



DEPARTMENT OF THE ARMY
NORTHWESTERN DIVISION, CORPS OF ENGINEERS
P.O. BOX 2870
PORTLAND, OREGON 97208-2870

Reply to
Attention of:

MAR 31 2003

CENWD-OC

Mr. Tom Fitzsimmons
Director
Washington Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Subject: Water Quality and the Corps Columbia and Snake River Hydroelectric Facilities

Dear Mr. Fitzsimmons:

Thank you for your letter dated January 31, 2003, concerning water quality issues at U.S. Army Corps of Engineers (Corps) hydroelectric facilities on the Columbia and Snake Rivers.

In your letter you indicate that the three Corps Districts within the Northwestern Division Region with projects on the Columbia and Snake Rivers are doing a good job of notifying Washington State of visible oil discharges from our hydroelectric facilities to the Columbia and Snake Rivers. However, you also state that the Corps may not be uniformly reporting internal oil spills to river water temporarily held within these hydroelectric facilities in a consistent manner to state and federal authorities. You further indicate that Washington State law requires the Corps to report these internal oil spills to state authorities.

The Corps recognizes that the Clean Water Act and the Oil Pollution Act establish a Federal and State partnership for the prevention of, and response to, oil discharges into the navigable waters of the United States. Our continued discussions are now improving this relationship. As we continue to work together, we must recognize, respect, and protect our relationship as two agencies tasked with the responsibility of promoting the projects and programs authorized by two sovereign legislatures. There will be instances when our responsibilities overlap, and we must be willing to allow each of our agencies to promote its own efforts to satisfy the public interest.

In this instance, your Department has made a legal interpretation that waters within Corps facilities are "waters of the state" which are regulated under your state program. I have been advised however, that the Corps is not legally required to follow state regulatory controls over the operation of the generators, turbines, galleries, sumps, and pumping operations within our Federal facilities. Pursuant to the Constitution's Commerce Clause, Congress has the power to

regulate the nation's network of navigable waterways. Congress has exercised this power along the Columbia and Snake River by mandating that the Corps construct, operate, and maintain Federal dams for multiple purposes including hydropower, irrigation, navigation, recreation, flood control and fish and wildlife benefits that are interstate in nature. Upon its entrance into Bonneville Dam, the Columbia River's water becomes an integral component of a Federal hydroelectric facility under the control and management of the Corps. Once this water is inside the dam, the Corps works diligently to employ consistent and effective control measures to ensure that any accidental oil leakage or spill is contained, captured, and removed.

I have been further advised that the operations of Federal facilities are not subject to state regulation unless Congress has clearly and unambiguously authorized a waiver of Federal supremacy. Neither the Clean Water Act nor the Oil Pollution Act contain clear and unambiguous waivers concerning oil discharges. Pursuant to these acts, if oil is discharged from Corps facilities into navigable waters, then an incident reportable to the National Response Center (NRC) has occurred. See 33 U.S.C. §1321(b). It is my understanding that information reported to the NRC by the Corps Districts is readily accessible to the States, and that your interests in resource protection is addressed through this response procedure.

For yet another reason, we are also unable to allow your Department to assert regulatory controls over the internal operation of our facilities. Portland District has correctly advised you that drawings and plans of our galleries, sumps, and location of our generators and our turbines in the powerhouse cannot be shared with your Department because of heightened national security concerns. These facilities have been identified as potential terrorist targets. Accordingly, the Army has mandated that plans, specifications, and drawings of the Federal projects cannot be provided to other entities or members of the public at this time. As a governmental agency responsible for maintaining public safety, you surely recognize the immediate need for adhering to this policy.

As two governmental organizations in the Pacific Northwest, we share similar values for the use and protection of the water resources under our control and management. We must respect each other's sovereignty, and avoid duplicating actions that can be addressed effectively by the appropriate governmental unit. At the same time, we must continue to operate in a spirit of partnership and cooperation to address and improve the quality of Corps facilities to protect the Northwest's water and wildlife. The Corps' Bonneville Dam staff has provided your staff a number of tours of our facilities including information regarding the controls used to prevent internal oil discharges from reaching the Columbia River from the internal galleries and sumps. As a matter of intergovernmental comity, we welcome the opportunity to continue sharing this type of information in the Northwestern Division with your staff, and to receive any suggestions that they may have on how we may improve our prevention and timely response to internal oil discharges.

In your letter you also ask for our ideas as to how the Corps' Northwestern Division and your Department can work together better. We are willing to discuss formalizing an information-

sharing relationship through a Memorandum of Understanding (MOU) between our two agencies that recognize the authorities of each agency. I suggest that your staff contact Mr. David Ponganis, telephone number (503) 808-3828, who will be our point of contact for coordination of the above referenced MOU with the Department of Ecology.

Sincerely,



David A. Fastabend
Brigadier General, U.S. Army
Division Engineer

cc:

Portland District, Attn: NWP-OC

Seattle District, Attn: NWS-OC

Walla Walla District, Attn: NWW-OC