



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

DEC 3 2008

The Honorable John Paul Woodley, Jr.  
Assistant Secretary of the Army (Civil Works)  
Department of the Army  
108 Army Pentagon  
Washington, DC 20310

OFFICE OF  
WATER

Dear Secretary Woodley:

In August 2008, I designated the Santa Cruz and Los Angeles Rivers as special cases pursuant to the 1989 Army/EPA *Memorandum of Agreement Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the CWA*. EPA continues to evaluate relevant information and to coordinate with the Los Angeles District and others on this matter.

On May 23, 2008, the U.S. Army Corps of Engineers Los Angeles District determined that two reaches of the Santa Cruz River, Study Reach A from Tubac gage (USGS # 09482000) to Continental gage (USGS # 09481740), and Study Reach B from Roger Road Wastewater Treatment Plant to the Pima/Pinal County Line ("Study Reaches"), are Traditional Navigable Waters (TNWs) for purposes of the Clean Water Act ("District Determination"). As an initial phase of EPA's Special Case Review of the Santa Cruz River, we have carefully evaluated the conclusions reached in the District Determination.

The District Determination concluded that the two reaches "have the potential to be used for commercial recreational navigation activities, such as canoeing, kayaking, birding, nature and wildlife viewing." District Determination at 5. That conclusion was based on the District's consideration of the "[p]ublic access points within of (*sic*) the Study Reaches such as low river banks, bridges, and trail systems, together with their physical characteristics, such as frequency, duration, and permanency of flow." *Id.* The District Determination's analysis and evidence of susceptibility is not insubstantial nor speculative; rather, it is appropriately supported by citations to specific evidence (see, e.g., discussion of river hydrology, ongoing Corps river restoration feasibility studies, and presence of tourist resorts along the River). District Determination, pp. 2-5. Based on EPA's review, we have concluded that the District Determination is consistent with the Clean Water Act, its implementing regulations, relevant case law and policy including the EPA/Corps Rapanos guidance dated June 5, 2007, as revised on December 3, 2008. As a result of EPA's review of the District Determination and additional information available to EPA, I am affirming the Los Angeles District's determination that the two segments of the Santa Cruz River referenced above are Traditional Navigable Waters (TNWs).

EPA's determination to affirm the District's designation of the two reaches as TNWs is based on several key considerations, including:

- Evidence that the physical characteristics within the Study Reaches indicate a susceptibility for use in the future for commercial navigation, including commercial water-borne recreation. For example, river-width, when combined with flow data from relevant flow gauges, shows sufficient levels of flow in the Study Reaches to support navigation.
- Evidence that the Study Reaches, or portions thereof, have been navigated.
- Evidence of the likelihood of future commercial navigation use, including two ongoing Corps of Engineers river restoration feasibility studies.
- Visual inspection by EPA during site visits to Study Reaches.

Based upon the information before me, I conclude that the Study Reaches are susceptible to being used in the future for commercial navigation, including commercial water-borne recreation. That conclusion is supported by evidence that is clearly documented, and not insubstantial nor speculative. Therefore, I find that this determination is consistent with the provisions of the December 3, 2008 Rapanos guidance<sup>1</sup>.

I have asked EPA Region 9 to begin immediately to implement this decision and request that you also transmit this determination to the Los Angeles District so it may be used by the Corps to complete pending and future jurisdictional determinations for the Santa Cruz River watershed.

In consultation with the Los Angeles District, EPA is proceeding with its geographic jurisdictional analysis of the remainder of the Santa Cruz River and the Los Angeles River and will make decisions for both when our review is complete. I appreciate the Corps assistance in this important evaluation. Please feel free to call me or have your staff contact my Chief of Staff, Greg Peck, with any questions regarding this matter.

Sincerely,



Benjamin H. Grumbles  
Assistant Administrator

cc: Wayne Nastri, Regional Administrator, EPA Region 9  
Stephen A. Owens, Director, ADEQ

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<sup>1</sup>EPA has not determined whether any other portion of the Santa Cruz River is also a TNW. The Agency will continue to evaluate that question for those other portions. EPA will also evaluate whether the River, or any portions thereof, satisfy any other provision of EPA's regulatory definition of "waters of the United States." EPA will also proceed with our geographical jurisdictional analysis of the Los Angeles River.



## MEMORANDUM FOR THE RECORD

SUBJECT: Determination of Two Reaches of the Santa Cruz River as Traditional Navigable Waters (TNW)

Summary

The Corps' Los Angeles District has determined that two reaches of the Santa Cruz River, Study Reach A from Tubac gage station (USGS # 09481740) to the Continental gage station (USGS #09482000) and Study Reach B from Roger Road wastewater treatment plant (WWTP) downstream to the Pima/Pinal County line, Arizona, as shown in Exhibit A, are TNWs (collectively, referred to as the "Study Reaches"). This determination is consistent with the Clean Water Act (CWA), the agencies' regulations (including 33 C.F.R. § 328.3), relevant case law, and existing guidance, including the June 5, 2007 joint U.S. Environmental Protection Agency and Department of the Army legal memorandum entitled *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Rapanos Guidance) and *Appendix D of the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* issued June 5, 2007 (Appendix D).

Background

The Santa Cruz River originates in Arizona, flows south into Mexico, and then flows north again into Arizona. It is the primary river which flows from Nogales, Mexico through Tucson, Arizona, and a number of Indian reservations, including Tohono O'odham Nation (TON), to the Gila River near Phoenix. The watershed of the Santa Cruz River is approximately 8,600 square miles. Until the late nineteenth century, the Santa Cruz River was primarily a perennial watercourse that served the region's agricultural needs until a quickly developing industrial society began to tap the river's subsurface flow (Exhibit B).

The Upper Santa Cruz River Valley, located between Nogales, Arizona on the US-Mexico border, and extending 65 miles north to the major urban area of Tucson, has a long history of European settlement spanning three centuries. Prior to the discovery of the area by European explorers, the area was inhabited for thousands of years by aboriginal native peoples. The Santa Cruz River has long been an important corridor for trade and exploration. The river and its well-established riparian habitat have served as a vital commodity for people and wildlife in the region.<sup>1</sup>

In addition to the use of the Study Reaches by recreational watercraft described in case-specific analysis below, in the mid 1850s, William Rowlett and his brother, Alfred, constructed an earthen dam on the Santa Cruz River south of the present-day Silverlake Road. They also installed a water-powered flour mill at this location in 1857/58. In 1860, William Grant purchased the flour mill and the dam/lake and improved the dam and mill in order to supply military posts in the southwestern region. He built a second, larger mill on the river and purchased the machinery in California. However, the mill was burned in 1861 to keep it from falling into Confederate hands. The mill was purchased by James Lee and returned to operations in 1864. In 1884, the mill, dam,

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<sup>1</sup> *The Santa Cruz River: A Resource Shared by Two Cities* by Hugh Holub, paper presented to the Border XXI EPA Regional Water Sub Work Group Meeting on March 6, 2001, Nogales, Sonora.

and lake were sold to Frederick Maish and Thomas Driscoll who developed the Silver Lake Resort. In 1883, Solomon Warner built a second dam and mill on the river. The lake was approximately 60 acres, 8 feet deep, and the *Arizona Citizen* reported the use of a flat-bottom boat on the lake. Waterfowl populated the lake and hunting organizations claimed exclusive rights to shooting the waterfowl. The dams at both Silver Lake and Warner's Lake were breached by floods in 1886 and 1887; the *Arizona Star* reported on July 13, 1887 that the river was wide and deep enough to float a "mammoth steamboat." In 1888, Frank and Warren Allison purchased Warner Lake, repaired the dam, and stocked the lake with carp for commercial fish production selling over 500 pounds of fish per day. Both dams were washed out by 1890.<sup>2</sup>

Further, in the summer of 1951, Glenton G. Syke, Tucson city engineer, navigated the Santa Cruz River in a 14-foot-long boat from the San Xavier del Bac Mission to Congress Street in Tucson.<sup>3</sup>

The Study Reaches were selected based on personal knowledge of the river by Regulatory staff, evidence of perennial flows based on stream gage data, and more readily available evidence of navigability.

#### Basis for TNW Determination

The Rapanos Guidance indicates that in its context, the term TNW refers to those waters that are under the jurisdiction of the Corps, pursuant to 33 C.F.R. § 328.3(a)(1), (i.e., "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."

As stated in Appendix D: "when determining whether a water body qualifies as a "traditional navigable water" (i.e., an (a)(1) water), relevant considerations include whether a Corps District has determined that the water body is a navigable water of the United States pursuant to 33 C.F.R. § 320.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 C.F.R. Part 329, or a federal court has determined that the water body is navigable-in-fact under federal law for any purpose, or the water body is "navigable-in-fact" under the standards that have been used by the federal courts."

To determine whether the Study Reaches are a TNW, in accordance to 33 C.F.R. § 328.3(a)(1), a case-specific analysis to evaluate whether the Study Reaches are navigable-in-fact, including consideration of its potential susceptibility to interstate and foreign commerce, was undertaken. The Corps has determined that the Study Reaches are a TNW based on the following factors:

1. The physical characteristics of the Santa Cruz River within the Study Reaches indicate that they have the capacity and susceptibility to be navigated by recreational watercraft.

- A. Study Reach A is approximately 22 miles in length. The river near Tubac is typically more confined in ordinary flows to a channel approximately 15-20 feet wide with an approximate 1.5 mile wide, densely vegetated floodplain. Downstream of Amado, the floodplain increases in width to approximately 2.5 miles; the river channel is less confined, less vegetated, and more braided. Exhibit C shows monthly and daily flows for the Tubac, Amado, and Continental gage stations, as well as peak flows for the Amado and Continental gage stations (Tubac information unavailable). The monthly gage data indicate perennial flow at Tubac since

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<sup>2</sup> History of Navigation of the Santa Cruz River by Don Bufkin, citation unknown.

<sup>3</sup> Admiral of the Santa Cruz by Glenton G. Sykes, *The Journal of Arizona History*, Vol. 20, Number 4, Winter, 1979.



1996, flow most months at the Amado gage station since 2003 (prior years unavailable), and intermittent flows at the Continental gage station.<sup>4</sup> Average daily flows are typically lower in May and June but increase during the summer monsoon season which typically begins in July. Average daily flow rates again typically increase during December and January. The gage data indicate the highest daily mean value at the Tubac gage station over the last 11-12 years was 637 cubic feet per second (cfs) during October and the lowest daily mean value at the same station during the same period was 4.5 cfs during June. The highest daily mean values typically occur from July-October.<sup>5</sup> The range of mean monthly flows (6.9 to 78 cfs) and the average daily flow in a representative year of 35 cfs indicate perennial flow at the Tubac gage station. The mean monthly discharge information at the Amado gage station is only available since October, 2003; the mean monthly discharge at this station in the last four years varied from .97 cfs to 67 cfs while the daily mean flow chart at the Amado gage station indicates perennial flow. The mean monthly discharge at the Continental gage station since 1940 varies from .43 cfs to 76 cfs while the mean daily values since 1939 shows flow daily with the exception of mid to late May through mid-June. This is expected since the river begins subsurface flow at this point, which defines the downstream end of this Study Reach.

B. Study Reach B is approximately 32 miles in length. The width of the riverbed varies from approximately 280 feet at the Roger Road WWTP to approximately 670 feet at Cortaro and approximately 575 feet at Trico Road while the active (ordinary flow) river channel at all three locations varies from 40-60 feet; at one location within this Study Reach, the river diverges into two similarly-sized channels. The river in Study Reach B is often confined at its maximum width by steep banks with soil cement or other bank stabilization in several locations. In other locations, for example at Ina Road, the river has lower, easily accessible, vegetated banks. Some areas are more densely vegetated than others. Exhibit C shows monthly, daily, and peak flows for gage stations at Cortaro and Trico Road (just upstream of the Pima/Pinal County line). Average daily flows are typically lower in May and June but increase during the summer monsoon season which typically begins in July. Average daily flows again typically increase during December and January. The highest average daily mean value at the Cortaro gage station over the last 57-60 years was 703 cfs, also in October, and the lowest average daily mean value at the same station over the same period was 22 cfs during June. The average monthly discharge ranges from 23 to 124 cfs and the average daily flow in a representative year of 75 cfs indicate perennial flow at the Cortaro gage station. At the Trico Road gage station, since 1997, the average monthly discharge ranged from 3.5 cfs to 710 cfs and daily mean values since 1989 ranged from 11 cfs to 863 cfs. The gage data document perennial flow at the Cortaro and Trico Road gages every month since 1996 with the exception of October, 1996.<sup>6</sup>

C. The peak flow charts demonstrate the frequency of flows which exceed 1,000 cfs.<sup>7</sup> Peak flow data is unavailable at the Tubac gage station; however, the maximum peak flow at the Amado gage station since 2004 was approximately 7,800 cfs and peak flow has approached or exceeded 2,000 cfs annually. The maximum peak flow at the Continental gage station was approximately 45,000 cfs in the early 1980s and the minimum peak flow has exceeded 1,000 cfs 63 times since 1940. The maximum peak flow at the Cortaro gage station exceeded 60,000 cfs in the early 1980s and has exceeded 1,000 cfs on an annual basis from 1940-1988 with the exception of once in the 1940s and once in the 1950s; the peak flow at the Cortaro gage station

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<sup>4</sup> <http://nwis.waterdata.usgs.gov/az/nwis/monthly>

<sup>5</sup> <http://nwis.waterdata.usgs.gov/az/nwis/dvstat>

<sup>6</sup> Ibid

<sup>7</sup> <http://nwis.waterdata.usgs.gov/az/nwis/peak>

has also exceeded 1,000 cfs on an annual basis since approximately 1995. The maximum peak flow at the Trico gage station exceeded 25,000 cfs in 2007 and the minimum peak flow has been at or exceeded 1,000 cfs most years since 1989. The figures at the end of Exhibit C indicate the "real time" stages for late March-early April, 2008, at the Tubac, Cortaro, and Trico Road gage stations indicating flows in the river on a daily basis.<sup>8</sup> All three stations indicated flows with depths varying from 1-2 feet and no precipitation had occurred for approximately 6 weeks.<sup>9</sup> Additional real-time stage data obtained for late May is also provided for Tubac, Green Valley (near Continental), Cortaro, and Trico Road and indicates 1-2 feet of water currently in the channel at all the above locations. Extremely light precipitation occurred one day during this timeframe; however, the amount of precipitation received would not have been sufficient to cause surface flows<sup>10</sup>. A list of the large magnitude peak flow events of the Santa Cruz River over the last 100 years is provided at Exhibit D.<sup>11</sup>

D. While there is a variation in minimum flow required for canoeing, studies indicate the 95% confidence interval on the predicted minimum canoeing flow of 86 cfs for flatwater is 63 to 118 cfs.<sup>12</sup> Approximately two-three feet of water depth is sufficient to float a canoe, kayak, or small boat. Based on the above information, during most days from July-October and again for approximately half the months of December and January, there is sufficient flow in the Santa Cruz River within the Study Reaches to float a canoe (based on the average daily mean value). Typically a kayak would be able to navigate in lower flows and less water than canoes.

E. Based on aerial photographs attached at Exhibit E, the Santa Cruz River from Tubac gage station to just upstream of Continental gage station and Roger Road WWTP to the Pima/Pinal County line has uninterrupted flow.

F. The Arizona Department of Environmental Quality has adopted water quality standards for the Santa Cruz River for partial body contact.<sup>13</sup> Partial body contact allows for use of the surface water where the body comes into contact with the water but does not become fully submerged. Allowable uses under partial body contact would include but are not limited to boating and wading.

2. The Study Reaches within the Santa Cruz River have public accessibility.

A. The river has low banks in the vicinity of Tubac which allows for easy public access; these areas are currently frequented by riders on horseback. Resorts along the river provide access for out-of-state visitors for birding and hiking along the river.

B. Two Corps of Engineers feasibility studies for river restoration, El Rio Medio and Tres Rios del Norte, are in process. El Rio Medio will begin at Congress Street and progress downstream to Prince Road; Tres Rios del Norte will begin at Prince Road and progress

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<sup>8</sup> National Weather Service Advanced Hydrologic Prediction Service: <http://www/nws.noaa.gov/oh/ahps/>

<sup>9</sup> Personal observation, Marjorie Blaine, Senior Project Manager, Regulatory Division, Tucson Project Office

<sup>10</sup> Ibid

<sup>11</sup> <http://www.wrh.noaa.gov/twc/hydro/floodhis.php>

<sup>12</sup> Riparian Areas of the Southwestern United States: Hydrology, Ecology, and Management by Malchus B. Baker and Peter F. Ffolliott, CRC Press, 2004

<sup>13</sup> Personal communication with Steve Pawlowski, Arizona Department of Environmental Quality, Unit Manager, Water Quality Standards and Assessments, April 24, 2008.



downstream to Sanders Road in Marana. These projects will provide public trails along the river. Although the final design for these two projects has not been completed, it is likely river access will be provided. The two projects are shown in Exhibit F.

C. There is currently public access to the river at several bridges, including but not limited to the Ina Road bridge where there are pull-out areas, the Cortaro Road bridge (including a parking lot), and at the Sanders Road bridge in Marana. All of these bridges have easy access to Interstate 10.

D. The historic 1200-mile Juan Bautista de Anza National Historic Trail runs from Nogales, Arizona to San Francisco, California. This trail parallels and overlaps the Santa Cruz River in the Study Reaches. The river can be accessed at several points along this trail in the Study Reaches by auto or also on foot (Exhibit F).

3. The Study Reaches of the Santa Cruz River have been used for interstate commerce and have the potential to be used for commercial activities involving navigation and interstate commerce in the future.

A. Navigation has occurred historically and recent times within the Study Reaches of the Santa Cruz River.

(1) On August 23, 2005, as part of a promotion, a local radio show host navigated the Santa Cruz River in a raft for an unspecified distance starting at El Camino del Cerro (within Study Reach B) (Exhibit G).

(2) In October, 1994, two members of the Friends of the Santa Cruz navigated a 17-foot-long canoe from a point south of Tubac three miles to a point north of Tubac (Exhibit G).

B. The Santa Cruz River is an international and interstate water. Several areas along the river provide access for birding by out-of-state visitors and resorts bordering the river, such as the Tubac Golf Resort, host out-of-state visitors who partake in local recreation including hiking, horseback riding, and birding along the river. The Tucson Audubon Society's North Simpson Farm is an area where prolific riparian habitat restoration projects have been focused and it is well-known for its opportunities for birding. This type of "ecotourism" provides a significant water resource-oriented opportunity in the desert. The Study Reaches and other areas within the region receive many interstate and foreign tourists seeking to expand their "bird list"; the Sonoran Desert, particularly in riparian areas such as the Santa Cruz River, provides a significant opportunity to see species endemic to this area.

C. Use of the river within the Study Reaches by recreational watercraft provides evidence of the susceptibility for commercial use.

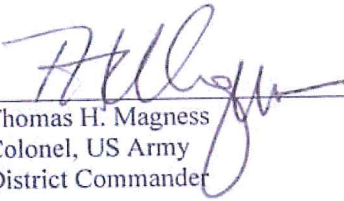
#### Determination

Public access points within of the Study Reaches such as low river banks, bridges, and trail systems, together with their physical characteristics, such as frequency, duration, and permanency of flow, indicate that the Study Reaches have the potential to be used for commercial recreational navigation activities, such as canoeing, kayaking, birding, nature and wildlife viewing. Such attractions and activities demonstrate that the Study Reaches may be susceptible to use in interstate commerce. Collectively, the above discussed factors demonstrate that the Study

Reaches are navigable-in-fact, and thus a TNW, susceptible to use in interstate commerce associated with recreational navigation activities. Therefore, I hereby determine that the Study Reaches are subject to the jurisdiction of Section 404 of the CWA, pursuant to 33 C.F.R. § 328.3(a)(1).

This determination does not 1) consider any other potentially applicable bases for determining CWA jurisdiction within the Study Reaches or 2) foreclose analysis of other areas of the Santa Cruz River outside the Study Reaches for purposes of determining CWA jurisdiction.

5/23/08  
Date

  
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Thomas H. Magness  
Colonel, US Army  
District Commander





**Congress of the United States**  
**Washington, DC 20515**

**MEMORANDUM**

**December 16, 2008**

**To: Rep. Henry A. Waxman**  
**Chairman, House Committee on Oversight and Government Reform**

**James L. Oberstar**  
**Chairman, House Committee on Transportation and Infrastructure**

**Fr: Majority Staff, Committee on Oversight and Government Reform, and**  
**Majority Staff, Committee on Transportation and Infrastructure**

**Re: Decline of Clean Water Act Enforcement Program**

This memo summarizes the results of a joint investigation by the Oversight Committee and the Transportation Committee into allegations that the Clean Water Act enforcement program has deteriorated significantly over the past two years. The memo is based on a review of more than 20,000 pages of documents produced to the Committees by the Environmental Protection Agency and the U.S. Army Corps of Engineers.

The documents indicate that the Supreme Court's decision on June 19, 2006, in *Rapanos v. United States* and the Administration's guidance implementing that decision have resulted in a dramatic decline in the number of Clean Water Act inspections, investigations, and enforcement actions. In numerous e-mails, memos, and other documents, EPA field offices across the country have expressed serious concerns about this negative trend, warning that they are no longer able to ensure the safety and health of the nation's waters.

The documents also indicate that in one particular case involving the Santa Cruz River in Arizona, the Assistant Secretary of the Army for Civil Works disregarded a scientific determination of career staff that would prevent the reduction of Clean Water Act coverage. Working in conjunction with corporate lobbyists and developers, this political appointee launched a campaign to overturn the scientific determination, although his efforts ultimately failed after direct intervention by EPA's Assistant Administrator for Water.



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## BACKGROUND

On June 19, 2006, the Supreme Court issued a ruling in the case of *Rapanos v. United States*.<sup>1</sup> This case focused on the question of which waters in the United States fall under the jurisdiction of the Clean Water Act. None of the five separate opinions obtained the support of a majority of the Court. Thus, federal agencies looked to Justice Scalia's plurality opinion and Justice Kennedy's concurrence to determine the scope of the Clean Water Act.

Justice Scalia determined that the Clean Water Act applies only to relatively permanent waters, such as streams and rivers, and to adjacent wetlands. Justice Kennedy had a somewhat more expansive view, arguing that waters or wetlands are covered by the Clean Water Act if they have a "significant nexus" to "traditional navigable waters" or fall into one of the other specific categories he listed.

The *Rapanos* decision effectively narrowed the scope of the Clean Water Act's jurisdiction. Some waters that were previously protected by the Clean Water Act were no longer covered. Because many waters, especially waters in the arid Southwest, are not continuously flowing, the Army Corps of Engineers and EPA were required to go through a laborious and time-intensive process of finding a "significant nexus" to traditional navigable waters.

Justice Stevens warned in a dissent that this new requirement would take time and resources away from critical tasks under the Clean Water Act. He wrote:

Justice Kennedy's approach will have the effect of creating additional work for all concerned parties. ... And the Corps will have to make case-by-case (or category-by-category) jurisdictional determinations, which will inevitably increase the time and resources spent processing permit applications.

On June 5, 2007, EPA and the Army Corps of Engineers jointly issued guidance to implement the Supreme Court's decision in the *Rapanos* case and enable their field staffs to make Clean Water Act jurisdiction determinations. Under this guidance, agencies could assert jurisdiction over "traditional navigable waters" and their adjacent wetlands. For nonnavigable tributaries that do not typically flow year-round, agencies were directed to conduct a fact-specific analysis to determine if the waters in question have a "significant nexus" with traditional navigable waters.<sup>2</sup>

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<sup>1</sup> *Rapanos v. United States*, 376 F. 3d 629 (2006).

<sup>2</sup> Environmental Protection Agency and Army Corps of Engineers, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (June 5, 2007).

On December 3, 2008, EPA and the Corps of Engineers issued revised guidance after receiving public and internal comments about the effectiveness of the initial guidance.<sup>3</sup>

On July 7, 2008, Chairman Oberstar and Chairman Waxman wrote to EPA to request documents relating to the Clean Water Act enforcement program.<sup>4</sup> The Chairmen explained that they had obtained information suggesting that the Supreme Court's decision and the Administration's guidance had resulted in significant adverse impacts. The Committees requested the documents by July 21, 2008.

Although EPA collected documents responsive to this request, it refused to produce many of them to the Committees. As a result, the Oversight Committee issued a subpoena for these documents on August 20, 2008.<sup>5</sup> The subpoena required EPA to produce the documents by August 22, 2008. EPA has now produced several hundred pages of documents in response to the subpoena. EPA heavily redacted many documents, however, concealing all references to the identity of alleged polluters and the locations of waters affected. EPA also continues to withhold hundreds of responsive documents, contrary to the requirements of the subpoena.

On August 7, 2008, Chairman Oberstar and Chairman Waxman sent a separate request to J.P. Woodley, the Assistant Secretary of the Army for Civil Works. This request sought all documents relating to the "traditional navigable water" determination for the Santa Cruz River in Arizona.<sup>6</sup> The Department of the Army has produced approximately 20,000 pages of documents in response to this request.

## **I. DECLINE IN CLEAN WATER ACT ENFORCEMENT PROGRAM**

Documents produced to the Committees indicate that there has been a drastic deterioration of EPA's Clean Water Act enforcement program. Hundreds of violations have not been pursued with enforcement actions and dozens of existing enforcement cases have become informal responses, have had civil penalties reduced, and have experienced significant delays. Many violations are not being detected because of the reduction in the number of investigations initiated. Contrary to the public statements of Bush Administration officials, the documents indicate that this decline is directly attributable to the Supreme Court decision in the *Rapanos* case in 2006 and the Administration's 2007 guidance implementing that decision.

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<sup>3</sup> Environmental Protection Agency and Army Corps of Engineers, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 3, 2008).

<sup>4</sup> Letter from Chairman Oberstar and Chairman Waxman to EPA Administrator Stephen Johnson (July 7, 2008).

<sup>5</sup> House Oversight and Government Reform website, Chairman Waxman Issues a Subpoena for Clean Water Act Documents (Aug. 20, 2008) (online at [www.oversight.house.gov/story.asp?ID=2155](http://www.oversight.house.gov/story.asp?ID=2155)).

<sup>6</sup> Letter from Chairman Oberstar and Chairman Waxman to J.P. Woodley (Aug. 7, 2008).



## A. Overall Decline in Number of Enforcement Cases

On March 4, 2008, EPA's Assistant Administrator for Enforcement and Compliance Assurance, Granta Y. Nakayama, wrote a memo to EPA's Assistant Administrator for Water, Benjamin Grumbles.<sup>7</sup> In the memo, Mr. Nakayama warned that the *Rapanos* decision and the Administration's guidance have "negatively affected approximately 500 enforcement cases."<sup>8</sup> He wrote that there has been a "significant impact on enforcement" and that "[d]ata collected from the regions shows that a significant portion of the CWA [Clean Water Act] enforcement docket has been adversely affected."<sup>9</sup>

Mr. Nakayama's memo indicated that between July 2006 and December 2007, EPA made a conscious decision not to pursue enforcement of as many as 300 Clean Water Act violations. In addition, Mr. Nakayama's memo identified "147 instances where the priority of an enforcement case was lowered."<sup>10</sup> A previous draft of the table included in the memo provided additional detail about these 147 cases. The draft identified:

- At least 25 "changes in the type of enforcement mechanism used in a case, such as changing from a formal to an informal enforcement response";
- At least 26 "decision[s] to reduce the amount of the civil penalty in the enforcement action based upon uncertainty about CWA jurisdiction"; and
- At least 80 "significant delay[s] due to budgetary or resource constraints caused by the necessity of having to prove jurisdiction under the *Rapanos* standard."<sup>11</sup>

Finally, Mr. Nakayama's memo identified 61 enforcement cases in which the *Rapanos* decision and the Administration guidance provided an affirmative defense to companies accused of violating the Clean Water Act.<sup>12</sup>

According to the memo, at least 234 ongoing or potential oil spill cases have suffered as a result of the *Rapanos* decision and the Administration's guidance.<sup>13</sup> This represents nearly half

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<sup>7</sup> U.S. Environmental Protection Agency, Memorandum from Granta Y. Nakayama, EPA's Assistant Administrator for Enforcement and Compliance Assurance, to Benjamin Grumbles, EPA's Assistant Administrator for Water (Mar. 4, 2008).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> E-mail from James Vinch to Kenneth Champagne (Feb. 5, 2008; 2:55 p.m.).

<sup>12</sup> *Id.*

<sup>13</sup> U.S. Environmental Protection Agency, Memorandum from Granta Y. Nakayama, EPA's Assistant Administrator for Enforcement and Compliance Assurance, to Benjamin Grumbles, EPA's Assistant Administrator for Water (Mar. 4, 2008).

of the 500 enforcement cases adversely affected. The memo indicates that at least 208 oil spill violations failed to trigger EPA enforcement actions.<sup>14</sup>

### **B. Serious Concerns Raised by Field Offices**

Documents produced to the Committees indicate that multiple EPA field offices have reported that their Clean Water Act enforcement programs are deteriorating rapidly.

On January 10, 2008, EPA's Dallas office, the regional office responsible for Texas, Oklahoma, and Louisiana, informed the Washington D.C. headquarters: "Our oil pollution enforcement program has been significantly impacted by Rapanos."<sup>15</sup>

Under the heading, "Numerous Oil Spill Cases 'On Hold,'" the Dallas regional office explained:

Historically the Region has reviewed all reported spills for follow-up enforcement. ... Prior to the Rapanos ruling, any spill confirmed after investigation to have reached a USGS [U.S. Geological Survey] designated waterway received an enforcement action requiring payment of a penalty and confirmation of corrective actions to prevent future releases. Since the Rapanos ruling, the Region has documented 76 cases (and counting) where a spill to a USGS designated waterway has been confirmed, but no follow-up for penalties or corrective action has been sought due to difficulties asserting jurisdiction post-Rapanos.<sup>16</sup>

The Dallas regional office also described the "Impact to Oil Spill Enforcement":

The number and type of spills that continue to receive enforcement actions since Rapanos has narrowed, however, the expenditure of resources for each case has increased. ... The increased workload also delays timely enforcement.<sup>17</sup>

The Dallas regional office further explained that "[c]ompanies have elected to discontinue SPCC [spill prevention, control, and countermeasure] protections at multiple locations based on their contention that there is no threat to jurisdictional waterways."<sup>18</sup> It added: "Certain spill responses that would have historically merited EPA response action have not been acted upon."<sup>19</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> E-mail from Nelson Smith to James Vinch (Jan. 10, 2008; 10:05 a.m.).

<sup>16</sup> E-mail from Nelson Smith to Craig Matthiessen, et al. (Jan. 7, 2008; 4:06 p.m.); *see also* E-mail from Nelson Smith to James Vinch (Jan. 15, 2008; 4:49 p.m.) (noting that "We had previously reported 76 cases, but have identified 13 additional ones for a current total of 89").

<sup>17</sup> E-mail from Nelson Smith to Craig Matthiessen, et al. (Jan. 7, 2008; 4:06 p.m.).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*



Similarly, an official in EPA's Denver regional office sent an e-mail to EPA headquarters on January 7, 2008. She warned:

We literally have hundreds of OPA [Oil Pollution Act] cases in our "no further action" file due to the Rapanos decision, most of which are oil spill cases. ... Again, we do have a file with well over 100 cases held due to Rapanos.<sup>20</sup>

Another official in the Denver regional office sent a lengthy list of "spill and SPCC violations which we failed to take cases on due to jurisdictional waters issues following the Rapanos decision."<sup>21</sup>

According to an October 31, 2007, e-mail from a career EPA official in the San Francisco regional office, there was a "[I]arge potential risk to ... enforcement programs if jurisdiction loses [sic] are widespread."<sup>22</sup> The official went on to explain that "[r]egulated parties in [redacted] already challenging need for stormwater and wastewater permits."<sup>23</sup>

In a January 23, 2008, e-mail, the same official from the San Francisco regional office stated: "We will bring the [redacted] matter to HQ's attention as further evidence that impacts of th[e] Rapanos guidance on the NPDES [National Pollutant Discharge Elimination System] program are real and must be addressed."<sup>24</sup>

On August 28, 2007, another official in EPA's San Francisco regional office sent an e-mail describing how companies that run a million gallon per day waste water treatment plant and a half million gallon per day waste water treatment plant asserted that they were not required to obtain discharge permits because the Clean Water Act did not apply.<sup>25</sup>

On February 5, 2008, a senior environmental engineer in EPA's San Francisco regional office sent an e-mail announcing that his office was giving up on a case in which the Justice Department was seeking civil penalties for a series of Clean Water Act violations. The subject line of the e-mail was "R.I.P."<sup>26</sup> It stated:

It is time to pull the plug on keeping this case on life support. With the march of time largely attributable to the impact on the case by Senor Rapanos and his merry band of

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<sup>20</sup> E-mail from Martha Wolf to Craig Matthiessen, et al. (Jan. 7, 2008; 5:06 p.m.).

<sup>21</sup> E-mail from Jane Nakad to James Vinch (Jan. 22, 2008; 9:09 p.m.); staff notes on unredacted e-mail from Jane Nakad to James Vinch (Jan. 22, 2008; 9:09 p.m.).

<sup>22</sup> E-mail from David Smith to Alexis Strauss (Oct. 31, 2007; 1:06 p.m.).

<sup>23</sup> *Id.*

<sup>24</sup> E-mail from David Smith to Alexis Strauss, et al. (Jan. 23, 2008; 9:07 a.m.).

<sup>25</sup> E-mail from Laura Bose to [redacted] (Aug. 28, 2007; 8:37 p.m.).

<sup>26</sup> E-mail from Jeremy Johnstone to Wilson Yee, et al. (Feb. 5, 2008; 1:34 p.m.).



supreme court justices we had lost many many violations due to statute of limitations. ... At this point it was a penalty-only referral, and just plain stale. So we will withdraw the referral, and save our ammo for another fight.<sup>27</sup>

### C. Fewer Resources and Investigations

Documents produced to the Committees indicate that officials at both EPA headquarters and the regional offices are concerned that they have insufficient resources to pursue Clean Water Act investigations and enforcement actions. They attribute this lack of resources largely to staff time being diverted to comply with new requirements imposed by the Supreme Court's decision in the *Rapanos* case and the Administration's guidance implementing the decision.

On February 26, 2008, the Director of Water Enforcement at EPA headquarters sent an e-mail to the Director of Civil Enforcement warning of this lack of resources and its impact on the Office of Enforcement and Compliance Assurance (OECA). He wrote:

The difficulty in interpreting and applying the Rapanos decision and the Inter-Agency Guidance has created a drain on OECA's resources, caused delays and uncertainty in compliance determinations and has generally reduced the effectiveness of its enforcement program. ...

The Guidance effectively establishes a presumption of non jurisdiction over "not relatively permanent tributaries" and their adjacent wetlands, which requires a costly and time consuming "significant nexus analysis" for these common types of waterbodies. The regions do not have sufficient resources to support this increased evidentiary burden, thereby reducing oversight and increasing incentives for noncompliance.<sup>28</sup>

Another EPA headquarters enforcement official wrote: "the burden of having to demonstrate a significant nexus for these tributaries before an enforcement action is slowing enforcement, and in some instances, has stopped an enforcement action."<sup>29</sup>

Atlanta EPA officials discussed this problem in a series of e-mails. On January 9, 2008, one official in the Atlanta regional office wrote that "the time it takes to do JDs [jurisdictional determinations] in light of Rapanos is a resource drain and may be preventing us from doing as many enforcement actions as we have been able to do in the past."<sup>30</sup>

Another official in the regional office responded that, if the first official "means that our present cases take a much longer time to complete, then yes, we are taking less cases overall."<sup>31</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> Staff notes on e-mail from Mark Pollins to Randy Hill (Feb. 26, 2008).

<sup>29</sup> Staff notes on e-mail from Peter Stokely.

<sup>30</sup> E-mail from Suzanne Rubini to Ronald Mikulak (Jan. 9, 2008; 2:58 p.m.).

<sup>31</sup> E-mail from Mike Wylie to Suzanne Rubini (Jan. 10, 2008; 7:09 a.m.).

The first official then stated: "You could then look at the number of typical cases we take forward and compare how much more time it will take to maintain the level of enforcement we typically take. The fact is we cannot support that given the staffing."<sup>32</sup>

Two weeks later, on January 26, 2008, the Atlanta office reported to EPA headquarters:

*Rapanos* has had significant impacts on enforcement actions within Region 4. ... In order to properly use the guidance, the amount of time necessary to perform and write up a jurisdictional determination has gone from a few hours, to several days, including more field work. This fact is highlighted by Region 4's 404 inspection numbers which dropped from 73 in '05 and 83 in '06, to only 40 in '07. This downward trend is due, at least in part, to the additional resources required to perform and support post-*Rapanos* jurisdictional determinations. Region 4 anticipates that this trend will continue resulting in a reduction in the number of permit reviews that Region 4 conducts and the number of enforcement cases that Region 4 will take.<sup>33</sup>

On July 14, 2008, an attorney in the criminal enforcement division of EPA's Atlanta regional office wrote an e-mail noting that "we will not be able to pursue the bulk of our water cases because of insufficient resources."<sup>34</sup>

An official in EPA's Seattle regional office experienced similar problems, noting that the region faced an "almost entirely new workload" and that "[b]udgets allow for little to no site investigation, particularly in Alaska."<sup>35</sup>

Similarly, an official in EPA's Kansas City regional office summarized the impact of the resource deficiencies on staff. He wrote:

The morale of the Region 7 Wetland Program has plummeted since the Guidance's release, and our stress level has been overwhelming. It has reached critical levels. Employees have lost hope, said they "don't care anymore," and have thought about quitting.<sup>36</sup>

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<sup>32</sup> E-mail from Philip Mancusi-Ungaro to Suzanne Rubini (Jan. 10, 2008; 10:08 a.m.).

<sup>33</sup> E-mail from Suzanne Rubini to James Vinch (Jan. 22, 2008; 5:01 p.m.).

<sup>34</sup> E-mail from Richard Glaze to Ivan Vikin, et al. (July 14, 2008; 8:15 a.m.).

<sup>35</sup> Staff notes on Environment Protection Agency, *Overview of New Guidance on Clean Water Act Jurisdiction*.

<sup>36</sup> Staff notes on memorandum from Brian Frazer to William Spratlin (emphasis in original).



On January 22, 2008, an official in EPA's Chicago regional office wrote an e-mail echoing these concerns. He stated: "Rapanos is now requiring extensive upfront work in all our cases before we even inspect."<sup>37</sup>

In addition, EPA officials warned that some cases are never initiated due to the drain on resources. On January 16, 2008, for example, an official in EPA's San Francisco regional office wrote an e-mail warning that "there is a lot of self-editing going on so cases don't get queued up in the first place."<sup>38</sup> Later that day, a senior EPA attorney in the same office stated: "I'd like to add a note about the upfront self-editing ... OECA should be made aware of that (or, rather, reminded of it)."<sup>39</sup>

Two days later, on January 18, 2008, an official in the San Francisco regional office prepared an e-mail to the EPA's Office of Enforcement and Compliance Assurance warning that many cases were never initiated because of inadequate resources. She wrote:

One thing that OECA should be aware of is the fact that the Region does a lot of "self-editing" in the early stages of potential case development, choosing not to pursue investigations that may have Rapanos issues, despite the fact that prior to Rapanos (and/or the draft guidance) we probably would have pursued them. Thus, we may not conduct field investigations/inspections or request further information in many of these types of matters, and, as a result, they never make it to the point where they would be included in this response.<sup>40</sup>

#### **D. Concealing the Identity of Polluters**

EPA has refused to produce hundreds of documents to the Committees, including documents relating to the adverse impacts of the Administration's guidance implementing the Supreme Court's decision in the *Rapanos* case. With respect to documents that were produced to the Committees, EPA has redacted many of them, in some cases so heavily that it is difficult to determine the central thrust of the documents. It appears that EPA has redacted these documents primarily to conceal the identity of companies accused of polluting waterways and the specific waterways that may have been affected.

For example, one document produced to the Committees is a briefing slide prepared by EPA's San Francisco regional office on stormwater cases. EPA redacted the slide so it reads as follows:

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<sup>37</sup> E-mail from Patrick Kuefler to Stephen [Illegible] (Jan. 14, 2008; 9:53 a.m.).

<sup>38</sup> E-mail from Michael Hingerty to Laurie Kermish (Jan. 16, 2008; 9:09 a.m.).

<sup>39</sup> E-mail from Ann Nutt to Michael Hingerty, et al. (Jan. 16, 2008; 9:49 a.m.).

<sup>40</sup> E-mail from Laurie Kermish to Ann Nutt (Jan. 18, 2008; 10:42 a.m.).



Pollution. A large copper mine, owned by [redacted], a Mexican company, is situated at headwaters of the [redacted].<sup>41</sup>

EPA also produced an e-mail sent on January 28, 2008, from an official in EPA's Dallas regional office. With EPA's redactions, the e-mail states:

[M]ultiple spills by [redacted]. This company has had repeated spills in the [redacted] National Forest, and have been lax in their response and clean-up. But for the jurisdictional issues with the impacted waterways, these spills might have been combined in a civil referral action.<sup>42</sup>

EPA redacted an e-mail sent on January 23, 2008, from an official in EPA's Kansas City regional office reporting a "2000 gal. spill, sheen observed," a "spill to intermittent creek," and another spill that "would flow north then east to [redacted]."<sup>43</sup>

EPA also redacted an e-mail sent on January 29, 2008, by an official in EPA's Denver regional office informing EPA headquarters:

[T]here may be spills that would have been referrals to DOJ absent the jurisdictional issues. Specifically, one I know of is ... 5,000 barrel oily produced water spill in [redacted].<sup>44</sup>

Another document produced to the Committees by EPA was an e-mail sent on June 29, 2006, from an official in EPA's Kansas City regional office. It is redacted as follows:

The facility is only [redacted] (maybe even less than that) from a perennial, [redacted] which empties into [redacted]. The facility is only [redacted] from [redacted]. Considering all of the problems at the facility, this is a pretty big risk.<sup>45</sup>

Finally, EPA also redacted an e-mail sent by an attorney in EPA's San Francisco regional office in order to conceal both the alleged polluter and the waterway affected. It states:

Rapanos played a large part in the reason we chose not to pursue this case where [redacted] built an entire golf course w/o a 402 (or 404) permit that affected ephemeral tributaries to the [redacted].<sup>46</sup>

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<sup>41</sup> Environmental Protection Agency, *Stormwater Cases Jurisdictional Presentation* (undated).

<sup>42</sup> E-mail from Nelson Smith to James Vinch (Jan. 28, 2008; 12:35 p.m.); Staff notes on e-mail from Nelson Smith to James Vinch (Jan. 28, 2008; 12:35 p.m.).

<sup>43</sup> E-mail from Diane Huffman to James Vinch (Jan. 23, 2008; 11:18 a.m.).

<sup>44</sup> E-mail from Jane Nakad to James Vinch (Jan. 29, 2008; 11:10 a.m.).

<sup>45</sup> E-mail from Paula Higbee to Kristina Kemp, et al. (June 29, 2006; 10:09 a.m.).

<sup>46</sup> E-mail from Rich Campbell to Laurie Kermish (Jan. 10, 2008; 5:21 p.m.).

## **E. Administration Claims of No Negative Impact**

The documents produced to the Committees appear to contradict statements by Administration officials that the Supreme Court's decision in the *Rapanos* case and the Administration's guidance implementing it have had no significant impact on the Clean Water Act enforcement program.

On April 16, 2008, EPA's Assistant Administrator for Water, Ben Grumbles, testified before the Committee on Transportation and Infrastructure. When asked by Chairman Oberstar whether any waters had lost Clean Water Act protections, Mr. Grumbles testified that there had been only a "slight, not significant, decrease in coverage."<sup>47</sup> He then questioned whether there had been "any impacts" on the Clean Water Act enforcement program.<sup>48</sup>

Career EPA officials noted the apparent disconnect between the Administration's statements and the reality on the ground. For example, on January 23, 2008, the head of the San Francisco office wetlands program wrote:

We understand that in response to Rep. Oberstar's recent inquiries about the effects of the Rapanos guidance, OW [Office of Water] conducted only a cursory internal search and is reporting to Oberstar that no problems have been created for the NPDES program (in contrast to what we are hearing).<sup>49</sup>

## **II. APPLICATION OF CLEAN WATER ACT TO SANTA CRUZ RIVER**

In addition to demonstrating a substantial decline in Clean Water Act enforcement cases, the documents produced to the Committees show that J.P. Woodley, a political appointee who serves as the Assistant Secretary of the Army for Civil Works, placed the interests of corporate lobbyists over the scientific determinations of career officials in making a decision about the Santa Cruz River in Arizona.

On May 23, 2008, the District Engineer for the Los Angeles District of the Army Corps of Engineers issued a determination concluding that pursuant to the *Rapanos* decision, two stretches of the Santa Cruz River were "traditional navigable waters."<sup>50</sup> This "TNW" determination meant that tributaries of the Santa Cruz River would be protected by the Clean Water Act and developers would need permits to discharge dredge or fill materials into those tributaries.

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<sup>47</sup> House Committee on Transportation and Infrastructure, *Hearing on the Clean Water Restoration Act of 2007*, 110<sup>th</sup> Cong. (Apr. 16, 2008).

<sup>48</sup> *Id.*

<sup>49</sup> E-mail from David Smith to Alexis Strauss, et al. (Jan. 23, 2008; 9:07 a.m.).

<sup>50</sup> U.S. Army Corps of Engineers, *Memorandum for the Record* (May 23, 2008).



After this determination was made, Mr. Woodley met with lobbyists opposed to the decision and launched a personal campaign to overturn it, despite vehement opposition from officials at the Army Corps of Engineers, EPA, and within his own office. Although his campaign ultimately was unsuccessful, it wasted countless hours of work for career officials and risked seriously endangering water quality and public health.

#### A. Lobbying Efforts to Overturn the Decision

On May 23, 2008, Col. Thomas Magness, Commander of the Los Angeles District of the Army Corps of Engineers, issued a written determination that two stretches of the Santa Cruz River were “traditional navigable waters” for purposes of determining Clean Water Act jurisdiction. This determination was necessary for the Corps of Engineers to evaluate whether the upstream tributaries of the Santa Cruz River are covered by the Clean Water Act. Following the *Rapanos* decision, developers have routinely requested such jurisdictional determinations before initiating projects so they know whether they will need to obtain Clean Water Act permits. According to Col. Magness’s determination:

Public access points within ... the Study Reaches such as low river banks, bridges, and trail systems, together with their physical characteristics, such as frequency, duration, and permanency of flow, indicate that the Study Reaches have the potential to be used for commercial recreational navigation activities, such as canoeing, kayaking, birding, nature and wildlife viewing. Such attractions and activities demonstrate that the Study Reaches may be susceptible to use in interstate commerce.<sup>51</sup>

On June 12, 2008, J.P. Woodley, the Assistant Secretary of the Army for Civil Works, attended a meeting with the Farm Bureau, an organization that lobbies on behalf of agricultural interests. At this meeting, Virginia Albrecht, a lobbyist for various construction, farming, and mining interests, complained about the determination by Col. Magness that the Clean Water Act applied to the two stretches of the Santa Cruz River.

In an e-mail the same day, David Castanon, the Regulatory Chief of the Los Angeles District, or SPL, described the meeting to Col. Magness:

[A]t the end of the meeting, Virginia Albrecht (an attorney who represents mining, building and farming associations in Washington) asked Woodley if he was aware of a bad TNW determination that SPL had made on the Santa Cruz River in Arizona that had only sewage flow. Woodley asked Chip to look into it and report back on Friday.<sup>52</sup>

The next morning, Mr. Woodley read Col. Magness’s determination himself and launched a major effort to challenge it. His Executive Officer, Col. Michael Donovan, sent an e-mail to Col. Magness, stating: “Mr. Woodley read the attached document this morning and was very upset. He does not see the determination to be valid.”<sup>53</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> E-mail from David Castanon to Thomas Magness (June 12, 2008; 4:01 p.m.).

<sup>53</sup> E-mail from Michael Donovan to Thomas Magness (June 13, 2008; 5:02 a.m.).



Later that morning, Mr. Woodley contacted the Army's Office of General Counsel. Anne Young, an attorney in that office, sent an e-mail to the Deputy General Counsel for the Army, Craig Schmauder, explaining the call. She wrote:

Mr. Woodley is quite upset. ... If a joke, Woodley will laugh. If not a joke, Woodley wants: 1) decision reversed and 2) all navigability determinations made at HQ level.<sup>54</sup>

In response, Mr. Schmauder asked: "Why is Mr. Woodley so angered here? Was he surprised?"<sup>55</sup> She replied:

He was completely surprised. Mr. Woodley thinks that the only reason the District declared the reach 'traditionally navigable' was because a radio talk show host rode a raft down the reach during a flood. ... It may be best for us to speak with Mr. Woodley and see if we can reason with him.<sup>56</sup>

At the same time Mr. Woodley was complaining to the Army General Counsel's office, his own Assistant for Environment, Tribal, and Regulatory Affairs, Chip Smith, was apparently telling the same attorneys that he disagreed with his boss. In an e-mail to Anne Young in the Counsel's office, Mr. Smith wrote:

Mr. Woodley tells me you are looking into this TNW determination for him. He disagrees with it. I agree with it. Albeit not excited about it.<sup>57</sup>

Mr. Smith received an e-mail that day from Mark Cohen, the Deputy Chief of the Regulatory Division of the Corps of Engineers, explaining the negative ramifications of Mr. Woodley's efforts to overturn the determination. He wrote:

If these reaches are not TNWs, there would be a profound effect on our ability to regulate tributaries to the Santa Cruz river. ... An inability to find a significant nexus for these tributaries would lead to a wide loss of jurisdiction and ultimately pose serious water quality concerns for the area.<sup>58</sup>

Later that morning, Ms. Young, the attorney in the Counsel's office, sent an e-mail to Deputy General Counsel Schmauder. She wrote: "Ben wanted to know if Mr. Woodley was in left field and I told him I thought he might be because his own staff appears to agree with

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<sup>54</sup> E-mail from Anne Young to Craig Schmauder (June 13, 2008; 8:02 a.m.).

<sup>55</sup> E-mail from Craig Schmauder to Anne Young (June 13, 2008; 9:01 a.m.).

<sup>56</sup> E-mail from Anne Young to Craig Schmauder (June 13, 2008; 9:53 a.m.).

<sup>57</sup> E-mail from Chip Smith to Anne Young (June 13, 2008; 9:11 a.m.).

<sup>58</sup> E-mail from Mark Cohen to Chip Smith (June 13, 2008; 5:55 p.m.).

District.”<sup>59</sup> This appears to be a reference to Ben Grumbles, EPA’s Assistant Administrator for Water.

At the end of the day, Col. Magness, the author of the determination, informed his superior, Brigadier General John McMahon, Commander of the South Pacific Division of the Corps of Engineers, about the challenge to his decision. He wrote: “Mr. Woodley was spinning up this morning apparently after hearing about our TNW decision on the Santa Cruz River in AZ from a long-time opponent to our program.”<sup>60</sup>

#### **B. Subsequent Lobbying Pressure to Reverse Determination**

A week later, on June 20, 2008, Kelly House, the President of El Dorado Holdings, a real estate company, sent an e-mail to Mr. Woodley’s Principal Deputy Assistant Secretary, George Dunlop. He wrote:

Until last week we were under the impression that everything was proceeding properly until we saw [the] Santa Cruz TNW. ... Now we are very concerned about the direction this is taken and assuming that we are at a very sensitive point in the process.<sup>61</sup>

Mr. Dunlop forwarded this e-mail to Chip Smith, Mr. Woodley’s Assistant for Environment, Tribal, and Regulatory Affairs, with the following message:

I think you know Kelly House from Arizona. Here is his commentary on the DE’s [District Engineer’s] Santa Cruz River determination. ... I know you said that you reviewed this and that the DE seemed to have little choice but to determine the property jurisdictional. ... But maybe we need to review the entire text to make sure that DE is not creating precedent for us that we don’t want to have to live with. Please take another look at the Santa Cruz decision.<sup>62</sup>

Within the hour, Mr. Dunlop circled back with Mr. House, the real estate company’s president, informing him that he had directed this review. Mr. Dunlop wrote:

As regards Santa Cruz, I checked with our people here, and there is a consensus that the DE had no choice but to declare the reaches that he did as jurisdictional, but we are making another read of the 90+page document to see if the concerns you raise are inconsistent with policy guidance.<sup>63</sup>

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<sup>59</sup> E-mail from Anne Young to Craig Schmauder (June 13, 2008; 10:58 a.m.).

<sup>60</sup> E-mail from Thomas Magness to John McMahon (June 13, 2008; 4:50 p.m.).

<sup>61</sup> E-mail from Kelly House to George Dunlop (June 20, 2008; 11:41 a.m.).

<sup>62</sup> E-mail from George Dunlop to Chip Smith (June 20, 2008; 1:40 p.m.).

<sup>63</sup> E-mail from George Dunlop to Kelly House (June 20, 2008; 2:12 p.m.).

About a week later, on June 25, 2008, Mr. House sent another e-mail to Mr. Woodley's Principal Deputy Assistant Secretary, Mr. Dunlop. In this e-mail, he complained that the career officials involved clearly wanted to "continue to assert jurisdiction over the same 'waters/tributaries' post Rapanos as were regulated pre Rapanos."<sup>64</sup> He stated: "I doubt this is what this Administration stands for."<sup>65</sup> He also stated: "George, please do not pass this on and probably best to delete entirely."<sup>66</sup> Mr. Dunlop replied: "I understand what you are saying."<sup>67</sup>

### C. Suspension of the Determination

On June 30, 2008, Mr. Woodley initiated a process to suspend the determination, triggering a 60-day review period during which he could overturn the decision. Mr. Schmauder, the Army's Deputy Chief Counsel, sent Mr. Woodley an e-mail that day confirming the initiation of this process. He wrote: "your policy direction to rescind the LA District's Santa Cruz TNW determination has been set in motion."<sup>68</sup>

A Corps of Engineers official explained in an e-mail later that day that Mr. Woodley initiated this process after consulting with lobbyists and despite the fact that his own staff disagreed with him. He wrote:

I was aware of Mr. Woodley's displeasure with this determination following a meeting he had with a representative of the Homebuilders Association. ... It is my understanding that Chip supported the District's call but was unable to persuade [sic] Mr. Woodley otherwise.<sup>69</sup>

When news of the suspension made its way to Col. Magness, the official who originally made the determination, he immediately sent an e-mail to his superior, Brig. Gen. McMahon, warning of the consequences. He wrote:

Recinding [sic] our decision destroys the credibility of field commanders to make these calls and seriously slows this already cumbersome process.<sup>70</sup>

On the same day, a Los Angeles District career official who helped Col. Magness draft the determination sent an e-mail urging an attorney at the Corps of Engineers to intervene to stop

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<sup>64</sup> E-mail from Kelly House to George Dunlop (June 25, 2008; 8:05 a.m.).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> E-mail from George Dunlop to Kelly House (June 25, 2008; 2:01 p.m.).

<sup>68</sup> E-mail from Craig Schmauder to J.P. Woodley (June 30, 2008; 4:52 p.m.).

<sup>69</sup> E-mail from Jennifer Moyer to James Hannon (June 30, 2008; 8:18 p.m.).

<sup>70</sup> E-mail from Thomas Magness to John McMahon (June 30, 2008; 12:55 p.m.).



the suspension process. She wrote: "You must stress to Mr. Woodley the unbelievable consequences to water quality which would occur if the TNW determination is overturned."<sup>71</sup>

Also on this day, the Counsel for the Los Angeles District, Lawrence Minch, expressed concern that lobbying efforts were negatively affecting the process. In an e-mail to Col. Magness, the author of the determination, he wrote:

This appears to be occurring in response to lobbying efforts by the attorneys for the big developers. ... I am very concerned about this politicization of the Regulatory process.<sup>72</sup>

On the next day, July 1, 2008, Col. Magness again consulted with his superior, Brig. Gen. McMahan. He wrote:

I need your help on this one. I have been given nothing as to the basis of this decision. My sentiment is that this is politics. This can send shock waves through our program.<sup>73</sup>

Col. Magness also consulted Annette Kuz, Brig. General McMahan's Division Counsel. Later that day, Ms. Kuz sent two e-mails summarizing Col. Magness's concerns. She wrote: "Col. M called me as well and voiced his concern relative to a record that doesn't contain a rationale based on science in the event the Secretary issues a rescission."<sup>74</sup> In addition, she explained:

He [Col. Magness] specifically noted having concerns relative to receiving a foia [Freedom of Information Act request] and the documentation related to Mr. Woodley's recent meeting with developers and their representative Virginia Albrecht.<sup>75</sup>

The same day, an attorney from the Los Angeles District Office held a conference call with officials at Army headquarters. In a summary of the call, he wrote:

Tiffany and I did our best to defend the TNW determinations that SPL has made and to counter misinformation about the Santa Cruz River that the lobbyists at [sic] obviously planted. ... Mr. Woodley is apparently under the impression that the stretch of the Santa Cruz that we have found to be a TNW is dry much of the year and that, when it contains water, it is unsafe for boating.<sup>76</sup>

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<sup>71</sup> E-mail from Marjorie Blaine to Tiffany Troxel (June 30, 2008; 5:43 p.m.).

<sup>72</sup> E-mail from Lawrence Minch to Thomas Magness (June 30, 2008; 1:31 p.m.).

<sup>73</sup> E-mail from Thomas Magness to John McMahan (July 1, 2008; 5:50 a.m.).

<sup>74</sup> E-mail from Annette Kuz to Mark Charlton, et al. (July 1, 2008; 11:22 a.m.).

<sup>75</sup> E-mail from Annette Kuz to Lloyd Pike and Earl Stockdale (July 1, 2008; 1:35 p.m.).

<sup>76</sup> E-mail from Lawrence Minch to Thomas Magness (July 1, 2008; 1:28 p.m.).

By July 3, 2008, the suspension was completed and the 60-day review had begun. The influence of lobbyists on this process was documented in an e-mail the same day from an Assistant Chief Counsel of the Corps of Engineers. He wrote:

Recently ASA(CW) J.P. Woodley was advised by a private sector attorney that the Corps Los Angeles District had improperly designated two reaches of the Santa Cruz River in Arizona as navigable-in-fact 'traditional navigable waters' (TNWs) for purposes of asserting jurisdiction under the Clean Water Act. ... Subsequently, Mr. Woodley decided to undertake a 60-day review of that L.A. District decision.<sup>77</sup>

Also that day, Steven Stockton, the Director of Civil Works, informed Mr. Woodley that the 60-day review process had begun. He wrote:

This note confirms the acknowledgement ... that the OASA(CW) and the Army OGC will conduct a 60-day review of the SPL's recent determination that two segments of the Santa Cruz River, AZ, are "traditional navigable waters".<sup>78</sup>

Mr. Woodley responded: "I doubt we will need 60 days."<sup>79</sup>

#### **D. 60-Day Review Period**

During the 60-day review process, career officials supported the original determination while Mr. Woodley and several lobbyists pushed for a rapid reversal.

Career officials noted that based on the research conducted by the Los Angeles District Office, the stretches of the Santa Cruz River were traditional navigable waters. On July 3, 2008, Steven Stockton, the Director of Civil Works, expressed his view of the process:

Not sure who brought it to the ASA(CW)'s attention. I suspect one of the Arizona developers. ... I expect the district determination will be upheld unless George and JP can convince EPA this has gone too far.<sup>80</sup>

On July 6, 2008, David Castanon, the Regulatory Chief of the Los Angeles District, agreed. He wrote:

I can attest to the extensive amount of information that was part of our TNW determination. We had a lot of hydrological info, historical info, maps, etc. We also sent

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<sup>77</sup> E-mail from Lance Wood to Michael Kapaun (July 3, 2008; 2:53 p.m.).

<sup>78</sup> E-mail from Steven Stockton to George Dunlop and J.P. Woodley (July 3, 2008; 11:44 a.m.).

<sup>79</sup> E-mail from J.P. Woodley to Steven Stockton (July 3, 2008; 11:58 a.m.).

<sup>80</sup> E-mail from Steven Stockton to Don Riley (July 3, 2008; 12:31 p.m.).

up to HQ and Chip Smith other associated info (photos, power points, etc). Upon review, he did agree with us, but apparently Woodley still was not satisfied.<sup>81</sup>

The next day, the division's Regulatory Program Manager, Wade Eakle, also agreed. In an e-mail on July 7, 2008, he wrote: "I saw the package, it was very well documented."<sup>82</sup>

Mr. Eakle also sent internal talking points to Brig. Gen. McMahon, which stated:

District put forth enormous effort to collect/analyze scientific/engineering data and in evaluating it against existing national joint Army/EPA TNW guidance. Sources included USGS, academia, historians, etc.<sup>83</sup>

While career officials supported the determination, Mr. Woodley pushed to quickly overturn the determination. On July 17, 2008, Craig Schmauder, the Deputy General Counsel for the Army, described Mr. Woodley's approach for this review. He wrote: "We are on a fast moving train per direction from Mr. Woodley."<sup>84</sup>

The next day, Mr. Woodley's Principal Deputy Assistant Secretary, George Dunlop, sent an e-mail to Gregory Peck, the Chief of Staff of EPA's Water Office, stating that Mr. Woodley wanted to keep career EPA staff out of the review process. He wrote:

Mr. Woodley told me that he is very concerned that the internal working papers/deliberative documents marked not for distribution outside the Government on this subject are being widely distributed and published and seem to be coming from sources within EPA. He ... asked that I convey to you and Ben [Grumbles, Assistant Administrator for Water] his intention that the Army not develop or exchange any documents with anyone at EPA except you or Ben, or some other person of known probity.<sup>85</sup>

Mr. Peck agreed, stating:

I appreciate the sensitivity and your willingness to raise this concern. We will work closely with you to protect deliberative materials by limiting distribution within EPA to Ben and myself.<sup>86</sup>

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<sup>81</sup> E-mail from David Castanon to Wade Eakle (July 6, 2008; 10:18 p.m.).

<sup>82</sup> E-mail from Wade Eakle to David Castanon (July 7, 2008; 6:46 a.m.).

<sup>83</sup> E-mail from Wade Eakle to John McMahon (July 18, 2008; 3:50 p.m.).

<sup>84</sup> E-mail from Craig Schmauder to Michael Donovan and George Dunlop (July 17, 2008; 4:17 p.m.).

<sup>85</sup> E-mail from George Dunlop to Gregory Peck (July 18, 2008; 3:11 p.m.).

<sup>86</sup> E-mail from Gregory Peck to George Dunlop (July 18, 2008; 4:09 p.m.).



By July 29, 2008, Steven Stockton, the Director of Civil Works, informed his colleagues at the Los Angeles District Office that Mr. Woodley planned to reverse the determination. He explained: "Mr. Woodley called and was concerned about the TNW policy review on the Santa Cruz River. ... Mr. Woodley is convinced that we got it wrong."<sup>87</sup> He added: "I am just concerned that Mr. Woodley has formed an opinion based upon incomplete information and that our job just became that much tougher."<sup>88</sup>

Two days later, Col. Magness, the author of the determination, sent an e-mail to Mr. Stockton expressing his concern:

Am hearing rumors about a pending decision from Mr. Woodley to reverse my decision. As you know, this will have major political, environmental, and media implications. I don't know where we are and how/if to influence at this point.<sup>89</sup>

In his reply, Mr. Stockton indicated that the Corps of Engineers supported Col. Magness and his original determination. He wrote: "We are behind you. ... Will let you know if this starts to go south."<sup>90</sup>

On July 25, 2008, the National Association of Home Builders sent a letter to Mr. Woodley asserting that the determination by the Corps of Engineers "is unsupported by any legitimate evidence." The letter provided a legal argument that it called "simple" and "straightforward," which was that only waters previously regulated under the Rivers and Harbors Act could be "traditional navigable waters" under the Clean Water Act.<sup>91</sup> Under this test, the two stretches of the Santa Cruz River would not qualify as traditional navigable waters.

After reading the letter, Mr. Woodley's Principal Deputy Assistant Secretary, George Dunlop, commented: "Splendid reading. A scholarly work."<sup>92</sup>

However, career attorneys at the Corps of Engineers disagreed. An Assistant Chief Counsel and an Assistant Counsel at the Corps of Engineers emphasized to Craig Schmauder and Chip Smith "the distinction between the definition of 'the navigable waters of the United States' for purposes of the Rivers and Harbors Act of 1899 and traditional navigable waters for purposes of the Clean Water Act."<sup>93</sup> One Corps of Engineers attorney expressed his view of the process:

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<sup>87</sup> E-mail from Steven Stockton to Linda Morrison (July 29, 2008; 7:34 a.m.).

<sup>88</sup> E-mail from Steven Stockton to Chip Smith (July 29, 2008; 8:46 a.m.).

<sup>89</sup> E-mail from Thomas Magness to Steven Stockton (July 31, 2008; 2:15 p.m. Eastern Standard Time).

<sup>90</sup> E-mail from Steven Stockton to Thomas Magness (July 31, 2008; 11:32 a.m. Pacific Standard Time).

<sup>91</sup> Letter from William P. Killmer, et al., to J.P. Woodley (July 25, 2008).

<sup>92</sup> E-mail from George Dunlop to Craig Schmauder (Aug. 4, 2008; 4:47 p.m.).

<sup>93</sup> E-mail from John Wilson to Marjorie Blaine and Lance Wood (Aug. 4, 2008; 12:59 p.m.).

This was sooooo predictable. Let us NEVER underestimate the power of Ms. Albrecht to influence the powers that be with merely a sweet whisper in the ear!<sup>94</sup>

EPA officials also raised concern with this legal argument. One EPA official commented: "I'm fairly sure it was written for NAHB [National Association of Home Builders] by Virginia Albrecht; it uses many of her phrases and arguments."<sup>95</sup> Another EPA employee told his colleagues that "it probably greatly influenced HQ thinking."<sup>96</sup>

#### **E. EPA Intervention and Restoration of Determination**

Before final action was taken by Mr. Woodley to reverse the determination, EPA Assistant Administrator Ben Grumbles intervened to exercise his agency's statutory authority to make final decisions in "special cases" of this kind. On August 13, 2008, Mr. Woodley sent an e-mail to Army Corps of Engineers officials directing them to stop work on the 60-day review process. He wrote:

Ben Grumbles had indicated to me that EPA will take over the navigability determination for the Santa Cruz. All work on this matter by all Corps personnel should cease at once.<sup>97</sup>

On August 18, 2008, Mr. Grumbles transmitted a letter to Mr. Woodley officially designating the Santa Cruz River as a special case over which EPA exercises final decision authority.<sup>98</sup> On December 3, 2008, Mr. Grumbles sent a letter to Mr. Woodley affirming the original navigability determination.<sup>99</sup>

### **III. WEAKENING OF GUIDANCE**

Documents produced to the Committees indicate that the White House significantly weakened guidance issued by the Administration to implement the Supreme Court's decision in the *Rapanos* case. These actions appear to have been taken at the behest of J.P. Woodley, the Assistant Secretary of the Army for Civil Works, and Virginia Albrecht, the lobbyist who intervened in the case involving the Santa Cruz River.

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<sup>94</sup> E-mail from Martin Cohen to Daniel Inkelas and Russell Petit (Aug. 9, 2008; 5:27 p.m.).

<sup>95</sup> E-mail from Donna Downing to Rachel Fertik, et al. (Aug. 5, 2008; 8:03 a.m.).

<sup>96</sup> E-mail from David Smith to Marjorie Blaine, et al. (Aug. 5, 2008; 10:16 a.m.).

<sup>97</sup> E-mail from J.P. Woodley to Craig Schmauder, et al. (Aug. 13, 2008; 12:44 p.m.).

<sup>98</sup> E-mail from Benjamin Grumbles to J.P. Woodley (Aug. 18, 2008; 11:44 a.m.).

<sup>99</sup> Letter from Benjamin Grumbles to J.P. Woodley (Dec. 3, 2008).



In a July 8, 2008, e-mail, a Corps of Engineers attorney described how a draft of the June 2007 guidance was weakened by the White House at the behest of lobbyists. He explained:

The draft Rapanos guidance that the Army and EPA sent over to the CEQ and the White House for review was a reasonably sound draft document that would have allowed the Government to “aggregate” all of the streams in a watershed area when making a “significant nexus” determination, whether those streams had adjacent wetlands or not. But the CEQ/White House made some significant changes in the document that they finally cleared for signature. You can imagine who influenced the high-level decision-makers to make those changes.

So the final Rapanos guidance greatly limits what we can aggregate or evaluate in making a “significant nexus” determination. That has the effect of making it hard to assert jurisdiction over any particular ephemeral or not-relatively-permanent intermittent stream. That result must surely have been anticipated by the high-level decision-makers who insisted on it. Thus it would be surprising if any change is made regarding this issue during the current administration.<sup>100</sup>

Another Corps of Engineers employee responded: “I knew about Virginia Albrecht’s influence over the guidance and over the Santa Cruz River TNW withdraw. It’s really unjust that she was allowed to do this.”<sup>101</sup> These e-mails reinforce contemporaneous press accounts of lobbyist influence on the June 2007 guidance.<sup>102</sup>

The weakened June 2007 guidance contributed to the collapse of the EPA enforcement program discussed earlier in this memorandum. An EPA enforcement attorney succinctly summarized the problem: “The Guidance has compromised EPA’s enforcement authority.”<sup>103</sup>

Some EPA officials sought revisions to the guidance. For example, the Region 9 office based in San Francisco argued that the guidance should apply not only to waters with commercial activity, but also to waters with recreational activity. In a March 4, 2008, e-mail, Wayne Nastri, the Region 9 Administrator told Ben Grumbles, the Assistant Administrator for Water, that traditional navigable waters should include:

all waters ... for which there is any documented evidence of actual recreational navigation by any form of watercraft, including tubes, rafts, canoes, kayaks, and floatplanes (i.e. the presumption should be made that recreational opportunity is sufficient to establish interstate commerce potential).<sup>104</sup>

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<sup>100</sup> E-mail from Lance Wood to Heather Wylie (July 8, 2008; 12:06 p.m.).

<sup>101</sup> E-mail from Heather Wylie to Lance Wood (July 8, 2008; 4:27 p.m.).

<sup>102</sup> See, *After Lobbying, Wetlands Rules Are Narrowed*, New York Times (July 6, 2007).

<sup>103</sup> Staff notes of e-mail from James Vinch (Jan. 16, 2008; 8:12 a.m.).

<sup>104</sup> Staff notes on e-mail memorandum from Wayne Nastri to Ben Grumbles (Mar. 4, 2008).



Similarly, EPA's Region 8 office in Denver commented: "Region 8 believes future guidance should have an expansive view of susceptibility to commerce."<sup>105</sup> The region continued:

Some Corps offices are taking the position that foreseeable commerce should not be part of a TNW designation. ... In general, this position has resulted in a general reduction in the upstream extent of the TNW designation.<sup>106</sup>

Mr. Woodley, however, wanted a far more stringent standard. Mr. Woodley's assistant, Chip Smith, sent an e-mail on August 20, 2008, describing Mr. Woodley's position. He wrote: "Mr. Woodley supports commercial navigation, not a person floating a boat, and he supports current use, with susceptibility being very, very limited with strict criteria."<sup>107</sup>

The Administration issued revised guidance on December 3, 2008. These revisions mirrored Mr. Woodley's position. Aside from waters that are considered navigable under the Rivers and Harbors Act or that have been determined by a federal court to be navigable, a water will only be considered a TNW under the revised guidance if it is "being used for commercial navigation," has "historically been used for commercial navigation," or is "susceptible to being used in the future for commercial navigation."<sup>108</sup> Because the revised guidance does not consider non-commercial navigation and limits consideration of future commercial navigation, it likely will exacerbate the deterioration of EPA Clean Water Act enforcement actions by further limiting jurisdiction over many water bodies.

#### IV. RECOMMENDATIONS

The Committees' investigation shows that longstanding Clean Water Act protections have become imperiled as a direct result of the Supreme Court's decision in *Rapanos* and the Administration's response to it. Hundreds of enforcement cases have been dropped, downgraded, delayed, or never brought in the first place, and career officials in regional offices throughout the country have warned that they are no longer able to ensure the safety and health of the nation's waters.

In order to remedy these critical problems, executive and congressional action may be necessary.

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<sup>105</sup> Staff notes on e-mail from Rachel Furtik to Rose Kwok (Feb. 20, 2008).

<sup>106</sup> Staff notes on e-mail from Rachel Furtik to Rose Kwok (Feb. 20, 2008).

<sup>107</sup> E-mail from Chip Smith to James Laity and David Evans (Aug. 20, 2008; 6:10 p.m.).

<sup>108</sup> Environmental Protection Agency and Army Corps of Engineers, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 3, 2008).



INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY  
DISCLOSURE AUTHORIZED ONLY TO CONGRESS FOR OVERSIGHT PURPOSES IN RESPONSE TO SUBPOENA

James Vinch/DC/USEPA/US

02/05/2008 02:55 PM

To Kenneth Champagne/ENF/R8/USEPA/US@EPA

cc

bcc

Subject Re: Oberstar Data from today's call

Ken,

Here is a draft.



Oberstar Regional Chart.wpd

Jim Vinch  
Attorney-Advisor  
Office of Enforcement and Compliance Assurance  
Water Enforcement Division  
US Environmental Protection Agency  
Ariel Rios South, Rm 4118A  
1200 Pennsylvania Ave NW  
Washington DC 20460  
tel: (202) [REDACTED]

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Kenneth Champagne/ENF/R8/USEPA/US

Kenneth  
Champagne/ENF/R8/USEPA/  
US

02/05/2008 02:28 PM

To Peter Stokely/DC/USEPA/US@EPA, James  
Vinch/DC/USEPA/US@EPA

cc

Subject Oberstar Data from today's call

Hey guys,

Thanks for the great call today! Would you be able to provide me with a table or summary with the Oberstar numbers discussed on today's call? My supervisor wanted some detail, and I want to make sure I can characterize them properly.

Thanks!

Kenneth Champagne  
U.S. Environmental Protection Agency  
Region 8  
Section 404 Enforcement Program  
p. (303) [REDACTED]  
f. (303) [REDACTED]



Table for compiling EPA Response to Oberstar Congressional of 10/10/07

Region	1. Cases where an enforcement action was considered to be appropriate based on existing violations, but where the Region chose not to pursue formal enforcement based-- at least in part-- on the uncertainty about EPA's jurisdiction over the receiving waters.	2. Cases where an enforcement action was considered to be appropriate based on existing violations, but where the Region chose to "lower the priority" (as more specifically described below) of the case based-- at least in part-- on the uncertainty about EPA's jurisdiction over the receiving waters. For the purpose of this category "lowering a priority" means any decision by the Region to reduce or reassign the importance, urgency or scope of an enforcement action in any of the following ways:  2a.) any change in the type of enforcement mechanism used in a case, such as changing from a formal to an informal enforcement response.  2b.) a decision to reduce the amount of the civil penalty in the enforcement action based upon uncertainty about CWA jurisdiction; or  2c.) any significant delay due to budgetary or resource constraints caused by the necessity of having to prove jurisdiction under the Rapanos standard.	3. Any case where lack of CWA jurisdiction has been asserted by the alleged discharger as an affirmative defense to an enforcement action.	Overlap	
1	1 (404)	1 (OPA)	2 (402)	1 (404); 1 (402)	1
2		1 (402)		1 (402/404)	0
3	4 (402/404)			4 (402/404)	0
4	13(OPA); 8(402)	2 (402)	2 (402); 2 (404)	2 (402); 5 (404)	14 (404)

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5	3 (404)	1 (404); 1 (402)	2 (402)	13 (404); 12 (402)	6 (404); 1 (402)	2
6	86 (OPA); 52 (402/404)	1 (402/404)		3 (402/404)	3 (OPA); 2 (402/404)	0
7	3 (OPA); 10 (402); 4 (404)	14 (402)	2 (OPA); 1 (402)	3 (OPA); 4 (402); 3 (404)	2 (OPA); 3 (402); 1 (404)	10
8	106 (OPA); 3 (402/404)	2 (OPA); 1 (402/404)	4 (OPA); 3 (402/404)	2 (OPA); 5 (402/404)	2 (OPA); 2 (402/404)	4
9	11 (404)	2 (OPA)	4 (402); 1 (402/404)	1 (OPA); 7 (402); 4 (404); 1 (402/404)	5 (402); 4 (404); 1 (402/404)	4
10	1 (402)		5 (402)	1 (OPA); 4 (402); 4 (404)	5 (402); 5 (404)	6
<b>TOTALS</b>	<b>304</b>	<b>25</b>	<b>26</b>	<b>80</b>	<b>61</b>	<b>37</b>

\* While we have attempted to define Congressman Oberstar's request for cases which were lowered in priority, please feel free to report any other delay or re-prioritization of a case due to the difficulty of proving jurisdiction.

39 cases identified above are judicial referrals.



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-Nelson Smith/R6/USEPA/US  
01/10/2008 10:05 AM

To James Vinch/DC/USEPA/US@EPA

cc

bcc

Subject Fw: Region 6 Oil Program Input for Oberstar Inquiry

Jim-

Per the discussion on yesterday's OPA enforcement call, I wanted to make sure you got all the information regarding the impacts of the Rapanos ruling in Region 6. This information was already sent up through OEM and you may get it through other channels; but I wanted to make sure it wasn't missed as it seems clearly responsive to Congressman Oberstar's request. Our oil pollution enforcement program has been significantly impacted by Rapanos. Please see items 2., 3., 4., and 6. below.

-Nelson "Beau" Smith  
OPA Compliance Assurance  
EPA Region 6  
214/

— Forwarded by Nelson Smith/R6/USEPA/US on 01/10/2008 09:58 AM —

Nelson Smith/R6/USEPA/US  
01/07/2008 04:06 PM

To Craig Matthiessen/DC/USEPA/US, Kevin Mould/DC/USEPA/US, Gilberto Irizarry/DC/USEPA/US, Hugo Fleischman/DC/USEPA/US

cc James Mullins/R6/USEPA/US@EPA, Ragan Broyles/R6/USEPA/US@EPA, Richard Franklin/R6/USEPA/US@EPA, Donaldp Smith/R6/USEPA/US@EPA, Bryant Smalley/R6/USEPA/US@EPA, Samuel Tates/R6/USEPA/US@EPA

Subject Region 6 Oil Program Input for Oberstar Inquiry

As promised during our phone conference this morning, below is a listing of the changes to the R6 Oil Program brought about by the Rapanos ruling:

**1. Narrowed SPCC Inspection Targeting** - Targeting for SPCC inspections has become much more conservative than pre-Rapanos. We have established a specific distance from "non-controversial navigable waters" that establishes the new universe of eligible facilities. That universe is significantly smaller than historical, but we can not quantify the change. We also can not quantify the environmental effects of reducing the geographic size of the eligible SPCC facilities.

**2. Numerous Oil Spill Cases "On Hold"** - Historically the Region has reviewed all reported spills for follow-up enforcement. If a spill is suspected to have reached a jurisdictional waterway, an information request (CWA 308) is issued. Prior to the Rapanos ruling, any spill confirmed after investigation to have reached a USGS designated waterway received an enforcement action requiring payment of a penalty and confirmation of corrective actions to prevent future releases. Since the Rapanos ruling, the Region has documented 76 cases (and counting) where a spill to a USGS designated waterway has been confirmed, but no follow-up for penalties or corrective action has been sought due to difficulties asserting jurisdiction post-Rapanos.

**3. Impact to Oil Spill Enforcement** - The number and type of spills that continue to receive enforcement actions since Rapanos has narrowed, however, the expenditure of resources for each case has increased. While the primary focus prior to Rapanos was investigating the cause of the spill, more time and effort

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than ever before is now spent investigating the impacted waterway and downstream tributary connections. Site visits, mapping, aerial photography review, historical research, hydrologic data analysis and even sophisticated computer modeling (\$9,000 per site) are draining available resources for spill enforcement. The increased workload also delays timely enforcement.

**4. Impact to SPCC Enforcement -** EPA's jurisdictional authority under SPCC has been directly challenged by industry since the Rapanos ruling. The primary basis for SPCC coverage is the potential to impact a jurisdictional waterway. Companies have elected to discontinue SPCC protections at multiple locations based on their contention that there is no threat to jurisdictional waterways under Rapanos. As previously detailed for spill enforcement, the narrowed field of SPCC cases that are still brought for enforcement involve significant extra case development effort to establish jurisdiction.

**5. Impact to Spill Response Program -** Certain spill responses that would have historically merited EPA response action have not been acted upon by OSCs. In some instances, the response duty OSCs have made a post-Rapanos decision not to respond based upon questions and their perception of what was jurisdictional. The uncertainty also leads to additional work in determining if we can respond. In one instance, EPA's response authority was directly challenged during the response by EPA personnel in the field, based on that company's assertion, under Rapanos, that a jurisdictional waterway had not been impacted.

**6. Widespread Confusion -** Only a small portion of spills in the Region occur to waterways that are clearly jurisdictional post-Rapanos. Most occur to intermittent streams, farm ponds, small creeks, or adjacent wetlands. Likewise, only a fraction of SPCC facilities are adjacent to major water features. This leads inevitably to widespread confusion among both industry and EPA as to where exactly the lines of jurisdiction are drawn. Efforts to alleviate confusion through compliance assistance are compromised by the Agency's own internal difficulties in delineating jurisdictional authority in such a way as to provide meaningful guidance to industry. Confusion has led to instances where spills have gone unreported, which in turn compromises the agency's ability to respond appropriately.

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Nelson Smith/R6/USEPA/US

01/15/2008 04:49 PM

To James Vinch/DC/USEPA/US@EPA

cc Edwin Quinones/R6/USEPA/US@EPA, James  
Mullins/R6/USEPA/US@EPA, Samuel  
Tates/R6/USEPA/US@EPA, Ragan

bcc

Subject Oberstar Request - List of R6 OPA Cases

Jim-

This is a follow-up to the email I sent on January 10, 2008. I have since been asked to provide you with the specific names of the R6 OPA cases that meet Congressman Obertar's criteria. We generated this list from our internal database and inserted the information into the form provided. We had previously reported 76 cases, but have identified 13 additional ones for a current total of 89.

Please feel free to call if you have any questions.


-Nelson "Beau" Smith  
OPA Compliance Assurance  
EPA Region 6  
214/██████████



Oberstar List for R6 OPA Enforcement.wpd




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Martha  
Wolf/EPR/R8/USEPA/US  
01/07/2008 05:06 PM

To Craig Matthiessen/DC/USEPA/US@EPA, Hugo  
Fleischman/DC/USEPA/US@EPA, Kevin  
Mould/DC/USEPA/US@EPA  
cc Carol Campbell/R8/USEPA/US@EPA, Martin  
Hestmark/ENF/R8/USEPA/US@EPA, David  
Ostrander/EPR/R8/USEPA/US@EPA, Mark  
bcc



Subject Fw: A Quick Question - Congressional Request

History:  This message has been forwarded.

Sorry for being a few hours late with this, I just got back into the office today. We literally have hundreds of OPA cases in our "no further action" file due to the Rapanos decision, most of which are oil spill cases. We would need further time to get more detailed information on those cases, but can if needed. The cases readily available fitting your description include:

Again, we do have a file with well over 100 cases held due to Rapanos if you need us to go through those for you. Please let me know if you need additional information.

Thanks

Martha Wolf (8EPR-ER)  
Team Leader, Preparedness and Prevention Unit  
EPA Region 8  
1595 Wynkoop Street  
Denver, Colorado 80202-1129  
Phone: 303.  Fax: 303. 

"Our task must be to free ourselves by widening our circle of compassion to embrace all living creatures."  
- Albert Einstein

— Forwarded by Martha Wolf/EPR/R8/USEPA/US on 01/07/2008 04:48 PM —

David  
Ostrander/EPR/R8/USEPA/US  
S  
01/03/2008 03:07 PM

To Martha Wolf/EPR/R8/USEPA/US@EPA  
cc Melissa Payan/EPR/R8/USEPA/US@EPA, Curtis  
Kimbel/EPR/R8/USEPA/US@EPA  
Subject Fw: A Quick Question - Congressional Request

fyi Note short turn around.

— Forwarded by David Ostrander/EPR/R8/USEPA/US on 01/03/2008 03:07 PM —

Debbie  
Dietrich/DC/USEPA/US  
01/03/2008 02:40 PM

To OSWER SF Reg DDs  
cc OSWER OEM REMOVAL MANAGERS, Hugo

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Fleischman/DC/USEPA/US@EPA, [REDACTED]@epa.gov  
Subject A Quick Question - Congressional Request

Hi everyone! Sorry for the short turnaround on this, but we are working on a Congressional deadline. The EPA HQ Office of Water is working on a response to a letter from Congressman Oberstar regarding issues raised by the Supreme Court's Rapanos decision on the definition of navigable waters. As part of this response, OEM has been asked to provide the following information:

"Please provide the Committee with an accounting of all jurisdictional issues related to the definition of "navigable waters" following the Rapanos decision that have arisen since June 19, 2006 and that are not governed under section 404 of the Clean Water Act, including jurisdictional issues related to section 402 of the Clean Water Act and the Oil Pollution Act."

We, of course, are only concerned with issues pertaining to our oil program. Because our response is due early next week, we are not asking you to do a complete search of your oil spill case files. Rather, we are asking only that you let us know if you have documented any oil spill cases or SPCC/FRP regulatory jurisdictional questions where navigable waters issues were raised to the attention of the Division Director within the Region. We here at HQ are not aware of any navigable water issues that have been raised during this time period, but we did want to check with you. Please respond to Craig Matthiessen, with a cc to Hugo Fleischman and Kevin Mould, by noon on Monday, Jan 7. Thanks for your help!

Debbie Dietrich, Director  
Office of Emergency Management (5104A)  
USEPA  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
Ph 202-[REDACTED]  
Fax 202-[REDACTED]

INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY  
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Nakad/ENF/R8/USEPA/US

Porter/DC/USEPA/US@EPA

01/22/2008 09:09 PM

cc

bcc

Subject

As indicated, I was delayed sending the oil enforcement program response to this request due to not finding out about the request until January 9. And I was not in the office until 1/14 due to illness. We had to pull files to compile the information in order to include case names. Attached are spill and SPCC violations which we failed to take cases on due to jurisdictional waters issues following the Rapanos decision.

Jane Nakad  
OPA Compliance Specialist and Enforcement Officer  
Technical Enforcement Program  
303-██████████

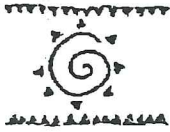
U.S. Environmental Protection Agency  
Mail Code: 8ENF-UFO  
1595 Wynkoop Street  
Denver, CO 80202

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authorized and may be unlawful. Oberstar Regional Response R8 oilwpd





Ann Nutt/R9/USEPA/US  
11/01/2007 09:00 AM

To Jessica Kao/R9/USEPA/US@EPA, Laurie  
Kermish/R9/USEPA/US@EPA

cc

bcc

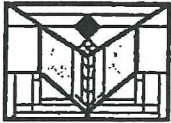
Subject Re: Fw: .apanos Issues for SEA

FYI, I talked to Nancy last night, and learned that she is going to the meeting. I gave her a heads up about Rapanos (and about which may also get discussed). After you've had a chance to look at what was sent to Alexis, it might be a good idea to send it along to Nancy, with any observations you want to add. (And can you cc me?)

Ann Nutt  
Office of Regional Counsel  
EPA, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Phone: (415) [REDACTED]  
Fax: (415) [REDACTED]

Laura Bose/R9/USEPA/US



Laura Bose/R9/USEPA/US  
10/31/2007 04:28 PM

To Laurie Kermish/R9/USEPA/US@EPA, Jessica  
Kao/R9/USEPA/US@EPA  
cc Ann Nutt/R9/USEPA/US@EPA

Subject Fw: .apanos Issues for SEA

Laurie and Jessica: Ann and I were discussing the SEA and I agreed to send you what we had on Rapanos

Laura Tom Bose  
Senior Policy Advisor  
Water Division (WTR-1)  
(415) [REDACTED]  
FAX (415) [REDACTED]  
bose.laura@epa.gov

— Forwarded by Laura Bose/R9/USEPA/US on 10/31/2007 04:27 PM —

Amy Miller/R9/USEPA/US

10/31/2007 03:48 PM

To Alexis Strauss/R9/USEPA/US@EPA

cc DavidW Smith/R9/USEPA/US@EPA, Laura  
Bose/R9/USEPA/US@EPA, Loretta  
Barsamian/R9/USEPA/US@EPA

Subject Re: .apanos Issues for SEA

One minor note involves and  
Amy C. Miller

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CWA Compliance Office  
U.S. Environmental Protection Agency Region IX  
Tel. (415) [REDACTED]  
Fax (415) [REDACTED]

Alexis Strauss/R9/USEPA/US

Alexis Strauss/R9/USEPA/US

10/31/2007 01:24 PM

To DavidW Smith

cc Amy Miller/R9/USEPA/US, Laura Bose/R9/USEPA/US,  
Loretta Barsamian/R9/USEPA/US@EPA

Subject Re: Rapanos Issues for SEA [REDACTED]

thx  
DavidW Smith/R9/USEPA/US

DavidW Smith/R9/USEPA/US

10/31/2007 01:06 PM

To Alexis Strauss/R9/USEPA/US@EPA

cc

Subject Rapanos Issues for SEA [REDACTED]

Points on Rapanos in [REDACTED] or SEA discussion:

- Large potential risk to NPDES, 303, 404, and enforcement programs if jurisdiction loses are widespread
- Regulated parties in [REDACTED] already challenging need for stormwater and wastewater permits, 303(d) listings, TMDLs, and 404 permits based on Rapanos arguments
- No JDs submitted to date for EPA review from [REDACTED] Corps Field office very quiet about what they are doing on JDs and navigability
- [REDACTED] Field Office staff prepared draft assertion of navigability for [REDACTED], and [REDACTED] and EPA R9 staff found it deficient; unclear if any additional work underway to improve analysis.
- Understand there are perhaps 20-30 pending JD requests in [REDACTED]
- Repeated requests to Corps for information on pending JDs in [REDACTED] have yielded nothing
- Smith called Linda Taunt last week to request info State may have on navigability concerning [REDACTED] and [REDACTED] to assist expected analysis needed for JD analysis; no response yet.
- Jensen enforcement case may be first opportunity to address navigability on [REDACTED]

David Smith  
Chief  
Wetlands Regulatory Office (WTR-8)  
EPA Region 9  
75 Hawthorne Street  
San Francisco, CA 94105  
(415) [REDACTED]

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DavidW Smith /R9/USEPA/US

01/23/2008 09:07 AM

To Alexis Strauss/R9/USEPA/US@EPA, Linda  
Moore/R9/USEPA/US@EPA  
cc Doug Eberhardt/R9/USEPA/US@EPA, Amy  
Miller/R9/USEPA/US@EPA, Jessica  
Kao/R9/USEPA/US@EPA, Laurie  
bcc

Subject WTR8 Weekly Report- Rapanos/NPDES issue

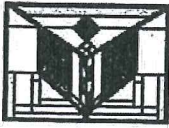
Clean Water Act Jurisdiction and NPDES Permitting. The ACOE, submitted a draft jurisdictional determination for concluding the s isolated and non-jurisdictional. As the JD was requested by o avoid coverage under an existing NPDES wastewater treatment permit, we asked the Corps to withdraw the draft JD and forward it to EPA and the Regional Water Quality Control Board for consideration. The Corps declined to delay or withdraw the JD; we have asked EPA HQ to elevate this as a critical policy matter because we believe the Corps should not be processing JD requests where there is no 404 issue involved and the State has already determined a NPDES permit is required. Similarly, met last week with officials, who complained ADEQ is viewing all waters as jurisdictional for purposes of NPDES permitting and expressed concern about potential inconsistencies in how the State and Corps would make jurisdictional determinations. We will bring the matter to HQ's attention as further evidence that impacts of th Rapanos guidance on the NPDES program are real and must be addressed. We understand that in response to Rep. Oberstar's recent inquiries about the effects of the Rapanos guidance, OW conducted only a cursory internal search and is reporting to Oberstar that no problems have been created for the NPDES program (in contrast to what we are hearing).

(Note to Alexis, Doug, and Amy- didnt know if Wayne had heard any of this, but thought it might make an important "heads up". I mentioned the matter to Nancy M. yesterday; I heard about the matter from Margorie Blaine at the Corps office in

David Smith  
Chief  
Wetlands Regulatory Office (WTR-8)  
EPA Region 9  
75 Hawthorne Street  
San Francisco, CA 94105  
(415)-[REDACTED]



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Laura Bose/R9/USEPA/US  
08/29/2007 10:10 AM

To Jessica Kao/R9/USEPA/US@EPA  
cc DavidW Smith/R9/USEPA/US@EPA, Laurie  
Kermish/R9/USEPA/US@EPA, Nancy  
Marvel/R9/USEPA/US@EPA  
bcc

Subject Re: Fw: Draft summary of where Waters of the US have  
been raised

Laurie discussed with me. I had previously discussed with Alexis and been given approval to send.

Laura Tom Bose  
Senior Policy Advisor  
Water Division (WTR-1)  
(415) [REDACTED]  
FAX (415) [REDACTED]

Jessica Kao/R9/USEPA/US



Jessica Kao/R9/USEPA/US  
08/29/2007 09:49 AM

To Laura Bose/R9/USEPA/US@EPA, DavidW  
Smith/R9/USEPA/US@EPA  
cc Laurie Kermish/R9/USEPA/US@EPA, Nancy  
Marvel/R9/USEPA/US@EPA  
Subject Re: Fw: Draft summary of where Waters of the US have  
been raised

Laura, I think it's important to keep enforcement confidential information as such. Written communications with the state creates a waiver issue.

DavidW Smith/R9/USEPA/US

DavidW Smith/R9/USEPA/US

08/29/2007 08:39 AM

To Elizabeth Goldmann/R9/USEPA/US@EPA, Jason  
Brush/R9/USEPA/US@EPA, Jessica  
Kao/R9/USEPA/US@EPA, Laurie  
Kermish/R9/USEPA/US@EPA, Hugh  
Barroll/R9/USEPA/US@EPA, Robert  
Leidy/R9/USEPA/US@EPA

cc

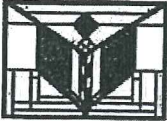
Subject Fw: Draft summary of where Waters of the US have been  
raised

David Smith  
Chief  
Wetlands Regulatory Office (WTR-8)  
EPA Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

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(415) [REDACTED]

— Forwarded by DavidW Smith/R9/USEPA/US on 08/29/2007 08:37 AM —



Laura Bose /R9/USEPA/US

08/28/2007 08:37 PM

To

cc John Tinger/R9/USEPA/US@EPA, Gary  
Sheth/R9/USEPA/US@EPA, Karen  
Irwin/R9/USEPA/US@EPA, DavidW  
Smith/R9/USEPA/US@EPA, Amy  
Miller/R9/USEPA/US@EPA

Subject Draft summary of where Waters of the US have been raised  
ir

Hi Chris: As I mentioned today, EPA and [REDACTED] call on  
waters of the US and how the Rapanos decision has impacted actions in [REDACTED] Amy Miller and Dave  
Smith have been deeply involved in these issues and have been leading the work.

In preparation for the call, we have been summarizing the instances where we have heard the "not a water  
of the US" argument being raised. Could you please review these summaries and edit them if needed?  
Assuming they only need some minor editing, please share these with Linda for any additional comments.  
Amy Miller will be taking this material and putting it into a briefing paper for Alexis and Nancy Marvel next  
Tuesday, so if we could get this back by week's end that would be ideal.

proposing to amend their standards to clarify the scope of the surface water quality standards with two  
new subsections, (B)(3) and (B)(4). Subsection (B)(3) clarifies that the surface water quality standards do  
not apply to man-made cooling ponds provided they are created outside of what would otherwise be  
considered a Water of the U.S. Subsection (B)(4) clarifies that surface water quality standards rules do  
not apply to surface waters located on Indian lands.

Issues were also raised on how EPA's guidance on Rapanos will affect [REDACTED] tion of "surface water".  
Commentors also questioned whether [REDACTED] definition of "surface water", which tracks the federal  
definition of "waters of the U.S." and clarifies that ephemeral and intermittent streams are surface waters,  
[REDACTED] has stated publicly it considers their definition of "surface water", as it currently is in the regs, to be  
fully defensible as being substantially the same as the federal definition of "Water of the U.S."

[REDACTED] .5 mgd WWTP. [REDACTED] oposed to reissue a permit, but has not issued it  
in final due to Waters of U.S. comments by the discharger. The discharge is to an unnamed ephemeral  
wash, a tributary (3 miles distance) to the ephemeral [REDACTED] wash, tributary (6 miles distance) to the  
[REDACTED] ne facility is in process of completing a large capacity underground storage system.  
No effluent has been discharged to wash since May 2006, and the facility does not expect to discharge  
except in emergency. Facility contends that there is no significant nexus to a navigable water.

[REDACTED] 1.0 mgd WWTP operated by [REDACTED]  
[REDACTED] ted effluent is discharged to a recharge basin  
constructed within an ephemeral unnamed wash, tributary to [REDACTED] tributary to  
[REDACTED] the [REDACTED] River Basin. [REDACTED] as notified the facility that the recharge basin is located  
within a water of the U.S. and requires a NPDES permit. The permittee asserts that only in a 25 year flood  
event would flows overtop the basin and result in a discharge of ponded effluent leaving the basin, and  
therefore that this is not a discharge to a water of the U.S. [Note that the recharge basins appear to have  
been constructed partially to improve groundwater recharge of the [REDACTED] r (as opposed to



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evaporation ponds) due to endangered species concerns; that discharge is tertiary treated and appears to be meeting all standards

(not yet proposed) permits. Permittees (the ) are claiming that large parts of their jurisdiction do not discharge to a water of the U.S., including . Permittees have raised the issue at meetings with , but have not yet submitted maps or otherwise proceeded with justification.

On March, received comments on its draft 2006 Integrated Report preliminary assessment of impaired water bodies. The mining industry (e.g., ) questioned 's listing of any ephemeral waters (in general) as impaired in light of the Rapanos decision. defends its authority to list and write TMDLs for ephemeral waters by stating that standards specifically apply to ephemeral waters. currently developing TMDLs for ephemeral and isolated tributary (a tributary to so its in the same watershed) and . Given the TMDLs are related to the mining impacts also expects similar comments from the industry on these TMDLs.

have a pending state civil action, for among other things storm water violations. EPA/DOJ have pending civil actions for Section 404 violations. Both cases involve the and Wash and in both cases the Defendants have raised the issue that these waters are not jurisdictional.

EPA has several pending construction storm water cases in the . EPA is investigating the jurisdictional status of the waters involved in each case.

considering pursuing a 402 case for the placement of debris into ). They are currently reviewing the jurisdictional status.

Thanks in advance for your help.

Laura Tom Bose  
Senior Policy Advisor  
Water Division (WTR-1)  
(415) [REDACTED]  
FAX (415) [REDACTED]  
[REDACTED]



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Jeremy  
Johnstone/R9/USEPA/US

02/05/2008 01:34 PM

To wilson yee, Ann Murphy/R9/USEPA/US, Rick  
Sakow/R9/USEPA/US@EPA

cc amy miller

bcc

Subject R.I.P.

After consulting internally (up through Alexis and Nancy), Amy and I met today with HQ- and DOJ-istas to discuss and confirm this conclusion:

It is time to pull the plug keeping this case on life support.

With the march of time largely attributable to the impact on the case by Senor Rapanos and his merry band of supreme court justices, we had lost many many violations due to statute of limitations. We'd achieved compliance at the facilities (and in deed beyond, we believe) due to the AO's that had been issued in '04 and '05. At this point it was a penalty-only referral, and just plain stale.

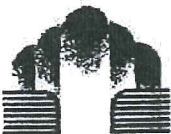
So we will withdraw the referral, and save our ammo for another fight.

But - Thank you, Thank you, Thank you for your help in pulling together the materials to try to make the Rapanos showing. Perhaps, as a learning exercise it was worth the effort... I at least truly appreciate your help with this beast.

I thought that you would like to know....

-----  
Jeremy Johnstone  
Senior Environmental Engineer  
Clean Water Act Compliance Office (WTR-7)  
U.S. Environmental Protection Agency, Region 9  
Tel: 415-  
Fax: 415-  
email:

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Rubini/R4/USEPA/US

01/09/2008 02:58 PM

To Ronald Mikulak/R4/USEPA/US@EPA

cc Mike Wylie/R4/USEPA/US@EPA, Philip  
Mancusi-Ungaro/R4/USEPA/US@EPA, Tom  
Welborn/R4/USEPA/US@EPA

Subject Re: Fw: Response to Oberstar Request

I'd be happy to collect your response and Doug's response and send up something collectively. Also, Phil wanted to put something in a cover letter informing HQ that Oberstar's request is missing the point. He believes that the time it takes to do JDs in light of Rapanos is a resource drain and may be preventing us from doing as many enforcement actions as we have been able to do in the past. Do you agree with Phil's assessment....are we in fact doing fewer enforcement actions because of the time drain caused by Rapanos?

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Ronald Mikulak/R4/USEPA/US

Ronald  
Mikulak/R4/USEPA/US

01/09/2008 12:19 PM

To Suzanne Rubini/R4/USEPA/US@EPA

cc Mike Wylie/R4/USEPA/US@EPA, Philip  
Mancusi-Ungaro/R4/USEPA/US@EPA, Tom  
Welborn/R4/USEPA/US@EPA

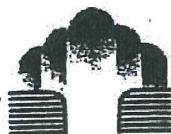
Subject Re: Fw: Response to Oberstar Request

Suzanne - are we supposed to coordinate our response through you or respond directly?

Thanks - Ron

Ronald J. Mikulak, Chief  
Wetlands Regulatory Section  
EPA - Region 4

Phone #: 404-  
FAX #: 404-  
e-mail:  
Suzanne Rubini/R4/USEPA/US



Suzanne  
Rubini/R4/USEPA/US

01/07/2008 11:35 AM

To Philip Mancusi-Ungaro/R4/USEPA/US@EPA, Tom  
Welborn/R4/USEPA/US@EPA, Ronald  
Mikulak/R4/USEPA/US@EPA, Mike  
Wylie/R4/USEPA/US@EPA

cc

Subject Fw: Response to Oberstar Request

Don't know if you have seen this.....

ATTORNEY WORK PRODUCT/ATTORNEY CLIENT PRIVILEGE - DO NOT RELEASE



Philip  
Mancusi-Ungaro/R4/USEPA/  
US

01/10/2008 10:08 AM

To Suzanne Rubini/R4/USEPA/US@EPA  
cc Mike Wylie/R4/USEPA/US@EPA, Ronald  
Mikulak/R4/USEPA/US@EPA, Tom  
Welborn/R4/USEPA/US@EPA

bcc

Subject Re: Fw: Response to Oberstar Request

My thinking was to use a rough estimate of what it takes to do a JD now both in terms of time, and potentially travel costs (that would be really rough). And then compare that to an estimate of what it used to take to do JD's in a pre rapanos world. You could then look at the number of typical cases we take forward and compare how much more time it will take to maintain the level of enforcement we typically take. the fact is we cannot support that given the staffing.

I do not know if we can do this, but it would put the focus on what will happen down the road if we do not figure out a way to improve how we do JD's

I would also note the amount of time that has been spent on training in the field, at least for this year.

Philip G. Mancusi-Ungaro  
Office of Water Legal Support-R4  
United States Environmental Protection Agency  
Phone - 404- [REDACTED] Fax - 404- [REDACTED]  
Suzanne Rubini/R4/USEPA/US



Suzanne  
Rubini/R4/USEPA/US

01/10/2008 09:17 AM

To Mike Wylie/R4/USEPA/US@EPA  
cc Philip Mancusi-Ungaro/R4/USEPA/US@EPA, Ronald  
Mikulak/R4/USEPA/US@EPA, Tom  
Welborn/R4/USEPA/US@EPA

Subject Re: Fw: Response to Oberstar Request

is there a way to quantify that?

ATTORNEY WORK PRODUCT/ATTORNEY CLIENT PRIVILEGE - DO NOT RELEASE  
Mike Wylie/R4/USEPA/US

Mike Wylie/R4/USEPA/US

01/10/2008 07:09 AM

To Suzanne Rubini/R4/USEPA/US@EPA  
cc Philip Mancusi-Ungaro/R4/USEPA/US@EPA, Ronald  
Mikulak/R4/USEPA/US@EPA, Tom  
Welborn/R4/USEPA/US@EPA

Subject Re: Fw: Response to Oberstar Request

If Phil's means that our present cases take a much longer time to complete, then yes, we are taking less cases overall.

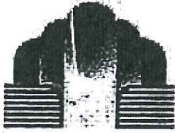
Suzanne Rubini/R4/USEPA/US



Suzanne



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Suzanne  
Rubini/R4/USEPA/US  
01/22/2008 05:01 PM

To James Vinch/DC/USEPA/US@EPA  
cc Mark Pollins/DC/USEPA/US@EPA, Kate  
Anderson/DC/USEPA/US@EPA, Doug  
Mundrick/R4/USEPA/US@EPA, Ronald  
bcc

Subject Region 4 Oberstar response

Suzanne Rubini/R4/USEPA/US

*Rapanos* has had significant impacts on enforcement actions within Region 4. Prior to the *Rapanos* decision and guidance, CWA Section 404 jurisdictional determinations for enforcement and permit reviews could, in many cases, be done using desktop tools, and in some cases minimal field work. In order to properly use the guidance, the amount of time necessary to perform and write up a jurisdictional determination has gone from a few hours, to several days, including more field work. This fact is highlighted by Region 4's 404 inspection numbers which dropped from 73 in '05 and 83 in '06, to only 40 in '07. This downward trend is due, at least in part, to the additional resources required to perform and support post-*Rapanos* jurisdictional determinations. Region 4 anticipates that this trend will continue resulting in a reduction in the number of permit reviews that Region 4 conducts and the number of enforcement cases that Region 4 will take.

In the area of concentrated animal feeding operations (CAFOs), the *Rapanos* decision and subsequent guidance has had a unique impact in light of the Second Circuit decision in *Waterkeepers Alliance et al. v. EPA*. Since the *Waterkeepers* decision, Region 4 has noticed a decline in the number of NPDES permits that are being applied for in light of the need to have an actual discharge in addition to the uncertainty over the definition of waters of the United States. Also, in two of our current enforcement actions, the Region has been working for over six months grappling with the *Rapanos* issues involved in these cases. There have been six staff, including attorneys, NPDES inspectors, and wetlands inspectors, and five managers involved in this matter and they have collectively expended at more than 800 hours on the jurisdictional issues raised by the *Rapanos* decision.

Attached please find a list of the Region 4 enforcement cases that are responsive to the Oberstar request. Should you have any additional questions, please feel free to contact me at 404-██████████.



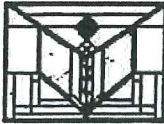
Oberstar.wpd

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Attorney Client

Communication

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Richard Glaze /R4/USEPA/US

07/14/2008 08:15 AM

To Ivan Vikin/R4/USEPA/US@EPA, Ricky

Langlois/R4/USEPA/US@EPA

cc Richard Glaze/R4/USEPA/US@EPA

bcc

Subject need for SOP on jurisdictional reviews for non-wetlands waters

Ricky and Ivan:

The draft message below results from my recent participation in Regional meetings relating to the use of Regional resources to conduct jurisdictional reviews on streams in light of Rapanos. I'd like to send this to Kris Dighe and Mike Fisher but do not wish to preempt or step on the toes of CID AAO. Perhaps it should even come from you guys or jointly from you and the RCEC's.. However we send it, we need to do something. I'll be happy to brief you. Please advise how you wish for me to proceed.

Thanks, Rich

Gentlemen:

It appears that the latest trend in CWA enforcement is the JD review for non-wetlands waters. Prosecutors have begun to tell us (justifiably) that they are not comfortable taking a case until we have some assurance of colorable jurisdiction. We have begun a process for ranking cases within our Region to make the best use of limited resources to enable these reviews to be accomplished. (As I understand it, as of now, NEIC does not seem to have much to offer, but they are gearing up to help in the future.) Before we get too far down the road in teeing up our criminal cases for jurisdictional reviews in the Region, we believe we need some guidance from HQ and/ DOJ on what scope of review to seek from our scientists who will be analyzing the waters and when to seek the jd's. It is easy for the prosecutor to take the position that we need a full blown physical, chemical and biological review of each stream, but there are simply not enough resources to accomplish this and it is not necessarily going to be helpful in all cases. Moreover, it does not seem necessary to do a complete stream study for consistency with EPA guidance. (Perhaps a bifurcated approach would work: First look for "relative permanence," then if the stream is not clearly permanent, then decide whether to even bother pursuing the case). From what I can tell from attending several meetings with our water division, demanding a full blown significant nexus evaluation will mean we will not be able to pursue the bulk of our water cases because of insufficient resources. (We are competing with civil enforcement and TMDL folks for these resources and we are not going to be at the head of the line for the resources).

I would be happy to do whatever I can from this end to help advance the ball. We need to do something as expeditiously as possible.

Richard Glaze  
Senior Regional Criminal Enforcement Counsel  
United States EPA, Region 4,  
Sam Nunn Atlanta Federal Center, 13th Floor  
61 Forsyth Street  
Atlanta, Georgia 30303  
404-  
404- (fax)  
email:

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07/29/2008 01:21 PM  
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Kuefler/R5/USEPA/US  
01/14/2008 09:53 AM

cc Joan Karnauskas/R5/USEPA/US@EP,  
Swanson/R5/USEPA/US@EPA, Thom  
Bramscher/R5/USEPA/US@EPA  
bcc

Subject Re: I will need your response by cob to  
Oberstar's RFI on CWA enforcement c

History: This message has been replied to.

Attached is NPDES. Rapanos is now requiring extensive upfront work in all our cases before we even inspect. the list of cases or sites that we have had to invest additional resources in order to deal with Rapanos.



Table EPA Response to Oberstar NPDES.doc

Patrick F. Kuefler  
Phone 312/ [REDACTED] FAX 312/ [REDACTED]





Ann Nutt/R9/USEPA/US  
01/18/2008 09:12 AM

To Michael Hingerty/R9/USEPA/US@EPA  
cc Andrew Helmlinger/R9/USEPA/US@EPA  
bcc  
Subject Re: Response to Oberstar [ ]

They want the information inserted into the chart. I don't know how to do that, so I would appreciate it if one of you could do it. If you could add to the chart that Amy started, we can send one chart from Region 9.

---

Ann Nutt  
Office of Regional Counsel  
EPA, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Phone: (415) [REDACTED]  
Fax: (415) [REDACTED]

Michael Hingerty/R9/USEPA/US

Michael  
Hingerty/R9/USEPA/US  
01/17/2008 03:30 PM

To Ann Nutt/R9/USEPA/US@EPA  
cc Amy Miller/R9/USEPA/US@EPA, Laurie  
Kermish/R9/USEPA/US@EPA  
Subject Re: Response to Oberstar [ ]

We went over the list of cases earlier today with the Oil Team, including staff, managers and attorneys and would add the following to the list:

2a

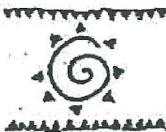
(CWA 311)  
spill (CWA 311)

2c

(CWA 311)

(415) [REDACTED]

Ann Nutt/R9/USEPA/US



Ann Nutt/R9/USEPA/US  
01/16/2008 09:49 AM

To Michael Hingerty/R9/USEPA/US@EPA, Amy  
Miller/R9/USEPA/US@EPA  
cc Laurie Kermish/R9/USEPA/US@EPA  
Subject Re: Response to Oberstar [ ]

I am happy to send a consolidated reply, but it should probably go out on Friday, since Monday (1/21) is a holiday.

I'd like to add a note about the upfront self-editing, as part of the transmittal message, not the chart. OECA should be made aware of that (or, rather, reminded of it). If I can throw in a couple of examples (one form OPA, one form CWA), it would be great-- so if anyone has time to shoot me something along those lines, I'd appreciate it.

Thank you!

---

Ann Nutt  
Office of Regional Counsel  
EPA, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Phone: (415) [REDACTED]  
Fax: (415) [REDACTED]

Michael Hingerty/R9/USEPA/US


Michael  
Hingerty/R9/USEPA/US  
01/16/2008 09:09 AM

To Laurie Kermish/R9/USEPA/US@EPA  
cc Ann Nutt/R9/USEPA/US@EPA  
Subject Re: Response to Oberstar [ ]

So far, no one has thought of any cases that fit the categories. We have our monthly enforcement meeting tomorrow and it is on the agenda. As is probably true for your programs, there is a lot of self-editing going on so cases don't get queued up in the first place.

Michael Hingerty  
(415) [REDACTED]

Laurie Kermish/R9/USEPA/US

 Laurie  
Kermish/R9/USEPA/US  
01/15/2008 09:53 PM

To Michael Hingerty/R9/USEPA/US@EPA  
cc Ann Nutt/R9/USEPA/US@EPA  
Subject Response to Oberstar

Attached is the most recent draft of the Region's response to the Oberstar request for information. I believe we are to send this to OECA by 1/21. Do you have any additions for the 311/OPA Program?

Amy C. Miller  
CWA Compliance Office  
U.S. Environmental Protection Agency Region IX



Laurie  
Kermish/R9/USEPA/US  
01/18/2008 10:42 AM

To Ann Nutt/R9/USEPA/US@EPA  
cc  
bcc  
Subject Re: Reg. 9 response to Oberstar request

small edits below.  
Ann Nutt/R9/USEPA/US



Ann Nutt/R9/USEPA/US  
01/18/2008 10:14 AM

To Amy Miller/R9/USEPA/US@EPA, Michael  
Hingerty/R9/USEPA/US@EPA, Laurie,  
Kermish/R9/USEPA/US@EPA  
cc

Subject Reg. 9 response to Oberstar request

Many thanks for all the work on this . I didn't get specific examples for the self -edited cases , but I would send the following message , if it sounds OK to you all :

Jim,

Here is the chart with Region 9 cases that fall within the categories described. One thing that OECA should be aware of is the fact that the Region does a lot of "self-editing" in the early stages of potential case development, choosing not to pursue cases investigations that may have Rapanos issues, despite the fact that prior to Rapanos (and/or the draft guidance) we probably would have pursued them. Thus, we may not conduct field investigations/inspections or request further information in many of these types of cases matters, and, as a result, they never make it to the point where they would be included in this response.



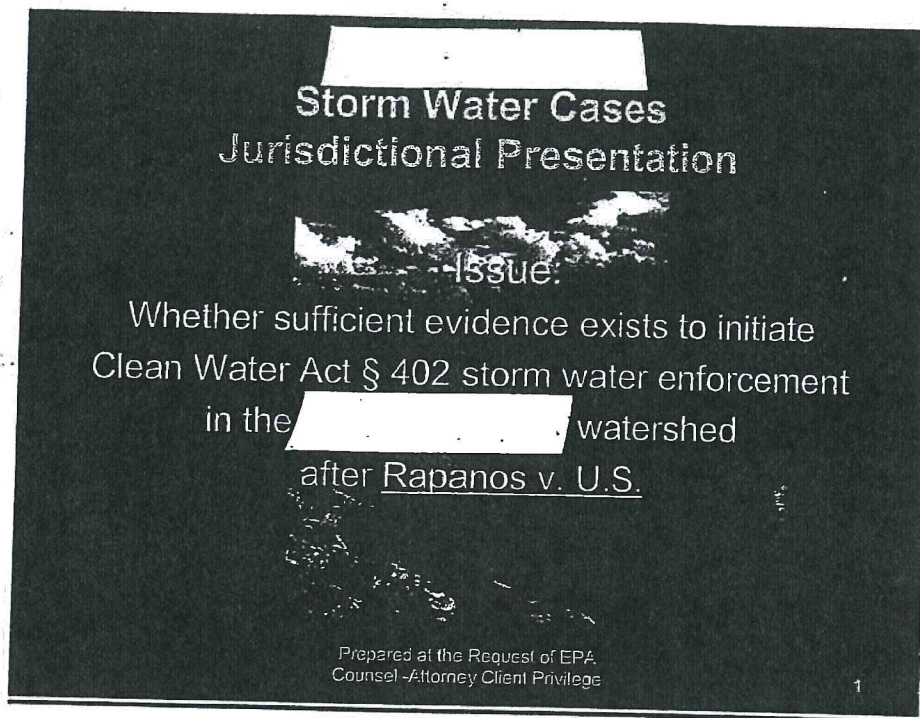
Oberstar Region 9 Response.wpd

Ann Nutt  
Office of Regional Counsel  
EPA, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Phone: (415) [REDACTED]  
Fax: (415) [REDACTED]



**SPEAKER NOTES TO:**



**SLIDE #1**

Data and reports relied upon during this presentation can be made available by EPA Region 9.  
Please contact:

Amy Miller, CWA Compliance Office, Region 9; or  
Rich Campbell, Office of Regional Counsel, Region 9.

**SLIDE #2**

[1]  
See 33 CFR 328.3(a)(1) (Corps regulations); see also 40 CFR 122.2(a)(1) (EPA regulations).

[2]  
See 33 CFR 328.3(a)(2) (Corps regulations); see also 40 CFR 122.2(a)(2) (EPA regulations).

**SLIDE #3**

No speaker notes for this slide.

July 3, 2007

**SLIDE #4**

We focus on \_\_\_\_\_ Watershed because that is where the enforcement sites at issue are located.

**SLIDE #5**

NPDES discharges from WWTP shown above are to ephemeral tributaries of the

Site Name	Receiving water
-----------	-----------------

---

Construction Stormwater NOI search engine:

**SLIDE #6**

No speaker notes for this slide.

**SLIDE #7**

[1]  
The \_\_\_\_\_ is the last undammed river in

[2]  
Stream order is a measure of the relative size of streams. The smallest tributaries are referred to as first-order streams, while the largest river in the world, the Amazon, is a twelfth-order waterway. First- through third-order streams are called headwater streams. Over 80% of the total length of Earth's waterways are headwater streams. Streams classified as fourth- through sixth-order are considered medium streams.

See [http://www.epa.gov/watertrain/pdf/new\\_streamcorridor.pdf](http://www.epa.gov/watertrain/pdf/new_streamcorridor.pdf) (hyperlinked above)

[3]

[4]

\_\_\_\_\_, 90 miles east of \_\_\_\_\_ confluence is at \_\_\_\_\_ 71 miles north of \_\_\_\_\_ at the southern edge of \_\_\_\_\_

July 3, 2007

**SLIDE #8**

[2]

**SLIDE #9**

[1]

First NCA designated by Congress in 1988.

Purpose: To protect and enhance the desert riparian ecosystem, a rare remnant of what was once an extensive network of similar riparian systems throughout the Southwest.

More information – See “Initiatives” linked handout

[2]

Congressional Designation of the USPP as the Management Agency made up of 21 government agencies and private organizations (primarily funded by BLM, DOD, NPS, USGS, etc.)



July 3, 2007

Federally funded projects include watershed studies and monitoring and land acquisition. Water mitigation projects are funded by BLM and DOD to establish conservation easement to retire irrigated agriculture and reduce groundwater pumping near the river. This effort alone is expected to produce year round stream flows in an additional 20 miles of the

**Federal:**

- USDA-ARS-SWRC
- US Geological Survey
- US Forest Service
- Bureau of Land Management
- US Army
- National Park Service
- US Fish & Wildlife Service

**NGOs:**

- The Nature Conservancy
- National Audubon Society

**Private:**

[3]

EPA ORD/USDA Research Priority

EPA Landscape Ecology Branch and USDA Agricultural Research Service have completed landscape level analyses and hydrological modeling of the evaluate change in runoff and sediment yield associated with development. to

EPA Region IX/ORD is pursuing funding to extend this research to cover the

July 3, 2007

**SLIDE #10**

**SLIDE #11**

[1]

[2]

ne

S.

See

**SLIDE #12**

[1]

Map available at

Partnership website:

[2]

Map available from USGS website:

July 3, 2007

**SLIDE #13**

The Corps' Regulatory Guidance Letter 05-05 provides a complete explanation of the OHWM. (See Appendix D for [redacted] and for a discussion of the OHWM in Arid Regions ERDC

**SLIDE #14-16**

No speaker notes for these slides.

**SLIDE #17**

Note: The [redacted] Order Stream, [redacted] 1 in the U.S. By comparison, a 7th Order Stream is the [redacted] and a 8th Order Stream is the [redacted]. There is only a single 10th Order stream in the U.S.: the Mississippi River. See Leopold, Luna B. (USGS), et al., "Fluvial Processes in Geomorphology" Table 5-2 (Dover Publications, Inc.).

Note: The [redacted] is recognized by the Corps of Engineers as a navigable in fact water of the United States pursuant to Section 10 of the 1899 Rivers and Harbors Act, 33 USC section 403.

**SLIDE #18**

- [redacted] is largest tributary to lower [redacted]
- Interstate: crosses from [redacted] also drains portions of western [redacted]
- [redacted] watershed consists of [redacted]
- Drains half of [redacted]; largest watershed [redacted]
- Principal tributaries: [redacted]

**SLIDE #19**

[2]  
Current Recreational Boating in the [redacted]





July 3, 2007

SLIDE #21

From its confluence of the \_\_\_\_\_ : the \_\_\_\_\_ flows past \_\_\_\_\_ approximately  
250 miles to the \_\_\_\_\_. Surface water flows in the \_\_\_\_\_ middle reach \_\_\_\_\_ and  
( \_\_\_\_\_ ) are primarily attributed to releases from: upstream  
impoundments, effluent from wastewater treatment plants, and agriculture return flows \_\_\_\_\_ ).  
There are over 100 NPDES permits along the \_\_\_\_\_ and its tributaries.

Since 1900, the \_\_\_\_\_ : has become wider and shallower since construction of dams along the  
river, including \_\_\_\_\_ : river was perennial to the confluence with the  
types of boating \_\_\_\_\_ residents floated boats, canoes, logs, rafts and ferries on the  
\_\_\_\_\_ could have and did support some

See e.g.

SLIDE #22

[1]  
\_\_\_\_\_ was constructed \_\_\_\_\_ and is operated by Corps for flood control (w/  
capacity to store 2,500,000 acre feet of flood water). Water must be released (i.e., the Corps of  
Engineers does not have storage rights). See

con't

[2]  
The Corps' dam manual proscribes discharges when reservoir reaches a certain level. Between  
flood events which resulted in spillway releases.

See

[3]  
Department of Interior and the Corps are currently proposing to attempt to coordinate maximum  
releases that will be contained within the \_\_\_\_\_ city \_\_\_\_\_ channel in order to  
accommodate the renewed operation of the Bureau of Reclamation?;

SLIDE #23

\_\_\_\_\_ the District and \_\_\_\_\_ have joined forces on several occasions to keep  
county roadways open across the \_\_\_\_\_ during times of river flow. At the present time, the  
\_\_\_\_\_ has funded or participated in the construction of four 10,000  
cfs capacity bridges, \_\_\_\_\_ downstream of

July 3, 2007

Additionally, the District has acquired and installed eight 14' diameter steel tubes at [redacted] where a flow of over 10,000 cfs can be accommodated.

**SLIDE #24**

[redacted] is generally navigable (primarily recreational). [redacted] begins in the [redacted]. The upper portion of the [redacted] begins at the [redacted] and flows west about 140 miles through the [redacted] is intermittent as it enters [redacted] from [redacted] through the [redacted]. The river does maintain a 35-mile perennial stretch beginning approximately 20 miles downstream from where it enters [redacted].

See also:

The next downstream reach currently navigable in fact is the reach that extends from the [redacted] confluence near [redacted] to approximately 15 miles below [redacted] near [redacted] where the [redacted] diversion dam diverts water for use as agricultural irrigation water.

The next downstream reach currently navigable in fact is near [redacted], near [redacted] downstream of the [redacted].

**SLIDE #25**

No speaker notes for this slide.

**SLIDE #26**

[1]  
Under pre-pumping steady-state conditions the total volume of annual recharge in the [redacted] is estimated to be 23.2 million cubic meters. Annual recharge from the ephemeral tributaries in the basin account for approximately 3.4 – 9.65 million cubic meters or 15-40% of this total.

As the recipient of flows, sediment, and organic material from the extensive network of ephemeral and perennial tributaries, the [redacted] exhibits several characteristics typically associated with ecosystem functions of the larger intact permanent riverine systems in the Arid West: Extensive channel/floodway cross-section; complex relief in the floodway (meanders, depositional bars, 2nd channels); Woody debris at various stages of decay; and Intact connectivity with up- & downstream reaches.



July 3, 2007

[2]

The Ephemeral Tributaries at the Enforcement Sites are similar to many other ephemeral tributaries in the watershed. Because the is free flowing, any pollutants entering the have an uninterrupted and unimpeded path to the a traditional navigable water.

The USDA Research Center's Watershed, in has generated the "best data on ephemeral systems in the world" and its modeling data in area demonstrates significance of flows to See

Maximum annual flow was 102,107 acre-feet in 1984 at the See Water Atlas.

**SLIDE #27**

[1]

Based on the gauges on when comparing annual water production in acre-feet/year, the contributes ~20% of the flow in the at this point during dry years. The relative contribution of the decreases with wet years. Dep't of Water Resources 2006)

Note: gauge is indeed spelled "gaugé." See Merriam-Webster dictionary: <http://www.m-w.com/dictionary/gauge>.

[2]

Average annual precipitation is 12.34 inches at

[3]

\*Rule of thumb 1 cfs = 7.5 gallons a second or 450 gallons a minute

**SLIDE #28**

[1]

See generally, Geomorphic Assessment of the Prepared for U.S. Army Corps of Engineers al., 1994).

Area Office (

**SLIDE #29**

[1]

Draft 2006 Status of Ambient Surface Water Quality in

July 3, 2007

There are many studies of the water quality of the lower and middle reach of the  
Please contact EPA Region 9 for a list.

[2]

Exceedances of E coli may represent a significant health concern for people swimming or wading in water downstream of confluence.

Selenium may negatively impact federally protected birds (bald eagle and southwest willow flycatcher).

### SLIDE #30

[1]

The February 2007 issue of J. American Water Resources Ass'n (Vol. 43 - "Headwaters Hydrology") focuses on the issues affecting smaller headwater streams (e.g., ephemeral tributaries) including hydrological connectivity between headwater streams and downstream waters; the role of headwater streams in downstream water quality; hydrologic connectivity and the contribution of stream headwaters to ecological integrity at regional scales; ecological linkages between headwaters and downstream ecosystems; and the contribution of headwater streams to biodiversity in river networks; among other issues.

[2]

Some studies that support these conclusions are, e.g.:

- Studies show that ephemeral, first-order drainage systems remove 65 to 98% of the nutrient loads to irrigation channels (e.g., Ensign, et al., 2006).
- Due to their large area of microbially active surfaces relative to volume of water, small streams have been identified as important locations for nutrient cycling (Brisco and Ziegler, 2004).
- During high flows in smaller channels, transformed and stored nutrients are taken up or stored farther downstream (Clinton and Vose, 2006).
- Small headwater streams make up most of the total river miles in any watershed, and they are critical in controlling nutrient export to downstream ecosystems (Inwood et al., 2005, and Gomi, et al., 2002).

### SLIDE #31

Photo: USFWS Recovery Plan; f  
database

site; USFWS southwestern willow flycatcher

[1]

Small first order and intermittent streams export detritus and invertebrate drift downstream and contribute significantly to downstream productivity (Cummins, et al., 2005).





July 3, 2007

Based on the biological value and potential threats identified in the Assessment (e.g., urbanization) ... the Assessment identified several linkages of highest priority for protection, including the reach near the confluence (Linkage and the area near ! in the ) watershed (Linkage

[2]

**HABITAT BLOCK:** an area of land that consists of important wildlife habitat and can reasonably be expected to remain wild for at least 50 years.

[3]

**FRACTURE ZONE:** areas of reduced permeability between habitat blocks. The Assessment speaks to the need to protect watercourses within these zones, including "washes" to facilitate wildlife movement through these more developed areas.

[4]

**POTENTIAL LINKAGE ZONE:** a portion or subset of the fracture zone or habitat block identified as an area critical to wildlife movement. **RIPARIAN HABITAT/LINKAGE ZONE:** streams that historically supported riparian communities and perennial water flow (in some cases pools linked by subsurface flow for much of the year). Each potentially provides essential habitat for aquatic species, and critical landscape connectivity for both aquatic and terrestrial animals (*Section VIII*).

#### SLIDE #35

Map is from USFWS final designation of critical habitat for the southwestern willow flycatcher, at website:

The dispersal of plant seeds in the by millions of neotropical migrant birds flying north and south along the riparian corridor is another demonstration of the biological connection b/w the  
*See, e.g.,*

#### SLIDE #36

[1]

Hydrologic nexus is also reflected by the central role plays in the operation of the 1945 Water Treaty with To comply with the Treaty, the Corps relies on the to control the saline balance of the ( before it reaches just south of the international boundary wit

[2]

There are three main water quality issues of concern at salinity, nutrients, and other contaminants, such as DDT. Defense Technical Info Center website:

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SPEAKER NOTES TO:

Water Cases Jurisdictional Presentation

July 3, 2007

**SLIDE #37**

No speaker notes for this slide.

**SLIDE #38**

1867 Map obtained at

**SLIDE #39**

The average annual runoff entering from Mexico is approximately 23,000 acre-feet.  
See:

**Flooding.** Heavy October rains in 1990 caused a vigorous flow of the in  
Rain falling in of wall of  
water down the river, flooding the .. Usually  
about 6 to 8 feet wide, the river spread half a mile wide. Near I the water was traveling  
at 17,500 cubic feet per second, with a higher flow through the area than River flow  
through the

**Pollution.** A large copper mine, owned by , a Mexican company, is situated at  
headwaters of the

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Nelson Smith/R6/USEPA/US

01/28/2008 12:35 PM

To James Vinch/DC/USEPA/US@EPA

cc

bcc

Subject Re: Oberstar Response

Jim-

All of the oil spill cases identified by Region 6 are administrative cases in the "pre-case stage" as you stated. The only possible exception would be the multiple spills by [redacted] This company has had repeated spills in the [redacted], and have been lax in their response and clean-up. But for the jurisdictional issues with the impacted waterways, these spills might have been combined in a civil referral action.

-Nelson "Beau" Smith  
OPA Compliance Assurance  
EPA Region 6  
214/[redacted]

James Vinch/DC/USEPA/US

James Vinch/DC/USEPA/US

01/24/2008 10:02 AM

To Wendy Silver/ENF/R8/USEPA/US@EPA, David  
Rochlin/ENF/R8/USEPA/US@EPA, Richard  
Baird/ENF/R8/USEPA/US@EPA, Stephen  
Mendoza/R5/USEPA/US@EPA, Diane  
Huffman/R7/USEPA/US@EPA, Suzanne  
Rubini/R4/USEPA/US@EPA, Jane  
Nakad/ENF/R8/USEPA/US@EPA, Nelson  
Smith/R6/USEPA/US@EPA, Scott  
McDonald/R6/USEPA/US@EPA

cc

Subject Oberstar Response

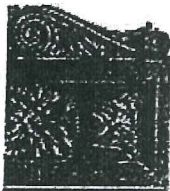
Thank you all for providing your responses to the Oberstar request. Am I correct in assuming that all the cases that you have identified on the chart are administrative cases (or in the "pre-case stage"), and that there are no judicial referrals among them (unless you've specifically identified a case as such in the chart)? Please let me know if this is correct with respect to your particular response. Please feel free to contact me if you have questions.

Jim Vinch  
Attorney-Advisor  
Office of Enforcement and Compliance Assurance  
Water Enforcement Division  
US Environmental Protection Agency  
Ariel Rios South, Rm 4118A  
1200 Pennsylvania Ave NW  
Washington DC 20460  
tel: (202) [redacted]

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Diane  
Huffman/R7/USEPA/US  
01/23/2008 11:18 AM

To James Vinch/DC/USEPA/US@EPA  
cc David Cozad/CNSL/R7/USEPA/US@EPA, Leslie  
Humphrey/R7/USEPA/US@EPA, Stanley  
Walker/ARTD/R7/USEPA/US@EPA, Ward  
bcc

Subject Fw: Response to Oberstar Request

History: This message has been forwarded.

Jim,

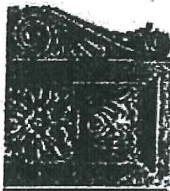
The attached file has been updated from the one I sent you yesterday. Please use this one. Thanks,



Oberstar Request Table.doc

Diane L. Huffman  
Branch Chief  
Water Enforcement Branch  
WWPD/WENF  
EPA Region 7  
901 N. 5th Street  
Kansas City, KS 66101  
Ph: 913-██████████ Fax: 913-██████████

— Forwarded by Diane Huffman/R7/USEPA/US on 01/23/2008 11:14 AM —



Diane  
Huffman/R7/USEPA/US  
01/22/2008 03:07 PM

To James Vinch/DC/USEPA/US  
cc David Cozad/CNSL/R7/USEPA/US@EPA, Leslie  
Humphrey/R7/USEPA/US@EPA, Ward  
Burns/ARTD/R7/USEPA/US@EPA, Stanley  
Walker/ARTD/R7/USEPA/US@EPA, Betty  
Berry/R7/USEPA/US

Subject Fw: Response to Oberstar Request

Jim,

Attached is the Region 7 response to the Oberstar Request. Based on a conversation our Regional Counsel had with Randy Hill last week, we have added a paragraph at the end of the table with additional information on the affect the Rapanos decision has had on our inspection targeting efforts. Let me know if you have any questions. Thanks,



Oberstar Request Table.doc

Diane L. Huffman  
Branch Chief  
Water Enforcement Branch  
WWPD/WENF  
EPA Region 7

Cases on Hold for Rapanos

Facility Name	Type of Enforcement Action (Traditional, SEEP, NON, OSEEP, or Both)	Type of Case (Spill or SPCC or Both)	Violation Summary	Other Issues	Assigned to
	Traditional	Spill	Violation Summary * spill history * Not checking Double Walled Tank Interstitial Space * Not doing Intregrely testing required by Plan	spill to storm drain to unnamed intermittent trib.	Higbee
	NON	SPCC	2000 gal. spill, sheen observed * No NRC # * Did not follow rule sequence * No discussion of overflow prevention * No Discussion of Pipe Supports	spill to intermittent trib	Bums
	Traditional	Spill	* No Fence * No Containment for Rack * Not complying with SPCC Plan * No evidence of 5 yr review	All Plan violations no equipment problems	Bums
	Traditional	SPCC	* No Fence * No Containment for Rack * Not complying with SPCC Plan * No evidence of 5 yr review	* Refused to take SEEP in 8/05 * Case getting old spill to intermittent creek	Bums
	Traditional	Both	No plan, inadequate containment, spill * No Management Approval * No Inspection records * Did not update Plan for changes * Plan does not specify inspection frequency * No Fence * Other	Spill would flow north then east to	Higbee
	NON	SPCC			Bums

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Jane  
Nakad/ENF/R8/USEPA/US  
01/29/2008 11:10 AM

To James Vinch/DC/USEPA/US@EPA  
cc  
bcc  
Subject Re: Oberstar Response

Sorry, I was out last week when you sent this email. I am having problems opening this file in the office due to encryption issues. Yes, there may be spills that would have been referrals to DOJ absent the jurisdictional issues. Specifically, one I know of is (and I am not sure if this made the list I sent you):

5,000 barrel oily produced water spill in /

on

Jane Nakad  
OPA Compliance Specialist and Enforcement Officer  
Technical Enforcement Program  
303-██████████

U.S. Environmental Protection Agency  
Mail Code: 8ENF-UFO  
1595 Wynkoop Street  
Denver, CO 80202

The preceding message, including any attachments, contains information that may be confidential and may be exempt from disclosure under applicable law. It is intended to be conveyed only to the named recipient(s). If you received this message in error or if you are not the intended recipient, please notify the sender and delete the message from your system. Any use, dissemination, distribution, or reproduction of this message by unintended recipients is not authorized and may be unlawful.

James Vinch/DC/USEPA/US

James Vinch/DC/USEPA/US

01/24/2008 09:02 AM

To Wendy Silver/ENF/R8/USEPA/US@EPA, David  
Rochlin/ENF/R8/USEPA/US@EPA, Richard  
Baird/ENF/R8/USEPA/US@EPA, Stephen  
Mendoza/R5/USEPA/US@EPA, Diane  
Huffman/R7/USEPA/US@EPA, Suzanne  
Rubini/R4/USEPA/US@EPA; Jane  
Nakad/ENF/R8/USEPA/US@EPA, Nelson  
Smith/R6/USEPA/US@EPA, Scott  
McDonald/R6/USEPA/US@EPA

cc

Subject Oberstar Response

Thank you all for providing your responses to the Oberstar request. Am I correct in assuming that all the cases that you have identified on the chart are administrative cases (or in the "pre-case stage"), and that there are no judicial referrals among them (unless you've specifically identified a case as such in the chart)? Please let me know if this is correct with respect to your particular response. Please feel free to contact me if you have questions.

Jim Vinch  
Attorney-Advisor



INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY  
DISCLOSURE AUTHORIZED ONLY TO CONGRESS FOR OVERSIGHT PURPOSES IN RESPONSE TO SUBPOENA

Paula  
Higbee/ENSV/R7/USEPA/US  
06/29/2006 10:09 AM

To Kristina Kemp/CNSL/R7/USEPA/US@EPA, Ward  
Burns/ARTD/R7/USEPA/US@EPA, Alan  
Hancock/ARTD/R7/USEPA/US@EPA  
cc Stanley Walker/ARTD/R7/USEPA/US@EPA

bcc

Subject

History: This message has been forwarded.

Hey KK! Got your message about postponing the meeting. I had already told Ward that I couldn't make it either.

I wanted to clear up some misinformation though. The facility is only (maybe even less than that) from a perennial, which empties into The facility is only from. Considering all of the problems at the facility, this is a pretty big risk.

INTERNAL DELIBERATIVE DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY  
DISCLOSURE AUTHORIZED ONLY TO CONGRESS FOR OVERSIGHT PURPOSES IN RESPONSE TO SUBPOENA

Rich Campbell/R9/USEPA/US

To Laurie Kernish/R9/USEPA/US@EPA

01/10/2008 05:21 PM

cc

bcc

Subject oberstar response

History: This message has been forwarded.

Laurie,

I might add a couple matters to the list that is being developed....

Rapanos played a large part in the reason we chose not to pursue this case where built an entire golf course w/o a 402 (or 404) permit that affected ephemeral tributaries to the I'd add to either category (1) or (2c) or maybe even 2a because we ended up just doing compliance assistance with

- Respondents specifically challenged our jurisdiction over the enforcement site that drained to (you may recall there were two creeks that were impacted, and the AOC addresses only because is very intermittent, and Respondents were prepared to dig in their heels on that one....). I'd add to category (3).

Rich

## MEMORANDUM FOR THE RECORD

SUBJECT: Determination of Two Reaches of the Santa Cruz River as Traditional Navigable Waters (TNW)

Summary

The Corps' Los Angeles District has determined that two reaches of the Santa Cruz River, Study Reach A from Tubac gage station (USGS # 09481740) to the Continental gage station (USGS #09482000) and Study Reach B from Roger Road wastewater treatment plant (WWTP) downstream to the Pima/Pinal County line, Arizona, as shown in Exhibit A, are TNWs (collectively, referred to as the "Study Reaches"). This determination is consistent with the Clean Water Act (CWA), the agencies' regulations (including 33 C.F.R. § 328.3), relevant case law, and existing guidance, including the June 5, 2007 joint U.S. Environmental Protection Agency and Department of the Army legal memorandum entitled *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Rapanos Guidance) and *Appendix D of the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* issued June 5, 2007 (Appendix D).

Background

The Santa Cruz River originates in Arizona, flows south into Mexico, and then flows north again into Arizona. It is the primary river which flows from Nogales, Mexico through Tucson, Arizona, and a number of Indian reservations, including Tohono O'odham Nation (TON), to the Gila River near Phoenix. The watershed of the Santa Cruz River is approximately 8,600 square miles. Until the late nineteenth century, the Santa Cruz River was primarily a perennial watercourse that served the region's agricultural needs until a quickly developing industrial society began to tap the river's subsurface flow (Exhibit B).

The Upper Santa Cruz River Valley, located between Nogales, Arizona on the US-Mexico border, and extending 65 miles north to the major urban area of Tucson, has a long history of European settlement spanning three centuries. Prior to the discovery of the area by European explorers, the area was inhabited for thousands of years by aboriginal native peoples. The Santa Cruz River has long been an important corridor for trade and exploration. The river and its well-established riparian habitat have served as a vital commodity for people and wildlife in the region.<sup>1</sup>

In addition to the use of the Study Reaches by recreational watercraft described in case-specific analysis below, in the mid 1850s, William Rowlett and his brother, Alfred, constructed an earthen dam on the Santa Cruz River south of the present-day Silverlake Road. They also installed a water-powered flour mill at this location in 1857/58. In 1860, William Grant purchased the flour mill and the dam/lake and improved the dam and mill in order to supply military posts in the southwestern region. He built a second, larger mill on the river and purchased the machinery in California. However, the mill was burned in 1861 to keep it from falling into Confederate hands. The mill was purchased by James Lee and returned to operations in 1864. In 1884, the mill, dam,

<sup>1</sup> *The Santa Cruz River: A Resource Shared by Two Cities* by Hugh Holub, paper presented to the Border XXI EPA Regional Water Sub Work Group Meeting on March 6, 2001, Nogales, Sonora.



and lake were sold to Frederick Maish and Thomas Driscoll who developed the Silver Lake Resort. In 1883, Solomon Warner built a second dam and mill on the river. The lake was approximately 60 acres, 8 feet deep, and the *Arizona Citizen* reported the use of a flat-bottom boat on the lake. Waterfowl populated the lake and hunting organizations claimed exclusive rights to shooting the waterfowl. The dams at both Silver Lake and Warner's Lake were breached by floods in 1886 and 1887; the *Arizona Star* reported on July 13, 1887 that the river was wide and deep enough to float a "mammoth steamboat." In 1888, Frank and Warren Allison purchased Warner Lake, repaired the dam, and stocked the lake with carp for commercial fish production selling over 500 pounds of fish per day. Both dams were washed out by 1890.<sup>2</sup>

Further, in the summer of 1951, Glenton G. Syke, Tucson city engineer, navigated the Santa Cruz River in a 14-foot-long boat from the San Xavier del Bac Mission to Congress Street in Tucson.<sup>3</sup>

The Study Reaches were selected based on personal knowledge of the river by Regulatory staff, evidence of perennial flows based on stream gage data, and more readily available evidence of navigability.

#### Basis for TNW Determination

The Rapanos Guidance indicates that in its context, the term TNW refers to those waters that are under the jurisdiction of the Corps, pursuant to 33 C.F.R. § 328.3(a)(1), (i.e., "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."

As stated in Appendix D: "when determining whether a water body qualifies as a "traditional navigable water" (i.e., an (a)(1) water), relevant considerations include whether a Corps District has determined that the water body is a navigable water of the United States pursuant to 33 C.F.R. § 320.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 C.F.R. Part 329, or a federal court has determined that the water body is navigable-in-fact under federal law for any purpose, or the water body is "navigable-in-fact" under the standards that have been used by the federal courts."

To determine whether the Study Reaches are a TNW, in accordance to 33 C.F.R. § 328.3(a)(1), a case-specific analysis to evaluate whether the Study Reaches are navigable-in-fact, including consideration of its potential susceptibility to interstate and foreign commerce, was undertaken. The Corps has determined that the Study Reaches are a TNW based on the following factors:

1. The physical characteristics of the Santa Cruz River within the Study Reaches indicate that they have the capacity and susceptibility to be navigated by recreational watercraft.

- A. Study Reach A is approximately 22 miles in length. The river near Tubac is typically more confined in ordinary flows to a channel approximately 15-20 feet wide with an approximate 1.5 mile wide, densely vegetated floodplain. Downstream of Amado, the floodplain increases in width to approximately 2.5 miles; the river channel is less confined, less vegetated, and more braided. Exhibit C shows monthly and daily flows for the Tubac, Amado, and Continental gage stations, as well as peak flows for the Amado and Continental gage stations (Tubac information unavailable). The monthly gage data indicate perennial flow at Tubac since

<sup>2</sup> History of Navigation of the Santa Cruz River by Don Bufkin, citation unknown.

<sup>3</sup> Admiral of the Santa Cruz by Glenton G. Sykes, *The Journal of Arizona History*, Vol. 20, Number 4, Winter, 1979.

1996, flow most months at the Amado gage station since 2003 (prior years unavailable), and intermittent flows at the Continental gage station.<sup>4</sup> Average daily flows are typically lower in May and June but increase during the summer monsoon season which typically begins in July. Average daily flow rates again typically increase during December and January. The gage data indicate the highest daily mean value at the Tubac gage station over the last 11-12 years was 637 cubic feet per second (cfs) during October and the lowest daily mean value at the same station during the same period was 4.5 cfs during June. The highest daily mean values typically occur from July-October.<sup>5</sup> The range of mean monthly flows (6.9 to 78 cfs) and the average daily flow in a representative year of 35 cfs indicate perennial flow at the Tubac gage station. The mean monthly discharge information at the Amado gage station is only available since October, 2003; the mean monthly discharge at this station in the last four years varied from .97 cfs to 67 cfs while the daily mean flow chart at the Amado gage station indicates perennial flow. The mean monthly discharge at the Continental gage station since 1940 varies from .43 cfs to 76 cfs while the mean daily values since 1939 shows flow daily with the exception of mid to late May through mid-June. This is expected since the river begins subsurface flow at this point, which defines the downstream end of this Study Reach.

B. Study Reach B is approximately 32 miles in length. The width of the riverbed varies from approximately 280 feet at the Roger Road WWTP to approximately 670 feet at Cortaro and approximately 575 feet at Trico Road while the active (ordinary flow) river channel at all three locations varies from 40-60 feet; at one location within this Study Reach, the river diverges into two similarly-sized channels. The river in Study Reach B is often confined at its maximum width by steep banks with soil cement or other bank stabilization in several locations. In other locations, for example at Ina Road, the river has lower, easily accessible, vegetated banks. Some areas are more densely vegetated than others. Exhibit C shows monthly, daily, and peak flows for gage stations at Cortaro and Trico Road (just upstream of the Pima/Pinal County line). Average daily flows are typically lower in May and June but increase during the summer monsoon season which typically begins in July. Average daily flows again typically increase during December and January. The highest average daily mean value at the Cortaro gage station over the last 57-60 years was 703 cfs, also in October, and the lowest average daily mean value at the same station over the same period was 22 cfs during June. The average monthly discharge ranges from 23 to 124 cfs and the average daily flow in a representative year of 75 cfs indicate perennial flow at the Cortaro gage station. At the Trico Road gage station, since 1997, the average monthly discharge ranged from 3.5 cfs to 710 cfs and daily mean values since 1989 ranged from 11 cfs to 863 cfs. The gage data document perennial flow at the Cortaro and Trico Road gages every month since 1996 with the exception of October, 1996.<sup>6</sup>

C. The peak flow charts demonstrate the frequency of flows which exceed 1,000 cfs.<sup>7</sup> Peak flow data is unavailable at the Tubac gage station; however, the maximum peak flow at the Amado gage station since 2004 was approximately 7,800 cfs and peak flow has approached or exceeded 2,000 cfs annually. The maximum peak flow at the Continental gage station was approximately 45,000 cfs in the early 1980s and the minimum peak flow has exceeded 1,000 cfs 63 times since 1940. The maximum peak flow at the Cortaro gage station exceeded 60,000 cfs in the early 1980s and has exceeded 1,000 cfs on an annual basis from 1940-1988 with the exception of once in the 1940s and once in the 1950s; the peak flow at the Cortaro gage station

<sup>4</sup> <http://nwis.waterdata.usgs.gov/az/nwis/monthly>

<sup>5</sup> <http://nwis.waterdata.usgs.gov/az/nwis/dvstat>

<sup>6</sup> *Ibid*

<sup>7</sup> <http://nwis.waterdata.usgs.gov/az/nwis/peak>



has also exceeded 1,000 cfs on an annual basis since approximately 1995. The maximum peak flow at the Trico gage station exceeded 25,000 cfs in 2007 and the minimum peak flow has been at or exceeded 1,000 cfs most years since 1989. The figures at the end of Exhibit C indicate the "real time" stages for late March-early April, 2008, at the Tubac, Cortaro; and Trico Road gage stations indicating flows in the river on a daily basis.<sup>8</sup> All three stations indicated flows with depths varying from 1-2 feet and no precipitation had occurred for approximately 6 weeks.<sup>9</sup> Additional real-time stage data obtained for late May is also provided for Tubac, Green Valley (near Continental), Cortaro, and Trico Road and indicates 1-2 feet of water currently in the channel at all the above locations. Extremely light precipitation occurred one day during this timeframe; however, the amount of precipitation received would not have been sufficient to cause surface flows<sup>10</sup>. A list of the large magnitude peak flow events of the Santa Cruz River over the last 100 years is provided at Exhibit D.<sup>11</sup>

D. While there is a variation in minimum flow required for canoeing, studies indicate the 95% confidence interval on the predicted minimum canoeing flow of 86 cfs for flatwater is 63 to 118 cfs.<sup>12</sup> Approximately two-three feet of water depth is sufficient to float a canoe, kayak, or small boat. Based on the above information, during most days from July-October and again for approximately half the months of December and January, there is sufficient flow in the Santa Cruz River within the Study Reaches to float a canoe (based on the average daily mean value). Typically a kayak would be able to navigate in lower flows and less water than canoes.

E. Based on aerial photographs attached at Exhibit E, the Santa Cruz River from Tubac gage station to just upstream of Continental gage station and Roger Road WWTP to the Pima/Pinal County line has uninterrupted flow.

F. The Arizona Department of Environmental Quality has adopted water quality standards for the Santa Cruz River for partial body contact.<sup>13</sup> Partial body contact allows for use of the surface water where the body comes into contact with the water but does not become fully submerged. Allowable uses under partial body contact would include but are not limited to boating and wading.

## 2. The Study Reaches within the Santa Cruz River have public accessibility.

A. The river has low banks in the vicinity of Tubac which allows for easy public access; these areas are currently frequented by riders on horseback. Resorts along the river provide access for out-of-state visitors for birding and hiking along the river.

B. Two Corps of Engineers feasibility studies for river restoration, El Rio Medio and Tres Rios del Norte, are in process. El Rio Medio will begin at Congress Street and progress downstream to Prince Road; Tres Rios del Norte will begin at Prince Road and progress

<sup>8</sup> National Weather Service Advanced Hydrologic Prediction Service: <http://www/nws.noaa.gov/oh/ahps/>

<sup>9</sup> Personal observation, Marjorie Blaine, Senior Project Manager, Regulatory Division, Tucson Project Office

<sup>10</sup> Ibid

<sup>11</sup> <http://www.wrh.noaa.gov/twc/hydro/floodhis.php>

<sup>12</sup> Riparian Areas of the Southwestern United States: Hydrology, Ecology, and Management by Malchus B. Baker and Peter F. Ffolliott, CRC Press, 2004

<sup>13</sup> Personal communication with Steve Pawłowski, Arizona Department of Environmental Quality, Unit Manager, Water Quality Standards and Assessments, April 24, 2008.



downstream to Sanders Road in Marana. These projects will provide public trails along the river. Although the final design for these two projects has not been completed, it is likely river access will be provided. The two projects are shown in Exhibit F.

C. There is currently public access to the river at several bridges, including but not limited to the Ina Road bridge where there are pull-out areas, the Cortaro Road bridge (including a parking lot), and at the Sanders Road bridge in Marana. All of these bridges have easy access to Interstate 10.

D. The historic 1200-mile Juan Bautista de Anza National Historic Trail runs from Nogales, Arizona to San Francisco, California. This trail parallels and overlaps the Santa Cruz River in the Study Reaches. The river can be accessed at several points along this trail in the Study Reaches by auto or also on foot (Exhibit F).

3. The Study Reaches of the Santa Cruz River have been used for interstate commerce and have the potential to be used for commercial activities involving navigation and interstate commerce in the future.

A. Navigation has occurred historically and recent times within the Study Reaches of the Santa Cruz River.

(1) On August 23, 2005, as part of a promotion, a local radio show host navigated the Santa Cruz River in a raft for an unspecified distance starting at El Camino del Cerro (within Study Reach B) (Exhibit G).

(2) In October, 1994, two members of the Friends of the Santa Cruz navigated a 17-foot-long canoe from a point south of Tubac three miles to a point north of Tubac (Exhibit G).

B. The Santa Cruz River is an international and interstate water. Several areas along the river provide access for birding by out-of-state visitors and resorts bordering the river, such as the Tubac Golf Resort, host out-of-state visitors who partake in local recreation including hiking, horseback riding, and birding along the river. The Tucson Audubon Society's North Simpson Farm is an area where prolific riparian habitat restoration projects have been focused and it is well-known for its opportunities for birding. This type of "ecotourism" provides a significant water resource-oriented opportunity in the desert. The Study Reaches and other areas within the region receive many interstate and foreign tourists seeking to expand their "bird list"; the Sonoran Desert, particularly in riparian areas such as the Santa Cruz River, provides a significant opportunity to see species endemic to this area.

C. Use of the river within the Study Reaches by recreational watercraft provides evidence of the susceptibility for commercial use.


#### Determination

Public access points within of the Study Reaches such as low river banks, bridges, and trail systems, together with their physical characteristics, such as frequency, duration, and permanency of flow, indicate that the Study Reaches have the potential to be used for commercial recreational navigation activities, such as canoeing, kayaking, birding, nature and wildlife viewing. Such attractions and activities demonstrate that the Study Reaches may be susceptible to use in interstate commerce. Collectively, the above discussed factors demonstrate that the Study

Reaches are navigable-in-fact, and thus a TNW, susceptible to use in interstate commerce associated with recreational navigation activities. Therefore, I hereby determine that the Study Reaches are subject to the jurisdiction of Section 404 of the CWA, pursuant to 33 C.F.R. § 328.3(a)(1).

This determination does not 1) consider any other potentially applicable bases for determining CWA jurisdiction within the Study Reaches or 2) foreclose analysis of other areas of the Santa Cruz River outside the Study Reaches for purposes of determining CWA jurisdiction.

5/23/08  
Date

  
\_\_\_\_\_  
Thomas H. Magness  
Colonel, US Army  
District Commander

**Troxel, Tiffany A SPL**

---

**From:** Castanon, David J SPL  
**Sent:** Thursday, June 12, 2008 4:01 PM  
**To:** Magness, Thomas H COL SPL  
**Cc:** Minch, Lawrence N SPL; Troxel, Tiffany A SPL; Field, Jay SPL  
**Subject:** ASA inquiry

I talked to Chip a few minutes ago.

The Farm Bureau meeting at the ASA office was unrelated to SPL in any way. But at the end of the meeting, Virginia Albrecht (an attorney who represents mining, building and farming associations in Washington) asked Woodley if he was aware of a bad TNW determination that SPL had made on the Santa Cruz River in Arizona that had only sewage flow. Woodley asked Chip to look into it and report back on Friday. Chip has downloaded our TNW memo, News Release, Q's and A's. I assured him we had more hydrology than just wastewater effluent. Marjorie will send him the powerpoint slides we used in your briefing.

Dave



**McMahon, John R BG SPD**

---

**From:** Magness, Thomas H COL SPL  
**Sent:** Friday, June 13, 2008 4:50 PM  
**To:** McMahon, John R BG SPD  
**Subject:** FW: Santa Cruz River, California, TNW Decision Information

**Importance:** High

**Attachments:** Santa Cruz TNW Decision by SPL 10jun08.doc



Santa Cruz TNW  
Decision by SPL...

Sir

FYSA. Mr. Woodley was spinning up this morning apparently after hearing about our TNW decision on the Santa Cruz River in AZ from a long-time opponent to our program. His "concerns" were apparently addressed by Chip Smith after he reviewed the material and, by the time I got back with Mike Donovan, everything was reportedly back to normal. I do not believe he got with MG Riley. I think we're good but did want you to know that he was in "high hover mode" for about 6 hours today on this issue!  
Tom Magness

Thomas H. Magness  
COL, US Army  
District Commander  
Los Angeles District, US Army Corps of Engineers  
(w) 213. [REDACTED]  
(c) 213. [REDACTED]

-----Original Message-----

**From:** Donovan, Michael J COL ASA(CW) [mailto:[REDACTED]]  
**Sent:** Friday, June 13, 2008 5:02 AM  
**To:** Magness, Thomas H COL SPL  
**Subject:** FW: Santa Cruz River, California, TNW Decision Information  
**Importance:** High

Tom,

As a heads up. Mr. Woodley read the attached document this morning and was very upset. He does not see the determination to be valid. He is currently at a meeting with the SecArmy, but wants to speak with MG Riley on the issue when he gets back (0900 hrs eastern).

I am sending along this note as a heads up. I want to give you time to prep so that you are not caught short.

Give me a call when you have the opportunity.

Mike

COL Michael Donovan  
XO ASA-CW

108 Army Pentagon  
Room 3E446  
Washington DC 20310-0108

Office (703) [REDACTED]  
Cell (703) [REDACTED]  
FAX (703) [REDACTED]  
Blackberry Cell (571) [REDACTED]  
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[REDACTED]

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-----Original Message-----

From: Smith, Chip R Mr ASA(CW)  
Sent: Thursday, June 12, 2008 6:01 PM  
To: Woodley, John P Jr Mr ASA(CW)  
Cc: Donovan, Michael J COL ASA(CW); Smith, Dwayne R LTC ASA(CW); 'Moyer, Jennifer A HQ02'; Eakle, Wade L SPD; 'Castanon, David J SPL'; Lopez-Ortiz, Myrna I Ms ASA(CW); 'McLaughlin, Kimberly S HQ02'; Schmauder, Craig R Mr OGC  
Subject: Santa Cruz River, California, TNW Decision Information

Sir:

Attached is a WORD file that contains a news release, Q&A, and excerpts from the Corps decision document in this matter. This TNW decision was raised today in our meeting with the Farm Bureau and you asked me to look into it. I will read the attached materials (70 pages) tonight and talk to the Corps tomorrow. I will get back to you when I have digested this information and can boil it down to its essence.

Chip Smith  
Office of the Assistant Secretary of the Army (Civil Works) Assistant for Environment, Tribal and Regulatory Affairs  
108 Army Pentagon 3E427  
Washington, D.C. 20310-0108  
703-[REDACTED] Voice  
703-[REDACTED] Cell  
703-[REDACTED] Fax

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Schmauder, Craig R Mr OGC

From: Young, Anne M Ms OGC  
Sent: Friday, June 13, 2008 10:58 AM  
To: Schmauder, Craig R Mr OGC  
Subject: RE: Santa Cruz River, California, TNW Decision Information

Ben wanted to know if Mr. Woodley was in left field and I told him I thought he might be because his own staff appears to agree with District. Based on Woodley's characterization he was inclined to agree with Mr.. Woodley but he wanted my analysis. I have the documents from Chip and am reviewing them now.

-----Original Message-----

From: Schmauder, Craig R Mr OGC  
Sent: Friday, June 13, 2008 10:55 AM  
To: Young, Anne M Ms OGC  
Subject: Re: Santa Cruz River, California, TNW Decision Information

What was Ben's reaction or advice?

Craig R. Schmauder, Dep GC ----- Sent from my BlackBerry Wireless Device

----- Original Message -----

From: Young, Anne M Ms OGC  
To: Schmauder, Craig R Mr OGC  
Sent: Fri Jun 13 10:06:36 2008  
Subject: RE: Santa Cruz River, California, TNW Decision Information

Ben stopped by and Mr. Woodley is still agitated. I will do a little summary write up for you and Ben of my analysis; OASA(CW) analysis; and what we propose as the next steps.

-----Original Message-----

From: Schmauder, Craig R Mr OGC  
Sent: Friday, June 13, 2008 8:59 AM  
To: Young, Anne M Ms OGC  
Subject: Re: Santa Cruz River, California, TNW Decision Information

Doesn't appear to be a joke. It is posted all over the SPK public website.

Yikes!

Craig R. Schmauder, Dep GC ----- Sent from my BlackBerry Wireless Device

----- Original Message -----

From: Young, Anne M Ms OGC  
To: Schmauder, Craig R Mr OGC  
Sent: Fri Jun 13 08:02:45 2008  
Subject: FW: Santa Cruz River, California, TNW Decision Information

FYI. Mr. Woodley is quite upset. I am reading and promised to speak with HQ and the District. If a joke, Woodley will laugh. If not a joke, Woodley wants: 1) decision reversed and 2) all navigability determinations made at HQ level.

-----Original Message-----

From: Donovan, Michael J COL ASA(CW) On Behalf Of Woodley, John P Jr Mr ASA(CW)  
Sent: Friday, June 13, 2008 7:52 AM  
To: Young, Anne M Ms OGC  
Subject: FW: Santa Cruz River, California, TNW Decision Information

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FOR OFFICIAL USE ONLY

COL Michael Donovan  
XO ASA-CW

108 Army Pentagon  
Room 3E446  
Washington DC 20310-0108

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[REDACTED]  
[REDACTED]

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-----Original Message-----

From: Smith, Chip R Mr ASA(CW)  
Sent: Thursday, June 12, 2008 6:01 PM  
To: Woodley, John P Jr Mr ASA(CW)  
Cc: Donovan, Michael J COL ASA(CW); Smith, Dwayne R LTC ASA(CW); 'Moyer, Jennifer A HQ02'; Eakle, Wade L SP4; 'Castanon, David J SPL'; Lopez-Ortiz, Myrna I Ms ASA(CW); 'McLaughlin, Kimberly S HQ02'; Schmauder, Craig R Mr OGC  
Subject: Santa Cruz River, California, TNW Decision Information

Sir:

Attached is a WORD file that contains a news release, Q&A, and excerpts from the Corps decision document in this matter. This TNW decision was raised today in our meeting with the Farm Bureau and you asked me to look into it. I will read the attached materials (70 pages) tonight and talk to the Corps tomorrow. I will get back to you when I have digested this information and can boil it down to its essence.

Chip Smith  
Office of the Assistant Secretary of the Army (Civil Works) Assistant for Environment,  
Tribal and Regulatory Affairs  
108 Army Pentagon 3E427  
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703-[REDACTED] Fax

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Schmauder, Craig R Mr OGC

From: Young, Anne M Ms OGC  
Sent: Friday, June 13, 2008 9:53 AM  
To: Schmauder, Craig R Mr OGC  
Subject: RE: Santa Cruz River, California, TNW Decision Information

He was completely surprised. Mr. Woodley thinks that the only reason the District declared the reach "traditionally navigable" was because a radio talk show host rode a raft down the reach during a flood.

I sent you an email from Chip Smith -- he agrees with the District. I will get with Chip and discuss how we should proceed. It may be best for us to speak with Mr. Woodley and see if we can reason with him.

-----Original Message-----

From: Schmauder, Craig R Mr OGC  
Sent: Friday, June 13, 2008 9:01 AM  
To: Young, Anne M Ms OGC  
Subject: Re: Santa Cruz River, California, TNW Decision Information

Why is Mr. Woodley so angered here? Was he surprised?

Craig R. Schmauder, Dep GC ----- Sent from my BlackBerry Wireless Device

----- Original Message -----

From: Young, Anne M Ms OGC  
To: Schmauder, Craig R Mr OGC  
Sent: Fri Jun 13 08:12:08 2008  
Subject: RE: Santa Cruz River, California, TNW Decision Information

ok

-----Original Message-----

From: Schmauder, Craig R Mr OGC  
Sent: Friday, June 13, 2008 8:08 AM  
To: Young, Anne M Ms OGC  
Subject: Re: Santa Cruz River, California, TNW Decision Information

Keep me posted.

Craig R. Schmauder, Dep GC ----- Sent from my BlackBerry Wireless Device

----- Original Message -----

From: Young, Anne M Ms OGC  
To: Schmauder, Craig R Mr OGC  
Sent: Fri Jun 13 08:02:45 2008  
Subject: FW: Santa Cruz River, California, TNW Decision Information

FYI. Mr. Woodley is quite upset. I am reading and promised to speak with HQ and the District. If a joke, Woodley will laugh. If not a joke, Woodley wants: 1) decision reversed and 2) all navigability determinations made at HQ level.

-----Original Message-----

From: Donovan, Michael J COL ASA(CW) On Behalf Of Woodley, John P Jr Mr ASA(CW)  
Sent: Friday, June 13, 2008 7:52 AM  
To: Young, Anne M Ms OGC  
Subject: FW: Santa Cruz River, California, TNW Decision Information

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COL Michael Donovan  
XO ASA-CW

108 Army Pentagon  
Room 3E446  
Washington DC 20310-0108

Office (703) [REDACTED]  
Cell (703) [REDACTED]  
FAX (703) [REDACTED]  
Blackberry Cell (571) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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-----Original Message-----

From: Smith, Chip R Mr ASA(CW)  
Sent: Thursday, June 12, 2008 6:01 PM  
To: Woodley, John P Jr Mr ASA(CW)  
Cc: Donovan, Michael J COL ASA(CW); Smith, Dwayne R LTC ASA(CW); 'Moyer, Jennifer A HQ02'; Eakle, Wade L SPD; 'Castanon, David J SPL'; Lopez-Ortiz, Myrna I Ms ASA(CW); 'McLaughlin, Kimberly S HQ02'; Schmauder, Craig R Mr OGC  
Subject: Santa Cruz River, California, TNW Decision Information

Sir:

Attached is a WORD file that contains a news release, Q&A, and excerpts from the Corps decision document in this matter. This TNW decision was raised today in our meeting with the Farm Bureau and you asked me to look into it. I will read the attached materials (70 pages) tonight and talk to the Corps tomorrow. I will get back to you when I have digested this information and can boil it down to its essence.

Chip Smith  
Office of the Assistant Secretary of the Army (Civil Works) Assistant for Environment,  
Tribal and Regulatory Affairs  
108 Army Pentagon 3E427  
Washington, D.C. 20310-0108  
703- [REDACTED] Voice  
703- [REDACTED] Cell  
703- [REDACTED] Fax

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Schmauder, Craig R Mr OGC

**From:** Young, Anne M Ms OGC  
**Sent:** Friday, June 13, 2008 9:51 AM  
**To:** Schmauder, Craig R Mr OGC  
**Subject:** FW: Santa Cruz River TNW Determination

**Attachments:** Santa Cruz TNW Decision by SPL 10jun08.doc; Santa Cruz Reach B photo 1.JPG; Santa Cruz Reach B photo 2.JPG; Santa Cruz River.ppt



Santa Cruz TNW Decision by SPL...



Santa Cruz Reach B photo 1.JPG...



Santa Cruz Reach B photo 2.JPG..



Santa Cruz River.ppt (3 MB)

Fyi

-----Original Message-----

**From:** Smith, Chip R Mr ASA(CW)  
**Sent:** Friday, June 13, 2008 9:11 AM  
**To:** Young, Anne M Ms OGC  
**Subject:** FW: Santa Cruz River TNW Determination

Anne:

Mr. Woodley tells me you are looking into this TNW determination for him. He disagrees with it. I agree with it. Albeit not excited about it. If you need to talk to the district let me know.

Chip

-----Original Message-----

**From:** Smith, Chip R Mr ASA(CW)  
**Sent:** Friday, June 13, 2008 8:56 AM  
**To:** Woodley, John P Jr Mr ASA(CW)  
**Cc:** Donovan, Michael J COL ASA(CW); Smith, Dwayne R LTC ASA(CW); Lopez-Ortiz, Myrna I Ms ASA(CW); Dunlop, George Mr ASA(CW); Schmauder, Craig R Mr OGC; 'Moyer, Jennifer A HQ02'  
**Subject:** Santa Cruz River TNW Determination

Sir:

Attached is the WORD file from yesterday (news release and decision document), plus a Power Point and 2 photos. Two reaches of the river have been determined to be TNWs based on physical characteristics, flows, access, past and recent use, resort facilities, and susceptibility to future use. The determination was made in response to requests from several landowners in the watershed who wanted to know the jurisdictional status of their properties. No determination was been made for the remainder of the river, much of which is on Indian Reservations and access has not been possible or necessary for this TNW action. I believe that the Corps had made the correct determination in this case. Please look at the attached information and let me know if you concur or wish me to set up a conference call to discuss the TNW call further. Thanks.

Chip Smith

Office of the Assistant Secretary of the Army (Civil Works) Assistant for Environment,  
Tribal and Regulatory Affairs  
108 Army Pentagon 3E427  
Washington, D.C. 20310-0108  
703-██████████ Voice  
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Santa Cruz River TNW Data  
From: Cohen, Mark D SPL [redacted@usace.army.mil]  
Sent: Friday, June 13, 2008 5:55 PM  
To: Smith, Chip R Mr ASA(CW)  
Cc: Castanon, David J SPL; Blaine, Marjorie E SPL; Lester, Cynthia J SPL  
Subject: RE: ASA Inquiry on the Santa Cruz River TNW Determination

Chip,

In response to your questions this morning:

The river is approximately 225 miles long. Reach A is 22 miles and reach B is 32 miles in length.

If these reaches are not TNWs, there would be a profound effect on our ability to regulate tributaries to the Santa Cruz River. While the Santa Cruz would still likely be an RPW, the nearest TNW to the 8,600 square mile Santa Cruz River Watershed Basin would be 300 river miles away (the Colorado River) from the Pima County line. An inability to find a significant nexus for these tributaries would lead to a wide loss of jurisdiction and ultimately pose serious water quality concerns for the area. Tributaries to the Santa Cruz include many perennial and intermittent streams, with wetlands and other high value resources (including Sabino Canyon, Davidson Canyon, and Cienega Creek).

Let me know if you need anything else.

Thanks,

Mark

-----Original Message-----

From: Smith, Chip R Mr ASA(CW) <redacted>  
To: Blaine, Marjorie E SPL  
Cc: Troxel, Tiffany A SPL; Lester, Cynthia J SPL; Castanon, David J SPL; Young, Anne M Ms OGC <redacted@us.army.mil>; Moyer, Jennifer A HQ02; McLaughlin, Kimberly S HQ02  
Sent: Fri Jun 13 08:30:01 2008  
Subject: RE: ASA Inquiry on the Santa Cruz River TNW Determination

Good stuff. How long is the river and what is the length of the two sections. If these reaches are NOT TNWs what is the effect on the landscape in terms of jurisdiction over tribs and wetlands?

Chip

-----Original Message-----

From: Blaine, Marjorie E SPL [mailto:redacted@usace.army.mil]  
Sent: Thursday, June 12, 2008 7:28 PM  
To: Smith, Chip R Mr ASA(CW)  
Cc: Troxel, Tiffany A SPL; Lester, Cynthia J SPL; Castanon, David J SPL  
Subject: RE: ASA Inquiry on the Santa Cruz River TNW Determination

Chip

Dave Castanon asked me to forward you my ppt presentation for the Santa Cruz River TNW determination. Please find this attached. Due to the size of the ppt, I am sending an second email with two photos of the Santa Cruz River in Reach B. The importance of these photos is to show that there is no sewage in the river. The effluent has, as a minimum, been through secondary treatment and the Arizona Dept of Environmental Quality has approved the Santa Cruz River for partial body contact which means in activity such as boating and wading which does not include full submergence.

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Santa Cruz River TNW Data

Although I am off on Fridays, I will provide you with my cell phone number if you have any questions. It is (520) [REDACTED]. I'll be around in the morning for a bit but will be on the golf course later.

Please let me know if there is anything I can do to assist.

Marjorie Blaine  
Senior Project Manager/Biologist  
U.S. Army Corps of Engineers  
Tucson Project Office, Regulatory Division  
5205 E. Comanche Street  
Tucson, AZ 85707  
(520) [REDACTED] (phone)  
(520) [REDACTED] (fax)

---

From: Castanon, David J SPL  
Sent: Thursday, June 12, 2008 3:09 PM  
To: Magness, Thomas H COL SPL; Field, Jay SPL; Minch, Lawrence N SPL; Moore, Brian M SPL; Reed, Anthony G LTC SPL  
Cc: Blaine, Marjorie E SPL; Troxel, Tiffany A SPL; Lester, Cynthia J SPL; Calderon, Daniel J  
Subject: ASA Inquiry on the Santa Cruz River TNW Determination

Sir,

FYSA, Chip Smith (Woodley's Env, Reg, and Tribal Affairs) assistant will be calling us tomorrow to learn more about the Santa Cruz River TNW determination. I have a medical appointment in the first part of the day, but I can be reached by cell phone most of the day. I've provided my cell # to Chip.

Dave

---

From: Smith, Chip R Mr ASA(CW) [mailto:[REDACTED]]  
Sent: Thursday, June 12, 2008 3:01 PM  
To: Woodley, John P Jr Mr ASA(CW)  
Cc: Donovan, Michael J COL ASA(CW); Smith, Dwayne R LTC ASA(CW); Moyer, Jennifer A HQ02; Eakle, Wade L SPD; Castanon, David J SPL; Lopez-Ortiz, Myrna I Ms ASA(CW); McLaughlin, Kimberly S HQ02; Schmauder, Craig R Mr OGC  
Subject: Santa Cruz River, California, TNW Decision Information

sir:

Attached is a WORD file that contains a news release, Q&A, and excerpts from the Corps decision document in this matter. This TNW decision was raised today in our meeting with the Farm Bureau and you asked me to look into it. I will read the attached materials (70 pages) tonight and talk to the Corps tomorrow. I will get back to you when I have digested this information and can boil it down to its essence.

Chip Smith  
Office of the Assistant Secretary of the Army (Civil works) Assistant for  
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Santa Cruz River TNW Data  
Environment, Tribal and Regulatory Affairs  
108 Army Pentagon 3E427  
Washington, D.C. 20310-0108  
703-██████████ Voice  
703-██████████ Cell  
703-██████████ Fax

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Schmauder, Craig R Mr OGC

**From:** Dunlop, George Mr ASA(CW)  
**Sent:** Friday, June 20, 2008 2:42 PM  
**To:** Schmauder, Craig R Mr OGC  
**Subject:** RE: Santa Cruz River--Traditional Navigable Water determination (UNCLASSIFIED)

**Classification:** UNCLASSIFIED  
**Caveats:** NONE

Great!

Many thanks.

GEORGE

=====  
George S. Dunlop  
Principal Deputy Assistant Secretary  
Department of the Army  
Office of the Assistant Secretary for Civil Works  
3E431 Army Pentagon  
(703) [REDACTED]

-----Original Message-----

**From:** Schmauder, Craig R Mr OGC  
**Sent:** Friday, June 20, 2008 2:19 PM  
**To:** Dunlop, George Mr ASA(CW)  
**Cc:** Smith, Chip R Mr ASA(CW)  
**Subject:** RE: Santa Cruz River--Traditional Navigable Water determination (UNCLASSIFIED)

Thanks George. I've printed off all the materials on this subject and will study them over the weekend. Mr. Woodley has asked me to advise him soonest whether or not we should overturn the DE on the navigability call. I anticipate doing so early next week.

v/r, Craig  
Craig R. Schmauder (SES)  
Deputy General Counsel  
(Installations, Environment & Civil Works)

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-----Original Message-----

**From:** Dunlop, George Mr ASA(CW)  
**Sent:** Friday, June 20, 2008 1:50 PM  
**To:** Schmauder, Craig R Mr OGC  
**Subject:** FW: Santa Cruz River--Traditional Navigable Water determination (UNCLASSIFIED)

**Classification:** UNCLASSIFIED  
**Caveats:** NONE

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FYI

-----  
George S. Dunlop  
Principal Deputy Assistant Secretary  
Department of the Army  
Office of the Assistant Secretary for Civil Works  
3E431 Army Pentagon  
(703) [REDACTED]  
[REDACTED]

-----Original Message-----

From: Dunlop, George Mr ASA(CW)  
Sent: Friday, June 20, 2008 1:40 PM  
To: Smith, Chip R Mr ASA(CW)  
Subject: FW: Santa Cruz River--Traditional Navigable Water determination (UNCLASSIFIED)

Classification: UNCLASSIFIED  
Caveats: NONE

Chip:

I think you know Kelly House from Arizona. Here is his commentary on the DE's Santa Cruz River determination. I did not share with him any discussion about Mr. Woodley's concern about susceptibility, but his commentary seems to demonstrate that the DE may have used a great deal of the EPA logic about that in this determination.

I know you said that you reviewed this and that the DE seemed to have little choice but to determine the property jurisdictional, and perhaps the "susceptibility" rationales were not the determining ones. But maybe we need to review the entire text to make sure that DE is not creating precedent for us that we don't want to have to live with.

Please take another look at the Santa Cruz decision, and let me know if specific susceptibility rationales Kelly House articulates seem to be a factor or something that needs our attention.

Many Thanks,  
GEORGE

-----  
George S. Dunlop  
Principal Deputy Assistant Secretary  
Department of the Army  
Office of the Assistant Secretary for Civil Works  
3E431 Army Pentagon  
(703) [REDACTED]  
[REDACTED]

-----Original Message-----

From: Kelly House [mailto:[REDACTED]@eldoradoholdings.net]  
Sent: Friday, June 20, 2008 11:41 AM  
To: Dunlop, George Mr ASA(CW)  
Subject: FW: Santa Cruz River--Traditional Navigable Water determination

George, good morning it was certainly great to see and talk with you again...however the only "downside" of sitting next to you at dinner...was not getting an opportunity to talk to Becky :-). Next time.

I promised you two items 1) my attempt to summarize EPA's Tetra Tech analysis regarding our pending JD based upon "significant nexus"... to follow later this morning, and then

2) the recent Santa Cruz TNW (see below) determination by the Corps...which quite frankly I don't understand at all given that the "navigable component" is primarily based upon i)

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two isolated promotional canoeing events one at least at which occurred during flooding, ii) a mathematical determination that "technically" at certain times flow is sufficient to "float a boat". And further the "highway for commerce component" is not even based upon recreational river activities, but rather tangential factors such as; proximity to public roadway, isolated hiking trails, nearby hotel, perhaps some birding, etc.

So I am very much confused; particularly when compared and contrasted with the HQ's Bah Lakes decision.

Please keep in mind that we are anxiously awaiting our JD decision from the Corps ...filed in November, approved with "no significant nexus" by Phoenix office in March, field review by both Corps' District 8 and EPA Region 9 in April. Until last week we were under the impression that everything was proceeding properly until we saw a) Santa Cruz TNW and b) the Tetra Report for EPA. Now we are very concerned about the direction this is taken and assuming that we are at a very sensitive point in the process. We are certainly not looking to upset any one, particularly the decision makers, just asking questions.

I'll forward you the Tetra summary...and don't forget you promised me the name of the book that you are reading concerning/connecting capitalism, judeo Christianity, government, etc . Seems like there was at least one other thing you promised...but I'm a little jet lagged, that and being awake at 3 this morning.

Enjoy your weekend...should be 112 + in Phoenix... with no rain in sight.

Kelly House  
El Dorado Holdings, Inc.  
426 N. 44th Street, Suite 100  
Phoenix, AZ 85008  
602- [REDACTED] (office)  
602- [REDACTED] (fax)  
602- [REDACTED] (cell)

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-----Original Message-----

From: Susan Benaron [mailto:[REDACTED]]  
Sent: Thursday, June 05, 2008 3:15 PM  
To: Fred Huntington; Mark Chenault; [REDACTED]  
Subject: FW: Santa Cruz River--Traditional Navigable Water determination

All:

Important 404 news below. Pass this along to anyone who needs it.

Su Benaron

Cultural Resources Manager

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Dunlop, George S Mr ASA(CW)

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From: Dunlop, George Mr ASA(CW)  
Sent: Friday, June 20, 2008 2 12 PM  
To: 'Kelly House'  
Subject: More from Dunlop (UNCLASSIFIED)

Classification: UNCLASSIFIED  
Caveats: NONE

Kelly:

1. Thanks for the Tetra Tech. This is a little overwhelming for me, so you'll have to keep me in the loop if there are further concerns.
2. As regards Santa Cruz, I checked with our people here, and there is a consensus that the DE had no choice but to declare the reaches that he did as jurisdictional, but we are making another read of the 90+page document to see if the concerns you raise are inconsistent with policy guidance. I appreciate your sharing your concerns.
3. Book. Stark, Rodney, The Victory of Reason: How Christianity Led to Freedom, Capitalism and Western Success, Random House, New York, 2006. Also: Here is a review from the Action Institute (from whom I purchased the book): >  
[http://www.acton.org/publications/mandm/mandm\\_review\\_106.php](http://www.acton.org/publications/mandm/mandm_review_106.php) <. The review does not really do justice to the exciting story line Stark develops about the rise and fall of capitalism in Italy, The Netherlands, England, etc. .. And hopefully not the fall in the USA.

Best,  
GEORGE

=====  
George S. Dunlop  
Principal Deputy Assistant Secretary  
Department of the Army  
Office of the Assistant Secretary for Civil Works  
3E431 Army Pentagon  
(703) [REDACTED]  
[REDACTED]

-----Original Message-----  
From: Kelly House [mailto:[REDACTED]@eldoradoholdings.net]  
Sent: Friday, June 20, 2008 11:50 AM  
To: Dunlop, George Mr ASA(CW)  
Subject: FW: Trillium - Tetra Tech Report

George, attached is my attempt to reasonably summarize the Tetra Tech report, I have to admit though that many of the terms and factors are foreign to me; ecological time, sub-decadal scales, metapopulational dynamics, evolutionary time, etc...maybe I need to go back and re-read the Rapanos Guidance, I could have sworn we were looking at flow, frequency, duration and proximity :-). Something as an engineer I do understand.

I have not yet heard back from Dave or Cindy. Please treat this information discreetly..in fact if you would like the full 20+ page report I can readily forward it to you, and would prefer to do so rather than having the request come down from HQ. I trust

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your judgment.

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Kelly House  
El Dorado Holdings, Inc.  
426 N. 44th Street, Suite 100  
Phoenix, AZ 85008  
602-██████████ (office)  
602-██████████ (fax)  
602-██████████ (cell)

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---

From: Mike Cronin  
Sent: Tuesday, June 17, 2008 8:44 AM  
To: David.J.Castanon ██████████; Cynthia.J.Lester ██████████  
Cc: Kelly House  
Subject: Trillium - Tetra Tech Report

Dave and Cindy -

Kelly House is traveling and asked this I forward the attached summary of the Tetra Tech report on Trillium. Kelly wants to make sure that we have accurately summarized the report's observations, opinions, perceptions and conclusion.

Please let us know if we have misstated or omitted any key points.

Thank you,

Michael J. Cronin

Director of Entitlements  
El Dorado Holdings, Inc.  
426 North 44th Street, Suite 100  
Phoenix, AZ 85008  
Office - 602. ██████████  
Cell - 602. ██████████

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Dunlop, George S Mr ASA(CW)

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**From:** Dunlop, George Mr ASA(CW)  
**Sent:** Wednesday, June 25, 2008 2:01 PM  
**To:** 'Kelly House'  
**Subject:** RE: Santa Cruz TNW (UNCLASSIFIED)

Classification: UNCLASSIFIED  
Caveats: NONE

Kelly:  
Thanks for this. I understand what you are saying. Chip Smith is supervising the review of the decision for Mr. Woodley. We will not leave this unattended.

GEORGE

=====  
George S. Dunlop  
Principal Deputy Assistant Secretary  
Department of the Army  
Office of the Assistant Secretary for Civil Works  
3E431 Army Pentagon  
(703) [REDACTED]  
[REDACTED]

-----Original Message-----

From: Kelly House [mailto:[REDACTED]@eldoradoholdings.net]  
Sent: Wednesday, June 25, 2008 8:05 AM  
To: Dunlop, George Mr ASA(CW)  
Subject: Santa Cruz TNW

Thought you might be interested in what some of the local press is reporting on the Santa Cruz TNW....see below

Regarding the Tetra Report... unfortunately we probably won't know any more until we receive the Colonel's final JD determination. To date, to the best of my knowledge, he is not returning calls or emails from our office.

Although if I could be permitted to speak personally and candidly . I truly believe the objective is pretty clear... continue to assert jurisdiction over the same "waters/tributaries" post Rapanos as were regulated pre Rapanos.

And if it can't be done by using science to prove significant nexus for flow, frequency, duration and proximity... then fall back on 1) the mandate to protect the biological, chemical and environmental health of the waters of the U.S.; by claiming that biologically everything is connected and any impact is significant, and further the impact can only be measured in ecological and evolutionary time; and/or 2) find numerous TNW's (ignoring Rivers and Harbor's criteria, and highway for commerce requirement) in the southwest so that the reach to "significant nexus" from a TNW is significantly reduced:

I doubt this is what this Administration stands for, I don't think it is what the majority of the Congress believed when they voted for the CWA (in fact as I understand it the major concern was impact to local land-use decisions).but over time the CWA has become a

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preservation bill, a protect public resources bill, a no net-loss of wetlands bill, etc. All of which works well for a regulatory agency who is determined to federalize the development process, and assert their will over other members of the federal family.

The sad part is that this is essentially a "taking" with no public benefit; particularly when you consider the big picture all the dredge and fill permits combined have little or no impact on the quality of the nations' waters when compared to floods, hurricanes, fires, agricultural pesticides/fertilizers runoff, etc.

George, please do not pass this on and probably best to delete entirely... Thank you for the freedom to speak openly.

Kelly House

El Dorado Holdings, Inc.

426 N. 44th Street, Suite 100

Phoenix, AZ 85008

602- [REDACTED] (office)

602- [REDACTED] (fax)

602- [REDACTED] (cell)

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Full text below:

"A federal agency has ruled that the Santa Cruz River is "navigable," a decision that could strengthen the regulation of development and pollution discharges into the waterway.

Advertisement

Rosemont Mine opponents believe the determination could pose a major

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**McGlynn, Kathleen A Ms ASA(CW)**

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**From:** Schmauder, Craig R Mr OGC  
**Sent:** Monday, June 30, 2008 4:52 PM  
**To:** Woodley, John P Jr Mr ASA(CW)  
**Cc:** Dunlop, George Mr ASA(CW), Donovan, Michael J COL ASA(CW), McGlynn, Kathleen A Ms ASA(CW), Darden, Elwyn Mr ASA(CW)  
**Subject:** Santa Cruz TNW Determination

Mr. Woodley, just a quick note to advise you that your policy direction to rescind the LA District's Santa Cruz TNW determination has been set in motion. Mr. Dunlop sent an email to and discussed the matter with Steve Stockton and he is working it now. I have discussed the matter with Corps HQ and Division Counsel. I will advise soonest when the rescission is completed. I have informed the Corps that your policy direction was to rescind the determination immediately.

v/r, Craig  
Craig R. Schmauder (SES)  
Deputy General Counsel  
(Installations, Environment & Civil Works)

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**Hannon, James R MVD**

---

**From:** Moyer, Jennifer A HQ02  
**Sent:** Monday, June 30, 2008 8:18 PM  
**To:** Hannon, James R MVD  
**Subject:** Re: Santa\_Cruz\_River\_TNW\_Determination (UNCLASSIFIED)

Hi Jim,

I was aware of Mr. Woodley's displeasure with this determination following a meeting he had with a representative of the Homebuilders Association, per a heads-up from Chip Smith. I had a conversation with the Regulatory Chief there, letting him know that Mr. Woodley planned to look into this matter about two weeks ago and haven't heard anything else until today. Prior to Chip's call and my subsequent call to the District, I was not engaged in any discussions on the Santa Cruz. I will ask Russ Kaiser if he was in contact as he is the primary POC for TNWs; it is possible that Mark Sudol was the POC that COL Magness references.

It is my understanding that Chip supported the District's call but was unable to persuade Mr. Woodley otherwise. This matter at issue in this case is at the crux of our discussions on determining traditional navigable waters.

I would be pleased to provide you with further background (there is a bit of a backstory) if you'd like. I'm in meetings in Fort Worth from 8:30-3:00 central tomorrow, and then I'll be catching a flight back to DC.

Jennifer

----- Original Message -----

**From:** Hannon, James R MVD  
**To:** Moyer, Jennifer A HQ02  
**Cc:** Lang, Lawrence A HQ02  
**Sent:** Mon Jun 30 17:02:54 2008  
**Subject:** FW: Santa\_Cruz\_River\_TNW\_Determination (UNCLASSIFIED)

Jennifer,

COL Magness note mentions Reg HQ involvement as well as other Districts in coming to this decision.

Who was primary lead here?

Thanks,  
Jim

-----Original Message-----

**From:** Magness, Thomas H COL SPL  
**Sent:** Monday, June 30, 2008 4:53 PM  
**To:** Stockton, Steven L HQ02  
**Cc:** McMahon, John R BG SPD; Lang, Lawrence A HQ02; Benavides, Ada HQ02; Moyer, Jennifer A HQ02; Hannon, James R MVD  
**Subject:** RE: Santa\_Cruz\_River\_TNW\_Determination (UNCLASSIFIED)

Sir

Here are a few points on this:

-- We have a backlog of nearly 400 JDs in the LA District. We are getting crushed under the weight of these post-Rapanos decisions. We cannot determine jurisdiction without first identifying the nearest downstream TNW. This decision in Arizona was to determine the nearest TNW to support some of the pending JDs. We made these TNW calls on the Gila River and are now moving forward to look at associated JDs while similarly moving out on examinations of other rivers.

**McMahon, John R BG SPD**

**From:** Magness, Thomas H COL SPL  
**Sent:** Monday, June 30, 2008 12:55 PM  
**To:** McMahon, John R BG SPD  
**Subject:** RE: SPL Santa Cruz River TNW Determination - OASA(CW) Asking for Rescission

Sir

Unfortunate. We have to move forward. As sent to you yesterday, we have a backlog of nearly 400 JDs and have to make some decisions. We can't make JDs without identifying the nearest downstream TNW. TNWs do not identify themselves! It is a function of water quantity, i.e. where is there sufficient flow to support navigation. Recinding our decision destroys the credibility of field commanders to make these calls and seriously slows this already cumbersome process. Unfortunate...but I respect the role of those who might push for this rescission. I will continue to monitor the net while we continue to press forward.

Tom Magness

PS -- I absolutely reject the notion that we were pressured by EPA to make this decision. Totally untrue.

Thomas H. Magness  
COL, US Army  
District Commander  
Los Angeles District, US Army Corps of Engineers  
(w) 213. [REDACTED]  
(c) 213. [REDACTED]

-----Original Message-----

**From:** McMahon, John R BG SPD  
**Sent:** Monday, June 30, 2008 12:44 PM  
**To:** Magness, Thomas H COL SPL  
**Subject:** Fw: SPL Santa Cruz River TNW Determination - OASA(CW) Asking for Rescission

Tom:

Fysa--note the close hold nature. More to follow.  
R/JRM

John R. McMahon  
BG, USA  
Commander, South Pacific Division  
415-[REDACTED] (W)  
415-[REDACTED] (C)

-----  
Sent from my BlackBerry Wireless Device

----- Original Message -----

**From:** Pike, Lloyd D HQ02  
**To:** Wilson, John M HQ02

**Troxel, Tiffany A SPL**

---

**From:** Blaine, Marjorie E SPL  
**Sent:** Monday, June 30, 2008 5:43 PM  
**To:** Troxel, Tiffany A SPL  
**Cc:** Minch, Lawrence N SPL  
**Subject:** RE: Valencia Wash

**Importance:** High

June 16.

Since I think the reason Virginia is involved in this has something to do with Pima County, you need to know that the reason the County does not want the S.C. River to be a TNW (and Greg Santo the Environmental Manager for P.C. Dept of Transportation TOLD me this directly) is because if it is, then they felt that most of the washes in Pima County which flow into it (directly or indirectly) would probably have a SN and be regulated under Sec 404, and hence, Sec 402. They do not want the State to regulate them under Sec 402 because the State recently told them that they have to implement stormwater improvements which will cost them \$30 million. The County felt that whatever we determined, the State would have to agree with in terms of regulatory authority. Not true.....we had a meeting with ADEQ a couple of weeks ago and they were adamant that Rapanos only applies to 404 and until a court proves otherwise, they were going to stick to their guns but the County disagrees and says "no 404, no 402, no \$30 million". So the battle is not really over 404, it's over the County having to spend money to make the stormwater improvements.

On the other hand, the County has been wanting us to regulate Davidson Canyon which is a trib to Cienega Creek which becomes the Pantano Wash, trib to the Rillito River, trib to the S.C. River just downstream of where Reach B starts. Davidson Canyon has recently been nominated by the State to be an "outstanding water" but the determination on that is not final. Augusta Mining wants to build the Rosemont Mine which would virtually destroy Davidson Canyon. The County has come out quite vehemently as being opposed to it and wants to be a cooperating agency on the Forest Service EIS. They feel that our involvement will further their efforts to defeat this project.

You must stress to Mr. Woodley the unbelievable consequences to water quality which would occur if the TNW determination is overturned. On the "Q" drive in the same place as the report, you will see several photos of tribs to Reach B. Many of them still had flowing water in April when we had not had any rainfall in six weeks. I drove by one of them yesterday and it STILL has a small amount of flowing water (that would be the one in photo 723--BTW, there is a photo log after the photos).

Let me know if there is ANYTHING I can do to help.

*Marjorie*

---

**From:** Troxel, Tiffany A SPL  
**Sent:** Monday, June 30, 2008 5:29 PM  
**To:** Blaine, Marjorie E SPL  
**Subject:** Valencia Wash

When did you send the approved JD to Pima County?

Tiffany A. Troxel  
Office of Counsel  
U.S. Army Corps of Engineers



**Troxel, Tiffany A SPL**

---

**From:** Minch, Lawrence N SPL  
**Sent:** Monday, June 30, 2008 1:31 PM  
**To:** Magness, Thomas H COL SPL  
**Cc:** Troxel, Tiffany A SPL  
**Subject:** Santa Cruz TNW

I understand that Steve Stockton has asked for your views about a proposal to suspend the Santa Cruz River TNW determination. This appears to be occurring in response to lobbying efforts by the attorneys for the big developers. Please talk with me and Tiffany before responding to him. I am very concerned about this politicization of the Regulatory process.

Lawrence N. Minch  
District Counsel  
Los Angeles District  
US Army Corps of Engineers  
Tel. (213) [REDACTED]  
Fax (213) [REDACTED]

Attorney Work Product  
Attorney-Client Privileged Communication

**McMahon, John R BG SPD**

---

**From:** Magness, Thomas H COL SPL  
**Sent:** Tuesday, July 01, 2008 6:50 AM  
**To:** McMahon, John R BG SPD  
**Subject:** Fw: Santa\_Cruz\_River\_TNW\_Determination (UNCLASSIFIED)

Sir

I need your help on this one. I have been given nothing as to the basis of this decision. My sentiment is that this is politics. This can send shock waves through our program. Thanks.

V/R

Tom Magness

Thomas H. Magness  
COL, US Army  
Commander, Los Angeles District  
US Army Corps of Engineers  
(w) 213. [REDACTED]  
(c) 213. [REDACTED]

-----Original Message-----

**From:** Stockton, Steven L HQ02  
**To:** Benavides, Ada HQ02; Moyer, Jennifer A HQ02; Pike, Lloyd D HQ02  
**CC:** McMahon, John R BG SPD; Lang, Lawrence A HQ02; Hannon, James R MVD; Magness, Thomas H COL SPL; Kuz, Annette B SPD; Stockdale, Earl H HQ02  
**Sent:** Tue Jul 01 05:02:08 2008  
**Subject:** RE: Santa\_Cruz\_River\_TNW\_Determination (UNCLASSIFIED)

Ada/Lloyd/Jennifer,

I understand that there is a meeting at 1000 this morning with Regulatory and Counsel. ASA(CW) would like us to rescind this determination and I need to get back to him today with a way ahead. Please let me know outcome of meeting at 1000 so I can get back to him.

Steve

Steven L. Stockton, P.E., SES  
Director Civil Works, USACE  
(W) (202) [REDACTED]  
(Cell) (202) [REDACTED]  
[REDACTED]

-----Original Message-----

**From:** Magness, Thomas H COL SPL  
**Sent:** Monday, June 30, 2008 4:53 PM  
**To:** Stockton, Steven L HQ02  
**Cc:** McMahon, John R BG SPD; Lang, Lawrence A HQ02; Benavides, Ada HQ02; Moyer, Jennifer A HQ02; Hannon, James R MVD  
**Subject:** RE: Santa\_Cruz\_River\_TNW\_Determination (UNCLASSIFIED)

Cc: Kuz, Annette B SPD; McMahon, John R BG SPD  
Sent: Mon Jun 30 12:34:18 2008  
Subject: RE: SPL Santa Cruz River TNW Determination - OASA(CW) Asking for Rescission

ATTORNEY WORK PRODUCT-DO NOT COPY, RELEASE OR RETRANSMIT

FYI. Close hold please---just wanted you to be aware of the potential.

-----Original Message-----

From: Wilson, John M HQ02  
Sent: Monday, June 30, 2008 2:02 PM  
To: Stockdale, Earl H HQ02; Pike, Lloyd D HQ02; Wood, Lance D HQ02; Steffen, Phillip J HQ02; Cohen, Martin R HQ02; Inkelas, Daniel HQ02  
Subject: SPL Santa Cruz River TNW Determination - OASA(CW) Asking for Rescission

Sirs,

Craig has been in touch with me today regarding the LA District's CWA Traditional Navigable Water determination for two reaches of the Santa Cruz River in Arizona. Sec. Woodley would like to have the determination rescinded while it is reviewed further at the HQ/OASA(CW) level. I am collecting information on the river and the determination as well as a summary of the law addressing CWA TNW determinations to brief Craig in the next few days.

Lance and I briefed the Chief Counsel on this issue a few weeks ago and advised him that while this was on the outer limit of what could be called a CWA TNW, the determination did have support in case law and was inline with the TNW determinations being made by EPA for other waterbodies.

Craig is currently determining what the mechanics will be for the rescission, but I wanted to make sure you were aware that this way underway and that it is currently Sec. Woodley's intent to have the decision withdrawn, at least temporarily. I made sure that Craig knew that EPA had applied pressure on SPL to make this determination and that there would likely be some fallout from their Office of Water if the rescission occurs. Also, there is a pending CWA enforcement action on the Santa Cruz River (but on a different "reach" - not one addressed by this TNW determination).

Thanks,  
Max

Max Wilson  
Assistant Counsel  
Environmental Law and Regulatory Programs  
Office of the Chief Counsel  
U.S. Army Corps of Engineers  
Ph. 202-██████████

ATTORNEY WORK PRODUCT  
ATTORNEY CLIENT PRIVILEGE



**Kuz, Annette B SPD**

---

**From:** Kuz, Annette B SPD  
**Sent:** Tuesday, July 01, 2008 11:22 AM  
**To:** Charlton, Mark C SPD; Eakle, Wade L SPD; McAndrew, Maureen A SPD  
**Subject:** Santa Cruz TNW

FOR YOUR EYES ONLY

So BG McMahon just called. I gave him a rough summary of the call. I advised him to call Mr. Stockton and seek assistance relative to the programmatic impacts related to putting decisions derived from the TNW in a holding pattern. He was going to do that. Also he'll followup with Col. M.

Col. M called me as well and voiced his concern relative to a record that doesn't contain a rationale based on science in the event the Secretary issues a rescission.

We'll see what happens next. VR

Annette B. Kuz  
Assistant Chief Counsel/Division Counsel  
USACE South Pacific Division

████████████████████  
1455 Market St. Ste 2084  
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cell(415) ██████████

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**Kuz, Annette B SPD**

---

**From:** Kuz, Annette B SPD  
**Sent:** Tuesday, July 01, 2008 1:35 PM  
**To:** Pike, Lloyd D HQ02; Stockdale, Earl H HQ02  
**Subject:** RE: Santa Cruz River TNW designation

Just a heads up. Colonel Magness called me and identified having something in the file documenting where we're headed with all of this. He specifically noted having concerns relative to receiving a foia and the documentation related to Mr. Woodley's recent meeting with developers and their representative Virginia Albrecht. I anticipate that both he and BG McMahon will be asking for programmatic assistance related to working the regulatory matters that will be further backlogged.

Lloyd, thanks much for your masterful representation of advocating for an informal suspension. That was hugely helpful. VR

Annette B. Kuz  
Assistant Chief Counsel/Division Counsel USACE South Pacific Division

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Attorney-Client Privileged Communication/Attorney WorkProduct No Release under FOIA No Forwarding outside of USACE/Army

-----Original Message-----

**From:** Pike, Lloyd D HQ02  
**Sent:** Tuesday, July 01, 2008 1:02 PM  
**To:** Stockton, Steven L HQ02; Stockdale, Earl H HQ02; Hannon, James R MVD  
**Cc:** Cohen, Martin R HQ02; Kuz, Annette B SPD; Wood, Lance D HQ02; Wilson, John M HQ02; Minch, Lawrence N SPL  
**Subject:** RE: Santa Cruz River TNW designation

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Craig called with word that Mr. Woodley has accepted the recommendation that we proceed with an "informal suspension".

It would be good if you, Steve, would speak to Mr. Woodley or George to confirm that we will ask LA District to pull the jurisdictional determination from their web site but take no further action pending the review of the facts and law by Mr. Woodley and OGC. I understand that Mr. Woodley may have further guidance as to how he would like JD's in similar situations to be reviewed before final determination. Finally, Martin can convey this to DOJ. I assume that the EPA coordination will continue to be at the district or regional level. Thanks.

-----Original Message-----

**From:** Hannon, James R MVD  
**Sent:** Tuesday, July 01, 2008 1:48 PM  
**To:** Stockton, Steven L HQ02  
**Cc:** Lang, Lawrence A HQ02; Moyer, Jennifer A HQ02; Pike, Lloyd D HQ02; Cohen, Martin R HQ02; Wood, Lance D HQ02; Olson, David B HQ02  
**Subject:** FW: Santa Cruz River TNW designation

Steve,

The following is a summary of today's meeting with Army OGC, Corps Counsel, DOJ, and the Operations/Regulatory CoP (included HQ/Division/District staff).

**Troxel, Tiffany A SPL**

---

**From:** Minch, Lawrence N SPL  
**Sent:** Tuesday, July 01, 2008 1:28 PM  
**To:** Magness, Thomas H COL SPL  
**Cc:** Troxel, Tiffany A SPL  
**Subject:** RE: Santa\_Cruz\_River\_TNW\_Determination (UNCLASSIFIED)

Tiffany and I participated in the conference call at 7 am this morning and did our best to defend the positions SPL has taken without being obstructionist. The call was primarily counsel, including the DOJ attorneys responsible for the DOJ enforcement case, although there were some Regulatory personnel on the line at HQ.

Craig Schmauder from Army OGC was present. He is the chief legal advisor to Mr. Woodley. (Craig is also the former Deputy Chief Counsel of USACE and was acting Chief Counsel at the time Earl Stockdale was selected for the post.) Craig is going to be speaking with Mr. Woodley later today and outline for him the legal options.

Tiffany and I did our best to defend the TNW determinations that SPL has made and to counter misinformation about the Santa Cruz River that the lobbyists at obviously planted. We tried, however, to be constructive and factual in our comments and avoid argument. For example, Mr. Woodley is apparently under the impression that the stretch of the Santa Cruz that we have found to be a TNW is dry much of the year and that, when it contains water, it is unsafe for boating. We explained that our determinations were based on gage data which showed water year round, generally at a depth that would allow a small boat or kayak to float. I also explained the controversy concerning the LA River and how it relates to the Santa Cruz TNW determinations.

The realistic options discussed, given Mr. Woodley's preliminary views, ranged from (1) a request that the District informally suspend making further TNW determinations, or JDs dependent on TNW determinations, for a specified period of time (probably 30 days) to allow ASA review of the policy issues re the TNW determinations to (2) revocation of the TNW determinations.

While I was writing this, I received a message from the CECC informing me that Mr. Woodley has accepted the recommendation that we proceed with an "informal suspension". In terms of the options on the table, this is the option that most USACE counsel would prefer. The exact details of how the suspension will work still need to be ironed out, but it will definitely require that we pull the current information about the Santa Cruz TNW determination from our web page and hold off on taking action on TNW determinations any further reaches of the Santa Cruz, the Gila, or any other river if the determination would be based on susceptibility to navigation.

-----Original Message-----

**From:** Magness, Thomas H COL SPL  
**Sent:** Tuesday, July 01, 2008 5:43 AM  
**To:** Minch, Lawrence N SPL; Moore, Brian M SPL; Castanon, David J SPL  
**Subject:** Fw: Santa\_Cruz\_River\_TNW\_Determination (UNCLASSIFIED)

Its getting interesting. Please clear your calendars to make this meeting.  
Thomas H. Magness  
COL, US Army  
Commander, Los Angeles District  
US Army Corps of Engineers  
(w) 213. [REDACTED]  
(c) 213. [REDACTED]

-----Original Message-----

**From:** Stockton, Steven L HQ02  
**To:** Benavides, Ada HQ02; Moyer, Jennifer A HQ02; Pike, Lloyd D HQ02  
**CC:** McMahon, John R BG SPD; Lang, Lawrence A HQ02; Hannon, James R MVD; Magness, Thomas H COL SPL; Kuz, Annette B SPD; Stockdale, Earl H HQ02  
**Sent:** Tue Jul 01 05:02:08 2008  
**Subject:** RE: Santa\_Cruz\_River\_TNW\_Determination (UNCLASSIFIED)



**Wood, Lance D HQ02**

---

**From:** Kapaun, Michael J CPT HQ02  
**Sent:** Thursday, July 03, 2008 3:08 PM  
**To:** Wood, Lance D HQ02  
**Subject:** RE: Requested summary regarding Santa Cruz River matter.

Thanks Lance,  
I think that I can format this accordingly and I believe that it provides enough detail for MG Riley to be kept informed about the recent developments.  
Best Regards,  
Mike

-----Original Message-----

**From:** Wood, Lance D HQ02  
**Sent:** Thursday, July 03, 2008 2:53 PM  
**To:** Kapaun, Michael J CPT HQ02  
**Cc:** Pike, Lloyd D HQ02; Wilson, John M HQ02; Wood, Lance D HQ02  
**Subject:** Requested summary regarding Santa Cruz River matter

(Mike,

I hope these paragraphs are what you need. If not, please tell me and I will make changes. Also, please put this in proper form for your purposes, or tell me how to do that. Thank you. Lance)

"Recently ASA(CW) J.P. Woodley was advised by a private sector attorney that the Corps Los Angeles District had improperly designated two reaches of the Santa Cruz River in Arizona as navigable-in-fact "traditional navigable waters" (TNWs) for purposes of asserting jurisdiction under the Clean Water Act (CWA) (more specifically, under Appendix D of the EPA/Army CWA-Rapanos case guidance). Subsequently, Mr. Woodley decided to undertake a 60-day review of that L.A. District decision, and requested that the District suspend certain administrative actions during that 60-day review period.

Consequently, this week the Corps' Los Angeles District ("SPL"), the South Pacific Division (SPD), and Corps Headquarters (HQs) agreed that during the 60-day review period SPL will suspend any pending TNW determinations and all approved jurisdictional determinations (approved JDs) that would require "significant nexus determinations" based on the recent TNW determination for the two segments of the Santa Cruz River. Also until completion of the policy review, SPL has removed from its website the subject TNW determination for the two segments of the Santa Cruz River and any approved JD's that incorporated or used the Santa Cruz TNW determination as part of the JD analysis.

The Corps stands ready to assist the OASA(CW) in any way we can to facilitate the review."

POC: Lance D. Wood  
Assistant Chief Counsel  
Environmental Law and Regulatory Programs U.S. Army Corps of Engineers  
(202) [REDACTED]

McGlynn, Kathleen A Ms ASA(CW)

FOR OFFICIAL USE ONLY

From: Woodley, John P Jr Mr ASA(CW)  
Sent: Thursday, July 03, 2008 11 58 AM  
To: Steven L Stockton [REDACTED]  
Subject: Re Santa Cruz TNW

Steve--thank you very much. I doubt we will need 60 days.  
Best,  
J P Woodley

----- Original Message -----

From: Stockton, Steven L HQ02 <[REDACTED]>  
To: Dunlop, George Mr ASA(CW); Woodley, John P Jr Mr ASA(CW)  
Cc: Pike, Lloyd D HQ02 <[REDACTED]@usace.army.mil>; Wood, Lance D HQ02  
<[REDACTED]@usace.army.mil>; Stockdale, Earl H HQ02 <[REDACTED]@usace.army.mil>;  
Benavides, Ada HQ02 <[REDACTED]@usace.army.mil>; McMahon, John R BG SPD  
<[REDACTED]@us.army.mil>; Charlton, Mark C SPD <[REDACTED]@usace.army.mil>;  
Magness, Thomas H COL SPL <[REDACTED]@usace.army.mil>; Moore, Brian M SPL  
<[REDACTED]@usace.army.mil>; Hannon, James R MVD <[REDACTED]@usace.army.mil>;  
Morrison, Linda A Ms ASA(CW); Moyer, Jennifer A HQ02 <[REDACTED]@usace.army.mil>;  
Riley, Don T MG HQ02 <[REDACTED]MG@usace.army.mil>; Smith, Chip R Mr ASA(CW)  
Sent: Thu Jul 03 11:44:19 2008  
Subject: Santa Cruz TNW

Mr Woodley and Mr Dunlop,

This note confirms the acknowledgement by the Corps' Los Angeles District ("SPL"), the South Pacific Division (SPD), Corps Headquarters (HQs), and the OASA(CW) that the OASA(CW) and the Army OGC will conduct a 60-day review of SPL's recent determination that two segments of the Santa Cruz River, AZ, are "traditional navigable waters" (TNWs). During this review period SPL will suspend any pending TNW determinations and all approved jurisdictional determinations (approved JDs) that would require "significant nexus determinations" based on the recent TNW determination for the two segments of the Santa Cruz River. Also until completion of the policy review, SPL has removed from its website the subject TNW determination for the two segments of the Santa Cruz River and any approved JD's that incorporated or used the Santa Cruz TNW determination as part of the JD analysis.

We are ready to assist your office in any way we can to facilitate your review.

VR,  
Steve

Steven L. Stockton, P.E., SES  
Director Civil Works, USACE  
(W) (202) [REDACTED]  
(Cell) (202) [REDACTED]  
[REDACTED]

FOR OFFICIAL USE ONLY



**Riley, Don T MG HQ02**

---

**From:** Stockton, Steven L HQ02  
**Sent:** Thursday, July 03, 2008 12:31 PM  
**To:** Riley, Don T MG HQ02  
**Subject:** RE: Santa Cruz TNW

Not sure who brought it to ASA(CW)'s attention. I suspect one of the Arizona developers (Douglas Ranch). I think SPL has done a pretty good job with the TNW analysis given the vagaries of the Carabell - Rapanos decision. (Note from Tom Magness below.) I have spoken with both John McMahon and Tom. My guess is that EPA will support this TNW determination and want it to go even further. At the end of the day I expect the district determination will be upheld unless George and JP can convince EPA this has gone too far.  
Steve

Steven L. Stockton, P.E., SES  
Director Civil Works, USACE  
(W) (202) [REDACTED]  
(Cell) (202) [REDACTED]  
[REDACTED]

-----Original Message-----

**From:** Magness, Thomas H COL SPL  
**Sent:** Monday, June 30, 2008 4:53 PM  
**To:** Stockton, Steven L HQ02  
**Cc:** McMahon, John R BG SPD; Lang, Lawrence A HQ02; Benavides, Ada HQ02; Moyer, Jennifer A HQ02; Hannon, James R MVD  
**Subject:** RE: Santa\_Cruz\_River\_TNW\_Determination (UNCLASSIFIED)

Sir

Here are a few points on this:

-- We have a backlog of nearly 400 JDs in the LA District. We are getting crushed under the weight of these post-Rapanos decisions. We cannot determine jurisdiction without first identifying the nearest downstream TNW. This decision in Arizona was to determine the nearest TNW to support some of the pending JDs. We made these TNW calls on the Gila River and are now moving forward to look at associated JDs while similarly moving out on examinations of other rivers.

-- While Jurisdiction is a complicated measure of chemical, biological, and physical impacts, the TNW determination is mostly a function of water quantity. In other words, does the water body have sufficient flow to support navigation? I am confident that we had the evidence and data to support this case.

-- On the Gila River, we identified two reaches with sufficient flow to support navigation. We deployed scientists to verify, looked at recent and historical flow data, and collected photographic evidence to verify these conditions.

-- In making this decision, we have stayed in contact with HQ Regulatory folks and with other districts making similar decisions, especially here in the West. The flow in these reaches is sufficient year-round to support our navigability decision. While it is mostly, but not exclusively, effluent from a wastewater treatment plant, we believe that case law does allow for this source in decisions of navigability.

-- While not a factor in this decision, without this TNW, the closest TNW may be the Colorado River, several hundred miles away. Using the CR as a basis for JDs would likely mean that we would lose most of our jurisdiction in the state. I do not believe this was the intent of the Rapanos decision, even under the most conservative interpretations.

As you know sir, we are pinched on both ends on this. In California, we are taking heat from environmental groups who did not think we made enough of the LA River as a TNW. In Arizona, we are hearing from developers who don't agree with what we have called TNWs.



**Domurat, George W SPD**

---

**From:** Blaine, Marjorie E SPL  
**Sent:** Monday, July 07, 2008 9:40 AM  
**To:** Eakle, Wade L SPD; Castanon, David J SPL  
**Cc:** Cohen, Mark D SPL; Lester, Cynthia J SPL; Domurat, George W SPD; Charlton, Mark C SPD  
**Subject:** RE: TNWs/JDs in Arizona

Wade

Please let me know of anything additional you think you need. I just did a set of 3 slides for Colonel Magness (with Mark Cohen's assistance and Aaron's review) so if you'd like those, pls. let me know.

*Marjorie*

---

**From:** Eakle, Wade L SPD  
**Sent:** Monday, July 07, 2008 6:46 AM  
**To:** Castanon, David J SPL  
**Cc:** Cohen, Mark D SPL; Blaine, Marjorie E SPL; Lester, Cynthia J SPL; Domurat, George W SPD; Charlton, Mark C SPD  
**Subject:** RE: TNWs/JDs in Arizona

Thanks Dave,

I saw the package, it was very well documented. If I hear anymore from the Commander or others here, I'll let you know.

Wade

---

**From:** Castanon, David J SPL  
**Sent:** Sunday, July 06, 2008 10:18 PM  
**To:** Eakle, Wade L SPD  
**Cc:** Cohen, Mark D SPL; Blaine, Marjorie E SPL; Lester, Cynthia J SPL  
**Subject:** RE: TNWs/JDs in Arizona

Wade,

I was out last week and am just now catching up on all this email traffic about the Santa Cruz River TNW determination. As for General McMahan's email below, I can attest to the extensive amount of information that was part of our TNW determination. We had a lot of hydrological info, historical info, maps, etc. We also sent up to HQ and Chip Smith other associated info (photos, power points, etc). Upon review, he did agree with us, but apparently Woodley still was not satisfied. Marjorie Blaine is the PM on this. Let us know if you think there is anything more we need to provide.

Marjorie, perhaps you can send Wade the same package we sent to Chip

Thanks,

Dave

---

**From:** Eakle, Wade L SPD  
**Sent:** Wednesday, July 02, 2008 8:50 AM  
**To:** Castanon, David J SPL  
**Cc:** Lester, Cynthia J SPL; Durham, Mark SPL; Allen, Aaron O SPL; McLaughlin, Kimberly S HQ02; Domurat, George W SPD  
**Subject:** FW: TNWs/JDs in Arizona

FYSA

---

**From:** McMahan, John R BG SPD  
**Sent:** Wednesday, July 02, 2008 8:45 AM

**To:** Stockton, Steven L HQ02  
**Cc:** Benavides, Ada HQ02; Magness, Thomas H COL SPL; Kuz, Annette B SPD; Charlton, Mark C SPD; Eakle, Wade L SPD, Constantaras, Andrew SPD; Riley, Don T MG HQ02; Pike, Lloyd D HQ02  
**Subject:** TNWs/JDs in Arizona

**Steve:**

Believe we (SPD) should help ASACW et al see the ground truth picture in AZ as they deliberate on these TNW/JD questions. How do we inject this ground truth into the mix--with maps, watershed analyses, flows, etc? Will need a few weeks to pull such a picture together but believe it would be worthwhile. Please advise.

Thanks.

VR, John

**John R. McMahon**  
**BG, USA**  
**Commander, South Pacific Division**  
**U.S. Army Corps of Engineers**  
415-██████████ (Office)  
415-██████████ (FAX)

**Constantaras, Andrew SPD**

---

**From:** Eakle, Wade L SPD  
**Sent:** Friday, July 18, 2008 3:50 PM  
**To:** McMahon, John R BG SPD  
**Cc:** Charlton, Mark C SPD; Constantaras, Andrew SPD; Kuz, Annette B SPD; McAllister, Victoria L SPD  
**Subject:** FW: Internal Talking Points on SCR TNW  
**Attachments:** SCR TNW Talking Points for July 20 ASA Visit.doc



SCR TNW Talking  
Points for Jul...

BG McMahon,

Per your request, please find attached internal and external talking points.

Respectfully,

Wade Eakle

-----Original Message-----

**From:** Castanon, David J SPL  
**Sent:** Friday, July 18, 2008 3:46 PM  
**To:** Eakle, Wade L SPD  
**Subject:** FW: Internal Talking Points on SCR TNW

FYI

-----Original Message-----

**From:** Cohen, Mark D SPL  
**Sent:** Thursday, July 17, 2008 3:52 PM  
**To:** Magness, Thomas H COL SPL  
**Cc:** Castanon, David J SPL  
**Subject:** Internal Talking Points on SCR TNW

Sir,

Attached are the internal talking points Dave created per our meeting with Division last week (note that the external talking points we had previously written are also attached). They have been coordinated within Regulatory and Counsel and they are now final. As well, Reg and Counsel met extensively today to discuss strategy for our onsite meeting next week. We're ready to go!

Thanks,

Mark

-----Original Message-----



**From:** Magness, Thomas H COL SPL  
**Sent:** Thursday, July 17, 2008 8:53 AM  
**To:** Cohen, Mark D SPL  
**Subject:** Re: Draft Internal Talking Points on SCR TNW

Mark. Please coordinate asap. I need to go final and share with others. Thanks.

Thomas H. Magness  
COL, US Army  
Commander, Los Angeles District  
US Army Corps of Engineers  
(w) 213: [REDACTED]  
(c) 213: [REDACTED]

-----Original Message-----

**From:** Cohen, Mark D SPL  
**To:** Magness, Thomas H COL SPL  
**CC:** Minch, Lawrence N SPL; Castanon, David J SPL  
**Sent:** Thu Jul 17 08:47:19 2008  
**Subject:** Draft Internal Talking Points on SCR TNW

Sir,

Please see attached, talking points (internal/external), as we discussed. I have cc'd Larry, as I do not yet think he's had a chance to review these. If you need me to revise, please let me know.

Thanks,

Mark

<<SCR TNW Talking Points for July 20 ASA Visit (2).doc>>

**INTERNAL TALKING POINTS**  
**ASA/OGC/HQUSACE POLICY REVIEW**  
**OF THE**  
**SANTA CRUZ RIVER, AZ**  
**TRADITIONAL NAVIGABLE WATER DETERMINATION**

**1. Purpose of Field Tour and Briefing:** We appreciate the opportunity to provide ASA, OGC, and HQUSACE a tour of the two Santa Cruz River TNW reaches and to present and discuss information used by the District to inform the TNW determination. We plan to cover the factual information in depth and to address the policy and legal aspects of the determination. By the end of this visit, we would like to understand whether there are any outstanding issues, concerns or unanswered questions on the part of the national review team so that we may have an opportunity to provide any follow up information or analysis.

**2. Basis of 23 May 08 TNW Determination:** District put forth enormous effort to collect/analyze scientific/engineering data and in evaluating it against existing national joint Army/EPA TNW guidance. Sources included USGS, academia, historians, etc. Two segments of the river were found to be navigable-in-fact based on standards and factors used by the federal courts. Those factors included the presence of physical capacity for navigation, public accessibility, and the potential for future navigation involving commercial activity and future interstate commerce. These same factors are used in prior joint memos from HQUSACE and HQ EPA for Rapanos JDs from other districts that had been elevated.

**3. Mischaracterizations of the Santa Cruz River Flows:** Some parties have mischaracterized the designated TNW segments as only having flows deriving from sewage effluent. This is incorrect, natural flows exist in these reaches in addition to discharges of secondary treated waste water (on which state water quality regulations allow partial body contact which includes such activities as wading or boating). This region experiences two rainy seasons: November through February as well as the summer monsoons between July and September, with frequent rain falls in October. At the studied stream gauges, daily mean flow varied between 5 and 637 cfs at Study Reach A and 11 and 863 cfs at Study Reach B, and the annual peak flows were at or above 1000 cfs in most years. These flows result in the navigable conditions approximately 8-9 months out of the year.

**4. Interagency Coordination and Relationships:** SPL coordinated with other state and federal agencies (AZ Dept. Environmental Quality, EPA Region 9, DOJ) prior to making the TNW determination. The current uncertainty regarding the determination and the potential implications of the national level policy review are straining our local and agency relationships and is causing confusion to a wide range of interests in other

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watersheds around the state. Consultation with affected agencies/parties by those involved in the national policy review should be considered so as not to damage these relationships.

**5. Policy Review Timeline:** It is important that this policy review be completed as soon as possible. Extending the review to 60 days or more will exacerbate the backlog of pending jurisdictional determinations (currently at 400) in the Los Angeles District. This delay is also contributing added stress to the regulatory program staff members, who are the first line agency representatives to the public. For all concerned, this matter needs to be decided as soon as possible.

**6. External Communication Issues:** It is our understanding that HQUSACE and ASA will respond to the two recent congressional inquiries sent to ASA from Representatives Grijalva and Giffords. For media inquiries, SPL has developed talking points to ensure dissemination of a consistent message (see attached).



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**Schmauder, Craig R Mr OGC**

---

**From:** Smith, Chip R Mr ASA(CW)  
**Sent:** Thursday, July 17, 2008 4 19 PM  
**To:** Schmauder, Craig R Mr OGC, Donovan, Michael J COL ASA(CW); Dunlop, George Mr ASA(CW)  
**Cc:** McGlynn, Kathleen A Ms ASA(CW)  
**Subject:** RE Grumbles\_draft\_Santa\_Cruz\_17Jul08 (DO NOT FORWARD)

**Importance:** Low

concur

-----Original Message-----

**From:** Schmauder, Craig R Mr OGC  
**Sent:** Thursday, July 17, 2008 4:17 PM  
**To:** Donovan, Michael J COL ASA(CW); Dunlop, George Mr ASA(CW)  
**Cc:** Smith, Chip R Mr ASA(CW); McGlynn, Kathleen A Ms ASA(CW)  
**Subject:** RE: Grumbles\_draft\_Santa\_Cruz\_17Jul08 (DO NOT FORWARD)

No issues other than avoiding EPA driven delay in the review process. We are on a fast moving train per direction from Mr. Woodley.

v/r, Craig  
Craig R. Schmauder (SES)  
Deputy General Counsel  
(Installations, Environment & Civil Works)

NOTICE: This message may contain information protected by the attorney-client, attorney work-product, deliberative-process, or other privilege. Do not disseminate without the approval of the Office of the General Counsel, Department of the Army. If you have received this message in error, please notify the sender immediately by telephone and delete this message.

-----Original Message-----

**From:** Donovan, Michael J COL ASA(CW)  
**Sent:** Thursday, July 17, 2008 1:43 PM  
**To:** Schmauder, Craig R Mr OGC; Dunlop, George Mr ASA(CW)  
**Cc:** Smith, Chip R Mr ASA(CW); McGlynn, Kathleen A Ms ASA(CW)  
**Subject:** Grumbles\_draft\_Santa\_Cruz\_17Jul08 (DO NOT FORWARD)  
**Importance:** High

Gentlemen,

Please note the draft letter that recently arrived via fax from Mr. Grumbles.

As indicated on the fax header sheet, Mr. Grumbles is asking for comments from the ASA-CW prior to signing the letter. Mr. Woodley should be able to review the draft letter following his meeting with REP Forbes (approx 1500 hrs).

If you have any issues/concerns I ask that you send them along to LTC Smith and myself so that we can pass along to Mr. Woodley.

COL Michael Donovan  
XO ASA-CW

108 Army Pentagon  
Room 3E446  
Washington DC 20310-0108

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Schmauder, Craig R Mr OGC

From: Peck, Gregory [REDACTED]
Sent: Friday, July 18, 2008 4 09 PM
To: Dunlop, George Mr ASA(CW)
Cc: Smith, Chip R Mr ASA(CW); Schmauder, Craig R Mr OGC
Subject: Re: Santa Cruz (UNCLASSIFIED)

George;

I appreciate the sensitivity and your willingness to raise this concern. We will work closely with you to protect deliberative materials by limiting distribution within EPA to Ben and myself.

Thanks George.

Greg

Chief of Staff
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

202-[REDACTED]

"Dunlop, George
Mr ASA (CW) "

<[REDACTED]>

07/18/2008 03:11
PM

Gregory Peck/DC/USEPA/US@EPA To
cc
"Smith, Chip R Mr ASA (CW) "
<[REDACTED]>,
"Schmauder, Craig R Mr OGC"
<[REDACTED]> Subject
Santa Cruz (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Greg:

Mr. Woodley told me that he is very concerned that internal working papers/deliberative documents marked not for distribution outside the Government on this subject are being widely distributed and published and seem to be coming from sources within EPA. He is concerned that the review that the Army has underway would be compromised if this were to continue, and asked that I convey to you and Ben his intention that the Army not develop or exchange any documents with anyone at EPA except to you or Ben, or some other person of known probity, such as Anthony Moore.

In light of the pending field visit (to which it is our understanding that an EPA regional representative will accompany the Army team) and Ben's expressed interest in being

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engaged, he ask me to convey his concerns and intentions.

Best,  
GEORGE

=====  
George S. Dunlop  
Principal Deputy Assistant Secretary  
Department of the Army  
Office of the Assistant Secretary for Civil Works  
3E431 Army Pentagon  
(703) [REDACTED]  
[REDACTED]

Classification: UNCLASSIFIED  
Caveats: NONE  
(See attached file: winmail.dat)

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Schmauder, Craig R Mr OGC

**From:** Stockton, Steven L HQ02 [REDACTED]  
**Sent:** Tuesday, July 29, 2008 8:46 AM  
**To:** Smith, Chip R Mr ASA(CW); Morrison, Linda A SAS  
**Cc:** Hannon, James R MVD; Stockdale, Earl H HQ02; Wilson, John M HQ02; Wood, Lance D HQ02; Olson, David B HQ02; Schmauder, Craig R Mr OGC; Benavides, Ada HQ02; Sudol, Mark F IWR, Dunlop, George Mr ASA(CW); Greer, Jennifer A HQ02, Donovan, Michael J COL ASA(CW)  
**Subject:** RE: Santa Cruz TNW

Chip,  
Thanks. Understand. I spoke with Craig earlier this morning. I agree with the approach we have laid out to apply some disciplined thought and to develop a consensus recommendation. I am just concerned that Mr Woodley has formed an opinion based upon incomplete information and that our job just became that much tougher.  
Steve

Steven L. Stockton, P.E., SES  
Director Civil Works, USACE  
(W) (202) [REDACTED]  
(Cell) (202) [REDACTED]

-----Original Message-----

**From:** Smith, Chip R Mr ASA(CW) [mailto:[REDACTED]]  
**Sent:** Tuesday, July 29, 2008 8:36 AM  
**To:** Stockton, Steven L HQ02; Morrison, Linda A SAS  
**Cc:** Hannon, James R MVD; Stockdale, Earl H HQ02; Wilson, John M HQ02; Wood, Lance D HQ02; Olson, David B HQ02; Schmauder, Craig R Mr OGC; Benavides, Ada HQ02; Sudol, Mark F IWR; Dunlop, George Mr ASA(CW); Greer, Jennifer A HQ02; Donovan, Michael J COL ASA(CW)  
**Subject:** RE: Santa Cruz TNW  
**Importance:** Low

Steve:

There has not been a briefing for Mr. Woodley on Santa Cruz. He stopped by Craig and I, independent of one another, and asked for preliminary thoughts, which we gave him. Each conversation was perhaps 5 minutes long. Both Craig and I noted that no determination has been made and that we were scheduled to meet with the Corps Regulatory and Counsel staff Wednesday, July 30, to de-brief everyone on our trip, show photos, maps, and data, and discuss the TNW call. If there is a consensus that the TNW call is not sustainable, then we will discuss options, like the Santa Cruz River being an RPW or non-RPW, or using the "a(3)" factors.  
Sorry for the confusion. No decision has yet been made and you will be briefed by your staff or Craig and I before we make a recommendation to Mr. Woodley.

Chip

-----Original Message-----

**From:** Stockton, Steven L HQ02 [mailto:[REDACTED]]  
**Sent:** Tuesday, July 29, 2008 7:34 AM  
**To:** Morrison, Linda A SAS  
**Cc:** Hannon, James R MVD; Stockdale, Earl H HQ02; Wilson, John M HQ02; Wood, Lance D HQ02; Olson, David B HQ02; Schmauder, Craig R Mr OGC; Smith, Chip R Mr ASA(CW); Benavides, Ada HQ02; Sudol, Mark F IWR; Dunlop, George Mr ASA(CW); Greer, Jennifer A HQ02  
**Subject:** Santa Cruz TNW

Linda,  
Mr Woodley called and was concerned about the TNW policy review on the Santa Cruz River. Apparently OGC and ASA(CW) staff briefed him on their conclusions and Mr Woodley is convinced that we got it wrong.

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Would have been a nice to know what he was told before the phone call.

Also, Mr Woodley is under the impression that HQ, not OASA(CW), was responsible for suspending the TNW determination, and that we have the responsibility for the policy review and giving guidance back to the field.

Please get together with Counsel and schedule a briefing for me on the results of the policy review and the way ahead. Would like to be briefed this week or early this week.

Steve

Steven L. Stockton, P.E., SES  
Director Civil Works, USACE  
(W) (202) [REDACTED]  
(Cell) (202) [REDACTED]  
[REDACTED]

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**Romero, Maria D SPL**

---

**From:** Stockton, Steven L HQ02  
**Sent:** Thursday, July 31, 2008 11:32 AM  
**To:** Magness, Thomas H COL SPL  
**Subject:** Re: SC River Decision

Tom,

We are behind you. Meeting yesterday with Oasa (CW) and HQ staff. Meeting with EPA to occur within next few days. Will let you know if this starts to go south.  
Steve

Steven L. Stockton, P.E., SES  
Director Civil Works, USACE  
(W) (202) [REDACTED]  
(Cell) (202) [REDACTED]  
[REDACTED]

----- Original Message -----

**From:** Magness, Thomas H COL SPL  
**To:** Stockton, Steven L HQ02  
**Sent:** Thu Jul 31 14:15:58 2008  
**Subject:** SC River Decision

Sir

Am hearing rumors about a pending decision from Mr. Woodley to reverse my decision. As you know, this will have major political, environmental, and media implications. I don't know where we are and how/if to influence at this point. Any guidance would be much appreciated. Thanks sir.  
Tom Magness

Thomas H. Magness  
COL, US Army  
Commander, Los Angeles District  
US Army Corps of Engineers  
(w) 213. [REDACTED]  
(c) 213. [REDACTED]



Schmauder, Craig R Mr OGC

From: Dunlop, George Mr ASA(CW)  
Sent: Monday, August 04, 2008 4:47 PM  
To: Schmauder, Craig R Mr OGC  
Subject: FW: Tasker - Home Builders Assoc re: Santa Cruz River. (UNCLASSIFIED)

Attachments: Killmer\_Taczanowski\_National\_Homebuilders\_re\_determination\_of\_Two\_reaches\_of\_Santa\_Cruz\_as\_navigable\_25Jul08.pdf



Gilmer\_Taczanowsk  
\_National\_H...

Classification: UNCLASSIFIED

Caveats: NONE

Splendid reading. A scholarly work.

=====  
George S. Dunlop  
Principal Deputy Assistant Secretary  
Department of the Army  
Office of the Assistant Secretary for Civil Works  
3E431 Army Pentagon  
(703) [REDACTED]  
[REDACTED]

-----Original Message-----

From: Donovan, Michael J COL ASA(CW)  
Sent: Monday, August 04, 2008 4:10 PM  
To: Brown, LaMar Mr ASA(CW); Edwards, Kevin Mr ASA(CW)  
Cc: Dunlop, George Mr ASA(CW); Smith, Chip R Mr ASA(CW); 'Capps, Stephan A LTC HQ02'  
Subject: Tasker - Home Builders Assoc re: Santa Cruz River.

LaMar,

Please develop a tasker for response to the attached letter from the Home Builders Association of Arizona regarding their concern with the ongoing determination of navigability for portions of the Santa Cruz River.

Chip Smith will be the AO for the OASA-CW. Craig Schmauder will be in support.

COL Michael Donovan  
XO ASA-CW

108 Army Pentagon  
Room 3E446  
Washington DC 20310-0108

Office (703) [REDACTED]  
Cell (703) [REDACTED]  
FAX (703) [REDACTED]  
Blackberry Cell (571) [REDACTED]  
[REDACTED]  
[REDACTED]

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July 25, 2008

**RECEIVED**

JUL 28 2008

Office of the ASA (CW)  
Washington, DC**BY FEDERAL EXPRESS**

The Honorable John Paul Woodley, Jr.  
Assistant Secretary of the Army, Civil Works  
108 Army Pentagon, Room 3E446  
Washington, D.C. 20310

**Re: Determination of Two Reaches of the Santa Cruz River as  
Traditional Navigable Waters**

Dear Assistant Secretary Woodley:

On May 23, 2008, Colonel Thomas H. Magness, United States Army, acting as the Commander of the Los Angeles District of the Army Corps of Engineers ("the Corps"), issued a written determination that two reaches of the Santa Cruz River in southern Arizona are traditional navigable waters ("TNW") pursuant to 33 C.F.R. § 328.3. We understand that Corps Headquarters is reviewing that determination. The purpose of this letter is to provide you with comments regarding Colonel Magness' determination (hereinafter called the "TNW Determination") which, in our view, has no factual basis and is legally unsupported.

**1. Background on the Associations.**

As a preliminary matter, the National Association of Home Builders ("NAHB") is a national trade association consisting of more than 235,000 builder and associate members organized into approximately 850 affiliated state and local associations in all 50 states, the District of Columbia and Puerto Rico. NAHB's members include individual and firms that construct single-family homes, apartments, condominiums, and commercial and industrial projects, as well as land developers and remodelers. NAHB has been closely involved in a number of Clean Water Act regulatory issues, including issues arising under the Section 404 permit program administered by the Corps.

The Home Builders Association of Central Arizona ("HBACA") and the Southern Arizona Home Builders Association ("SAHBA") are affiliates of NAHB. HBACA was formed in 1951 to provide a unified voice on issues affecting the housing and building industry in central Arizona, including Maricopa and Pinal Counties, and currently has approximately 850 members. SAHBA was similarly formed in 1953 to provide a vehicle for businesses in the housing and building trades industries in southern Arizona (including Pima County) to address issues relating to those industries. SAHBA presently has approximately 700 members.

National Association of Home Builders • 1201 15th Street, N.W. • Washington, D.C. 20005  
Toll Free: 800-368-5242 x8200



Hon. John P. Woodley, Jr.  
July 25, 2008  
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All three Associations represent their members in legal, regulatory and legislative matters affecting the use and development of their land, including matters arising under the Clean Water Act. For the reasons set forth below, we are very concerned about the basis for the TNW determination, and the precedent that this determination may establish in the arid Southwest, given the historic and current condition of the Santa Cruz River.

## 2. The TNW Determination.

As previously stated, Colonel Magnus has determined that two reaches of the Santa Cruz River, which is located in southern Arizona, are TNWs. One reach determined to be navigable is called "Study Reach A" and begins at the U.S. Geological Survey ("USGS") gage station near Tubac, Arizona, and ends at the USGS gage station near Continental, Arizona, a distance of approximately 20 miles. By most historical accounts, the Santa Cruz River was ephemeral or intermittent in this area with very limited and irregular surface flows. The Arizona Department of Environmental Quality ("ADEQ") has classified Study Reach A as an ephemeral water for water quality and related purposes. A.A.C. R18-11-101(27) & App. B. At present, base flow in the lower portion of Study Reach A is regulated by the discharge of sewage effluent from the Nogales International Wastewater Treatment Plant, while the upper portion of this reach is dry most of the year.

The other reach determined to be navigable is called "Study Reach B" and begins at the outfall of Pima County's Roger Road wastewater treatment plant in northwestern Tucson, Arizona, and ends at the Pima County-Pinal County border, a distance of approximately 30 miles. Historically, this reach was ephemeral and presently has no natural flow for most of the year. Its base flow is sewage effluent that is discharged from Pima County wastewater treatment plants in northwest Tucson. ADEQ has classified Study Reach B as an "effluent-dependant water" for water quality and related purposes. A.A.C. R18-11-113(D)(7).

## 3. The Legal Test for Navigability.

As an initial matter, the Associations want to make clear our position that the jurisdiction of the Clean Water Act ("CWA") covers more than just TNWs. In *Rapanos v. United States*, 547 U.S. 715 (2006), both Justice Scalia (writing for the four-Justice plurality) and Justice Kennedy (concurring in the judgment) agreed that the CWA's scope extends beyond TNWs. See *id.* at 731 (Justice Scalia: "[T]he Act's term 'navigable waters' includes something more than traditional navigable waters ..."); *id.* at 779 (Justice Kennedy: "...[T]he Act contemplates regulation of certain 'navigable waters' that are not in fact navigable"). However, the determination of whether an aquatic feature is a TNW is the crucial, foundational component of each of their CWA analyses. Justice Scalia wrote that one "finding" necessary to determine if a wetland is covered by the CWA is if the "adjacent channel contains a 'wat[er] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters) ...." *Id.* at 742 (emphasis added). Justice Kennedy stated that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in



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question and navigable waters in the traditional sense." *Id.* at 779 (emphasis added) (Kennedy, J., concurring). Thus, while the CWA's purview is not coterminous with TNWs, waters deemed navigable in the traditional sense remain critical to determine the reach of Corps and EPA authority.

The determination of what Arizona rivers qualify as TNWs should be a simple, straightforward inquiry of what has been previously regulated by the Corps under the Rivers and Harbors Act ("RHA"), 33 U.S.C. §§ 403, 407. The Colorado River is the only water body in Arizona that qualifies.<sup>1</sup> Previously, the Corps concluded that the Gila River was non-navigable from Painted Rock dam to the Colorado River. If that reach of the Gila River is not navigable, then federal regulatory authority under the RHA could not extend to upstream reaches of the Gila River or any of its tributaries since RHA jurisdiction requires a continuous water-borne connection.<sup>2</sup> Therefore, the Colorado River represents the only watercourse "traditionally" regulated in Arizona.

The Corps' regulatory definition of the term "waters of the United States," found in 33 C.F.R. Part 328, does not alter the scope of federal jurisdiction. The test for traditional federal regulatory authority over "navigable waters of the United States" was set forth in *The Daniel Ball*, 77 U.S. 557, 563 (1870), which explained:

The test by which to determine the navigability of our rivers is found in their navigable capacity. Those rivers are public navigable rivers in law which are navigable in fact. Rivers are navigable in fact when they are used, or susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

Under this test, a water body must be used, or susceptible of being used, as a highway for commerce and, either by itself or in conjunction with other waters, form a continuous interstate highway for water-borne commerce.

<sup>1</sup> *Arizona v. California*, 283 U.S. 423 (1931). Notably, the Colorado River is the only Arizona watercourse listed on the Los Angeles District website as regulated under the RHA.

<sup>2</sup> See e.g., *Mirnahaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 621-22 (8th Cir. 1979).

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The Corps' regulatory definition of "waters of the United States" incorporates *The Daniel Ball* test. So-called "(s)(1)" waters purport to consist of waters that were traditionally regulated based on their ability to form a continuous interstate highway for water-borne commerce. See 33 C.F.R. § 328.3(a)(1) (referring to "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide"). The Supreme Court's recent opinions in *Rapanos* similarly refer to "traditional interstate navigable waters" and to "waters susceptible to use in interstate commerce – the traditional understanding of the term 'navigable waters of the United States.'" *Rapanos v. United States*, 126 S.Ct. 2208, 2216 (citing 33 C.F.R. § 328(a)(1)) (plurality opinion), 2237 (Kennedy, J., concurring) (emphasis supplied). See also *Sierra Pacific Power Co. v. F.E.R.C.*, 681 F.2d 1134, 1138-40 (9th Cir. 1982) (holding that the Truckee River is not a navigable water of the United States because it lacks a navigable interstate linkage by water); *Puget Sound Power & Light Co. v. F.E.R.C.*, 644 F.2d 785, 789 (9th Cir. 1981) ("Navigability depends upon the stream's usefulness as a transportation mechanism for commerce").

In short, for a water body to be classified as a TNW, the water body must have been used, or be susceptible to use as a highway for water-borne interstate commerce, as opposed to being capable of floating a small boat immediately after a flood event or during peak discharges of sewage effluent.

4. **The Historical Evidence and Finding of Non-Navigability Made By the Arizona Navigable Stream Commission.**

Colonel Magness has apparently ignored the findings and determination that were made in 2006 by the Arizona Navigable Stream Adjudication Commission ("the Commission"), which was established by A.R.S. §37-1101, *et seq.*, for the purpose of investigating and determining whether rivers, streams and other water bodies in Arizona were navigable for title purposes as of February 14, 1912. The Commission conducted hearings, received evidence and ultimately determined "that the Santa Cruz River was not used or susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water as of February 14, 1912." Arizona Navigable Stream Adjudication Commission, *Report, Findings And Determination Regarding The Navigability Of The Santa Cruz River From The Mexican Border To The Confluence With The Gila River 27* (Oct. 18, 2006) ("Navigability Determination").<sup>3</sup> In addition, the Commission also determined:

• "[T]he Santa Cruz River, while considered to be a perennial stream, has an almost insignificant flow during the dry seasons of the year. As of February 14, 1912 and currently, it flows/flowed primarily in direct response to precipitation and seasonal storms."

<sup>3</sup> A copy of the Commission's Navigability Determination is enclosed with this letter.



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- "[T]here is no evidence of any historical or modern commercial boating having occurred on the Santa Cruz River."
- "[T]here is no evidence of any commercial fishing having occurred on the Santa Cruz River."

*Id.* at 28. The Navigability Determination discusses a considerable amount of evidence, including written documents, studies, newspapers and other historical accounts, concerning pre-historic, historic and current conditions in the Santa Cruz River valley in support of its findings and determinations, which will not be repeated in this letter. *Id.* at 17-26. The Commission summarized this evidence as follows:

Although the Santa Cruz River has never within history or known prehistory been considered a navigable river, additional requirements for water from mining activities, agriculture and general requirements due to increased population diminished the amount of water available in the riverbed by a significant amount by 1912. As of the date of statehood, while there was some flow in the upper reaches of the Santa Cruz River, i.e., in Santa Cruz County, the remainder of the river would have to be considered ephemeral or intermittent at best. The lower reach of the river from Marana north to the confluence with the Gila River has always been dry, flowing only in response to significant precipitation. The Santa Cruz valley has served as an overland trade route from prehistoric times, but there is no documented record of any trade or travel on the river during the period leading up to statehood. Travel in or near the Santa Cruz River was accomplished by horseback, wagon, pack mule, trains and later automobiles as the road system improved.

*Id.* at 25.

Other historians and commentators have provided similar descriptions of the Santa Cruz River. For example, in a recent study of major river systems in the southwestern United States, which was sponsored in part by the USGS, the authors summarized the Santa Cruz River as follows:

[T]he Santa Cruz was a discontinuous ephemeral stream in the 1800s with effluent-influent reaches that supported dense woody vegetation. With the exception of periods of flooding, there is no evidence that the Santa Cruz River had continuous flow from its headwaters to its terminus at the Gila River. Instead, local reaches of perennial flow punctuated an otherwise ephemeral stream.



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Robert H. Webb, Stanley A. Leake and Raymond M. Turner, *The Ribbon of Green: Change in Riparian Vegetation in the Southwestern United States* 254 (Univ. of Arizona, 2007).

An historian who has served as an expert witness for the Arizona Attorney General's Office and the City of Tucson on water-related issues has stated, in a report prepared on the upper Santa Cruz River (which includes Study Reach A):

Virtually no evidence exists to suggest the river was at any time navigable. Indeed, the river's most recent biographer, Michael Logan, entitled his eloquent and scholarly volume published in 2002, *The Lessening Stream: An Environmental History Of The Santa Cruz River*. It never mentions navigation. This persuasive interdisciplinary synthesis, supported by sound primary research, skillfully weaves history with geology, archeology, and anthropology and concludes that the history of the upper Santa Cruz River centered on irrigation and agriculture, not navigation or commerce. Similarly, Tellman and Yarde dutifully attempt to report navigation possibilities in their account. However, compelling primary source information that suggests the Santa Cruz River as a navigable stream does not exist. Put another way, the bog and tempestuous history of conflicts over a chronically intermittent stream and the high premium given to its irrigation capabilities - the great demands placed on the documented limits of the surface water - further indicates that navigational use was highly unlikely. The preponderance of scientific evidence ... attests to the fact that surface flows at [the time of statehood] were virtually non-existent. The waters of the Santa Cruz River fueled the basin's economy but they were not used for their navigability and transportation value. Instead, this "lessening stream's" intermittent supply served agricultural and domestic needs.

Jack L. August, Jr., *The Upper Santa Cruz River: History Of A Lessening Stream* 14-15 (March 2003) (citing Michael F. Logan, *The Lessening Stream: An Environmental History Of The Santa Cruz River* (University of Arizona Press 2002), and Barbara Tellman and Richard Yarde, *A Historical Study Of The Santa Cruz River: Background Information For Determination of Navigability Of The River At The Time Of Statehood, 1912* (Water Resources Research Center, University of Arizona 1996)).

Colonel Magness, unfortunately, ignored these publications and reports, as well as the Commission's Navigability Determination, and instead provided facts that are incorrect, misleading or simply irrelevant to determining whether the two study reaches have been used, or may be susceptible to use, as highways of interstate commerce.

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For example, Colonel Magness notes that earthen dams were constructed on the river in the mid-1800s. TNW Determination at 1-2. The small lakes formed by these dams were used for milling, hunting waterfowl, aquaculture and other purposes until the 1880s. *Id.* First, the location of these improvements is *not* within either study reach. Instead, they were near present-day Silverlake Road, which is in South Tucson. Study Reach A ends about 30 miles south of this location, while Study Reach B begins about 8 miles north of this location.

Second, the reach of the Santa Cruz River from Martinez Hill, located west of the Tucson International Airport, to Sentinel Peak, near present-day Congress Street, was apparently perennial until the early twentieth century, at which time the City of Tucson's development of infiltration galleries and shallow wells for municipal water supplies dried up that reach of the river. *See Webb, supra*, at 258-59. A photo of the Santa Cruz River in this area is attached to the TNW Determination as Exhibit B.<sup>4</sup> As the picture shows, however, this area was covered with grasses and mesquite groves, and was described as "swampy." *Id.* at 255.

Third, the reference to the river being "wide and deep enough to float a 'mammoth steamboat' (TNW Determination at 2) appears to refer to exaggerations made by a real estate speculator in the late 1800s:

Back at the end of the nineteenth century, an enterprising land speculator promoted sales of property at Calabasas (now Rio Rico, north of Nogales) with brochures showing ocean-going steamships moored at a busy Santa Cruz River wharf. ... The story persisted for years that steamships had plied the river. Anyone who came to see the busy wharf was destined to be disappointed in the shallow marshy creek, unable to support even small boats except in flood season.

Barbara Telbman, Richard Yarde and Mary G. Wells, *Arizona's Changing Rivers: How People Have Affected the Rivers* 3 (Water Resources Center, Univ. of Ariz. March 1997).

The reality is that, as the foregoing authorities demonstrate, Colonel Magness' statement that "[u]ntil the late nineteenth century, the Santa Cruz River was primarily a perennial watercourse that served the region's agricultural needs until a quickly developing industrial society began to tap the river subsurface flow" (TNW Determination at 1), is simply not accurate. In fact, much of the river was historically ephemeral or, at best, intermittent, including the two study reaches the Corps has declared to be TNWs. There is no evidence that either study

<sup>4</sup> The same photo is also reproduced in Webb, at page 268, which describes the photo as showing a downstream view of the river in 1904, looking northeast from the slope of Sentinel Peak. It is surprising that the only historic photo appended to the TNW Determination is not from either study reach, but instead shows another portion of the river. At a minimum, this fact should have been clearly noted to avoid confusion.



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reach was used, or was susceptible to being used, for any form of interstate water-borne commerce, as the Commission determined in 2006.

5. The Corps' TNW Determination Is Unsupported By Any Legitimate Evidence.

a. The Ordinary Condition of the Santa Cruz River.

Colonel Magness contends that the two study reaches possess "physical characteristics" indicating that they have the capacity and susceptibility to be navigated by recreational water craft. TNW Determination at 2. As a preliminary matter, a water body's susceptibility to use for recreational purposes is insufficient by itself to support a finding that the water body is a TNW, i.e., susceptible to being used as a highway for interstate commerce. See, e.g., *Alaska v. Ahta, Inc.*, 391 F.2d 1401, 1404-05 (9th Cir. 1989) (holding that evidence of substantial commercial use by recreational watercraft industry that employs some 400 persons supported finding of river's navigability at statehood). *Puget Sound Power*, 644 F.2d at 788 ("The 'personal or private use by boats' may demonstrate 'the availability of the stream for the simpler types of commercial navigation.'") (quoting *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 416 (1940)). Putting aside that legal error, the discussion that follows on pages 2 through 4 of the TNW Determination is incomplete and misleading.

Colonel Magness reviewed flow data published by the USGS for stream gages located near Tubac, Amado and Continental evaluating the Study Reach A, and gages near Cortaro Road and Trico Road in evaluating Study Reach B. Colonel Magness discussed the mean and average flow rates at these gage stations. The problem with this approach is that it fails to properly take into account flood flows that result from localized storm events, which do not represent the ordinary or normal base flow in the river. As the Supreme Court has explained:

In the case of the Rio Grande in New Mexico, the Court said . . . :  
 "Its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water. The ordinary flow of water is insufficient. It is not like the Fox River, which was considered in *The Montello*, in which was an abundant flow of water and a general capacity for navigation along its entire length, and although it was obstructed at certain places by rapids and rocks, yet these difficulties could be overcome by canals and locks, and when so overcome would leave the stream, in its ordinary condition, susceptible of use for general navigational purposes." ... [T]he Court, describing the Red River in the western part of Oklahoma, said that "Only for short intervals, when the rain-fall is running off, are the volume and depth of the water such that even very small boats could be operated therein ... The rises usually last from one to seven days and in the aggregate seldom cover as much as forty days in the year;" and, in relation to



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the eastern part of the river, it was found ... that "its characteristics are such that its use for transportation has been and must be exceptional, and confined to the irregular and short periods of temporary high water." In [a third case] the Court accepted the findings of the two courts below as to the non-navigability of the Arkansas River above the mouth of the Grand River in Oklahoma, and the District Court, to whose findings the Circuit Court of Appeals referred, had said that "The use of that portion of the river for transportation boats has been exceptional and necessarily on high water, was found impractical and abandoned. The rafting of logs or freight has been attended with difficulties precluding utility. There is no practical susceptibility to use as a highway of trade or travel."

*United States v. Utah*, 283 U.S. 64, 87-88, n.12 (1931) (quoting *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699 (1899); *Oklahoma v. Texas*, 258 U.S. 574, 587 (1922); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922). (citations omitted)<sup>3</sup>. See also *North Dakota v. United States*, 972 F.2d 235, 239 (8th Cir. 1992) (an isolated commercial venture that is partially successful because of unusually high water is not evidence of navigability); *Puget Sound Power*, 644 F.2d at 787 ("If the waterway is merely capable of exceptional transportation during periods of high water, it is not navigable.").

Here, it is apparent from the face of the TNW Determination that the Santa Cruz River's normal flow is substantially less than the peak flow. For example, while the mean monthly discharge at the Continental gage station since 1940 has varied from 0.43 cfs to 76 cfs, the maximum peak flow at that same station was approximately 45,000 cfs in the early 1980s, and the minimum peak flow has exceeded 1,000 cfs 63 times (approximately once each year) since 1940. TNW Determination at 3. The data presented in the TNW Determination show a similar pattern for the other gage stations. In order to determine the ordinary or normal flow rate, therefore, Colonel Magness should have eliminated peak (i.e., flood) flows by, for example, calculating the mean or average flow rate without considering the 25 highest daily mean flows to exclude periods of temporary flooding.

Instead, peak flows apparently are discussed in the TNW Determination to show that for a few weeks each year (or less) the Santa Cruz actually carries more than a few cubic feet per second of water. Compare, e.g., *Alhna*, 891 F.2d at 1402 (stating that the normal flow in the river at issue varies from 3,600 to 4,800 cfs from May through September). The issue, again, is

<sup>3</sup> In *United States v. Utah*, by contrast, the special master had determined that portions of the Colorado River specifically determined that the river's "susceptibility of use as a highway for commerce was not confined to exceptional conditions or for short periods of temporary high water, but that during at least nine months of each year the river ordinarily was susceptible of such use ... ." *Id.* at 87.

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the "ordinary condition" of the Santa Cruz River, not its peak flows during flood events, as the courts have repeatedly stated.

Even more troubling is the failure of Colonel Magness to acknowledge the role that sewage effluent plays in maintaining minimum flows in both study reaches. The base flow in Study Reach A is regulated by the Nogales International Wastewater Treatment Plant ("NIWIP"), which is located near Rio Rico, Arizona, approximately 10 miles south (upstream) of the Tubac gage station. The NIWIP discharges between 8.8 mgd and 16.0 mgd of sewage effluent into the Santa Cruz River every month. According to the Environmental Protection Agency "[t]he volume of effluent discharged from the NIWIP is directly but not completely correlated with the length of the above ground portions of the Santa Cruz River. This length, depending on season and year, currently averages about 26 km (16 miles)." *Environmental Assessment for Nogales International Wastewater Treatment Plant (NIWIP) Upgrade/Expansion*, 1-36 (Region IX, U.S.E.P.A.).<sup>6</sup> See also *id.* at 1-17 ("it is clear, however, that during the vast majority of the time, the primary contributor to surface flow downstream of the NIWIP is the volume of effluent discharged to the Santa Cruz River"). Similarly, the USGS has stated that base flow at the Tubac gage station "is regulated by [the] sewage treatment plant at Rio Rico. No natural flow for most of each year." USGS, *Water Resources Data Arizona: Water Year 1999, Water-Data Report AZ-99-1*, 179 (2000) (emphasis supplied).

Study Reach B is likewise dominated by sewage effluent. Pima County operates and maintains two metropolitan area wastewater treatment facilities, which are located near the Santa Cruz River at Roger Road and Ina Road. In fact, the southern (upstream) limit of Study Reach B is the Roger Road sewer plant's outfall. TNW Determination at 1. The combined treatment capacity of those facilities is 78.5 mgd, and they collectively discharged over 52,000 acre-feet of effluent directly into the river in 2007. Pima County Regional Wastewater Reclamation Department, *2007 Effluent Generation Report* 3.<sup>7</sup> As a consequence, virtually all of the flows recorded in Study Reach B are the result of the discharge of sewage effluent into the river. For example, the USGS has stated that most of the base flow at the Trico Road gage station, located in the northern (downstream) portion of Study Reach B, consists of effluent discharged from the Ina Road sewer plant, which is located 17.6 miles upstream. USGS, *Water Resources Data* at 191.

Remarkably, the TNW Determination fails to squarely address the fact that the "ordinary" flow in both study reaches consists primarily (if not completely) of sewage effluent. Instead, the TNW Determination cryptically notes, for example, that ADEQ "has adopted water

<sup>6</sup> This environmental assessment and other background information on the NIWIP's operations are available at <http://www.epa.gov/usmexicoborder/infrastructure/nogales/waste.html> (last visited July 23, 2008).

<sup>7</sup> This report is available at [http://www.pima.gov/www/reports/index\\_reports.htm#effluent](http://www.pima.gov/www/reports/index_reports.htm#effluent) (last visited July 23, 2008).



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quality standards for the Santa Cruz River for partial body contact." TNW Determination at 4. Full body contact is, for obvious reasons, not permitted, nor can this water be used to irrigate crops for human consumption.<sup>8</sup>

Colonel Magness disregarded both flood flows and effluent discharges to conclude that data from the Tubac, Cortaro and Trico Road gage stations indicate that "during most days" from July to October and during approximately half of the months of December and January, "there is sufficient flow in the Santa Cruz River within the Study reaches to float a canoe." TNW Determination at 4. As explained above, to the extent there is water within the study reaches during those periods, it is the result of a combination of flood flows caused by precipitation events and the discharge of sewage effluent. Neither condition represents the ordinary or normal condition of the river.

**b. Two "Boating" Stunts Do Not Establish Navigability.**

The concluding pages of the TNW Determination contain a hodgepodge of irrelevant information, including references to two instances where the Santa Cruz River was allegedly "navigated." TNW Determination at 5. These activities consisted of two largely unsuccessful attempts to float a small boat on the river immediately following a flood event. *Id.* at Exhibit G ("additional navigation documentation"). According to this documentation, in August 2005, a Tucson radio station intern launched a raft "in the flooded Santa Cruz River," but managed to get out of the river before he was located by police officers. A Tucson fire department official stated that this stunt was irresponsible and unsafe. This news story highlights that during flood events, the Santa Cruz River is not susceptible to navigation but is, instead, a safety risk.

The other documentation is a news story that was published in October 1994, describing an event that apparently occurred in 1993 "after the January floods." *Id.* This news article, which is written in a humorous style, highlights the difficulty of boating on the Santa Cruz River, even after a significant flood event. It appears that the would-be boaters began approximately one mile south of Tubac, had their canoe immediately capsize when it slammed against a tree, but were ultimately able to travel about three miles of the river and into a portion of Study Reach A. The article mentions another, earlier attempt to "navigate" the river following a flood event

<sup>8</sup> ADEQ has classified the Santa Cruz River from the NIWTP outfall to Tubac Bridge and from the Roger Road wastewater treatment plant outfall to Baumgartner Road in southern Pinal County as "effluent-dependent waters." See A.A.C. R18-11-113(D)(7). ADEQ has also classified the reach of the Santa Cruz River from the Tubac Bridge north (downstream) to the Roger Road wastewater treatment plant outfall as ephemeral, which is defined as "a surface water that has a channel that is at all times above the water table, and that flows only in direct response to precipitation." A.A.C. R18-11-101(22) & App. B. Thus, ADEQ has classified all of Study Reach A as an ephemeral water.

<sup>9</sup> Major flooding occurred in much of Arizona during January 1993, as evidenced by Exhibit D of the TNW Determination. According to that document, a peak flow of 37,400 cfs was recorded on January 19, 1993 at the USGS gage in Tucson.



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in 1914, noting that the boat failed to reach its intended destination in Tucson and was, instead, dragged out of the river and used as a watering trough for cattle.

These stunts, while amusing, do not support the TNW Determination. To the extent they are relevant, they highlight the fact that the Santa Cruz River is unsafe and cannot be navigated during periods of peak flow. The balance of the TNW Determination discusses a number of additional, unhelpful facts, such as the potential for tourists to visit the river and engage in activities such as hiking, horseback riding and birding. TNW Determination at 4, 5. Obviously, the possibility that out-of-state tourists may visit the area and hike along the river due to its easy access is irrelevant to the issue of whether the river is "susceptible of being used, in [its] ordinary condition, as [a] highway[] for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. at 563.

For these reasons, we believe that Colonel Magness' determination that Study Reaches A and B are navigable waters of the United States has no legal or factual basis. Accordingly, we ask that Corps headquarters vacate the TNW Determination. We also ask that Colonel Magness be instructed to apply the correct *Daniel Ball* test for determining whether other Arizona water bodies constitute a TNW. If you have any questions or require additional information, please contact at the National Association of Home Builders: Susan Asmus, Staff Vice President, Environmental Policy, [REDACTED]@nahb.com, (800-368-5242 x[REDACTED]); or Duane Desiderio, Staff Vice President, Legal Affairs, [REDACTED]@nahb.com, (800) 368-5242 x[REDACTED].

Sincerely,



William P. Killmer  
 Group Executive Vice President, Advocacy  
 National Association of Home Builders



President and Executive Director  
 Home Builders Association of Central Arizona



Edward P. Taczanowski  
 President  
 Southern Arizona Home Builders Association

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Enclosures: Report, Findings and Determination of Arizona Navigable Stream Adjudication  
Commission, Regarding Santa Cruz River, October 18, 2006

c: Colonel Thomas H. Magness, Commander, Corps Los Angeles District (by Federal Express)

2022668161

**Wilson, John M HQ02**

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**From:** Blaine, Marjorie E SPL  
**Sent:** Monday, August 04, 2008 4:06 PM  
**To:** Wilson, John M HQ02  
**Subject:** RE: TNW questions and answers

Max

Thanks for the info. I appreciate your efforts on all this.

Wow...you did have a great trip. I'm so glad you saw the flycatchers and the Elegant Trogon. Lucky guy! Too bad about the Harris hawks. Next time you are here, I'll take you out to the golf course :)

Take care,

Marjorie

-----Original Message-----

**From:** Wilson, John M HQ02  
**Sent:** Monday, August 04, 2008 12:59 PM  
**To:** Blaine, Marjorie E SPL; Wood, Lance D HQ02  
**Subject:** RE: TNW questions and answers

Marjorie,

Lance and I have both emphasized the distinction between the definition of "the navigable waters of the United States" for purposes of the Rivers and Harbors Act of 1899 and traditional navigable waters for purposes of the Clean Water Act to the Pentagon officials. I am fairly comfortable that Craig, Chip, and Dave understand that there is a legal distinction between RHA navigable waters and CWA TNWs and that making a CWA TNW determination does not implicate the navigation servitude. The Pentagon staff consulted with Corps staff after returning from the trip, but they are keeping the progress of their review close so I don't know where things currently stand.

The birding in SE Arizona was spectacular. I ended up seeing several Vermillion Flycatchers as well as several different species of hummingbirds, the amazing Elegant Trogons, several amazing species of warbler including Lucy's, Grace's, Black-Throated Grey, and Painted Redstarts, four different species of Tanager, Swainson's Hawk, and a White-Tailed Kite among many, many other birds. I tried to find a Harris Hawk, but missed that one. I will definitely be back.

Thanks again for taking the time to put together such an informative trip.

Max

Max Wilson  
Assistant Counsel  
Environmental Law and Regulatory Programs  
Office of the Chief Counsel  
U.S. Army Corps of Engineers  
Ph. 202-██████████

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**Cohen, Martin R HQ02**

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**From:** Cohen, Martin R HQ02  
**Sent:** Saturday, August 09, 2008 5:27 PM  
**To:** Inkelas, Daniel HQ02; Petit, Russell W HQ02  
**Subject:** Fw: T&I NEWS RELEASE: Oberstar, Waxman Demand Answers from Corps

**Attachments:** TNW.pdf



TNW.pdf (316 KB)

This was sooooo predictable. Let us NEVER underestimate the power of Ms. Albrecht to influence the powers that be with merely a sweet whisper in the ear!

Martin Cohen  
Assistant Chief Counsel  
For Litigation  
US Army Corps of Engineers

Sent From My Blackberry

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**From:** Troxel, Tiffany A SPL  
**To:** Kuz, Annette B SPD; McAndrew, Maureen A SPD; Wood, Lance D HQ02; Wilson, John M HQ02; Inkelas, Daniel HQ02; Cohen, Martin R HQ02; Gruis, Tracy N HQ02  
**Sent:** Thu Aug 07 17:05:05 2008  
**Subject:** FW: T&I NEWS RELEASE: Oberstar, Waxman Demand Answers from Corps

FYSA, on press release below, and letter from Congress to the ASA, attached.

Tiffany A. Troxel  
Office of Counsel  
U.S. Army Corps of Engineers  
PH: (805) [REDACTED]  
FAX: (805) [REDACTED]

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**Troxel, Tiffany A SPL**

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**From:** Smith.DavidW [REDACTED]  
**Sent:** Tuesday, August 05, 2008 10:16 AM  
**To:** Blaine, Marjorie E SPL; Castanon, David J SPL; Cohen, Mark D SPL  
**Subject:** Fw: Home Builders Assoc re: Santa Cruz River.

**Attachments:** Killmer\_Taczanowski\_National\_Homebuilders\_re\_determination\_of\_Two\_reaches\_of\_Santa\_Cruz\_as\_navigable\_25Jul08.pdf



Killmer\_Taczanowsk  
\_National\_H...

You've probably seen this but as it probably greatly influenced HQ thinking, though we should be prepared to refute these arguments as best we can. My thought was that we should push back on the notions that:

- high flow conditions should be ignored (though I would note that even without considering flood flows, there's sufficient flow to boat)
- ordinary condition means not considering higher flows or treated effluent contributions to flows
- evidence of actual navigation should be ignored (though if there were even anecdotal evidence of more boating, it might help)

Would be interested in hearing how you're reacting to this letter.

Thanks  
David Smith  
Chief  
Wetlands Regulatory Office (WTR-8)  
EPA Region 9  
75 Hawthorne Street  
San Francisco, CA 94105  
(415) [REDACTED]

----- Forwarded by DavidW Smith/R9/USEPA/US on 08/05/2008 10:03 AM -----

Donna  
Downing/DC/USEPA  
/US

To  
Rachel Fertik/DC/USEPA/US@EPA,  
08/05/2008 08:03 AM Stacie Craddock/DC/USEPA/US@EPA,  
DavidW Smith/R9/USEPA/US@EPA,  
Rose Kwok/DC/USEPA/US@EPA  
cc

Subject  
Fw: Home Builders Assoc re: Santa  
Cruz River.

Hi Rachel, Stacie, Rose, and Dave S.:

FYI, attached is a letter from NAHB on TNWs and specifically the navigability call on the Santa Cruz. We got it here this morning, but the July 25 date suggests it has helped shape the Army Corps' HQ position on the Santa Cruz. I'm fairly sure it was written for NAHB by Virginia Albrecht; it uses many of her phrases and arguments.

Rachel Stacie, and Rose, I'm sending it to you because its arguments are relevant to our interagency staff discussions on TNWs. Dave, I'm sending it to you just in case you don't have it yet.

-- donna

(See attached file:  
Killmer\_Taczanowski\_National\_Homebuilders\_re\_determination\_of\_Two\_reaches\_of\_Santa\_Cruz\_as\_navigable\_25Jul08.pdf)



McGlynn, Kathleen A Ms ASA(CW)

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**From:** Woodley, John P Jr Mr ASA(CW)  
**Sent:** Wednesday, August 13, 2008 12:44 PM  
**To:** Schmauder, Craig R Mr OGC, Earl H Stockdale [REDACTED],  
Steven L Stockton [REDACTED]  
**Cc:** Dunlop, George Mr ASA(CW)  
**Subject:** Santa Cruz

Craig, Steve and Earl--Ben Grumbles has indicated to me that EPA will take over the navigability determination for the Santa Cruz. All work on this matter by all Corps personnel should cease at once. No Army official or employee is authorized or permitted to make any statement whatever to any person regarding this matter and all inquiries must be referred to my office for response as appropriate. Please acknowledge this message as soon as possible. Thank you very much.  
Best,  
J P Woodley

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**McGlynn, Kathleen A Ms ASA(CW)**

---

**From:** Grumbles Benjamin [REDACTED]  
**Sent:** Monday, August 18, 2008 11:44 AM  
**To:** Woodley, John P Jr Mr ASA(CW)  
**Subject:** Special Cases

**Attachments:** Ltr to Woodley re LA and Santa Cruz Rivers 08-17-08.pdf



Ltr to Woodley re  
LA and Santa...

Per our phone conversations, here is the letter I'm sending to you today. Also, here's my message to the press (if/when they call): "EPA is working closely with the Corps of Engineers to use our Clean Water Act regulatory tools to protect the nation's vital waterways. Our coordinated efforts on the Los Angeles River and Santa Cruz River will help ensure environmental protection and regulatory predictability consistent with recent Supreme Court decisions." Thanks for your partnership.

(See attached file: Ltr to Woodley re LA and Santa Cruz Rivers 08-17-08.pdf)

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D. C. 20460**

OFFICE OF  
WATER

August 17, 2008

The Honorable John Paul Woodley, Jr.  
Assistant Secretary of the Army (Civil Works)  
Department of the Army  
108 Army Pentagon  
Washington, D.C. 20310

Dear Secretary Woodley:

I want to begin by emphasizing my appreciation for your personal efforts to coordinate with me and the U.S. Environmental Protection Agency (EPA) as we work to clarify the scope of Clean Water Act (CWA) jurisdiction following the U.S. Supreme Court decision in *Rapanos v. United States*. I know we share the goal of implementing an effective, efficient, and equitable CWA Section 404 regulatory program for protecting the Nation's vital waterways. Thank you for your leadership as we coordinate to ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions being conducted under CWA Section 404 are both consistent with the *Rapanos* decision and are environmentally protective.

In this regard, the agencies have recently coordinated in assessing the jurisdictional status of two rivers in the Corps Los Angeles District. The Los Angeles River in California and the Santa Cruz River in Arizona have been the focus of legal and policy evaluations in determining their status as traditional navigable waters (TNW) under our regulations. These two cases raise important legal and policy issues in light of the extensive case law regarding the definition of traditional navigable waters and because of special environmental and climatic factors found in the arid Southwest.

Recognizing the issues raised by these two cases and EPA's role under the CWA in establishing the geographic scope of jurisdiction for all programs under this statute, I have decided to invoke the coordination procedures established in the 1989 Army/EPA *Memorandum of Agreement Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the CWA* (MOA). With this letter, I am designating the Los Angeles and Santa Cruz Rivers as Special Cases under the MOA and, therefore, EPA Headquarters will make the final determination of their jurisdictional status under the CWA. I understand that the Los Angeles District has already made a decision regarding the TNW status of certain segments of the Los Angeles River and EPA will, of course,

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respect the Corps decision as a final determination regarding those portions. The Office of Water will coordinate with EPA Region IX, the Office of General Counsel, and your office in assessing the relevant legal and policy issues and ecological characteristics in determining the jurisdictional status of these rivers under 33 C.F.R. § 328.3 and 40 C.F.R. § 230.3 of our regulations. We will work with you to complete this review in a timely manner.

Thank you again for your effective leadership in clarifying the scope of CWA jurisdiction in light of *Rapanos*. I look forward to working closely with your office as we coordinate to complete the CWA determinations that are the subject of the two Special Cases designated by this letter. Please feel free to call me or have your staff contact my Chief of Staff, Greg Peck, with any questions regarding this matter.

Sincerely,



Benjamin H. Grumbles  
Assistant Administrator

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**Wood, Lance D HQ02**

**From:** Wylie, Heather A SPL  
**Sent:** Tuesday, July 08, 2008 4:27 PM  
**To:** Wood, Lance D HQ02  
**Subject:** RE: EPA struggles to enforce CWA

Hi Lance:)

I knew about Virginia Albrecht's influence, over the guidance and over the Santa Cruz River TNW withdraw. It's really unjust that she was allowed to do this. Hang in there, we are lucky we have you!

Hugs and smiles to you, Heather  
(805) - [REDACTED]

-----Original Message-----

**From:** Wood, Lance D HQ02  
**Sent:** Tuesday, July 08, 2008 12:06 PM  
**To:** Wylie, Heather A SPL  
**Cc:** Wilson, John M HQ02  
**Subject:** RE: EPA struggles to enforce CWA

Hello, Heather,

Thank you for sharing. Just in case you do not know this:

The draft Rapanos guidance that the Army and EPA sent over to the CEQ and the White House for review was a reasonably sound draft document that would have allowed the Government to "aggregate" all of the streams in a watershed area when making a "significant nexus" determination, whether those streams had adjacent wetlands or not. But the CEQ/White House made some significant changes in the document that they finally cleared for signature. You can imagine who influenced the high-level decision-makers to make those changes.

So the final Rapanos guidance greatly limits what we can aggregate or evaluate in making a "significant nexus" determination. That has the effect of making it hard to assert jurisdiction over any particular ephemeral or not-relatively-permanent intermittent stream. That result must surely have been anticipated by the high-level decision-makers who insisted on it. Thus it would be surprising if any change is made regarding this issue during the current administration.

Later, Lance

Lance D. Wood  
Assistant Chief Counsel  
Environmental Law and Regulatory Programs U.S. Army Corps of Engineers  
(202) [REDACTED]

Privileged Attorney-Client Communication; Attorney Work Product. Do not release under FOIA.

-----Original Message-----

**From:** Wylie, Heather A SPL  
**Sent:** Tuesday, July 08, 2008 12:35 PM  
**To:** Blaine, Marjorie E SPL  
**Cc:** Magness, Thomas H COL SPL; Vanderbilt, Forrest B SPL; Durham, Mark SPL; Castanon, David J SPL; Markham, John W SPL; Macneil, Spencer D SPL; Troxel, Tiffany A SPL; Swenson, Daniel P SPL; Wong, Kenneth SPL; Cohen, Mark D SPL; Henderson, Bruce A SPL; Szijj, Antal J SPL; Coler, Kari J SPL; Monarres, Laurie A SPL  
**Subject:** RE: EPA struggles to enforce CWA

<http://polfeeds.com/item/Chairmen-Oberstar-Waxman-Question-EPA-on-Clean-Water-Act->

Enforcement

You have to read the actual letters (Scroll to the bottom of the above link.)! Start with Nakayama's attachment! I love her, she appropriately slams the "reach of creek" scope of analysis. She says what I have been saying for over a year now; that the guidance is not consistent with the Rapanos ruling, science or the intent of the CWA and is putting our waters at risk! I couldn't have written it better myself. Thank gosh for Greenpeace that this is in the hands of Waxman and Oberstar now! Maybe we will be rescued from having to implement an illegal piece of "guidance" soon.

---

From: Blaine, Marjorie E SPL  
Sent: Tuesday, July 08, 2008 9:11 AM  
To: CESPL-CO-R  
Subject: FW: EPA struggles to enforce CWA

FYI.  
Marjorie

EPA Enforcement Is Faulted

Agency Official Cites Narrow Reading of Clean Water Act

By Juliet Eilperin <<http://projects.washingtonpost.com/staff/email/juliet+eilperin/>>

Washington Post Staff Writer  
Tuesday, July 8, 2008; Page A06

An official administration guidance document on wetlands policy is undermining enforcement of the Clean Water Act, said a March 4 memo written by the Environmental Protection Agency <<http://www.washingtonpost.com/ac2/related/topic/U.S.+Environmental+Protection+Agency?tid=informline>> 's chief enforcement officer.

The memo by Granta Y. Nakayama, EPA's assistant administrator for enforcement and compliance assurance, was obtained by the advocacy group Greenpeace <<http://www.washingtonpost.com/ac2/related/topic/Greenpeace+International?tid=informline>> and released yesterday by two House Democratic committee chairmen. It highlights the confusion that has afflicted federal wetlands protections since a 2006 Supreme Court decision.

That 5 to 4 decision, known as Rapanos v. United States, held that the Army Corps of Engineers <<http://www.washingtonpost.com/ac2/related/topic/U.S.+Army+Corps+of+Engineers?tid=informline>> had exceeded its authority when it denied two Michigan developers permits to build on wetlands, but the court split on where the Corps should have drawn the line on what areas deserve protection.

A plurality made of up Chief Justice John G. Roberts Jr. <[http://www.washingtonpost.com/ac2/related/topic/John+Roberts+\(Chief+Justice\)?tid=informline](http://www.washingtonpost.com/ac2/related/topic/John+Roberts+(Chief+Justice)?tid=informline)> and Justices Antonin Scalia <<http://www.washingtonpost.com/ac2/related/topic/Antonin+Scalia?tid=informline>>, Clarence Thomas <<http://www.washingtonpost.com/ac2/related/topic/Clarence+Thomas?tid=informline>> and Samuel A. Alito Jr. <<http://www.washingtonpost.com/ac2/related/topic/Samuel+Alito?tid=informline>> proposed an across-the-board reduction in the Corps' regulatory role, but



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Smith, Chip R Mr ASA(CW)

From: Laity, James A [REDACTED]@omb.eop.gov]  
Sent: Wednesday, August 20, 2008 6:43 PM  
To: Smith, Chip R Mr ASA(CW); Evans.David [REDACTED]  
Cc: Fraas, Arthur G.  
Subject: RE TNWs

I am available most of next week. What are your schedules? I think at this point, purpose of meeting should be to identify and frame issues for elevation. Will go more smoothly if all decision makers receive (approximately) the same info in advance. -- jim

PS: Glad to hear JD RGL is out and you have not heard strong objections. Have you heard anything positive (eg, from pipeline operators--does it address their concerns) --jim

---

From: Smith, Chip R Mr ASA(CW) [mailto:[REDACTED]]  
Sent: Wednesday, August 20, 2008 6:10 PM  
To: Laity, James A.; Evans.David [REDACTED]  
Cc: Fraas, Arthur G.  
Subject: Re: TNWs

Jim:

Perhaps we should meet next week. To get up to speed and frame issues. The JD RGL has been out for a month or two at this juncture, and all has been quiet.

Adjacency, we have a staff draft, but remain stuck on a point or two that should be elevated.

TNWs we are way apart. Mr Woodley supports commercial navigation, not a person floating a boat, and he supports current use, with susceptibility being very, very limited with strict criteria. Again, elevation seems the way to go.

Chip

-----  
Sent from my BlackBerry Wireless Device

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----- Original Message -----

From: Laity, James A. <[REDACTED]@omb.eop.gov>

To: Evans.David@epa <[REDACTED]>;  
Smith, Chip R Mr ASA (CW)

Cc: Fraas, Arthur G. <[REDACTED]@omb.eop.gov>

Sent: Wed Aug 20 16:34:16 2008

Subject: TNWs

Dave/Chip: I see Ben has announced that EPA will make the Santa Cruz River a special case because it raises broader policy issues. I assume the interagency work group will have a chance to discuss and resolve these issues before EPA issues any determination.

I have been buried with other stuff lately and have let Rapanos slip, but I think we need to move quickly to get something out in the next month. Where do we stand on 1) PJDs v JDs (did the Army ever issue a revised RGL), 2) TNWs, and 3) Adjacency. What do you two see as the next steps. Should we elevate adjacency or is there anything more to be done at the staff level. You recall that DOJ told us that it was essentially a policy call, and I believe policy makers are not in agreement, so we probably need to let them start resolving it. Susan, and I'm sure CEO, will want to be involved in any such discussion.

-- jim

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