

Congress of the United States
Washington, DC 20515

August 7, 2008

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

Dear Secretary Woodley:

Two recent actions by the U.S. Army Corps of Engineers (Corps) raise serious concerns about the role of the Corps in the deterioration of the Clean Water Act¹ program.

We have learned that the Corps is engaged in a process of determining whether waters throughout the United States are “traditionally navigable waters” (TNW), a designation that generally makes a body of water, including wetlands, subject to the Clean Water Act. These actions appear to be in response to the Supreme Court’s decision in *Rapanos v. United States*,² and the regulatory processes of the Corps and the Environmental Protection Agency (EPA) for determining Clean Water Act jurisdiction pursuant to the implementing guidance issued by EPA and the Corps in June 2007.³ These determinations will have dramatic and lasting implications for implementation of the Clean Water Act, including federal and state authorities to prohibit, limit, or protect against discharges of toxic chemicals, raw sewage, and oil into the nation’s waters, as well as the agencies’ ability to achieve the goals of the Act to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”

Reports of two recent determinations by the Corps for the Santa Cruz River in Arizona and the Los Angeles River in California cause us grave concern that the Corps (and EPA) may be interpreting the scope of the Clean Water Act in contravention of the law. For instance, we are concerned that the Corps’ justification for determining what waters qualify for Clean Water Act protections, as described in Appendix D of the 2007 implementing guidance, is based on the restrictive definitions of the Rivers and Harbors Appropriations Act of 1899 (Rivers and Harbors Act) rather than those of the Clean Water Act.⁴ Reliance on the Rivers and Harbors Act definition of “navigable waters” for the purposes of determining the jurisdictional reach of the Clean Water Act would be contrary to the explicit language of the Corps’ regulations,⁵ decades-

¹ Formally known as the Federal Water Pollution Control Act.

² 126 S.Ct. 2208 (2006).

³ U.S. Environmental Protection Agency and U.S. 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).

⁴ 33 U.S.C. 1362(7).

⁵ 33 CFR 329.1 (2007).

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old legal precedent,⁶ and the opinions of the plurality and Justice Kennedy in the *Rapanos* decision.⁷

On May 23, 2008, the Los Angeles District of the Corps of Engineers issued a final, signed determination that two reaches of the Santa Cruz River in Arizona would be considered traditionally navigable waters. However, less than two months after the determination was issued, the press reported that the Corps suspended the Santa Cruz River determination, and the determination document was “temporarily removed” from the Corps’ public website “pending further policy review.”⁸ This occurred during the same timeframe in which the Corps received a letter from the National Association of Home Builders (NAHB) criticizing the Santa Cruz River determination and asserting that the scope of this TNW determination, and by implication the authority of the Clean Water Act, should be limited to waters “previously regulated by the Corps under the Rivers and Harbors Act.”⁹ Utilization of the approach recommended in the NAHB letter would have serious adverse impacts on the entire Clean Water Act program. For instance, this approach could result in the removal of 96% of the state of Arizona’s surface waters from Clean Water Act protections.¹⁰

In March 2008, the Los Angeles District of the Corps of Engineers prepared a draft traditionally navigable water determination for the Los Angeles River in California which concluded that only the portion of the river influenced by the tide was a traditionally navigable water. Under this draft determination, the rest of the river would not be considered a TNW. This draft determination raised serious uncertainties regarding whether the river’s tributaries and much of the Los Angeles River basin might be excluded from Clean Water Act jurisdiction. When the Corps issued a final TNW determination for the Los Angeles River in June 2008, the Corps determined a second segment of the river within the Sepulveda Basin was also a TNW. However, because the June 2008 determination finds so little of the Los Angeles River to be a

⁶ See *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

⁷ See 126 S. Ct. at 2220 (quoting Scalia, J. “...the Act’s term ‘navigable waters’ includes something more than traditionally navigable waters”) and 126 S. Ct. at 2241 (quoting Kennedy, J. “Congress . . . must have intended a broader meaning for navigable waters [apart from waters ‘presently used’ or ‘susceptible to use’ in interstate commerce]”).

⁸ U.S. Corps of Engineers, webpage stating “This document has been temporarily removed pending further policy review” (online at www.spl.usace.army.mil/cms/files/projects/santacruz/Signed_Santa_Cruz_River_TNW_Determination.pdf) (visited Aug. 4, 2006).

⁹ Letter from William Kilimer, National Association of Home Builders, et al. to Assistant Secretary John Paul Woodley, Jr. (July 25, 2008).

¹⁰ See Comments of Director Steven Owens, Arizona Department of Environmental Quality, Docket EPA-HQ-OW-2002-0282 (*Rapanos* Guidance).

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TNW, the river's tributaries and much of the Los Angeles River basin may lose their Clean Water Act protections.

We understand that the Corps has planned or is undertaking similar TNW determinations throughout the United States. However, the Santa Cruz River and Los Angeles River determinations are particularly troubling because they seem to have been carried out in an *ad hoc* manner, seemingly subject to complete reversal or suspension without any clear and objective standards. The Corps' failure to use a clear and transparent standard for determining the reach of the Clean Water Act will erode the public's confidence in the agencies' permitting and enforcement activities. The uncertainty generated by these actions diverts resources and undermines federal and state efforts to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

As part of our ongoing investigation, we request that you provide our Committees with complete and unredacted copies of all communications relating to the TNW determinations for the Los Angeles River and the Santa Cruz River. This request includes communications within the Corps (District offices, Division offices, and Corps Headquarters), communications with EPA (both Region 9 and EPA Headquarters), other interagency communications (with the White House or any federal department or agency), and communications with persons outside of the federal government. We request that these communications be provided to the Committees no later than August 25, 2008.

In addition, we request that you answer the following questions and provide the following information by August 25, 2008:

1. What is the administration's definition of a navigable-in-fact water for the purposes of the Clean Water Act? What is the administration's definition of a traditionally navigable water for the purposes of the Clean Water Act? Please explain the legal difference between these two terms, if any, in the context of jurisdiction of the Clean Water Act?
2. Is there a formal administration policy for determining the status of navigable-in-fact waters? Is there a formal administration policy for determining the status of traditionally navigable waters? Are the policies implemented consistently in all Corps Districts? Provide a copy of all documents articulating these policies. If there are no documents articulating these policies, please describe the policies, including all guidelines for navigable-in-fact or TNW determinations.
3. Please describe the statutory, regulatory, or other authority for the Corps and/or EPA to conduct navigable-in-fact or TNW determinations. Please also include a specific explanation of the legal authority of the Corps to utilize the regulatory definition for "navigable waters of the United States" found at 33 CFR Part 329 for determining the jurisdictional reach of the Clean Water Act in light of the explicit prohibition that "This

definition does not apply to authorities under the Clean Water Act which definitions are described under 33 CFR parts 323 and 328.”¹¹

4. What is the formal or informal role for the EPA to review or revise navigable-in-fact or TNW determinations that have been finalized by the Corps? Provide copies of all documents that establish the EPA role, including a description of the specific points in the navigable-in-fact and TNW determination process at which EPA may review, revise, or otherwise affect the determination. Please explain how this formal or informal role for EPA is consistent with the *Civiletti* memorandum concerning the ultimate administrative authority of EPA to interpret the term “navigable waters” under section 404 of the Clean Water Act.¹²
5. Provide a list of all completed and pending navigable-in-fact or TNW determinations. This list should include the name of the waterbody subject to the determination, the segment of the waterbody under review (i.e., river mile or other geographic designation), the Corps District Office and EPA Region in which the determination is ongoing or has occurred, information on any associated jurisdictional determination process, whether EPA has or had a consultative role in the navigable-in-fact or TNW determination, whether EPA concurs or concurred in the navigable-in-fact or TNW determination, and a description of any public involvement in the navigable-in-fact or TNW determination.
6. Prior to a Corps determination of whether a water is a navigable-in-fact water or a traditionally navigable water, is there an implied presumption that a water is or is not a navigable-in-fact water or a traditionally navigable water? That is, what and where is the burden of proof? Provide all documentation regarding the development and use of any such implied presumption.

The Committee on Transportation and Infrastructure has jurisdiction over the Clean Water Act and its implementation. The Committee on Oversight and Government Reform is the principal oversight committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X. An attachment to this letter provides additional information about how to respond to the Committee’s request.

¹¹ 33 CFR 329.1 (2007).

¹² 43 Op. Att’y Gen. 197 (1979).

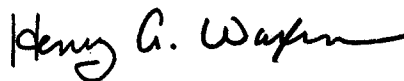
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If you have any questions concerning this request, please contact Ryan C. Seiger of the Committee on Transportation and Infrastructure at (202) 225-0060 or Greg Dotson of the Committee on Government Reform and Oversight at (202) 225-4407.

Sincerely,



James L. Oberstar
Chairman
Committee on Transportation
and Infrastructure



Henry A. Waxman
Chairman
Committee on Oversight
and Government Reform

cc: The Honorable Stephen L. Johnson, Administrator

John L. Mica
Ranking Minority Member
Committee on Transportation and Infrastructure

Tom Davis
Ranking Minority Member
Committee on Oversight and Government Reform