

Congress of the United States
Washington, DC 20515

July 7, 2008

The Honorable Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Johnson:

We are writing because of our grave concerns over the current status of implementation of the Clean Water Act. Since 1972, the Clean Water Act has achieved remarkable progress in improving the water quality of the nation's rivers, lakes, and streams. New information obtained by our Committees indicates that enforcement of key provisions appears to be faltering.

An effective and robust enforcement regime is central to protecting the nation's waters and fulfilling the goals of the Clean Water Act. We have obtained an internal document from the Environmental Protection Agency (EPA) that indicates that the Supreme Court's decision in *Rapanos v. United States*, combined with guidance to implement the decision issued jointly by EPA and the Army Corps of Engineers, has resulted in significant adverse impacts to the clean water enforcement program. This document was provided to us by the environmental group Greenpeace and appears to be authentic.

This internal document is a March 4, 2008, memorandum from Granta Y. Nakayama, EPA's Assistant Administrator for Enforcement and Compliance Assurance, to Benjamin Grumbles, EPA's Assistant Administrator for Water.¹ In the memorandum, Assistant Administrator Nakayama examines the implications of the *Rapanos* decision, which failed to produce a controlling majority opinion, but, instead, produced three distinct opinions on the appropriate scope of Federal authorities under the Clean Water Act: (1) the Scalia "relatively permanent/flowing waters test, supported by 4 justices; (2) the Kennedy "significant nexus" test; and (3) the Stevens dissenting opinion, supported by the remaining 4 justices, advocating for maintenance of existing EPA and Corps authority over waters, including wetlands.² Assistant Administrator Nakayama also assesses the implementing guidance issued by EPA and the Corps in June 2007.³

¹ 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).

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).

Mr. Nakayama concludes that the decision and the implementing guidance are having a “significant impact on enforcement” and calls for revisions to the guidance in order to “significantly improve the predictability and efficiency” of the enforcement program.⁴

In the memorandum, Mr. Nakayama states: “Data collected from the regions shows that a significant portion of the CWA enforcement docket has been adversely impacted.”⁵ He also states: “The *Rapanos* decision and the resulting Guidance have created uncertainty about EPA’s ability to maintain an effective enforcement program with respect to other CWA obligations.”

According to Mr. Nakayama, the *Rapanos* decision and the guidance “negatively affected approximately 500 enforcement cases” in just nine months.⁶ The memorandum indicates that between July 2006 and December 2007, the agency made a conscious decision not to pursue enforcement of as many as 300 Clean Water Act violations because of the jurisdictional uncertainty created by the *Rapanos* decision and the guidance. This represents a sizable proportion of EPA’s approximately 1,000 civil administrative and judicial enforcement cases under sections 311, 402, and 404 of the Clean Water Act undertaken in FY 2007. Mr. Nakayama’s memo also identifies “147 instances where the priority of an enforcement case was lowered” due to the *Rapanos* decision and the guidance and 61 enforcement cases in which the *Rapanos* decision and guidance provided an affirmative defense to polluters.⁷

This sudden reduction in enforcement activity will undermine the implementation of the Clean Water Act and adversely affect EPA’s responsibility to protect the nation’s waters. Yet instead of sounding the alarm about the EPA’s enforcement problems, the agency’s public statements have minimized the impact of the *Rapanos* decision. On April 16, 2008, when Assistant Administrator Grumbles testified before the Committee on Transportation and Infrastructure about the implementation of the Clean Water Act after *Rapanos*, Mr. Grumbles failed to inform the Committee that approximately 500 enforcement cases had been negatively affected.⁸ Mr. Grumbles also did not inform the Committee that the head of EPA’s Office of Enforcement and Compliance Assurance recently told him that *Rapanos* and the guidance had created uncertainty about EPA’s ability to maintain an effective enforcement program. Instead, he said that *Rapanos* and the guidance had “generated the important benefit of greater

⁴ 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).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Testimony of Benjamin H. Grumbles, Assistant Administrator, U.S. EPA, before the House Committee on Transportation and Infrastructure (Apr. 16, 2008).

coordination among” EPA’s clean water programs, including the Office of Enforcement and Compliance Assurance.⁹

Our Committees are investigating these enforcement problems. To assist our Committees’ investigation into this matter, we request that you provide our Committees with complete and unredacted copies of (a) communications between EPA regional offices and EPA headquarters relating to the data collected and referenced in the March 4, 2008, memorandum from Assistant Administrator Nakayama to Assistant Administrator Grumbles; (b) communications within each EPA regional office relating to the March 4, 2008, memorandum; and (c) all other communications related to the March 4, 2008, memorandum from Assistant Administrator Nakayama to Assistant Administrator Grumbles. Please provide the communications referenced in (a) and (b) by July 14, 2008, and the communications referenced in (c) by July 21, 2008.

We also request that you answer the following questions and provide the following information by July 21, 2008:

1. The guidance states that it relates only to those provisions at issue in *Rapanos* and does not address or affect other subparts of the EPA and Corps of Engineers regulations or response authorities. Nevertheless, EPA data indicate that EPA regional offices have applied the guidance when identifying violations for both the National Pollutant Discharge Elimination System (NPDES) permit program (section 402) and Oil Spill (section 311) enforcement programs.
 - a. Does the guidance apply in cases other than interpreting Clean Water Act jurisdiction for discharges subject to permitting under section 404? What are EPA’s policies (formal or otherwise) regarding the impact of the *Rapanos* decision and the guidance on jurisdiction under sections 402 and 311 of the Clean Water Act? Is this policy consistent with actions taken by EPA regional offices?
 - b. Do the EPA regional offices use the guidance in making jurisdictional determinations under sections 402 and 311? If so, under what authority or direction are EPA regional offices applying the guidance to the section 402 and 311 programs?

If not, please reconcile that position with the table provided by Associate Administrator Christopher Bliley in his correspondence to Chairman Oberstar dated March 21, 2008, titled “Effects of *Rapanos* on EPA’s Civil Enforcement Program, Summary of Regional Responses, Covering Period of July 2006 through

⁹ *Id.*

December 2007.” Also, please provide a similar, updated table for the period January 2008 through June 20, 2008.

2. Please provide all guidance and documents from each EPA region regarding each region’s policies regarding the relationship between the *Rapanos* decision and guidance and establishing jurisdiction under sections 311, 402, and 404 of the Clean Water Act, including for enforcement actions for violations of the Act.
3. Assistant Administrator Nakayama referred to “uncertainty about EPA’s ability to maintain an effective enforcement program” and stated that a “significant portion of the CWA enforcement docket has been adversely impacted.” What entity or office, or what individual or position, at each EPA regional office and at EPA headquarters is responsible for decisions to either pursue or not pursue formal and informal enforcement actions for suspected Clean Water Act violations in light of the uncertainty about EPA’s jurisdiction identified by your Assistant Administrator? Is this the same entity, office, individual, or position that determines whether to “lower the priority” of an enforcement action based on the uncertainty about EPA’s jurisdiction?
4. When EPA makes jurisdictional determinations for enforcement actions regarding violations of sections 311, 402, and 404, are such determinations made with an implied presumption of jurisdiction or non-jurisdiction for intermittent and ephemeral tributaries to traditionally navigable waters and headwater streams, including associated wetlands for such waters?
 - a. If there is an implied presumption of non-jurisdiction, what is the policy justification for this presumption, and what is the legal basis for making such a presumption? Please provide all documents that include EPA and other executive agency deliberations regarding this policy or practice.
 - b. If there is an implied presumption of non-jurisdiction, please explain how this presumption is consistent with the stated goal of the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”
 - c. If there is an implied presumption of non-jurisdiction, please clarify EPA’s statement to Chairman Oberstar, dated May 15, 2008, that “...EPA and the 45 states authorized to issue NPDES permits, *as a standard practice*, do not question CWA jurisdiction when a discharger applies for a permit....” [Emphasis added].
5. To what extent has EPA’s Criminal Enforcement Program regarding Clean Water Act violations been impacted by the *Rapanos* decision and the guidance? Please provide all documents involving these impacts.

The Honorable Stephen L. Johnson


July 7, 2008

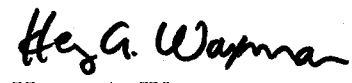
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The Committee on Transportation and Infrastructure has jurisdiction over the Clean Water Act and its implementation. The Committee on Oversight and Government Reform is the principal oversight committee in the House of Representatives and has broad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

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

Sincerely,


James L. Oberstar
Chairman
Committee on Transportation
and Infrastructure


Henry A. Waxman
Chairman
Committee on Oversight
and Government Reform

Enclosures

cc: John L. Mica
Ranking Minority Member
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Tom Davis
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