# 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.

TABLE OF CONTENTS

## BACKGROUND

On June 19, 2006, the Supreme Court issued a ruling in the case of *Rapanos v. United States*.[1] 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.[2]

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[1] *Rapanos v. United States*, 376 F. 3d 629 (2006).

[2] 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.[3]

On July 7, 2008, Chairman Oberstar and Chairman Waxman wrote to EPA to request documents relating to the Clean Water Act enforcement program.[4] 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.[5] 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.[6] 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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[3] 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).

[4] Letter from Chairman Oberstar and Chairman Waxman to EPA Administrator Stephen Johnson (July 7, 2008).

[5] 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).

[6] 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.[7] In the memo, Mr. Nakayama warned that the *Rapanos* decision and the Administration's guidance have "negatively affected approximately 500 enforcement cases."[8] 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."[9]

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."[10] 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."[11]

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.[12]

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.[13] This represents nearly half

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[7] 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).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] E-mail from James Vinch to Kenneth Champagne (Feb. 5, 2008; 2:55 p.m.).

[12] *Id.*

[13] 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.[14]

### 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."[15]

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.[16]

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.[17]

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."[18] It added: "Certain spill responses that would have historically merited EPA response action have not been acted upon."[19]

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[14] *Id.*

[15] E-mail from Nelson Smith to James Vinch (Jan. 10, 2008; 10:05 a.m.).

[16] 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").

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

[18] *Id.*

[19] *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.[20]

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."[21]

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

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."[24]

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.[25]

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."[26] 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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[20] E-mail from Martha Wolf to Craig Matthiessen, et al. (Jan. 7, 2008; 5:06 p.m.).

[21] 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.).

[22] E-mail from David Smith to Alexis Strauss (Oct. 31, 2007; 1:06 p.m.).

[23] *Id.*

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

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

[26] 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.[27]

### 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.[28]

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."[29]

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."[30]

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."[31]

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[27] *Id.*

[28] Staff notes on e-mail from Mark Pollins to Randy Hill (Feb. 26, 2008).

[29] Staff notes on e-mail from Peter Stokely.

[30] E-mail from Suzanne Rubini to Ronald Mikulak (Jan. 9, 2008; 2:58 p.m.).

[31] 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."[32]

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.[33]

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.[34]

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."[35]

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.[36]

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[32] E-mail from Philip Mancusi-Ungaro to Suzanne Rubini (Jan. 10, 2008; 10:08 a.m.).

[33] E-mail from Suzanne Rubini to James Vinch (Jan. 22, 2008; 5:01 p.m.).

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

[35] Staff notes on Environment Protection Agency, *Overview of New Guidance on Clean Water Act Jurisdiction.*

[36] 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."[37]

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."[38] 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)."[39]

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.[40]

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

[38] E-mail from Michael Hingerty to Laurie Kermish (Jan. 16, 2008; 9:09 a.m.).

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

[40] 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].[41]

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.[42]

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]."[43]

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].[44]

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.[45]

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].[46]

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[41] Environmental Protection Agency, *Stormwater Cases Jurisdictional Presentation* (undated).

[42] 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.).

[43] E-mail from Diane Huffman to James Vinch (Jan. 23, 2008; 11:18 a.m.).

[44] E-mail from Jane Nakad to James Vinch (Jan. 29, 2008; 11:10 a.m.).

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

[46] 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."[47] He then questioned whether there had been "any impacts" on the Clean Water Act enforcement program.[48]

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).[49]

## 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."[50] 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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[47] House Committee on Transportation and Infrastructure, *Hearing on the Clean Water Restoration Act of 2007*, 110th Cong. (Apr. 16, 2008).

[48] *Id.*

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

[50] 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.[51]

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.[52]

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."[53]

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[51] *Id.*

[52] E-mail from David Castanon to Thomas Magness (June 12, 2008; 4:01 p.m.).

[53] 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.[54]

In response, Mr. Schmauder asked: "Why is Mr. Woodley so angered here? Was he surprised?"[55] 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.[56]

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.[57]

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.[58]

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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[54] E-mail from Anne Young to Craig Schmauder (June 13, 2008; 8:02 a.m.).

[55] E-mail from Craig Schmauder to Anne Young (June 13, 2008; 9:01 a.m.).

[56] E-mail from Anne Young to Craig Schmauder (June 13, 2008; 9:53 a.m.).

[57] E-mail from Chip Smith to Anne Young (June 13, 2008; 9:11 a.m.).

[58] E-mail from Mark Cohen to Chip Smith (June 13, 2008; 5:55 p.m.).

District."[59] 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."[60]

### 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.[61]

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.[62]

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.[63]

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[59] E-mail from Anne Young to Craig Schmauder (June 13, 2008; 10:58 a.m.).

[60] E-mail from Thomas Magness to John McMahon (June 13, 2008; 4:50 p.m.).

[61] E-mail from Kelly House to George Dunlop (June 20, 2008; 11:41 a.m.).

[62] E-mail from George Dunlop to Chip Smith (June 20, 2008; 1:40 p.m.).

[63] 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."[64] He stated: "I doubt this is what this Administration stands for."[65] He also stated: "George, please do not pass this on and probably best to delete entirely."[66] Mr. Dunlop replied: "I understand what you are saying."[67]

### 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."[68]

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 pursuade [sic] Mr. Woodley otherwise.[69]

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.[70]

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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[64] E-mail from Kelly House to George Dunlop (June 25, 2008; 8:05 a.m.).

[65] *Id.*

[66] *Id.*

[67] E-mail from George Dunlop to Kelly House (June 25, 2008; 2:01 p.m.).

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

[69] E-mail from Jennifer Moyer to James Hannon (June 30, 2008; 8:18 p.m.).

[70] 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."[71]

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.[72]

On the next day, July 1, 2008, Col. Magness again consulted with his superior, Brig. Gen. McMahon. 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.[73]

Col. Magness also consulted Annette Kuz, Brig. General McMahon'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 recission."[74] 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.[75]

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.[76]

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[71] E-mail from Marjorie Blaine to Tiffany Troxel (June 30, 2008; 5:43 p.m.).

[72] E-mail from Lawrence Minch to Thomas Magness (June 30, 2008; 1:31 p.m.).

[73] E-mail from Thomas Magness to John McMahon (July 1, 2008; 5:50 a.m.).

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

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

[76] 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.[77]

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".[78]

Mr. Woodley responded: "I doubt we will need 60 days."[79]

**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.[80]

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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[77] E-mail from Lance Wood to Michael Kapaun (July 3, 2008; 2:53 p.m.).

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

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

[80] 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.[81]

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."[82]

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.[83]

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."[84]

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.[85]

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.[86]

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[81] E-mail from David Castanon to Wade Eakle (July 6, 2008; 10:18 p.m.).

[82] E-mail from Wade Eakle to David Castanon (July 7, 2008; 6:46 a.m.).

[83] E-mail from Wade Eakle to John McMahon (July 18, 2008; 3:50 p.m.).

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

[85] E-mail from George Dunlop to Gregory Peck (July 18, 2008; 3:11 p.m.).

[86] 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."[87] 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."[88]

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.[89]

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."[90]

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.[91] 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."[92]

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."[93] One Corps of Engineers attorney expressed his view of the process:

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[87] E-mail from Steven Stockton to Linda Morrison (July 29, 2008; 7:34 a.m.).

[88] E-mail from Steven Stockton to Chip Smith (July 29, 2008; 8:46 a.m.).

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

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

[91] Letter from William P. Killmer, et al., to J.P. Woodley (July 25, 2008).

[92] E-mail from George Dunlop to Craig Schmauder (Aug. 4, 2008; 4:47 p.m.).

[93] 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![94]

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."[95] Another EPA employee told his colleagues that "it probably greatly influenced HQ thinking."[96]

### 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.[97]

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.[98] On December 3, 2008, Mr. Grumbles sent a letter to Mr. Woodley affirming the original navigability determination.[99]

## 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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[94] E-mail from Martin Cohen to Daniel Inkelas and Russell Petit (Aug. 9, 2008; 5:27 p.m.).

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

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

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

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

[99] 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.[100]

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."[101] These e-mails reinforce contemporaneous press accounts of lobbyist influence on the June 2007 guidance.[102]

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."[103]

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.[104]

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[100] E-mail from Lance Wood to Heather Wylie (July 8, 2008; 12:06 p.m.).

[101] E-mail from Heather Wylie to Lance Wood (July 8, 2008; 4:27 p.m.).

[102] *See, After Lobbying, Wetlands Rules Are Narrowed*, New York Times (July 6, 2007).

[103] Staff notes of e-mail from James Vinch (Jan. 16, 2008; 8:12 a.m.).

[104] 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."[105] 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.[106]

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."[107]

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."[108] 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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[105] Staff notes on e-mail from Rachel Furtik to Rose Kwok (Feb. 20, 2008).

[106] Staff notes on e-mail from Rachel Furtik to Rose Kwok (Feb. 20, 2008).

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

[108] 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).