

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
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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:			3. Any case where lack of CWA jurisdiction has been asserted by the alleged discharger as an affirmative defense to an enforcement action.	Overlap
		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.		
1	1 (404)	1 (OPA)	2 (402)		1 (404); 1 (402)	1
2		1 (402)			1 (402/404)	0
3	4 (402/404)			6 (402)	4 (402/404)	0
4	13(OPA); 8(402)	2 (402)	2 (402); 2 (404)	2 (402); 5 (404)	14 (404)	10

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

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

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
TOTALS	304	25	26	80	61	37

* 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.

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 Tate/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

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.

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 Oberstar'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


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

To Craig Mattiessen/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

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]

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- [REDACTED]

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 oil.wpd



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: Rapanos 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: Rapanos 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: Rapanos Issues for SEA ☐

One minor note involves and r
Amy C. Miller

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)
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75 Hawthorne Street
San Francisco, CA 94105
(415) [REDACTED]

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

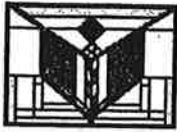
Subject WTR8 Weekly Report- Rapanos/NPDES issue

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
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(415)-[REDACTED]



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]
[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

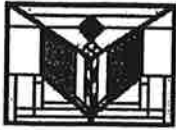
cc

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

David Smith
Chief
Wetlands Regulatory Office (WTR-8)
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San Francisco, CA 94105

(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] finition 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] opposed 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.

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] was 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

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.

is 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 r and s 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]



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:



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?

ATTORNEY WORK PRODUCT/ATTORNEY CLIENT PRIVILEGE - DO NOT RELEASE
Ronald Mikulak/R4/USEPA/US

Ronald
Mikulak/R4/USEPA/US
01/09/2008 12:19 PM

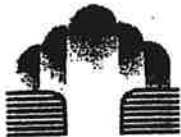
To Suzanne Rubini/R4/USEPA/US@EPA
cc Mike Wylie/R4/USEPA/US@EPA, Philip
Mancusi-Ungaro/R4/USEPA/US@EPA, Tom
Welborn/R4/USEPA/US@EPA
Subject Re: Fw: Response to Oberstar Request

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

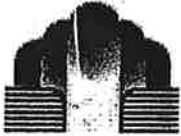
To Suzanne Rubini/R4/USEPA/US@EPA
cc Philip Mancusi-Ungaro/R4/USEPA/US@EPA, Ronald
Mikulak/R4/USEPA/US@EPA, Tom
Welborn/R4/USEPA/US@EPA
Subject Re: Fw: Response to Oberstar Request

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



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-██████████.



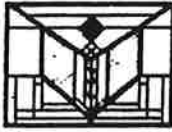
Oberstar.wpd

ATTORNEY WORK PRODUCT/ATTORNEY CLIENT PRIVILEGE - DO NOT RELEASE

Attorney Client

Communication

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



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: ██████████

CONFIDENTIALITY NOTICE : This message is being sent by or on behalf of an attorney. It is intended exclusively for the individuals or entities to whom

Kuefler/R5/USEPA/US

01/14/2008 09:53 AM

cc Joan Karnauskas/R5/USEPA/US@EP,
Swanson/R5/USEPA/US@EPA, Thon
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:

**Storm Water Cases
Jurisdictional Presentation**

Issue:
Whether sufficient evidence exists to initiate
Clean Water Act § 402 storm water enforcement
in the [redacted] watershed
after Rapanos v. U.S.

Prepared at the Request of EPA
Counsel -Attorney Client Privilege

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 (hyperlinked above)

[3]

[4]

_____ confluence is at _____ at the southern edge of _____
, 90 miles east of _____ 71 miles north 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) and for a discussion of the OHWM in Arid Regions ERDC

SLIDE #14-16

No speaker notes for these slides.

SLIDE #17

Note: The Order Stream, 1 in the U.S. By comparison, a 7th Order Stream is the and a 8th Order Stream is the 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 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

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

SLIDE #19

[2]
Current Recreational Boating in the

July 3, 2007

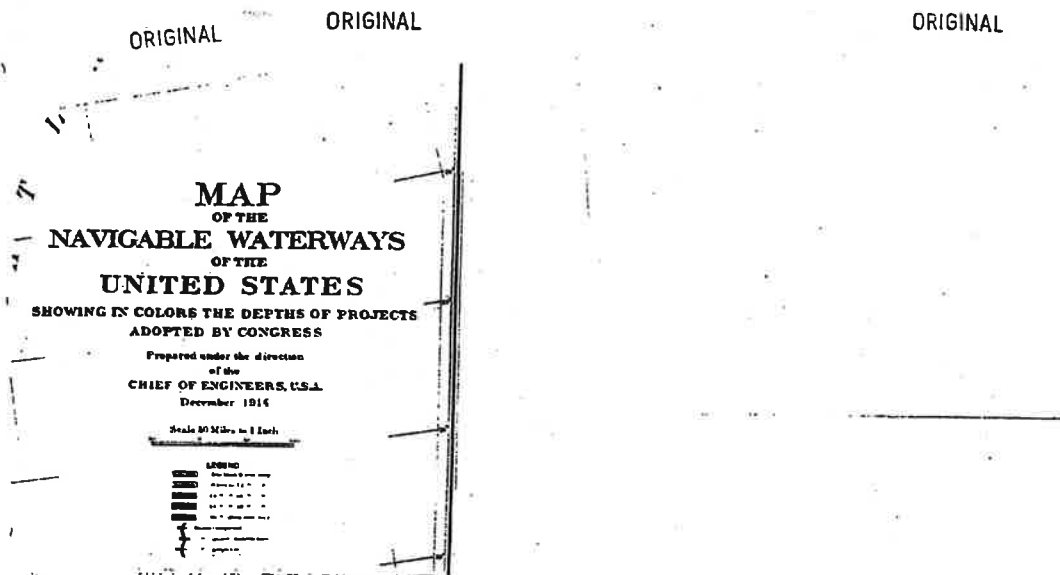
Class II white water rapids in
area used for boating; and
who boat in the area

businesses rent and sell boating equipment to individuals

n

SLIDE #20

[1]
Dams and groundwater pumping initiated in early 1900s limited perennial reaches of
across .. See also "Map of the Navigable Waterways of the United States" prepared by
Corps (December 1914), which shows : as navigable across . (Exhibit 96-004-
012 in , Navigability Stream Adjudication Comm'n hearings).



[2]
Because the crosses the state from east to west it was historically very important as a
travel corridor (Tellman et al., 1997). Documented uses of the river include water supply for
irrigation, recreational and commercial boating, fishing and recreation.
Historical boating in the ; according to the State
Lands Department:
• Regular use of small boats on the in 1800s by people traveling to
• Ferry boat operations in 1890s until 1900s in the ! area including the
• Use of boats in late 1880s for travel during high flows between
(

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 _____

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]. [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 [redacted].

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 "gauge." 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; 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

[2]

Ephemeral backwaters and disconnected side channels held the highest abundance and diversity of larvae and juveniles [of arid-land fishes] (Pease AA, et al.); Riverine waterholes are biodiversity hot spots in the landscape, which sustain biota during dry periods and function as refugia (Morton et al., 1995 and Hamilton, 2005).

[3]

Movement/Dispersal corridors: The aquatic pathway is a well-documented mechanism of dispersal in ... dryland rivers and may be the only mechanism utilized by some [macroinvertebrate] taxa (Marshall, et al., 2006); dace and pupfishes disperse to temporary habitats during flooding, and suckers migrate to spawning grounds (Kingsford, et al., 2006).

Waterfowl mediated gene-flow and long-distance dispersal in aquatic invertebrates ... even local movements can have a major role in the dispersal of aquatic organisms that cannot move between catchments via flotation, fish, or other means (Figuerola, et al. 2003; Green, et al., 2005)

*ORD is gathering literature on southwest ephemeral and arid streams with a focus on the
Their analysis of the literature will be available in December 2007.

SLIDE #32

[1]

Cienegas are extremely rare aquatic resources; spring fed riverine marshlands adjacent to the floodway of the river
~95% of the low to mid-elevation cienegas have been lost

SLIDE #33

[1]

See generally,

[2]

See generally,

SLIDE #34

[1]

The Workgroup Report, 2006:
See Assessment Linkage is an extensive area that includes the reach of the and connects the with the mountain ranges. This linkage area provides important corridors for movement of wildlife in the area. See also Assessment Linkages (hydrology at issue include numerous Creeks and Washes, and the the primary identified threats are: "De-watering of rivers," "Highway," "Mining," "Railroad," and "Urbanization."); see also Linkages

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:

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 Y 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

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

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] t, 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]

This email may contain confidential information that is attorney-client privileged, attorney work product or deliberative. Do not distribute outside of Federal government.



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- [REDACTED] Fax: 913- [REDACTED]

----- 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	spill history	spill to storm drain to unnamed intermittent trib.	Higbee
	NON	SPCC	*Not checking Double Walled Tank intersitial Space *Not doing Intregrety testing required by Plan		Burns
	Traditional	Spill	2000 gal. spill, sheen observed	spill to intermittent trib	Higbee
	NON	SPCC	*No NRC # * Did not follow rule sequence *No discussion of overfill prevention *No Discussion of Pipe Supports	All Plan violations no equipment problems	Burns
	Traditional	SPCC	* No Fence * No Contalnmnt for Rack * Not complying with SPCC Plan * No evidence of 5 yr review	*Refused to take SEEP in 8/05 *Case getting old	Burns
	Traditional	Both	No plan, inadequate containment, spill	spill to intermittent creek	Higbee
	NON	SPCC	*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	Burns



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 [REDACTED]

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.

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.¹

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,

¹ *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 1890.²

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.³

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

² History of Navigation of the Santa Cruz River by Don Bufkin, citation unknown.

³ 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.⁴ 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.⁵ 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, 1996.⁶

C. The peak flow charts demonstrate the frequency of flows which exceed 1,000 cfs.⁷ 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

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

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

⁶ Ibid

⁷ <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.⁸ All three stations indicated flows with depths varying from 1-2 feet and no precipitation had occurred for approximately 6 weeks.⁹ 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 flows¹⁰. A list of the large magnitude peak flow events of the Santa Cruz River over the last 100 years is provided at Exhibit D.¹¹

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.¹² 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.¹³ 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

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

⁹ Personal observation, Marjorie Blaine, Senior Project Manager, Regulatory Division, Tucson Project Office

¹⁰ Ibid

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

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

¹³ 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


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]
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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
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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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COL Michael Donovan
XO ASA-CW

108 Army Pentagon
Room 3E446
Washington DC 20310-0108

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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,
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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

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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
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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
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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.

Page 1

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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
Page 2

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Santa Cruz River TNW Data
Environment, Tribal and Regulatory Affairs
108 Army Pentagon 3E427
Washington, D.C. 20310-0108
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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- (office)
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602- (cell)

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

From: Susan Benaron [mailto:]
Sent: Thursday, June 05, 2008 3:15 PM
To: Fred Huntington; Mark Chenault;
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 <. 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]

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

From: Kelly House [mailto:[REDACTED]@geldoradoholdings.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.
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602-██████████ (office)
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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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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)

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 5:50 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 recission.

We'll see what happens next. VR

Annette B. Kuz
Assistant Chief Counsel/Division Counsel
USACE South Pacific Division

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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

ATTORNEY WORK PRODUCT-DO NOT COPY, RELEASE OR RETRANSMIT

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)

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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]

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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: McMahon, 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 Anzona

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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T&IHOGRA-7AUG08-00005107

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



Killmer_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

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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.

I. 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
Page 2

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 Magness 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

Hon. John P. Woodley, Jr.
July 25, 2008
Page 3

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.¹ 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.² 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.

¹ *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.

² See e.g., *Minnahaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 621-22 (8th Cir. 1979).

Hon. John P. Woodley, Jr.
 July 25, 2008
 Page 4

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").³ 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."

³ 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, archaeology, 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 long 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.⁴ 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 Tellman, 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

⁴ 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. Ahtia, Inc.*, 891 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 Coxtaro 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 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)⁵. 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

⁵ 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 ("NIWTP"), which is located near Rio Rico, Arizona, approximately 10 miles south (upstream) of the Tubac gage station. The NIWTP discharges between 8.8 mgd and 15.0 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 NIWTP 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 (NIWTP) Upgrade/Expansion*, 1-36 (Region IX, U.S.E.P.A.).⁶ 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 NIWTP 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* 3.⁷ 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

⁶ This environmental assessment and other background information on the NIWTP's operations are available at <http://www.epa.gov/usmexicoborder/infrastructure/nogales/waste.html> (last visited July 23, 2008).

⁷ This report is available at http://www.pima.gov/wwm/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.⁸

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.*⁹ 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

⁸ 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.

⁹ 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



Connie
 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)

2088538.1

National Association of Home Builders • 1201 15th Street, N.W. • Washington, D.C. 20005
Toll Free: 800-368-5242 x8200

T&IHCOGR-7AUG08-005205

Wilson, John M HQ02

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

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

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,
Stacie Craddock/DC/USEPA/US@EPA,
DavidW Smith/R9/USEPA/US@EPA,
Rose Kwok/DC/USEPA/US@EPA
cc

08/05/2008 08:03
AM

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)

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McGlynn, Kathleen A Ms ASA(CW)

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,

A handwritten signature in black ink, appearing to read "B. H. Grumbles", written in a cursive style.

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; Sziijj, 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 CEQ, will want to be involved in any such discussion.

-- jim

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