



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

DEC 3 2008

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

OFFICE OF  
WATER

Dear Secretary Woodley:

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

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

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

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

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

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

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

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

Sincerely,



Benjamin H. Grumbles  
Assistant Administrator

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

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