

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

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-----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.