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# Board of Supervisors Memorandum

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August 18, 2008

## Clean Water Act Compliance

### I. Introduction

Pima County has complied with the Clean Water Act since enactment in 1972. Since enactment we have continuously interacted with various regulatory agencies of the Corps of Engineers as well as the Environmental Protection Agency in administering the Act and will continue to do so in the future. It is only because of past, and possible continuing, private litigation over applicability of the Act to private property that the present issue arises.

As has been stated previously to the Board, the Supreme Court Rapanos decision did little to clarify applicability of the Clean Water Act to variously defined waters, rivers, and streams as well as wetlands of the United States, as well as regulation of private property. Hopefully, Congress will provide further clarification which would be helpful. The Corps of Engineers has now redefined applicability through administrative guidelines as opposed to formal rule-making. The process for determining federal jurisdiction has been confusing to everyone involved. Added to the complexity of the Supreme Court decision is the dual administration and management of various sections of the Clean Water Act between federal and state agencies.

Staff supports the Clean Water Act to protect our valuable riparian environments. Administration of the Act needs to be based on a sound legal and technical foundation.

### II. Recent Board Direction

After the special meeting on July 18, 2008, a resolution was prepared and presented to the Board on August 5, 2008. In addition, an alternative resolution was prepared by the Coalition for Sonoran Desert Protection. After discussion, the Board directed staff to communicate to the U.S. Army Corps of Engineers that the Board's position and preference are that the Santa Cruz River and other watercourses in Pima County receive the highest possible continued protection under the Clean Water Act. The attached letter was directed to Colonel Thomas Magness, articulating the Board's stated position at the August 5, 2008 meeting. The Board continued the resolutions to the meeting of August 18, 2008, to gather stakeholder input and other information. To that end, a letter has been addressed to stakeholders in the discussion, which obviously would include the Board of Realtors, the Southern Arizona Homebuilders Association, the Coalition for Sonoran Desert Protection, the Audubon Society and possibly others. Other interest groups are welcome to join in the discussion. A comprehensive discussion cannot be undertaken by August 18, 2008, because of the insufficient time to arrive at a consensus resolution. In consultation with the Executive Director of the Coalition for Sonoran Desert Protection, the attached resolution should substitute for both previous resolutions.

### III. Contradictions in Concepts of Navigability and Unintended Consequences

Clean Water Act regulatory authority that relies upon any definition of navigability is a confusing concept, particularly in the arid west. Tying the concept of dry wash navigability to the protection of ephemeral streams and watercourses from pollution, contamination, encroachment and destruction are difficult common sense linkages. The Clean Water Act and its interpretation uses "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce . . ." This is the language and rationale upon which the Corps of Engineers Los Angeles District has based their Traditional Navigable Water designation of the Santa Cruz River. Unfortunately, there are other definitions and other sets of rules and regulations regarding certain components of these watercourse systems that arise and cause confusion and/or contradiction of these concepts. A few are listed below.

1. The original government land office survey failed to establish the meander boundary of the Santa Cruz River or other navigable water bodies in the original government land office surveys dated from the late 1800's to early 1900's. In the manuals of instruction for the original government land office surveys of public lands, the original definition of navigable waters in these manuals of survey instructions indicates "The beds of navigable bodies of water are not public domain and are not subject to survey and disposal by the United States. The sovereignty is in the individual states. Under the laws of the United States, the navigable waters have always been and shall forever remain on common highways." The survey of public lands original instructions indicate "All bodies of navigable water and other important rivers and lakes (as hereinafter described) are to be segregated from the public lands that mean high water elevation. The traverse of the margin of a permanent natural body of water is termed a meander line." Review of all of the original government land office surveys that would encompass the townships containing the Santa Cruz River indicate that the Santa Cruz River was never meandered in the terms of the original instruction as to the survey of public lands for the purpose of identifying a navigable water body. It is clear to me that the Santa Cruz River has never been navigable, in fact.
2. The Arizona Navigable Streams Commission on October 18, 2006, issued an opinion that the Santa Cruz River from Nogales to the Gila River was not navigable, based on a state statute applying different standards and for different purposes than the federal law. This non-navigable decision is based on a number of reviews of navigability of the Santa Cruz River. The Commission determined that the Santa Cruz River was non-navigable as of the date of statehood, February 14, 1912.
3. Ownership Contradictions of a Navigable Waterway - A fundamental concept of a navigable stream or river designation is that the ownership of the bed of the navigable body, in this case being the river, vests in the state or the federal government rather than private parties or a local government. In the arid west where ephemeral streams are dominant, the bed of a navigable waterway may move from time to time. The decision

on navigability on the date that is most important is the date of statehood when title to the navigable stream would have been vested in the state. To complicate matters, the actual location of the bed of a major ephemeral watercourse at statehood may be entirely different today. Well documented over the various floods on the Santa Cruz River and other tributaries is the significant lateral migration that occurs during flood flows. This lateral migration may move the bed of the river a few hundred feet to several thousand feet. These erosional changes in the bed of the river are well-documented in a number of studies, including the well-documented erosional effects and change of streambed location in the October 1983 floods that devastated Pima County. Hence, not only is the issue of ownership of the bed of the river at stake in navigability studies, but the actual location of the bed at the time of statehood is also in question due to floods that have caused significant locational changes in the bed of the watercourse.

4. Effluent Dominated Santa Cruz River and Long-term Assurance of Navigability - Presently, 53,700 acre feet of properly treated effluent is discharged to the Santa Cruz River in the metropolitan Tucson area, supporting its navigability and, in particular, the "recreational water craft" discussion in the memorandum dated May 23, 2008 on the determination by the Corps of Engineers regarding the Traditional Navigable Water designation for the Santa Cruz River. The practical ownership of the discharged effluent is as follows. Bureau of Reclamation 28,200 acre feet in trust for satisfying claims associated with the Southern Arizona Water Rights Settlement Act. Another 17,500 acre feet is owned by the City of Tucson, 3,000 acre feet allocated to Pima County, and 5,000 acre feet attributable to other water providers pursuant to an agreement between the City of Tucson and these other water providers. In addition, in 2005, the total effluent generated in these metropolitan wastewater treatment plants was 69,000 acre feet, of which 15,300 acre feet was reclaimed for reuse before discharge. Long-term water plans of the region's largest water provider, Tucson Water, indicate substantial future reuse of effluent and diminishing discharge to the Santa Cruz River at the time, hence reducing the practicality of recreational water craft navigation.
5. Arizona Department of Environmental Quality Triennial Water Quality Review and Restrictions on Discharging Effluent Waters to the Santa Cruz River - The Arizona Department of Environmental Quality Triennial Review has indicated future effluent water discharges to the Santa Cruz River will be limited or potentially eliminated. In particular, the Arizona Department of Environmental Quality seeks to limit effluent water streams from reaching the Ak-Chin Indian Reservation in Pinal County. Present discharges dictate the length and distance of effluent flows. The present flows may from time to time be near or reach the Ak-Chin Reservation. Hence, the County may be required by the Arizona Department of Environmental Quality to begin removing these flows from the Santa Cruz River, further impairing recreational water craft navigability and potentially adversely affecting established riparian vegetation in the Santa Cruz River that has become dependent on effluent flow.

Unfortunately, it is not up to Pima County or any other local government to sort out these contradictions, even though we may be burdened with their contradictory interpretations between federal and state agencies. It is the responsibility of the Corps of Engineers in the area of navigability and traditional navigable definitions, as well as the Environmental Protection Agency, to state clearly what watercourses are regulated by the Clean Water Act based on the most recent Supreme Court decision. It is these contradictions that add to the confusion over applicability and administration.

#### **IV. Staff Concerns Related to Clean Water Act Administration**

Much has been made regarding the written memorandum and statements of County staff related to the Clean Water Act Traditional Navigable Water designation of the Santa Cruz River and related discussions regarding Section 404 permit issuance and specific project implementation. These communications are being construed as County staff being opposed to environmental policies codified by Pima County, specifically through the Sonoran Desert Conservation Plan. I have reviewed these documents and, as I have indicated previously, it is my view that they are not. The correspondence does indicate some differing staff opinion, but staff debate is not policy. Primarily, these comments reflect the concerns expressed by County staff within implementing public works agencies over how administration and the Clean Water Act, particularly post-Rapanos, would significantly delay or increase the cost of their specific project implementation requirements or obligations. These are legitimate questions and require appropriate analyses and responses. They are not, as has been interpreted, points of view trying to obstruct the environmental policies of the Board.

Staff's concern over the applicability of the Clean Water Act is twofold.

First, the Corps, in applying issues of navigability and tributary rules, has taken jurisdictional oversight over what has been determined the "nth tributary," which means a tributary to a tributary to a tributary to a tributary of a navigable stream. These determinations are made by determining a "Significant Nexus" to a Traditional Navigable Water. These nth order tributaries very often are very small washes that frankly, in some cases, are not even regulated by Pima County's own Floodplain Management Ordinance. Obtaining jurisdictional determination on whether an nth order tributary is subject to the Clean Water Act takes an inordinate amount of time and has been, in some cases, costly, with little environmental benefit. I share staff's concerns in this area and have asked the Deputy County Administrator for Public Works to commission a study related to a number of public projects receiving Section 404 Permits. This study will examine the issuance of at least 20 publicly issued 404 Permits. It will determine the process, time and resources consumed in obtaining said permits, and the measured environmental benefits of permit receipt. These are very often the same concerns expressed by the private sector over Clean Water Act compliance. This Clean Water Act Effectiveness Study is discussed in the following section.

The second issue of concern relates to water quality standards being applied to ephemeral streams and washes, which often lack aquatic habitat. The best example has been concern expressed by other entities over the evolving standards being imposed on stormwater discharges and the fiscal impacts of these compliance requirements to the particular agency's primary mission. We are now reviewing the proposed stormwater permits being issued to the Arizona Department of Transportation, as well as the City of Phoenix, to determine the cost of compliance as well as environmental benefit of the proposed permit. A rule and regulation regarding the environment is only as good as the final outcome, which is to preserve, protect and enhance the environment. A rule and regulation that causes excessive costs or delays of public project implementation with little corresponding environmental benefit requires re-examination and review. This is, frankly, what staff was doing in their discussions on these issues.

#### **V. Clean Water Act Effectiveness Study**

County Public Works has been criticized as lacking in consideration for the natural environment in the permitting and implementation of its projects and, as has been pointed out, the administration of the Clean Water Act has been cumbersome and sometimes difficult. To quantify these issues, I have ordered an effectiveness review of the Clean Water Act application and compliance in Pima County.

Within 120 days, staff, under my direction and that of the Deputy County Administrator for Public Works, and with public review, will provide me an independent program effectiveness review. The review will include consideration of:

1. The original intent and current spirit of the Clean Water Act (CWA).
2. The program as it is locally administered here in Pima County.
3. The program as it is administered elsewhere in the Los Angeles District.
4. What real environmental benefits are and are not being provided by the CWA, as currently administered in Pima County.
5. What CWA functions are already independently provided by local activities.
6. An assessment of regional general permits for Public Works activities.
7. What an ideal program would look like, inclusive of effective alternatives analysis.
8. What "no regrets" steps we could take toward that ideal program, given the flexibilities of the current state of flux in the CWA nationally.

This study will assist us in determining how to better comply with application of the Clean Water Act to yield improved benefits to the community.

#### **VI. Certain Concerns May Be Resolved**

In the middle of the present discussion, the Corps of Engineers issued new guidance on June 26, 2008, that may help immensely with the first issue of concern. The Corps issued Regulatory Guidance Letter Number 08-02, which appears to be intended to address many of the comments of concern made by staff and criticisms by others, as well as public comments at the Board's special meeting of July 18, 2008, to discuss this matter. This guidance would appear to significantly shortcut the jurisdictional determination requirement regarding nth order tributaries. The County can voluntarily assume that an nth order tributary is jurisdictional for appropriate permitting and the consultation with appropriate agencies regarding mitigation. This would appear to reduce the amount of time, effort and money spent to go through the jurisdictional determination process. We will use this process and procedure, now that it is officially available, and report on our experiences. This process hopefully will significantly accelerate environmental compliance and implementation of our public works projects. We have and always will comply with the environmental requirements in place, and in most cases we have always exceeded minimal standards.

#### **VII. State Letter to the Environmental Protection Agency Dated August 7, 2008, Regarding the Clean Water Act**

Attached is a copy of a letter that was directed to the Environmental Protection Agency by the Arizona Department of Environmental Quality. The letter confirms what we know, that the issue of navigability "in fact" is not related to applicability of Clean Water Act jurisdiction. However, it certainly is a factor in ownership issues that would arise regarding ongoing litigation over the determination that the Santa Cruz is not, in fact, navigable by the Arizona Navigable Stream Commission. The fact that the title, if the lands are declared navigable, vests with the state and hence is administered by the State Land Department, is of some concern to the County. Past administration of state lands and, in particular, the difficulty the County has had in attempting to preserve Tumamoc Hill, speaks volumes of our concern regarding State Land administration over publicly owned stream beds of Arizona, including those within Pima County. While some would argue that state administration is very limited under the "public trust" doctrine, our past experience in this area causes us concern, particularly in the area of State mineral or sand and gravel leases.

#### **VIII. Los Angeles District Engineer Position on the Santa Cruz River**

I recently met with the District Engineer, Colonel Thomas Magness, who was in Arizona recently. Washington Headquarters Corps personnel have also recently visited our area on a review and fact finding mission, which the County nor, as we believe, any other parties were invited to attend. It is my belief that Colonel Magness' position regarding his designation of the Santa Cruz River as a traditional navigable waterway for the segments

designated will not change unless overruled by Corps headquarters. It is believed that a decision regarding a Traditional Navigable Water is solely the District Commander's decision and can only be challenged through the federal judicial process. These determinations are beyond the ability of the County to influence or alter; however, we can use our influence in support of the Clean Water Act by passing the attached resolution.

**IX. Previous and Continuing County Protection of Natural County Watercourses and Riparian Areas**

The County has been and continues to be one of the foremost leaders in the environmental protection of our natural riverine environments. The County first adopted the Floodplain Management Ordinance in 1974. This ordinance has been amended numerous times to reflect current state-of-the-art thinking related to floodplain management, flood hazard reduction, and enhancement of the environment. Pima County is the only county in Arizona to have a riparian protection component in our Floodplain Management Ordinance. We also are the only county in Arizona to adopt a planning standard that requires 95 percent of natural riverine riparian areas to be protected and retained in land use change proposals (riparian element of the Sonoran Desert Conservation Plan). We are also the only county in Arizona and perhaps the West, that has an active Floodprone Land Acquisition Program designed to acquire and permanently protect floodprone and riparian areas. We have sponsored and continue to sponsor major environmental enhancement reconstruction projects to reverse historical urbanization and groundwater pumpage damage to our riparian areas. We have constructed, at considerable cost to local taxpayers, riparian restoration projects such as the Cortaro Mesquite Bosque, Swan Wetlands, and the Kino Environmental Restoration Project, as well as numerous small but important projects such as the Cienega Bottomlands Restoration Project, Pantano Jungle Restoration Project in the Cienega Creek Natural Preserve, and have in active planning, a number of other projects such as Paseo de las Iglesias, El Rio Medio, and Tres Rios del Norte along the Santa Cruz River.

**X. Future Pima County Role in Integrating the Multi-Species Conservation Proposal and the Clean Water Act**

One of the most frustrating aspects of complying with the Clean Water Act on a project-by-project basis is that vast sums of money are spent on mitigation without any assurance that the mitigation contributes to riparian conservation on a watershed or regional scale. This problem is similar to the issue of project-by-project mitigation under the Endangered Species Act. Small, unconnected conservation projects will ultimately be less effective than conservation undertaken as part of comprehensive science-based prioritization of resources. We have a good record of undertaking such a comprehensive resource assessment with the Sonoran Desert Conservation Plan, and we will soon be ready to submit a proposal for a federal permit that addresses Endangered Species Act issues as we complete our Multi-Species Conservation Plan in the next months.

Such a process could be undertaken to obtain a permit that assures actual conservation and allows projects to go forward in compliance with the Clean Water Act. Our conservation plan process during the last decade, with its emphasis on riparian resources, actually creates a framework for such an undertaking.

Information generated as part of this process, and as part of the many studies we have already funded and completed for and with the Army Corps of Engineers, could contribute to the establishment of a riparian resource plan. Such a plan then would allow Pima County to pursue a regional permit under the Clean Water Act that, like the federal Endangered Species Act permit, would achieve actual conservation and bring stability and efficiency to economic interests.

There are two established avenues under the Clean Water Act for this regional approach: 1) the Special Area Management Plan (SAMP) option and 2) the Regional General Permit (RGP) option. Regional General Permits expedite permitting for routine activities which are likely to have few impacts. Special Area Management Plans assess impacts on valued aquatic resources on a cumulative basis. One outcome of a Special Area Management Plan process could be Regional General Permits for different activities. Regional General Permits can also be developed separately without a Special Area Management Plan.

In the past, the Special Area Management Plan process has proven costly and time intensive to jurisdictions. There is also a concern that after such an effort, the Regional General Permit process remains more efficient for project proponents. Staff will research both processes and make a specific recommendation based on factual findings of other jurisdictional experience.

In general, I recommend that we proceed in the direction of undertaking a comprehensive science-based prioritization of riparian resources, consistent with the Sonoran Desert Conservation Plan. The Multi-Species Conservation Proposal that will be forwarded to the Board in the next months will contribute to this effort through the conservation, monitoring and management of riparian resources.

The resulting riparian conservation program can form the basis for a Regional General Permit, regardless if it takes the form of a Special Area Management Plan. This will advance the County's interest in achieving meaningful regional conservation and in bringing predictability to the permitting process under both the Endangered Species Act and the Clean Water Act.

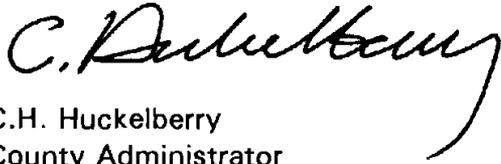
We will initiate discussions with the Corps of Engineers on either a Special Area Management Plan or Regional General Permit and ask all stakeholders to participate in these discussions.

The Honorable Pima County Board of Supervisors  
**Clean Water Act Compliance**  
August 18, 2008  
Page 9

**Recommendation**

It is recommended the Board of Supervisors pass and adopt Resolution No. 2008-\_\_\_\_\_, related to the Clean Water Act.

Respectfully submitted,



C.H. Huckelberry  
County Administrator

CHH/jj (August 14, 2008)

Attachments

Resolution Number 2008 - \_\_\_\_\_

**Resolution of the Pima County Board of Supervisors Affirming  
Pima County's Commitment to the Clean Water Act**

**Whereas**, the Pima County Board of Supervisors has consistently affirmed its commitment to natural resource conservation and its devotion to environmental sensitivity in implementing all of its projects and programs, and

**Whereas**, the Pima County-adopted Sonoran Desert Conservation Plan and efforts underway to implement its various elements clearly confirm the Board's commitment to minimizing impacts of growth and development on the natural environment, and

**Whereas**, federal environmental regulations are rigorously followed by all Pima County agencies responsible for implementing projects and programs, and

**Whereas**, federal Clean Water Act permits have been solicited and secured for various Pima County projects since the adoption of this law in 1972, and

**Whereas**, recent changes to Section 404 Clean Water Act permit processes incorporate the identification of Traditional Navigable Waters and the determination of Significant Nexus to those Waters to define federal regulatory jurisdiction, and

**Whereas**, the U.S. Army Corps of Engineers has determined that the Santa Cruz River is a Traditional Navigable Water based on a May 23, 2008 Memorandum for the Record, and

**Whereas**, the Board of Supervisors desires to clearly declare its position with regard to adherence to federal regulatory requirements, and

**Whereas**, scientific, cultural and historic data presented by the Corps demonstrate navigability of the Santa Cruz River and the capacity to support and facilitate past and future commerce, such as outdoor recreation including cultural activities as well as the economic activity of national and international tourism,

**Now, Therefore**, be it resolved that the Pima County Board of Supervisors hereby directs staff to undertake the following actions:

1. Acknowledge and approve the Corps regulatory determinations of two segments of the Santa Cruz River as Traditional Navigable Waters within Pima County.
2. Request an Environmental Protection Agency (EPA) determination by Special Case that the entire Santa Cruz River is a Traditional Navigable Water, also known as (a)(1) waters, or that, at a minimum, preserves the Corps' regulatory determinations of two reaches of the Santa Cruz River as Traditional Navigable Waters and take other action to assure Clean Water Act application to Traditional Navigable Waters within Pima County if the designation is challenged by other parties.
3. Request the Governor of Arizona to: A) support EPA determination by Special

Case that the entire Santa Cruz River be designated a Traditional Navigable Water and take all available steps to assure Clean Water Act application to Traditional Navigable Waters within Pima County, and B) instruct the Arizona Department of Environmental Quality to support such action.

4. Advise the Arizona congressional delegation of Pima County's support with respect to proposed federal legislation pertaining to the Clean Water Act clarifying the scope and definition of Waters of the United States (House of Representative Bill 2421 and Senate Bill 1870).
5. Request State assistance to resolve conflicts over the ownership and control of navigable waters, specifically to allow counties and flood control districts, as political subdivisions of the State, to retain ownership and control of any properties under their ownership that are declared navigable waters, subject to the requirements of the public trust doctrine, regardless of jurisdictional location. Further, request the Governor of the State of Arizona to instruct State agencies to support County and Flood Control District ownership of navigable waterways.
6. Request Corps of Engineers and Environmental Protection Agency assistance regarding regulatory protection of all waterways within Pima County.
7. Request Corps of Engineers acknowledgment of the Regional Riparian Restoration element of the Sonoran Desert Conservation Plan and the development of program as well as regulatory incentives to facilitate implementation of this plan and to work cooperatively with the County in developing a Special Area Management Plan to assess impacts on valued aquatic or riparian resources on a cumulative basis.
8. Request Federal, as well as State, assistance to facilitate compliance with the Clean Water Act through the development of a transparent, efficient and standard process for application of, and compliance with, the Act.

Passed, adopted, and approved this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

\_\_\_\_\_  
Richard Elias, Chairman  
Pima County Board of Supervisors

Attest:

\_\_\_\_\_  
Clerk of the Board of Supervisors

Approved as to Form:

  
\_\_\_\_\_  
Deputy County Attorney



## COUNTY ADMINISTRATOR'S OFFICE

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C.H. HUCKELBERRY  
County Administrator

August 8, 2008

Colonel Thomas H. Magness  
United States Army Corps of Engineers  
Los Angeles District  
915 Wilshire Boulevard, Suite 1550  
Los Angeles, California 90017

**Re: Discussion of the Pima County Board of Supervisors and Board of Directors of the Pima County Flood Control District Regarding the Clean Water Act**

Dear Colonel Magness:

The Board of Supervisors continued to discuss issues related to the Clean Water Act and Corps designation of the Santa Cruz River as a Traditional Navigable Water at their meeting of August 5, 2008.

The Board asked that I convey to you their desire to support your designation of segments of the Santa Cruz River as a Traditional Navigable Water. They expressed their desire for the strongest possible environmental protection of the Santa Cruz River as well as all riparian areas of Pima County.

They understand this is a complicated and complex issue; however, they also strongly support your action to designate the Santa Cruz River as a Traditional Navigable Water.

Sincerely,

A handwritten signature in black ink that reads "C.H. Huckelberry". The signature is written in a cursive style.

C.H. Huckelberry  
County Administrator

CHH/jj

c: The Honorable Congressman Raúl Grijalva  
The Honorable Congresswoman Gabrielle Giffords  
The Honorable Chairman and Members, Pima County Board of Supervisors



Janet Napolitano  
Governor

# ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

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Stephen A. Owens  
Director

August 7, 2008

Mr. Benjamin H. Grumbles, Assistant Administrator  
Office of Water  
U.S. EPA  
1200 Pennsylvania Avenue, NW, Mail Code 4101M  
Washington, D.C. 20460

Dear Mr. Grumbles:

I am following up on our conversation on August 4 regarding the "Traditional Navigable Water" (TNW) designation for the Santa Cruz River made by the Los Angeles District Corps of Engineers (the District). As I indicated, the Arizona Department of Environmental Quality (ADEQ) supports the designation and appreciates the efforts of District regulatory staff to ensure Clean Water Act protections for the Santa Cruz River and its tributaries. We are deeply concerned that officials at the Army Corps of Engineers headquarters in Washington, D. C. are considering overturning the District's TNW determination for the Santa Cruz River. We urge the EPA to support the TNW designation.

ADEQ strongly opposes any effort to limit Clean Water Act jurisdiction over the Santa Cruz River and its tributaries. These important surface waters have been protected under the Clean Water Act at least since the 1972 Amendments. Significant issues have been created by the joint *Rapanos* Guidance issued by the Corps and EPA last summer, which inappropriately applies the holdings of the *United States v. Rapanos* Supreme Court decision to streams (the *Rapanos* holding is applicable to wetlands). The application of the *Rapanos* Guidance to tributary streams ignores longstanding Corps and EPA regulations and applicable case law and therefore violates the Clean Water Act.

You asked about the applicability of the findings of the Arizona Navigable Stream Commission to the Corps' TNW designation of the Santa Cruz River. In short, the Commission's findings and authorities relate solely to whether Arizona streams were navigable *in fact* at Arizona statehood in 1912 and have nothing to do with a finding of navigability under the Clean Water Act. As you know, the standard of navigability under the Clean Water Act is "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce . . ." See 33 CFR Section 328.3 and 40 CFR Section 230.3. The District's designation is consistent with the Clean Water Act standard. Any suggestion that the Arizona Commission's findings govern Clean Water Act jurisdiction is simply incorrect.

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Mr. Benjamin Grumbles  
August 7, 2008  
Page 2 of 2

We continue to urge EPA and the Corps to rescind or revise the *Rapanos* Guidance, in accordance with our December 5, 2007 comments and this letter, to ensure that the Clean Water Act protections that have been in place in Arizona for the last 35 years remain in place.

Sincerely,

A handwritten signature in black ink, appearing to read "S.A. Owens", written in a cursive style.

Stephen A. Owens  
Director

cc John Paul Woodley, Assistant Secretary, USACE