

A county exploits a crippled Clean Water Act

By Dick Kamp

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The federal Water Pollution Control Amendments of 1972 have gone from being a powerful tool created by the Nixon administration to prevent and enforce anti-pollution laws at the state and federal level to an excuse to avoid enforcement by cities and counties across the West—including Pima County.

Better known as the Clean Water Act, it boasts statutory authority to control pollution discharges regulated by the Environmental Protection Agency, state and regional agencies, as well as to oversee the U.S. Army Corps of Engineers' job of issuing permits to keep waters flowing.

The breakdown is a result of *United States v. Rapanos*, a Supreme Court decision in June 2006 that addressed the Clean Water Act's ability to protect wetlands that had uncertain connections to bodies of water. The court case addressed the corps' authority under Section 404 of the Clean Water Act to regulate wetlands.

The Rapanos decision resulted in a strange split reflective of the politics of the court. Four members of the court wanted the old authority of the act to apply; four wanted a restrictive interpretation that said that the water had to be flowing for the act to regulate. Justice Anthony Kennedy insisted that there needed to be a "significant nexus" between a streambed and "a navigable water of the United States."

Suddenly, every potential streambed in the country required an analysis of whether it was connected to another that could have or has had watercraft on it before it could be protected from pollution or disruption.

What turmoil this stirred in the West, where the sunsets are magnificent, very little water is perennial and many tributaries to sometimes-peripheral streams are dry. Who knows what all the Supremes were thinking about regarding our arid ecology as they pondered how to regulate the country's waterways.

In 1975, the 9th U.S. Circuit Court of Appeals decided that the old Phelps Dodge Douglas, Ariz., smelter couldn't discharge pollution into a nearby

arroyo under the act; the first of many precedents for the act's broad authority prior to 2006. (An earlier 2001 Supreme Court case did halt protection of isolated waterways for migrating birds, the first step in reducing authority.)

Most attorneys—both pro and con stronger federal enforcement—as well as the EPA's enforcement division, concluded that the Rapanos decision applies to all aspects of the Clean Water Act, not just the corps' Section 404 authority.

In fact, EPA headquarters, according to an internal memo from March released by Congressman Henry Waxman (D-Calif.), has ceased seriously pursuing enforcement of the Clean Water Act at least half the time.

Reform of the act

Congressional efforts are under way to restore the act to its original strength before the Bush Supreme Court left us with thousands of weird decisions to be made such as: "Is the Santa Cruz River navigable?"

This is a question that we should not have to see answered in order to get pollution controlled or diversions into the river regulated.

The Clean Water Restoration Act (HR 2421 and SB 8) is sitting quietly in committee in the House and Senate, introduced by Congressman James Oberstar (D-Minn.) and Senator Russell Feingold (D-Wis). The 176 co-sponsors (including fellow Democrat, Arizona Congressman Raul Grijalva) have set out to restore to the Clean Water Act the authority that Congress had accepted pre-Rapanos. Oberstar-Feingold may require amended language before it can pass through both chambers to be signed by another regulatory-minded president.

Rep. Gabrielle Giffords (D-Ariz.) has not signed on to the bill, although she says she sees its mission as critical. She says she is committed to responding to Oberstar's request, following the April hearing, "to move beyond the rhetoric and address the legitimate concerns about protecting our nation's waters." But her concern, shared by some moderates and conservatives, is that Oberstar-Feingold may grant the act too much authority over private property.

Gov. Janet Napolitano is a strong supporter of Oberstar-Feingold. Water Quality Director Joan Card of the Arizona Department of Environmental Quality, testified on her behalf at an April hearing held by Oberstar that 96 percent of the state watercourses may be in danger of being poorly regulated under the act, a figure also cited by EPA Region 9.

Obama-McCain priorities?

In response to a query as to whether he would make restoration of the authority of the act a priority in his administration, Democratic presidential candidate Barack Obama's chief spokesperson, Shannon Gilson, replied, "A variety of court rulings have left about half of the nation's streams, rivers and over 20 million acres of wetlands less protected than the federal Clean Water Act intended. These decisions also create uncertainty and less predictability for municipalities, businesses and the public."

"Accordingly, waters of the United States should be defined in a way that reflects the vital role that streams and wetlands play in buffering property from the effects of flooding, enhancing water quality, ensuring safe drinking water and providing important habitat," said Gilson, adding that if elected, Obama "will support and sign into law legislation that effectively restores the historical scope of the Clean Water Act, and thereby advances environmental protection, community values and public health objectives."

Several futile attempts were made to obtain comments from Arizona Republican Sen. John McCain on how he would address Clean Water Act problems if elected president.

Industry likes Rapanos:

There are many who do not want to see the Oberstar-Feingold bill pass and who disagree with Obama. It is in their interests to keep big government off their backs.

Among them are the organizations that form WAC—the Waters Advocacy Coalition that presented Congressional testimony hostile to Oberstar's bill at the April hearing. This "grass roots" organization includes 28 influential groups such as the National Mining Association, American Farm Bureau Federation, American Forest and Paper Association, American Public Power Association, Edison Electric Institute, National Association of Home Builders, National Association of Realtors and the National Association of Counties, of which Pima County is a member.

Washington attorney Virginia Albrecht presented the testimony.

According to John Bernal, Pima County Public Works assistant administrator, Albrecht has "assisted the county for several years under contract to the county attorney." (Albrecht left a message for this reporter

with her secretary that she would let Pima County discuss county matters.)

Albrecht is a respected Clean Water Act attorney for the pro-development-industry-mining-agriculture team and has argued before the Supreme Court.

She argued at the hearing that Oberstar-Feingold would impose "more federal regulation ... could have dire and unintended consequences by imposing further regulatory burdens on states and local communities, usurping state authorities."

She called on Congress to "direct EPA and the corps to develop comprehensive regulations that provide greater clarity and predictability regarding the extent and limit of federal jurisdiction."

In other words, to put into concrete that the Clean Water Act will remain clearly defined as weak.

Pima exploits Rapanos

Albrecht apparently advised Pima County officials in their battle to claim that the Rapanos decision is indeed one that must be abided by—especially when it ensures that pollution and water diversion permits will fit individuals' needs.

As far back as November 2007, the county was operating under a memo from John Bernal that suggested that proving navigability should be a county strategy in addressing Army Corps permitting issues in order to try and get some issued. Thousands of such permits are backlogged nationally as a result of Rapanos.

In June, Deputy County Attorney Harlan Agnew presented testimony to ADEQ insisting that the agency could not establish new restrictive pollution regulations unless they proved that the streams were tributaries to navigable waters, while simultaneously asking for special protection for Davidson Canyon – potentially from the proposed Rosemont Mine and other developments near the Santa Rita Mountains.

ADEQ's Card interpreted the testimony as declaring that the state could not regulate pollution—including special protection for Davison Canyon. Did Pima County really care about polluting mines, wondered the agency aloud, or was it playing legal-political games?

Again, under post-Rapanos Clean Water Act world, a nexus to navigable water must be established to get the EPA and the Army Corps to protect such waterways as the Santa Cruz River and tributaries such as the Rillito River or Davidson Canyon.

It became public knowledge in early June that the Los Angeles District office had declared the Santa Cruz River a "traditionally navigable water."

Albrecht played a role in internal county memos, such as one on June 25 that demanded the Army Corps provide better justification for navigability of the Santa Cruz. She may have also assisted ex-Public Works staffer Greg Santos with his 10 pages of draft appeal written at that time against the navigable determination, or perhaps it was the county attorney's office.

Sources in Washington close to the Army Corps have suggested that Albrecht may have met with Army Assistant Secretary John Paul Woodley immediately prior to his mysterious suspension of Santa Cruz navigability status at the beginning of July. Bernal says that the county had no part in a Woodley meeting and nothing is apparent in memos.

If the Santa Cruz is denied navigability determination, this could effectively stop the Army Corps from issuing or denying a permit for the proposed Rosemont mine for its impacts on Davidson Canyon.

On July 18, following newspaper reports on the county policy, the Pima Board of Supervisors called for an investigation of staff to determine if it had been hindering the navigable designation of the Santa Cruz River.

Yet, as recently as July 25, Administrator Chuck Huckelberry wrote to the Army Corps of Engineers to ask whether the county would be subject to the Clean Water Act Section 402 pollution discharge requirements related to storm water control if Pima voluntarily agreed to legal permit conditions addressing obstruction of water ways.

In other words, would the EPA or ADEQ not enforce the Clean Water Act?

In an Aug. 1 letter to EPA Administrator Stephen Johnson, Grijalva said he wants EPA to investigate the Army Corps suspension of Santa Cruz River navigability. If the Corps does not declare the two stretches navigable, he wants the EPA to use their authority to override the Corps, as a "special case" based on unique features, including its crossing international, tribal and other boundaries. Subsequently, EPA "can and must use its authority under the...act ... to declare the whole of the...river...navigable ... so that

the River and its tributaries can continue to be protected from un-permitted pollution and destruction."

Grijalva says that the Santa Cruz case "appears to be the tip of the iceberg" of post-Rapanos damage. He demanded details of EPA Region 9 Rapanos-driven non-enforcement of pollution cases (the majority of them) discussed in the March memo released by Congressman Waxman.

Waxman and Oberstar upped the pressure on the Corps in an August 7 letter demanding explanations for how and why they were analyzing the Santa Cruz and Los Angeles Rivers. Subsequently, on Aug. 18, EPA agreed to become the lead agency to determine whether the entire Santa Cruz River, from the border north, and the L.A. River are "navigable."

Pulling together to end Rapanos disaster

Perhaps Pima County motivations can best be described as myopic. They wanted to move on with public works, they did not want some areas to get regulated where they contend regulations are unjustified. Rather than fighting on behalf of the substance of county concerns, staffers expended a lot of energy and taxpayer dollars exploiting the weaknesses of the Clean Water Act after a bad Supreme Court decision.

Pima County, like other less environmentally sympathetic regional and local governments in the West, has been making a pact with a devil.

The county has been encouraging the long list of growing failures to regulate water in the West and nationally, and these, in turn, are used as precedents by polluters and developers to cower a docile Bush EPA and the Army Corps of Engineers.

Harlan Agnew described to a reporter in June his objections over ADEQ trying to over-regulate sewage discharges and perhaps he is right. John Bernal has been concerned over public works projects in La Canada wash not getting permitted efficiently. Perhaps he is right.

They have been very wrong in aiding and abetting the dismantling of a federal regulatory tool that has saved lives and the environment.

Bernal, the former commissioner of the U.S. Section of the International Boundary and Water Commission under President Bill Clinton, now says, "The winds have shifted in the county" in fighting the Clean Water Act. He adds, "Rapanos has sowed a lot of confusion and it has slowed our ability to get our projects permitted. I guess we need Congressional reform to restore the strength of the Clean Water Act."

He's right, and bipartisan forces need to work quickly to heal this problem just as soon as the next president enters office. If they have problems with Oberstar-Feingold language—then come up with language that will work and get the votes to pass it. They must avoid bureaucratic excuses as to why industry and developments should not have water impacts regulated.

Pima is just one of many local governments exploiting a federal breakdown during an administration that has encouraged federal regulatory ambiguity.

Region 9 EPA staffers have described Southern California towns hostile to regulation that have challenged any Clean Water Act pollution regulations affecting sewage plants and industrial plants located by dry washes.

In Nevada, according to EPA personnel, state and municipal regulatory officials have welcomed Rapanos as an excuse to back off of pollution enforcement.

The revelation that "conservationist" Pima County can act against the interests of conservation can be a regional lesson on balancing development and environmental protection.

The crisis of the Clean Water Act, however, is growing and cities, counties, states and private citizens should be joining together to demand that Congress pass Oberstar-Feingold, and halt the march to return to pre-Nixon water degradation in Arizona and across the country. Senator Obama says he will help.

Sen. McCain's supporters should demand the same from their candidate. The next White House should see this as a top environmental priority.

(Editor's note: Kamp is an environmental liaison for Wick Communications.)