

National Association of Home Builders v. E.P.A.
Civil Case No. 09-0548 (D.C. District Court)

QUESTIONS AND ANSWERS

On March 23, 2009, the National Association of Home Builders, the Southern Arizona Home Builders Association and Home Builders Association of Central Arizona filed a complaint challenging decisions made by the Environmental Protection Agency (EPA) and the Army Corps of Engineers declaring that portions of the Santa Cruz River are “traditional navigable waters.”

The purpose of this document is to explain the circumstances relating to this lawsuit and discuss the claims asserted by the Home Builders and their potential impact.

Q. Where is the Santa Cruz River?

A. The Santa Cruz River is located in southern Arizona. It begins in the Canalo Hills northeast of Nogales, flows south through a small portion of Mexico, and then flows north through Tucson and into Pinal County, where it enters broad plain called the Santa Cruz Flats and becomes a series of non-continuous channels.

Q. Does the Santa Cruz River contain permanent water flows?

A. No. The Santa Cruz River is a discontinuous stream that flows in response to precipitation events and, in recent years, discharges of sewage effluent from wastewater treatment plants. Water flows in most of the river are ephemeral or, at best, intermittent in nature.

Q. What is a “traditional navigable water”?

A. A traditional navigable water (also called a TNW) is a water body that is used, or is susceptible to being used, as a highway of commerce, over which trade or travel may be conducted in the customary modes of trade and travel on water. Put simply, the water body must be used or be capable of being used as a highway for the transportation of goods or people.

Q. Where did this test originate?

A. The test was established by United States Supreme Court in a line of decisions going back nearly 140 years. If the test is met, the water body is subject to regulation by the United States under the Commerce Clause of the Constitution, including federal statutes such as the Rivers and Harbors Act and the Clean Water Act. The water body is also subject to a federal navigation servitude to support its use for trade and transportation.

Q. Did EPA and the Corps declare that the entire Santa Cruz River is a traditional navigable water?

- A. No. The agencies declared that two “study reaches” of the river are traditional navigable waters. One reach, called Study Reach A, begins near Tubac, Arizona, as short distance north of Nogales, and extends north about 20 miles. By most historical accounts, this river reach was ephemeral or intermittent. It currently flows primarily in response to discharges of sewage effluent from the Nogales International Wastewater Treatment Plant and local precipitation events.

The other river reach, called Study Reach B, begins near a wastewater treatment plant in northwest Tucson and extends north about 30 miles to the Pinal County border. This reach has no natural flow for most of the year, and is also dominated by sewage effluent discharged from wastewater treatment plants that serve the Tucson area.

- Q. When were these river reaches declared to be traditional navigable waters?

- A. The initial decision was issued by the Corps of Engineers’ Los Angeles District on May 23, 2008. That decision was elevated to the Corps’ Washington headquarters for further review. Then, in August 2008, EPA designated the Santa Cruz River as a “special case” and conducted its own internal review. On December 8, 2008, EPA’s Assistant Administrator for Water affirmed the Corps’ decision and directed the agency’s regional office to implement the decision in all future actions in the Santa Cruz River watershed, which contains more than 2.3 million acres of land in southern Arizona.

- Q. Was the public notified that the agencies were evaluating whether the Santa Cruz River is a traditional navigable water?

- A. No. The public was not given notice or an opportunity to submit to evidence concerning the river’s navigability. After discovering the Corps’ May 2008 decision, the Home Builders submitted detailed comments to the Corps’ Headquarters, along with a copy of the Arizona Navigable Stream Commission’s 2006 report and finding that the Santa Cruz River was not navigable. This information appears to have been ignored by the agencies.

- Q. What are the Home Builders’ challenges to the agencies’ navigability determination in its new lawsuit?

- A. The Home Builders are asserting two challenges to the agencies’ determination. First, Home Builders contend that the procedures followed by the EPA and the Corps of Engineers were unlawful. As stated, notice was not given to landowners and other interested persons, and interested persons were not allowed to provide comments or otherwise participate in the decision-making process. In short, this was not an open and transparent process, but instead was based mainly on political considerations. The Home Builders believe this process violated the Administrative Procedure Act.

Second, the Home Builders maintain that the agencies’ declaration that portions of the Santa Cruz River are traditional navigable waters was arbitrary and

unlawful. As stated, a water body is a traditional navigable water if it is used, or is susceptible to being used, as a highway for water-borne commerce. Historically, flows in the Santa Cruz River were insufficient to permit the river to be used to transport goods, and the river's current flows are largely the result of discharges from regional wastewater treatment plants. These circumstances do not support the agencies' declaration that the river is a commercially navigable water body.

- Q. If the Home Builders are successful, will discharges of pollutants, such as sewage effluent, into the Santa Cruz River be subject to regulation under the Clean Water Act?
- A. The issues in this case are whether the two reaches of the river are traditional navigable waters under the Supreme Court's test and whether EPA and the Corps of Engineers followed the proper procedures in making their decision. Whether the Santa Cruz River is a "water of the United States" and therefore subject to regulation under the Clean Water Act is not at issue in this case. Even if the Home Builders are successful in their legal challenge and the agencies' decision is set aside, regulation of discharges into the Santa Cruz River will not be precluded.
- Q. If the Santa Cruz River may still be regulated under the Clean Water Act even if it is not a traditional navigable water, why are the Home Builders concerned about the agencies' decision?
- A. Significant legal consequences can result from the determination that a water body is a traditional navigable water. In Arizona, desert washes and other ephemeral drainage features have been regulated by both agencies as "tributaries" of traditional navigable waters. Under a recent Supreme Court decision, *Rapanos v. United States*, decided in 2006, tributaries are subject to regulation under the Clean Water Act if they have a significant nexus or relationship to a navigable water body.

Consequently, the legal standard used by EPA and the Corps of Engineers in determining whether a water body is a traditional navigable water, as well as the procedures followed by the agencies in making such determination, are very important. In this particular case, the agencies declared that two reaches of the Santa Cruz River, which have virtually no natural flow and have never been used to commercially transport goods or people, are traditional navigable waters. In doing so, the agencies provided no notice or an opportunity to comment. The Home Builders' goal is to ensure that the correct legal standard is applied and the proper procedures are followed in deciding whether a watercourse is navigable.