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U.S. Fish and Wildlife Service
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AESO/FA
22410-2008-FA-0002

November 23, 2007

E-Mail Transmission
Memorandum

To: Regional Director, Fish and Wildlife Service, Albuquerque, New Mexico
(Attn: Dean Watkins) (ARD-ES)

From: Field Supervisor

Subject: Comments on U.S. Army Corps of Engineers and Environmental Protection
Agency Post-Rapanos Guidance

Arizona Ecological Services Field Office has reviewed the Post-Rapanos Guidance, including the Jurisdictional Determination Form Instructional Guidebook dated May 30, 2007, Regulatory Guidance Letter 07-01 dated June 5, 2007, and other relevant material provided by the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency. As requested, we offer the following comments regarding implementation of the guidance by local Corps Districts and general observations on the guidance itself.

The Guidebook indicates the Corps will assert jurisdiction over Traditional Navigable Waters (TNWs) and their adjacent wetlands. Our understanding is that the Colorado River is the only waterbody in Arizona for which navigability is not in question (i.e. it is a TNW). We are aware the local Regulatory Branch office is currently in the process of developing recommendations for additional TNW determinations for Arizona. Waterbodies for which the Corps' Los Angeles District is compiling information include the Gila, Santa Cruz, Rillito, and Virgin rivers. Although we have little expertise regarding the issue of navigability, we do believe all of these waterways and their tributaries are critically important for fish and wildlife resources in the arid southwest. We support the Corps' efforts to identify these rivers as TNWs and retain jurisdiction over them.

The Guidebook indicates the Corps will also maintain jurisdiction over non-navigable tributaries of TNWs that are Relatively Permanent Waters (RPWs). Other waterways that warrant evaluation for TNW or RPW status include, but are not limited to, the Bill Williams, Little Colorado, Verde, Salt, San Pedro, and Hassayamapa rivers. They are all critically important for fish and wildlife resources, including a number of threatened and endangered species such as the Little Colorado spinedace, southwestern willow flycatcher, and Chiricahua leopard frog. We believe these waters contribute to the biological integrity of the Colorado River.

The Guidebook indicates that jurisdiction over several classes of waters will be based on a fact-specific analysis for those waters that have a significant nexus with a TNW. These include non-navigable tributaries that are not relatively permanent and their adjacent wetlands. To pass the significant nexus test, the tributary must have more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of a TNW. This is a particularly important issue for the arid southwest where the status of ephemeral washes could be questioned. We offer that these tributaries do, in fact, contribute to the biological integrity of downstream waters. The Guidebook recognizes this on page 54:

Ephemeral waters in the arid west that are tributaries may have a significant nexus to a TNW. For example, in some cases they may serve as a critical transitional area between the upland environment and the traditional navigable waters. Such ephemeral tributaries, with the associated riparian corridor, may provide refugia, foraging and breeding opportunities in areas that may have limited stands of vegetation and water due to the environmental conditions of the arid southwest. During and following precipitation events, ephemeral tributaries collect and transport water or sometimes sediment from the upper reaches of the landscape to the traditional navigable waters. These ephemeral tributaries, and associated riparian corridors, may provide habitat for wildlife and aquatic organisms. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may affect the integrity of a TNW.

We believe this assertion is accurate and consistent with the 404(b)(1) Guidelines, which direct the Corps to analyze the effects of 404-permitted activities on “other wildlife” including resident and transient mammals, birds, reptiles, and amphibians (40 CFR Part 230). We have provided the Corps with numerous comments that support the fact that other wildlife, including riparian and aquatic species, utilize the systems under consideration for TNW or RPW status and their associated tributaries (see 404 Public Notice Reviews under Document Library at <http://www.fws.gov/southwest/es/arizona/>).

Substantial concepts of conservation biology support the notion that riverine, stream, riparian, and upland ecosystems do not operate in an ecological vacuum but instead interact and contribute the chemical, physical, and biological integrity of one another. Furthermore, the Southwest is not an “arid wasteland” but is home to a diversity of fish and wildlife resources, many of which are found nowhere else on Earth. These resources have adapted to the cyclical nature of weather that drives the ecological behavior of riverine, stream, riparian, and upland ecosystems. Simply because a wash is dry for an extended time period does not mean it cannot contribute to the chemical, physical, and biological integrity of downstream waters, including TNWs and RPWs. We believe that the use of the term “relatively permanent” has a different description in the arid Southwest than in other parts of the country. A review of the life history of many native mammals, birds, reptiles, and amphibians in Arizona would reveal that species travel up and down waterways, thus contributing to biological functions and integrity.

We believe these concepts are sufficient to illustrate that tributaries have more than a speculative or insubstantial effect on the chemical, physical, and/or biological integrity of TNWs and Arizona’s diverse biotic communities are dependent upon them. If the Corps needs species-specific information, please contact our office, and we will endeavor to provide that information.

Thank you for the opportunity to provide input on the subject guidance. We recommend coordination of this review with the Arizona Game and Fish Department. If you have any questions, please contact Mike Martinez (x224) or Debra Bills (x239).

/s/ Steven L. Spangle

cc: Chief, Habitat Branch, Arizona Game and Fish Department, Phoenix, AZ
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