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VIA E-MAIL (mark.d.cohen@usace.army.mil) AND FIRST CLASS MAIL
Mark Cohen
Assistant Chief – Regulatory Division
US Army Corps of Engineers
Los Angeles District
915 Wilshire Blvd., Suite 1550
Los Angeles, CA 90017

September 3, 2008

Re: Response to Heather Wylie's Notice of Proposed Suspension

Dear Mr. Cohen:

Please consider this letter Ms. Heather Wylie's formal response to the Notice of Proposed Suspension ("NPS") that she received from her supervisor, North Coast Branch Chief Aaron Allen, dated August 7, 2008. As indicated in our initial letter to you dated August 21, 2008, we are Ms. Wylie's representatives in this matter.

As an initial matter, we ask that you recuse yourself as the decision-maker in this matter due to both your perceived inability to remain impartial and the fact that you will likely be called as a witness should future legal proceedings prove necessary. We have evidence that your immediate supervisor, Regulatory Division Chief David Castanon, was planning to terminate Ms. Wylie even before she went on the boat trip that is one of the two purported grounds for her suspension. We believe that your supervisor orchestrated this action in which you are complicit, and not a detached, independent decision-maker.

When Ms. Wylie first learned of Mr. Allen's suspension proposal she approached you about it and asked if you knew about her boat trip. You said you were aware of it and that you were very uncomfortable talking to her about it. This indicates that you were aware an adverse action was pending against Ms. Wylie. This creates a concern about pre-judgment or

bias because it appears that Mr. Allen had already discussed the situation with you and that perhaps you approved of the suspension.

Therefore, it is highly likely that you, Mr. Castanon, and Mr. Allen would be central witnesses in future legal proceedings. Procedural due process requires that an impartial, independent person consider Ms. Wylie's response and make the final determination in this matter. *See Mathews v. Eldridge*, 424 U.S. 319, 325 n.4 (1976). This basic requirement of fairness requires that the decision-maker be from outside of the Los Angeles District or at least one level above your supervisor.

Turning to the NPS itself, the nature of the purported grounds for suspension, Mr. Allen cites two purported grounds for suspension: 1) Ms. Wylie's July 8, 2008 e-mail to 15 Corps staff members citing support for her, Granta Nakayama's and others position that the Corps' June 2007 Rapanos Guidance scope of analysis was written in contravention of the law; and 2) Ms. Wylie's off-duty, private participation in a boat trip down the L.A. River intended to demonstrate the Corps' failure to properly determine jurisdiction under the CWA for both the L.A. River and similar waters nationwide. We will address each ground in turn, however, we should note in overview that the circumstances leading up to the proposed suspension demonstrate that the charges underlying this action are entirely pretextual to mask illegal retaliation for Ms. Wylie's continued protected disclosures concerning the Corps' own violations of the Clean Water Act.

July 8, 2008 E-mail

Mr. Allen stated in the NPS that Ms. Wylie's e-mail was "unauthorized and inappropriate" because she "failed to follow instructions" to not send e-mails "at work that undermined and contradicted current Corps of Engineers policies[,]" and to not to send e-mails "to the CESPL-CO-R address list and any group larger than the North Coast Branch staff without prior review by the Chief, or Acting Chief of the North Coast Branch." Mr. Allen also stated that the "content and subject matter of the E-mail were entirely inappropriate because it stated among other things that the Corps is currently implementing illegal guidance to determine waters of the United States pursuant to the Rapanos Supreme Court decision."

1. Ms. Wylie's Action Is Sanctioned by Law

We do not dispute that Ms. Wylie disclosed the illegality of the Corps' actions in her July 8, 2008 e-mail, or that she had done so previously as well. That was her intent – to make people aware of the illegality of the Corps' actions and the danger those actions posed.

In fact, it is Ms. Wylie's disclosure of illegality via the e-mail that protects her under federal law. Ms. Wylie's e-mail reiterated that the current Corps' policy on jurisdictional determinations pursuant to the Corps/EPA June 2007 guidance ("Guidance"), purportedly developed based on *Rapanos*, is illegal under the Clean Water Act (CWA). Ms. Wylie voiced her concerns because, as she has previously pointed out to Corps managers and staff, the Corps' policy forces staff regulators to use a limited scope of analysis in their jurisdictional determinations under the CWA, the "reach of creek" analysis, which makes it nearly impossible to retain required CWA protections in direct contravention to Justice Kennedy's mandate in *Rapanos* and the goals and purposes of the CWA.

Ms. Wylie's e-mail referred the recipients to an attached news article that reinforced what she had been disclosing all along about the illegality of the Guidance and subsequent Corps' policy. The article in turn referenced an internal EPA document, a memo from EPA Assistant Administrator Granta Nakayama ("Nakayama Memo" – attached hereto), that buttressed both the accuracy and importance of Ms. Wylie's disclosures. Mr. Nakayama stated how the Guidance, in particular the "relevant reach" concept, has severely impacted enforcement under the CWA, as its "procedure for establishing jurisdiction for not-relatively permanent (intermittent and ephemeral) tributaries and their adjacent wetlands has created the most significant challenge to maintaining an effective and efficient enforcement program." Ms. Wylie emphasized that the "concept of relevant reach also ignores longstanding scientific ecosystem and watershed protection principles critical to meeting the goals of the CWA." Nakayama Memo at 3.

Ms. Wylie is protected from retaliation for her e-mail under both the federal Whistleblower Protection Act (WPA), 5 U.S.C. § 2302(b)(8), and the whistleblower protection provision of the CWA, 33 U.S.C. § 1367, thus rendering Mr. Allen's proposed suspension illegal. Ms. Wylie is protected under the WPA because her e-mail disclosed illegal conduct to people beyond her first line supervisor. She is protected under the CWA because

she was furthering the enforcement of the CWA by exposing actions that, as Mr. Nakayama's memo points up, were and are undermining the CWA's protections. While it is true that employees are normally expected to support official agency policy, these whistleblower laws protect disclosures in opposition to agency policy when made for the purpose of exposing illegal agency action or agency action which undermines the purposes of an environmental statute.

2. Ms. Wylie's E-mail Was Not Insubordination

It should be highlighted that Mr. Allen's statements about the July 8 e-mail recipients are factually incorrect. Ms. Wylie did not send the e-mail to the CESPL-CO-R address list. She sent it to a select list of Corps individuals based on who she thought needed to see the e-mail, including middle-level and senior personnel. Further, Ms. Wylie e-mailed approximately the same number of people as there are North Coast Branch personnel.

As such, Ms. Wylie did not violate the direction she had been given concerning group e-mails; in fact she honored those directions in her selectivity of recipients.

Moreover, Mr. Allen's directive was both unclear and illogical. It does not specify the precise number of e-mail recipients that Ms. Wylie may address, making compliance into a guessing game. In addition, under Mr. Allen's directive Ms. Wylie is free to individually address e-mails to an unlimited number of recipients. She is forbidden only from utilizing the economy of Corps resources by combining the recipients into one message.

This alleged failure to follow instructions concerning the number or identity of e-mail recipients is a truly trivial matter on which to base any disciplinary action in an adult workplace, let alone to use it as support for a 30-day suspension.

3. E-Mail Charge Is Pretextual

We also note that Mr. Allen never had a counseling session or meeting to put Ms. Wylie on notice that a) the Corps took issue with the e-mail; or b) he felt the e-mail recipients were somehow part of a prohibited list or exceeded the maximum limits arbitrarily placed on her. Within a couple days of Ms. Wylie sending the email, Mr. Allen did informally tell

her that he that he had seen the e-mail and had some concerns about it, at which point Ms. Wylie checked with nearly every e-mail recipient. No one had a problem with it.

Ms. Wylie heard nothing more from Mr. Allen or anyone else about the "inappropriate" e-mail until it was later used in combination with the boat trip to justify the 30-day suspension. There were two and a half weeks between the e-mail and the boat trip. Moreover, during the same conversation in which Ms. Wylie asked you if you knew about the boat trip (see above), she also asked if you had issues with her July 8, 2008 e-mail. You told her no, that the e-mail was insignificant such that you did not really even remember it. It appears that the Los Angeles District Regulatory Division was merely grasping for additional grounds to suspend Ms. Wylie, after a decision had been reached to proceed against her.

4. Charge Undermines Merit System

To the extent that Ms. Wylie's July 8, 2008 e-mail "undermined and contradicted" a current Corps policy, it did so only regarding a Corps directive that is *illegal*. Thus, discipline based on the e-mail flies in the face of the articulation of merit principles found at 5 U.S.C. § 2301:

> "(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences-- A) a violation of any law, rule, or regulation..."

In addition, this directive violates the U.S. Army's own Principles of Ethical Conduct [see http://www.hqda.army.mil/ogc/Principles%20of%20Ethical%20Conduct.pdf] urging employees to "endeavor to avoid any actions creating the appearance that they are violating the law..." Moreover, these principles state that employees "*shall* disclose waste, fraud, abuse and corruption..." [Emphasis added] That was precisely what Ms. Wylie was doing.

L.A. River Boat Trip

The second basis Mr. Allen cites for Ms. Wylie's suspension is her participation in a boat trip (via kayak) on the L.A. River at the end of July 2008. Mr. Allen claims Ms. Wylie failed "to observe written policy, or

procedures by participating in an unsafe, unauthorized boating expedition...that violated a Corps [] policy that prohibits boating in the area." As an initial matter, Mr. Allen did not cite a specific written rule, policy or procedure prohibiting private citizens from boating in the L.A. River. We are unsure upon what authority the Corps relies to prohibit private citizens from boating in the L.A. River.

1. Ms. Wylie's Actions Are Constitutionally Protected

Whether or not Ms. Wylie was in fact boating in the river out of joy for boating or in protest of the Corps failure to designate the river a TNW has not been demonstrated. If boating for pleasure, her purely personal activity has no connection with her job and may not be the basis for discipline. *See, e.g., Kruger v. Dept. of Justice*, 32 M.S.P.R. 71, 74 (1987).

If, however, Ms. Wylie was in fact boating in the river to protest the Corps failure to designate parts of the river as a traditional navigable water (TNW) outside of the 4 miles designated as such by the Corps, then her participation in the trip was symbolic speech that is protected under the First Amendment of the Constitution. *See, e. g., Spence v. Washington*, 418 U.S. 405, 409-411 (1974).

Arguably, the purpose of the trip was to demonstrate 1) that the full length of the L.A. river main stem met the two part susceptibility test for a TNW because it a) has physical characteristics needed to support boating and b) it actually did support a test boat trip (these tests are necessary to designate the river a TNW – see Guidance Appendix D and case law cited therein); and 2) to raise awareness of the broader issue of the Corps' failure to properly designate and protect similar rivers across the country as TNWs. The Corps improperly considered conditions not included in relevant case law or even in the Guidance, such as safety, access and parking, in determining CWA jurisdiction for the L.A. and Santa Cruz Rivers.

Regardless of its intent, the boat trip highlighted the failure of the Corps to designate the full 55 miles of the river as a TNW and thus the further failure to give the watershed the required protections under the Clean Water Act. Moreover, as Ms. Wylie expressed herself as a public citizen, outside her duties as a Corps employee, her actions fall within the First Amendment zone of protection for public employees. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Ms. Wylie's trip on the L.A. River plainly touched upon a genuine matter of public concern. *See Connick v. Myers*, 461 U.S. 138, 146 (1983). The Corps' determination to only designate 4 miles of the LA River main stem as a TNW dictates whether or not the watershed will receive vital protections from dumping of pollutants, dredging, filling, etc. under the CWA, and public reaction to the Corps' TNW determination has been outspoken and widespread.

Ms. Wylie's concerns have since been validated by subsequent events. As you know, the EPA by letter dated August 17, 2008 took the highly unusual step of designating the L.A. and Santa Cruz Rivers as "Special Cases," permanently removing the jurisdictional decision-making power from the Corps and stating that those rivers raised "important legal and policy issues in light of the extensive case law regarding the definition of traditional navigable waters[.]" The EPA would not have asserted Special Case authority if EPA agreed that the Corps TNW determinations on these two rivers complied with the law.

2. Ms. Wylie's Conduct Disclosed Illegality

As noted above, the EPA was so concerned with the Corps' actions that it took over responsibility for the jurisdictional determinations on the L.A. and Santa Cruz Rivers. Ms. Wylie's stance on this issue was not only reasonable, it was spot on.

Because her off-duty action underlined the Corps' abuse of authority and failure to follow the CWA, it too is protected by both the Whistleblower Protection Act and Clean Water Act whistleblower provisions previously cited.

3. Charge Motivated By Malice

Mr. Allen inexplicably states that Ms. Wylie's mere presence on the trip could have subjected the Corps to liability had anything gone wrong. That claim is patent nonsense.

As previously stated, Ms. Wylie participated in this event in her free time as a private citizen, not as a Corps employee. She in no way portrayed herself as a representative of the Corps before, during, or after the trip. Indeed, her participation in the trip evinced her disagreement with official Corps' CWA jurisdiction policies. Nobody participating in the trip, regardless of whether they knew Ms. Wylie worked for the Corps,

could have conceivably thought that her mere presence meant the Corps in any way sanctioned or condoned the trip.

Moreover, Ms. Wylie did not announce her presence and her attendance is not at all prominent. There are multiple "YouTube" videos of the boat trip in which Ms. Wylie is not present. The only images of her require scouring the internet in order to glimpse fleeting glances of Ms. Wylie. The decision to search upon this pretext for Ms. Wylie's presence supports the thesis that Mr. Allen and Mr. Castanon were actively searching for any reason to take adverse action against Ms. Wylie.

In addition to the above arguments, it should be noted that the proposed suspension:

1. Will Harm the Efficiency of the Federal Service

Mr. Allen states in the NPS that the suspension will improve the efficiency of the Federal service. Exactly the opposite is true. Through both her July 8 e-mail and her symbolic boat trip, Ms. Wylie could only improve the efficiency of the Federal service's proper functioning under the CWA. As the EPA's Mr. Nakayama stated in his memo, the Guidance as implemented by the Corps' has "created the most significant challenge to maintaining an effective and efficient enforcement program."

Additionally, EPA Region 9 (including David Smith and Robert Leidy) has well documented on-going disputes with Mr. Allen and Mr. Castanon at the Los Angeles District Corps over the Corps' poor level of analysis and failure to properly implement the CWA with respect to jurisdictional determinations among other things. The EPA's well-documented concerns about the illegalities and failures on the Corps' part to properly implement the CWA encompass many of the same issues about which Ms. Wylie has spoken out. The LA District of the Corps has created widespread government efficiency problems through their failure to properly make jurisdictional determinations. Countless work hours have been spent by government legal and scientific experts to try and sort out the mess the Corps has made with its CWA determinations.

There is an overwhelming body of evidence that shows the extreme government inefficiency caused by the Corps' attempts to improperly rollback Clean Water Act safeguards. By raising the Corps' continued failure to comply with the CWA and related case law, and by highlighting

the on-the-ground results via the boat trip, Ms. Wylie has tried to effect change that would result in increased Corps efficiency and effectiveness under the CWA. Punishing her for that will only hurt the efficiency of the Federal service.

Douglas Factors

Even assuming that there is some kernel of merit in the charges, the proposed level of discipline is disproportionate:

Nature and seriousness of the offense: A 30-day suspension is a major disciplinary action usually associated with egregious misconduct. That is certainly not the case here, in that these charges involve conduct that is essentially innocent in nature.

First, Ms. Wylie checked with most of the July 8, 2008 e-mail recipients and no one she talked to had any issues with the e-mail. Even you told Ms. Wylie that you did not have an issue with the e-mail and could not even remember it because you had considered it so insignificant. Moreover, as noted above in detail, Ms. Wylie sent the e-mail, and previous e-mails, to disclose the fact that the Corps was violating the CWA and to provide supporting documentation. Her behavior was disruptive only to the extent it irritated her supervisors because she properly continued to question why the Corps would implement illegal guidance to create widespread enforcement problems.

As for the second charge, Ms. Wylie participated in the boat trip in her off duty hours in her capacity as a private citizen. While she knowingly participated in the trip, she had no idea she would get in trouble – let alone career-altering trouble – given that she participated in her free time as a private citizen in furtherance of free speech rights, and never portrayed herself as a representative of the Corps. It is unclear at what point the act of kayaking became the basis for adverse action within the Corps.

Ms. Wylie took any risks on her own, just like every other person on the trip. She was a person on a boat trip who just happened to be a Corps employee. Further, this was a totally unselfish, non-malicious act on her part; undertaken solely out of her concern for the future of the L.A. River watershed and other watersheds across the country negatively impacted

by the Corps' continued failure to follow CWA jurisdictional requirements. She had nothing to gain personally by her actions.

Past disciplinary record: Ms. Wylie has had only one previous disciplinary action instituted against her, a letter of reprimand that is still in Step 3 of a union dispute and is thus not final. In his *Douglas* Factors Analysis, (Tab G to the Proposed Suspension), Mr. Allen cites several "informal disciplinary issues" with Ms. Wylie, but none of these were even serious enough to warrant any sort of formal action.

Mr. Allen states that "there have been numerous other incidents involving her conduct over the last twelve months." Although that statement is an unsupported blanket statement, we assume that all of the "incidents" revolve around Ms. Wylie steadfastly raising the failure of the Corps to comply with EPA enforcement requirements. This is not insubordination, but activity protected under federal whistleblower laws. Her actions were those of a dedicated public servant, and her behavior was disruptive only to the extent it irritated her supervisors because she properly continued to question why the Corps would implement illegal guidance to create widespread enforcement problems.

Mr. Allen also cites two memos in which Ms. Wylie says a requested task will have to take a back seat to other job duties, yet he gives no indication that the issue was even raised with Ms. Wylie at the time these events took place.

Past work record: Ms. Wylie has worked at the Corps for over four years and received excellent performance reviews up until December 2007. Notably, this was her first review after she had begun questioning the Corps' failure to properly apply and enforce the CWA (she questioned the Corps' CWA actions first in regard to vernal pool jurisdiction in June 2007). From that point forward she continued to object to the Corps' actions, and she continued to receive negative reviews.

Ms. Wylie generally gets along well with her co-workers and is known for being a very hard worker who is extremely passionate about her job. Mr. Allen cites "several incidents with" and "complaints from" co-workers and applicants about Ms. Wylie, yet he points to nothing specific nor mentions how those incidents and complaints were resolved or what Ms. Wylie's side of the story was. In sum, by all accounts she had

an excellent work record until she began to raise concerns about the Corps' failure to adhere to CWA requirements.

Effect on ability to perform: Mr. Allen simply concludes that the e-mail and boat trip, "combined with her past conduct problems" are interfering with Ms. Wylie's ability to perform satisfactorily. She had sent e-mails like this before, and the boat trip was entirely on her free time. He does not provide any reason for why these particular two incidents, the incidents for which she is being severely punished, impact her ability to adequately perform her job. In fact, just the opposite is true. Given the clear support for her long-standing concerns in both Congress and the EPA, as evidenced by the current congressional inquiry and the EPA taking over jurisdiction on the L.A. and Santa Cruz Rivers, Mr. Allen should be impressed that her evaluation of the situation was absolutely correct. This demonstrates that she could more than adequately review jurisdictional determinations and perform the other facets of her job which are intricately related to CWA enforcement and permitting.

Further, Mr. Allen makes no connection between Ms. Wylie's allegedly assigning "herself tasks not directly related to her objectives" and the two specific incidents at issue.

Consistency of the penalty re: other team members: We presume that no other Corps team member has been punished for kayaking on a river in their free time. Mr. Allen himself states that the 30-day suspension is a "harsh penalty" given what Ms. Wylie is actually accused of doing. But he says it is warranted because she got a second and third offense following one month after her first offense, and because of the "seriousness of the unsafe boating" trip.

Only Ms. Wylie's first "offense" is properly considered as prior discipline, yet even that offense is still in the grievance process. The Corps unfairly stacks the charges by treating Ms. Wylie's July 8 email as a second offense and the boat trip as a third offense for purposes of increasing the penalty. As detailed above, Ms. Wylie was not alerted that she would be disciplined for the July 8 email until after Mr. Allen learned about the boat trip several weeks later. Equally important is the fact that the email was not a problem for the recipients or even for yourself, who told Ms. Wylie you could not even remember it because it was so insignificant. Moreover, up until this response, Ms. Wylie has not had a chance to address Mr.

Allen's allegations; an important fact given that the email, as shown above, did not in fact violate the arbitrary rules placed on her regarding email recipients. Under these circumstances, fairness dictates that the July 8 email not be treated as a "second offense" for purposes of enhancing her penalty. To do so plainly amounts to "piling on" to trump up support for and try to justify an unwarranted punishment.

Further, the allegedly "unsafe" nature of the boating trip is belied by online videos of the trip, showing it to be well-managed and respectfully undertaken. Moreover, it is unclear why Ms. Wylie taking a risk on her own accord, in her free time and in no way representing the Corps, supports such a harsh punishment any more than her hang-gliding or parachute jumping or engaging in other high-risk activities in her leisure time.

As detailed above, Ms. Wylie's participation in the boat trip constituted First Amendment free speech and was undertaken for purely unselfish reasons. The idea that she engaged in conduct unbecoming a federal employee is laughable. She tried to raise awareness of the Corps' dereliction of its duty to the American public to efficiently and effectively enforce the CWA.

The proposed punishment is draconian and entirely unwarranted. Essentially, the Corps proposes to suspend Ms. Wylie for 30 days for kayaking on the L.A. River in her free time.

Consistency of the penalty re: Table of Penalties: Mr. Allen states that the onerous penalty is warranted because these were Ms. Wylie's second and third offenses and are related, and they occurred within three weeks of each other. Again, Ms. Wylie's first offense is still in the grievance process and the email charge should not be treated as a formal "offense" or any sort of prior discipline for penalty purposes.

The following are just a few examples of federal employee conduct resulting in 30-day suspensions which, when compared to Ms. Wylie's alleged conduct, demonstrate the extremely unfair and disproportionate nature of her proposed 30-day suspension: high-level supervisor engaging in pattern of retaliation including geographic reassignments, *Special Counsel v. Costello*, 75 M.S.P.R. 562, 615 (1997), *rev'd on other grounds*, 182 F.3d 1372 (Fed. Cir. 1999); IRS officer sexually harassing a taxpayer and

illegally accessing a taxpayer's account, *Soliman v. Dept. of the Treasury*, 2007 MSPB LEXIS 1778; threatening behavior and use of abusive or offensive language, *Zohn v. Dept. of Defense*, 2005 MSPB LEXIS 7620; physical sexual harassment, *Alsedek v. Department of the Army*, 58 M.S.P.R. 229, 241 (1993); falsification of time and attendance cards, *House v. U.S. Postal Service*, 80 M.S.P.R. 138 (1998); and a high-level supervisor threatening employee with poor evaluation and removal for employee's protected disclosures, *Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 612-13 (1991).

These serious transgressions resulted in the same punishment now being directed at Ms. Wylie for 1) sending an email that you yourself deemed insignificant and which correctly highlighted the issue of the Corps' illegal actions; and 2) kayaking on the L.A. River in her free time. A 30-day suspension is not a remotely consistent or reasonable penalty.

Notoriety of the offense: Mr. Allen admits the e-mail had no notoriety implications for the Corps because it was solely an internal document, but he states that the boat trip and associated media coverage had "the potential to be very embarrassing" for the Corps. First, "potential" for embarrassment is not notoriety or harm to agency's reputation. As detailed above, even if the people on the trip knew that Ms. Wylie worked for the Corps, they knew she was participating as a private citizen exercising her right to free speech, not in any sort of official capacity as a Corps employee. Ms. Wylie did not advertise the fact she was a Corps employee and certainly never represented herself as a Corps employee. Indeed, the Corps only learned of her participation in the trip by scouring online blogs for photos that could include her. Even the couple of photos Mr. Allen found and cited did not identify Ms. Wylie by name.

Moreover, any potential embarrassment from the boat trip will be far surpassed by the real embarrassment stemming from the fact that the Corps is trying to suspend a passionate, honest and forthright employee for 30 days for her private participation in a kayak trip.

Notice of rules: Ms. Wylie was unaware that participating in a boat trip on the L.A. River, in her free time and of her own accord, violated any formal rules, let alone that it could subject her to anything near this type of punishment. The Corps has no official jurisdiction or enforcement power to prohibit private citizens from boating on the L.A. River.

In addition, public access and safety issues are not factors that are relevant to jurisdictional analysis under the Guidance or case law.

Further, the trip was approved by local authorities. Los Angeles police on the scene of the boat trip checked to ensure that the boaters had a filming permit, which they did. The police then allowed them to proceed on their way.

Potential for rehabilitation: Ms. Wylie's incidents of alleged "disruptive" and "discourteous" behavior and "insubordination" relate to her refusal to sit idly by while the Corps fails to enforce the CWA. Her July 8 e-mail and her symbolic boat trip, along with her previous attempts to open the Corps' eyes to its illegal actions, demonstrate integrity and her value as a public servant, not insubordination. She has not intended to be a source of disruption; she merely took a stand on behalf of the public interest.

Presumably, the Corps wants its professional staff to be dedicated to the principles of the Clean water Act and passionate about the agency's mission.

Mitigating circumstances: Ms. Wylie received excellent performance reviews for the first three of her four years with the Corps. It was only when she began questioning the Corps' actions under the CWA that she started receiving negative reviews. Certainly her vocal opposition to the Corps' continued failure to efficiently and effectively apply and enforce the CWA created unusual job tensions.

Mr. Allen's analysis of this Douglas Factor in the NPS plainly reveals intense tension between him and Ms. Wylie. One obvious source of tension was that Ms. Wylie was absolutely correct in her criticisms, as borne out in the Nakayama Memo noted above and the EPA's assumption of jurisdiction over the L.A. and Santa Cruz Rivers. The fact that Ms. Wylie has been proven correct in her concerns is more than a mitigating factor.

Contrasting Ms. Wylie's actions in the public interest is the bad faith and malice on the part of her supervisors in this matter. As noted above, Mr. Castanon was trying to terminate her before the boat trip ever occurred. These charges are clearly a pretext for punishing Ms. Wylie for

her continued outspoken attempts to illuminate and demonstrate the illegality of the Corps' CWA jurisdictional determinations.

Adequacy and effectiveness of deterrence: Mr. Allen cites his attempts to address Ms. Wylie's "problem" behavior, yet he did not follow up with her regarding his concerns about the July 8 e-mail and he made no attempt whatsoever to address the boat trip with her before giving her the NPS. The only formal discipline attempted with Ms. Wylie to attempt to "remedy" her behavior is a letter of reprimand which is not even final yet.

Further, the boat trip is completely unlike anything she had done before and was done in her off hours as a private citizen. It was a completely novel incident and the Corps' response totally blindsided her.

Mr. Allen jumped from a letter of reprimand to a 30-day suspension and bluntly states "alternative methods do not appear to be feasible to address the existing conduct problems" yet he does not appear to have explored a single alternative method. Instead, Mr. Allen seized upon severe discipline as the only alternative that occurred to him.

For the foregoing reasons, these charges should be rescinded. In our August 21 letter we indicated Ms. Wylie's willingness to settle this matter in a cordial fashion and we are still open to that possibility. However, given the total lack of response to this settlement overture, we must assume that the Corps has no interest in settling this matter amicably, and proceed accordingly in the best interests of Ms. Wylie.

We look forward to a decision.

Sincerely,

Adam Draper
Staff Attorney

Paula Dinerstein
Senior Counsel

Counsel for Heather Wylie