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No. 10-218

IN THE

# Supreme Court of the United States

PPL MONTANA, LLC,
*Petitioner*

v.

MONTANA,
*Respondent*.

**On Writ of Certiorari to the Supreme Court of Montana**

# BRIEF OF AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION, FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL COUNCIL OF FARMER COOPERATIVES, NATIONAL MINING ASSOCIATION, PUBLIC LANDS COUNCIL, AND REAL ESTATE ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether a section of a river is navigable at the time the state joined the Union, as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use?

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## INTERESTS OF *AMICI CURIAE* [1]

This Court's determination of the proper test for navigability in a title dispute affects entities that are subject to regulation under the Clean Water Act ("CWA" or "Act"), including *amici*, who all undertake numerous CWA-regulated activities.[2]

The American Petroleum Institute ("API") is a nationwide non-profit trade association that represents over 450 members engaged in all aspects of the petroleum and natural gas industry, including exploration, production, refining, marketing, transportation, and distribution of petroleum products. The business activities of API's members are frequently subject to regulation under the CWA and related environmental statutes and regulations.

The American Road & Transportation Builders Association's ("ARTBA") membership includes public

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[1] All parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of Court. Pursuant to Rule 37.6 of this Court, *amici* state that their counsel authored this brief and *amici* paid for it. This brief was not written in whole or in part by counsel for a party to these cases, and no one other than *amici* made a monetary contribution to its preparation.

[2] Recently, *amici* and several other organizations filed extensive comments on the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (jointly, "the Agencies") Draft Guidance on Identifying Waters Protected by the Clean Water Act, Docket No. EPA-HQ-OW-2011-0409-0002 (May 2, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-0002 ("Draft Guidance"). *See* Waters Advocacy Coalition, *et al.*, Comments in Response to the Environmental Protection Agency's and U.S. Army Corps of Engineers' Draft Guidance on Identifying Waters Protected by the Clean Water Act, Docket No. EPA-HQ-OW-2011-0409-3514 (July 29, 2011), *available at* http://www.regulations.gov/#!documentDetail;D= EPA-HQ-OW-2011-0409-3514.

agencies and private firms and organizations that own, plan, design, supply, and construct transportation projects throughout the country. ARTBA's industry generates more than $200 billion annually in United States economic activity and sustains more than 2.2 million American jobs. ARTBA members are directly involved with the federal wetlands permitting program and undertake a variety of construction-related activities that require compliance with the CWA. As part of the highway construction process, ARTBA members are actively involved in the restoration and preservation of wetlands. In the 39 years since the CWA's passage, ARTBA has actively worked to achieve the complementary goals of improving our nation's transportation infrastructure and protecting essential water resources. In doing so, ARTBA is proud to note the constant efforts of the transportation construction industry to minimize the effects of transportation infrastructure projects on the natural environment. If the federal regulatory scope of the CWA is unnecessarily or unintentionally expanded, the increased regulatory burdens would severely hinder efforts to both build transportation improvements and accomplish environmental objectives through mitigation.

The Foundation for Environmental and Economic Progress ("FEEP" or "Foundation") is a national coalition of large landholding companies founded in 1989 to help advance balanced federal environmental law and policy regarding the use and development of private land. The Foundation has a specific interest in federal programs that affect land use. Its members are planned community developers, as well as companies that engage in forestry, mining, and agriculture. Foundation members own significant

amounts of land in 44 states and are deeply committed to environmental stewardship of their land. Many have earned awards for cutting-edge environmentally sensitive projects. Because of the nationwide scope of their projects, Foundation members have extensive experience with the CWA, and frequently must obtain permits from the Corps. FEEP members, therefore, are keenly interested in the application of regulatory requirements to their development projects and have an important perspective because of their direct, "real-world" involvement in the administration of the CWA and its regulations. To share that perspective, the Foundation has actively participated in many agency rulemakings under the CWA.

The National Association of Home Builders ("NAHB") represents over 160,000 builder and associate members throughout the United States. Its members include individuals and firms that construct and supply single-family homes, and apartment, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers. NAHB's members are frequently subject to regulation under the CWA. NAHB, as an organization, has extensive involvement in litigating CWA issues and regularly counsels and educates members on CWA issues. NAHB is a leader in advocacy efforts, before the federal courts, Congress, and the regulatory agencies, on CWA regulatory issues.

The National Cattlemen's Beef Association ("NCBA"), initiated in 1898, is the marketing organization and trade association for America's cattle farmers and ranchers. With offices in Denver and Washington, D.C., NCBA is a consumer-focused, producer-directed organization representing the larg-

est segment of the nation's food and fiber industry. NCBA represents 147,000 of America's farmers, ranchers, and cattlemen, through direct membership and state affiliate and breed organizations, who provide much of the nation's supply of food. Its members are proud of their tradition as stewards and conservators of America's land, and good neighbors to their communities.

The National Council of Farmer Cooperatives ("NCFC") has been the voice of America's farmer cooperatives since 1929. NCFC members include 58 national, regional, and federated farmer cooperatives, which in turn are comprised of over 2,500 local cooperatives across the United States whose member-owners include a majority of our nation's more than 2 million farmers and ranchers. NCFC members also include 22 state and regional councils of cooperatives. Farmer cooperatives handle, process, and market almost every type of agricultural commodity, furnish farm supplies, and provide credit and associated financial services to their farmer members. As such, NCFC advocates on behalf of its members at the federal level to encourage a healthy public policy environment in which farmer-owned cooperative businesses operate and thrive, and provides leadership in cooperative education. In particular, NCFC supports science-based, achievable, and affordable environmental policies and initiatives, and actively works to ensure environmental laws like the CWA are implemented accordingly.

The National Mining Association ("NMA") is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing

machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership, and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources. This includes policies under federal environmental laws like the CWA.

The Public Lands Council ("PLC") has represented livestock ranchers who use public lands since 1968, preserving the natural resources and unique heritage of the West. PLC works to maintain a stable business environment in which livestock producers can conserve the West and feed the nation and world. Public land ranchers own nearly 120 million acres of the most productive private land and manage vast areas of public land, accounting for critical wildlife habitat and the nation's natural resources. Their water rights and the wise use of water are crucial to their livelihoods; thus, any regulation promulgated under the CWA has potential to impact them.

The Real Estate Roundtable ("Roundtable") represents the leadership of the nation's top privately owned and publicly held real estate ownership, development, lending, and management firms, as well as the elected leaders of the 17 major national real estate industry trade associations. Collectively, Roundtable members hold portfolios containing over 5 billion square feet of developed property valued at over $1 trillion; over 1.5 million apartment units; and in excess of 1.3 million hotel rooms. Participating Roundtable trade associations represent more than 1.5 million people involved in virtually every aspect

of the real estate business. More information on the Roundtable can be found at www.rer.org. Real estate firms represented through the Roundtable's members frequently obtain CWA permit coverage when developing and building their projects, under both section 402 (for discharges of stormwater) and section 404 (for discharges of fill material). As a result, the fundamental question of whether a parcel contains "waters of the United States" to trigger CWA jurisdiction is of utmost importance to Roundtable members and the real estate community generally.

## SUMMARY OF ARGUMENT

The legal standard for "navigable waters" varies according to the statute at issue and the purpose for which the determination is made. This case is about the legal standard for "navigable waters" for title purposes, but it has potential implications for the proper test in other contexts, including the CWA. Under this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), the CWA term "navigable waters," defined as "waters of the United States," includes two types of waters—"traditional navigable waters" and nontraditional navigable waters. "Traditional navigable waters" are waters that are susceptible to use as continuous highways for transportation of goods in interstate commerce; they are the same as the "navigable water[s] of the United States" under the Rivers and Harbors Appropriation Act of 1899 ("RHA"), 33 U.S.C. §§ 401 *et seq*. Nontraditional navigable waters can be jurisdictional, based on their relationship to traditional navigable waters.[3]

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[3] To assist the Court in sorting through the overlapping terminology, *amici* have appended a Glossary of Key Terms.

EPA and the Corps have proposed, and intend to finalize imminently, new CWA guidance. In the Draft Guidance, the Agencies rely on non-CWA and non-RHA case law to support a new "traditional navigable waters" definition that will allow them to deem a water body a "traditional navigable water" for CWA purposes if any federal court has deemed the water navigable "for any purpose" or if the water can float a kayak or canoe.

*Amici* urge the Court to make it clear that the Agencies may not rely on navigable waters determinations made under other statutes or for other purposes, such as title or admiralty, to support a "traditional navigable waters" determination under the CWA. Moreover, regardless of the context, navigability determinations cannot be based on a water body's susceptibility to use for recreational purposes.

## ARGUMENT

In this case, the Court is asked to examine the legal standard for "navigable waters" in the context of a title dispute arising under the "equal footing" doctrine. The court below held, incorrectly, that current recreational use of one segment of a river is sufficient to determine that the entire river is navigable for title purposes. Navigability is also determinative of the extent of federal regulatory jurisdiction in statutes enacted pursuant to the Commerce Clause such as the RHA and the CWA. Nothing in this Court's jurisprudence has ever suggested that recreational use by itself could establish that a water body is a "navigable water" under the RHA or the CWA. Indeed, this Court has held consistently that the decisional principles that guide a court in making

a "navigable waters" determination vary according to the statute at issue and the purpose for which the determination is made. *See Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) (holding that "any reliance upon judicial precedent must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case").

The Court last addressed "navigable waters" for CWA purposes in *Rapanos*. There, five Justices rejected the notion that EPA and the Corps could assert CWA jurisdiction over any water that has "any hydrological connection" to traditional navigable waters. Instead, they premised CWA jurisdiction over nonnavigable waters on a nonnavigable water's relationship to "traditional navigable waters." 547 U.S. at 742 (Scalia, J., plurality); *id*. at 789 (Kennedy, J., concurring). In referring to "traditional . . . navigable waters," both the plurality and the concurring opinions cited *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), and its Commerce Clause progeny, signaling that they were referring to waters that are susceptible to use as continuous highways for transportation of goods in interstate commerce. These are the "navigable waters of the United States" that have been regulated since the nineteenth century under the RHA, *see Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 622 (8th Cir. 1979), and, since *Rapanos* was decided, they are referred to in the CWA context as "traditional navigable waters."

But in response to *Rapanos*, rather than give the term "navigable waters" its "traditional" meaning, the Agencies have relied on aberrant case law in non-CWA and non-RHA cases, including title cases,

to advance a new concept of "traditional navigable waters" for the CWA. Indeed, as this brief goes to the printer, the Agencies are attempting to codify a new "traditional navigable waters" standard that will allow them to deem a water body a "traditional navigable water" for CWA purposes if it has been used once for recreation (*e.g.*, to float a canoe) or if any federal court has deemed the water navigable "for any purpose," including, specifically, for title or admiralty purposes.

Against this background, *amici* write to explain the concept of traditional navigable waters in the CWA context, to ask the Court to make it clear that the legal standards for "navigable waters" are different depending on the statute at issue and the purpose of the determination, and to urge the Court to reverse the decision of the lower court and, in so doing, take care that its words not be subject to misuse to endorse the Agencies' renegade interpretation of "traditional navigable waters" under the CWA.

## I. THE TEST FOR "NAVIGABLE WATERS" VARIES ACCORDING TO THE STATUTE AT ISSUE AND THE PURPOSE FOR WHICH THE DETERMINATION IS MADE.

This Court has made it clear that the legal standard for "navigable waters," which arises in admiralty and maritime cases, title actions, and cases examining federal regulatory jurisdiction under the Commerce Clause, varies depending on the statute at issue and the purpose for which a navigability determination is made. *See Kaiser Aetna*, 444 U.S. at 171-73. Each of these standards is rooted in the definition of "navigable waters of the United States" provided by this Court in the seminal case, *The Daniel Ball*, which stated:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

77 U.S. at 563.

Although *The Daniel Ball* was a case brought in admiralty, the Court also addressed Commerce Clause jurisdiction. *Id.* It is thus the starting point for discussion of navigability for admiralty, title, and Commerce Clause purposes, but over the years, each jurisprudential strand has developed its own tests. For example, present capability for commercial navigation is the test of navigability for admiralty purposes, *see Alford v. Appalachian Power Co.*, 951 F.2d 30, 32 (4th Cir. 1991), but navigability at the time a state entered the Union is the test for title purposes, *see United States v. Utah*, 283 U.S. 64, 75 (1931).

Perhaps the best illustration of the importance of context for navigability determinations is the case of the Great Salt Lake. In *Utah v. United States*, 403 U.S. 9, 10-11 (1971), this Court found that the Great

Salt Lake was a "navigable water" for title purposes because the lake was capable of being used as a highway for commerce at the time of Utah's statehood. In contrast, in *Hardy Salt Co. v. S. Pac. Transp. Co.*, 501 F.2d 1156, 1167 (10th Cir. 1974), the U.S. Court of Appeals for the Tenth Circuit found that the Great Salt Lake was not a "navigable water of the United States" within the meaning of the RHA because the landlocked, intrastate lake did not have the requisite interstate linkage to form a continued highway of interstate or foreign commerce.

Moreover, the treatment of the Great Salt Lake in CWA case law underscores the importance of context for navigability determinations. Although the Great Salt Lake is nonnavigable for RHA purposes, it does not follow that the lake is non-jurisdictional under the CWA. This is because, as discussed below, CWA jurisdiction over "navigable waters," defined as "waters of the United States," extends beyond "traditional navigable waters" to include some nontraditional navigable waters. Thus, although the Great Salt Lake is not a "navigable water of the United States" under the RHA, the Court of Appeals for the Tenth Circuit has nonetheless held that the Great Salt Lake is subject to CWA jurisdiction. *See Utah v. Marsh*, 740 F.2d 799, 803 (10th Cir. 1984). Accordingly, and as discussed further below, nowhere is the context of navigability more important than in the CWA.

## II. THE COURT LAST ADDRESSED "NAVIGABLE WATERS" FOR CWA PURPOSES IN *RAPANOS*.

The CWA regulates "navigable waters," which the Act defines as "the waters of the United States." 33 U.S.C. § 1362(7). This Court has taken up the issue

of the meaning of "navigable waters," defined as "waters of the United States," in the context of the CWA three times.

Addressing the CWA definition of "navigable waters" for the first time in *United States v. Riverside Bayview Homes, Inc.*, the Court explained that by defining "navigable waters" as "the waters of the United States," Congress demonstrated its intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term," and held that CWA jurisdiction reaches wetlands that "actually abut . . . a navigable waterway." 474 U.S. 121, 133, 135 (1985).

Next, in *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* ("*SWANCC*"), the Court explained that although the Act's term "navigable waters" is broader than the traditional understanding of that term, the qualifier "navigable" is not devoid of significance and "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. 159, 172 (2001) (citations omitted). The *SWANCC* Court held that "nonnavigable, isolated, intrastate" waters were beyond the jurisdiction of the CWA. *Id*. at 171-72.

Most recently, the Court considered the meaning of "navigable waters" in the CWA context in *Rapanos*. The *Rapanos* petitioners argued that the CWA terms "navigable waters" and "waters of the United States" have the same meaning as they do in the RHA and are therefore limited to the traditional definition of *The Daniel Ball*, which required that the waters be susceptible to use as a highway for interstate or

foreign commerce. See Brief for Petitioners, *Rapanos* (No. 04-1034), 2005 WL 3295630, at *16-20 (Dec. 2, 2005); *Rapanos*, 547 U.S. at 730-31. The Court, in a four-Justice plurality and concurrence by Justice Kennedy, held that in the context of the CWA, the meaning of "navigable waters," defined as "waters of the United States," is broader than the traditional navigable waters definition of *The Daniel Ball*. *Id.* at 734, 742 (Scalia, J., plurality); *id.* at 760-61, 779 (Kennedy, J., concurring). The Act also includes waters that are not traditional navigable waters.

With regard to those waters that do not qualify as traditional navigable waters, both the plurality and concurrence premised CWA jurisdiction on the nontraditional navigable water's relationship to "traditional navigable waters." *See id.* at 742 (Scalia, J., plurality) (requiring a showing that "the adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters) . . . ." *See also id*. at 779 (Kennedy, J., concurring) (requiring the "existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.").

The plurality and concurrence both cited to *The Daniel Ball*, 77 U.S. at 563, and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406-09 (1940), to explain the concept of "traditional navigable waters." *Rapanos*, 547 U.S. at 723, 734 (Scalia, J., plurality); *id*. at 760-61 (Kennedy, J., concurring). Waters satisfy the *Daniel Ball* definition if (1) they are navigable-in-fact (or capable of being rendered so) and (2) together with other waters form waterborne highways used to transport commercial goods in interstate or foreign commerce. *See The Daniel Ball*,

77 U.S. at 563. These waters are the "navigable waters of the United States" under the RHA. *See Hardy Salt Co.*, 501 F.2d at 1168 (Congress intended "navigable waters" in the 1899 RHA and its predecessor 1890 Act to have the *Daniel Ball* meaning).

Traditional navigable waters in the CWA context are the "navigable waters of the United States" under the RHA, not title or admiralty "navigable waters." Indeed, the RHA was the foundation from which Congress started when it passed the CWA. Representative John D. Dingell (D-Mich.) recognized these origins when he explained that the new CWA would go beyond the RHA and "old narrow definitions of navigability, as determined by the [C]orps." *See* 118 Cong. Rec. 33,757 (1972), *reprinted in* 1 LEGIS. HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS of 1972 at 250 (1973).[4] Likewise, the Corps's contemporaneous interpretation of the CWA reflected its RHA underpinnings. *See* 39 Fed. Reg. 12,115, 12,115 (Apr. 3, 1974) (In its 1974 regulations, the Corps based its interpretation of "navigable waters," defined as "waters of the United States," on judicial precedent interpreting "navigable waters of the United States" under the RHA.). This Court referenced the CWA's origins when it explained in *SWANCC* that "the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172 (citing *Appalachian Elec. Power Co.*, 311 U.S. at 407-08).

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[4] *See also* Virginia S. Albrecht and Stephen M. Nickelsburg, *Could* SWANCC *Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ELR 11042, 11044-48 (2002).

In sum, a new framework for determining jurisdiction under the CWA emerged after *Rapanos*. The statutory term "navigable waters," defined as "waters of the United States," embraces two kinds of waters—"traditional navigable waters" and "nontraditional navigable waters." Traditional navigable waters are the same as the "navigable waters of the United States" under the RHA and are per se jurisdictional under the CWA; nontraditional navigable waters can be jurisdictional based on their relationship to traditional navigable waters under both the plurality and concurrence tests.[5]

## III. THE AGENCIES' POST-*RAPANOS* TRADITIONAL NAVIGABLE WATERS DETERMINATIONS HAVE NOT BEEN FAITHFUL TO *RAPANOS*.

With jurisdiction over nonnavigable waters now premised on a tie to traditional navigable waters, the Agencies proceeded after *Rapanos* to broaden the concept of traditional navigable waters beyond waters that can be used as highways for interstate commerce. The broader the definition of "traditional navigable waters," the more likely the Agencies would be able to find the requisite connection to nonnavigable waters and assert jurisdiction over them.

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[5] Rather than following this Court's admonition in *Marks v. United States*, 430 U.S. 188, 193 (1977), to read cases decided by a plurality to produce a single holding, EPA and the Corps have interpreted *Rapanos* broadly to produce two holdings, either of which they claim they may apply to establish jurisdiction. *See, e.g.*, Draft Guidance at 2.

### A. The Agencies' Case-By-Case Traditional Navigable Water Determinations Have Gone Far Beyond *Rapanos.*

Many of the Agencies' case-by-case traditional navigable waters determinations have been based on potential use by out-of-state visitors or a water body's potential to float a canoe or kayak. For example, in December 2007, EPA and the Corps designated a 150-mile segment of the Little Snake River as a traditional navigable water.[6] The segment is navigable only by kayak and canoe, and even then only rarely, and there was no indication that the segment was susceptible to use as a highway for transport of goods. Similarly, in December 2007, the Agencies deemed Boyer Lake, an isolated, wholly intrastate lake in Minnesota, a traditional navigable water based on one point of public access and speculation that some recreational fishermen who use the lake come from out of state.[7] The Agencies went even further with Bah Lakes, declaring this landlocked 70-acre water body a traditional navigable water based on the *possibility* that some out-of-state travelers could use small recreational watercraft on the lake.[8]

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[6] EPA and Corps, Memorandum for NWO-2007-1550 (Dec. 12, 2007), *available at* http://www.usace.army/mil/CECW/Documents/cecwo/reg/cwa_guide/TNW_NWO-2007-1550.pdf.

[7] EPA and Corps, Memorandum for MVP-2007-1497-RQM (Dec. 11, 2007), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/TNW_MVP-2007-1497.pdf.

[8] EPA, Memorandum for JD # 2007-04488-EMN (Jan. 16, 2008), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/BahLakeEPA_memo2007-04488.pdf.

In December 2008, EPA declared two reaches of the Santa Cruz River in southern Arizona to be traditional navigable waters.[9] The Santa Cruz River has no significant water flow during the dry seasons of the year; it flows primarily in direct response to precipitation and seasonal storms. Virtually all of the flows recorded in both reaches consist of sewage effluent discharged into the river from upstream sewer plants. There was no evidence that the effluent-filled reaches were susceptible to use as highways for interstate or foreign commerce. On the contrary, there were only two documented instances of recreational use of the river, and both of these small boat trips were largely unsuccessful.[10]

Most recently, in July 2010, EPA declared the entire 51-mile mainstem Los Angeles River a traditional navigable water.[11] The Los Angeles River is a

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[9] Benjamin H. Grumbles, EPA Region 9 Assistant Administrator, EPA's Letter to Corps on Santa Cruz Traditional Navigable Water Determination (Dec. 3, 2008).

[10] Industry groups challenged the Santa Cruz determination, but the district court dismissed the case, holding that the CWA precludes judicial review of a traditional navigable water determination. *Nat'l Ass'n of Home Builders v. United States*, 731 F. Supp. 2d 50, 55 (D.D.C. 2010), *appeal docketed*, No. 10-5341 (D.C. Cir. Oct. 15, 2010). This Court recently granted certiorari to review *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3514 (U.S. Jun. 28, 2011) (No. 10-1062), on the issue of a party's ability to seek judicial review of an EPA jurisdictional determination under the CWA, so NAHB may yet get its day in court.

[11] *See* EPA, Region 9, Special Case Evaluation Regarding Status of the Los Angeles River, California as a Traditional Navigable Water (July 1, 2010), *available at* http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf.

cement-lined channel that is less than 1 foot deep and has a daily average flow of 10 cubic feet per second during the summer months. *Id*. at 27, 28. Notwithstanding the river's shallowness and low flows, EPA deemed it a traditional navigable water based largely on an experimental expedition made by a group of 12 kayakers and canoeists. *Id*. at 23. Comedian Conan O'Brien demonstrated the absurdity of this designation on *The Tonight Show* with a sketch in which he and Andy Richter attempt to canoe down the Los Angeles River in six inches of water, surrounded by concrete and graffiti.[12] As shown in the sketch, the Los Angeles River is definitely not susceptible to use as a highway for interstate or foreign commerce; the two men can barely maneuver the water body in a canoe.

### B. Now The Agencies Are Proposing Guidance That Will Codify A Recreational Use Standard For Traditional Navigable Waters Under The CWA Based On Non-CWA and Non-RHA Cases.

Now, the Agencies are attempting to codify their novel take on traditional navigable waters. Rather than conduct a public rulemaking as the Court suggested in *Rapanos*, the Agencies have issued the Draft Guidance and intend to finalize and then implement this guidance as soon as possible. EPA and Corps, Notice of Draft Guidance, 76 Fed. Reg. 24,479 (May 2, 2011).

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[12] Conan O'Brien Canoes the L.A. River (June 2009), *available at* http://www.canoekayak.com/canoe/conan-canoes-the-la-river/.

Astonishingly, the Draft Guidance states that a water body will qualify as a traditional navigable water under the CWA "[i]f the federal courts have determined that [the] water bodyis navigable-in-fact under federal law *for any purpose* . . ." Draft Guidance, WOUS TNWs Attachment, Waters that Qualify as Waters of the United States Under Section (a)(1) of the Agencies' Regulationsat 1, Docket No. EPA-HQ-OW-2011-0409-0005 (undated), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-0005 (emphasis added). Moreover, recreational use by itself is enough for a water body to qualify as a traditional navigable water. Draft Guidance at 6 ("[W]aters will be considered traditional navigable waters if . . . [t]hey are susceptible to being used in the future for commercial navigation," which can be demonstrated by "current boating trips or canoe trips for recreation or other purposes."). And, "[a] trip taken solely for the purpose of demonstrating a waterbody can be navigated would be sufficient" to demonstrate that a water body is a traditional navigable water. *Id*. n.v.

With no RHA or CWA case law to support their inventive view of traditional navigable waters, the Agencies rely on navigable waters determinations made "for any purpose." They cite *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151 (D.C. Cir. 2002), a D.C. Circuit case reviewing a Federal Energy Regulatory Commission ("FERC") navigability determination under the Federal Power Act ("FPA"), and *Alaska v. Ahtna*, *Inc*., 891 F.2d 1401 (9th Cir. 1989), an equal footing case. These citations to non-CWA, non-RHA cases are all the more remarkable because they are squarely at odds with the position the government has taken in this case. Here, in its *amicus* brief recommending denial of certiorari, the

United States argues that the various "navigable waters" tests may not be applied interchangeably, and states that "[t]he precise legal standard and its application vary depending on the purpose for which a specific determination is being made." United States Brief *Amicus Curiae* on Petition for Writ of Certiorari at 3, May 20, 2011.

Moreover, the government's *Amicus Curiae* brief in this case argues that two cases involving the FPA are irrelevant to the navigability determination in this case because they "were not applying this Court's standards de novo but deferentially reviewing FERC's application of the FPA's statutory definition of navigability." *Id*. at 14. Yet, the Draft Guidance relies on *FPL*, a case deferentially reviewing FERC's application of the FPA definition of navigability. Draft Guidance at 6. The Agencies like *FPL* because the court affirmed FERC's determination that navigability can be established by canoe trips taken solely for the purpose of demonstrating a water body can be navigated. *See FPL*, 287 F.3d at 1154, 1158. Applying their expedient "any purpose" standard, they can use this FPA case to codify a traditional navigable waters test for CWA purposes that far overreaches anything this Court had in mind in *Rapanos*.[13]

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[13] Moreover, an FPA case is not good authority for a CWA traditional navigable waters determination because the FPA definition of "navigable waters" has an explicit, broader meaning than the *Daniel Ball* definition used in the RHA. *See Hardy Salt Co*. 501 F.2d at 1168 (citing Federal Power Act § 3(8), 16 U.S.C. § 796(8); Act of February 4, 1887, ch. 104, 24 Stat. 379) (citing to the 1887 version of the FPA as an example of Congress giving an explicit, broader meaning to "navigable waters" than the *Daniel Ball* definition used in the RHA).

The Draft Guidance also cites *Ahtna*, a case examining a river's navigability for title purposes under the "equal footing" doctrine, to support the notion that commercial recreational boating is sufficient to establish that a water body is a traditional navigable water. Draft Guidance at 24. In *Ahtna*, the U.S. Court of Appeals for the Ninth Circuit relied on the river's present use by a fishing and sightseeing industry that employs approximately 400 people to hold that the river at issue was navigable for title purposes at the time of statehood. 891 F.2d at 1405. Of course, under the government's argument in this case—*i.e.*, that "navigable waters" tests may not be used interchangeably—a title case is not good precedent for a traditional navigable waters determination under the CWA. But the Guidance is outcome-driven.[14]

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[14] Even for title cases, *Ahtna*'s determination that a water is navigable based on commercial recreation is incorrect. Contrary to *Ahtna,* the title cases establish that evidence of present-day commercial recreational use is not enough for a navigable waters determination under the "equal footing" doctrine. *See, e.g., United States v. Oregon*, 295 U.S. 1, 23 (1935) (waters nonnavigable for title purposes despite use by fur trappers, canoes, and row boats); *North Dakota v. United States*, 972 F.2d 235, 240 (9th Cir. 1992) (modern day canoe use and "boatability" data are not reliable indicators of a water's navigability at statehood). Reliance on recreational use as a measure of navigability is also very limited in other contexts, such as admiralty cases. *See, e.g., Adams v. Montana Power Co.*, 528 F.2d 437, 440 (9th Cir. 1975) (portion of river used by small pleasure craft is nonnavigable for admiralty purposes).

Moreover, in *Ahtna*, the court used present-day evidence of navigability to determine navigability under the "equal footing" doctrine because the parties stipulated that the river's physical characteristics had not changed since statehood. 891 F.2d at 1405. As such, *Ahtna*'s holding is case-specific and does not

In short, the Agencies are advancing a position in the Draft Guidance that is directly contrary to this Court's precedent and to the representations the government is making to this Court. The Draft Guidance would direct agency staff to base CWA traditional navigable waters determinations on navigability determinations made for any purpose, and relies on non-CWA, non-RHA cases to support one-time recreational use as a standard for traditional navigable waters determination under the CWA.

## IV. NAVIGABILITY DETERMINATIONS CANNOT BE BASED ON RECREATIONAL USE AND MUST BE MADE SEGMENT BY SEGMENT.

A water body's susceptibility to use for recreational purposes is not the proper standard for determining navigability for title purposes in this case, nor is it the appropriate standard for determining whether a water qualifies as a traditional navigable water under the CWA. For a water body to qualify as a traditional navigable water under the CWA, it must be susceptible to use as a highway for waterborne transportation of commercial goods in interstate or foreign commerce, thereby satisfying the definition from *The Daniel Ball* and its Commerce Clause progeny that this Court relied on in *Rapanos*. Evidence that a canoe or kayak can float on a water body is insufficient to meet this standard. Recreational use of a waterway may affect commerce, but the waterway does not thereby become susceptible for use as a highway for interstate or foreign commerce. *See*

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stand for the general principle that a court may look at present-day recreational use for a navigability determination for title purposes.

*Alford v. Appalachian Power Co.*, 951 F.2d 30, 33 (4th Cir. 1991).

Moreover, the navigability of a waterway must be determined on a section-by-section basis. As it has done for title and admiralty cases,[15] this Court has historically applied a section-by-section approach when examining navigability for purposes of determining the scope of federal regulatory jurisdiction under the commerce power. For example, in *Appalachian Elec. Power Co.*, the Court examined the navigability of a 111-mile reach of the New River to determine whether the United States had federal regulatory jurisdiction to prevent the Appalachian Electric Power Company from constructing a hydroelectric dam. 311 U.S. at 411. Courts of Appeals examining navigability for purposes of determining federal jurisdiction under the Commerce Clause have applied this Court's section-by-section approach. *See, e.g., Lykes Bros., Inc. v. U.S. Army Corps of Eng'rs*, 64 F.3d 630, 633 (11th Cir. 1995) (finding that Fisheating Creek is navigable, and is thus jurisdictional under the RHA, only for several miles from its mouth at Lake Okeechobee to Fort Center, Florida); *Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447,

[15] *See, e.g., United States v. Utah*, 283 U.S. at 77 (approving special master's findings that portions of the Green, Grand, and Colorado Rivers were navigable such that title for those portions was vested in Utah while other portions of the Colorado and San Juan Rivers were nonnavigable such that title for those portions was vested in the United States); *LeBlanc v. Cleveland*, 198 F.3d 353, 359 (2d Cir. 1999) (finding that the Hudson River downstream of Fort Edward was a "navigable water" for purposes of admiralty jurisdiction because it was capable of supporting interstate commerce, but that the waters north of Fort Edward were nonnavigable waters because manmade dams prevented continuous boat travel).

451 (6th Cir. 1982) (finding the Great Miami River was navigable for Commerce Clause purposes from its mouth to Mile 117, but that the river was nonnavigable from Mile 117 to Mile 153).

Likewise, the Corps's navigable waters determinations for RHA purposes are also reach-by-reach. For example, the Corps determined that two segments of the Sacramento River—a 301-mile reach and a 26-mile reach—are navigable waters under the RHA.[16] In addition, the Corps designated three separate segments of the Grass River in New York as navigable waterways for purposes of the RHA.[17] Section-by-section analysis is appropriate when courts or agencies examine navigability under the CWA or RHA.

## CONCLUSION

For all of the foregoing reasons, the decision of the Montana Supreme Court in *PPL Montana v. State*, 229 P.3d 421 (Mont. 2010), should be reversed. *Amici* urge the Court to make it clear that the legal standard for "navigable waters" varies depending on the statute at issue and the purpose for which a navigability determination is made and to hold that evidence of present-day recreational use is insufficient for a navigability determination for title

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[16] *See* Corps, Sacramento District, Regulatory Division, Navigable Waterways in the Sacramento District, *available at* http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/ca_waterways.html.

[17] *See* Corps, Buffalo District, Navigable Waterways in Buffalo District Where Department of the Army Permits are Required, *available at* http://www.lrb.usace.army.mil/orgs/reg/waterway_ny.pdf.

or any purpose and that navigability of a waterway must be determined on a section-by-section basis.

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*Public Lands Council, and*
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September 7, 2011

# APPENDIX

# APPENDIX

## Glossary of Key Terms

**"Navigable waters of the United States" under the Rivers and Harbors Act of 1899 ("RHA")** – Navigable waters of the United States must satisfy the *Daniel Ball* definition: (1) they are navigable-in-fact (or capable of being rendered so) and (2) together with other waters form highways used to transport commercial goods in interstate commerce. 77 U.S. (10 Wall.) 557, 563 (1870).

**"Navigable waters," defined as "waters of the United States" under the Clean Water Act ("CWA")** – The CWA defines "navigable waters" as "the waters of the United States." 33 U.S.C. § 1362(7). According to *Rapanos v. United States*, the "navigable waters," defined as "waters of the United States" under the CWA, are not limited to the "navigable waters of the United States" under the RHA. 547 U.S. 715, 734 (2006) (Scalia, J., plurality); *id.* at 779 (Kennedy, J., concurring). Instead, the CWA regulates traditional navigable waters (see below) and certain nontraditional navigable waters (see below).

**Traditional navigable waters** – A term that emerged after this Court's decision in *Rapanos* to refer to a subset of CWA waters that satisfy the *Daniel Ball* definition and are the "navigable waters of the United States" under the RHA. The *Rapanos* Court also referred to this subset of CWA waters as "traditional interstate navigable waters," *Rapanos*, 547 U.S. at 742 (Scalia J., plurality), and "navigable waters in the traditional sense," *id*. at 779 (Kennedy, J. concurring). If a water does not qualify as a traditional navigable water, it still can be regulated under the CWA. *See* nontraditional navigable waters.

**Nontraditional navigable waters** – The remainder of CWA waters; after *Rapanos* these waters may be jurisdictional based on their relationship to traditional navigable waters. Waters that are not themselves traditional navigable waters and that lack the requisite relationship to traditional navigable waters are not regulable under the CWA.