

APPENDIX D

Legal Definition of “Traditional Navigable Water”

Waters that Qualify as Waters of the United States Under section (a)(1) of the Agencies' Regulations

The Rapanos guidance affirms that EPA and the Corps will continue to assert jurisdiction over “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.” 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(s)(1). The guidance also states that, for purposes of the guidance, these “(a)(1) waters” are the “traditional navigable waters.” These (a)(1) waters include all of the “navigable waters of the United States,” defined in 33 C.F.R. Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN).

EPA and the Corps are providing this guidance on determining whether a water is a “traditional navigable water” for purposes of the Rapanos guidance, the Clean Water Act (CWA), and the agencies’ CWA implementing regulations. To determine whether a water body constitutes an (a)(1) water under the regulations, relevant factors include Corps regulations, prior determinations by the Corps and by the Federal courts, and caselaw. Corps districts and EPA regions should determine whether a particular waterbody is a traditional navigable water based on application of those factors to the specific facts in each case.

As noted above, the (a)(1) waters include, but are not limited to, the “navigable waters of the United States.” A water body qualifies as a “navigable water of the United States” if it meets any of the tests set forth in 33 C.F.R. Part 329 (e.g., the water body is (a) subject to the ebb and flow of the tide, and/or (b) the water body is presently used, or has been used in the past, or may be susceptible for use (with or without reasonable improvements) to transport interstate or foreign commerce). The Corps districts have made determinations in the past regarding whether particular water bodies qualify as “navigable waters of the United States” for purposes of asserting jurisdiction under Sections 9 and 10 of the Rivers and Harbors Act of 1899 (33 USC Sections 401 and 403). Pursuant to 33 C.F.R. § 329.16, the Corps should maintain lists of final determinations of navigability for purposes of Corps jurisdiction under the Rivers and Harbors Act of 1899. While absence from the list should not be taken as an indication that the water is not navigable (329.16(b)), Corps districts and EPA regions should rely on any final Corps determination that a water body is a navigable water of the United States.

If the federal courts have determined that a water body is navigable under Federal law for any purpose, that water body qualifies as a “navigable water” for purposes of 33 C.F.R. § 328.3(a)(1) and 40 C.F.R. § 230.3(s)(1). Corps districts and EPA regions should be guided by the relevant opinions of the federal courts in determining whether waterbodies are “currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce” (33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3(s)(1)) or “navigable-in-fact.”

The definition of “navigable-in-fact” comes from a long line of cases originating with The Daniel Ball, 77 U.S. 557 (1870). When describing what waters qualify as navigable waters subject to federal jurisdiction, the Supreme Court stated:

Those rivers must be regarded as 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.

The Daniel Ball, 77 U.S. at 563.

In The Montello, the Supreme Court clarified that “customary modes of trade and travel on water” encompasses more than just navigation by larger vessels:

The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.

The Montello, 87 U.S. 430, 441-42 (1874). In that case, the Court held that early fur trading using canoes sufficiently showed that the Fox River was a navigable water of the United States. The Court was careful to note that the bare fact of a water’s capacity for navigation alone is not sufficient; that capacity must be indicative of the water’s being “generally and commonly useful to some purpose of trade or agriculture.” Id. at 442.

In U.S. v. Utah, 283 U.S. 64, (1931) and U.S. v. Appalachian Power, 311 U.S. 377 (1940), the Supreme Court held that so long as a water is susceptible to commercial use, it is navigable-in-fact, even if the water has never been used for any commercial purpose. U.S. v. Utah, at 81-83 (“The question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question.”); U.S. v. Appalachian Power, 311 U.S. 377, 416 (1940) (“Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.”).

In Economy Light & Power, the Supreme Court held that a waterway need not be continuously navigable; it is navigable even if it has “occasional natural obstructions or portages” and even if it is not navigable “at all seasons . . . or at all stages of the water.” Economy Light & Power Co. v. U.S., 256 U.S. 113, 122 (1921).

In FPL Energy Marine Hydro, the D.C. Circuit reiterated the fact that “*actual use* is not necessary for a navigability determination” and repeated earlier Supreme Court holdings that navigability and capacity of a water to carry commerce could be shown through “physical characteristics and experimentation.” FPL Energy Marine Hydro LLC

v. FERC, 287 F.3d 1151, 1157 (D.C. Cir. 2002). In that case, the D.C. Circuit upheld a FERC navigability determination that was based upon three experimental canoe trips taken specifically to demonstrate the river's navigability. Id. at 1158-59.

The 9th Circuit has also recently implemented the Supreme Court's holding that a water need only be susceptible to being used for waterborne commerce to be navigable-in-fact. Alaska v. Ahtna, Inc., 891 F.2d 1404 (9th Cir. 1989). In Ahtna, the 9th Circuit held that current use of an Alaskan river for commercial recreational boating is sufficient evidence of the water's capacity to carry waterborne commerce at the time that Alaska became a state. Id. at 1405. It was found to be irrelevant whether or not the river was actually being navigated or being used for commerce at the time, because current navigation showed that the river always had the capacity to support such navigation. Id. at 1404.

In summary, a water body qualifies as a "traditional navigable water" (i.e., (a)(1) water) if a Corps District has determined that the water body is a navigable water of the United States pursuant to 33 C.F.R. §329.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 C.F.R. §329, or a Federal Court has determined that the water body is navigable under Federal law for any purpose, or the water body is "navigable-in-fact" as this term has been defined by the Federal Courts.