March 20, 2009

David Smith
Chief
Wetlands Regulatory Office (WTR-8)
EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105

RE: LOS ANGELES RIVER STATUS AS TRADITIONAL NAVIGABLE WATER (TNW) –SPECIAL CASE REVIEW

Dear Mr. Smith,

The Santa Monica Baykeeper, the Natural Resources Defense Council, Heal the Bay, Friends of the Los Angeles River, Southern California Watershed Alliance, Clean Up Rocketdyne and the Aerospace Cancer Museum of Education (collectively "Environmental Groups") urge the United States Environmental Protection Agency ("EPA") to find that the Los Angeles River ("LA River" or "River") is a TNW in its entirety. Both the available evidence and the statutory and case law mandate this result. Moreover, only a finding that the entire LA River is a TNW will be consistent with the EPA's purpose and function "to assure the protection of the environment by abating and controlling pollution on a systematic basis."[1]

## *Background of the LA River Special Case Review*

The navigability of the LA River was initially examined by the United States Army Corps of Engineers ("Army Corps") in early 2008 as part of the "significant nexus" analysis to determine the Army Corps' Clean Water Act ("CWA" of "Act") jurisdiction over certain streams in the upper LA River watershed. In March 2008, the Army Corps concluded that only the estuary of the river, up to the vicinity of Highway 1, is a TNW.[2] The Army Corps subsequently retracted this navigability determination and issued a new one with a slightly expanded scope in

[1] 40 C.F.R. § 1.3.

[2] *Determination of TNW Status of the Los Angeles River* (File No. 2008-218-AJS), Memorandum for Chief, Regulatory Division (March 20, 2008).

June 2008. This second navigability determination found that in addition to the LA River estuary, an upstream section of the River, known as the Sepulveda Basin, was also a TNW.[3]

In response to increasing public pressure following the June 2008 LA River navigability determination by the Army Corps, the EPA invoked the special case procedure of the Army Corps/EPA *Memorandum of Agreement Concerning the Determination of Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the CWA* from 1989, under which the EPA Headquarters makes the final determination of the TNW status of a waterbody for CWA jurisdiction purposes.[4]

The special case review of the LA River was undertaken to "verify that Clean Water Act protections remain in effect throughout" the LA River watershed with the goal to ensure that the CWA programs "to protect and restore the quality of the waters of the United States" will "continue and improve."[5] The EPA would evaluate the entire LA River and assess "different legal bases for asserting jurisdiction and navigability."[6] The factors to be considered in the LA River navigability analysis are: sufficient river flow and depth to support boating; history and purposes of boating on the river, including recreational and commercial uses; public access to the river; plans to improve or restore the river to increase navigation potential.[7] The EPA also invited the public to assist in any way possible with the evaluation of the LA River TNW status.[8]

Many groups, including Environmental Groups, and individuals who recreate on and use the LA River for navigation have already submitted extensive information and evidence to the Army Corps, EPA Headquarters and EPA Region 9 showing the LA River is and will be used in the future for watercraft travel and transportation.[9] Additional evidence is attached to this letter. Based on this evidence, the entire LA River is clearly a TNW within the meaning of the CWA and interpretive court decisions.

### *"Traditional Navigable Waters" in the Clean Water Act Framework*

The Clean Water Act was passed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[10] The Act's goal is to eliminate discharge of

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[3] *Determination of Traditional Navigable Waters on the Los Angeles River*, Memorandum for the Record (June 4, 2008).

[4] August 17, 2008 Letter from Benjamin H. Grumbles, U.S. EPA Assistant Administrator for Water, to John Paul Woodley, Assistant Secretary of the Army (Civil Works).

[5] *Evaluation of Jurisdiction and Navigability on Santa Cruz River, AZ and Los Angeles River, CA: EPA's Planned Approach* (November 10, 2008).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] It is our understanding that this evidence is now part of the record for the LA River navigability determination.

[10] 33 U.S.C. §1251(a).

pollution into navigable waters by 1985 with an interim goal of achieving fishable and swimmable conditions by 1983.[11] The means to accomplish the Act's ambitious objectives include section 303 (water quality standards)[12], section 402 (NPDES permit program)[13], section 404 (dredge and fill permits) [14], section 301 (effluent limitations and other restrictions on discharge of pollution)[15] and section 311 (oil spill control and prevention), all of which establish specific limitations and controls on the discharge of pollutants into "navigable waters." Thus, the term "navigable waters" is a cornerstone in the Act's regulatory framework as it determines whether a specific waterbody will be afforded the protections of the CWA's pollution prevention programs.

The CWA defines "navigable waters" expansively as "the waters of the United States, including the territorial seas."[16] The term "navigable waters" therefore has been consistently given a broad meaning in accord with the "evident breadth of congressional concern for protection of water quality and aquatic systems."[17] After the Supreme Court's splintered ruling in the *Rapanos* and *Carabell* cases (collectively *Rapanos*), the status of a waterbody as a TNW acquired a new importance due to its role in the "significant nexus" analysis employed by Justice Kennedy to determine CWA jurisdiction over waters which are not TNW as well as the jurisdictional analysis in the plurality's opinion.[18]

### *The Navigability Factors in the Current* Rapanos *Guidance Are Unjustifiably Narrow*

Following *Rapanos*, in 2007 the Army Corps and the EPA issued a joint guidance memorandum in an attempt to clarify the Supreme Court's ruling and ensure consistency. The agencies subsequently revised the *Rapanos* Guidance in December 2008. Unfortunately, the

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[11] *Id.*

[12] 33 U.S.C. § 1313.

[13] *Id.* § 1342

[14] *Id.* § 1344 (permit program regulating pollution from dredge and fill activities, administered by the United States Army Corps of Engineers).

[15] *Id.* § 1311.

[16] 33 U.S.C. § 1362(7).

[17] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

[18] *Rapanos* resulted in five opinions: the opinion of Justice Scalia joined by three other justices; the opinion of Justice Kennedy, concurring in the judgment to remand the cases and thus providing the necessary fifth vote to support a ruling; Chief Justice Roberts' concurring opinion; the dissent led by Justice Stevens and Justice Breyer; and a separate dissent by Justice Breyer. *Rapanos v. United States*, 547 U.S. 715 (2006). The plurality concluded that only wetlands with "continuous surface connection" with a "'water of the United States' (i.e. a relatively permanent body of water connected to traditional interstate navigable waters)" are covered by the CWA. *Id.* at 742. Justice Kennedy's opinion, however, relied on established by Supreme Court precedent finding that wetlands are subject to CWA protections if they are in "significant nexus" with "other covered waters more readily understood as 'navigable.'" *Id.* at 780.

current *Rapanos* Guidance definition of "traditional navigable waters" is impermissibly limited and contradicts established case law.[19]

Under the current *Rapanos* Guidance, traditional navigable waters are "all the waters described in 33 C.F.R. § 328 (a) (1), and 40 C.F.R. § 230.3 (s)(1)."[20] These "(a)(1) waters," encompass the waters defined in 33 C.F.R. § 329 and "by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact."[21] Moreover, for Guidance and CWA jurisdiction purposes, "waters will be considered traditional navigable waters if:

- They are subject to Section 9 and 10 of the Rivers and Harbors Act, or
- A federal court has determined that the water body is navigable-in-fact under federal law, or
- They are waters currently being used for commercial navigation, including commercial water-borne recreation (e.g. boat rentals, guided fishing trips, waters ski tournaments, etc.), or
- They have historically been used for commercial navigation, including commercial water-borne recreation, or
- They are susceptible to being used in the future for commercial navigation, including commercial water-borne recreation. Susceptibility for future use may be determined by examining a number of factors, including the physical characteristics and capacity of the water (e.g., size, depth, and flow velocity, etc.) to be used in commercial navigation, including commercial recreational navigation, and the likelihood of future commercial navigation or commercial water-borne recreation. Evidence of future commercial navigation use, including commercial water-borne recreation (e.g., development plans, plans for water

[19] A summary of pertinent case law is in fact provided in Appendix D (Legal Definition of "Traditional Navigable Waters") to the Army Corps/EPA previous *Rapanos* Guidance issued in 2007.

[20] *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* ***Rapanos v. United States & Carabell v. United States*** (December 2, 2008) at 4.

[21] *Id.* at 5. Under section 328.3 of Title 33 of the Code of Federal Regulations, "waters of the United States" or "navigable waters" are:

(1) All 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;
(2) All interstate waters including interstate wetlands;
(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
(4) All impoundments of waters otherwise defined as waters of the United States under the definition;
(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
(6) The territorial seas;
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

> dependent events, etc.), must be clearly documented. Susceptibility to future commercial navigation, including commercial water-borne recreation, will not be supported when the evidence is insubstantial or speculative. Use of average flow statistics may not accurately represent streams with "flashy" flow characteristics. In such circumstances, daily gage data is more representative of flow characteristics.[22]

However, such a rigid and circumscribed approach to navigability determinations is unwarranted given the broad goals of the CWA and conflicts with established caselaw which was not overruled by *Rapanos* as discussed below.

### *To Determine the TNW Status of the LA River the EPA Must Apply Navigability Factors Established by Federal Caselaw*

To be consistent with the goals of the CWA and the broad Congressional policy to protect and restore the waters of the United States as swiftly as possible, the EPA cannot limit its navigability analysis of the LA River to the factors listed in the *Rapanos* Guidance but should consider the principles established by federal caselaw.

Contrary to the suggestion of the current *Rapanos* Guidance, although it discussed the term "traditional navigable waters," *Rapanos* did not overrule prior judicial interpretations of the term. Instead, the Court used "traditional navigable waters" as a starting point for its analysis of the scope of CWA-protected waters, reasoning that the CWA covers waters other than "traditional navigable waters." *Rapanos*, 547 U.S. at 723-739, 759-762, 765-787. Despite its mention of the term "traditional navigable waters" the Court did not interpret the meaning of the term but simply referred to interpretations established in earlier caselaw. *See, e.g. id.* at 723 (plurality's reference to "traditional navigable waters" as defined by *Daniel Ball* and *Appalachian Electric Power Co.*). Thus, factors and reasoning used by federal courts to determine navigability must be applied by the EPA in its special case review of the LA River.

Federal courts have interpreted navigability broadly. "Navigability is a flexible concept and 'each application of the [*Daniel Ball* test] … is apt to uncover variations and refinements which require further elaboration."*Alaska v. Ahtna*, Inc., 891 F.2d 1401, 1405 (9th Cir. 1989) (citations omitted). Thus, courts have concluded that waters are TNW regardless of the size and the type of the vessels used for navigation of the particular waterbody[23], so long as some parts of the waterbody are "susceptible of being used" and may be used, despite the "occasional

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[22] *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* ***Rapanos v. United States & Carabell v. United States*** (December 2, 2008) at 5, fn. 20.

[23] *See The Montello*, 87 U.S. 430, 441-42 (1874) (stating that "the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation" and holding that use of river by fur trading canoes establishes the river is navigable-in-fact).

difficulties," for navigation.[24] Further, a waterbody may have a TNW status even if navigation is not possible all year around and can be accomplished only in certain segments of the waterbody.[25]

Contrary to the current *Rapanos* Guidance, waters used by personal watercraft and not for any commercial purpose[26], including intrastate waters[27], may be traditional navigable waters even in cases where evidence of future plans for navigation use are not documented or yet formalized.[28]

More recent caselaw continues this broad approach to navigability determinations. Importantly, courts have found that a stream's TNW status may be demonstrated through "physical characteristics and experimentation" such as three experimental canoe trips conducted specifically to show the stream's navigability.[29] A waterbody primarily used for recreational boating can be a TNW because the navigability test is "whether the river was susceptible of being used as a highway for commerce" and "[t]o deny that this use of the river is commercial because it relates to the recreation industry is to employ too narrow a view of commercial activity." *Ahtna*, 891 F.2d at 1405.

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[24] *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926).

[25] *See Economy Light & Power Co. v. United States*, 256 U.S. 113, 122 (1921) ("Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions and portages; nor need the navigation be open all seasons of the year, or at all stages of the water."). *See also* 33 C.F.R. § 329.11 ("Federal regulatory jurisdiction … extend[s] laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers.) However, "[i]f the waterway is merely capable of exceptional transportation during periods of high water, it is not navigable." *Puget Sound Power & Light Co. v. Energy Regulatory Comm'n*, 644 F.2d 785, 787.

[26] *See Appalachian Elec. Power Co.*, 311 U.S. at 416 ("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 any event, the *Rapanos* Guidance requirement that future use must documented by clear evidence is baffling as the use is, by definition, difficult to demonstrate until it occurs. It also appears inconsistent with the Guidance's own suggestion that *susceptibility* to navigation can make a water a TNW based on a variety of factors, including the physical characteristics and capacity for such use.

[27] *See Utah v. United States*, 403 U.S. 9, 10 (1971) (rejecting the argument that the Great Salt Lake is non-navigable because it was used for navigation only by a "few people who performed ranching operations along the shores of the lake" and finding instead that the lake's characteristic as a "highway" made it navigable).

[28] *See Appalachian Elec. Power Co.*, 311 U.S. at 408 (availability for navigation is a factor that must be considered and a waterbody may be navigable even if improvements are required; such improvements, however, need not be "actually completed or authorized" and may vary depending on the circumstances).

[29] *FPL Energy Maine Hydro LLC v. Fed. Energy Regulatory Comm'n*, 287 F.3d 1151, 1156 (D.C. Cir. 2002) (holding that a federal agency's finding of navigability based on test canoe trips and the river's characteristics "in the absence of any commercial and recreational use" is reasonable).

*The LA River is a Traditional Navigable Water*

When applying the above-discussed navigability factors to the LA River, the inescapable conclusion is that the River is a TNW for Clean Water Act purposes in its entirety.

First, there is substantial evidence that in the last decade the LA River has been increasingly used for recreational purposes by small watercraft, including canoes and kayaks, and is thus navigable.[30] Most recently, the navigability of the River and its potential for increased navigation was clearly demonstrated in July 2008, when a group of kayakers went down the entire LA River. This well-documented trip was taken in ordinary low-flow conditions of the River, not the rainy season during which, as noted by Justice Kennedy in *Rapanos*[31], the River releases powerful water volumes. Even though the participants encountered some difficulties in navigating a few segments of the River, these navigational problems were the "occasional difficulties" which, as discussed in *Holt State Bank*, cannot preclude a finding of navigability.[32] Not surprisingly, after the LA River Expedition, its organizers were inundated with requests by individuals interested in organized navigation of the River.[33] Thus, navigation of the LA River is far from "extraordinary." Not only is the River undoubtedly navigable; it is also clearly capable of attracting commercial future use by small watercraft.

Second, while the significance of public access as factor for navigability of the LA River[34] is unclear, this factor is also satisfied. Any argument that there is no public access to the River is a misnomer. The River is located in the middle of a densely populated urban area with a remarkable shortage of public recreation opportunities and parks and hence naturally attracts residents and visitors of the area. As the evidence attached to this letter demonstrates, the LA River is accessed by the public for kayaking and canoeing throughout its length.

Third, the City of Los Angeles' plans for the restoration of the LA River demonstrate the River's potential for continued and increased use not just for personal but also for commercial recreational purposes of the type envisioned in *Ahtna*. With the limited opportunities for river boating in the Los Angeles area these plans are vital for many citizens who want to explore and enjoy the River as an important and valuable natural resource. Clearly, to them and to all enthusiasts wanting to "run the river," the fact that the LA River has a concrete bed and offers navigational challenges is not enough to deter them from actually navigating it. The potential for

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[30] This evidence was already submitted to the Army Corps and is attached to this letter as Attachment D. Additional evidence is provided in Attachments A and C.

[31] *Rapanos*, 547 U.S. at 769.

[32] The 2008 LA River Expedition report is attached to this letter as Attachment A.

[33] A sample of the inquiries sent to the LA River Expedition organizers is attached to this letter Attachment B.

[34] Public access was listed as one of the navigability factors to be considered by the EPA in its special case review. *Evaluation of Jurisdiction and Navigability on Santa Cruz River, AZ and Los Angeles River, CA: EPA's Planned Approach* (November 10, 2008).

increased recreational navigation on the River clearly demonstrates that the River, if protected by the CWA, will be better able to support commercial recreational boating for residents and visitors of Los Angeles.

The LA River is both an unusual and a typical river. Neither the EPA nor any other responsible agency, however, should neglect its duty to protect the River from pollution simply because it was altered from its natural condition and lacks the postcard image quality of many other rivers in the nation. Even in the driest of Southern California weather, the LA River has sufficient flow to carry boats and transport people from the River's headwaters at Owensmouth to the estuary along a 52-mile distance. The commitment of Los Angeles, its citizens and the environmental community to restore the River and encourage commercial recreational use by residents and visitors cannot be ignored. Statutory provisions, case law and common sense dictate a finding that the River is a traditional navigable waterway. This is exactly what the EPA's review of the River must conclude.

Sincerely,

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Attachments