No. 21-454

In The
Supreme Court of the United States

MICHAEL SACKETT, ET UX.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES IN SUPPORT OF *PETITIONERS*

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Home Builders of the United States ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals are providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 120,000 members are home builders or remodelers and are responsible for the construction of 80% of all new homes in the United States. The remaining members are associates working in closely related fields within the housing industry, such as environmental consulting, mortgage finance and building products and services.

A large part of building and selling homes consists of obtaining and preparing land for construction.[2] That land often contains Clean Water Act ("CWA") "waters of the United States," as the federal government has defined and interpreted that term. *See* 33 C.F.R. § 328.3(a); 40 C.F.R. § 122.2. Often

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[1] *Amicus curiae* has obtained consent from the Petitioners and the Respondents have filed a blanket consent with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

land developers must alter those "waters" to ensure that their communities make the best use of the land in accordance with local and state zoning and land use requirements. Unfortunately, the boundaries of the CWA have been constantly changing due to the "significant nexus" test developed in *Rapanos v. United States,* 547 U.S. 715 (2006) and as interpreted by the government. These ever-changing rules make it more costly for developers to purchase and develop land and these costs in turn make it difficult to provide homes that the public can afford.

SUMMARY OF THE ARGUMENT

In *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Eng'rs*, 547 U.S. 715 (2006), the plurality and concurring opinions, written by Justice Scalia and Justice Kennedy, each tied the jurisdiction of the CWA to "traditional navigable waters." There are numerous types of waterbodies that the Court could consider traditional navigable waters. Both Justice Scalia and Justice Kennedy, however, equated the traditional navigable waters with the "navigable waters of the United States" as defined in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870).

The Agencies have improperly developed their own broader definition of traditional navigable waters. Moreover, they have improperly determined that Priest Lake is a traditional navigable water using that broad definition.

ARGUMENT

In *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Eng'rs*, 547 U.S. 715 (2006) (hereinafter *Rapanos*), both the plurality and concurring opinions, written by Justice Scalia and Justice Kennedy, established that certain wetlands are jurisdictional under the Clean Water Act ("CWA") if they have a sufficient connection to a *traditional navigable water*.[3] The lower courts in this matter have grappled with the issue of whether the wetlands on the Sackett property have a sufficient connection to Priest Lake to support jurisdiction under the CWA. It has been assumed, with little analysis, that Priest Lake is a traditional navigable water. NAHB disputes the government's definition of traditional navigable water and questions whether Priest Lake is a traditional navigable water.

The Agencies and the Court use the term traditional navigable waters as if it is a settled term of art or law. It is not. NAHB is concerned that the Court may establish a jurisdictional test and use that term without explanation, or inadvertently declare Priest Lake a traditional navigable water without defining the term and explaining why the Lake meets the definition.

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[3] NAHB uses "traditional navigable waters" as a shorthand for "traditionally navigable waters," "navigable waters in the traditional sense," "waters that have traditionally been found navigable," etc.

I. THERE ARE VARIOUS TYPES OF WATERBODIES THAT THE COURT COULD CONSIDER TRADITIONAL NAVIGABLE WATERS.

The term traditional navigable waters is not found in the CWA nor is it defined by regulation. In addition, the Court has not clearly defined traditional navigable waters. Based on caselaw, relevant statutes and regulatory documents NAHB has developed a list of five types of waterbodies that the Court could consider traditional navigable waters. *See* Table 1 at App. A-1.

A. Tidal Waters.

The phrase "navigable waters" originated in England. The common law test for navigability was determined by the ebb and flow of tide—tidal waters were considered navigable waters. That test grew from the fact that in England there were very few navigable waters that were not also tidal. *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443, 454–55 (1851); *Escanaba & Lake Michigan Transp. Co. v. City of Chicago*, 107 U.S. 678, 682 (1883). The common law test, however, was insufficient in the United States because "[s]ome of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). Thus, the Court expanded the test for determining whether a waterbody is a navigable water. *United States v.*

Sasser, 967 F.2d 993, 996 (4th Cir. 1992) (explaining that the tidal test survived after *The Daniel Ball*); *United States v. Stoeco Homes, Inc.,* 498 F.2d 597, 610 (3d Cir. 1974) (explaining that *The Daniel Ball* expanded the test for navigability but did not extinguish the tidal test).

B. The "Navigable Waters of the United States" or *The Daniel Ball* Waters.

The Court first developed a broader test of navigability for regulatory[4] purposes in *The Daniel*

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[4] Some have questioned whether *The Daniel Ball* is an admiralty case or a Commerce Clause case. John F. Baughman, *Balancing Commerce, History, and Geography: Defining the Navigable Waters of the United States*, 90 Mich. L. Rev. 1028, 1037 n. 66 (1992). The ship was libeled in admiralty. However, the underlying license regulations were based on Congress's Commerce Clause power. *The Daniel Ball*, 77 U.S. (10 Wall.) at 558, 564. Moreover, the constitutional issue before the Court was the scope of federal Commerce Clause authority regarding the transportation of goods on a vessel that did not travel out of state but whose goods were destined for other states. Finally, even this Court has referred to *The Daniel Ball* as "a case concerning federal power to regulate navigation." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012); *see Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) (citing to *The Daniel Ball* "to define the scope of Congress' regulatory authority under the Interstate Commerce Clause").

Moreover, *The Daniel Ball* test is the same basic test federal courts use to determine their admiralty or maritime jurisdiction. *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 271–72 (1932); *Perry v. Haines*, 191 U.S. 17, 26 (1903). For admiralty jurisdiction, however, the waterbody must presently be able to transport interstate commerce. *Tundidor v. Miami-Dade Cnty.*, 831 F.3d 1328, 1331–32 (11th Cir. 2016).

Ball, 77 U.S. (10 Wall.) at 563 (1870). The case concerned whether the steamship, the *Daniel Ball*, violated federal law by failing to be licensed and inspected as required by statute. *Id*. at 558. It was stipulated that the steamer only traveled between Grand Haven, at the mouth of the Grand River to Grand Rapids. *Id.* at 559. The owners argued that the Grand River was not a navigable water of the United States and thus, the license and inspection requirements did not apply to the *Daniel Ball*. *Id*. at 561. The Court established a two-part test for determining whether waterbodies are "navigable waters of the United States." First, they must be "navigable in fact," which means 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." *Id.* at 563. Second, they are considered navigable waters of the United States (as opposed to 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."[5] *Id.; see also*, *United States v. The Montello*, 78 U.S. (11 Wall.) 411, 415 (1870)("If, however, the river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its

[5] Thus, the two-part test has a navigation component (customary modes of travel), a commerce component (a highway of commerce for trade and travel), and an interstate component (connection to other states or countries).

connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State . . .”). The Court held that the Grand River was a navigable water of the United States because it joins Lake Michigan and thereby forms a highway of commerce that connects the River “with other States and with foreign countries.” *The Daniel Ball,* 77 U.S. (10 Wall.) at 564 (1870).

The Daniel Ball expanded but did not supplant the tidal waters test. Thus, tidal waters are also still considered navigable waters of the United States. *See Exec. Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 253 (1972) (explaining that maritime jurisdiction was “expanded” from tidal waters to navigable waters); *United States v. DeFelice*, 641 F.2d 1169, 1175 n. 14 (5th Cir. 1981); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 749 (9th Cir. 1978) (recognizing that *The Daniel Ball* expanded the tidal test to non-tidal inland waters). Additionally, over time, the first part of *The Daniel Ball* test has been expanded for Commerce Clause purposes. In *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921), the Court clarified that a waterbody that was used for commercial navigation in the past remains navigable in fact even if it is not currently used for that purpose. Furthermore, in *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406–408 (1940), the Court held that a water body is navigable in fact if it can be made so with reasonable improvements. The second part of *The Daniel Ball* test (the interstate connection element), however, has not been altered.

Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 623 (8th Cir. 1979) (hereinafter *Minnehaha*); Mark B. Harmon & Harry T. Gower, III, *Prosecuting Marine Pollution Crimes*, 5 U.S.F. Mar. L.J. 241, 249 (1993).

Therefore, a navigable water of the United States is a water that (i) was or is used, or is susceptible of being used with reasonable improvements, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water and (ii) forms by itself, or by uniting with other waters, a continued highway over which commerce was, is or may be carried on with other States or foreign countries. *The Daniel Ball*, 77 U.S. (10 Wall.) at 561-563 (1870); *Appalachian Elec. Power Co.*, 311 U.S. at 406–408 (1940); *Econ. Light & Power Co.,* 256 U.S. at 123 (1921).

C. Rivers and Harbors Act Waters.

Sections 9 and 10 of the Rivers and Harbors Act of 1899[6] provide the U.S. Army Corps of Engineers ("Corps") with regulatory authority over obstructions to navigable waters. 33 U.S.C. §§ 401, 403. Section 13 of the Rivers and Harbors Act makes it unlawful to place refuse into the navigable waters of the United States or their tributaries. 33 U.S.C.

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[6] Section 9 regulates bridges, dams, and causeways, while Section 10 deals with smaller obstructions such as piers, wharfs, and fill material. 33 U.S.C. §§ 401, 403.

§ 407. The Corps defines its authority under the Rivers and Harbors Act as follows:

> Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

33 C.F.R. § 329.4. The first part of the sentence reflects the historic use of tidal influence to define navigable waters of the United States. However, the government has argued that, pursuant to this language, a waterbody is a navigable water of the United States, even if it does not form by itself or by uniting with other waters a highway "over which commerce is or may be carried on with other States or foreign countries." *The Daniel Ball,* 77 U.S. (10 Wall.) at 563 (1870). Numerous courts of appeals have rejected this argument and have held that the waters covered by the Rivers and Harbors Act are identical to the *The Daniel Ball* waters. *Lykes Bros., Inc. v. U.S. Army Corps of Eng'rs*, 64 F.3d 630, 634 (11th Cir. 1995) (providing that Rivers and Harbors Act waters must meet both parts of *The Daniel Ball* test); *Nat'l Wildlife Fed'n v. Alexander*, 613 F.2d 1054, 1062 (D.C. Cir. 1979) (explaining that section 10 waters are limited "to those waters usable in interstate commerce that connect with other waters so as to form a continuous interstate waterway."); *Hardy Salt Co. v. S. Pac. Transp. Co.*, 501 F.2d 1156, 1169 (10th Cir. 1974) ("[A] navigable water of the United States within the meaning of Sections 9, 10 and 13 of the Rivers and Harbors Act must be

construed in line with the interpretation in *The Daniel Ball*, as contemplating such a body of water forming a continued highway over which commerce is or may be carried on with other states or foreign countries, by water."); *Stoeco Homes, Inc.*, 498 F.2d at 609 (3d Cir. 1974) (quoting the *The Daniel Ball* two-part test); *See also Sierra Pac. Power Co. v. F. E. R. C.*, 681 F.2d 1134, 1138 (9th Cir. 1982) (explaining that a "navigable water of the United States" as used in the Federal Power Act must meet *The Daniel Ball* two-part test).

In *Minnehaha*, the U.S. Court of Appeals for the Eight Circuit addressed waterbodies like those in *Sackett*. In *Minnehaha*, plaintiffs challenged the Corps assertion of Rivers and Harbors Act authority over Lake Minnetonka. Lake Minnetonka is located entirely within Minnesota and its sole connecting waterway is Minnehaha Creek. *Minnehaha,* 597 F.2d at 623 (1979). The parties agreed that Lake Minnetonka was navigable in fact, but the Eighth Circuit found that only the upper portion of Minnehaha Creek was navigable. The Corps argued that the Lake and Creek had interstate road and rail connections, and that made them part of a highway of commerce. *Id*. at 620. The court rejected this argument. It explained that though the first part of *The Daniel Ball* test has been clarified over time, the second part has not been changed. Thus, because the waterbodies did not "form in themselves, or in conjunction with other navigable waters a continued highway over which interstate commerce [could] be conducted," the court held that the Corps did not have jurisdiction under the Rivers and Harbors Act. *Id*. at 623.

D. Navigable in Fact Waterbodies.

Pursuant to the equal footing doctrine, states hold the title to the bed of waterbodies (within the state) that were navigable at the time the state was admitted into the Union. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590–91 (2012). To determine navigability for title purposes, the courts use only the first part of *The Daniel Ball* test—namely whether waterbodies 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." *Id.* at 592 (quoting *The Daniel Ball*). Thus, "navigable in fact" waters refer to waters that satisfy only the first part of *The Daniel Ball* test.

For example, in *Utah v. United States*, 403 U.S. 9 (1971), the federal government contested Utah's ownership of the bed of the Great Salt Lake. Utah proved that commerce had moved on the lake, but not to other states by water. *Id.* at 11-12. The Court explained that because the Great Salt Lake was navigable in fact under the first part of *The Daniel Ball* test, Utah owned the bed underneath it. *Id.* Furthermore, the Court stated that "the fact that the Great Salt Lake is not part of a navigable interstate or international commercial highway in no way interferes with the principle of public ownership of its bed." *Id.* at 10. In other words, as long as the Lake was "navigable in fact" (which it was) then the state had title to the bed. *See also United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (utilizing the first part of *The Daniel Ball* to determine title);

Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 84-86 (1922) (utilizing the first part of *The Daniel Ball* to determine title); *State of Oklahoma v. State of Texas*, 258 U.S. 574, 583 (1922) (utilizing the first part of *The Daniel Ball* to determine title).

E. The Agencies' Regulatory Definition of "Waters of the United States" or The "(a)(1)" Waters.

The U.S. Environmental Protection Agency's and Corps' (collectively, "the Agencies") regulations define (in part) the CWA term "waters of the United States" as "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide." 33 C.F.R. §328.3(a)(1); 40 C.F.R. § 120.2. These waters are often referred to as the "paragraph (a)(1)" or simply the "(a)(1)" waters.

Since 2015, the Agencies have struggled to fully define the CWA term "waters of the United States." The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 (April 21, 2020); Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054, (June 29, 2015); Final Rule for Regulatory Programs of the Corps of Eng'rs, 51 Fed. Reg. 41206 (Nov. 13, 1986). Even through the Agencies' various iterations they have maintained the above language as part of the definition of "waters of the United States." 85 Fed. Reg. at 22338, 80 Fed. Reg. at 37104, 51 Fed. Reg. at 41250.

The Agencies erroneously refer to these waters, together with the territorial seas, as the traditional navigable waters. U.S. EPA and U.S. Army Corps of Eng'rs, *Appendix D to the Jurisdictional Determination Form Instructional Guidebook* (June 5, 2007) ("Appendix D"), *available at https://www.epa.gov/wotus/appendix-d-legal-definition-traditional-navigable-waters*.

II. THE TRADITIONAL NAVIGABLE WATERS ARE *THE DANIEL BALL* WATERS.

Despite the plethora of different waterbodies that could be the "traditional navigable waters," NAHB believes that only one definition is supported by this Court's case law: the definition of *navigable waters of the United States* as identified in *The Daniel Ball* and the Rivers and Harbors Act. The government's "(a)(1)" definition does not describe the "traditional" navigable waters for the reasons detailed below.

A. In *Rapanos,* Justice Scalia and Justice Kennedy Equate the Traditional Navigable Waters With *The Daniel Ball* Waters.

In *Rapanos,* the issue was whether the Corps had jurisdiction over certain wetlands that were not adjacent to a traditional navigable water. *Rapanos,* 547 U.S. at 715 (2006). Justice Scalia, writing for the plurality, developed a two-part jurisdictional test. First, it requires the presence of a relatively permanent water body that is connected to a "traditional interstate navigable water." Second, it requires the wetland in question to have a "continuous surface connection" to the relatively

permanent waterbody. *Id.* at 742 (2006) (plurality opinion).

Similarly, Justice Kennedy's test requires "the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Rapanos,* 547 U.S. at 779 (2006). (Kennedy, J. concurring). Thus, both tests require a connection to a traditional navigable water.

Justice Scalia's test applied the term—"traditional interstate navigable water." By using the word "interstate" he suggested a waterbody that can be used to travel to other states. *Id*. at 742. In addition, he referenced the term "navigable waters of the United States" (citing to *The Daniel Ball*) and referred to the "navigable waters of the United States" as the "traditional judicial definition" of "navigable waters." *Id*. at 723. Finally, when describing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), he explained that the Court "upheld the Corps' interpretation of 'the waters of the United States' to include wetlands that 'actually abut[ted] on' traditional navigable waters." *Rapanos,* 547 U.S. at 725 (2006). In *Riverside*, the government described the waterbody in question, Black Creek, as a "navigable water of the United States." Virginia S. Albrecht and Stephen M. Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 Envtl. L. Rep. News & Analysis 11402, 11052 n. 90 (Sept. 2002); *see also United States v. Riverside Bayview Homes, Inc.,* 729 F.2d 391, 394 (6th Cir. 1984) (describing Black Creek as navigable and a tributary to Lake St. Clair. Lake St. Clair is also

navigable and shares a border with Canada). Therefore, because Black Creek is a navigable water of the United States and Justice Scalia referred to it as a traditional navigable water, he equated navigable waters of the United States with traditional navigable waters.

Thus, in *Rapanos*, Justice Scalia associated traditional navigable waters with the navigable waters of the United States as defined in *The Daniel Ball*.

Similarly, Justice Kennedy discussed waters that are "susceptible to use in interstate commerce," referred to them as "the traditional understanding of the term 'navigable waters of the United States,'" and then cited both *Appalachian Elec. Power Co.*, 311 U.S. at 406–408 (1940) and *The Daniel Ball,* 77 U.S. (10 Wall.) at 563–564 (1870). *Rapanos,* 547 U.S. at 760 (2006) (Justice Kennedy concurring). By using the term "navigable waters of the United States" he also equated traditional navigable waters to *The Daniel Ball* and Rivers and Harbors Act waters.

* * *

While the shifting terminology of both justices has proved confusing to the lower courts, nonetheless, in *Rapanos* both the plurality and concurring opinions equated the traditional navigable waters with the waters the Court identified in *The Daniel Ball*.

B. The Agencies Incorrectly Interpret The Term Traditional Navigable Waters.

In July 2006, in response to the *Rapanos* decision, the Corps issued guidance to the field concerning when and how to make CWA jurisdictional determinations. App. B-1. Throughout that guidance document, the Corps referred to the "traditionally navigable (Section 10) waters." App. B-1 at B-1 to B-5. Thus, at that time the Corps correctly recognized that the "Section 10" or Rivers and Harbors Act waters were the traditional navigable waters.

Subsequently, in June 2007, the Agencies reinterpreted their understanding of traditional navigable waters in Appendix D of the U.S. E.P.A. & Army Corps of Eng'rs, *Jurisdictional Determination Form Instructional Guidebook* (June 5, 2007), *https://www.epa.gov/wotus/appendix-d-legal-definition-traditional-navigable-waters* ("Appendix D"). In that document, the Agencies initially provide that (a)(1) waters are traditional navigable waters and conclude that any waterbody that is tidal, a navigable water of the United States or is navigable in fact is a traditional navigable water.

This document is flawed. First, the Agencies provide that a waterbody is a "navigable water of the United States" if it is tidal or "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." *Id.* at 2. While this definition is partly correct, it fails to fully recognize the second part of *The Daniel Ball* test and the court

cases which hold that the jurisdiction of the Rivers and Harbors Act is congruent with that test. *Supra pp.* 10-11.

Furthermore, the Agencies provide that "[I]f the federal courts have determined that a water body is navigable-in-fact under federal law *for any purpose*, that water body qualifies as a 'traditional navigable water.'" Appendix D at 2-3 (2007) (emphasis added). That statement flies in the face of this Court's decision in *PPL Montana.* In *PPL Montana*, the Court explained that it does not apply the test for "navigability" the same way when being used to determine title, for admiralty purposes or for analyzing the scope of the government's authority over interstate commerce. *PPL Mont.,* 565 U.S. at 592-93 (2012); *see also Kaiser Aetna v. United States*, 444 U.S. at 170-71 (1979). If the purpose of a navigability determination impacts how the test is applied, then so should the purpose of determining if a waterbody is a traditional navigable water. In other words, it makes little sense to use the test for determining navigability under the equal footing doctrine (navigable-in-fact) as a basis for determining the scope of the CWA which is based on Congress's Commerce Clause authority. *See e.g.*, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 171–73 (2001) (providing that Congress enacted the CWA under its Commerce Clause authority); *New York v. United States*, 505 U.S. 144 (1992) (explaining that the CWA, among other acts, was enacted pursuant to the Commerce Clause).

Moreover, the Agencies (a)(1) definition provides that a "water of the United States" is one that "may be susceptible to *use* in interstate or foreign commerce . . .." 33 C.F.R. §328.3(a)(1); 40 C.F.R. § 120.2. (emphasis added). This definition removes any requirement that waterbodies be "used . . . as highways for commerce, over which trade and travel are or may be conducted . . .." *The Daniel Ball,* 77 U.S. (10 Wall.) at 563 (1870). Thus, there is no navigability requirement. A waterbody can be "used" for commerce and still not be navigable. For example, a ranch pond could be used to water cattle that are sold in interstate commerce. That pond is "used" in commerce, but not as a highway to move goods or people.

Finally, the Agencies' interpretation of traditional navigable waters is not due any deference. First, the term traditional navigable water is not a statutory term but a judicial phrase. As such, Congress did not delegate the authority to define the term to the Agencies and Courts are not "obliged to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle." *Akins v. Fed. Election Comm'n*, 101 F.3d 731, 740 (D.C. Cir. 1996), *vacated on other grounds*, 524 U.S. 11 (June 1, 1998); *Emp. Sols. Staffing Grp. II, L.L.C. v. Off. of Chief Admin. Hearing Officer*, 833 F.3d 480, 484 (5th Cir. 2016) ("agency's interpretations of caselaw are reviewed *de novo*."). In addition, Appendix D is part of a guidance document that was created without public input pursuant to the Administrative Procedure Act's notice and comment requirements. "Interpretations such as those in opinion letters—like interpretations contained in policy statements,

agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

* * *

A close reading of *Rapanos* reveals that the plurality and concurring opinions equate the phrase traditional navigable waters with the navigable waters of the United States as the Court defined that term in *The Daniel Ball*. The Agencies, however, have misinterpreted the term traditional navigable waters. Their definition deletes the navigability requirement, waters down the commerce connection, and removes any interstate element.

Therefore, if the Court continues to use the phrase traditional navigable waters it should clearly equate those waters to the navigable waters of the United States as defined in *The Daniel Ball*. In contrast, the Court could abandon the phrase traditional navigable waters and instead simply use the well-defined term navigable waters of the United States.

III. THE EPA HAS NOT DETERMINED THAT PRIEST LAKE IS A "NAVIGABLE WATER OF THE UNITED STATES".

The proper identification of a traditional navigable water is the essential, foundational component of any CWA jurisdictional analysis. *Rapanos,* 547 U.S. at 779 (2006). Here the Sacketts' wetlands flow into an unnamed tributary, to Kalispell Creek and then

into Priest Lake. From Priest Lake the water flows to the Priest River and then to the Pend Oreille River. The Corps has determined that the Pend Oreille River, which traverses the Idaho/Washington state border, is a navigable water of the United States. App. C-1.[7]

As detailed above, *supra* p.7 n.5, navigable waters of the United States include a navigation element, a commerce element, *and* an interstate element. The administrative record confirms that Priest Lake is navigable and can support commerce. However, the government has not demonstrated that commerce on Priest Lake can move to another state by water. Thus, Priest Lake may lack an interstate element.

The Corps' Jurisdictional Determination ("JD") of May 15, 2008, prepared by EPA Wetland Ecologist John Olson, opens with the identification of Priest Lake as the nearest downstream traditional navigable water into which the Sacketts' wetlands flow. Olson details a flow route from the wetlands to an unnamed tributary to Kalispell Creek to Priest Lake. Cert. App. C-1. Field notes prepared in support of the JD read:

> Priest Lake is [a] TNW (consistent w/ previous COE JDs around lake and *based on interstate commercial use on lake* and navigation-in-fact with commercial uses (boat rentals, fishing guides, public

[7] Reproduced from *https://www.nww.usace.army.mil/Portals/28/docs/regulatory/Sec10Waters/Section10RiversIdaho.pdf?ver=2016-06-03-150345-950 (last visited* April 11, 2022).

> campground and boat ramps, private marinas, etc.)).

Administrative Record by Nicholas J. Woychick, *Sackett, et al. v. Johnson*, No. 2:08-cv-00185 (Jan. 15, 2013), Dkt#62, Olson Inspection Notes re: Sackett Site Inspection on 05/15/2008, 00317, 00319 (May 15, 2008) ("Admin. Record Index #31") (emphasis added). The administrative record also includes a 2007 Priest Lake-specific JD prepared by Gregg Rayner of the Corps' Walla Walla District. Rayner also classifies Priest Lake as an "(a)(1)" water, or Traditional Navigable Water:

> Priest Lake is jurisdictional because it is *used in interstate commerce* (Category B. (1)) and is an impoundment of waters (Category B. (4)) and flows to navigable waters of the United States (Category A). Out-of-state and foreign visitors use Priest Lake for boating, fishing, swimming, hunting, and general recreation. Visitors use the public boat launch facilities available around the lake. There are commercial marinas on the lake that are also used by out-of-state visitors. Priest Lake flows into Priest River which flows into Pend Oreille River, which is a navigable water of the United States (Category A).

Administrative Record by Nicholas J. Woychick, *Sackett, et al. v. Johnson,* No. 2:08-cv-00185 (Jan. 15, 2013), Dkt#62, Priest Lake Jurisdictional Determination by Gregg Rayner, U.S. Army Corps of Eng'rs, Walla Walla Dist., 00145, 00146 (Feb. 21,

2007) ("Admin. Record Index #8") (emphasis added). Priest Lake clearly meets the "navigation" element of a traditional navigable water.[8] The lake has 23,360 surface acres, 62 miles of shoreline, and a depth of more than 350 feet. JA at 33-35.[9] Sailing, canoeing, kayaking, fishing, and other water-based recreational activities are prevalent. Likewise, there is little doubt that Priest Lake meets the "commerce" element because steam-powered logging tugs of a bygone era once traversed the lake.[10]

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[8] The Idaho State Board of Land Commissioners together with the state courts have determined that Priest Lake is a "navigable" water for state title purposes. Lakes Considered Navigable For State Title Purposes, *available at https://www.idl.idaho.gov/wp-content/uploads/sites/2/2020/01/list-navigable-lakes-rivers-1-1.pdf* (*last visited* April 10, 2022); The U.S. Coast Guard has determined that Priest Lake is a "navigable" water for the purposes of exercising Coast Guard authority and jurisdiction. Navigability Determinations for the Thirteenth District, *available at https://www.pacificarea.uscg.mil/Portals/8/District_13/dpw/docs/Navigability_Determination_fr_the_13th_Coast_Guard_District.pdf?ver=2017-06-20-135946-777* (*last visited* April 10, 2022).

[9] Idaho Dept of Fish and Game, Fisheries Management Plan: 2007-2012 at 133, *available at https://idfg.idaho.gov/old-web/docs/wildlife/planFisheries.pdf (last visited* April 10, 2022).

[10] Mike Brodwater, Evidence of Logging Past, *THE SPOKESMAN-REVIEW*, July 25, 2010, *available at www.spokesman.com/stories/2010/jul/25/evidence-of-logging-past/* (*last visited* April 10, 2022). *See also* Steamboat "Tyee" pulling log boom on Priest Lake, Idaho, Priest Lake Historical Photograph Collection, *available at https://www.lib.uidaho.edu/digital/priestlake/items/priestlake224.html (last visited* April 10, 2022).

However, just because a waterbody is capable of supporting boat traffic and used in commerce does not necessarily make it a navigable water of the United States. The government has ignored *The Daniel Ball's* interstate requirement. 77 U.S. (10 Wall.) 557, 563 (1870). Accordingly, it never determined whether Priest Lake, an intrastate lake, unites with other waters to form a continued highway over which commerce is or may be carried on with other states or foreign countries.

The government points to "out-of-state and foreign visitors" arriving overland to participate in commercial activities (boat rentals, fishing guides, commercial marinas) on Priest Lake to illustrate a connection to commerce. Rather, the analysis should center on Priest Lake, Priest River, and the Pend Oreille River and whether those waters together form an interstate highway of waterborne commerce. Absent such a finding, Priest Lake does not qualify as a navigable water of the United States or a traditional navigable water.

CONCLUSION

In *Rapanos*, both the plurality and concurring opinions require that a sufficient connection exist between wetlands (not adjacent to traditional navigable waters) and traditional navigable waters for the wetlands to fall within the jurisdiction of the CWA. Moreover, both opinions equate the traditional navigable waters to navigable waters of the United States as characterized by *The Daniel Ball* two-part test. Finally, it is unclear that Priest Lake satisfies *The Daniel Ball* test.

NAHB, therefore, respectfully suggests that the Court clearly define traditional navigable waters as *The Daniel Ball* waters. In addition, NAHB suggests that the Court explain why Priest Lake is or is not a navigable water of the United States or remand that question to the lower courts.

Dated: April 18, 2022

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TABLE OF APPENDICES

Appendix A-1

WATER	TEST
Tidal Waters	Ebb and flow of tide.
The Daniel Ball Waters or the "Navigable Waters of the United States"	1. Was or is used, or is susceptible of being used with reasonable improvements, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and 2. Forms by itself, or by uniting with other waters, a continued highway over which commerce was, is or may be carried on with other States or foreign countries.
Rivers and Harbors Act Waters	Same as *The Daniel Ball* Waters.
Navigable in Fact Waterbodies (for title)	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.
Agencies' Regulatory Definition of "Waters of the United States" or the (a)(1) Waters	1. Waters, which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide. 2. Territorial seas.

From: Sudol, Mark F HQ02
Sent: Wednesday, July 05, 2006 10:25 AM
To: CDL-REG-All; CDL-REG-CHIEFS; CDL-REG-MSC; CDL-REG-Ros
Cc: Barnes, Gerald W HQ02: Smith, Chip R HQDA: Wood, Lance D HQ02; Stockdale, Earl H HQ02: 'Schmauder, Craig R Mr OGC'; Dunlop, George S HQDA; Sherman, Rennie H HQ02; Cummings, Ellen M HQ02
Subject: Interim Guidance on the *Rapanos* and *Carabell* Supreme Court Decision

Everyone,

The Supreme Court handed down a decision on June 19, 2006, in the *Rapanos* and *Carabell* cases. That decision addresses the scope of Clean Water Act (CWA) jurisdiction over certain waters of the United States, including wetlands. I appreciate the difficulty you are facing in trying to keep an on-going program functioning in the face of the present uncertainty. Given the confusion created by the differing opinions that the Supreme Court justices filed in that case, it will take some time for the Corps and the EPA to analyze and reach consensus on what legal guidance is to be derived from the decision. In the near future we intend to issue joint EPA/Army guidance clarifying CWA jurisdiction in light of the *Rapanos*/*Carabell* decision.

We anticipate that the *Rapanos*/*Carabell* decision will lead the Corps and the EPA to make some changes in how we describe and document the justifications that underlie some of our CWA jurisdictional determinations (JDs). In other words,

the tests that we cite and the facts that we document in some of our JD administrative records will probably change somewhat, to insure that our JDs reflect the Supreme Court's most recent legal tests for asserting CWA jurisdiction. We will try to send you our advice in this regard as soon as possible and in the very near future.

In the meantime, in order to allow the Corps and EPA to prepare and issue substantive guidance, I am recommending that, to the extent circumstances allow, you delay making CWA jurisdictional determinations for areas beyond the limits of the traditional navigable waters (i.e., outside the "Section 10" waters) for the next three weeks. Even though you should delay making CWA jurisdictional calls in areas outside the traditional navigable waters for the next three weeks, that does not mean that the processing and issuance of CWA permit authorizations in those areas using general permits and standard individual permits should be delayed, as is further explained below.

* * *

* * *

Similarly, during the period until we issue substantive guidance on how to implement the *Rapanos*/*Carabell* decision, you should not refer any new regulatory enforcement actions to the Department of Justice other than those involving illegal activities in or affecting traditionally navigable (Section 10) waters, or violation of the terms or conditions of Corps permits covering activities in Section 10 waters. If illegal discharges of dredged or fill material in other waters are causing significant, immediate environmental harm and would justify injunctive relief, notify CECC-L (Martin Cohen) and we will determine an appropriate response on a case by case basis.

Regarding the issuance of permit authorizations during the period before we issue substantive guidance on *Rapanos*/*Carabell*, all forms of Section 10 and CWA Section 404 permit authorizations for activities proposed to take place in the traditional navigable waters (i.e., the Section 10 waters) should continue to be issued as before, since the *Rapanos*/*Carabell* decision does not affect Section 10 of the Rivers and Harbors Act of 1899 at all, and does not affect CWA jurisdiction over any category of Section 10 waters. In waters other than the traditional navigable (Section 10) waters, where a permit applicant proposes to conduct an activity involving the discharge of dredged or fill material pursuant to any form of CWA general permit authorization (e.g., NWP, regional general permit, SPGP, etc.), the Corps will continue to authorize those activities using applicable general permits,

recognizing that such a permit applicant has the right to seek a modification of the terms and conditions or such a general permit authorization at a later time, as explained below.

Regarding applications for standard individual permits under CWA Section 404 covering activities involving the discharge of dredged or fill material outside the limits of the traditional navigable (Section 10) waters, as a general matter we expect that those individual Section 404 permits will continue to be issued as expeditiously as is practicable, to meet the legitimate needs of permit applicants, during the next few weeks while we are preparing substantive "*Rapanos*/*Carabell* guidance." The primary exception to that general rule might be for any individual Section 404 permit covering activities outside the traditional navigable waters where permit issuance is feasible during the next few weeks, but where special conditions of the proffered permit would require the permittee to provide compensatory mitigation, and where that permittee might believe that some or all of his activities are now not subject to regulation under CWA Section 404 because of the *Rapanos*/*Carabell* decision, and thus that the mitigation requirements of the permit are excessive or unnecessary. In such a circumstance the Corps should inform the permit applicant that he or she has a number of options, as follows: The

permit applicant can accept and sign the proffered permit now, with its existing terms and conditions; or the permit applicant can ask for a delay in the issuance of the permit until the Corps District has received substantive *Rapanos*/*Carabell* guidance from Corps Headquarters, so that the amount of required compensatory mitigation can be re-evaluated (if appropriate) based on that new guidance.

For Corps CWA Section 404 permit authorizations made during the next few weeks for activities outside the traditional navigable waters pursuant to either a general permit or a standard individual permits, where the permittee later concludes that the terms or conditions of that permit authorization are inappropriate in light of the *Rapanos*/*Carabell* decision, that permittee can ask the Corps to modify the terms or conditions of that permit to rectify the matter subsequent to the issuance of the anticipated EPA/Army substantive *Rapanos*/*Carabell* guidance.

Corps Headquarters POCs are Mark Sudol and Russ Kaiser (Regulatory COP), Lance Wood (CCE), and, for litigation and enforcement matters, Martin Cohen (CCL).

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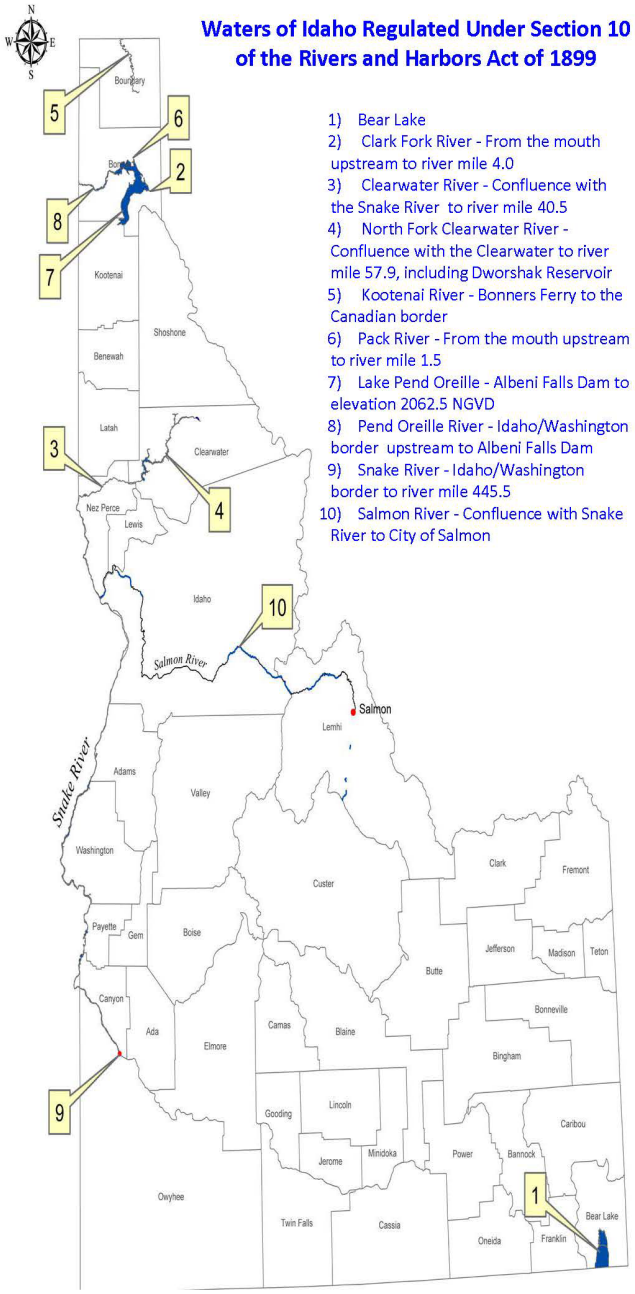
Appendix C-1


Waters of Idaho Regulated Under Section 10 of the Rivers and Harbors Act of 1899
1) Bear Lake
2) Clark Fork River - From the mouth upstream to river mile 4.0
3) Clearwater River - Confluence with the Snake River to river mile 40.5
4) North Fork Clearwater River - Confluence with the Clearwater to river mile 57.9, including Dworshak Reservoir
5) Kootenai River - Bonners Ferry to the Canadian border
6) Pack River - From the mouth upstream to river mile 1.5
7) Lake Pend Oreille - Albeni Falls Dam to elevation 2062.5 NGVD
8) Pend Oreille River - Idaho/Washington border upstream to Albeni Falls Dam
9) Snake River - Idaho/Washington border to river mile 445.5
10) Salmon River - Confluence with Snake River to City of Salmon
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E
S
Boundary
Bonner
Kootenai
Shoshone
Benewah
Latah
Clearwater
Nez Perce
Lewis
Idaho
Salmon River
Salmon
Lemhi
Snake River
Adams
Valley
Washington
Custer
Clark
Fremont
Payette
Gem
Boise
Jefferson
Madison
Teton
Butte
Canyon
Ada
Elmore
Camas
Blaine
Bonneville
Bingham
Gooding
Lincoln
Caribou
Jerome
Minidoka
Power
Bannock
Owyhee
Twin Falls
Cassia
Oneida
Franklin
Bear Lake
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June 1, 2016