

# Client Alert

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## **Supreme Court Decision in *PPL Montana v. Montana* Provides Useful Support for Challenging Corps Jurisdictional Determinations**

On February 22, 2012, the U.S. Supreme Court issued a unanimous decision in *PPL Montana LLC v. Montana*, 565 U.S. \_\_\_ (2012), reversing the Montana Supreme Court's ruling that required PPL Montana, a hydroelectric dam operator, to pay rent for the use of the riverbeds covered or inundated by the dams. This decision may provide useful support for groups facing a Clean Water Act ("CWA") jurisdictional question with the U.S. Army Corps of Engineers ("Corps") or the Environmental Protection Agency ("EPA").

*PPL Montana* concerned three rivers that flow through Montana. The state of Montana contended that these rivers were navigable at the time the state entered the Union in 1889 and, therefore, it gained title to the disputed riverbeds under the equal-footing doctrine. Based on its title claims, Montana sought compensation from PPL Montana, a power company that owns 10 dams on the three rivers, for its use of the riverbeds for its hydroelectric projects. As a result of the Montana Supreme Court decision, PPL Montana faced the prospect of paying the state \$41 million in rent for its use of the riverbeds for the period from 2000 to 2007 alone.

In the opinion written by Justice Anthony Kennedy, the U.S. Supreme Court reversed the state court decision and held that to determine title to the riverbeds under the equal footing doctrine, the state court should have considered the rivers on a segment-by-segment basis to assess whether each segment is navigable. Although the Court did not expressly state that this analysis applies to examination of navigable waters for federal regulatory purposes, the opinion provides support for the notion that when examining whether waters are jurisdictional under the CWA, EPA and the Corps should consider whether each segment of a water body is navigable.

In examining the test for "navigable waters" under the equal footing doctrine, the Court explained that the basic test for "navigable waters" was formulated in *The Daniel Ball*, an 1870 Supreme Court opinion, which held that waters are navigable 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." This test has been invoked in considering the navigability of waters for other purposes such as admiralty determinations and assessment of federal regulatory authority through the application of specific federal statutes such as the CWA. The Court emphasized, however, that the test for navigability is not applied in the same way in these distinct types of cases. Proposed jurisdictional guidance from EPA and the Corps asserts that a water can be classified as a "traditional navigable water" under the CWA if it is "navigable in fact" under federal law for any purpose, not limited to a commerce-related purpose. The PPL Montana decision calls that position into question. The Court did not go as far as to say that it is inappropriate, for example, to cite an admiralty case when determining whether waters are navigable for federal regulatory purposes, but it provides support for the notion that navigable waters determinations made for non-CWA purposes (e.g., admiralty, title, other federal regulatory statutes such as the Federal Power Act) are not dispositive for navigable waters determinations under the CWA.

Moreover, the Court held that the state court erred in its reliance upon the evidence of present-day, primarily recreational, use as evidence of navigability under the equal footing doctrine because the state court did not examine whether these recreational watercraft, such as canoes and kayaks, were similar to those customarily used for trade and travel at the time of statehood. In proposed jurisdictional guidance from EPA and the Corps, the agencies purport to assert CWA jurisdiction over a water body as a “traditional navigable water” simply because a kayak or canoe can float on it. The PPL Montana Court’s emphasis on the necessary link between modern recreational use and use in interstate commerce provides support for the argument that recreational use alone is not sufficient to demonstrate a water body is jurisdictional under the CWA.

Last week, the Corps and EPA sent their revised jurisdictional guidance to the Office of Management and Budget for review. The issue of the scope of what is a traditional navigable water under the CWA will be critical if this guidance is finalized, as expected.

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