As Holly has mentioned, last month, Conan O'Brien made humor out of the navigability of the Los Angeles River by attempting to canoe down it. Holly's post describes the legal controversy over the "traditional navigable waters" determination for the L.A. River, an appeal of which is still pending. (I note that there's a small error in Holly's post: the Army Corps decision she links to isn't the final one by the Army Corps, and in its final determination the Corps actually changed its mind in part, finding that a stretch of the LA River, far upstream in the Sepulveda Basin, constitutes "traditional navigable waters." [Clarifying update: also, the Corps in that same document found that a stretch of the river in the estuary area is a TNW. Thanks to George Wolfe for noting that I omitted this.])

The navigability finding may have important regulatory consequences for minor tributaries and attenuated wetlands. And the entire L.A. river itself, along with all its major tributaries, will certainly still be considered to be under federal jurisdiction. [I could explain that, but that's for another blog post! UPDATE: I explain this in a general way in a comment below.]

Nonetheless, the Army Corps' determination, currently under review by the EPA, that the vast majority of the river is not considered "traditional navigable waters," has rankled environmentalists and may still have regulatory consequences.

Actual boating in the river surely provides some good evidence that the river is "navigable in fact" and thus should be considered "traditional navigable waters."

It appears, however, that whatever permission O'Brien received to canoe on the river was not met with happiness by Army Corps management. This post by Joe Linton of the L.A. CreekFreak blog includes in its entirety an e-mail from Corps management that indicates that all filming permits within the Army Corps' L.A. River jurisdiction must be vetted at the highest levels of the regional Army Corps district office. The e-mail states, among other things:

> It is the policy of this District that boating of any sort is NOT PERMITTED in the river — no ifs, no ands, no buts — no boats/boating, kayaks/kayaking, canoes/canoeing — no floatable vessels of any sort. No swimming either.

I strongly suspect, as Linton does, that this was a response to the O'Brien sketch that appeared on TV days earlier. I am aware of others' recent requests to boat in

the river, as well as an expedition last year that was apparently intended, among other things, to demonstrate the river's navigability. The Army Corps has responded negatively to all these developments. Given that the Army Corps appears to be interested in preventing anyone from boating in the River, I suspect the O'Brien piece puts them in an awkward position. Presumably, someone at the Corps district office approved the filming of that, and it is at odds with the Corps' own position that boating isn't allowed.

In the end, I have to think the stretches of the river at issue here cannot be deemed non-navigable simply because the Corps refuses to let people boat on it. The Corps' decision finding that most of the river is not at traditional navigable water relies at least in part onthe Corps ' finding that "[t]here is very little evidence of historic navigation along the Los Angeles River." But if current and recent navigation have been blocked by the Corps, that is hardly a sound basis for decision.