



DEPARTMENT OF THE ARMY  
ST. PAUL DISTRICT, CORPS OF ENGINEERS  
180 FIFTH STREET EAST, SUITE 700  
ST. PAUL, MN 55101-1678

REPLY TO ATTENTION OF  
REGULATORY BRANCH

January 25, 2017

Mr. Doug Norris  
MnDNR Division of Ecological and Water Resources  
500 Lafayette Road, Box 25  
St. Paul, MN 55155

Dear Mr. Norris:

Thank you for the opportunity to review and comment on the State of Minnesota's 404 Assumption Feasibility Report (Report). We provided comment's on Chapter 3.2 "Extent of Assumption" of the Report in an email dated November 18, 2016. Per your request, I am also providing those comments by letter.

Under federal law, there are certain waters over which the U.S. Army Corps of Engineers (Corps) retains §404 permit jurisdiction in the event of a state or tribal assumption of the §404 program under 33 USC 1344(g) and its implementing regulations. Those waters retained by the Corps of Engineers are "those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto".<sup>1</sup> As a practical matter, those reserved waters include navigable-in-fact waters regulated under Section 10 of the Rivers and Harbors Act (§10 waters), other "traditionally navigable waters" (TNWs), and the wetlands adjacent to each.<sup>2</sup> TNWs may be identified programmatically or determined on a case-by-case basis. Our view of the waters properly included as retained waters for purposes of §404 assumption is consistent with the definition of traditional navigable waters discussed in Appendix D of the guidance promulgated by the Environmental Protection Agency (EPA) and Corps following the Rapanos and Carabell Supreme Court Decisions ("Clean Water Act Jurisdiction Following the Supreme Court's Decision in Rapanos v. U.S. and Carabell v. U.S." (2 December 2008)). The Corps of Engineers uses these definitions consistently for purposes of implementing §404 and does not have the latitude to read the retained waters language in §1344(g)(1) in a manner inconsistent with these definitions.

We have previously provided to you the St. Paul District's most current list of §10 waters formally identified to date. That list contains an inventory of waters where the Corps of Engineers has conducted a navigability study applying the criteria in 33 CFR Part 329 **and** found that the waters meet those criteria. As you review that list of §10 waters, please be aware that the list is not an exhaustive inventory of all §10 waters within the State but rather a compilation of locations where we have, to date, found those criteria to have been met. The absence of a water body from the §10 list in no way suggests that it is not navigable-in-fact (unless the Corps has conducted a navigability study and affirmatively found that water to be non-navigable).<sup>3</sup> Also, please note that the Corps' listing of known §10 waters in the state of Minnesota may include some waters where the only basis for initially including those waters on the list was their demonstrated historic use for interstate or foreign commerce. However, even some (or all) of those waters may also meet the retained waters criteria identified in §1344(g)(1)

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<sup>1</sup> 33 USC §1344(g)(1).

<sup>2</sup> Less any water where the only basis for determining navigability is the historic use of that water for interstate commerce.

<sup>3</sup> 33 CFR 329.16(b).

as they may also be susceptible to use for interstate or foreign commerce with reasonable improvements.

In addition to those waterbodies identified on the §10 list, those waters identified as “traditionally navigable” (TNWs) under the joint Corps/EPA CWA jurisdiction guidance issued in December 2008<sup>4</sup> are also retained waters for purposes of §404 assumption (unless the sole basis for the assertion of CWA jurisdiction is the historic use of that water in interstate or foreign commerce). Please note that TNWs may be identified on a programmatic or a case-by-case basis and that the St. Paul District has used this guidance to identify several TNWs in the State of Minnesota (not included on the §10 list). We anticipate that there are many more waters that will eventually be identified as TNWs based on case-by-case evaluations.

It is also important to note that retained waters also include wetlands adjacent to those §10 and other TNWs. While the assumption statute does not define the term “adjacent”, the definition of “adjacent” used in Corps and EPA CWA regulations has been essentially consistent since July 1977<sup>5</sup> and was in place when Congress enacted 404(g)(1) in December of 1977. The District believes that the statutory term “wetlands adjacent thereto”<sup>6</sup> should be interpreted using the definition that was in use when the phrase was enacted into law and has been subsequently applied by the Corps, EPA and the courts. The Corps definition of adjacent (“bordering, contiguous, or neighboring”) is applied on a case-by-case, fact-specific basis. While we realize the difficulty in identifying retained waters using case-by-case analyses (either TNW analyses or adjacency analyses), it would be inappropriate to determine adjacency based on a prescribed distance from another water or some other purely mechanical method.

We recommend adding a footnote in the Report describing that the “Secretary” referred to in the EPA implementing regulations is the Secretary of the Army - acting through the Chief of Engineers for the Corps of Engineers. That addition will clarify how the memorandum of agreement (MOA) with the Secretary relates to discussions about the Corps in the Report’s following paragraphs.

The District also believes it is important to clarify that, while the Corps of Engineers will happily collaborate with the State in the development of an MOA outlining the extent of assumable and retained waters in Minnesota, the development of that agreement cannot involve a negotiation regarding which waters will be retained by the Corps; the waters over which the Corps will retain jurisdiction are defined by federal law. Further, we recommend that the Report note that it is the Corps (rather than EPA) that determines the waters over which it will retain jurisdiction. See the note at 40 CFR §233.11, which says “Note: States should obtain from the Secretary an identification of those waters of the U.S. within the State over which the Corps retains authority under section 404(g) of the Act.”

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<sup>4</sup>U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, Appendix D: Legal Definition of “Traditional Navigable Waters” ([http://www.usace.army.mil/cw/cecwo/reg/cwa\\_guide/app\\_d\\_traditional\\_navigable\\_waters.pdf](http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/app_d_traditional_navigable_waters.pdf))

<sup>5</sup> The definition of “adjacent” used in the current version of the Code of Federal Regulations is slightly different than the definition of “adjacent” referenced above. However, the current definition of “adjacent” was incorporated into the Corps of Engineers regulations as part of the Obama administration’s CWA jurisdiction rule, the implementation of which has been suspended by court order. Therefore, the definition of the term “adjacent” historically used by the Corps and EPA (and endorsed by Justice Kennedy (and four other Justices) in the Supreme Court’s *Rapanos* decision as the appropriate standard for evaluating the jurisdictional status of wetlands adjacent to navigable-in-fact waters) will be used by the Corps in identifying retained waters.

<sup>6</sup> 33 USC 1344(g)(1) and 33 CFR 323.5.

Again, thank you for the opportunity to comment on the Report. We look forward to continuing to work with Minnesota in the assumption process and in our efforts to protect Minnesota's wetlands and waterways.

Sincerely,

A handwritten signature in black ink, appearing to read 'Chad Konickson', written in a cursive style.

Chad Konickson  
Chief, Regulatory Branch