



MEMORANDUM FOR MVP-2007-1497-RQM

Subject: Determination of Boyer Lake as Traditional Navigable Water (TNW) for Jurisdictional Determination (JD) # MVP-2007-1497-RQM

Summary

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have determined that Boyer Lake is a TNW for JD MVP-2007-1497-RQM. This determination is consistent with the Clean Water Act (CWA), the agencies' regulations (including 33 C.F.R. Parts 328.3), relevant case law, and existing guidance, including the June 5, 2007 joint EPA and Department of the Army legal memorandum *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Rapanos Guidance), and *Appendix D of the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* issued in June 5, 2007 (Appendix D).

Background

This Memorandum documents the joint Headquarters (HQ) level review conducted by EPA and the Corps regarding the draft JD form prepared by the St. Paul District for case number MVP-2007-1497-CKK. Joint HQ review of this JD form was completed in accordance with the EPA and the Corps *Memorandum for Coordination on Jurisdictional Determinations (JDs) under Clean Water Act (CWA) Section 404 in Light of the SWANNC and Rapanos Supreme Court Decisions*, dated June 5, 2007 (Coordination Memo). The subject of the JD is Boyer Lake, which is a 310 acre lake located in Becker County, Minnesota. In the draft JD form the St. Paul District initially determined that Boyer Lake was an isolated, non jurisdictional water with no substantial connection to interstate (or foreign) commerce. The referenced JD form was first submitted by the St. Paul District to EPA via e-mail dated November 6, 2007. EPA and Corps HQ joint review of the JD form was initiated on November 15, 2007.

Location

Boyer Lake is a 310 acre lake located in Becker County, Minnesota, at coordinates 46.8770° N (Lat.) and -96.0541° W (Long.).

Basis for TNW Determination

The Rapanos Guidance indicates that in its context, the term TNW refers to those waters that are under the jurisdiction of the Corps, pursuant to 33 C.F.R. 328.3(a)(1), (i.e., “[a]ll 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.”

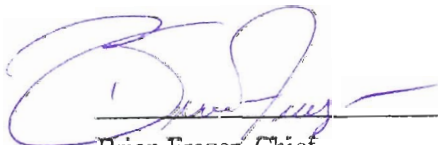
As stated in Appendix D: “when determining whether a water body qualifies as a “traditional navigable water” (i.e., an (a)(1) water), relevant considerations include whether a Corps District has determined that the water body is a navigable water of the United States pursuant to 33 C.F.R. § 329.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 C.F.R. § 329, or a federal court has determined that the water body is navigable-in-fact under federal law for any purpose, or the water body is “navigable-in-fact” under the standards that have been used by the federal courts.”

To determine whether Boyer Lake is a TNW, EPA and Corps HQ conducted a case-specific analysis to evaluate whether Boyer Lake is navigable-in-fact, including its susceptibility to interstate and foreign commerce. EPA and Corps HQ have determined that the Boyer Lake is a TNW due to the following factors:


1. There is current access to the water body that allows members of the public to place watercraft on the water body.
 - A report from the Minnesota Department of Natural Resources (MDNR) for Boyer Lake, available on the internet at <http://www.dnr.state.mn.us/lakefind/showreport.html?downum=03057900>, indicates that public boat access is available on the northwest shore of the lake, adjacent to US 10.
 - Additional access may be provided where Highway US 10 runs along the northern shore of Boyer Lake.
2. The water body has the capacity to be navigated by watercraft.
 - The aforementioned MDNR report indicates that Boyer Lake has an area of 310 acres and a maximum depth of 26 feet.
 - The physical characteristics (depth and size) of the water body and the presence of boat access facilities indicate that Boyer Lake has the capacity to be navigated by watercraft.
3. The water body has the potential to be used for activities involving navigation and interstate commerce.
 - Boyer Lake is located approximately 35 miles east of the boundary between North Dakota and Minnesota on US 10.
 - The referenced MDNR report indicates that the agency stocked Boyer Lake with game fish in the years 2001, 2003 and 2005.
 - Information from various internet sites, including <http://www.fishingminnesota.com>, <http://www.minnesotafishinghalloffame.com>, and <http://www.lakestatefishing.com>, and the abovementioned report from the MDNR, indicate that Boyer Lake is used for recreational fishing, and that some of the fishermen using the lake come from out-of-state areas such as Fargo, North Dakota. These factors demonstrate that Boyer Lake is susceptible to use in water-based interstate commerce.

Conclusion

Collectively, the above discussed factors demonstrate that Boyer Lake is navigable-in-fact, and thus a TNW susceptible to use in interstate commerce associated with recreational boating activities for the purposes of fishing. Therefore, EPA and Corps HQ hereby determine that Boyer Lake is subject to the Corps jurisdiction under Section 404 of the CWA, pursuant to 33 C.F.R. § 328.3(a)(1). Also, EPA and Corps HQ are hereby requesting the St. Paul District to complete the JD form for Boyer Lake in accordance with the above discussion and determination.



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Date: 11 Dec 07

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