



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OFFICE OF
WATER

MEMORANDUM FOR JD # 2007-04488-EMN

Subject: Determination of Bah Lakes as Traditional Navigable Water (TNW) for Jurisdictional Determination (JD) # 2007-04488-EMN

Summary

The United States government has determined that Bah Lakes is a TNW for JD # 2007-04488-EMN. This determination is consistent with the Clean Water Act (CWA), the agencies' regulations (including 33 C.F.R. § 328.3), relevant case law, and existing guidance, including the June 5, 2007 joint EPA and Department of the Army legal memorandum entitled *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 results of the Headquarters (HQ) level review conducted by U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) regarding the draft JD form prepared by the Corps St. Paul District for case number 2007-04488-EMN. The subject of the JD is a lake in Minnesota, with the name of Bah Lakes. In the draft JD form the Corps St. Paul District initially determined that Bah Lakes was an isolated non-jurisdictional water with no substantial connection to interstate (or foreign) commerce. The 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).

Location and Setting

Bah Lakes is an approximately 70.42 acres lake located in Grant and Douglas Counties, Minnesota, at coordinates 45.9944° N (Lat.) and -95.7696° W (Long.). The lake is usually covered with up to 10-foot-deep water. Bah Lakes does not have an outlet to any stream or river. The lake is fringed by deep marsh areas dominated by emergent vegetation, including cattail, reed, bulrush, spikerush, and wildlife; while open water areas may support pondweed, naiad, coontail, watermilfoil, waterweed, duckweed, waterlily and spatterdock. The areas surrounding the lake are largely undeveloped and subject to agriculture or preservation.

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 Bah Lakes is a TNW, in accordance to 33 C.F.R. § 328.3(a)(1), the United States government conducted a case-specific analysis to evaluate whether Bah Lakes is navigable-in-fact, including consideration of its potential susceptibility to interstate and foreign commerce. The United States government has determined that Bah Lakes is a TNW based on the following factors:

1. The physical characteristics of the Bah Lakes, including its depth and size, indicate that the waterbody has the capacity to be navigated by watercraft.
 - A. According to information provided by the Minnesota Department of Natural Resources (MDNR), Bah Lakes is classified as a Type 5 Shallow Open Water, has an area of 70.42 acres, and is usually covered with up to 10-foot-deep water.
 - B. Information provided by the Corps St. Paul District indicates that Bah Lakes has sufficient water depths to provide navigation for small watercraft.
2. Bah Lakes has the potential to be used for activities involving navigation and interstate commerce, such as recreational commercial navigation.
 - A. The proximity and accessibility of Bah Lakes from County Road 19 would currently allow the public to easily place watercraft on the lake.
 - i. Bah Lakes is classified and managed by the Minnesota Department of Natural Resources (MDNR) as a Protected Public Natural Environment.
 - ii. County Road 19 crosses over and runs along the borders of Bah Lakes.
 - iii. The right-of-way of County Road 19 extends to the border of Bah Lakes, according to information provided by Grant and Douglas Counties (Mr. Luke Hagen, Grant County Engineer, and Mr. David Robley, Douglas County Engineer), including design plans for a proposed widening project.
 - iv. Topographic maps and aerial photographs for the site indicate that:
 - a. the border of the lake is within a few feet from the roadway of County Road 19;
 - b. there are areas along the roadway of County Road 19, which could be used as pullouts and parking, and;
 - c. there are no apparent obstacles (such as substantial differences in elevation, or any other physical or topographical barrier) between the road and the water, which could prevent accessing the water from County Road 19.
 - B. In addition to its above described current public access, Bah Lakes has further potential for future access for the public to place watercraft on the water body.
 - i. The abovementioned proposed County Road 19 improvement project would provide a wider and safer roadway, shoulders, and right-of-way. These improvements would result in safer conditions for pulling out and parking along the roadway, which would further facilitate access for the public to place watercraft on the lake.

- C. Because of its location relative to state boundaries and conduits of interstate travel Bah Lakes is readily accessible to out-of-state travelers.
- i. Bah Lakes is located approximately 0.5 miles south of the intersection between County Road 9 and I-94 (US-52), and is therefore readily accessible to travelers using I-94 (US-52).
 - ii. Bah Lakes is located approximately 60 miles southeast of the City of Fargo and the boundary between North Dakota and Minnesota on I-94 (US-52), and is therefore readily accessible to interstate travelers and users coming from North Dakota.
- D. Water bodies located near Bah Lakes provide water-based resources likely to attract out-of-state travelers for recreational commercial navigation uses.
- i. It is well documented that other similar resources in the area are subject to commercial recreational navigation uses.
 - a. Bah Lakes is located approximately 0.5 miles from the Bah Lakes Waterfowl Production Area (WPA). WPAs are wetlands and grasslands managed by the U.S. Fish and Wildlife Service (USFWS) as part of the National Wildlife Refuge System for the production of waterfowl and other wildlife species. The USFWS web site for WPAs in the region (<http://www.fws.gov/Midwest/FergusFallsWetland/wpa.html>) indicates that the Bah Lakes WPA features attractions such as: bird watching, canoeing, hunting, and nature and wildlife viewing.
 - b. Bah Lakes is located approximately 2.0 miles south of Pelican Lake, which is an approximately 4,000 acres lake managed by the MDNR for public recreation, including boating and fishing. Several hotels, resorts and campgrounds are located along the borders of Pelican Lake.
 - c. As advertised on various internet sites, including http://www.alexandriamn.org/images/uploads/22_Lakes_Pelican.pdf, <http://www.mnresortsales.com/resorts/1960148.html>, <http://www.northernminnesota.org/destinations>, and <http://www.fws.gov/Midwest/FergusFallsWetland/wpa.html>, Pelican Lake and the Bah Lakes WPA are popular destinations for travelers interested in recreational commercial boating activities.
- E. Bah Lakes provides water-based resources likely to attract out-of-state travelers for recreational commercial navigation uses.
- i. There are internet sites available (such as: http://www.goingoutside.com/lake/105/1051264_Bah_Lakes_Minnesota.html), which specifically advertise Bah Lakes as an attractive lake for outdoor enthusiasts, and highlight other resorts, hotels, campgrounds, and recreational attractions in the area that could support the use and enjoyment of Bah Lakes.
 - ii. The natural characteristics and setting of Bah Lakes, including its emergent marsh vegetation and largely undeveloped surroundings, together with the presence of the nearby Bah Lakes WPA, suggests that fish and wildlife similar to that found in the WPA would also be present in the lake, providing an attractive resource for out-of-state travelers in the area.
 - iii. It is reasonable to expect that users of nearby water-based attractions, including Bah Lakes WPA and Pelican Lake, could also use Bah Lakes for similar water-based recreational activities.
 - iv. The fact that Bah Lakes is an accessible public lake with the capacity to be navigated by small watercraft, which is protected and managed by the MDNR, and supports fish and waterfowl, would provide an attraction for out-of-state travelers in the area

- interested in boating, canoeing, kayaking, bird-watching, nature and wildlife viewing, fishing, and hunting.
- v. Ducks Unlimited, Inc. (DU) recently acquired a land conservation easement to protect existing grassland, wetland and shoreline habitats located along the south border of Bah Lakes. This conservation easement would remove developmental pressure around the lake and protect fish and wildlife habitat, which in conjunction with the MDNR designation of the lake would facilitate the use and management of Bah Lakes as a recreational lake. Also, DU is a well know organization with numerous sponsors and strong advertisement capabilities. Therefore, the public would be able to easily obtain information about Bah Lakes and its attractions through DU and its resources. This would provide an additional incentive for out-of-state travelers in the area to visit and use Bah Lakes for recreational navigational uses such as boating, canoeing, kayaking, and nature and wildlife viewing.
 - vi. According to information provided by personnel from DU in Minnesota, there is hunting currently taking place along the borders of Bah Lakes.
 - vii. The above mentioned recreational navigation attractions and activities demonstrate that Bah Lakes may be susceptible to use in interstate commerce in many forms, including sale/rental of small watercraft, boating gear and equipment, and guided trips using small watercraft.

Conclusion

The accessibility to Bah Lakes from I-94 (US-52) and County Road 19, together with its physical and natural characteristics, the fact that it is a public lake managed by the MDNR, and the presence of nearby water-based attractions used for commercial recreational navigation, indicate that the lake has the potential to be used for recreational navigation activities, such as boating, canoeing, kayaking, bird-watching, nature and wildlife viewing, fishing, and hunting. Such attractions and activities demonstrate that Bah Lakes may be susceptible to use in interstate commerce in many forms, including sale/rental of small watercraft, boating gear and equipment, and guided trips using small watercraft.

Collectively, the above discussed factors demonstrate that Bah Lakes is navigable-in-fact, and thus a TNW, susceptible to use in interstate commerce associated with commercial recreational navigation activities. Therefore, the United States government hereby determines that Bah Lakes is subject to the jurisdiction of Section 404 of the Clean Water Act, pursuant to 33 C.F.R. § 328.3(a)(1).



Benjamin H. Grumbles
Assistant Administrator for Water
U.S. Environmental Protection Agency

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