



Minnesota Assumable Waters Analysis for State “Assumption” of Section 404 of Federal Clean Water Act

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We will briefly cover:

- 1) Minnesota's 2018 Assumable Waters Analysis
- 2) What Changed
- 3) Current Status in Minnesota

Recent 404 Assumption Efforts in Minnesota

- 1) MN Federal Clean Water Act Section 404 Permit Program Feasibility Study – January 17, 2017.
- 2) Analysis of Retained and Assumable Waters in Minnesota – May 3, 2018.
- 3) 2019 State legislation “to begin to develop and assemble the material” to assume 404.
- 4) 2019 EPA Wetland Program Development Grant to help develop a more complete 404 assumption package.

For more info, see: <https://bwsr.state.mn.us/404-assumption>

What are “assumable waters?”

When a state assumes 404, the assumption authority does not apply to all waters; the Corps “retains” permitting authority over certain waters.

CWA Section 404(g)(1): “...other than 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..., including wetlands adjacent thereto...”

Those waters that are not retained by the Corps are “assumable” by the state.

1-25-17 Corps' Description of Retained Waters

- 1) “Navigable-in-fact” waters regulated under Section 10 of the Rivers and Harbors Act.
- 2) Other Traditionally Navigable Waters* (TNWs), “identified programmatically or determined on a case-by-case basis.”
- 3) Wetlands adjacent to each of the above, using the Corps regulatory definition, “applied on a case-by-case, fact specific basis.”

❖ Unless the sole basis for jurisdiction is historic use in interstate or foreign commerce.

The Analysis

BWSR worked with the Corps to develop specific criteria that could be used to estimate and map (GIS) the waters described in the 1-25-17 Corps letter. The analysis was completed in series due to the jurisdictional relationships between wetlands and other waters under the Clean Water Act.

The sequential steps were to identify:

- 1) Non-Wetland Waters Retained by the Corps.
- 2) Adjacent Wetlands Retained by the Corps.
- 3) Section 404 Jurisdictional Non-Wetland Waters Assumable by the State.
- 4) Section 404 Jurisdictional Wetlands Assumable by the State.

Mapping Criteria

- Specific mapping criteria/rules were developed for each of the four steps and are described in the 2018 Assumable Waters Analysis Report.
- See Appendix E of the Report located on the BWSR website:
<https://bwsr.state.mn.us/404-assumption>

Appendix E: Criteria for Estimating COE-Retained and State-Assumable Waters in Minnesota

Based on the 1-25-17 COE Description of Retained Waters

The analysis described herein was undertaken by staff at the Minnesota Board of Water and Soil Resources (BWSR) and Minnesota IT Services (MNIT) to estimate the extent of waters (lakes, rivers, streams, wetlands, etc.) that would be retained by the U.S. Army Corps of Engineers (COE) if the State of Minnesota pursued assumption of the Federal Clean Water Act (CWA) Section 404 permitting program according to Section 404(g)(1) of the Act. The analysis also approximated the extent of waters currently regulated by the COE that would be assumed by the State if assumption was pursued. It was completed using a geographic information system (GIS) and readily available statewide geospatial data. This analysis is based on the current Corps interpretation of retained waters, as communicated to the State of Minnesota in a letter dated January 25, 2017.

Since the process for estimating retained waters had to be conducted in series because of the jurisdictional relationship between wetlands and other waters under the CWA, criteria were developed jointly with the COE and concurrence obtained at several points during the analysis. The first set of criteria identified lakes, streams, and rivers that, consistent with the 1-25-17 COE letter, would be considered Traditional Navigable Waters (TNWs) and thus retained by the COE under State-assumption. The second set of criteria then focused on identifying wetlands that would be adjacent to these retained waters consistent with current federal guidance for jurisdictional determinations under the CWA. Adjacency determinations frequently require more site-specific analyses than what could be accomplished in the analysis conducted for this report. However, to the greatest extent possible, the criteria for identification of adjacent wetlands was intended to identify those wetlands that would be considered jurisdictional under the CWA consistent with current COE and EPA guidance.

According to the 1-25-17 COE letter, the set of waters retained by the COE would include waters regulated under Section 10 of the Rivers and Harbors Act (Section 10 waters), TNWs, and wetlands adjacent to these waters. The process for identifying these waters is described in Parts I and II below. Since a complete map of Section 10 waters in Minnesota did not exist at the time the analysis was initiated, the process for identifying retained non-wetland waters focused primarily on the identification of TNWs using the criteria in Part I. All or most Section 10 waters are likely captured using this method, although verification should be performed if 100 percent reliability is required. The next part of the process for identifying retained waters is the identification of wetlands adjacent to the non-wetland waters identified in Part I using the criteria discussed in the previous paragraph.

The next steps of this analysis consisted of determining the extent of non-wetland waters and wetlands currently jurisdictional under Section 404 that would be assumable by the State of Minnesota (i.e. those waters and wetlands that would no longer require a separate Section 404 permit from the COE if the State were to assume the program). Essentially, these are waters currently regulated by the COE that are not TNWs or their adjacent wetlands. The criteria used to identify these non-wetland waters and wetlands are described in Parts III and IV.

Findings: 2018 Assumable Waters Analysis

Type of Water	% COE-Retained	% State-Assumable
Wetlands (acres)	91.5%	8.5%
Lakes/Basins (acres)	98.7%	1.3%
Streams (miles)	12.0%	88.0%

In general, few waters and wetlands to assume (except for headwater streams and ditches).

Analysis of Retained and Assumable Waters in Minnesota

A Supplement to the January 17, 2017 Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study Report to the Legislature

May 3, 2018



mi MINNESOTA

Findings: Other Problems

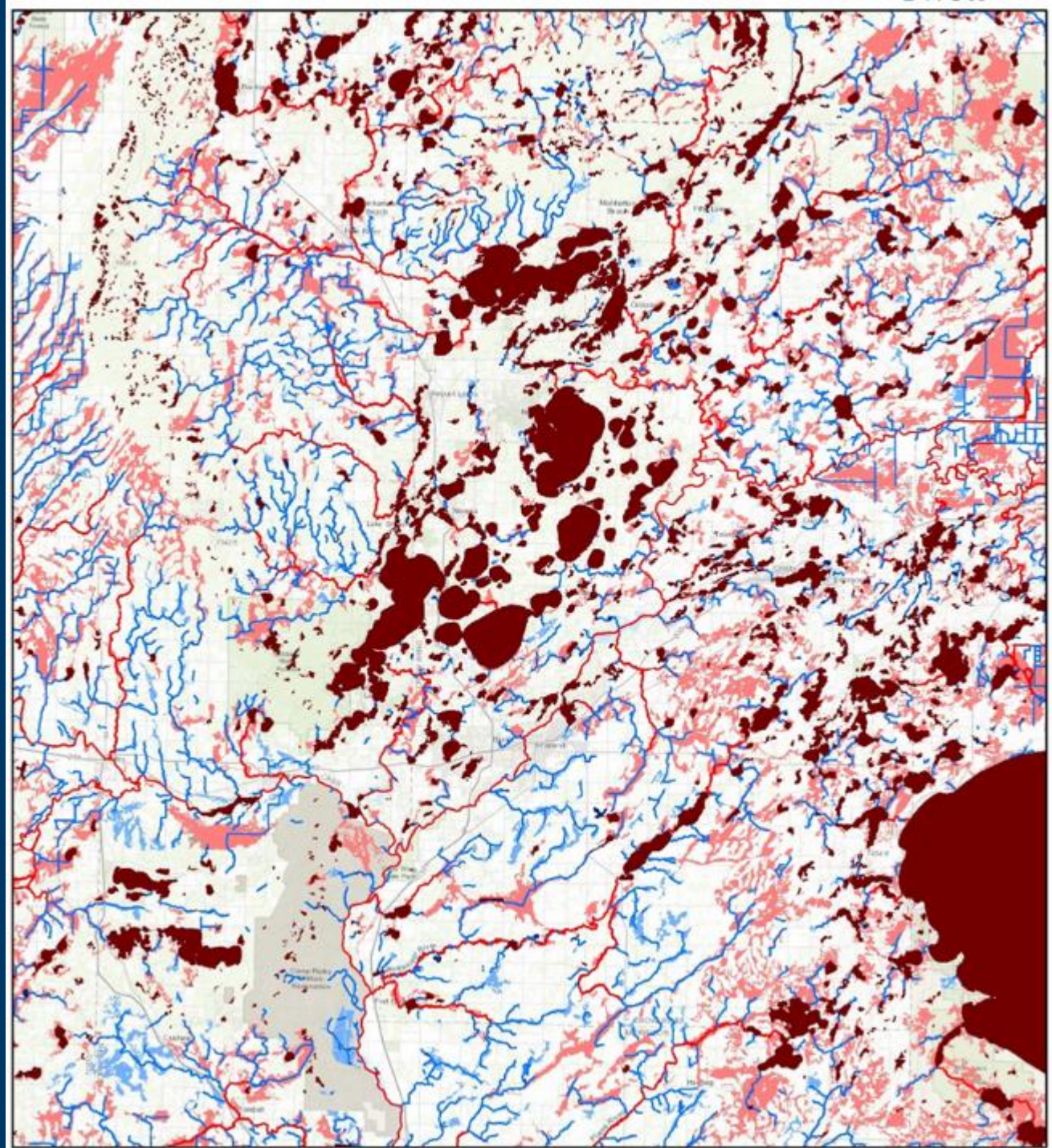
- The distribution of waters described in the Corps letter creates a complicated patchwork of fragmented regulatory authorities.
- Wetlands adjacent to 2 or more water bodies are retained by the Corps if any of the water bodies are retained.
- In some cases a stream could be assumed by the State, while its adjacent wetlands are retained by the Corps.
- Many waters (particularly wetlands) would often require a case-by-case analysis just to determine which agency has authority over a project – this would be impracticable.

Findings: 2018 Assumable Waters Analysis

Central Minnesota Example

Shades of Red = Corps-retained

Shades of Blue = State-assumable

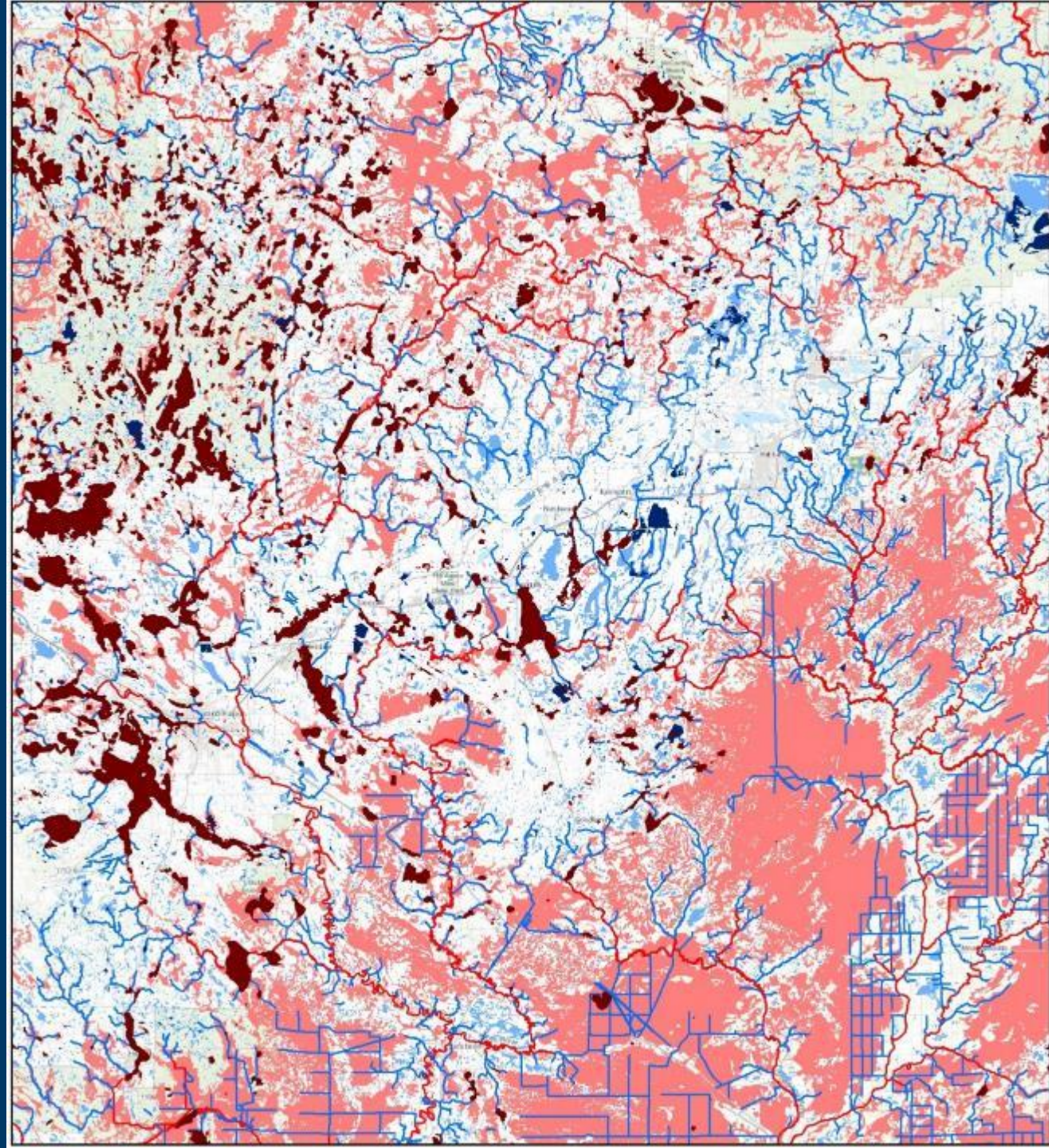


Findings: 2018 Assumable Waters Analysis

NE Minnesota Example

Shades of Red = Corps-retained

Shades of Blue = State-assumable

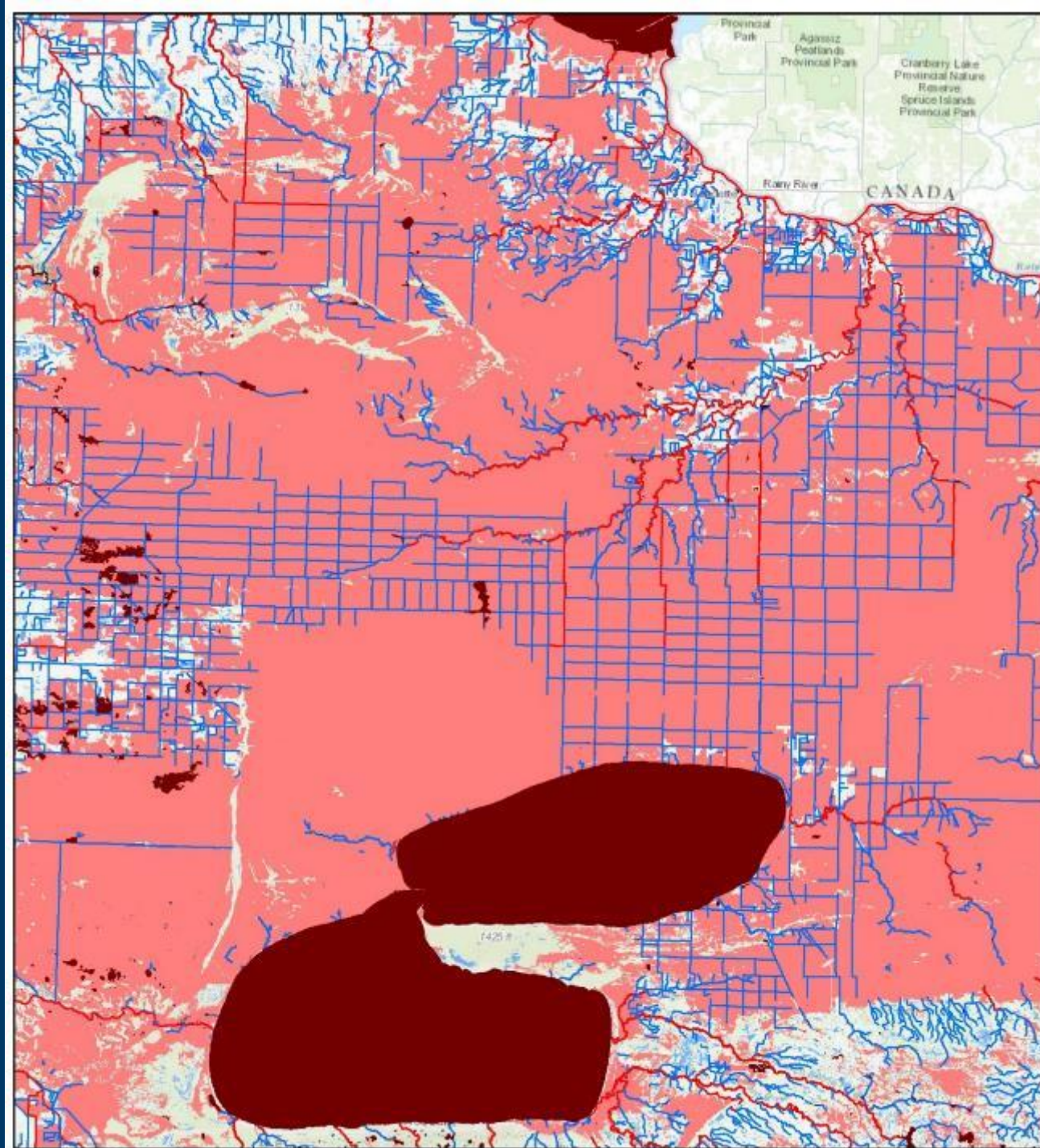


Findings: 2018 Assumable Waters Analysis

North-Central Minnesota Example

Shades of Red = Corps-retained

Shades of Blue = State-assumable

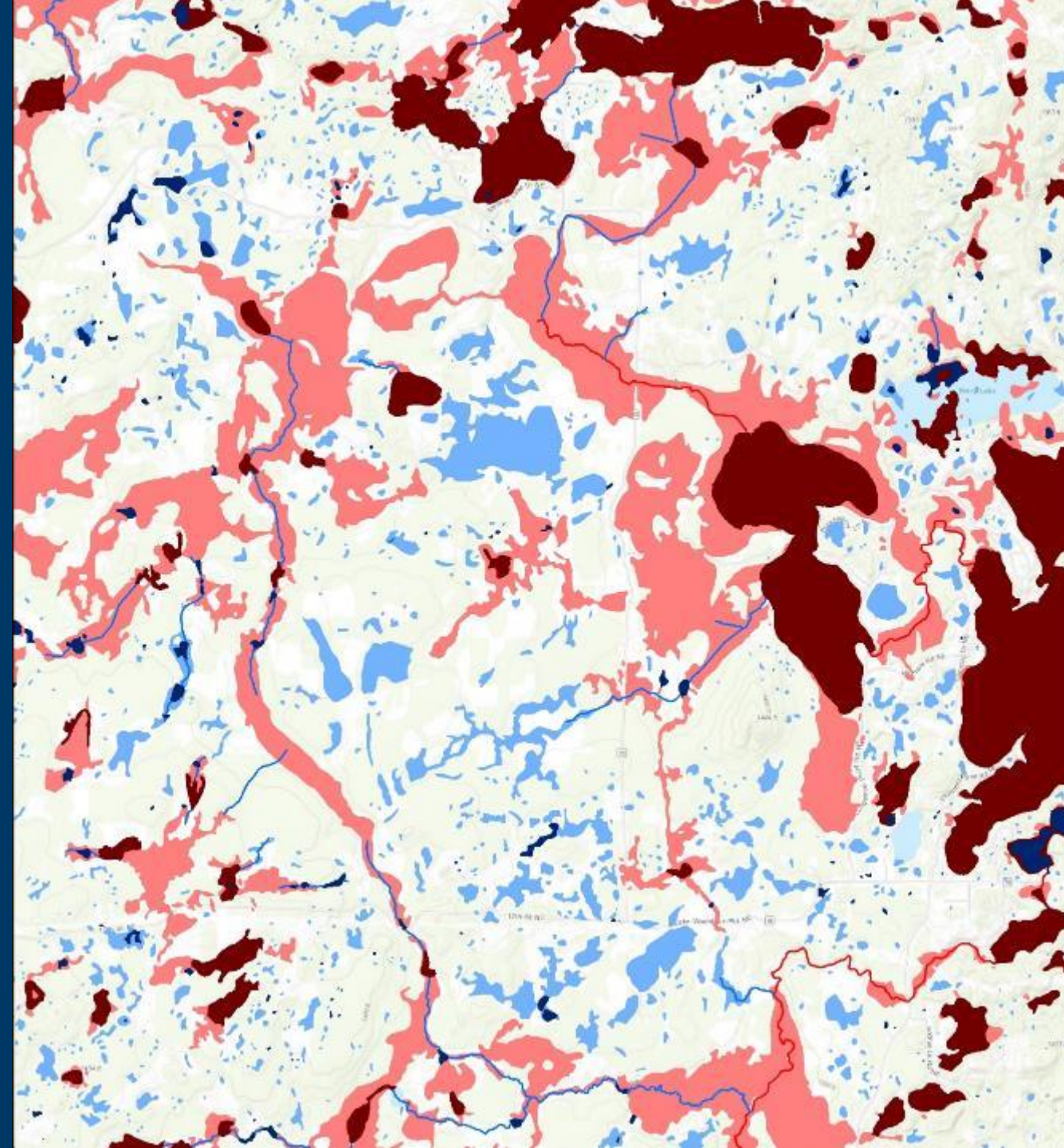
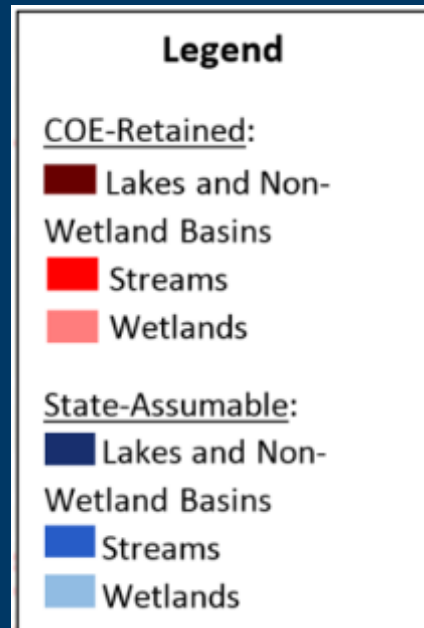


Case-by-Case Retained Waters Identification Procedures

- A case-by-case identification would likely be similar to the Section 404 Jurisdictional Determination process.
- For projects affecting wetlands, it would involve two steps:
 - 1) Whether the wetland is considered adjacent to a non-wetland water(s).
 - 2) Whether that water, or any of the waters it is adjacent to if multiple, is retained by the Corps.

Examples of:

- Regulatory patchwork
- Dual adjacency
- Split of regulatory responsibilities
- Case-by-case determinations



Under this interpretation of Corps-retained waters, 404 assumption just wasn't feasible for Minnesota.

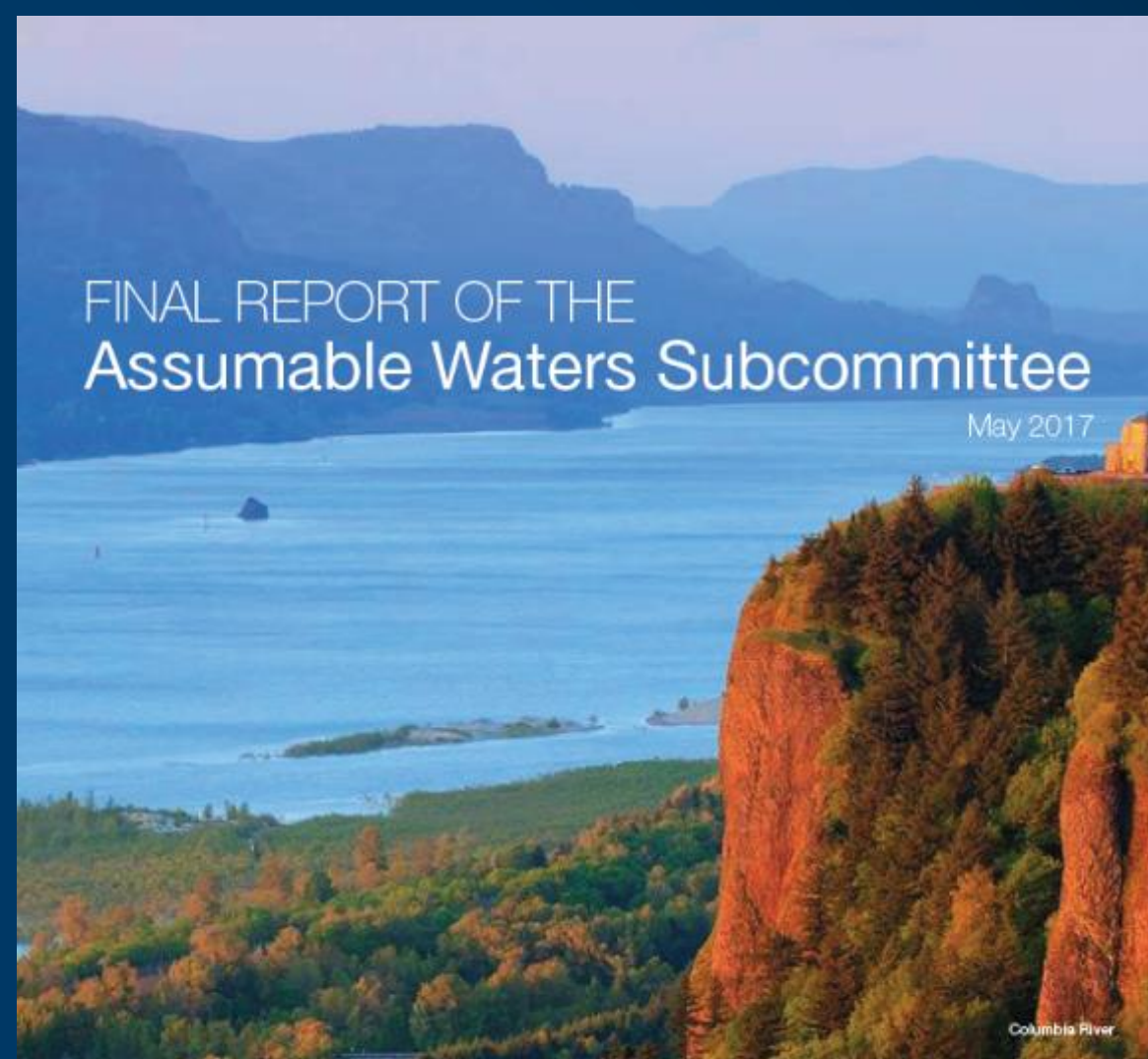
Other Factors Analyzed

- ✓ Assumable wetlands by major watershed.
- ✓ Retained and assumable wetlands by land ownership.
- ✓ A comparison of the location of COE-permitted projects with the location and extent of assumable waters.
- ✓ COE permits compared to assumable wetlands by watershed.
- ❖ None of the above analyses changed the big-picture conclusions resulting from the study.

What changed?

- 1) Assumable Waters Subcommittee recommendations to EPA
 - a) Retained waters = Section 10 waters*
 - b) COE-retained wetlands = wetlands within a set distance (e.g. 300 ft) from a retained water
- 2) EPA 404 assumption rulemaking
- 3) 2018 U.S. Department of the Army memo adopting Subcommittee recommendations

**Except for those listed solely for historic use.*



“Section 10” Waters

- “Section 10” of the Rivers and Harbors Act of 1899.
- Defined in 33 CFR 329.4 as:
 - *“those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.”*
- Section 10 waters are designated by the Corps Division Engineer via a specific federal process and identified on a Section 10 list.

Steps for Determining Corps-Retained Waters

1. Identify all Section 10 waters, including their full extent.
 - ❖ Only the Corps can make Section 10 determinations.
2. Determine if any Section 10 waters are listed solely for historic use and thus assumable by the state.
3. Establish the administrative boundary for retained wetlands.
4. Incorporate into the MOA with the Corps.

Minnesota Section 10 Waters

- There were numerous waterbodies on the list.
- But the list, and particularly the extent of the waters on the list, needed to be verified.
- There were also additional bays, lakes, and river segments that could be Section 10 waters.

NAVIGABLE WATERS OF THE UNITED STATES IN MINNESOTA

1. BIG FORK RIVER

Navigable throughout
includes:
Dora Lake (source)

2. BIG STONE LAKE

Navigable throughout

3. BOIS DE SIOUX RIVER

Navigable throughout

4. INTERNATIONAL BOUNDARY WATERS FLOW WEST THROUGH COOK, LAKE, ST. LOUIS AND KOOCHICHING COUNTIES

Navigable throughout,
within limits of the
United States,
includes:

North Lake (source)
Francis Bay
Little North Lake
Little Gunflint Lake
Gunflint Lake
Magnetic Lake
Pine River
Pine Lake
Clove Lake
Granite Bay
Granite River
Gneiss Lake
Devils Elbow Lake
Ambush Lake
Prayer Lake
Morris Lake
Maraboef Lake
Saganaga Lake
James Bay
Sea Gull River
Red Rock Bay
Red Rock Lake
Swamp Lake
Cypress Lake
Mud Bay
Knife Lake
South Arm Knife Lake
Toe Lake
Portage Lake
Knife River
Seed Lake
Melon Lake

Carp Lake
Birch Lake
Sucker Lake
Newfound Lake
Moose Lake
Inlet Bay
Basswood Lake
Rice Bay
Wind Bay
Hoist Bay
Back Bay
Jackfish Bay
Pipestone Bay
Basswood River
Horse River
 Navigable 1 mile up-
 stream
Wednesday Bay
Crooked Lake
Thursday Bay
Friday Bay
Saturday Bay
Sunday Bay
Iron Lake
Peterson Bay
Bottle Lake
Bottle River
Lac La Croix
Tiger Bay
Boulder Bay
Boulder Rive
Never Fail Bay
Fish Stake Narrows
Lady Boot Bay
Toe Lake
Snow Bay
North Lake
South Lake
Loon Lake
East Loon Lake
Little Loon Lake
Little Indian Sioux River
 Navigable 2 miles
 upstream
Loon River
Little Vermilion Lake
Little Vermilion Narrows
Sand Point Lake
Crane Lake
Grassy Bay
East Bay
Rollick Bay

Rollick Creek
 Navigable 1 mile
 upstream
North West Bay
King Williams Narrows
Harrison Narrows
Staege Bay
Browns Bay
Swansons Bay
Namakan Narrows
Namakan Lake
Hammer Bay
Blind Pig Channel
Deep Slough
Randolph Bay
Junction Bay
Hoist Bay
Moose Bay
Moose River
 Navigable 1 mile
 upstream
Kabetogama Lake
Old Dutch Bay
Sullivan Bay
Ash River
 Navigable 2 miles
 upstream
Blind Ash Bay
Nebraska Bay
Mud Bay
Daley Bay
Bowman Bay
Irwin Bay
Duck Bay
Tom Cod Bay
Black Bay
Moose Bay
Blue Fin Bay
Lost Bay
Elks Bay
Long Slough
Lost Lake
Kohler Bay
Blind Indian Narrows
Johnson Bay
Squaw Narrows
Mica Bay
Squirrel Narrows
Kettle Channel
Rainy Lake
Anderson Bay
Finger Bay

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DETERMINATION OF NAVIGABILITY
Red River of the North

Navigability Studies

BWSR staff:

- Reviewed all original Section 10 Navigability Studies.
- Provided summary information to the Corps.

1. The St. Paul District, with the concurrence of the North Central Division, has submitted a report pursuant to ER 1165-2-302 in which it recommends that the Red River of the North, Minnesota-North Dakota be declared a navigable water of the United States.

2. The Red River of the North forms the boundary between Minnesota and North Dakota and extends for 294.5 miles to the international boundary. The total length of the river is 549.5 miles. The river is formed by the confluence of the Bois de Sioux and Otter Tail Rivers at Breckenridge Minnesota, and Wahpeton, North Dakota. Three dams have been constructed at various locations on the river without locks thereby precluding a continuous uninterrupted passage of vessels on the river. In addition, there are a number of railroad and highway bridges which cross the river as well as numerous flood control projects.

3. Historical documentation reveals that the Red River of the North was used to transport furs and supplies between points in Canada and the present site of St. Paul, Minnesota by means of canoes and bateaux which used a portage between Lake Traverse and Big Stone Lake and the Minnesota River. In addition, commerce including wheat, lumber, and other general merchandise was moved by river barge on the river until the early part of the 20th Century when waterborne commerce was discontinued on the

Section 10 Navigability Studies

- The data provided included information on the limits of navigability and the basis for listing.
- Used by the Corps to develop a final Section 10 list and GIS map.

Waters Name	Alternative Name	Report	Waters Type	State	Navigable Limit	HUC 4	Confidence on point of navigation	Basis for listing	Comments
Big Fork River	NA	Big Fork River	River	MN	Navigability starts at Dora Lake outlet (47.748272, -94.042719)	Rainy River	High	Historical use - floating timber	The Big Fork River "Rises" in Dora Lake but Dora Lake is not noted as navigable itself. No map or drawing included.
Kettle River	NA	Kettle River	River	MN	Navigability shown to start just north of intersection of Kettle River and US Highway 210 (46.682538, -92.788122)	St. Croix River	Moderate	Historical use - floating timber	No exact starting point noted but location shown on map appears to originate just north of intersection with US Highway 210.
Willow River	Larsons Creek	Kettle River	River	MN	Navigability shown to start approximately at intersection of Larsons Creek with Park Hills Road. (46.302261, -92.521783)	St. Croix River	Moderate	Historical use - floating timber	No exact starting point noted but location shown on map appears to originate at (or near) intersection with Park Hills Road (Hwy 171). The identified southward dropping stretch is identified as Larsons Creek rather than Willow River. The flowage identified as Willow River extends east and originates in a large wetland complex (46.365090, -
Moose River	Moose Horn River	Kettle River	River	MN	Navigability starts at Wild Rice Lake outlet. (46.671128, -92.605795)	St. Croix River	Moderate	Historical use - floating timber	No exact starting point noted but location shown on map coincides with outlet of Wild Rice Lake north of US Hwy 210.
West Branch Moose River	Moose Horn River	Kettle River	River	MN	Navigability shown to start just east of intersection of West Branch Moose River with Highway 157 (46.585997, -92.732060)	St. Croix River	Moderate	Historical use - floating timber	No exact starting point noted but location shown on map appears to originate at (or near) intersection with Highway 157.
Grindstone River	NA	Kettle River	River	MN	Navigability shown to start at confluence of North and South Branches of Grindstone River approximately at Lower Grindstone Lake dam. (46.020884, -92.943122)	St. Croix River	Moderate	Historical use - floating timber	No exact starting point noted but location shown on map coincides with location of the dam impounding Lower Grindstone Lake.

MN Section 10 Waters

Result: Section 10 waters GIS map.

- ❖ The Section 10 map now essentially becomes the basis for the retained waters map.

Corps-retained waters =

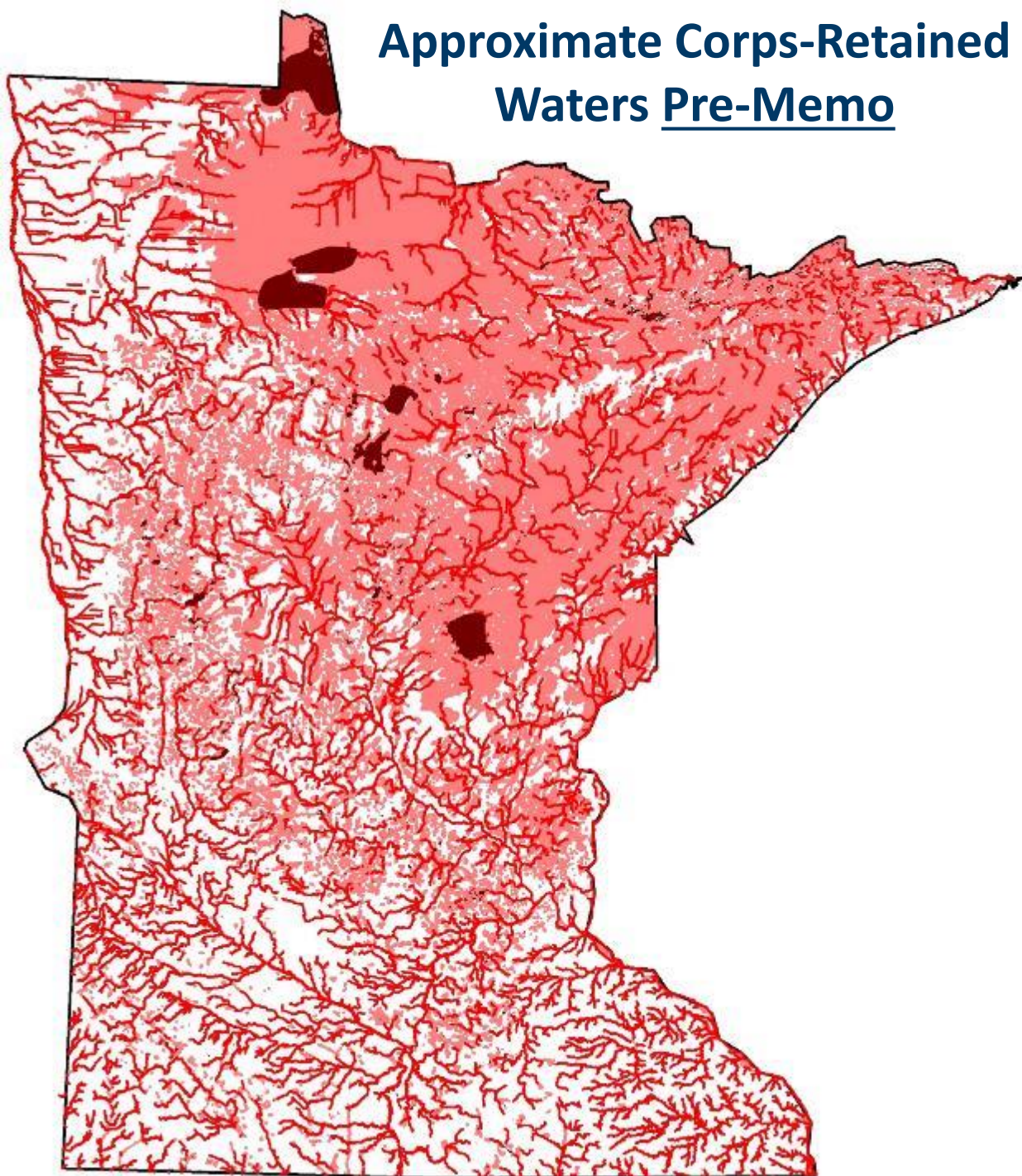
- 1) “Section 10” waters*
- 2) adjacent wetlands to administrative boundary (e.g. 300 feet)

*Section 10 of the Rivers and Harbors Act, except those listed for historic use only.

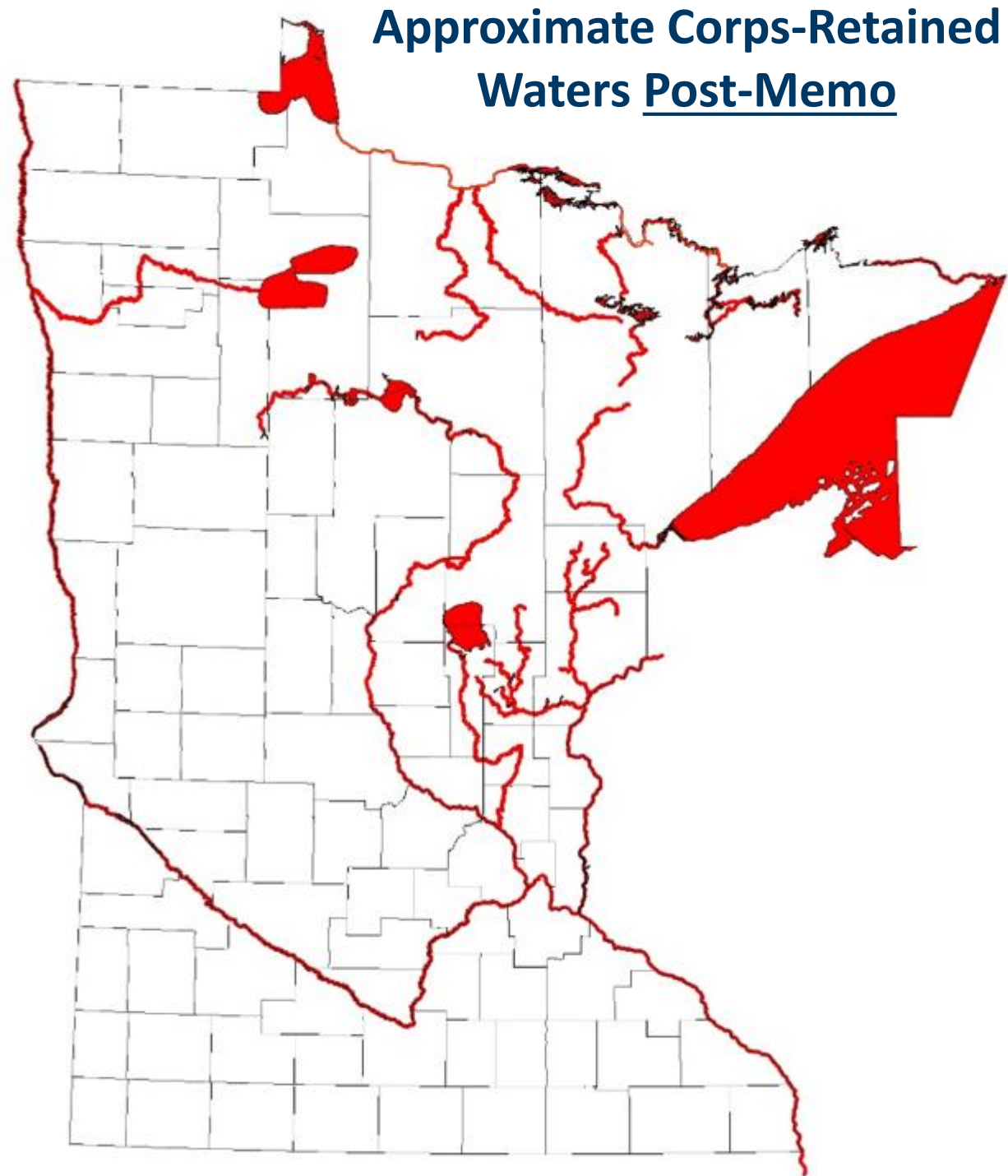
Section 10 Navigable Waters



Approximate Corps-Retained Waters Pre-Memo



Approximate Corps-Retained Waters Post-Memo



What do the changes mean for Minnesota?

- Removes a significant barrier to 404 assumption (assumable waters).
- Federal rulemaking expected to further improve assumption feasibility (hopefully).
- Renewed interest in 404 assumption amongst MN stakeholders.
- Greater clarity = informed decision-making.

Next Steps

- Using the Section 10 waters map, begin working with the Corps to specifically identify all retained waters.
 - Eliminate Section 10 waters listed solely due to historic use (?).
 - Determine the administrative boundary for retained wetlands.
- Incorporate the retained waters list/map into an MOA between the Corps and the State.

Thank You!

**For more information, see the 404 Assumption page of the
BWSR website at:**

<https://bwsr.state.mn.us/404-assumption>

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