



REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, ALASKA
P.O. BOX 6898
JOINT BASE ELMENDORF-RICHARDSON, ALASKA 99506-0898

February 14, 2011

District Commander

POA-2008-0550

Mr. Laurence A. Peterson, Operations Manager
Travis/Peterson Environmental Consulting, Inc.
329 2nd Street
Fairbanks, Alaska 99701

Dear Mr. Peterson:

This letter is in response to the July 28, 2010, appeal of our July 23, 2010, approved jurisdictional determination (JD) for the parcels located at 2710 Hurst Road, 2720 Hurst Road, and Lot 3 Quinnell First Addition. All parcels are located within Section 4, T. 2 S., R. 2 E., Fairbanks Meridian; USGS Quad Map Fairbanks D-1, SW; Latitude 64.7663° N., Longitude -147.3660° W.; in North Pole, Alaska.

The Administrative Appeal Decision was signed on January 31, 2011, remanding the decision to the Alaska District on one of several points made in the appeal. The point prompting the remand regards the determination of Chena Slough as a Traditional Navigable Water (TNW).

Enclosed with this letter is a Memorandum for the Record (MFR) that further documents and clarifies the record to support our conclusion that Chena Slough is a TNW. Because Chena Slough is a TNW and the subject wetland possesses a significant nexus with Chena Slough, the subject wetland has been determined to be jurisdictional in accordance with current interagency guidance following the 2007 U.S. Supreme Court decision in *Rapanos v. United States & Carabell v. United States*.

Therefore, we have determined the above property contains waters of the U.S., including wetlands, under the Corps' regulatory jurisdiction. A copy of the Approved Jurisdictional Determination form is available at <http://www.poa.usace.army.mil/reg/ApprovedJDs.htm> under the above file number.

Department of the Army (DA) authorization is required if you propose to place dredged and/or fill material into waters of the U.S., including wetlands. Section 404 of the Clean Water Act requires that a DA permit be obtained for the placement or discharge of dredged and/or fill material into waters of the U.S., including jurisdictional wetlands (33 U.S.C. 1344).

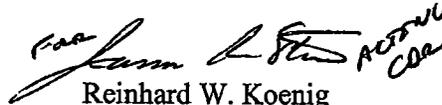
The U.S. Army Corps of Engineers defines wetlands as those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

This approved jurisdictional determination is a final decision resulting from additional analysis and evaluation, as directed by a final appeal decision, and is not an appealable action under 33 CFR § 334.5(b)(3). The JD is valid for five (5) years from the date of this letter.

Nothing in this letter excuses you from compliance with other Federal, State, or local statutes, ordinances, or regulations.

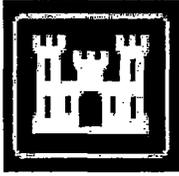
You may contact Greg Mazer via email at Gregory.j.mazer@usace.army.mil, by mail at the address above, by phone at (907) 474-2166 if you have questions. For additional information about our Regulatory Program, visit our web site at www.poa.usace.army.mil/reg.

Sincerely,

A handwritten signature in black ink, appearing to read "Reinhard W. Koenig". To the right of the signature, there are handwritten initials "R.W.K." and "COE".

Reinhard W. Koenig
Colonel, Corps of Engineers
District Commander

Enclosures



CEPOA-RD MEMORANDUM FOR RECORD



SUBJECT: POA-2008-0550 Channel C – Response to Remand, February 2011

On January 31, 2011, the Pacific Ocean Division Engineer signed the decision regarding TPECI's request for appeal (RFA). The decision found that the RFA did not have merit on 2 of the 3 grounds for appeal. Reason 2 of the 3 reasons for appeal was found to have merit on one of several points. The decision determined that "the District must further document and clarify its conclusion that Chena Slough is a TNW", or identify which waterway and/or point on a waterway does meet the criteria for being a TNW. The JD was remanded to the District "for further evaluation, documentation and reconsideration" in this area.

The following describes the rationale for our determination that Chena Slough is a TNW. Much of this determination is drawn from the Response to the Appeal of the Approved Jurisdictional Determination for POA-2008-0550, Channel C, which is the document prepared in August 2010 clarifying the significant nexus and submitted as part of the Administrative Record. The document was submitted to the Appeal Review Officer as clarifying information, but was determined to be new information, and therefore not considered in the appeal decision.

Chena Slough in its present form is widely considered to be a tributary of the Chena River and thus a separate water body. Although there are several historical references that imply that the Chena River and the Chena Slough were once collectively referenced as Chena Slough, this is no longer the case. The modern meaning of Chena Slough is the tributary to the Chena River extending from Moose Creek Dam and entering the Chena River just east of Fairbanks, as discussed in the significant nexus finding report.

Furthermore, Chena Slough meets the criteria for determining TNWs as described in the December 2, 2008 interagency guidance, specifically those "waters currently being used for commercial navigation, including commercial water-borne recreation (e.g., boat rentals, guided fishing trips, water ski tournaments, etc.)".

As mentioned in the significant nexus finding, Chena Slough is a popular place for fishing and boating. Canoeing on Chena Slough is recommended for "an after-work paddle" in Outside in the Interior: An Adventure Guide for Central Alaska, written by Kyle Joly and published in 2007. The section within the book entitled Chena and Piledriver Sloughs states in regard to Chena Slough that

“there are many places to launch along the slough” and describe it as a “surprisingly good place to watch birds or catch fish.”

Evidence that canoeing Chena Slough directly contributes to recreational commerce is found in the minutes (notes) of the August 3, 2006 meeting held by the Fairbanks North Star Borough Rural Services Office’s Public Education/Outreach Subcommittee. The minutes show that the committee intended to rent 16 canoes at Alaska Outdoor Rentals with drop-off and pick-up service for a total of \$1,252 for the purpose of conducting the upcoming “stream clean up day”. A copy of the Public Education/Outreach Subcommittee Minutes is presented in the “Pertinent information from references” section of the Administrative Record.

As discussed in the Administrative Appeal Decision, navigable waters under Section 10 are not synonymous with TNWs. The Alaska District website (<http://www.poa.usace.army.mil/reg/NavWat.htm>) indicates that the “entire length” of the Chena River (including Noyes Slough) is a navigable water under Section 10 of the Rivers and Harbors Act. This water and the other waters listed on this website are a subset of those waters considered to be TNWs under Section 404 of the Clean Water Act. Thus, the absence of Chena Slough from this list in no way excludes them from their status as a TNW.

It should be noted that the court case *Petersen v United States*, 367 F.2d 271 (1966) has no bearing on the TNW determination of the Chena Slough. It is not clear whether the statements from the judgment regarding navigability intend to include Chena Slough, as it is known contemporarily, as part of the Chena River. Regardless, the navigability determination implied by the statements does not relate to or affect the TNW determination, which is defined by the December 2, 2008 interagency guidance.

This MFR documents the Alaska District’s determination that Chena Slough is a TNW. Because the subject wetland possesses a significant nexus with this TNW, as documented in the significant nexus report, the Alaska District affirms its previous determination that the subject wetland is jurisdictional.

DATE: 11-Feb-11

Greg Mazer
Project Manager
