



FROM THE NORTH DAKOTA STATE WATER COMMISSION



## Navigable Waters Are Not Necessarily Navigable Waters: A State v. Federal Perspective

When water managers hear the term “navigable waters” these days, their thoughts will likely go to the recent news stories and concern related to the US Environmental Protection Agency’s (EPA) proposed rule changes to expand the Clean Water Act and its definition of that term. At the same time, North Dakota’s Office of the State Engineer has ramped up enforcement and public education efforts to reduce littering and off-road vehicle usage on sovereign lands – which include beaches and islands on “navigable waters.” Naturally, the state and federal government’s usage of the same term has caused concern and confusion. But when the state and federal government are talking about “navigable waters” – they are not always talking about the same thing.

When the State of North Dakota says “navigable” it typically means: *“used, or are susceptible of being used, ... as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”* This wording comes from an 1870 U.S. Supreme Court case, *The Daniel Ball*, and has been repeatedly affirmed by both the North Dakota and United States Supreme Courts. To apply this definition of navigability, the test is to determine whether a waterbody was used or could have been used at the time North Dakota became a

state in 1889. If evidence shows that a waterbody was or could have been “navigable” at statehood, then the state owns the bed of that waterbody (i.e., it is sovereign land). If evidence cannot show that the waterbody was “navigable” at statehood, then the riparian owner, or the person who owns the land adjacent to that waterbody, also owns the bed of that waterbody.

When the federal government uses the term “navigable waters,” typically the context is in relation to the Clean Water Act (CWA). “Navigable water” under the CWA means “waters of the United States (WOTUS) including the territorial seas.” Federal regulations further define WOTUS to include seven different categories of water. The first category of water defined under WOTUS is the same as what the State would consider “navigable waters.” The federal government sometimes refers to this category of water as “traditional navigable waters” or “A1” waters (because the language is found in Section 328.3(a)(1)). However, the federal WOTUS waters are much broader and encompass other categories.

In 2006, the infamous Rapanos decision from the US Supreme Court discussed which waters are considered WOTUS waters. Rapanos limited the EPA’s jurisdiction under the CWA to water with a “significant nexus” to

navigable waters. The Rapanos decision is confusing for many reasons, but one reason is because it is unclear what “significant nexus” means. Because agencies have been struggling for nearly a decade to apply the “significant nexus” test, the Army Corps of Engineers and EPA are currently in the process of rule making to revise the definition of WOTUS.

Regardless of how the proposed federal rule changes proceed in defining navigable water and WOTUS, it will not impact how the state identifies navigable waters for sovereign land management purposes. For purposes of sovereign land management, the state’s navigable waters only include the “traditional navigable waters” or “A1” water.

## Current Definition Of WOTUS

- (1) All 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;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
  - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
  - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

# Chris Bader Recognized With 2014 William C. Ackermann Medal For Excellence In Water Management



**Recipient of the 2014 William C. Ackermann Medal For Excellence In Water Management.**

In August, Chris Bader, Information Technology Administrator for the North Dakota State Water Commission, was recognized by the American Water Resource Association (AWRA) with their William C. Ackermann Medal For Excellence In Water Management.

The AWRA is a nationally recognized non-profit corporation devoted to advancing the science and technology of water resources. The award is given to "...an individual who has achieved a status of eminence in the design or implementation of exemplary water management practices at the state, regional, or local government level. Particular consideration is given to those who have put into operation nontraditional practices for managing water resources."

Chris received this award for his efforts in developing an automated water use reporting system that tracks industrial water use in North Dakota's oil producing counties.

"Because of Chris's passion for efficiency, many of his ideas over the years have greatly improved the way in which North Dakota's Office of the State Engineer manages our state's water resources. His development of state-of-the-art telemetry technology to track water use by oil companies (for which he's being nominated), is yet another example of Chris's commitment to innovation," said State Engineer, Todd Sando.

Responding to legislative concerns about monitoring increased water usage by the oil industry, the Water Commission began a study in 2011 to determine the most effective and cost-efficient method of implementing telemetry to track water withdrawals. Prior to 2011, there was a wide variety of software and hardware being used to track water use, and lack of uniformity made it exceedingly difficult for the Water Commission to quickly and accurately measure water use for oil. One option to solve this problem would have been to require one software and hardware vendor to be used statewide, although this option would likely have required significant increases in cost and effort by water depots owners and operators.

Instead, Chris developed an ingeniously simple program that enables the exchange of formatted information between different computer and software systems via the Internet. The program allows water users to transmit data to a remote source, greatly simplifying

the data collection and analysis process for water users and the State Water Commission. The efficiency and simplicity of this solution has led other states and regulatory entities throughout the country to incorporate the same type of program into their project areas.

"I am honored to receive the AWRA award, and I appreciate the effort on the part of my colleagues here at the agency that submitted my nomination," said Bader. "The award to a large extent is a reflection of the agency and my staff. The agency has always provided an environment that fosters innovation, which in the end is responsible for these types of projects. Also, without the support and dedication of my staff, accomplishing these types of projects would simply not be possible."

For more information on the telemetry innovations pioneered by Chris and his staff, please see the October 2013 issue of the North Dakota Water Magazine.



**Water depot in Watford City.**



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