National Advisory Council for Environmental Policy and Technology

Assumable Waters [Clean Water Act 404(g)(1)] Subcommittee

September 28-29, 2016

Meeting Summary

U.S. Environmental Protection Agency

The following items are included in this meeting summary:

I. Background and Summary of Decisions, Approvals, and Action Items

Background

This was the fifth meeting (via webinar in this case) of the Assumable Waters Clean Water Act 404(g)(1) Subcommittee. The Subcommittee was convened under the National Advisory Council for Environmental Policy and Technology to provide advice and recommendations on how the EPA can best clarify which waters a state or tribe assumes permitting responsibility for under an approved Clean Water Act (CWA) section 404 program. All presentations and meeting materials can be found here: https://www.epa.gov/cwa-404/assumable-waters-sub-committee.

The meeting, which was held virtually, included discussion of the progress made in the Waters, Adjacency, and Legal workgroups since the June 7-9, 2016 meeting. This summary does not

follow a chronological order of events. Instead, it attempts to summarize discussions related to key topics covered throughout the two-day virtual meeting, including.

Summary of Decisions, Approvals, and Action Items

The Subcommittee made the following decisions:

- The Subcommittee approved the June 7–9, 2016 meeting summary with the suggested modifications (https://www.epa.gov/cwa-404/draft-agenda-june-7-9-2016-meeting)
- The Subcommittee charged the workgroups with refining their products based on Subcommittee member suggestions.
- The Subcommittee charged the facilitator and others with drafting the final report in accordance with the procedures noted below.

The Subcommittee agreed to the below action items and timeline for completion.

CBI or the waters workgroup

- Amend the language of waters Option B to indicate that determinations are made state-by-state or tribe-by-tribe, not necessarily case-by-case.

CBI

- Arrange a conversation with the Corps on TNWs if members indicate such a conversation would be helpful.
- Schedule webinar in early December to hear comments on the draft, answer questions, and make sure the group is prepared for the January face-to-face meeting
- Confirm scheduling for the January meeting.

USACE

- Provide further clarification on waters Option C within two to three weeks, potentially by October 21.
- Distribute meeting slides on GIS mapping.

EPA

- Distribute meeting slides.

Select states:

- States that have not submitted slides to the Subcommittee must do so if they want background on issues within the state to be included in the final report.

Ms. Virginia Albrecht

- Send examples of waters determined to be TNWs since *Rapanos* to Mr. Field to circulate to the group.

All

- Follow the procedure and timeline for finalizing workgroup papers and drafting the final report noted above. Specifically:
    - CBI will "hold the pen" as a neutral drafter
    - Jan Goldman-Carter, Virginia S. Albrecht, Gary T. Setzer, Peg Bostwick, Les Lemm, and Michelle Hale will help draft the report and provide an initial review
    - Susan D. Lockwood and Kimberly Fish will help with Michigan and New Jersey examples
    - Richard D. Gitar and James P. DeNomie will address tribal considerations
    - After input from these individuals, the full Subcommittee will then review the draft

II. Presentations and Key Discussions

A. Check-in, Roll Call, Call to Order, and Initial Business

The meeting facilitator, Mr. Patrick Field of the Consensus Building Institute, reviewed key logistical elements of the online meeting, and led a roll call of Subcommittee members joining by phone and videoconference. A list of participants is included at the end of this summary. Mr. Jacob Strickler, acting EPA Designated Federal Official (DFO), then called the meeting to order and welcomed the members. He announced that public comment would take place on September 28 from 3:00–3:30pm, and the next in person meeting of the Subcommittee was currently scheduled for January 10–12, 2017.

The Subcommittee co-chair, Mr. Dave Evans, welcomed the group and set the context for the meeting. He noted that a key goal of this meeting was to discuss the final draft workgroup reports, so the group is well positioned to achieve closure in its next meeting in January 2017. He thanked members for their efforts and engagement to date.

Mr. Field then reviewed the meeting agenda, which is included in Appendix A, and proceeded with the first item on the agenda: reviewing and approving the summary from the last Subcommittee meeting, June 7–9, 2016. Members suggested several revisions during this initial discussion and, during a subsequent discussion on Day 2, approved the summary with the suggested revisions included.

B. Review of Process to Date

Mr. Field provided a quick overview of the Subcommittee's progress and work to date. He highlighted the following elements of the timeline:

- Over the summer, there were efforts to finalize the waters and adjacency working group papers and legislative history.
- A few states have not submitted slides to the Subcommittee. These states will need to submit slides if they want background on issues within the state to be included in the final report.
- For the remainder of 2016, a small group will work on drafting the final report. Drafts and revisions will be run through CBI.
- During the January meeting, members will review the report, address any outstanding issues, and finalize it.
- The report will then be sent to NACEPT.

C. Review of Waters Legal Background and Legislative History

Ms. Virginia S. Albrecht from the National Association of Home Builders provided an overview of the legislative history of waters. Ms. Albrecht noted that the working group on legislative history finished its draft paper on August 17. The paper's main conclusion is that when Congress passed 404(g) of the CWA in 1977, it intended the U.S. Army Corps of Engineers (USACE or "the Corps") to maintain permitting authority over Phase 1 waters, minus waters considered navigable solely because of historical use.

Ms. Albrecht described the legislative history as follows:

- In 1972, Congress passed the CWA.
- In 1973, the USACE defined CWA jurisdiction the same as Rivers and Harbors Act (RHA) waters. RHA waters are known as "navigable waters of the U.S."
- The USACE was sued based on this definition of CWA jurisdiction. The district court concluded that CWA jurisdiction is broader than the "navigable waters of the U.S."
- In 1975, in response to a court order, the Corps announced a phased implementation plan for expanding its CWA program. Phase 1 consisted of coastal wetlands and waters and inland navigable waters of the U.S., *i.e.* RHA waters. Phases 2 and 3 involved additional waters.
- The Corps' announcement created a backlash in Congress. The House passed a bill to limit the Corps' jurisdiction to navigable waters of the U.S. The House bill used the same language that ended up in 404(g).
- The Senate wanted CWA jurisdiction to extend beyond just navigable waters of the U.S. The Senate set up a program — accepted by the House in the final version of 404(g) —

that allowed states to assume permitting authority over certain waters, with EPA approval and with the Corps retaining waters as defined in Section 404(g)(1).

- Congress expected the states would rush to assume permitting authority through the new program, so most of the remote waters would be regulated by the states, subject to the CWA, with the Corps maintaining permitting authority over classic RHA waters.

A question and answer session followed Ms. Albrecht's presentation. A Subcommittee member asked for further clarification on the exception in Section 404(g)(1) for waters considered navigable solely because of historical use. Ms. Albrecht explained that once a water is considered navigable, it becomes an RHA water in perpetuity, even if at some point it becomes no longer navigable. Ms. Albrecht suggested that when Congress passed 404(g), it eliminated the idea of administering waters that are jurisdictional solely because of historic use.

D. Waters Options

Ms. Peg Bostwick, Subcommittee member, presented on the water workgroup's recommendations. The workgroup developed a range of options regarding guidance for states, Corps districts, and EPA regions that can be implemented to provide more consistency when determining the scope of state assumable waters. Ms. Bostwick emphasized that the workgroup had focused on providing guidance on the administrative division between waters the Corps must regulate and waters states can assume; the workgroup was not providing guidance on CWA jurisdiction.

The workgroup's first recommendation was as follows:

> *The federal agencies should provide clarity regarding the extent of Waters of the U.S. that may be assumed under Section 404(g). The preferred option for doing so is based primarily on the identification of waters that must be retained by the Corps using existing lists of waters regulated by the Corps under Section 10 of the RHA, except for those waters deemed navigable based solely on historical use, and with the addition of wetlands adjacent to the Section 10 waters. All other waters may be assumed by a state or tribe.*

Ms. Bostwick noted that a preference for this option — referred to as Option A — was determined using a sticky note poll. She clarified that the option involves using the existing Section 10 list only as a starting point for determining waters that must be retained, not as a final list of such waters. If waters are added to or taken off this list in a given state, that would

impact only the list of waters that are assumable, not the list of waters over which the federal government has jurisdiction.

Ms. Bostwick added the following points:

- The workgroup has been told that almost all the Corps offices retain Section 10 lists, which suggests these lists could serve as a practical and fairly simple starting point for determining the list of assumable waters. Using the Section 10 list as a starting point, the Corps could identify and remove waters it considers navigable only because they have been used in the past.
- In making its recommendation, the workgroup has relied in part on its understanding of the legislative history of Section 404(g), and a concern that the Congressional intent behind Section 404(g) may be lost due to changes in regulations and agency responses to the decision in *Rapanos v. United States*, 547 U.S. 715 (2006). The workgroup does not believe that *Rapanos* altered the assumable waters question.
- The workgroup recommends that the Corps be allowed to add waters that are "susceptible to use in their natural condition or by reasonable improvement" to the Section 10 list, and thus retain administrative responsibilities over these waters.
- The workgroup also recommends that whenever a state or tribe proposes assumption, the state or tribe, the Corps, and EPA should decide on a Memorandum of Agreement (MOA), and collaborate in the review and modification of the existing Section 10 list. They should work together to clarify the scope of assumable waters, and provide clarity on any waters that do not clearly meet the guidelines. The EPA should be involved in this process early on, well before it is called on to approve the list.

Ms. Peg Bostwick discussed two other options for determining waters that must be retained. Under Option B, there would be a case-by-case determination of Corps-retained and state/tribal assumable waters at the time of program assumption. Ms. Bostwick referred to this option as the "status quo." She suggested it is problematic because there is no clear guidance, clarity, or certainty for the public on waters that are or are not assumable.

Option C would involve a determination that "navigable waters" to be retained by the Corps under CWA Section 404(g) are equivalent to "navigable waters" as defined under Corps regulations 328.3(a)(1). Under this option, there would be no difference between the definition of assumption and CWA jurisdiction. Ms. Bostwick expressed concern that this option would alter provisions of the assumption process, leaving the states and tribes very few waters to assume, and the option is therefore inconsistent with the goals of the workgroup.

Ms. Bostwick summarized the workgroup's additional recommendations as follows:

- Recommendation 2: The Corps and EPA should jointly develop field level guidance on state/tribal 404 Program assumption, with input from states and tribes. This guidance should define the process for development of an MOA between the state/tribe and the Corps as required prior to assumption under Section 404(g).
- Recommendation 3: Field level guidance should have sufficient flexibility to allow for negotiation between the state and the Corps on a case-by-case basis.
- Recommendation 4: While flexibility is important, some general rules on assumption should be established.
- Recommendation 5: Information on which waters have been assumed and which remain the administrative responsibility of the Corps should be marked on an appropriate map or geographic information system.

Discussion

During the discussion period following Ms. Bostwick's presentation, she noted that the members of the workgroup were generally in agreement on the group's recommendations, but the workgroup member from the USACE, Mr. William L. James, had not yet had an opportunity to express an opinion. Mr. James then offered the following comments:

- The Corps does not agree with the workgroup's preferred option, Option A, for reasons already expressed.
- The Corps is unsure about Option B, depending on what it means to engage in a case-by-case determination on assumption, and whether this determination starts from the Section 10 list.
- The Corps supports Option C, but believes traditionally navigable waters (TNWs) should be included in the list of retained waters. There is a need for a clear reference to TNWs because they are not defined in Section 404(a) of the CWA.

In response to questions from the Subcommittee, Mr. James provided additional points of clarification regarding the Corps' position. He suggested this position includes the following claims:

- RHA Section 10 waters are a subset of TNWs.
- The Corps has authority to regulate TNWs under CWA Section 404.
- Many Section 404 waters are not TNWs. The Corps wants to retain its authority to regulate TNWs, not all Section 404 waters.

- The Corps has defined the scope of TNWs in Section 328.3(a)(1) of its CWA regulations, referred to as "(a)(1) waters."

Subcommittee members offered the following comments on the waters options:

- The differences between RHA waters and TNWs are unclear. There is ambiguity in the case law regarding which waters are eligible as RHA waters. In addition, the precise definition of TNWs is tied to the issue of navigability, and is found in case law that goes beyond cases addressing RHA waters. For these reasons, the workgroup looked closely at the CWA legislative history and decided on Option A, which is tied to Phase 1 of the Corps' CWA program and references RHA Section 10.
- Using the definition of (a)(1) waters to determine which waters are assumable would not accord with Congress's directive to look at the RHA when interpreting Section 404(g).
- The distinction between (a)(1) waters and RHA waters may not be so important in practice. While there are legal differences and there are more TNWs than RHA waters, both refer to "big" waters. Practically, it may be possible to start by using the Section 10 list, and use any TNW analysis that the Corps has conducted as an additional reference point.
- The legislative history strongly suggests Section 404(g)(1) is limited to RHA waters. However, because the text of 404(g)(1) is similar that in Section 328.3(a)(1) of the CWA, and courts have interpreted this language broadly in the context of decisions on the CWA, there have been suggestions that Section 404(g)(1) could be interpreted more broadly. In short, there is tension between the legislative history of (g)(1) and the textual similarities between (a)(1) and (g)(1). The two sides of this debate are unlikely to convince each other. Instead, we should consider starting with the Section 10 list, and agree on a process for the Corps to assume additional waters on a case-by-case basis. This is the most practical and efficient approach, since the Section 10 lists already exist.

Mr. Field brought the discussion to a close by suggesting members consider whether to eliminate Option B. He suggested members might provide more detail on how Option C could work in practice, and then compare that process to Option A to see if the differences are meaningful.

Further refinement of waters options

On Day 2 of the meeting, the Subcommittee discussed additional refinements to the waters options. The discussion on Option A focused on the mechanics of using the Section 10 list to determine which waters are assumable. Members made the following comments:

- If there are waters "susceptible to use" that are not currently in the Section 10 list, and the Corps believes these waters should be on the list, the Corps should formally add these waters to the list in order to retain them. There is an existing process for adding them to the list.
- There should be a provision in Option A that allows entities to continue to study and adjust the Section 10 list after assumption. The process of adding Section 10 waters to the list could take years.
- For the Corps, there is a significant amount of work and coordination required to add waters to the Section 10 list. Districts may not have the time or personnel to do it. The Corps may not be willing to commit to revising the Section 10 list to include any and all retained waters.
- To determine if a water is included on the Section 10 list solely based on historical use, the Corps would look at the original navigability report and document its findings.
- The Section 10 list should be the starting point, and the list of retained waters should be a subset or expansion of the Section 10 list distinct from the Section 10 list itself.
- Modifying the Section 10 list is a formal, structured process. It needs to be initiated at the district level, and requires concurrence by the division engineer. It is a time- and labor-intensive process for the Corps. It would be simpler to just remove historical use waters from the retained list.
- Adding waters to the Section 10 list should be distinct from casually refining the list for purposes of an MOA. The Corps should be able to add waters to the Section 10 list before or after the MOA. Eventually, however, if the Corps is adding waters to the retained waters list beyond those in the Section 10 list, it should be required to amend the Section 10 list.
- In developing the list of retained waters, we start with the Section 10 list, and anything on this list is by definition, a retained water. If the Corps identifies other waters that meet the criteria, they can add it to the Section 10 list either before or after assumption, via a formal process. Once it is added to the Section 10 list it will then be in the retained waters list. Waters that are on the Section 10 list solely based on historical use can be removed from the retained waters list more informally, without removing them from the Section 10 list. In short, it is easier to remove waters from the retained waters list than it is to add them.
- Under Option A, TNWs are not automatically on the Section 10 list.

- Tidal waters are by definition on the Section 10 list. Some states have an asterisk indicating that all waters susceptible to the ebb and flow of the tide are considered waters of the U.S.
- Under Option A, waters not already on the Section 10 list that are determined by the Corps to meet criteria for inclusion on the Section 10 list may be added to the list of retained waters. Option A involves retention of Section 10 waters only. Option A does not involve looking at whether something is a TNW.
- There is an underlying issue that the language "susceptible to use" is the same in both Section 404(g)(1) of the CWA and the Corps' RHA regulations. We should avoid interpreting or limiting what we are calling "susceptible to use," in order to avoid entering the realm of legal interpretation.
- We should not assume the phrase "susceptible to use" means the same thing when it is used in regards to Section 10, and when it is used in regards to TNWs. The former reference is connected to interstate or foreign commerce, while the latter is connected to transport for international commerce. We should avoid using the "susceptible to use" language in the recommendation, and instead note whether our target is Section 10 or (a)(1) waters.

For the discussion on Option C, Mr. Field began by proposing that Option C could include the following details:

- As with Option A, the Section 10 list could serve as the starting point.
- Any TNWs for which the Corps has a study — whether district-wide or based on case-by-case determinations — could then be added to the list.
- Waters that are on the list solely based on historical use would be removed, and waters that are not on the list but are susceptible to use would be added.
- When a permit comes in, if the Corps thinks it is for a TNW, then the Corps can indicate that it believes it must administer the permit.

Participants offered the following responses to Mr. Field's proposal on Option C, and additional comments:

- It is not clear in Mr. Field's proposal whether, when the Corps makes a determination on an individual permit, the Corps would be making a determination on the status or category of the water body, or just a determination on whether it will administer the permitting request.
- It is important to clarify that when Subcommittee members use the term "susceptible to use," they are referring to the full parenthetical in Section 404(g)(1), which

encompasses waters that are either susceptible to use or presently used. Waters presently used for navigation may or may not already be on the Section 10 list. When we discuss adding waters to the Section 10 list, we could be adding waters that are either susceptible to use or presently used. Anything that meets the Section 10 criteria could go on the retained waters list if added to the Section 10 list.

- It is not clear how Option C would work in practice. It was included as an option that may be agreeable to the Corps. Those who do not support this option may not see the value in further defining it. In addition, if the Corps goes forward with this option, it is likely to use the TNW list and not worry about putting additional waters on the Section 10 list.
- If a water is susceptible to use, then by definition it is also a TNW. These categories are not entirely distinct. However, waters susceptible to use may not be on the official TNW list.
- In general, the Corps does not expend its resources determining the full extent of TNWs. This determination is usually made on a case-by-case basis when there is a request for a jurisdictional determination by a landowner. In such cases, the Corps makes a determination only on the specific parcel noted in the request.
- The plain language of Section 404(g)(1) suggests that states can assume TNWs and other waters unless the waters are included in the Section 404(g)(1) parenthetical.
- The Corps does not have any TNW lists. The initial list of retained waters should therefore be based on the language of Section 404(g)(1). When the Corps conducts a jurisdictional determination for a particular water, any work to determine whether it is susceptible to use could also be done at time. If in the future the Corps develops TNW lists, then those waters may come back into the bucket of retained waters.
- If Option C involves a case-by-case determination either at time of an MOA list or at the time of a permit application, then Option C is not meaningfully distinct from Option B. Option C should provide the same degree of clarity as Option A. The Corps should suggest how it would like Option C to read, and how it would like an MOA to read.
- The language in Option C suggests that the Corps would use language of jurisdictional guidance to determine waters that should be retained. However, the Corps has not gone so far as to say that every water under its jurisdiction should also be retained. It will be helpful to get more clarity on the Corps' position.

In response to these comments, the Corps agreed to try to craft an amended Option C and present it to the group.

The discussion on Option B focused on whether the option should remain as part of the report or be removed. Participants made the following suggestions:

- We should leave Option B on the table to show we looked at it and discussed it.
- We should try to narrow each option down to simple statements, so that the states can administer it. For example, Option A is Section 10 waters, while Option C is Section 10 waters plus some CWA waters. The problem with Option B is that it is impossible to simplify it.
- Option B is contrary to what the EPA regulations currently indicate. The regulations indicate that the Corps is supposed to provide a list.
- Option B represents a combination of three different options coming out of the June Subcommittee meeting, which the workgroup believes reflects the status quo. It may be worth keeping this option in the report even if it is not desirable, in order to suggest there are additional options beyond options A and C, even if these options may be complicated or unworkable. We do not want to suggest we have thought of every option.
- Option B should indicate that determinations are made state-by-state or tribe-by-tribe, not necessarily case-by-case. Under the status quo, each time a state wants to assume it needs to negotiate with its own Corps district.

In response to this last comment, Mr. Field agreed to amend language for Option B to reflect this reality.

Members next discussed whether it would be helpful for the Corps to offer an in-depth presentation on TNWs, using slides it prepared in connection with other work, potentially through a webinar. One member discussed the importance of clarifying that the *Rapanos* guidance and rule changes have not changed the scope of (a)(1) waters/TNWs, regardless of whether there is a webinar, while another member noted the importance of members understanding that TNWs are part of the Corps' responsibilities under the CWA. Mr. Feld suggested that CBI would distribute the meeting slides, and would be willing to help arrange a conversation with the Corps on TNWs if members indicate such a conversation would be helpful.

E. GIS Mapping of Example States

Mr. James and Ms. Stacey M. Jensen, from the U.S. Army Corps of Engineers, presented on the Corps' GIS mapping work. Mr. James presented a map from the Corps' Kansas City district that showed all waters on the Section 10 list in the district. The map depicted a total of 887 stream

miles of Section 10 waters. Next, Mr. James showed additional waters in regards to which the Corps has made TNW determinations. These waters totaled, including Section 10 waters, 2,476 stream miles. Mr. James noted that there are roughly three times as many TNW stream miles as Section 10 stream miles in the district. He suggested that a number of the TNWs are major streams, including the Arkansas River. Similarly, the Harry Truman Reservoir is a TNW but not on the Section 10 list.

Currently, Kansas City and Omaha are the only districts for which the Corps has a published a TNW mapping list. Ms. Jensen noted that most districts classify the waters on a case-by-case basis. Other districts, such as coastal districts, might show different patterns.

Members offered the following comments and asked the following questions after the presentation. *Responses from Mr. James and Ms. Jensen are in italics.*

- In determining TNWs, is the Corps using guidance after *Rapanos*? Yes, the determinations are made in accordance with a memo that came out shortly thereafter.
- Why are the TNWs not regulated under Section 10? *TNWs tend to be broader than Section 10 waters.*
- In the past, the Corps has suggested that it is difficult to distinguish between Section 10 and TNWs, but it has done so here. The Corps retains some waters under the RHA; others were added under amendments to the CWA and court decisions interpreting the scope of the Corps' Section 404 programs. These latter waters are probably the very waters that Congress intended the states could assume. *TNWs include Section 10 waters and other waters that are navigable in fact but are not in Section 10. The map shows quite a few waters that are TNWs but not Section 10 waters, including Devil's Lake and the Great Miami River in Ohio.*
- The *SWANCC* (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)) and *Rapanos* decisions did not make additional waters TNWs or change the definition of TNWs, they just made the definition of TNWs more important because jurisdiction is now tied to whether something is a TNW (rather than commerce). While there has been a longstanding practice of listing RHA waters based on navigability, there has not been a similar process for TNWs.
- The Subcommittee should consider as a practical matter how Option A would work and how Option C would work in light of the information that currently exists with respect to the Section 10 lists and the TNW lists. For EPA to put a policy in place, it will be important that our recommendations are implementable.

- Are these maps on the districts' websites? *No, the maps are in the Corps' internal database. The TNW lists are on our district websites, just not in a visual format.*
- Is there a document that explains the analysis that led to the Corps' conclusions that these are TNWs? *Yes, but I'm not sure the documentation has been posted.*
- Some of the waters currently categorized as TNWs could also be RHA waters; the Section 10 list is likely out of date. It could still be helpful to start with the Section 10 list as indicated in Option A.
- The maps provide some helpful clarity. Still, the Corps is trying to use criteria related to jurisdiction to determine who is administratively responsible. TNWs should be assumable unless they are Section 10 waters.
- No matter one's opinion on which is the preferred option, the mapping suggests there are important differences between TNWs and RHA waters, even though the maps might look different in other districts.

During this session, a member volunteered to send examples of waters determined to be TNWs since *Rapanos* to Mr. Field to circulate to the group. Mr. Field concluded the session by noting that a number of members suggested Option B is not of interest. He also suggested that the group as a whole would not achieve unanimity on recommending Option A or Option C, and this will need to inform how they decide to write the final report. The goal should be to make the two options as clear as possible, and explain where the various parties agree and where they differ in their recommendations.

F. Review of Adjacency Legal Background and Legislative History

Ms. Jan Goldman-Carter reviewed the legal background and legislative history on adjacency. She highlighted the following points:

- Overall, there is no clear legislative history on what is meant by adjacency in Section 404(g)(1).
- In the Corps' 1975 regulations, there is reference to "wetlands contiguous or adjacent thereto," but the regulations do not define contiguous, adjacent, or wetlands.
- There is a definition for adjacent in the 1977 regulations as "bordering, contiguous or neighboring." This continues to be the definition of "adjacent" in Corps regulations.
- The 1977 regulations were final rules by the time Section 404(g) was finalized in December of that year. The preamble to 1977 regulations explains that the term "contiguous" has been eliminated because it is only a subpart of the term "adjacent."

- The only other relevant legislative history involves an extended colloquy between Congressmen Bauman and Clausen, which shows the intent to limit the Corps' permitting authority and interprets "adjacent" as "immediately contiguous."
- The two pieces of legislative history are in conflict, which suggests adjacency is susceptible to various interpretations, and the Corps and the states will have flexibility to determine wetlands over which the Corps must retain authority.
- The adjacency report should stick tightly to these findings and conclusions.

G. Adjacency Options

Mr. Gary Setzer reviewed the adjacency options, and noted changes he had made to the adjacency working group report since the last meeting. Mr. Setzer described the adjacency options as follows:

- Option 1 represents the status quo. It relies on the definition of waters of the U.S. used by the Corps in its regulatory actions
- Option 1 is not consistent with congressional intent because it ties adjacency to CWA jurisdiction, and captures extensive wetlands. It does not solve the problems the committee has been discussing over the last year.
- While states may be able to engage in a regulatory process by using state programmatic general permits, this results in a duplication of effort and an inefficient regulatory process. State autonomy is diminished, and it reduces customer service by requiring a case-by-case determination on permitting authority.
- Option 2 would enable the state or tribe to assume additional wetland resources and is more closely aligned with congressional intent, but still represents the status quo in some respects. Wetland systems touching retained waters can extend thousands of miles, and the Corps would be able to retain waters separated by natural or man-made features, like the St. Louis River.
- Implementing Option 2 would require a case-by-case field inspection.
- Option 3 would involve determining a bright line national standard to define the landward extent of adjacent wetlands retained by the corps. The working group believes this option would best ensure an efficient federal/tribal regulatory program.
- Initially, the working group considered establishing the bright line at the ordinary high water mark or the mean high water mark, but more recently it has considered using shoreline features available in a GIS system instead.
- The working group intends to do additional work to expand on justification for developing a bright line based on some kind of navigability criteria, such as sediment transport and its impact on navigability.

- Option 3 includes three variations that each have different strengths. Option 3A would eliminate concern over the Corps retaining administrative authority over extensive wetlands systems. Option 3B is simple and predictable, and would increase efficiency. Option 3C provides an opportunity to fine-tune a national standard, and provides clarity, efficiency, and flexibility. It encourages each state and tribe to customize the assumed program so it is consistent with its other programs, and streamlines the regulatory process.
- For any of these Option 3 variations, the workgroup suggested the assumption boundary could be at 100, 300, or 1000 feet.

Participants offered the following comments and asked the following questions following Mr. Setzer's presentations. *Responses from Mr. Setzer are in italics.*

- How would the GIS mapping work? Would it be a state-by-state process, since there are no national guidelines? *The process would draw on the resources of the state or the Corps to draw a line on the GIS system. States vary in their capabilities to conduct this work. Some have LIDAR available, and would be in a good position to draw a tight boundary line using their GIS systems.*
- To do this, states would have to just map all of the retained waters, correct? *The states are looking for toolkits that would allow the regulated community to go online and easily determine who is going to process their application.*
- The adjacency working group intentionally avoided being prescriptive about the mapping technologies and the degree of mapping, because different states have different capabilities and are different sizes.
- The Corps supports Option 1.
- Option 3C may provide more flexibility than Option 3A. We should support a bright line rule, and 300 feet is reasonable, but we need some variability based on the landscape.

Further refinement of adjacency options

On Day 2 of the meeting, the Subcommittee discussed additional refinements to the adjacency options. Mr. Field began the conversation by presenting a potential fourth option, which emerged from the prior day's conversation, and which he suggested might address concerns around a national bright line rule. The new option was as follows:

- In the MOA, the Corps and the tribe or state would be expected to include clear direction for wetlands that are retained or assumed in one of two forms. Either they would

- a) Provide a very clear, detailed, and implementable process for a case-by-case determination that the state can use to determine administrative responsibility as applications come in (*i.e.*, the wetland is retained, it is assumed, or it is in a gray zone so there is a need to consult with the Corps), or
- b) Provide an administrative line or lines drawn via technical and practicable considerations, captured by GIS, and included in the MOA.

Members offered the following comments on this potential Option 4 and the adjacency options more generally.

- A national bright line is important because it establishes a threshold for the bright line that the Corps can't go below. If a state has a less positive relationship with the Corps district, it might be concerned that the MOA negotiations will not go well, in which case having a national standard would be very important.
- The case-by-case element within Option 4 would create uncertainty for the states. It may not be realistic or feasible. It would be important to provide some guidance or examples of what is acceptable.
- Option 4 is a variant of Option 3C, except it omits the national bright line.
- Option 4 negates what we're trying to achieve on clarity and predictability.
- While it is important to maximize predictability, some case-by-case determinations are inherent in all the options.
- We need something that is simple, clear, transparent, and easily implementable in the field. If it addresses 80% of situations that would be great, and the MOAs can address the outliers.
- Our charge from the EPA includes providing clarity regarding who is the permitting authority, and making sure our recommendation is easily understood and implementable in the field.

Mr. Field summarized the conversation by noting that the group does not support Option 4(a), while Option 4(b) may be a variant of Option of 3(c) that the group could work with.
He concluded by praising the group for its work clarifying the options on adjacency.

H. Final Report

At various times over the course of the two-day meeting and during a designated session on Day 2, members discussed their plans for finalizing the working group papers and drafting and editing final report. These discussions are consolidated below.

Managing lack of agreement

The Subcommittee engaged in significant discussion on how to manage the lack of agreement within the group on the preferred options, and how to appropriately reflect these differences in the final report. Participants offered the following comments and suggestions:

- The Subcommittee could opt to have the final report reflect the approach favored by the states and the tribes, and then have the EPA and the Corps join in some time in the future after they have had a chance to scrutinize the report and conduct the necessary legal analysis.
- It is unusual for federal agencies to be members of a Subcommittee of this nature, or for them to serve as co-chairs. In this case, the federal agencies opted for this approach because of the nuanced subject matter, which is intertwined with multiple statutes and complex regulations. EPA's and the Corps' active participation and membership was designed to provide non-federal members with insights that might be relevant to the deliberations.
- The Subcommittee may need to explore alternative approaches towards offering consensus recommendations. It should try to frame the final report in a constructive way even if not everyone can agree.
- The Subcommittee should report the consensus of non-federal members. This will allow it to put a set of clean, workable recommendations on the table. The purpose of the Federal Advisory Committee Act (FACA) is to allow agencies to have the benefit of consensus-based input from stakeholders, and the federal agencies on the Subcommittee are not stakeholders insofar as they do not represent the affected communities.
- If the agencies do not join in the recommendations of the Subcommittee, this could create a negative perception. Given that the agencies played such an active role in the deliberations, it could be problematic if they are now seen as distancing themselves from the effort.
- Differences of opinion exist not just between federal and non-federal representatives. It is important that we reflect the view of other members neither states nor federal agencies.
- The Subcommittee could begin the report by describing the journey we all went through together, then describe our general consensus, and then note that a subset of the group could not agree to the final recommendation and had a set of specific concerns. It would be a single report, but it would bifurcate at a certain point.
- Giving multiple options for EPA to consider might be a good way forward.

- Consensus does not mean unanimity. It just means there is not an affirmative dissenting vote. The report could identify our areas of difference and explain our approach to consensus.

Mr. Field suggested that the initial draft of the final report could provide background, detail the journey the Subcommittee took, describe the various options, and weigh these options against the relevant criteria. Then, in January, the group would have a conversation on bifurcation and capturing the range of views in the Subcommittee. Members offered the following comments on Mr. Field's suggestion:

- It feels risky to wait until January to discuss what the final product is going to look like. Instead, we could write the report describing the perspective of the states and tribes, and then describing the Corps' perspective and rationale for supporting other options. It would not be a consensus report in the strict sense of the word.
- It may be acceptable to EPA if we faithfully report out the preference of the states and tribes. This has been a public process and observers outside the Subcommittee understand that we have various perspectives. EPA will still be able to undertake policy clarification actions.
- It feels less useful to have the Corps write a minority report.
- It would be helpful to have a draft in advance of the January meeting, including an indication from each member on their inclusion in supporting the consensus recommendations, and any explanations from those who cannot be part of the consensus that they want reflected in the report.
- If an outside party asks a member about his or her personal opinions on the draft, the member should be permitted to share his or her personal opinion, but be clear that this does not represent the opinion of the Subcommittee as a whole. The member can also direct the person to the Subcommittee website.

Mr. Field suggested that the group could produce a draft report in accordance with the above instructions, and distribute it in late October or early November. Members could then comment on the clarity of the language and any legal errors, and contribute language on which options they support and why. Mr. Field could then revise the draft with language on members' preferences, and distribute it before the January meeting. To facilitate this timeline and approach, the Corps would provide further clarification on Option C for waters within two to three weeks, potentially by October 21.

Finalizing and including working group papers in the report

Next, members discussed their plans for finalizing the working group papers. Mr. Field suggested that the Subcommittee might opt not to further revise the working group papers, and instead think about how to address the relevant issues they raise in the final report. Alternatively, the Subcommittee could solicit further comments on the working group papers, work to finalize them, and include them in the administrative record. Or the Subcommittee could instead opt to include the papers as appendices to the final report itself.

Members offered the following comments on this issue:

- The level of quality and clarity of the draft papers is very high.
- Regardless of what we do with the working group papers, we should remove everything from them that borders on legal interpretation.
- Logistically, it might be easier to remove these references in the context of drafting a final report rather than redlining the working group papers.
- If the working group papers will be appendices or attachments to the final report, then they should be cleaned up. But if they will just serve as starting points for the final report, with only portions of them actually appearing in the final report, then final word-smithing of the papers would not be necessary.
- If the working group papers are a portion of the larger final report, there should be another round of comments.
- The Corps is still not comfortable with some of the language in the working group papers.
- While it may be helpful to finalize the papers, it would not be worth it to include them in the final report if doing so causes a delay.
- Some members of NACEPT might want to see the full reports, while others might want to see something more abbreviated.
- The final report could include a link to the papers in the administrative record.

After some discussion, the members agreed that they would work to finalize the working group papers, but they would be put forward as the work of their authors, not of the group as a whole and not reflecting a consensus. The Subcommittee agreed to check with NACEPT on whether it would be more useful to include the papers in the final report (and if so in what format), or simply to add them to the administrative record. Subcommittee members would have a few weeks to provide comments to the working paper authors, and the authors would then have a few additional weeks to incorporate the comments.

Reference to legal issues or analysis

Members discussed how the final report should address legal issues, and cautioned that it should steer clear of legal analysis. They made the following comments:

- The final report should emphasize our recommendations and provide explanations, and those explanations should be focused on practical matters, not legal rationales. The EPA policy response will require a lot of agency legal analysis, performed in conjunction with the Department of Justice and the Corps, so this should not be our focus at this stage. EPA has asked specifically for policy recommendations.
- For EPA, the full inclusion of legal analysis could raise concerns among its counsel. If the report clearly states that this is work by non-federal attorneys on the Subcommittee, then it may be acceptable, but the EPA General Counsel's office may want to consider the issue. It may be useful to remind folks EPA is looking for policy recommendations, not legal interpretation – legal interpretation is the role of the courts and agencies.
- If the Subcommittee's advice is tied to a strict legal interpretation, the agencies may not be able to act on it regardless of how strong it is if the legal analysis is not supported by the agencies. EPA does not want to feel that it is signaling a particular legal interpretation by accepting a given option.
- It might be necessary to include legal references in the final report in order to explain the programmatic references, but the report should steer clear of legal analysis.
- The charge to the Subcommittee is that any recommendation must be consistent with the CWA and Section 404(g). So those legal issues must be considered.

Report drafting process

Mr. Field suggested the following elements for a potential report-drafting process:

- The facilitator "holds the pen" as a neutral drafter
- Jan Goldman-Carter, Virginia S. Albrecht, Gary T. Setzer, Peg Bostwick, Les Lemm, and Michelle Hale will help draft the report and provide an initial review
- Susan D. Lockwood and Kimberly Fish will help with Michigan and New Jersey examples
- Richard D. Gitar and James P. DeNomie will address tribal considerations
- After input from these individuals, the full Subcommittee will then review the draft

The group approved of this suggested process. They agreed to try to schedule a webinar in early December to hear comments on the draft, answer questions, and make sure they are prepared for the January face-to-face meeting, and they also agreed to confirm scheduling for the January meeting.

III. Public Comment

There were no comments from the public during the public comment period, nor were there any emails or other messages about public comment.

IV. Wrap Up/Closing

Mr. Evans concluded the meeting by thanking participants for their attention, input, and professionalism. He suggested it would be important to get a clear report on next steps out to the group. Mr. Jake Strickler, EPA, promised to distribute slides from the meeting.

V. Meeting Participants

A. Participating Subcommittee Members

Collis G. Adams, New Hampshire Department of Environmental Services
Virginia S. Albrecht, National Association of Home Builders
Craig Aubrey, U.S. Fish and Wildlife Service (on phone)
Trevor Baggiore, Arizona Department of Environmental Quality
Laureen Monica Boles, National Advisory Council for Environmental Policy and Technology
Peg Bostwick, Association of State Wetland Managers
David L. Davis, Virginia Department of Environmental Quality
James P. DeNomie, Midwest Alliance of Sovereign Tribes
David S. Evans (Co-chair), U.S. Environmental Protection Agency
Kimberly Fish, Michigan Department of Environmental Quality
Richard D. Gitar, Fond du Lac Reservation
Jan Goldman-Carter, National Wildlife Federation
Michelle Hale, Alaska Department of Environmental Conservation
William L. James, U.S. Army Corps of Engineers
Les Lemm, Minnesota Board of Water and Soil Resources
Susan D. Lockwood, New Jersey Department of Environmental Protection
Eric D. Metz, Oregon Department of State Lands and Oregon Department of Environmental Quality
Gary T. Setzer, Maryland Department of the Environment
Michael J. Szerlog, U.S. Environmental Protection Agency, Region 10

Subcommittee members Thomas Driscoll, National Farmers Union, and Barry Rabe, Ph.D. (Co-chair), University of Michigan, were unable to attend.

B. Government and Members of the Public in Attendance

William Bunch, retired, US Army Corps of Engineers
Jeanne Christie, Association of State Wetland Managers (on phone)
Amanda Palleschi, Inside EPA

C. Facilitation Team

Patrick Field, Consensus Building Institute
Tobias Berkman, Consensus Building Institute
Julie Herlihy, Consensus Building Institute
Jake B. Strickler, (Acting Designated Federal Officer), U.S. Environmental Protection Agency

D. EPA OWOW Support Team

Kathy Hurld, U.S. Environmental Protection Agency
Simma Kupchan, U.S. Environmental Protection Agency
Michael McDavit, U.S. Environmental Protection Agency
Abu Moulta Ali, U.S. Environmental Protection Agency
Jeffrey Spier, U.S. Environmental Protection Agency
Andrew Cherry, U.S. Environmental Protection Agency

VI. Appendix A – September 28-29, 2016 AGENDA

NACEPT ASSUMABLE WATERS SUBCOMMITTEE MEETING
(Draft) AGENDA

Date: September 28, 2016: 1:00 pm – 4:00 pm, September 29, 2016: 1:00 pm – 4:00 pm
Location: Webinar

To participate via the webinar/video conferencing system Zoom:

Time: Sep 28, 2016 1:00 PM (GMT-4:00) Eastern Time (US and Canada) Sep 29, 2016 1:00 PM (GMT-4:00) Eastern Time (US and Canada)

- Join from PC, Mac, Linux, iOS or Android: https://cbuilding.zoom.us/j/5305689032

- Or join by phone:
  o +1 408 638 0968 (US Toll) or +1 646 558 8656 (US Toll) o Meeting ID: 530 568 9032
  o International numbers available:
  https://cbuilding.zoom.us/zoomconference?m=z7hP6QfK3JDl8Vj0q59YShhuyB7Fdlu2

Wednesday, September 28

1:00-1:05 Check-In, Roll Call, Review of Use of Zoom

1:05-1:15 Call to Order and Initial Business

- Call to Order and Instructions – *Jacob Strickler, acting Designated Federal Official (DFO)*
- Review of goals and objectives of our effort and these webinars – *Dave Evans and Barry Rabe Co-Chairs*
- Review of Agenda and materials – *Patrick Field Facilitator*
- Review and approval of JUNE Meeting Summary - *Facilitator*

1:15 – 1:30 Review of Process to Date

- *Patrick Field – Facilitator*

1:30 – 1:45 Review of Waters Legal Background and Legislative History

- *Jan Goldman-Carter and Virginia Albrecht, Subcommittee members*
- Questions

1:45 – 2:15 Waters Options

- *Peg Bostwick, Subcommittee member*
- Discussion

2:15 – 2:30 Review of Adjacency Legal Background and Legislative History

- *Jan Goldman-Carter and Virginia Albrecht, Subcommittee members*
- Questions

2:30 – 3:00 Adjacency Options

- *Gary Setzer, Subcommittee member*
- Discussion

3:00 – 3:30 Public Comment

3:30 – 3:50 GIS Mapping of Example States

- *William James, Subcommittee member*
- Questions

3:50 - 4:00 Continued Discussion and Summary of Webinar

4:00 Adjourn for the Day – *Jacob Strickler, acting DFO*

Thursday, September 29

1:00-1:05 Check-In, Roll Call, Review of Use of Zoom

1:05-1:10 Call to Order and Initial Business

- Call to Order and Instructions – *Jacob Strickler, acting DFO*
- Review of Agenda and summary of Day 1 - *Facilitator*

1:10 – 1:45 Refinement of Waters Options from Day 1

- Discussion

1:45 – 2:15 Refinement of Adjacency Options from Day 1

- Discussion

2:15 – 2:45 Role of Agencies in Decision Making

- *Dave Evans, Subcommittee Co-Chair*
- Discussion

2:45 – 3:30 Final Report

- Review of current draft final report outline – *Facilitator*
- Developing Purpose or "Why" statement for value of greater clarity on assumption
- Discussion
- Review of current process for preparing draft – *Facilitator*
- Discussion

3:30 - 4:00 Final Discussions and Summary of Webinars and Next Steps

4:00 Adjourn Meeting– *Jacob Strickler, acting DFO*