

National Advisory Council for Environmental Policy and Technology

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

January 25-27, 2017

Meeting Summary

U.S. Environmental Protection Agency

The following items are included in this meeting summary:

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

Background

This was the seventh meeting 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 included discussion of the progress made in the Waters, Adjacency, and Legal workgroups since the December 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 three-day meeting.

Summary of Decisions, Approvals, and Action Items

The Subcommittee made the following decisions:

- The Subcommittee approved the December 9, 2016, meeting summary with the suggested modifications.
- The Subcommittee charged the facilitator and the drafting work group to draft the final report in accordance with the procedures noted below.
- The Subcommittee decided that the two “majority” and “minority” alternatives it would put forward in the Waters section are B and C, respectively.
- The Subcommittee decided that the two “majority” and “minority” alternatives it would put forward in the Adjacency section are C3 and A, respectively.

The Subcommittee agreed to the below action items for completion.

USACE

- Provide data about how often stand-alone TNWs are not included on the Section 10 list.
- Complete drafting of relevant alternatives and minority recommendation sections of text.

EPA

- Distribute a call-in number for the May NACEPT meeting.

Waters and Adjacency Work Groups

- Complete drafting of relevant alternatives and majority recommendation sections of text.

II. Presentations and Key Discussions

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

Mr. Jacob Strickler, acting EPA Designated Federal Official (DFO), called the meeting to order and welcomed the members. He thanked all parties involved with the process for their hard work and diligence throughout the process and noted that the group has made great progress in clarifying issues despite disagreements between the parties. He announced that public comment would take place on January 26 from 1:45–2:00 pm ET and on January 27 from 11:15 to 11:30 am ET.

The Subcommittee chair, Mr. Barry Rabe, welcomed the group and set the context for the meeting. He acknowledged the challenges of the process but also emphasized the group’s diligent work in trying to meet the charge that it has been given. He thanked members for their efforts and engagement to date.

The meeting facilitator, Mr. Patrick Field of the Consensus Building Institute, reviewed the meeting agenda, which is included in Appendix A, 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. Field proceeded with the first item on the agenda: reviewing and approving the summary from the last Subcommittee

meeting, December 9, 2016. Members suggested several revisions on subsequent days of the meeting and approved the summary with the suggested revisions included on Day 3 of the meeting.

B. Review of the Process to Date

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

- The Subcommittee first met in October 2015 and since that time has worked diligently and has developed numerous materials.
- The draft report began coming together during the fall of 2016 with different people writing different sections.
- Mr. Field worked to incorporate edits and comments received from Subcommittee members before sending the draft report to the drafting group.
- The "recommendations" and the "adjacency" sections are newly drafted for this January meeting.
- Mr. Field noted that graphics still need to be incorporated into the report.
- This meeting will be focused on substantive edits. Once those have been identified by the subcommittee, they will be incorporated and another draft of the report will be circulated for Subcommittee members to include copy-edits.

C. Tribal Findings, Issues, and Recommendations Section

Subcommittee members discussed the following items regarding the Tribal Findings section of the report:

- Because states typically lack jurisdiction in Indian Country, EPA generally excludes tribal lands from assumption.
- The boundaries of tribal lands can change over time, which makes it harder to administer the assumable waters program since tribal waters are generally not subject to assumption by a state. An Indian land-buyback program is returning lands to tribal holding, which will accentuate this issue. Some tribes are also purchasing lands privately and enrolling them under their trusts.
 - Rather than trying to resolve this issue, the report should simply include language cautioning that the issue of tribal and state jurisdiction and responsibility over waters is still evolving.
 - Including this section in the text could encourage states, tribes, and federal government to negotiate MOUs proactively.

D. Alternatives for Identifying Assumable and Retainable Waters and Accompanying Subcommittee Recommendations

Subcommittee members provided the following comments and asked the following questions regarding the subcommittee recommendations for identifying assumable and retainable waters.

Regarding Alternative B: Primary Dependence on RHA Section 10 Lists of Navigable Waters to Define USACE Retained Waters (the Majority Recommendation)

- Questions were raised about how complex and resource-intensive it would be to remove no-longer-used waters from the list and adding new waters that are susceptible to use.
 - There is a prescribed process for making these changes to the list.
 - Waters can be added to the list even after the memorandum of agreement is negotiated and signed.
 - Due to how long it can take EPA to approve a program change to a state's or tribe's assumed waters program, the state or tribe could include waters that could be added to the assumed list in the MOA between the USACE and the state or tribe.
- There may need to be text included in this section of the report about which waters are susceptible for coverage under the Rivers and Harbors Act.
- Section 10 of the Rivers and Harbors Act was not intended to serve as a proxy definition for the waters retained by the Army Corps.
- There is a risk of reducing clarity by using lists created using other criteria as the list of waters retained by the Army Corps.
- Primarily relying on the Section 10 list makes it easier for states and tribes to determine which waters are retained by the Army Corps. Using diverse lists, including lists defined under the Clean Water Act, is not in keeping with the primary intent of 404(g)(1) and could be confusing.
- Going beyond Section 10 lists is also a potential cause for confusion in the case of states such as Minnesota and Michigan that have a lot of inland lakes that could be classified as "traditionally navigable waters." For example, the Army Corps designated two small lakes in Minnesota as traditionally navigable waters.
- If there are waters that are eligible for Section 10 listing, then the Army Corps should move them from the list of traditionally navigable waters to the formal Section 10 list.
- The Army Corps does not proactively search for waters to designate as traditionally navigable waters. Rather, the Corps makes this determination when required to do so – typically when performing a jurisdictional determination. The Corps does not have the staff or resources, for the most part, to conduct proactive TNW determinations in each district across the country for all waters. Thus, there are waters that could be Section 10 waters (though not all TNWs would be Section 10 waters) that are not currently on the Section 10 lists.

A group of subcommittee members working on the “Identifying Assumable and Retainable Waters” sections of the report explained their revisions to this section: they reduced the number of criteria from four to three, clarified how these criteria are used to support the majority opinion for identifying assumable and retainable waters (Alternative B), reduced redundancies, shortened rebuttal statements, and changed some criteria to questions. In addition, this group of subcommittee members reported that they deleted sections of text pertaining to the Army Corps that were inaccurate, lengthy, or did not allow USACE “to speak for themselves.” Finally, this work group reported that they added an example of a Kansas City district for Alternative C, showing that retained waters would be tripled. In response to questions from subcommittee members, members of this work group explained the following:

- With regard to the Kansas City example, Alternative C would triple stream waters, not total waters retained.
- A party applying for a permit might have a question about the scope of federal jurisdiction; states or tribes in these instances ask these individuals to clarify that with the Army Corps.
- Permit applicants might want to test jurisdiction to determine EPA or USACE involvement.
 - A subcommittee member noted that if these waters were traditionally navigable waters and the state assumed them under Section 404, there would be “no real question” as to whether they were federal waters as they would be regulated by the state.
 - The workgroup articulated a concern that Alternative C involved a situation where a state would not be aware of all traditionally navigable waters at the beginning of the process and thus could not assess the scope or costs of assuming the program.

Regarding Alternative C: Primary Dependence on RHA Section 10 Lists of Navigable Waters TNW determinations to Define USACE Retained Waters (the USACE Recommendation)

Representatives of the Army Corps provided an update to their work on the “Identifying Assumable and Retainable Waters” section of the report. They explained that they:

- Removed many of the legal references in this section of the report;
- Clarified that under Alternative C, the Army Corps would retain Section 10 waters and all TNWs on stand-alone lists, which are held by the Army Corps. Additional waters could be added on a case-by-case basis over time if a federal court decision caused a change. In this instance those waters would get added to the list; in the MOA there would be a process for any waters to get added and a description of how EPA would be involved.
- Clarified that the Army Corps could add waters over time rather than proactively “going out and getting” all of the waters during the assumption process given lack of resources to do so. The Army Corps added that they are aware of case-specific situations that are somewhat anomalous and worth discussing further. In many states, the Army Corps generally is aware of

traditionally navigable waters based on case-specific and stand-alone work. In states such as Alaska, however, the Army Corps may not be aware of the location of all traditionally navigable waters because the agency has not been specifically asked to make such determinations.

Following the Army Corps' comments, subcommittee members engaged in the following discussion. *Comments and responses from the Army Corps subcommittee member and technical expert are indicated in italics.*

- What happens before the MOA? *While the Army Corps has a list of stand-alone and some case-specific TNWs, the agency will not look for additional TNWs.*
- Regarding Alaska specifically, would the Army Corps' list of TNWs close at the time the list is generated, and none are added when the Army Corps comes in as a commenter after the state assumes jurisdiction? *Alaska is a wildcard like Minnesota, in that there are waters that have not been looked at that may be exactly like or share many similar characteristics with other waters that were determined to be TNWs. For case-specific determinations, the rationale has to be supportive and a full argument needs to be made; the stand-alone determinations require approval from the division engineer as well as additional navigability details. EPA can and does also make TNW determinations. It should be noted that case-specific TNW determinations made by the Corps on their JD form are only good for 5 years. If a water body was a TNW prior to the case-specific determination, however, it would still be a TNW.*
- If an application comes in close to retained waters after assumption, the state processes the application if the waters are not listed as TNWs. For a clear federal jurisdiction line the applicant would need to go to court.
- The Subcommittee also discussed how applicants can be concerned with the federal jurisdiction of a water, as that determines EPA's involvement.
- Will there be language/guidance in Alternative C to suggest that while there may be undiscovered TNWs or Section 10 waters, the list would provide those that were understood to be present at the time and retained for administrative-only purposes? *Yes, that is correct.*
- What would happen to new additions to the list while the MOA is in the process of being approved? *The MOA could be negotiated and remain in draft form until just before the time the state submits the application. At that time it would be final (there are typically 120 days to approve/disapprove, or it can be extended). This should not be too much of an inconsistency.*
- Many Subcommittee members articulated that the Army Corps' explanation for how the agency would handle waters not designated as TNWs at the time of state assumption seems different from what the Army Corps has presented in past Subcommittee meetings. Representatives conveyed that the Army Corps' current explanation was more in line with what they had been hoping for.

- Alaska is a state with lots of waters that could probably be classified as TNWs. Those waters, if they were not on the Section 10 list, or were not included under a stand-alone determination, could be assumed by the state of Alaska. *The Army Corps would retain waters for which the agency has made determinations as noted above.*
- The Subcommittee discussed whether a state or tribal application for assumption might prompt a redirection of resources (from the Army Corps or a citizen-based group) to add as many waters as possible before assumption.
- *Throughout the subcommittee process, the Army Corps has advocated to use the (a)(1) definition for waters that are retained. Waters are only included in the (a)(1) list once the Army Corps has made a determination. Although it may seem that this is not legally defensible, it is legally defensible for the simple reason that a water can only be a TNW once it is determined to be so.*
- The Subcommittee discussed its evolving understanding, and some members suggested that previous efforts towards making concessions regarding add-on TNWs seemed unnecessary. Subcommittee members also discussed the need to convert case-specific TNWs to stand-alones (adding the upstream and downstream navigability limits) before the state assumes jurisdiction.
- Why would the Army Corps make a post-assumption change? *Circumstances might change in the water that cause the TNW determination to change. But this would happen only on rare occasions.*
- What criteria would you use to make a “stand-alone determination?” *It depends on the extent of reach.*
- In alternative C, when the Army Corps is adding to the TNW list, could the Army Corps do it under new guidance that comes from Army Corps headquarters? It could be helpful to specify what current TNW implementing guidance the Army Corps is referencing. *Yes, we can do that.*
- For some states the Army Corps has created a TNW list, and there aren’t many case-specific determinations, correct? Could you tell us more about that? *Last year, the Army Corps made 81 determinations across the entire country, and that isn’t even sorted for uniqueness. So not very many. The Army Corps could provide additional data about the determinations made.*
- Understanding that 81 TNW determinations were made last year, could regulations create a whole category of TNW waters? We have a vast swath of waters that are not currently TNW waters, and we are being told that only a handful of waters would be declared TNW, but what assurance do states and tribes have that the agencies will not declare blanket TNWs in the future? *The only assurance that the Army Corps can provide is based on current policy. A member noted that the Rivers and Harbors Act has been around for a lot longer and it has been pretty stable over time.*

- What, if any, impact would a preliminary JD have on the scope of waters that would be retained? *It would not have any impact. For the purpose of permitting processes, the Army Corps assume that all of those waters are jurisdictional.*
- With this greater clarity from the Army Corps, we are starting to get a clearer idea of the universe of waters that they propose would be retained by the Army Corps.
- What are the mechanisms by which a TNW determination could be triggered? *Case specific determinations are only done at landowner request. The stand-alone determinations are outside of that process; either someone has asked the Army Corps to take a look at it, or it's come up in a case, or something else.*
- The request for case-specific TNW determination could be used as a tactic by landowners who do not want the state to assume jurisdiction.
- It seems that the Army Corps assurance that “these circumstances will be rare” in sub-section iii is not fully assuaging other Subcommittee members’ concerns, and so the Army Corps may want to elaborate, in their draft recommendation, on the reasons for the circumstances being rare.
- If a state needs to change its statute to be consistent with Section 404, then it would be broadcasting to the public its intention to move towards assumption, and members of the public may request TNW determinations. Does the Army Corps have discretion in terms of how to handle these requests? *Stand-alone determinations are made at the discretion of the district engineer. There is no obligation to do anything.*
- Are waters determined by the Army Corps to be TNWs using stand-alone determinations basically just waiting to go onto the Section 10 list? *In many cases, the TNWs will be the same as waters on the Section 10 list, but they just have not gotten through the process for Section 10 listing. The majority of the waters are the same, but there are some examples where waters are TNW but are not eligible for Section 10. The Great Salt Lake is an example of a body of water that is TNW but is not on Section 10 list. The Great Salt Lake is being used in commerce, so it is TNW, but since it itself is not being used to transport commerce between states, it is not eligible for Section 10.*
- How often do stand-alone TNWs not make it onto the Section 10 list? What percentage of stand-alone TNWs does not make it onto the Section 10 list? *There are various bodies of water where the Army Corps has not tried to add stand-alone TNWs to the Section 10 list. The Army Corps will try to provide that data to the subcommittee members.*
- These types of points and rationales would be very valuable to include in the background section of the report. It seems that there are various other factors that inform whether the Army Corps moves waters onto the Section 10 list, including some restrictions related to the Rivers and Harbors Act. There are various waters that are TNWs that could be eligible for the

Section 10 list, but that Army Corps chooses not to move to Section 10. *That is correct, the Army Corps has various factors that it looks at beyond eligibility.*

- There are three categories of waters:
 - TNWs that have gone onto the Section 10 list
 - TNWs that are eligible for the Section 10 list but have not been placed onto that list
 - TNWs that are not eligible for the Section 10 list
- In terms of what the Army Corps intends to retain under Alternative C, the Army Corps is proposing to retain under its jurisdiction Section 10 waters and all stand-alone TNW waters. But the Army Corps does not intend to actually formally move these TNWs onto the Section 10 list.
- It would be very helpful for the report if the Army Corps could write down the reasons and factors why it would choose not to move a TNW onto a Section 10 list. *Let's say that the Army Corps gets a petition for a JD, tidal waters are automatically on the Section 10 list. For non-tidal waters, it's a separate process to put waters on the Section 10 list. The Army Corps does not usually do a Section 10 inquiry, unless there is a Congressional inquiry or a lot of public input, etc. The big push and the bulk of waters that are included in the Section 10 list date back to the 1970s when there was a big political push under the Clean Water Act.*
- Subcommittee members asked questions to try to understand what percentage of TNWs would be eligible for Section 10 but have not been classified under Section 10. They suggested it would be helpful to provide as much data as the Army Corps can. *The main factor between whether a water is TNW or whether it is also Section 10 is whether the water body itself is used for Section 10.*
- To be a TNW, does there have to be actual use for interstate recreation, or just a potential for use? *It could be potential use, for example if there are public access facilities. The Army Corps will provide any data that it can from its databases regarding TNWs and Section 10 determinations.*

Subcommittee members also explored whether a process-oriented compromise could be found in which Alternative B is combined with elements of Alternative C. Subcommittee members favored maintaining Alternatives B and C as discrete alternatives for the sake of greater clarity. Subcommittee members also discussed whether there is provision for input from other federal agencies in the Army Corps Section 10 designation process but, upon close review of the Code of Federal Regulations, the Subcommittee determined that the Army Corps possesses sole jurisdiction in making this determination.

A group of subcommittee members working on the "Identifying Assumable and Retainable Waters" sections of the report then explained that the new understanding about the Army Corps process for determining Section 10 waters does not make an appreciable difference in the preference for

Alternative B among other subcommittee members. Given that TNW listings are more dynamic than Section 10 listings, Alternative B provides greater certainty, specificity, and clarity to states and tribes. These subcommittee members also stated that they included the examples of the Great Salt Lake and lakes in Minnesota to help illustrate Alternative B in Section 6 of the report.

Representatives from the Army Corps stated that they added a “close the door” clause to clarify that it would be very unlikely that the Army Corps would make a post-assumption change in status of waters.

The Subcommittee concluded that the two “majority” and “minority” alternatives it would put forward in the Waters section are B and C, respectively.

E. Alternatives for Identifying Wetlands that will be Retained and Accompanying Subcommittee Recommendations

Subcommittee members provided the following comments and asked the following questions regarding the recommendations for identifying wetlands that will be retained.

Regarding inclusion of a national administrative line or a state or tribe specific line in recommendation C3 to denote the bounds of retained and assumed wetlands

- Inclusion of a nationally defined line, with some flexibility to account for local conditions, could be simpler.
- A national administrative line creates a default standard from which parties may have a hard time moving. It would be better to simply allow the parties to negotiate based on their local circumstances.
- To avoid the perception of a “national standard,” we could use the term “default boundary” rather than “national administrative line.”
- The rationale to have some sort of default national standard is to avoid the current situation wherein a state or tribe and the Army Corps do not know where to begin negotiations.
- Having some sort of default line allows states and tribes to conduct the economic analysis that in turn allows them to move forward with the assumption process.
- One option would be for the Subcommittee to suggest criteria and guidance for EPA to determine a default national line rather than including a specific recommendation in the report. A participant noted that leaving this to EPA may cause another 2-3 years of delay.
- At the very least, any sort of national line would need to account for the significantly different hydrology and environment in different parts of the country, such as the Northeast versus the Midwest.
- The rationale of the current approach in the draft report is based on the science of riparian buffers, based on which we considered buffers between 100 and 1,000 feet. The science

between these different buffer distances is based on different local conditions and different needs for the buffer.

- Might it be possible to divide the country into different temperate zones and have different default boundary lines accordingly?
- Default lines that are established could be based on existing boundaries, for example those that EPA has defined for floodplains and vernal pools.
- While there is scientific work being done to help define “ordinary high water mark” for diverse geographies and locations, the approach being taken to determining ordinary high water mark will still be based on local, boots on the ground analysis.

Regarding the Army Corps’ interpretation of “adjacent wetlands”

- The text currently contains language about the Army Corps’ “consistent interpretation of adjacent wetlands since 1977.” This language is confusing because it seems that the Army Corps has revised its interpretation of adjacent wetlands many times since 1977. In fact, there is a report clearly outlining how different Army Corps districts use different interpretations for “adjacent wetlands.”
- Additionally, the Army Corps interpretation of the definition of adjacent wetlands has changed over time in response to federal court decisions.

Regarding which alternatives are included in the report

- Alternatives C1 and C2, which have been rejected, should be included in the report to help provide context for the preferred alternatives.
- The rationale for why these alternatives were rejected is not always presented in the text of the report, and doing so would help with contextualization.

A group of subcommittee members working on the “Identifying Wetlands that will be Retained” sections of the report explained that the work group’s preference was not to rebut the Army Corps’ arguments within this section. In addition, the work group made an attempt to define adjacency in one part of the document. Following the work group’s comments, subcommittee members engaged in the following discussion:

- Subcommittee members advised against leaving the administrative boundary undefined since it allows for greater confusion, inconsistency and uncertainty.
- The Subcommittee recommended adding reasoning for including the 300-foot boundary line. Possible rationales include: having a specific number aids in making calculations, flexibility is important, and a range with a high end could make the high number a default.
- One Subcommittee member inquired whether the Subcommittee had the legal authority to include a recommended number.

In response to a question about administrative jurisdiction that the Army Corps could employ with regards to determining adjacency of wetlands, Army Corps representatives explained that the agency does not have a clear record of which wetlands have been determined to be “adjacent” in the same way that the agency has a clear documentation of which waters are determined to be TNW.

Subcommittee Recommendation: The Subcommittee concluded that the two “majority” and “minority” alternatives it would put forward in the Adjacency section are C3 and A, respectively.

F. Presentation of the Recommendations in the Final Report

At various times during the course of this meeting, Subcommittee members discussed how the recommendations should be presented in the report. Subcommittee members offered the following comments.

Regarding whether the report presents a common, shared perspective versus clearly articulating divergent perspectives, including rebuttals to various alternatives:

- The current style of presenting “pros and cons” after each recommendation causes confusion because it is not clear whose perspective those pros and cons are meant to represent. It would likely be clearer if each of the Subcommittee members simply made clear which recommendations they support and EPA can take this account in their decision-making.
- The recommendations sections currently contain implicit rebuttals of opposing perspectives. It might be more productive to simply state the case for each perspective, rather than trying to include rebuttals in the report.
- From the perspective of the states and tribes, another member noted, it is important to articulate why a suggestion from the Army Corps would not work to address state/tribal concerns and interests.
- Inclusion of alternatives by the Army Corps that would severely limit the scope for assumption by the states and tribes would defeat the whole purpose of this Subcommittee. This is why it is important to respond to the Army Corps’ recommendations in the report.
- The focus of the report should be clarifying the issues and how to make the Assumption provision implementable. It should not be advocacy for the perspective of the states, tribes, or the Army Corps.
- The current structure of the report and this discussion seems to be hardening “majority” and “minority” opinions about the path forward. Should the purpose of our Subcommittee be instead to provide a plausible path to assumption for a state or tribe that wants to pursue it, instead of handing this issue over to the EPA to decide?

- The original approach of this Subcommittee was to seek a consensus opinion of all participating parties but it became clear that we could not get to a place where both the Army Corps and the other parties could be comfortable. Given this, our role as a Subcommittee should be to lay out the options as clearly as possible.
- Given that there may not be middle ground between the position of the Army Corps and the states and tribes, the Subcommittee may need to make recommendations to EPA and policy-makers about regulatory changes and other actions that may need to be taken. EPA noted that such recommendations could be proffered by the subcommittee.
- Some of the recommendations are currently written in language indicating that they were written by the Army Corps. Should the report contain an “Army Corps” opinion or a more generic “minority opinion?”
- It may be better to leave out content about legal risk and allow agencies to determine this on their own.
- The Army Corps would prefer to be able to speak for itself in the report. The agency’s analysis of legal risk is at the heart of its perspective and opinions.
- Rewriting the text in a more affirmative voice, rather than rebutting others’ assertions, may be more effective in terms of creating a useful tone for the report.
- If needed, making it clear where the Army Corps disagrees with other parties in the report could be useful to enhance clarity around divergent perspectives.

Subcommittee Recommendations to Conclude this Discussion for the Drafting Work Group: 1) Move pros and cons to the justification section for the two alternatives, one preferred by most and one by the USACE; 2) consider the tone and balance of affirmative versus rebuttal statements.

Regarding similarity and divergence of style between different sections of the report:

- The recommendations sections for the Waters and Adjacency sections should be made more similar in terms of style and tone.
- Organizing the criteria by the “common criteria” that come from the charge to the Subcommittee and then the additional criteria that are specific for each recommendation would be one way to increase similarity and parallelism of style between the different sections of the report.
- The Adjacency work group contended with some very complex considerations and, in order to retain this nuance, the Waters section should be made to look more like the Adjacency section.

Subcommittee Recommendation to Conclude this Discussion for the Drafting Work Group: Seek to make the two primary sections more consistent to the extent possible.

G. Implementation and Process Recommendations Section

Subcommittee members provided the following comments regarding this section of the draft report:

- The Subcommittee has discussed stating a preference for providing field-level guidance over rulemaking because it is a faster, more efficient process, but given recent discussions around potentially needing additional direction, this portion of the draft report should instead recommend either field-level guidance or rule-making.
- The section on General Procedures for the Assumption Process has some duplication with existing EPA regulations, and so this section could be streamlined by referencing those existing regulations.
- This section should be reviewed to make sure that it is content-neutral.
- The recommendation to use GIS mapping could be broadened to encompass other “advanced technologies.”

A subcommittee member emphasized that a statement be included in the final report articulating the importance of maintaining the current assumed status in New Jersey and Michigan. Language to this effect is included in Section 10 of the report.

H. Appendices

Subcommittee members suggested that the following appendices be included in the report:

- Section 404(g)(1) of the Clean Water Act
- List of staff members who participated in the Subcommittee process
- A table of regulatory citations
- A table of “confusing terms”

I. Process for Finalizing Report

Subcommittee members discussed the process for finalizing the report. The Army Corps will provide updated versions of their portions of the text by the week after the January subcommittee meeting and will provide information about TNW and Section 10 waters by two weeks after the January subcommittee meeting. A drafting work group will work on making final revisions to the draft report. Due to this FACA committee being convened by EPA, EPA employees will not serve on the drafting work group. The goal is to have the final draft of the report ready for the NACEPT meeting in May 2017. Resources and support for formatting and graphics could be provided by CBI, EPA, or the University of Michigan¹. Virginia Albrecht volunteered to assist CBI with checking and finalizing legal citations. The University of Michigan may be able to offer technical assistance with editing.

¹ CBI and SRA are providing support for the report’s format and graphics - consistent with federal regulations.

J. Public Comment

The following public comments were made during the Subcommittee meeting.

Jeanne Christie, Executive Director of the Association of State Wetlands Managers

I want to thank the subcommittee for the opportunity to comment. I am offering this comment on behalf of ASWM, AQUA, and ECOS. These are all organizations made up of state representatives. On a personal note, we had discussed this with ASWM members, and we've been following this area with a great amount of interest. States implement a great portion of the Clean Water Act, but Section 404 is the one exception. New administrations have come in and have explored how they can resolve this quandary. I've been listening to the discussion all day and I want to emphasize that the issue is not the extent of CWA jurisdiction but who administers it. States and tribes would be held to the same or higher standard as the Army Corps. We are strongly supportive of cooperative federalism. We would support recommendations that we've heard in this report on behalf of the majority. We believe that subcommittee members have a very detailed understanding of Congress' intention in enacting Section 404. It's essential for state and tribal program managers to be able to gauge waters that are likely to be included in state jurisdiction so that they can determine the likely costs and benefits of assumption. They need to get buy-in from political leadership and so that's why bright lines are needed. We encourage you to move ahead and complete your work and we hope that EPA will act on recommendations coming out of this group.

III. Wrap Up/Closing

Mr. Field stated that while it may have been nice for the subcommittee to achieve unanimity, providing clarity regarding both waters and adjacency of wetlands between two different options, along with clear rationales, will be very helpful for decision-makers.

Mr. Rabe noted that the NACEPT meeting is a pretty large group and that it would be good to have a diverse representation of individuals from the subcommittee at that meeting. Although the subcommittee will continue to function until the end of its term on September 8, 2017, its final responsibility is reporting to NACEPT. NACEPT could come back to the subcommittee with follow-up questions.

It is unlikely that the FACA subcommittee would be renewed after August 2017. Mr. Strickler added that technically, the work of the subcommittee is not complete until NACEPT formally transmits the report to EPA. FACA rules stipulate that committee members are requested not to make representations on behalf of the subcommittee to the press or public, although members are permitted to speak on their own behalf.

Mr. Rabe also raised the question about whether there might be interest in doing a more public outreach effort around this report beyond NACEPT. For example, the subcommittee could do a public meeting at the University of Michigan and pursue some foundation funding. A subcommittee member responded that, while there will likely be some interest from states and tribes in the report, many are unlikely to pay close attention to this issue until they are strongly considering assumption. Another subcommittee member noted that many state governments are planning targeted outreach to key stakeholders, such as homebuilders associations and environmental advocates.

Mr. Rabe thanked subcommittee members for their hard work, focus on the charge before them and commitment to public service and Patrick Field and CBI for facilitation of the subcommittee.

IV. 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

Trevor Baggio, 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

Thomas Driscoll, National Farmers Union

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

Barry Rabe, Ph.D. (hair), University of Michigan

Gary T. Setzer, Maryland Department of the Environment

Michael J. Szerlog, U.S. Environmental Protection Agency, Region 10

B. Government and Members of the Public in Attendance

Julia Anastasio, Association of Clean Water Administrators (ACWA)

Dan Auerbach, ORISE Fellow with U.S. Environmental Protection Agency

Ruth Chemerys, U.S. Environmental Protection Agency

Jeanne Christie, Association of State Wetland Managers

Julian Gonzalez, ACWA

Inside EPA – however, they did not sign in.

Stacey Jensen, U.S. Army Corps of Engineers

Amanda Palleschi, ORISE Fellow with U.S. Environmental Protection Agency

Dave Ross, Wisconsin Department of Justice

Ann Rossi, U.S. Environmental Protection Agency

Greg Serenbetz, U.S. Environmental Protection Agency

Dolores Wesson, U.S. Environmental Protection Agency

C. Facilitation Team

Patrick Field, Consensus Building Institute

Tushar Kansal, Consensus Building Institute

Jake B. Strickler, (Acting Designated Federal Officer), U.S. Environmental Protection Agency

D. EPA OWOW Support Team

Sineta Brown, U.S. Environmental Protection Agency

Andrew Cherry, U.S. Environmental Protection Agency

John Goodin, U.S. Environmental Protection Agency

Kathy Hurlid, 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

Todd Siegal, U.S. Environmental Protection Agency

Jeff Speir, U.S. Environmental Protection Agency

V. Appendix A – January 25-27, 2017 AGENDA

NACEPT ASSUMABLE WATERS SUBCOMMITTEE MEETING (Draft) AGENDA

Date: January 25, 2017; 9:00 am – 5:00 pm, January 26, 2017: 9:00 am – 5:00 pm, January 27, 2017: 9:00 am – 1:00 pm, Meeting #5

Location: Courtyard Marriott Reagan Airport/Crystal City
2899 Jefferson Davis Highway
Arlington, Virginia 22202

To participate by conference call:

1. Please register with acting DFO Jacob Strickler, by calling (202) 564-4692. Note: There is a very limited number of conference lines available.
2. In the 10 minutes prior to meeting start time, call the Dial-In Number: **1-877-744-6030**.
3. Provide the Operator with the conference ID Number for that day's call.
 - a. Conference ID Number for June 7: **18023197**
 - b. Conference ID Number for June 8: **18036096**
 - c. Conference ID Number for June 9: **18046428**
4. Helpful Keypad commands:
 - a. *0 - Operator Assistance
 - b. *6 - Self Mute/Unmute

Wednesday, January 25 (times are approximate and best estimate prior to the meeting)

8:30-9:00 Check-in and seating

9:00-9:45 Call to Order and Initial Business

- Call to Order and Instructions – *Jacob Strickler, acting Designated Federal Official (DFO)*
- Introductions – *participants*
- Review of goals and objectives of our effort – *Barry Rabe, Chair*
- Review of Agenda and materials - *Facilitator*
- Review and approval of December Webinar Meeting Summary - *Facilitator*
- Updates on Logistics: travel, receipts, etc. - *Sineta Brown, EPA, Wetlands Division*

- 9:45 – 10:15 Overview of the Process (*facilitator*)
- Review of the Process, Meetings, Accomplishments
 - Review of the Report Drafting Process
 - Overview of the Draft Report
 - Discussion of “groundrules” for group editing!
- 10:15-12:30 Review and Finalize Initial Sections
- *Background, Authority, and Scope for the Subcommittee*
 - *History of Assumption*
 - *Tribal Findings, Issues, and Recommendations*
 - Subcommittee will review each section and make final comments
 - Break during the review as needed
- 12:30-1:30 LUNCH BREAK
- 1:30-2:15 *Legislative History* Section Review
- Subcommittee will review section and make final comments
- 2:15–3:45 *Providing Clarity Regarding the Extent for which Wetlands Adjacent to must be Retained Waters* Section Review
- Subcommittee will review section and make final comments
 - The goal of this portion of review is to ensure clarity of the options
 - Detailed discussion of preferences for the options will be discussed in Day 2
 - Break during the review as needed
- 3:45–4:45 *Providing Clarity for Which Waters Are Assumable and Which Must be Retained* Section Review
- Subcommittee will review section and make final comments
 - The goal of this portion of review is to ensure clarity of the options
 - Detailed discussion of preferences for the options will be discussed in Day 2
- 4:45 Summary of Day – *Facilitator and Co-Chair*
- 5:00 Adjourn for Day – *Jacob Strickler, acting DFO*

Thursday, January 26 (times are approximate and best estimate prior to the meeting)

8:30-9:00	Check-in and seating
9:00-9:15	Call to Order and Initial Business <ul style="list-style-type: none">• Call to Order and Instructions - <i>Jacob Strickler, acting Designated Federal Official (DFO)</i>• Review of Agenda for Day – <i>Facilitator</i>
9:15-10:30	Finalize Discussion of Sections from Day 1
10:30 – 10:45	Break
10:45 – 12:15	Review of Preferences for Adjacency <ul style="list-style-type: none">• Discussion of what “preferences” are and ensuring respect for disagreement• Subcommittee will review section and make final comments• The goal of this portion of review is to provide clear preferences and how to express those preferences in these sections
12:15 – 1:40	LUNCH BREAK
1:40 - 1:45	Resettle for Public Comment
1:45 – 2:00	Public Comment <ul style="list-style-type: none">• Members of the public in-person or in the meeting may make a brief public comment to the Subcommittee• <i>The Committee will take commenters at the comment start time and if commenters do not fill the time, the Subcommittee will continue with agenda topics</i>
2:00 – 4:00	Review of Preferences for Waters <ul style="list-style-type: none">• Subcommittee will review section and make final comments• The goal of this portion of review is to provide clear preferences and how to express those preferences in these sections• Break as needed
4:00-5:00	<i>Final Recommendations and Appendices Section Review</i>

- Subcommittee will review section and make final comments

5:00-5:15 Summary of the Day – *Chair and Facilitator*

5:15 Adjourn for Day – *Jacob Strickler, acting DFO*

Friday, January 27 (times are approximate and best estimate prior to the meeting)

9:00-9:15 Call to Order - *Jacob Strickler, acting DFO*

- Review of Agenda for Day - *Co-chairs*

9:15-11:00 Finalize Discussions from Day 2, as needed

11:00 – 11:15 Break

11:15- 11:30 Final Public Comment

- Members of the public in-person or in the meeting may make a brief public comment to the Subcommittee
- *The Committee will take commenters at the comment start time and if commenters do not fill the time, the Subcommittee will continue with agenda topics*

11:30-12:30 Next Steps

- Process for final edits and finalizing document
- Dates, presentation, and presenters to NACEPT
- Other Subcommittee business

12:30 – 1:00 Final Reflections from Participants and Chair

1:00 Adjourn - *Jacob Strickler, acting DFO*