



Final Report of the Assumable Waters Subcommittee

PRESENTED TO NACEPT 10 MAY 2017

Subcommittee Charge

- The final Subcommittee report to NACEPT should provide advice and recommendations to EPA on how to clarify for which waters states and tribes will assume CWA section 404 permitting responsibilities, and for which waters the USACE will retain permitting authority. The recommendations should reflect consideration of the following assumptions:
 - A CWA Section 404 permit is required – meaning there is an activity regulated under Section 404 that will result in a discharge of dredged or fill material to a Water of the U.S.
 - Any recommendation must be consistent with the CWA and in particular Section 404(g).
 - Clarity regarding who is the permitting authority (the state/tribe or the USACE) should be easily understood and implementable in the field.

The Problem

- Section 404(g) of the CWA authorizes states (and later, tribes), with approval from the EPA, to assume authority to administer the 404 program in some, but not all, navigable waters and adjacent wetlands
- Since 404(g)'s enactment in 1977, only **two states**, Michigan and New Jersey, **and no tribes** have been approved to assume the Section 404 Program
- Michigan has been administering its program continuously since 1984 and New Jersey continuously since 1994.

The Problem cont.

- While several other states and tribes have explored assumption, no others have advanced in part due to confusion about the meaning of Section 404(g)(1): **which waters can be assumed by states or tribes and which waters must be retained by the USACE.**

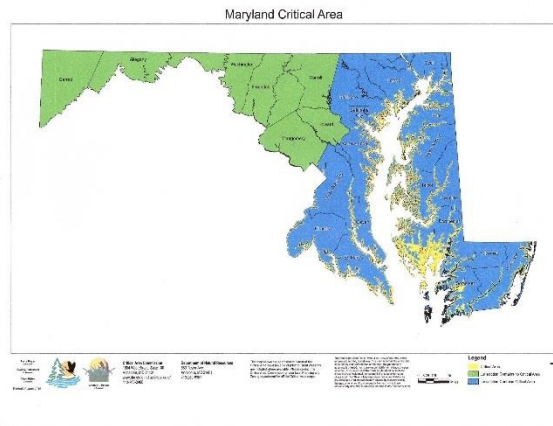
404(g)1: The Clause in Question

“... those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto ...”

Varied U.S. Waters and Wetlands



Maryland Critical Areas



Key Subcommittee Understandings

- Assumption by a state or tribe **does not alter CWA jurisdiction over waters of the United States.**
- Moreover, **nothing in the report or recommendations** of the Subcommittee is intended to alter in any way the definition or scope of federal jurisdiction.
- Rather, this report **speaks only to the administrative division** of authority under Section 404 between the USACE and an approved state or tribe.

Other Subcommittee Understandings

- Waters, such as rivers, lakes, and streams, and adjacent wetlands are clearly linked legally, in policy, and in hydrology, and in total are often referred to as “waters.”
- However, for the purposes of developing recommendations and for usage in this report, the Subcommittee chose the use of two terms: **“waters”** and **“adjacent wetlands.”**

Tribal Considerations

- Section 518 of the CWA, enacted as part of the 1987 amendments to the statute, authorizes the EPA to treat eligible Indian tribes in a manner similar to states.
- In a state-assumed program, states will generally not assume authority for administering the 404 program within Indian country; such authority will generally be retained by the USACE unless the tribe itself is approved by the EPA to assume the 404 program.
- Because Tribal Indian Reservation boundaries are not static and precise definitions and considerations vary from state to state: waters to be retained by the USACE on tribal lands must be specifically addressed in any USACE and a state Memorandum of Agreement.

Origin and Purpose of Section 404(g)

Workgroup looked at origin and implementation of 404g, concluding:

- The legislative history of 404(g) in both the House and the Senate evidences a Congressional expectation that most States would assume the 404 program, and therefore effectively limit USACE permitting authority to Phase I waters, except waters deemed navigable based solely on historical use, which are assumable by a state (i.e., those waters subject to regulation by the USACE under section 10 of the RHA).
- No definitive meaning of the term “adjacent” wetlands in 404(g)(1) emerges from a review of the legislative history. Therefore, the meaning of adjacency within 404(g)(1) is susceptible to various interpretations.

Subcommittee Process

- Subcommittee members met eight times and also worked between meetings in work groups from October 2015 through April 2017
- Three primary topics were explored:
 - The origins, legislative history, and processes of Section 404 state or tribal assumption.
 - The extent of waters of the United States that may be assumed by an approved state or tribe or retained by the USACE.
 - The extent of wetlands that must also be retained by the USACE following state or tribal assumption.

Subcommittee Members

NAME	AFFILIATION
Collis G. Adams	New Hampshire
Virginia S. Albrecht	National Association of Home Builders
Craig W. Aubrey	U.S. Fish and Wildlife Service
Trevor Baggione	Arizona
Laureen Monica Boles	NACEPT Liaison
Peg Bostwick	Association of State Wetland Managers
David L. Davis	Virginia
James P. DeNomie	Midwest Alliance of Sovereign Tribes
Tom Driscoll	National Farmers Union
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Kimberly Fish	Michigan
Richard D. Gitar	Fond du Lac Tribe
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Les Lemm	Minnesota
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Eric D. Metz	Oregon
Barry Rabe, Co-Chair	University of Michigan
Dave Ross*	Wyoming*
Gary T. Setzer	Maryland
Michael J. Szerlog	USEPA Region 10



**Resigned from the Subcommittee due to a change in employment

Subcommittee “Agreement”

- The EPA did not take a position regarding the recommendations:
 - because EPA will be receiving advice from the NACEPT.
 - However, EPA participated actively in the discussion, formulation, and review of the alternatives and provided technical advice.
- The USFWS also participated in the discussions but did not take a position on the final recommendations.
- “Recommending Members” - members who took a position regarding the recommendations.
 - These include all members, including the USACE, but not the EPA and the USFWS.

Waters Alternatives

- Waters Alternative A: Case-by-case determination of USACE-retained and state- or tribal-assumable waters at the time of program assumption (the status quo).
- Waters Alternative B: Primary dependence on RHA Section 10 lists of navigable waters to define USACE-retained waters.
- Waters Alternative C: RHA Section 10 waters plus CWA 33 CFR 328.3(a)(1) TNW waters as retained waters.

Waters Alternative A

- This is a “status quo” alternative – the case where states, tribes, and USACE districts struggle to define retained and assumed waters.
- Because Waters Alternative A would not meet the charge of the Subcommittee for recommendations that are clear, easily understood and implementable in the field, this alternative was not put forward.

Waters Alternative B

- This alternative uses existing USACE **lists of RHA Section 10 waters** to define USACE-retained waters.
- USACE district offices maintain state-by-state lists of waters that are regulated by the USACE under Section 10 of the RHA for every state except Hawaii.

Waters Alternative B (cont.)

When a state or tribe initiates the assumption process, the USACE district will use the Section 10 list to develop a list of retained waters by:

1. deleting waters included on the Section 10 list based on **historical use only** (applying the relevant factors set forth in the RHA Section 10 regulations);
2. in the case of a state assumption, **adding tribal waters**, and
3. identifying and adding waters that appropriately belong on the Section 10 list and therefore on the List of Retained Waters.

Waters Alternative B (cont.)

- The USACE can add waters to the list of retained waters:
 - if the USACE identifies waters that are eligible for but not included on the list of waters regulated under RHA Section 10 at the time of assumption,
 - following some future alteration in the physical condition of a water body such that it is now regulated under RHA Section 10, or
 - following consideration of the RHA case law and relevant factors set forth in the RHA Section 10 regulations.

Waters Alternative C

- Retained waters would be determined using both the **RHA Section 10 lists**, and additional waters determined by the USACE to be **Traditional Navigable Waters** (TNWs, or (a)(1) waters) under the CWA.

Waters Alternative C (cont.)

- USACE lists of RHA Section 10 waters (as in Waters Alternative B) as retained waters; and,
- For purposes of state or tribal assumption, the list of “navigable waters” that would be retained by the USACE would include any waters for which TNW stand-alone determinations or EPA TNW determinations have been previously made; and,
- Case-specific TNW determinations are also made by USACE Districts but are only valid for the specific approved jurisdictional determination for which they are prepared. At the time a state or tribe begins assumption discussions with a USACE District, the District would evaluate all of their completed case-specific TNW determinations to determine whether addition of that water to the retained navigable waters list is warranted under a stand-alone determination.

Waters Alternative C (cont.)

- There may be rare occasions when the USACE must make a new or revised Section 10 or TNW determination after it has provided its “retained navigable waters” list to a state or tribe.
- In these cases, as with the above option, appropriate adjustments would be made to the retained navigable waters list to account for these revisions.

Waters Recommendations

- The Subcommittee did not reach agreement on a single recommendation for Waters, therefore there is a majority and USACE alternative put forward.

Waters Recommendations

- **Majority recommendation**: Waters Alternative B – Primary Dependence on RHA Section 10 Lists of Navigable Waters to Define USACE Retained Waters.
- **USACE recommendation**: Waters Alternative C – Section 10 waters plus CWA (a)(1) TNW Waters as Retained Waters.

Majority Waters Alternative B Recommendation Rationales

- Criterion 1. Does it provide clarity and is easily understood and implementable in the field?
- Criterion 2. Is it consistent with the CWA and with Section 404(g)?
- Criterion 3. It comports with Congressional intent that qualified states assume responsibility for the Section 404 regulatory program.

Waters Alt. B Criterion 1

- The use of Section 10 lists to define USACE retained waters – is practical at the field level, being based on currently available information. It is also reasonably predictable for both the agencies and the public.
- The recommended alternative provides a clearly defined set of waters to be retained by the USACE based on an existing administrative tool: the RHA Section 10 lists. This reduces confusion, uncertainty, and prolonged negotiations between a state or tribe and the associated USACE district or districts.

Waters Alt. B Criterion 2

- Alternative B is consistent with CWA Section 404(g) based on the plain language of Section 404(g) and the legislative history.
- The legislative history review leads the majority of Subcommittee members to conclude that the “navigable waters” to be retained by the USACE were intended to be the same waters regulated by the RHA (which are detailed in the Section 10 USACE Districts’ lists).

Waters Alt. B Criterion 3

- The Subcommittee majority views that Alternative B:
 - makes it easier for states and tribes to understand the costs associated with assumption and thus more readily weigh the costs and benefits of assuming the program; thereby, encouraging state or tribal assumption, if desired, consistent with Congressional intent and with other CWA programs.

USACE Recommendation

Rationales for Waters Alt. C

- The USACE believes there should not be a distinction between different uses of the term “navigable waters” under different sections of the statute, and believes this is consistent with the purposes of the CWA and Section 404(g).
- The USACE believes TNWs reflect the concept of “navigability” appropriate to ensure the objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.
- The states and tribes would know the Section 10 waters (as identified by the District lists) as well as the stand-alone TNW determinations made by the Districts.
 - All approved jurisdictional determinations made by the USACE are posted on District websites and are publicly available.
 - The case-specific TNW determinations that may be included on the retained waters list when the state initiates that process are also available.

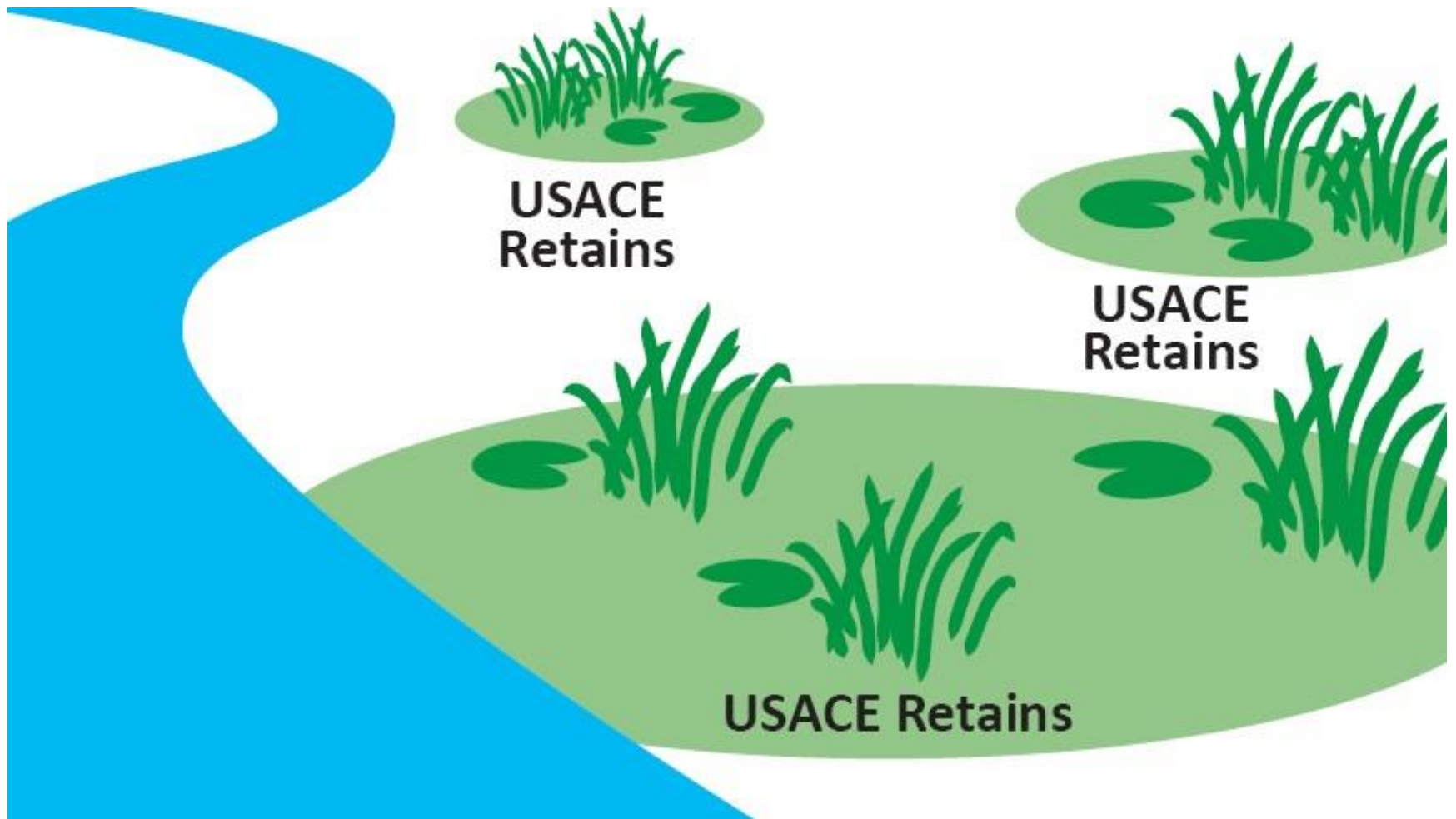
Waters Recommendation Differences

- Alternative C would retain more waters by the USACE, but the extent would depend on each state's characteristics.
- Alternative B would allow more waters to be assumed, providing broader state or tribal administration of waters.
- Alternative B would limit waters specific to the Section 10 list, providing an existing, single and clear list of waters to be retained and thus certainty and predictability for states and tribes.
- The USACE believes TNWs reflect the concept of “navigability” appropriate to ensure the objective of the CWA while the Majority believe that only Section 10 or RHA waters were the ones Congress intended to be retained.

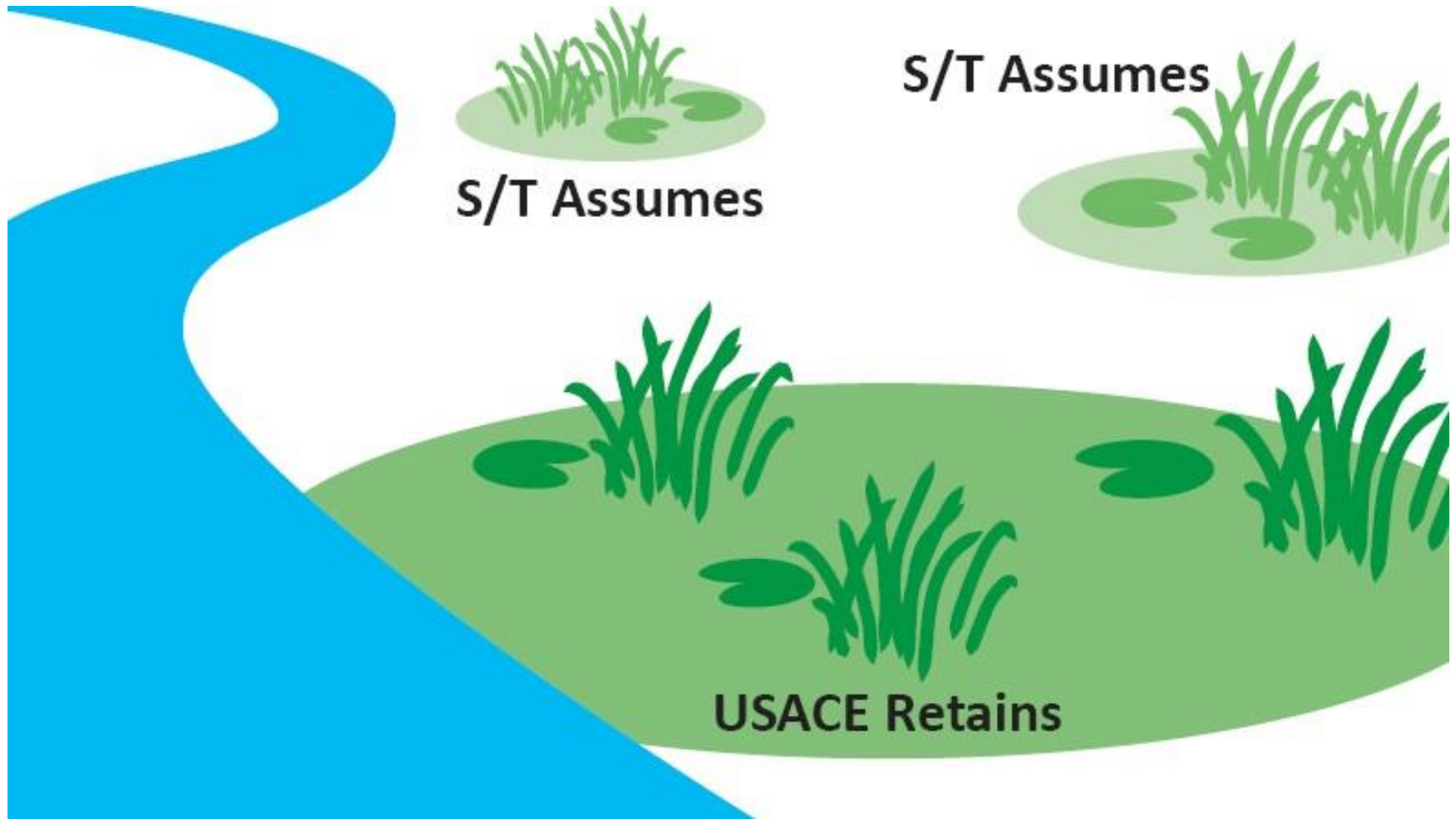
Wetlands Alternatives

- Wetlands Alternative A: USACE retains all wetlands whether touching or not touching retained navigable waters, regardless of furthest reach.
- Wetlands Alternative B: USACE retains entirety of wetlands touching retained waters, regardless of furthest reach.
- Wetlands Alternative C: Establishment of a national administrative boundary.

Wetlands Alternative A

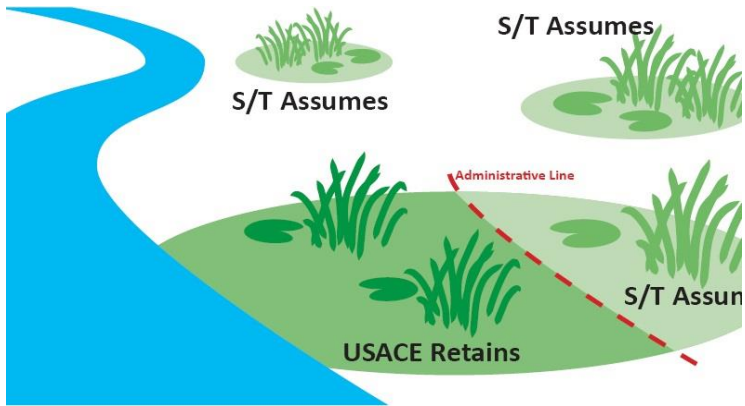


Wetlands Alternative B

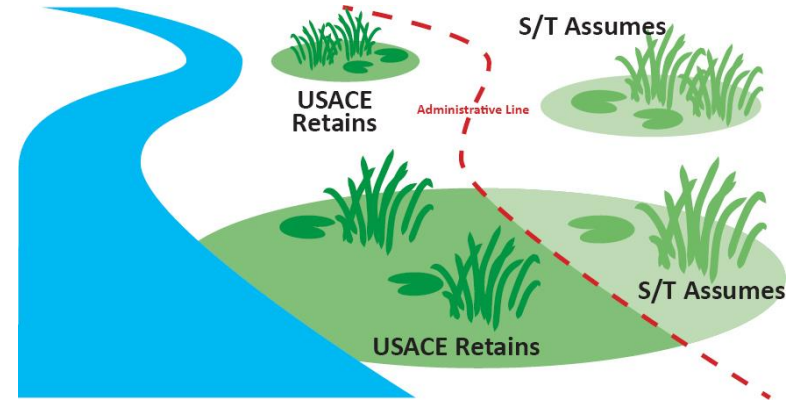


Wetlands Alternative C1, C2, C3

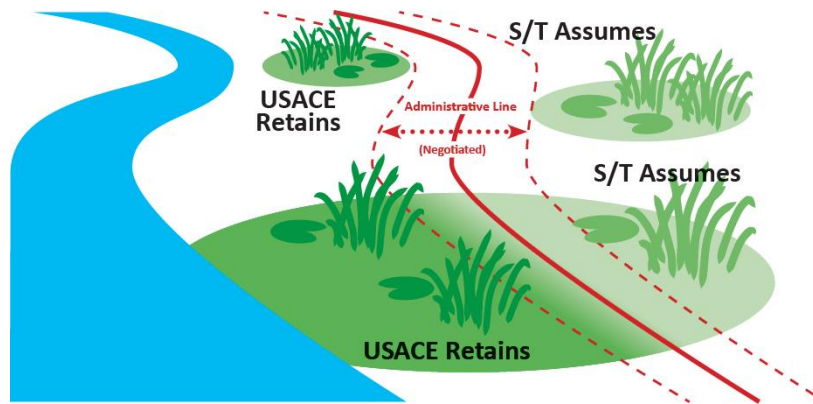
Wetlands Alternative C1



Wetlands Alternative C2



Wetlands Alternative C3



Adjacent Wetlands Recommendations

- The Subcommittee did not reach agreement on a single recommendation for Adjacent Wetlands, therefore there is a majority and USACE alternative put forward.

Wetlands Recommendations

- **Majority recommendation:** Wetlands Alternative C3 -- USACE retains all wetlands landward to an administrative boundary established during the development of the Memorandum of Agreement with the USACE, with a 300-foot national administrative boundary as a default where the state or tribe could negotiate with USACE a line either direction from the administrative boundary.
- **USACE recommendation:** Wetlands Alternative A – USACE retains all adjacent wetlands regardless of furthest reach.

Majority Wetlands Alt. C3

Recommendation Rationales

Wetlands Alternative C3:

- Is consistent with the Subcommittee's findings and conclusions about the origin and purpose of Section 404(g);
- Establishes an administrative boundary that is consistent with many state and tribal boundaries already established for administrative ease;
- Provides states and tribes with the flexibility to adjust the boundary based on their unique circumstances, including but not limited to regulatory authority, topography, and hydrology;
- Assures that the USACE is able to maintain navigability as required by the Rivers and Harbors Act;
- Allows for the identification and mapping of the administrative boundary prior to program assumption, providing clarity, understanding, and after assumption, ease of implementation;

Majority Wetlands Alt. C3

Recommendation Rationales (cont.)

- Uses a process to determine the extent of retained wetlands that is easily distinguished from the process used to determine Section 404 jurisdiction, resulting in improved efficiency, regulatory certainty, and sufficient wetland resources for a state or tribe to assume;
- Provides a clear, reasonable, and implementable separation of administrative authority by establishing a clearly demarcated boundary between USACE-retained and state or tribally-assumed wetland areas; and
- Maximizes the efficiency and effectiveness of assumed programs by allowing them to be tailored to a state's or tribe's specific circumstances.

USACE Wetlands Alt. A Recommendation Rationales

- Under Wetlands Alternative A, the USACE would retain permitting authority over all wetlands adjacent to retained navigable waters.
- Wetlands Alternative A uses the definition of adjacent wetlands currently being used by the USACE for regulatory actions under Section 404. Adjacent wetlands are determined in accordance with current regulations and implementing guidance.
- The USACE has a defined process of determining whether particular wetlands are considered adjacent and USACE personnel are familiar with these procedures.

Wetlands Recommendation Differences

- Alternative A would retain current jurisdictional and administrative determinations as one and use the definition of “adjacent” currently being used by the USACE for regulatory actions under Section 404.
- Alternative C3 would balance administrative consistency across states and tribes and flexibility to adapt to each state or tribe’s regulatory and hydrological characteristics and is consistent with MI and NJ programs.
- Alternative C3 would provide clarity and certainty for states and tribes in determining the extent of their administrative authority during consideration of assumption and would make assumption practical for states and tribes where there are extensive, connected wetlands.
- Alternative C3 would allow permittees to know clearly who to turn to for a permit.
- Both alternatives would sometimes, to often, require case-by-case determinations of wetlands during specific permit applications.

Other Implementation and Process Recommendations

- Maintain Michigan and New Jersey 404 Assumed Programs.
- Develop Guidance for the Field.
- Provide Flexibility.
- Incorporate National Principles and Considerations into Field Guidance.
- Provide General Procedures for the Assumption Process.
- Utilize Best Available Technology.

Summary

- The Subcommittee, per its charge, provides advice and recommendations to EPA on how to clarify for **which waters states and tribes will assume CWA Section 404 permitting responsibilities**, and for which waters the **USACE will retain** permitting authority.
- **Nothing in the report or recommendations** of the Subcommittee is intended to alter in any way the definition or scope of federal jurisdiction.
- Rather, this report **speaks only to the administrative division** of authority under Section 404 between the USACE and an approved state or tribe.

Summary of Recommendations

- **Majority recommendations:**

- Waters Alternative B – Primary dependence on RHA Section 10 Lists of Navigable Waters to Define USACE Retained Waters.
- Wetlands Alternative C3 -- USACE retains all wetlands landward to an administrative boundary established during the development of the memorandum of agreement with the USACE, with a 300-foot national administrative boundary as a default.

- **USACE recommendations:**

- Waters Alternative C – Section 10 waters plus CWA (a)(1) TNW waters as retained waters.
- Wetlands Alternative A – USACE Retains All Adjacent Regardless of Furthest Reach.

Acknowledgements

- Barry Rabe for his Chairmanship.
- Peg Bostwick and Gary Setzer as lead drafters of the waters and wetlands sections.
- Jan Goldman-Carter and Virginia Albrecht for their legal history review.
- Michelle Hale for her role as “super editor”.
- Richard Gitar for his wetlands tribal expertise.
- All Subcommittee members!
- The USACE, including participation and legal, mapping, and technical support.
- The EPA team for on-going technical support: Jacob Strickler, Laura Bachle, Michael McDavit, Kathy Hurd, Michael Szerlog, Simma Kupchan, Abu Moulta-Ali, Sineta Brown, Jeff Speir, and Andrew Cherry.

Questions?