

National Advisory Council for Environmental Policy and Technology
Assumable Waters [Clean Water Act Section 404(g)(1)] Subcommittee

March 15-17, 2016

Meeting Summary

U.S. Environmental Protection Agency

The following items are included in this meeting summary:

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Appendix A.

March 15-17, 2016 AGENDA

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

Background

This was the third in the four to six meetings planned for this subcommittee, the purpose of which is to provide advice and recommendations to the National Advisory Council for Environmental Policy and Technology (NACEPT) on how to clarify for which waters States and Tribes may assume Clean Water Act (CWA) section 404 permitting responsibilities and for which waters the United States Army Corps of Engineers (USACE) will retain permitting authority. All

presentations and meeting materials can be found here: <https://www.epa.gov/cwa-404/march-assumable-waters-subcommittee-presentations>

This meeting included discussion of the progress made in the Waters, Adjacency, and Legal workgroups since the meeting that took place over December 1 - December 2, 2015. The Waters and Adjacency workgroups worked on recommendations for how to clarify, or how to identify, waters and adjacent wetlands to be assumed or retained under CWA 404 Assumption. The workgroups also considered what steps and practical guidance that States, Tribes, Regions, EPA, and Districts would likely need to help identify who would administer CWA 404 for these waters. The Legal workgroup sought to provide a legal perspective on questions and issues raised by the subcommittee and the other two workgroups.

Summary of Decisions, Approvals, and Action Items

The subcommittee made the following decisions:

- The subcommittee approved the December 1-2, 2015 meeting summary with suggested modifications.
- The subcommittee charged the workgroups with refining their products based on subcommittee member suggestions, for all to consider at the next meeting.

II. Presentations and Key Discussions - Day 1

A. Welcome and Initial Business

Ms. Bachle, EPA Designated Federal Official (DFO), called the meeting to order and welcomed the members.

The subcommittee co-chairs, Mr. Dave Evans and Dr. Barry Rabe, welcomed everyone and reviewed the agenda. They thanked the members for the substantial amount of work they had contributed since the last meeting, which was evidenced by the breadth and quality of the documents provided for review. They commented that this meeting marks the mid-way point in the project timeline, and the group will need to begin to clarify what the final products might include. They acknowledged that the difficult part of the work has now begun, and that they would seek to assist the group to create an agreement that can stand the test of time.

The facilitators, Patrick Field and Eric J. Roberts of the Consensus Building Institute, sought revisions to the December 2015 meeting summary. Members suggested several revisions and agreed to approve the summary with the suggested revisions included.

B. Legal Workgroup Report Out

Members of the Legal workgroup presented draft documents for discussion. It was noted that the entire Legal workgroup had not fully vetted the draft documents yet.

Legislative History of Section 404(g)(1) of the Clean Water Act

Ms. Simma Kupchan, USEPA attorney and legal advisor and support to the legal workgroup, presented a memorandum on the legislative history of section 404(g)(1) of the Clean Water Act (CWA). The purpose of the legislative history was to help determine the meaning of the parenthetical language that defines the waters that a State or Tribe may not assume and which the USACE must retain after a state has assumed the program. Key points summarized in the legislative history included:

1. The language in the 404(g)(1) parenthetical phrase that defines the waters over which the USACE will retain jurisdiction in an assumed State is identical to the language used by the House Committee to narrow the definition of “navigable waters,” except that it includes “wetlands adjacent thereto.”
2. The 1977 Congress anticipated that most States and Tribes would assume the 404 program and therefore regulate Phase II and III waters, leaving the USACE with authority over Phase I waters (including their adjacent wetlands) minus the historical Phase I waters.
3. The parenthetical waters are not the same as those waters defined in the Rivers and Harbors Act of 1899 nor the “(a)(1)” waters defined in the USACE and EPA regulations.

Discussion: Subcommittee members made the following comments about Ms. Kupchan’s presentation:

- Consider adding the following to the legislative history: the USACE had regulations in May 1973 that were the interim final regulations, and the 1974 regulations became the final version.

Draft Outline of Section 10 Case Law

Mr. Dave Ross, Wyoming Attorney General’s Office, Subcommittee and Legal workgroup member, presented the “Outline of Section 10 Case Law: Summary of Key Concepts and Terms Relevant to the Work of the Assumable Waters Subcommittee.” The outline, as reviewed and discussed, focused on the legal framework for determining the jurisdictional status of inland waters under the Rivers and Harbors Act (RHA); it did not address tidal waters. He commented that when the subcommittee references waters that can or cannot be assumed they should strive to understand, in plain language, what the authors meant when using specific terminology. Commenting on the complexity of the law, he said it appears many courts have relied on the wrong cases to make determinations. Legal workgroup members commented that the legal committee not had a chance to review and reach consensus on Mr. Ross’ paper or conclusions.

Discussion: Subcommittee discussion of the presentation generally touched upon the following topics or themes:

What is commerce? – The group discussed how to interpret the meaning of commerce, recognizing that the definition of commerce is debatable. On the one hand, commerce may mean large barges and steam ships while on the other hand, it could be sightseeing tours, river rafting, or sport fishing. Some of the latter may or may not cross state lines. Commerce could also be ferries transporting people across a river from one state to another.

Issues of crossing state lines, historical waters, and susceptible to use determinations – The group discussed the language for the second prong of the Daniel Ball test – that the water must form a highway, either by itself or with other waters, over which commerce can be carried on with other states or countries – and whether or not a water must be 100% continuously able to support commerce. Members commented that the second prong is supported by several court cases and that the notion of continuous commerce across a state line is reinforced when a case is talking about navigable waters of the US in contrast to waters of the state that are regulatable. Another member said the issue of water crossing state lines is addressed in the legislative history of the house bill and preamble to the USACE’s regulations. Some members suggested the group should not focus on historical use waters and, instead, should focus on Section 10 waters minus historical use. However, the challenge with historical use waters is determining if they are susceptible to use. For example, a member proposed a plausible situation and asked two questions: fur traders may have used a water to transport furs and that use made it a Section 10 water that could be assumed by states in 404, but does the fur trader’s historical use indicate that the water is susceptible to use today? Do we reasonably expect some measure of fur trade in future years?

USACE jurisdiction outside of navigable waters – The group made the following comments about the extent of the USACE jurisdiction under RHA. USACE has Section 10 jurisdiction outside of navigable waters. For example, it is within USACE jurisdiction if someone does something to an upland area that diverts flow to a wetland, which reduces flow in a river. In another example, the USACE has used Section 13 of RHA to require landowners to remove trees the landowner cut down and left along the riverbank because those trees could wash into the river during high water and block the river down-stream.

The Meaning of “Adjacent” in Section 404(g)(1) of the Clean Water Act

Ms. Jan Goldman-Carter, National Wildlife Federation, Subcommittee and Legal workgroup member, introduced and presented an overview of the Legal workgroup's draft document titled "The Meaning of "Adjacent" in Section 404(g)(1) of the Clean Water Act." The memorandum reviewed the legislative history to determine the meaning of the term "adjacent" as it is used in 404(g)(1) and whether it means something different from the generally understood interpretation of "adjacent" in the regulations defining "waters of the United States." The Legal team concluded that the term "adjacent" is used for a different purpose in 404(g)(1) than in the regulations defining "waters of the United States." They interpreted the regulatory and legislative history to support a narrower meaning of adjacent for purposes of assumption than for "waters of the United States." The Legal workgroup proposed the Adjacency work group discuss and show how a clearly defined, narrow meaning of adjacent is more effective for the States and Tribes when assuming and administering a 404-equivalent program.

Discussion: Subcommittee discussion of the presentation generally touched upon the following topics or themes:

Learning from Michigan and New Jersey Assumption Practices – The group made the following comments while discussing the Michigan and New Jersey assumption practices to better understand the adjacent wetlands retained by the USACE: The reason the assumption agreements do not seem informative could be a result of decisions made behind the scenes. In New Jersey, the state's mapping staff and the USACE worked together to determine jurisdictions. Historically, the USACE considered their adjacent area to include the land from the mean high water (MHW) up to 10 feet of elevation. After mapping MHW up to 10 feet of elevation, the USACE discovered it was roughly 1,000 feet of lateral extent, which became the figure used throughout the State. In some cases in Michigan, the USACE and the State retain authority over different portions of the same wetland; but there is nothing in the Memorandum of Understanding (MOU) or the assumption agreement about how these decisions were made. Both the Michigan and New Jersey MOUs that described USACE retention of adjacent wetlands went through public comment, were signed by the State and the USACE, and approved by EPA when approving the state's program assumption request. A member commented that it seems there might be hydrologic function component where the wetlands were relevant to the system over which the USACE should maintain control. Another member said she had learned that the USACE maintains adjacent wetlands to preserve the structural integrity of a river channel, and that they mostly focus on areas of direct flow from wetlands into the river system; however this information is not known to be formally documented anywhere.

Weight of evidence – The group discussed how much weight should be given to the colloquy in Congressional proceedings since the most direct evidence of intent on adjacency is in a colloquy among Congressmen Clausen, Bowman, and Roberts. Colloquies are usually arranged to enter a specific point into the record. The weight of importance, from most to least, of various documents might be the following: legislative standard, conference report, House or Senate report, colloquy, and random floor statements. Colloquies may be relied upon in cases (such as the CWA history) where it is the only statement on an issue, as is the case here.

Workgroup sessions

The three workgroups worked throughout the afternoon. The full group reconvened on the morning of day two.

III. Presentations and Key Discussions - Day 2

A. Waters Workgroup Presentation and Discussion

On behalf of the Waters Workgroup, Ms. Peg Bostwick, Association of State Wetland Managers and Subcommittee and Waters workgroup member, presented the “Draft Report and Recommendations, Waters Workgroup” that describes guidance for tribes, states, USACE districts, and EPA regions to implement and provide consistency when determining the scope of state and tribal assumable waters. The draft report and recommendations document is available here: <https://www.epa.gov/sites/production/files/2016-05/documents/15mar16reptwaters.pdf>.

Discussion: Subcommittee discussion of the presentation generally touched upon the following topics or themes. On several occasions, participants suggested that adaptive management and administrative discretion are needed in the “grey” areas. Participants also commented on the importance of remembering that State or Tribal assumption does not mean that water quality protections will decrease when a state or tribe assumes program administration because any permit issued must at least meet the CWA’s minimum requirements. A state or tribe could have additional requirements or higher standards, but not fewer or lower.

Tribal considerations – The following points were made while discussing tribal considerations with regard to the draft report and recommendations. Special consideration will be needed for assumption on and around tribal lands, especially at the boundaries of tribal and state lands or in areas where tribal lands are mixed with other state or federal lands across the landscape. States cannot assume inside of reservations or on lands held in trust for the reservation; only the tribes can assume permitting for waters in these areas. Fee-simple lands may also be considered part of the reservation even though they may not be included in the trust, which could present complications if a state assumes a water and at a later date the land is taken into trust. There are many different names (e.g. reservation, homestead, corporation, Rancherias,

etc.) given to lands owned by tribes, and each name may have unique considerations in regards to assumption. In Alaska, where there are corporations instead of reservations, corporations are not able to assume because they are not the tribal governing body that enacts laws, regulations, and ordinances. A member clarified that the federal government would be engaged in formal government-to-government consultation with a tribe during the assumption process; it would not be considered coordination. A few questions were raised for additional consideration: Is a water shared between a state and a tribe considered an interstate water? What is the process if a state assumes waters first and, at a later date, a tribe wants to assume the program?

Generally, the document will need to be revised to include “States and Tribes” throughout, and additional tribal input on the content will be needed. It was suggested that EPA’s tribal attorneys could review the final language to make sure it is accurate.

Burden of proof concerns – Members discussed concerns about language (in recommendation IV, procedural step six) that indicated the USACE must provide documentation to justify the inclusion of a water on a list of USACE retained waters or otherwise allow a state or tribe to assume. The presence of information and the level of detail in the information at each USACE District may vary. In some cases, information is not available, lists of Section 10 waters are incomplete, or the District may not have a navigability report that details why a determination was made. In these cases, fieldwork might be required to determine the point at which navigability terminates. Other Districts may have navigability reports for navigability determinations, but they might have to dig into the reports to identify the historical segments of waters. Collecting additional field data or digging into the reports would be a large undertaking that USACE may not have the resources to complete, and the workload would be highly variable depending on the state (e.g. there are hundreds of Section 10 waters in Tennessee and few in other states such as Hawaii). The USACE raised concerns that the lack of information to meet this burden of proof would transfer waters from the USACE to a State or Tribe simply because the USACE did not have the resources to collect the appropriate information to determine the head of navigation and the historical portions of the water. It was suggested that state or tribal assumption efforts might be complicated or hindered unintentionally if significant fieldwork is needed to make these determinations before tribes or states can assume.

Role of public comment on the proposed list of retained waters – Group members raised the following points while discussing state and public review processes. Some members suggested the public should have an opportunity to learn about and comment on which waters will be retained or assumed. It was also suggested that the public have the opportunity to provide comments as the MOAs are developed.

Support team staff said that the public, the USACE, and others can comment on the entire MOA package that is submitted to the EPA. The package includes the MOA between the USACE and the State or Tribe and the list of waters the USACE would propose to retain. Support team staff encouraged (but did not require) comments on the package to be received before submission to EPA. Support team staff also noted that public notification requirements easily could be included at the start of the process, and one potential, low burden approach would be to submit a notice in the federal registry that a state or tribe is beginning the process and welcoming comments.

A member encouraged flexibility in state level public comment processes and noted that states may have their own public notice requirements. Another member said federal regulations often require public comment on federal actions. In some cases the state public notice procedures may provide more public comment opportunities than the federal process.

A member commented that an MOA might have to be revised based on public comment if it is released for public comment after the MOA is finalized. The facilitator noted the broader process point and suggested the guidance could encourage state-level public comment. Another member suggested it might be sufficient if the USACE were to publicize the Section 10 list with the assumption process to notify the public they'll be talking about which waters to retain.

Members also raised the following considerations:

- A member suggested that, in a broader context, deciding which waters are retained is about deciding which waters are or are not Section 10 waters (minus historic use), and this has implications on federal interests. It may be useful to be clear in the subcommittee's recommendations that we are not making judgments that diminish in any way federal interest in Section 10 waters.

Dispute resolution and final decision making authority with respect to deciding whether a water is assumed or retained – Group members shared the following perspectives while discussing how to resolve disagreements between a tribe or state and the USACE about the scope of the waters to be assumed. Participants highlighted the need for states or tribes to be involved in the dispute resolution or final decision making processes, and they suggested clarification is needed on which agency, and who within the agency, is the final decision maker and how and when states or tribes could interact with them. Proposed options included:

- Option A: elevate the issue to federal headquarters level to resolve the matter and make the decision. Relatedly, the group could look to other models from Federal agencies where issues are elevated from the state or district level to the headquarters level (e.g. the mitigation banking dispute resolution process or the 404(q) MOA elevation/dispute resolution process).

- Option B: as a special case, in which the EPA assistant administrator for water would decide. Some participants suggested the special case approach is not preferred, may not fit well with this issue, and is infrequently utilized at present to address other issues.

Other comments – Group members also suggested the following changes to the draft document:

- In general, use the phrase “transport and commerce” to be clear we are talking about 404(g)(1) waters and avoid confusion with Waters of the US (a1 waters).
- Recommendation IV, Step 3 – clarify so that it is understood that States do not assume Section 10 authority even though waters based on historic use only may be assumed for 404 purposes by the state.
- Recommendation III, Principle 5 – replace “may be added” with “should or will be added.”
- Recommendation III, Principle 6 – Consider moving this to another section of the document since this is more of a policy recommendation than a principle.
- Recommendation IV – Consider revising this list from a process standpoint to make it read more like steps to be followed.

Next Steps: The Waters workgroup will revise the draft report and recommendations based on the group input. The committee will discuss legal risk and susceptibility to use on day three.

B. Adjacency Workgroup Presentation and Discussion

Subcommittee and Adjacency workgroup members Eric Metz, of Oregon Department of State Lands and Oregon Department of Environmental Quality, and Michelle Hale, of Alaska Department of Environmental Conservation, presented the draft report of the workgroup’s deliberations. Subcommittee member discussion generally touched on the following topics or themes. The group seemed to agree that the legislative history appears to interpret adjacent waters as a narrower subset of CWA adjacent wetlands, and discussion generally tended to show the group felt Options 3 and 4 listed below could be viable approaches while Options 1 and 2 are less likely to work. Please find the presentation here:

<https://www.epa.gov/sites/production/files/2016-05/documents/adjacency4pres.pdf>

Option 1 – USACE retains all wetlands adjacent to retained waters** (*As defined to be a water of the US; **As defined by the Waters workgroup.)*

This option would have the USACE potentially retain so many wetlands across wet states like Alaska and Minnesota that state or tribal assumption will not be a practical option. Additionally, this option might not be attractive under the Clean Water Rule (CWR). Members raised other concerns including:

- If the definition of Waters of US changes (e.g. CWR becomes in effect) it could potentially change the scope of a state or tribe’s program.

- If the definition changes and a water is no longer a Water of the US, is it still an assumed water? It was pointed out that it would still be a state or tribally regulated water, and it would only lose state or tribal protection if the state or tribal program could be no broader in scope than CWA Waters of the US.
- A member suggested that some wetlands have dual adjacency to retained water and to non-retained water, and the group would have to determine which water has the strongest relationship as a way to determine its adjacency. This option may require a consistent case-specific adjacent wetland determination.

*Option 2 – Entirety of the contiguous wetland retained by USACE (*Contiguous in this case is a subset of adjacent which is generally understood to mean immediately abutting. Wetlands with a berm would not be contiguous).*

Contiguous would have to be defined clearly. The ease of administration may be negated by the challenge of determining where the wetland ends. Wetland delineation would most likely have to occur on a case-by-case basis as existing maps are not always accurate; this would be an expensive and time-consuming task. An additional challenge with this option is the uncertainty of knowing which wetlands would be adjacent when drafting the MOA since each wetland on the ground would not have been verified. However, wetlands in areas that are experiencing heavy development could be delineated and others without development pressure could be delineated at a later date. Every state may have a different definition for contiguous that is not related to determining if that water is a Water of the US. For example, Michigan defined any wetlands within a certain number of feet of a Great Lake as contiguous because of the hydrologic connection. This was for Michigan's administration of their program as it defined those wetlands within this distance as always regulated by the state, by definition. Michigan's definition of contiguous does not determine whether a wetland is or is not a Water of the US. It was concluded that defining contiguous or how a wetland is contiguous (e.g. groundwater or something else) is an additional challenge, as would be explaining this to the public and helping them understand where and why limits are drawn.

*Option 3 – Contiguous Wetlands Waterward of a Bright Line are retained by USACE (*Wetlands landward from a bright line are assumable by a state/tribal 404 authority and those waterward remain under USACE 404 authority. Defined line could be the OHWM projected inland).*

Members expressed the advantage of clear, predictable, and measureable bright line approach like New Jersey uses. However, members also raised a number of concerns: New Jersey has a relatively similar topography along the coast where the bright line was established; bright lines do not take into account wetlands complexes (the Michigan example along the shore of Lake Erie is a good example of small elevation differences dictating wetlands); and, bright lines can be difficult to defend technically (yet easy to defend administratively).

While considering option three, the group raised the following points when discussing a hypothetical project that spanned both sides of the bright line. A project spanning both sides of the wetland could require permits from two agencies, or if the majority of a project's impact is

on one side of the bright line the agency overseeing that portion could have the permitting authority. Alternatively, the two agencies could issue a joint permit. EPA would review permits for projects in the state or tribally assumed areas, and could suggest the USACE review those permits. States and tribes could issue permits for impacts in the wetlands retained by the USACE too. “Major discharges” of dredge and fill material,, which federal agencies must oversee, could be built in for large projects that cause impacts greater than a specified threshold.

Option 4 – Distance limitation on extent of adjacent wetlands retained by USACE – (this is not the approach used by New Jersey). This approach would identify distances beyond which the adjacent wetland could be assumed by a state or tribe (i.e. a bright line for all adjacent wetlands, not just those that are contiguous). This could be more easily administered, and it seems consistent with the intent of the legislation and legislative history because it is a narrow subset of adjacent. Decisions ultimately come down to conceptual purity versus practical reality; administrative practicality seems to be the general answer when it comes to how decisions are made in Michigan or New Jersey programs.

The group discussed the options and various challenges and benefits to each, however it largely focused on Options 3 & 4. A summary of the discussion is as follows:

Option 4 may be less risky legally, but a strong rationale is needed to approach this differently from the CWA terms, however confused they may be at the moment. There are two prongs in the legislative intent: first, immediately contiguous means close—wetlands that are close to navigable waters. Second is the incentive for states and tribes to assume the program—that is legislative intent moving toward administrative practicality. We are trying to achieve administrative practicality that will foster assumption and the legal risk we are taking is trying to explain the use of a bright line and where it is established.

The group discussed tribal or state-specific and nationwide bright lines. Some suggested the bright line should not be a nationwide line because it would be difficult to draw a line that applies to all states or tribes; however, state or tribe-specific bright lines could follow established national criteria. Others preferred a national bright line because it would provide states or tribes with leverage when negotiating with Districts. Nationwide bright lines could be a starting point and adjusted to specific conditions during discussions between the state or tribe and the USACE about other regulatory buffers and practices. This may allow for greater flexibility. Instead of setting a nationwide bright line, it was suggested the group create a framework with sideboards (e.g. parameters indicating a minimum and or maximum distance within which the bright line could be established) for a state or tribe.

The group made the following comments about how to establish a bright line. The bright line could be established by some proxy or combination of linear distance and elevation. A member suggested the group recommend criteria that could enable flexibility while establishing a bright line. One of the criteria could be ease of administration. Instead of setting a specific distance for the bright line, another criteria could be to set a minimum distance from a specific point (e.g.

MHW) to protect navigational interest. Criteria could also establish buffers that protect habitat or other important natural resources.

It was noted that a nationally consistent distance would not likely be allowable under the Administrative Procedures Act as simply guidance. Setting a nationally consistent distance would likely have to be a rule-making procedure; it would not be guidance because it is too definitive.

The group briefly discussed geographical information systems (GIS). GIS maps will be useful in any option, but field verification of the wetland limits frequently will be required, especially in cases with known data inaccuracies or old data sets. A bullet could be added to indicate that relevant technology (not just GIS) should be utilized to delineate wetland boundaries.

The group reviewed a map illustrating the jurisdictional delineation between the State of Michigan and the USACE at a nuclear plant (this was a permit that was issued). They discussed how the delineations were made and continued to discuss bright lines set at distances from the Ordinary High Water Mark. The participants noted the complexity of determining assumption in practice under this kind of site-by-site approach.

Next Steps: The Adjacency Workgroup will further discuss criteria, focusing mostly on options three and four. They requested a representative from the USACE join their discussions.

C. Imagining the Final Report

The group discussed the elements of the final report, which the subcommittee will draft. USACE and EPA representatives and support staff may participate in discussions of what will be in the report, but will not take the lead in drafting the report. Participants suggested a successful report would clearly describe the rationale supporting innovative recommendations that would achieve congressional intent and that the agencies could plausibly implement. Participants suggested the final report include the following elements:

- The report could start with a clear description of the subcommittee's objectives and the congressional intent, contrasting the congressional intent with the current context and linking those back to the subcommittee's objectives. Descriptions of the Waters, Adjacency, and Legal workgroup objectives should also be included.
- Guidance, recommendations, or options should be supported by strong rationale and elucidate the underlying assumptions and the different considerations the group was trying to balance when deciding which recommendations to propose. At various points in the document, it may be useful to clearly articulate how the guidance or recommendation relates to the subcommittee's objectives. It was suggested the document also comment on administrative discretion and note that when conceptual purity bumps up against practical reality, practical reality wins.
- The report should clearly describe guidance, recommendations, and/or options similar to the reports the working groups have been drafting. The documents created thus far

(e.g. legislative history, and others) could be included as supporting material. A participant suggested following the format of the Waters workgroup draft report.

- Case studies from Michigan (e.g. the nuclear power plant), New Jersey, and the Fond du Lac Band (e.g. Section 10 river with historic use only), or other real-world examples that show what would be retained or assumed would be useful to include. Additionally, descriptions of how an option or recommendation might affect a state, tribe, or agency would be useful.

The group discussed the level of detail to include in the final report and the process of submitting the report to NACEPT. The group was encouraged to provide as much detail as possible about each option they considered, since the USACE and EPA will draw on the information to draft technical guidance. The group will have two opportunities to present the information to NACEPT. Initially, a webinar presentation of the draft report could be organized this summer to educate NACEPT members about the work and the draft recommendations. Laureen Boles, NACEPT representative on the subcommittee, and the co-chairs then will present the final report in the fall at an in-person NACEPT meeting, which will be open to the public. After receiving the report from the subcommittee, NACEPT would review the report and either recommend it to the EPA as drafted, recommend it to the EPA with caveats, send it back to the subcommittee with changes or concerns, or potentially add their own views or recommendations (although this is rare without first going back to the subcommittee).

The group discussed considerations for proposing guidance versus a regulation or rule. If the subcommittee drafts guidance, they should clarify the intended audience for the guidance. Any guidance that is binding would be considered a rule and could not be issued by an agency as guidance. Subcommittee members were advised to consider the level of certainty states, tribes, and federal agencies would need for long-term implementation; rules are more stable than guidance. However, rule-making procedure would likely take longer than guidance to develop.

The group discussed the timeline to draft the report. The facilitator tested the potential to have some of the report drafted by the June meeting. Some subcommittee members suggested it would be difficult to lay out options and details for the options until the group decides if they will provide options or a definition for adjacency. They highlighted the tight schedule and workload constraints, as well as noted that agency input would be needed early to ensure the ideas are headed in the right direction. An EPA representative suggested that options for determining adjacency could be very helpful for the EPA and the USACE.

The group discussed who would participate in consensus decision-making. The subcommittee recognized the value of showing support from agency representatives in the final document and encouraged the agency representatives to participate and provide recommendations to the extent they feel comfortable doing so. Participation by EPA and USACE representatives does not commit either agency to the subcommittee's recommendation. If the group does not reach full consensus, a section of the report can describe the different perspectives on the issue(s).

The report can also include official disclaimers that it does not reflect official agency opinion and represents the group's best effort and thinking.

Next Steps:

- On day three, the group will review a process diagram of the rulemaking process, guidance development process, and NACEPT process and sample reports submitted to NACEPT by other subcommittees.
- The group may need to further discuss adjacency at the June meeting.
- The facilitators will convene a small group to outline the draft report and then consider the schedule and how to proceed.
- The EPA and USACE representatives will consider whether or not they want to be involved in consensus decision-making and report back to the facilitators.

IV. Public Comment

Members of the public provided the following comments during the allotted public comment period:

Mr. Jeff Tiberi, a member of the Local Government Advisory committee (an informal liaison to this subcommittee), thanked the group for their work and commended them for the thoughtful approach they are taking. He stressed the importance of flexibility given the differences found throughout such a large country and expressed support for public comment on the MOA.

Mr. Walter Gauthier, a retired USACE' ecologist in the Detroit District provided comments by phone (*the phone connection was not completely clear and some comments may not have been captured*). Regarding adjacency determinations, he commented that they did the best they could to sort out adjacency on a day-to-day basis after assumption was completed. Some areas, such as low areas near tributaries to the Great Lakes were difficult to determine because ordinary high water levels would extend far into these areas.

IV. Presentations and Key Discussions - Day 3

On the morning of the third day, the workgroups convened and worked together prior to reconvening with the full subcommittee in plenary. When the subcommittee reconvened, the Waters and Adjacency workgroups framed several outstanding issues for full subcommittee deliberation.

A. Waters Workgroup

Subcommittee members seemed to be in general agreement that the waters to be retained by USACE included Section 10 waters of the Harbors and Rivers Act minus historical waters. To

further refine and clarify the waters that would be retained by the USACE, the Waters working group suggested the subcommittee further explore waters that are susceptible to use. Subcommittee member conversation about susceptibility touched on the following themes.

The group discussed Section 10 waters and how the USACE has determined susceptibility in the past. Most of the Section 10 lists were created 30-40 years ago and likely have not been updated. It is unlikely the USACE attempted to identify waters that were susceptible at that time since historical waters likely covered those and many others. However, some waters were identified as susceptible if it was obvious they were susceptible. For example, the Trinity River in Texas is susceptible because a project is on the books to make it navigable to Dallas but the project has never been funded.

Susceptibility of use is related to flow and to commerce. Regarding flow, susceptibility is a question of how much flow is available and what can be done to make the water navigable. For example, a river is likely susceptible to use if it has clear navigability and possibility for commerce but also has existing impediments like dams or old locks that currently limit commerce. Determining susceptibility due to interstate commerce is challenging because it involves defining commerce and determining how much commerce makes the water susceptible to use. Some people might say recreational river rafting is commerce, while others will say it must be guided recreational river rafting to count as commerce. Still others will say it must be large commerce such as moving barges full of grain down a river. Commerce is also dynamic over time. One example provided was a tributary of a clearly navigable water where commercial canoeing takes place solely on the tributary. Is that interstate commerce for CWA 404(g)(1) purposes? Case law defines commerce in many different ways.

The group discussed options for how to address susceptibility due to commerce. One option is for the group to forego defining commerce and recommend the tribe or state and USACE negotiate it while defining the list of retained waters. EPA support staff suggested this could be a useful approach since the EPA would not write a definition of commerce for these purposes; drafting a definition would be the Attorney General's responsibility. To aid the state or tribe and the USACE to negotiate susceptibility due to commerce, the subcommittee could review, compile, and summarize court cases that defined commerce. This effort, some of which the Legal workgroup already started, could provide guidance or criteria for how commerce could be defined in each negotiation.

Some states (e.g. Alaska) have a lot of waters that would be susceptible if recreation is a subset of susceptibility. Recreation as a potential subset of susceptibility is a concern for Alaska because some people may try to float a river with the sole intention of triggering the requirement for the federal government to retain the water.

The facilitator summarized the discussion, stating that it is a complex issue and some guidance is available to help constrain what is susceptible. It was suggested that susceptible to use might not be the most difficult issue to tackle because: 1) there is the interstate commerce

requirement, and 2) waters that are or become susceptible to use could be folded back into USACE waters (i.e., it is not a definitive decision) at any time.

B. Adjacency Workgroup

The Adjacency workgroup summarized their discussion:

- Currently, the USACE considers bordering, neighboring, and/or contiguous wetlands as adjacent.
 - If a wetland shares one edge or a border with the water, it is considered bordering.
 - A wetland is considered contiguous when it is located between the Ordinary High Water Mark (OHWM) and the water.
 - If the wetland is separated from the water by a feature—and direct hydrologic flow occurs only with anticipated high flow regimes—then the wetland is considered neighboring.
 - Rapanos guidance joined bordering and contiguous to create abutting. Considering the Michigan nuclear plant example provides insight on what the USACE must retain to ensure navigability of Section 10 waters. However, contiguous plus bordering can be a large area, and possibly more than what is needed to ensure navigability (imagine a wetland complex that extends back from a water tens of miles).
- The workgroup considered the following options for developing the MOA between the state or tribe and USACE. First, as a starting point, the USACE could retain abutting wetlands the state or tribe could take anything beyond them. In the MOA, they would precisely describe which wetlands would be bifurcated and establish criteria for automatic bifurcation and further bifurcation that could be used on a case-by-case basis.
- A mechanism to address periodic changes in the lists of retained waters would be needed due to hurricanes, climate change, or regular fall and winter storms that cause storm damage and changes to the shoreline.
- Since the OHWM is the limit of the contiguous wetlands and OHWM can go up a tributary for miles, the tribe or state and USACE will need to discuss which waters the USACE retains if they will not have an impact on navigation.

Subcommittee member discussion touched upon the following topics:

USACE retention of wetlands to protect navigability – Participants noted that Section 10 requires the USACE to maintain navigability for federal purposes and that abutting areas are important because they could impact navigability. A participant suggested that more clearly defining areas or activities that must be controlled to protect Section 10 navigability as the purpose could provide insight on which waters and adjacent wetlands the USACE must retain.

The group continued to discuss the definition of contiguous. Some participants suggested they did not understand options 3 and 4 with the narrow definition of contiguous and that they thought contiguous was essentially abutting. It was also suggested that the group not look to the CWA to create definitions for contiguous. A participant clarified that the original thought process had not changed: abutting is touching.

The group discussed options for creating a bright line and whether or not to provide guidance on line drawing or simply suggesting that drawing a line is a good idea. Bright lines could be a predefined buffer, a precise distance, or follow buffers in place in each state. Elevation, vegetation types, and administrative ease could also be used to establish a bright line for each state or tribe. Some participants suggested the group should provide criteria for drawing the line. A participant also commented that flexibility is key, but too much flexibility would reduce the potential for national consistency.

The subcommittee discussed options three and four. One participant suggested combining options 3 and 4 into one to allow flexibility. Another participant suggested that option 4 may not make sense with elevation changes.

B. Guidance vs. Regulations

The group discussed the differences and implications of guidance or regulations.

Federal agency rule making is subject to all requirements of the Administrative Procedures Act (APA). It would require broad public notification and opportunities for public engagement, and the federal agency would be required to summarize and respond to comments and indicate how they affect the final policy. Formal interagency coordination would also be required (possibly at two junctures), as well as tribal, local government, and small business consultation. Depending on the nature of the rule, economic analysis could be required. Rulemaking also requires development of a detailed range of alternatives. Rulemaking is a multi-year process with some finishing in 2-4 years, while others have taken a decade. It is anticipated that rulemaking for this effort would be on the 2-4 year timeframe; however, the EPA also would feel compelled to address some broader issues about 404(g) in regulation while simultaneously addressing the assumable/retained waters, which could open up many other issues and conflicts but also provide technical fixes or updates.

Field-level guidance is more discretionary. At a minimum, the senior leadership of the EPA, or if jointly issued with USACE, both leaderships would need to accept and embrace the recommendations. Consultation with states, local governments, and tribes would occur. Tribal consultation would not be pursuant to tribal and federal consultation policy but would have a matching substantive level of engagement. The timeframe could be approximately 6 months to a year, and if public comment was collected, it would take an additional 6 months.

A flow chart of each process was presented (The flow chart is viewable here: https://www.epa.gov/sites/production/files/2016-06/documents/rule_process.pdf)

The group raised several considerations about the guidance and rulemaking options. The considerations have been categorized as either pro-rulemaking or pro-guidance:

Pro-rulemaking considerations:

- Rulemaking is much better at providing national consistency; although, it may be difficult to provide a defensible rationale for a consistent national threshold.
- Rulemaking may be better at changing behaviors than guidance. USACE Districts sometimes say, in relation to other guidance, “this is only guidance, it isn’t binding.”
- Guidance is less durable since it isn’t binding; rulemaking has more staying power since it can only be revised with subsequent rulemaking.
- Rulemaking that is binding would help states to negotiate with the USACE, whereas guidance may not.
- Although public comment can be completed for guidance, it is not required, which is concerning for some states.

Pro-guidance considerations:

- Guidance is more flexible but would not necessarily provide national consistency because it does not have to be followed.
- Guidance that is legislative analysis to interpret and clarify congressional language may be hard to ignore.
- Rapanos was guidance interpreting a court decision and it has had a great deal of impact on field level implementation.
- Dispute resolution suggestions could be included in guidance to support states and tribes in negotiations with the USACE.
- Pursuing rulemaking at this stage could alienate some stakeholders since tribes and states come with different resources and reasons for assuming. Some may prefer to work outside of the rule. Additionally, some stakeholders view any EPA regulation with suspicion. In this light, rulemaking could prove risky.
- Three or four states currently may be willing to assume with additional guidance.

Other Considerations

- Contextual considerations include the upcoming change of administration and current momentum on this topic. It is uncertain how the next administration may view this issue. Currently, many people are motivated to see action occur on this topic, which may provide reason for moving forward more quickly with guidance. Or, since there is support and interest now, it may mean that it is a good opportunity to pursue rulemaking; however, the groundswell of interest could also be a hindrance as the stakes increase with rulemaking.
- Guidance could be developed initially to inform rulemaking that would follow at a later date. Implementation of guidance might identify needs that inform whether or not rulemaking is necessary. If guidance works and more states and tribes assume, their

experience can be included in any future rulemaking efforts. Similarly, if guidance does not lead to assumption, then it is clear that something else will be needed to facilitate assumption.

- If guidance is pursued, it should be developed in coordination with the states and tribes because it is about relationships between multiple entities at the ground level.
- If rulemaking were pursued, EPA would likely do this independently. Joint-rulemaking with the USACE would probably not occur, but there would still be close coordination with the USACE.
- The facilitator suggested that education and training may be needed for tribes, states, regions, and districts regardless of which path is chosen.

C. NACEPT Report Examples

The subcommittee reviewed various reports that had been submitted to NACEPT as listed on the NACEPT website. Some were short letters while others were formal reports. In the case of final formal reports, they are issued as EPA publications that are entered into the Library of Congress. The subcommittee would be the author of the report; EPA will not be drafting it. The facilitators can help to draft the report.

The report could serve both as communication to EPA and to broader stakeholder groups. Recent reports have been focused on a broader audience beyond EPA. EPA is moving away from publishing full reports and moving toward shorter reports with parts of the document living online.

D. Next Steps

The group decided to establish an outlining work group.

The following subcommittee members volunteered to serve on the final report outlining group: Trevor Baggione, Richard D. Gitar, Thomas Driscoll, David Ross, Lauren Boles and Peg Bostwick to review the outline.

The following were next steps identified by the Subcommittee.

Who	What	When
Waters Work Group	• CBI provide susceptible notes	• March 31
	• Refine draft document	• 7 April
	• Obtain tribal review (by Richard/James and EPA tribal experts)	• April
	• Address dispute resolution, susceptible to use, other	• April
	• Identify a few cases to illustrate points	• April
	• Circulate to Legal WG for comment	• Early May
	• Revise draft as needed and circulate to SC	• May 31

Adjacency Work Group	• Refine options #3 and #4 and criteria	• April
	• Delineate any definitions as needed for clarity/difference from WUS	• April
	• Elucidate role of technology	• April
	• Draft document similar in format to Waters Group	• April
	• Identify a few cases to illustrate points	• April
	• Circulate to Legal WG for comment	• Early May
Legal Work Group	• Revise draft as needed and circulate to SC	• May 31
	• Revise and refine legislative history (Virginia point of contact (POC))	• April
	• Revise and refine adjacency (Jan POC)	• April
	• Revise and refine Section 10 cases (David R POC)	• April
	• Meet with USACE legal	• May
	• Comment for legal support/justification on other WGs draft documents	• May
	• Revise “reference” documents as needed and circulate to subcommittee	• May 31
	• Determine which “reference” documents should be included in the final report appendices.	• May 31
Final Report Outlining Group	• Review sample other documents	• March
	• Draft an annotated outline of a final report with key sections, appendices, etc.	• April
	• Prepare the report introduction on “why” – purpose, intent, etc.	• April
	• Circulate to subcommittee for comment	• Early May
	• Revise outline as needed and circulate to SC	• May 31
Sub-committee	• Meet for next meeting	• June 7 to 9
CBI	• Create standard naming convention for documents	
	• Draft and distribute Waters workgroup discussion	
	• Draft full meeting summary	
	• Work with final report outlining group to assemble and copy edit the report.	

VIII. Wrap Up / Closing

The meeting co-chairs thanked the group for their continued constructive engagement and good humor despite some differences in perspective. They also highlighted the unique opportunity the group has to create a document that could be used as a source of guidance for

many years to come. They suggested also considering how to promote the final document to maximize its use.

Ms. Bachle closed the meeting.

IX. Meeting Participants

A. Subcommittee Meeting 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)
Laura Bachle, (Designated Federal Officer), U.S. Environmental Protection Agency
Trevor Baggio, Arizona Department of Environmental Quality (on phone)
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 (MAST)
Thomas Driscoll, National Farmers Union
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
Barry Rabe, Ph.D. (Co-chair), University of Michigan
Dave Ross, Wyoming Attorney General's Office
Gary T. Setzer, Maryland Department of the Environment
Michael J. Szerlog, U.S. Environmental Protection Agency, Region 10

ALL MEMBERS WERE IN ATTENDANCE

B. Other Attendees

Julia Anastazio, Association of Clean Water Agencies (ACWA)
John Goodin, U.S. Environmental Protection Agency

Amanda Palleschi, Inside EPA

Fran Eargle, USEPA and DFO for Local Government Advisory Committee

Marisa Heiling, intern with Local Government Advisory Committee

Owen McDonough, NAHB

Barbara Walther, St. Paul District, USACE

Kenny Jaynes, Galveston District, USACE

Jeff Tiberi, Local Government Advisory Committee

C. Facilitation Team

Patrick Field, Consensus Building Institute

Eric J. Roberts, Consensus Building Institute

Jake B. Strickler, U.S. Environmental Protection Agency

D. EPA OW/OGC Support Team

Sineta Brown, U.S. Environmental Protection Agency

Andrew Cherry, U.S. Environmental Protection Agency

Kathy Hurd, 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

Appendix A

NACEPT ASSUMABLE WATERS SUBCOMMITTEE MEETING

AGENDA for Meeting #3

Meeting #3

Dates: March 15, 2016; 9:00 am – 4:30 pm, March 16, 2016: 9:00 am – 5:00 pm, March 17, 2016: 9:00 am – 3:00 pm

Location: U.S. Environmental Protection Agency
One Potomac Yard- 4th Floor Conference Room PY South, Room S4370, S4380, and S4360
2777 Crystal Drive
Arlington, VA 22202

To participate by conference call:

1. Please register with DFO Laura Bachle, by calling 202-566-2468. 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.
 - a. Conference ID Number for March 15: **64915842**
 - b. Conference ID Number for March 16: **64916715**
 - c. Conference ID Number for March 17: **64917111**
4. Helpful Keypad commands:
 - a. *0 - Operator Assistance
 - b. *6 - Self Mute/Unmute

Tuesday, March 15 (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 - *Laura Bachle, Designated Federal Official (DFO)*
- Introductions – *participants*
- Review of goals and objectives of our effort – *Co-Chairs*
- Review of Agenda - *Co-chairs*
- Review and approval of December Meeting Summary - *facilitator*
- Updates on Logistics: travel, receipts, etc. - *Sineta Brown, EPA, Wetlands Division*

9:45 – 11:45

Legal Work Group Report Out

- Legal Work Group Reports out on Adjacency and Waters (up to 30 minutes on each topic)
- Questions, Comments, and Clarification from other Work Groups

11:45-12:15

Prepare Work Groups for Afternoon Deliberations

- Identify objectives for Waters and Adjacency Work Groups by Work Group
- Assign Legal Work Group members to each of the other two

12:15

Adjourn full Subcommittee for Day - *Laura Bachle, DFO*

12:15-1:30

LUNCH BREAK

1:30-4:30

Work Groups Carry On Work

- Work Groups meet face-to-face to finalize ideas, options, and questions for the full group
- Coordinators help prepare presentation to Subcommittee for Wednesday

4:30

Work Groups Adjourn

Wednesday, March 16 (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

- Call to Order and Instructions - *Laura Bachle, Designated Federal Official (DFO)*
- Review of Agenda for Day - *Co-chairs*

9:15-11:30

Waters

- Presentation by Work Group
- Discussion among Participants
- Issues, Next Steps, Further Charge to Group

11:30 – 1:00

LUNCH BREAK

1:00 - 1:05

Resettle for Public Comment

1:05 – 1:30

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*

1:30-3:30

Adjacency

- Presentation by Work Group
- Discussion among Participants
- Discussion among Participants
- Issues, Next Steps, Further Charge to Group

3:30-3:45

Break

3:45-4:30

Imagining the Final Report

- What criteria for success are most important to us for our report: 1) innovation and new concepts/ideas; 2) plausible options for agency consideration; 3) specific implementable direction and advice; 4) other?
- Given our discussions, discuss initial components/ideas for final report
- Discuss possible process for developing final report
- What might be implementation tools, documents that the agencies have to potentially make the recommendations operational?
- Any issues we haven't covered we need to in order to include in the final report?

4:45-5:00 Summary of the Day – *Co-Chairs*

5:00 Adjourn full Subcommittee for Day - *Laura Bachle, DFO*

Thursday, March 17 (times are approximate and best estimate prior to the meeting)

8:30-9:00 Check-in and seating for Work Groups

9:00-11:00 Work Groups meet to further work given Subcommittee feedback

11:00-11:15 Call to Order and Initial Business

- Call to Order and Instructions - *Laura Bachle, Designated Federal Official (DFO)*
- Review of Agenda for Day - *Co-chairs*

11:15-12:15 Waters

- Report Out by Work Group
- Discussion among Participants
- Issues, Next Steps, Further Charge to Group

12:15 – 1:30 LUNCH BREAK

1:30 - 2:30 Adjacency

- Report Out by Work Group
- Discussion among Participants
- Issues, Next Steps, Further Charge to Group

2:30 – 2:45 Work Planning

Facilitator and Participants

- Review of Key Action Items
- Further Tasking of any Work Groups
- Agenda topics for next meeting
- Review of next meetings' dates and locations

2:45 – 3:00

Reflections from Co-Chairs

3:00

Adjourn - *Laura Bachle, DFO*