

**United States Environmental Protection Agency  
National Advisory Council for Environmental Policy and Technology  
Assumable Waters Subcommittee**

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**Operating Procedures and Safe Guards**

**I. Introduction**

Section 404(g) of the Clean Water Act (CWA) lays out the requirements for the assumption and implementation of state and tribal CWA section 404 permitting programs. Congress, with the addition of CWA section 404(g), made clear that states and tribes wishing to assume administration of the dredge and fill permit program, could do so for certain waters. This Subcommittee under the National Advisory Council for Environmental Policy and Technology (NACEPT) will focus on a very narrow and specific charge related to the waters for which a state or tribe may assume permitting responsibility. To be known as the “Assumable Waters Subcommittee,” (Subcommittee), the Subcommittee will be asked to provide advice and develop recommendations for NACEPT on how the U.S. Environmental Protection Agency (EPA) can best clarify for which waters the state/tribe has CWA section 404 permit responsibilities, and for which waters the USACE retains CWA section 404 permit responsibility, under an approved state/tribal program. This subcommittee is consistent with the Administrator’s priority to launch a new era of state and tribal partnership to ensure the efficacy, efficiency, and coordination of overlapping and complimentary efforts. Specifically, this subcommittee effort will address the states’ request to provide clarity on this issue enabling them to assess and determine the geographic scope and costs associated with implementing an approved program.

**II. Authority**

The NACEPT is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), Public Law 92–463. The EPA established the NACEPT in 1988 to provide advice to the EPA Administrator on a broad range of environmental policy, management, and technology issues. The EPA has formed a subcommittee, known as the Assumable Waters Subcommittee (Subcommittee) to provide advice to NACEPT on how the EPA can best clarify the waters that a state or tribe may assume permitting responsibility for under an approved CWA dredge and fill permit program. Subcommittee members, like the parent NACEPT committee, serve as representatives from industry; non-governmental organizations; and federal, state, tribal, and local governments.

The subcommittee will have a limited duration and narrow focus. Other aspects of state or tribal assumption will not be within the scope of the deliberations for this Subcommittee. For example, the Subcommittee will not be deliberating on the merits of assumption, nor on any aspect of the larger question of which waters are “waters of the U.S.” It will focus on

how the EPA can clarify the waters for which a state or tribe assumes CWA section 404 permitting responsibility and for which waters the USACE will retain this authority.

### **III. Objectives and Scope of Activities**

The final Subcommittee report to NACEPT may provide advice and recommendations on how EPA could clarify for which waters states and tribes will assume CWA section 404 permitting responsibilities, and for which waters the USACE will retain permitting authority. Deliberations will be:

- 1) Consistent with the subcommittee's charge; and,
- 2) Consistent with the CWA.

### **IV. Membership**

#### **A. Members**

Categories of participation include representative members, regular government employees, and a NACEPT liaison. Representative members are uncompensated volunteers with equal voting and decision-making power. The EPA Administrator approves members for two-year terms. Regular government employees represent their agency's interest as paid federal staff, also for a two-year term. The NACEPT Liaison serves as the formal liaison between the parent committee and the subcommittee.

#### **B. Member Expectations**

- 1) Participation. Subcommittee members are expected to attend all meetings and could be dismissed after a member fails to participate in two meetings.
- 2) Quorum. A quorum of 50% + 1 of the subcommittee members is required for decision-making. Members joining an in-person meeting by telephone will be counted toward the requirement to achieve a quorum.
- 3) Representation. Subcommittee members are participating in a representative capacity. They are expected to consult during the deliberations with their organization and/or constituents, and to ensure that any agreement developed by the subcommittee is acceptable to their constituents. For this subcommittee's purposes, federal members from the US EPA, US Army Corps of Engineers and the Fish and Wildlife Service are considered representative of their organizations and under the same obligations.
- 4) Termination. Members serve at the Administrator's pleasure. Members can be removed for any reason the appointing official deems appropriate. Reasons to remove a member may include personal/professional circumstances would prove detrimental or disruptive to his/her continued participation in the subcommittee's work; failure to participate in two or more meetings; or a change in the member's professional affiliation.

## **V. Subcommittee Organization and Structure**

### **A. Organization**

The number, designation, mission, scope and membership of this subcommittee are subject to approval by the appointing official and subject to agreement between the DFO of the subcommittee and the NACEPT. This subcommittee is subject to the rules of the NACEPT committee and may not function or report recommendations directly to EPA.

### **B. Structure**

- 1) Co-chairs. The co-chairs serve as active members of the group. The co-chairs will encourage good process and consult with the facilitator and DFO on meeting agendas and timelines.
- 2) Subcommittee Members. A Subcommittee member is expected to represent the interests of their organization, participate fully in the activities of the subcommittee, including the following: active discussion, active listening, ensuring the member is heard correctly, being prepared for meetings, voicing consent or dissent constructively, and helping the committee enforce its ground rules (see Safeguards for Members below).
- 3) Federal Subcommittee Members (EPA, USACE and FWS). The expectations are the same for Regular Governmental Employees (RGE's) as with subcommittee members representing outside interests. In addition, a federal member is expected to act as a liaison with their parent agency, providing cohesive Agency level information and feedback to the subcommittee.
- 4) Designated Federal Official. The Designated Federal Official (DFO) will be responsible for ensuring compliance with the Federal Advisory Committee Act (FACA). He/she will determine whether to conduct subcommittee meetings, prepare and approve all meeting agendas, attend all subcommittee meetings, adjourn any meeting when he/she determines adjournment to be in the public interest, and chair meetings when directed to do so by the official to whom the subcommittee reports.
- 5) Facilitator. The facilitator will be responsible for helping to ensure that the process runs smoothly, developing meeting agendas in cooperation with the DFO, preparing and distributing draft and final meeting summaries, and helping parties resolve their differences and achieve consensus on the issues to be addressed by the subcommittee. Responsibilities of the facilitator include, but are not limited to:
  - Ensure a common understanding of the goals of the subcommittee;
  - Keep discussion focused upon the intended subject;
  - Make the group aware of content versus process;
  - Assist the subcommittee in preparing written materials;

- Maintain a productive, safe climate for contributions by all members; including protecting group members from personal attack;
  - Enforcement of the ground rules and modification of the ground rules when necessary to maintain the focus and operations of the subcommittee;
  - Honor the agenda by calling attention to any deviations in previously agreed timeframes or subjects for discussion;
  - Encourage participation by less vocal members;
  - Ensure that participants understand the discussion, and seek clarification where they do not;
  - Uncover hidden or unpopular issues;
  - Keep the discussion moving forward;
  - Ensure that all assignments, deadlines, and other agreed expectations are understood by those with responsibility;
  - Get consent at every major decision point;
  - Reframe as necessary;
  - Assist the subcommittee in reaching consensus and articulating issues where consensus is not possible.
- 6) Technical Experts. It may be necessary to call upon people outside the group to provide particular expertise on certain matters. Prior to the meeting, it is the facilitator's job to discuss the role of the expert with the group and with the expert, go over any particular ground rules regarding technical expertise, and prepare the expert logistically for the meeting. It is important to respect time constraints of technical experts.
- 7) Public Observers. Subcommittee meetings are open to the public. Any attendee who participates in the meeting who is not a subcommittee member will participate as an observer. Observers have the right to see and hear all the proceedings of the subcommittee, and will be provided the opportunity to comment at least once at each meeting. As part of the public notice of the meeting, the agenda will specify time slot(s) during which opportunities for public comment will be provided. Observers may participate in discussions outside of the scheduled public input sessions when invited by the co-chairs.

## **VI. Subcommittee Meetings**

The subcommittee is expected to operate in accordance with all the openness requirements of FACA and EPA policy. Such requirements include, but are not limited to: publishing notice of meetings in the Federal Register, holding open meetings, and taking and certifying meeting minutes. Accordingly,

- Unless otherwise determined in advance and authorized by the EPA Administrator, all meetings will be open to the public

- All documents made available to or prepared by or for the subcommittee will be made available to the public on the following website: <http://www2.epa.gov/cwa-404/assumable-waters-sub-committee>
- Materials brought before, or presented at, a meeting will be made available to the public for review at the time of the scheduled meeting
- Members of the public may attend any meeting or portion of a meeting that is not closed to the public and may, at the determination of the Co-chairs and DFO, offer oral comments during the public comment portion of the agenda

#### A. Frequency

The Assumable Waters Subcommittee will meet in-person or via video/teleconference approximately four (4) to six (6) times. In addition to full subcommittee meetings, members may be asked to participate in ad hoc workgroups to address specific issues.

#### B. Open Meetings

All meetings and teleconferences will be publicly noticed in the *Federal Register* 15 days prior to the meeting and will be open to the public.

#### C. Agendas

Meeting agendas will be developed prior to each meeting by the DFO, in consultation with the chairperson(s) and facilitator. Agendas will provide clarity regarding specific tasks and issues to cover, and specific timeframes for each topic. Agendas and meeting materials will be made publicly available via a webpage on the NACEPT website and/or via the Federal Register

#### D. Summaries and Records

Meeting summaries of the proceedings will be prepared by the facilitators after each meeting and shared with the co-chairs for review, then distributed to the members in draft before the next meeting. Draft meeting summaries will be posted on the website prior to the next Subcommittee meeting. Summaries will only be final after review and approval by the full Subcommittee at the subsequent meeting (with the exception of the final meeting summary which will be finalized by the co-chairs).

An official record of Subcommittee deliberations will be kept and be made publicly available. Drafts will be provided to Subcommittee members for review and comment before they are made final. The chairperson(s) will be responsible for obtaining final report approval from subcommittee members based on deliberations at a public meeting. The DFO will ensure that the meeting summaries and final report are kept as records and that the chairperson(s) certify the summaries and the final report as accurate and complete within 90

days of the last meeting.<sup>1</sup> All agendas, meeting summaries and records will be posted on the Assumable Waters webpage which can be found on the NACEPT website at: <http://www2.epa.gov/cwa-404/assumable-waters-sub-committee>

## **VII. Decision-Making**

### **A. Definition of Consensus**

The subcommittee will strive to make decisions by consensus. Consensus is defined as no dissent by any member of the subcommittee.

Members should not block or withhold consensus unless they have serious reservations with the approach or solution that is proposed for consensus. Members who dissent are expected to make clear their reasons why and to offer alternatives or options that would possibly meet both the dissenting member's interests and the interests of other members.

Absence will be equivalent to not dissenting.

All consensus agreements reached are assumed to be tentative agreements until members of the subcommittee agree by consensus to make them final.

If there is dissent on procedural matters, the co-chairs, DFO, and facilitator will consult, taking into account the views of subcommittee members, and develop a way forward.

If consensus is not possible on substantive matters, the record of the discussion will reflect the different points of view expressed and the underlying reasons for those differing views. NACEPT will be provided the record of discussion which details differing viewpoints for issues on which consensus could not be reached.

### **B. Role of NACEPT**

The subcommittee does not have authority to make recommendations directly to the Agency. It must pass its recommendations to the parent committee (NACEPT). After a review of subcommittee recommendations to ensure they are within the scope of the subcommittee's jurisdiction, NACEPT will discuss and deliberate on the recommendations and may revise, reject or approve the recommendations.

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<sup>1</sup> FACA states that "documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist." (NARA General Records Schedule 6.2)

## **VIII. Meeting Facilitation**

EPA will provide a neutral facilitator or facilitation team for the subcommittee.

The facilitator is to remain non-partisan with regard to the topics discussed and outcomes achieved by the subcommittee.

The facilitator will be available to facilitate all subcommittee and workgroup meetings.

If requested, the facilitator is expected to hold the confidence of any member who speaks to the facilitator confidentiality.

Any concerns about the performance of the facilitator should be raised to the DFO.

## **IX. Safeguards for Members**

### **A. Good Faith**

All members agree to act in good faith in all aspects of the process. Good faith includes a willingness to bring all issues to the table, and explore openly all relevant and productive ideas that may emerge from the discussion of the subcommittee. Specific offers, positions, or statements made during the deliberations may not be used by other members for any purpose outside subcommittee meetings or as a basis for future litigation. It is the intent of the subcommittee that other attendees of the meetings also voluntarily comply with this provision in order to support the process by encouraging the free and open exchange of ideas, views, and information.

### **B. Member Guidelines**

To enhance the prospect of achieving a consensus on subcommittee recommendations, subcommittee members are asked to:

- Participate consistently in meetings;
- Clearly and succinctly state their needs and concerns early in discussions;
- Seek to understand other participant's needs and concerns;
- Actively participate in defining issues to be resolved;
- Assist in securing and bringing forward the best available information;
- Strive to develop creative solutions to problems that address multiple concerns; and
- Seek input from and report progress to colleagues, networks, and constituencies.

### **C. Right to Withdraw**

Any member may withdraw from the deliberations at any time without prejudice.

### **D. Media Statements.**

No member should make public announcements or hold discussions with the media characterizing the position of the subcommittee, EPA, or any other member of the subcommittee. A member may characterize her or his own position with media. The co-chairs will serve as points of contact for media inquiries regarding subcommittee deliberations as a whole during the process. During media inquiries, the co-chairs should limit their comments to talking points and key messages agreed upon by the full subcommittee.

#### **X. Docket and Subcommittee Website**

The EPA docket for this subcommittee can be found at EPA-HQ-OW-2015-0056. The webpage for the subcommittee can be found on the NACEPT website at: <http://www2.epa.gov/cwa-404/assumable-waters-sub-committee>