

**National Advisory Council for Environmental Policy and Technology**

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

**October 6-7, 2015**

**Meeting Summary**

**U.S. Environmental Protection Agency**

The following items are included in this meeting summary:

- I. Introduction
- II. Summary of Decisions, Approvals, and Action Items
  - A. Decisions
- III. Presentations and Key Discussions Day 1
  - A. Briefing on the Federal Advisory Committee Act (FACA)
  - B. Clean Water Act Section 404(g): Assumption 101 & Assumable Waters
  - C. Administrative Discretion
  - D. Michigan's Assumed Waters
  - E. New Jersey's Assumed Waters
  - F. Overview of Opportunities and Challenges for States and Tribes
- IV. Presentations and Key Discussions Day 2
  - A. Legislative History and Legal Interpretation of CWA §404(g)(1)
  - B. Questions to Answer and Definitions to Refine for Further Subcommittee Work
  - C. Exercise on Delineating Different Waters
  - D. K. Action Items for the Next Subcommittee Meeting
  - E. L. Discussion of End Product
- V. Public Comments
- VI. Wrap Up / Closing

## VII. Meeting Participants

- A. Participating Subcommittee Members
- B. Government and Members of the Public in Attendance
- C. Facilitation Team
- D. EPA OWOW Support Team

## Appendix A. Requests by Members for More Information and Definitions

### I. Introduction

The U.S. Environmental Protection Agency (EPA), with Laura Bachle presiding as the Designated Federal Officer (DFO), convened the first meeting of the National Advisory Council for Environmental Policy and Technology's (NACEPT) Assumable Waters Subcommittee on October 6<sup>th</sup> and 7<sup>th</sup>, 2015 in Washington D.C. The purpose of the meeting was to begin to provide advice and recommendations on how the EPA can best clarify which waters a State or Tribe assumes permitting responsibility for under an approved Clean Water Act (CWA) section 404 program.

### II. Summary of Decisions, Approvals, and Action Items

#### A. Decisions

- **Decision: the subcommittee members concurred with the suggestion to change “press” to “media” and then approved the operating procedures.**

#### B. Action Items

- The subcommittee members requested clarification and definitions of several terms (both verbally and by writing notes on flip charts), including adjacent wetlands, navigable, reasonable improvement, etc. – See Appendix A
- The USACE will present an overview of the Section 10 program in the December meeting.
- The USACE and USEPA will present an introduction to the issue of adjacency.
- Several states will present on their efforts to define “assumable” waters in both process and substance.
- A work group will review definitions suggested for further clarification in this meeting.
- The EPA will draft a graphic of the variety of waters, as suggested in this meeting.
- The EPA will seek to gather and post appropriate state and federal guidance, reports, and other materials relevant to the committee’s work.
- The facilitators will prepare a meeting summary of the meeting.

### **III. Presentations and Key Decisions Day 1**

#### **A. Opening Remarks**

After the Call to Order by Ms. Laura Bachle, the Designated Federal Officer, the subcommittee meeting began with welcoming messages from Mr. Ken Kopocis, EPA Deputy Assistant Administrator, Office of Water, and Ms. Benita Best-Wong, EPA Director, Office of Wetlands, Oceans, and Watersheds, Office of Water. Mr. Kopocis began by thanking the members for their participation. He described how the Subcommittee meeting will begin with some background on assuming authority of 404 permitting responsibilities and continued by stating that this meeting will engage states in helping the EPA to clarify which waters may be assumed by States and Tribes. This effort is part of larger initiatives of the EPA Administrator, Ms. Gina McCarthy, to protect waters and establish new partnerships with States and Tribes. Ms. Best-Wong also thanked the members. She stated that the decisions of this Subcommittee are important to the Agency as it wants the benefit of broad-based input to inform how to clarify assumable waters. She looks forward to the recommendations that the Subcommittee will make. Ms. Laureen Boles, the NACEPT liaison, briefly introduced herself and stated that she looks forward to being a part of this effort.

The meeting continued with introductions of all 21 Subcommittee members present, as well as other individuals in attendance. A full attendance list can be found in Section VII on pages 24 and 25. The co-chairs, Mr. David Evans, EPA, and Mr. Barry Rabe, Ph.D., University of Michigan, both described their roles and set the stage for the meetings. Mr. Evans explained that the charge of this subcommittee is quite specific, but that does not mean that it is narrow; the scope may be well defined, but the group has flexibility when making recommendations to the NACEPT. He concurred with Mr. Kopocis in that the EPA hopes this will further its priority of taking State and Tribal partnerships to a new level. This subcommittee was in response to a request by the Environmental Council of States (ECOS), Association of Clean Water Administrators (ACWA), and the Association of State Wetland Managers (ASWM). He expressed the EPA's desire for recommendations on which waters States and Tribes may assume. Dr. Rabe continued by thanking everyone for participating and added that he hopes to bring his understanding of federalism to this subcommittee. He noted that it is rare to have these types of conversations and hoped that the group could create recommendations that are in the best interest of the statute.

Ms. Peg Bostwick, of the Association of State Wetland Managers, asked if the EPA wants recommendations or changes in procedures related to assumption of 404 permitting responsibilities. Mr. Evans expressed that he personally thinks that it would be good if the subcommittee could make recommendations on both process and substance.

Ms. Michelle Hale, of the Alaska Department of Environmental Conservation, questioned Dr. Rabe on what meant by his hope that the subcommittee create recommendations that are faithful to the statute and wondered if it would be alright for the recommendations to evolve

within the ambiguities of the original statute. Dr. Rabe explained that while science has changed in the decades since the statute was written, we are clearly not tasked with changing it. The group should consider all that has changed with these issues over the years and try to incorporate it into the statutory context. Mr. Eric Metz, Oregon Department of State Lands and Oregon Department of Environmental Quality, asked if the subcommittee is working off of what the original statute said. Mr. Evans noted yes, but that the statute's provisions on this matter are general and therefore there is room for interpretation. He added that upcoming presentation by Ms. Simma Kupchan, EPA, would add clarity to this issue, in regards to legislative history.

## **B. Review of Operating Procedures**

Mr. Patrick Field, the subcommittee's facilitator, from the Consensus Building Institute, led a review of the operating procedures for the meetings. The operating procedures can be found here: <http://www2.epa.gov/cwa-404/assumable-waters-sub-committee>. Mr. Field highlighted several parts of the operating procedures.

- All subcommittee members have an equal position during meetings. Mr. Field and the EPA support team will make every effort to schedule all meetings so that the maximum number of members may attend. Any meeting of 50% +1 of the members (12 for this subcommittee) is considered a public meeting, regardless of where or when it takes place.
- Members are reminded that while participating in the subcommittee, they represent their respective organizations rather than themselves. Members may be terminated by the DFO if they have a conflict of interest, are not showing up to meetings, or behave in an exceptionally disruptive manner, but this is rare.
- Mr. Field stated that alternates for members are not allowed, but he hoped that meeting times will be acceptable to all. Mr. Evans concurred and explained that the public comment periods during each meeting allow for non-members, including those from the members' organizations, to weigh in.

Mr. Evans continued by stating that while he wants to participate substantively in these subcommittee meetings and encourage robust and egalitarian participation of others, he will be mindful to listen more and not steer the subcommittee. As the EPA headquarters representative, he is more interested in facilitating the group's work to produce recommendations. Dr. Rabe concurred and explained that he has no agenda except to aid in providing perspective in framing the issues.

Mr. Field continued by adding that the co-chairs do have the right to change the agenda if need be, yet all members can contribute. Also, all documents, presentations, or similar things that are "brought" to the subcommittee meetings are required to be made public. A draft meeting

summary will also be made by Mr. Field with the assistance of Mr. Jake Strickler, EPA. It will be shared with all members and subject to their revisions before being approved at the next subcommittee meeting.

Mr. Field continued to detail the protocols.

- He explained that subcommittee members are expected to work in “good faith”, which includes being respectful, engaged, creative, and checking with their respective constituents.
- He expects the group to strive for formal consensus, meaning no dissent. If a member is not present that implies no dissent. If a member does decide to dissent, he expects that member to explain their reasons for dissenting and to offer alternatives. Withdrawal from the subcommittee is allowed, but it is expected that a reason for withdrawal be given.
- When speaking to the press, members are only allowed to represent their personal views and those of their organization, not those of the entire subcommittee.

Mr. James DeNomie, Midwest Alliance of Sovereign Tribes, suggested that the term “press” in the operating procedures be changed to “media” to better reflect all types of media including television, radio, and social media, in addition to the written media.

➤ **Decision: the subcommittee members concurred with the suggestion to change “press” to “media” and then agreed to approve the operating procedures.**

Ms. Sineta Brown, EPA, who has been responsible for all meeting logistics and travel vouchers, briefed the group on EPA rules on travel. She will send an email to participants with a request for all relevant receipts (ex. toll, hotel, public transit, taxi). The faster that she receives the receipts, the faster she is able to send reimbursements. The bank is usually able to process reimbursements within 3-5 business days. She encouraged members to contact her with any questions.

Mr. Field provided information on the schedule of meetings for the subcommittee. There will likely be four to six depending on the need. The next one is scheduled for December 1<sup>st</sup> and 2<sup>nd</sup>, 2015. He placed paper on the walls for members to note schedule conflicts from February through June of 2016. Ms. Hale noted that state legislative sessions run from January through April. Some state members may be required to be present in their home states during this period, perhaps even on short notice.

Ms. Hale then asked what the topic might be for the next meeting. She suggested a presentation on different scenarios for how States and Tribes might implement 404. Dr. Rabe concurred and said there should be time during the next meeting for States and Tribes to present their experiences of considering 404 assumption. Ms. Virginia Albrecht, National

Association of Home Builders, agreed adding that it would be helpful to know what problems the members' organizations are trying to solve. Ms. Hale expressed her view that these problems stem from the statute not being clear. Mr. Metz volunteered that Oregon's experience negotiating 404 assumption with the Portland District of the U.S. Army Corps of Engineers (USACE) has been difficult. He added that he is glad that this subcommittee meeting is happening and that it is open and transparent. Mr. Gary Setzer, Maryland Department of the Environment, stated that when Maryland was considering 404 assumption, they began the process by asking the USACE directly what waters were assumable and that he had a good experience back in 1993-94. This led Ms. Albrecht to pose the question of whether a State or Tribe starts these negotiations by going to the USACE? And who has the legal jurisdiction to make the determinations? The group called on Ms. Kathy Hurld, an EPA technical expert in the room, and Ms. Hurld stated that these were important questions to ask and that the group will need to have discussions around those topics.

Mr. William James, USACE, stated that CWA §404(g) leaves out mention of navigable waters and that historically navigable waters are old and complex, yet will be a large part of this discussion. Another large issue will be the discussion of the meaning of "susceptible with reasonable improvement".

Ms. Hale pointed out that the problem for States when they negotiate with USACE Districts and EPA Regions is that they both have to communicate with their headquarters. Mr. Dave Ross, Wyoming Attorney General's Office, expressed an interest in knowing more about the background of Section 10 waters from the USACE. Mr. Setzer pointed out that Maryland negotiated 404 assumption with the USACE and then with the EPA separately. For Ms. Hale, the manner in which Alaska made a memorandum of understanding with both the EPA and the USACE solely around the process of negotiating assumption, was very productive. Mr. Metz added that he does not blame the Corps for its difficulty in negotiating assumption because it does not have guidance. Ms. Bostwick asked if the USACE has lists of navigable waters and if so, have they changed over time. Mr. James responded by saying that almost all USACE Districts post their Section 10 waters, but that he is not sure if the navigable waters change over time. From his experience with the Nashville District in 1986, he knows that that District has not changed their Section 10 waters.

### **C. Briefing on the Federal Advisory Committee Act (FACA)**

Ms. Marilyn Kuray, EPA Office of General Counsel (OGC), presented on the legal requirements under the FACA. This presentation is available at <http://www2.epa.gov/cwa-404/assumable-waters-sub-committee>:

Ms. Kuray highlighted how FACA committees and subcommittees are meant to allow federal agencies, like the EPA to get input from the public without having "closed door" meetings. She described how this subcommittee is charged with making recommendations to the chartered

committee, NACEPT. Only NACEPT can make recommendations to the EPA and has a broad authority to do many things with the subcommittee's recommendations. However, if the subcommittee bypasses the NACEPT and makes recommendations directly to the EPA, those recommendations will become illegitimate and unusable. Furthermore, individual subcommittee members may only represent themselves and never the subcommittee as a whole.

Ms. Kuray also described the role of the DFO in FACA meetings. It is the DFO's responsibility to call all meetings to order and to close them; he/she has the authority to end the meeting at any time should they become unruly. Additionally, subcommittee members are responsible for representing their respective organizations while participating in the FACA meeting. There is no requirement for financial disclosure, but if members are aware of a potential conflict of interest, it is best to discuss the issue with the DFO. Also it is prudent to tell the DFO if one is meeting with one's congressional representative while in Washington, DC for the FACA subcommittee.

Finally, Ms. Kuray warned that some social media meetings could be considered virtual meetings if enough members were participating. They would therefore need to be open to the public. She requested that members exercise caution when using email or cloud editing with other members (for example, neither using "reply all" when responding to subcommittee-related emails nor emailing a quorum of members, which is 12 for this subcommittee). Ms. Kuray also clarified that workgroups for this meeting will be subject to FACA regulations for public involvement when they reach 12 or more members. Mr. William James of the U.S. Army Corps of Engineers raised the issue that he may need to contact many of the Corps' districts for data and information, but Ms. Kuray said that this would not be an issue.

Mr. Trevor Baggiore, Arizona Department of Environmental Quality, asked for clarification on who the NACEPT members are and what types of recommendations they consider. Ms. Laureen Boles, as a NACEPT member herself described the group as diverse both in its membership and also the types of issues that it deals with.

#### **D. Clean Water Act Section 404(g): Assumption 101 & Assumable Waters**

Ms. Kathy Hurl introduced herself as an EPA staff member in the Wetlands Division of the Office of Water's Office of Wetlands, Oceans, and Watersheds. She is the EPA's national lead on 404 assumption. She presented background on CWA Section 404(g) says and the reasons for having this subcommittee meeting. Her presentation can be found here:

<http://www2.epa.gov/cwa-404/assumable-waters-sub-committee>. In addition to what is described in her presentation, Ms. Hurl highlighted that the CWA is meant to be a floor; that State and Tribal regulations have to be consistent with and no less stringent than the federal regulations. She confirmed that the CWA 106 grant monies given to the States and Tribes are to be used to implement all CWA programs (including implementation of CWA 404 programs) and

that there are no federal funds allocated for the express purpose of implementing an assumed CWA section 404 program. There is also no partial assumption; either a State or Tribe takes on permitting responsibility for all of the waters that the USACE does not retain or it assumes none. Ms. Hurld noted that in the context of the recently released Clean Water Rule (CWR), the subcommittee could get caught in discussions of if a water is a water of the U.S. or not. However, for the purposes of this meeting members should assume that any given water is a water of the U.S. and that the subcommittee is only working on who the permitting authority is.

In response to Ms. Hurld's presentation, several subcommittee members stated comments or raised questions:

- Ms. Hale noted that the amount of waters now covered under the final regulatory definition of Waters of the U.S. will impact the cost of assumption for States and Tribes.
- Ms. Bostwick added that within 404(g)(1), the subcommittee is really only discussing adjacent wetlands. Mr. James clarified that statement by adding that while the focus has been on wetlands, streams and tributaries should also be considered.
- Mr. DeNomie explained that Wisconsin, being surrounded by the Great Lakes and containing over 14,000 lakes, as well as having the second most numerous separate Tribal communities, may be a nightmare for having multiple permitting entities.

Other members (and the facilitator) asked the following questions; *responses from Ms. Hurld are italicized*:

- Mr. Field asked what the phrase "wetlands adjacent thereto" modifies. Does it mean the entire parenthetical? Or all waters as the current legal interpretation seems to support?  
*This has been interpreted by the agencies to apply to the entire parenthetical. However, she noted that the group does not need to be exact in definitions, we are looking for recommendations that help provide clarity on permitting authority. The interpretation of this group could be different if it helps the discussion.*
- Mr. Ross felt that legal questions are important and wanted to understand the meaning of the comma within the CWA §404(g)(1) statute.  
*This subcommittee could make recommendations on the meaning of that comma.* Mr. Evans suggested that the EPA could ask their OGC for written comment on the best legal reading of this statute. Ms. Hale supported the idea of seeking legal advice to understand the meaning of the comma in the statute. Mr. Field wondered whether or not a FACA subcommittee could seek legal advice separate from the convening agency.
- Mr. Thomas Driscoll, National Farmers Union, wondered how assumption worked in practice.  
*States usually have the tributaries. Avoid getting into the discussion of if certain waters are or are not "Waters of the U.S.". Focus on what the USACE retains and what the States or Tribes can take.* Mr. Evans noted that the waters that are currently controversial

under the current regulatory definition of Waters of the U.S. (sometimes referred to in common vernacular as the Clean Water Rule; an example of which is ephemeral streams) are not going to be the most difficult waters to decide upon for the goal of this subcommittee; these waters will clearly be assumable by States or Tribes. Mr. James suggested that diagrams and maps of examples would be very helpful.

#### **E. Administrative Discretion**

Mr. Michael McDavit, EPA, Wetlands Division of the Office of Water's Office of Wetlands, Oceans, and Watersheds, presented on the topic of administrative discretion and how it applies to what this subcommittee can and cannot recommend. His presentation can be found here: <http://www2.epa.gov/cwa-404/assumable-waters-sub-committee>. Mr. McDavit described how executing discretion can be done when the law is vague, as is the case with CWA §404(g)(1) and in fact the EPA is asking for the subcommittee's help with clarifying how to administer the statutes provisions. He gave examples of when the EPA does implement discretion including the Oil Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act; in both cases common sense discretion what used to operationalize these laws. Mr. Metz indicated that he liked the term "operationalizing" the law and stated that discretion is widely used in any program. The regulator ultimately is responsible for making these types of decisions.

#### **F. Experience of the Two States Assuming the Program**

##### *1. Michigan's Assumed Waters*

Ms. Kimberly Fish introduced herself as representing the Michigan Department of Environmental Quality, specifically the Water Resources Division. Ms. Fish presented on the history and issues of Michigan's experience with assumption of 404 permitting responsibilities. Her presentation can be found here <http://www2.epa.gov/cwa-404/assumable-waters-sub-committee>. Ms. Fish described Michigan as having a long history of strong environmental regulations in addition to a mindset to managing their own resources. This prepared them well for assumption. They assumed 402 permitting responsibility as soon as they were able. In 1977, long before they assumed 404 responsibility, they were working with the USACE. It was a time in which the state employees were doing reports for the USACE. This created both strong legal and personal relationships between the two organizations. Michigan's 404 assumption was further facilitated by another unique factor: unlike many states, all of Michigan is the responsibility of only one USACE District, Detroit. This facilitates communication and understanding. The USACE also appreciated the help as the State had more personpower at the time than the District.

Michigan's Assumption is based on a Memorandum of Agreement (MOA) between the State and the USACE. In this MOA, the USACE retains responsibility for only those waters that are on a Section 10 list (in addition to the obvious cases of the Great Lakes). This list is specific and results in well-defined boundaries. Most of the USACE-retained waters are within a narrow band of streams that flow into the Great Lakes. This list has grown over time and some small tributaries and wetlands, or parts of wetlands have been added. Michigan has assumed the remaining waters, which are the vast majority of the waters that are internal to state. All applications come to the State first, which then looks at them to see which organization has jurisdiction. There are some waters in which Michigan and the USACE have joint jurisdiction. In these cases they work together on the site inspections and usually the state takes the lead on mitigation.

Ms. Fish explained that Michigan has gone through some controversy regarding cost and state budgeting in keeping their 404 program. The program had to reeducate their constituents and show how the state-run program was more efficient. In most cases the clarity of the state-run program is appreciated.

Other members asked the following questions; *responses from Ms. Fish are italicized*:

- Mr. Collis G. Adams, New Hampshire Department of Environmental Services, asked Ms. Fish to speak to her experiences, especially in regards to wetlands protection and easements. *After the federal mitigation rules were passed, Michigan also had rules, and therefore there was little discretion. The statutes now allow Michigan to hold easements. This is a big responsibility and enforcing easements can be a nightmare. Yet Michigan decided that it was worth the effort because it makes things easier for permit applicants and there is no third party who has to hold the easements. The lack of clarity from the EPA on this law makes implementing it difficult. Working through that lack of clarity takes a lot of dialogue.*
- Ms. Hale asked about the MOA and how flexible the list used for it is. *The list has changed over time, primarily related to tributaries.*
- Mr. Ross asked who permits the wetland mitigation banks within Michigan. *The State does and it works closely with the EPA and USACE. Michigan usually takes the lead in the process and works with the banker.*
- Dr. Rabe wondered how Michigan was able to take such a leadership role in this. *That role came out of the cooperative relationship that the State had built with the EPA and the USACE. It also helped that Michigan had already been a leader in environmental regulation.*
- Mr. Metz asked what role the EPA has in reviewing permitting requirements. Ms. Hurld was called upon to answer and elaborated that for anything that threatens endangered

species, involves hazardous materials, wild and scenic rivers, review cannot be waived. Furthermore, the EPA retains the right to review any permit. Ms. Fish added, this can become confusing when waters change, for example if a dam is removed. Yet Michigan's MOA with the USACE does not address what happens when waters change.

## 2. New Jersey's Assumed Waters

Ms. Susan Lockwood, New Jersey Department of Environmental Protection, presented on the State's 404 assumption program. Her presentation can be found here <http://www2.epa.gov/cwa-404/assumable-waters-sub-committee>. New Jersey's history with 404 assumption is different from Michigan's in many ways. New Jersey is the most densely populated state in the country and at the time they were considering assumption they were experiencing rapid loss of wetlands. New Jersey hoped to slow this with Coastal Zone Management in 1972 and the 1987 Freshwater Protection Act. They were also motivated to assume 404 responsibilities by a poor relationship with the USACE. They developed a 404 program based on three parameters. First, if a waterway is to be regulated it needed to be mapped. Second, the State took all USACE regulated waters and added a 1000 foot buffer, which is simply a mapping convention to make clear boundaries for permitting responsibilities. CWA 404 states that the State regulates all waters, yet if something is a coastal wetland the State may regulate it. New Jersey does regulate these waters, but it not under assumption. Finally, in 2008 New Jersey began to review its own mitigation banking policies.

Other members asked the following questions; *responses from Ms. Lockwood are italicized:*

- Mr. David Davis, Virginia Department of Environmental Quality, asked if the way that New Jersey drew the line where it assumes permitting responsibility derived directly from the statute. *The 1000 feet that they settled on, was simply a distance that they felt was good. 100 feet could have been their definition, it was up to their discretion.* Ms. Bostwick noted that while there is room for discretion in interpreting the statute, CWA §404(g) does list waters that are assumable.
- Mr. Ross asked if the list of waters retained by the USACE has changed much over time, as it has in Michigan. *No, they have not.* Mr. Setzer pointed out that many of New Jersey's waters are like Maryland's; they are coastal tidal waters and therefore retained by the USACE. There are few navigable rivers. *What New Jersey did for its assumption program works.*

## G. Overview of Opportunities and Challenges for States and Tribes

Ms. Peg Bostwick, Association of Wetlands Managers, presented and led a discussion on the topic of assuming 404 permitting responsibilities from the perspective of States and Tribes. She

noted that she has long been a proponent of assumption since she worked in Michigan for about 20 years. During that time she found that people quickly get used to the state permitting process. She believes that it is important to maintain the mindset that assumption is something positive. She also stated that the USACE might be reluctant to give up its permitting authority. Yet, she said that there is no State or Agency that has the ability to do all aspects of 404 permitting and therefore they need to work together. She also spoke a bit to the history of 404 assumption and noted that there have been many changes since 1977 when it began. She sees some concern that the definition of navigable waters and adjacent wetlands has grown to a point where too few waters are able to be assumed, hence making assumption not worthwhile for States and Tribes.

Ms. Bostwick laid out several main issues that this subcommittee will have to deal with. The first is the question of what waters are defined as Section 10 waters by the USACE. When Michigan assumed, these were pretty clear. Yet the CWA was an expansion beyond those Section 10 waters. Congress stated that in those waters where the U.S. was expanding its protection (i.e. beyond Section 10 waters), the States could assume (these would be classified as Phase I, II, and III). The original mission of the USACE was to protect large commercial waters that were the Section 10 waters.

A second main issue that Ms. Bostwick thinks the subcommittee will have to deal with is that it will be difficult for the subcommittee to recommend a standard that will clearly delineate which waters can be assumed. She suggested that the criteria will need to change depending on geography of the country and that any recommendation will need to allow for some flexibility. The two examples of states that have assumed (Michigan and New Jersey) highlight what can be done with flexibility. Flexibility will be required when characterizing “adjacent” waters as this is a very difficult term to define. The USACE was originally interested in adjacent waters that could impact navigable waters, but now they have expanded their authority. Ms. Bostwick also pointed out some things that are taken for granted, may not always be true, for example, the idea that interstate waters are never assumable. There are cases of states taking on permitting authority of some of these waters.

Finally, Ms. Bostwick pointed out that there are some unique instances to be aware of, like when the Corps has to maintain jurisdiction on Tribal lands. States cannot assume jurisdiction over lands that are held in trust by the federal government.

Ms. Bostwick's presentation was followed by a facilitated discussion of this topic and members made the following comments and questions; *responses from Ms. Bostwick are italicized*:

Mr. Metz found the presentations and discussions to be a fruitful start to understanding what waters are assumable, however he expressed concern that making recommendations that will translate into easily “map-able” delineations, especially for adjacent waters will be more

difficult. He believed that the group could make a lot of progress in providing clarity, but was uncertain if they could provide enough clarity for a state like Florida, which is dominated by interconnected waters. Ms. Hale agreed with Mr. Metz in that the group has had a good start.

Ms. Boles questioned whether there is a time period that was the most relevant to consider when analyzing the meaning of Section 404. *An appropriate place to begin is 1977, when Congress amended the CWA, adding Section 404(g). It is important to first understand the congressional intent behind the statute, before expanding upon it and interpreting it in the light of what has changed since the law was created.*

Ms. Albrecht suggested that it would also be interesting to look at various definitions of “traditionally navigable waters”; different Agencies sometimes mean different things when using this term. She pointed out that it might help give the subcommittee ideas on how to parse out 404. *It would also be worthwhile to look at “commercial navigation” and how it might include recreational activities like fishing, but then consider if that was the original congressional intent.* Ms. Jan Goldman-Carter, National Wildlife Federation, noted that it would be useful to explore the legislative history in order to understand what Congress meant by these terms in 1977. Mr. Adams concurred and suggested forming a workgroup focused on this, which he volunteered to participate in. Mr. Metz expressed that he did not think the subcommittee needed to fully understand congressional intent before they moved forward. They could make progress and then come back to these definitions as needed.

Mr. Field posed the idea that during the following day’s meeting that it would be useful to create three categories – retainable by the USACE, clearly assumable, and the things in-between – and then take time explaining each category by giving examples of waters that would fall under each category. Ms. Goldman-Carter, agreed with this and thought these categories could provide touchstones as to which waters are and are not assumable.

Ms. Hale noted that it would be useful to understand the interests of the USACE and the States and Tribes. She pointed out that transferring permitting authority from the USACE to States or Tribes will not reduce environmental protection as they are both required to meet the minimum standards of the CWA. She questioned the need for the USACE to be doing any permitting at all. They are interested in navigation and states can do what is needed to maintain navigation. Ms. Albrecht explained that in 1977, Congress gave 404 permitting authority to the USACE because they were already regulating waters used for commerce.

Mr. Les Lemm, Minnesota Board of Water and Soil Resources, stated that it will be important for the subcommittee’s definition of adjacency to be different from that of the Waters of the U.S. Rule. The question of who will do the permitting is a political or administrative line, not an issue of science like the Waters of the U.S. Rule.

Several members discussed the idea of recommending flexibility for each State or Tribe that may assume 404 permitting authority. Ms. Bostwick noted that it will be helpful to have a clearer process by which waters are understood to be assumable. Currently the USACE simply states those that are and those that are not. She stated that recommendations from this subcommittee would allow for flexibility as there are no absolute answers to the question of what waters are assumable. Ms. Hale was concerned about allowing too much flexibility, as there are vastly differing views between the USACE, the EPA, and Alaska about what is assumable (she used the example of Alaska's North Slope). She argued for having "bright guidelines" because administrations change, and any new administration may change its interpretation of assumption if it is not clearly defined.

On the issue of the USACE's interpretation of CWA §404(g), Mr. James noted that he knows of no guidance for the USACE Districts on how to interpret and negotiate the law. The 38 Districts individually reference the statute. Mr. Metz questioned how the subcommittee's recommendation would be brought back to the 38 Districts as he imagined that issues with different interpretations and implementations will arise. Mr. Evans stated that Mr. James will be extremely valuable for this. The EPA is glad that he is the USACE representative on this subcommittee as he is well positioned to transmit the recommendations back to the USACE Districts.

Ms. Albrecht asked if there would be similar issues with the EPA Regions since there are 10. Mr. Michael Szerlog, EPA Region 10 (member participating via phone), responded by stating that each Region is different and the conversations about assumption also change when the Regions speak with different Districts. He stated from the perspective of the EPA Regions that it will help to have recommendations that will make assumption easier to understand for States and Tribes. Court cases and other rules have added meaning to the topic of assumption, but that has also made the issue more difficult to understand.

The final discussion on the first day of the meeting was a chance for members to voice their impressions of the first day.

The co-chairs began the discussion with Mr. Evans stating that the first day was a good start to understanding the issues. Dr. Rabe concurred and added that the group will need to have clear tasks lined up for the next meeting. He was particularly interested in what information and presentations the USACE might be able to bring to the next meeting. Mr. Evans added that he was uncertain if the subcommittee would be able to achieve a universal definition of what the waters would be retained by the USACE. However, he hoped a recommendation could be achieved that would provide guidance on substance and clearer definitions of key terms. The ideal outcome would be both substantive and procedural and would produce clarity for assumption in different settings.

Ms. Hale indicated that there are some members of the public, from ECOS, that the state representatives might want to meet with.

Mr. Metz asserted that the subcommittee will need a good work plan in order to achieve its goals. Mr. Field stated that there would be time the next day to create a work plan. Mr. Evans added that while the EPA cannot draft recommendations or suggest outcomes, it can work to provide information to the group. Mr. Metz also noted that workgroups will need to be formed and members will need to take on the leadership of these workgroups. Mr. Field concurred stating that FACA committees and subcommittees are most effective when they do most of their own work.

Dr. Rabe suggested that other presentations on experiences of other states would be helpful. Ms. Albrecht and others agreed that this would be appropriate for the December subcommittee meeting.

Mr. Adams noted that at a recent meeting he saw a pictograph about the current regulatory definition of Waters of the U.S. that the EPA had created. Mr. Evans knew about this and said it would be possible to share it with the group.

The term “Daniel Ball” was raised earlier in the meeting by Ms. Albrecht. She researched the term and briefly presented to the group. It refers to a river in Michigan and a question of its navigability. Under English common law, the Crown would have jurisdiction over navigable waters. This is easy to delineate around the British Isles as most navigable waters are tidal. For many years the U.S. had the same law. In 1871 navigable waters were redefined as waters that were used for commerce. These waters of the U.S. were interstate or foreign commercial highways; the key elements being that cargo or people were carried over them.

#### **IV. Presentations and Key Decisions Day 2**

The DFO opened Day 2 and noticed the public of the public comment period scheduled during the day

##### **A. Legislative History and Legal Interpretation of CWA §404(g)(1)**

Ms. Simma Kupchan, EPA Office of General Counsel, presented on the background of CWA Section 404(g)(1) of the CWA. Her presentation can be found here <http://www2.epa.gov/cwa-404/assumable-waters-sub-committee>. She began with the legislative history of the law. The CWA was passed in 1972, but Section 404(g)(1) was added by amendment in 1977. At that time it was expected that most states would assume permitting responsibility.

There is a good legal understanding of (a)(1) waters, which are waters used for commerce and includes waters that were used for commerce in the past. However, the legal understanding of

(g)(1) parenthetical waters is less clear. The Supreme Court has acknowledged that (g)(1) waters extend beyond navigable waters.

The presentation on the background of (g)(1) began with the Rivers and Harbors Act (RHA) of 1899, which the USACE has exercised since it was enacted. After the CWA was passed in 1972, the USACE promulgated regulations limiting the scope of its authority under the CWA to its jurisdiction over navigable waters of the US under the RHA. The EPA Administrator, Mr. Russell Train, wrote to Congress requesting that the USACE adopt a broader view of the Waters of the U.S., and the US District Court for the District of Columbia eventually remanded this regulatory interpretation. In 1975, the USACE promulgated a new round of regulations which interpreted the CWA term “waters of the US” more broadly. The 1975 regulations included three phases Phase I waters were all of the waters that the USACE had been regulating; Phase II included Phase I waters, plus all tributaries of those waters; Phase III included Phases I and II and all other Waters of the U.S., included isolated water bodies. The 1975 “phases” were retained but consolidated into a revised regulatory definition in 1977. Members of the U.S. House of Representatives were then concerned that the scope of USACE’s definition was too broad and passed a bill which would have limited the Corps’ jurisdiction to waters that, among other things, are *presently* used in interstate and foreign commerce, reserving jurisdiction over other waters to the state. The full Congress ultimately rejected the House’s narrowing of CWA jurisdiction, and instead passed Section 404(g), which allowed states the option of establishing a section 404 permitting program that meets all CWA requirements, but retained under Corps administration those waters which are presently used in interstate and foreign commerce.

In response to Ms. Kupchan’s presentation, members asked the following questions; *responses from Ms. Kupchan are italicized:*

Mr. James asked why there are so many States that have assumed permitting responsibility of CWA Section 402 while so few have assumed 404. Ms. Hurlburt was called upon to reply and stated that in the 1970’s more States already had regulations in effect for “end of the pipe” pollution, which made it easier for them to assume responsibility for Section 402 (which regulates that type of pollution). Fewer States were regulating for dredge and fill of waters as Section 404 does. Furthermore, 402 assumption allows for taking on the regulation of some pollutants and not all if a State or Tribe decides they are only capable of some regulation. In contrast States and Tribes have to take on all the permitting responsibility for all waters that are deemed beyond the jurisdiction of the USACE; they cannot pick and choose in a manner like they can with 402. Finally and perhaps most importantly, that Congress did not provide money for 404 programs, unlike 402 programs. *Congress had intended that 402 and 404 could be assumed in the same manner.*

Ms. Bostwick asked why the subcommittee could not simply look to the Phases to decide which waters the USACE would retain and which the States and Tribes could assume. *The USACE was already regulating Phase I waters, which were intended to match up with (a)(1) waters that were currently and historically used for transport of interstate commerce. Congress had intended (a)(1) to equal Phase I, however (a)(1) is broader than (g)(1) because it includes historical use and use for recreation.* Ms. Boles questioned the significance of "recreation" in the statute. *While (g)(1) has the term "transport", (a)(1) does not, therefore (a)(1) could include recreation on interstate waters as commerce, which is an example of it being much broader. Congress did not explain the difference between (a)(1) and (g)(1).* Mr. Lemm noted that the interim regulations from 1975 to 1977 could give the subcommittee a view of the congressional intent. *Ms. Kupchan stated that it is important to note that (g)(1) includes adjacent waters. It could be easiest to define adjacency in (g)(1) as the current regulatory definition of Waters of the U.S..* Mr. Davis noted that comparisons of parts of the CWA are confusing. For example, 402 just referred to "end of the pipe" discharges, yet while 404 which was created later and is less clear, it is still frequently compared to 402. He questioned the reasoning for looking at (a)(1) when it seems easier to start with Phase I waters as being retained by the USACE. *It is valuable to look at (a)(1) because that provision has been analyzed extensively in the case law, certainly more than Phase I.* Ms. Hurld noted that the current regulatory definition of Waters of the U.S. does not change the definition of (a)(1).

Mr. DeNomie questioned if the Tribes have been included in 404. *Tribes have been included.* Ms. Hurld added that in EPA regulations, when Congress gives States authority, this authority is the same for Tribes.

Mr. James raised the issue that while the new regulatory definition of Waters of the U.S. does not change §404(g)(1) directly, the new regulatory definition does change how adjacent waters are defined. He questioned whether the subcommittee could provide clarity for 404 assumption without using the current definition for adjacent waters as it is defined in the CWR. Ms. Hale noted that the definition for adjacency under the CWR has the same intent as the rest of the CWA, namely to improve water quality. Mr. Ross expressed concern that the group could be tempted to involve itself too much in the CWR. He explained that the group is charged with clarifying what waters the USACE will retain and therefore only the adjacent wetlands to navigable waters should be debated,. *The CWA in general was a move to improve water quality and did not have a focus on navigability.* Mr. Evans concurred and added that in 1977, Congress clearly could not have understood waters subject to the CWA with the precision that it now does when defining waters. Yet it is part of the charge of the subcommittee to make recommendations about how the law should be implemented, and it has the freedom to base its decision on original congressional intent or how the law is applied today or some combination of the two.

Mr. Baggioire pointed out that members of the subcommittee were frequently using the term “traditional navigable waters”. He noted that this may have different meanings when comparing Section 10 waters and CWA §404(g)(1) waters. Ms. Hale added that Section 10 waters lists are not concrete, but rather change and vary from one USACE District to another. Mr. James noted that in the case of Michigan, the waters that the State assumed did not include the traditional waters. Mr. Field questioned whether the terms “traditionally navigable” and “historically navigable” were equal. *In this context they should have the same meaning.* Mr. Davis added that “traditional navigable waters” is not a term that is always appropriately used as it has become mixed up and used to refer to (a)(1) waters. (a)(1) waters are, however, much broader in what they cover. Mr. Ross suggested that (g)(1) waters were equal to Section 10 waters minus those that were used historically.

Mr. Metz provided an example of Oregon’s proposition of which waters it might retain., Oregon suggested that USACE retained waters only include those waters (rivers) that were currently used to transport goods; they removed the term historical and added transport. This would have made the State’s work a lot easier in determining jurisdiction. Ms. Bostwick added that the organization for which she works, the Association of State Wetland Managers, has seen a lot of suggestions for different types of assumption, for example, Florida would like to assume all of its waters. While it is important to try to meet the desires of States and Tribes, one also has to acknowledge that the USACE is responsible for carrying out its mission to maintain the waterways of this country.

Mr. Setzer highlighted that the subcommittee has been focusing on regulations, yet statutes are more important. *Ms. Kupchan concurred and stated that while statutes trump regulations in their legal weight, it is important for the subcommittee to look at the regulations in order to understand how the statute has been interpreted historically. Moreover, regulations are law as well.*

- The subcommittee members requested clarification and definitions of several terms (both verbally and by writing notes on flip charts), including adjacent wetlands, navigable, reasonable improvement, etc. – See Appendix A

#### B. Questions to Answer and Definitions to Refine for Further Subcommittee Work

Mr. Field then facilitated a discussion to identify the key questions that the subcommittee needs to answer during this process.

Ms. Lockwood noted that the USACE had navigability as its focus until the CWA was enacted. They then had the additional responsibility to deal with environmental issues; the USACE has a

mission to preserve navigability *and* protect water quality. It's inappropriate to characterize them as only having a mission to preserve navigability. Mr. James added that at the time that the CWA was enacted, Congress looked at other Agencies who could take on the responsibility of protecting water quality under CWA §404. Because the USACE had a history of permitting, they were chosen to issue permits under the CWA.

Ms. Fish pointed out that while we may talk of States and Tribes assuming permitting responsibility, the USACE and the EPA will still be very involved. There is always a need for a partnership.

Mr. James brought up the issue of confusion surrounding the use of the term "susceptible to use". This term does not mean, for example, that a river that could be made navigable by the building of a dam or other large changes, is "susceptible to use" as a navigable waterway. Mr. Davis used the example of a rocky river, where it is easy to remove the rocks to allow boats to pass, as being "susceptible to use". Ms. Goldman-Cater added that this term is about "channels of use". People may decide to use a waterway for navigation in the future. Mr. Ross also pointed out that this term and others are meant to allow for some flexibility when applying the law.

Ms. Lockwood made the point that dams usually make the upstream limit for Section 10 waters. While this is often the case, Mr. James noted that it is not necessarily true.

Mr. Metz questioned the need to develop very thorough definitions for all of these terms in order to achieve the goals of the subcommittee to make its recommendations. Mr. Field rephrased the objective as what is necessary to define in order to achieve the goals of the subcommittee. Ms. Boles added that the group should make efforts to define all relevant terms well as its guidance will be based on these terms. Mr. Evans noted that part of the recommendations of the subcommittee could be identifying the definitions that need to be clarified. Mr. Szerlog also noted that it is useful to have the regulatory history when striving to have clearer definitions. An example is that "assumable" is defined differently by the USACE across the country.

Mr. Davis noted the group was becoming very focused on federal law and questioned whether they needed to focus on state laws. He stated that often States have more stringent water quality laws. There was a question as to whether if a State's laws were broad enough to cover both CWA §404(g) and the USACE Section 10 waters, could it take over permitting of every water. Mr. Evans explained that this is not possible because States (and Tribes) cannot issue permits for things that CWA Section 404(g) states belong under the USACE's jurisdiction. Ms. Hurlt stated that the 404 program is an assumable and not a delegated program. Mr. Evans added that the EPA is responsible for judging whether a State or Tribe's regulation is sufficient.

Mr. Lemm inquired into the significance of the term "shoreward". Mr. James responded that it does not matter much. It only signifies that the waters of a USACE regulated waterway do not

include only the shipping channel, but extend to the banks of a river (or more precisely, the mean high-water mark on the shore).

Ms. Boles had a question about the definition of the present. She wondered if the present in the terms of the CWA section 404 means 1977 or if the present could refer to the point in time when a state attempts to assume.

Mr. Metz concluded the session with a note about how the assumption process is currently a negotiation process between the USACE and States or Tribes. If the subcommittee wishes to continue to have this negotiation be a part of their recommendation, they should define the roles and responsibilities of each party that enters into those negotiations.

### **C. Exercise on Delineating Different Waters**

Mr. Field led an exercise to help the group attempt to delineate which waters were clearly assumable by States and Tribes, those that are potentially assumable, and those that are clearly retained by the USACE. The goal of this exercise was to help the subcommittee members create a similar understanding of each of the categories. Mr. Field took suggested examples from the members, and after any needed clarification or discussion, placed them under the appropriate category. Mr. Field noted that this exercise would likely be on-going across several Subcommittee meetings. The results of the exercise are noted below.

#### “Small” waters: clearly assumable by a State or Tribe

- Intermittent, ephemeral, and perennial streams
- Tributaries that are not navigable
- Perched wetlands
- Artificially constructed wetlands
- Prairie potholes and similar waters listed under paragraph A7 and A8 of the CWR

#### “Middle” waters: potentially assumable by a State or Tribe

- Large intrastate lakes (though some are named in Section 10 District lists)
- Perennial tributaries
- Primary tributaries (above the point where they become navigable)
- Adjacent
  - Abutting
  - Only separated by a berm
  - Neighboring (though this has the potential to be more distant)
- Estuary waters (i.e. salt marshes) above the high-tide mark

#### “Large” waters: clearly retained by the USACE

- Waters with federally authorized navigational projects (aka project water)

- Tidal waters – up to the mean high water mark
- The Great Lakes and connecting waterways
- Large rivers
- The Intracoastal waterway – along the Gulf Coast
- International navigable waters
- Adjacent wetlands that impact navigable waters

Several discussions evolved out of this exercise. They are as follows:

Mr. Driscoll noted that some constituencies may find it useful for the subcommittee's recommendations to use the language of the current regulatory definition of Waters of the U.S. Ms. Albrecht concurred and suggested that at some point the group may want to take what language they have developed in their recommendation and translate it into the language of the Waters of the U.S. regulatory definition. Ms. Hale however expressed concern about using the current regulatory definition of Waters of the U.S. It may be possible to use terms from the CWR, but it is not a good idea to use direct references to it.

Mr. Metz questioned if there was an established outer boundary of adjacency. Mr. Evans stated that it is usually understood as waters within the floodplain of a wetland but no more than 1500 feet from the shore. Mr. Lemm highlighted that in Minnesota this can extend for many miles; detached waters may still be within the floodplain of one another, thereby making adjacency extend far beyond what might normally make sense as adjacent waters.

Dr. Rabe had several points to make about the 404 statute. First he noted that one might expect 404 to be assumed to the same degree as the 402 program, which was Congress' intent. This is not the case, in practice, and 404 assumption currently could be considered a "failure" in an attempt at federalism. He also noted that the subcommittee needs to be mindful of the relationship between the USACE and the EPA. The two Agencies have significantly different missions. It may be best to take more time to learn from the USACE. He also pointed out that the original statute is poorly written and too short. The short paragraph is a good teaching tool for poor legislative writing! Furthermore, this issue has larger definitional problems than many others. He thought that there are opportunities to learn from examples of States that have or have attempted to assume 404 permitting. Finally, the Tribes have a unique situation and more should be done to learn about some of their cases.

Mr. Evans concurred with what Dr. Rabe said and added that the subcommittee should keep in mind the challenges of creating clarity for what waters can be assumed that will work for States and Tribes across the country. He volunteered the assistance of the EPA in assembling information and supporting the committee before the next meeting.

#### **D. Action Items for the Next Subcommittee Meeting**

Mr. Field facilitated a group discussion of the action items that needed to be done by the members before the next meeting or during it. He outlined several topics that had been raised by the group. They included:

- Learning several things from the USACE. Mr. James volunteered to present on the USACE's view of adjacency. Mr. Field added that information on the historical background of these topics from the USACE's perspective would also be valuable. Mr. Ross requested documents on cases that deal with the USACE regulating upland waters, which is important when they impact downstream waters.
- Learning from the experiences of States and Tribes that have considered 404 assumption. These include: Oregon, Virginia, Alaska, Maryland, and the Fond du Lac Tribe. Mr. DeNomie concurred stating that that would be valuable information for the Midwest Alliance of Sovereign Tribes. Mr. Evans added that there are relevant wetland grants that Tribes have received.
- Mr. Field stated that graphics would be helpful in understanding many of these issues. Ms. Fish added that examples of interstate waters would be useful.

Mr. Field ended this discussion by stating that he will speak with members and find out who may be willing to volunteer to lead some of these efforts to gather and present information.

#### **E. Discussion of End Product**

Mr. Field concluded the meeting with a session on what each member envisioned as a final recommendation to come from this subcommittee. Each member took a turn to describe their thoughts.

- Ms. Bostwick thought clear guidance for the EPA Regions and USACE Districts was needed. She would like to see options for states and accepts that there will be some areas of uncertainty.
- Mr. Davis suggested that each State or Tribe could have map delineating assumable waters or they could easily be produced.
- Ms. Lockwood stated that a decision tree to understand which waters were assumable and which were not would be useful.
- Mr. Metz thought that national guidance on data sources and how to use it for people using GIS would be valuable.
- Mr. Driscoll stated that recommendations or a clear list of assumable waters would be good.
- Ms. Hale indicated that very specific measures or clear boundaries of assumable waters would be best for States and Tribes. She added that clarity about the roles of the EPA and USACE's respective headquarters would be beneficial, with the goal of having greater consistency across the country.

- Ms. Albrecht stated that while clear boundaries would be ideal, they might not be achievable on a national scale. She used the examples of Michigan and New Jersey having two very different, yet both functional, systems.
- Ms. Boles stated that an explanation of different options for States and Tribes, with the benefits and drawbacks listed, would be good.
- Mr. James thought that the USACE Districts would like clear guidance and that they would likely accept what is recommended. He added that while it would be best to have specific numbers or delineations, it would be very difficult to justify them. He noted the example of the multitude of suits against the EPA over the CWA, many stemming from the EPA attempting to give specifics about regulations.
- Mr. Lemm made an argument in favor of clear delineations stating that they make implementation much easier and they help permit applicants understand who they need to go to in order to follow the regulations.
- Mr. Metz expressed a need for dispute resolution to be a part of the recommendations of the subcommittee. Clarity about the roles and responsibilities of the USACE, the EPA, and States and Tribes would be helpful when they get stuck in the MOA process.
- Mr. Collins requested a pictogram showing the current regulatory definition of Waters of the U.S. constituency.
- Ms. Hale suggested looking at the example of 402 assumption since it has been done by so many states.
- Mr. Ross questioned what a useful product or target for the EPA would look like. Mr. Evans responded that if the subcommittee could make a recommendation that would at least shrink the “middle” waters as described in the earlier exercise and enlarge those waters that are clearly assumable and those that are clearly retained, it will have made significant progress.

## V. Public Comments

On Wednesday afternoon, October 7<sup>th</sup>, 2015, between 1:30 and 2:30 pm EST, the subcommittee accepted public comments. Two comments were offered.

Mr. Owen McDonough, Ph.D., an environmental policy scientist with the National Association of Home Builders (NAHB), stated the following. Dr. McDonough explained that regardless of the recommendation of this subcommittee, these waters will still be regulated for pollution from dredge and fill activities. However, he expressed hope that the group would be able to make a recommendation that either defined areas for assumption with clear boundaries or at least proposed a mechanism for clearly determining what waters can be assumed. He expressed the difficulty of the States and Tribes in attempting to assume 404 responsibilities when they do not really know what they are getting into. Also from the perspective of the NAHB, they would favor having permitting authority at a more local level (i.e. with States and Tribes). He concluded by thanking all subcommittee members for their service in the work of providing recommendations to the EPA.

The second public comment came from Wally Gauthier a retired member of the Detroit District of the USACE. While working with the Detroit District, he was involved in the studies of waters which determined which had been historically in use. The District and the State of Michigan were quick to begin work on assumption, beginning only days after the MOA was signed.

#### [\*\*VI. Wrap Up / Closing\*\*](#)

Mr. Field checked with the group to see if there were any other questions or concerns with the operating procedures and the subcommittee's charter. There were none.

The co-chairs, Dr. Rabe and Mr. Evans both thanked the members for their active, constructive involvement in this meeting. Their efforts made it a successful meeting, laying the foundation for future meetings.

Ms. Bachle thanked everyone who helped make this meeting possible and also thanked the members for their service to the public in their active involvement in the subcommittee. She then closed the meeting.

## VII. Meeting Participants

### A. Subcommittee Meeting Participants

Collis G. Adams, New Hampshire Department of Environmental Services  
Virginia S. Albrecht, National Association of Home Builders  
Laura Bachle, (Designated Federal Officer), U.S. Environmental Protection Agency  
Trevor Baggiore, Arizona Department of Environmental Quality  
Laureen Monica Boles, National Advisory Council for Environmental Policy and Technology  
Peg Bostwick, Association of State Wetland Managers  
David L. Davis, Virginia Department of Environmental Quality  
James P. DeNomie, Midwest Alliance of Sovereign Tribes (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 (via phone)  
(Craig Aubrey, U.S. Fish and Wildlife Service did not attend this meeting)

### B. Other Attendees

Britt Aosmundstad, National Association of State Departments of Agriculture  
Benita Best-Wong, Director, Office of Wetlands, Oceans, and Watersheds, U.S. Environmental Protection Agency  
Andrew Cherry, U.S. Environmental Protection Agency  
Jeanne Christie, Association of State Wetland Managers  
Wally Gauthier, U.S. Army Corps of Engineers (retired)  
Ellen Gilinsky, U.S. Environmental Protection Agency  
John Goodin, U.S. Environmental Protection Agency

Eugene Green, U.S. Environmental Protection Agency  
Susan Kirsch, Association of Clean Water Administrators  
Matthew Klasen, U.S. Environmental Protection Agency  
Ken Kopocis, Assistant Administrator for the Office of Water, U.S. Environmental Protection Agency  
Owen McDonough, Ph.D., National Association of Home Builders  
Megan Moreau, U.S. Environmental Protection Agency  
Joe Morgan, ORISE, U.S. Environmental Protection Agency  
Amanda Palleschi, Inside EPA, U.S. Environmental Protection Agency  
Toni Rousey, U.S. Environmental Protection Agency  
Tina Zhang, Self

#### **C. Facilitation Team**

Patrick Field, Consensus Building Institute  
Jake B. Strickler, U.S. Environmental Protection Agency

#### **D. EPA OWOW/OGC Support Team**

Sineta Brown, U.S. Environmental Protection Agency  
Deborah Dalton, U.S. Environmental Protection Agency  
Kathy Hurld, U.S. Environmental Protection Agency  
Simma Kupchan, U.S. Environmental Protection Agency  
Marilyn Kuray, U.S. Environmental Protection Agency  
Michael McDavit, U.S. Environmental Protection Agency  
Abu Moulta Ali, U.S. Environmental Protection Agency

## Appendix A: Requests by Members for More Information and Definitions

Ideas from “Post-It” notes, as written, except for words in *italics* added for groupings and clarity. Re-grouped into topics.

### *U.S. Army Corps of Engineers Topics:*

- Presentation: Section 10 adjacency
- Define “Phase I” waters (in the real world – examples of what was included)
- Legislative history statements about why Corps retains
- Information from Corps Districts regarding scope of jurisdiction circa 1977 – under S 10 and Phase I 404
- *Define*: Navigable
- Presentation: Section 10 101
  - How Corps implements
  - Relationship to 404
  - History of program
  - History of jurisdictional scope
- Information: Bill Sapp article on various definitions of “navigable waters” would be good to share
- Information: Summary of Corps Sec. 10 lists & listing protocols (there are highly variable)
- *Information*: More clarification of Section 10
- How did Corps determine their federal jurisdiction before 1972? What was the geographic extent of their jurisdiction?
- Corps’ views on state assumption? How will Corps be affected?

### *States Topics:*

- <5 pg. position papers from states that attempted assumption (create a form)
- Reports and presentations from states that have studied assumable waters
- List of states that have studied assumption and in which year(s)
- State reports on assumption
- Information State assumption proposals to date (status or outcome) Brief overview of relevant cases
- Presentation States that have thought about assumption
  - Focus on jurisdictional roadblocks
  - Analytical approach to jurisdictional scope
- Report from North Dakota on efforts to determine feasibility of assumption

- Impediments to assumption from perspective of states that have investigated assumption but abandoned it
- Choose a state, where assumption would be difficult, and walk through the process

*Adjacency Topics:*

- *Definition:* Adjacent Wetlands
- Information from Corps regarding scope of regulation of “adjacent wetlands” in 1977 (under Phase I)
- What did congress mean when they said “adjacency” in (g)(1)?
- What did the regs say about adjacent in 1977
- Certainly we are using the term adjacent for purposes of 404(g)(1) to only include wetlands.
- (Geographically) Presentation on the effects of using Clean Water Rule definition of Adjacency, on a state’s assumable waters
- “Adjacent Wetlands” as the Corps defined in Phase I context of 1975 interim regulations
- Define adjacent wetlands
- 1977 definitions
  - Adjacent
- Adjacent in Regs in place 1977

*Congressional History Topics:*

- Post 1977 Preamble and Conference Committee report
- Information on House floor debate (1977) – Relevant statements
- Is there any addition discussion, preamble, comment/response to the purpose/goal of 404(g)?

*Tribal Topics:*

- Any other Tribe applied for TAS CWA 404?
- Information on Tribal assumption process and proposals to date

*Navigability*

- Where Corps or EPA has made a formal determination that a particular waterbody is a Traditional Navigable Water – can that water be assumed by state? e.g. Santa Cruz river in Arizona
- What is meaning of “navigable waters” outside the parentheses in 404(g)(1)
- *Definition:* Traditionally navigable

- Navigable vs. traditional navigable
- *Definition:* Navigable

*Other Topics:*

- Discuss impact on grant funding
- Schematics illustrating relation of intertwining terms (TNW, Sec 10, 404(g))
- Traditionally Navigable Waters – information from EPA on how use/definition of this term has changed since 1977.
- 1977 definitions
  - Navigable
- Common ground definitions/assumptions that can be applied nationally
- Where Corps or EPA has made a formal determination that a particular waterbody is a Traditional Navigable Water – can that water be assumed by state? e.g. Santa Cruz river in Arizona

*Other Definitions*

- Potential draft definitions of adjacency for navigable purposes only i.e. “adjacent wetlands” needed to support transport capacity of rivers and lakes
- Define “susceptible in natural condition with reasonable improvements”
- “reasonable improvement”
- Reasonable Improvement
- Reasonable Improvement
- “Reasonable”
- Natural condition
- “traditional navigable waters” vs. “sec 10 waters” vs. “navigable-in-fact” waters
- Transport
- “means to transport”
- “Transport” in 404g
- Definition Transport vs. interstate commerce
- “Interstate or foreign commerce” 404(g) context
- Commerce
- Commerce
- Commercial Navigation
- Traditional Waters
- TNW(a)(1)
- Section 10