

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

December 1-2, 2015

Meeting Summary

U.S. Environmental Protection Agency

The following items are included in this meeting summary:

- I. Summary of Decisions, Approvals, and Action Items
- II. Presentations and Key Discussions Day 1
- III. Presentations and Key Discussions Day 2
- IV. Public Comments
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 - A. Participating Subcommittee Members
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 - C. Facilitation Team
 - D. EPA OWOW Support Team

Appendix A.

Dec.1-2, 2015 AGENDA

I. Summary of Decisions, Approvals, and Action Items

This was the second 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 will assume Clean Water Act (CWA) section 404 permitting responsibilities, and for which waters the USACE will retain permitting authority. This meeting included discussion of key terms and learning from States and Tribes on their experiences.

- The subcommittee approved the October 6-7, 2015, meeting summary with the suggested modifications.
- The subcommittee decided to create three workgroups to further the work of the subcommittee. The three groups will be: Waters; Adjacency; and Legal. The first two deal with clarifying how to identify specific waters to be assumed or retained under CWA 404 assumption. They should consider the steps and the practical guidance that the States, Tribes, Regions, and Districts need in order to implement 404(g)(1). The legal workgroup will provide legal perspectives on questions and issues raised by the subcommittee and other two workgroups.

II. Presentations and Key Decisions Day 1

Please note: All presentations and meeting materials can be found here:

<http://www.epa.gov/cwa-404/december-assumable-waters-subcommittee-presentations>

A. Welcome and discussion of work products

Ms. Bachle called the meeting to order and provided a brief overview of the meeting agenda. Mr. Joel Beauvais, the (Acting) Deputy Assistant Administrator for Water¹ for EPA, welcomed everyone and thanked the members for their involvement in the subcommittee. The Co-chairs thanked the members for their work to date and expressed optimism that this meeting would be as productive as the first.

Ms. Lauren Boles, National Advisory Council for Environmental Policy and Technology (NACEPT) discussed the types of work products that the subcommittee could present to the NACEPT. She noted that the members of that committee will need to have the same level of clarification of terms and ideas the subcommittee needed for their discussions. Therefore it would be beneficial to the NACEPT if the subcommittee included their assumptions, background, and understandings in the recommendations. Ms. Bachle added that a published report or a memorandum are two possible products that the subcommittee could give to the NACEPT. What the subcommittee produces is generally at the discretion of the subcommittee itself.

¹ Since the December meeting, Mr. Joel Beauvais has formally been appointed as the Deputy Assistant Administrator for Water.

B. Terms of Reference

A two-page draft document summarizing important terms of reference was introduced. Terms such as “Categories of Waters” and “Terms Used in the 404(g) Parenthetical” were discussed. The terms in the “Categories of Waters” are organized from broadest scope to the narrowest. In addition, a memorandum entitled “The legislative history of section 404(g)(1) of the CWA – November 30, 2015” was also shared with Subcommittee, as prepared by a Committee member.

Discussion: It was noted that the “means to transport interstate or foreign commerce” may be the most important term, as it has been the term most discussed by the courts and it is also a test that a water is navigable-in-fact. Members discussed the legislative history and case examples to refine these distinctions.

C. Learning from States and Tribes

States by eco-region (i.e. arid states, eastern states, Pacific Northwest states) and the Fond du Lac Band of Lake Superior Chippewa shared their experiences in seeking to define and describe assumable waters, in addition to their experiences with assumption. There was a brief discussion after each set of presentations, and a summary discussion after all the presentations. These presentations helped subcommittee members understand the diversity of waters within the United States and the challenges States and Tribes face with assumption. There was also a presentation on how interstate waters are addressed in the State of Michigan’s 404 permitting program.

Discussion: There were significant lessons to draw from all of the presentations. Members articulated some barriers to assumption, such as cost and the lack of information (such as incomplete mapping). Benefits were also articulated, such as: potentially expedited permitting, clarity for applicants, and more legal authority at the State or Tribal level (e.g., additional permitting considerations, police powers). Members discussed at length the categories of waters, discussed the need for ease of administration and the pros and cons of “bright lines.” Discussed at length was “how would we write this (the relevant statutory language) today” with terms that would ideally be easy to administer and still stand up legally. Administration of the permit program was also discussed, fleshing out the practicalities of how the Corps district and the State or Tribe would cooperate under different permitting scenarios. The discussion led to **Refining categorization of Retained, Assumed, and “To Be Determined” Waters**, which was an exercise begun at the first meeting in October. Three categories of waters were outlined in order to better understand where difficulties lie in making determinations about which waters are assumed. These three categories are: waters clearly retained by the U.S. Army Corps of Engineers (USACE); waters clearly able to be assumed by States and Tribes; and other waters between those categories where determinations are difficult to make. (The October meeting summary can be found here: <http://www.epa.gov/cwa-404/assumable-waters-sub-committee>)

Based on the discussion, the subcommittee decided to make the following changes to these categories:

Retained by USACE:

- Remove major tributaries.
- Add rivers with actual commercial activity.
- Add waters that support navigation across national boundaries.
- Add ports.
- Add tidal bays and estuaries.
- Add intrastate lakes or ponds on Section 10 lists.

Assumable:

- Add wetlands adjacent to all of these waters listed as assumable (from the exercise in October).
- Add wetlands not adjacent to the retained waters.

The subcommittee decided that this exercise had been helpful, but that they now had sufficient understanding of waters and what categories they should be put in to consider this exercise completed.

E. CWA Section 10, 404 Permit Program

Mr. William James, USACE presented on the organization of the USACE and its history in relation to permitting for projects that impact wetlands and waterways, and in particular the Section 10 Waters of the Rivers and Harbors Act. The following points were made:

- Determinations of which waters are navigable are made by the USACE Districts. There is not a definite standard for making these determinations, but the USACE Districts are generally clear about the physical locations and limits of the navigable waters within their District.
- It is valuable to compare the authorities of Section 10 waters as defined in the Rivers & Harbors Act (RHA) and those in section 404 of the CWA (See slide 18 of Mr. James's presentation).
- Permits can be complicated. The USACE processes three to four thousand annually. A permit applicant may need a RHA Section 10 permit or a CWA section 404 permit or both. During the public interest review, the District Engineer investigates the impact of an activity that requires a permit, weighing the costs and the benefits of project and only allowing the permit if the work is not contrary to the public interest, (note: public

interest includes compliance with the CWA section 404(b)(1) guidelines for CWA permits). The District Engineer may discuss the project with others, but ultimately makes the decision.

General Discussions

Subcommittee members expressed many ideas about the **principles** of their final recommendations. These included the following:

- The method for determining which waters are assumable should be relatively simple
- It should be clear for any applicant where they can go for a permit. The terms that are used in applications should be clear to all applicants.
- The process for delineating which waters are assumable should be able to be easily applied in all or almost all situations.
- Ideally the line of assumability would make sense ecologically.
- The recommendation should consider the political feasibility in addition to legal feasibility.
- The potential financial burden for States and Tribes of the recommendation should be taken into account.
- The recommendation should honor the legislative intent of these statutes when they were enacted.
- Assuming that the subcommittee's recommendation is adopted by the EPA, it should be considered successful if several States and Tribes assume 404 permitting.
- States and Tribes could work together to manage 404 permitting.

Several members of the subcommittee had views on defining which wetlands are **adjacent** to waters retained by the USACE by using "bright lines." Participants noted this approach may not work in all situations, but it may be very helpful when making decisions about which government has responsibilities, particularly in emergency situations, when decisions need to be made quickly.

G. Review of Products suggested from October Meeting

During the first Assumable Waters subcommittee meeting in October, the members suggested creating two visuals:

- A graphic showing how States and Tribes have jurisdiction over all waters within their borders. The graphic can be found here: <http://www.epa.gov/cwa-404/cwa-section-404-permitting-authority-which-waters-are-within-state-or-tribes-jurisdiction>

- A historical timeline of all of the relevant statutes leading up to the passage of the CWA Section 404(g). http://www.epa.gov/sites/production/files/2015-11/timeline_404g1_faca_dec_2015draft.docx

These were briefly discussed. The day closed with reflection on how the day's learning helped frame the discussion for the following day on adjacency.

IV. Presentations and Key Decisions Day 2

A. Adjacency

Mr. Russ Kaiser of the EPA and Ms. Stacy Jensen of the USACE presented on the history of adjacency, or adjacent wetlands and waters, and the implementation of the related regulations. The Clean Water Rule (CWR) changed adjacent waters to all connected waters (i.e. wetlands, oxbows, etc.). All waters within 100 feet of the ordinary high-water mark of a Water of the U.S. is considered adjacent automatically (or 1,500 feet in areas bordering the Great Lakes and the coast). The adjacency area also extends with the floodplain of a river up to 1,500 feet. As a river flows downstream, the floodplain usually expands as well, therefore expanding the area within which by rule wetlands are considered to be adjacent. Any waters that overlap an area of adjacency and extend beyond it are not severed where they overlap a 100-year floodplain, or 1,500 foot line, but rather are considered adjacent in their entirety. Finally, waters beyond 1,500 feet, but still within a river's floodplain maybe adjacent as considered on a case-by-case basis.

B. Learning from States and Tribes on Adjacency

Following the order from the previous day, members shared their experiences.

Fond du Lac- The St. Louis River is the only Section 10 (and therefore retained) water in or bordering the reservation. The Section 10 listing is based on *historical* use; logs used to be floated down the river. Today it is not used for commercial purposes. Canoes and small water craft can be floated on the river today, but only in certain areas that do not have rapids. There are three types of wetlands that are adjacent to St. Louis River: wetlands directly adjacent to the river, those on the plateau above the river, and those on the other side of the railroad track. The 1000 foot boundary for adjacency is not desirable, because it would capture wetlands like this and it would take up too much of their wetlands. The waters close to the St. Louis River are very important for Band members to regulate. The Band would prefer to regulate all waters, including the St. Louis River next to the Reservation.

Maryland - Maryland made a concerted effort to assume 404 permitting in 1994, using their Critical Area Maps. A 1000 foot boundary was the line generally agreed to at that time by MD and USACE, which identified which waters MD would assume and which the USACE would retain. In 2008 the State had new maps made, which made the 1000 foot line clearer and

therefore more defensible. A 100 foot buffer was also delineated and is mapped in the Critical Area Maps. The State proposes this newly mapped line is increasingly defensible as a reasonable boundary.

Oregon –A few years ago, Oregon attempted to identify which waters would be assumable in the State. The State considered and proposed to USACE four different options: fixed distance from a navigable or tidal waterway (like New Jersey’s 1000 foot line); case-by-case determination using defined criteria (like Michigan’s program); all wetlands within a 100-year floodplain; and mapped tidal waters (just for the coast) (Please see slides 17 & 18 of Mr. Metz’s presentation on December 1, 2015). The USACE responded that they wanted Oregon’s assumption to be based on the joint EPA-USACE guidance from 2008, which called for making fact-specific, case-by-case determinations (see slides 19 & 20). Using this 2008 guidance would be simple in some cases. In other cases, using the 2008 guidance would be much more difficult. It would also cause many wetlands to be non-assumable. If a 1000 foot boundary was used as the determination of assumability then approximately 15% of Oregon’s waters would be non-assumable. However, if the 100 year floodplain was used as the determination, approximately 40% would be non-assumable. The 2008 guidance that the USACE wished to use was in part based on the 100 year floodplain. Oregon therefore determined that if 40% of their waters were non-assumable, assumption would not be worthwhile.

Alaska –Alaska is unique in that the vast majority of development happens either on or near water (i.e. within buffers surrounding waters). Most of the development that requires 404 permits in the State is for building roads. Several examples of areas within Alaska where development is occurring were given. There are many barge routes in Alaska that are logical for the USACE to retain. Yet defining adjacent wetlands becomes exceptionally challenging because frozen tundra thaws in the spring and summer making many parts of the State vast, interconnected wetlands. Having vast interconnected wetlands is a problem for defining adjacent wetlands to be retained by USACE in both Alaska and Oregon. Alaska is very interested in having adjacency defined by a simple determination based on engineering principles. However, a 1000 foot line would not likely be a viable delineation for Alaska to assume a 404 program because so much of the State’s development occurs on or very close to waters.

D. Work Planning

Three work groups were formed and members discussed the tasks, next steps, and timelines for each.

Tasks for the Workgroups

Waters Workgroup: Members include Collis G. Adams, Trevor Baggiore, Peg Bostwick, Susan D. Lockwood, Eric D. Metz, Dave Ross, and representative of the USACE (Mr. Metz requested someone with tidal experience as defining waters in tidal areas can become quite technical).

William James has served as the USACE representative on this workgroup. Abu Moulta-Ali will serve as the workgroup's coordinator².

- Explore the scope of retainable waters by “presently used” or “susceptible to use”, perhaps through a set of process steps:
 - Start with Section 10 list
 - Remove any “historic” waters (not presently used for means to transport interstate or foreign commerce)
 - Add any waters that presently are “susceptible to use” not currently on the Section 10 list
 - Consider the scope of “navigable-in-fact” waters that are not interstate, or part of a network of interstate waters
 - Address any “ebb and flow” of tidal waters not in list explicitly
- Determine data sources and details, as needed, for identifying high water mark to make such boundaries “mappable”
- Develop options for the scope of retainable waters to be considered by the full Subcommittee

Adjacency Workgroup: Members include, David L. Davis, Thomas Driscoll, Michelle Hale, , Kimberly Fish, Richard D. Gitar, Jan Goldman-Carter, Les Lemm, Gary T. Setzer, Michael J. Szerlog, and a representative of the USACE. (William James has served as the USACE representative on this workgroup. Kathy Hurld will serve as the workgroup's coordinator.

- Explore adjacency, building off of presentations and discussions at the last meeting
- Consider how to describe and delineate what adjacent wetlands/waters the USACE retains for its 404 permitting in relation to retained waters (presently or susceptible to use) and which ones would be assumed by States or Tribes (again, this is only who permits, not that a permit is needed)
- Consider clear, practicable guidance that is adaptable to range of kinds of States and Tribes and their waters
- Develop options for addressing adjacency to be considered by the full Subcommittee

Legal Workgroup: Members include Virginia S. Albrecht, James P. DeNomie, Jan Goldman-Carter, Dave Ross, and a representative of the USACE. William James has served as the USACE representative on this workgroup. Simma Kupchan will serve as the workgroup's coordinator. Peg Bostwick and Kathy Hurld are observers on this workgroup.

- Refine terms (i.e., navigation, recreational use, commerce, interstate transport)
- Research and summarize legislative history, regulatory history, case law, and Congressional intent relevant to the scope of assumable waters and adjacency.

² The role of the coordinator is limited to: setting up workgroup calls and meetings, take notes, keep the group on task as defined by the subcommittee, report back to the DFO and facilitator on the workgroup's effort.

- Explore rationale for distinguishing between the terms and approaches used in the 404(g) parenthetical and those used under the CWR
- Describe the various benefits/risks involved in potential recommendations
- Assist the other work groups, as requested

V. Public Comments

Mr. Jeff Tiberi, a member of the Local Government Advisory Committee (an informal liaison to this subcommittee) noted his committee is happy to help the Assumable Waters Subcommittee. They have many helpful documents on their website. He expressed hope that the subcommittee can provide some next steps for States and Tribes that may wish to assume 404 permitting.

Ms. Bachle submitted written comments submitted via the Clean Water Rule docket. The comments may be found on the Assumable Waters web page.

VI. Wrap Up / Closing

Mr. Jake Strickler, EPA, led the subcommittee in reflecting on the past two days of their meeting. Members said that it was worthwhile learning about the different State and Tribal experiences and the lessons learned from attempts at assumption, expressed confidence that the work groups would produce useful insights and information, and pleasure at the way the subcommittee meeting went. In particular it was noted how professional everyone was- they all remained focused, engaged, positive, and constructive, even if they may differ in views. Also members expressed gratitude for the excellent facilitation and organization of the meeting.

Ms. Bachle closed the meeting and the workgroups met separately to plan out the work that they would do before the next meeting in March, 2016.

VII. Meeting Participants

A. Subcommittee Meeting Participants

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

Laura Bachle, (Designated Federal Officer), U.S. Environmental Protection Agency

Trevor Baggio, Arizona Department of Environmental Quality

Laureen Monica Boles, National Advisory Council for Environmental Policy and Technology

Peg Bostwick, Association of State Wetland Managers

David L. Davis, Virginia Department of Environmental Quality

James P. DeNomie, Midwest Alliance of Sovereign Tribes (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
Joel Beauvais, Acting Deputy Assistant Administrator for the Office of Water, U.S.
Environmental Protection Agency
Jason Mohr, Montana Legislative Environmental Policy Office, Montana
Amanda Palleschi, Inside EPA
Jeff Tiberi, Local Government Advisory Committee

C. Facilitation Team

Patrick Field, 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
Deborah Dalton, U.S. Environmental Protection Agency
Kathy Hurlid, U.S. Environmental Protection Agency
Simma Kupchan, U.S. Environmental Protection Agency
Michael McDavit, U.S. Environmental Protection Agency
Abu Moulta Ali, U.S. Environmental Protection Agency

Appendix A: **NACEPT ASSUMABLE WATERS SUBCOMMITTEE MEETING**

AGENDA for Meeting #2

Date: December 1, 2015; 9:00 am – 5:00 pm, December 2 2015: 9:00 am – 4:00 pm

Location: U.S. Environmental Protection Agency
One Potomac Yard- Ground Floor
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 for that day's call.
 - a. Conference ID Number for December 1: **80092972**
 - b. Conference ID Number for December 2: **80093700**
4. Helpful Keypad commands:
 - a. *0 - Operator Assistance
 - b. *6 - Self Mute/Unmute

Tuesday, December 1 (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 <ul style="list-style-type: none">• Call to Order and Instructions - <i>Laura Bachle, Designated Federal Official (DFO)</i>• Welcome – Joel Beauvais, Acting Assistant Administrator for Water• Introductions - <i>participants</i>• Review of Agenda - <i>Co-chairs</i>• Review and approval of October Meeting Summary - <i>facilitator</i>• Kinds of Work Products to NACEPT - <i>Laureen Boles, NACEPT Liaison</i>• Updates on Logistics: travel, receipts, etc. - <i>Sineta Brown, EPA, Wetlands Division</i>
9:45 – 10:15	Key Terms of Reference <ul style="list-style-type: none">• Discuss “terms of reference” developed per the first meeting’s task -- <i>Subcommittee Workgroup</i>
10:15-12:00	Learning from States and Tribes <i>Each of several states by region will share their experiences in seeking to define and describe assumable waters (not adjacency), followed by brief discussion after each presentation</i> <ul style="list-style-type: none">• Experience of Tribes -- <i>Fond du Lac Tribe experience, Richard Gitar</i>• Experience of Arid States – <i>Wyoming, David Ross and Arizona, Trevor Baggione</i>• Experience of Eastern States – <i>Virginia, David Davis, and Maryland, Gary Setzer</i>• Experience of Pacific Northwest – <i>Oregon, Eric Metz, and Alaska, Michelle Hale</i>

12:00-1:15	LUNCH BREAK
1:15-2:15	Refining Categorization of Retained, Assumed, and “To be Determined” Waters <ul style="list-style-type: none"> • Close out presentations from the morning • Reflections on learning from the morning • Subcommittee review the October meeting draft categorization of waters based on the morning discussions
2:15-3:15	The CWA Section 10, 404 Permit Program <ul style="list-style-type: none"> • Presentation – <i>William James, US Army Corps of Engineers</i> • Discussion
3:15-3:30	BREAK
3:30-4:15	General Discussions <ul style="list-style-type: none"> • What have we learned from today? • What action items or next steps do we need for tomorrow or beyond? • Initial thoughts and comments by members – Facilitated discussion
4:15 – 4:45	Review of Products suggested from October Meeting <ul style="list-style-type: none"> • Summary/timeline of key legislative and other dates -- <i>Simma Kupchan, EPA, Office of General Counsel</i> • Graphic of Overall Categories of Waters -- <i>Kathy Hurd, EPA, Wetlands Division</i>
4:45 - 5:00	Reflections on the Day – Co-Chairs
5:00	Adjourn for Day - <i>Laura Bachle, DFO</i>

Wednesday, December 2 (times are approximate and best estimate prior to the meeting)

8:30-9:00	Check-in and seating
9:00-9:15	Call to Order and Initial Business <ul style="list-style-type: none"> • Call to Order and Instructions - <i>Laura Bachle, Designated Federal Official (DFO)</i> • Review of Agenda for Day - <i>Co-chairs</i>
9:15-10:45	Adjacency <ul style="list-style-type: none"> • Initial Presentation -- <i>Russ Kaiser (EPA) and Stacy Jensen (USACE)</i> • Discussion among Participants
10:45-11:00	BREAK
11:00 – 12:00	Learning from States and Tribes <i>States with experience trying to define/address adjacency will share their experiences</i> <ul style="list-style-type: none"> • Further state presentations/slides • Further Discussion • Summary of Key Points – <i>Facilitator</i> • Next Steps
12:00 – 1:15	LUNCH BREAK
1:15 - 1:20	Resettle for Public Comment
1:20 – 2:30	Public Comment <ul style="list-style-type: none"> • Members of the public in-person or in the meeting may make a brief public comment to the Subcommittee

- *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*
- 2:30 – 3:15 Further Refinement of Final Product Elements
- Review of October meeting suggested elements
 - Given the discussion in this December meeting, what refinements, additions, or changes to make to the outlines of a final product of the Subcommittee
- 3:15 – 3:45 Work Planning
- Facilitator and Participants*
- Review of Key Action Items
 - Identification and Tasking of any Work Groups
 - Agenda topics for next meeting
 - Review of next meetings' dates and locations
- 3:45 – 4:00 Reflections from Co-Chairs
- 4:00 Adjourn - *Laura Bachle, DFO*