

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

June 7-9, 2016

Final 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
- III. Public Comments
- IV. Wrap Up / Closing
- V. Meeting Participants
 - A. Participating Subcommittee Members
 - B. Government and Members of the Public in Attendance
 - C. Facilitation Team
 - D. EPA OWOW Support Team
- VII. Appendix A - June 7-9, 2016 AGENDA
- VIII. Appendix B – Sample River System
- IX. Appendix C - Action Items and Timeline, June 2016
- X. Appendix D – Facilitators’ Summary of Discussions Slides
- I. [Background and Summary of Decisions, Approvals, and Action Items](#)**

Background

This was the fourth 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 EPA could provide clarity for which waters States and Tribes may assume Clean Water Act (CWA) section 404 permitting responsibilities and for which waters the United States Army Corps of Engineers (USACE) will retain permitting authority. All presentations and meeting materials can be found here: <https://www.epa.gov/cwa-404/assumable-waters-sub-committee>

This meeting included discussion of the progress made in the Waters, Adjacency, and Legal workgroups since the March 15-17, 2016 meeting. This summary does not follow a chronological order of events. Instead, it attempts to summarize discussions related to key topics covered throughout the three-day meeting, including: the definition of consensus, the final report outline, the formulation of options for the waters and adjacency, results and discussion of a straw poll, procedures to follow during the development of an MOU between the state/tribe and the USACE, dispute resolution, and tribal considerations. It also summarizes the Subcommittee's progress and findings leading up to this fourth meeting.

Summary of Decisions, Approvals, and Action Items

The Subcommittee made the following decisions:

- The Subcommittee approved the March 15-17, 2016 meeting summary with the suggested modifications (<https://www.epa.gov/cwa-404/assumable-waters-subcommittee-march-15-17-2016-meeting-summary-0>)
- The subcommittee charged the workgroups with refining their products based on subcommittee member suggestions, for all to consider at the next meeting.
- The subcommittee agreed to a list of action items and a timeline for completion (Appendix B)

II. Presentations and Key Discussions

A. Welcome and Initial Business

Mr. Jacob Strickler, acting EPA Designated Federal Official (DFO), called the meeting to order and welcomed the members. He announced that public comment would be on Wednesday June 8 at 1:00 pm. He also announced that Dave Ross will no longer represent Wyoming on the Subcommittee since he took a new position in Wisconsin; however, the Subcommittee agreed to engage David as a technical advisor as needed and available.

The subcommittee co-chairs, Mr. Dave Evans and Mr. Barry Rabe, welcomed the group and set the context for the meeting. They thanked the subcommittee members for the work they had undertaken since the last meeting and noted that this meeting marks a transition in the sequence of meetings. Previously, the group reconstructed history and reviewed the lessons learned from tribal and state experiences. Now, the group will be looking at options and recommendations. They urged the subcommittee members to continue to respectfully express differences of opinion over the course of the meeting to ensure that the full range of issues considerations are discussed to the greatest extent possible. They noted the group would discuss definitions of consensus and begin to seek consensus on some topics, although it may not be possible to reach unanimous agreement.

The facilitators, Patrick Field and Eric J. Roberts of the Consensus Building Institute, reviewed the agenda and sought revisions to the March 2016 meeting summary. Members suggested several revisions and approved the summary with the suggested revisions included.

B. Definition of Consensus

Mr. Field proposed a definition of consensus for the group to review and comment on, and suggested that the goal is to produce a package of recommendations that people can sign onto although everyone might not support every piece of the package. He expressed hope that the agency representatives on the subcommittee would be able to add their name to the report as participating FACA members, and clarified that doing so does not bind the agency to the report or the recommendations. He also clarified that subcommittee members are appointed to represent a constituency, but that they operate as individuals. Members made the following comments, which have been grouped by topic or theme when appropriate:

- *Legally credible vs. Legally defensible* – The group discussed whether or not to use the terms legally credible or legally defensible. A member suggested that legally credible may be better language to use than legally defensible because the latter sets a very high bar. Others supported legally defensible since it shows the group tried to develop advice that is true to the statute. A member suggested that “sought to develop” legally defensible language could mean the subcommittee members are not saying it is legally defensible but that they tried to achieve it. Another member suggested explicitly stating that the group tried to stay close to the statutory language and legislative history in order to develop options and recommendations that are legally defensible and consistent with regulatory and statutory history.
- A member suggested striking the word recommendations from the definition of consensus since it may be acceptable to reach consensus on a range of options; but it may be difficult for people to agree with recommendations they don’t actually support. Additionally, the member noted that it is unclear what will emerge; the group may decide only to propose options and not make recommendations.

Mr. Field suggested there is an option to issue a minority report if the group’s definition of consensus is not achieved; however, minority reports are less compelling and the group should strive to encompass the whole, if possible. There are three options for how to include a minority report. Option one, which may be preferable, is for the report to reflect a range of different opinions on a particular issue. Option two is that individuals write letters from their individual standpoint to highlight their perspectives. Option three is to draft and include a minority report as an attachment. A member suggested that option one is easier and cleaner.

C. Final Report Outline Review

Mr. Field presented and sought feedback on a final report outline. Subcommittee members made the following comments, which have been grouped by topic when appropriate:

- The challenges section should cover both challenges of assumption (e.g. uncertainty of what is assumable), and challenges of states and tribes to assume (e.g. cost of assumption, etc).
- Add to the history section a few paragraphs about Waters of the US (WOTUS) and why this effort is not focused on WOTUS to help readers understand the distinction.
- Section 3.d.ii should read “States and Tribes.” “States and Tribes” should be included throughout the document.
- Add a section under recommendations about the pros and cons of recommending guidance or regulations/rule changes.
- Add a clear problem statement to define the problem and why the subcommittee was formed; this could possibly be included in an executive summary.
- Consider adding financial impacts somewhere, possibly under challenges.
- Clearly state the assumptions the group made to arrive at an option or a recommendation.
- Define terms so readers understand the group’s thinking.
- The group noted that the final report should include a section describing the reasons why this is a difficult topic to resolve since identifying the challenges may help to identify where opportunities for agreement are located. Part of why this is difficult is because the meaning of adjacent is unclear, and has possibly morphed over the years.
- The notion of cooperative federalism could be included. Some suggested tying cooperative federalism to the legislative history as it is tied to CWA.

Benefits and Challenges of assumption section – The group discussed the benefits and challenges of assumption portion of the outline. Mr. Strickler noted that the charge of the subcommittee is to provide clarity about which waters a state or tribe may assume and which the USACE will retain; this would in turn enable tribes and states to determine the geographic scope and costs of implementing assumption. Subcommittee members offered the following comments and ideas:

- Some suggested the challenges section should cover both challenges of assumption (e.g. uncertainty of what is assumable), and challenges that make it more difficult for states and tribes to assume (e.g. cost of assumption, etc.). The report should discuss these challenges instead of simply naming them.
 - The report could describe, as noted in already existing EPA documents, the rationale for the purpose of assumption and reasons and barriers that prevented states and tribes from assuming.

- Section “D” could be the benefits and cons of assumption. “F” could be challenges that states and tribes have had in assumption.
- The report could list only the benefits that other groups have identified about assumption as opposed to the committee stating the perceived benefits.
- The section could be reframed as “Factors” or “Considerations,” rather than using language that shows support or lack of support.
- An United States Army Corps of Engineers (USACE) attendee said the USACE must remain impartial in this section and cannot be seen as promoting or not promoting assumption.
- Instead of pros and cons, the section could clearly describe the outcomes of states and tribes going through the assumption process. This could leave the pros and cons up to determination, while still helping readers understand what assumption is all about.
- One option is to even handedly describe both the pros and cons of assumption.
- The pros/cons or cost/benefits could be grounded in the legislative history.
- If moving it into the legislative history section, it could be framed as “Why are we discussing assumption and why would a state or tribe want to assume.” This may reduce the perception of promoting assumption.
- Since only two states assumed, it will be necessary to discuss the challenges in multiple dimensions. The report will need to identify perceived benefits too; it could identify the real or potential benefits that the group agrees on.
- Many people seemed to agree with the following sequence of topics: history of assumption, legislative history, legal history, then what happened when states or tribes assumed, and finally other states and tribes want to assume and they have encountered “x” challenges.

Mr. Field suggested the draft outline would be revised so it is less promotional, and the group can always decide not to include the benefits or challenges if it is not fair and balanced enough.

D. Waters Workgroup Presentations and Subcommittee Discussions

On behalf of the Waters Workgroup, Mr. Collis G. Adams (New Hampshire Department of Environmental Services) and Mr. Eric D. Metz (Oregon Department of State Lands and Oregon Department of Environmental Quality) summarized the status of the Waters Workgroup discussions and draft report. Their main points included the following:

- A couple of foundational premises underpinned the Waters Workgroup discussions. First, the group worked under the premise that Congress intended the states and tribes to assume programs as a way to protect waters. Second, the group also worked under the premise that this effort is about assumption and not about WOTUS or Clean Water Rule jurisdictions; the CWA jurisdiction is separate from this effort.

- When thinking about how to create the strongest possible program, the Waters Workgroup assumed that a state/tribe-federal partnership would foster the strongest program to ensure protection of waters since it would be founded in the diversity of strengths, concerns, and needs shared between the partners.
- The Waters Workgroup tried to consider legal issues, but did not take into account court decisions. The draft report will need to be reviewed by the Legal Workgroup.
- Some grey areas remain around the meaning of terms such as recreational use, susceptible to use, and commerce.
- Field-level guidance may be needed to help determine limits of navigation based on features in the landscape.

Key Issues with Greater Clarity on Assumable Waters

In addition to the general lack of clarity on various terms that led to the confusion about the waters that would be assumed or retained and the establishment of the Subcommittee, the Subcommittee identified and discussed the following key issues of the Waters Workgroup draft report and recommendations as identified and summarized by the facilitator.

Issue 1: Has the understanding of state and tribal assumption changed since the 1977 regulations, and if so, which should prevail -- the original legislative intent or the evolving understanding and practice based on court cases and various rulemaking?

Subcommittee members identified different perspectives about whether or not the understanding for which waters can be assumed and for which waters can be retained have changed since the 1977 regulations were promulgated. The belief of whether or not the understanding has changed results in a tension between the strict legal reading of the law and the application of the law.

Some subcommittee members think the understanding has remained the same, noting that litigation has focused on jurisdiction issues and has almost entirely avoided the 404(g)(1) section of the Clean Water Act. Thus, from this view, the legislative history indicates that the understanding has not changed and the extent of waters that states or tribes could assume has not changed.

Other Subcommittee members think the understanding has changed. A USACE attendee commented that case law, policy, and rules and guidance etc., have changed the approach since 1977. The USACE's perspective is that the retained navigable waters are broader than other subcommittee members might believe.

The facilitator noted that two states had worked out a method to handle assumption despite fluctuations in jurisdiction caused by court decisions, and that this indicates a program can be, or at least to date has been, administered regardless of changes in jurisdiction from court cases. Alternatively, a subcommittee member noted all the other states and tribes have not assumed, suggesting it is very difficult since the early 1990s to assume.

Issue 2: Potential jurisdictional impacts

Subcommittee members discussed concerns about the potential for CWA jurisdiction to be affected. Some believe that trying to parse the difference between 404(g)1 terms and the same terms elsewhere in the CWA possibly eliminate connections that enable the USACE to maintain broad CWA jurisdiction.

A member of the Waters Workgroup noted that the goal is not to negatively affect the way jurisdiction of waters are interpreted under the RHA or the CWA. Instead, the goal is to find language that will maintain Congressional intent and the role of states and tribes while setting clear guidelines. Participants underscored that this effort is not about CWA jurisdiction; instead, it is about the transfer of 404(g)(1) administration from federal control to state or tribal control in a partnership that ensures the waters are adequately protected. An EPA support team member stated that the objective is not to change or define CWA jurisdiction and emphasized that if a water is WOTUS, it will be regulated.

Issue 3: Uncertainty about the meaning of susceptible to use, recreational use, and commerce.

Subcommittee members acknowledged that the definitions of susceptible to use, recreational use, and commerce are still unclear. Clarifying the definitions is important because the amount of waters that are retained (or assumed) could vary significantly depending how these terms are interpreted and applied. Members of the Legal Workgroup offered to review some of these uncertainties, and commented that some of the statements about these terms in the Waters Workgroup draft document may need fine-tuning. Legal Workgroup members cautioned the use of language that interprets terms and limits the application of the RHA. Waters Workgroup members encouraged the Legal Workgroup to review the document and offer suggested changes.

Issue 4: Lack of clarity between the current definition of Traditionally Navigable Waters (TNW), RHA waters, and waters that are retained per 404(g)(1).

The subcommittee made the following points while discussing TNW determinations.

- Things have evolved since 1977, and listed Section 10 waters are not the only navigable waters the USACE retains.
- Rapanos and associated guidance clarified CWA jurisdiction, but did not address 404(g)(1) specifically. Rapanos required that the agencies identify TNWs to maintain the connections (and therefore jurisdiction) to waters that should be regulated. While identifying TNWs, the USACE reviewed areas where there was not a Section 10 water and identified TNWs, thus completing the significant nexus determination. Having clarified the foundation for TNW, it now seems risky to retain only RHA waters under 404(g)(1).

- The language in TNW and a1 are closely related, and there would be challenging discussions in terms of legal risk of distinguishing between them.
- The USACE member expressed the likely difficulty of the USACE accepting the direction taken by the work group up to this point in time. Most of the work group members have focused on Congressional intent and legislative history for guidance, but the USACE believes that decades of implementing the program as well as numerous rules, regulations, policies, and legal cases have added important additional context for administering the program.
- It was suggested by some others in the Subcommittee that returning to congressional intent and identifying distinctions that allow congressional intent to be achieved might be a path forward.

The Subcommittee then discussed this further and members made the following comments.

- A simplified, and maybe not entirely correct, statement of USACE's interests is that the USACE would like to retain all TNWs and navigable waters that have commerce that moves people and goods, since some of the court cases that USACE has relied on have used people as commerce.
- TNW is an umbrella term and RHA is generally a subset of TNWs. The USACE districts have their lists of Section 10 waters; however there may be other waters that could be determined to be navigable waters of the US under Section 10 that have not yet been added to the list. In addition, there are many navigable waters of the U.S. that are not specifically listed on the district Section 10 waters lists, such as all the waters subject to the ebb and flow of tide.
- Retaining all TNWs (instead of just Section 10 waters minus the historical component) would increase the amount of navigable waters that the Corps would retain. If the Corps retains all TNWs, there would be fewer waters that could be assumed by the states/tribes. (Additionally, there could be fewer wetlands that could be assumed because wetlands adjacent to the TNWs would also be retained by the Corps.)"
- The USACE perspective of identifying "retained navigable waters" might not be that drastic, although it will vary between states. For example, Montana has very few Section 10 waters; but other states may have many Section 10 waters. The Section 10 waters plus the TNWs that were clarified minus any historic use equal the retained navigable waters. It might keep a state from assuming 404(g)(1) assumption in those waters and in wetlands adjacent to them, but it may not completely stop assumption. There would still be 1,000s of stream miles that are WOTUS and that could be assumed.
- There are various strings of TNW law dating back to the 1800s and 1900s, and RHA and Section 10 waters were only a subset. Until now, whether waters were designated as TNW never really mattered much because it was all commerce based. This might

indicate that some issues could be resolved if the group starts with the legislative history of RHA Section 10 minus historical waters, and takes an open view of what could count as susceptible to use and/or commercial use. Then, the group could add on an administrative line that works out the details for grey areas in a MOA.

- The group discussed the term ‘navigable waters’ as used in 404(g)(1) that: “the state can administer its own program for discharge of dredge or fill material into navigable waters.” The USACE clarified that the term ‘navigable waters’ in this phrase meant ‘navigable waters’ of the CWA, which caused the overall confusion. It is believed they meant that term to refer to WOTUS, and the parenthetical is then read as a subset of the waters the USACE would retain.
- Mr. Field drew a map illustrating a fictitious river system (see image in Appendix B), all of which are WOTUS. The main river was designated as Section 10, and a major tributary extending from the Section 10 river was designated as TNW. Several other creeks/small tributaries extending from the major tributary would be assumable by states and tribes. Another tributary extending from the Section 10 river would also be assumable because it is neither a Section 10 water nor designated as a TNW.
- Congress intended assumption for good reasons, and it is important to note that the states and tribes have tools at their disposal that USACE does not. For example, states have and tribes may have police power for land use and water protection and can be more efficient in applying those authorities. However, it feels that states/tribes have been pushed out of the Phase 2 waters and into gray areas that are case-by-case determinations. That is not acceptable from a state/tribal perspective since Congress said states/tribes could administer the program on Phase 2 and 3 waters. The subcommittee will create problems if it creates guidance that says that anything the USACE has designated as TNW must be extracted from Michigan or New Jersey’s programs. States are hearing that they cannot assume any waters designated as TNWs. The most effective program will make use of a state/tribe and federal partnership.
- It may be difficult to get beyond the positions of the states and USACE without legal boundaries defined by the state, EPA, and USACE legal teams; the subcommittee may want to request legal input to clarify the sideboards.
- A simple way of looking at this might be that USACE has a duty to follow the law and, right now, there is no guidance to do so. A straightforward legislative history could show how USACE has that duty and needs guidance on what it means to comply with 404(g)(1). This framing may give the group a larger space to work within.

Mr. Field suggested that the group look at a range of options for the issues related to the Waters Work Group document. The options would cover the state’s perspective, a middle ground, and the USACE’s needs, and each would be supported by reasonable rationales.

Following on the Adjacency Work Group document, the Waters Workgroup developed and shared a set of possible options.

Draft Waters Options

Recognizing the difficulty in achieving consensus on a set of recommendations that not all could support, the group discussed possible options that all participants might be able to live with, which could be included in the final report. The options are intended to show a range of possible ways forward (each supported by rationale) with the hope that agreement could be found within the range, while also being narrow enough that the range provides EPA with guidance and direction.

The group discussed the following options:

A. Daniel Ball Test (Initially referred to as Option A) – Under this option, the USACE would retain those waters that meet the two-pronged Daniel Ball test (minus the historic use waters). Commerce in this option refers to goods not people. Retained waters are part of an unbroken chain of continuous navigation. Members made the following initial comments:

- The Legal Workgroup will need to look at whether or not commerce refers to cargo or to people.
- Agencies have sometimes disregarded the second prong of the two –prong Daniel Ball test.

B. State Deference (Initially referred to as Option B) – This option would default to the states to aid planning efforts. It would be presumed that USACE would have Section 10 waters, and the State or Tribe would assume the tributaries, and a case-by-case determination would be required for other waters as a permit or request comes up. This case-by-case determination would require coordination with the USACE before the ultimate permit decision was made, or the state or tribe might possibly assume it and grant “special” review by the USACE for permits in some waters.

Members made the following comments:

- This is a slightly different approach than the Conditional option (see next option) with waters determined not “ahead of time” but with each permit application.
- The group discussed how this option might unfold in implementation. It was suggested that it would require the state or tribe to notify the USACE that they are looking at a site and that they think is their water. A practical problem may surface in that the state or tribe would have to guess whether or not they think the USACE would want to review the site. Another practical problem is that states and tribes may have constraints that require them to respond in a set timeframe to an applicant who wants to do something that would affect the water; it may take the USACE longer to review the application than the state or tribal time constraint allows.

- This approach might work with states or tribes that have joint permitting but might fail where states and tribes do not have joint permitting with the USACE.
- This might help a state or tribe bound their administrative authority when they apply for assumption.
- The group discussed whether or not a special review might become a 404 decision subject to NEPA and ESA.

C. Conditional (Initially referred to as Option C) – This option involves three steps: 1) USACE would first identify all Section 10 waters (minus historic) that are presently used for transportation and commerce. 2) Next, a case-by-case approach would be used by the State or Tribe and the USACE District(s) to determine retention or assumption of TNW waters outside of the presently used Section 10 waters (minus historic). 3) The final step would be a case-by-case approach to determine the retention or assumption of additional waters that may be susceptible to use. This would all be done as part of negotiating the MOA.

Members made the following comments:

- In Michigan, the waters are clearly defined on a list and the only thing that is case-by-case is the determination of how far into the wetlands the USACE will retain.
- The difference between this approach and the approach considered in Oregon is that, for Oregon, the USACE only looked at Section 10 waters in the first step.
- Steps two and three, which may not come up all that frequently, may allow the USACE to make TNW determinations on the fly during the application process.
- This option might create a middle ground path forward where the Subcommittee has a way of dealing with the extra set of waters the USACE is concerned about giving up due to definition problems, and that might create a path forward for providing criteria for how to negotiate those decisions. The criteria could include the Daniel Ball test, the susceptibility to use, recreational use, historical, etc.. If a water meets those criteria or established principles, then it could become a retained water. The criteria or principles would help to get to a subset of waters and data sources for TNW determinations.
- There are TNWs where official studies have been done to assert jurisdiction and others where there are not studies because the need to date has not arisen.
- Proposing that waters are assumed or retained on basis of transport for interstate commerce may be useful because USACE and EPA will need to address this term in the future.
- This would be a case-by-case determination during the MOA discussion.
- Regardless of if or when a case-by-case determination occurs, the Subcommittee needs to provide clarity on the criteria that are used to make the decision.
- The group made the following comments about TNW designations:
 - USACE has made 6 TNW determinations in Montana, 8 in Kansas, 4 in Oregon, and at least a couple in Arizona. TNWs determinations can be done as stand-

alone studies (essentially basic navigability studies) or determined in the field. Stand-alone determinations are approved by division engineers.

- It is important to understand the TNW criteria and to clarify the interstate or foreign commerce definitions; the concern is that someone could float a canoe on a bunch of streams connected to rivers to influence whether or not they are retained or assumed.
- This approach may reduce the USACE's concern about definitions and would enable them to continue to use TNWs to determine what is jurisdictional. But, since TNWs are so broad, thus one has to be careful about the criteria used to determine a retained water.
- It seems better to make these decisions up front as this option proposes instead of case-by-case, which does not give certainty or clarity to states and tribes.
- Perhaps there is a way to combine the first three options and establish the criteria and how to apply it. If one does not have enough information or resources to make a determination, then one can list those in an MOA and review them as information becomes available.
- Section 10 waters are a subset of TNWs.
- It seems most TNWs are probably "susceptible" to being Section 10 waters as intended by the term, and some of the historic waters are also potentially "susceptible" to being a Section 10 water.
- Another member commented that susceptible to use is unclear, and the USACE could say they have no plans to make a water navigable and then the state or tribe could assume it. If the USACE does something to make the water more susceptible to use, then it would be retained by the USACE. It would be an ongoing monitoring of USACE interest in the water.
- The Section 10 lists are changed from time to time. If a water meets the definition, it should be on the Section 10 list.

D. Section 10 List (Initially referred to as Option D) – The USACE would retain waters on the Section 10 list and the state or tribe would assume the rest of the waters. If known, the state or tribe would assume the historic use only waters on the Section 10 list. The Section 10 list could be modified by the USACE with notification to and consultation with the state or tribe as already allowed in its procedures.

Members made the following comments:

- This is basically the status quo interpretation (based on MI and NJ MOAs) of what happens if one accepts that the USACE retains only Section 10 waters.
- This seems like it is trying to go back to a time before 404(g)(1).
- This might be what happened in both Michigan and New Jersey, with the exception that New Jersey has the case-by-case determination if it is within 1,000 feet of tidal waters.

- To be clear, this option is about modifying the waters on the Section 10 list. The USACE would have to add the water to the Section 10 list to retain it.
- The advantage to this is clarity and simplicity for USACE Districts and states and tribes. The list is what the list is, without argument.

E. All Traditionally Navigable Waters ((a)(1) waters) (Initially referred to as Option E) – In this option the USACE would retain all waters that are on the Section 10 list or eligible for the Section 10 list, and other waters (TNWs or other WUS waters), and any waters not included above that are susceptible to use. The USACE would make this determination and share that listing with the state or tribe.

Members made the following comments:

- An EPA support team member asked how this option might describe the water that could be assumed, and suggested that it seems like everything that is not retained could be decided on a case-by-case approach.
- The USACE could use stand-alone TNW determinations to build the list of waters that are not on the RHA Section 10 list. Any waters that are susceptible to use could be included.
- A member expressed concern that TNW determination may not have been done comprehensively across the US so absence of a TNW study does not mean absence of a TNW.
- A possible way to set a boundary in this approach is to say that if a water hasn't been determined to be a TNW then it would not be retained.
- If historic use waters are subtracted from RHA Section 10, they would likely be added again through the TNWs or because of susceptible use.
- This option is basically all TNW waters that would be a1 waters.
- Pending the circumstances, this option would enable the USACE to retain the most waters under 404(g)(1)

In conclusion, members made the following comments about the options more broadly:

- The State/Tribe deference, Conditional, and Section 10 options seem like shades of grey. It might help if there are more specific ways to distinguish them from one another, possibly by whether or not there is a specific plan or proposal in place to make the water navigable.
- Some participants were not comfortable with using TNW determinations as a basis. However, TNWs could provide a data source of known waters the USACE is interested in. The principles of Daniel Ball, susceptible to use, etc. could be used to provide rationale for establishing a water as a TNW. The legal groups fine-tuning of some of the grey areas (recreation, susceptible to use, etc.) might help to provide even finer criteria for use. It was suggested that a water should not be retained simply because it is a TNW.

Instead of using TNWs, a member suggested focusing on Section 10 and tying the decision of retain/assume back to congressional intent.

E. Adjacency Workgroup and Subcommittee Discussions

Mr. David Davis (Virginia Department of Environmental Quality) and Mr. Les Lemm (Minnesota Board of Water and Soil Resources) summarized the status of the Adjacency Workgroup discussions and presented a draft report on behalf of the Adjacency Workgroup. Main points included the following:

- The Adjacency Workgroup tried to be clear that they were talking about assumption and not jurisdiction, and spent most of our time focused on Option 3 with its variations, which seemed to have the most support although it was not unanimous.
- The diagrams do not apply to tidal systems. One may have data for tidal wetlands but if one doesn't, then one could use the highest measured tide to identify what would be considered adjacent.

Adjacency Options:

A. Option 1 – USACE retains all wetlands adjacent to retained navigable waters. USACE retains jurisdiction over everything they are currently legally authorized to administer. This option does not have the limitation of a subset of adjacent wetlands. Maps of adjacent wetlands in Alaska, near Red Lake in Minnesota, and on the Fond du Lac Reservation in Minnesota show that this option leaves little to be assumed for those states and tribe or states and tribes like them.

Subcommittee members made the following comments about Option 1:

- The group discussed the Fond du Lac example and the wetland complexes associated with creeks that connect to Section 10 waters. It was noted that the Fond du Lac reservation is 44% wetlands, and that the wetlands are connected to the St. Louis River (a Section 10 water) although the type of wetland may change throughout the complex. A USACE attendee suggested that adjacency only extends to whatever is adjacent to the Section 10 water. If there is a small creek, it is likely it and the wetlands attached to it would be assumable as well. However, determining what is adjacent would require a case-by-case review of Section 10 waters and what is adjacent. The likely challenge for the Fond du Lac assuming 404 administrative authority is that much if not all of their wetlands complex are linked in some fashion directly to the St. Louis River itself, and not just tributaries.

B. Option 2 – USACE retains the entirety of wetlands touching retained navigable waters. If a wetland were not touching retained navigable waters, then the state or tribe could assume permitting authority. Similar to Option 1, this option would require field visits for determinations. Subcommittee members made the following comments about Option 2:

- The logic behind Option 2 is that if an impact occurs to the touching wetland, then it could affect the river.
- Under this option, the Fond du Lac map of adjacent wetlands would not change.

C. *Option 3 – Establishment of a bright line, the distance of which is up for discussion.* This option includes three sub-options:

- 3a – USACE retains all wetlands touching retained navigable waters and extending landward to the 100/300/1000-foot assumption boundary, which is an administrative line. If a wetland falls between the retained navigable water and the boundary but is not touching the retained navigable water, then it is assumable by a state or tribe.
- 3b – USACE retains all wetlands adjacent to retained waters up to the 100/300/1000-foot assumption boundary. Any wetland waterward of the assumption boundary would be retained by the USACE. This is similar to the New Jersey program. The assumption boundary would be set as a national standard.
- 3c – USACE retains all wetlands adjacent to retained waters up to the 100/300/1000-foot assumption boundary or a boundary negotiated during the development of the MOA. A national boundary would be established but criteria could be used to move or adjust the placement of the assumption line pending regional differences. Floodplains could be included under 3c, but it was not specifically addressed in this draft.

Subcommittee members made the following comments about Option 3 and the various sub options:

- Some states and tribes may be interested in clear criteria to guide or govern the negotiation between the state or tribe and the USACE to set the assumption boundary line. The criteria would help to document why a particular line was set.
- The group discussed the use of floodplain maps. A member suggested that his constituents would be less interested in floodplain demarcations than they would set foot limit demarcations because many farmers are seeing wetter conditions than normal. Another member said the FEMA maps are being redone, and that hopefully they would be more accurate; nevertheless, the state/tribal line for regulating floodplains is not the same as FEMA's line, which might make it difficult to use floodplain delineations as a starting point.
- The difference between 3b and 3c is that 3b sets a standard line and 3c requires negotiation with the USACE to set the final per state or tribal boundary line.
- The ordinary high water (OHW) line could be added to 3a, 3b, 3c with setbacks. The OHW line could be the starting point for figuring out from where the line is negotiated.
- 3c is good because it provides flexibility in the development of the MOA; different buffers could be applied based on the type of system that is being protected.
- 3c might allow and encourage the use of as much information as possible. For example, we are required to identify the OHW for lakes in Minnesota and we could use this data. Other states could measure OHW.

General comments on the adjacency options:

- The group briefly discussed adjacency. A USACE representative said they define adjacency as “bordering, contiguous, and neighboring.” A state representative suggested that this definition is a greater challenge than the waters challenge, since it would not leave much to assume.
- It was noted that wet states and flat states may not assume much under this definition, while states with more topography may be more likely to assume. A member suggested that the states that have the most to gain or lose from regulating wetlands would be automatically ruled out under this definition. Mr. Field suggested the group consider applying USACE’s definition of adjacency to states like Maryland, Tennessee, Kentucky, or New Jersey to see how it might play out. A member noted that much of New Jersey would no longer be assumable. Members suggested that the exercise should be cautious to not create a situation that results in a state losing area they have already assumed.
- Remember that these examples are all from the wettest states in the country.
- Another potential option to add is drawing a line at the Ordinary High Water (OHW) line.
- The Michigan approach is a hybrid of Options 3a, 3b, and 3c. The line in Michigan is a case-by-case approach based on the OHW line; there is no set distance. Timing is one of the main challenges in Michigan and it is overcome by the state regulating everything and doing their job according to their timelines and then the USACE follows up at a later date with their decision.
- The group made the following comments while discussing buffers:
 - An Environmental Law Institute (ELI) study reviewed 150 different buffers across the country and recommended that state and local planners use a 300 foot buffer for purposes of water quality. In another study in Rhode Island, investigators used the ELI study and other information to recommend the establishment of a 100 foot riparian buffer. Across all the studies, the distance of buffers for aquatic resources varies widely. For example, the recommended buffer for sedimentation might be 30 feet while the recommended buffer for habitat might be 300 feet.
 - Since the Subcommittee is looking at USACE’s charge to maintain navigability, which is mainly affected by sedimentation, we might start looking at narrower buffers of 100 feet or less. The Subcommittee has yet to discuss the relationship between buffers and Section 10 waters.
 - It may be useful to error on the side of the 300-foot buffer but the Subcommittee should learn more about the 1,000-foot buffers. Since flow can impact navigability, this is a reason to think more generously about where one draws the minimum standard.

- Wherever the buffer line is drawn, it may be drawn from the waterline itself since it is hard to establish the OHW line.
- Remember there's little to no formal work on what boundaries are appropriate for navigability versus water quality.

F. Straw Poll for Waters Options and Adjacency Options

Subcommittee members completed a straw poll exercise to gauge the level of support for each of the waters options and the adjacency options. Federal agency representatives did not participate in the activity.

Each participating subcommittee member was given 10 yellow dots and 2 green dots to complete the polling activity on two sets of options: one for waters options and one for adjacency options. For example, there were five waters options and members were asked to place one yellow dot by each of the waters options that they could live with (if they couldn't live with it, no dot was added), and to place one green dot next to their preferred waters option. This same process was used for the adjacency options.

Waters Options Straw Poll Results - The *Section 10 List* option received the most yellow and green dots, indicating that it was the option most people could live with and the most preferred option. The next and final option on which anybody indicated a preference was the *Conditional* option; many indicated they could live with this option.

Adjacency Options Straw Poll Results – *Option 3c* received the most yellow and green dots, indicating that it was the option most people could live with and the most preferred option. No other adjacency options were given green stickers to indicate that a member preferred it. Many subcommittee members also indicated they could live with *Option 3b*. A handful of members indicated they could live with *Option 3a*.

Discussion of Straw Poll Results

Subcommittee members made the following points focused on waters options while discussing the straw poll results. The conversation focused on the waters options:

- Clarity, consistency, and predictability is needed for good governance and the *Section 10 List* option provides these. It was congressional intent to allow states and tribes to assume administration of 404 programs, and the way to do that is through clarity, consistency, and predictability.
- There is also flexibility in the *Conditional* option because one can talk about Section 10 waters and TNW waters while developing the MOA.
- It seems the concerns with the *Conditional* option may be the lack of clarity about exactly what it entails. The Subcommittee may need to clarify it, if possible, with precise criteria that are tied to the RHA case law.

- The group discussed adding waters to or removing waters from the Section 10 list. For the *Section 10 List* option, waters would not have to be removed from the Section 10 list to be assumed. For example, waters that are historic use only are on the Section 10 list but could be assumable. However, waters that the USACE wanted to retain but not on the list would have to go through a Section 10 list formal modification. Perhaps it is possible that the state or tribe and the USACE decide to agree whether or not a water is likely to be able to be included on the Section 10 list, therefore retained, were it formally reviewed.
- It would be helpful to clarify the legal process for modifying the Section 10 list. A state or tribe would be using that list as the legal basis for their MOA and for the assumed program, but the Section 10 list is under RHA and not CWA. It could be legally challenged and that could have impacts on the programs.
- A potential amendment to land between the *Conditional* and *Section 10 List* options might be to set a process that enables the parties to determine a water's eligibility to be on the Section 10 list, even if it is not currently on it, but without necessarily going through the formal process of adding it to the Section 10 list. This would avoid using the Section 10 list as the sole basis.
- The process for determining navigability is outlined in 329.14 and 329.15.

G. Waters Document Procedures Review and Discussion

Subcommittee members also discussed the procedural steps described in the Waters Workgroup document under Roman numeral IV (page 15) (<https://www.epa.gov/cwa-404/assumable-waters-sub-committee>). Comments are grouped under each step of the procedure; broad comments are included under the general comments heading.

General Comments

- There is potential for disagreement between the USACE and the state or tribe by just proposing a list. The process should not preclude the USACE and state or tribe from sitting down informally to figure out the list together. Consider adding or suggesting informal, early discussions to develop a list before proposing it, or clearly state that this is an informal discussion and encourage the states and tribes and USACE to work through issues before entering the formal MOA creation process.
- There should be a point at which the EPA is engaged in this process. Engaging them early would enable the EPA to provide input and guidance so that the final proposal is something they could approve. They could identify fatal flaws up front, and may be able to serve as a mediator if a disagreement arises between the state or tribe and the USACE. The EPA may also be able to provide assistance with the tribal lands data needs.

Step 2 - The group made the following comments while discussing the list the USACE would provide the state or tribe:

- The list that the USACE would provide would include the retained navigable waters and some reference to or explanation about how to determine adjacent wetlands.
- Regarding the footnote on page 16 of the Waters Work Group paper, the 1977 regulations replaced the interim regulations. The footnote will need to be revised.
- Instead of being specific about the list, it might be possible to be more generic about the list that the USACE provides.

Members made the following comments about 2b about details about which waters are to be retained:

- More flexibility may be needed on the second and third bullet points; the legal team will review them.
- Consider restating “remove any waters” as “remove any reaches of waters that have been based on historic use only.”
- Another approach is to ask the USACE to provide a list of the waters that are presently used, instead of asking them to remove waters. They may not have the data to say why a water was listed as Section 10 but they will be able to say which waters are presently used. Or, it may be necessary to describe what steps will be taken if historic data is not available.

Step 4 - Members made the following comments about 4:

- Add the following to step four: Follow the regulations under the Indian Reorganization Act of 1934 that states: “new lands can be added to a reservation if the land is added to the reservation for exclusive use by tribal members.”
- It would behoove the state to work with tribes within a state as the state or tribe goes through assumption. Tribes must be engaged to provide information about tribal lands, whether they be trust lands, fee simple lands, or other types of land. If a tribe is unwilling to cooperate, then some of that data could be obtained through the EPA.

Dispute Resolution: The group made the following points about including (or not) a dispute resolution process:

- The committee may not need to recommend who the final arbiter is in cases of impasse between the state or tribe and USACE. Instead, the committee could recommend that 1) there should be a dispute resolution process involving all appropriate levels and elevating to the appropriate people if decision making between USACE and the state or tribe is stuck, and 2) EPA and USACE need to figure this out so that it is not determined in the context of a particular application.
- It also may be useful to recommend a time period in which the EPA would respond, if EPA will be drawn in.

The remaining steps were not discussed as the conversation shifted to potential procedures for the adjacency options.

H. Adjacency Procedures Discussion

The subcommittee briefly discussed guidance on procedures for the various adjacency options. The following comments were made:

- Pending the selected adjacency option, the process could vary greatly. However, there may be a period of information sharing in each option.
- GIS mapping: It was suggested that part of the process could include GIS mapping scenarios. This might work if the state or tribe and USACE agree on the buffer. However, others thought that GIS determinations could be completed for contiguous (touching) determinations but not others.
- A USACE support staff commented on the St. Louis River example and said that the tributaries to the river would be retained waters due to being TWN and might need a case-by-case determination to know at what point the waters are adjacent to Section 10 and adjacent to a tributary.
- Case-by-case determinations will not meet the goal of efficiency. On the other hand, due to complexities a case-by-case approach might be needed in some instances.
- The idea of a nationwide line and states and tribes negotiating where their line should be sounds good. However, the Subcommittee should be cautious and note that what we propose as a starting point might end up being the end point too because people will justify it as the standard since it is in the document.
- The procedure in adjacency is almost more difficult than for waters. First, the Subcommittee would have to get past Option 1, which is where the USACE is now. Then, you have to establish the national standard, and figure out other opportunities in state or tribal programs to justify the standard.

J. Brief presentation on a mapping exercise

Mr. Michael Szerlog (U.S. EPA Region 10) briefly presented a mapping exercise. The exercise used the United States Geological Survey's (USGS) Digital Elevation Model populated with a layer delineating a line 10 feet above the water level of tidally-influenced waters. For an example, he created a line demonstrating what wetlands touching this 10-foot line would look like (an example of what could be retained by the USACE). This data is available nationally, but the quality varies between states. He commented that adding a 1000-foot line would result in an approach similar to Option 3c. Field verification would be a substantial undertaking.

K. Tribal Considerations

Mr. Richard D. Gitar (Fond du Lac Reservation) and James P. DeNomie (Midwest Alliance of Sovereign Tribes) suggested several tribal considerations. Their main points are summarized below.

Specific suggestions on draft reports:

- On page 11 of the draft Waters Workgroup report, remove “Indian country” and use only tribal lands to represent the pluralism of tribes.
- On the draft Waters Workgroup report on page 11, number 2, and again on page 15, number 9 – each of these talk about assuming tribal lands. Clarify that this is about assumption of waters and wetlands that may be on tribal lands, not about assumption of tribal lands.

Additional information – Additional information that would assist tribes (and states) to assess and decide whether or not to assume a program include the following:

- Guidance on the types of expertise a tribe would need to issue permits.
- Guidance on options for tribes to acquire expertise from external sources if they do not have the expertise in-house.
- Guidance on the timeframe and parameters of the permits.
- Clarification on the roles and responsibilities of tribes, states, and federal agencies.
- Guidance on permit fee structures to ensure internal costs associated with permit issuance is covered.

Tribal engagement – Additional cultural and legal considerations should be accounted for when engaging tribes exploring assumption. For example, many tribal legislators speak English, but a tribal language may be used throughout the community; consider how to engage the tribe using their language. Engage both formal and informal governance structures: It is customary to approach the tribal legislators, and they often do what tribal elders say, but it is also important to meet with the tribal elders. Go not only to the legislators, but also go to the senior center to talk with elders over lunch, and learn whether or not it is a patriarchal or matriarchal community. In some communities, the women make the final decisions and it will be important to speak with the clan mothers. Consider engaging organizations that could help spread the word and raise awareness; these organizations include First Nations Development Institute, the Office of Native American Programs, the Midwest Alliance of Sovereign Tribes, etc.

Recognize the historical relationships between the tribes and the federal government, and between tribes and states – Due to past relationships, there is often a general distrust of federal and state government agencies, although it will vary from tribe to tribe. Some tribes have good relationships with federal government agencies and states while others do not. If states and tribes do not have a good relationship, then problems may surface when states are given the opportunity to comment on a tribe’s application for assumption. This dynamic has played out in other approved CWA programs. For example, some states have not wanted tribes to develop a water quality standard of their own and have fought against tribal water quality standards when they had the opportunity to review the application. An EPA team member suggested including text about state and tribal review in the report. For example, if a state assumes, tribes should have the opportunity to comment and vice versa.

Tribal Capacity – Many of the challenges tribes will face with assumption stem from capacity to have a wetland program, which is funding dependent. Most tribes that want to start a wetland program obtain grants through Section 104 of the CWA; but these funds can only be used to develop a program and cannot be used to sustain it. Tribal assumption administration may be constrained by limited funding or limited staffing.

Tribal governance – Tribal governance may also challenge a tribe's ability to assume. Tribal governments may shift policies more frequently than the state or federal governments. Occasionally, the entire governing administration or council will change at once.

Enforcement challenges – The assumption program also requires demonstrated capability for enforcement; however, tribes cannot take a non-band member to tribal court. However, in tribal assumption of the 404 program, the federal government provides backup enforcement. In some cases, this may be a disincentive for tribal assumption because if a significant amount of wetland is transferred to the tribe, then they may lose federal backing for protection of the wetland. Tribes that have direct implementation tribal cooperative agreements (DITCA) may have an advantage because they can conduct inspections and if there is no USACE permit, then they can inspect the site on behalf of the EPA and the EPA then decides what action to take based on the inspector's observations.

State assumption – Another consideration is to address is how state assumption may affect tribes. States should not be able to assume an area that a tribe could assume within its reservation. Additionally, tribes may own lands outside of the reservation boundaries and if the tribe is the sole owner of the property and in trust, the waters and wetlands on the property cannot be assumed by the state. In Michigan, a challenge has been trying to figure out how to address a change of status of new lands that are acquired and taken into trust.

L. Progress and Findings Summary and Discussion

Mr. Field presented an overview of the subcommittee charge, timeline of progress to date, a working concept graphic, and principles and findings of the subcommittee. Subcommittee member suggested revisions to the principles and findings, resulting in the findings detailed in the PowerPoint slide deck, *Assumable Waters Subcommittee Facilitator's Summary Check-in, June 8, 2016*.¹ The findings broadly cover conclusions about jurisdiction and administration with regard to the Subcommittee's task; the presence (or lack thereof) assumed programs; congressional intent regarding assumption; congressional intent on the basis of waters to retain or assume; the interpretation of adjacency based on legislative history, and; the importance of clear procedures. The group noted that the finding about congressional intent on the basis of waters to retain or assume would require clarification.

¹ See Facilitator Summary Slides on Subcommittee Website.

Each finding is outlined below and followed by subcommittee member comments on the findings:

Finding 1: Jurisdiction versus Administration:

- 404 program assumption does not alter the scope of jurisdiction over WOTUS.
- It is fundamental to the discussion of assumable waters that *all* of the waters the Subcommittee is discussing are jurisdictional under the CWA. Nothing in the subcommittee's work is intended to alter the scope of jurisdictional waters in any way.
- The state and tribal programs that assume 404 permitting authority must be as protective or more protective than what is required under federal regulations.

Subcommittee comments on Finding 1:

- When a state or tribe assumes a program, all of the waters that are eligible to be assumed must be assumed.

Finding 2: Current Programs:

- Two states, utilizing different approaches, had applied, been approved, and assumed for the CWA 404 program administrative purposes. These two states have administered these programs for two or more decades without legal challenges to the scope of assumed waters for administrative purposes and despite numerous national litigation, rule changes, and guidance changes on the jurisdictional questions surrounding WOTUS.
- No other tribes or states have assumed, while many states and tribes have explored or considered it over these last decades.

Subcommittee comments on Finding 2:

- Add that the Michigan and New Jersey programs were “approved by the Federal agencies as consistent with the Act.”
- Use of “while” is important because it indicates that many states and tribes have explored assumption and found it challenging to do.
- It is worth noting that even if there is clarity, it does not mean there will suddenly be a rush to assume because there are other issues preventing states and tribes from assuming.

Finding 3: Legislative History

- The legislative history evidences a Congressional intention and expectation that many states would assume the 404 program as codified in 404(g)(1). Congress explicitly amended the 1977 statute to allow states to assume (Congress was silent on tribes at that time but explicitly included them in 1988).

- Backdrop to this amendment included the scope of jurisdiction, a newer 1972 CWA law undergoing revision, and even at that time, confusion and uncertainty as to terminology and precision of language.
- At the time, it was noted: “By using the established mechanism in section 402 . . . , the committee anticipates the authorization of state management of the [404] permit program will be substantially expedited. At least 28 state entities which have already obtained approval of the national pollutant discharge elimination system under the section should be able to assume the [404] program quickly.”

Subcommittee comments on Finding 3:

- Some participants suggested it is important to provide a few contextual points: first, 404(g) rose out of a controversial effort to broaden and clarify a broad CWA jurisdiction administered by the federal government, which was seen as more controversial than many in Congress were supportive of. When coupled with state assumption, it became more politically acceptable. Second, in the youth of the CWA, those Congressional members debating the terms probably did not really know the full scope of the words they were using. Third, the past 30 years have provided ample evidence of controversy over 404 regulated activities, and there have been many practical challenges to assumption beyond just clarity of which waters. Finally, Congress said in theory that cooperative federalism makes sense and they wanted it, but there are practical reasons that assumption has not occurred more readily.
- It appears the legislators intended for states to assume the program, which is why they added 404(g). The use of the word “anticipate” reads like assumption will happen regardless. The addition of 404(g) was intended to effectuate this result.
- It seems the expectation and intention is codified into the statute.

Finding 4a: Congressional Intent on Basis of Waters to retain/assume:

- The legislative history supports that under a state or tribally-assumed program, the division of responsibility between the state or tribe and the USACE for administrative purposes was primarily based on the RHA in 404(g)(1).

Subcommittee comments on Finding 4a:

- Members said the basic idea is correct; however, the language requires clarification.
- Some members suggested this finding might be better paired with other legal findings, possibly combined with statements from the legislative history and finding that the waters provision in the parenthetical is referring to RHA Section 10 minus historic waters plus waters adjacent and susceptible to use.

- Another suggestion was to tie the parenthetical to RHA (and specifically to phase 1 waters) and leave the rest of CWA jurisdiction out. Some suggested the general tone should be “to understand the historic scope of authority of the USACE, one must look to the authority under RHA.”
- USACE believes things have evolved since 1977 and that the RHA waters are not the only navigable waters that are retained.

Finding 4b:

- A state or tribe would assume administration of the Section 404 permit program in all waters of the United States *except* those navigable waters retained by the USACE under primarily Section 10 of the RHA minus waters regulated on the basis of *historical use only* and including wetlands adjacent to the USACE-retained waters.
- Thus, retained waters would be waters currently used or susceptible to use in commercial navigation for the purpose of transporting commercial goods and wetlands adjacent thereto.

Comments on Finding 4b:

- There are definitional questions to consider in Finding 4b.

Finding 5: Adjacency

- Taking into account all of this legislative history, the Subcommittee concludes that it is reasonable to interpret the “adjacent wetlands” retained by the USACE pursuant to 404(g)(1) as a subset of adjacent wetlands that are in relatively close physical proximity to retained Phase I waters (other than historical use waters), and not wetlands extending thousands of feet or perhaps miles from those waters
- This, however, does not assuage some member’s concerns about options or choices for assumption that could be precluded due to later legal, regulatory, or policy actions that have occurred since.

Comments on Finding 5:

- No comments

Finding 6: Need for Clear Procedures

- Field level national guidance or other policies should be prepared by the USACE and EPA, with input from states and tribes, to include general procedures/steps that should be followed to identify retained and assumable waters when a state or tribe proposes to assume the CWA Section 404 permit program, in addition to any other actions needed to comply with federal regulations.

Comments on Finding 6:

- The subcommittee has not decided whether or not it should be field level guidance or rule making.

IV. Public Comment

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

Mr. Dave Ross complimented the subcommittee on the work they are doing, and said that it was a testament to the people in the subcommittee that they are able to get along so well despite differences in perspectives. He encouraged the subcommittee to strive toward consensus and suggested that if consensus cannot be reached, then the group could try to narrow down and concretely identify the areas of disagreement as much as possible. In addition to identifying the areas of disagreement, the group could describe potential options to resolve the differences. He added that this information would go a long way to aid the EPA and the USACE.

Mr. Wally Gauthier, submitted the following written comment: It seems that there is no way to dissuade the group from pursuing an approach to adjacency that restricts the Corps to a very narrow strip based on navigability interests. The public interest review required by the Corps for every application includes 20 other public interest factors, NEPA, and the 404(b)(1) guidelines, and there's no way to make this restriction coherent in the real world.

VI. Wrap Up / Closing

The facilitator reviewed the work products and timeline, which are outlined in Appendix B. The meeting co-chairs thanked the subcommittee for sticking with the task at hand given the challenges and level of detail required. He commended the group for the positive tenor and interactions between group members despite the differences in perspectives. Mr. Strickler closed the meeting.

VII. Meeting Participants

A. Subcommittee Meeting Members

Collis G. Adams, New Hampshire Department of Environmental Services

Virginia S. Albrecht, National Association of Home Builders

Craig Aubrey, U.S. Fish and Wildlife Service (on phone)

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

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
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 Anastasio, Association of Clean Water Agencies
Hannah Brubach, law clerk at Association of Clean Water Agencies
Jeanne Christie, Association of State Wetland Managers (on phone)
Frances Eargle, U.S. Environmental Protection Agency (on phone)
Wally Gauthier, Jr., retired U.S. Army Corps of Engineers (on phone)
John Goodin, U.S. Environmental Protection Agency
Eugene Green, U.S. Environmental Protection Agency (on phone)
Stacey M. Jensen, U.S. Army Corps of Engineers
Amanda Palleschi, Inside EPA
Dave Ross, Wisconsin Department of Justice (on phone)
Barbara Walther, U.S. Army Corps of Engineers

C. Facilitation Team

Patrick Field, Consensus Building Institute
Eric J. Roberts, Consensus Building Institute
Jake B. Strickler, (Acting Designated Federal Officer), U.S. Environmental Protection Agency

D. EPA OW/OGC Support Team

Sineta Brown, U.S. Environmental Protection Agency
Drew Cherry, U.S. Environmental Protection Agency
Kathy Hurd, U.S. Environmental Protection Agency
Simma Kupchan, U.S. Environmental Protection Agency
Michael McDavit, U.S. Environmental Protection Agency
Abu Moulta-Ali, U.S. Environmental Protection Agency

Appendix A: Meeting Agenda

Date: June 7, 2016; 9:00 am – 5:00 pm, June 8, 2016: 9:00 am – 5:15 pm, June 9, 2016: 9:00 am – 3:00 pm, Meeting #4

Location: Hyatt Arlington at Washington’s Key Bridge
1325 Wilson Boulevard
Arlington, VA 22209

To participate by conference call:

1. Please register with acting DFO Jacob Strickler, by calling (202) 564-4692. 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 June 7: **18023197**
 - b. Conference ID Number for June 8: **18036096**
 - c. Conference ID Number for June 9: **18046428**
4. Helpful Keypad commands:
 - a. *0 - Operator Assistance
 - b. *6 - Self Mute/Unmute

Tuesday, June 7 (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>Jacob Strickler, acting Designated Federal Official (DFO)</i>• Introductions – <i>participants</i>• Review of goals and objectives of our effort – <i>Co-Chairs</i>• Review of Agenda and materials - <i>Facilitator</i>• Review and approval of March Meeting Summary - <i>Facilitator</i>• Updates on Logistics: travel, receipts, etc. - <i>Sineta Brown, EPA, Wetlands Division</i>
9:45 – 10:30	Final Report Outline Review <ul style="list-style-type: none">• Draft Outline and possible drafting process for Final Report presented• Initial Questions, Comments, and Clarifications
10:30-10:45	Charge to Work Groups
10:45-11:00	Break
11:00-12:30	Work Groups Carry On Work in Small Group Setting

- Work Groups meet to refine and finalize ideas, options, and questions for the full group
- 12:30-1:30 LUNCH BREAK
- 1:30-3:00 Waters
- Presentation by Work Group
 - Discussion among Participants
 - Issues, Next Steps, Further Charge to Group
- 3:00-3:15 Break
- 3:15-4:45 Adjacency
- Presentation by Work Group
 - Discussion among Participants
 - Issues, Next Steps, Further Charge to Group
- 4:45 Summary of Day and Next Steps – *Co-chairs*
- 5:00 Adjourn for Day – *Jacob Strickler, acting DFO*

Wednesday, June 8 (times are approximate and best estimate prior to the meeting)

- 8:30-9:00 Check-in and seating
- 9:00-9:15 Call to Order and Initial Business
- Call to Order and Instructions - *Jacob Strickler, acting Designated Federal Official (DFO)*
 - Review of Agenda for Day – *Facilitator*
- 9:15-10:45 Continued Group Discussion on Issues
- 10:45-11:40 Work Groups Carry On Work in Small Group Setting (*as needed*)
- Work Groups meet to refine and finalize ideas, options, and questions for the full group to be incorporated into a final report, as needed
- 11:45 – 12:55 LUNCH BREAK
- 12:55 - 1:00 Resettle for Public Comment
- 1:00 – 1:15 Public Comment
- Members of the public in-person or in the meeting may make a brief public comment to the Subcommittee
 - *The Committee will take commenters at the comment start time and if commenters do not fill the time, the Subcommittee will continue with agenda topics*

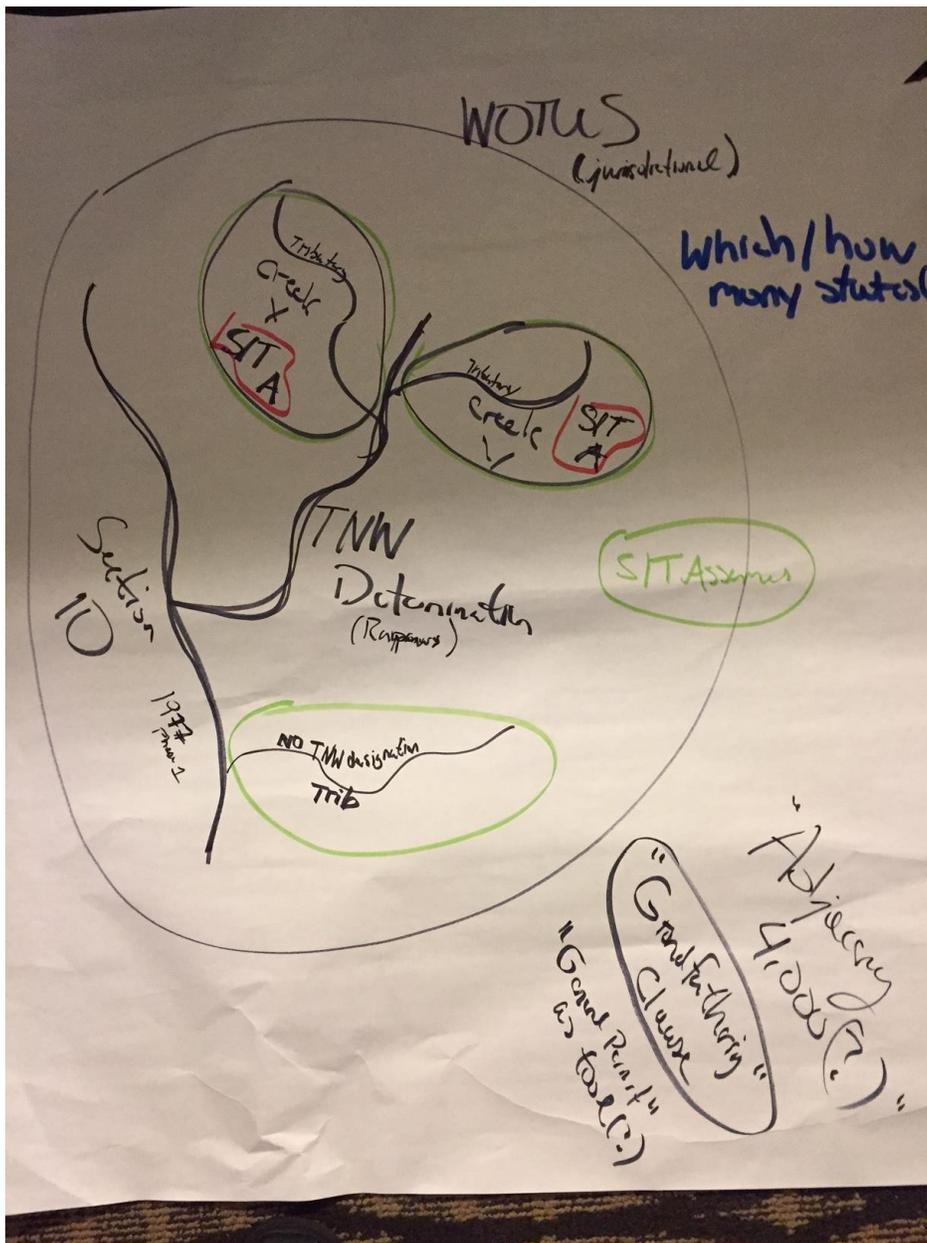
- 1:15-3:15 Waters
- Further presentation by Work Group
 - Discussion and consensus-seeking among Participants
 - Issues, Next Steps
- 3:15-3:30 Break
- 3:30-5:00 Adjacency
- Further presentation by Work Group
 - Discussion and consensus-seeking among Participants
 - Issues, Next Steps
- 5:00-5:15 Summary of the Day – *Co-Chairs*
- 5:15 Adjourn for Day – *Jacob Strickler, acting DFO*
- 5:15 *Outline Work Group confers about revising report outline given discussion to date*

Thursday, June 9 (times are approximate and best estimate prior to the meeting)

- 9:00-9:15 Call to Order - *Jacob Strickler, acting DFO*
- Review of Agenda for Day - *Co-chairs*
- 9:15-10:15 Review of revised Report Outline
- Seek consensus on outline
 - Assignment of Writing Tasks
- 10:15-12:14 Small Groups work on sections of the Report given direction/consensus
- 12:15–1:30 LUNCH BREAK
- 1:30 – 2:00 Brief report outs and questions from work on drafting the report
- 2:00 -- 2:45 Work Planning
Facilitator and Participants
- Review of Key Action Items
 - Further Tasking of any Work Groups
 - Webinar, face-to-face meeting, timing, dates, other?
 - Agenda topics for future deliberations
- 2:45 – 3:00 Reflections from Co-Chairs
- 3:00 Adjourn - *Jacob Strickler, acting DFO*

Appendix B: Example River System

[This is a picture of a fictitious river system Mr. Field drew to understand which waters are jurisdictional waters of the U.S. The drawing shows the main river being a Rivers and Harbors Act Section 10 water with a major tributary to the Section 10 river designated as a TNW. Several other creeks/small tributaries extending from the major tributary would be assumable by states and tribes. Another tributary extending from the Section 10 river would also be assumable because it is neither a Section 10 water nor designated as a TNW of how a river and its tributaries and adjacent wetlands.]



Appendix C: Action Items and Timeline

From June 2016 Meeting

Timeframe	Task	Who
ASAP	Draft June summary. Include public comment from email from W. Gauthier.	CBI
	Finalize March summary and send to EPA for posting	CBI (completed)
	Send to the committee the PowerPoint slides that were developed during the June meeting	CBI (completed)
	Revise final report outline based on group discussion, refine points to include	CBI, with assistance from report drafting team.
	Send doodle poll to schedule late September webinar meeting	EPA
	Post documents on website	EPA
	Distribute 329.14 and 15 about navigability determinations	CBI (completed)
	Distribute Appendix D, legal definition of TNW	CBI (completed)
Summer	Legal work group to review the Waters workgroup paper (esp. pages 7-11), and create sub-options/guidelines/side-boards considering: 1) Traditionally Navigable Waters issues more in depth, 2) susceptible to use, 3) recreation, 4) other	Jan and Virginia with assistance from David Ross and Simma K.
	Finalize the Waters workgroup paper	Peg to clean up, and Waters workgroup to review. CBI to send notes from mtg entered into document. ACOE to send comments too.
	Finalize the Adjacency workgroup paper	Gary to clean up, and Adjacency workgroup to review. CBI to send notes from mtg entered into document. ACOE to send comments too.
	Finalize Legislative History and Meaning of Adjacent documents.	Jan and Virginia with assistance from David Ross and Simma K.

	Finalize Section 10 Case Law Outline, add coastal information, possibly round out Section 10 case law, and summarize the “implications” of the case law.	Dave, in coordination with Jan, Virginia, and Simma
	Develop examples of Section 10 and Traditionally Navigable Waters. Compare and contrast maps of S10 waters and TNW waters to show the range of difference between these in a handful of states	William
Late September	Convene webinar to review work/provide direction.	EPA schedule, All participate
	Gather existing state and tribe slides – AK, OR, MI, NJ, FL, VA, MD, Fond du Lac – to put in one place on website	MI (Kimberly) AK (Michelle) VA (David) OR (Eric) NJ (Susan) MD (Gary) Fond du Lac (Rick)
	Gather new state slides – MT, AZ, MN, NH, if appropriate and allowed	AZ (Trevor) NH (Collis) MT (Eric) MN (Les)
October November December	Draft report	Gary, Peg, Jan, Virginia, Michele, and CBI lead, with other members filling in on specific pieces, e.g. Rick to draft tribal piece with James to review.
	Review report via email	All
	Subcommittee meeting to review report and discuss substantive issues	All
Winter	Finalize and deliver final report to NACEPT	Co-chairs