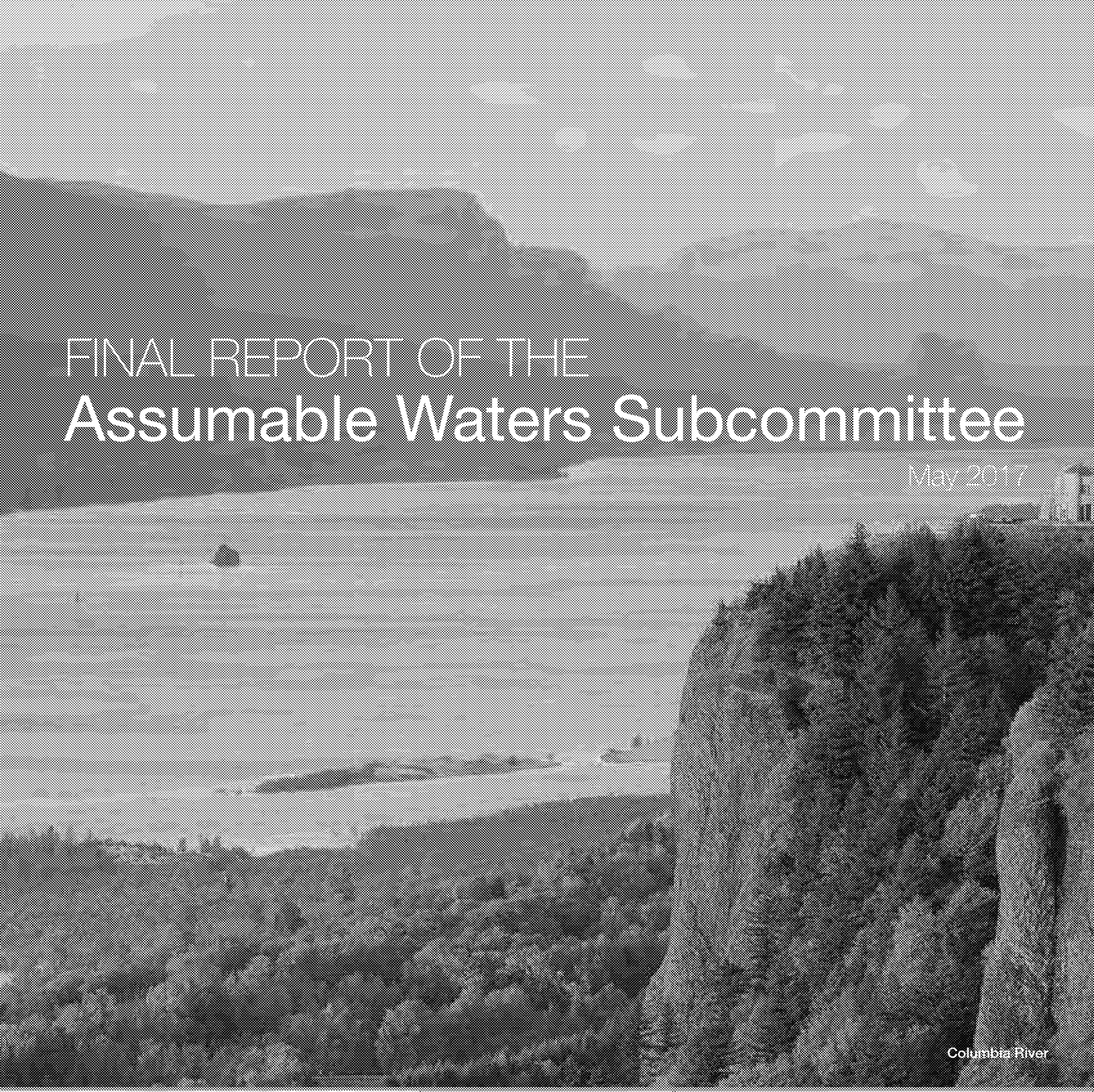
FINAL REPORT OF THE
Assumable Waters Subcommittee

May 2017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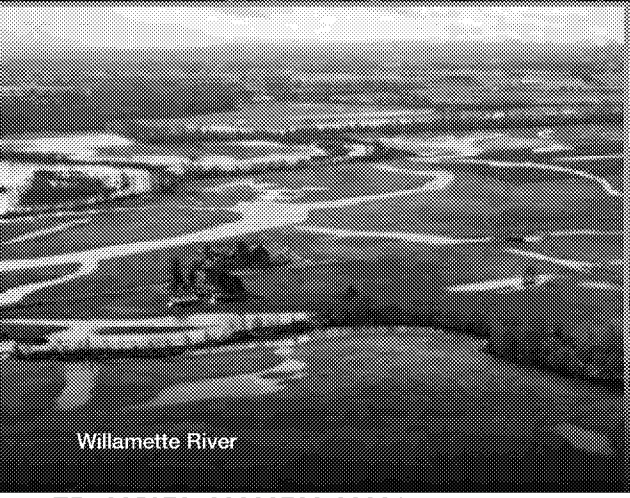
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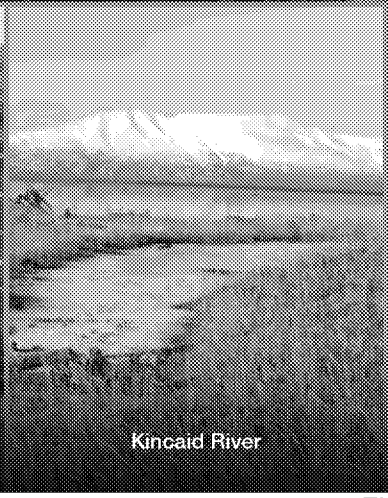
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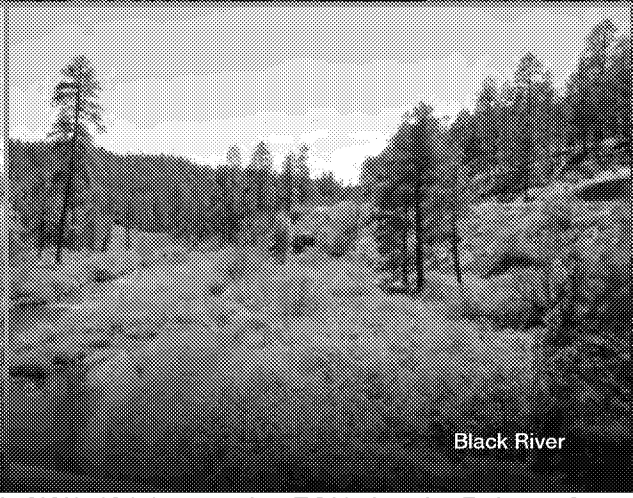
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Executive Summary

PROBLEM STATEMENT

Section 404 of the Clean Water Act (CWA) authorizes the US Army Corps of Engineers (USACE) to issue permits for discharge of dredged or fill material in navigable waters. "Navigable waters" is defined under the CWA to mean "the waters of the United States and territorial seas." Section 404(g) of the CWA authorizes states,[1] with approval from the US Environmental Protection Agency (EPA), to assume authority to administer the 404 program in some, but not all, navigable waters and adjacent wetlands. Section 404(g)(1) describes the waters over which the USACE must retain administrative authority even after program assumption by a state or tribe.

Only two states, Michigan and New Jersey, have been approved to assume the Section 404 Program. Other states have explored assumption, but those efforts have not borne fruit in part due to uncertainty over the scope of assumable waters and wetlands. The EPA formed the Assumable Waters Subcommittee under the auspices of the National Advisory Council for Environmental Policy and Technology (NACEPT) to provide advice and develop recommendations for NACEPT on how the EPA can best clarify for which waters a state or tribe may assume CWA section 404 permit responsibilities, and for which waters the USACE retains CWA section 404 permit responsibility under an approved state or tribal program. The Subcommittee included 22 members representing states and tribes, federal agencies, and other stakeholders. This report represents the results of the Subcommittee's work from October 2015 to April 2017 and is being presented to NACEPT for its consideration.

[1] Tribes were not specifically called out in the 1977 CWA amendments but are able to assume as provided in Section 518(e) of the CWA.

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UNDERLYING ASSUMPTIONS

Recommendations to the NACEPT were developed against the background of the following assumptions.

- In accordance with the requirements of Section 404, a state or tribe may only be authorized to assume the Section 404 Program if it has authority over all assumable waters of the United States, and demonstrates that it will apply legal standards consistent with the Clean Water Act (CWA) requirements in operating a permitting program.
- Assumption by a state or tribe does not alter CWA jurisdiction over waters of the United States. Moreover, nothing in the report or recommendations of the subcommittee is intended to alter in any way the definition or scope of federal jurisdiction. Rather, this report speaks only to the administrative division of authority under Section 404 between the USACE and an approved state or tribe.
- In accordance with EPA's charge to the subcommittee, recommendations are intended to provide clarity, to be practical and readily implementable in the field, and to be consistent with the CWA, particularly Section 404(g)(1).
- Waters, such as rivers, lakes, and streams, and adjacent wetlands are clearly linked legally, in policy, and in hydrology, and in total are often referred to as "waters." However, for the purposes of developing recommendations and for usage in this report, the Subcommittee chose the use of two terms: "waters" and "adjacent wetlands."
- Since the EPA will be receiving formal advice from the NACEPT, the EPA participated actively in the discussion, formulation, and review of the alternatives and provided technical advice, but did not take a position regarding the specific recommendations made by the Subcommittee. The US FWS also participated in the discussions but did not take a position on the final recommendations. Members who took a position regarding the recommendations are referred to as "recommending members." These include all members, including the USACE, but not the US EPA and the US FWS.

SUBCOMMITTEE ACTIVITIES

Subcommittee members met eight times and also worked independently from October 2015 through April 2017. Investigations and discussions were divided into three primary topics.

- The origins, legislative history, and processes of Section 404 state or tribal assumption. Subcommittee members, including attorneys and others, reviewed the language of Section 404(g), the legislative history, and other policy documents. The full findings of this group are included in *Appendix F*. The histories of the programs in Michigan and New Jersey are included in *Appendix B*.
- The extent of waters of the United States that may be assumed by an approved state or tribe, and the extent of waters where Section 404 authority must be retained by the USACE, even following state or tribal assumption. Findings and recommendations are discussed in detail in this report.
- The extent of wetlands that must also be retained by the USACE following state or tribal assumption. Findings and recommendations are discussed in detail in this report.

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SUBCOMMITTEE FINDINGS AND RECOMMENDATIONS

Waters (other than Wetlands) Assumable by a State or Tribe, and Waters that Must be Retained by the USACE

MAJORITY RECOMMENDATION. All the recommending Subcommittee members (the majority) except the member representing the USACE recommend to NACEPT that the EPA develop guidance or regulations to clarify that when a state or tribe assumes the 404 program, the USACE must retain authority over waters included on lists of waters regulated under Section 10 of the Rivers and Harbors Act (RHA). These lists are compiled and maintained by the USACE district offices for every state except Hawaii, and the majority of the Subcommittee recommends the lists be used with two minor modifications: any waters that are on the Section 10 lists based solely on historic use (e.g. based solely on historic fur trading) are not to be retained (based on the Congressional record and statute), and waters that are assumable by a tribe (as defined in the report) may also be retained by the USACE when a state assumes the program. The majority recognizes that waters may be added to Section 10 lists after a state or tribe assumes the program, and recommends in that case, such waters may also be added to lists of USACE-retained waters at that time.

The majority believes that this option is clear and practical, can be implemented efficiently at the time a state or tribe seeks assumption as well as in the operation of an assumed program, and is consistent with Congress' intent that the USACE retain authority over RHA Section 10 waters and adjacent wetlands. This alternative also is based on relatively stable and predictable information.

All other waters of the United States (with the exception of adjacent wetlands as discussed below) are assumable by a state or tribe.

MINORITY RECOMMENDATION. The Subcommittee member representing the USACE recommends USACE retain authority over waters on the Section 10 lists, and also waters that have been identified as Traditional Navigable Waters (TNWs) under the CWA in accordance with USACE CWA regulations at 33 CFR 328.3(a)(1) and guidance issued by the USACE and the EPA to implement the Supreme Court's opinion in Rapanos, Appendix D.[2] Under this recommendation waters that are officially determined by a USACE district as Section 10 or stand-alone CWA (a)(1) TNW waters at the time a state or tribe assumes the program would be retained by the USACE. In addition, the District would evaluate all of its completed case-specific TNW determinations to determine whether addition of that water to the retained waters list is warranted under a stand-alone determination. Waters that are later identified and officially determined as a Section 10 or stand-alone CWA(a)(1) TNW after assumption occurs will also be added to the list of retained waters. The USACE believes there should not be a distinction between different uses of the term "navigable waters" under different sections of the statute, and believes this is consistent with the purposes of the CWA and Section 404(g). While the statutory language of the CWA Section 404(g) parenthetical waters slightly differs from the regulatory language of 328.3(a)(1), the USACE believes the interpretation of the term "navigable waters" is the same under 404(g) and 328.3(a)(1) (other than those waters considered navigable based solely on their historic use).

[2] Appendix D of the 2007 "US Army Corps of Engineers Jurisdictional Determination Instructional Guidebook" available at: http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/ app_d_traditional_navigable_waters.pdf. The Guidebook, of which Appendix D is part, was dated 1 June 2007 and signed by USACE and the US EPA on 5 June 2007.

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Adjacent Wetlands Assumable by a State or Tribe, and Adjacent Wetlands that Must be Retained by the USACE

MAJORITY RECOMMENDATION. All the recommending Subcommittee members (the majority) except for the USACE member recommend that the EPA adopt and implement a policy under which the USACE would retain administrative authority over all wetlands adjacent to retained navigable waters landward to an administrative boundary agreed upon by the state or tribe and the USACE. The USACE CWA regulatory definition of "adjacent" would be used to identify adjacent wetlands, and the USACE would retain administrative authority only over adjacent wetlands within the agreed-upon administrative boundary. This administrative line could be negotiated at the state or tribal level to take into account existing state regulations or natural features that would increase practicability or public understanding; if no change were negotiated, a 300-foot national administrative default line would be used.

The majority of the subcommittee understands that the purpose of retention by the USACE of wetlands adjacent to Section 10 waters is primarily to ensure that the USACE has authority over activities that may alter the physical structure of the navigational channel or otherwise interfere with navigation. Thus, it believes that the extent of USACE authority over adjacent wetlands under an assumed program is reasonably limited to wetlands that are likely to affect navigation.

MINORITY RECOMMENDATION. The representative of the USACE recommends that the USACE retain the entirety of wetlands that are "adjacent" to retained navigable waters, using the definition of adjacent wetlands currently being used by the USACE for regulatory actions under Section 404 (i.e. the wetlands defined as adjacent under 33 CFR 328.3, implemented through the 2008 Rapanos guidance). The USACE believes that this recommendation is consistent with CWA Section 404, provides clarity regarding the permitting authority, and is easily understood and implementable in the field.

IMPLEMENTATION AND PROCESS RECOMMENDATIONS

This report also provides general recommendations regarding the potential content of new guidance or regulations on state or tribal assumable waters, and effective procedures for implementation.

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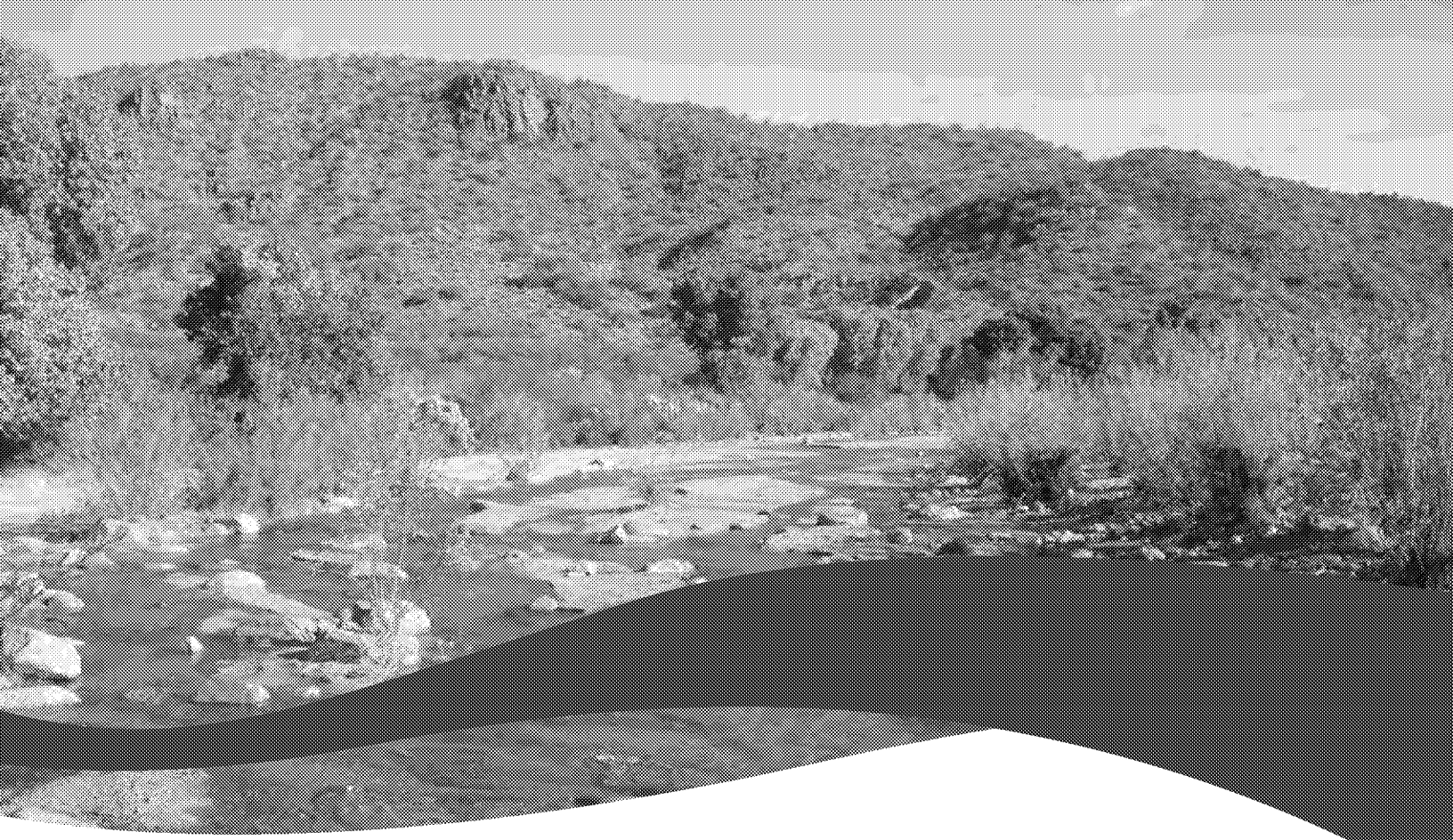

1. Statement of the Problem

Section 404(a) of the Clean Water Act (CWA) authorizes the US Army Corps of Engineers (USACE) to issue CWA permits for the discharge of dredged or fill material into navigable waters. Section 404(g) authorizes states,[3] with approval from the US Environmental Protection Agency (EPA), to assume authority to administer the 404 program in some but not all navigable waters. The waters and wetlands that a state may not assume, and that the USACE must retain even after a state has assumed the program, are specified in a parenthetical phrase in section 404(g)(1) as:

> *"... those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto ..."*[4]

It was the intent of Congress for states to implement the permit program under Section 404 of the Federal Clean Water Act.[5] However, since the enactment of 404(g) in 1977, only two states and no tribes have assumed the 404 Program. While other states (most recently including Maryland, Oregon, Virginia, Montana, Florida, Arizona, and Alaska) and some tribes have explored assuming the program, their efforts have not resulted in actual assumption. States have indicated that this is due in part to confusion about the meaning of Section 404(g)(1). This report focuses on clarifying the meaning of Section 404(g)(1) and thus the scope of waters and adjacent wetlands that may be assumed by a state or tribe.

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[3] Tribes were not specifically called out in the 1977 CWA amendments but are able to assume as provided in statute in Section 518(e) of the CWA, 33 USC 1378(e), which authorizes the Administrator to treat an Indian Tribe as eligible to apply for numerous CWA programs, including the 404 permit program under section 404(g). The EPA has also issued regulations on this matter at 40 CFR Part 233g: 404 – Tribal Program Regulations.

[4] §1344(g)(1)

[5] 33 USC § 1251(b)

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2. Background

WHAT IS ASSUMPTION?

"Assumption" of the CWA Section 404 program describes the process whereby a state or tribe obtains approval from the EPA to administer the 404 program within their borders and consequently begins administering the program. To obtain EPA approval, the state or tribal program must be consistent with and no less stringent than that required by law of the federal agencies. For example, a state or tribe must:

- have sufficient authority to regulate all waters of the US that may be assumed;
- regulate at least the same activities as listed in the Act and regulations;
- provide for sufficient public participation;
- ensure compliance with the Section 404(b)(1) guidelines, which provide environmental criteria for permit decisions;
- have adequate enforcement authority; and
- comply with other applicable regulations (33 USC part 1344(h); 40 CFR part 233).

In an assumed 404 program, the EPA retains the authority to review defined categories of permit applications and may request review of any application. The EPA coordinates its review of a particular application with the USACE and requests comments from the US Fish and Wildlife Service, and, as appropriate, the National Marine Fisheries Service, with the EPA providing comments to the state or tribe. In the event that the EPA objects to issuance of a 404 permit,

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the state or tribe cannot issue the 404 permit unless the EPA's objection is resolved. If the objection is not resolved, the USACE takes responsibility for the permit, including the decision to issue or deny the permit. These provisions of federal law provide safeguards that ensure consideration of both state or tribal and federal requirements as well as national consistency.

Before assuming the program, the state or tribe must enter into and sign separate Memoranda of Agreement (MOAs) with both the EPA and USACE. The MOA with the USACE must describe which navigable waters and adjacent wetlands will be retained by the USACE. To date, there has been little guidance to USACE districts, EPA regions, or states and tribes on how to make that determination.[6]

TRIBAL CONSIDERATIONS REGARDING ASSUMPTION[7]

Section 518 of the CWA, enacted as part of the 1987 amendments to the statute, authorizes the EPA to treat eligible Indian tribes in a manner similar to states ("treatment as a state" or TAS) for a variety of purposes, including administering each of the principal CWA regulatory programs and receiving grants under several CWA authorities (81 FR at 30183). This includes CWA Section 404. Tribal governments pursuing assumption of the 404 program will follow the same process as states, though it is expected that there will be some nuanced differences; for example, in addressing Tribal Indian Reservation boundaries.

In a state-assumed program, states will generally not assume authority for administering the 404 program within Indian country; instead, such authority will generally be retained by the USACE unless the tribe itself is approved by the EPA to assume the 404 program. Because Tribal Indian Reservation boundaries are not static and precise definitions and considerations vary from state to state, it is essential that waters to be retained by the USACE on tribal lands be specifically addressed in any MOA developed between the USACE and a state assuming the program.

Per Executive Order 13175 of November 6, 2000 – Consultation and Coordination With Indian Tribal Governments,[8] the federal government has an obligation to consult with federally-recognized tribes that may be affected during a state assumption effort.

OVERVIEW OF ASSUMPTION BY MICHIGAN AND NEW JERSEY

Since Section 404(g) was enacted in 1977, two states have assumed the program: Michigan and New Jersey.

Michigan and EPA signed a MOA regarding assumption in 1983. In 1984, the state and the USACE signed a MOA describing waters over which the USACE retained administration. Prior to assumption, Michigan had enacted a number of statutes related to water protection, including the 1955 Great Lakes Submerged Lands Act, the 1972

[6] In 1980, the EPA produced a document entitled: "The State's Choice: 404 Permit Program" that provides some insight into the agency's thinking at that time (*US EPA, Office of Water Regulations and Standards Criteria and Standards Division, EPA 440/5-81-002, October 1980*). The EPA's implementing regulations also provide very general guidance. These regulations state that the MOA between the USACE and state or tribe will contain "A description of waters of the United States within the State over which the Secretary retains jurisdiction, as identified by the Secretary." 40 CFR Part 233: 404 State Program Regulations.

[7] *See Appendix A*, Tribal Findings, Issues, and Considerations during Assumption.

[8] Federal Register Vol. 65, No. 218, pages 67249-67252.

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Inland Lakes and Streams Act, and the 1979 Wetland Protection Act. The Wetland Protection Act was passed to facilitate assumption of the 404 Program. In 1984, EPA formally approved Michigan's program.[9]

The waters and wetlands assumed by Michigan are described in the MOA between Michigan and the USACE. In this MOA, the USACE retains responsibility for waters that are on a Rivers and Harbors Act (RHA) Section 10 list maintained by the USACE district office. In addition, the USACE retains permitting authority over the Great Lakes, which although not on the list clearly qualify as Section 10 waters. This list is specific and results in well-defined boundaries and upstream limits for waters retained by the USACE. Most of these USACE-retained waters are within a narrow band of streams that flow into the Great Lakes. This list has been refined over time with the addition of some small tributaries and wetlands that are influenced by the water level of the Great Lakes. Michigan has assumed the remaining waters, which are the vast majority of the waters internal to the state.

The extent of adjacent wetlands over which the USACE retains authority is determined by the USACE on a case-by-case basis – generally including wetlands in close proximity to Section 10 waters, and having a direct surface water connection to and within the influence of the ordinary high water mark of those waters.

There are some waters over which Michigan and the USACE have joint authority. In these cases the two agencies work together on the permitting and compliance activities, and site inspections. Usually the state takes the lead on mitigation because the state has a robust mitigation program and can own property, hold conservation easements, and hold financial instruments, which the USACE cannot.

New Jersey assumed the program in 1994.[10] Prior to assumption, New Jersey passed its Wetlands Act in 1970, Coastal Zone Management Act in 1972, and the Freshwater Wetlands Protection Act in 1987. As part of the Freshwater Wetlands Protection Act, New Jersey undertook a mapping program to identify freshwater wetlands and waters. While the maps are not regulatory in nature, New Jersey's 404 program is keyed to these freshwater wetlands maps.

In the MOA between New Jersey and the USACE, the USACE retained regulatory authority over those wetlands that are: "... partially or entirely located within 1000 feet of the ordinary high water mark or mean high tide of the Delaware River, Greenwood Lake, and all water bodies which are subject to the ebb and flow of the tide."[11] State-administered waters in turn are generally determined by superimposing head of tide data on the state's freshwater wetlands quarter quadrangles that are at a scale of one inch equals 1000 feet. A line was established parallel to and 1000 feet from the ordinary high water mark or mean high tide of the waters described above. The USACE retains permitting authority over all wetlands that are waterward of, or intersected by, the administrative line described above. Because New Jersey regulates all wetlands/waters, it rarely has to determine whether a wetland is assumable or non-assumable. However, if there is any question or a reason that it makes a difference to an applicant, the state either adds a permit condition informing the applicant or contacts the USACE in advance to request the USACE determine whether they will or will not assert authority to regulate. See *Appendix B* for further elaboration of these two states' assumed programs.

[9] 49 FR 38948, Oct. 2, 1984. Redesignated at 53 FR 20776, June 6, 1988. Redesignated at 58 FR 8183, Feb. 11, 1993. Effective date, October 16, 1984.

[10] 59 FR 9933, Mar. 2, 1994.

[11] Ibid.

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NO FURTHER ASSUMPTION BY STATES OR TRIBES SINCE THE 1990s

The legislative history and statute indicate that Congress intended and expected that a number of states would choose to assume authority over the discharge of dredged or fill materials under the provisions of Section 404(g). However, no states or tribes have assumed the 404 Program since Michigan and New Jersey. There are many possible reasons for this, from the increasing complexity and cost of administering the program, to decades-long challenges about which waters should even be regulated under Section 404, to the fact that unlike several other EPA programs, Congress did not dedicate specific additional funding for states or tribes to cover the costs of administering a 404 program. Additionally, EPA and the USACE have not provided specific guidance that can be used to identify the waters (and wetlands) that must be retained by the USACE under 404(g). Without specific guidance, individual states or tribes and USACE districts have been left to interpret the meaning of 404(g)(1) to determine the extent of waters to be retained in each MOA negotiation. In turn, these negotiations have often broken down or stopped due to lack of clarity, uncertainty, or disagreement over the scope of retained waters and wetlands.

THE IMPORTANCE OF ASSUMPTION TO STATES AND TRIBES

States and tribes play a significant role in many Clean Water Act programs (for example, point and nonpoint source management, waste management, wastewater permitting under Section 402, and development of water quality standards). In most CWA programs, states and tribes partner primarily with the EPA. Section 404 is unique in the sharing of regulatory responsibilities with the USACE in addition to EPA. For those states or tribes with mature, integrated water management programs that include the regulation of dredged or fill activities, 404 Program assumption allows a state or tribe to carry out a fully integrated and comprehensive water program addressing the full range of state, tribal, and CWA requirements. Despite the complexity of the program and potential administrative costs, states and tribes remain interested in pursuing assumption.

While not all states and tribes are qualified or positioned to assume Section 404 responsibility, or are willing to bear the additional cost of doing so, assumption may have significant benefits for some states and tribes, as well as the public. State or tribal assumption in accordance with Section 404(g) could reduce the overlap and duplication of state, tribal, and federal permitting programs, and be the best use of state, tribal, and federal program resources. This is, of course, dependent upon assurance that the state or tribal program is as stringent as is required by the federal statutes and regulations, an assurance required by the CWA and provided by initial EPA approval and by ongoing federal oversight. Assumption allows a state or tribe to meet state or tribal regulatory time constraints; to incorporate needed local requirements and permit conditions; and, to integrate review of applications for discharge of dredged or fill material with other applicable regulatory requirements. The public may be supportive of assumption and willing to accept the costs to a state or tribal government and the potentially higher permit fees given potentially significant streamlining of the permitting process for many projects.

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ESTABLISHMENT OF THE SUBCOMMITTEE

In 2014, the Association of Clean Water Administrators, the Environmental Council of the States, and the Association of State Wetland Managers asked EPA to clarify which waters are assumable under the statute (see *Appendix C* for a copy of the request from the state associations). In response, EPA convened a stakeholder group to provide advice on this matter. To form the stakeholder group, EPA drew on its authority under the Federal Advisory Committee Act (FACA), Public Law 92-463[12]. In 1988, EPA established the National Advisory Council for Environmental Policy and Technology (NACEPT), a body subject to FACA, to provide advice to the EPA Administrator on a broad range of environmental policy, management, and technology issues. In March 2015, the Agency published a Federal Register Notice announcing that NACEPT would be establishing the Subcommittee to address the issue raised by the states and national organizations, and that it was seeking nominations for membership. In June of that year, EPA announced the appointment of 22 members representing federal, state, and tribal governments, non-governmental organizations and the regulated public (see *Appendix D* for a list of members and their affiliations).

EPA directed the Subcommittee to focus on a narrow and specific task related to the waters for which a state or tribe may assume permitting responsibility (see the Subcommittee Charter in *Appendix E*). The Subcommittee was asked to provide advice and develop recommendations for NACEPT on how EPA can best clarify for which waters a state or tribe may assume CWA section 404 permit responsibilities, and for which waters the USACE retains CWA section 404 permit responsibility under an approved state or tribal program.

As set forth in the Charter's Charge to the Subcommittee: "this effort will address the States' request to provide clarity on this issue enabling them to assess and determine the geographic scope and costs and benefits associated with implementing an approved program." The Subcommittee has had a limited duration and narrow focus. Other aspects of state or tribal assumption were not within the scope of Subcommittee deliberations. *In particular, the Charge emphasized that "the subcommittee will not be deliberating on the merits of assumption, nor on any aspect of the larger question of which waters are 'waters of the US.'"*

EPA asked that the final Subcommittee report to NACEPT reflect consideration of the following assumptions:

- A CWA section 404 permit is required – meaning there is an activity regulated under section 404 that will result in a discharge of dredged or fill material into a water of the US;
- Any recommendation must be consistent with the CWA and in particular section 404(g); and
- Clarity regarding who is the permitting authority (the state or tribe or the USACE) should be easily understood and implementable in the field.

[12] 5 USC Appendix 2

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OPERATION OF THE SUBCOMMITTEE

With this direction in mind, the Subcommittee held its initial meeting October 6–7, 2015, followed by four additional multi-day meetings and three webinars. The early meetings were spent clarifying and understanding the nature of the question being asked. Subsequently, the Subcommittee formed four work groups to focus on assigned issues – specifically, Tribal Considerations, Origin and Purpose of Section 404(g), Waters, and Adjacent Wetlands.

The Tribal Considerations work group clarified issues that both states and tribes need to address from the earliest stages of consideration of assumption. The work of the Origin and Purpose of Section 404(g) work group served as an underpinning not only for the entire Subcommittee's work but particularly for the work of the Waters and Adjacent Wetlands work groups. Waters, such as rivers, lakes, and streams, and adjacent wetlands are clearly linked legally, in policy, and in hydrology, and in total are often referred to as "waters." However, for the purposes of developing recommendations and for usage in this report, the Subcommittee chose the use of two terms: "waters" and "adjacent wetlands." The Subcommittee felt that the recommendation for which waters could be assumed vs. retained would relate directly to which adjacent wetlands would be assumed vs. retained: only wetlands adjacent to waters retained by the USACE, for example, would be retained by the USACE, regardless of the nature of the recommendation for retained wetlands.

The work groups were tasked with studying the assigned topics, reporting their findings, and developing alternatives for consideration by the entire Subcommittee. Typically, the work groups met during Subcommittee meetings at key points, and between meetings continued their work through conference calls and exchanges of emails.

It was immediately apparent to all participants that the Subcommittee should not deviate from the defined charge and should avoid addressing questions about the scope of CWA jurisdiction over "the waters of the United States." Thus, consistent with EPA's Charge to the Subcommittee, the question for the Subcommittee was not which waters are "waters of the United States," but rather which of the "waters of the United States" will be *retained* by the USACE, and which "waters of the United States" may be *assumed* by a state or tribe. All waters of the United States will continue to be regulated in accordance with Section 404 requirements regardless of whether a state or tribe assumes the program. The Subcommittee stresses that this distinction between administrative responsibility and jurisdictional authority is essential to keep in mind in reading the findings and recommendations in this report. The Subcommittee's focus has been on clarifying administrative responsibility.

ABOUT THE WRITING OF THIS REPORT

This report is based on extensive written work completed by the Subcommittee's work groups and reviewed and discussed by the full Subcommittee. A drafting work group assembled and edited the final report based on those work groups' products.

The work groups carried out extensive discussion, then one or two participants produced a draft working paper or brief that was in turn reviewed and edited by all work group members, and then further reviewed and edited by all Subcommittee members. In the case of the Origin and Purpose of Section 404(g) section, the Subcommittee relied heavily on non-agency Subcommittee members who were attorneys with extensive experience in the CWA.

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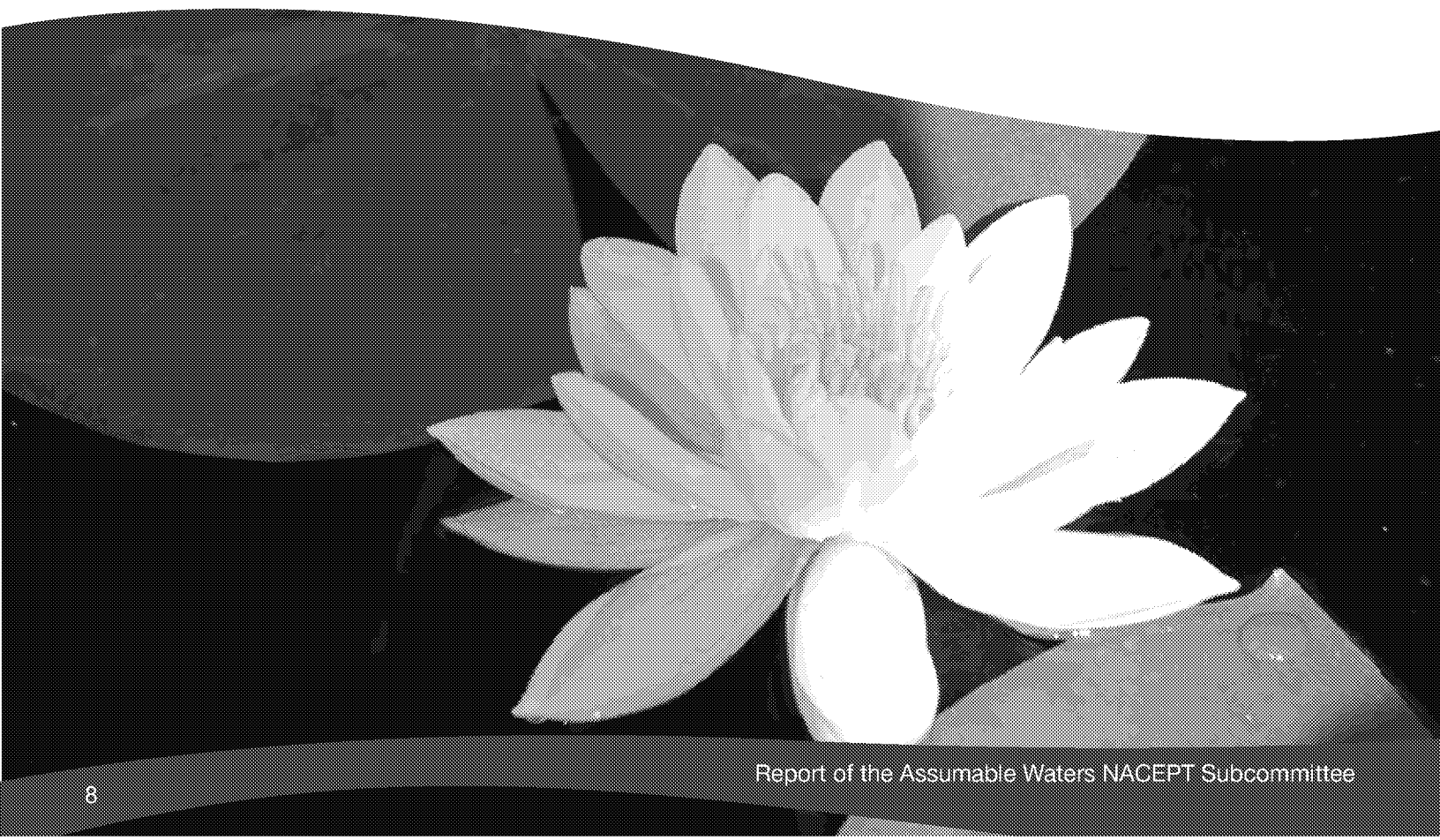
The reader may note that the following alternatives and recommendations sections for retained waters and adjacent wetlands vary somewhat in format and style. While the sections follow the same general approach (discussion, presentation of alternatives, and majority and minority recommendations), there are differences in the presentations. The Subcommittee has chosen to allow these differences to remain. These differences are in part due to the different work groups' writing style and formatting, and in part because the two issues have different legislative histories and treatments. The full Subcommittee agrees that the report accurately describes the Subcommittee's deliberations and majority and USACE minority recommendations.

While the US EPA provided comments along with all other Subcommittee members, drafting of this report was by non-EPA members of the subcommittee. Since the US EPA will be receiving formal advice from the NACEPT, the EPA participated actively in the discussion, formulation, and review of the alternatives and provided technical advice, but did not take a position regarding the specific recommendations made by the Subcommittee. The US FWS also participated in the discussions but did not take a position on the final recommendations. Members who took a position regarding the recommendations are referred to as "recommending members." These include all members, including the USACE, but not the US EPA and the US FWS.



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3. Origin and Purpose of Section 404(g)

ORGANIZATION OF THE WORK GROUP

In accordance with EPA's charge to the Subcommittee that "any recommendation must be consistent with the CWA and in particular 404(g)(1)," the Subcommittee established a work group to look into the meaning and history of Section 404(g)(1). The work group sought to provide clarification and understanding of the language of the statute by referring to the record of administrative developments, Congressional hearings, committee reports, and debates that led to the 1977 amendments to the CWA – which amendments resulted in, among other things, the adoption of section 404(g)(1). Memoranda of the work group's findings and conclusions are attached in *Appendix F* to this Report. Following is a brief summary of the work group's findings and conclusions. In the interest of brevity, citations to original sources are omitted from this summary, but they can be found in the Memoranda attached in *Appendix F*.

BACKGROUND ON NAVIGABLE WATERS TO BE RETAINED BY THE USACE AS DEFINED IN SECTION 404(g)(1)

At the time Congress enacted the CWA in 1972, the USACE had been regulating "navigable waters of the United States" under the Rivers and Harbors Act (RHA) since the 19th century. The CWA went beyond the RHA to regulate "navigable waters," which it defined to mean "the waters of the United States." The strikingly similar language in the two statutes led to confusion, and the USACE's initial post-CWA regulations treated the two jurisdictional terms interchangeably. But the statutes had different purposes: the RHA focused primarily on navigable capacity; the CWA on water quality. In 1975 the District Court for the District of Columbia ordered the USACE to adopt new regulations in accordance with the broader water quality purposes of the CWA. In July 1975, the USACE issued new regulations announcing a phase-in schedule for expanding the 404 program as follows:

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- *Phase I:* [effective immediately] discharges of dredged material or of fill material into coastal waters and coastal wetlands contiguous or adjacent thereto or into inland navigable waters of the United States and freshwater wetlands contiguous or adjacent thereto are subject to … regulation.
- *Phase II:* [effective July 1, 1976] discharges of dredged material or of fill material into primary tributaries, freshwater wetlands contiguous or adjacent to primary tributaries, and lakes are subject to … regulation.
- *Phase III:* [effective after July 1, 1977] discharges of dredged material or of fill material into any navigable water [including intrastate lakes, rivers and streams landward to their ordinary high water mark and up to the headwaters that are used in interstate commerce] are subject to … regulation.

Many in Congress were concerned about the expansion of the USACE's CWA dredge or fill regulatory program as addressed in their 1975 regulations quoted above, and in 1976 the House of Representatives passed HR 9560 which redefined the CWA term "navigable waters" specifically for the 404 program (but not the rest of the CWA) to:

> The term "navigable waters" as used in this section shall mean all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher high water mark on the west coast).

This House bill was not approved by the Senate and therefore it never became law. The Committee report accompanying the House bill explained that the new definition would be "the same as the definition of navigable waters of the United States as it has evolved over the years through court decisions ... with one exception. [It] omits the historical test of navigability." The Committee believed "that if a water is not susceptible of use for the transport of interstate or foreign commerce in its present condition or with reasonable improvement," then it should be excluded from the definition. "Activities addressed by section 404, to the extent they occur in waters other than navigable waters of the United States ... are more appropriately and more effectively subject to regulation by the States."

Although HR 9560 did not include wetlands in the definition of navigable waters, it protected wetlands by requiring 404 permits for dredged or fill activities in "coastal wetlands and ... those wetlands lying adjacent and contiguous to navigable streams."

The Senate declined to redefine "navigable waters" for purposes of the 404 program. But the Senate did pass a bill in August 1977 that allowed the states to assume 404 permitting authority, subject to EPA approval, in phase II and III waters (as defined in the USACE's 1975 regulations quoted above). Until the approval of a state program for Phase II and III waters, the USACE would administer section 404 in all navigable waters. After assumption, the USACE would retain 404 permitting authority in Phase I waters.

The final bill, HR 3199, referred to as the 1977 CWA Amendments, was a compromise. It did not change the definition of "navigable waters" for the 404 program. But it allowed the states to assume permitting authority in "phase II and III waters after the approval of a program by [EPA]."

To effectuate this intent, the final bill inserted the language from HR9560 that had limited the term "navigable waters" into a parenthetical phrase in section 404(g)(1) that defined the waters the USACE must retain. The parenthetical

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tracked the language the House Committee had originally used to limit USACE jurisdiction, except that the Conference Committee added "wetlands adjacent thereto" to the parenthetical phrase that defined waters to be retained by the USACE, known as "retained waters."

The legislative history of 404(g) in both the House and the Senate evidences a Congressional expectation that most States would assume the 404 program, and therefore effectively limit USACE permitting authority to Phase I waters (except waters deemed navigable based solely on historical use, which are assumable by a state). The USACE defined Phase I waters as "navigable waters of the United States" and "wetlands contiguous or adjacent thereto." The preamble to the USACE's 1977 regulations described them as "waters already being regulated by the USACE," i.e., those waters subject to regulation by the USACE under section 10 of the RHA, plus adjacent wetlands.

Numerous judicial opinions over more than a century have factored into the meaning and scope of USACE jurisdiction under the RHA. As the USACE states in its 1977 section 10 regulations, "[p]recise definitions of 'navigable waters' or 'navigability' are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies." Therefore, if and when questions arise in identifying the RHA waters to be retained according to the 404(g)(1) formula at the time a state or tribe assumes permitting authority, agency expertise will be necessary to interpret the RHA standard and apply it on the ground to determine whether a particular feature is assumable or must be retained by the USACE, all of which will be subject to judicial review.

BACKGROUND ON ADJACENT WETLANDS TO BE RETAINED BY THE USACE

When a state or tribe assumes permitting authority, the USACE must retain those waters described above and "wetlands adjacent thereto."

The phrase "wetlands adjacent thereto" was first added to Section 404(g)(1) by the Conference Committee during the final run-up to enactment of the 1977 amendments, although there had been a reference to wetlands earlier, in HR 9560, which had been passed by the House in the summer of 1976. That bill did not include wetlands in the definition of "navigable waters" but it required permits for discharges to "wetlands lying adjacent and contiguous to navigable streams." However, neither the House nor the Conference Committee defined what they meant by the terms "adjacent," "contiguous" or "wetlands."

While actual definitions of adjacent and wetlands were not included, the terms "contiguous or adjacent wetlands" were used in the USACE's July 1975 regulations. In July 1977 the USACE for the first time promulgated definitions of "adjacent" and "wetlands" for purposes of its "waters of the United States" regulatory definitions under the CWA. The preamble to the 1977 rule explained that:

> "[s]ince 'contiguous' is only a subpart of the term 'adjacent,' we have eliminated the term 'contiguous.' At the same time, we have defined the term 'adjacent' to mean 'bordering, contiguous, or neighboring.' The term would include wetlands that directly connect to other waters of the United States, or that are in reasonable proximity to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes, and similar obstructions."[13]

[13] 42 Fed. Reg. 37,122, 37,129 (July 19, 1977).

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There are no references in the legislative history of section 404(g) to the USACE's 1977 definition of "adjacent," though the regulatory definition quoted above was in place when Congress debated the 1977 amendments. Mention of the meaning of the term "adjacent" came up only once during the final floor debate on the 1977 amendments. In response to questions raised by another Member, Congressman Don H. Clausen, the ranking minority member of the Subcommittee on Water Resources of the House Committee on Public Works and Transportation and one of the drafters of the 1977 CWA amendments, replied that the word "adjacent" as used in 404(g)(1) means "immediately contiguous to the waterway." Other than this colloquy, there is no significant discussion of what Congress intended by using the word "adjacent" for purposes of allocating permitting authority under 404(g)(1).

In sum, no definitive meaning of the term "adjacent" in 404(g)(1) emerges from a review of the legislative history. Therefore, the meaning of adjacency within 404(g)(1) is susceptible to various interpretations.

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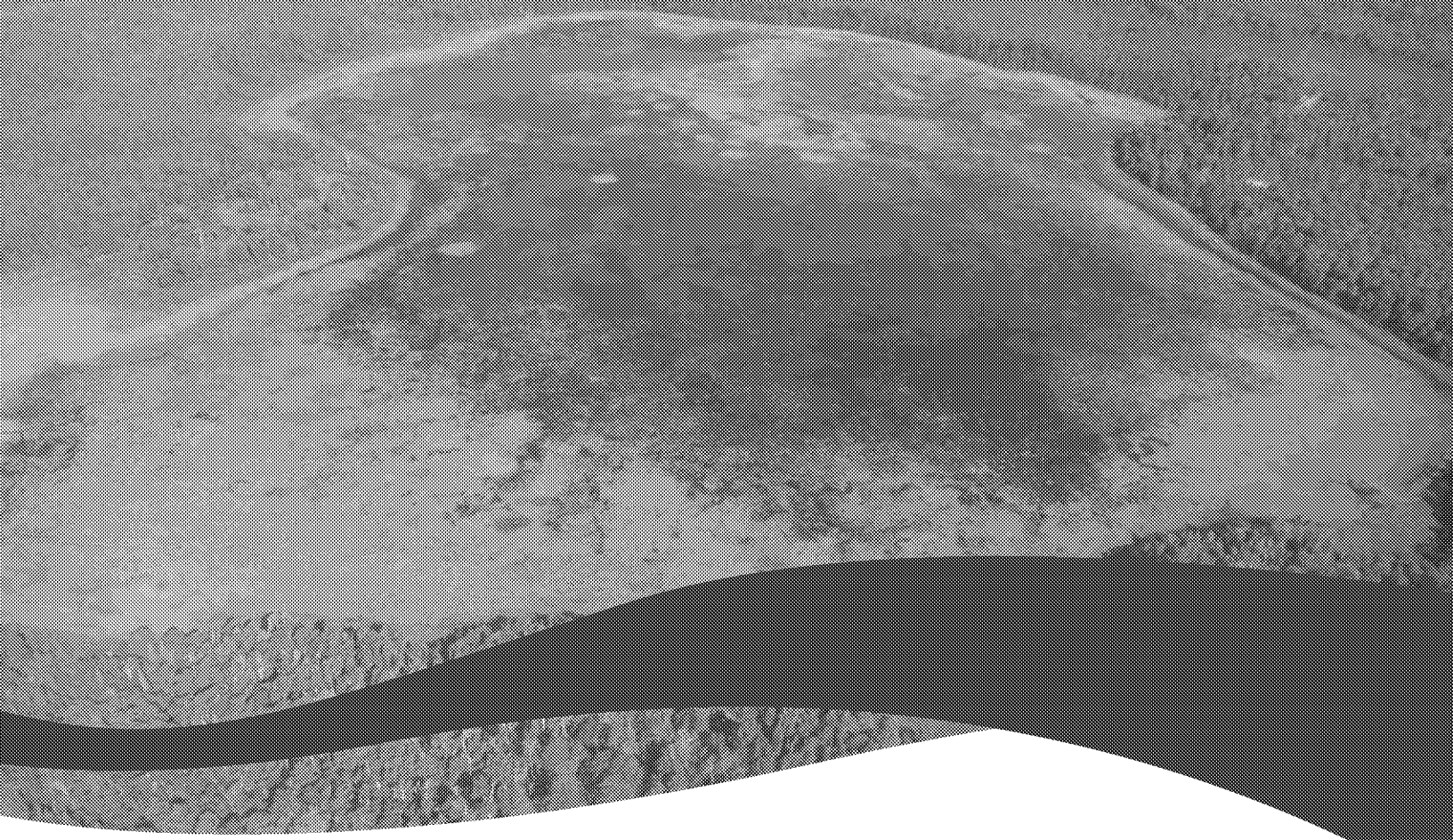

4. Description of Alternatives for Identifying Waters (other than Wetlands) Assumable by a State or Tribe, and Waters that Must be Retained by the USACE

The Subcommittee tasked the Waters work group with identifying a plausible, limited set of options that the federal agencies could use to clarify which waters (other than wetlands) are assumable by states or tribes and which need be retained by the USACE. These options were based on the experience in Michigan and New Jersey, a reading and understanding of the CWA and the legislative history of 404(g)(1), the input and experience of other states and tribes with a potential interest in assumption, and the experience of the USACE in administering the program in its entirety in all but two states since 1977. These options are listed below as ALTERNATIVES A, B, and C.

As a starting point, the waters work group noted that the following three regulations or statutes all use the term "navigable":

- RHA interpreted at 33 CFR 329.4, 1977,
- CWA jurisdictional definition of "(a)(1)" waters at 33 CFR 328.3(a)(1), and
- CWA Section 404(g)(1) parenthetical definition of waters to be retained by the USACE under a state- or tribe-assumed program.

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However, the term "navigable" has different meanings in each of these passages, and the statutes and/or regulations that use "navigable" have different purposes. For example, the purpose of 328.3(a)(1) is to define the scope of jurisdiction under the CWA, while the purpose of 404(g) is to provide for an administrative division of permitting responsibilities between states or tribes and the USACE.

WATERS ALTERNATIVE A:
Case-by-case determination of USACE-retained and state- or tribal-assumable waters at the time of program assumption (the status quo).

At the time a state or tribe decides to pursue assumption, the USACE district and the state or tribe will work together to identify, utilizing existing information, which waters will be retained by the USACE and which will be assumed by the state or tribe. Under this alternative, neither EPA nor the USACE would provide further guidance or clarification on criteria to be used to help define the scope of retained vs. assumed waters, but states or tribes would retain their ability to seek assumption within existing processes and procedures. While the Subcommittee deemed it important to put forward this option as one of three, it should be noted that states and tribes have requested that EPA clarify the extent of assumable waters because uncertainty regarding the potential scope of state and tribal permitting authority under an assumed program has proven to be a barrier to full consideration of 404 Program assumption by the states and tribes. This option provides no further clarity due to historic differences and communications in different states, tribes, and districts.

WATERS ALTERNATIVE B:
Primary Dependence on RHA Section 10 Lists of Navigable Waters to Define USACE-Retained Waters

This alternative uses existing USACE lists of RHA Section 10 waters to define USACE-retained waters. USACE district offices maintain state-by-state lists of waters that are regulated by the USACE under Section 10 of the RHA for every state except Hawaii. These include waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. This district-maintained list will be used as the basis for the list of USACE-retained waters (List of Retained Waters) for any state or tribe pursuing assumption.

Waters included on the Section 10 lists based solely on historical navigational use may be assumed by a state or tribe,[14] and thus would be deleted from a list of USACE-retained waters. All waters of the United States not included on the list of USACE-retained waters would be assumable by a state or tribe.

As discussed earlier in this report in *Section 2*, subsection on *Tribal Considerations Regarding Assumption* (*see page 3*), if a state (as opposed to a tribe) is seeking assumption, waters associated with lands held in trust for federally recognized Indian tribes – that is, that are subject to assumption by a tribe – could also be retained by the USACE unless and until the time of a tribal assumption.

Under ALTERNATIVE B, when a state or tribe initiates the assumption process, the USACE district will use the Section 10 list to develop a List of Retained Waters by (1) deleting waters included on the Section 10 list based on

[14] See *Appendix F* of this report regarding assumption of such waters.

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historical use only (applying the relevant factors set forth in the RHA Section 10 regulations); (2) in the case of a state assumption, adding tribal waters, and (3) identifying and adding waters that appropriately belong on the Section 10 list and therefore on the List of Retained Waters.

If the USACE identifies waters that are eligible for but not included on the list of waters regulated under RHA Section 10, either at the time of assumption or following some future alteration in the physical condition of a water body, the USACE can add such waters following consideration of the RHA case law and relevant factors set forth in the RHA Section 10 regulations, including 33 CFR 329.8 (improved or natural conditions of the water body), 329.9(a) (past use), 329.9(b) (future or potential use), and 329.10 (existence of obstructions). Under ALTERNATIVE B, these waters would be retained by the USACE only if they are added to the Section 10 list, unless the determination is based solely on historical use. Once added, these waters would be included in the List of Retained Waters.

The Subcommittee discussed variations within this option at length, but all variations relied on the use of the existing Section 10 lists as the starting point. When a state or tribe seeks assumption, the state or tribe, the USACE, and the EPA would collaborate in review of the existing Section 10 list, clarify the scope of assumable waters, and resolve any waters that do not clearly meet the guidance described in the above paragraph. It is of note that while the state and federal agencies would collaborate in the development of the List of Retained Waters, the USACE would still have sole responsibility for maintaining and adding to the underlying Section 10 list. Inclusion of EPA in these discussions would further assure consideration of state or tribal assumption factors and concerns in devising the List of Retained Waters, including consideration of related issues (e.g., tribal waters). The EPA and the USACE would need to establish a clear dispute resolution procedure to be followed if the state or tribe and the USACE district were not able to complete the List of Retained Waters as part of their MOA development within a reasonable time frame.

WATERS ALTERNATIVE C:
Rivers and Harbors Act (RHA) Section 10 Waters plus CWA 33 CFR 328.3(a)(1) Waters as Retained Waters.

ALTERNATIVE C was proposed by the USACE representative on the Subcommittee and the following explanation of the Alternative has been written by the USACE.

Under this option, retained waters would be determined using both the RHA Section 10 lists, and additional waters determined by the USACE to be Traditional Navigable Waters (TNWs, or (a)(1) waters) under the CWA. In this option, the following process would be used[15].

[15] The USACE recognizes that there may be Section 10 and/or TNW waters that are not on the existing District lists under paragraphs (i) and (ii). If a state or tribal government asks the USACE for a list of Section 10 waters and TNWs that the USACE does not believe are subject to state CWA Section 404 assumption, the appropriate District office(s) will provide to the state or tribe the existing list of Section 10 waters (minus those based solely on historical use) and TNWs the USACE has available at that time. However, if and when assumption of the Section 404 program is being pursued by a state or tribe, at that time the USACE may be able to provide a more complete and updated list of retained waters, which might differ from the list given initially, and would include the waters resulting from completion of the process outlined in paragraphs (i) and (ii). The USACE recognizes that in many states some waters that have the legal status of Section 10 waters and/or TNWs have not yet been determined by the USACE to have such status. To the extent that available USACE resources allow, the USACE would try to update the list of retained waters for any particular state before the assumption process is finalized by the EPA. For purposes of clarity for the administrative process of state or tribal assumption and in recognition of limited USACE resources to identify all Section 10 and/or TNW waters with such legal status which have not yet been identified within a state, it is practical to limit the list of retained waters by the USACE at the time of final state assumption to those already identified as a Section 10 and/or TNW waters. Nothing in this part diminishes the statutory authorities over waters that may be Section 10 and/or TNWs but have not yet been formally determined as such.

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- Include the RHA Section 10 "navigable waters of the US" identified on Section 10 lists developed by the USACE districts within their areas of responsibility. These include waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. For purposes of state or tribal assumption, the list would exclude any waters or reaches of such waters based solely on use in the past.

- Include the Traditional Navigable Waters (TNWs).[16,17] For purposes of state or tribal assumption, the list of "navigable waters" that would be retained by the USACE would include any waters for which TNW stand-alone determinations or EPA TNW determinations have been previously made. In addition, case-specific TNW determinations are also made by USACE Districts but are only valid for the specific approved jurisdictional determination for which they are prepared. At the time a state or tribe begins assumption discussions with a USACE District, the District would evaluate all of their completed case-specific TNW determinations to determine whether addition of that water to the retained navigable waters list is warranted under a stand-alone determination. Any CWA (a)(1) TNW[18] determination can also serve as precedent for evaluation as a navigable water of the US to be added to the District Section 10 list.

- For purposes of the assumption process, only those waters in paragraphs (i) and (ii) would be retained by the USACE except for the rare exceptions described in paragraph iv below which may occur after a state or tribe has assumed the program under 404(g).

- Post-Assumption: There may be rare occasions when the USACE must make a new or revised Section 10 or TNW determination after it has provided its "retained navigable waters" list to a state or tribe (e.g., when a District independently makes changes to determinations per regulations at 33 CFR 329.14 or under TNW determination guidance, or when a Federal court has made a determination of "navigable waters of the US" or TNW, or when Congress makes a "non-navigable" determination under 33 USC Chapter 1, Subchapter II). In these cases, as with the above option, appropriate adjustments would be made to the retained navigable waters list to account for these revisions. Note that the state or tribe will primarily take on permitting and thereby jurisdictional determinations under their state or tribal programs post-assumption unless and otherwise triggered by these exceptions.

[16] See 33 CFR 328.3(a)(1) and Appendix D of the 2007 "US Army Corps of Engineers Jurisdictional Determination Instructional Guidebook" for a definition and guidance on identifying TNWs available at: http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/app_d_traditional_navigable_waters.pdf

[17] TNWs in this paragraph are only based on the EPA determinations or determinations made under the USACE's approved jurisdictional determinations and do not include determinations made under a preliminary jurisdictional determination which only indicate which waters "may be" subject to USACE jurisdiction under the USACE's statutory authorities.

[18] The USACE proposes retaining waters that the USACE deems to be "traditional navigable waters" or TNWs under the CWA regulation defining 'the waters of the United States' at 33 CFR Section 328.3(a)(1). To avoid confusion with "navigable waters of the United States" regulated under the Rivers and Harbors Act, this report refers to these as "CWA (a)(1) TNWs."

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5. Subcommittee Discussion and Recommendations for Identifying Retained Waters

MAJORITY RECOMMENDATION:
WATERS ALTERNATIVE B – Primary Dependence on RHA Section 10 Lists of Navigable Waters to Define USACE Retained Waters

After consideration of various options, all recommending subcommittee members with the exception of the USACE member recommend that EPA adopt and implement policy (guidance and/or regulations) consistent with ALTERNATIVE B to differentiate between assumable waters and those that must be retained by the USACE. The majority of the Subcommittee understands this option to have two primary advantages: clarity, and consistency with CWA Section 404(g)(1) as understood by the majority of Subcommittee members. The following discussion provides reasons for this recommendation as developed by the majority of the Subcommittee, referencing two of the criteria included in the charge to the Subcommittee and identifying a separate third criteria related to Congressional intent based on the legislative history of 404(g). These recommendations are made with the understanding that the Subcommittee is not making any recommendation that would affect the jurisdictional definition of waters of the United States.

Note that none of the Subcommittee members endorsed ALTERNATIVE A – essentially a "no action" alternative – and thus the Subcommittee provides no further discussion of this alternative.

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CRITERION 1. Does the recommendation provide clarity and is it easily understood and implementable in the field?

ALTERNATIVE B – the use of Section 10 lists to define USACE retained waters – is practical at the field level, being based on currently available information. It is also reasonably predictable for both the agencies and the public.

The recommended alternative provides a clearly defined set of waters to be retained by the USACE based on an existing administrative tool: the RHA Section 10 lists. This reduces confusion, uncertainty, and prolonged negotiations between a state or tribe and the associated USACE district or districts. Thus, it meets the criterion set forth in the Charge to the Subcommittee.

Lists of RHA Section 10 navigable waters of the United States are maintained by the USACE for all states except Hawaii. Additionally, ALTERNATIVE B recognizes that some RHA Section 10 lists, while generally stable, may not include all Section 10 regulated waters, and that the status of a specific water may change over time (e.g., removal of a dam that renders a stream reach navigable under the RHA). If changes are necessary, agencies can rely on existing regulations to guide the process for modifying the list. This alternative acknowledges that as the USACE and RHA case law amends a state Section 10 list as needed, parallel revisions may be made to the list of USACE-retained waters.

It is not expected that the overall reach of these lists will be modified greatly in the future. Thus, states and tribes can predict with reasonable accuracy which waters would be retained by the USACE in considering whether to pursue an application for Section 404 assumption. Moreover, relying on pre-existing lists (which may be augmented based on existing regulations and RHA case law) will foster efficient assumption procedures and minimize disagreements.

Of equal importance, identification of USACE-retained waters on a list of retained waters in a manner that is generally consistent with RHA Section 10 lists will allow the public to readily determine which agency is responsible for Section 404 regulation at a specific location under a state or tribal assumed program. The Section 10 lists are well established, and can be relatively easily labeled on regional maps or GIS systems, and therefore the Lists of Retained Waters would similarly be easily labeled. As noted in the discussion of the alternatives, the one complexity in utilizing the RHA Section 10 list for state or tribal assumption is those RHA Section 10 listed waters that may be based solely on historical use and would not be retained by the USACE.

By contrast, ALTERNATIVE C could result in uncertainty at the statewide and field level regarding the scope of state- or tribal-assumable versus USACE-retained waters, both before and after state or tribal program assumption. Under ALTERNATIVE C, the USACE would retain both RHA Section 10 waters and CWA "traditional navigable waters" under the USACE's jurisdictional regulations at 33 CFR 328.3(a)(1). As compared to ALTERNATIVE B, which relies on the clear definition of RHA waters, ALTERNATIVE C depends on multiple regulations, guidance, and procedures, and ties the identification of retained waters to determining the extent of CWA (a)(1) TNWs – waters that are less clearly defined than Section 10 waters.

Whereas the majority of RHA Section 10 waters are identified on lists maintained by each USACE district, the location and extent of CWA (a)(1) TNWs that would be retained by the USACE in the case of assumption are identified through a number of different approaches. The USACE and EPA have made some "stand-alone" CWA (a)(1) TNW determinations, and the USACE districts have documented some of these. These stand-alone determinations would be included in the list of retained waters under ALTERNATIVE C. The USACE also issues approved jurisdictional

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determinations when they are requested by landowners or other interested parties. Many of these case-by-case jurisdictional determinations issued after the Supreme Court decision in *Rapanos v. United States*, 547 US 715 (2006) identify the nearest CWA (a)(1) TNW, but these "case-by-case" determinations are not considered permanent.

Because most TNWs have not yet been identified as such and thus lists of stand-alone TNWs could increase, ALTERNATIVE B provides more clarity, certainty and predictability to states, tribes and the regulated community regarding the scope of the state or tribal program.

After state or tribal program assumption, the USACE proposes to cease routine jurisdictional determinations in assumed waters but ALTERNATIVE C notes that additional waters might still be identified as CWA (a)(1) TNW waters in association with various legal proceedings, including federal enforcement actions. These CWA (a)(1) TNWs identified after assumption would be added to the List of Retained Waters at the time they are identified.

CRITERION 2. Is the recommendation consistent with the CWA, and with Section 404(g)?

ALTERNATIVE B is consistent with CWA Section 404(g) based on the plain language of Section 404(g) and the legislative history. Congress clearly intended that states and tribes should play a significant role in the administration of Section 404 – as they do in other CWA programs – anticipating that many states would assume the Section 404 program.

Congress also recognized the long-standing role and expertise of the USACE in maintaining navigation under the RHA, and therefore specified that the USACE would retain the parallel 404 permitting authority in those RHA waters and adjacent wetlands even after a state or tribe assumed 404 permitting authority over remaining waters and wetlands. Congress relied on RHA Section 10 to identify USACE-retained waters, with one exception: waters that were deemed "navigable" for RHA purposes based solely on historical practices (e.g., waters capable of carrying canoes for fur-trading in the 18th century) are also assumable by states or tribes.

On the other hand, all Subcommittee members except the USACE member believe that ALTERNATIVE C – under which the USACE would retain both RHA Section 10 waters and CWA (a)(1) TNWs identified up to the date of assumption – is not consistent with CWA Section 404(g), based upon its plain language and the legislative history. Congress was specific about what it intended in 404(g):

> *"The Committee amendment does not redefine navigable waters. Instead the committee amendment intends to assure continued protection for all of the Nation's waters, but allows States to assume primary responsibility for protecting those lakes, rivers, streams, swamps, marshes and other portions of the navigable waters outside the USACE program in the so-called Phase I waters."*[19]

The USACE's 1977 regulations reinforced that understanding. The preamble characterized Phase I as covering "waters already being regulated by the USACE [i.e. RHA waters] plus all adjacent wetlands to these waters."

[19] Clean Water Act of 1977 Report of the Committee on Environment and Public Works, United States Senate, July 1977, pg. 75

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The USACE definition of "navigable waters of the United States" under the RHA is similar to the definition of waters to be retained by the USACE under Section 404(g)(1) – except for the deletion of historically used waters and addition of adjacent wetlands.

> Section 10 regulations, 33 CFR section 329.4: *"Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce."*
>
> Section 404(g)(1) description of waters to be retained by the USACE: " *... waters that are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate and foreign commerce ... including wetlands adjacent thereto.*"

This similarity leads the majority of Subcommittee members to again conclude that the "navigable waters" to be retained by the USACE were intended to be the same waters regulated by the RHA. Further, the USACE regulation indicates that, "*This definition does not apply to authorities under the Clean Water Act, which definitions are described at 33 CFR parts 323 and 328.*"[20]

Moreover, the majority of the Subcommittee also understands the USACE to have acknowledged during Subcommittee discussions that the USACE can and does distinguish between Section 10 waters and CWA (a)(1) waters for regulatory purposes, displaying maps showing the two different categories in two states where USACE districts have identified Section 10 and CWA TNW waters. The Nationwide Permits issued by the USACE on January 6, 2017 also repeatedly distinguish between RHA waters and CWA waters, suggesting that such a distinction is and can be made with relative ease. Therefore, the majority of the Subcommittee holds that distinguishing between Section 10 and CWA (a)(1) waters for the purpose of distinguishing between assumable and USACE-retained waters remains practical and appropriate in accordance with 404(g).

CRITERION 3. Does the Recommendation comport with Congressional intent that qualified states assume responsibility for the Section 404 regulatory program?

The Subcommittee majority views that ALTERNATIVE B makes it easier for states and tribes to understand the costs associated with assumption and thus more readily weigh the costs and benefits of assuming the program, thereby encouraging state or tribal assumption, if desired, consistent with Congressional intent and with other CWA programs.

States and tribes may be willing to undertake Section 404 program assumption for the reasons discussed earlier in this report, but they do incur the cost of development and administration of a state or tribal 404 program. Assumption of all CWA waters except those on the RHA Section 10 list minus solely historical use – as has occurred in Michigan and New Jersey – would provide an economy of scale to the state and the public, which could make the development and ongoing fixed costs more acceptable for qualified states or tribes who wish to pursue this approach under the CWA.

ALTERNATIVE C would be an effective barrier to assumption for many if not most states and tribes. The impact of ALTERNATIVE C would vary geographically, but particularly in states with significant wetlands and other water resources, the USACE could retain a greater percentage of waters (and adjacent wetlands) under this option. As

[20] 33 CFR §329.1.

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an example, during Subcommittee discussions the USACE representatives presented a graphic map prepared by the Kansas City District that compared CWA (a)(1) waters to RHA Section 10 waters in the district. RHA Section 10 waters in the district totaled 887 stream miles; the addition of CWA (a)(1) waters tripled this to 2476 stream miles. The extent of adjacent wetlands would be expected to increase proportionally.

Many waters identified as "TNWs" under CWA jurisdictional guidance[21], such as inland lakes, have an impact on interstate commerce resulting from tourism, but may have little to no impact on the *transport* of interstate or foreign commerce (as do RHA waters). Examples of determinations made under this jurisdictional federal guidance include Bah Lake (an isolated 70-acre water, maximum depth 10 feet) and Boyer Lake (300-acre 28-feet maximum depth) – both of which are defined as CWA (a)(1) TNWs. Such water bodies are common on the American landscape. While the scale might be different in different states it is clear that there are more CWA (a)(1) TNW waters, and more scattered across the landscape, than are RHA waters. The net effect is that the scope and location of CWA (a)(1) TNW waters are such that having the USACE retain these waters could undermine Congress's intent that the states assume authority over most of the waters within their borders.

Finally, it should be noted that states and tribes have operated for many years under the belief that if they develop a comprehensive wetland/dredge and fill permitting program consistent with federal statute and regulations, they will be eligible to assume that program for all but Section 10 waters (and adjacent wetlands). In order to protect state waters, many states have developed wetland assessment and monitoring programs, wetlands water quality standards, and regulatory processes that would eventually help to provide eligibility for full Section 404 assumption should they choose to pursue that option. ALTERNATIVE C could decrease the value of that investment.

USACE RECOMMENDATION:
WATERS ALTERNATIVE C – Section 10 waters plus CWA (a)(1) Waters as Retained Waters.

While the USACE is neutral with respect to state or tribal assumption of Section 404 of the CWA program, the USACE does believe there are valid considerations that must be factored into the determination of which waters must be retained (and ultimately which waters can be assumed by a state or tribe). The USACE believes there should not be a distinction between different uses of the term "navigable waters" under different sections of the statute, and believes this is consistent with the purposes of the CWA and Section 404(g). While the statutory language setting forth the CWA Section 404(g) parenthetical waters slightly differs from the regulatory language of 328.3(a)(1), the USACE believes the interpretation of the term "navigable waters" is the same under 404(g) and 328.3(a)(1) (other than those waters considered navigable based solely on their historic use). The USACE believes TNWs reflect the concept of "navigability" appropriate to ensure the objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters (see "Appendix D: Legal Definition of 'Traditional Navigable Waters'"[22]). The USACE has maintained this position since at least the 2008 post-Rapanos guidance was issued and it is not a "new" position created by the agency for purposes of this subcommittee.

[21] Appendix D of the 2007 "US Army Corps of Engineers Jurisdictional Determination Instructional Guidebook" available at: http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/app_d_traditional_navigable_waters.pdf

[22] Ibid.

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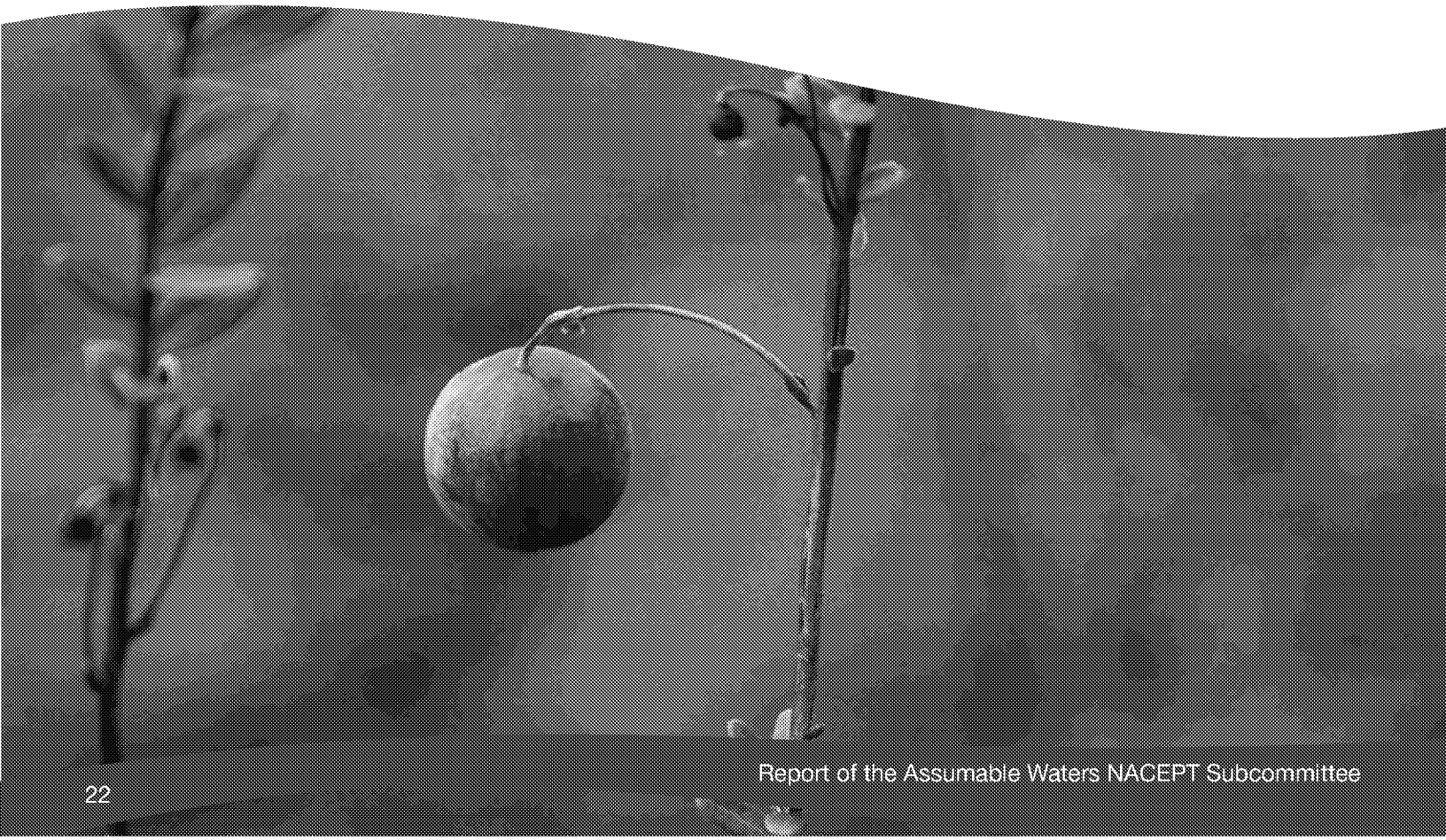
A narrower reading of those waters retained by the USACE under the state assumption program would not take into consideration the evolution of the USACE Regulatory Program since 1977. The USACE must continue to modify its program to reflect changes in law, policy, science, and other considerations, including changes in what waters constitute waters of the US under the CWA.

Different definitions for the term "navigable waters" under different provisions of the same statute could also result in confusion that would not provide clarity for the regulated public. The states and tribes would know the Section 10 waters (as identified by the District lists) as well as the stand-alone TNW determinations made by the Districts. All approved jurisdictional determinations made by the USACE are posted on District websites and are publicly available. Thus, the case-specific TNW determinations that may be included on the retained waters list when the state initiates that process are also available. In conclusion, these lists and waters are known and publicly available and therefore provide clarity to the USACE, the state, and the regulated public.



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6. Description of Alternatives for Identifying Adjacent Wetlands Assumable by a State or Tribe, and Adjacent Wetlands that Must be Retained by the USACE

The Adjacency work group was established by the Subcommittee to develop alternatives for the identification of wetlands adjacent to the navigable waters being retained by the USACE under an assumed CWA Section 404 permit program. The work group learned that unlike the background information regarding retained waters, there is no conclusive Congressional intent on the meaning of "wetlands adjacent thereto" – i.e., wetlands that must be retained by the USACE.

The work group's initial discussion on adjacent wetlands was influenced by the floor debate between Congressman Bauman and Congressman Clausen on the 1977 amendments to the CWA. During their debate, Congressman Bauman asked about the meaning and extent of adjacent wetlands in Section 404(g). In response, Congressman Clausen stated that he would "interpret the word 'adjacent' to mean immediately contiguous to the waterway." This is the only reference to the meaning of "adjacent" in the context of 404(g) in the entire legislative record.

The work group also considered the use of the word "adjacent" in the USACE's 1975[23] and 1977 regulations defining "waters of the United States." Although the word "adjacent" was being used in the USACE regulations defining

[23] 40 Fed. Reg. 31,320, 31,324, 31, 326 (July 25, 1975).

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"waters of the United States" just prior to the 1977 CWA amendments, there are no references to the USACE regulations in the legislation or Committee reports. In addition, the regulatory definition of adjacency was established after the original statutory language, but before final passage, of the 1977 amendments. Because of the timing of the various actions, the Subcommittee could not assume that Congress was aware of the USACE regulatory definition when this section of the statute was written. For most subcommittee members, it is clear, however, that the word "adjacent" in 404(g) was referring to adjacency to RHA waters, which were being retained primarily to foster federal navigation interests. Therefore, while the meaning of adjacent in 404(g) is not certain, the majority of the Subcommittee believes the purpose of adjacent in 404(g) is different than the jurisdictional definition in the USACE "waters of the United States" regulations. "Adjacent" is used in Section 404(g) to allocate permitting responsibilities between the USACE and a state or tribe that is assuming the 404 program, whereas "adjacent" is used in the USACE "waters of the United States" regulations to define the scope of jurisdiction under the CWA. Agencies generally have discretion in making judgments on how to administer their programs, and thus should have some discretion in how they define what is adjacent for purposes of allocating administrative authority between states or tribes and the USACE.

WETLANDS ALTERNATIVE A: USACE Retains All Wetlands Whether Touching or Not Touching Retained Navigable Waters, Regardless of Furthest Reach

WETLANDS ALTERNATIVE A interprets the word "adjacent" in 404(g) to mean the same as the word "adjacent" in regulations[24] currently being used by the USACE to identify jurisdictional "adjacent" wetlands. Under WETLANDS ALTERNATIVE A, the USACE would retain permitting authority over all wetlands adjacent to retained navigable waters whether or not they are touching retained navigable waters and regardless of their extent (see *Figure 1: WETLANDS ALTERNATIVE A*).

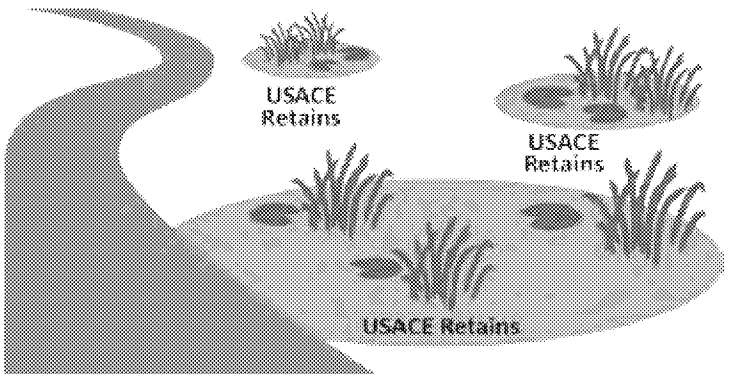

Figure 1. WETLANDS ALTERNATIVE A

ALTERNATIVE A would require that the USACE retain expansive wetland systems that are touching a retained water, regardless of their extent. Thus, the specific extent of retained wetlands could not be determined at the time of program assumption and the majority of projects would require a case-by-case field inspection to determine whether the USACE would retain permitting authority.

[24] 33 CFR S328.3(c). ("The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms beach dunes and the like are 'adjacent wetlands'."

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WETLANDS ALTERNATIVE B: USACE Retains Entirety of Wetlands Touching Retained Waters, Regardless of Furthest Reach

WETLANDS ALTERNATIVE B also relies on the current definition of "adjacent" in the regulations that define "waters of the United States," but under this alternative, the USACE would not retain all "adjacent" wetlands. Rather, it would only retain permitting authority over wetlands touching the waters being retained by the USACE.

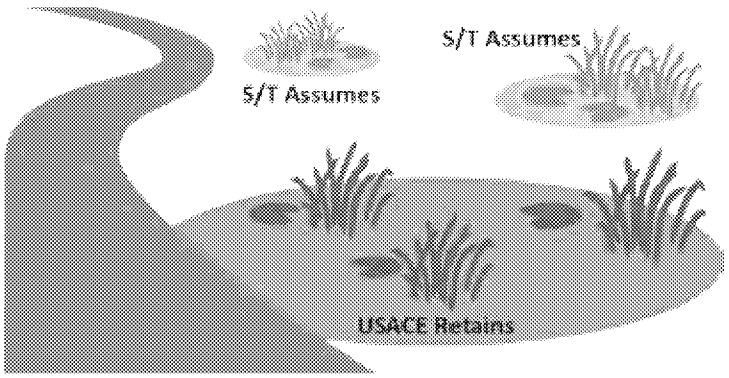

Figure 2. WETLANDS ALTERNATIVE B

As discussed in the Origin and Purpose of Section 404(g) section of this report, above, Congress intended that in a case of state or tribal assumption the USACE would retain permitting authority over "Phase I waters" (except waters deemed navigable based solely on historical use, which would be assumable by a state or tribe). Phase I waters were defined in the USACE's 1975 regulations as coastal and inland "navigable waters of the United States" and wetlands "contiguous or adjacent thereto" – i.e., waters subject to regulation by the USACE under Section 10 of the RHA, plus adjacent wetlands. The RHA is designed to protect the navigable capacity of the "navigable waters of the US" and thus requires permits for work in "navigable waters of the US" and work outside "navigable waters of the US ... if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on its navigable capacity." WETLANDS ALTERNATIVE B assumes that wetlands touching retained waters have the greatest ability to impact navigability under Section 10 of the RHA and that wetlands not affecting navigability can be assumed by a state or tribe for administrative purposes under the CWA. As a result, wetlands that are "not touching" retained waters could be assumed by a state or tribe (see *Figure 2: WETLANDS ALTERNATIVE B*).

Like WETLANDS ALTERNATIVE A, WETLANDS ALTERNATIVE B would require that the USACE retain expansive wetland systems that are touching a retained water, regardless of their extent. Also similar to WETLANDS ALTERNATIVE A, the specific extent of retained wetlands could not be determined at the time of program assumption and the majority of projects would require a case-by-case field inspection to determine whether the USACE would retain permitting authority.

WETLANDS ALTERNATIVE C: Establishment of a National Administrative Boundary

WETLANDS ALTERNATIVE C requires the establishment of a national administrative boundary based on a fixed distance from USACE-retained navigable waters (e.g., 100, 300, or 1,000 feet). The boundary would depict the limits of federal program administration and the beginning of state or tribal program administration under an assumed CWA Section 404 permit program.

The establishment of a national administrative boundary to assign regulatory responsibility over adjacent wetlands should build on USACE authorities under the RHA. The RHA was enacted primarily to protect navigation and the

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navigable capacity of the nation's waters. Section 10 of the RHA requires that the following regulated activities be approved or permitted by the USACE: placement and removal of structures; work involving dredging; disposal of dredged material; filling, excavation, or any other disturbance of soils or sediments; or modification of a navigable waterway. All of these activities have the potential to affect navigability, further underscoring that the RHA's primary purpose is to protect navigable capacity. Depicting adjacent wetlands retained by the USACE as an administrative distance from retained waters based on existing state-established setbacks, buffers, or a defined elevation as in the case of New Jersey, or other criteria, preserves the USACE's control over waters and wetlands necessary to protect these waters from activities that may adversely impact navigability.

In general, the activities taking place landward of the "ordinary high water mark" (inland) or "mean high water mark" (coastal) that potentially impact navigation and warrant continued regulation by the USACE under an assumed program are those that are likely to generate sediment and debris that reach channels and harbors and affect the navigable capacity of waters used to transport interstate or foreign commerce. Consequently, activities taking place in wetlands adjacent to navigable waters may warrant regulation by the USACE either under the CWA, the RHA, or both. Regulated activities that may impact navigable capacity, however, would likely occur in areas that are in close proximity to the waterways retained by the USACE. Riparian buffers and setbacks are established by many states to, among other purposes, help store floodwaters and prevent sediment transport, directly supporting and preserving navigation. Thus, such state-established boundaries can provide both a practical and a logical basis for the establishment of a national administrative boundary between wetlands retained by the USACE and wetlands assumed by a state or tribe.

The establishment of a national administrative boundary would resolve a number of adjacency issues. The use of an administrative line to assign regulatory responsibility for the implementation of the CWA ensures complete protection of water and wetland resources without confusion or unnecessary duplication, while preserving the USACE's responsibility to protect and maintain navigation under the RHA as required by Congress. Since the boundary defines the landward extent of the adjacent wetlands retained by the USACE, it eliminates the need to determine the extent and connectivity of large wetland systems to allocate administrative authority between the USACE and a state or tribe. The boundary would be established prior to program assumption and incorporated into GIS or other mapping methods to facilitate a state or tribe's assessment of the costs and benefits of assumption. Finally, because WETLANDS ALTERNATIVE C establishes a bright line boundary, the entirety of expansive wetland systems such as those in examples from Alaska, Minnesota, and the Fond du Lac Reservation would not be retained by the USACE. Thus, more wetlands would be assumable than would be the case under other alternatives.

Based on the above discussion, the Subcommittee agreed that a default distance of 300 feet from the retained navigable water would be fully adequate to protect federal navigation interests and could serve as a reasonable national administrative boundary. The Subcommittee identified several possible implementation strategies once this national administrative boundary is established, which are presented below.

WETLANDS ALTERNATIVE C1: USACE Retains All Wetlands Touching Retained Navigable Waters and Extending Landward to the National Administrative Boundary

Under WETLANDS ALTERNATIVE C1, the USACE would retain permitting authority over all wetlands physically "touching" retained navigable waters and extending landward to the national administrative boundary. The state or tribe would assume those wetlands beyond the established boundary. Additionally, wetlands that are shoreward of

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the administrative boundary but not "touching" a retained navigable water would be assumed by the state or tribe (see *Figure 3: WETLANDS ALTERNATIVE C1*).

While the administrative boundary would clearly define the extent of USACE retention for large or expansive wetlands, many projects would still require a case-by-case field inspection to determine whether the affected wetland is in fact touching the retained water. This alternative would likely result in the greatest amount of wetlands assumable by a state or tribe, but contains some implementation inefficiencies similar to WETLANDS ALTERNATIVES A and B due to the need for case-by-case field inspections on many projects. For instance, physical separations, such as river berms or beach dunes are dynamic, meaning that this alternative would result in an equally dynamic "sometimes in or sometimes out" scenario that is not conducive to predictability for the public.

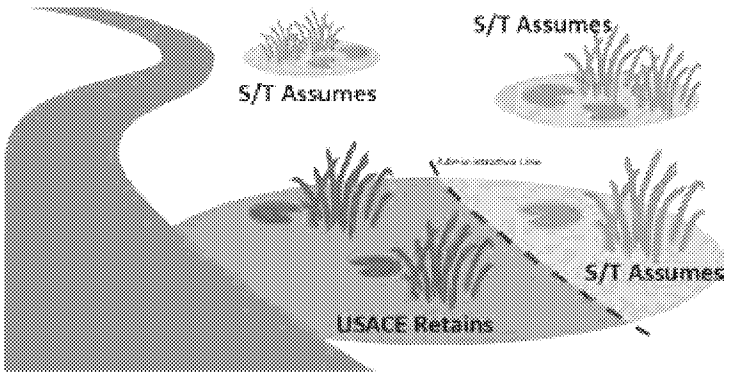

Figure 3. WETLANDS ALTERNATIVE C1

WETLANDS ALTERNATIVE C2: USACE Retains All Adjacent Wetlands Between Retained Waters and the National Administrative Boundary

Under WETLANDS ALTERNATIVE C2, the USACE retains permitting authority over all wetlands adjacent to retained navigable waters up to the national administrative boundary. The state or tribe would only assume those wetlands beyond the national administrative boundary (see *Figure 4: WETLANDS ALTERNATIVE C2*).

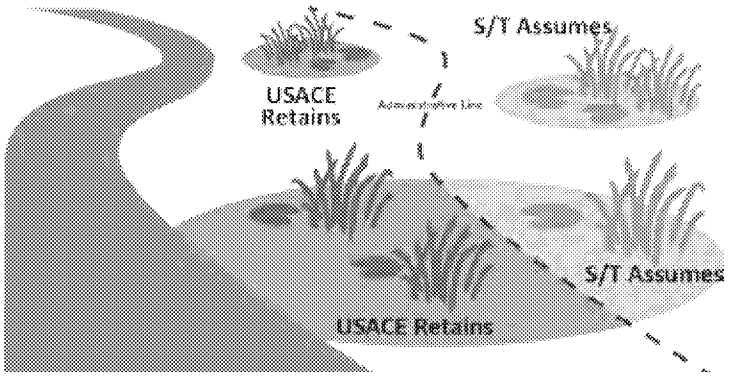

Figure 4. WETLANDS ALTERNATIVE C2

Under this alternative, there is no need for case-by-case field investigations to determine the extent and connectivity of large or expansive wetland systems. The partitioning of administrative authority under Section 404 assumption would be completely separate from issues relating to determining Section 404 jurisdiction, and the farthest reach of all retained wetlands would be known prior to program assumption. WETLANDS ALTERNATIVE C2 provides substantial clarity and certainty for states, tribes, the USACE, and the regulated public.

WETLANDS ALTERNATIVE C3: USACE Retains All Wetlands Landward to an Administrative Boundary Established During the Development of the Memorandum of Agreement with the USACE, with a 300-foot National Administrative Boundary as a Default

WETLANDS ALTERNATIVE C3 establishes a 300-foot national administrative boundary up to which the USACE retains permitting authority over all wetlands regardless of whether they are touching retained navigable waters. However, under this alternative, that boundary could shift in accordance with negotiations between a state or tribe and the

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USACE during the development of the required MOA with the USACE. The actual boundary could be established to account for the expertise and comprehensive programs of a state or tribe, planning and regulatory authorities, regional or geographic differences, and other local conditions that may affect or complement the CWA Section 404 Program. For example, the 300 foot National Administrative Boundary could be moved up to as close as 75 feet to match up with established building setback requirements, or as far away as 1,000 feet to match up with a broad state shoreland boundary. In the event that negotiations to establish an administrative boundary specific to that state or tribe are unsuccessful, the extent of USACE-retained wetlands default to the 300-foot National Administrative Boundary (see *Figure 5: WETLANDS ALTERNATIVE C3*).

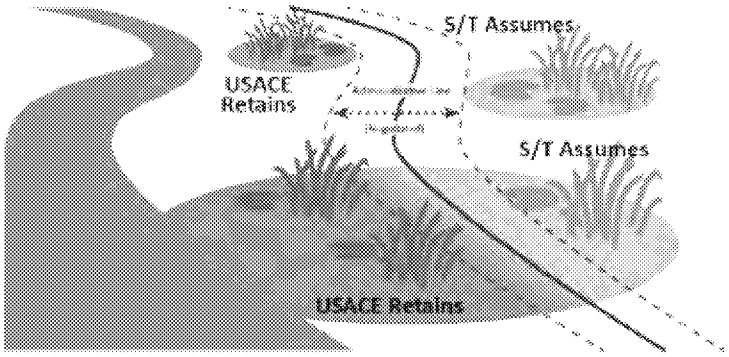

Figure 5. WETLANDS ALTERNATIVE C3

This alternative retains the clarity and certainty of WETLANDS ALTERNATIVE C2 and continues to separate assumption from issues relating to determining Section 404 jurisdiction. However, WETLANDS ALTERNATIVE C3 also provides the added benefit of improving the consistency and effectiveness of an assumed program by allowing states or tribes to incorporate Section 404 requirements into existing programs and requirements established to address local resource needs and circumstances.

In formulating WETLANDS ALTERNATIVE C3, which establishes an administrative boundary measured from retained waters to define the limits of a federally-administered Section 404 program and the beginning of a state- or tribally-assumed program, the Subcommittee discussed state or tribal programs that could form the basis for establishing an administrative boundary. For example, a state or tribe may have statutes or regulations for riparian buffers or setbacks. The benefits associated with buffers or setbacks accrue from the existence of appropriate vegetation and their ability to reduce erosion and sedimentation, among other benefits, which benefits are directly linked to navigability. Finally, in addition to existing government programs, the consideration of natural features such as topography, hydrology, or other unique conditions may also influence the location of an administrative boundary and improve the effectiveness and efficiency of an assumed CWA Section 404 permit program.

Criteria for establishing a state or tribal-specific administrative boundary could be developed by the EPA in guidance or regulations, and allow for the recognition and integration of state or tribal-specific programs and circumstances as discussed above, provided the ability to keep nutrients, sediment, or debris from impacting the retained navigable water is maintained. The state or tribe and the USACE would address these criteria during the development of the MOA and, once negotiations were completed, document the rationale for the selected administrative boundary in the MOA.

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7. Subcommittee Discussion and Recommendations on Identifying Adjacent Wetlands

MAJORITY RECOMMENDATION:
USACE Retains All Wetlands Landward to an Administrative Boundary Established During the Development of the Memorandum of Agreement with the USACE, with a 300-foot National Administrative Boundary as a Default.

After consideration of various options, all recommending Subcommittee members except the USACE representative recommend that the EPA adopt and implement a policy consistent with WETLANDS ALTERNATIVE C3 to differentiate between wetlands retained by the USACE and those assumed by a state or tribe under an assumed Section 404 Program. The majority's reasons for this recommendation include that WETLANDS ALTERNATIVE C3:

- is consistent with the Subcommittee's findings and conclusions about the origin and purpose of Section 404(g);
- establishes an administrative boundary that is consistent with many state and tribal boundaries already established for administrative ease;
- provides states and tribes with the flexibility to adjust the boundary based on their unique circumstances, including but not limited to regulatory authority, topography, and hydrology;

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- assures that the USACE is able to maintain navigability as required by the Rivers and Harbors Act;
- allows for the identification and mapping of the administrative boundary prior to program assumption, providing clarity, understanding, and after assumption, ease of implementation;
- uses a process to determine the extent of retained wetlands that is easily distinguished from the process used to determine Section 404 jurisdiction, resulting in improved efficiency, regulatory certainty, and sufficient wetland resources for a state or tribe to assume;
- provides a clear, reasonable, and implementable separation of administrative authority by establishing a clearly demarcated boundary between USACE-retained and state or tribally-assumed wetland areas; and
- maximizes the efficiency and effectiveness of assumed programs by allowing them to be tailored to a state's or tribe's specific circumstances.

Discussion on the justification and rationale for WETLANDS ALTERNATIVE C3 follows, including comparisons to other alternatives when appropriate based on criteria developed by the Adjacency work group.

CRITERION #1: WETLANDS ALTERNATIVE C3 is consistent with Section 404(g) of the CWA.

Congress passed 404(g) with the expressed intention that states and tribes would play a significant role in the administration of the Section 404 program. The purpose of section 404(g)(1) is to identify those waters and wetlands that must be retained by the USACE. The legislative history also indicates that the purpose of retention by the USACE is related to RHA Section 10 authorities primarily to maintain navigability and related interests.

WETLANDS ALTERNATIVE C3 is consistent with Congressional intent because it provides clarity on the wetlands for a state or tribe may assume, thereby removing one of the current barriers to assumption. WETLANDS ALTERNATIVE C3 is also consistent with Congressional intent because it establishes an administrative boundary that will ensure that the USACE can protect and maintain navigability and water quality in retained waters.

The unique state-assumed section 404 program administered by New Jersey since 1994 has clearly demonstrated that a state-specific administrative boundary, different from a CWA jurisdictional boundary, is both implementable and consistent with Section 404(g)(1). WETLANDS ALTERNATIVE C3 allows for the establishment of other assumed programs with state-specific or tribal-specific administrative boundaries.

CRITERION #2: WETLANDS ALTERNATIVE C3 provides a clear, reasonable, and implementable separation of administrative authority.

The stated charge of the Assumable Waters Subcommittee is to provide advice and recommendations on how to best clarify which waters a state or tribe can assume under an EPA-approved CWA Section 404 program. WETLANDS ALTERNATIVE C3, by establishing a "bright line" administrative boundary, provides needed clarity. The public, states, tribes, and federal agencies can easily identify the appropriate permitting authority at the time an application is submitted.

WETLANDS ALTERNATIVE A (USACE Retains All Wetlands, Whether Touching or Not Touching Retained Navigable Waters, Regardless of Furthest Reach) and WETLANDS ALTERNATIVE B (USACE retains entirety of wetlands touching

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retained waters, regardless of further reach) would result in four problem scenarios. First, large wetland complexes can extend tens or even hundreds of miles from the retained water. Examples provided by the states of Alaska and Minnesota demonstrate that using the regulatory CWA jurisdictional definition of adjacency to describe retained wetlands would result in expansive wetland systems being retained by the USACE, leaving fewer wetlands to be assumed by a state or tribe.

Second, wetlands often extend away from navigable waters in intricate and snakelike networks, which could result in a confusing pattern of USACE and state or tribal permitting authority across the landscape. For example, the St. Louis River (a tributary to Lake Superior) forms some of the boundaries of the Fond du Lac Indian Reservation in Minnesota where wetlands comprise 44% of the Reservation. Wetlands adjacent to the St. Louis River, which has been determined to be a navigable water, are interconnected with other wetlands that extend tens of miles away from the river, well beyond other wetlands that are not connected or adjacent to the river.

Third, wetlands adjacent to USACE-retained waters can extend beyond state-assumed waters. For example, the USACE retains a stream with the exception of the upstream portion of it that is beyond the point of navigability (or "head of navigation"), but wetlands adjacent to the retained portion of the stream continue to extend farther up the watershed (a common occurrence, particularly in upstream reaches). Absent some administrative demarcation of which adjacent wetlands would be retained, an awkward situation results where a state or tribe assumes an upstream section of a stream, but the USACE retains its adjacent wetlands.

Fourth, scenarios that require case-by-case field inspections to determine the appropriate regulating authority will reduce the efficiencies of an assumed program.

Prior to assumption, the problems associated with WETLANDS ALTERNATIVES A and B would make it difficult for states or tribes to accurately assess the feasibility and benefits of assumption because the extent of retained wetlands would be unknown or unclear. Lacking a known boundary for retained wetlands, it would require a significant upfront investment for a state or tribe to make an informed decision about pursuing assumption of the 404 program and accurately planning for its development. In the event that a state or tribe assumed the program without having ascertained the boundary, the problem scenarios discussed above would essentially make it more difficult for the state or tribe to deliver on the stakeholder efficiencies anticipated under an assumed Section 404 permit program such as ease of determining administrative control, speed of reaching a permit decision, and other customer service improvements. Use of WETLANDS ALTERNATIVE C3 would eliminate these problems by establishing a standard national boundary.

CRITERION #3: WETLANDS ALTERNATIVE C3 establishes an administrative boundary that can be consistent with already established state or tribal program boundaries.

Many states and tribes have already established various boundaries, lines, or demarcations in their state or tribal programs. For administrative ease, these established lines can be used to establish the administrative line for retained and assumable waters. Such an administrative boundary will assure that the USACE is able to maintain navigability as required by RHA waterward of the boundary, while the state or tribe assumes authority to protect wetlands and water quality as required by the CWA landward of the boundary.

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CRITERION #4: WETLANDS ALTERNATIVE C3 provides flexibility to maximize the efficiency and effectiveness of a State- or Tribally-assumed 404 program.

In WETLANDS ALTERNATIVE C3, under prescriptive guidance or regulations that establish a default administrative boundary (i.e., 300 feet from retained navigable water), states and tribes can still further negotiate the location of the administrative boundary with the USACE during the establishment of the relevant MOA (for example, 75 or 1,000 feet). Unlike WETLANDS ALTERNATIVES C1 and C2, WETLAND ALTERNATIVE C3 allows the parties to establish a boundary taking into account other existing regulatory programs or requirements and the unique landscape characteristics of the state or tribal territory. This could lead to better environmental results, administrative efficiency, clarity for the public and regulators, and a strengthening of the aligned state or tribal program.

WETLANDS ALTERNATIVE C3 also provides states and tribes with the ability to tailor the line to features specific to the state or tribe. In such a large geographically and biologically diverse nation, there are significant differences in landscapes and the nature of our waters and wetlands among the states. WETLANDS ALTERNATIVE C3 allows USACE and the state or tribe to address these regional resource differences and provide an opportunity to utilize the best available information, tools, and procedures. For example, the distance used to establish the administrative boundary could vary based on unique floodplain characteristics of a given waterbody. Focusing on up-front mapping may even encourage the development of improved, more comprehensive inventories and cartography.

CRITERION #5: Under WETLANDS ALTERNATIVE C3, the administrative boundary for retained wetlands can be identified and mapped prior to program assumption, providing clarity, understanding, and ease of implementation.

In many cases, the state or tribe would assert continuous permitting authority over all waters and wetlands regardless of whether the USACE also regulates those waters and wetlands. In other cases, a state or tribe may choose to minimize or eliminate permitting duplication entirely and not require a permit for projects permitted by the USACE (i.e., exempt landowners from state or tribal permitting requirements). While in either case, the extent of retained waters and wetlands must be identified, in those instances where a state or tribe exempts federally regulated activities, it is even more important for landowners to know the permitting authority before submitting a permit application (i.e., know the boundary and extent of retained wetlands) because the application will go to either the state, tribe or the USACE. WETLANDS ALTERNATIVE C3 provides a relatively simple and consistent mechanism for identifying the clear boundary of retained wetlands.

The extent of the wetlands retained by the USACE under WETLANDS ALTERNATIVES A and B is not limited by distance. This could make identifying and mapping assumable waters extremely challenging. WETLANDS ALTERNATIVES A and B would often require a case-by-case analysis or the equivalent of a jurisdictional determination of proposed projects to determine the appropriate permitting authority(s).

CRITERION #6: WETLANDS ALTERNATIVE C3 improves applicant confidence and program effectiveness.

Absent a map or clearly identified boundary criteria, applicants may not know who the permitting authority is until after their application is submitted. This uncertainty would result in longer or inconsistent permitting timeframes. Regulatory uncertainty also tends to result in less effective regulation. A standardized boundary eliminates permitting barriers. Separating the administrative boundary from Section 404 jurisdiction issues and coupling it with other state and tribal

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regulatory programs improves predictability for agencies and applicants. Improved consistency shortens permitting wait times.

CRITERION #7: WETLANDS ALTERNATIVE C3 improves decision-making abilities for States and Tribes

Bounding the extent of retained wetlands allows states and tribes to better assess potential assumption and development of a 404 program. The WETLANDS ALTERNATIVES A and B do not support a consistent and clear basis for states or tribes to determine the extent and location of wetlands they would be assuming.

CRITERION #8: WETLANDS ALTERNATIVE C3 identifies retained and assumable wetlands independently of Section 404 jurisdiction

WETLANDS ALTERNATIVES A and B use the same or similar criteria to determine retained wetlands as are used to determine Section 404 jurisdiction. These alternatives generate confusion between the administrative process of assumption and the CWA jurisdictional determinations of the regulatory program. WETLANDS ALTERNATIVE C3 provides a state or tribe with a well-understood and precise scope of assumable wetlands that should not be affected or confused by changes to CWA jurisdictional definitions. WETLANDS ALTERNATIVE C3 provides regulatory certainty about the agency responsible for 404 permitting, even while certainty may change over whether the activity will require a permit under federal law.

Summary of Majority Recommendation

Congress passed section 404(g) of the CWA to enable a state or tribe to assume section 404 permitting authority over many, but not all, of the "waters of the United States." However, the legislative history relating to retained wetlands does not reveal a conclusive legislative intent about the meaning of "adjacent." What is certain is that the word "adjacent" in 404(g)(1) was focused on adjacency to Phase 1 waters, essentially Section 10 RHA waters. WETLANDS ALTERNATIVE C3 ensures the USACE's ability to maintain navigability as required by the RHA, while the state or tribe (under an assumed program) protects wetlands and water quality as required by the CWA.

It is also clear to the majority of the Subcommittee that the word "adjacent" is used in Section 404(g)(1) for a different purpose than it is used in the "waters of the United States" regulations published by the USACE in 1977. The USACE regulations define the wetlands that are subject to CWA regulation while Section 404(g)(1) describes which entity will exercise permitting authority over them. As a result, the EPA has substantial administrative discretion in allocating administrative authority between states, tribes, and the USACE pursuant to Section 404(g)(1). Since all jurisdictional wetlands will continue to be subject to 404 protections, it is reasonable to use that discretion to establish an administrative boundary that clearly identifies the division of regulatory authority.

WETLANDS ALTERNATIVE C3 is not only consistent with the CWA and legislative history, but it also addresses shortcomings of other alternatives. It provides clarity while still allowing individual states and tribes the ability to tailor the program to their administrative needs and align with other regulatory programs to improve the efficiency and effectiveness of the regulations. WETLANDS ALTERNATIVE C3 clearly separates administrative authority from jurisdiction, resulting in clear, predictable, and implementable administrative boundaries; a reasonable extent of assumable wetlands; and state or tribal programs that are insulated from challenges to 404 jurisdiction.

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Under WETLANDS ALTERNATIVE C3, states and tribes will be able to accurately assess the feasibility and benefits of assumption because the extent of retained wetlands will be a known factor. States and tribes can make informed decisions about pursuing an assumed program and plan for its development. Finally, WETLANDS ALTERNATIVE C3 ensures that the regulated public, states, tribes, and federal agencies will know the permitting authority at the time an application is submitted.

USACE RECOMMENDATION:
WETLANDS ALTERNATIVE A – USACE Retains All Adjacent Regardless of Furthest Reach

The USACE representative on the Subcommittee proposed WETLANDS ALTERNATIVE A and has written the following section explaining the reasons the USACE favors this Alternative.

Under WETLANDS ALTERNATIVE A, the USACE would retain permitting authority over all wetlands adjacent to retained navigable waters. WETLANDS ALTERNATIVE A uses the definition of adjacent wetlands currently being used by the USACE for regulatory actions under Section 404. Adjacent wetlands are determined in accordance with current regulations and implementing guidance.

With respect to implementing which "wetlands adjacent thereto" should be retained by the USACE under state or tribal assumption, such wetlands would be identified by continuing to use the definition of adjacent wetlands which has not changed since it was originally published in USACE regulations in July 1977. This definition existed at the time Congress passed Section 404(g). It is reasonable to conclude that if Congress had desired to limit the wetlands that are to be retained by the USACE during a program assumption, more restrictive language would have been included in the statute rather than simply using the term "adjacent" which had already been defined and of which the Congress would have certainly been aware. The interpretation of "legislative intent" based on Congressional Committee Reports and floor debates has not provided rationale to support changes in interpretation of the term "adjacent". This alternative inherently satisfies the criterion in the charge to the subcommittee that the recommendation be consistent with the CWA and in particular section 404(g). The USACE has a defined process of determining whether particular wetlands are considered adjacent and USACE personnel are familiar with these procedures. In practice, if a discharge of dredged or fill material is proposed into a wetland that is determined to be adjacent to retained navigable waters, the USACE would be the permitting authority. If it is not, the state or tribe would be. The process of determining whether a particular wetland is adjacent to the retained navigable waters would be agreed upon during development of the MOA. This alternative meets the criterion of providing clarity regarding who is the permitting authority (the state or tribe or the USACE) and it is easily understood and implementable in the field.

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8. Implementation and Process Recommendations

The Subcommittee also developed additional implementation and process recommendations. These recommendations apply no matter which substantive recommendations are followed. Note that the recommendations below sometimes refer to regulation changes, sometimes to field level guidance, and sometimes to memos. The important point is that the guidance is requested, while it is understood that the form the guidance takes may be different. All recommending members of the Subcommittee support these recommendations. The USACE supports these recommendations, except and unless they contradict their preferred alternatives as described earlier in this report.

MAINTAIN MICHIGAN AND NEW JERSEY 404 ASSUMED PROGRAMS

Nothing in these recommendations or report is intended to require alterations or changes to the existing assumed programs in Michigan and New Jersey. The Subcommittee recognizes that these two long-standing programs were created through specific state-district negotiations and have established and functional track records.

DEVELOP GUIDANCE FOR THE FIELD

The Subcommittee recommends that the federal agencies develop guidance or regulations on state and tribal 404 Program assumption. This guidance could be in the form of a memorandum to the field, and/or amendments to current EPA Section 404 State Program Regulations (40 CFR Part 233). The EPA and USACE should develop this guidance jointly, with input from states and tribes, for use by the EPA Regional Offices and USACE districts, as well as

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by state and tribal governments. The guidance should enable states or tribes and the USACE districts to distinguish between state- or tribal-assumable waters and those waters where responsibility for 404 permitting is to be retained by the USACE following assumption. It is also important that the guidance carefully differentiate between the legal definition of jurisdictional waters (i.e. waters of the United States), and the assignment of administrative authority based on state- or tribally-assumed waters and USACE-retained waters. The Subcommittee did not determine whether the guidance should be implemented through policy or regulation.

PROVIDE FLEXIBILITY

The distribution and concentration of waters of the United States, as well as the subset of those waters that may be administered under an assumed Section 404 program, differ greatly across the nation. For example, state or tribal territory can be comprised of coastal zones or arid western regions; they can support larger interstate rivers, or sustain numerous lakes, streams, and wetlands within their territorial boundaries. The extent of waters, the primary hydrologic patterns that dictate the flow and use of waters, and the overall ecology can also vary greatly, as can the type and extent of interstate and foreign commerce transported on the waters within state or tribal territory. This variability requires that the guidance called for above provide states and tribes sufficient flexibility to meet the geographically and programmatically diverse needs of the states and tribes while adhering to CWA section 404 (g)(1).

INCORPORATE NATIONAL PRINCIPLES AND CONSIDERATIONS INTO FIELD GUIDANCE

Field guidance should incorporate general principles and considerations – arising from the language of Section 404(g), records reflecting Congressional intent, and subsequent federal regulations – that identify the extent of state or tribal assumable waters, and lead to relatively consistent decisions from state to state and tribe to tribe, and certainly within a particular state from the perspective of various agencies. The principles and considerations that should be incorporated into national guidance are listed below.

- Federal agencies should support state or tribal assumption, consistent with Congressional intent. Most Subcommittee members believe, based on the background leading up to the enactment of the 1977 CWA amendments, that Congress intended states and tribes to play a significant role in the administration of Section 404, as they do in other CWA programs, including assumption.

- Program assumption is a partnership between a state or tribe and federal agencies. This partnership enables a state or tribe to not only reduce duplication of state, tribal and federal permitting, but also take full advantage of state, tribal and federal expertise. Provisions of the program assumption regulations ensure an equivalent or greater level of resource protection meeting 404 criteria, provide for federal government oversight, and maintain USACE responsibilities in navigable waters, including adjacent wetlands

- The final list of retained waters prepared by the USACE in accordance with current federal law and regulations should also include input from the state or tribe and the appropriate federal agencies. The list should be available at the signing of the MOA between the state or tribe and the USACE.

- A national methodology should be developed to support the identification of retained waters. The methodology should be flexible and enable a state or tribe and USACE to use the best records, data, and procedures available.

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- Tribal lands defined as Indian country, including lands within reservation boundaries, dependent Indian communities, and other lands held in trust for the tribes by the federal government, may be assumed by a tribe if approved by the EPA, but typically may not be assumed by a state.

PROVIDE GENERAL PROCEDURES FOR THE ASSUMPTION PROCESS

Field level national guidance prepared by the EPA and USACE, with input from states and tribes, should include general procedures to be followed when a state or tribe proposes to assume the Section 404 permit program. The guidance would amend or supplement existing EPA regulations governing the state assumption process in 40 CFR Part 233 by providing a greater degree of specificity about negotiations between a state or tribe and the USACE.

- A state or tribe initiates the 404 Program assumption process with the EPA and the USACE.
- Upon request by a state or tribe that is considering assumption, the USACE District will provide a list and/or map of waters within state or tribal borders that would be retained by the USACE based upon national guidance or regulation.
- The terms used in 404(g)1 such as the "ordinary high water mark" (inland) or "mean high water mark" (coastal) or "mean higher high water mark" (West coast) may require further clarification or definition in the USACE District's initial listing.
- The USACE list of retained waters provided by the USACE, EPA, and/or the tribe may include waters located on Indian reservation land (unless such waters have already been assumed by a tribe). In many cases, these waters will be retained by the USACE for CWA 404 administration because states will lack authority to regulate activities on Indian reservation lands. Engagement with tribes will be important to determine the extent of these lands.
- Where a tribe is proposing 404 Program assumption, the tribe will prepare a description (list, map) of Indian country lands over which the tribe would request Section 404 program authority. The tribe will coordinate with the EPA and state regulatory authorities and state and federal tribal coordinators in the review of lands that would be under tribal authority.
- The state or tribe will review the retained waters list, and may request additional information from the USACE regarding the basis for including particular waters, if needed. The USACE will make available to the state or tribe any written navigational determinations, court orders, or similar documentation. The state or tribe and the USACE may also agree to modify the list based on more accurate, currently available geographic information. The EPA should participate in this review, to ensure that the list of assumed waters is consistent with the CWA and acceptable at the time the EPA approves assumption.
- The state or tribe and the USACE will include the agreed-upon list of waters for which Section 404 administration must be retained by the USACE in an MOA regarding state or tribal assumption (see 40 CFR §233.14). The MOA will clarify that all other waters will be under the administration of the state or tribe in accordance with 404(g) upon approval of the state or tribal program by the EPA. Descriptions of waters

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under state or tribal and federal authority may be based on any data that are available and useful to the public, including lists, maps, descriptions, digital geographic information, etc.

- The MOA between the state or tribe and the USACE should include provisions to amend the MOA and the attached lists of state or tribal and federal authority at such time as the status of a particular water is modified due to improvements, legal decisions, or other pertinent changes (such as natural events which significantly alter the condition of a waterway). If desired, a regular period for review may be established.

- The field guidance should establish a dispute resolution procedure to be followed if a state or tribe and the USACE district are not able to complete the list of retained waters as part of the MOA development within a reasonable amount of time. This dispute resolution process should be developed by the EPA and USACE.

UTILIZE BEST AVAILABLE TECHNOLOGY

The Subcommittee recommends that retained waters and adjacent wetlands, to the greatest extent practicable, be identified on an appropriate map or geographic information system for administrative purposes. This will provide readily available information to regulatory agencies, as well as the general public, applicants and other interested parties. In support of this recommendation, the Subcommittee encourages states, tribes, and USACE districts to use the best available technologies, such as LiDAR (Light Detection and Ranging) remote sensing, drones, and other tools during the development of the MOA between a state or tribe and the USACE district.

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Appendix A: Tribal Findings, Issues, and Considerations during Assumption

Section 518 of the CWA, enacted as part of the 1987 amendments to the statute, authorizes the EPA to treat eligible Indian tribes in a manner similar to states ("treatment as a state" or TAS) for a variety of purposes, including administering each of the principal CWA regulatory programs and receiving grants under several CWA authorities (81 FR at 30183). This includes CWA Section 404.

The Subcommittee, with the leadership of its two tribal participants, identified a set of "Tribal Issues" that the EPA, USACE, states, tribes and other interested parties should be aware of when considering assumption under CWA Section 404(g)(1). It should be noted that there may be specific jurisdictional and other legal matters that are in dispute within specific states and with specific tribes. The EPA may need to consider these issues as it addresses any application for assumption of the program.

USACE RETAINS INDIAN COUNTRY AQUATIC RESOURCES

The EPA-approved state assumed programs generally would not extend to waters and wetlands within Indian country. Instead, such areas would generally continue to be administered by USACE, at least until such time that a tribe is approved by the EPA to assume the 404 program itself.[25] This retention of administration by USACE should be outlined in any MOA between the USACE and the state when such state wishes to assume the 404 program.

[25] See 40 CFR 233.1(b).

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INDIAN RESERVATION BOUNDARIES

Tribal Indian Reservation boundaries are not necessarily static; for instance, additional lands can be added to reservations and new reservations can be created. As stated in the Indian Reorganization Act of 1934 "The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, that lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations," (25 US Code Section 467) and as provided by the Bureau of Indian Affairs regulations (25 CFR Section § 151.3, 151.10, and 151.11).

In addition, Indian Reservations can have varied land ownership patterns. Some Indian reservations consist solely of lands that are held in trust status with the United States. Other reservations may have mixed ownership of property within the reservation (including tribal, public and private ownership). Mixed ownership and trust status within reservations can occur for a variety of reasons including land inheritance, when and how the reservation was established, and treatment of the reservation by Congress as interpreted in court decisions. The EPA has interpreted CWA section 518 as including a delegation of authority by Congress to eligible Indian tribes to administer regulatory programs under the statute over their entire reservations, irrespective of who owns the land 81 FR 30183 (May 16, 2016).

LANDS OUTSIDE OF THE RESERVATION

In CWA Section 518(e)(2), the phrase "…or otherwise within the borders of an Indian reservation." is interpreted to modify each category of land (*i.e.*, "…held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation…").[26] Thus, any land that an Indian tribe wishes to regulate under the CWA – including under section 404 – must qualify as Indian reservation land as used in CWA 518. Such lands must therefore be located within the exterior boundaries of a formal Indian reservation, or qualify as an informal Indian reservation – *e.g.*, tribal trust lands located outside the boundaries of a formal reservation or Pueblos. Thus, privately owned reservation lands that are part of the reservation should generally be excluded from assumed state programs, and thus retained by USACE), or could generally be assumed by the relevant tribe.

Lands can be brought into trust at various times, before or after a state or tribe has assumed a 404 program, and trust lands can create a patchwork of assumed and retained waters. Thus, cooperative relationships and agreements should be developed between the federal agencies, states and tribes in order to appropriately administer the program. Therefore, the assumption MOAs between the states or tribes and the EPA and the USACE should contain language on how changes in the trust status of Indian land is going to be handled.

[26] See Preamble to the Clean Water Act Treatment As a State – TAS rules at 56 FR 64881 and 58 FR 8177). (See also CWA Section 518(e)(2).

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Appendix B: Michigan and New Jersey's Assumed Programs

CASE STUDY OF MICHIGAN PROGRAM

Michigan has a long history of leadership in environmental protection and management, beginning with passage of a state water pollution control statute in 1929. So with passage of the Federal Water Pollution Control Act Amendments of 1972, Michigan began working to align state programs with the new federal regulations to enable Michigan to administer the CWA programs. Michigan was delegated authority to administer the Section 402, National Pollution Discharge Elimination Program in 1973. In 1972 Michigan also passed an inland lakes and streams statute that established dredged or fill regulations over inland waters. Regulations over dredged or fill activities and bottomland occupations within the Great Lakes had been in place since 1955.

During the 1970's as the federal agencies were developing implementation guidelines and regulations, and Congress was considering amendments to the CWA, Michigan began development of a wetland program and was building a partnership with the USACE. Michigan and the USACE signed an agreement in 1977 to use a joint permit application form for projects within all state and federally regulated waters, and to coordinate public hearings when required for those projects. Over the next several years, the agencies continued to align the state and federal programs to improve efficiency and reduce duplication, including issuance of additional federal general permits and state statutory amendments. Following passage of the 1977 CWA amendments that added Section 404(g)(1), Michigan passed a wetland statute in 1979 with the intention of assuming the Section 404 program.

In 1981 the agencies entered into two additional agreements to streamline the state and federal programs. The first was an agreement to coordinate enforcement actions and after-the-fact permitting procedures. The second was

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an agreement to share staff resources; this agreement allowed the state to place staff in locations throughout the state to conduct site reviews for both state and federal permits, in exchange the USACE provided joint staff training, reimbursed state travel costs, and funded the development of public outreach materials.

This effort laid the groundwork for assumption of the 404 program. Michigan formally requested assumption in 1983 and the Environmental Protection Agency (EPA) approved the program the same year. With the signing of the USACE Memorandum of Agreement (MOA) in 1984, which identified the retained waters, Michigan became the first state to assume the 404 program[27].

The EPA and USACE Memoranda

The 1983 MOA with the EPA provided the framework for Michigan's administration of the 404 program. The agreement specifies the state's responsibilities for permitting and enforcement, the federal oversight responsibilities including procedures for federal review of certain permit applications, and state program reporting requirements. The categories of permit applications which the EPA did not waive federal review under Section 404(j) are specifically defined; they include proposed state general permit categories and major discharges of dredged or fill material. Major discharges are further defined and include: discharges of toxic pollutants or hazardous substances; impacts to unique waters for a geographic region, commercial or recreational values of a significant area, or endangered or threatened species; and wetland fills, breakwater or seawall construction, or culvert enclosures of specified volumes and sizes.

Michigan's program agreement with the EPA was updated in 2011 after an extensive review of Michigan's program and nearly three decades of program changes at both the federal and state level. The updated agreement is substantially the same as the original agreement, with new language added to clarify responsibilities for coordination with other states and tribes, coordination with federal agencies for mitigation banks, and streamlining of reporting requirements.

The 1984 MOA with the USACE identifying retained waters is still in effect. In defining waters to be assumed by the state and the waters to be retained by the USACE the MOA simply states that all waters within the state are assumed other than waters identified by the language in 404(g)(1). The MOA quotes the 404(g)(1) language, and then states that those waters are identified on an attached list of "Navigable Waters of the United States in US Army Engineer District, Detroit, November 1981". The list of navigable waters of the United States identifies specific waterways by name and location, and identifies the head of navigation that is the upstream limit of the USACE's retained authority under the 404 program.

Current Status of Michigan's Program

Michigan has been successfully implementing the 404 program for over 3 decades. But implementation requires continual coordination with the federal agencies. State staff screen each permit application to determine if the proposed project is located within assumed or retained waters. If the project is in a retained area, a copy of the application is forwarded to the USACE. Michigan still regulates all waters and wetlands throughout the state, so applications within retained waters are coordinated with the USACE. All application information is shared between

[27] 49 FR 38948, Oct. 2, 1984. Redesignated at 53 FR 20776, June 6, 1988. Redesignated at 58 FR 8183, Feb. 11, 1993. Effective date, October 16, 1984.

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the agencies, site inspections are coordinated when appropriate, and permit conditions and mitigation requirements are coordinated to avoid conflicts and inconsistencies. Since Michigan has a robust wetland mitigation program and the state can own property, hold conservation easements, and hold financial instruments, state staff normally take the lead in negotiating and reviewing mitigation proposals. The state and USACE also coordinate compliance and enforcement actions within retained waters to reduce duplication and prevent conflicting compliance requirements.

Coordination with the United States Fish and Wildlife Service (US FWS) is also a necessary part of the program. State staff are responsible for screening applications for potential impacts to threatened and endangered species and coordinating with US FWS and state endangered species staff. State staff also work with US FWS to develop species specific screening criteria, permit conditions and best management practices.

State staff work continuously with the EPA staff to coordinate review of major discharge applications, new or revised general permit categories, major enforcement actions, and all statutory, rule or policy changes that affect the 404 program. The state has one staff person who is designated as the 404 program liaison to streamline communication between the agencies.

Annually Michigan processes approximately 3,000 to 4,000 permit applications under the 404 program in assumed waters. Normally 60 to 70 percent of those projects fall within the state's general permit categories. Typically, the EPA reviews one to two percent of the total applications because they fall within the major discharge categories described in the state's MOA with the EPA. In addition, state staff investigates and takes action on approximately 1000 to 1500 reports of non-compliance.

CASE STUDY OF NEW JERSEY PROGRAM

New Jersey is the most densely populated state in the nation with a population of 8,958,013 in 8,721.3 square miles or 1,195.5 people per square mile (2015 Statistics from the US Census). As a result, New Jersey faces many environmental issues in advance of other states and has developed an active and vocal grass roots environmental movement.

As early as 1917, New Jersey enacted a Waterfront Development law to protect navigation and ensure adequate dockage for shipping along the coast. In 1929, the state began protecting streams under the Flood Hazard Area Control Act which regulated structures placed within the natural waterway of any stream. The New Jersey Department of Environmental Protection was created on the first Earth Day, April 22, 1970. That same year, New Jersey passed the Coastal Wetlands Act.

In response to passage of the 1972 Federal Coastal Zone Management Act, in 1973 New Jersey passed the Coastal Area Facility Review Act. In 1977, the state's Pinelands Preservation Act began protecting from development a unique area in the southern part of New Jersey. It also prohibited development in freshwater wetlands.

New Jersey does not have its own USACE District. The state is served by the New York District, located in New York City and serving New York state and the eastern portion of New Jersey; and the Philadelphia District, located in Philadelphia, Pennsylvania and serving Pennsylvania and the western part of New Jersey. In the 1980s, the USACE program included Nationwide permits which were self-regulating and that allowed up to 10 acres of impacts per

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permit. New Jersey used its Water Quality Certificate authority to try to limit the impacts. However, a review by the US Fish and Wildlife Service of 40 wetland fill cases in northern New Jersey between 1980 and 1984 documented approximately 800 acres of wetland impacts resulting from illegal filling, Nationwide permits, and Individual permit activities.

In the mid-1980s, environmental groups in New Jersey united with the goal of obtaining a state freshwater wetlands protection law. On June 8, 1987, Governor Tom Kean enacted a building moratorium prohibiting all development in wetlands until passage of a wetland law. On July 1, 1987, New Jersey passed the Freshwater Wetlands Protection Act (FWPA), effective July 1, 1988.

The law contained a provision, directing the state to "take all appropriate action to secure the assumption of the permit jurisdiction exercise by the United States Army Corps of Engineers pursuant to the Federal Act." (NJSA 13:9B-27) To fulfill this mandate, the statute was structured to give the state the necessary authority to assume the Federal permitting program. In addition, the state legislature appropriated sufficient funds for the Department of Environmental Protection to staff and equip a statewide, freshwater wetlands regulatory program independent of the USACE.

New Jersey submitted an application for assumption to the EPA in 1993. The program was approved and New Jersey became the second state to implement an assumed Federal 404 program in 1994.

MOA with the EPA

As required by the Federal Transfer Regulations[28], New Jersey signed a memorandum of agreement with the EPA. In addition to those projects that continue to require Federal review in accordance with the EPA transfer regulations, New Jersey agreed that the following project types would also continue to get Federal review under its assumed program:

- Filling of 5 or more acres of wetlands;
- Significant reduction in ecological, commercial or recreational value of 5 or more acres;
- Culverts longer than 100 feet;
- Channelization of more than 500 feet of river or stream.

MOA with the Army USACE

As required by the Federal Transfer Regulations, the State of New Jersey signed a memorandum of agreement with the USACE[29]. The state and the USACE agreed to the following definition to distinguish assumed and non-assumed waters:

> "All waters of the United States, as defined at 40 CFR Section 232.2(q), within the State of New Jersey will be regulated by NJDEP as part of their state program, with the exception of those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to

[28] 40 CFR Part 233: 404 State Program Regulations

[29] 59 FR 9933, Mar. 2, 1994

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transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, including wetlands adjacent thereto. *For the purposes of this agreement, the USACE will retain regulatory authority over those wetlands that are partially or entirely located within 1,000 feet of the ordinary high water mark or mean high tide of the Delaware River, Greenwood Lake, and all water bodies which are subject to the ebb and flow of the tide.*"

The "1,000 feet" criterion had two sources. First, the USACE traditionally took jurisdiction to elevation 10 in coastal areas in New Jersey under the Rivers and Harbors Act. They consider any wetlands and/or waters located between the water and 10 feet above sea level to be navigable waters or "wetlands adjacent thereto." They estimated that on average, the distance from the Mean High Water Line landward to 10 feet above sea level is approximately 1,000 feet. In addition, the state's wetland maps were drawn at a scale where one inch equals 1,000 feet. Therefore, the state and the USACE agreed to use 1,000 feet from the ordinary high water mark or mean high tide as the division between waters to be retained (regulated by both agencies), and those to be assumed (regulated by the state alone).

MOU with the US Fish and Wildlife Service

The US Fish and Wildlife Service (FWS) opposed assumption by the State of New Jersey. In order to assuage their concerns, the state voluntarily signed a memorandum of understanding (MOU) with both the EPA and FWS. The MOU requires the state to provide certain applications directly to the FWS for review if they are located within municipalities known to contain federally-listed threatened or endangered species.

Coordination with State Historic Preservation Office (SHPO)

As part of its assumed program, the state also screens applications for referral to the SHPO to comply with Section 106 of the National Historic Preservation Act (16 USC Section 470(f)).

Current Status of Program

The state of New Jersey reviews all incoming wetlands/waters permit applications regardless of whether they are in assumed or non-assumed waters. The state also conducts jurisdictional determinations throughout most of the state. The state prescreens incoming permit applications to identify projects constituting "major discharges," which are then sent to the EPA for Federal review. In addition, if a permit application falls within one of the identified municipalities with federally-listed threatened or endangered species, and constitutes one of the permit types of concern to the FWS, the state screens the application and sends a copy to the FWS. The FWS returns comments to DEP and the EPA for consideration. If the state cannot satisfy FWS concerns, the project begins a new review with the EPA through the "major discharge" process. The state cannot approve a Section 404 permit over the EPA objections.

In those cases where a project is in a non-assumed water, the state issues its state permit independently of the USACE. However, monthly coordination meetings with the USACE let the agencies compare information on projects under review by both agencies. In addition, the agencies coordinate required mitigation. New Jersey also reviews and approves mitigation banks independently in assumed areas. In non-assumed areas, the state is a member of both the New York and Philadelphia USACE Interagency Review Teams.

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The state also conducts compliance and enforcement for violations in non-assumed waters.

Over the years, the state has made between 550 and 2,000 permit decisions annually. Of these, on average fewer than 10 applications per year require coordination with the EPA as "major discharges," approximately 80 per year required FWS review, and between 225 and 250 are coordinated with the State Historic Preservation Office.

In addition, the state's Enforcement Bureau has undertaken an average of 1,000 actions annually on reports of non-compliance.

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Appendix C: Letter from the Association of Clean Water Administrators, the Environmental Council of the States, and the Association of State Wetland Managers

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April 30, 2014

Nancy K. Stoner
Acting Assistant Administrator for Water
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW (4101M)
Washington, DC 20460

Via email to: stoner.nancy@epa.gov

Dear Acting Assistant Administrator Stoner:

Re: Assumable Waters under Clean Water Act Section 404

In the rule proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) regarding the scope of the definition of "waters of the United States," a statement in the preamble explains that the rule does not affect the scope of waters subject to state assumption in accordance with §404(g). 79 Fed. Reg. 22,188, p. 22,200 (April 21, 2014). The undersigned organizations appreciate that such language was included in the proposed rule addressing this critical aspect of state §404 program assumption.

We agree with the preamble statement in the rule that "[c]larification of waters that are subject to assumption by states or tribes or retention by the Corps could be made through a separate process under section 404(g)" (ibid). We recommend that steps to further clarify the scope of assumable and non-assumable waters be initiated in a timely manner. We are concerned that states currently considering assumption are having difficulty making progress because of the current uncertainty.

We would appreciate the opportunity to actively engage in a discussion with EPA to address this issue. Our organizations recognize that any steps toward clarification must be undertaken thoughtfully in accordance with the provisions of §404(g), and without altering the existing state 404 programs in Michigan and New Jersey.

Clear identification of assumable and non-assumable waters has been made more difficult by legal decisions that address terms such as "navigable" and "adjacent." Nonetheless, Congress intended that states be able to assume regulatory responsibility for the majority of waters within their boundaries. Clarification of assumable waters will help to facilitate state assumption where it is desired – providing benefits to the public, the resource, and the state and federal agencies.

Under §404 of the Clean Water Act – all waters regulated by the Corps or by a state/tribal program – are deemed "waters of the United States." We believe that "other waters," as well as some portion of both "navigable waters," and "adjacent wetlands" may be administered by a state or tribe in accordance with 404(g). We look forward to discussions with EPA to explore this very important area of public policy.

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Our goal is to work collaboratively to discern the criteria that will be used by a state/tribe, EPA, and the Corps to identify assumable/non-assumable waters pursuant to §404(g). We would also like to reach agreement on how to formalize these criteria (e.g., Memorandum of Understanding). Several steps may be needed to address both the immediate concerns of states pursuing assumption and the needs of those that may do so in the future.

Our organizations are committed to supporting state efforts to assume the Section 404 program by identifying issues and working with partners to resolve them. See, for example, ECOS Resolution #08-3 on State Delegation of the Clean Water Act Section 404 Permit Program – originally approved in 2008 – was on April 2, 2014 reaffirmed, with the addition of the following language: "[NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES] Encourages U.S. EPA to work with states to bring clarity and certainty to the identification of assumable and non-assumable waters."

We look forward to a timely and productive discussion with you. Please contact Jeanne Christie of ASWM at 207-892-3399 or jeanne.christie@aswm.org, to discuss this request. Thank you again for your attention to this matter.

Sincerely,

Alexandra Dapolito Dunn	Sean Rolland	Jeanne Christie
ECOS	ACWA	ASWM

Cc: Ken Kopocis, EPA
Benita Best-Wong, EPA
Jim Pendergast, EPA
Bill Ryan, OR DSL
Ben White, AK
Eric Metz, OR DSL
Ginger Kopkash, NJ
Bill Creal, MI

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Appendix D: List of Subcommittee Members

COLLIS G. ADAMS, CWS, CPESC
Wetlands Bureau Administrator
New Hampshire Department of Environmental Services
Land Resources Management

VIRGINIA S. ALBRECHT
Special Counsel
National Association of Home Builders
Hunton & Williams LLP

CRAIG W. AUBREY
Chief, Division of Environmental Review
Ecological Services Program
US Fish and Wildlife Service Headquarters
Ecological Services, MS: ES

TREVOR BAGGIORE
Division Director, Water Quality
Arizona Department of Environmental Quality

LAUREEN MONICA BOLES
NACEPT Liaison

PEG BOSTWICK
Senior Policy Analyst
Association of State Wetland Managers
Great Lakes Office

DAVID L. DAVIS, CPWD, PWS
Director, Office of Wetlands & Stream Protection
Virginia Department of Environmental Quality

JAMES P. DENOMIE
Tribal Consultant
Tribal Member of Bad River Chippawa Tribe
of Lake Superior
Midwest Alliance of Sovereign Tribes

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TOM DRISCOLL
Government Relations Representative
National Farmers Union

DAVID S. EVANS, DEPUTY DIRECTOR
Co-Chair of the Subcommittee
Office of Wetlands, Oceans, and Watersheds
USEPA OWOW *(resigned as of 12-9-2016 due to employment change)*

KIMBERLY FISH
Assistant Division Chief
Michigan Department of Environmental Quality
Water Resources Division

RICHARD D. GITAR
Water Regulatory Specialist/Tribal Inspector
Office of Water Protection
Fond du Lac Reservation

JAN GOLDMAN-CARTER
Director of Wetlands and Water Resources,
National Wildlife Federation
National Advocacy Center

MICHELLE HALE
Director, Division of Water
Alaska Department of Environmental Conservation

WILLIAM L. JAMES
US Army Corps of Engineers National Mining Expert

LES LEMM
Wetlands Section Manager
Minnesota Board of Water and Soil Resources

SUSAN D. LOCKWOOD
Environmental Specialist 4
New Jersey DEP Division of Land Use Regulation

ERIC D. METZ, P.W.S.
Planning and Policy Manager
Aquatic Resource Management Program
Oregon Department of State Lands

BARRY RABE, PH.D
Co-Chair of the Subcommittee
Director of the Center for Local, State,
and Urban Policy
Gerald R. Ford School of Public Policy
University of Michigan

DAVE ROSS
Senior Assistant Attorney General
Wyoming Attorney General's Office
Water & Natural Resources Division *(resigned as of 5-16-2016 due to employment change)*

GARY T. SETZER
Policy Advisor, Office of the Secretary
Maryland Department of the Environment

MICHAEL J. SZERLOG, MANAGER
Aquatic Resources Unit
Office of Environmental Review and Assessment,
Environmental Protection Agency, EPA Region 10

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Appendix E: Subcommittee Charter

INTRODUCTION

Section 404(g) of the Clean Water Act (CWA) lays out the requirements for the assumption and implementation of state and tribal CWA section 404 permitting programs. Congress, with the addition of CWA section 404(g), made clear that states and tribes wishing to assume administration of the dredge and fill permit program, could do so for certain waters. This Subcommittee under the National Advisory Council for Environmental Policy and Technology (NACEPT) will focus on a very narrow and specific charge related to which waters a state or tribe assumes permitting responsibility for under an approved CWA section 404 program and for which waters the US Army Corps of Engineers (USACE) will retain CWA section 404 permitting authority. To be known as the "Assumable Waters Subcommittee," (Subcommittee), the Subcommittee will be asked to provide advice and develop recommendations on how the US Environmental Protection Agency (EPA) can best clarify for which waters the state/tribe has CWA section 404 permit responsibilities, and for which waters the USACE retains CWA section 404 permit responsibility, under an approved state/tribal program. This effort is part of the Administrator's priorities as it supports states and tribes seeking to assume the CWA section 404 program by providing clarity on the scope of waters for which they would be responsible for administering the CWA section 404 program. Specifically, this effort will address the states' request to provide clarity on this issue enabling them to assess and determine the geographic scope and costs associated with implementing an approved program.

BACKGROUND

The NACEPT is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), Public Law 92–463. The EPA established the NACEPT in 1988 to provide advice to the EPA Administrator on a broad

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range of environmental policy, management, and technology issues. The EPA is now seeking to form a subcommittee under the NACEPT, to be known as the Assumable Waters Subcommittee (Subcommittee) to provide advice on how the EPA can best clarify the waters that a state or tribe may assume permitting responsibility for under an approved CWA dredge and fill permit program. Subcommittee members, like the parent NACEPT committee, serve as representatives from academia, industry, non-governmental organizations, and federal, state, tribal, and local governments.

The Subcommittee is being formed to provide advice and recommendations concerning a focused, but critical, aspect of implementing the CWA section 404 program for the discharge of dredge and fill materials. The USACE currently evaluates CWA section 404 permit applications for activities in the majority of the nation's waters subject to the CWA. Although states and tribes may assume the dredge and fill permit responsibilities pursuant to section 404(g) of the CWA, only two states (Michigan and New Jersey) and no tribes have assumed such responsibility to date. When a state or tribe considers assuming such responsibilities, among the first questions that needs to be answered is for which waters will the state or tribe assume permitting responsibility and for which waters will the USACE retain permitting authority. States have raised concerns to the EPA that section 404 of the CWA and its implementing regulations lack sufficient clarity to enable states and tribes to estimate the extent of waters for which they would assume program responsibility and thus calculate associated program implementation costs.[30] The lack of clarity on these questions has been identified by the states as a challenge to pursuing assumption as envisioned under the CWA.[31]

The Subcommittee will have a limited duration and narrow focus. Other aspects of state or tribal assumption will not be within the scope of the deliberations for this Subcommittee. For example, the Subcommittee will not be deliberating on the merits of assumption, nor on any aspect of the larger question of which waters are "waters of the US." It will focus on how the EPA can clarify the waters for which a state or tribe assumes CWA section 404 permitting responsibility and for which waters the USACE will retain this authority.

CHARGE TO THE SUBCOMMITTEE

The final Subcommittee report to NACEPT should provide advice and recommendations to EPA on how to clarify for which waters states and tribes will assume CWA section 404 permitting responsibilities, and for which waters the USACE will retain permitting authority. The recommendations should reflect consideration of the following assumptions:

1. A CWA section 404 permit is required – meaning there is an activity regulated under section 404 that will result in a discharge of dredge or fill material to a Water of the US
2. Any recommendation must be consistent with the CWA and in particular section 404(g)
3. Clarity regarding who is the permitting authority (the state/tribe or the USACE) should be easily understood and implementable in the field

[30] Environmental Council of States, the Association of Clean Water Administrators, and the Association of State Wetland Managers letter. April 30, 2014. Letter can be found in the docket.

[31] Ibid

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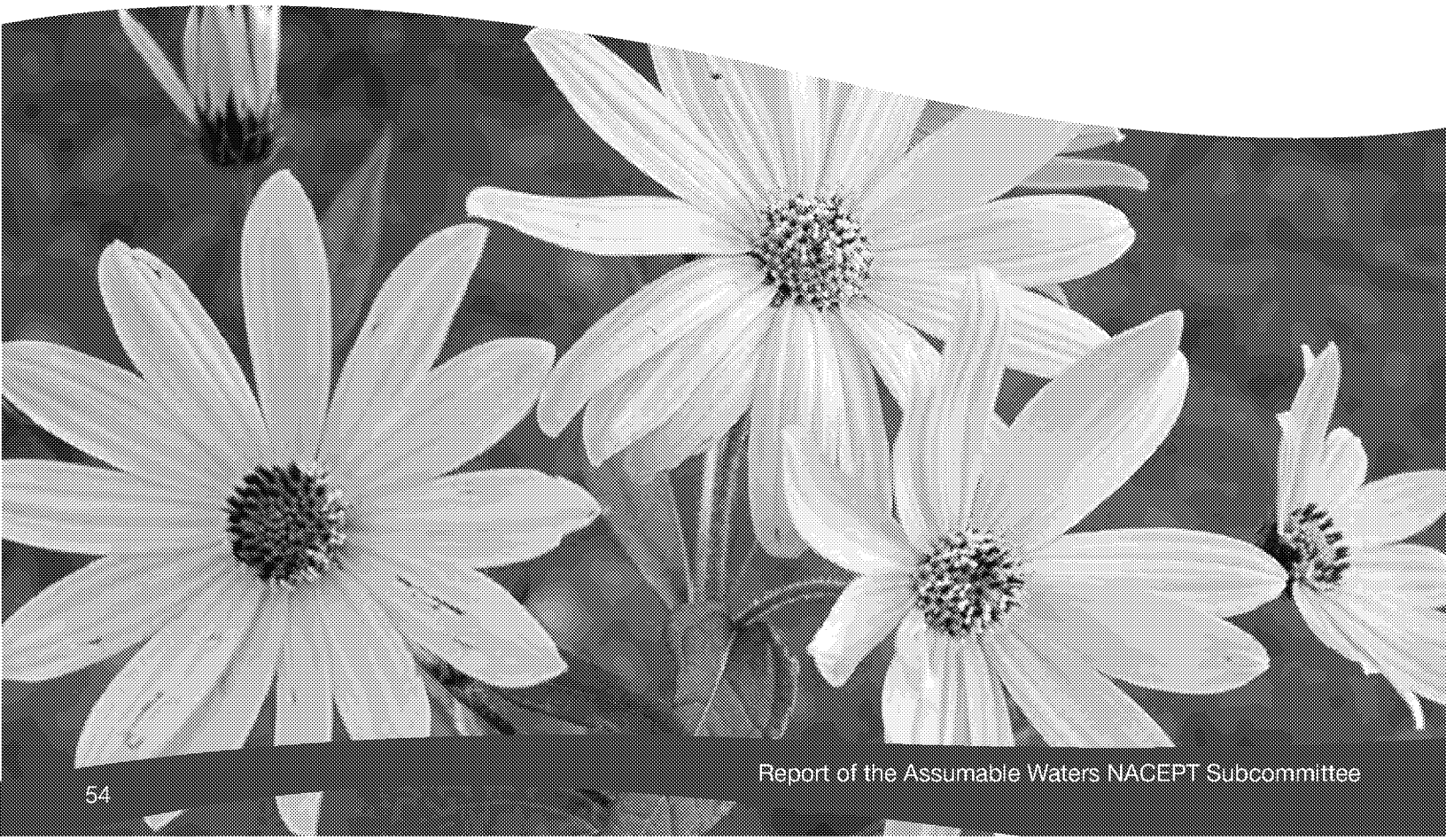
PROPOSED SCHEDULE

The Subcommittee will meet approximately four to six times following initiation of the group for twelve to sixteen months face-to-face or via video/teleconference. Additionally, members may be asked to participate in ad hoc workgroups to develop potential policy recommendations and reports to address specific issues.

Tentative meeting schedule (subject to change):

- September 2015 – Meeting 1
- December 2015 – Meeting 2
- Late February 2016 – Meeting 3
- April 2016 – Meeting 4
- June 2016 – Meeting 5
- September 2016 – Meeting 6 (if needed) to finalize recommendations to NACEPT



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Appendix F: The Legislative History of Section 404(g)(1) of the Clean Water Act[32]

INTRODUCTION

Section 404 of the Clean Water Act (CWA) authorizes the US Army Corps of Engineers (the USACE) to issue permits for the discharge of dredged or fill material into "navigable waters."[33] Pursuant to section 404(g)(1), States, with approval from the Environmental Protection Agency (EPA), may assume authority to administer the 404 permit program in some but not all navigable waters. The waters that a state may not assume, and which the USACE must retain even after a state has assumed the program, are defined in a parenthetical phrase in section 404(g)(1) as:

(… those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) …[34]

This memorandum explores the meaning of this parenthetical language by reviewing the legislative history of the 1977 CWA amendments that led to section 404(g)(1). The legislative history summarized below includes the reports of the House Committee on Public Works and Transportation and the Senate Committee on Environment and Public Works, passages from earlier versions of both the House and Senate bills, and excerpts from the Conference

[32] Prepared by Virginia S. Albrecht, Jan Goldman-Carter, and Dave Ross

[33] 33 USC § 1344(a).

[34] 33 USC § 1344(g)(1).

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Report regarding the final language of the amendments. After careful review of this material, it is clear that the waters Congress intended the USACE to retain after a state assumed 404 authority are: (1) the waters identified by the USACE as Phase I waters in its 1975 regulations, except for those navigable waters of the United States deemed navigable based solely on historic uses, and (2) wetlands adjacent to the retained Phase I waters.[35]

HISTORY OF SECTION 404(g)(1)

Responding to a court order, the USACE proposes to expand its definition of navigable waters for section 404.

After the CWA was enacted in 1972, the USACE promulgated regulations defining the CWA term "navigable waters" synonymously with the RHA term "navigable waters of the United States." The National Wildlife Federation and the Natural Resources Defense Council challenged the USACE' CWA definition, and in March 1975 the District Court for the District of Columbia ordered the USACE to issue new regulations broadening the definition to accord with the broader water quality purposes of the CWA.[36] On July 25, 1975, in compliance with the court order, the USACE issued revised regulations creating a phased schedule for expanding the program, as follows:

- *Phase I:* [effective immediately] discharges of dredged material or of fill material into coastal waters and coastal wetlands contiguous or adjacent thereto or into inland navigable waters of the United States[37] and freshwater wetlands contiguous or adjacent thereto are subject to … regulation.
- *Phase II:* [effective July 1, 1976] discharges of dredged material or of fill material into primary tributaries, freshwater wetlands contiguous or adjacent to primary tributaries, and lakes are subject to … regulation.
- *Phase III:* [effective after July 1, 1977] discharges of dredged material or of fill material into any navigable water [including intrastate lakes, rivers and streams landward to their ordinary high water mark and up to the headwaters that are used in interstate commerce] are subject to … regulation.[38]

[35] As described below, Phase I waters were understood to be "navigable waters of the United States" already regulated by the USACE under section 10 of the Rivers and Harbors Act (RHA), plus adjacent wetlands.

[36] *Nat. Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975). The CWA defines the term "navigable waters" to mean "the waters of the United States." At the time the CWA was passed, the USACE had been regulating "navigable waters of the United States" under the Rivers and Harbors Act for more than 100 years. The strikingly similar language in the two statutes led to confusion. The USACE' initial post-CWA regulations treated the terms synonymously. 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974). But the two statutes had different purposes – the RHA was focused on maintaining navigable capacity, the CWA on water quality. And the CWA Conference Report stated that the "term 'navigable waters' [should] be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Rep. No. 92-1236, at 144 (1972), *reprinted in* Comm. on Pub. Works, 93d Cong., 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 281, 327 (Jan. 1973).

[37] The term "navigable waters of the United States" is a term of art used to reference waters subject to the USACE jurisdiction under the RHA. The USACE defined the term in the 1975 regulations as "waters that have been used in the past, are now used, or are susceptible to use as a means to transport inter-state commerce landward to their ordinary high water mark and up to the head of navigation as determined by the Chief of Engineers, and also waters that are subject to the ebb and flow of the tide shoreward to their mean high water mark.… See 33 CFR 209.260 … for a more definitive explanation of this term." 40 Fed. Reg. 31,320, 31,324 (July 25, 1975). The regulatory cross-reference included in this definition was to the USACE' then current RHA regulations. Those regulations emphasized that, "[p]recise definitions of 'navigable waters' or 'navigability' are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies." 33 CFR § 209.260(b) (1973). Those regulations were later updated, and now read "[p]recise definitions of 'navigable waters of the United States' or 'navigability' are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies." 33 CFR § 329.3 (2015).

[38] 40 Fed. Reg. at 31,326.

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Responding to the USACE' regulations, the House Committee on Public Works writes a bill to limit 404 jurisdiction to Phase I waters.

Reviewing the new USACE regulations, the House Committee on Public Works and Transportation expressed concern that "full implementation of this permit program under the new regulations would have a dramatic effect on the overall Corps of Engineers permit program."[39] The Committee Report noted that permits under the RHA numbered close to 11,000 per year and were expected to remain constant, but the new 404 regulations would increase 404 applications from 2,900 to 30,000 per year as Phases II and III became effective.[40] The Committee was concerned that the expanded 404 program "will prove impossible of effective administration and … discourage the States from exercising their present responsibilities in protecting water and wetland areas."[41] The Committee report stated that environmental protection should be a shared responsibility of the States and the Federal government. Noting that "[t]he Federal government has traditionally had the responsibility of protecting the navigable waters of the United States for public use and enjoyment," the Committee concluded that "activities addressed by section 404, to the extent they occur in waters other than navigable waters of the United States … are more appropriately and more effectively subject to regulation [by] the States."[42]

The House bill tracks the RHA definition, except it omits "historic" navigable waters of the United States.

To address the concerns identified in the Committee report, section 17 of the Committee bill, H.R. 9560, added a definition of "navigable waters" to be applied to the 404 program that is "the same as the definition of navigable waters of the United States as it has evolved over the years through court decisions with one exception. [It] omits the historical test of navigability."[43] The Committee noted that the historical test had been used "to classify as navigable … many bodies of water … [that] were not capable of supporting interstate commerce in their existing condition or with reasonable improvement,"[44] for example, waters that were used in the fur trade in the 1700's, "where traders would transport their furs by trail to the lake, across the lake by boat, and then again by trail into another State."[45] Similarly, "small lakes located entirely within one State, which were part of a highway of commerce in the 1800's by virtue of their proximity to a railway track which led into another State, [had] been classified as navigable."[46] Thus, the Committee intended to exclude "small intra-state lakes … which could not conceivably be used today or in the future for interstate commerce."[47] The Committee "fe[lt] strongly that if a water is not susceptible of use for the transport of interstate or foreign commerce in its present condition or with reasonable improvement, then it should not be considered a 'navigable water of the United States.'"[48]

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[39] H.R. Rep. No. 94-1107, at 22 (1976).

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 23.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 23-24.

[48] *Id.* at 24

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Reflecting these Congressional intentions, section 17 read as follows:

> The term "navigable waters" as used in this section shall mean all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher high water mark on the west coast).[49]

As discussed below, section 17 morphed during the legislative process, and the above language ended up in 404(g)(1) and was used to describe the navigable waters the USACE would retain in a case of state assumption. The language "wetlands adjacent thereto" was added to the final bill separately.

During debate in the House, the 404 permit requirement is extended to certain wetlands, and certain activities are exempted.

Section 17 was debated vigorously on the House floor in 1976.[50] Many vehemently opposed restricting the USACE' jurisdiction, while proponents of section 17[51] feared the USACE's infringement on States' authorities and farmers' operations.[52] In a compromise, the final House bill included the Committee's definition of "navigable waters" (for 404 purposes), but protected wetlands by requiring 404 permits for dredge and fill activities in "coastal wetlands and … those wetlands lying adjacent and contiguous to navigable streams."[53] The bill did not include wetlands in the definition of navigable waters, however.

The bill also exempted from the permit program normal farming activities, ranching, and the construction or maintenance of farm or stock ponds and irrigation ditches.[54] Additionally, it created a process for States to administer the program themselves whenever the Secretary of the Army found that they have sufficient legal authority and capability to carry out such functions and that the delegation of authority would be within the public interest.[55] The House of Representatives passed H.R. 9560 and approved these amendments to the 404 program on June 3, 1976.[56]

The Senate bill creates a mechanism for States to assume the 404 program but does not modify the definition of navigable waters.

The Senate took up the bill in the summer of 1977. Emphasizing the ambitious water quality goals of the 1972 Clean Water Act, the Senate Committee on Environment and Public Works declined to redefine "navigable waters" for purposes of the 404 program. Instead, the Senate bill, S. 1952, in section (l)(5), allowed States to assume the

[49] *Id.* at 63.

[50] *See* 122 Cong. Rec. 16,514-73 (June 3, 1976).

[51] Note: In the final bill, the definition of "navigable waters" appears in section 16. *Id.* at 16,572.

[52] *See id.* at 16,514-73.

[53] *Id.* at 16,553.

[54] *Id.* at 16,552.

[55] *Id.* at 16,572.

[56] *Id.* at 16,569.

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primary responsibility for implementing the permit program "outside the USACE program in the so-called phase I waters."[57] The waters that would be retained by the USACE if a state assumed the program were the same waters the House bill had defined as "navigable waters" except section (l)(5) added adjacent wetlands:

> [A]ny coastal waters of the United States subject to the ebb and flow of the tide, including any adjacent marshes, shallows, swamps and mudflats, and any inland waters of the United States that are used, have been used or are susceptible to use for transport of interstate or foreign commerce, including any adjacent marshes, shallows, swamps and mudflats.[58]

S. 1952 would allow the States to assume authority over "phase 2 and phase 3 waters."[59] The assumption procedures were modeled on the 402 procedures for transfer of National Pollutant Discharge Elimination System ("NPDES") authority to the States in the hopes that the familiar process would expedite state adoption of the program.[60] The amendment also exempted activities similar to those exempted in the House bill and provided for general permits to eliminate delays and administrative burdens associated with the program.[61] The Senate concluded that until the approval of a state program for Phase II and Phase III waters, the USACE would administer section 404 in all navigable waters.62 The Senate passed S. 1952 on August 4, 1977.[63]

The final bill does not change the definition of "navigable waters" but does provide for state assumption that would effectively limit USACE permitting authority in assumed States to Phase I waters.

Ultimately, the final bill, H.R. 3199, referred to as the 1977 Clean Water Act Amendments, did not change the definition of navigable waters for the 404 program. Instead, the amendments were a combination of the House and Senate bills. While members of the House, and more specifically the House Committee on Public Works and Transportation, wanted to redefine "navigable waters" for the 404 program, others strongly opposed such restrictions. Both chambers agreed, however, that the States could properly assume authority for administering the 404 program in waters other than those called out in section 17 of the House bill and section (l)(5) of the Senate bill. Accordingly, the conferees agreed upon an amendment that would leave the definition of "navigable waters" unchanged, but would allow the States to assume the program in most waters.

Thus, under the 1977 amendments, the States can administer an individual and general permit program for the discharge of dredged or fill material into "phase 2 and 3 waters after the approval of a program by the Administrator."[64]

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[57] S. Rep. No. 95-370, at 75 (1977) *reprinted in* Comm. on Env't & Publ. Works, 95th Cong., 4 A Legislative History of the Clean Water Act of 1977 ("Legis. History 1977"), at 635, 708 (Oct. 1978).

[58] 4 Legis. History 1977, at 830.

[59] *Id.* at 708.

[60] *Id.* at 710-11.

[61] *Id.* at 707.

[62] *Id.* at 708.

[63] 123 Cong. Rec. 26,775 (Aug. 4, 1977).

[64] H.R. Rep. No. 95-830, at 101 (1977) *reprinted in* 3 Legis. History 1977, at 185, 285.

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If and when a state assumed the program, the C' permitting authority would be limited to "those waters defined as the phase I waters in the Corps … 1975 regulations, with the exception of waters considered navigable solely because of historical use."[65]

The final bill inserted the language that the House Committee had originally used to limit USACE jurisdiction, except that the Conference Committee added "wetlands adjacent thereto" to the parenthetical phrase defining the waters over which the USACE would always retain permitting authority.[66]

The legislative history in both the House and the Senate evidences a Congressional expectation that most States would assume the 404 program, and therefore effectively limit USACE permitting authority to Phase I waters.

> 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 program quickly.[67]

Also, "the corps [conducted] … a study [in 1976] to determine the scope of state programs similar to or duplicative of corps regulations and to determine the interest of the States in accepting delegation of the 404 program."[68] Based on the preliminary responses of 52 states and territories, 34 indicated their intent, under certain conditions, such as federal funding, to assume the dredge and fill program.[69] Only 6 responded that they would not seek assumption of the program, and 12 were undecided.[70]

Summary of Key Points

The language in the 404(g)(1) parenthetical phrase that defines the waters over which the USACE will retain jurisdiction in an assumed state is identical to the language used by the House Committee to narrow the definition of "navigable waters," except that it includes "wetlands adjacent thereto."

Congress intended that the parenthetical language be interpreted to mean the same waters as the USACE had defined as Phase I waters in its 1975 regulations, except those deemed navigable based solely on historical use. Thus, waters deemed navigable based on historical use only are assumable by a state.

The 1977 Congress anticipated that most states would assume the 404 program and therefore regulate dredge and fill activities in Phase II and III waters, leaving the USACE with authority over Phase I waters (including their adjacent wetlands but excluding historical use waters).

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[65] 123 Cong. Rec. 38,969 (Dec. 15, 1977). The USACE's July 19, 1977 final regulations characterized Phase I as covering "waters already being regulated by the Corps[ ] plus all adjacent wetlands to these waters." 42 Fed. Reg. 37,122, 37,124 (July 19, 1977).

[66] H.R. Rep. No. 95-830, at 39, *reprinted in* 3 Legis. History 1977, at 285.

[67] S. Rep. No. 95-370, at 77-78, *reprinted in* 4 Legis. History 1977, at 710-11.

[68] H.R. Rep. No. 95-139, at 67, *reprinted in* 4 Legis. History 1977, at 1196, 1262.

[69] *Id.*

[70] *Id.*

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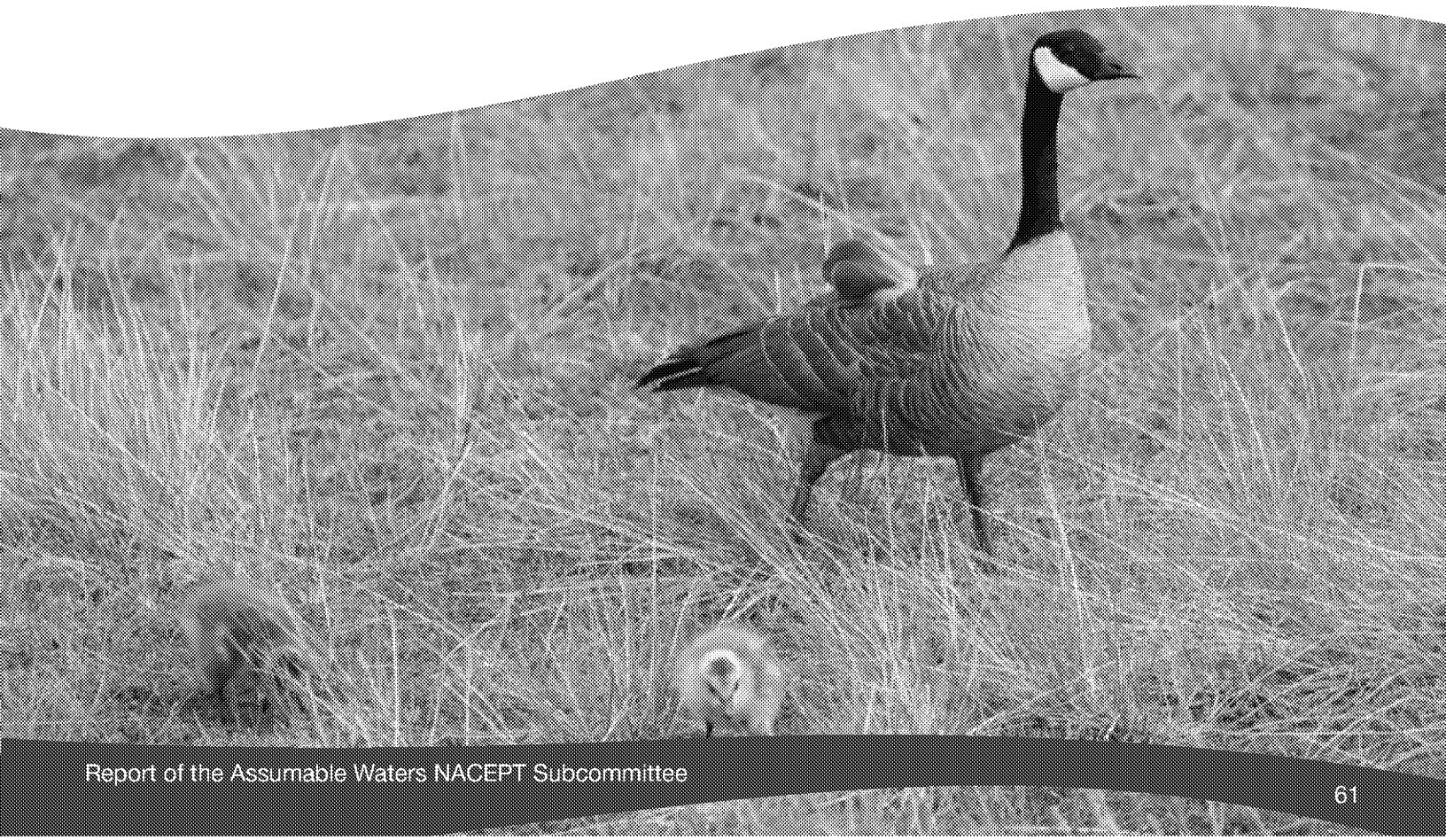
The parenthetical waters identified by the USACE as Phase I waters in its 1975 regulations incorporated the description of "navigable waters of the United States" already regulated by the USACE under section 10 of the RHA, except the parenthetical excluded waters deemed navigable based solely on historical use, and included adjacent wetlands. The USACE's regulations at the time emphasized that "[p]recise definitions of 'navigable waters' or 'navigability' are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies." 33 CFR § 209.260(b) (1973). The language changed later, and the current regulation now states "[p]recise definitions of 'navigable waters of the United States' or 'navigability' are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies." 33 CFR § 329.3 (2015).



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