NACEPT

Shaping the Nation's Environmental Policy

National Advisory Council for Environmental Policy and Technology

June 1, 2017

Administrator E. Scott Pruitt
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Submission of the Assumable Waters Subcommittee Final Report from the National Advisory Council for Environmental Policy and Technology (NACEPT)

Dear Administrator Pruitt:

On behalf of the National Advisory Council for Environmental Policy and Technology (NACEPT), I am pleased to forward to you, with endorsement by the Council, the Assumable Waters Subcommittee Final Report.

In a 2014 letter to the U.S. Environmental Protection Agency (EPA), three state associations requested the EPA to provide clarity on the question of over which waters a state or tribe may assume Clean Water Act section 404 permitting authority. Clarity was needed to help facilitate state and tribal assumption of the permitting program. In response, and for the purpose of making recommendations to EPA on how the agency might provide such clarity, EPA established the Assumable Waters Subcommittee under NACEPT and in accordance with the Federal Advisory Committee Act (FACA). Members of the Subcommittee came from academia, industry, non-governmental organizations, and local, state and tribal governments. A number of those members are very familiar with the strengths and limitations of the EPA.

This report was written by the Assumable Waters Subcommittee. As part of the council's activities as a federal advisory committee providing extramural policy information and independent advice to the Administrator and other officials of the EPA, NACEPT reviewed and endorsed the report. NACEPT is structured to provide a balanced assessment of policy matters related to the effectiveness of environmental programs of the United States. This report has not been reviewed for approval by EPA and, hence, the report's contents and recommendations do not represent the views and policies of EPA or other agencies in the Executive Branch of the federal government. Further, the content of this report does not represent information approved or disseminated by EPA.

ED_005978_00020876-00001 FL CWA 404 Assumption FOIA_Interim Release 11

Even though the EPA provided comments along with all other Subcommittee members, drafting of this report was done by non-EPA members of the subcommittee. 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 U.S. Fish and Wildlife Service (USFWS) 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 Subcommittee members, including the U.S. Army Corps of Engineers (USACE), but not the EPA and the USFWS.

The Subcommittee came to a majority and minority set of recommendations, with all members but the USACE agreeing to the majority recommendations. The recommendations include extensive rationales and reasoning. The majority included numerous state representatives as well as those representing farming, homebuilding, and wildlife interests. The majority recommendation is that those waters over which the USACE retains permitting authority should be identified based upon existing Rivers and Harbors Act Section 10 Lists of Navigable Waters and the USACE should retain all wetlands landward to an administrative boundary established during the development of the memorandum of agreement between the state or tribe and the USACE, with a 300-foot national administrative boundary as a default. The USACE did not agree with the majority recommendation and recommends that they retain *all s*ection 10 waters as defined by the Rivers and Harbors Act, plus all CWA (a)(1) Traditionally Navigable Waters (TNWs). Additionally, the USACE recommends that the USACE retains all adjacent wetlands regardless of furthest reach.

While the Subcommittee report does not identify precisely which entities within the EPA organization could be charged with carrying out these recommendations, it seems evident that key direction and involvement must come from the Administrator's Office, particularly in the area of communications. The Subcommittee and NACEPT believe that there is an opportunity here for the Agency to engage a new set of partners in a key environmental program and that the benefits are worth the effort. The report conveys a sense of urgency about the need for EPA to take advantage of these opportunities for collaboration and partnership. NACEPT therefore encourages careful consideration of the recommendations and strategies presented and urges a rapid initial response.

In NACEPT's discussion of the report, it was noted that, in seeking a solution that is clear, easily understood and implementable in the field, EPA may want to consider that the development of a clarifying regulation, compared to guidance or policy, may provide additional stability as well as guarantee the opportunity for public participation. In addition, NACEPT noted that the need for EPA direction was a result of the absence of clarification by Congress since enactment of the Clean Water Act and Rivers and Harbors Act.

We appreciate you giving the Subcommittee and NACEPT the opportunity to comment on this important issue, and we stand ready to provide any additional input or answer any questions.

Sincerely,

William G. Ross Jr.
NACEPT Chair

Attachment

cc: Donna J. Vizian, Acting Assistant Administrator, OARM
Michael Shapiro, Acting Assistant Administrator, OW
Barry Rabe, Chair, NACEPT Assumable Waters Subcommittee
John Goodin, Acting Director, Office of Wetlands, Oceans and Watersheds

ED_005978_00020876-00003 FL CWA 404 Assumption FOIA_Interim Release 11