Michigan in a MOA is not dispositive of the issue. If the waters are non-delegable as a matter of law pursuant to 33 U.S.C. § 1344(g)(1), then any purported delegation of permitting authority over those waters is void and unenforceable.

Federal regulations state that precise 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 C.F.R. § 329.3). Further, USACE listings of Navigable Waters of the United States may be updated "as necessitated by court decisions, jurisdictional inquiries, or other changed conditions." (33 C.F.R. § 329.16).

The issue of defining what waters are assumable pursuant to Section 404(g)(1) has caused significant confusion since its inception. Many states and tribes have considered pursuing assumption, but determined not to proceed due to the uncertainty regarding what waters may be assumed.

The Assumable Waters Subcommittee was convened under the National Advisory Council for Environmental Policy and Technology (NACEPT) to consider the issue of which waters are legally assumable by a state or tribe under the Clean Water Act. The Assumable Waters Subcommittee presented their recommendations to the NACEPT members on May 10, 2017 and submitted it to Administrator Scott Pruitt on June 2, 2017.

The Subcommittee did not reach agreement on a single recommendation, and therefore a majority and a USACE alternative were put forth. Neither recommendation endorsed adoption of the Section 10 Waters list as determinative of whether a water is assumable. Both the majority and USACE recommend using the Section 10 Waters list as a starting point and modifying it as warranted. These recommendations by the Subcommittee and USACE are contrary to the 1984 Michigan approach which relies solely on the list of Section 10 Waters when determining assumability.

The issue of whether the MOA is dispositive was also touched on in *Huron Mountain Club v. United States Army Corps of Engineers, et al.*, No. 12-cv-197, 2012 U.S. Dist. LEXIS 102961, 2012 WL 3060146 (W.D. Mich. July 25, 2012). In that case Huron Mountain Club sought an injunction against Kennecott Eagle Minerals ("Kennecott") construction of the Eagle Mine in the Upper Peninsula of Michigan based on a number of issues including that Kennecott had failed to obtain a § 404 permit from the USACE. In its brief in support of its injunction Huron Mountain Club did not address the issue of § 404 delegation to Michigan. Kennecott, in its brief in opposition, mentioned delegation in passing in a footnote. The federal defendants (USACE, EPA, DOI, etc.) in their brief argued that Michigan had assumed jurisdiction in this matter stating:

> "In a separate agreement executed in 1984, the Corps and the State agreed that Michigan shall assume Section 404 regulatory jurisdiction over all waters in the State except those listed on the exhibit to the 1984 agreement. Id. ¶ 9, Appx. 2. The Salmon Trout River was not on the list and thus only the State of Michigan has Section 404 permitting authority over that water body. Id. ¶ 11."