



Summary of Draft Final Assumable Waters Report

The draft final report of the Assumable Waters Subcommittee, submitted to the National Advisory Council for Environmental Policy and Technology (NACEPT), is a 60+ page document that contains not only recommendations for EPA concerning division of permitting authority in event of state/tribal assumption of 404 permitting programs, but also:

- Advice on implementation processes such as field guidance, ways to foster flexibility, incorporation of national principles and general procedures, and best available technology
- A thorough exploration of relevant regulatory and legal history
- Program assumption history (for New Jersey and Michigan, the two states who *have* assumed 404 authority)
- Alternative recommendations which were considered and later rejected, with explanations
- Exploration of what waters would be retained by states/ by USACE under various scenarios including the ones decided on as final majority and minority recommendations

The final recommendation is actually divided into two recommendations: one by a majority of subcommittee members, and one by the US Army Corp of Engineers (USACE). While they issued different recommendations on division of permitting authority, they shared recommendations on practical implementation tips and processes. The rest of this document *only summarizes the two recommendations on division of 404 permit authority between states and USACE*, so for more information we would highly recommend the full report, available [here](#).

Issue Summary:

Sec. 404(g) of the CWA authorizes states to assume authority to administer §404 dredge and fill program over a portion of the waters in their state. The remaining waters are retained administratively by USACE. Law and regulation are ambiguous on what waters, exactly, are to be retained by USACE when a state assumes authority. Prior examples do not help much either, as only two states have assumed 404 authority – NJ and MI. Others states are considering assumption but they do not know what waters they would be assuming, so they hesitate to further explore the process. This subcommittee was convened to issue recommendations to EPA on the issue.

Assumption Recommendation Summary

Final Majority Recommendation (*All recommending subcommittee members except USACE signed on*)

- **Majority recommends that when a state/tribe assumes § program:**
 - USACE must retain authority over waters included on list of regulated waters under § 10 of Rivers and Harbors Act (RHA)
 - Exception: Any waters on the §10 list solely for historic use, i.e. fur trapping, are not to be retained by USACE
 - Exception: Waters assumable by a tribe may also be retained by USACE when a state assumes the §404 program
 - All other waters of the United States, with the exception of adjacent wetlands discussed below, are assumable by a state or tribe
 - Adjacent Wetlands:
 - Majority recommends that EPA adopt/implement a policy under which USACE would retain administrative authority over all wetlands adjacent to retained navigable waters landward to an administrative boundary agreed upon by state/tribe and USACE
 - If no administrative line is negotiated, a 300 foot national administrative default line would be used
 - USACE CWA regulatory definition of “adjacent” would be used in identifying wetlands here

Final Minority Recommendation (*USACE recommendation*)

- **USACE recommends that when a state/tribe assumes §404 program:**
 - The USACE retain authority over §10 RHA list waters
 - The USACE retain authority over waters identified as Traditionally Navigable Waters (TNWs) under the CWA, USACE regulations, and USACE guidance
 - The USACE recommends that waters officially determined by USACE districts as §10 / stand-alone CWA TNW waters *at time of* assumption would be retained by USACE
 - USACE recommends that waters *later* identified/determined officially as §10 / stand-alone CWA TNW would be *added* to list of waters retained by USACE
 - Adjacent Wetlands
 - USACE retains authority over wetlands adjacent to retained navigable waters
 - Would use definition of adjacent used by USACE for regulatory actions under §404 / also used in 2008 Rapanos guidance