

From: [Mohr, Jason](#)
To: [Brad Hamlett](#); [Brown, Bob \(Rep\) \(Rep.Bob.Brown@mt.gov\)](#); [Chas Vincent](#); [Glimm, Carl \(Rep\) \(Rep.Carl.Glimm@mt.gov\)](#); [Jennifer Fielder](#); [Kathleen Williams](#); [Sharon Stewart-Peregoy \(Sen.Sharon.Stewart-Peregoy@mt.gov\)](#); [Zachary Brown \(brownformontana@gmail.com\)](#)
Subject: FW: FY-EPA Advisors Likely To Include Army Corps" Dissent In CWA 404 Permit Plan
Date: Wednesday, July 13, 2016 4:30:00 PM

Committee members,

Thanks for your time over the past couple of days. Below is information you requested of Jeff Tiberi, policy director for the Montana Association of Conservation Districts regarding the federal subcommittee on 404 assumption.

Sincerely,

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From: Personal Account [<mailto:tiberi52@gmail.com>]
Sent: Monday, July 11, 2016 3:27 PM
To: Mohr, Jason
Subject: Fwd: FY-EPA Advisors Likely To Include Army Corps' Dissent In CWA 404 Permit Plan

FYI...

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EPA Advisors Likely To Include Army Corps' Dissent In CWA 404 Permit Plan

June 13, 2016

An EPA advisory panel plans to include in its recommendations for how EPA can assist states in obtaining authority to issue Clean Water Act (CWA) section 404 dredge-and-fill permits a caveat that says which parts of the guidance may not be able to be approved by the Army Corps of Engineers, the federal agency that issues most 404 permits.

During the June 7-9 meetings of the National Advisory Council for Environmental Policy and Technology's (NACEPT) assumable waters subcommittee, many members agreed a final version of the recommendations

WATER POLICY INTERIM
COMMITTEE 2015-16

August 29, 2016

Exhibit 9

should include some sort of statement of the Corps' perspective on key definitions since there are areas where it is highly likely to disagree. These include the scope of waters for which the Corps would retain permitting authority and how to define which wetlands are "adjacent" to those waters.

"The Corps is so far apart with [its waters definition], and it's hard for us to comment on the documents because there's just so much there, that it's past the point we can make edits or comments because that would turn the document upside down in some cases," said William L. James, the Corps member of the NACEPT subcommittee.

EPA convened the NACEPT subcommittee in response to an April 2014 request from states, and asked it to provide recommendations on how the agency can best clarify for which waters a state or tribe may obtain CWA section 404 permit responsibilities, and for which waters the Corps retains permit responsibility.

Under the statute, the Corps has the authority to issue permits for the discharge of dredged or fill material into waters of the United States, including wetlands, but EPA has the authority to develop policy used in evaluating permit applications, approve and oversee state and tribal assumption, review individual permit applications and prohibit, deny or restrict the use of any defined area as a disposal site.

Delegated Authority

Thus far, only Michigan and New Jersey have received delegated 404 authority, but EPA has been working with 24 other states and tribes trying to assume authority. The full panel's final recommendations are expected to shape a new rule or policy to provide clarity for states wanting to assume authority under 404, including best practices and procedural guidance that could be tailored to each individual state.

But many members of the panel have previously questioned whether such guidance provided to EPA and the Corps could withstand legal concerns from within the Corps.

Members at prior NACEPT assumable waters subcommittee meetings pointed to political concerns within the Corps, such as the dissent of the Corps' assistant chief

counsel for environmental law and regulatory programs
Lance Wood.

Wood has argued in law review articles and elsewhere that state assumption is not adequately protective of wetlands and aquatic resources, creates unnecessary cost and administrative burdens on states, and subjects wetland protection measures to state politics.

NACEPT subcommittee member Eric Metz, a planning and policy manager at the Oregon Department of State Lands' Aquatic Resource Management Program, cautioned during a December 2015 meeting that the final recommendations should neither work for a formal endorsement or opinion from agencies on recommendations but also not "work so independent of the agencies' legal perspectives."

Additionally, panelists have discussed that any guidance would have to be mindful of legal issues pending in the courts around the CWA jurisdiction rule, including how to address adjacent wetlands.

Subcommittee's Drafts

The assumable waters subcommittee has completed drafts outlining several options for clarifying the issue of adjacency and the definition of "waters," and plans to include versions those drafts in its final set of recommendations. But members at the June 9 meeting

discussed the importance of including a separate section on legal issues to be reviewed before the next meeting, as well as a possible inclusion of footnotes that there are some recommendations the Corps may not agree to.

Working group members discussed either the possibility of including a "footnote" saying certain areas would not be accepted by the Corps or a "broader statement of perspective" of the Corps that acknowledges potential conflict more generally, but did not decide on which of those two options would make it into the next draft.

The group also agreed to pull out some of the "legal pieces" included in the "waters work group" draft from March 12 and work on those separately to include somewhere in the final document. These sections generally urge federal agencies to issue field level guidance to states on 404 assumption as well as a "uniform national procedure for identification of state-assumable waters" to be included in

the field guidance."

The legal team will look at the CWA and other applicable statutes, such as section 10 of the Rivers & Harbors Act, and the legislative intent of those definitions.

"What I was thinking we most needed is basically to take that as kind of an outline and go back into the case law and think about how we would refine that, so we'd use that in the final report," said subcommittee member Jan Goldman-Carter, senior manager of the wetland and water resources division of the National Wildlife Federation and a leader of the subcommittee's legal review efforts.

The work group drafts will undergo that legal review throughout the summer with the goal of finalizing them before a September webinar. The subcommittee is then slated to meet in December to finalize a report to deliver to the NACEPT co-chairs by early 2017. -- *Amanda Palleschi* (apalleschi@iwpnews.com)