DRAFT
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**The Meaning of "Adjacent" in Section 404(g)(1) of the Clean Water Act**

*This draft was prepared to facilitate deliberations at the March 2016 Assumable Waters Subcommittee Meeting. It does not reflect the consensus of the full Subcommittee or any working group created thereunder, nor does it reflect the policy or legal position of any participating entity. This draft is for discussion purposes only.*

## I. Introduction

As noted in the Subcommittee's legislative history memorandum, Section 404 of the Clean Water Act (CWA) authorizes the U.S. Army Corps of Engineers (the Corps) to issue permits for the discharge of dredged or fill material "into the navigable waters…."[1] The statute defines "navigable waters" to mean "the waters of the United States, including the territorial seas."[2] Pursuant to section 404(g)(1), States, with approval from the Environmental Protection Agency (EPA), may assume authority to administer the permit program for discharges of dredged and fill material to some but not all navigable waters. The waters that a State may not assume 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…[3]

Review of the legislative history in the memorandum showed that Congress intended the States to assume the majority of navigable waters, with the Corps retaining jurisdiction over a limited subset of navigable waters. This memorandum looks at the meaning of the term "adjacent" as it is used in 404(g)(1) and whether it means something different from the generally understood interpretation of "adjacent" in the regulations defining "waters of the United States."

## II. Discussion

### A. The term "adjacent" is used for a different purpose in 404(g)(1) than in the regulations defining "Waters of the United States".

In March 1975, three years after the original CWA was enacted, the District Court for the District of Columbia held that the Corps' April 3, 1974, regulations defining "navigable waters" were inconsistent with the CWA. The court ordered the Corps to issue new regulations and broaden the definition.[4] On July 25, 1975, in compliance with the court order, the Corps issued revised "navigable waters" regulations creating a phased schedule for expanding the program,

[1] 33 U.S.C. § 1344(a).
[2] *Id.* § 1362(7).
[3] *Id.* § 1344(g)(1).
[4] *See Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

and defining Phase I, II, and III waters.[5] The rule defined Phase I waters, effective immediately, as "…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*...."[6]

In response, the House Committee on Public Works and Transportation began to craft legislation to amend the CWA to redefine "navigable waters" specifically for section 404.[7] The intent was to limit the jurisdictional scope of the Corps' section 404 dredge and fill program. The original draft of the bill, H.R. 9560, did not mention wetlands:

> The term "navigable waters" as used in [section 404] 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…"[8]

All other waters, the Committee indicated, would be "more appropriately and more effectively subject to regulation [by] the States." [9]

Subsequently, the bill was amended to apply the permit requirement to "coastal wetlands and [] those wetlands lying *adjacent and contiguous* to navigable streams"[10] (but this language was not used to define 'navigable waters'). Additionally, the amendment 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 State's exercise of authority would be within the public interest.[11] The House of Representatives passed H.R. 9560 and approved these amendments to the 404 program on June 3, 1976.[12] The Senate bill, S. 1952, did not amend "navigable waters."[13] Instead, it allowed States to assume the primary responsibility for implementing the permit program.

Ultimately, the final bill, referred to as the 1977 Clean Water Act amendments, did not change the definition of navigable waters for the 404 program. But during conference, the two chambers agreed upon an amendment that would allow States to assume the program. The final bill "establishes a process to allow the Governor of any State to administer an individual and general permit program for the discharge of dredged or fill material into phase 2 and 3 waters

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[5] 40 Fed. Reg. 31,320 (July 25, 1975).
[6] 40 Fed. Reg. 31,326 (July 25, 1975).

[7] *See* H. Comm. on Pub. Works and Transp., H.R. Rep. No. 94-1107, to accompany H.R. 9560, at 22 (May 7, 1976).
[8] *Id.* at 63.
[9] *Id.* at 22.

[10] 122 Cong. Rec. 16514, 16553 (June 3, 1976).
[11] *Id.* at 16572.
[12] *Id.* at 16569.
[13] S. Comm. on Env't and Pub. Works, S. Rep. No. 95-370, to accompany S. 1952, at 75 (July 28, 1977).

after the approval of a program by the Administrator." [14] If and when a State assumed the program, the State would regulate Phase II and III waters, and the Corps would retain authority in the Phase I waters. The waters in which a State may not regulate the discharge of dredged or fill material under a State program "are 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."[15] For the purpose of defining these retained waters, the final bill inserted the language that the House Committee had originally used to limit Corps jurisdiction, except that the Conference Committee added "wetlands adjacent thereto" to the parenthetical phrase defining the waters over which the Corps would always retain authority.[16] It is within this compromise that the phrase "*wetlands adjacent thereto*" was added to the parenthetical that defines retained waters.

"Adjacent" is being used, here, in a different manner than in the regulations defining "waters of the United States." The term does not modify "navigable waters," and it is not being used to determine the geographical scope of CWA jurisdiction. When the term "adjacent" is used in the "waters of the United States" regulations, it is simultaneously defining which waters are – and are not – subject to the CWA. When the term "adjacent" is used in the 404 (g) (1) parenthetical, it is used to establish subsets of "navigable waters" – the subset of wetlands "adjacent" to other phase I retained waters that will be regulated by the Corps. But it is not being used to establish the reach of the CWA. Thus, it is being used for a different purpose – to determine who will regulate which CWA waters, not whether or not the waters will be regulated at all.

### B. The meaning of "adjacent" in 404(g)(1) is likely more narrow than the definition of "adjacent" in the regulation defining "Waters of the United States."

The term "adjacent," as it is used in the regulations defining CWA jurisdiction means "bordering, contiguous, or neighboring."[17] Additionally, "[w]etlands 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.'"[18] This definition first appeared in the 1977 regulations,[19] and was before Congress at the time of the 1977 congressional debates and the December 1977 Conference Committee compromise amendment creating the section 404(g)(1) parenthetical. However, as described above, the term "adjacent" has a different purpose in Section 404(g)(1). To determine the meaning of adjacent in light of the purpose of 404(g)(1), it is important to consider the Corps' explanation of its 1977 rule defining adjacent for CWA jurisdiction purposes, as well as the legislative history of section 404(g)(1) indicating an intention to limit Corps section 404 permitting jurisdiction in order to foster state assumption, including the floor statement of one of the co-sponsors of the original House bill.

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[14] H.R. Rep. No. 95-830, at 101 (Dec. 6, 1977) (Conf. Rep.).

[15] 123 Cong. Rec. 38969 (Dec. 15, 1977). (emphasis added)

[16] H.R. Rep. No. 95-830, at 101 (Dec. 6, 1977) (Conf. Rep.).

[17] 33 C.F.R. § 328.3 (2015).

[18] *Id*.

[19] 42 Fed. Reg. 37,144 (July 19, 1977).

While the term "adjacent" has a different purpose in Section 404(g)(1) than in the definition of "navigable waters," the Corps' 19 July 1977 final rule preamble explaining the meaning of the term is still relevant because it explains changes in the definition of "navigable waters" from the 1975 rule, including changes related to Phase I adjacent wetlands. This preamble explanation is relevant because the 1977 CWA section 404 (g)(1) legislative history provides that the Corps' retained waters "are *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*."[20] Recall that the 1975 rule defined Phase I waters as including "…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*...." [21] Recall too that H.R. 9560 was amended before passage in 1976 to apply the 404 permit requirement to wetlands lying "*adjacent and contiguous* to navigable streams."[22]

The 1977 preamble equates its 1977 "Category I" [River and Harbor Act] waters, including "adjacent wetlands" with the 1975 rule's "wetlands…contiguous or adjacent" thereto. 42 Fed. Reg. at 37, 127. The 1977 rule preamble characterized Phase I as including "all waters subject to the ebb and flow of the tide and/or waters that are, were, or are susceptible to use for commercial navigation purposes (waters already being regulated by the Corps) *plus all adjacent wetlands to these waters* (thus eliminating the artificial ordinary high water and mean high waters mark distinctions.)" 42 Fed. Reg. at 37,124. In order to clarify the meanings of the terms 'adjacent' and 'contiguous,' the Corps explains in the 1977 rule preamble 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." Id.* at 37,129.

Turning to section 404(g)(1), the Corps' 1977 CWA jurisdiction definition of adjacent as "bordering, contiguous, or neighboring" is in tension with the legislative history of section 404(g)(1) indicating an intention to limit Corps section 404 permitting jurisdiction in order to foster state assumption, including the floor statement of one of the co-sponsors of the original House bill. In 1977 in response to a question on the floor of the House of Representatives, 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,[23] explained, in response to questioning, that the word "adjacent" means "immediately contiguous to the waterway."[24] The full extent of the colloquy is below:

> Mr. Bauman: …As the gentleman knows, there has been some controversy as to exactly how this new legislation will be applied. I understand that the Federal Government will retain through the Corps of Engineers jurisdiction over navigable waters, but what does "adjacent wetlands" mean? How far will that go? I represent counties where when the tide comes up, a third of those countries [sic]

[20] 123 Cong. Rec. 38969 (Dec. 15, 1977). (emphasis added)

[21] 40 Fed. Reg. 31,326 (July 25, 1975).

[22] 122 Cong. Rec. 16514, 16553 (June 3, 1976).

[23] *See* 122 Cong. Rec. 16539 (in reference to H.R. 9560).

[24] 123 Cong. Rec. 38972 (Dec. 15, 1977).

> could suddenly be adjacent wetlands. I would hope that the States would be able to have delegated to them control over such areas.
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> Mr. Roberts: Wetlands adjacent to traditionally navigable waters remain under Federal jurisdiction. Other wetlands may be regulated by a State under its own program if approved by EPA.
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> Mr. Bauman: But there will be an ability on the part of the Federal Government to delegate to the States control over the adjacent wetlands, next to navigable waters; is that correct?
>
> Mr. Don H. Clausen: Mr. Speaker, will the gentleman yield?
>
> Mr. Roberts: I yield to the gentleman from California.
>
> Mr. Don H. Clausen: I thank the gentleman for yielding. In response to the gentleman's question, wetlands adjacent to traditionally navigable waters will remain under the jurisdiction of the Federal Government with one exception -- jurisdiction over historically navigable waters can be assumed by a State if that State so chooses. In further response to the gentleman's question, I would interpret the word "adjacent" to mean *immediately contiguous* to the waterway.
>
> Mr. Bauman: I thank the gentleman.[25]

This colloquy illustrates the legislative intent to limit Corps section 404 jurisdiction in order to foster state regulation of dredge and fill in most waters while at the same time ensuring that the Corps retains jurisdiction over phase I waters (other than historical use waters), including adjacent wetlands. Rep. Clausen's statement interpreting adjacent as "immediately contiguous" is made in response to questioning pressing for limited Corps jurisdiction. This statement implies that adjacent wetlands for purposes of 404(g), as understood by its drafters, includes a narrower subset of adjacent wetlands that are contiguous wetlands. This statement may even be read to imply that wetlands adjacent to retained waters are a smaller subset of wetlands contiguous to retained waters, because of the statement interpreting adjacent wetlands under 404(g)(1) to be those that are *immediately* contiguous.

This floor colloquy is the only specific discussion of the meaning of adjacent we could find in the 1977 legislative history. However, it directly addresses the point we are exploring, and it is consistent with the overall intent of the 1977 amendments (and in particular 404(g)(1)), which was to shift to the States (with EPA approval) the authority to administer the 404 program in Phase 2 and 3 waters and to limit the Corps to Phase 1 waters. The waters in which a State may not regulate the discharge of dredged or fill material under a State program "are those waters defined as the phase I waters in [the Corps] 1975 regulations, with the exception of waters

[25] *Id*.

considered navigable solely because of historical use."[26] All other waters were "more appropriately and more effectively subject to regulation [by] the States."[27]

Interestingly for our purposes in trying to determine the meaning of "adjacent" in the 1977 amendments, in defining the waters over which the Corps would retain jurisdiction, the Conference Committee tweaked the language of the 1975 regulations defining Phase 1 waters. It deleted the phrase "wetlands contiguous or adjacent thereto" and replaced it with "wetlands adjacent thereto." This choice of language, read in light of the Corps 1977 rule explanation (before Congress at the time of the final bill passage), suggests that 'adjacent' is broader than 'contiguous.' On the other hand, read in light of the section 404(g)(1) legislative history, it suggests that 'adjacent' is narrower than the Corps' definition of 'adjacent' for CWA jurisdiction purposes and should be treated as such for purposes of the 404(g)(1) parenthetical in order to further Congress's intention that the States assume broad authority over dredge and fill activities in waters that are not central to the federal interest.

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**NOTE: The text above constitutes our draft legal analysis of the meaning of "adjacent" in section 404(g)(1) based on the available legislative and regulatory history.**

**Below are draft outline headings intended as food for thought in filling out a sound legal and policy rationale for giving a narrower meaning to "adjacent wetlands" for purposes of 404(g)(1).**

**C. Consideration of whether and how Michigan and New Jersey assumption practices may inform our understanding of the Corps' retained adjacent wetlands.**

- The assumption agreements do not seem informative.
- Consider practice of bi-furcating jurisdiction of a wetland contiguous to a Corps retained waterway.

**D. Policy discussion re delineating the limits of Corps' retained 404 permitting authority over adjacent wetlands vs state permitting authority over adjacent wetlands as distinct from delineating the extent of CWA jurisdiction.**

[26] 123 Cong. Rec. 38969 (Dec. 15, 1977).
[27] H.R. Rep. No. 94-1107, at 22.

**E. Discuss and support the proposition that the states would be more interested in assuming and administering a state 404-equivalent program if the extent of adjacent wetlands retained by the Corps is limited, easily determined, and flexible enough to allow for some discretion to delineate the limits based on state-specific circumstances.**

**F. Conclusions**