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DRAFT REPORT AND RECOMMENDATIONS ADJACENCY WORKGROUP 11/14/16 DRAFT

CHARGE

The National Advisory Council for Environmental Policy and Technology (NACEPT) is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), Public Law 92–463. NACEPT created the Assumable Waters Subcommittee to focus on a very narrow and specific charge related to the Clean Water Act (CWA): for which waters and adjacent wetlands a state or tribe may assume permitting responsibility under Section 404. The Subcommittee was asked to provide advice and develop recommendations for NACEPT on how the U.S. Environmental Protection Agency (EPA) can best clarify for which waters and adjacent wetlands a state or tribe has CWA Section 404 permitting responsibilities under an assumed program, and for which waters and adjacent wetlands the U.S. Army Corps of Engineers (USACE) retains CWA Section 404 permitting responsibility. In order to address this charge, the Subcommittee divided its work into three workgroups: the Legal Workgroup, the Waters Workgroup, and the Adjacency Workgroup. This is a work product of the Adjacency Workgroup.

INTRODUCTION

The U.S. Army Corps of Engineers published interim final regulations on July 25, 1975 establishing the following phased schedule for the discharge of dredged material or of fill material into navigable waters:

(a) Phase I: After the effective date of this regulation [July 25, 1975], discharges of dredged material or of fill material into 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 are subject to the procedures of this regulation.

(b) Phase II: After July 1, 1976, discharges of dredged material or of fill material into primary tributaries, freshwater wetlands contiguous or adjacent to primary tributaries, and lakes are subject to the procedures of this regulation.

(c) Phase III: After July 1, 1977, discharges of dredged material or of fill material into any navigable water are subject to the procedures of this regulation. 40 Fed. Reg. 31,326 (July 25, 1975).

The 1977 amendments to the CWA included a provision that allowed states to administer a permit program for the discharge of dredged or fill material into “phase 2 and 3 waters after the approval of a program by the Administrator.”¹ Section 404(g)(1) of the CWA states:

“The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than

¹ H.R. Rep. No. 95-830, at 101 (Dec. 6, 1977) (Conf. Rep.).
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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), within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact”²

Pursuant to Section 404(g)(1), states and tribes³ may assume authority to administer the federal dredge and fill CWA Section 404 permit program for some but not all navigable waters. The waters which the USACE must retain even after a State has assumed the program, are defined in the parenthetical phrase within Section 404 (g)(1). To qualify for assumption, a state or tribe must meet requirements that assure a level of resource protection that is equivalent to what is required of the federal agencies. The EPA is responsible for reviewing state statutes and regulations, and ultimately deciding whether the CWA Section 404 program can be assumed by a state or tribe.

In 1980, three years after Congress passed the CWA amendments, the EPA published “The States’ Choice: 404 Permit Program,” which explained the benefits of an assumed CWA Section 404 permit program, and highlighted the ability of a state or tribe to manage the natural resources within its borders and integrate CWA Section 404 requirements with environmental considerations mandated by other federal programs implemented by the state or tribe. The publication’s introduction stated:

“... Congress has said that the States have the “primary responsibilities and rights ... to prevent, reduce and eliminate pollution,” and it is EPA’s responsibility to preserve and protect that role.

“States control the lands and waters within their own boundaries. Many States are already working with the same environmental issues that the 404 Program addresses. A State can greatly simplify the approach to dredge and fill issues by developing a State 404 Program. The transfer of 404 permitting authority from Federal to State level will make it easier for government to respond to the applicant with a single voice, for permit procedures to be consolidated, and for time delays and expense to be reduced. The entire operation could be smoother and more effective.

“The State that assumes control of its own 404 Program fulfills its administrative role. States have the sensitivity to function as the balance wheel so often desperately needed in environmental issues – to maintain natural resources while considering industrial and commercial development.”⁴

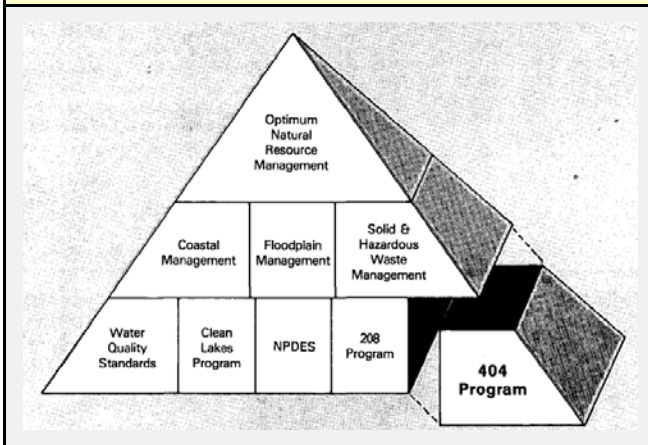
² 33 U.S.C. § 1344(g)(1).

³ In 1988, Congress authorized the EPA Administrator to treat Indian tribes as states for the purposes of Section 404 of the Clean Water Act (33 U.S.C. §1377(e)).

⁴ United States Environmental Protection Agency, Office of Water Regulations and Standards, Forward to *The State’s Choice: 404 Permit Program*, EPA 440/5-81-002, October 1980, ii.

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FIGURE 1. OPTIMUM STATE NATURAL RESOURCE MANAGEMENT⁵



The promise of state or tribal programs becoming the primary administrators of the CWA Section 404 permit program has never come to fruition. While many states have investigated assumption of the federal dredge and fill permit program since the 1977 amendments and the subsequent release of this publication, only two states - Michigan and New Jersey - have been successful. One important way to facilitate state assumption is to provide clarity as to which waters and adjacent wetlands a state or tribe may assume permitting responsibility.

ADJACENCY IN CWA SECTION 404(g)(1)⁶

Section 404 of the CWA authorizes the U.S. Army Corps of Engineers (USACE) to issue permits for the discharge of dredged or fill material into “navigable waters.”⁷ Pursuant to Section 404(g)(1), states and tribes, with approval from EPA, may assume authority to administer the Section 404 permit program in some but not all navigable waters. The waters that a state or tribe may not assume, and which the USACE must retain even after a State or tribe has assumed the program, 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)⁸

The legislative history shows that Congress intended the Corps to retain what were called Phase 1 waters in the USACE’s 1975 regulations: “*coastal waters and coastal wetlands contiguous or adjacent thereto or . . . inland navigable waters of the United States and freshwater wetlands contiguous or adjacent thereto.*” 40 Fed. Reg. 31,320, 31,326 (July 25, 1975). These Phase 1 waters were waters the USACE had regulated since the late 19th century under the Rivers & Harbors Act, plus “contiguous or adjacent wetlands.”

The USACE’s regulations in 1975 did not define “contiguous,” “adjacent” or “wetlands.” The first time the phrase “adjacent wetlands” appeared in the language that ultimately became 404(g)(1) was in the House bill passed June 3, 1976. 122 Cong. Rec. 16,572 (June 3, 1976). The bill did not define the terms “adjacent” or “wetlands.”

⁵*Id.* at 7.

⁶ National Advisory Council on Environmental Policy & Technology, Assumable Waters Subcommittee, Legal Workgroup, Adjacency in 404(g)(1), August 25, 2016.

⁷ 33 U.S.C. § 1344(a)

⁸ 33 U.S.C. § 1344(g)(1)

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In July 1977, the USACE for the first time promulgated definitions of “adjacent” and “wetlands” for purposes of its “waters of the United States” (WOTUS) regulatory definitions. The preamble to the 1977 WOTUS rule explained 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.’ The term would include wetlands that directly connect to other waters of the United States, or that are in reasonable proximity to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes, and similar obstructions.” 42 Fed. Reg. 37,122, 37,129 (July 19, 1977).

While there are no references in the legislative history of section 404(g) to the USACE’s 1977 definition of “adjacent,” the question of the meaning of the term adjacent came up during the final floor debate on the 1977 amendments in December 1977. In response to questions raised by another Member, 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, explained that the word “adjacent” means “immediately contiguous to the waterway.” 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] could suddenly be adjacent wetlands. I would hope that the States would be able to have delegated to them control over such areas.

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.

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

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the gentleman's question, I would interpret the word “adjacent” to mean immediately contiguous to the waterway.

Mr. Bauman: I thank the gentleman.

While this colloquy between two members of Congress is not the most definitive legislative history,⁹ it illustrates the legislative intent to limit the USACE’s Section 404 permitting authority in order to foster state or tribal regulation of dredge and fill in most waters while at the same time ensuring that the USACE retains permitting authority over Phase I waters (other than historical use waters), including adjacent wetlands. Representative Clausen’s statement interpreting adjacent as “immediately contiguous” is made in response to questioning pressing for limited USACE jurisdiction. This floor colloquy is the only specific discussion of the meaning of adjacent found in the 1977 legislative history.

Robert E. Bauman was a member of the U.S. House of Representatives from Maryland's 1st congressional district, which included the entire Eastern Shore of Maryland, as well as Harford, Calvert, Charles and St. Mary’s counties on Maryland’s western shore. Approximately 20% of the Eastern Shore’s land mass is comprised of wetlands and in Dorchester County that figure jumps to over 44 % of the land mass (See Table 1).

TABLE 1. WETLAND ACREAGE ON MARYLAND’S EASTERN SHORE¹⁰				
COUNTY	LAND AREA (SQUARE MILES)	LAND AREA (ACRES)	WETLAND ACREAGE (1981/1982)	PERCENTAGE OF LAND SURFACE
Cecil	360	230,400	9,018	3.91
Kent	278	177,920	15,313	8.61
Queen Anne’s	372	238,080	32,511	13.66
Talbot	259	165,760	19,967	12.05
Caroline	321	205,440	30,514	14.85
Dorchester	593	379,520	169,168	44.57
Wicomico	379	242,560	37,761	15.57
Somerset	338	216,320	81,563	37.70
Worcester	475	304,000	59,486	19.57
TOTAL	3,375	2,160,000	455,301	21.08

The questions posed by Congressman Bauman (What does adjacent wetlands mean? and How far will that go?) demonstrated his familiarity with the CWA Section 404 permit program and reflected Congress’ concern that regulations promulgated by the USACE would infringe on state and tribal authorities. Although the final bill negotiated by the House and Senate Conference Committee did not change the definition of navigable waters for the 404 program, it did provide for state and tribal

⁹ There is a hierarchy of documents used to determine the legislative intent of a law. In general, the priority of importance is 1) statutory text; 2) case law; 3) committee reports; 4) conference reports; 5) drafting and deliberation history; and presidential signing statements. Secondary sources of information may include newspaper articles, investigatory reports, and other press coverage of the time period.

¹⁰ Tiner, R. W. and D.G. Burke. 1995. Wetlands of Maryland. U.S. Fish and Wildlife Service, Ecological Services, Region 5, Hadley, MA and Maryland Department of Natural Resources, Annapolis, MD. Cooperative publication. 193 pp. plus Appendices.

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assumption. Assumption was seen as a way to effectively limit the scope of USACE permitting authority, while at the same time ensuring: (1) the USACE retained permitting authority over Phase I waters (other than historical use waters), including adjacent wetlands, and (2) efficacy in a state-run program as required by the CWA.

Although Congress clearly intended the USACE to retain Phase 1 waters identified in the USACE's 1975 regulations, Congress's statutory description of retained waters and wetlands did not track the 1975 regulatory language. With regard to wetlands, the USACE 1975 regulations referred to "wetlands contiguous or adjacent" to retained waters, but the House bill, passed in 1976, and the final bill passed by Congress December 15, 1977 both referred to "wetlands adjacent" to the retained waters.

In sum, no definitive meaning of the term "adjacent" in Section 404(g)(1) emerges from a review of the legislative history. According to the 1977 Preamble, the USACE believed that "contiguous" is a subset of "adjacent" for purposes of defining "waters of the United States," but other than the floor colloquy quoted above there is no real discussion of what Congress intended by using the word "adjacent" for purposes of allocating permitting authority under 404(g)(1).

THE WATERS WORKGROUP

Relying on the legislative history of the CWA, previous decisions made by the federal agencies in approving CWA Section 404 permit programs in Michigan and New Jersey, and the needs of the states and tribes, the Waters Workgroup has tentatively (but not at this point unanimously) concluded that CWA Section 404 permitting in the following waters must be retained by the USACE when a state or tribe assumes administration of the CWA Section 404 permit program:

- 1) Waters identified by the USACE as Phase I waters in its 1975 regulations incorporating the description of "navigable waters of the United States" already regulated by the USACE under section 10 of the RHA, pursuant to the USACE RHA regulations, except the parenthetical excluded waters deemed navigable based solely on historical use;
- 2) Additional waters that are presently used or susceptible to use to transport interstate and foreign commerce pursuant to the USACE's RHA regulations; and
- 3) Wetlands adjacent to those waters.

In addition, the Waters Workgroup tentatively concluded that state, tribal and federal agencies should be afforded a degree of flexibility in defining the scope of waters to be assumed by a state or tribe (and retained by the USACE) to account for distinct state or tribal needs. However, guiding principles regarding the extent of assumable waters that can be applied nationally should be included in and serve as the basis for field level guidance. The Waters Workgroup also noted that in order to provide information for the regulated public as well as regulatory agencies, mapping and geographic information systems should be used to the extent possible in addition to lists of waters to clarify the location of state, tribal or federal authority for purposes of Section 404 permitting.

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THE ADJACENCY WORKGROUP

The Subcommittee charged the Adjacency Workgroup with exploring ideas, issues and options related to jurisdictional wetlands adjacent to waters retained by the USACE under an assumed CWA Section 404 permit program. The Workgroup was directed to address the following tasks: (1) describe and further clarify which adjacent wetlands the USACE would retain and which could be assumed by states and tribes; (2) develop a clear, practicable methodology that can be adapted to a range of wetland types with topological and geological differences; and (3) develop options for consideration by the full Subcommittee that can be incorporated into national guidance distributed to the states, USACE districts, and EPA regions.

FINDINGS AND RECOMMENDATIONS

Recommendation #1

In order to provide clarity over the extent of wetlands that must be retained by the U.S. Army Corps of Engineers (USACE), it should be recognized that Clean Water Act (CWA) Section 404(g)(1) uses the term adjacency for a different purpose than it is used in the waters of the United States (WOTUS) regulations. WOTUS regulations define the adjacent wetlands that are subject to CWA regulation, while 404(g)(1) is about which entity – the USACE or an approved state or tribe - will exercise permitting authority over adjacent wetlands that are subject to CWA regulation.

With no prescriptive definitions from Congress, and recognizing Congress’s intention to foster State assumption (with U.S. Environmental Protection Agency approval), states, tribes and the USACE have flexibility to adopt state or tribal specific approaches to identifying retained wetlands. This flexibility provides the means to limit the adjacent wetlands retained by the USACE pursuant to 404(g)(1) to those wetlands that are in relatively close physical proximity to retained phase 1 waters (other than historical use waters) and not wetlands extending thousands of feet or perhaps miles from those waters.

Note: USACE is not yet to this point of agreement. Case law and various regulations have led the USACE to a different place that could, in its view, preclude administratively operationalizing this intent in the present day.

ADJACENCY

The Adjacency Workgroup discussed a number of approaches to the identification of wetlands adjacent to the navigable water being retained by the USACE under an assumed CWA Section 404 permit program. Initial discussions centered on the terms contiguous and adjacent used in the USACE’s July 25, 1975 interim final regulations establishing a phased implementation schedule for the discharge of dredged or fill material into navigable waters. However, the focus shifted to the definitions promulgated by the USACE in July 1977, which defined “adjacent” and “wetlands” to complement the “waters of the United States” regulatory definition. The preamble to the 1977 regulations explained 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.’ The term would include wetlands that directly connect to other waters of the United States, or that are in reasonable proximity to these waters but physically separated from them by man-made dikes or

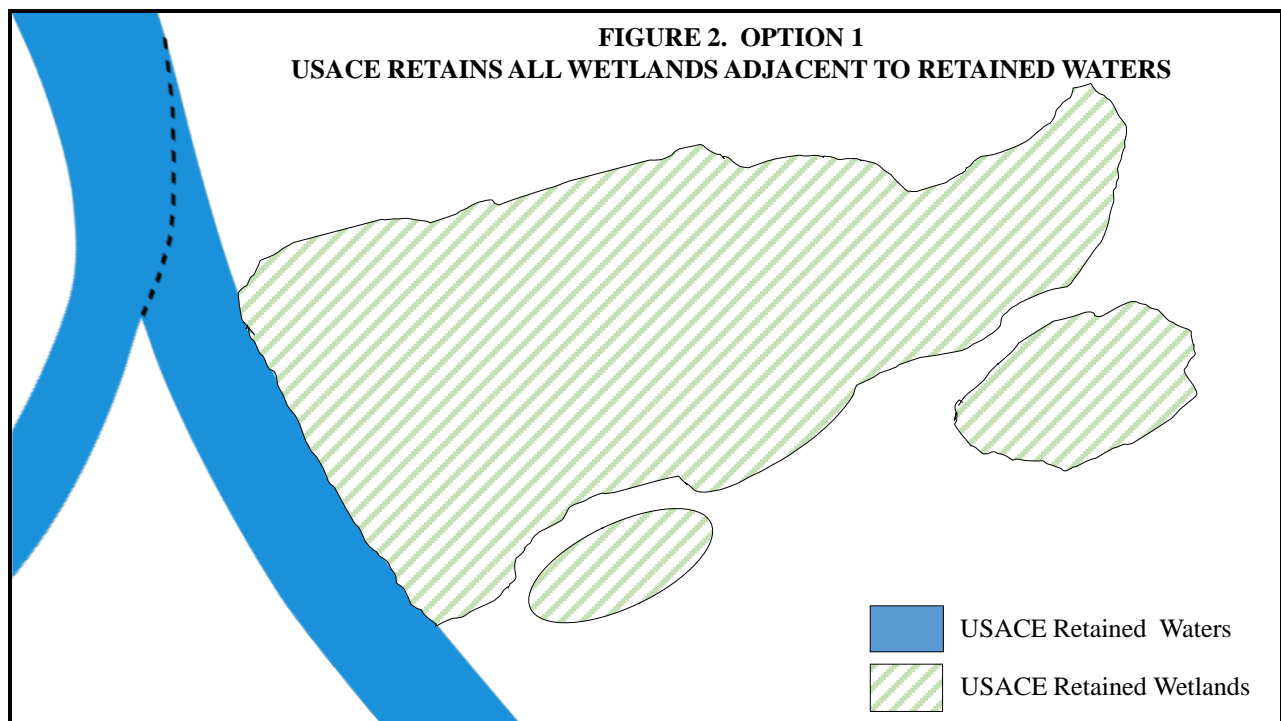
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barriers, natural river berms, beach dunes, and similar obstructions.” 42 Fed. Reg. 37,122, 37,129 (July 19, 1977). More recently, Workgroup discussions touched on the Clean Water Rule promulgated by EPA and the USACE on June 29, 2015, which further clarifies the terms adjacent, bordering, contiguous and neighboring.

In the end, the Adjacency Workgroup decided to discuss “wetlands adjacent thereto” primarily as those wetlands that are “touching” the waters being retained by the USACE under an assumed CWA Section 404 permit program or by the regulatory definition of adjacent, which means bordering, contiguous, or neighboring . Relying on this understanding, the Adjacency Workgroup developed the following options for consideration by the Subcommittee.

Option 1: USACE Retains All Wetlands Adjacent to Retained Navigable Waters

Except for the CWA Section 404 permit programs administered by Michigan and New Jersey, Option 1 represents the status quo for states and tribes, including reliance on the definition of “waters of the United States” currently being used by the USACE for regulatory actions under Section 404. Under Option 1, the USACE would retain permitting authority over all wetlands adjacent to retained Section 10 waters, including wetlands that are *not* touching the retained water.

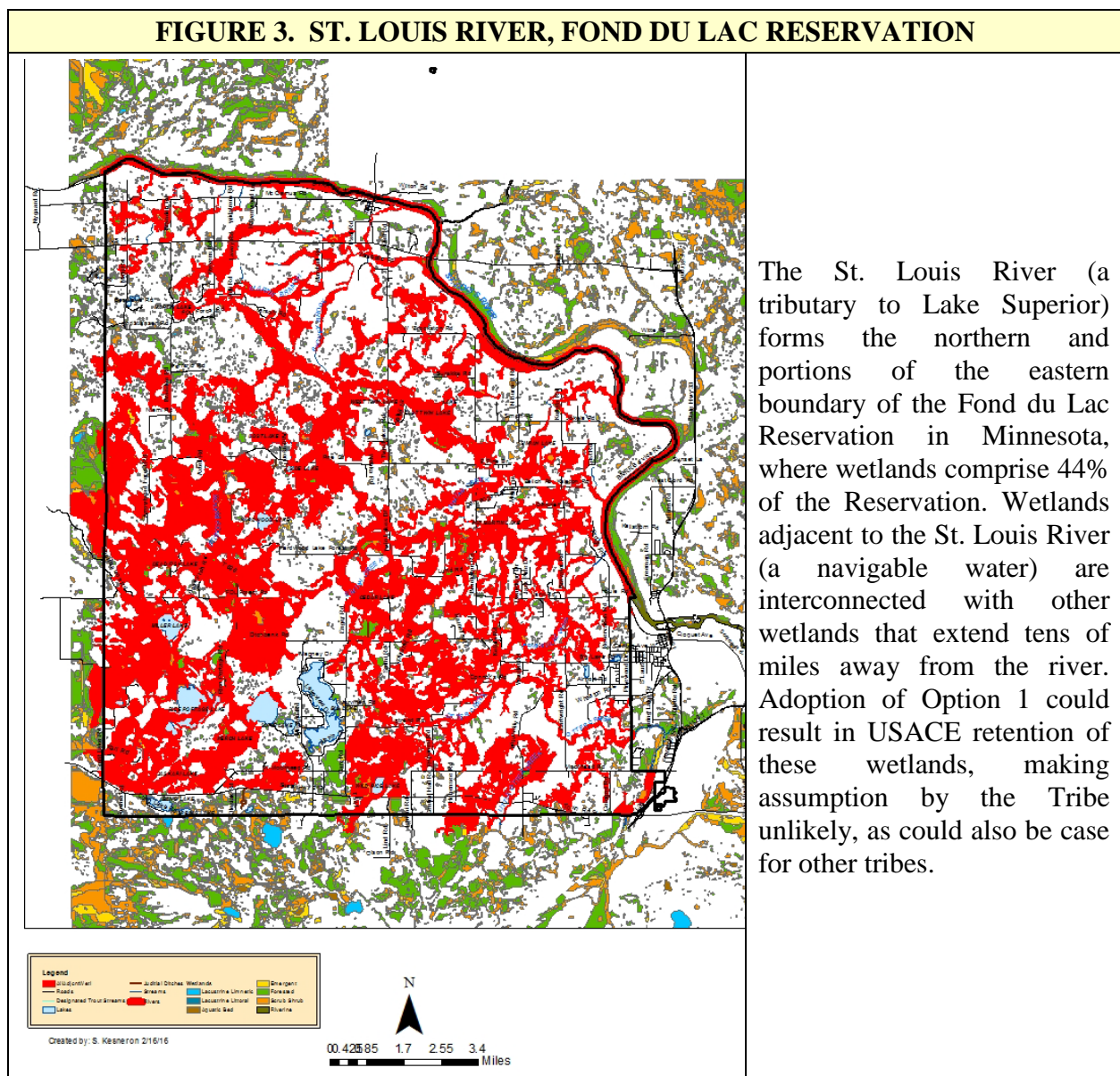


The most significant advantage associated with Option 1 is that the same definition that would be used by the USACE, states and tribes to identify jurisdictional wetlands being regulated by the USACE under the CWA would be the same definition used to delineate the extent of adjacent wetlands retained by the USACE under an assumed Section 404 program. This would be a “safe” option because it does not require an interpretation of adjacent wetlands in CWA Section 404(g)(1) that differs from the understanding of adjacency for CWA jurisdictional purposes. Additionally, since it relies on a definition that is currently in use by the USACE for the scope of the CWA Section 404 permit program, it

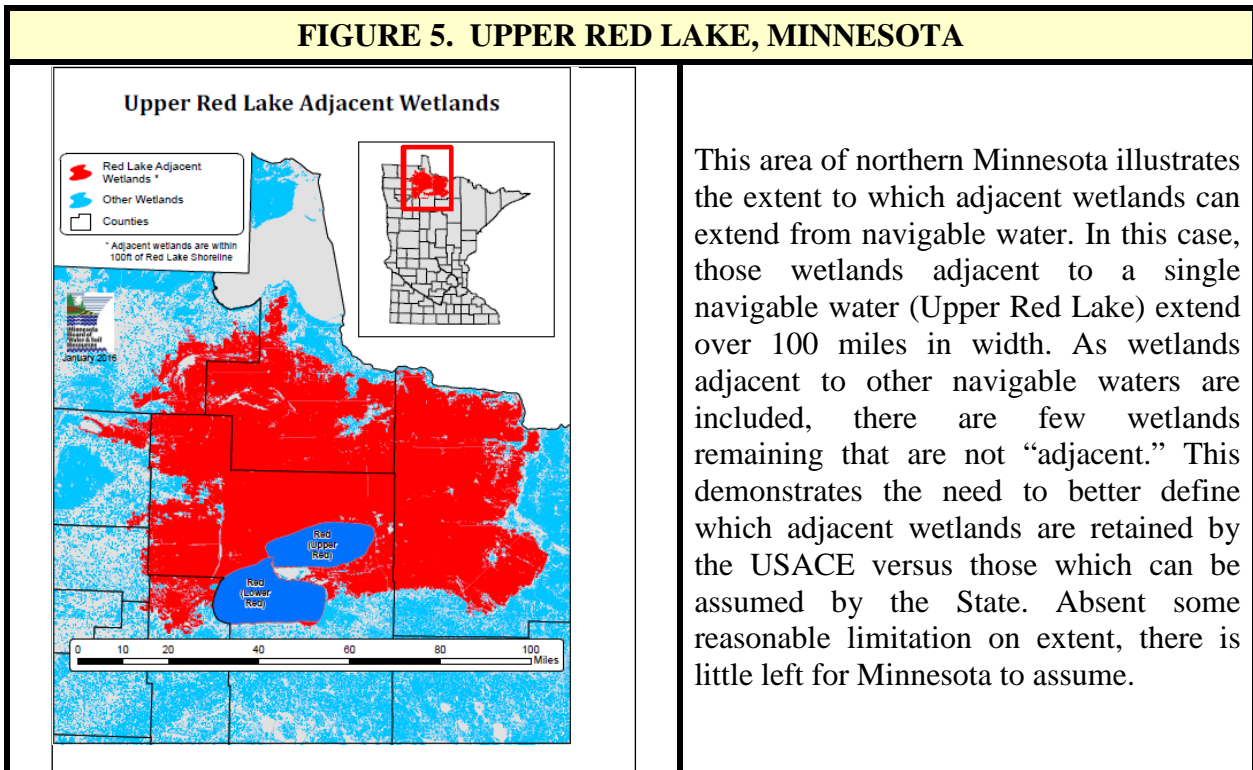
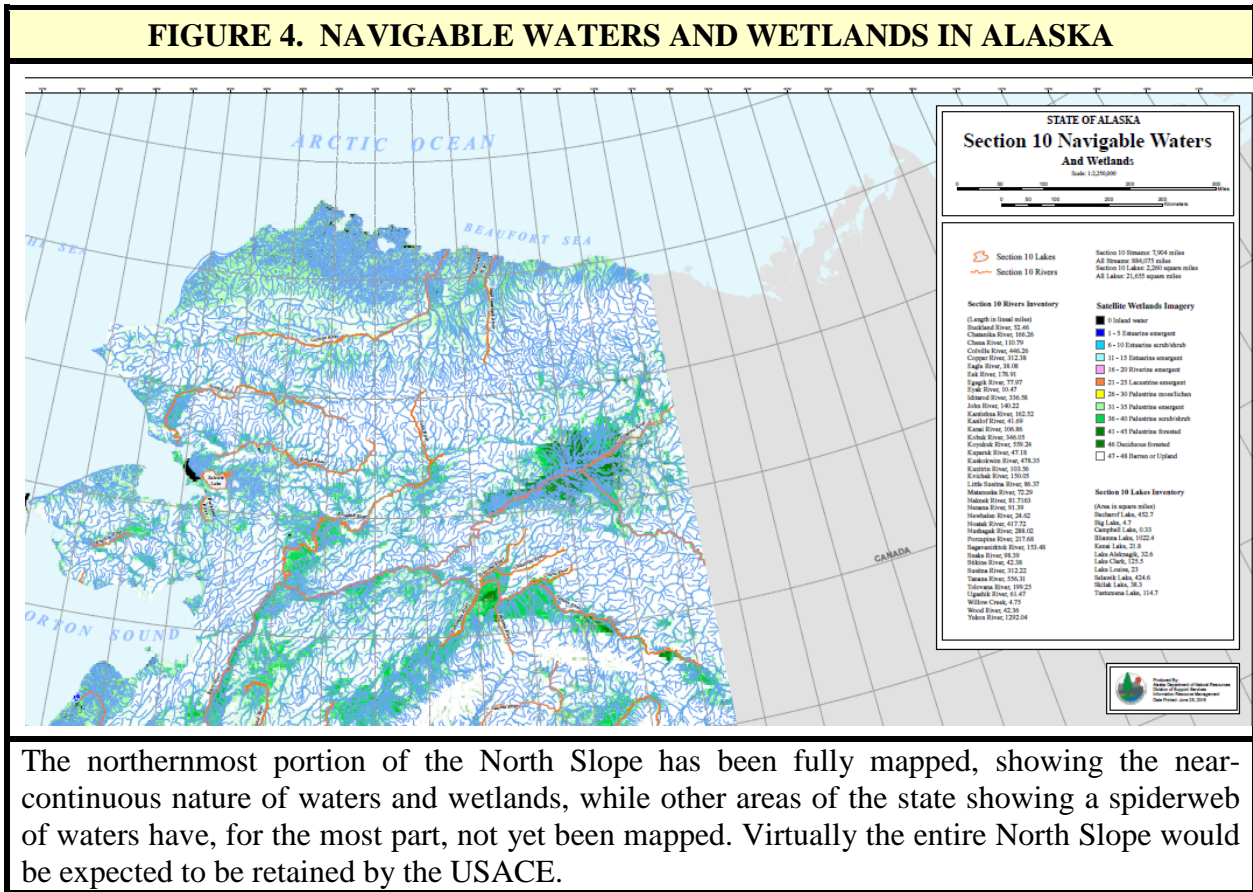
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eliminates the need for any negotiations on the issue of adjacency. This advantage may also prove to be a weakness, because the definition of adjacency could change in the future if the underlying regulations defining the scope of adjacent wetlands regulated under the CWA change.

The most significant disadvantage associated with Option 1 is that it would maintain the *status quo*: the number of states or tribes willing to make the necessary investments to assume the CWA Section 404 permit program would continue to be limited because of their inability to assume a significant part of the Section 404 regulatory actions. Examples provided by the states of Alaska and Minnesota and Fond du Lac Reservation and clearly demonstrate that using the regulatory CWA jurisdictional definition of adjacency under Option 1 has the potential to capture expansive wetland systems; and, thus, leave few wetland systems to be assumed by a state or tribe.



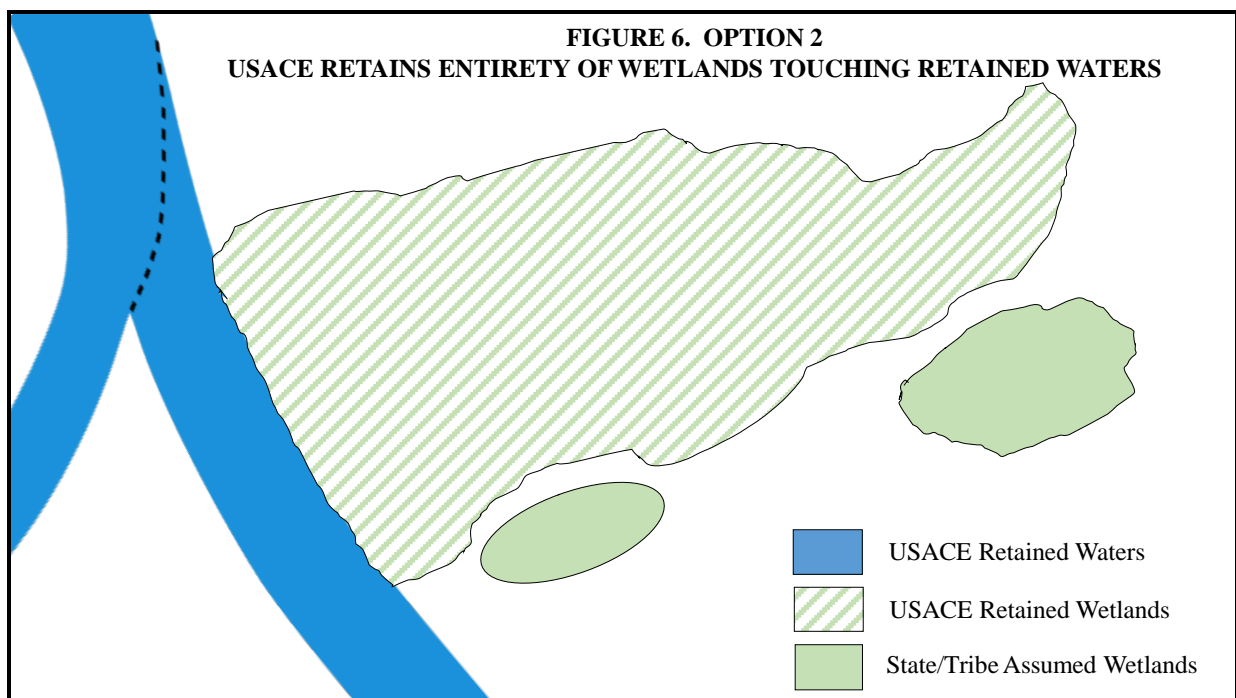
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Option 1, however, may not be consistent with the Congressional intent of Section 404(g)(1), which encourages assumption and allows states and tribes to assume all waters except those that qualify as waters subject to regulation under Section 10 of the RHA (other than historical use waters), and adjacent wetlands. As a result, the division of responsibility between a state or tribe and the USACE under an assumed program is based on USACE jurisdiction under the RHA, not CWA jurisdiction, which is used to identify the wetlands retained by the USACE in Option 1. Given the focus of Section 10 of the RHA in determining the scope of the USACE’s retained waters pursuant to 404(g)(1), it is reasonable to focus primarily on whether impacts to adjacent wetlands have the potential to adversely affect the navigability and related federal interests in the waterway. Additionally, Option 1 would not provide the customer service improvements often envisioned by the regulated community under an assumed program because, in most instances, this option would require a field verification of adjacent wetlands by the USACE to determine whether a particular application would qualify for a state-only or tribe-only review, reducing the efficiency of the regulatory process.

Option 2: USACE Retains Entirety of Wetlands Touching Retained Waters



Under Option 2, the federal permitting authority would be limited to those wetlands touching the Section 10 waters being retained by the USACE. As a result, this option enables a state or tribe to assume additional wetland resources, which brings it closer in line with the congressional intent of CWA Section 404(g)(1). It also appears to be consistent with the apparent intent of extending the jurisdiction of Section 10 of the RHA to adjoining non-navigable aquatic areas in order to ensure oversight of work that could affect navigation. The preamble citation in the USACE’s July 1977 regulations states that “In addition, any work that is performed outside the limits of navigable water which affects its navigable capacity may (emphasis added) also require a Section 10 permit. The language in the regulations at 322.3(a)(1) states that a Section 10 permit is needed outside the limits of the navigable waters if “these

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structures or work affect the course, location, or condition of the waterbody in such a manner as to **impact on the navigable capacity of the waterbody** (emphasis added).¹¹ Similarly, Section 13 of the RHA prohibits the discharge of “...refuse... into any navigable water of the United States, or into any tributary of any navigable water...”¹² It also makes it unlawful “...to deposit...material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed...”¹³. Option 2 may also be easier to map and, as a result, simplify the administration of the state or tribal assumed program.

The disadvantages of Option 2 are similar to those associated with Option 1. As a result, this option has the potential to maintain the *status quo* (i.e., the number of states or tribes willing to make the necessary investments to assume the federal program will be limited because of their inability to assume a significant share of the Section 404 regulatory actions). As previously illustrated by the Fond du Lac Reservation and the states of Minnesota and Alaska, wetland systems that are touching navigable waters retained by the USACE and extend for thousands of feet or perhaps even miles will continue to be regulated by the USACE under Option 2. Additionally, under this option the USACE will retain wetlands that are in close proximity to navigable water but separated by elevation or other natural or man-made features, needlessly limiting the scope of an assumed program. Option 2 would also require a field verification of adjacent wetlands by the USACE, in most cases, to determine whether a particular application would qualify for a state-only or tribe-only review, reducing the efficiency of the regulatory process.

Option 3: Establishment of a National Administrative Line

Option 3 would require the establishment of a national administrative line based on a fixed distance from USACE retained Section 10 waters. A nationally recognized 100, 300 or 1,000-foot administrative line or assumption boundary would define the landward extent of the adjacent wetlands retained by the USACE. A national standard provides the best assurance that an assumed CWA Section 404 permit program will deliver a consistent and efficient federal/state or federal/tribal regulatory program. The assumption boundary would simplify the administration of an assumed CWA Section 404 permit program by clearly defining and depicting the jurisdiction retained by the USACE and that assumed by a state or tribe in a manner that is understandable to the regulated community. Additionally, depicting adjacent wetlands retained by the USACE as an administrative distance from retained waters that provides for the protection of water quality and habitat is not only consistent with the goals of the CWA, but also preserves the USACE’s control over waters necessary to protect federal navigation interests.

The strategy to develop a national administrative line relies on wetlands and adjacency definitions currently in use by state, tribal and federal regulatory programs, which provides consistency between the administrative process of assumption and the jurisdictional determinations of the regulatory program. This will eliminate confusion and the need for any negotiations on the issue of adjacency. The use of consistent terminology will also help to minimize the potential for a court challenge.

¹¹ Final Rules. U.S. Army Corps of Engineers, 42 Fed. Reg. 37,122 (July 19, 1977)

¹² 33 U.S.C. § 407

¹³ Ibid.

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As previously noted, the division of responsibility between a state or tribe and the USACE under an assumed program, is based on USACE jurisdiction under the RHA, not CWA jurisdiction. The RHA was enacted to protect navigation and the navigable capacity of the nation's waters.¹⁴ Section 10 of the RHA requires that regulated activities conducted below the ordinary high water (OHW) elevation of navigable waters or below the mean high water (MHW) mark (or the mean higher high water mark on the west coast) of tidal waters be approved or permitted by the USACE. The activities regulated under Section 10 include the placement and removal of structures; work involving dredging; disposal of dredged material; filling, excavation, or any other disturbance of soils or sediments; or modification of a navigable waterway.

When trying to establish a national administrative line to define the CWA jurisdiction of the USACE under an assumed CWA Section 404 permit program that will also complement the USACE's jurisdiction under the RHA, it is important to understand that Section 10 permits may be required for "...any work that is performed outside the limits of a navigable water which affects its navigable capacity..."^{15,16} Similarly, Section 13 of the RHA prohibits the discharge of "...refuse... into any navigable water of the United States, or into any tributary of any navigable water..."¹⁷ It also makes it unlawful "...to deposit...material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed..."¹⁸.

The placement or removal of structures within or cantilevered over the OHW elevation or MHW mark has the potential to adversely affect navigation. So does the dumping of refuse or other material into Section 10 waters. As regulated activities move landward, however, concerns about obstructing navigation transition to concerns about sediment and other pollutants affecting the navigable capacity of the waterway or aquatic resources. Under a state-assumed or tribal-assumed CWA Section 404 permit program, maintaining navigability of tidal waters and nontidal waterways becomes the primary responsibility of the USACE, while protecting aquatic resources under the CWA becomes the responsibility of state and tribes. Given the Section 404(g)(1) legislative intent to encourage state or tribal assumption by limiting the USACE's retained waters based on RHA rather than CWA jurisdiction, it is reasonable to focus primarily on whether impacts to adjacent wetlands have the potential to adversely affect navigability and related federal interests in the waterway when determining the scope of the USACE's retained adjacent wetlands. Accordingly, the Adjacency Workgroup determined that a fixed distance of 100, 300, or 1,000 feet should be sufficient to meet USACE responsibilities under the RHA.

It is important to note that the USACE may retain any wetland under its Section 10 authority that is beyond the assumption boundary established under an assumed CWA Section 404 permit program if it is determined that a proposed activity would affect the course, location, or condition of the waterbody in

¹⁴ Final Rules. U.S. Army Corps of Engineers, 42 Fed. Reg. 37,122 (July 19, 1977)

¹⁵ Final Rules. U.S. Army Corps of Engineers, 42 Fed. Reg. 37,122 (July 19, 1977)

¹⁶ The language in the regulations at 322.3(a)(1) states that a Section 10 permit is needed outside the limits of the navigable waters if "these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on the navigable capacity of the waterbody."

¹⁷ 33 U.S.C. § 407

¹⁸ Ibid.

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such a manner as to impact on the navigable capacity of the waterbody. However, it was not common practice for the USACE to regulate that type of impact prior to obtaining regulatory authority under Section 404.

In general, the regulated activities that take place landward of the OHW elevation or MHW mark that potentially impact navigation and warrant continued regulation by the USACE under an assumed program generate sediment and debris that fill channels and harbors and affect the navigable capacity of waters transporting interstate or foreign commerce and must be periodically removed by dredging. Consequently, activities taking place in wetlands adjacent to navigable waters may warrant regulation by the USACE either under the CWA, RHA or both. Regulated activities that may impact navigable capacity, however, would likely occur in areas that are in close proximity to the waterways retained by the USACE. These areas that protect retained waterways from sedimentation and other forms of pollution are frequently referred to as riparian zones or riparian buffers. Riparian buffers are vegetated strips of land next to a waterway that not only help to store flood waters and prevent sediment, nitrogen, phosphorus, and other pollutants from reaching a waterway, but also provide aquatic and wildlife habitat. While riparian buffers have been studied primarily as an effective resource protection tool, they may also prove to be a logical way to establish a national administrative line between wetlands retained by the USACE and wetlands assumed by a state or tribe.

Land use clearly has an effect on surface water quality. In general, the closer to the receiving water, the greater potential for direct effects on water quality. This basic principle forms the rationale for the establishment of riparian buffers. There are multiple studies, scientific reports, and recommendations that address appropriate buffer widths. Some of the literature refers to “upland” buffers, while some does not differentiate between upland and wetland. Regardless, the rationale and principles behind the establishment of buffers can certainly be relevant factors in establishing a national administrative line by identifying those wetlands in close physical proximity to a waterway that should be retained by the USACE. For purposes of this discussion, the width of the administrative bright line could be measured from the ordinary high water mark of navigable water, the mean high water mark (or the mean higher high water mark on the west coast) of tidal waters, or shoreline features available on a geographic information system.

In 2003, the Environmental Law Institute (ELI) published a document entitled *Conservation Thresholds for Land Use Planners*. The document reviewed approximately 150 recommended minimum riparian and wetland buffer widths to maintain water quality and wildlife functions in ecosystems in the United States, as found in the scientific literature as of December 2001. Based on this scientific literature, ELI concluded that land use planners should strive to establish 100-meter (328 feet) wide riparian buffers to enhance water quality and wildlife protection.

In 2008, ELI published the *Planner’s Guide to Wetland Buffers for Local Governments*. In developing this Guide, ELI examined approximately 50 enacted wetland buffer ordinances, nine model ordinances, and several hundred scientific studies and analyses of buffer performance. In regards to water quality, the Guide concluded that, depending on site conditions, much of the sediment and nutrient removal may occur within the first 15-30 feet of the buffer, but buffers of 30-100 feet or more will remove pollutants more consistently.

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In 2011, the Rhode Island Department of Environmental Management and the Coastal Resources Management Council published the Rhode Island Low Impact Development Site Planning and Design Guidance Manual. Following up on the work previously conducted by ELI, the manual concluded that a minimum buffer of 100 feet was the most widely recommended width for the protection of most buffer functions. The manual also suggested that a 150-foot minimum “no touch” buffer zone seems to be the most widely recognized width for the protection of cold water streams.

Recommendation #II

In order to simplify the administration of an assumed Section 404 program, a national administrative line, based on a fixed distance from Section 10 waters retained by the U.S. Army Corps of Engineers (USACE), should be established that depicts the adjacent wetlands retained by the USACE and those assumed by a state or tribe. A nationally recognized 100, 300 or 1,000-foot administrative line would represent an assumption boundary used by a state or tribe and the USACE to identify the landward extent of adjacent wetlands retained by the USACE. Additionally, in order to further simplify the regulatory process, the assumption boundary should be measured using shoreline features available on geographic information system rather than the ordinary high water mark or the mean high water mark (mean higher high water mark on the west coast.)

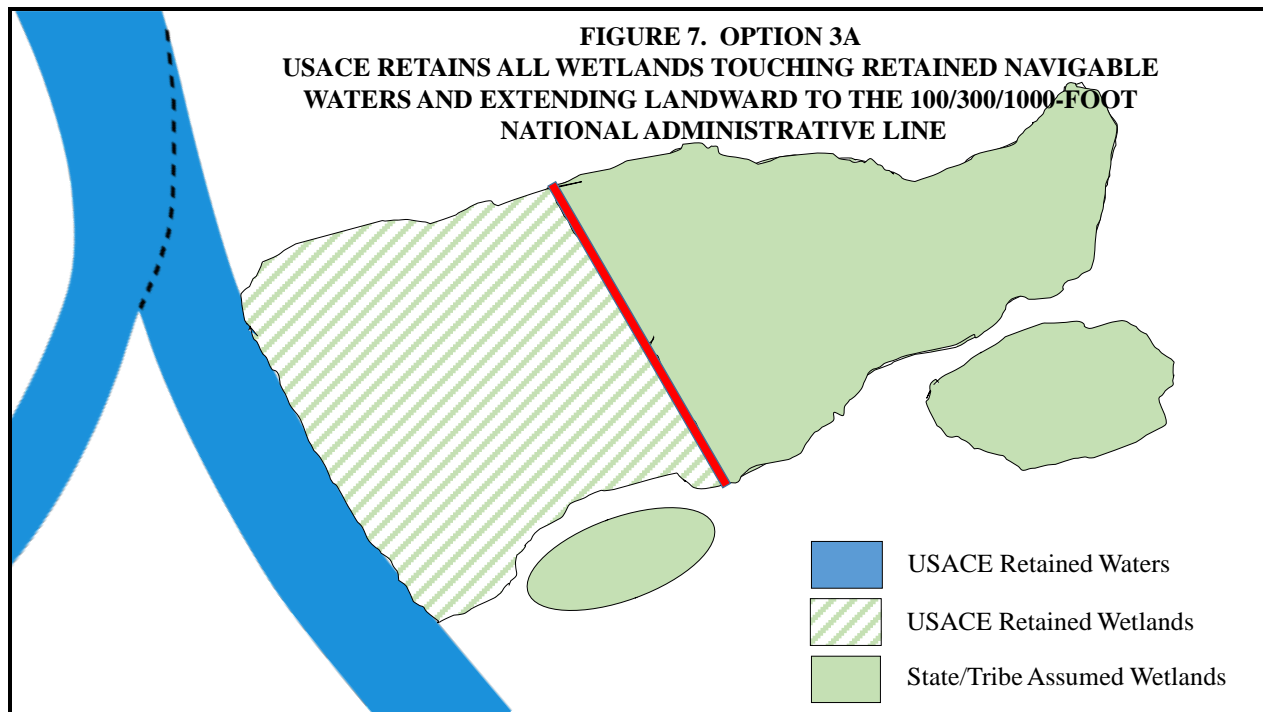
Implementation of a National Administrative Line

The recommendation to establish a national administrative line that depicts the end of federal wetland jurisdiction and the beginning of state or tribal jurisdiction under an assumed CWA Section 404 permit program was the first step in developing an administrative process. The Adjacency Workgroup decided that, once the national administrative line was established, there were several available implementation options. These options are presented below as Option 3A, 3B and 3C.

Option 3A: USACE Retains All Wetlands Touching Retained Navigable Waters and Extending Landward to the 100/300/1000-Foot National Administrative Line

Under Option 3A, the USACE would retain permitting authority over all wetlands physically “touching” retained navigable waters and extending a landward distance of 100, 300, or 1,000 feet, depending on which distance is selected as the national administrative line. Those wetlands extending beyond the proposed assumption boundary would be assumed by a state or tribe. Additionally, as shown in Figure 7, wetlands that are within the assumption boundary but not “touching” retained navigable water would also be assumed by a state or tribe. The delineation of jurisdictional wetlands by a state, tribe, or the USACE would rely on current federal jurisdictional definitions. Despite the conventions developed above, some wetlands may require a site-specific determination in order to establish the appropriate agency to administer the Section 404 permit application. These special cases will be determined at the time of application. For example, an inconsequential portion of a proposed project may cross the assumption boundary and the USACE and state/tribe will need to determine the appropriate authority to handle the permit application.

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The advantage of Option 3A is that it provides additional clarity to the regulated community. This option establishes a 100/300/1000-foot assumption boundary that can be incorporated into a geographic information system to identify the agency responsible for processing a permit application. This option tracks the contiguous and abutting elements of the existing adjacency definition that is currently in use by the USACE and it eliminates the need for any negotiations on the issue of adjacency. Furthermore, the addition of a 100/300/1000-foot assumption boundary clarifies and limits the wetlands being retained by the USACE, which makes assumption of the program more attractive to states and tribes.

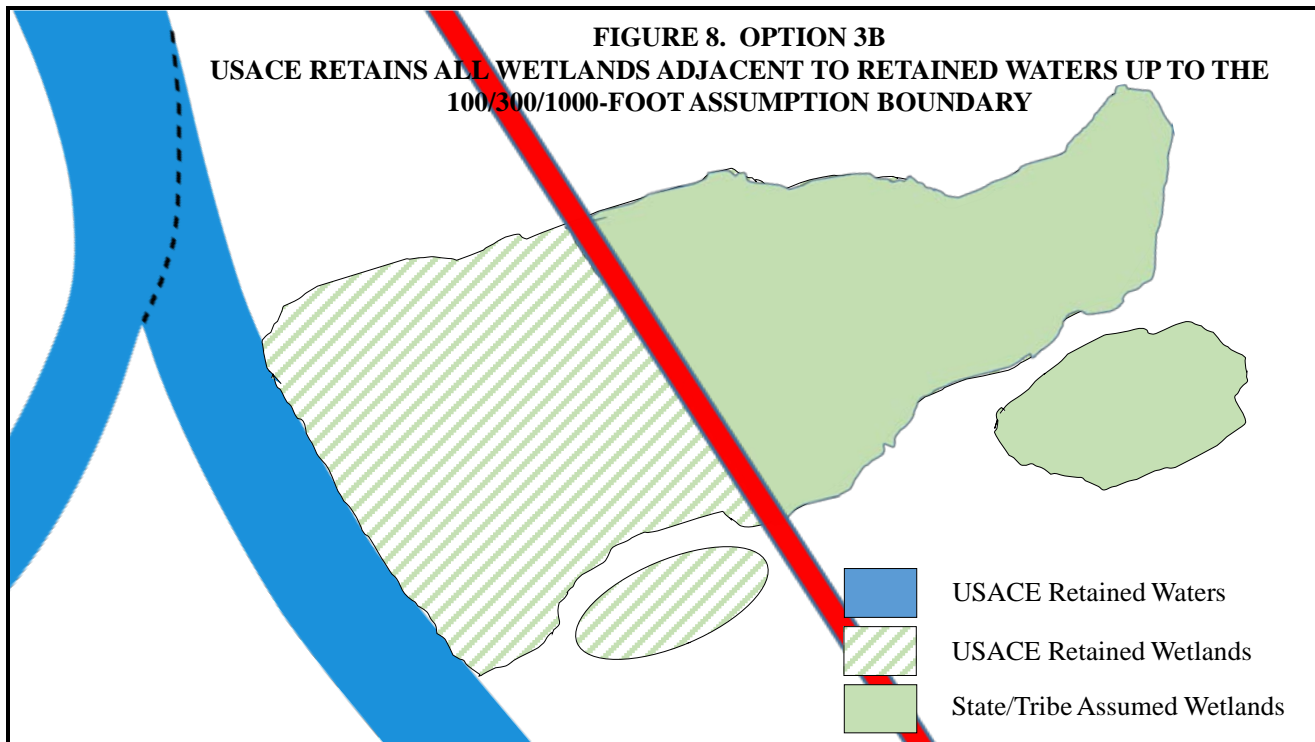
A disadvantage of Option 3A is that it does not address wetland systems with subsurface flow leaving potential confusion about the appropriate agency to process a permit application. In addition, Option 3A has the potential to capture wetlands that are separated by elevation (i.e. wetlands on a bluff), or other topographic or geologic features that create a distinct separation that should be considered when determining whether the wetland should be retained by the USACE. This option is also likely to require a case by case determination to decide whether a particular application qualifies for a state-only or tribal-only review, which would reduce the efficiency of the regulatory process.

Option 3B: USACE Retains All Wetlands Adjacent to Retained Waters Up to the 100/300/1000-Foot Assumption Boundary

Option 3B would let the USACE retain permitting authority over all wetlands adjacent to retained navigable waters up to a landward distance of 100, 300, or 1,000 feet, depending on which distance is selected as the national administrative line. Figure 8 illustrates the difference between Option 3A and 3B. Under option 3B, the USACE permitting authority would extend over all wetlands between retained navigable waters and the proposed assumption boundary, regardless of whether the wetlands are touching navigable water. Only those wetlands beyond the assumption boundary would be assumed by a state or tribe. The delineation of jurisdictional wetlands by a state, tribe, or the USACE would rely on

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current federal jurisdictional definitions. Despite the conventions developed above, some wetlands may require a site-specific determination in order to establish the appropriate agency to administer the Section 404 permit application. These special cases will be determined at the time of application. For example, an inconsequential portion of a proposed project may cross the assumption boundary and the USACE and state/tribe will need to determine the appropriate authority to handle the permit application.



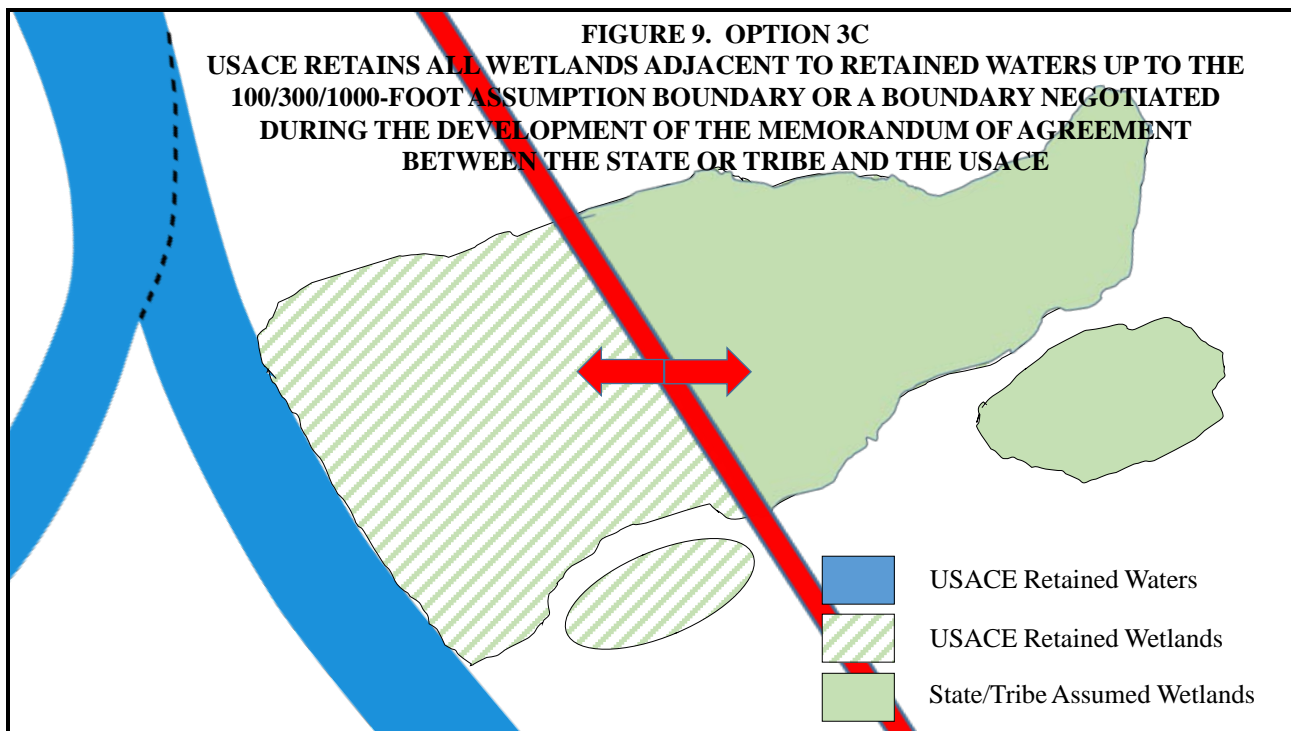
The advantage of Option 3B is its simplicity and predictability. A 100, 300, or 1,000-foot national administrative line would present a clear demarcation that could be easily mapped using GIS to designate those resources regulated by the USACE and those resources regulated by a state or tribe. In addition, the retention of all wetlands adjacent to USACE retained waters between the assumption boundary and navigable water increases the efficiency of the regulatory process because, in most cases, the CWA Section 404 permitting authority would be assigned at the time of application. It also appears consistent with the 404(g)(1) legislative and regulatory history. Additionally, since it puts into place elements of the adjacency definition that are currently in use by state, tribal and federal regulatory programs, it eliminates the need for any negotiations on the issue of adjacency. Furthermore, the addition of an assumption boundary clarifies and limits the wetlands being retained by the USACE, which makes assumption of the program more attractive to states and tribes.

Option 3B addresses two of the disadvantages identified under Option 3A such as wetlands systems with subsurface flow and the need for a case by case determination in order to determine whether a particular application qualifies for a state-only or tribe-only review, which reduced the efficiency of the regulatory process. On the other hand, this option still has the potential to capture wetlands that are separated by elevation (i.e. wetlands on a bluff), although that concern could be addressed in the MOA.

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Option 3C: USACE Retains All Wetlands Adjacent to Retained Waters Up to the 100/300/1000-Foot Assumption Boundary or a Boundary Negotiated During the Development of the Memorandum of Agreement

Option 3C is similar to Option 3B. The USACE would retain permitting authority over all wetlands adjacent to retained navigable waters up to a landward distance of 100, 300, or 1,000 feet, depending on which distance is selected as the national administrative line. Their permitting authority would extend over all wetlands between retained navigable waters and the proposed assumption boundary, regardless of whether the wetlands are touching navigable water. Only those wetlands beyond the assumption boundary would be assumed by a state or tribe. The delineation of jurisdictional wetlands by a state, tribe, or the USACE would rely on current federal jurisdictional definitions. As discussed under Option 3B, some wetlands may still require a site-specific determination in order to establish the appropriate agency to administer the CWA Section 404 permit application. These special cases would be determined at the time of application. For example, an inconsequential portion of a proposed project may cross the assumption boundary and the USACE and state/tribe will need to determine the appropriate authority to handle the permit application.



Option 3C, however, increases flexibility by providing the opportunity to adjust the national administrative line for a particular state or tribe based on the planning and regulatory authorities administered by the state or tribe that may further inform the permitting process and help ensure consistency with the environmental review criteria in the Section 404 (b)(1) guidelines. Under this option, the distance of the administrative line from USACE retained waters would be negotiated based on state or tribal capabilities during the development of a state or tribal MOA with the USACE required as part of the assumption application submitted to the EPA.

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For example, the benefits of buffers primarily accrue from the existence of appropriate vegetation. While it can be argued that environmental considerations such as water quality or habitat are part of the rationale for the retention of adjacent wetlands, the federal CWA does not regulate the manipulation or removal of vegetation absent the placement of dredge or fill material. However, when a state or tribe has regulations in place that add to the protection of riparian areas consistent with the science and rationale behind buffers, this adds an administrative basis for adjusting the national administrative line. These programs could include buffer requirements, shoreland regulations (including building setback distances), or other such regulatory constraints on land use near navigable waters. Option 3C also provides an opportunity to fine tune the national administrative line to reflect topographic, hydrologic or other unique conditions and enhance the administration of an assumed CWA Section 404 permit program.

Option 3C also addresses certain deficiencies identified in the other options such as duplication of efforts, clarity, efficiencies, etc. It is the most flexible option, encouraging each state or tribe to not only customize its assumed program so that it is consistent with its other regulatory programs, but to streamline its regulatory process. Option 3C also leverages existing state or tribal tools and data to improve the efficiency and effectiveness of the regulatory program. The major disadvantage is that customized programs may pose a challenge for consistent implementation of the CWA Section 404 permit program nationally. This disadvantage, however, currently exists for the USACE and the EPA under the current assumption process and could be overcome by developing guidelines to be used during MOA negotiations that would ensure consistency and compliance with the CWA.

Recommendation #III

The Adjacency Workgroup endorses Option 3C, which not only establishes a national administrative standard, but also provides a degree of flexibility to adjust the standard for a particular state or tribe based on the planning and regulatory authorities administered by the state or tribe. If guided and implemented with appropriate criteria, this option should maintain wetland protection and increase the efficiency of the Clean Water Act (CWA) Section 404 permit program in a manner that is consistent with 404(g)(1) and its legislative and regulatory history. The option is also consistent with the vision presented in the U.S. Environmental Protection Agency's (EPA) 1980 publication that highlighted the ability of a state or tribe to manage the natural resources within its borders and integrate CWA Section 404 requirements with other environmental considerations implemented by a state or tribe. It also reduces duplication of permitting efforts by a state or tribe and the U.S. Army Corps of Engineers (USACE).

Allowing states and tribes to adjust the national standard or fine-tune administrative aspects of the state-assumed program takes advantage of the strengths of each state or tribal program. Guidelines for negotiating a Memorandum of Agreement should be developed by the EPA and the USACE, in cooperation with states and tribes, which identify any adjustments to the national standard and provide examples of situations where a wetland may be added to or excluded from the types of wetlands being retained by the USACE.

SUMMARY OF RECOMMENDATIONS

- I. In order to provide clarity over the extent of wetlands that must be retained by the U.S. Army Corps of Engineers (USACE), it should be recognized that Clean Water Act (CWA) Section 404(g)(1) uses the term adjacency for a different purpose than it is used in the waters of the United States (WOTUS) regulations. WOTUS regulations define the adjacent wetlands that are subject to CWA regulation, while 404(g)(1) is about which entity – the USACE or an approved state or tribe - will exercise permitting authority over adjacent wetlands that are subject to CWA regulation.**

With no prescriptive definitions from Congress, and recognizing Congress’s intention to foster State assumption (with U.S. Environmental Protection Agency approval), states, tribes and the USACE have flexibility to adopt state or tribal specific approaches to identifying retained wetlands. This flexibility provides the means to limit the adjacent wetlands retained by the USACE pursuant to 404(g)(1) to those wetlands that are in relatively close physical proximity to retained phase 1 waters (other than historical use waters) and not wetlands extending thousands of feet or perhaps miles from those waters.

Note: USACE is not yet to this point of agreement. Case law and various regulations have led the USACE to a different place that could, in its view, preclude administratively operationalizing this intent in the present day.

- II. In order to simplify the administration of an assumed Section 404 program, a national administrative line, based on a fixed distance from Section 10 waters retained by the U.S. Army Corps of Engineers (USACE), should be established that depicts the adjacent wetlands retained by the USACE and those assumed by a state or tribe. A nationally recognized 100, 300 or 1,000-foot administrative line would represent an assumption boundary used by a state or tribe and the USACE to identify the landward extent of adjacent wetlands retained by the USACE. Additionally, in order to further simplify the regulatory process, the assumption boundary should be measured using shoreline features available on geographic information system rather than the ordinary high water mark or the mean high water mark (mean higher high water mark on the west coast.)**
- III. The Adjacency Workgroup endorses Option 3C, which not only establishes a national administrative standard, but also provides a degree of flexibility to adjust the standard for a particular state or tribe based on the planning and regulatory authorities administered by the state or tribe. If guided and implemented with appropriate criteria, this option should maintain wetland protection and increase the efficiency of the Clean Water Act (CWA) Section 404 permit program in a manner that is consistent with 404(g)(1) and its legislative and regulatory history. The option is also consistent with the vision presented in the U.S. Environmental Protection Agency’s (EPA) 1980 publication that highlighted the ability of a state or tribe to manage the natural resources within its borders and integrate CWA Section 404 requirements with other environmental considerations implemented by a state or tribe. It also reduces duplication of permitting efforts by a state or tribe and the U.S. Army Corps of Engineers (USACE).**

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Allowing states and tribes to adjust the national standard or fine-tune administrative aspects of the state-assumed program takes advantage of the strengths of each state or tribal program. Guidelines for negotiating a Memorandum of Agreement should be developed by the EPA and the USACE, in cooperation with states and tribes, which identify any adjustments to the national standard and provide examples of situations where a wetland may be added to or excluded from the types of wetlands being retained by the USACE.

For deliberation purposes only as background information for the Assumable Waters Subcommittee.
Prepared by Gary Setzer.