Adjacency Workgroup Report

This is a summary draft of the workgroup's discussions and efforts to date.
Charge to Adjacency Workgroup

• Explore adjacency, building off of presentations and discussions at the last meeting

• Consider how to describe and delineate:
  • what adjacent wetlands/waters the USACE retains for its 404 permitting in relation to retained waters (presently or susceptible to use), and
  • which ones would be assumed by states (again, this is only who permits, not that a permit is needed)

• Consider clear, practicable guidance that is adaptable to range of kinds of states/waters

• Develop options for addressing adjacency to be considered by the full Subcommittee
Exploration of Adjacency

• Considered adjacency maps presented at December meeting and additional ways to define adjacent wetlands (buffers etc)

• Learned
  • Alaska is not unique
  • Bright line can be delineated various ways
    • Linear foot threshold
    • OHWM (RHA section 10 waters) projected inland
    • Physically abutting: with bifurcation or entire system
  • Legislative history could support a narrower reading of adjacent wetlands to be retained
  • Identified two ways to approach clarity:
    • Identify method/criteria to determine which adjacent wetlands are retained
    • New definition
Key Points from Legislative History: Adjacency in 404(g)(1)

- CWA structure – states/tribes to lead in managing aquatic resources.
- CWA 1977 and 1987 amendments - states and tribes may assume administration section 404.
  - Note: state/tribal assumption does not mean the waters are not CWA waters
- Sufficient legislative history to interpret adjacent wetlands in the parenthetical as being a (narrower) subset of CWA adjacent wetlands.
- Floor debate – “adjacent means immediately contiguous to the waterway”
- Have examples of how interpreted – MI & NJ MOA’s, memos etc.
- 1975 and 1977 Corps Regulatory history explaining contiguous is a subset of adjacent.
Workgroup Wrestled With:

• Should there be a bright line?

• What criteria would you base/justify drawing a line?
  • Protection of navigation i.e., Protection of Corps basic RHA mission
  • GIS availability
  • Other programs that have setbacks or buffers – e.g., critical areas, flood control areas

• Contiguous vs immediately contiguous? Touching vs more touching?

• How implementation of the CWR definition of adjacent may affect this discussion.

• Should one entity regulate an entire wetland system or can it be bifurcated?

• How to provide clarity – common mechanism/criteria to identify retained adjacent wetlands, but allows for flexibility in implementation (Note: some in the group identified this approach may create confusion across political boundaries if same approach is not used nationally)

• Why Corps needs to retain “adjacent wetlands”; Section 10 RHA considerations
Potential Options

1. **USACE retains all wetlands adjacent to retained waters**
   Note: this would use the definition of adjacent as defined as a water of the US.

2. **USACE retains entirety of wetlands contiguous to retained waters**
   Note: In this context, *contiguous* is considered to be immediately adjacent/touching and *retained waters* are those identified by the Waters Workgroup.

3. **Contiguous Wetlands Waterward of a Bright Line* are retained by USACE**
   - This is a variation of Option 2

4. **Distance limitation on extent of adjacent wetlands retained by USACE – Use of a Bright Line* **
   - This is a variation of Option 1

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Option 1: USACE retains all wetlands adjacent* to retained waters**

(* As defined to be a water of the US; ** As defined by the Waters workgroup)

Benefits:

• Same definition used to determine CWA jurisdictional extent

• May expedite the state/tribal application process
  • Limited jurisdiction may compel interest

• Our work here is done?

Challenges:

• Case-by-case determinations – likely to be needed

• Is it consistent with Congressional intent?

• Would limit extent of assumable waters

• Extent of adjacent wetland systems may preclude state/tribal assumption

• Term is often the subject of litigation

• May result in Corps retention of wetlands that are close in proximity but separated by elevation

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Option 1 – USACE retains all wetlands adjacent to retained waters

Note: this would use the definition of adjacent as defined as a water of the US

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Option 2: Entirety of the contiguous* wetland retained by USACE

**Benefits:**
- Ease of administration – which wetlands are to be retained
- Consistency with
  - RHA – because it is touching
  - More consistent with Congressional intent than Option 1
- Nationally
- Easier to map
- May increase scope of assumed waters than Option 1

**Challenges:**
- May need site visit to determine extent of wetland - $, time
- Extent of contiguous wetland miles inland may preclude assumption
- Consistency with RHA – no limit on how far inland to protect navigation

*Group is using the term “Contiguous” here as contiguous is a subset of adjacent which is generally understood to mean immediately abutting.

Note: Wetlands with a berm would not be contiguous
Option 2 – USACE retains entirety of wetlands contiguous to retained waters

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Option 3: Contiguous Wetlands Waterward of a Bright Line* are retained by USACE

Benefits:

• Ease of administration
  • It is easily understandable by the regulated public
  • It is implementable by regulating agencies
• Addresses need for consistency
  • Could be easily mapped - LIDAR mapping?
  • Measured from an existing point of measurement (e.g., OHWL)
• It is easily definable and could be mapped – assists in assumption efforts
• Provides a [reasonable] limit on the extent of wetland retained, to those activities that may impact navigation
• State and tribal flexibility

Challenges:

• If predetermined distance is set too far from the OHW or MHHWM, could preclude some state/tribes from assuming.
• When a state regulatory program does not exist, the OHWL (or whatever the beginning point of measurement is) would still need to be determined.
• Determining where in the wetland USACE authority ends and state/tribes begins
• Variability between states and tribes across boundaries

*Wetlands landward from bright line are under state/tribal 404 authority and those waterward are under USACE 404 authority. Defined line could be the OHWM projected inland.

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**Option 3 – Contiguous Wetlands Waterward of a Bright Line**

*are retained by USACE* (Limit on Option 2)

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Option 4: Distance limitation on extent of adjacent wetlands retained by USACE – Use of a Bright Line*

(Note: this is not the approach used in NJ program.)

**Benefits:**

- Ease of implementation:
  - Understandable by the regulated public, increasing effectiveness.
  - Identifiable by regulating agencies, increasing efficiency and ability to determine which waters are assumable.
- The point of measurement, or process to determine it, is already in place if relying on an existing state/tribal regulatory program.
- Provides a [reasonable] limitation on the extent of adjacent wetlands retained by the Corps – retained wetlands do not extend miles from the navigable water.
- Creates bright line with flexibility on where line is drawn
- Can be tailored to fit state/tribal needs

**Challenges:**

- Different bright line as you cross political boundaries.
- When a state/tribal regulatory program does not exist, will need to determine the distance.
- Regulatory intent doesn’t appear to include/is silent on the use of “artificial” lines such as distance limits.
- Variability across political boundaries

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Option 4 – Distance limitation on extent of adjacent wetlands retained by USACE
– Use of a Bright Line*(Limit on Option 1)
Criteria For Option 3 and 4 bright line

• Ensure floodways are free of debris and obstructions
• Is National consistency of where the line is drawn necessary? State/tribal programs are all variable and Congress understood this. Pros and cons to both
• Retained waters are far enough out from waterway to protect navigation.

Could use:
• OHW
• Linear distance based upon science
• Flood plains or maps
• Stream or wetland buffer setbacks as defined by state/tribe
Reference materials

• Legal memorandum on adjacency
• MI and NJ MOAs and OR draft MOA with Corps
• Buffer studies
  • Wisconsin Buffer Initiative: http://faculty.nelson.wisc.edu/nowak/

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