

Adjacency Workgroup Report

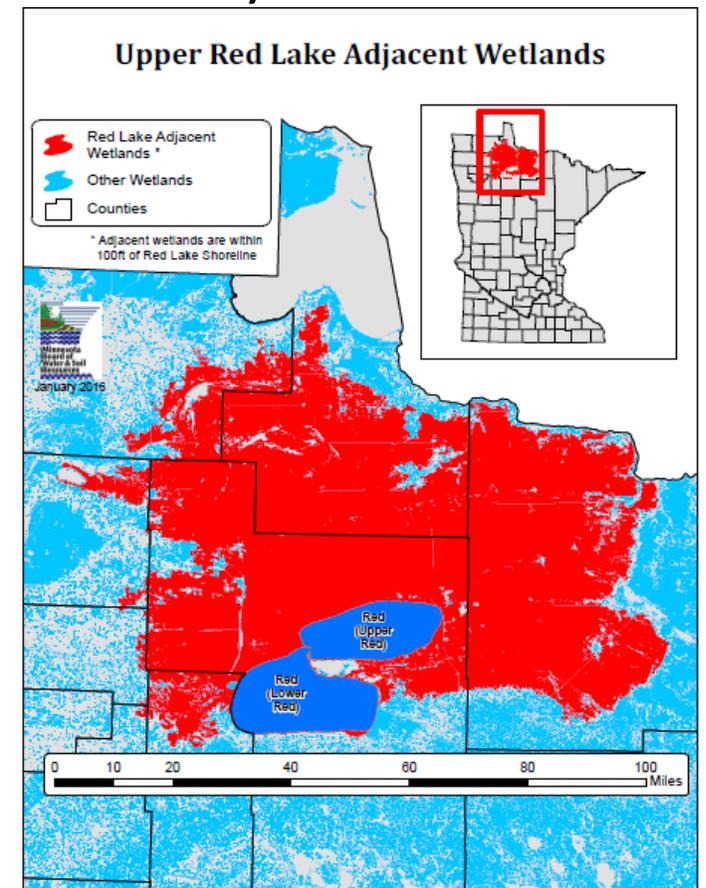
This is a summary draft of the workgroup's discussions and efforts to date.

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

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:

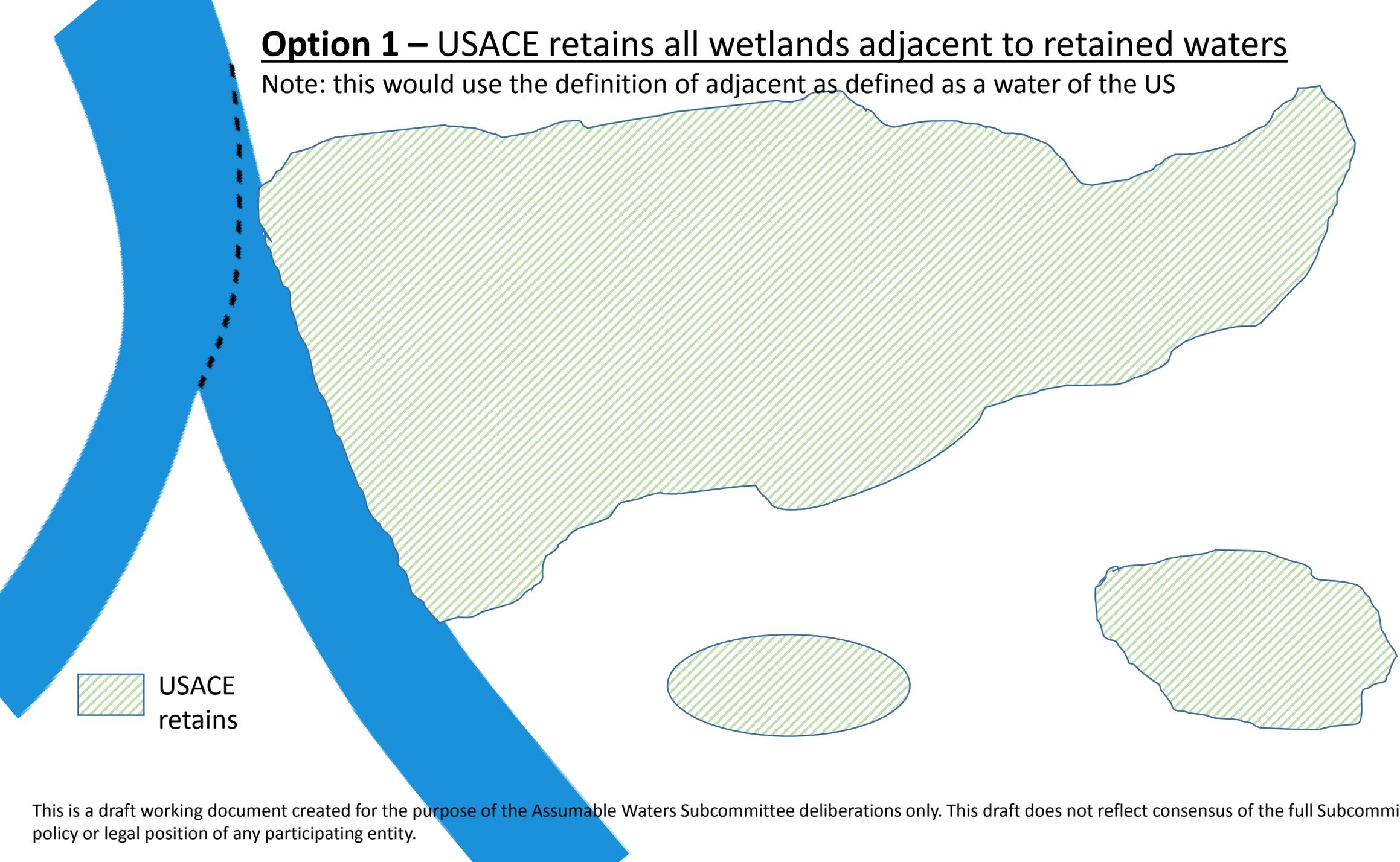
- Same definition used to determine CWA jurisdictional extent
- May expedite the state/tribal application process
 - Limited jurisdiction may compel interest
- Our work here is done?

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

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



 USACE
retains

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:

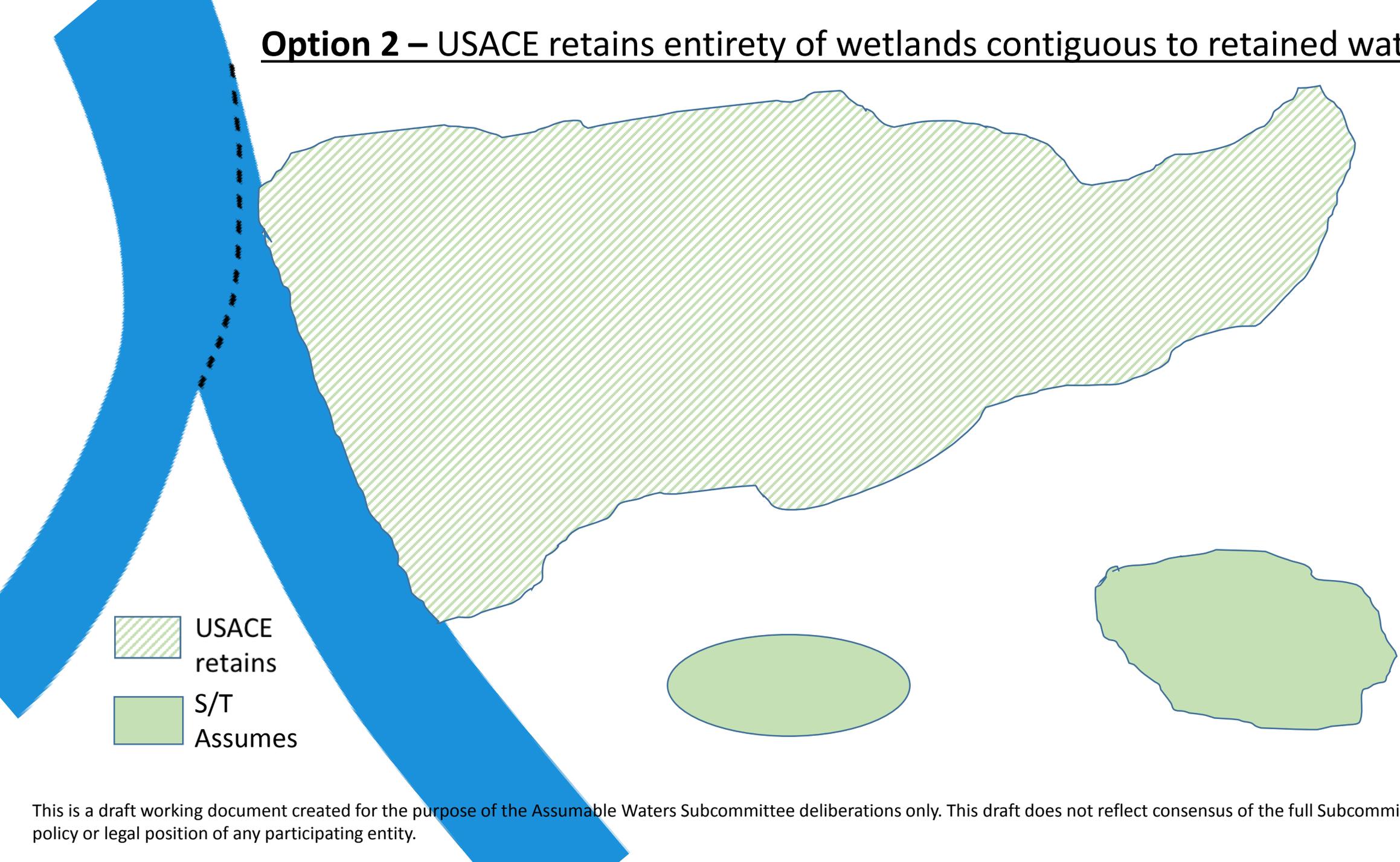
- May need site visit to determine extent of wetland - \$, time
- Extent of contiguous wetland miles inland may preclude assumption
- Consistency with RHA – no limit on how far inland to protect navigation

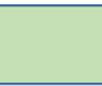
*Group is using the term “Contiguous” here as contiguous is a subset of adjacent which is generally understood to mean immediately abutting.

Note: Wetlands with a berm would not be contiguous

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Option 2 – USACE retains entirety of wetlands contiguous to retained waters



-  USACE retains
-  S/T Assumes

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

Benefits:

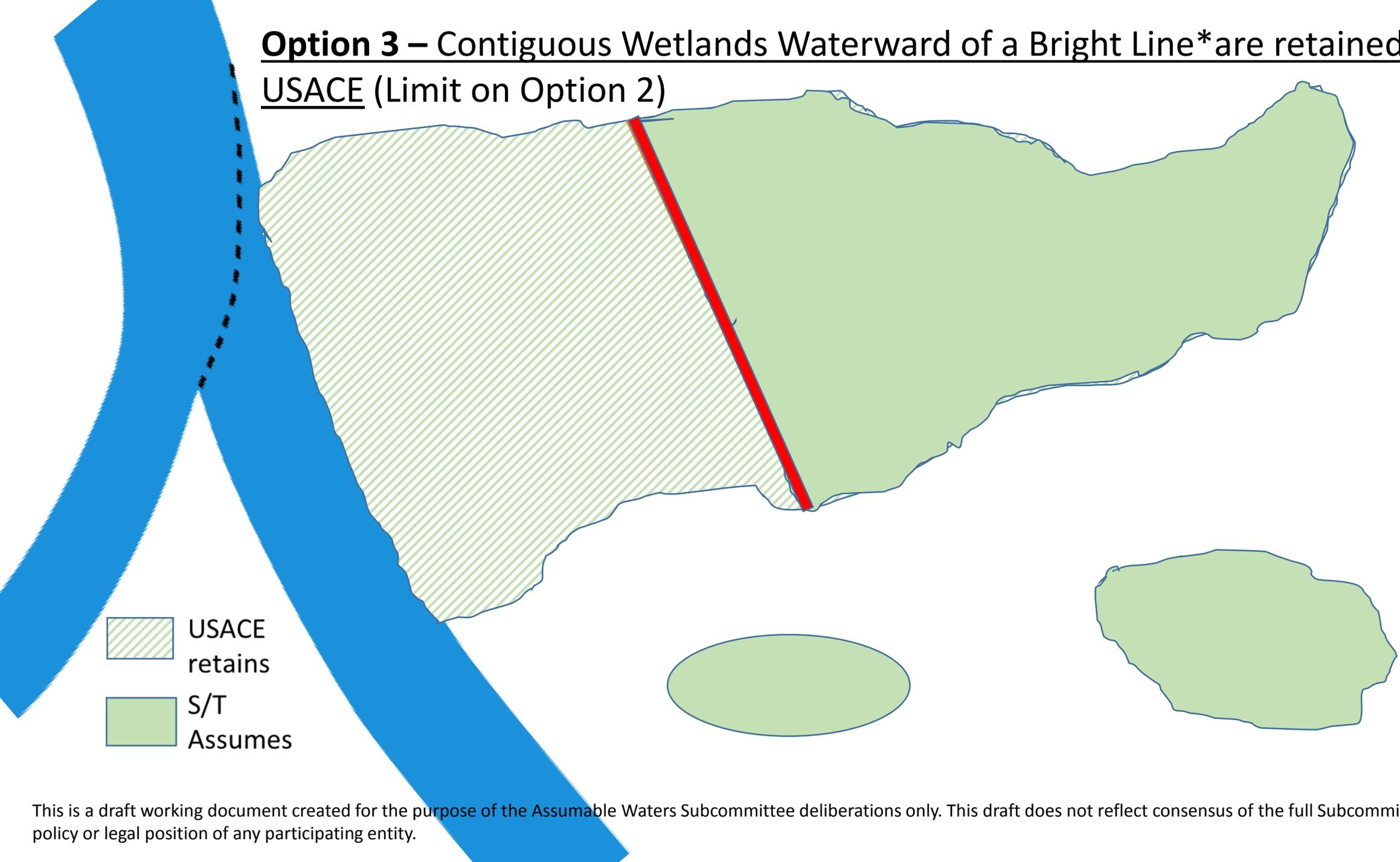
- Ease of administration
 - It is easily understandable by the regulated public
 - It is implementable by regulating agencies
- Addresses need for consistency
 - Could be easily mapped - LIDAR mapping?
 - Measured from an existing point of measurement (e.g., OHWL)
- It is easily definable and could be 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

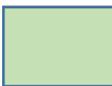
Challenges:

- 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.

Option 3 – Contiguous Wetlands Waterward of a Bright Line* are retained by **USACE** (Limit on Option 2)



-  USACE retains
-  S/T Assumes



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.)

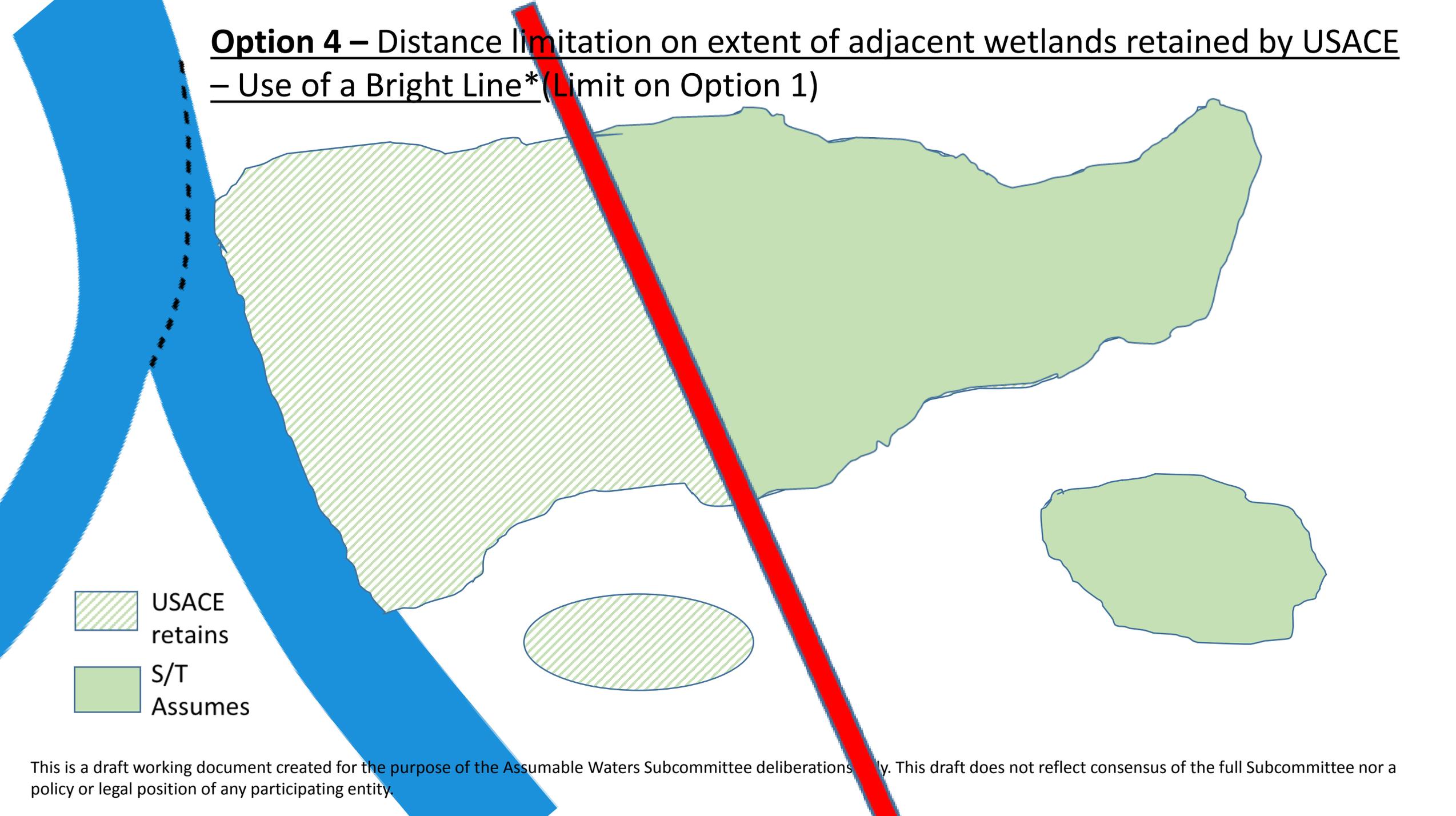
Benefits:

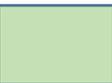
- Ease of implementation:
 - understandable by the regulated public, increasing effectiveness.
 - Identifiable by regulating agencies, increasing efficiency and ability to determine which waters are assumable.
- The point of measurement, or process to determine it, is already in place if relying on an 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

Option 4 – Distance limitation on extent of adjacent wetlands retained by USACE
– Use of a Bright Line* (Limit on Option 1)



-  USACE retains
-  S/T Assumes

Criteria For Option 3 and 4 bright line

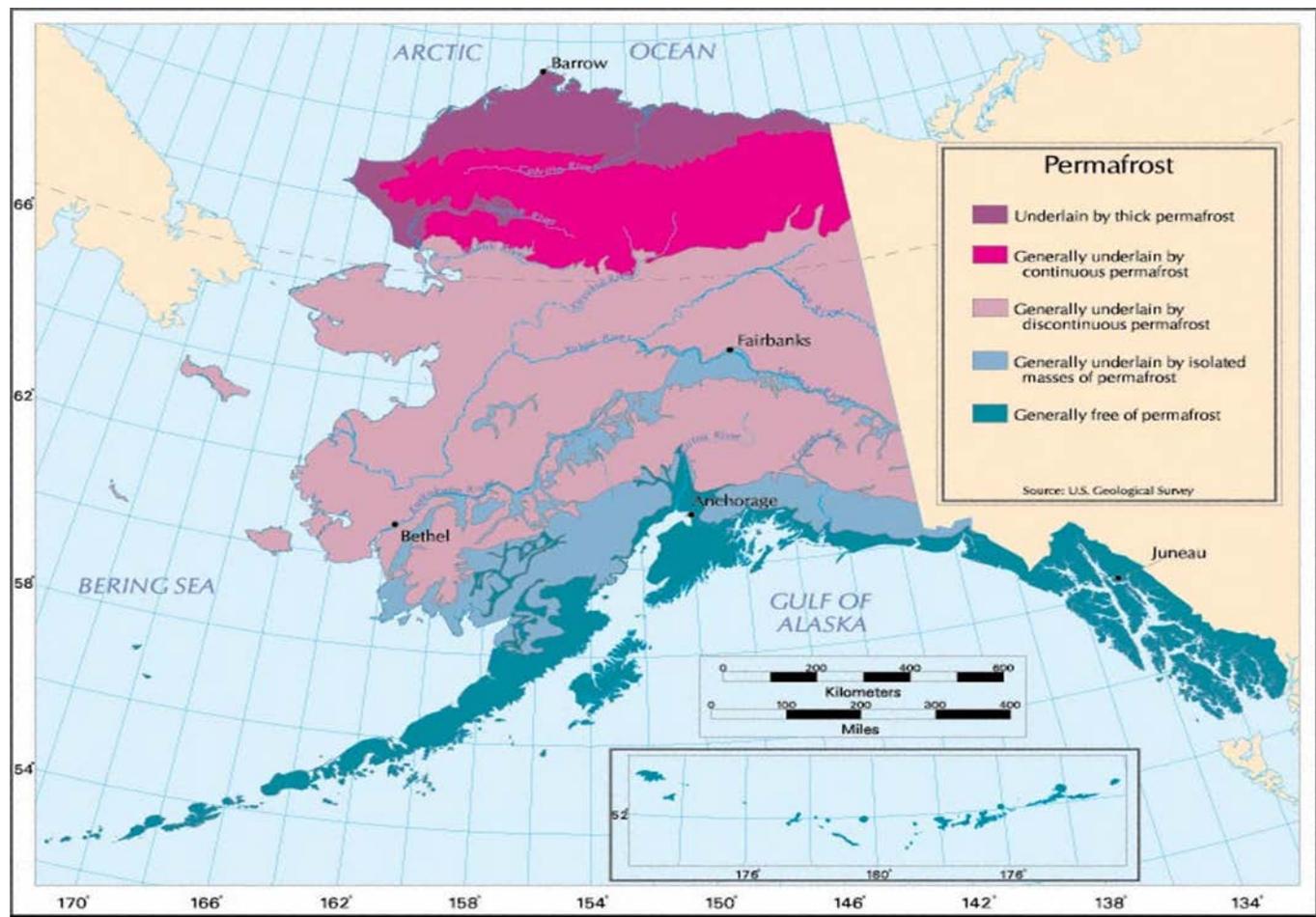
- Ensure floodways are free of debris and obstructions
- Is National consistency of where the line is drawn necessary? State/tribal programs are all variable and Congress understood this. Pros and cons to both
- Retained waters are far enough out from waterway to protect navigation.

Could use:

- OHW
- Linear distance based upon science
- Flood plains or maps
- Stream or wetland buffer setbacks as defined by state/tribe

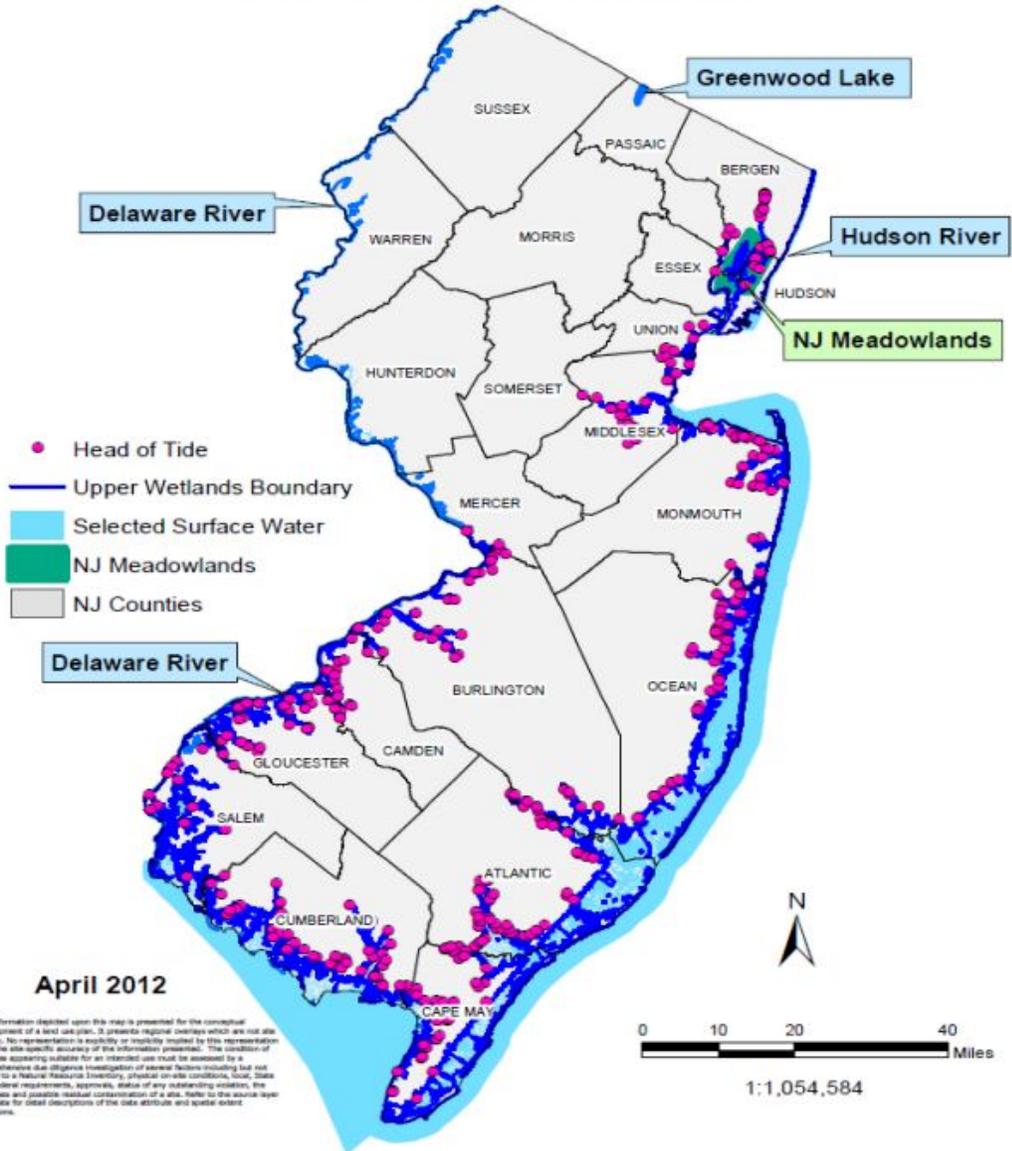
Reference materials

- Legal memorandum on adjacency
- MI and NJ MOAs and OR draft MOA with Corps
- Buffer studies
 - Environmental Law Institute buffer report: <http://www.eli.org/research-report/planners-guide-wetland-buffers-local-governments>
 - Wisconsin Buffer Initiative: <http://faculty.nelson.wisc.edu/nowak/>
 - EPA Report on buffers and nitrogen removal: <http://ccrm.vims.edu/education/seminarpresentations/fall2006/Workshop%20OCD/Other%20References/Riparian%20Buffers%20&%20Nitrogen%20Removal.pdf>
 - Benefits of Wetland Buffers: A Study of Functions, Values and Size: [http://www.minnehahacreek.org/sites/minnehahacreek.org/files/pdfs/education/MCWD Buffer Study.pdf](http://www.minnehahacreek.org/sites/minnehahacreek.org/files/pdfs/education/MCWD%20Buffer%20Study.pdf)



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New Jersey Unassumed Waters



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FERMI III: USACE /DEQ SHARED JURISDICTION EXAMPLE

