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#### **Rational for Option 4: Establish a “Bright Line” to Identify Non-Assumable Waters based upon a distance limitation**

At a minimum, maintaining navigability is undoubtedly a primary purpose for retaining federal program administration over “immediately contiguous” wetlands<sup>1</sup>. However, while it is unclear, it is possible that there are other environmental (i.e. water quality) or administrative (i.e. consistency with existing state programs) reasons behind this limitation as well. It is entirely possible to establish a “bright line” boundary for non-assumable wetlands that is limited (immediately contiguous), but that also addresses environmental and administrative considerations.

#### Environment/Water Quality Considerations

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, some does not differentiate between upland and wetland. Regardless, the rationale and principles behind the establishment of buffers can certainly be relevant factor in defining the wetlands immediately contiguous to a waterway that will be retained by the U.S. Army Corps of Engineers (Corps). For purposes of this discussion, the buffer width would be measured from the ordinary high water mark of navigable water or the mean high water mark of tidal waters.

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, the 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,

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<sup>1</sup> CWA section 511(a)

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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.

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 concludes that a minimum buffer of 100 feet seems to be the most widely recommended width for the protection of most buffer functions. The manual also suggests that a 150-foot minimum “no touch” buffer zone seems to be the most widely recognized width for the protection of cold water streams.

### Administrative Considerations

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 immediately contiguous wetlands, the federal Clean Water Act does not regulate the manipulation or removal of vegetation absent a dredge or fill. However, when state programs or regulations exist consistent with the science and rationale behind buffers, this adds an administrative basis for establishing a “bright line.” These programs can include buffer requirements, shoreland regulations (including building setback distances), or other such administrative constraints on land use near navigable waters.

The following are examples of buffer requirements in several states, and shoreland regulations in Minnesota (note: other state examples can be added):

#### 1. Buffer requirements.

The states and tribes participating in the Assumable Waters Subcommittee have provided the following buffers from their statutes and regulations for consideration. (*Note: Perhaps this table could be expanded to include other administrative distances (i.e. shoreland regs) as discussed below, with states deleted or added as necessary.*)

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STATE	WETLAND BUFFER	STREAM BUFFER
Alaska		
Arizona		
Fond du Lac Reservation		
Maryland	1) 25-foot buffer for nontidal wetlands 2) 100-foot buffer for Nontidal Wetlands of Special State concern	Not Applicable.
Michigan		
Minnesota	Variable, established via local ordinance.	50 ft average, 30 ft minimum,
New Jersey		
Oregon		
Virginia	100 ft buffer <sup>1,2</sup>	100 ft buffer <sup>1,2</sup>
Wyoming		

1 Virginia Statutes regulate “state waters”, which include stream and wetlands, unless specific statute sections distinguish between streams and wetlands separately

2 Virginia Tax Code (58.1-339.10), Virginia Surface Coal Mine Reclamation Regulations (4VAC25-130-817.57), Virginia Regulations for Chesapeake Bay Preservation (9VAC25-830-140), Virginia Poultry Waste Storage Regulations (9VAC25-630-80), Virginia Land Application of Biosolids Regulations (9VAC25-32-560), to name a few

Based on the work conducted by ELI and Rhode Island, as well as the wide range of buffers implemented by states across the country, , it is reasonable to describe the waters and adjacent wetlands which the USACE must retain even after a State has assumed the program as those waters defined in a parenthetical phrase in Section 404 (g)(1) and the wetlands within a 300-foot buffer of the ordinary high water mark of navigable water or the mean high water mark of tidal waters.

## 2. Shoreland Regulations (Minnesota, others?)

*Talk about shoreland districts (300 ft from stream, 100 ft from lake in MN), building setbacks (typically at least 75 to 100 ft in MN), and other related regulatory/administrative distances*

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*from navigable waters that are already set up in many state's laws that can be used to establish a bright line...*

## **Implications**

*Initial draft Pros/Cons below. Also consider adding some discussion.*

### **Pros**

- It is easily understandable by the regulated public, increasing effectiveness.
- It is implementable by regulating agencies, increasing efficiency.
- When an existing state regulatory program is in place, the point of measurement (OHWL), or process to determine it, is already in place.
- It is easily definable and, thus, states can predict which waters can and can't be assumed (extremely important information to understand the implications and costs of potential assumption).
- Provides a reasonable limitation on the extent of retention by the Corps as to not regulate areas of wetland that extend miles from the navigable water.

### **Cons**

- When a state regulatory program does not exist, the OHWL (or whatever the beginning point of measurement is) would still need to be determined.
- If a different "bright line" is allowed in different states (in order to match existing state administrative programs), the Corps may have different distances of retention.

## **Summary/Conclusion**

The establishment of a "bright line" simplifies the administration of a state-assumed Section 404 program by clearly depicting the jurisdiction retained by the USACE and assumed by a state in a manner that is understandable to the regulated community. Furthermore, depicting adjacent wetlands as a "buffer" (or other administrative distance of similar purpose) protecting water quality and habitat not only preserves the USACE's control over waters necessary for interstate and foreign commerce, but is also consistent with the goals of the CWA.

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<b>WETLAND ACREAGE ON MARYLAND'S EASTERN SHORE</b>				
<b>COUNTY</b>	<b>LAND AREA (SQUARE MILES)</b>	<b>LAND AREA (ACRES)</b>	<b>WETLAND ACREAGE (1981/1982)</b>	<b>PERCENTAGE OF LAND SURFACE</b>
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
<b>TOTAL</b>	<b>3,375</b>	<b>2,160,000</b>	<b>455,301</b>	<b>21.08</b>

Understanding is that landward from bright line is state/tribal authority and bright line waterward is USACE authority.

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