

This is a draft working document created for the purpose of the Assumable Waters Subcommittee deliberations only. This draft does not reflect consensus of the full Subcommittee nor a policy or legal position of any participating entity.

2. Option 2: USACE retains entirety of wetlands contiguous to retained waters

- b. Entirety of the contiguous wetland is retained by Corps - Proposing to use 'contiguous' instead of 'adjacent' because both terms have been used together and interchangeably throughout the administration of the 404 program, the plain meaning of contiguous, "is touching", is less ambiguous than 'adjacent' since the meaning of adjacent has been expanded beyond "is touching" by the current and proposed rules.
- i. Pro:
- is legally defensible,
 - is consistent with Congressional intent based on the 1977 Congressional debate,
 - appears to be consistent with the apparent intent of extending Rivers and Harbors Act (RHA) jurisdiction to adjoining non-navigable aquatic areas in order to ensure oversight of work that could affect navigation, e.g.:
 - Section 10 requires permits for "work...performed outside the limits of a navigable water which [sic] affects its navigable capacity" (see, e.g., preamble to Corps' 1977 regs, pg 37122, middle column)
 - Section 13 of the RHA prohibited the discharge of "refuse" not only directly into navigable waters, but also onto their banks if it:
 - was "liable to be washed into such navigable waters" by "ordinary or high tides, or by storms or floods, or otherwise" & if
 - it would or could impede or obstruct navigation.
 - is easy to identify and map
- ii. Con:
- may prohibit assumption of very large areas of wetland in many states and tribal lands, including areas of the wetlands which do not have impacts on the navigable water due to extreme distances,
 - may create situations where state/tribal assumption would not be economically or practically feasible, (i.e. would leave little to be assumed)
 - including the entirety of the contiguous wetland is not necessary to protect the federal interests in the navigable water (states/tribes may have more interests in areas more distance from the navigable waters)

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