

## Adjacency in 404(g)(1)

August 25, 2016

### I. Findings

- A. As discussed in detail in the legislative history memo dated August 17, 2016, Congress enacted section 404(g) of the Clean Water Act (CWA) to enable a State to assume 404 permitting authority over many but not all of “the waters of the United States” within its boundaries.
- B. When a State assumes permitting authority, the Corps must retain “*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.*” 33 U.S.C. § 1344(g)(1).
- C. The legislative history shows that Congress intended the Corps to retain what were called Phase 1 waters in the Corps’ 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 Corps had regulated since the late 19th century under the Rivers & Harbors Act, plus “contiguous or adjacent wetlands.”
- D. The Corps regulations in 1975 did not define “contiguous,” “adjacent” or “wetlands.”
- E. 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.”
- F. In July 1977 the Corps for the first time promulgated definitions of “adjacent” and “wetlands” for purposes of its “waters of the United States” (WOTUS) regulatory definitions.
- G. 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).
- H. There are no references in the legislative history of section 404(g) to the Corps’ 1977 definition of “adjacent.”

I. But 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.”

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

Mr. Bauman: I thank the gentleman.

K. This colloquy illustrates the legislative intent to limit the Corps’ section 404 permitting authority in order to foster State regulation of dredge and fill in most waters while at the same time ensuring that the Corps retains permitting authority over Phase I waters (other than historical use waters), including adjacent wetlands. Rep. Clausen’s statement interpreting adjacent as “immediately contiguous” is made in response to questioning pressing for limited Corps

jurisdiction. This floor colloquy is the only specific discussion of the meaning of adjacent we could find in the 1977 legislative history.

- L. Interestingly, although Congress clearly intended the Corps to retain Phase 1 waters identified in the Corps' 1975 regulations, Congress's statutory description of retained waters and wetlands did not track the regulatory language. With regard to wetlands, the Corps' 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.
- M. In sum, no definitive meaning of the term "adjacent" in 404(g)(1) emerges from a review of the legislative history. We know from the 1977 regulatory preamble that the Corps believed for purposes of defining "waters of the United States" that "contiguous" is a subset of "adjacent," 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).

**II. Conclusion: The meaning of adjacency within 404(g)(1) is susceptible of various interpretations, and the Corps and a State pursuing an assumption memorandum of agreement (MOA) will have flexibility in how they identify wetlands over which the Corps must retain permitting authority.**

- A. Adjacency is used in 404(g) for a different purpose than it is used in the WOTUS regulations. WOTUS regulations define the waters that are subject to CWA regulation. 404(g) is about which entity will exercise permitting authority over waters that are subject to CWA regulation, but no waters will be excluded from CWA regulation by a determination that some wetlands are or are not "adjacent" to the retained waters.
- B. Congress intended to encourage State assumption of permitting authority over Phase 2 and 3 waters.
- C. With no prescriptive definitions from Congress, and recognizing Congress's intention to foster State assumption (with EPA approval), States and the Corps have flexibility to adopt State-specific approaches to identifying retained wetlands.
- D. The New Jersey and Michigan MOAs adopted different approaches to identifying retained wetlands, yet both programs have worked well for several decades.
- E. Practical, bright lines will facilitate implementation of the administrative program.
- F. The adjacency work group has flexibility in recommending options for identifying retained wetlands.

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For deliberation purposes only as background information for the Assumable Waters Subcommittee.  
Prepared by Virginia Albrecht, Jan Goldman-Carter, and Dave Ross.