ADJACENCY WORKGROUP
2-29-16 *DRAFT*

General Background and Rationale supporting options on how to clarify which adjacent wetlands the Corps administers CWA section 404 and for which the state or tribe administers the program.

Pursuant to section 404(g)(1) of the Clean Water Act (CWA), States, with approval from the Environmental Protection Agency (EPA), may assume authority to administer the permit program for discharges of dredged and fill material to some but not all navigable waters. The waters that a State may not assume, and which the U.S. Army Corps of Engineers (USACE) must retain even after a State has assumed the program, are defined in a parenthetical phrase in Section 404 (g)(1) as:

> *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…*[1]

"Adjacent" is being used, here, in a different manner than in the regulations defining "waters of the United States.". The term does not modify "navigable waters," and it is not being used to determine the geographical scope of CWA jurisdiction. When the term "adjacent" is used in the regulations, it is simultaneously defining which waters are – and are not – subject to the CWA. When the term "adjacent" is used in the parenthetical, it is used to establish subsets of "navigable waters" – the subset of wetlands "adjacent" to retained waters will be regulated by the USACE, and the subset of wetlands that are not adjacent to retained waters will be regulated by the State. But it does not establish the reach of the CWA. Thus, it is being used for a different purpose – to determine who will regulate which CWA waters, not whether or not the waters will be regulated at all.

In 1977 in response to a question on the floor of the House of Representatives, 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,[2] explained, in response to questioning, that the word "adjacent" means "immediately contiguous to the waterway."[3] The full extent of the colloquy is below:

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[1] § 1344(g)(1).
[2] *See* 122 Cong. Rec. 16539 (in reference to H.R. 9560).
[3] 123 Cong. Rec. 38972 (Dec. 15, 1977).

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> 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 countries [sic] could suddenly be adjacent wetlands. I would hope that the States would be able to have delegated to them control over such areas.
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> 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.
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> 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?
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> Mr. Don H. Clausen: Mr. Speaker, will the gentleman yield?
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> Mr. Roberts: I yield to the gentleman from California.
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> 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.
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> Mr. Bauman: I thank the gentleman.[4]

Robert E. Bauman was a member of the U.S. House of Representatives from Maryland's 1st congressional district, which includes the entire Eastern Shore of Maryland, as well as parts of Harford, Baltimore and Carroll counties on Maryland's western shore. Approximately 20% of the Eastern Shore's land mass is comprised of wetlands and in Dorchester County that figure jumps to over 44 % of the land mass. Interestingly, the question posed by Congressman Bauman is one of the questions that was a catalyst for the Assumable Waters Subcommittee: What does "adjacent wetlands" mean and how far will that go? Recognizing that the original House of Representative's bill did not include the phrase "adjacent wetlands," which was included in the

[4] *Id.*

conference committee bill, Congressman Bauman had a legitimate interest in questioning the extent of federal jurisdiction under a state-assumed Section 404 program.

It is important not to diminish Congressman Clausen's response to Congressman Bauman's question ("…I would interpret the word 'adjacent' to mean *immediately contiguous* to the waterway") by assuming that the phrase "immediately contiguous" is either redundant or that the modifier immediately is inconsequential. For example, if a man is sitting in an auditorium and there are 20 seats to his right, then the person to his immediate right would be sitting next to him, which is an important distinction. Similarly, considering the context of Congressman Bauman's question, the phrase "immediately contiguous" should be interpreted to mean wetlands next to the navigable waters and not wetlands extending thousands of feet from those waters.

Workgroup working understanding: There is sufficient legislative history to reasonably interpret "adjacent wetlands" within the parenthetical to mean a subset of adjacent wetlands.