



December 7, 2022

JOINT COORDINATION MEMORANDUM TO THE FIELD BETWEEN THE U.S. DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS (CORPS) AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)

Subject: U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) Coordination of draft approved jurisdictional determinations under the “Revised Definition of ‘Waters of the United States’” (the 2022 rule, 33 C.F.R. § 328.3; 40 C.F.R. § 120.2).

I. Purpose. The purpose of this memorandum is to establish a process by which the Corps and EPA (“the agencies”) will coordinate on Clean Water Act (CWA) geographic jurisdictional matters to ensure accurate and consistent implementation of the 2022 rule.

With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of Section 404 that are not subject to this memorandum, this memorandum does not nullify or supersede the January 19, 1989 “Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Geographic Jurisdiction and the Application of the Exemptions under Section 404(f) of the Clean Water Act” (1989 MOA), including its special case provisions,¹ nor does it supersede policy or individual permit elevations under the CWA Section 404(q) “Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency” (1992 404(q) MOA).^{2,3}

The procedures in this memorandum do not create any rights, either in substance or procedure, that are enforceable by any party. In addition, nothing in this memorandum is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of either signatory agency. Furthermore, nothing in this memorandum is intended to affect the authority of a Tribe or State pursuant to an authorized CWA Section 401, 402, or 404 program, and nothing in this

¹ Available at: <https://www.epa.gov/cwa-404/memorandum-agreement-determination-geographic-jurisdiction-section-404-program-and>.

² Available at: <https://www.epa.gov/cwa-404/cwa-404q-memorandum-agreement-resolving-disputes-1992>.

³ For purposes of implementing the 2022 rule, the coordination procedures as outlined in the *SWANCC* Guidance (68 FR 1991, 1995 (January 15, 2003)) and the 2007 *Rapanos* Coordination Memorandum (available at <https://www.epa.gov/sites/default/files/2016-04/documents/rapanosmoa6507.pdf>), as amended by the 2008 Department of the Army Memorandum on *Rapanos* coordination (available at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll5/id/1414>), are immaterial.

memorandum will be construed as indicating a financial commitment by the agencies for the expenditure of funds.

II. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Local Level Review of Draft Approved Jurisdictional Determinations. All draft approved jurisdictional determinations (JDs) that involve a significant nexus evaluation shall be coordinated in accordance with the procedures in this memorandum. All draft approved JDs that involve a significant nexus evaluation shall be coordinated at the local level. Such draft approved JDs assessing certain tributaries under paragraph (a)(3)(ii) or certain adjacent wetlands under paragraph (a)(4)(iii) of the 2022 rule may be elevated to the headquarters level of the agencies (HQ) under section II.D.2.b.ii.B below. All draft approved JDs assessing waters under paragraph (a)(5)(ii) of the 2022 rule (*i.e.*, intrastate lakes and ponds, streams, or wetlands that do not meet another jurisdictional category) shall be elevated to the HQ-level under section II.D.2.b.iii below.

A. Information requirements. To initiate the local-level coordination process, the Corps district shall provide the EPA region with the draft approved JD Form (explaining the full basis and rationale for asserting or not asserting jurisdiction) and any maps, as well as any easily available electronic information. Transmittal of this package serves as the “notification of coordination.” Within five calendar days of notification, the EPA region may request, if warranted, all additional information relied upon to inform the draft approved JD, such as aerial or satellite imagery, site visit documentation, or other resources used to support the draft decision and rationale described on the draft approved JD Form. The Corps district will make its best efforts to transmit the additional information as soon as possible after the request from the EPA region.

B. Transmittal of information. Both agencies will transmit all documents electronically in the most efficient manner (*e.g.*, via email). The date of Corps notification of coordination to the EPA region initiates the time frames and deadlines described in section II.D below.

C. Scope/level of EPA regional review. The EPA region should review the information provided by the Corps district to ensure that the Corps’ draft basis for asserting or not asserting jurisdiction reflects the requirements outlined in the 2022 rule. The EPA region may need to independently review additional sources of information to complete a thorough evaluation of the application of the 2022 rule.

D. Coordination process.⁴

1. If the EPA region has comments, it must provide those comments back to the Corps district within 14 calendar days of the notification of coordination. The EPA region should notify the Corps district as soon as possible whether it intends to provide comments.

⁴ All time periods discussed in this memorandum are based on calendar days, and day one is the first day after notification. Should any deadline in this memorandum fall on a weekend or federal holiday, the deadline will be the next business day.

2. If the EPA region provides comments within the 14-day local-level coordination period:

a. The agencies must coordinate on matters of fact at the local level (region and district) and make every attempt to resolve any issues. When the EPA region transmits the comments to the Corps district, the EPA region may request a meeting to discuss comments with the Corps district. Any such meeting must be held within the 14-day coordination period.

b. After the initial coordination has occurred:

i. Prior to the end of the 14-day local-level coordination period, or within five days of the transmittal of any comments from the EPA region or the meeting, whichever is later in time, the Corps district may notify the EPA region that it plans to reconsider the draft approved JD and is therefore withdrawing it from local-level coordination.⁵

ii. *For draft approved JDs assessing waters under paragraph (a)(3)(ii) or paragraph (a)(4)(iii) of the 2022 rule:* Unless the Corps district provides the EPA region with the notification of its intent to reconsider the draft approved JD as specified in section II.D.2.b.i above, the Corps district must transmit a revised draft approved JD to the EPA region within five days of the transmittal of the EPA region's comments or the meeting, whichever is later in time, or notify the EPA region that the Corps district does not intend to revise the draft approved JD.

A) Within three days of transmittal of a revised draft approved JD or a notification by the Corps district of no intent to revise, the EPA region may notify the Corps district that its concerns have been addressed, and the local-level coordination for the draft approved JD will be considered complete. This means the Corps district may proceed with finalizing the approved JD; or

B) Within three days of transmittal of a revised draft approved JD or notification by the Corps district of no intent to revise, the EPA region may notify the Corps district that it is elevating the draft approved JD to the HQ level and in accordance with section III below; or

C) If the EPA region does not provide any notification to the Corps as specified in A) or B) of this subsection within three days of the transmittal of a revised draft approved JD or notification by the Corps district that it does not intend to revise the draft approved JD, the local-level coordination for the draft approved JD will be

⁵ The revised draft approved JD will be subject to the coordination procedures in this memorandum.

considered complete. This means the Corps may proceed with finalizing the approved JD.

iii. Draft approved JDs for waters assessed under paragraph (a)(5)(ii) of the 2022 rule will be automatically elevated to the HQ level after local-level coordination under the applicable provisions of sections II.D.1 through D.2.b.i. The Corps district must transmit any EPA regional comments and any Corps district revisions to EPA HQ and Corps HQ. Procedures for HQ level joint review are discussed in section III below.

3. If the EPA region does not have comments, it should notify the Corps district as soon as possible. If the region does not provide comments within the 14-day coordination period or if the region notifies the district that it has no comments, and the draft approved JD does not assess any waters under paragraph (a)(5)(ii) of the 2022 rule, the local-level coordination for the draft approved JD will be considered complete and the Corps district may issue the approved JD. If the region does not provide comments within the 14-day coordination period or if the region notifies the district that it has no comments, and the draft approved JD does assess waters under paragraph (a)(5)(ii) of the 2022 rule, the local-level coordination for the draft approved JD will be considered complete and the draft approved JD shall be elevated to the HQ-level per the procedures in section II.D.2.b.iii.

III. Specified Draft Approved Jurisdictional Determination Coordination Requirements:
Headquarters-Level Joint Review of Draft Approved JDs. If the draft approved JD for waters assessed under paragraph (a)(3)(ii) or paragraph (a)(4)(iii) of the 2022 rule is elevated to the HQ level (to the chief level⁶ or above) by an EPA region under section II.D.2.b.ii.B, the EPA region should concurrently notify and transmit all relevant information described to both Corps HQ and EPA HQ. Draft approved JDs for waters assessed under paragraph (a)(5)(ii) of the 2022 rule are transmitted to HQ by the Corps district per section II.D.2.b.iii.

A. Once information is transmitted, EPA HQ and Corps HQ shall have 14 calendar days to coordinate.⁷ At any point during those 14 calendar days, EPA HQ and/or Corps HQ may request that the draft approved JD also be coordinated with relevant staff from the Office of the Assistant Secretary of the Army for Civil Works (ASA(CW)). The requesting agency will notify and transmit the information to ASA(CW), who will then coordinate with EPA HQ on

⁶ “Chief level” refers to the Branch Chief responsible for geographic jurisdiction at EPA and the Corps Regulatory Chief.

⁷ To facilitate effective coordination, time frames identified for this point of the elevation process through the end of section III.A can be modified if both parties mutually agree in writing for a specific elevated case. In such cases, Corps HQ shall inform the Corps district and EPA HQ shall inform the EPA region of any newly agreed upon time frames.

the draft approved JD, and the time period for additional HQ-level coordination will be seven calendar days from notification by the requesting agency.⁸

1. If a mutual decision between EPA HQ and Corps HQ or ASA(CW) is reached, EPA HQ and Corps HQ or ASA(CW) may issue a signed memorandum providing policy guidance to all their respective regional and district offices. Upon receipt of the jointly signed memorandum, the Corps district responsible for drafting the approved JD should determine what revisions are necessary and transmit to EPA HQ, Corps HQ and, if engaged, ASA(CW) a final draft approved JD and a memorandum describing how guidance provided in the jointly signed memorandum was applied to the final draft approved JD.

2. If a mutual decision between EPA HQ and Corps HQ or ASA(CW) is not reached, EPA may issue a signed memorandum providing policy guidance that will be provided to all EPA regional and Corps district offices. Upon receipt of the signed memorandum, the Corps district responsible for drafting the approved JD should determine what revisions are necessary and transmit to EPA HQ, Corps HQ and, if engaged, ASA(CW) a final draft approved JD and memorandum describing how guidance provided in the signed memorandum was applied to the final draft approved JD.

3. EPA HQ and the Corps HQ or ASA(CW) will make best efforts to notify the Corps district as soon as possible if they do not intend to provide policy guidance and the Corps district may finalize the draft approved JD. EPA HQ and the Corps HQ or ASA(CW) may provide draft approved JDs that do not need further policy guidance to all EPA regional and Corps district offices for informational purposes. If neither EPA HQ nor the Corps HQ or ASA(CW) notifies the Corps district that they intend to provide policy guidance within the time period specified in section III.A, the Corps district may finalize the draft approved JD.

B. EPA retains ultimate administrative authority to construe geographic jurisdiction⁹ and EPA HQ may notify Corps HQ or ASA(CW) that it plans to make a project-specific jurisdictional decision covered by the draft approved JD, and consistent with 33 CFR 325.9(b). As soon as possible, and no later than 14 calendar days of notice of a revised draft approved JD pursuant to section III.A.1 or section III.A.2, EPA HQ shall notify Corps HQ or ASA(CW) and the Corps district if EPA intends to make a site-specific jurisdictional decision pursuant to this section. Site-specific determinations made by EPA pursuant to this section of this memorandum will be binding on the federal government and represent the government's position in any subsequent federal action or litigation regarding the determination. EPA HQ will distribute a copy of any determination to all EPA regions and all

⁸ Note that the language in the sub-sections below will refer to "Corps or ASA(CW)" to reflect that EPA will be coordinating either with Corps HQ or ASA(CW), depending on whether EPA and/or Corps HQ have submitted a request to ASA(CW).

⁹ EPA retains ultimate administrative authority to construe the jurisdictional term "navigable waters." See Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act ("Civiletti Memorandum"), 43 Opp. Att'y Gen. 197 (1979).

Corps districts. If EPA HQ does not provide any notification to Corps HQ or ASA(CW) and the Corps district within 14 calendar days of notice of a revised draft approved JD pursuant to section III.A.1 or section III.A.2, the coordination for the draft approved JD will be considered complete. This means the Corps district may proceed with finalizing the approved JD.

IV. Appeals. A Corps district approved JD issued after consideration of receipt of HQ-level guidance is an appealable action under 33 C.F.R 331 et seq. Any appeal can examine and question any matter or finding of fact, but the decision on appeal will not question or overturn any legal or policy guidance made by EPA HQ and/or Corps HQ or ASA(CW) pursuant to this joint memorandum.

V. This memorandum will remain in effect for nine months after the effective date of the 2022 rule. No later than 30 days prior to the termination date of this memorandum, the agencies shall initiate a joint HQ-level review to reevaluate various requirements in this memorandum, assess implementation effectiveness, and consider the need for further coordination. This joint HQ-level review shall be completed prior to the termination date of this memorandum. This memorandum and its outlined expectations may only be modified or extended by written agreement of both signatory agencies.



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