



September 27, 2023

**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 “pre-2015 regulatory regime.”

**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 pre-2015 regulatory regime where that regulatory regime is operative.<sup>1</sup> The “pre-2015 regulatory regime” refers to the agencies’ pre-2015 definition of “waters of the United States,”<sup>2</sup> implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. 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/utills/getfile/collection/p16021coll5/id/1414>), are superseded by this coordination memorandum.

With respect to final determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of CWA 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,<sup>3</sup> nor does it supersede policy or individual

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<sup>1</sup> For more information about the operative definition of “waters of the United States” for specific geographic areas and parties in light of litigation, please visit <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

<sup>2</sup> The pre-2015 definition of “waters of the United States,” is also referred to as “the 1986 regulations,” inclusive of the exclusion for prior converted cropland, which both agencies added in 1993. See 33 CFR 328.3 (2014) and 40 CFR 230.3(s) (2014).

<sup>3</sup> Available at: <https://www.epa.gov/cwa-404/memorandum-agreement-determination-geographic-jurisdiction-section-404-program-and>.

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).<sup>4</sup>

Because the Supreme Court in *Sackett* adopted the *Rapanos* plurality standard, and the agencies’ pre-2015 regulatory regime discussed the *Rapanos* plurality standard, the agencies will implement the pre-2015 regulations generally consistent with the pre-2015 regulatory regime’s approach to the plurality standard, including relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will not assert jurisdiction based on the significant nexus standard, will not assert jurisdiction over interstate wetlands solely because they are interstate, will interpret “adjacent” to mean “having a continuous surface connection,” and will limit the scope of the (a)(3) provision to only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories. Approved jurisdictional determinations (JDs) are case-specific determinations based on the record, and factual questions or *Sackett* concerns may be raised in the context of a particular approved JD. 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, Corps districts may choose to coordinate with EPA regions on draft approved JDs on a case-by-case basis and either the Corps districts or EPA regions may seek headquarters-level review or guidance on draft approved JDs at any time.

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 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 JDs assessing wetlands under paragraph (a)(7) and other waters under paragraph (a)(3) of the 1986 regulations shall be coordinated at the local level in accordance with the procedures in this memorandum. Such draft approved JDs may be elevated to the headquarters level of the agencies (HQ) under section II.D below. Draft approved JDs shall be coordinated for the previously specified categories of waters if jurisdiction is being asserted, as well as if jurisdiction is not being asserted.

**A. Information requirements.** To initiate the local-level coordination process, the Corps district shall provide the EPA region with the draft basis for jurisdiction (*e.g.*, approved JD form, memorandum for record, or similar document 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 three business days of notification, the EPA region may request, if warranted, all additional information relied upon to inform the draft basis for jurisdiction, such as aerial or satellite imagery, site visit documentation, or other resources used to support the draft decision and rationale described on the draft basis for jurisdiction. The Corps district will make its best efforts to transmit the additional information as soon as possible after the request from the EPA region.

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<sup>4</sup> Available at: <https://www.epa.gov/cwa-404/cwa-404q-memorandum-agreement-resolving-disputes-1992>.

**B. Transmittal of information.** Both agencies will transmit all documents electronically in the most efficient manner (*e.g.*, via email). The date of the 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 pre-2015 regulatory regime. The EPA region may need to independently review additional sources of information to complete a thorough evaluation of the application of the pre-2015 regulatory regime.

**D. Coordination process.**<sup>5</sup>

**1.** The EPA region should notify the Corps district as soon as possible whether it intends to provide comments. If the EPA region has comments, it must provide those comments to the Corps district within 10 business days of the notification of coordination.

**2.** Even if the EPA region does not have comments on a draft approved JD, the EPA region may still choose to elevate the draft approved JD within the 10 business day coordination period per the procedures in section III below to obtain HQ review or guidance. If the EPA region does not have comments and the region does not intend to elevate the draft approved JD to HQ, it should notify the Corps district as soon as possible. If the region does not provide comments and does not elevate the draft approved JD within the 10 business day coordination period, or if the region notifies the district that it has no comments and does not intend to elevate the draft approved JD, the local-level coordination for the draft approved JD will be considered complete and the Corps district may finalize the approved JD.

**3.** If the EPA region provides comments within the 10 business 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 10 business day coordination period.

**b.** After the initial coordination has occurred:

**i.** Prior to the end of the 10 business day local-level coordination period, or within three business 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.<sup>6</sup>

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<sup>5</sup> Day one is the first business day after notification.

<sup>6</sup> The Corps may choose to withdraw and re-coordinate a draft approved JD, for example, if EPA's comments result in the district deciding to complete a field site visit or contact the requestor for additional information, and such action cannot be completed during the original coordination period. The revised draft approved JD will be subject to the coordination procedures in this memorandum.

**ii.** 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.3.b.i above, the Corps district must transmit a revised draft approved JD to the EPA region within three business 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 business 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 business 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 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 business 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 considered complete. This means the Corps may proceed with finalizing the approved JD.

**III. Specified Draft Approved Jurisdictional Determination Coordination Requirements: Headquarters-Level Joint Review of Draft Approved JDs.** If the draft approved JD for wetlands assessed under paragraph (a)(7) or waters assessed under paragraph (a)(3) of the 1986 regulations is elevated to the HQ level (to the chief level<sup>7</sup> or above) by an EPA region under section II.D, the EPA region should concurrently notify and transmit all relevant information described to both Corps HQ and EPA HQ.

**A.** Once information is transmitted, EPA HQ and Corps HQ shall have 10 business days to coordinate.<sup>8</sup> At any point during those 10 business 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 (OASACW). The requesting agency will notify and transmit the information to OASACW, who will then coordinate with EPA HQ on the draft approved JD, and the time period for additional HQ-level coordination will be five business days from notification by the requesting agency.<sup>9</sup>

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<sup>7</sup> “Chief level” refers to the Branch Chief responsible for geographic jurisdiction at EPA and the Corps Regulatory Chief.

<sup>8</sup> 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.

<sup>9</sup> Note that the language in the sub-sections below will refer to “Corps HQ or OASACW” to reflect that EPA will be coordinating either with Corps HQ or OASACW, depending on whether EPA and/or Corps HQ have submitted a request to OASACW.

1. If a mutual decision between EPA HQ and Corps HQ or OASACW is reached, EPA HQ and Corps HQ may issue a signed memorandum providing direction to all their respective regional and district offices. If a mutual decision between EPA HQ and OASACW is reached, EPA HQ and OASACW 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, OASACW a final draft approved JD and a memorandum describing how the direction or guidance provided in the jointly signed memorandum was applied to the final draft approved JD.<sup>10</sup>

2. If a mutual decision between EPA HQ and Corps HQ or OASACW 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, OASACW 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 OASACW will make best efforts to notify the Corps district as soon as possible if they do not intend to provide direction or policy guidance and the Corps district may finalize the draft approved JD. EPA HQ and the Corps HQ or OASACW may provide 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 OASACW notifies the Corps district that they intend to provide direction or policy guidance within the time period specified in section III.A (*i.e.*, 10 business days or the agreed upon timeframe specified in footnote 8), the Corps district may finalize the draft approved JD.

**B.** EPA retains ultimate administrative authority to construe geographic jurisdiction<sup>11</sup> and EPA HQ may notify Corps HQ or OASACW 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 10 business 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 OASACW 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 Corps districts. If EPA HQ does not provide any notification to Corps HQ or OASACW and the Corps district within 10 business 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.

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<sup>10</sup> While this memorandum does not specify a period of time within which the district should submit the final draft approved JD and memorandum, the district should seek to submit the materials in a timely manner, generally within 90 calendar days unless there are extenuating circumstances.

<sup>11</sup> 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).

**IV. Appeals.** A Corps district approved JD issued after consideration of HQ-level guidance received through the coordination process is an appealable action under 33 CFR 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 OASACW pursuant to this joint memorandum.

**V.** This memorandum will remain in effect for nine months after the memorandum has been signed by all signatories. No later than 30 calendar 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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