



## COORDINATION PROCESS UPDATE: JOINT COORDINATION MEMORANDA 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)

### Background

The final "Revised Definition of 'Waters of the United States'" rule was [published in the \*Federal Register\*](#) on January 18, 2023, and took effect on March 20, 2023 (2023 rule). In light of the May 25, 2023 decision in *Sackett v. EPA*, the 2023 rule was amended by the [conforming rule, and the amendments](#) took effect on September 8, 2023. However, the 2023 Rule, as amended, is not currently operative in certain states and for certain parties [due to litigation](#). Where the 2023 rule, as amended, is not operative, the pre-2015 regulatory regime<sup>1</sup> is in effect. Under both regimes, the EPA and the Corps ("the agencies") are interpreting "waters of the United States" consistent with the [Supreme Court's decision in \*Sackett\*](#).

### Coordination Memoranda for Approved Jurisdictional Determinations

An approved jurisdictional determination (JD) is a document provided by the Corps stating the presence or absence of "waters of the United States" on a parcel or a written statement and map identifying the limits of "waters of the United States" on a parcel.<sup>2</sup> Under existing Corps' policy, approved JDs are generally valid for five years unless new information warrants revision prior to the expiration date.<sup>3</sup>

For both regulatory regimes (the 2023 Rule, as amended, and the pre-2015 regime) under which the Corps is issuing approved JDs, the agencies entered into joint coordination memoranda to establish a process by which the Corps and EPA will coordinate on Clean Water Act geographic jurisdictional matters to ensure accurate and consistent implementation of the regimes where each regulatory regime is operative. **These coordination memoranda were signed on September 27, 2023, and the purpose of this document is to provide the public with**

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<sup>1</sup> The "pre-2015 regulatory regime" refers to the agencies' pre-2015 definition of "waters of the United States," implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.

<sup>2</sup> See [33 C.F.R. § 331.2](#).

<sup>3</sup> See U.S. Army Corps of Engineers, [Regulatory Guidance Letter No. 05-02](#), § 1(a), p. 1 (June 2005).

**an update in light of requests from the public for more information about the coordination process. Information in this update document is current as of April 23, 2024.**

**Amended 2023 Rule Memorandum:** This memorandum addresses U.S. Department of the Army, Corps, and EPA coordination of draft approved JDs under the “Revised Definition of ‘Waters of the United States,’” as amended by the final rule “Revised Definition of ‘Waters of the United States’; Conforming” (the 2023 rule, as amended, 33 CFR § 328.3; 40 CFR §120.2).

- **Categories of Waters that Require Coordination:** All draft approved JDs assessing wetlands under paragraph (a)(4) and waters under paragraph (a)(5) of the 2023 rule, as amended, are being 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. Draft approved JDs are being coordinated for the specified categories of waters, regardless of their jurisdictional status.

**Pre-2015 Regulatory Regime Memorandum:** This memorandum addresses U.S. Department of the Army, Corps, and EPA Coordination of draft approved JDs under the pre-2015 regulatory regime.

- **Categories of Waters that Require Coordination:** All draft approved JDs assessing wetlands under paragraph (a)(7) and other waters under paragraph (a)(3) of the 1986 regulations are being 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. Draft approved JDs are being coordinated for the specified categories of waters, regardless of their jurisdictional status.

In addition, under both memoranda, with respect to determinations of the geographic jurisdictional scope of “waters of the United States” for purposes of Section 404 that are not subject to the memoranda, 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.

Both coordination memoranda also state that approved 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.

### **Approved JDs Coordinated with Headquarters**

With the finalization of the September 2023 conforming rule, the Corps resumed issuing jurisdictional determinations that were paused in light of the *Sackett* decision. Since the conforming rule became effective on September 8, 2023 and through April 23, 2024, the Corps has finalized 2,676 approved JDs; 948 approved JDs under the 2023 Rule, as amended, and 1,728 approved JDs under the pre-2015 regulatory regime. Using the elevation process described in the coordination memoranda, 166 draft approved JDs have been elevated to

Headquarters for review. As of April 23, 2024, the agencies have resolved 73 of the elevated draft approved JDs (see Figure 1). The agencies are continuing to work to resolve the remaining elevated draft approved JDs. The vast majority of approved JDs that were finalized between September 8, 2023 and April 23, 2024 were finalized without elevation.

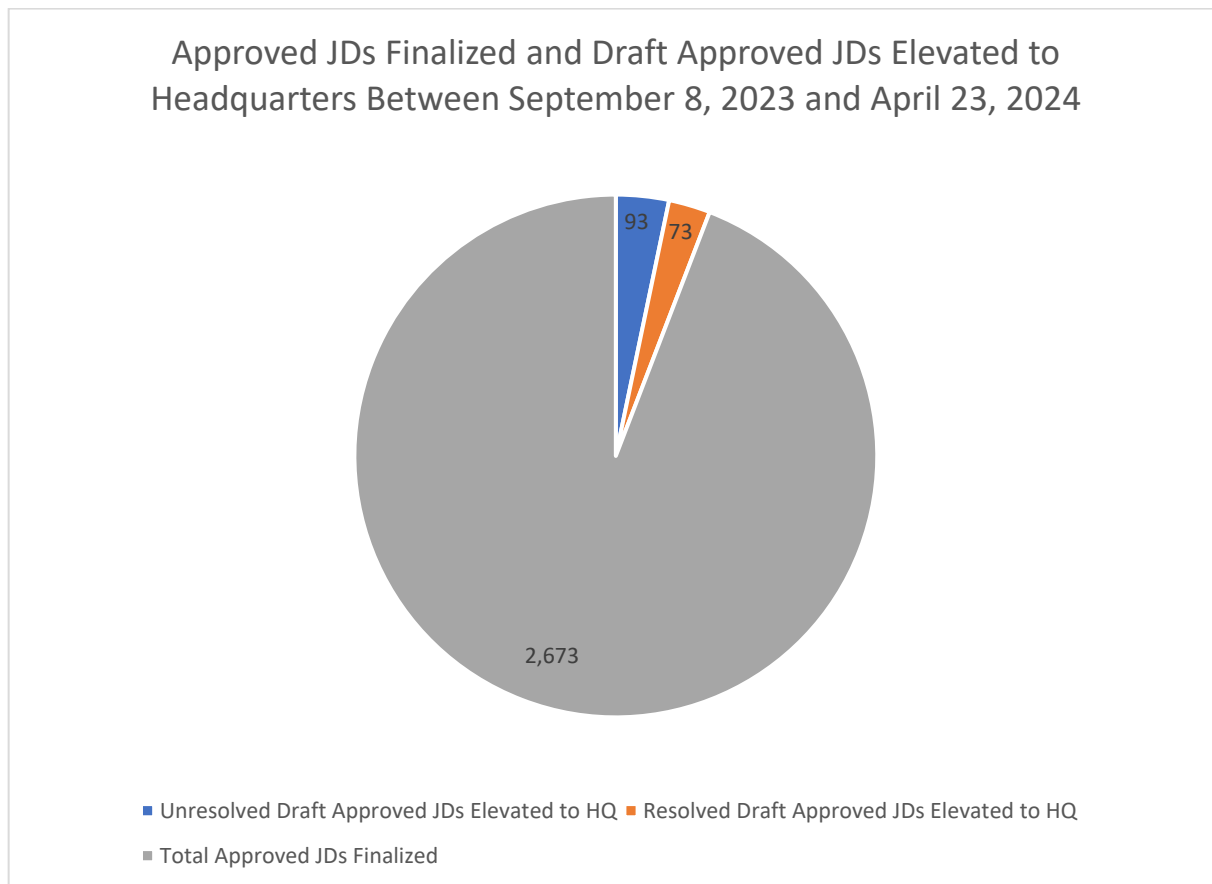


Figure 1: This figure shows approved JDs finalized by the Corps as well as draft approved JDs that have been elevated to the agencies' headquarters between September 8, 2023 and April 23, 2024. Of the 166 draft approved JDs that have been elevated to headquarters, 73 elevations have been resolved.

### **Policy Memoranda**

If a draft approved JD is elevated to the Headquarters level for review, a policy memorandum may be issued providing guidance to the respective EPA regional and Corps district offices. The agencies are posting any such memoranda on the web to ensure transparency and accessibility to the public.

The Clean Water Act and EPA and Corps regulations, interpreted consistent with *Sackett*, contain legally binding requirements. The policy memoranda issued as part of the coordination process do not substitute for those provisions or regulations, nor are they regulations themselves. Thus, the memoranda do not impose legally binding requirements on EPA, the

Corps, Tribes, States, or the regulated community, and may or may not apply to a particular situation based upon the circumstances.

**Memoranda for draft approved JDs completed under the 2023 Rule, as amended ([available on the web](#)).**

- [Memorandum on LRB-2021-01386](#) – This memorandum addresses the concept of how to identify the wetland area which is then assessed under the jurisdictional standard.
- [Memorandum on MVS-2023-00288](#) – This memorandum addresses the concept of how to identify tributary reaches for purposes of assessing tributaries.
- [Memorandum on NWP-2023-602](#) – This memorandum addresses whether the specific subsurface storm drain at issue can serve as a continuous surface connection for adjacent wetlands.

**Memoranda for draft approved JDs completed under the pre-2015 regulatory regime ([available on the web](#)).**

- [Memorandum on NWO-2003-60436](#) – This memorandum addresses the concept of how to identify the wetland area which is then assessed under the jurisdictional standard.
- [Memorandum on LRL-2023-00466](#) – This memorandum addresses the concept of when ponds are considered part of the tributary network.
- [Memorandum on SAS-2001-13740](#) – This memorandum addresses the concept of how to apply the waste treatment system exclusion.

**Next Steps**

The coordination memoranda will remain in effect until June 27, 2024. No later than 30 calendar days prior to the termination date of each coordination memorandum, the agencies will initiate a joint Headquarters-level review to reevaluate various requirements in the coordination memorandum, assess implementation effectiveness, and consider the need for further coordination. This joint Headquarters-level review of each coordination memorandum will be completed prior to their expiration date. Each coordination memorandum and its outlined expectations may only be modified or extended by written agreement of both signatory agencies.