



## MEMORANDUM BETWEEN THE DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Subject: U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army), Corps of Engineers (Corps) Coordination to Ensure Consistent Implementation of the Navigable Waters Protection Rule

1. Purpose. The purpose of this memorandum is to establish a process by which the U.S. Environmental Protection Agency (EPA), the Department of the Army (Army<sup>1</sup>), and the U.S. Army Corps of Engineers (Corps) (the agencies) will coordinate on policy matters to ensure the consistent implementation of the Navigable Waters Protection Rule: Definition of "Waters of the United States" (NWPR; 85 FR 22250, April 21, 2020). This memorandum also establishes, for a limited period of time, a process for coordinating certain draft approved jurisdictional determinations (JDs) and a joint agency review process for final approved JDs and EPA jurisdictional decisions following implementation of the rule.

An effective coordination process will promote and improve interagency cooperation, facilitate increased communication, and establish an efficient process for determining Clean Water Act (CWA) jurisdiction. 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 of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act" (1989 MOA), including its special case provisions,<sup>2</sup> 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).<sup>3</sup>

2. Current Practice. The Corps Districts are currently posting all final approved JDs for public viewing on their respective websites as well as on the Corps Headquarters (HQ) website at: <https://permits.ops.usace.army.mil/orm-public>. In addition, all approved JDs as of August 28, 2015, are posted to the EPA approved JD website at: <https://watersgeo.epa.gov/cwa/CWA-JDs>. These approved JDs remain available on the websites until the approved JD is no longer valid.

3. Policy Coordination. The agencies all agree on the importance of clear, consistent policy direction from their respective HQs to field staff and recognize that questions can arise when implementing a new rule. To facilitate policy coordination:

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<sup>1</sup> In this memorandum, "Army" refers to the Office of the Assistant Secretary of the Army (Civil Works).

<sup>2</sup> Available at: <https://www.epa.gov/cwa-404/memorandum-agreement-determination-geographic-jurisdiction-section-404-program-and>.

<sup>3</sup> Available at: <https://www.epa.gov/cwa-404/cwa-404q-memorandum-agreement-resolving-disputes-1992>.

(a) The agencies will establish points of contact at each HQ office as well as a defined communication process, such that the Corps HQ and EPA HQ can quickly raise and resolve jurisdictional policy questions not associated with any specific action but arising from implementation. Where the issues are novel and are not explicitly addressed by the NWPR and its preamble language, the Corps HQ and EPA HQ will coordinate on policy questions with Army.

(i) Points of contact (POCs) shall include the EPA jurisdiction lead, the Corps Regulatory Program Manager for jurisdiction, and the Assistant for Regulatory and Tribal Affairs at Army.

(b) The agencies will maintain open lines of communication. Communication between the agencies is typically regular and informal, and the agencies expect most questions can be resolved through such ongoing informal coordination. However, in any case where a policy issue requires more formal coordination and response, an agency POC may send an electronic memorandum requesting a formal coordinated policy resolution to the other two POCs. The date of electronic transmission serves as the notification of request and initiates timeframes for coordination.<sup>4</sup>

(i) The receiving agencies will review the memorandum and supporting information and respond in writing within 14 calendar days.

(ii) If the receiving agencies are not able to provide a written response within 14 calendar days, any party may request a formal meeting with the other agencies; such meeting will be held within 7 calendar days after the conclusion of the 14-day period (and may be held earlier).

(iii) The receiving agencies will provide a formal written policy resolution no later than 28 days following the request. In any cases of disagreement, EPA shall write and provide the policy resolution.<sup>5</sup>

(iv) All agencies will communicate policy decisions to field staff as appropriate.

4. After-Action Reviews of Certain Appeal Decisions. The agencies will establish a process to conduct after-action reviews of final appeal decisions<sup>6</sup> associated with appeals of approved JDs and permit-related appeals where the reasons for appeal relate to jurisdictional issues. These after-action reviews will be coordinated at the HQ level to look for technical issues that are brought to light as part of the appeal and how Districts across the country are handling these technical issues as illuminated by the appeal decision document. The agencies will communicate any relevant findings to field staff and will use these reviews to inform future trainings and coordination.

(a) After they are finalized, Corps HQ will review final appeal decisions associated with appeals of approved JDs and permit-related appeals where the reasons for appeal address jurisdictional issues.

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

<sup>5</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).

<sup>6</sup> The Corps administrative appeals process regulations are found at 33 CFR 331.

(b) Quarterly, Corps HQ will send completed after-action reviews to EPA for their information.

(c) If needed, Corps or EPA may trigger the coordination process identified in paragraph (3)(b) of this memorandum to formally resolve any policy issues identified in the quarterly reports.

5. Joint Review of Final Approved JDs/Jurisdiction Decisions. The agencies will establish a process for a semi-annual joint Corps and EPA HQ review of a sample of Corps final approved JDs and of EPA jurisdictional decisions. This process will provide the agencies an opportunity to identify any challenges that can be addressed through more targeted training, guidance, and/or coordination.

(a) Each review will include a sample of Corps approved JDs and EPA jurisdictional decisions completed during the review period. Samples of approved JDs should be collected from Corps Districts in a proportion that resembles the respective District's share of all approved JDs completed nationwide during the review period. Samples of EPA jurisdictional decisions should be collected in a proportion that resembles each Region's share of such decisions during the review period and will comprise no more than 10 percent of the total approved JDs and jurisdictional decisions reviewed. The sample set will include a minimum of 200 completed actions and include examples of assertions of jurisdiction under NWPR paragraph (a) and exclusions under NWPR paragraph (b).<sup>7</sup> For paragraph (b) waters, the review will specifically include exclusions made according to paragraphs (b)(1), (b)(3), (b)(5), (b)(6), and (b)(8) as these particular exclusions have certain new aspects compared to the agencies' prior practice. The agencies retain the ability to alter these topics should unanticipated consistency issues arise, with the option to further limit future reviews where policy questions have been resolved through coordination.

(b) The review of Corps approved JDs will be limited to the approved JD form itself, any point in time or period-in-time resources relevant to the JD, and any maps provided with the JD form. The review for EPA jurisdictional decisions will be limited to the decision document, any point-in-time or period-in-time resources relevant to the decision, and any maps supporting the analysis.

(c) To facilitate an efficient and timely review while also ensuring an adequate sample size, prior to the initial review event, the agencies will develop a review process including a checklist that may be used by field staff or contractors to pre-screen the JDs to identify potential issues prior to review by the Corps, Army, and EPA HQ review team.

(d) The agencies may alter the sample size under paragraph (5)(a) and the review process under paragraph (5)(c) based on mutual agreement to ensure a thorough review can be completed in a timely manner.

6. Approved Jurisdictional Determination Coordination Requirements. In addition to the 1989 MOA procedures and policy coordination and after-action reviews in paragraphs (3) – (5) of this memorandum, the Corps and EPA will follow the elevation and coordination procedures in paragraph (7) of this memorandum for the following draft approved JDs:

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<sup>7</sup> For convenience, the agencies generally refer to the Corps' regulations at 33 CFR 328.3 throughout this memorandum. EPA's codification of the definition of "waters of the United States" is found at 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, 302.3, 401.11, and Appendix E to Part 300. The NWPR also codifies the definition of "waters of the United States" in a new section 40 CFR 120.2.

(a) Draft approved JDs where a negative jurisdictional decision based solely on a finding that a non-jurisdictional feature (*e.g.*, ephemeral stream) or artificial structure (*e.g.*, dam, spillway) does not convey surface water flow to a downstream jurisdictional water in a typical year and thus severs jurisdiction of the subject water and potentially implicates upstream aquatic resources. Coordination under this paragraph is not intended to include a decision that an individual wetland, lake, pond, or impoundment of a jurisdictional water lacks a sufficient connection to a downstream jurisdictional water to be jurisdictional.

(b) Draft approved JDs where an affirmative jurisdictional decision is based solely on a finding that a particular wetland, lake, pond, or impoundment of a jurisdictional water is inundated by flooding from a jurisdictional water in a typical year. Coordination under this paragraph is not intended to include a decision based on other wetland adjacency criteria (*i.e.*, abutting; separated only by a natural berm, bank, dune, or similar natural feature; separated only by an artificial barrier but having a direct hydrologic surface connection to a jurisdictional water in a typical year).

(c) Interagency coordination under this memorandum is not required for any other types of draft approved JDs under the NWPR.

7. Jurisdictional Determination Coordination Procedures. To facilitate and expedite the coordination of draft documents associated with the JDs specifically identified in paragraph (6) of this memorandum, both EPA and the Corps will transmit all documents electronically. The date of electronic transmission serves as the notification of elevation and initiates timeframes for coordination. For all waters referenced in paragraphs (6)(a) and (6)(b), agency coordination of draft approved JDs will be conducted as follows:

(a) The Corps District will document the basis and rationale for asserting jurisdiction or not asserting jurisdiction under the CWA and provide an electronic copy of the draft approved JD form to the appropriate EPA regional office along with any documentation from the record (including maps) sufficient to support the rationale in the JD form.

(b) The EPA regional office will review the draft approved JD form and supporting information, and within 14 calendar days of transmittal will provide any comments on the Corps' draft approved JD to the Corps District. The EPA regional office should notify the Corps as soon as possible whether it intends to provide comments on a particular draft approved JD. Typically, EPA review should be complete within 7 days, leaving the second week for coordination on matters of fact. Where EPA Regions are not able to complete the review in 7 days, at that point they should notify the Corps District that they need the full 14 days for review.

(i) If the EPA regional office does not provide comments within the 14-day coordination period, the District may proceed and finalize the draft approved JD.

(ii) If the EPA regional office has comments, the agencies will coordinate on matters of fact at the local level (regional and district offices) and make every attempt to resolve any issues within the 14-day coordination period. If there is no agreement in principle, the EPA regional office may request a formal meeting with the Corps district office before the end of the 14-day coordination period to discuss their comments; such meeting will be held within 7 calendar days

after the conclusion of the 14-day coordination period. If the agencies cannot resolve all remaining issues in principle at the conclusion of the meeting, the EPA regional office will either provide electronic notification to the District and EPA HQ within 5 calendar days after the meeting that they are proceeding with a special case under procedures identified in the 1989 MOA or the EPA regional office will provide notification to the Corps District that the Corps may proceed with finalizing the draft approved JD.

8. Appeals. A District decision made pursuant to coordination in paragraph (7) will be considered an appealable action for purposes of the Corps administrative appeals process under 33 CFR 331 et seq. Where a decision is resolved at HQ under the 1989 MOA, any appeal can examine and question any matter or finding of fact, but a decision on appeal will not question or overturn any legal or policy determination made by EPA or Corps HQs pursuant to this joint guidance memorandum.

9. Joint Technical Coordination and Training. Field staff from both the Corps and EPA are encouraged to coordinate outside this coordination process and the special case process described in the 1989 MOA as often as needed to ensure consistency between the agencies. Such coordination might include local area agreements (e.g., field-level MOAs) to define procedures for joint training; additional pre-decisional coordination on jurisdictional calls beyond what is in this memorandum; or the development of implementation datasets and tools as described in the NWPR preamble.

10. Effective Dates. Paragraphs (4), (5), and (6) of this memorandum will sunset one month after the completion of the third semi-annual review performed pursuant to paragraph (5) unless otherwise extended or modified by written agreement of both the EPA and the Army. The rest of the memorandum remains in effect indefinitely unless modified by written agreement from both agencies.

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R.D. JAMES  
Assistant Secretary of the Army  
(Civil Works)

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DAVID P. ROSS  
Assistant Administrator, Office of Water  
Environmental Protection Agency