



## MEMORANDUM FOR U.S. ARMY CORPS OF ENGINEERS CHIEF OF ENGINEERS AND U.S. EPA REGIONAL ADMINISTRATORS I-X

**SUBJECT:** Recission of June 30, 2020 Memorandum “U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) Process for Elevating and Coordinating Specific Draft Determinations under the Clean Water Act (CWA)”

After careful consideration, the U.S. Environmental Protection Agency and the Department of the Army are rescinding the memorandum “U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) Process for Elevating and Coordinating Specific Draft Determinations under the Clean Water Act (CWA),” signed by EPA on June 26, 2020 and Army on June 30, 2020. The memorandum established a process by which the Corps and EPA (together, the agencies) intended to elevate to their headquarters for coordination certain case-specific and stand-alone CWA determinations under paragraph (a)(1) of the Navigable Waters Protection Rule: Definition of “Waters of the United States” (NWPR; 85 FR 22250, April 21, 2020). These case-specific elevations included traditional navigable water determinations concluding a water is “susceptible to use” solely based on evidence of recreation-based commerce.

The NWPR did not change the definition of traditional navigable waters and retained the agencies’ longstanding “guidance on determining whether a water is a ‘traditional navigable water’ for purposes of the *Rapanos* Guidance, the Clean Water Act (CWA), and the agencies’ CWA implementing regulations.” Appendix D, “Legal Definition of ‘Traditional Navigable Waters,’” U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, is available at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll11/id/2316>.<sup>1</sup>

However, by establishing new procedures for one category of traditional navigable waters, the 2020 elevation memorandum created an unnecessary extra step for making traditional navigable waters determinations that the agencies have been making for many years. Therefore, the agencies are

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<sup>1</sup> NWPR, 85 FR 22281 (“because the agencies have not modified the definition of ‘traditional navigable waters,’ the agencies are retaining Appendix D to help inform implementation of that provision of this final rule”); Memorandum at 2 (“The agencies are retaining this appendix as Appendix D to this memorandum to help inform implementation of the “traditional navigable waters” provision of the NWPR, recognizing that the appendix refers to the *Rapanos* Guidance document.”).

rescinding that memorandum, and retaining their legal memorandum on traditional navigable waters, which has remained unchanged since 2007. The legal memorandum, “Legal Definition of ‘Traditional Navigable Waters,’” is attached to this memorandum, and can be found at <https://www.epa.gov/wotus/legal-definition-traditional-navigable-waters>. It also continues to remain available as Appendix D to the *Rapanos* Jurisdictional Determination Form Instructional Guidebook.

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