MEMORANDUM FOR U.S. ARMY CORPS OF ENGINEERS DIRECTOR OF CIVIL WORKS AND U.S. EPA REGIONAL ADMINISTRATORS I-X

Subject: 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)

1. Purpose. The purpose of this memorandum is to establish a process by which the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) (the agencies) intend to elevate to their headquarters (HQs) for coordination certain case-specific and stand-alone Clean Water Act (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).[1] These case-specific elevations include traditional navigable water (TNW) determinations concluding a water is "susceptible to use" solely based on evidence of recreation-based commerce, and the application of the NWPR paragraph (b) exclusions to NWPR paragraph (a)(1) waters.

As stated in the preamble to the NWPR regarding TNW determinations, the agencies commit to implementing "field elevation procedures should difficult legal questions arise, including requiring such interpretations to be reviewed by senior legal staff at each of the agencies' respective HQ." 85 FR 22282. The elevation and coordination process outlined in this memorandum will promote and improve interagency cooperation, facilitate increased communication, and establish an efficient and effective process for certain TNW determinations under the CWA. The agencies also intend to coordinate on draft approved jurisdictional determinations (JDs) that would exclude paragraph (a)(1) waters under the NWPR in instances when such waters meet the conditions of paragraph (b) of the NWPR.[2]

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

[1] 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 120.2.

[2] The preamble of the NWPR states that "Waters and features that are excluded under paragraph (b) of the final rule cannot be determined to be jurisdictional under any of the categories in the rule under paragraph (a)." 85 FR 22317.

Exemptions under Section 404(f) of the Clean Water Act" (1989 MOA), including its special case provisions.[3]

2. Background on TNW Determinations. Under the NWPR, paragraph (a)(1) waters are defined as: "The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide." 85 FR 22338. Waters that are, were, or are susceptible to use in interstate or foreign commence have generally been referred to as TNWs or (a)(1) waters for CWA purposes. The NWPR retains the same basic regulatory text for TNWs in paragraph (a)(1), but the separate territorial seas jurisdictional category from prior regulations was merged into paragraph (a)(1) for administrative efficiency.

Determining whether a waterbody is subject to regulation under the CWA as a TNW is case-specific, and includes an analysis of case law, prior judicial or administrative determinations by the agencies, and relevant portions of the agencies' regulations. Some of these resources are summarized and described in the preamble to the NWPR and the response to comments accompanying the final rule. Relevant excerpts are attached to this memorandum for ease of reference, including Section II.E.1 of the preamble (Appendix A), Section III.B of the preamble (Appendix B), and Section 2 of the Public Comment Summary Document (Appendix C).

As described in the NWPR preamble and the response to comments document accompanying the final rule, the agencies included an appendix to the Corps' 2007 Jurisdictional Determination Form Instructional Guidebook (Appendix D) summarizing some of the applicable case law in this area for field use. 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.[4] The NWPR preamble and response to comments document refer to the appendix to explain some of the applicable case law principles for TNW determinations. As mentioned in the NWPR preamble (85 FR 22282), however, the agencies may develop additional or more in-depth TNW implementation guidance in the future, if warranted.

3. Circumstances Requiring Elevation and Coordination. EPA and the Corps intend to follow the elevation and coordination procedures in paragraph (4) of this memorandum for all instances where:

(a) A new draft TNW determination concluding a water is "susceptible to use" solely based on evidence of recreation-based commerce. Such determinations would include draft stand-alone TNW determinations, draft approved JDs that include a case-specific TNW determination on a feature within the review area, or draft approved JDs where a case-specific draft TNW determination is made on a

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

[4] U.S. EPA and U.S. Army Corps of Engineers. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) ("*Rapanos* Guidance"), available at https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf. As stated in the NWPR preamble, the 2008 *Rapanos* Guidance will be rendered inoperative upon the effective date of the NWPR because it will no longer be necessary or material and may in fact create confusion as the agencies implement the final rule. However, to the extent that, as a result of litigation, the 1986 and 1988 regulations, which the 2019 Rule recodified, remain or become legally effective after the effective date of the NWPR, the agencies intend to use the guidance documents relevant to those regulations, including the 2008 *Rapanos* Guidance, if necessary to inform implementation of those regulations. 85 FR 22272.

feature outside the review area and the TNW is identified as "susceptible to use" solely based on evidence of recreation-based commerce.

(b) A draft approved JD indicates that a water meeting the conditions of paragraph (a)(1) also meets one or more conditions of paragraph (b) of the NWPR.

4. Elevation and Coordination Procedures. To facilitate and expedite the coordination of draft documents associated with the stand-alone TNW determinations and/or draft approved JDs, both agencies intend to transmit all documents electronically. The date of electronic transmission serves as the notification of elevation and initiates timeframes for coordination. For all draft TNW determinations referenced in paragraph (3) of this memorandum, agency coordination is intended to be conducted as follows:

(a) For any draft stand-alone TNW determinations or draft approved JDs which fall under paragraph (3), the Corps district office intends to elevate the determination to both of the following EPA and Corps HQs inboxes: 404JD-HQ@epa.gov and TNW-HQ@usace.army.mil. The district intends to include the draft approved JD form, if any, as well as all documentation supporting the draft TNW determination in this email for review.

(b) Draft stand-alone TNW determinations and/or draft approved JDs elevated to EPA and Corps HQs under this paragraph are intended to be reviewed by relevant EPA and Corps HQ staff as well as Counsel from the Army, Corps, and EPA. The relevant HQ staff and Counsels from Army, Corps, and EPA intend to initiate discussions no later than five (5) calendar days[5] after notification of elevation by the district.

> (i) If a mutual decision is reached whether the aquatic feature in question is or is not a TNW or is excluded under paragraph (b) of the NWPR, a joint HQ-level decision memorandum discussing the rationale for the decision, and signed by the EPA Director of the Office of Wetlands, Oceans and Watersheds and the Corps Director of Civil Works, will be provided to EPA regional and Corps district offices no later than 21 calendar days after notification of elevation; or
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> (ii) If a mutual decision is not reached whether the aquatic feature in question is or is not a TNW or is excluded under paragraph (b) of the NWPR, a decision memorandum prepared by EPA and signed by the Assistant Administrator for the Office of Water explaining EPA's rationale that the feature is or is not a TNW will be provided to the Office of the Assistant Secretary of the Army (Civil Works), Corps HQ, Corps districts, and EPA regional offices no later than 21 calendar days after notification of elevation.

(c) Upon receipt of the decision memorandum under subparagraph (4)(b)(i) or (ii), the Corps district will proceed pursuant to the decision memorandum. Once finalized, the Corps will post the stand-alone TNW determination or approved JD form and memorandum on its website. EPA will also post the decision memorandum on its website.

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[5] 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. For example, if notification is provided on a Thursday, the deadline would be the following Tuesday.

(d) If EPA, in the course of implementing, overseeing, or enforcing CWA programs, makes a newly designated TNW determination solely based on susceptibility to use and recreation-based commerce, a decision memorandum explaining EPA's rationale will be signed by the Assistant Administrator for the Office of Water (if the determination occurs in the course of implementation or oversight), or the Assistant Administrator for the Office of Enforcement and Compliance Assurance (if the determination occurs in the course of enforcement), and provided to Corps HQ and EPA regional offices and Corps districts within 21 days after a final decision.

5. Appeal. A district approved JD made pursuant to the HQ direction provided through either subparagraph 4(b)(i) or (ii) will be considered an appealable action for purposes of the Corps administrative appeals process under 33 CFR 331 et seq. Any appeal can examine and question any matter or finding of fact, but the decision will not question or overturn any legal or policy determination made by EPA or Corps HQs pursuant to this joint guidance memorandum.

6. General. The procedures contained within this memorandum do not create any rights, either in substance or procedure that are enforceable by any party. Nothing in this memorandum is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of any signatory agency and nothing in this memorandum will be construed as indicating a financial commitment by the agencies for the expenditure of funds.

7. Expiration date. This memorandum will remain in effect unless otherwise modified by written agreement of both EPA and Army.

DAVID ROSS

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David P. Ross
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U.S. Environmental Protection Agency

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