APPENDIX E

RGL 07-01

Practices for Documenting Jurisdiction under Section 404 of the Clean Water Act (CWA) and Sections 9 & 10 of the Rivers & Harbors Act (RHA) of 1899

Can be found at:
http://www.usace.army.mil/cw/cecwo/reg/rglsindx.htm



US Army Corps of Engineers®

REGULATORY GUIDANCE LETTER

No. 07-01 **Date: 05 June 2007**

SUBJECT: Practices for Documenting Jurisdiction under Sections 9 & 10 of the Rivers & Harbors Act (RHA) of 1899 and Section 404 of the Clean Water Act (CWA)

I. Purpose and Applicability.

A. Purpose. The purpose of this Regulatory Guidance Letter ("RGL" or "guidance") is to provide a consistent national approach for making, documenting, and approving jurisdictional determinations (JDs) by the U.S. Army Corps of Engineers (Corps) and making that information available to the public.

B. Applicability. This guidance applies to all JD requests received by a district for waters, including wetlands, subject to Sections 9 & 10 of the RHA of 1899 and Section 404 of the CWA, except as follows:

- When the JD is made by another agency for State Programmatic General Permits and/or Regional General Permits.
- When the proponent is using a "Non-Reporting" General Permit (e.g., a non-reporting nationwide permit (NWP)) to complete the proposed work.
- When headquarters (HQ) provides a district with a categorical waiver for a General Permit class.
- When the JD involves practices addressing alleged violations and/or enforcement actions.

II. CWA Jurisdiction Supporting Documents.

- Army Corps of Engineers Standard Operating Procedures For The Regulatory Program (October 1999)
- 33 CFR 328: Definition of Waters of the United States
- 33 CFR 329: Definition of Navigable Waters of the United States
- 33 CFR 330: Nationwide Permit Program
- 33 CFR 331: Administrative Appeals Process
- Government Accountability Office (GAO, February 2004) "WATERS AND WETLANDS: Corps of Engineers Needs To Evaluate Its District Office Practices in Determining Jurisdiction"

- Government Accountability Office (GAO, September 2005) "WATERS AND WETLANDS: Corps of Engineers Needs To Better Support Its Decisions for Not Asserting Jurisdiction"
- RGL 05-02. Expiration of Geographic Jurisdictional Determinations of Waters of the United States
- RGL 05-05. Subject: Ordinary High Water Mark (OHWM) Identification
- RGL 06-01. Subject: Determining the Timeliness of Requests for Appeals (RFA)
- U.S. Supreme Court Opinions for the consolidated cases *Rapanos v. United States* and *Carabell v. United States* (hereinafter "*Rapanos*")
- Memorandum Re: CWA Jurisdiction Following U.S. Supreme Court Discussion in *Rapanos v. United States*
- Memorandum for the Field: Coordination on JDs under CWA Section 404 in light of *SWANCC* and *Rapanos* Supreme Court decisions
- Appendix A of Advanced Notice of Proposed Rulemaking on the CWA Regulatory Definition of "Waters of the United States" (2003)
- JD Form Instructional Guidebook

III. Background.

In 2003 and 2004, the GAO published reports recommending that the Corps improve the documentation for asserting or declining jurisdiction, and that this information be made readily available to the public. Additionally and as a result of the 2006 Supreme Court decision in *Rapanos,* the Corps believes that it is increasingly important to more thoroughly document many of its JDs.

Concurrently, HQ discovered that some districts were preparing approved JDs for all JD requests while other districts were preparing approved JDs only for requests associated with standard permits. HQ also learned that many districts were prioritizing JDs, with those JDs that were associated with permit applications receiving highest priority; those JD requests would be acted on first by the district. Second, districts would act on JD requests that were prepared by consultants and not associated with a permit action. Finally, the remaining JD requests that lacked consultant-prepared JDs were accomplished last and, as a result, some districts were not taking any action on the latter requests due to heavy workloads. Furthermore, HQ learned that some districts were requiring field visits to support all JD requests. HQ discovered that practices for using preliminary and approved JDs were highly variable and inconsistent across the nation.

The guidance below has been developed to provide clarification for processing and documenting JDs.

IV. Guidance.

The Department of the Army, acting through the Corps, has authority to permit work and the placement of structures in navigable waters of the U.S. under Sections 9 and 10 of the RHA of 1899, and to permit the discharge of dredged or fill material in waters of the U.S. under Section 404 of the CWA.

Where the Corps has established jurisdiction over a particular water body, the lateral limits of jurisdiction for that water body are determined pursuant to, e.g., 33 CFR 328.4, 329.11, 329.12, and 329.13. Among the indicators of the lateral limits of jurisdiction set forth in those regulations are: the shoreward limit of adjacent wetlands, or, where there are no adjacent wetlands, the presence of an ordinary high water mark (OHWM), high tide line, or mean high water mark.

A. RHA Jurisdiction

In the Corps RHA regulations (33 CFR Part 329.4), the term "navigable waters of the U.S." is defined to include all those waters that are subject to the ebb and flow of the tide, and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

B. CWA Jurisdiction

In regard to the CWA, federal jurisdiction over various classes of water bodies is described in Corps regulations, as supplemented by informal guidance, such as the Corps/EPA Memorandum Regarding The CWA Jurisdiction Following U.S. Supreme Court Decision in *Rapanos v. United States*. Among the classes of water bodies subject to Federal CWA jurisdiction are: traditional navigable waters; wetlands adjacent to traditional navigable waters; non-navigable tributaries of traditional navigable waters that are relatively permanent (i.e., tributaries that typically flow year-round or have continuous flow at least seasonally); and wetlands that directly abut such relatively permanent tributaries. Furthermore, Federal CWA jurisdiction also covers the following classes of waters when a fact-specific analysis determines that those waters have a significant nexus with a traditional navigable water: non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally; wetlands adjacent to such tributaries; and wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary. A significant nexus exists if the tributary, together with its adjacent wetlands, has more than an insubstantial or speculative effect on the chemical, physical, and/or biological integrity of a downstream traditional navigable water. Principal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water, plus the functions

performed by the tributary and all of its adjacent wetlands.[1] Note: field staff must seek formal project-specific HQ approval prior to asserting or declining jurisdiction over any isolated water body based solely on 33 CFR 328.3(a)(2) or (a)(3).

C. JD Requests

When a landowner or other "affected party" (in the sense that term is used at 33 CFR 331.2) requests that the Corps provide a JD, then, to the maximum extent practicable consistent with district completion of other regulatory program responsibilities, the Corps should complete that JD in a timely manner. The Corps should strive to provide such a timely JD whether the JD request accompanies a permit application or is made independent of any permit application. If the request for the JD asks for a response by letter, then, as a general rule, the Corps should respond in the form of a letter that provides an approved JD.

Every District Engineer (DE) has authority to set reasonable priorities for a district's total regulatory workload to balance the various facets of that workload against the district's available regulatory resources. Nevertheless, the following policies should guide every Corps DE as he or she sets priorities for addressing requests for JDs.

- No class of JD requests should be considered of such low priority that the district will not provide an approved JD in response to that request at the earliest practicable time.
- Some requests for JDs that are not accompanying (or supporting) a permit application are deserving of relatively high priority treatment. For example, a landowner may need a JD to allow or facilitate the sale of his or her land. Consequently, as a general rule, no DE should relegate every request for a JD that is not supporting a permit application to a priority level below that of every JD request that is supporting a permit application.
- While as a general rule it may be reasonable to give higher priority to JD requests for which a delineation for waters of the U.S., including wetlands, has been prepared by a qualified consultant (so that every requester of a JD will have an incentive to employ such a qualified consultant if that is feasible and appropriate), the Corps must also respond in a timely manner to requests that the Corps itself perform the delineation for waters of the U.S., including wetlands. Not every person needing a Corps JD can afford to or would choose to employ a consultant to facilitate the process by providing a delineation for waters of the U.S., including wetlands.

Division and districts are encouraged to work with HQ in describing and publishing what information the requester of a JD can provide to expedite the decision-making process.

---

[1] Upland swales and erosional features (e.g., gullies, small washes characterized by low volume, infrequent, and short duration flow) are generally not waters of the U.S. because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the U.S. because they are not tributaries and/or they do not have a significant nexus to downstream traditional navigable waters.

D. Field (Site) Visits

Districts shall retain the flexibility in deciding the degree of investigation and resource allocation needed when making a field or a desk JD. Note: an onsite visit is not required for every JD.

DEs must weigh the perceived desire of some staff to conduct a site visit on every JD with budget realities that generally preclude this practice. Limited budgets require districts to carefully evaluate which projects will involve site visits to confirm jurisdictional status. Factors used by the district to determine if a site visit is required will generally include budget practicalities, the extent and accuracy of the information provided by the applicant or by his or her consultant, maps and photographs that depict site conditions, the need for additional information to complete the determination, and the size and regional importance of the aquatic resource under investigation.

JDs supported by adequate information, including data sheets, delineation maps, and aerial photographs, may not require a site visit and should not be delayed pending an onsite investigation, unless that is necessary. Thus, division and districts are encouraged to work with HQ in providing guidance on documentation requirements for field visits. That is, guidance should identify what information can be provided to the district to complete the JD without a site visit. Furthermore, this guidance should be posted on the district's regulatory web page.

E. Documentation Practices and Requirements

In accordance with the regulation at 33 CFR Part 331, the district currently has the flexibility to determine when a "preliminary" or an "approved" JD shall be used to document jurisdiction. Due to inconsistent practices noted across the U.S., the following guidance provides clarity for when a preliminary or an approved JD should be used to support a request confirming the status of jurisdiction on a property.

1. Preliminary JDs

Preliminary JDs are defined in the regulation at 33 CFR Part 331.2. "Preliminary JDs are written indications that there may be waters of the U.S. on a parcel or indications of the approximate locations(s) of waters of the U.S. on a parcel. Preliminary JDs are advisory in nature and may not be appealed."

Preliminary JDs may be used when:

- The JD is made by another agency for State Programmatic General Permits and/or Regional General Permits. (We will work with these agencies to determine specific requirements for documenting jurisdiction for their purposes as well as for our purposes.)
- The district has requested and received an HQ categorical waiver for a General Permit class. For example, the district may request that HQ waive an entire NWP category. If HQ approves the request for a category for a district, that district then may perform preliminary JDs to support the determination and decision-making process.

- The JD is made to address alleged violations and/or enforcement actions.

For documentation purposes, the HQ will provide the district with a JD Form, which should be used to support and document the determination for a preliminary JD to the maximum extent practicable. The district should complete the form and mark it as a "Preliminary JD." Although the Preliminary JD and supporting documentation must be included in the administrative file, these documents shall not be published on the district's regulatory web page.

As a general rule, a preliminary JD should not be used to respond to a request for an approved JD. A request received by a district for an approved JD should be processed and completed as an approved JD, to provide a consistent national approach for making and documenting JDs, and to ensure that information is available to the public.

2. Approved JDs

Approved JDs are defined in the regulation at 33 CFR Part 331.2. "Approved JD means a Corps document stating the presence or absence of waters of the U.S. on a parcel or a written statement and map identifying the limits of waters of the U.S. on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document."

The basis for the JD is a summary of the physical indicators and an explanation of how those indicators establish Corps jurisdiction. (The HQ JD Form has been developed to ensure that the basis (and rationale) for the JD is presented to satisfy this condition. Additional guidance on completing the form can be found in the JD Form Instructional Guidebook.) The required "basis of JD" for an approved JD may be satisfied by proper completion of the HQ approved JD Form. The administrative record for the approved JD shall include the completed JD Form and should include any supporting materials required to document the "basis of JD." Note: the JD Form shall be used to document all approved JDs. In completing the form, the regulatory project manager should recognize that:

- JDs require documentation that identifies if there is presence and/or absence of jurisdictional areas and delineates the boundaries of the water body. Maps, aerial photography, soil surveys, watershed studies, scientific literature, previous JDs for the review area or similarly situated areas in the region, and local development plans are examples of background information that will assist staff in delineating waters of the U.S. and completing accurate JDs. This information must be referenced in the file, with any conclusions formulated from this information stated in the JD form.
- JDs (and the supporting delineation for waters of the U.S.) for more complex sites may require additional documentation and effort by the project manager. For example, determining whether jurisdiction exists over a non-navigable, not-relatively permanent tributary and its adjacent wetlands will require documentation that evaluates whether there is a significant nexus between the tributary/wetland system in question and the traditional navigable water. Identification and evaluation of the functions relevant to the significant nexus determination will be more complete when incorporating literature citations or references from studies pertinent to the parameters being reviewed.

- All pertinent information reviewed for a given JD should be adequately reflected in the file. JDs supported by adequate information including, data sheets, delineation maps, and aerial photographs, may not require a site visit and should not be delayed pending an onsite investigation, unless that is necessary.

The district may not finalize the Approved JD until the appropriate coordination requirements have been met. Additional interagency coordination is required when the district is making a JD requiring a significant nexus evaluation or a non-navigable isolated water determination (see Section F below). Interagency coordination following the procedures in Section F below is not required for JDs involving traditional navigable waters, including their adjacent wetlands, and for relatively permanent non-navigable tributaries of traditional navigable waters, including wetlands that directly abut such relatively permanent tributaries. Corps standard practices now suggest that a draft of the completed JD form should be reviewed by the appropriate district chain of command prior to finalization of the JD. The Regulatory Division/ Branch Chief will determine the level of review that is appropriate for each category of JD.

After the Approved JD is finalized, a copy of the completed (approved) form and supporting documentation shall be placed in the administrative record. Furthermore:

- The completed district-approved JD form shall be converted to a PDF (or other appropriate web posting format) and posted on the local district regulatory program web page for a minimum period of one quarter from the date of posting. Forms shall be posted within 30-days of completion.
- Except for circumstances such as those described in Section I.B, the Corps will provide an approved JD in response to every request for a JD from an "affected party." If the person requesting a JD asks for a response by letter, then, as a general rule, the Corps should respond in the form of a letter that provides an approved JD. The letter must include a statement that the JD is valid for a period of five years from the date of the letter, unless new information warrants revision of the JD before the expiration date, or unless a DE has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.
- When the JD has been completed to support a General Permit authorization or a Letter of Permission (LOP), the following language shall be included in the verification letter or LOP for which the approved JD has been made:

  Attached to this verification that your project is authorized by (NWP__/RGP _/LOP _) is an approved jurisdictional determination. If you are not in agreement with that approved JD, you can make an administrative appeal under 33 CFR 331.

  For an approved JD, the standard permit or general permit correspondence should also include the Notice of Appeal Process fact sheet, the Request for Appeal form, and the basis of the JD. (See 33 CFR 331.4.)

F. Coordination Requirements for Approved JDs

In accordance with the procedures outlined in the EPA/Corps Memorandum for Coordination on JDs under CWA Section 404 in Light of the *SWANCC* and *Rapanos* Supreme Court Decisions ("EPA/Corps Memo"), the districts, prior to finalizing the JD, will complete additional coordination, as presented below, for any draft JD requiring a significant nexus evaluation or a non-navigable isolated water determination prior to finalizing the determination. While the review is being undertaken, the district is encouraged to continue work on other aspects of the application to further minimize potential time delays in processing the application request.

To facilitate and expedite the coordination of documents, both agencies will, to the maximum extent feasible, transmit all documents electronically. For purposes of this guidance, when documents are transmitted electronically, the date of receipt shall be the date of transmission. Should any deadline fall on a weekend or holiday, the deadline will be the next business day. Note: all correspondence records shall be kept in the administrative file.

After the processes below have been completed by the district, the district may finalize the JD. A copy of the completed (approved) JD form and all other supporting documentation shall be placed in the administrative record.

When a HQ decision is made pursuant to the subsections below and the JD is finalized by the district, the JD will be considered an appealable action for purposes of the Corps administrative appeals process under 33 C.F.R. Part 331. However, no decision on appeal will question or overturn any legal or policy determination made by EPA or Corps HQs pursuant to the "EPA/Corps Memo." The appeal can examine and question any matter or finding of fact. If the Review Officer determines that the HQs decision was based on a mistake of fact or a lack of necessary facts, that determination can be presented to EPA and/or Corps HQs suggesting reconsideration of the decision.

1. Coordination Requirements for JDs Supporting NWPs with Pre-Construction Notification (PCN) Requirements

In accordance with General Condition #27 of the NWPs, where the applicant submitted a NWP PCN to the Corps and the prospective permittee has not received written notice from the DE or Division Engineer within forty-five (45) calendar days from the Corps' receipt of the NWP PCN, the applicant may proceed with work in waters of the U.S., providing all of the General Conditions are met (33 CFR 330.4(a)). However, the 45 day period does not start until a complete PCN has been received. A complete PCN includes a delineation of waters of the U.S., including wetlands, for the project site. The delineation may be provided by the permit applicant, or it may be completed by the Corps. The delineation must identify the extent of jurisdiction under the RHA and CWA, as appropriate. Furthermore, the DE must determine if the PCN is complete within 30 calendar days of receipt and, as a general rule, will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the DE will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the DE. For example, if

the PCN does not describe the direct and indirect adverse environmental effects the project would cause, the PCN may be determined incomplete until such information is received by the DE. If adequate information is not provided to the district to determine if the delineation of jurisdictional waters of the U.S. is accurate, the PCN will be deemed incomplete, and the District will so notify the applicant. If the Corps cannot complete its review of the PCN and the proposed project within the 45-day time period specified in the NWPs, then the Corps should suspend or revoke the NWP authorization pursuant to 33 CFR 330.5(d)(2), to ensure that the proposed activity will not be authorized to proceed by the expiration of the 45-day period. Based on the information the prospective permittee provides to a district, that district will provide the appropriate EPA Regional Office with any draft JD requiring a significant nexus determination, in accordance with the procedures in the "EPA/Corps Memo" and as outlined below. Furthermore, districts also will provide Corps HQ with records for every draft JD involving non-navigable, isolated waters, and the records will be reviewed at the HQ level by EPA and the Corps pursuant to the procedures in the "EPA/Corps Memo" and as outlined below. This process is presented also in Figure 1.

For JD requests associated with PCNs for NWPs, the coordination process is as follows:

(a) JDs Requiring a Significant Nexus Evaluation

(1) The district office immediately will forward the JD request to the appropriate EPA Regional Office, with a recommendation on whether the district intends to assert or decline jurisdiction. The recommendation will include an electronic copy of the JD form and supporting documentation, if any.

(2) The EPA will have 15 calendar days from receipt of the JD from the district to decide whether or not to elevate the JD for a HQ-level for review. If EPA elevates the JD, they shall notify the Corps district office immediately. When the district is notified of the elevation, the district should forward a copy of the JD and supporting documentation to HQ. If the EPA does not notify the district within 15 calendar days from receipt of the JD that they will be elevating the JD, the district may finalize the JD and proceed with the NWP verification process.

(3) After the EPA notifies the district that the JD is going to be elevated, EPA (and Corps HQ) will have an additional 10 calendar days to request supplemental information on the JD. Note: requested information must relate to that information necessary to make the PCN a complete application.

(i) If no additional information is requested from the Corps on the JD, the Corps and EPA will have up to 40 calendar days to resolve the issue from the time the JD was first forwarded to EPA. If HQ does not respond to the district on the JD within 40 calendar days from the time the JD was first forwarded to HQ, the district may finalize the JD and proceed with the NWP verification process. However, if HQ provides recommendations on the JD, the district will finalize the JD in accordance with the recommendations and proceed with the NWP verification process. **OR**

(ii) If EPA requests additional information from the district on the JD:

(a) The district will provide the information requested to EPA, if available. If the district is able to provide the information to EPA without requesting additional information from the applicant, the information shall be forwarded to the EPA immediately. In this situation, the Corps and EPA will have up to 40 calendar days to resolve the issue from the time the JD was first forwarded to EPA. If HQ does not respond to the district on the JD within 40 calendar days from the time the JD was first forwarded to HQ, the district may finalize the JD and proceed with the NWP verification process. However, if HQ provides recommendations on the JD, the district will finalize the JD in accordance with the recommendations and proceed with the NWP verification process.
OR

(b) If the information is not available and the district is required to request additional information from the applicant, the information request will be forwarded to the applicant from the district along with any other information needed to process the NWP. After the information is received and determined adequate by the Corps, the district office immediately will forward the information to EPA. The EPA and the Corps will have a total of 40 calendar days to resolve the issue from the time the JD was first forwarded to EPA. If HQ does not respond to the district on the JD within 40 calendar days from the time the JD was first forwarded to HQ, the district may finalize the JD and proceed with the NWP verification process. However, if HQ provides recommendations on the JD, the district will finalize the JD in accordance with the recommendations and proceed with the NWP verification process. Note: the additional coordination time that was used between the Corps district and the applicant to fill the information request does not count against the 40 day time period.

(4) If the Corps is unable to make a decision on the NWP within 45 days of receipt of the completed PCN , the DE may notify the permittee in writing that the NWP authorization has been suspended in accordance with the procedure set forth in 33 CFR 330.5.(d)(2). If the DE does not suspend the NWP authorization, the applicant may proceed with the proposed project, so long as all terms and conditions of the permit authorization are satisfied (including the general conditions as presented in the regulation at 33 CFR 330.4).

(b) JDs Involving Non-Navigable Isolated Waters, Including Isolated Wetlands

(1) The district office will immediately forward the JD request to Corps HQ for review and then Corps HQ will notify EPA HQ of the request. Within 15 calendar days of receipt of the request, the district shall provide a recommendation on whether to assert or decline jurisdiction to Corps and EPA HQ. The recommendation will include a copy of the JD form and supporting documentation, if any.

(2) The Corps and EPA HQs will review the information provided by the district and will have an additional 10 calendar days to request supplemental information on the JD.

(i) The district will provide the information requested to HQ, if available. If the district is able to provide the information to HQ without requesting additional information from the applicant, the information shall be forwarded to HQ immediately. In this situation, the Corps and EPA will have up to 40 calendar days to resolve the issue from the time the JD was first forwarded to EPA. If HQ does not respond to the district on the JD within 40 calendar days from the time the JD was first forwarded to HQ, the district may finalize the JD and proceed with the NWP verification process. However, if HQ provides recommendations on the JD, the district will finalize the JD in accordance with the recommendations and proceed with the NWP verification process. **OR**

(ii) If the information is not available and the district is required to request additional information from the applicant, the information request will be forwarded to the applicant from the district along with any other information needed to process the NWP authorization. Note: requested information must relate to that information necessary to make the PCN complete. After the information is received and determined adequate by the district, the district immediately will forward the information to HQ. HQ will have a total of 40 calendar days to resolve the issue from the time the JD was first forwarded to HQ. If HQ does not respond to the district on the JD within 40 calendar days from the time the JD was first forwarded to HQ, the district may finalize the JD and proceed with the NWP verification process. However, if HQ provides recommendations on the JD, the district will finalize the JD in accordance with the recommendations and proceed with the NWP verification process. Note: the additional coordination time that was used between the Corps district and the applicant to fill the information request does not count against the 40 day time period. However, if the expiration of the 45-day time period specified in the NWPs would preclude proper consideration of the CWA jurisdictional issues, the DE should suspend the NWP authorization pursuant to 33 CFR 330.5(d)(2) until those issues have been resolved.

(3) If HQ does not request additional information within 35 calendar days from the time the JD was first forwarded to HQ, the district may finalize the JD and proceed with the NWP verification process. However, if HQ provides recommendations to the district on the JD, the district will finalize the JD in accordance with the recommendations and proceed with the NWP verification process.

2. Coordination Requirements for Other Approved JDs (e.g., JDs Associated with Standard Individual Permit Applications)

The districts will provide EPA Regional Offices with any draft JD requiring a significant nexus determination, in accordance with the procedures in the "Corps/EPA Memo" and as outlined below. Furthermore, the districts also will provide Corps HQ with the record for every draft JD involving non-navigable, isolated waters, and the records will be reviewed at the HQ level by EPA and the Corps pursuant to the procedures in the "Corps/EPA Memo" and as outlined below. This process is presented also in Figure 2.

(a) JDs Requiring a Significant Nexus Evaluation

The Corps district will conduct the JD, document the basis and rationale for asserting or declining to assert jurisdiction under the CWA, and provide an electronic copy of the draft JD form to the appropriate EPA regional office. (The EPA regional office may review the JD form to determine if it will comment on the Corps' determination. To help facilitate an efficient review of the draft JD and to expedite the review process, the EPA may ask the Corps to provide a copy of the documentation provided by the applicant and/or responsible party, where the JD is considered complex.) The EPA regional office will review the JD forms pursuant to the procedures in paragraphs (1) and (2) below. Draft JDs elevated to HQ under paragraph (2) will be reviewed by EPA and Corps HQs pursuant to the procedures outlined in paragraph (3) below.

(1) The agencies will coordinate and attempt to resolve any JD issues at the local level within 15 calendar days after EPA's receipt of the form. EPA may notify the Corps at any time within the 15 day period that it does not intend to provide comments on a particular draft JD. Within these 15 calendar days, the EPA regional office may elect to elevate the review to their Regional Administrator (RA) and so notify the Corps district in writing. Such written notification shall briefly explain the rationale for EPA's position. If no notification is provided by EPA within the 15 calendar days, the Corps district may proceed and finalize the JD.

(2) When the JD is elevated to the RA, the RA and the DE shall have 10 calendar days from the date of EPA's notification to the Corps under paragraph (1) above to resolve the issue. If the issue is not resolved between the RA and DE, the RA shall, within the 10 calendar days, elevate the JD to EPA HQ and concurrently provide written notification to the DE that the JD is being elevated. Upon receipt of notification from EPA that the matter has been elevated, the DE shall

immediately provide the draft JD record to Corps HQ. If no notification of elevation is provided by EPA within the 10 calendar days, or a resolution is otherwise reached, the Corps district may proceed and finalize the JD.

(3) The Corps and EPA HQs will review and provide guidance on elevated draft JDs. The Corps and EPA shall initiate discussions no later than 5 calendar days after notification of elevation under paragraph (1) above to determine if an interagency agreement exists on the elevated JD.

(i) If a mutual decision is reached on the assertion or declination of jurisdiction, a joint HQs level decision memo discussing the rationale of the decision will be provided to EPA and Corps field offices no later than 14 calendar days after HQ interagency discussions were initiated; **OR**

(ii) If a mutual decision is not reached at the EPA and Corps HQs, a joint HQs level decision memo prepared by EPA explaining EPA's rationale in support of an approved JD will be provided to EPA and Corps field offices no later than 21 calendar days after interagency discussions were initiated. Copies of the joint memo will be provided to all Corps districts and to EPA Regional offices.

(iii) Upon receipt of the joint HQs level decision memo, the Corps district may issue an Approved JD pursuant to the memo and post the JD form on its website.

(b) JDs Involving Non-Navigable Isolated Waters, Including Isolated Wetlands

The process identified in subsection (a) above will be completed for each isolated water determination.

In addition, Corps districts will provide the same information distributed to the EPA regional office to Corps HQ. EPA regional office will forward the information immediately to EPA HQ. (Corps and EPA HQs should coordinate immediately to ensure each office has the same materials to be reviewed for the determination.) Either Corps HQ or EPA HQ may choose to initiate a joint HQ review of a particular JD involving a non-navigable, isolated water. Such joint HQ review must be initiated within 21 calendar days of when the district provided copies of the draft JD to the EPA Region and Corps HQ. The joint HQ review will proceed as follows:

The Corps and EPA shall initiate discussions no later than 5 calendar days after receipt of the notification of elevation to determine if an interagency agreement exists on the elevated JD.

(1) If a mutual decision is reached on the assertion or declination of jurisdiction, a joint HQs level decision memo discussing the rationale of the decision will be provided to EPA and Corps field offices no later than 14 calendar days after HQ interagency discussions were initiated; **OR**

(2) If a mutual decision is not reached at the EPA and Corps HQs, a joint HQs level decision memo prepared by EPA explaining EPA's rationale in support of an approved JD will be provided to EPA and Corps field offices no later than 21 calendar days after interagency discussions were initiated. Copies of the joint memo will be provided to all Corps districts and to EPA Regional offices.

(3) Upon receipt of the joint HQs level decision memo, the Corps district may issue an Approved JD pursuant to the memo and post the JD form on its website.

If neither the Corps HQ or EPA HQ chooses to initiate a joint review within 21 calendar days, and the EPA regional office does not elevate within the timeframes identified in subsection (a) above, the district may proceed and finalize the JD.

3. Coordination Requirements

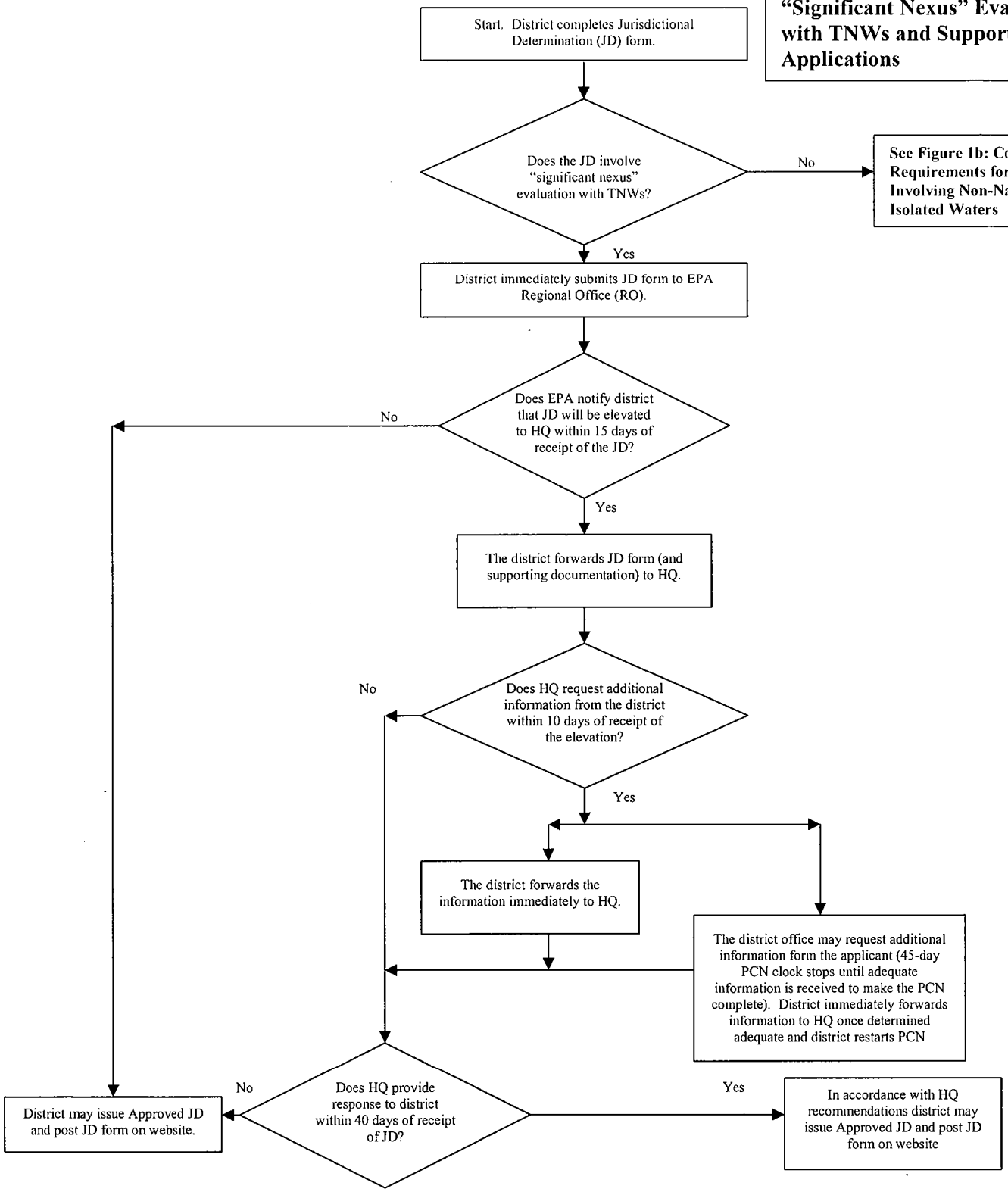
The coordination requirements presented above will remain in effect indefinitely for isolated, non-navigable waters potentially covered only under 33 C.F.R. 328.3(a)(2) or (3) or until this guidance is revoked or modified in writing by agreement of both the Army and EPA.

The requirements for all other waters requiring a significant nexus evaluation shall remain in effect for six months from the date of the last signature on the "EPA/Corps Memo" unless otherwise extended or modified by written agreement of both agencies. The Effective Date of the "EPA/Corps Memo" is June 5th 2007.

V. **Duration.** This guidance remains in effect unless revised or rescinded.

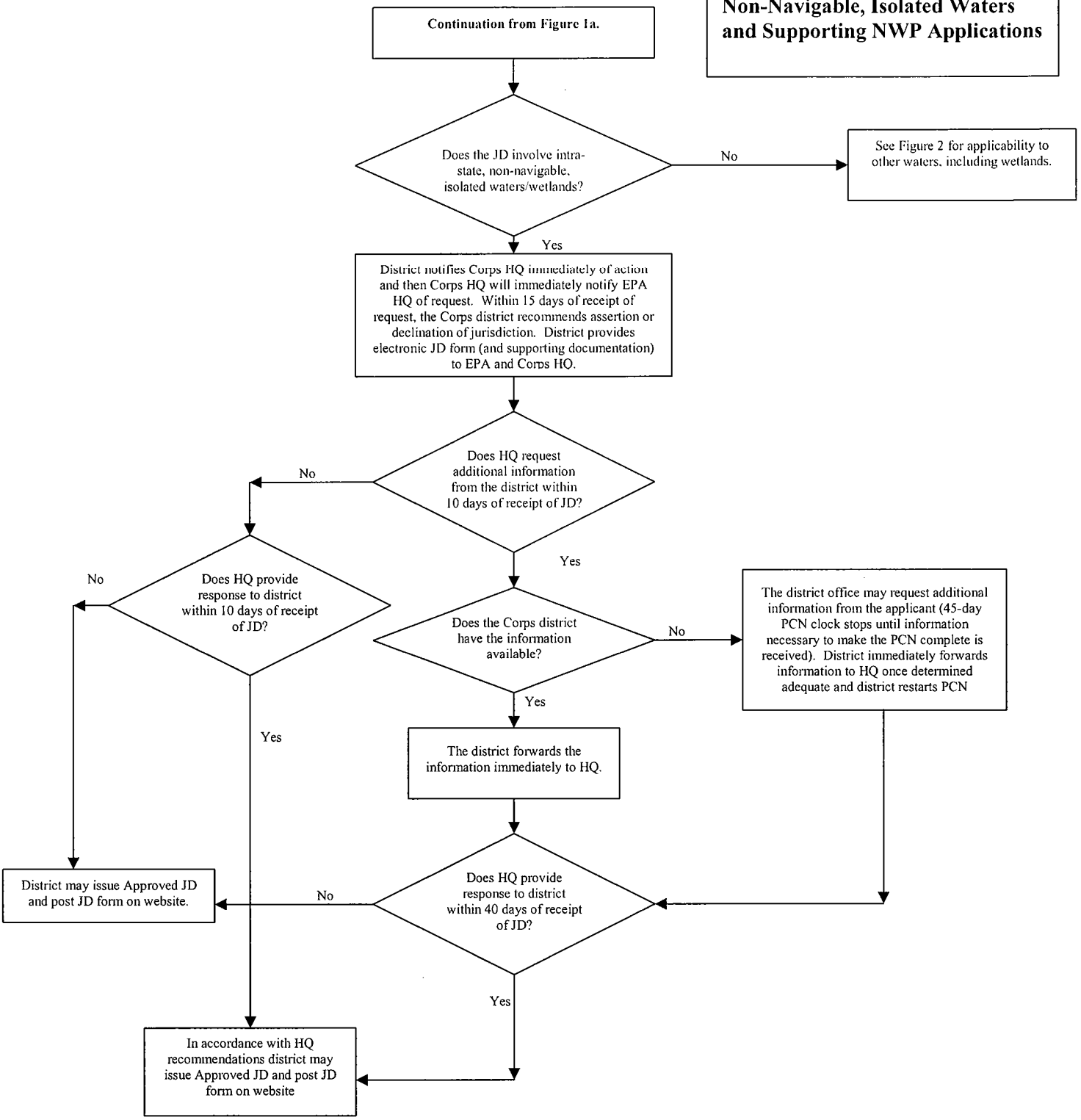
DON T. RILEY
Major General, US Army
Director of Civil Works

Figure 1a: Coordination Requirements for JDs Involving "Significant Nexus" Evaluation with TNWs and Supporting NWP Applications



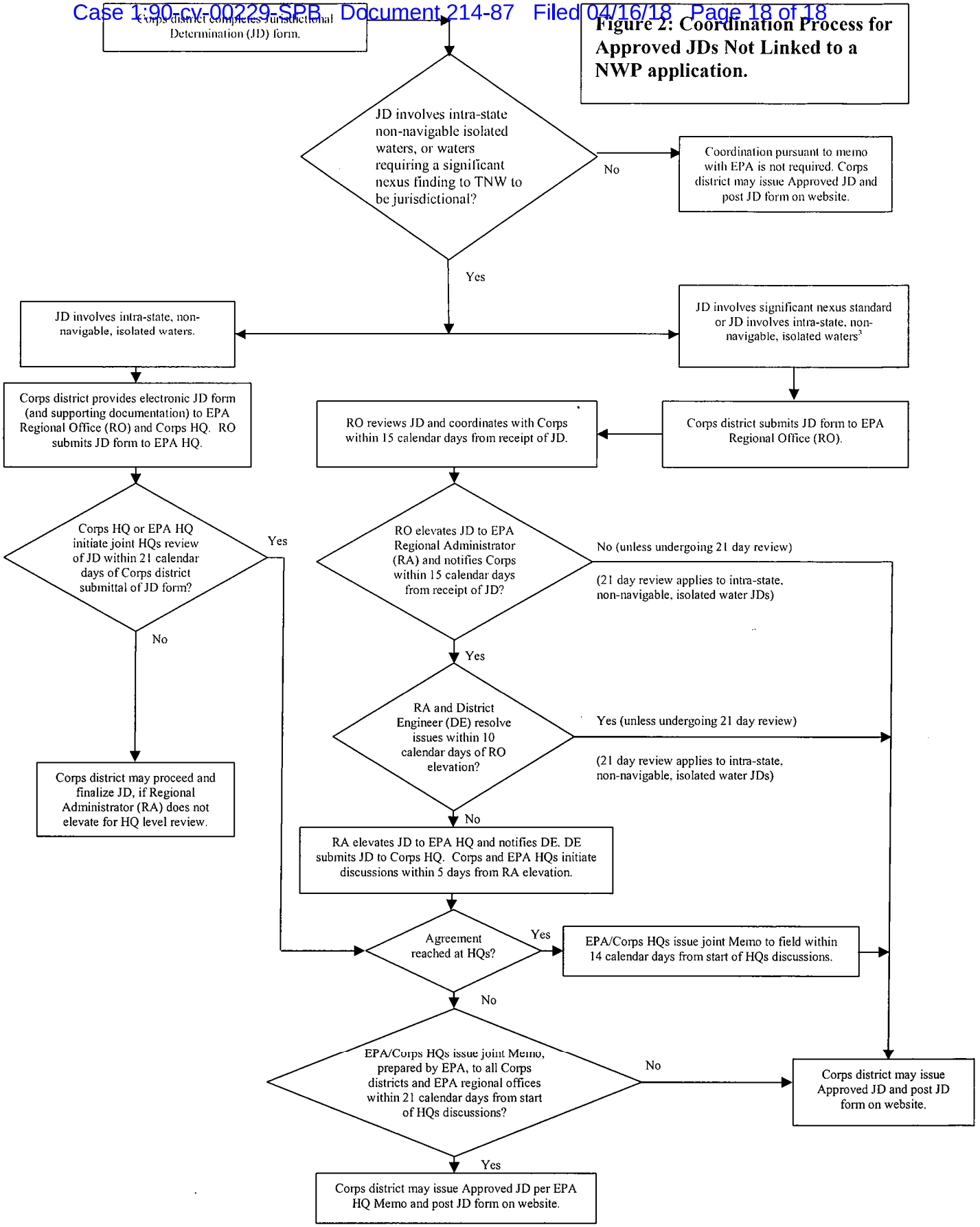
Notes: 1.An HQ decision pursuant to this process will be considered an appealable action for purposes of the Corps administrative appeals process under 33 C.F.R. §331 et seq. However, any decision on appeal will not question or overturn any legal or policy determination made by EPA or Corps headquarters pursuant to this joint guidance memorandum, but can examine and question any matter or finding of fact. If the Review Officer determines that the headquarters decision was based on a mistake of fact or a lack of necessary facts, that determination can be presented to EPA and/or Corps headquarters suggesting reconsideration of the decision.

Figure 1b: Coordination Requirements for JDs Involving Non-Navigable, Isolated Waters and Supporting NWP Applications



Notes: 1.An HQ decision pursuant to this process will be considered an appealable action for purposes of the Corps administrative appeals process under 33 C.F.R. §331 et seq. However, any decision on appeal will not question or overturn any legal or policy determination made by EPA or Corps headquarters pursuant to this joint guidance memorandum, but can examine and question any matter or finding of fact. If the Review Officer determines that the headquarters decision was based on a mistake of fact or a lack of necessary facts, that determination can be presented to EPA and/or Corps headquarters suggesting reconsideration of the decision.

Figure 2: Coordination Process for Approved JDs Not Linked to a NWP application.



Notes: 1.An HQ decision pursuant to this process will be considered an appealable action for purposes of the Corps administrative appeals process under 33 C.F.R. §331 et seq. However, any decision on appeal will not question or overturn any legal or policy determination made by EPA or Corps headquarters pursuant to this joint guidance memorandum, but can examine and question any matter or finding of fact. If the Review Officer determines that the headquarters decision was based on a mistake of fact or a lack of necessary facts, that determination can be presented to EPA and/or Corps headquarters suggesting reconsideration of the decision.