

## **APPENDIX C**

**Memorandum for the Field: Coordination on JDs under CWA  
Section 404 in light of *SWANCC* and *Rapanos* Supreme Court  
decisions**



## MEMORANDUM FOR DIRECTOR OF CIVIL WORKS AND US EPA REGIONAL ADMINISTRATORS

**Subject: U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) Coordination on Jurisdictional Determinations (JDs) under Clean Water Act (CWA) Section 404 in Light of the *SWANCC* and *Rapanos* Supreme Court Decisions**

1. Purpose. The purposes of this memorandum are to promote and improve interagency cooperation, facilitate increased communication, and establish an efficient and effective process for determining Clean Water Act Section 404 jurisdiction in light of the Supreme Court decisions in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (*SWANCC*), and the consolidated cases Rapanos v. United States, and Carabell v. United States, 126 S. Ct. 2208 (2006) (jointly hereafter Rapanos).

The procedures included in this memorandum replace the coordination procedures contained in the January 2003 EPA/Army guidance implementing the *SWANCC* decision (but leaves the remainder of that guidance unaffected) and articulate new coordination procedures for JDs affected by Rapanos. This memorandum does not nullify or supersede the 1990 Geographic Jurisdiction Memorandum of Agreement (MOA), including its special case provisions.

2. Current Practice. The Corps districts are currently posting all Approved JD Forms for public review on their respective websites. The EPA efficiently reviews these JD forms, as needed, to monitor consistency with regulation and policy.

3. Documentation Requirements. Under this memorandum, case-by-case evaluations are required to determine if there is a "significant nexus" to navigable waters for JDs involving the classes of waters listed in subparagraph 4.a.(2). Documentation for these JDs shall be made using the Approved JD Form developed by Corps headquarters (HQ) in consultation with EPA. The information on the jurisdictional form shall identify the rationale for asserting or not asserting jurisdiction.

#### 4. Coordination Requirements.

a. Interagency Coordination Required. The EPA and the Corps will follow the coordination procedures in paragraph (5) for the following JDs:

(1) Determinations for intra-state, non-navigable, isolated waters potentially covered solely under 33 C.F.R. §328.3(a)(3), where jurisdiction is asserted or not asserted based on interstate commerce factors.

(2) Determinations based on a finding of a “significant nexus” with traditional navigable waters, which are required for the following waters:

- (i) non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally (e.g., typically at least 3 months each year);
- (ii) wetlands that are adjacent to such tributaries; and
- (iii) wetlands that are adjacent to but that do not directly abut a relatively permanent non-navigable tributary.

b. Interagency Coordination Not Required. Interagency coordination following the procedures 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 with a continuous surface connection with such relatively permanent tributaries.

5. Coordination Procedures.<sup>1,2</sup> Effective immediately, for all waters referenced in paragraph 4.(a), agency coordination of JDs will be conducted as follows:

a. 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. 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.

b. Corps districts will provide the appropriate EPA regional office and Corps HQ with an electronic copy of every draft JD form (and supporting documentation) proposing to assert or decline jurisdiction over an intrastate, non-navigable, isolated water. The EPA regional office will in turn be responsible for ensuring that EPA HQ also receives copies of every such JD form in a timely manner. The EPA regional office will review the JD forms pursuant to the procedures in paragraphs 5.c. and 5.d. below. Draft JDs elevated to HQ under paragraph 5.d. will be reviewed by EPA and Corps HQs pursuant to the procedures outlined in paragraph 5.e. below. In addition, either Corps HQ or EPA HQ may choose to initiate a joint HQ review of a particular JD involving an intrastate, 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 pursuant to the procedures in subparagraph e.(2)(i) or e.(2)(ii) as appropriate. 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 under paragraph 5.d., the district may proceed and finalize the JD.

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<sup>1</sup> Should any deadline in this interagency memorandum fall on a weekend or holiday, the deadline will be the next business day.

<sup>2</sup> Coordination procedures are presented in Figures 1 and 2. Where a jurisdictional determination is associated with potential authorization of a project under a Nationwide Permit (NWP), it may be necessary for the Corps and EPA to establish an alternative consultation schedule to accommodate NWP timeframes potentially associated with the particular project.

c. With respect to interagency coordination of other jurisdictional determinations, 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 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.<sup>3</sup> 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.

d. When the JD is elevated to the RA, the RA and the District Engineer (DE) shall have 10 calendar days from the date of EPA's notification to the Corps under paragraph 5.c. 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.

e. The Corps and EPA HQs will review and provide guidance on elevated draft JDs as follows:

(1) The Corps and EPA shall coordinate efficiently and appropriately to reach agreement on the JD.

(2) The Corps and EPA shall initiate discussions no later than 5 calendar days after notification of elevation under paragraph 5.d. 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.

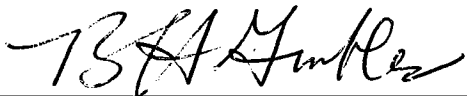
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<sup>3</sup> For the purposes of this guidance, "in writing" or "written notification" may include electronic mail communication.

(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.

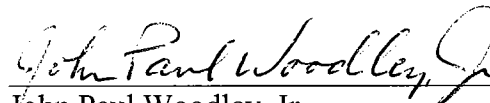
f. A HQs decision made pursuant to either subparagraph e.(2)(i) or (ii) above will be considered an appealable action for purposes of the Corps administrative appeals process under 33 C.F.R. §331 et seq. However, any decision on appeal will not question or overturn any legal or policy determination made by EPA or Corps HQs pursuant to this joint guidance memorandum, but 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.

6. This guidance will remain in effect indefinitely for isolated, intra-state, non-navigable waters potentially covered only under 33 C.F.R. §328.3(a)(3) where jurisdiction is being asserted or not asserted using interstate commerce factors unless and until this guidance is revoked or modified in writing by agreement of both agencies. This guidance for all other waters addressed herein shall remain in effect for six months from the date of the last signature on this memorandum unless otherwise extended or modified by written agreement of both agencies.



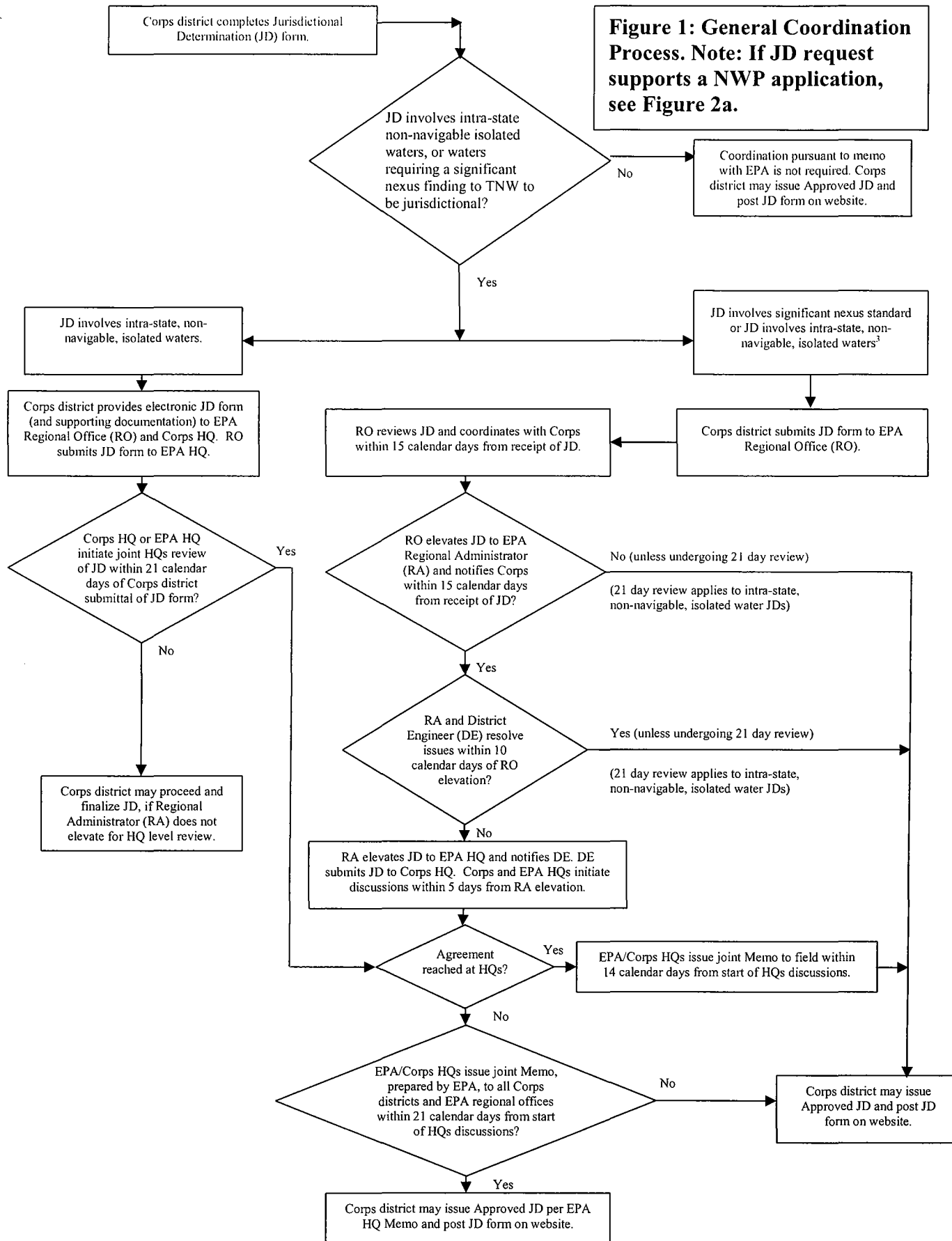
Benjamin H. Grumbles  
Assistant Administrator for Water  
U.S. Environmental Protection Agency

Date: June 5, 2007



John Paul Woodley, Jr.  
Assistant Secretary of the Army  
(Civil Works)

Date: 5 June 2007



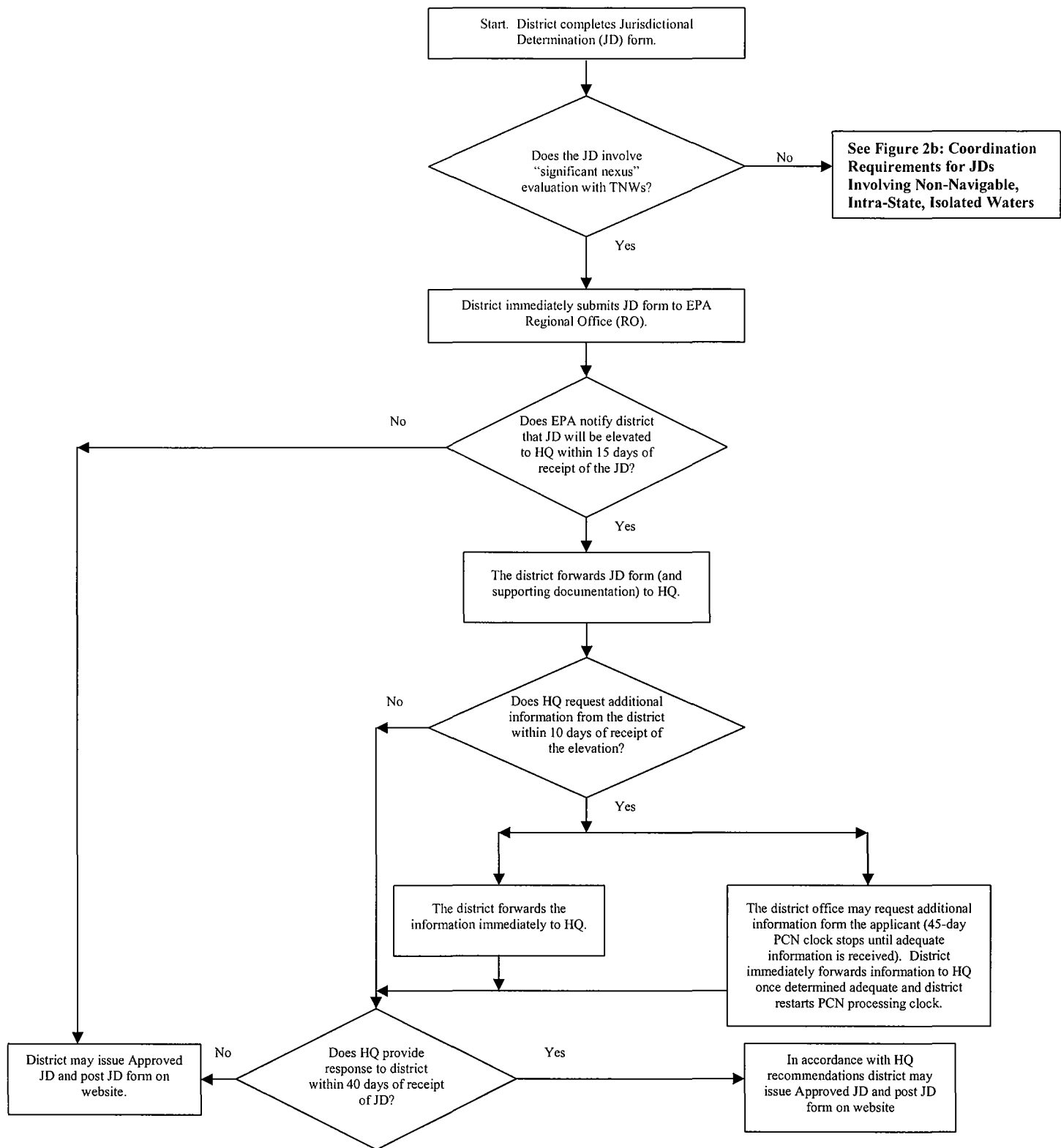
Notes: 1. A headquarters decision pursuant to this process will be considered an appealable action for purposes of the Corps administrative appeals process under 33 C.F.R. §331 et seq. However, any decision on appeal will not question or overturn any legal or policy determination made by EPA or Corps 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.

2. This guidance will remain in effect indefinitely for isolated, intra-state, non-navigable waters potentially covered only under 33 C.F.R. §328.3(a)(3) where jurisdiction is being asserted or not asserted using interstate commerce factors unless and until this guidance is revoked or modified in writing by agreement of both agencies. This guidance for all other waters addressed herein will remain in effect for six months from the date of the last signature on this memorandum unless otherwise extended or modified by written agreement of both agencies.

3. For JDs that involve intra-state, non-navigable waters, the elevation process must proceed along both paths of EPA/Corps referral per the procedures outlined in the joint coordination memo.

4. The above process does not apply for applications (pre-construction notifications) for Nationwide Permits (see Figure 2).

**Figure 2a: Coordination Requirements for JDs Involving “Significant Nexus” Evaluation with TNWs and Supporting NWP Applications**

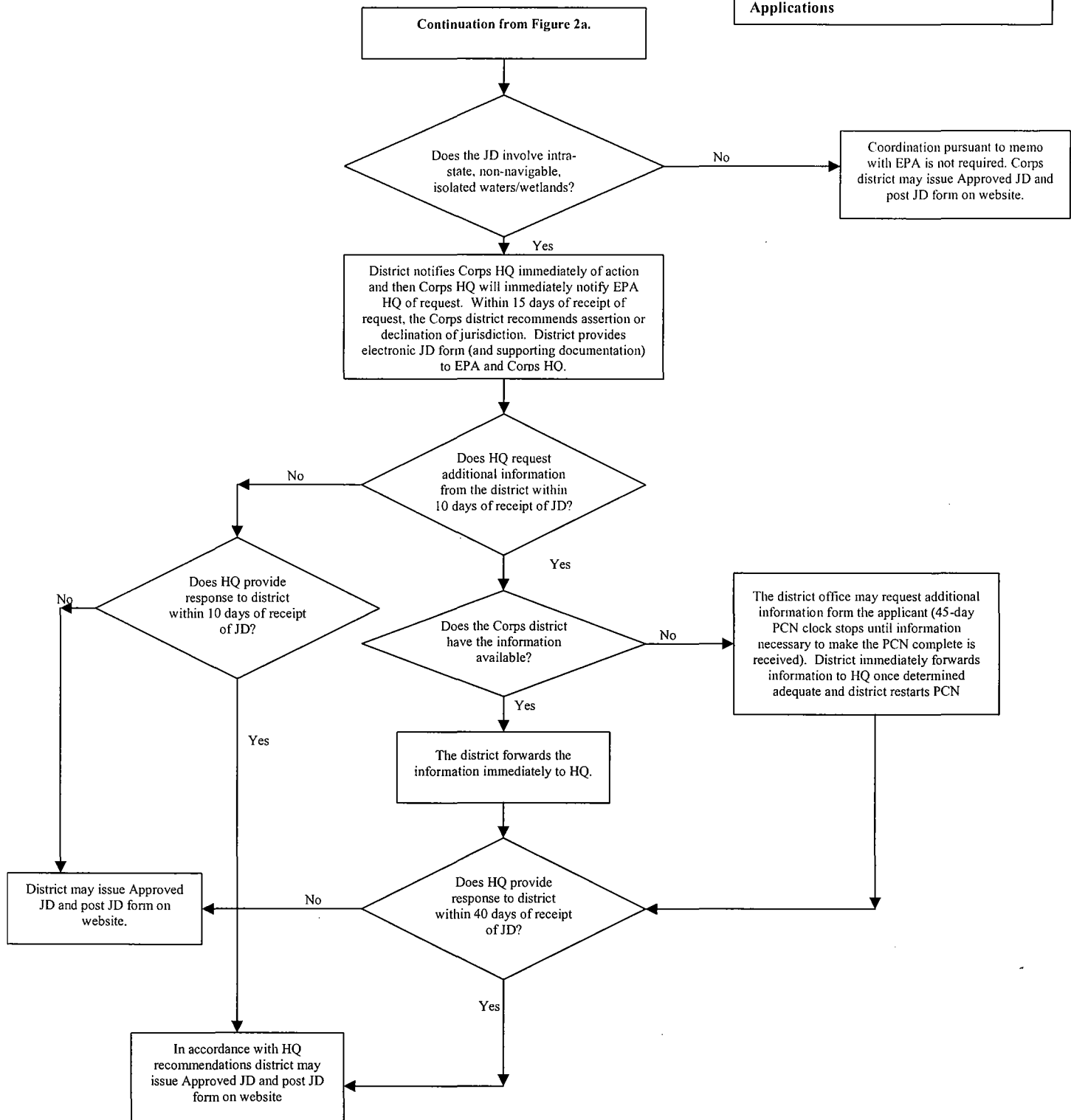


Notes: 1. A headquarters decision pursuant to this process will be considered an appealable action for purposes of the Corps administrative appeals process under 33 C.F.R. §331 et seq. However, any decision on appeal will not question or overturn any legal or policy determination made by EPA or Corps 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.

2. This guidance for all other waters addressed herein will remain in effect for six months from the date of the last signature on this memorandum unless otherwise extended or modified by written agreement of both agencies.

3. The process above applies for applications (pre-construction notifications) for Nationwide Permits involving “significant nexus” evaluations with TNWs.

**Figure 2b: Coordination Requirements for JDs Involving Non-Navigable, Intra-State, Isolated Waters and Supporting NWP Applications**



Notes: 1. A headquarters 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.

2. This guidance will remain in effect indefinitely for isolated, intra-state, non-navigable waters potentially covered only under 33 C.F.R. §328.3(a)(3) where jurisdiction is being asserted or not asserted using interstate commerce factors unless and until this guidance is revoked or modified in writing by agreement of both agencies.

3. The process above applies for applications (pre-construction notifications) for Nationwide Permits involving non-navigable, intra-state, isolated waters, including wetlands.