U.S. ARMY CORPS OF ENGINEERS
JURISDICTIONAL DETERMINATION FORM
INSTRUCTIONAL GUIDEBOOK

This document contains instructions to aid field staff in completing the *Approved Jurisdictional Determination Form* (*"JD form"*). **This document is intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination (JD) and documenting practices to support an approved JD until this document is further revised and reissued.**[1]

Caribbean Sea, St. Thomas, U.S. Virgin Islands.

This document was prepared in development with the Environmental Protection Agency and in coordination with the Department of the Army.

[1]The CWA provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law.

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APPENDICES

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C: Memorandum for the Field: Coordination on JDs under CWA Section 404 in Light of *SWANCC* and *Rapanos* Supreme Court decisions
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I. BACKGROUND

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

In the Corps/EPA CWA regulations (33 CFR 328.3(a)), the term "waters of the U.S." is defined as follows:

1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters including interstate wetlands;
3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
4. All impoundments of waters otherwise defined as waters of the U.S. under the definition;
5. Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
6. The territorial seas;
7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

In the Corps RHA regulations (33 CFR Part 329.4 (RHA)), 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.

In 1985, the U.S. Environmental Protection Agency (EPA) General Counsel signed the Migratory Bird Memo, which opined that movement of migratory birds across state boundaries could be used as a link to interstate commerce. The Corps, in preamble language to its 1986 regulations, adopted the EPA legal memo as the "Migratory Bird Rule" (MBR).[2] The MBR generally allowed the Corps to assert CWA jurisdiction over

[2]The "Migratory Bird Rule" is not a rule or a part of any Corps or EPA regulation, but instead consisted of examples in a preamble published in the Federal Register. The preamble language was never subject to notice and comment rulemaking procedures under the Administrative Procedures Act, and was never codified in the Code of Federal Regulations (CFR). Instead, it was advanced as a basis for asserting jurisdiction in a guidance memo.

nearly all natural water bodies, including wetlands that were used or could be used as habitat by migratory birds.

In 2001, the MBR was invalidated by the U.S. Supreme Court's decision in the *Solid Waste Agency of Northern Cook County (SWANCC) v. Corps,* which held that isolated, intrastate, non-navigable waters could not be regulated under the CWA based solely on the presence of migratory birds. Following the *SWANCC* decision (but prior to the decision in *Rapanos* and *Carabell* (discussed below)), it generally was believed that a water body (including a wetland) was subject to CWA jurisdiction if the water body was part of the U.S. territorial seas, or a traditional navigable water, or any tributary to a traditional navigable water, or a wetland adjacent to any one of the above. In addition, isolated wetlands and other waters might be considered jurisdictional where they had the necessary link to either navigable waters or interstate commerce.

In 2003, the EPA and the Corps provided joint guidance in Appendix A of the Advanced Notice of Proposed Rulemaking on the CWA Regulatory Definition of "Waters of the United States." This guidance informed field staff that they must seek formal project-specific HQ approval prior to asserting jurisdiction over waters based solely on the [commerce] factors listed in 33 CFR 328.3(a)(3).

In 2004-2005, the Corps, in coordination with the EPA, developed standardized forms to document JDs. The *Jurisdiction Determination Information Sheet* was used to document all cases where the district either asserted or did not assert jurisdiction over waters of the U.S., including wetlands. The *Determination of No Jurisdiction Information Sheet* was developed to document cases where the Corps declined to assert jurisdiction based on the MBR. The Corps headquarters (HQ) also required each district to post all approved JD forms on its district regulatory web site.

In 2006, the Supreme Court once again addressed the jurisdictional scope of Section 404 of the CWA, specifically the term "the waters of the U.S.," in *Rapanos v. U.S.* and in *Carabell v. U.S*. (hereafter referred to as *Rapanos).* The Justices issued five opinions with no single opinion commanding a majority of the Court. A plurality of the Court vacated the original Court of Appeals judgments and remanded both cases to the lower courts for re-evaluation. The decision provides two new analytical standards for determining whether water bodies that are not traditional navigable waters (TNWs), including wetlands adjacent to those non-TNWs, are subject to CWA jurisdiction: (1) if the water body is relatively permanent, or if the water body is a wetland that directly abuts (e.g., the wetland is not separated from the tributary by uplands, a berm, dike, or similar feature) a relatively permanent water body (RPW), or (2) if a water body, in combination with all wetlands adjacent to that water body, has a significant nexus with TNWs. CWA jurisdiction over TNWs and their adjacent wetlands was not in question in this case, and, therefore, was not affected by the *Rapanos* decision. In addition, at least five of the Justices in *Rapanos* agreed that CWA jurisdiction exists over all TNWs and over all wetlands adjacent to TNWs.

As a consequence of the U.S. Supreme Court decision in *Rapanos,* the EPA and the Corps, in coordination with the Office of Management and Budget (OMB) and the President's Council on Environmental Quality (CEQ), developed the Memorandum Regarding *Clean Water Act Jurisdiction Following Rapanos v. United States* (Appendix A). This guidance requires the application of the two new standards described above, as well as a greater level of documentation, to support an agency JD for a particular water body. Furthermore, this guidance required the Corps and EPA to develop a revised JD form to be used by field staff for documenting assertion or declination of CWA jurisdiction (Appendix B). This guidance was signed by Mr. Benjamin H. Grumbles, Assistant Administrator for Water, EPA, and Mr. John Paul Woodley, Jr., Assistant Secretary of the Army, Department of the Army.

The Memo states that the agencies will assert jurisdiction over the following categories of water bodies: TNWs; all wetlands adjacent to TNWs; non-navigable tributaries of TNWs 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 tributaries. In addition, the agencies will assert jurisdiction over every water body that is not an RPW if that water body is determined (on the basis of a fact-specific analysis) to have a significant nexus with a TNW. The classes of water body that are subject to CWA jurisdiction only if such a significant nexus is demonstrated are: 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, in combination with all of its adjacent wetlands, has more than a speculative or an insubstantial effect on the chemical, physical, and/or biological, integrity of a TNW. 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 TNW, plus the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands. Figure 1 identifies the process for determining CWA jurisdiction based on the standards presented in the *Rapanos* decision integrated with the process presented in 33 CFR 328.3(a).

A second "Memorandum for the Field: Coordination on JDs under CWA Section 404 in Light of *SWANCC* and *Rapanos* Supreme Court Decisions" (Appendix C) was developed and signed in response to the *Rapanos* decision also. As previously discussed, HQ originally required the districts to request concurrence for only those JDs where the district was considering to assert jurisdiction over a non-navigable, intra-state, isolated water and/or wetland. The agencies now require that all determinations for non-navigable, isolated waters be elevated for Corps and EPA HQ review prior to the district making a final decision on the JD.

In addition, the EPA now has an opportunity to review JDs requiring a significant nexus evaluation and may request a higher level review if there is a dispute regarding the determination.

Figure 2 presents a flowchart for the coordination and elevation requirements for JD requests, other than those for nationwide permits (NWPs), as presented in the "Memorandum for the Field: Coordination on JDs under CWA Section 404 in Light of *SWANCC* and *Rapanos* Supreme Court Decisions." Process for NWPs is presented in Figure 3.

For JD requests associated with pre-construction notifications for NWPs, the coordination process is amended as follows:

1. JDs involving a Significant Nexus Evaluation:

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

b. The EPA will have 15 calendar days from receipt of the JD from the district to decide whether or not to elevate the JD to a higher level for review. If EPA elevates the JD, they shall notify the Corps district office immediately. 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.

c. After the EPA notifies the district that the JD is going to be elevated, EPA will have an additional 10 calendar days to request supplemental information on the JD. Again, the EPA shall notify the Corps district office immediately if such action will be taken.

(1) 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**

(2) 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.

d. The Corps will try to make a decision on the NWP within 45 days of receipt of the pre-construction notification. If a decision is not made within 45 days, the applicant may proceed with the proposed project, providing the general conditions are met, as presented in the regulation.

Notes:

- A 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 HQ pursuant to this joint guidance memorandum, but can examine and question any matter or finding of fact. If the Review Officer determines that the HQ decision was based on a mistake of fact or a lack of necessary facts that determination can be presented to EPA and/or Corps HQ suggesting reconsideration of the decision.
- 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 (Appendix D) unless otherwise extended or modified by written agreement of both agencies.

2. JDs involving Isolated Waters:

a. The district office immediately forwards the JD request to Corps HQ for review and then Corps HQ will notify EPA HQ of 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 an electronic copy of the JD form and supporting documentation, if any.

b. 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.

(1) 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**

(2) 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 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.

c. 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.

Notes:

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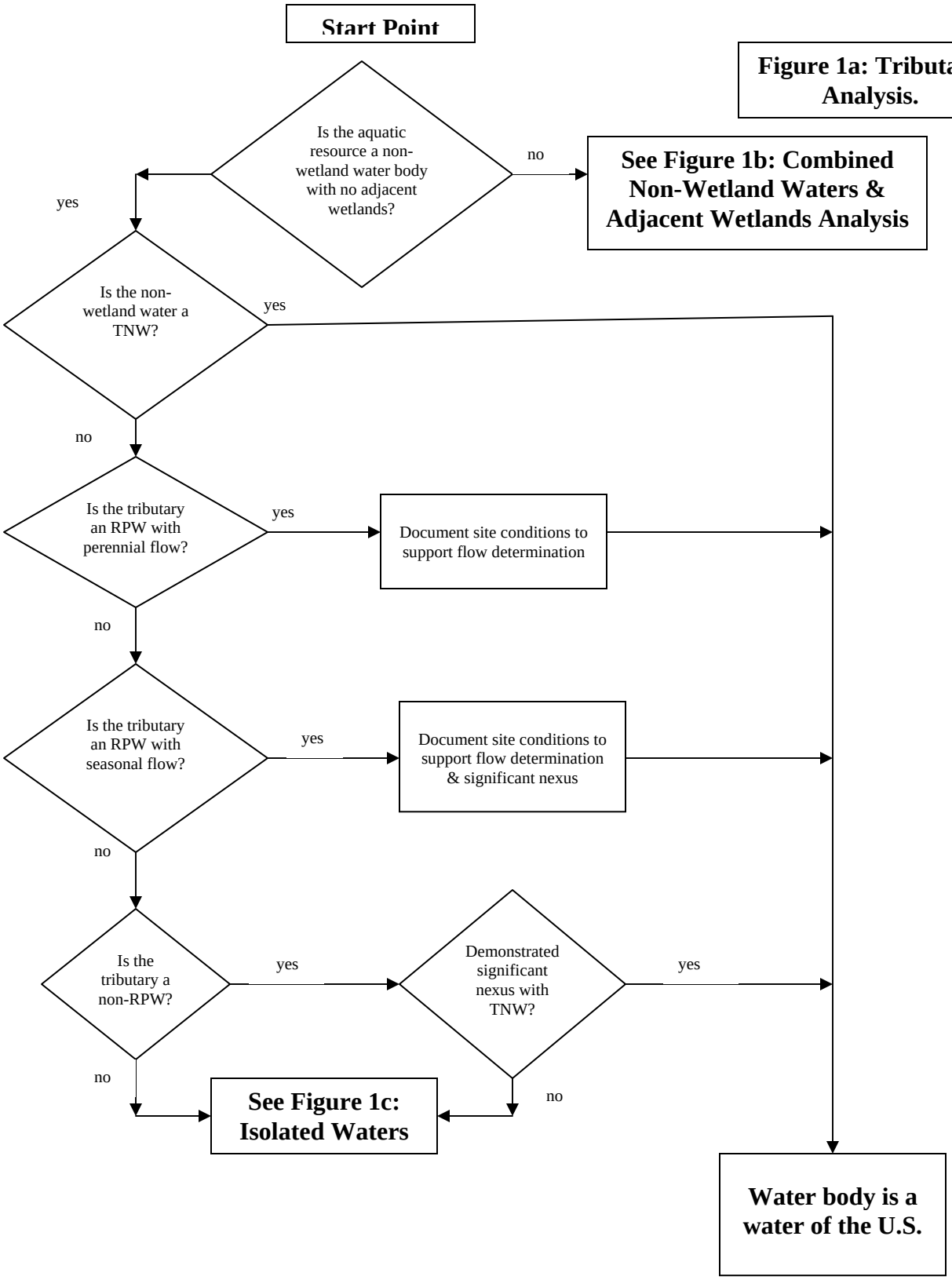
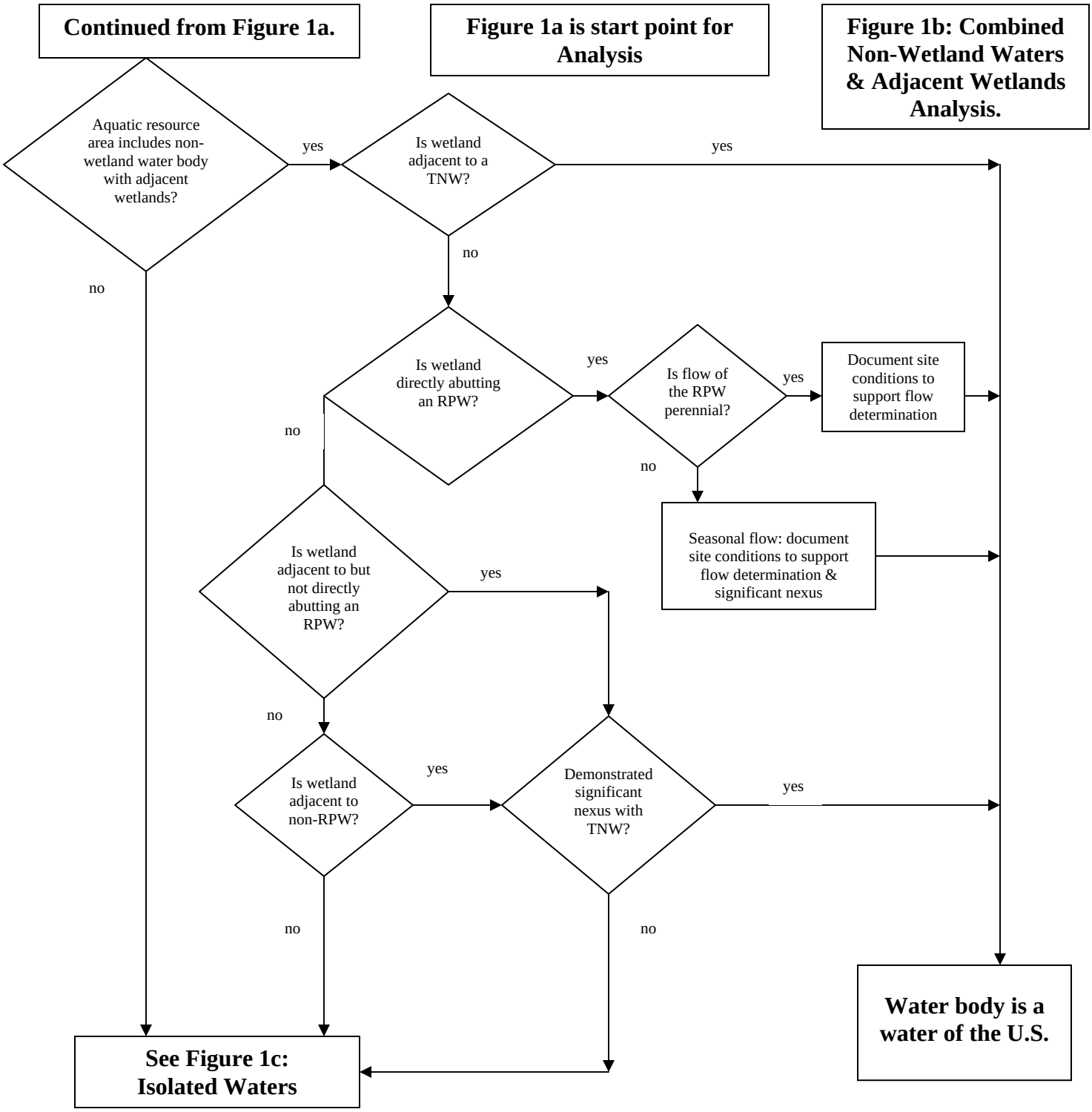
- This guidance will remain in effect indefinitely for isolated, intra-state, non-navigable waters potentially covered only under 33 C.F.R. §328.3(a)(3) where jurisdiction is being asserted or not asserted using interstate commerce factors unless and until this guidance is revoked or modified in writing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



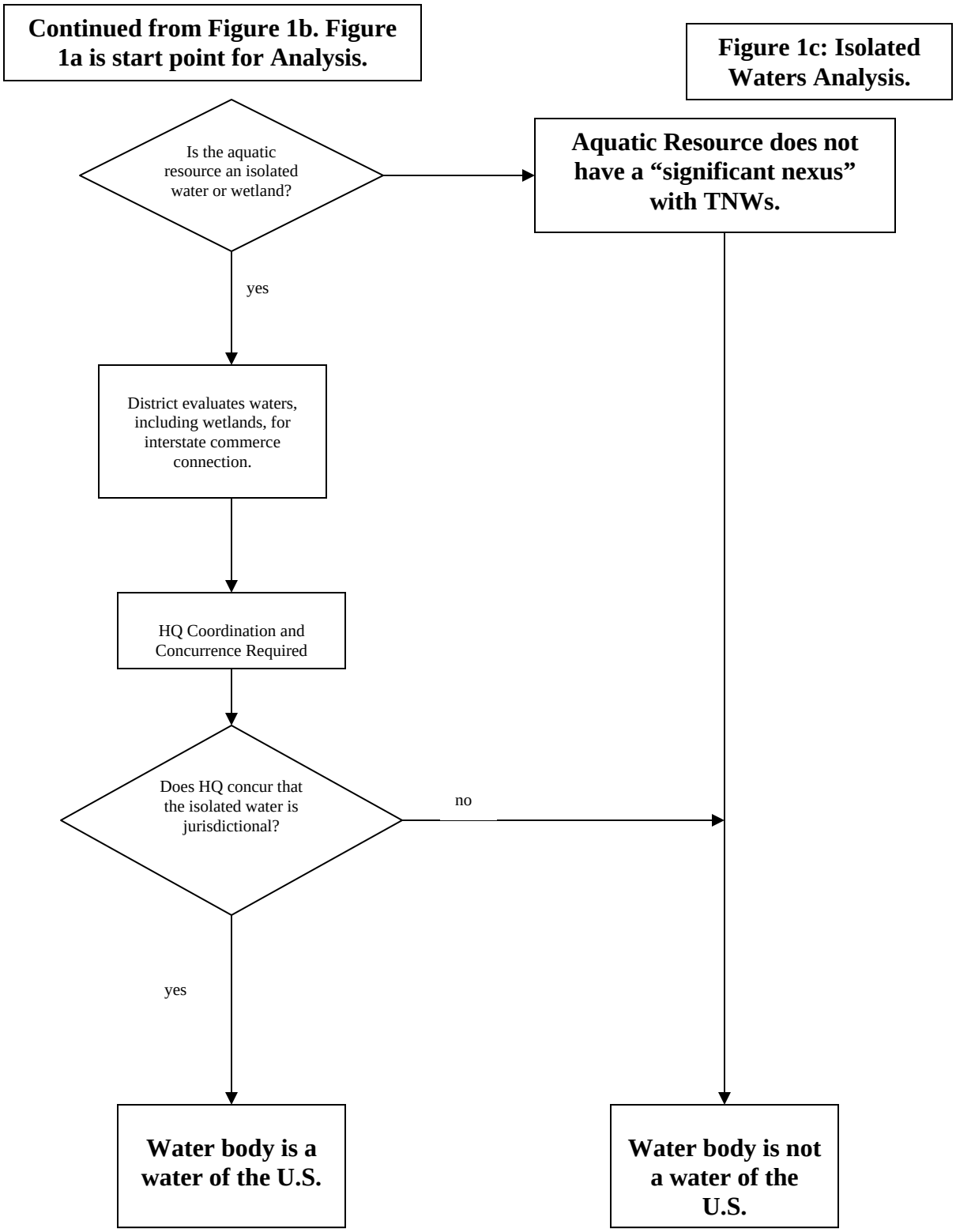
NOTES:

1. Non-wetland water bodies include traditional navigable waters (TNWs) and tributaries that flow directly or indirectly into TNWs. Additional information on TNWs is in Appendix D.
2. Tributary is a natural, man-altered, or man-made water body. Examples include rivers, streams, and lakes that flow directly or indirectly into TNWs.
3. RPW is relatively permanent water, where flow is year-round or continuous at least "seasonally. "
4. Significant nexus assessment of the flow characteristics and functions of the tributary determines if the tributary has more than an insubstantial or speculative effect on the chemical, physical and/or biological integrity of TNWs.
5. Additional coordination requirements for waters requiring significant nexus determination are presented in Figure 2.
6. Photographic examples of these water bodies follow.

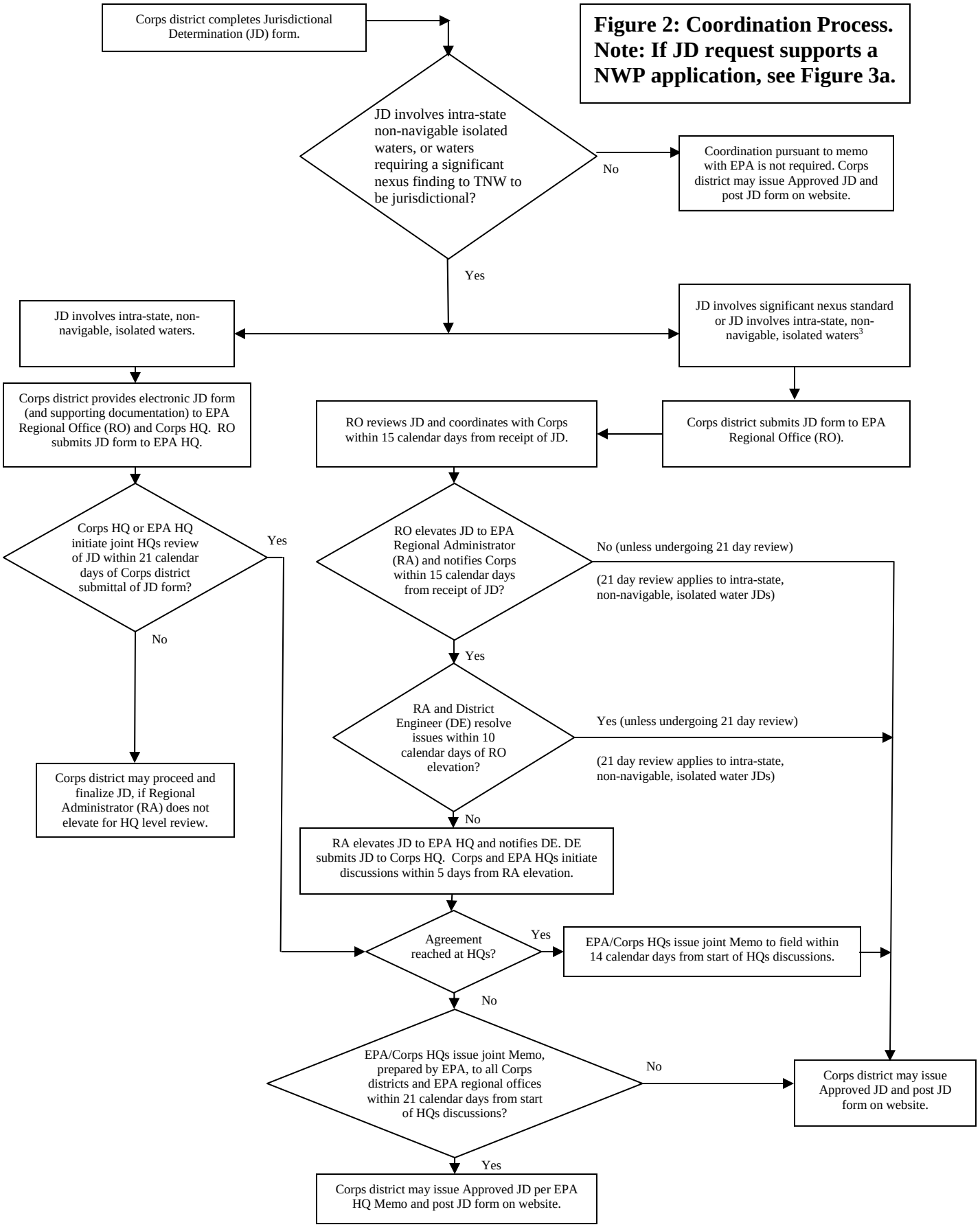


NOTES:

1. Non-wetland water bodies include traditional navigable waters (TNWs) and tributaries that flow directly or indirectly into TNWs. Additional information on TNWs is in Appendix D.
2. For a wetland adjacent to a TNW, adjacent means "bordering, neighboring or contigous." Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are also adjacent.
3. Tributary is a natural, man-altered, or man-made water body. Examples include rivers, streams, and lakes that flow directly or indirectly into TNWs.
4. RPW is relatively permanent water, where flow is year-round or continuous at least "seasonally. "
5. A wetland abuts a tributary if it is not separated from the tributary by uplands, a berm, dike, or similar feature.
6. Significant nexus assessment of the flow characteristics and functions of the tributary, itself, in combination with the functions performed by any wetlands adjacent to the tributary determines if they have more than an insubstantial or speculative effect on the chemical, physical and/or biological integrity of TNWs.
7. Additional coordination requirements for waters requiring significant nexus determination are presented in Figure 2.
8. Photographic examples of these water bodies follow.



NOTES:
1. Non-wetland water bodies include traditional navigable waters (TNWs) and tributaries that flow directly or indirectly into TNWs.
2. For a wetland adjacent to a TNW, adjacent means "bordering, neighboring or contiguous." Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are also adjacent.
3. Tributary is a natural, man-altered, or man-made water body. Examples include rivers, streams, and lakes that flow directly or indirectly into TNWs.
4. A wetland abuts a tributary if it is not separated from the tributary by uplands, a berm, dike, or similar feature.
5. Additional coordination requirements for isolated waters and those waters requiring significant nexus determination are presented in Figure 2.
6. Photographic examples of these water bodies follow.



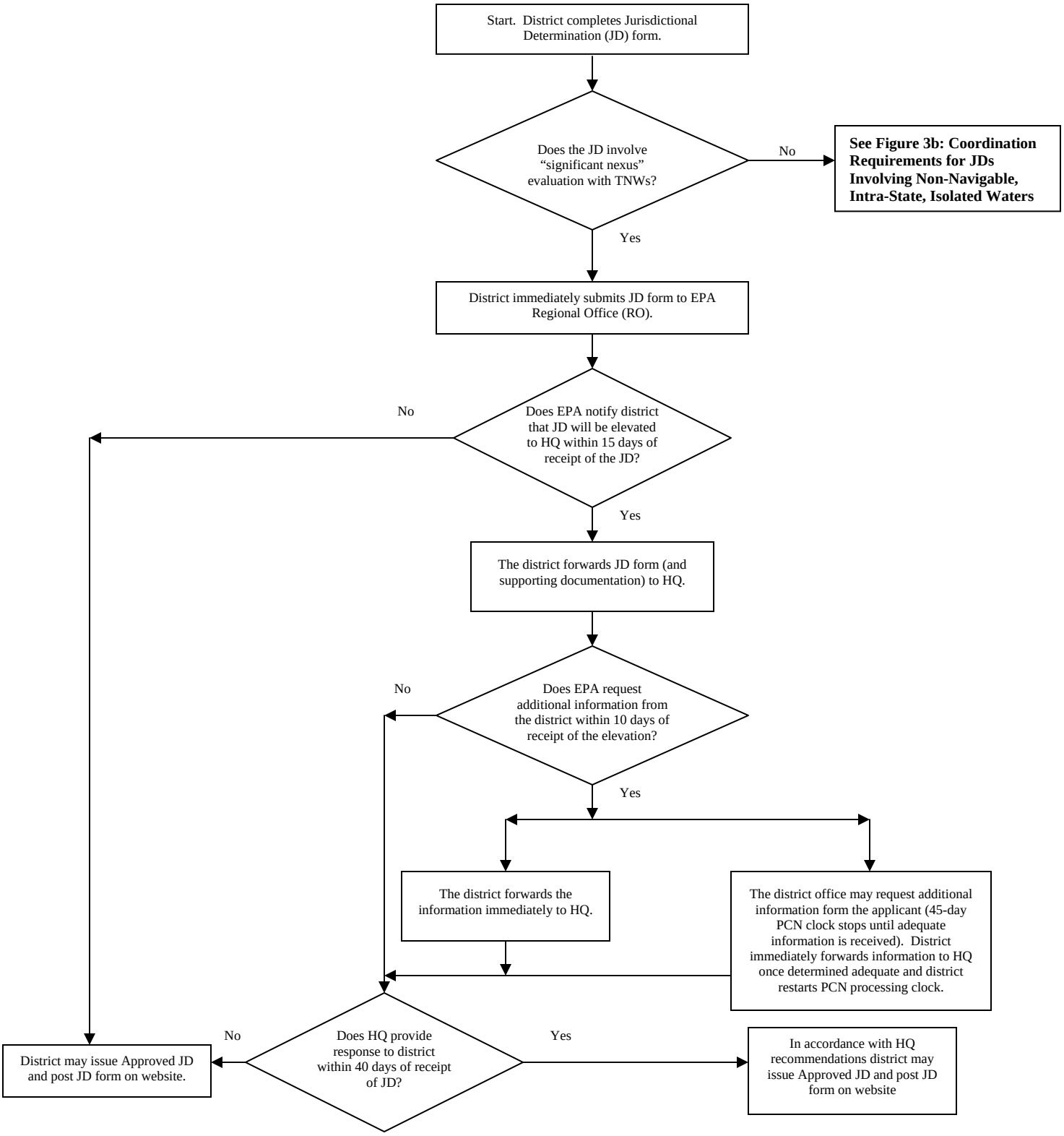
Notes: 1.A headquarters decision pursuant to this process will be considered an appealable action for purposes of the Corps administrative appeals process under 33 C.F.R. §331 et seq. However, any decision on appeal will not question or overturn any legal or policy determination made by EPA or Corps 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 3).

Figure 3a: Coordination Requirements for JDs Involving "Significant Nexus" Evaluation with TNWs and Supporting NWP Applications



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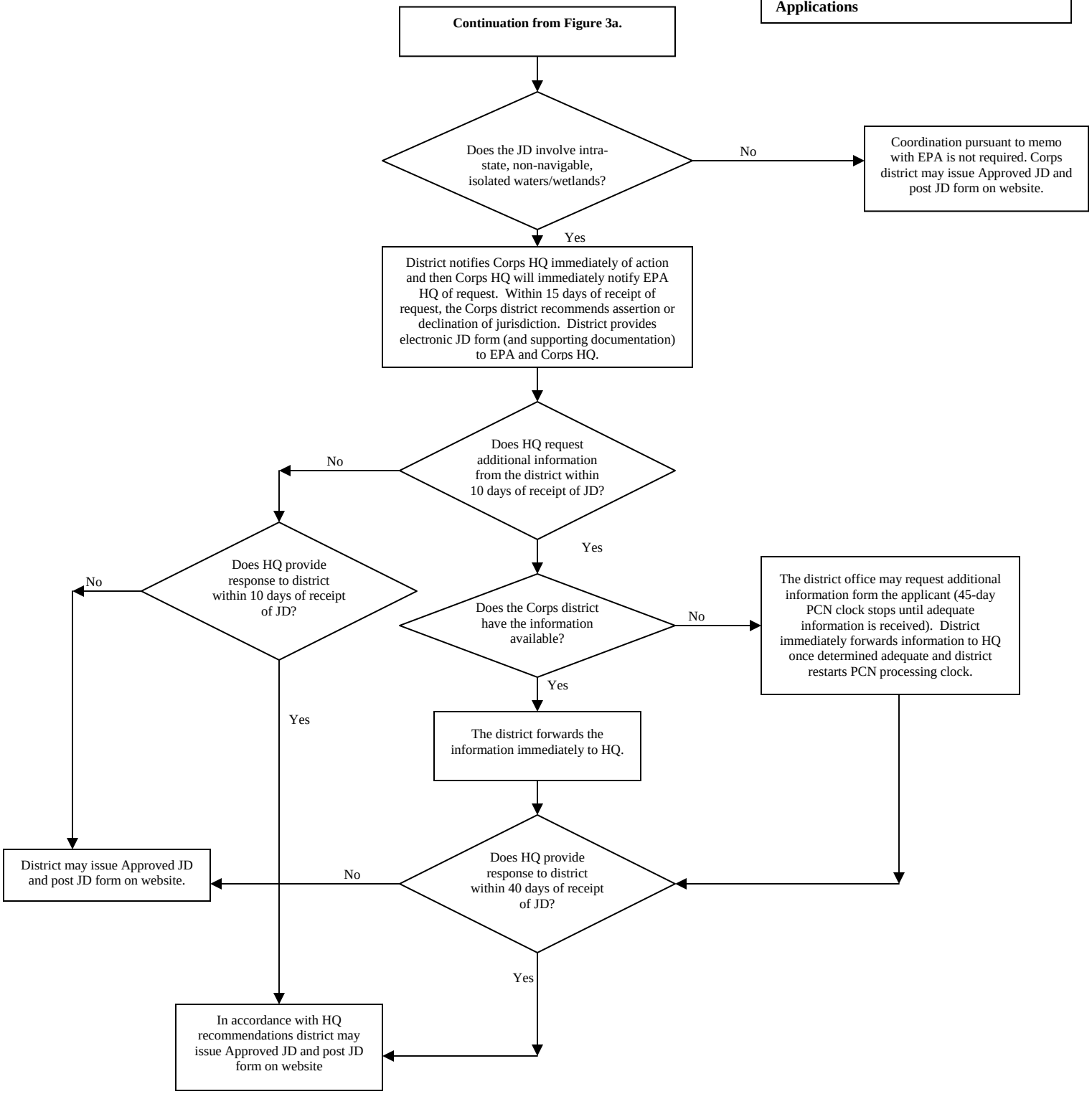
2. This guidance for all other waters addressed herein will remain in effect for six months from the date of the last signature on this memorandum unless otherwise extended or modified by written agreement of both agencies.
3. The process above applies for applications (pre-construction notifications) for Nationwide Permits involving "significant nexus" evaluations with TNWs.

Figure 3b: Coordination Requirements for JDs Involving Non-Navigable, Intra-State, Isolated Waters and Supporting NWP Applications



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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.

II. CWA JURISDICTION

The agencies will assert jurisdiction over the following waters:

- TNWs and wetlands adjacent to TNWs

- Non-navigable tributaries of TNWs that are relatively permanent (i.e., the tributaries typically flow year-round or have continuous flow at least seasonally) and wetlands that directly abut such tributaries

In addition, the following waters will also be found jurisdictional based on a fact-specific analysis that they have a significant nexus with a TNW:

- Non-navigable tributaries that are not relatively permanent

- Wetlands adjacent to non-navigable tributaries that are not relatively permanent

- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

  The significant nexus evaluation will include:

  - An assessment of the flow characteristics and functions of the tributary, itself, in combination with the functions performed by any wetlands adjacent to the tributary to determine if they have more than an insubstantial or speculative effect on the chemical, physical and/or biological integrity of TNWs.

  - A consideration of hydrologic factors such as:
    - volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary
    - proximity to the traditional navigable water
    - size of the watershed
    - average annual rainfall
    - average annual winter snow pack

  - A consideration of ecologic factors such as:
    - the ability of the tributary and its adjacent wetlands (if any) to carry pollutants and flood waters to traditional navigable waters
    - the ability of the tributary and its adjacent wetlands (if any) o provide aquatic habitat that supports biota of a traditional navigable water
    - the ability for adjacent wetlands to trap and filter pollutants or store flood waters
    - the ability to maintain water quality

In accordance with the *Rapanos* Guidance:

- Certain ephemeral waters in the arid west are distinguishable from the geographic features described below where such ephemeral waters are tributaries and may have a significant nexus to TNWs.

- Certain geographical features (e.g., ditches, canals) that transport relatively permanent (continuous at least seasonally) flow directly or indirectly into TNWs or between two (or more) waters of the U.S., including wetlands, are jurisdictional waters regulated under the CWA.

- Certain geographic features (e.g., swales, ditches, pipes) may contribute to a surface hydrologic connection where the features:
    - replace or relocate a water of the U.S., or
    - connect a water of the U.S. to another water of the U.S., or
    - provide relatively permanent flow to a water of the U.S.

- Certain geographic features generally are not jurisdictional waters:
    - Swales, erosional features (e.g. gullies) and small washes characterized by low volume, infrequent, and short duration flow
    - ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water
    - uplands transporting over land flow generated from precipitation (i.e., rain events and snowmelt)

A. EXAMPLE PHOTOS OF DIFFERENT AQUATIC RESOURCES

The following photos have been taken by Corps employees, unless otherwise noted, and are presented to illustrate in an informal and general way some of the concepts addressed in this document. Each of the following photos represents one snap shot of a particular place at a particular time. No photograph is presented herein as a definitive representation of what any particular class or category of aquatic resources will or should look like. Even photographs of the same aquatic area may look different at different times of the year, or from one year to another, or where photos were taken from different angles or locations, or using different lenses. In addition, any particular type or class of water body (e.g., an adjacent wetland) will have many variations within and among the various regions and topographic circumstances found throughout the U.S. Because of all these variations, each aquatic site must be independently evaluated to determine if the aquatic resource under review is a jurisdictional water of the U.S. While we hope that each of the following photos will serve as a useful, if highly limited, teaching aid, no photo can be used or presented as any sort of definitive or universal representation of whatever concept is being illustrated. Moreover, where photos are used to represent examples of non-RPWs, wetlands adjacent to non-RPWs, and/or wetlands not directly abutting RPWs, a site-specific significant nexus evaluation would be required to determine if the aquatic resource is a jurisdictional water of the U.S.

Some photos have been prepared to identify the approximate location of the ordinary high water mark (OHWM) for an aquatic resource, as it would typically occur in the field. Where aquatic resources are shown without a line or mark identifying an OHWM, one should not assume the resource lacks an OHWM in the field. Not all photos have been prepared to identify an OHWM for an aquatic resource.

1. TNWs: include all of the "navigable waters of the U.S.," defined in 33 CFR Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (see Appendix D). (For a few examples, see Photos 1-8)

Photo 1. Pacific Ocean at Ecola State Park, OR**.**

Photo 3. Three Rivers, Pittsburgh, PA.

Photo 2. Land Satellite Image of Great Salt Lake, UT.

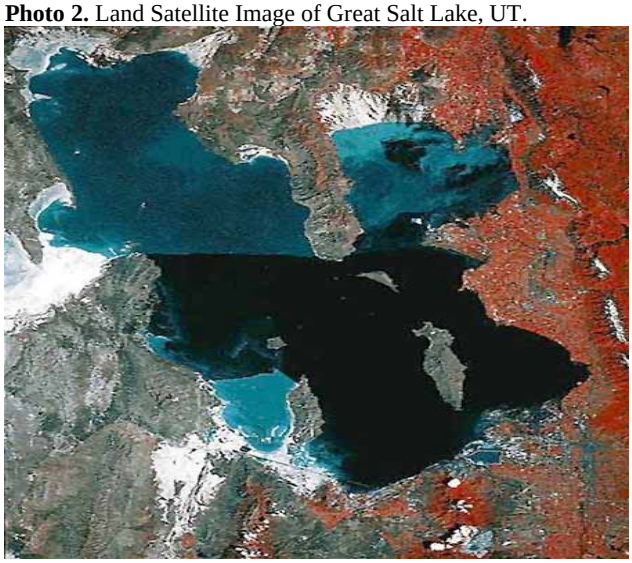


Photo 4. Bayou de View and its adjacent wetlands, AR.

TNWs are jurisdictional under the CWA.

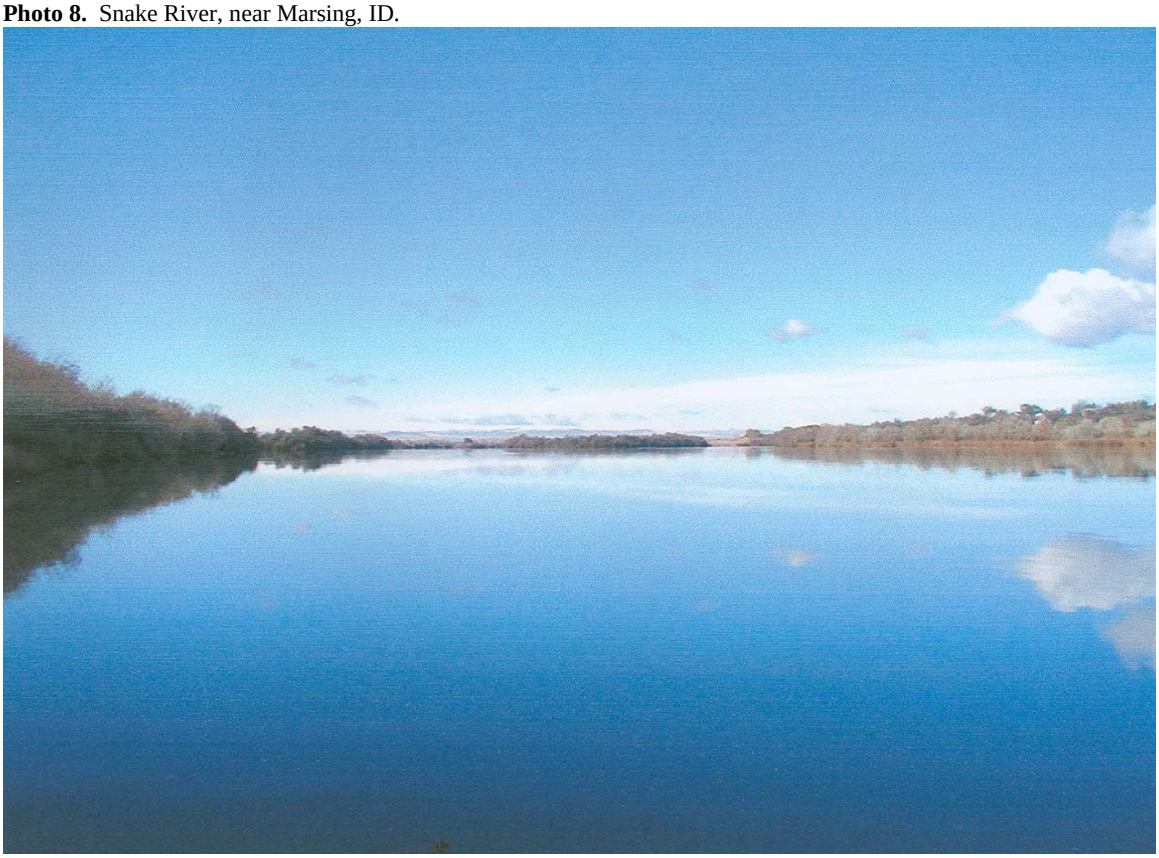
Photo 5. Yellowstone River at Billings, MT.

Photo 6. Missouri River near Loma, MT.

TNWs are jurisdictional under the CWA.

Photo 7. NYS Erie Canal, City of Tonawanda, Erie County, NY.

Photo 8. Snake River, near Marsing, ID.



TNWs are jurisdictional under the CWA.

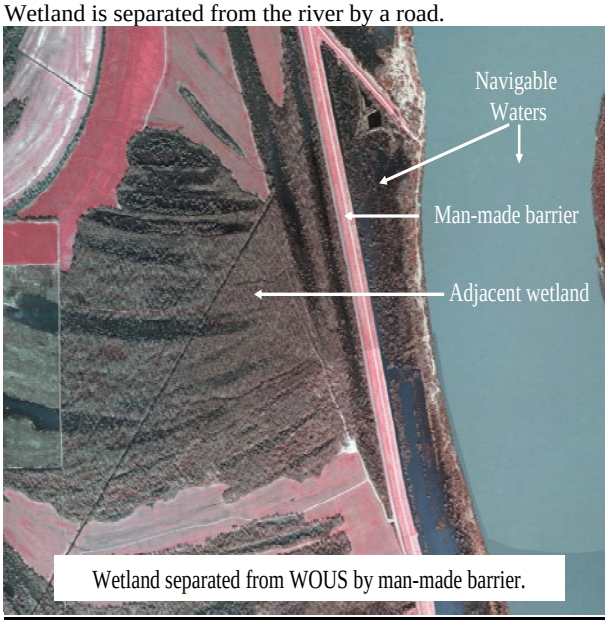
2. **Wetlands Adjacent to TNWs**: adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are adjacent. (See 33 CFR 328.3(c)) (For a few examples, see Photos 9 – 12)

Photo 9. Wetland adjacent to the Kanawha River, WV.

Photo 11. Wetland adjacent to the Pacific Ocean, HI.

Photo 10. Wetland adjacent to the Mississippi River, MN. Wetland is separated from the river by an upland berm.

Photo 12. Wetland adjacent to the Mississippi River, LA Wetland is separated from the river by a road.



Wetlands adjacent to TNWs are jurisdictional under the CWA.

3. **RPWs flow directly or indirectly into TNWs** where the flow through the tributary (a natural, man-altered, or man-made water body) is year-round or continuous at least "seasonally." (For a few examples, see Photos 13 – 18)

Photo 13. Wolf Trap Creek, Vienna, VA. Flow is perennial.

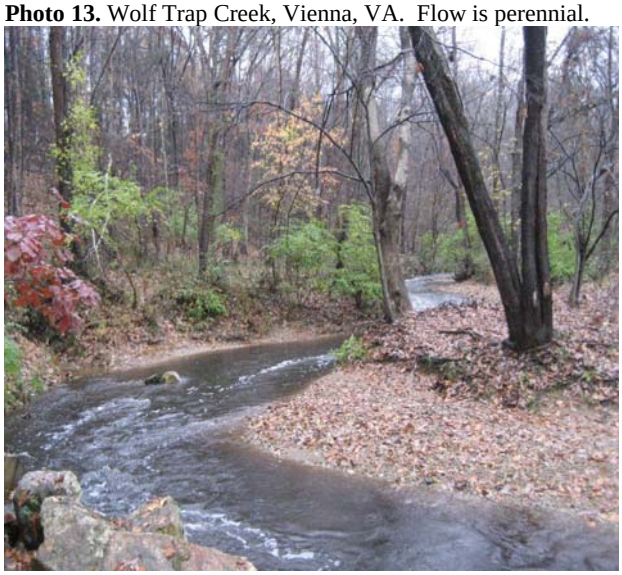
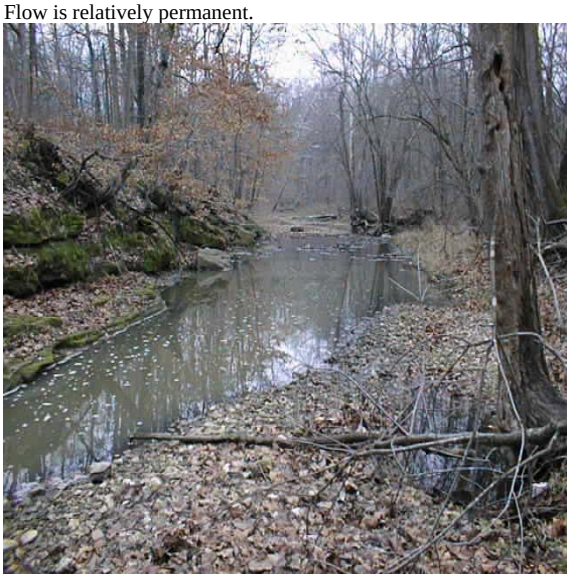


Photo 15. Loosahatchie River, Somerville, TN. Flow is perennial.

Photo 14. Un-named tributary in WV. Flow is seasonal.

Photo 16. South Fork Grindstone Creek, Boone County, MO. Flow is relatively permanent.



RPWs are jurisdictional under the CWA.
As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus between a TNW and an RPW that is not perennial.

Photo 17. Intermittent tributary, with continuous seasonal flow, in South Atlantic Division. Yellow lines mark approximate location of OHWM.

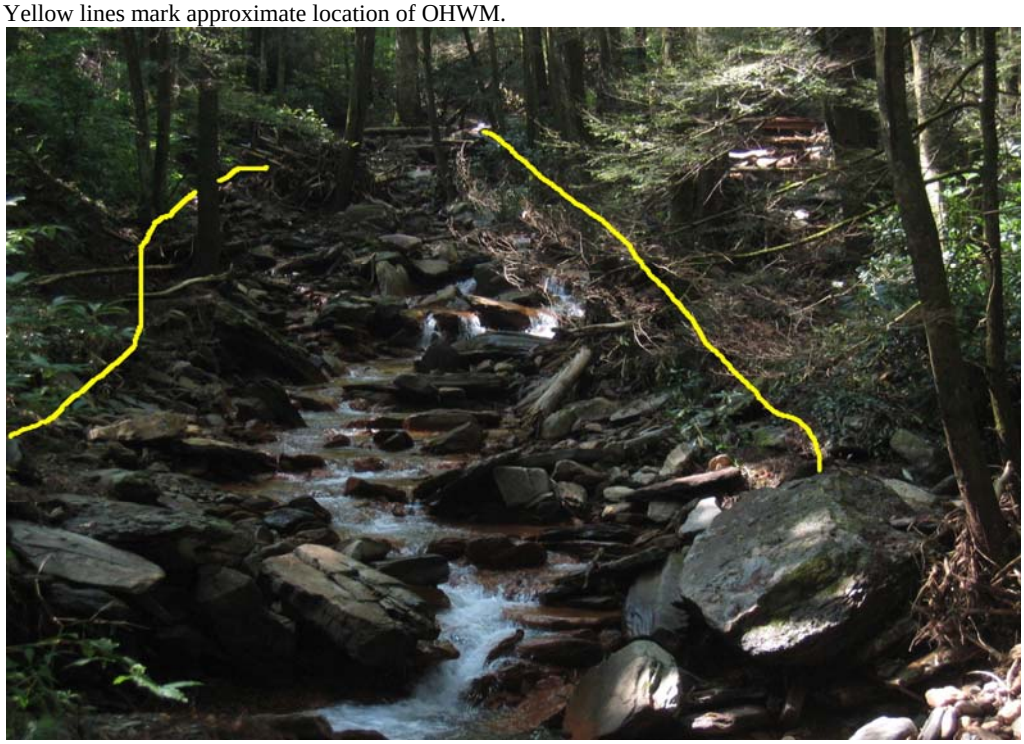
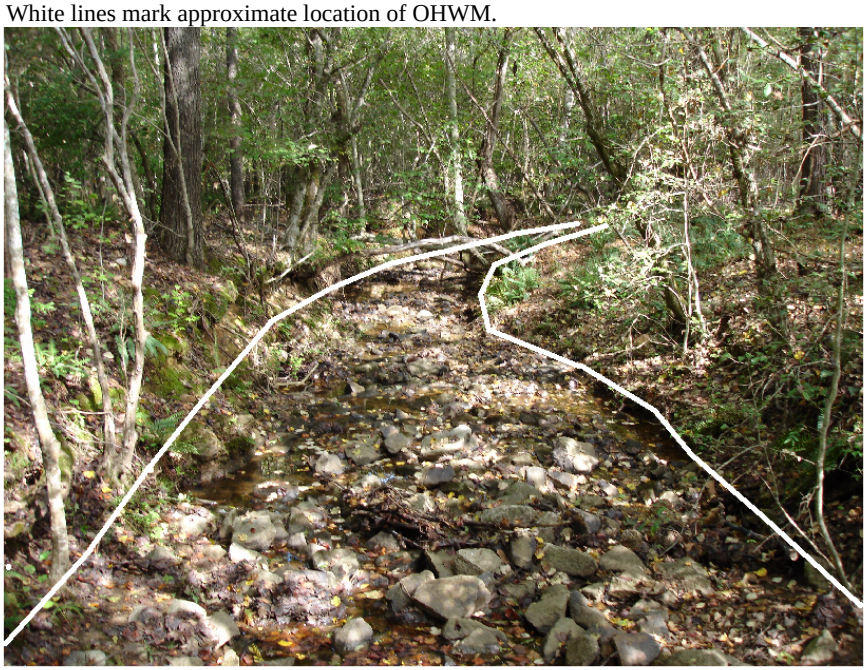


Photo 18. Intermittent tributary, with continuous seasonal flow, in South Atlantic Division. White lines mark approximate location of OHWM.



RPWs are jurisdictional under the CWA.
As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus between a TNW and an RPW that is not perennial.

4. **Non-RPWs that flow directly or indirectly into TNWs**, where the flow through the tributary is not continuous at least seasonally. (For examples, see Photos 19 – 29)

Photo 19. An unnamed ephemeral tributary flowing into Wolf Trap Creek, Vienna, VA. Water flows through the ephemeral tributary typically during and after storm events.

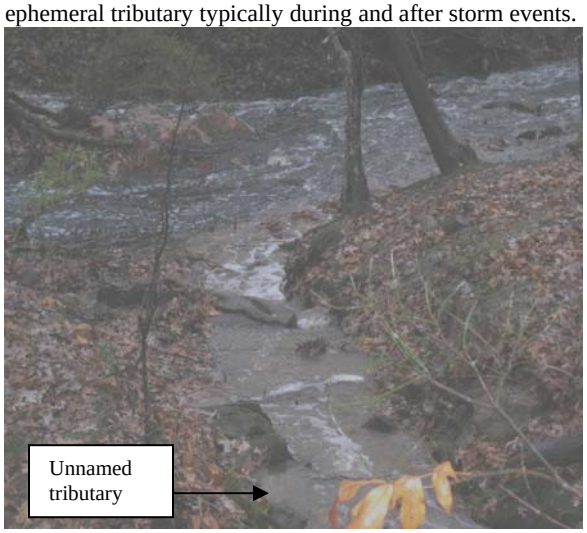
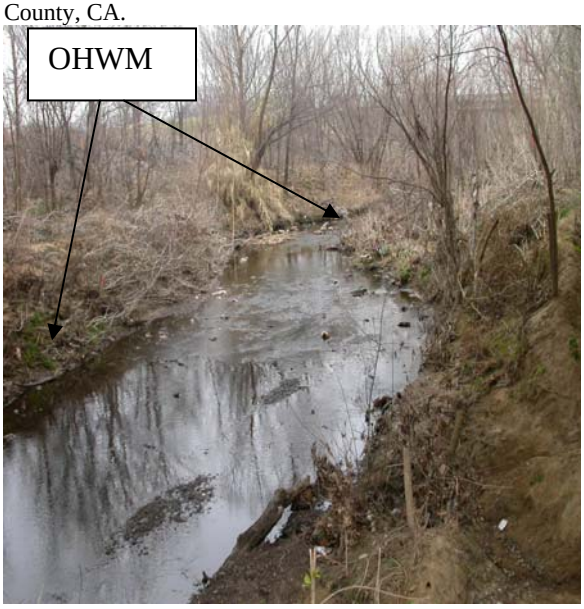


Photo 21. Soft-bottom intermittent tributary with a flood control levee, Ventura County, CA.

Photo 20. Unnamed ephemeral tributary, TX. Water flows typically during and after storm events. Yellow lines mark approximate location of OHWM.

Photo 22. Desert ephemeral tributary in Los Angeles County, CA.



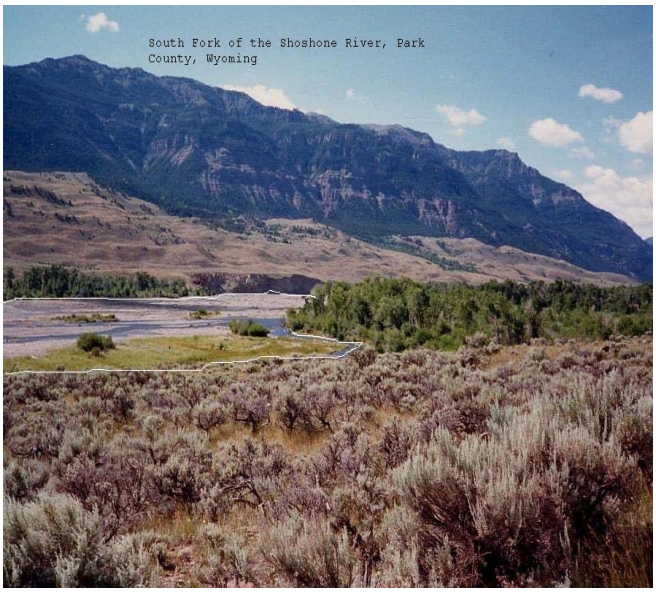
Non-RPWs are jurisdictional under the CWA where there is a "significant nexus" with a TNW. For each specific request for non-RPWs, field staff will need to perform significant nexus evaluation to determine if tributary in combination with its adjacent wetlands (if any) is jurisdictional under the CWA.

Photo 23. Ephemeral tributary. Albuquerque, NM.

Photo 24. Unnamed ephemeral tributary, Boise County, ID. Flow is piped under Highway 21 (and into the Boise River).

Photo 25. Rillito River (ephemeral tributary), AZ. Flow is following a 3" rainfall event.

Photo 25. South Fork of the Shoshone River in Park County, WY. This is a distant view of the extremely braided channel of the South Fork of the Shoshone River. White lines mark approximate location of OHWM.



Non-RPWs are jurisdictional under the CWA where there is a "significant nexus" with a TNW. For each specific request for non-RPWs, field staff will need to perform significant nexus evaluation to determine if tributary in combination with its adjacent wetlands (if any) is jurisdictional under the CWA.

Photo 27. Red Stone Creek (ephemeral tributary), Larimer County, CO. White line marks approximate location of OHWM.

Photo 28. Ephemeral tributary, Converse County, WY. White lines mark approximate location of OHWM.

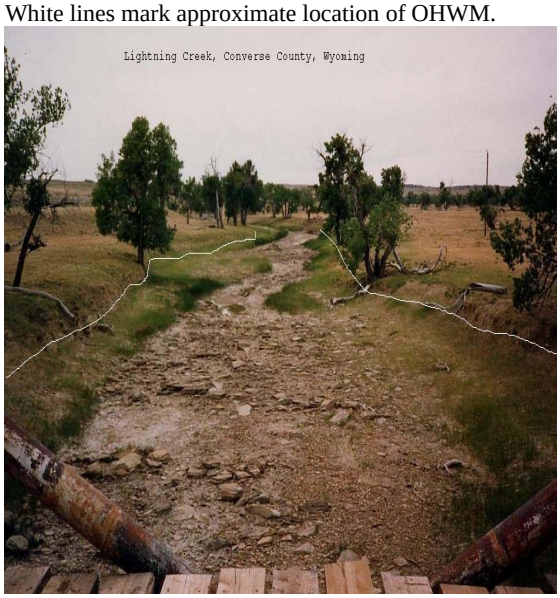


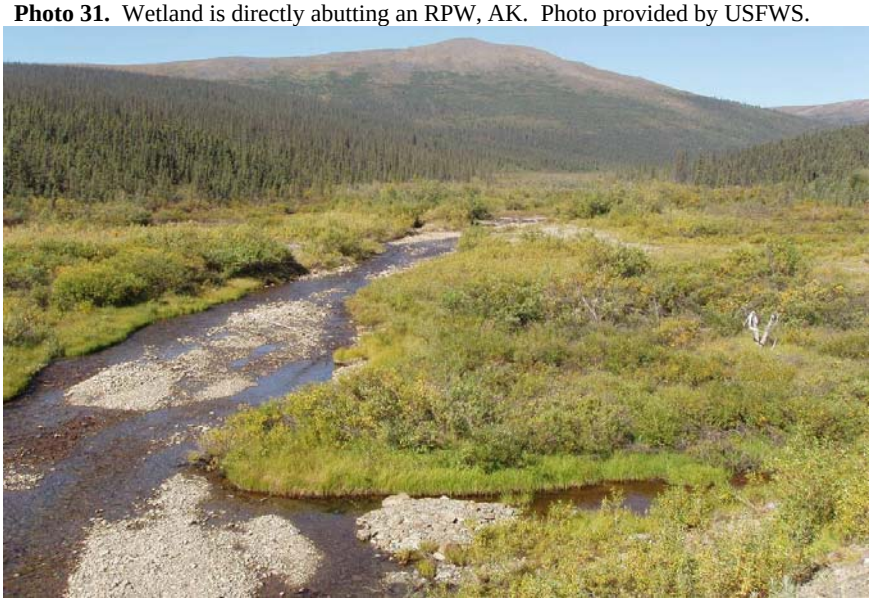
Photo 29. Ephemeral tributary, a concrete flood control channel, Santa Barbara, CA.

Non-RPWs are jurisdictional under the CWA where there is a "significant nexus" with a TNW. For each specific request for non-RPWs, field staff will need to perform significant nexus evaluation to determine if tributary in combination with its adjacent wetlands (if any) is jurisdictional under the CWA.

5. **Wetlands directly abutting RPWs that flow directly or indirectly into TNWs.** Note that a continuous surface connection does not require surface water to be continuously present between the wetland and the tributary. (For a few examples, see Photos 30-33)

Photo 30. Wetland is directly abutting an RPW, AK.

Photo 31. Wetland is directly abutting an RPW, AK. Photo provided by USFWS.



Wetlands directly abutting RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA. As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus for a wetland directly abutting an RPW that is not perennial.

Photo 32. Wetland is directly abutting an RPW, AR.
Red lines mark approximate location of OHWM.

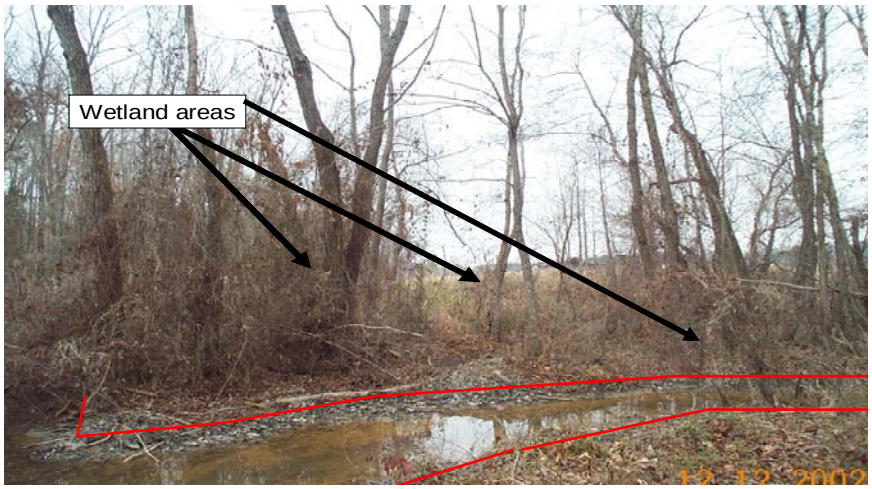
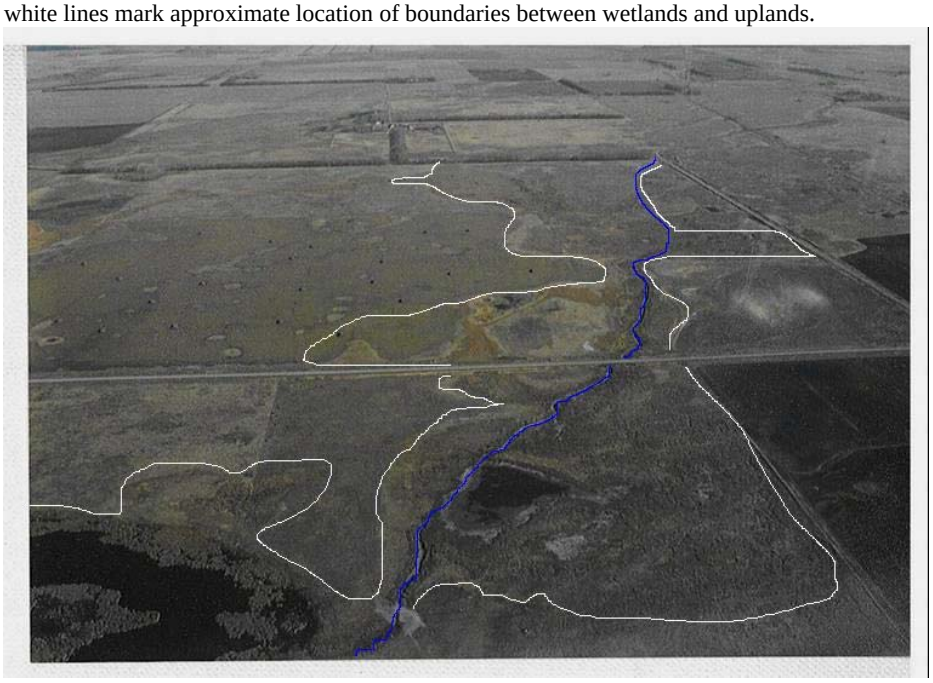


Photo 33. Wetland is directly abutting an RPW, ND. Blue line represents the channel; white lines mark approximate location of boundaries between wetlands and uplands.



Wetlands directly abutting RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA. As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus for a wetland directly abutting an RPW that is not perennial.

6. **Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs.** Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are adjacent. Note that a continuous surface connection does not require surface water to be continuously present between the wetland and the tributary. (For a few examples, see Photos 34-36)

Photo 34. Non-abutting wetland, IL.
Wetland is separated from an RPW by dike.

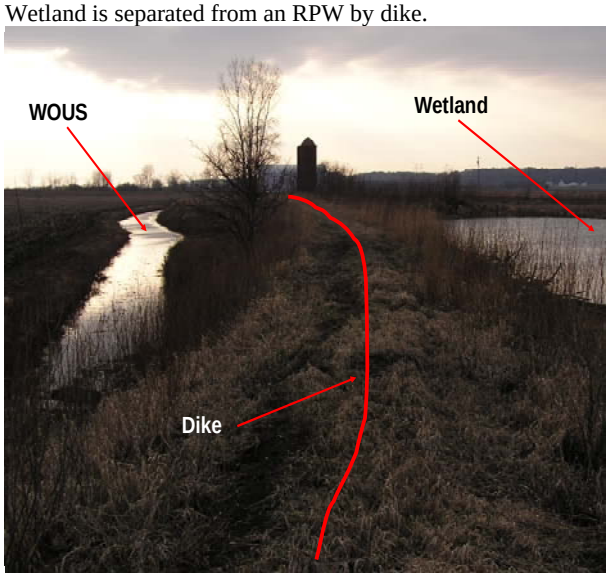


Photo 35. Non-abutting wetland, Marshall County, SD.
Wetland is separated from an RPW by berm.

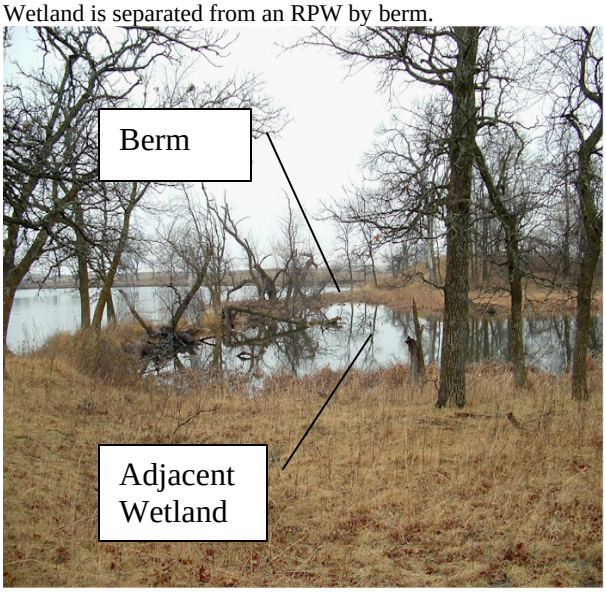


Photo 36. Non-abutting wetland, AK. Wetland is close but separated from an RPW by uplands.

Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA where there is a "significant nexus" with a TNW. For each specific request for wetlands adjacent but not directly abutting RPWs, field staff will need to perform significant nexus evaluation to determine if tributary is jurisdictional under the CWA.

7. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.** Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are adjacent. (For a few examples, see Photos 37 – 40)

Photo 37. Wetland is adjacent to a non-RPW, in AR. Red lines mark approximate location of OHWM.

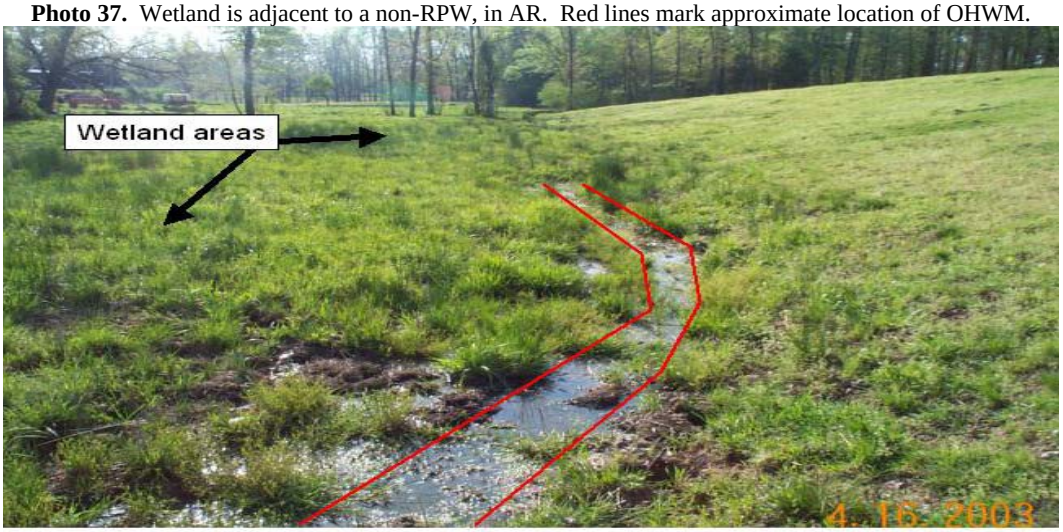
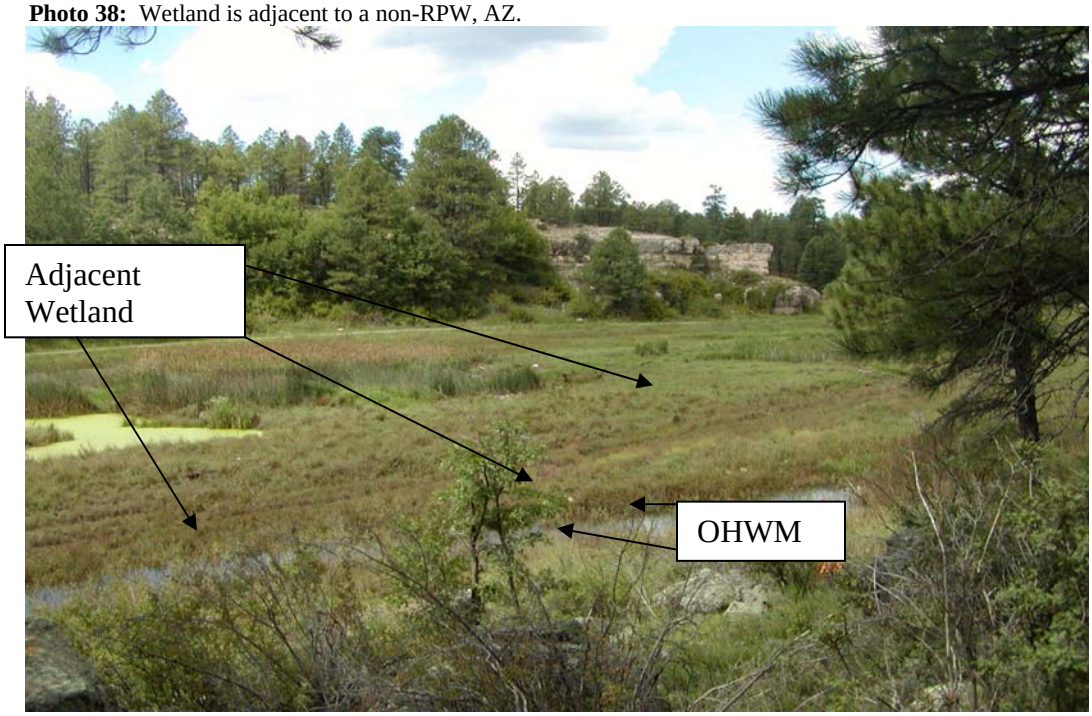


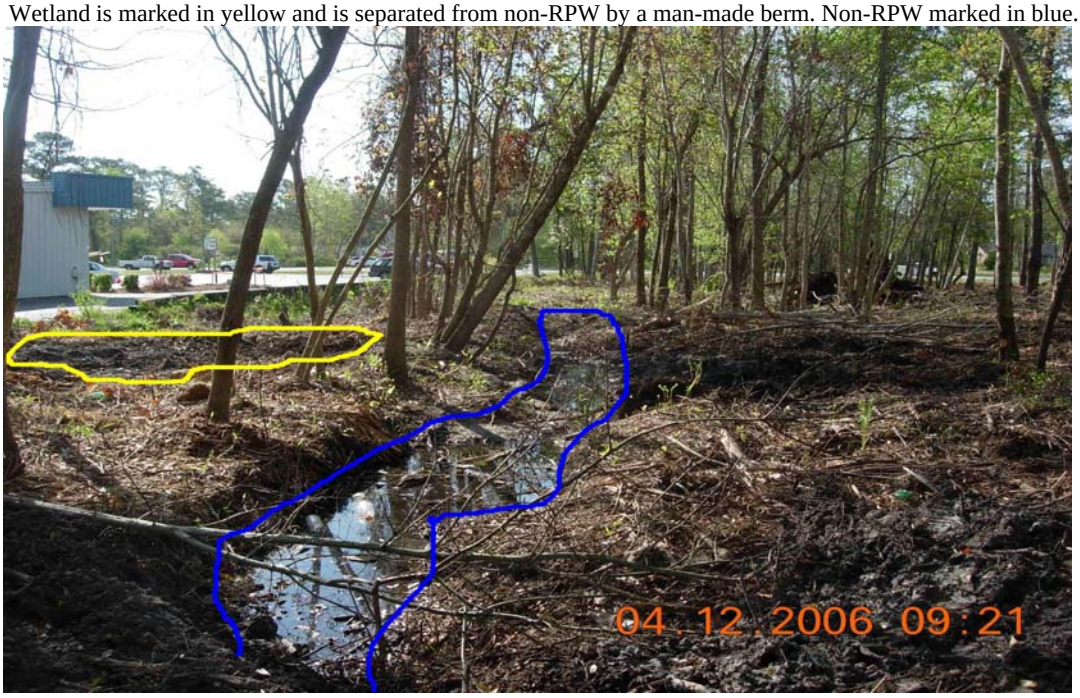
Photo 38: Wetland is adjacent to a non-RPW, AZ.



Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA where there is a "significant nexus" with a TNW. For each specific request, field staff will need to perform significant nexus evaluation to determine if tributary is jurisdictional under the CWA.

Photo 39: Wetland is adjacent to Piney Creek, Arapahoe County, CO.
White line marks approximate boundary between wetlands and uplands.

Photo 40: Adjacent wetland, South Atlantic Division.
Wetland is marked in yellow and is separated from non-RPW by a man-made berm. Non-RPW marked in blue.



Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA where there is a "significant nexus" with a TNW. For each specific request, field staff will need to perform significant nexus evaluation to determine if tributary is jurisdictional under the CWA.

8. Impoundments of jurisdictional waters. Generally, impoundment of a water of the U.S. does not affect the water's jurisdictional status. (For a few examples, see Photos 41-42)

Photo 41. Impoundment on a TNW, in PA; water is jurisdictional under the CWA.

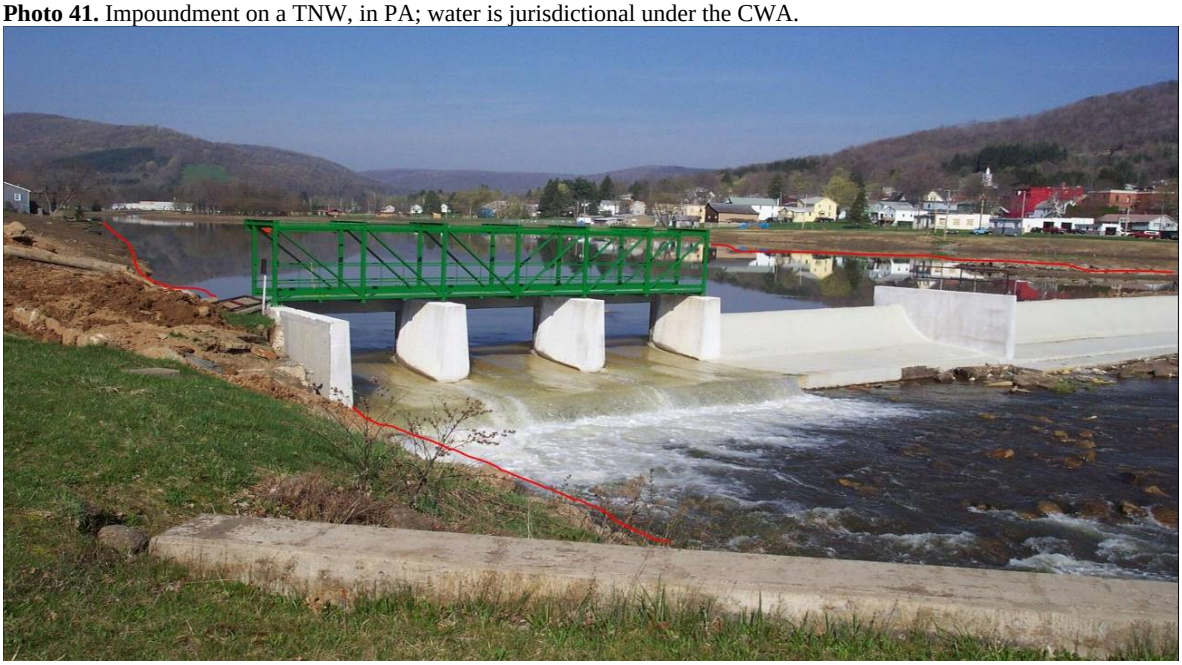


Photo 42. Impoundment on an RPW, in South Atlantic Division. Water flows into a TNW; water is jurisdictional under the CWA. Red lines mark the approximate location of the OHWM.

For each specific request for impoundments, field staff will need to make a case-by-case determination on jurisdictional status of resource.

9. **Isolated Waters (including Wetlands)** are geographically isolated. Nothing herein should be interpreted as providing authority to assert jurisdiction over waters deemed non-jurisdictional by *SWANCC*. The following photos show isolated waters; these particular waters were determined to not be jurisdictional under the CWA because they lacked links to interstate commerce sufficient to serve as a basis for jurisdiction. (Photos 43 - 48)

Photo 43. Isolated prairie pothole (wetland) in Marshall County, SD.

Photo 44. Isolated aquatic resources, WI.

Photo 45. Isolated wetland located in a micro-depression in the landscape of western KS

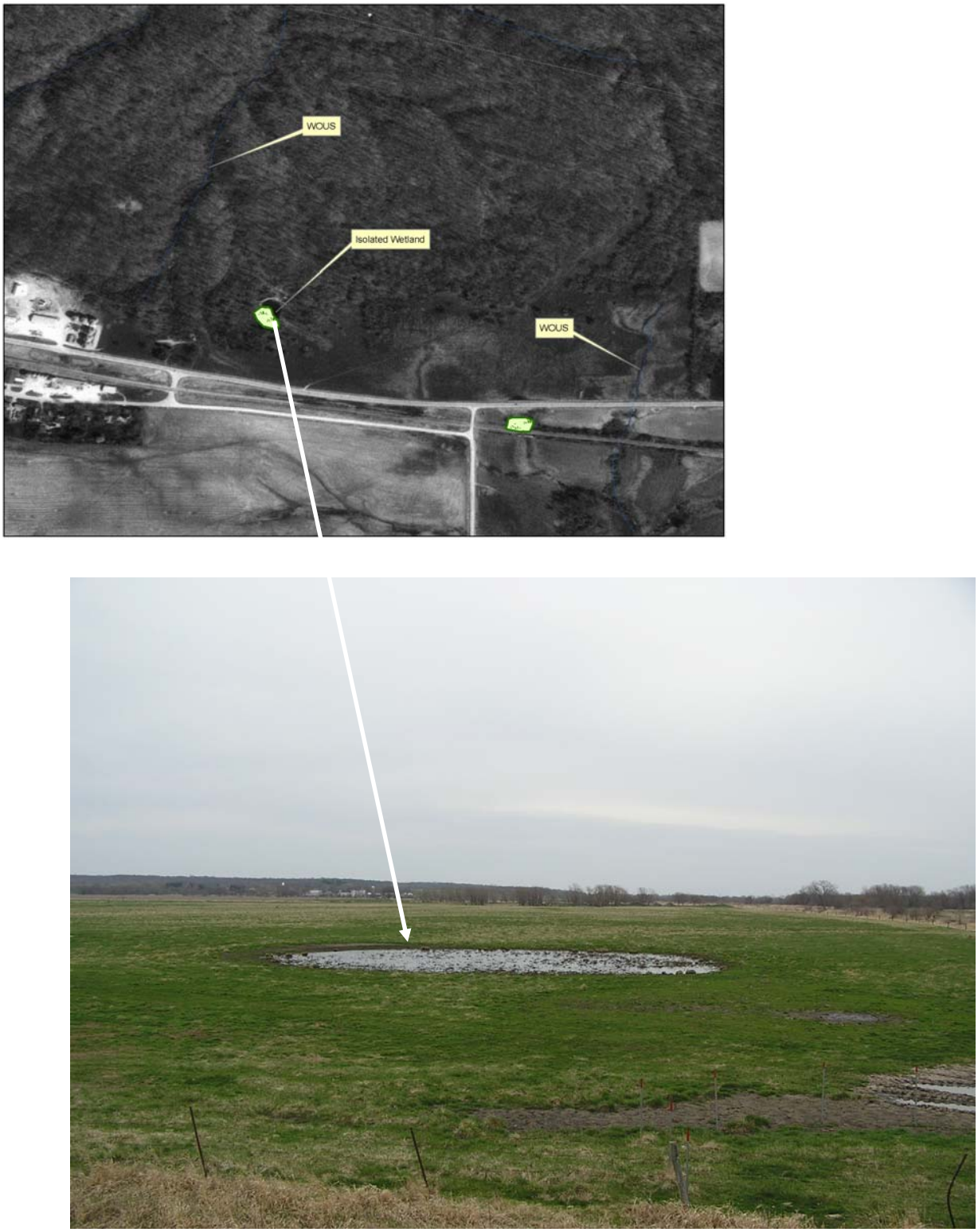
For each specific request for isolated waters (including isolated wetlands), field staff will need to make a case-by-case determination on jurisdictional status of resource.

Photo 46. An isolated wetland located in KS.

Photo 47. Isolated wetland, Vicksburg District.

For each specific request for isolated waters (including isolated wetlands), field staff will need to make a case-by-case determination on jurisdictional status of resource.

Photo 48. Isolated wetlands, IA.



For each specific request for isolated waters (including isolated wetlands), field staff will need to make a case-by-case determination on jurisdictional status of resource.

9. Features that may (or may not) be jurisdictional waters under the CWA.

Pipes. In the following two photos (Photos 49 -50), water is flowing through pipes. In these cases, the pipes do not sever jurisdiction with the upstream waters. For both cases below, the water bodies are jurisdictional under the CWA.

Photo 49. Water body is an RPW. This photo shows water flowing through a culvert. Culvert does not affect the jurisdictional status of the water body.

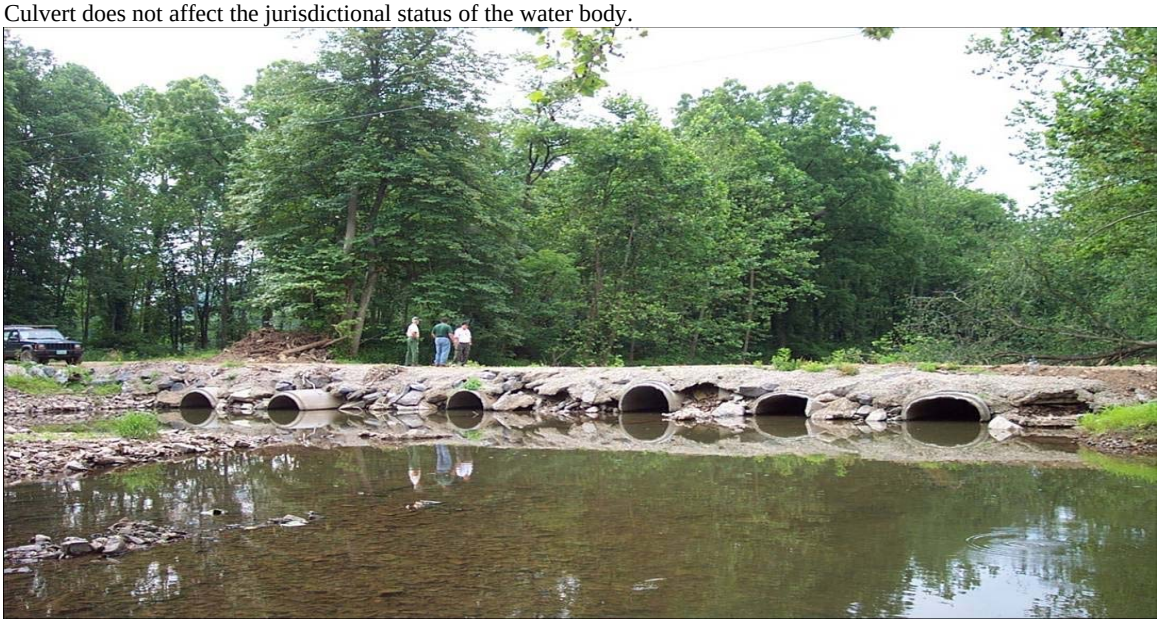


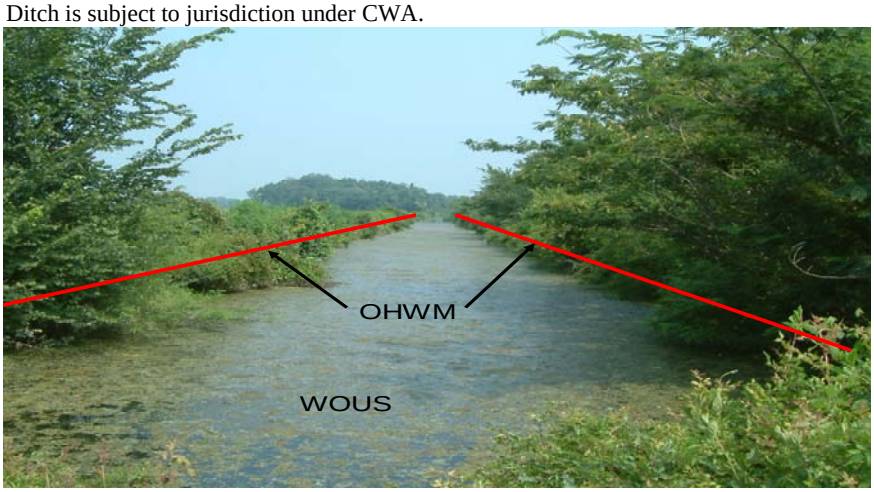
Photo 50. Water body is an RPW, WA. This photo shows water flowing through a culvert. Culvert does not affect the jurisdictional status of the water body. Dotted red lines mark approximate location of OHWM.

For each specific request relating to ditches or similar features, field staff will need to make a case-by-case determination on jurisdictional status of resource.

Ditches. Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water generally are not jurisdictional under the CWA, because they are not tributaries or they do not have a significant nexus to TNWs. If a ditch has relatively permanent flow into waters of the U.S. or between two (or more) waters of the U.S., the ditch is jurisdictional under the CWA. Even when not themselves waters of the United States, ditches may still contribute to a surface hydrologic connection between an adjacent wetland and a TNW. (For a few examples, see Photos 51 - 54).

Photo 51. A roadside ditch excavated wholly in uplands, CA.
Feature is not jurisdictional under CWA.

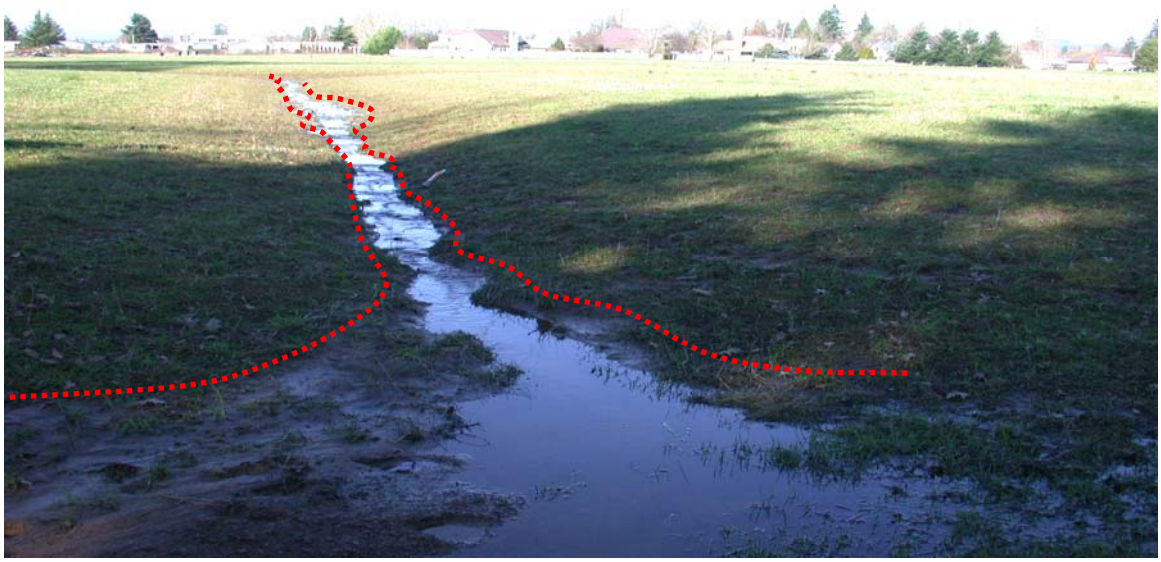
Photo 52. Ditch, an RPW, in Memphis District.
Ditch is subject to jurisdiction under CWA.



For each specific request relating to ditches or similar features, field staff will need to make a case-by-case determination on jurisdictional status of resource.

Photo 53. Drainage ditch, an RPW, in South Atlantic Division. Ditch excavated in wetlands; ditch is subject to jurisdiction under CWA. Yellow lines mark approximate location of OHWM.

Photo 54. A ditch, constructed in uplands, in WA. Ditch conveys water from a nearby wetland to a stream through a storm water outfall pipe. Red lines mark approximate location of OHWM.



For each specific request regarding ditches or similar features, field staff will need to make a case-by-case determination on jurisdictional status of resource.

Swales. Swales are generally shallow features in the landscape that may convey water across upland areas during and following storm events. Swales usually occur on nearly flat slopes and typically have grass or other low-lying vegetation throughout the swale. Swales are generally not waters of the U.S. because they are not tributaries or they do not have a significant nexus to TNWs. Even when not themselves waters of the United States, swales may still contribute to a surface hydrologic connection between an adjacent wetland and a TNW. (For a few examples, see Photos 55-58)

Photo 55. Swale is not jurisdictional under the CWA.

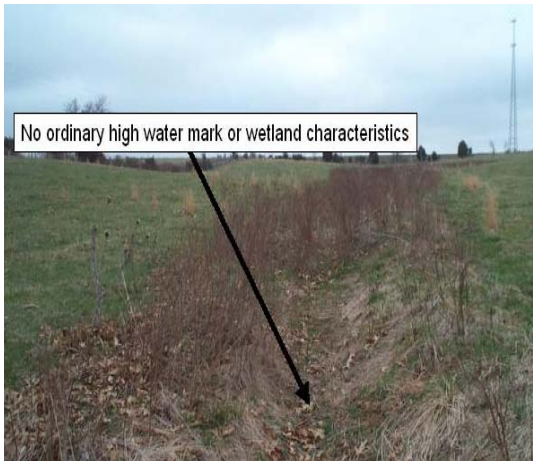


Photo 56. Swale is not jurisdictional under the CWA.

Photo 57. Unnamed desert swale is not jurisdictional under the CWA.

Photo 58. Swale is not jurisdictional under the CWA.

Swales generally are not jurisdictional under the CWA.

Erosional Features. Erosional features, including **gullies**, are generally not waters of the U.S. because they are not tributaries or they do not have a significant nexus to TNWs. (For a few examples, see Photos 59-60)

Photo 59: Gullies are eroded channels where surface runoff concentrates. This photo shows a gulley formed by eroding material.

Photo 60. These erosional features are small channels eroded into the soil surface by runoff.

Erosional features generally are not jurisdictional under the CWA.

B. IDENTIFYING THE REACH RELEVANT TO THE SIGNIFICANT NEXUS DETERMINATION FOR NON-RPW AND THEIR ADJACENT WETLANDS

This section describes how to identify the particular reach of waters to be evaluated for the purpose of making a significant nexus determination of a non-RPW and its adjacent wetlands. A tributary, as defined here, is a natural, man-altered, or man-made water body that carries flow directly or indirectly into a TNW. Examples include rivers, streams, and lakes that flow directly or indirectly into TNWs. Furthermore, for the purposes of the significant nexus determination process, a tributary is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). The flow characteristics of a particular tributary will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream).

For each of the following illustrations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands.

The following examples are presented to illustrate the process of identifying the reach to be evaluated for the purpose of making a significant nexus determination of a non-RPW and adjacent wetlands, as they relate to an identified project area.

Illustration 1: Baseline map with no proposed project.

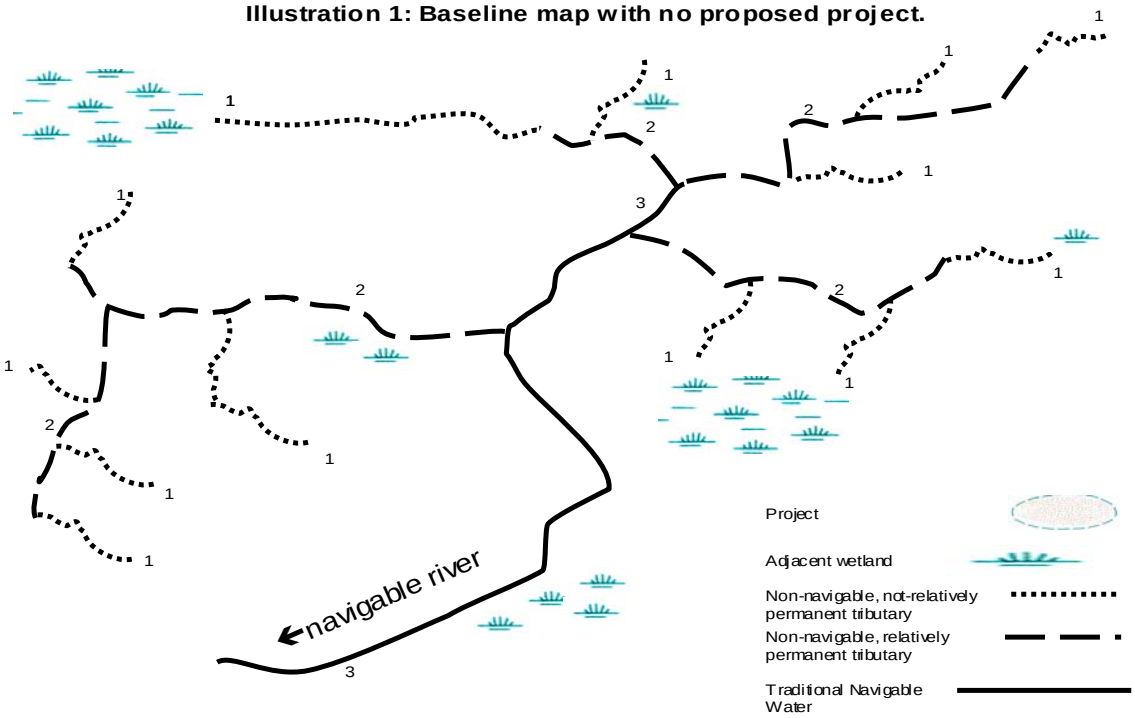


Illustration 2: Project is on a tributary with non-RPWs and no adjacent wetlands. For this example, the "relevant reach" is the tributary colored green, which terminates at the red line.

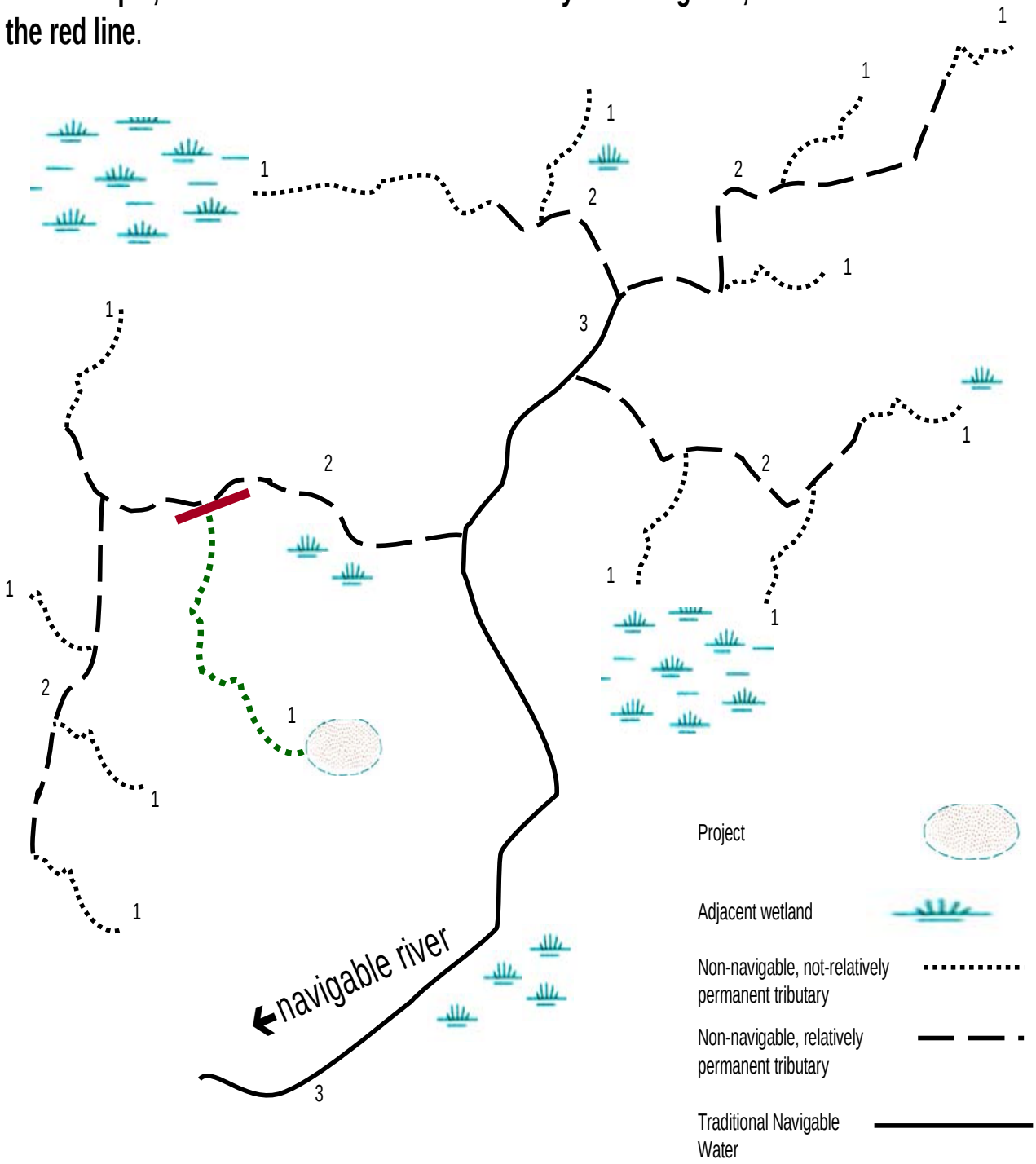


Illustration 3: Project is on a tributary with non-RPWs that become RPWs. The "relevant reach" is the tributary colored green, which terminates at the red line. Significant nexus for the "not-relatively permanent" portion of this reach is determined by analyzing the functions of the entire tributary of the same order and all adjacent wetlands. In this case, the lower portion of the tributary, being relatively permanent, is jurisdictional by definition.

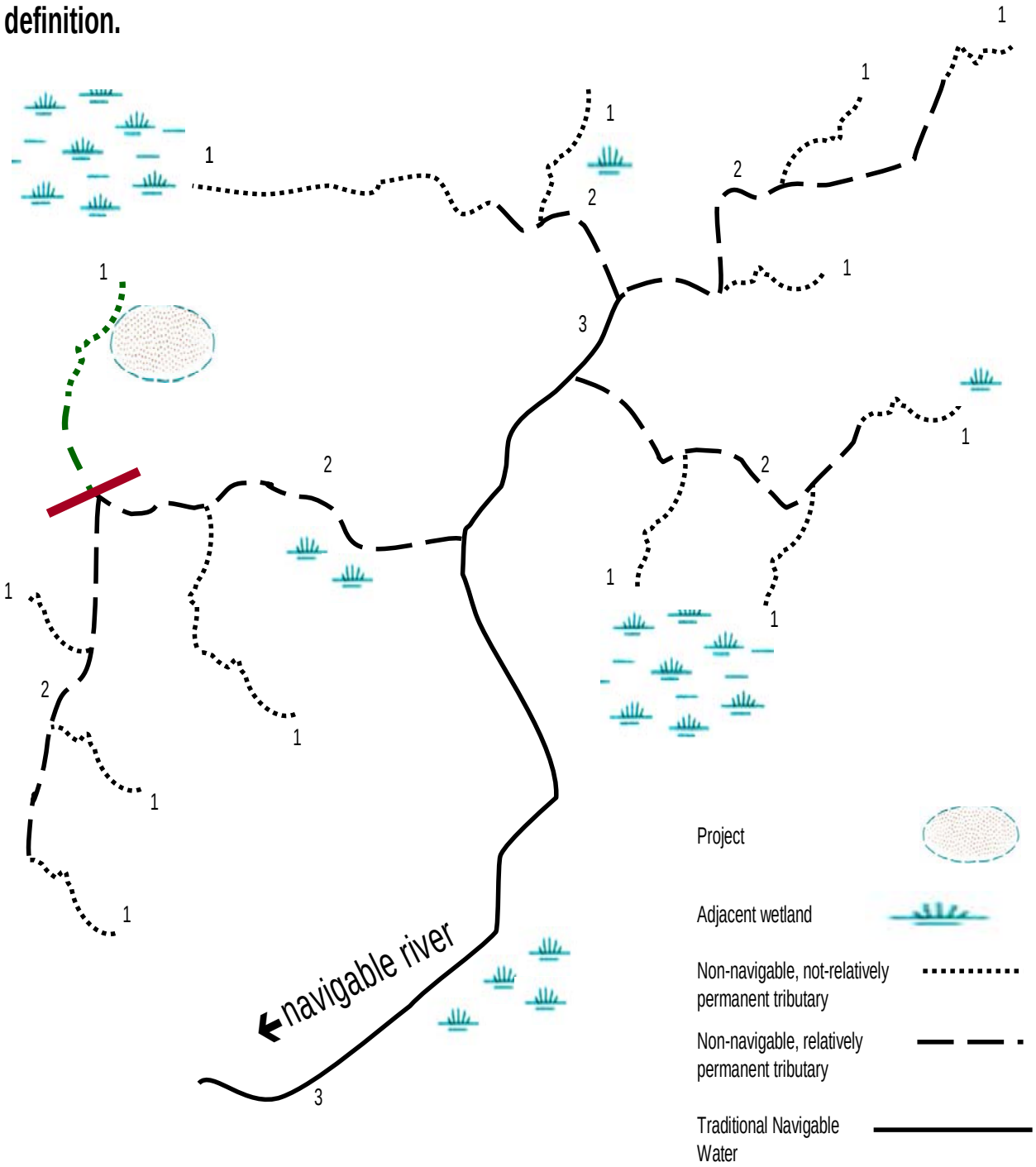


Illustration 4: Project involves a wetland adjacent to a tributary with non-RPWs. The "relevant reach" includes all of the wetlands adjacent to the tributary and the tributary, itself, colored green, which terminates at the red line. Significant nexus for the "not-relatively permanent" portion of this reach is determined by analyzing the functions of the entire tributary of the same order and all adjacent wetlands. In this case, the lower portion of the tributary, being relatively permanent, is jurisdictional by definition.

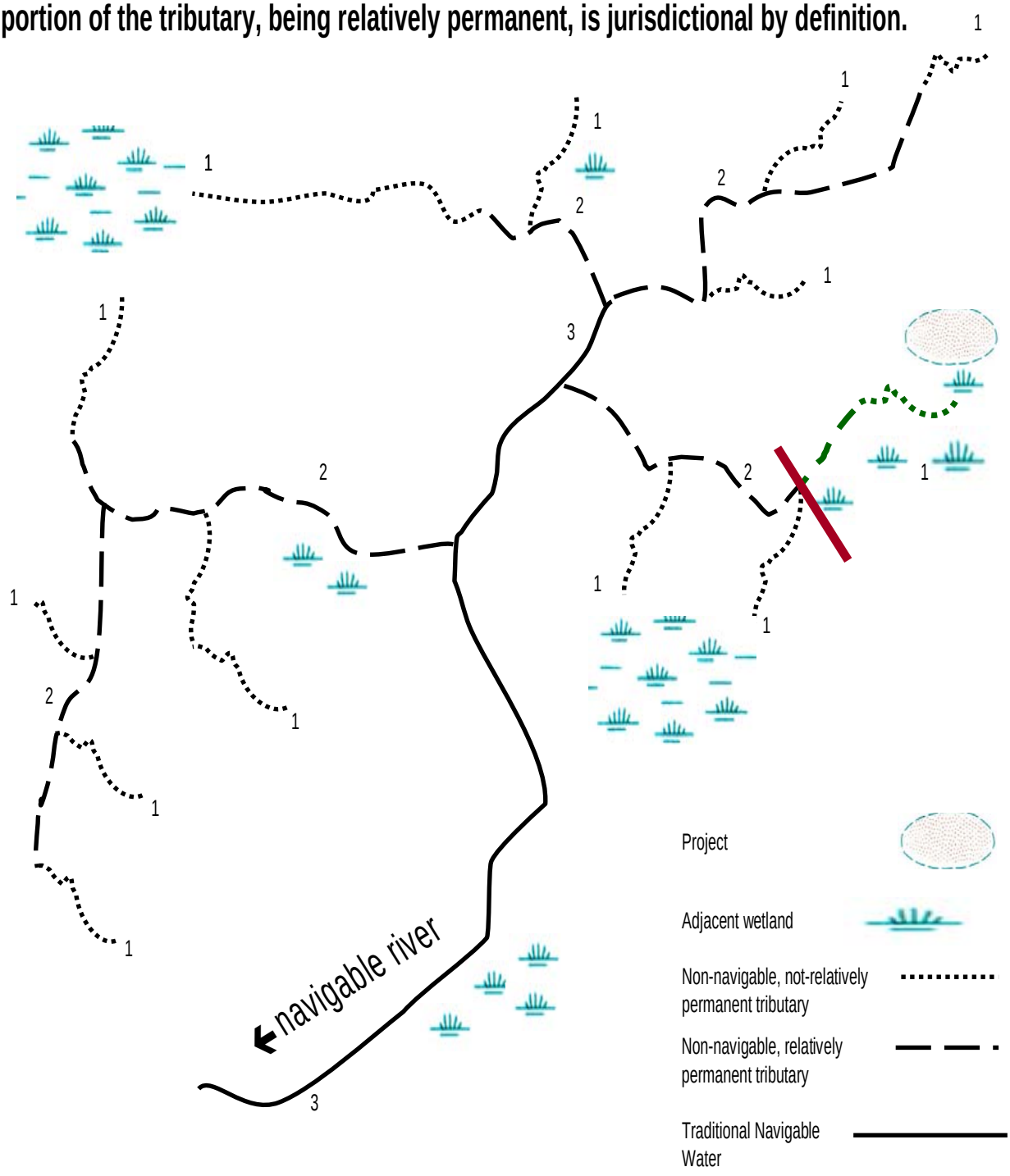


Illustration 5: Project involves a wetland adjacent to two tributaries with non-RPWs. The "relevant reach" includes the wetland, and any other wetlands adjacent to those tributaries, and both tributaries colored green; the reach terminates at the red lines.

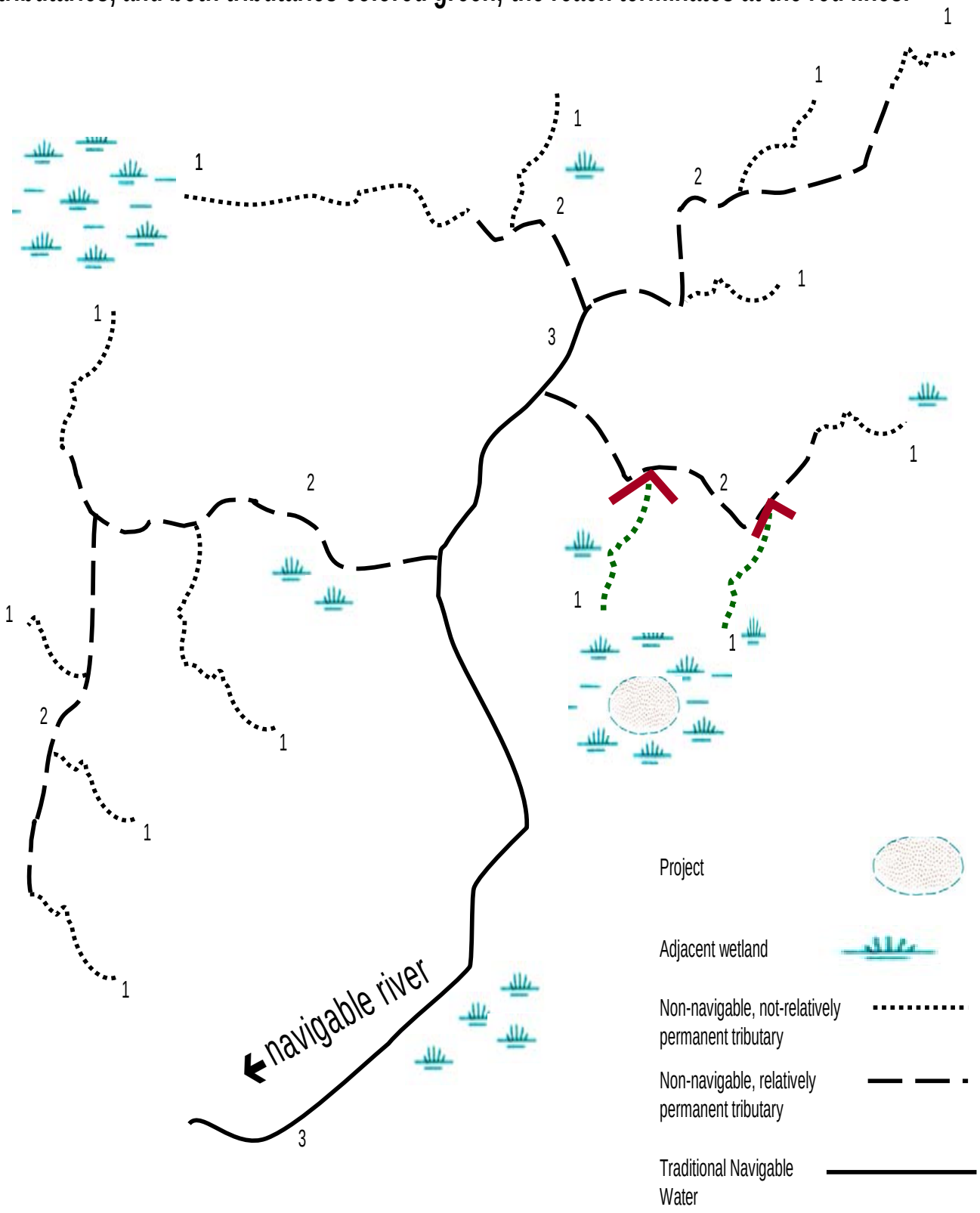
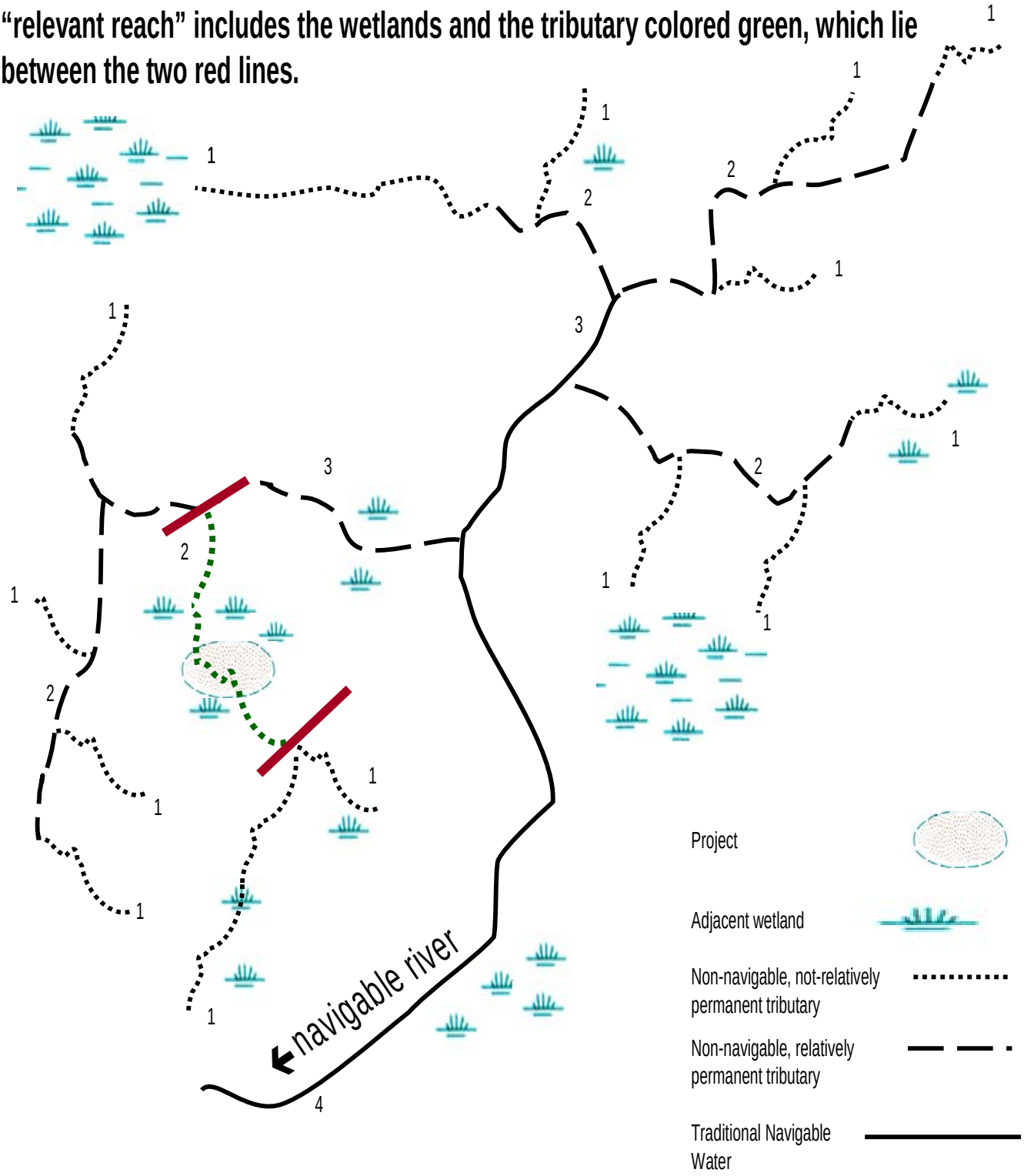


Illustration 6: Project involves wetlands adjacent to a tributary with non-RPWs. The "relevant reach" includes the wetlands and the tributary colored green, which lie between the two red lines.



III. GENERAL JD FORM INSTRUCTIONS

This document contains instructions to aid field staff in completing the *Approved Jurisdictional Determination Form (“JD form”).* **This document is intended to be used as the Corps Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination (JD) and documenting practices to support an approved JD until this document is further revised and reissued.**[3]

The attached Approved JD form (Appendix B) is intended to help implement the U.S. Supreme Court decision in *Rapanos.* Prior to using this instructional guidebook when completing the attached Approved JD form, field staff should read the memoranda regarding *Clean Water Act Jurisdiction Following Rapanos v. United States* (Appendix A) and *Coordination on JDs under CWA Section 404 in Light of SWANCC and Rapanos Supreme Court Decisions* (Appendix C).

Approved JDs will be completed in accordance with RGL 07-01 (Appendix E) to document site conditions reviewed within the project area under Section 10 of the RHA and Section 404 of the CWA. The attached JD form (Appendix B) will be used to document all Approved JDs[4] and serve as the basis for asserting or declining jurisdiction over waters regulated by the Corps.

A. SUPPORTING DOCUMENTATION:

JDs require documentation that identifies if there is the presence and/or absence of jurisdiction and/or the boundaries of the water body. Maps, aerial photography, soil surveys, watershed studies, scientific literature, previous JDs for the review area, and local development plans may assist staff in completing accurate JDs. This information should be referenced in the file, with any conclusions formulated from this information stated in the Approved JD form.

JDs for more complex sites may require additional documentation and effort by the project manager. For example, determining whether jurisdiction exists over a non-navigable tributary with non-relatively permanent flow and its adjacent wetlands will require documentation that evaluates if there is a significant nexus between the tributary/wetland system in question and the TNW. Identification and evaluation of the functions relevant to the significant nexus determination will be more complete when incorporating literature citations and/or references from studies pertinent to the parameters being reviewed.

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[3] See Footnote 1.

[4] An Approved JD is the Corps officially approved JD Form plus any supporting materials, documenting the presence or absence within an identified area of jurisdictional waters (e.g. waters of the U.S. subject to the CWA, or navigable waters of the U.S. subject to the Rivers and Harbors Act of 1899). An Approved JD shall be completed when requested by an affected party. The district shall provide a letter and a copy of the Approved JD to the person requesting the JD when requested. 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 District Engineer (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. (See RGL 94-02, Appendix F) In addition, the JD form shall be included in the official administrative record. (See RGL 07-01, Appendix E) Note: Approved JDs are appealable actions. (See RGL 06-01, Appendix G)

All reviewed information that contributed to an Approved JD should be adequately reflected in the administrative file along with a copy of the Approved JD.

B. <u>COORDINATION</u>:

The draft JD form will be reviewed and approved by the appropriate Corps district chain of command. The District Regulatory Division/Branch Chief will determine the level of review that is appropriate for each category of JD.

However, prior to finalizing (approving) the JD, (a) all JDs regarding non-navigable, isolated waters, including wetlands, will be elevated for an agency HQ review prior to the district's making a final decision; and (b) the EPA will be provided an opportunity to review and request a higher level review if there is an interagency dispute regarding a JD containing a "significant nexus" determination (Appendix C).

The district retains the flexibility to either provide the final Approved JD form as an attachment to its correspondence regarding the associated approved JD or to provide a hyperlink to the posted Approved JD form. In the event a hyperlink is provided, the recipient will be notified that a copy of the Approved JD form will be provided upon request. All requests by applicants for JDs will be responded to in writing in the form of a letter to the project proponent.

The attached JD form supersedes all previous JD forms. Therefore, districts should no longer use or post the prior *Jurisdiction Determination* or the *Determination of No Jurisdiction Information Sheets*. Upon completing the Approved JD form, districts will convert the form to a PDF (or other appropriate web posting format) and post on the local district regulatory program web page for a minimum period of one quarter from the date of posting. Forms will be posted within 30 days of completion.

Additional information on practices for documenting jurisdiction is found in RGL 07-01 (Appendix E).

IV. DETAILED JD FORM INSTRUCTIONS

The Approved JD form includes the following Sections: (I) Background Information, (II) Summary of Findings, (III) Clean Water Act (CWA) Analysis, and (IV) Data Sources. Sections I and II of the Approved JD form provide background information and a summary of the findings contained in Section III. Section III is organized to provide clear and consistent instructions to facilitate identification and analysis of relevant information as well as documentation of the results of the analysis to support the *presence* or *absence* of CWA jurisdiction. Summary sections are provided to allow field staff to clearly explain what water body(ies) is being reviewed and to document the relationship between the water body(ies) and the associated TNW. Section IV of the JD form summarizes the data sources used to complete the JD. Comments supporting the approved JD also should be placed in the final paragraph of Section IV – Additional Comments to Support JD.

PROCEDURAL NOTE: The instructions below only address those Sections of the Approved JD form that benefit from further explanation. The numbering of the Sections below corresponds with the relevant Sections of the JD form (Appendix B).

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD).

Report completion date is the date this form is completed and approved by the regulatory District Division/Branch Chief (or representative thereof).

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

Diagram(s). If a supporting diagram is available that illustrates the site conditions and thereby supports the determination of findings, the diagram should be included as a part of the form.

Review Area. Refers to the relevant reach of the water body being reviewed for determination of CWA jurisdiction.

D. REVIEW PERFORMED FOR SITE EVALUATION:

Office determination date is the date the office determination was completed by the District Regulatory program staff.

Field determination date is the date the District Regulatory program staff conducted a site visit (if applicable) to delineate or review an applicant's delineation for all waters of the U.S. All site visits will be identified in this box.

SECTION II: SUMMARY OF FINDINGS:

This section presents a summary of the findings from Section III.

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

Navigable waters of the U.S. subject to Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area.

- By checking the appropriate box(es), field staff will indicate whether the water body is a navigable water of the U.S. because:
  - a Corps district has determined that the water body is a navigable water of the U.S. pursuant to 33 CFR part 329.14; or
  - the water body is subject to the ebb and flow of the tide; or because it is presently used, or has been used in the past, or may be susceptible for use (with or without reasonable improvements) to transport interstate or foreign commerce; or
  - one or more decisions of the Federal Courts has determined that the water body is navigable-in-law; or

- the water body is navigable-in-fact (i.e. if the water body is either currently used or is susceptible to use in its existing condition for any commercial purpose involving navigation.

- Tabulated lists of final determinations of navigability are to be maintained in each district office, and will be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions. It should be noted that the lists represent only those water bodies for which determinations have been made; absence from that list should not be taken as an indication that the water body is not navigable for the purposes of RHA Section 10.

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

Figure 2 identifies the process for determining CWA jurisdiction based on the standards presented in the *Rapanos* decision integrated with the process presented in 33 CFR 328.3.

1. **Waters of the U.S.**[5] include:
   - TNWs, including territorial seas: *This class of water bodies is jurisdictional under the CWA.*
   - Wetlands adjacent to TNWs: *This class of water bodies is jurisdictional under the CWA.*
   - Relatively permanent waters[6] (RPWs) that flow directly or indirectly into TNWs: *This class of water bodies is jurisdictional under the CWA.*
   - Non-RPWs that flow directly or indirectly into TNWs: *A significant nexus finding is required to assert jurisdiction over this class of water bodies under the CWA.*
   - Wetlands directly abutting RPWs that flow directly or indirectly into TNWs: *This class of water bodies is jurisdictional under the CWA.*
   - Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs: *A significant nexus finding is required to assert jurisdiction over this class of water bodies under the CWA.*
   - Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs: *A significant nexus finding is required to assert jurisdiction over this class of water bodies under the CWA.*
   - Impoundments of jurisdictional waters: *Impoundment of waters of the U.S. as a general matter does not affect the water's jurisdictional status.*
   - Isolated (interstate or intrastate) waters, including isolated wetlands: *Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos. (Appendix F)*

[5] Categories of waters of the U.S. in this Instructional Guidebook and the JD form track those presented in the Memorandum regarding *Clean Water Act Jurisdiction Following Rapanos v. United States* (Appendix A) and are consistent with the scope of waters of the U.S. as defined at 33 CFR 328.3(a).

[6] For purposes of this guidance, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least seasonally (e.g., typically 3 months).

SECTION III: CWA ANALYSIS

A. The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1 only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1; otherwise, see Section III.B below.

1. **TNW**[7]

Documentation requirements to support determination includes:

- A Corps district determination that the water body is a navigable water of the U.S. pursuant to 33 CFR 329.14; or
- One or more decisions of the Federal courts determining that the water body is a navigable water of the U.S.; or
- One or more decisions of the Federal courts determining that the water body is a navigable water of a particular state, although not a navigable water of the U.S. (e.g., Great Salt Lake, UT); or
- The water body qualifies as a navigable water of the U.S. under any of the tests set forth in 33 CFR Part 329
  - E.g., the water body is (a) subject to the ebb and flow of the tide, and/or (b) the water body is presently used, or has been used in the past, or may be susceptible for use (with or without reasonable improvements) to transport interstate or foreign commerce; or
- The water body is Navigable-in-Fact:
  - A water body is navigable-in-fact if it is either currently used or susceptible to use in its existing condition for any commercial purpose involving navigation. A water body's susceptibility for commercial navigational uses can be demonstrated if the water body has the capacity to support any type of boating (such as canoeing or rafting), together with public access to the water body.

2. **Wetlands adjacent to TNWs.** Wetlands "adjacent" to TNWs are jurisdictional under the CWA.

Documentation requirements to support determination:

- Identify the TNW
- Identify rationale to support adjacency to the TNW

<u>Adjacent Wetlands:</u>

- Wetlands will meet all three parameters of hydrology, hydrophytic vegetation, and hydric soils, as required by agency regulations, and described in the *Corps of Engineers Wetlands Delineation Manual* (1987) or appropriate Regional Supplement

[7]Appendix D provides a legal memorandum on the documentation requirements needed to fulfill this section.

- Adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are also adjacent. (33 CFR 328.3(c))

B. CHARACTERISTICS OF TRIBUTARY REACH (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY)

- The agencies will assert jurisdiction over any non-navigable tributary of TNWs where the tributary is a "relatively permanent water" (RPW). A wetland that directly abuts an RPW is also jurisdictional**.**

- **If the RPW has perennial flow, complete only Section III.D.2 because a significant nexus finding is not required as a matter of law or policy. If the aquatic resource is a wetland directly abutting an RPW with perennial flow, complete Sections III.D.2 and III.D.4 because, as above, a significant nexus finding is not required as a matter of law or policy.**

- **If the aquatic resource is an RPW without perennial flow or a wetland directly abutting an RPW without perennial flow, complete Section III.B. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus** between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a TNW, even though a significant nexus finding is not required as a matter of law.

- A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. **Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus** between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a TNW, even though a significant nexus finding is not required as a matter of law.

- If the aquatic resource is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the aquatic resource has a significant nexus with a TNW.

- If a JD is requested for a parcel of property that contains a tributary with adjacent wetlands, the JD will cover the tributary and all adjacent wetlands on that property (complete Section III.B.1 for the tributary and Section III.B.2 for any wetland(s) on the property). In addition, complete Section III.B.3 for all wetlands adjacent to that tributary, which will also be considered in the significant nexus evaluation. Information to characterize functions for offsite adjacent wetlands used in the significant nexus evaluation included in Section III.B.3 will be based on reasonably available information – field visits are not required.

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met (Appendix C).

Terms

River miles Information pertaining to the proximity of wetlands and tributaries to TNWs (and/or RPWs) is requested on the JD form. The term "river miles" pertains to the flowing distance between the water bodies in question. The distance is not a straight line measurement; rather, the measurement is based on how far the water will travel from water body A to water body B. For example, the water in a meandering tributary will flow further than water flowing in a channelized tributary provided the two water bodies are the same distance in the landscape.

Aerial miles Information pertaining to the proximity of wetlands and tributaries to TNWs (and/or RPWs)is requested on the JD form. The term "aerial miles" pertains to the straight line distance between the water bodies in question.

Stream Order Where field data are available, the stream order should be verified based on field observations. When stream order is identified the source of information should also be identified, for example field observations, maps, NHD, etc. For a discussion of the order of tributaries, see Alan Needle Strahler's 1952 article "Dynamic Basis of Geomorphology" in the *Geological Society of America Bulletin.*

C. SIGNIFICANT NEXUS DETERMINATION

- The significant nexus evaluation will combine, for analytical purposes, the tributary and all of its adjacent wetlands, whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both.

- A significant nexus analysis will assess the flow characteristics and functions of the relevant reach of the tributary, in combination with functions collectively performed by all wetlands adjacent to the tributary, to determine if they have more than an insubstantial or speculative effect on the chemical, physical, or biological integrity of TNWs.

- Consideration will be given to the distance between the tributary and the TNW. The tributary will not be so remote as to make the effect on the TNW speculative or insubstantial.

- It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of a significant nexus.

- 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 TNWs. 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 or they do not have a significant nexus to a TNW. Even when not themselves, waters of the U.S., these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a TNW.

- Ephemeral waters in the arid west that are tributaries may have a significant nexus to a TNW. For example, in some cases they may serve as a critical transitional area between the upland environment and the traditional navigable waters. Such ephemeral tributaries, with the associated riparian corridor, may provide refugia, foraging and breeding opportunities in areas that may have limited stands of vegetation and water due to the environmental conditions of the arid southwest. During and following precipitation events, ephemeral tributaries collect and transport water or sometimes sediment from the upper reaches of the landscape to the traditional navigable waters. These ephemeral tributaries, and associated riparian corridors, may provide habitat for wildlife and aquatic organisms. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may affect the integrity of a TNW.

1. Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNW.

Field staff will assert jurisdiction over tributaries that are not relatively permanent where the tributary has a significant nexus with a TNW. As a result, the explanation in Section III.C.1 will include a discussion documenting the characteristics and underlying rationale for the conclusions regarding the presence or absence of a significant nexus.

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 TNW. Field staff will consider all available hydrologic information (e.g., gage data, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.) and physical indicators of flow including the presence and characteristics of a reliable OHWM with a channel defined by bed and banks. Other physical indicators of flow may include shelving, wracking, water staining, sediment sorting, and scour (Appendix H). Consideration will be given to certain relevant contextual factors that directly influence the hydrology of tributaries including the size of the tributary's watershed, average annual rainfall, average annual winter snow pack, slope, and channel dimensions.

Field staff will provide an explanation that demonstrates whether or not the aquatic resource has more than an insubstantial or speculative effect on the chemical, physical, or biological integrity of the TNW. The specific connections between the characteristics documented and the functions/services they play in affecting the TNW will be demonstrated. Specifically, an evaluation will be made of the frequency, volume, and duration of flow; proximity to the TNW; capacity to transfer nutrients and organic carbon vital to support food webs; habitat services such as providing spawning areas for important aquatic species; functions related to the maintenance of water quality such as sediment trapping; and other relevant factors. In some cases, even tributaries that are relatively distant from a TNW may have a significant nexus with the TNW.

2. Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNW.

The field staff will assert jurisdiction over tributaries that are non-RPWs where the tributary, in combination with all of its adjacent wetlands, has a significant nexus with a TNW. The field staff will assert jurisdiction over wetlands that are adjacent to a non-RPW where the wetlands, in combination with the relevant tributary reach, have a demonstrated significant nexus with a TNW. As a result, the explanation in Section III.C.2 will include a discussion documenting the characteristics and underlying rationale for the conclusions regarding the presence or absence of a significant nexus with a TNW.

Field staff will explain the specific connections between the characteristics documented and the functions/services that affect a TNW. Specifically, an evaluation will be made of the frequency, volume, and duration of flow; proximity to a TNW; capacity to transfer nutrients and organic carbon vital to support food webs; habitat services such as providing spawning areas for important aquatic species; functions related to the maintenance of water quality such as sediment trapping; and other relevant factors.

In addition, the evaluation will also consider the functions performed cumulatively by any and all wetlands that are adjacent to the tributary, such as storage of flood water and runoff; pollutant trapping and filtration; improvement of water quality; support of habitat for aquatic species; and other functions that contribute to the maintenance of water quality, aquatic life, commerce, navigation, recreation, and public health in the TNW. This is particularly important where the presence or absence of a significant nexus is less apparent, such as for a tributary at the upper reaches of a watershed. Because such a tributary may not have a large volume, frequency, and duration of flow, it is important to consider how the functions supported by the wetlands, cumulatively, have more than a speculative or insubstantial effect on the chemical, physical, or biological integrity of a TNW.

3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.**

   The field staff will assert jurisdiction over wetlands that do not directly abut an RPW where there is a demonstrated significant nexus with a TNW. As a result, the explanation in Section III.C.4 will include a discussion documenting the characteristics and underlying rationale for the conclusions regarding the presence or absence of a significant nexus with a TNW. The significant nexus determination can be based on the wetland under review, in combination with all other wetlands adjacent to that tributary. See Section 2 above for factors to be considered in the analysis.

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS

1. **TNWs and Adjacent Wetlands.** These classes of water bodies are jurisdictional under the CWA.

   Documentation to support determination:
   - Provide data supporting this conclusion in Section III.A.

2. **RPWs that flow directly or indirectly into TNWs.** This class of water bodies is jurisdictional under the CWA.

   Documentation to support determination:
   - If flow is typically year round; flow determinations should be supported by characteristics in Section III.B.1 of the form such as flow/gage data, rainfall data, anecdotal information, or
   - If flow is continuous at least "seasonally" provide data supporting this conclusion in Section III.B.

   As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus between a RPW that is not perennial and a TNW.

3. **Non-RPWs that flow directly or indirectly into TNWs.** This class of water bodies is jurisdictional under the CWA where there is a "significant nexus" with a TNW.

   Documentation requirements to support determination:
   - Section III.B.1 (and III.B.2 and III.B.3, if applicable) of the form needs to demonstrate that water flow characteristics of a non-RPW, in combination with the functions provided by those non-RPWs and any adjacent wetlands (if any), has more than an insubstantial or speculative effect on the chemical, physical, and/or biological integrity of the TNW

- Section III.C.1 or Section III.C.2 needs to identify rationale to support the significant nexus determination for the non-RPW

4. **Wetlands directly abutting RPWs that flow directly or indirectly into TNWs.** This class of water bodies is jurisdictional under the CWA.

   Documentation requirements to support determination:
   - Wetlands will meet the 3-parameter test contained in the agency's regulatory definition of wetlands. See also the protocol identified in the *Corps of Engineers Wetlands Delineation Manual* (1987) or appropriate Regional Supplement

   If flow between the RPW and TNW is perennial, then:
   - Section III.D.2. of the form needs to demonstrate that flow is typically year round
   - Demonstrate wetland is directly abutting an RPW. Note that a continuous surface connection does not require surface water to be continuously present between the wetland and the tributary.

   If flow between the RPW and TNW is at least seasonal, then:
   - Section III.D.2 of the form needs to demonstrate that water flows from an RPW directly or indirectly into TNW
   - Section III.B.2 needs to document that the wetland is directly abutting an RPW

   As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus between a wetland directly abutting an RPW that is not perennial and a TNW.

5. **Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs.** This class of water bodies is jurisdictional under the CWA where there is a "significant nexus" with a TNW.

   Documentation requirements to support determination:
   - Wetlands will meet the 3-parameter test contained in the agency's regulatory definition of wetlands. See also the protocol identified in the *Corps of Engineers Wetlands Delineation Manual* (1987) or appropriate Regional Supplement
   - Section III.B.1 of the form needs to demonstrate that water flows from an RPW directly or indirectly into a TNW
   - Section III.B.2 and 3 need to identify rationale that wetland is adjacent (not directly abutting) to an RPW that flows directly or indirectly into a TNW
   - Section III.C.3 needs to identify rationale to support significant nexus determination for a wetland, in combination with all other wetlands adjacent to that tributary

6. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.** This class of water bodies is jurisdictional under the CWA where there is a "significant nexus" with a TNW.

   Documentation requirements to support determination:
   - Wetlands will meet the 3-parameter test contained in the agency's regulatory definition of wetlands. See also the protocol identified in the *Corps of Engineers Wetlands Delineation Manual* (1987) or appropriate Regional Supplement
   - Section III.B.1 of the form needs to demonstrate that water flows from a non-RPW directly or indirectly into a TNW
   - Section III.B.2 and 3 need to identify rationale that the wetland is adjacent to a non-RPW that flows directly or indirectly into a TNW
   - Section III.C.2 needs to identify rationale to support significant nexus determination for the wetland, in combination with all other wetlands adjacent to that tributary

7. **Impoundments of jurisdictional waters.** Generally, impoundment of a water of the U.S. does not affect the water's jurisdictional status.

   Documentation requirements to support determination:
   - Demonstrate that impoundment was created from "waters of the U.S.," or
   - Demonstrate that water meets the criteria for one of the categories presented above (1-6), or
   - Demonstrate that water is isolated with a nexus to commerce (see E below). *Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding CWA Act Jurisdiction Following Rapanos. (Appendix C)*

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE

Note that prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps HQ for review consistent with the process described in the Corps/EPA Memorandum Regarding *CWA Act Jurisdiction Following Rapanos* (Appendix G).

Documentation to support determination:
- Formal request for HQ concurrence on JD
- JD form
- Data supporting JD form such as site maps, delineation reports, and other supporting documentation. If site plans and other documentation cannot be transmitted electronically, the district will inform Corps HQ and identify how information will be forwarded to them

- Documentation that explains the district's basis for asserting or declining CWA jurisdiction, that includes:
  - Identify if water/wetland is interstate or intra-state
  - References and data regarding links to interstate commerce considered when concluding whether to assert or decline CWA jurisdiction, and whether they are *actual* versus *potential* occurrence of the activities identified above
  - The rationale for concluding the water is not jurisdictional as another category of water of the U.S.
- A summary statement of the district position and information sources reviewed, contacts, and other documentation in the administrative record supporting its findings and/or recommendations

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS

This section presents the findings for waters and/or wetlands, which were not found jurisdictional under any category of waters of the U.S. This conclusion should be explained in the relevant earlier sections of the form and field staff is encouraged to provide additional rationale here.

SECTION IV: DATA SOURCES

A. SUPPORTING DATA. This section identifies the sources of data used to support the determination.

B. ADDITIONAL COMMENTS TO SUPPORT JD. This section may be used to provide additional information to support the determinations above.

If complex site conditions are present, clarify extenuating conditions in this section. For example, if multiple sites are jurisdictional within the review area, and they were delineated by different methods, this section should discuss the methods used for the different delineations. Additionally, if multiple wetland sites have been determined not to be jurisdictional, but could have been based on the MBR, you are to indicate total size of wetland(s). This section should be used to denote if the total acreage is based on one or multiple wetlands. If there are multiple wetlands located onsite and some are determined to be adjacent and others isolated, use this space to clarify findings above.

This section will be used to further supplement the significant nexus analyses provided in Section III.C., where site conditions are complex and warrant additional consideration. If additional reports or literature are used to support the analysis and not identified in Section A above, these documents (and other sources) will be referenced in this section.