



**US Army Corps  
of Engineers®**

# REGULATORY GUIDANCE LETTER

**No. 08-02**

**Date: 26 June 2008**

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SUBJECT: Jurisdictional Determinations

1. Purpose. Approved jurisdictional determinations (JDs) and preliminary JDs are tools used by the U.S. Army Corps of Engineers (Corps) to help implement Section 404 of the Clean Water Act (CWA) and Sections 9 and 10 of the Rivers and Harbors Act of 1899 (RHA). This Regulatory Guidance Letter (RGL) explains the differences between these two types of JDs and provides guidance on when an approved JD is required and when a landowner, permit applicant, or other “affected party”<sup>1</sup> can decline to request and obtain an approved JD and elect to use a preliminary JD instead.

a. This guidance does not address which waterbodies are subject to CWA or RHA jurisdiction. For guidance on CWA and RHA jurisdiction, see Corps regulations, “Memorandum re: Clean Water Act (CWA) Jurisdiction Following U.S. Supreme Court Discussion in *Rapanos v. United States*,” dated 19 June 2007, and the documents referenced therein.

b. This guidance takes effect immediately, and supersedes any inconsistent guidance regarding JDs contained in RGL 07-01.

2. Approved JDs. An approved JD is an official Corps determination that jurisdictional “waters of the United States,” or “navigable waters of the United States,” or both, are either present or absent on a particular site. An approved JD precisely identifies the limits of those waters on the project site determined to be jurisdictional under the CWA/RHA. (See 33 C.F.R. 331.2.)

a. The Corps will provide (subject to the limitation contained in paragraph 5.b. below) an approved JD to any landowner, permit applicant, or other “affected party” when:

(1) a landowner, permit applicant, or other “affected party” requests an approved JD by name or otherwise requests an official jurisdictional determination, whether or not it is referred to as an “approved JD”;

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<sup>1</sup> As defined at 33 CFR 331.2 “affected party” means a permit applicant, landowner, a lease, easement or option holder (i.e., an individual who has an identifiable and substantial legal interest in the property) who has received an approved JD, permit denial or has declined a proffered individual permit.

(2) a landowner, permit applicant, or other “affected party” contests jurisdiction over a particular water body or wetland, and where the Corps is allowed access to the property and is otherwise able to produce an approved JD; or

(3) the Corps determines that jurisdiction does not exist over a particular water body or wetland.

b. An approved JD:

(1) constitutes the Corps’ official, written representation that the JD’s findings are correct;

(2) can be relied upon by a landowner, permit applicant, or other “affected party” (as defined at 33 C.F.R. 331.2) who receives an approved JD for five years (subject to certain limited exceptions explained in RGL 05-02);

(3) can be used and relied on by the recipient of the approved JD (absent extraordinary circumstances, such as an approved JD based on incorrect data provided by a landowner or consultant) if a CWA citizen’s lawsuit is brought in the Federal Courts against the landowner or other “affected party,” challenging the legitimacy of that JD or its determinations; and

(4) can be immediately appealed through the Corps’ administrative appeal process set out at 33 CFR Part 331.

c. The District Engineer retains the discretion to use an approved JD in any other circumstance where he or she determines that is appropriate given the facts of the particular case.

d. If wetlands or other water bodies are present on a site, an approved JD for that site will identify and delineate those water bodies and wetlands that are subject to CWA/RHA jurisdiction, and serve as an initial step in the permitting process.

e. Approved JDs shall be documented in accordance with the guidance provided in RGL 07-01. Documentation requires the use of the JD Form published on June 5, 2007, or as modified by ORM2 or subsequent revisions to the June 5, 2007 JD form approved by Corps Headquarters. Districts will continue to post approved JDs on their websites.

3. A permit applicant’s option to decline to request and obtain an approved JD. While a landowner, permit applicant, or other “affected party” can elect to request and obtain an approved JD, he or she can also decline to request an approved JD, and instead obtain a Corps individual or general permit authorization based on either a preliminary JD, or, in appropriate circumstances (such as authorizations by non-reporting nationwide general permits), no JD whatsoever. The Corps will determine what form of JD is appropriate

for any particular circumstance based on all the relevant factors, to include, but not limited to, the applicant's preference, what kind of permit authorization is being used (individual permit versus general permit), and the nature of the proposed activity needing authorization.

4. Preliminary JDs. Preliminary JDs are non-binding “. . . written indications that there may be waters of the United States, including wetlands, on a parcel or indications of the approximate location(s) of waters of the United States or wetlands on a parcel. Preliminary JDs are advisory in nature and may not be appealed.” (See 33 C.F.R. 331.2.)

a. A landowner, permit applicant, or other “affected party” may elect to use a preliminary JD to voluntarily waive or set aside questions regarding CWA/RHA jurisdiction over a particular site, usually in the interest of allowing the landowner or other “affected party” to move ahead expeditiously to obtain a Corps permit authorization where the party determines that is in his or her best interest to do so.

b. It is the Corps' goal to process both preliminary JDs and approved JDs within 60 days as detailed in paragraph 5 below, so the applicant or other affected party's choice of whether to use a preliminary JD or approved JD should not affect this goal.

c. A landowner, permit applicant, or other “affected party” may elect to use a preliminary JD even where initial indications are that the water bodies or wetlands on a site may not be jurisdictional, if the affected party makes an informed, voluntary decision that is in his or her best interest not to request and obtain an approved JD.

d. For purposes of computation of impacts, compensatory mitigation requirements, and other resource protection measures, a permit decision made on the basis of a preliminary JD will treat all waters and wetlands that would be affected in any way by the permitted activity on the site as if they are jurisdictional waters of the U.S.

e. Preliminary JDs are also commonly used in enforcement situations because access to a site may be impracticable or unauthorized, or for other reasons an approved JD cannot be completed in a timely manner. In such circumstances, a preliminary JD may serve as the basis for Corps compliance orders (e.g., cease and desist letters, initial corrective measures). The Corps should support an enforcement action with an approved JD unless it is impracticable to do so under the circumstances, such as where access to the site is prohibited.

f. When the Corps provides a preliminary JD, or authorizes an activity based on a preliminary JD, the Corps is making no legally binding determination of any type regarding whether CWA/RHA jurisdiction exists over the particular water body or wetland in question.

g. A preliminary JD is “preliminary” in the sense that a recipient of a preliminary JD can later request and obtain an approved JD if that later becomes necessary or appropriate during the permit process or during the administrative appeal process. If a

permit applicant elects to seek a Corps individual permit based on a preliminary JD, that permit applicant can later raise jurisdictional issues as part of an administrative appeal of a proffered permit or a permit denial, as explained in paragraph 6 below.

h. In all circumstances where an approved JD is not required by the guidance in paragraph 2 of this RGL, District Engineers retain authority to use preliminary JDs. The Corps may authorize an activity with one or more general permits, a letter of permission, or a standard individual permit, with no “official” JD of any type, or based on a preliminary JD, where the District Engineer determines that to be appropriate, and where the permit applicant has been made aware of his or her option to receive an approved JD and has declined to exercise that option. Generally, approved JDs should be used to support individual permit applications, but the applicant should be made aware of his or her option to elect to use a preliminary JD wherever the applicant feels doing so is in his or her best interest.

5. Processing approved and preliminary JDs. Every approved JD and preliminary JD should be completed and provided to the person, organization, or agency requesting it as promptly as is practicable in light of the district’s workload, and site and weather conditions if a site visit is determined necessary.

a. Corps districts should not give preliminary JDs priority over approved JDs. Moreover, every Corps district should ensure that a permit applicant’s request for an approved JD rather than a preliminary JD will not prejudice the timely processing of that permit application. It is the Corps’ goal that every JD requested by an affected party should be completed within 60 calendar days of receiving the request. Regulatory Project Managers will notify their supervisors and develop a schedule for completion of the JD if it is not practicable to meet this 60 day goal.

b. The Corps should not provide either an approved JD or a preliminary JD to any person if the Corps has reason to believe that person is seeking a JD for any purpose relating to a CWA program not administered by the Corps (e.g., CWA Section 402, 303, or 311). In such circumstances the Corps should decline to perform the JD and instead refer the person who requested it to the Federal or state agency responsible for administering that program.

6. JDs and appeals. In any circumstance where a permit applicant obtains a Corps proffered individual permit or a permit denial, based on a preliminary JD, and where the permit applicant elects to pursue an administrative appeal of the proffered permit or the permit denial, the appeal “may include jurisdiction issues,” as stated at 33 C.F.R. 331.5(a)(2). However, if an affected party during the appeal of a proffered permit or a permit denial challenges or questions jurisdiction, those jurisdictional issues must be addressed with an approved JD. Therefore, if, during or as a result of the administrative appeal of the permit denial or the terms and conditions of the proffered permit, it becomes necessary to make an official determination whether CWA/RHA jurisdiction exists over a site, or to provide an official delineation of jurisdictional waters on the site, the Corps should provide an approved JD as soon as is practicable, consistent with the

goal expressed in paragraph 5 above. Such an approved JD would be subject to the same procedures as other approved JDs, such as requirements for coordinating approved JDs with EPA.

7. Key distinction between approved JDs and preliminary JDs. By definition, a preliminary JD can only be used to determine that wetlands or other water bodies that exist on a particular site “may be” jurisdictional waters of the United States. A preliminary JD by definition cannot be used to determine either that there are no wetlands or other water bodies on a site at all (i.e., that there are no aquatic resources on the site and the entire site is comprised of uplands), or that there are no jurisdictional wetlands or other water bodies on a site, or that only a portion of the wetlands or waterbodies on a site are jurisdictional. A definitive, official determination that there are, or that there are not, jurisdictional “waters of the United States” on a site can only be made by an approved JD. The Corps retains the ability to use a “no-permit-required” letter to indicate that a specific proposed activity is not subject to CWA/RHA jurisdiction when that is determined appropriate, but a “no-permit-required” letter cannot make any sort of determination regarding whether there are jurisdictional wetlands or other waterbodies on a site.

8. Mandatory use of the preliminary JD form. In each and every circumstance where a preliminary JD is used, the Corps district must complete the “Preliminary Jurisdictional Determination Form” provided at Attachment 1, which sets forth in writing the minimum requirements for a preliminary JD and important information concerning the requesting party’s option to request and obtain an approved JD, and subsequent appeal rights. The signature of the affected party who requested the preliminary JD will be obtained on the preliminary JD form wherever practicable (e.g., except for enforcement situations, etc.). Where a preliminary JD form covers multiple water bodies or multiple sites, the information for each can be included in the table provided with the preliminary JD form. Information in addition to the minimum of data required on the preliminary JD form can be included on that form, but only if such information pertains to the amount and location of wetlands or other water bodies at the site. Corps regulatory personnel are expected to continue to exercise appropriate judgment and use appropriate information when making technical and scientific determinations as to what areas on the site qualify as water bodies or wetlands. Any such additional information included on the preliminary JD form should not purport, or be construed, to address any legal determination involving CWA/RHA jurisdiction on the site.

9. Data collection. Information about the quality and quantity of the aquatic resources that would be affected by the proposed activity, the types of impacts that are expected to occur, and compensatory mitigation, are obtained by the Corps during the processing of an individual permit application and are included in pre-construction notification for reporting NWP. For example, NWP pre-construction notifications must contain a “description of the proposed project; the project’s purpose; direct and indirect adverse environmental effects the project would cause; . . . a delineation of special aquatic sites and other waters of the United States on the project site.” (Reissuance of Nationwide Permits Notice, 72 Fed. Reg. 11092, at 11194-95 (March 12, 2007).) Applicants should

provide a delineation of special aquatic sites in support of an individual permit or “letter of permission” application.

a. The information on a preliminary JD form should be limited to the amount and location of wetlands and other water bodies on the site and should be sufficiently accurate and reliable that the effective presumption of CWA/RHA jurisdiction over all of the wetlands and other water bodies at the site will support a reliable and enforceable permit decision. When a preliminary JD is used to support a request for a permit authorization, the information on the preliminary JD form is also relevant to the processing of that permit application (e.g., to calculate compensatory mitigation requirements). During the permit process, information in addition to the data on the preliminary JD form is developed and relied upon to support the Corps permit decision; that additional information should be carefully documented as part of the permit process (e.g., through an environmental assessment, 404(b)(1) analysis, combined decision document, or decision memorandum). This additional information for the permit decision should *not* be captured on a preliminary JD form.

b. The type of information collected to support the decision on the permit application will be the same for permit applications supported by approved JDs and for those supported by preliminary JDs. Therefore, decisions and judgments regarding environmental impacts, public interest determinations, and mitigation requirements should be adequately supported regardless of the type of JD used. For this reason, the data necessary to quantify and defend the Corps Regulatory Program’s performance will be available for a permit application regardless of whether it was supported by an approved JD or a preliminary JD.

c. The information used to support an approved JD should be reliable and verifiable. Traditionally, this information has been obtained or verified through a site visit, but now, with information from new, highly sensitive technology and imaging, site visits may not always be required for approved JDs.

d. When documenting preliminary JDs, any available technical, scientific, and observational information about the wetlands or other water bodies can be entered into ORM2 regardless of whether it is the type of information that could inform a formal jurisdictional determination (e.g., discussion of the ecological relationship between water bodies), so long as legal conclusions about jurisdictional status are not included. Any additional, available information that is entered into ORM2 must be accompanied by the warning that the information has not been verified, that it is not an official determination by the government, and that it cannot later be relied upon to determine whether an area is or is not jurisdictional.

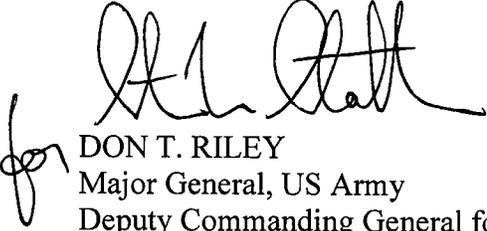
#### 10. Coordination with U.S. Environmental Protection Agency (EPA) and posting.

Districts will continue to post approved JDs on their web sites. Consistent with historical practice, preliminary JDs will not be coordinated with EPA or posted on District websites. Corps Headquarters is modifying the ORM2 data base to collect information regarding use of preliminary JDs, and regarding permit authorizations based on

preliminary JDs, or based on no official form of JD. Until ORM2 is modified to collect and access information related to preliminary JDs, every District should collect basic information, to the maximum extent practicable, on those subjects for purposes of documenting District workload.

11. This guidance remains in effect until revised or rescinded.

Attachment

  
for DON T. RILEY  
Major General, US Army  
Deputy Commanding General for Civil and  
Emergency Operations