DEPARTMENT OF THE ARMY
MOBILE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 2288
MOBILE, AL 36628-0001

CESAM-RD **July 11, 2008**

PUBLIC NOTICE
U.S. ARMY CORPS OF ENGINEERS

JURISDICTIONAL DETERMINATIONS

TO WHOM IT MAY CONCERN: The Mobile District Regulatory Division, U.S. Army Corps of Engineers (Corps) is circulating this notice to ensure that the public is aware of recent guidance pertaining to jurisdictions.

On June 26, 2008, the U.S. Army Corps of Engineers implemented Regulatory Guidance Letter (RGL) No. 08-02. This RGL provides to the public, new options available to them, as it relates to jurisdiction under Section 404 of the Clean Water Act (CWA) and Sections 9 and 10 of the Rivers and Harbors Act of 1899 (RHA).

The following pages include RGL 08-02 and the new preliminary jurisdictional determination form. This RGL and form are also available on our website at www.sam.usace.army.mil/RD/reg, under the "jurisdiction" section.

If you have any questions concerning this publication, you may contact Mr. Jason W. Steele via e-mail at Jason.W.Steele@usace.army.mil or telephone number **(251) 690-3188.**

Encls

MOBILE DISTRICT
U.S. Army Corps of Engineer

US Army Corps of Engineers®

REGULATORY GUIDANCE LETTER

No. 08-02 **Date: 26 June 2008**

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"[1] 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";

[1] 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. <u>A permit applicant's option to decline to request and obtain an approved JD</u>. 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 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 NWPs. 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 though 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. <u>Coordination with U.S. Environmental Protection Agency (EPA) and posting</u>. 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

ATTACHMENT

PRELIMINARY JURISDICTIONAL DETERMINATION FORM

BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR PRELIMINARY JURISDICTIONAL DETERMINATION (JD):

B. NAME AND ADDRESS OF PERSON REQUESTING PRELIMINARY JD:

C. DISTRICT OFFICE, FILE NAME, AND NUMBER:

D. PROJECT LOCATION(S) AND BACKGROUND INFORMATION:
(USE THE ATTACHED TABLE TO DOCUMENT MULTIPLE WATERBODIES AT DIFFERENT SITES)

State: County/parish/borough: City:

Center coordinates of site (lat/long in degree decimal format): Lat. °

Pick List, Long. ° **Pick List**.

Universal Transverse Mercator:

Name of nearest waterbody:

Identify (estimate) amount of waters in the review area:

Non-wetland waters: linear feet: width (ft) and/or acres.
Cowardin Class:
Stream Flow:

Wetlands: acres.
Cowardin Class:

Name of any water bodies on the site that have been identified as Section 10 waters:

Tidal:

Non-Tidal:

E. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

☐ Office (Desk) Determination. Date:

☐ Field Determination. Date(s):

1. The Corps of Engineers believes that there may be jurisdictional waters of the United States on the subject site, and the permit applicant or other affected party who requested this preliminary JD is hereby advised of his or her option to request and obtain an approved jurisdictional determination (JD) for that site. Nevertheless, the permit applicant or other person who requested this preliminary JD has declined to exercise the option to obtain an approved JD in this instance and at this time.

2. In any circumstance where a permit applicant obtains an individual permit, or a Nationwide General Permit (NWP) or other general permit verification requiring "pre-construction notification" (PCN), or requests verification for a non-reporting NWP or other general permit, and the permit applicant has not requested an approved JD for the activity, the permit applicant is hereby made aware of the following: (1) the permit applicant has elected to seek a permit authorization based on a preliminary JD, which does not make an official determination of jurisdictional waters; (2) that the applicant has the option to request an approved JD before accepting the terms and conditions of the permit authorization, and that basing a permit authorization on an approved JD could possibly result in less compensatory mitigation being required or different special conditions; (3) that the applicant has the right to request an individual permit rather than accepting the terms and conditions of the NWP or other general permit authorization; (4) that the applicant can accept a permit authorization and thereby agree to comply with all the terms and conditions of that permit, including whatever mitigation requirements the Corps has determined to be necessary; (5) that undertaking any activity in reliance upon the subject permit authorization without requesting an approved JD constitutes the applicant's acceptance of the use of the preliminary JD, but that either form of JD will be processed as soon as is practicable; (6) accepting a permit authorization (e.g., signing a proffered individual permit) or undertaking any activity in reliance on any form of Corps permit authorization based on a preliminary JD constitutes agreement that all wetlands and other water bodies on the site affected in any way by that activity are jurisdictional waters of the United States, and precludes any challenge to such jurisdiction in any administrative or judicial compliance or enforcement action, or in any administrative appeal or in any Federal court; and (7) whether the applicant elects to use either an approved JD or a preliminary JD, that JD will be processed as soon as is practicable. Further, an approved JD, a proffered individual permit (and all terms and conditions contained therein), or individual permit denial can be administratively appealed pursuant to 33 C.F.R. Part 331, and that in any administrative appeal, jurisdictional issues can be raised (see 33 C.F.R. 331.5(a)(2)). If, during that administrative appeal, it becomes necessary to make an official determination whether CWA jurisdiction exists over a site, or to provide an official delineation of jurisdictional waters on the site, the Corps will provide an approved JD to accomplish that result, as soon as is practicable. This preliminary JD finds that there *"may be"* waters of the United States on the subject project site, and identifies all aquatic features on the site that could be affected by the proposed activity, based on the following information:

SUPPORTING DATA. Data reviewed for preliminary JD (check all that apply - checked items should be included in case file and, where checked and requested, appropriately reference sources below):

☐ Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: .

☐ Data sheets prepared/submitted by or on behalf of the applicant/consultant.

- ☐ Office concurs with data sheets/delineation report.
- ☐ Office does not concur with data sheets/delineation report.

☐ Data sheets prepared by the Corps: .

☐ Corps navigable waters' study: .

☐ U.S. Geological Survey Hydrologic Atlas: .

- ☐ USGS NHD data.
- ☐ USGS 8 and 12 digit HUC maps.

☐ U.S. Geological Survey map(s). Cite scale & quad name: .

☐ USDA Natural Resources Conservation Service Soil Survey. Citation:

.

☐ National wetlands inventory map(s). Cite name: .

☐ State/Local wetland inventory map(s): .

☐ FEMA/FIRM maps: .

☐ 100-year Floodplain Elevation is: (National Geodectic Vertical Datum of 1929)

☐ Photographs: ☐ Aerial (Name & Date): .

or ☐ Other (Name & Date): .

☐ Previous determination(s). File no. and date of response letter: .

☐ Other information (please specify): .

<u>IMPORTANT NOTE: The information recorded on this form has not necessarily been verified by the Corps and should not be relied upon for later jurisdictional determinations.</u>

Signature and date of Regulatory Project Manager (REQUIRED)	Signature and date of person requesting preliminary JD (REQUIRED, unless obtaining the signature is impracticable)

SAMPLE

Site number	Latitude	Longitude	Cowardin Class	Estimated amount of aquatic resource in review area	Class of aquatic resource
1				0.1 acre	section 10 – tidal
2				100 linear feet	section 10 – non-tidal
3				15 square feet	non-section 10 – wetland
4				0.01 acre	non-section 10 – non-wetland