



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

# Memorandum

Subject: **INFORMATION**: Army Corps of Engineers  
Regulatory Guidance Letter on Jurisdictional  
Determinations

Date: May 6, 2009

From: Raja Veeramachaneni  
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and Environmental Review

In Reply Refer To:  
HEPE

To: Acting Chief Counsel  
Directors of Field Services  
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The purpose of this memorandum is to provide additional information regarding the Corps of Engineers Regulatory Guidance Letter (RGL) 08-02 dated June 26, 2008, regarding jurisdictional determinations (JD). The RGL identifies and distinguishes between (1) preliminary jurisdictional determinations and (2) approved jurisdictional determinations (JD).

An approved JD is an official 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 Clean Water Act (CWA) and/or Rivers and Harbors Act (RHA). (See 33 C.F.R. 331.2.) If wetlands or other water bodies are present on a site, an approved JD for that site will precisely identify the limits of those that are subject to CWA/RHA jurisdiction. Approved JDs are typically valid for a period of five years and can be appealed administratively. If no waters regulated under the CWA/RHA are present on the site, an approved JD is a legally defensible statement to that effect.

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)

The RGL states that a permit applicant can decline to request an approved jurisdictional determination and proceed to the permit application processing phase of the regulatory program using only a preliminary JD or no JD at all. The permit applicant or land owner voluntarily



waives or sets 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 it is in his or her best interest to do so.”

Voluntary acceptance of jurisdiction over aquatic resources within the project area allows an applicant to pursue a permit without having to wait for an approved JD to be issued by the Corps. All aquatic resources within the project site identified as potentially jurisdictional would be treated as such if a permit applicant chooses to use a preliminary JD instead of an approved JD as the basis for a permit application. The determination of wetland impacts would assume all waters within the study area are jurisdictional and mitigation requirements would be set accordingly.

In the instance where a permit applicant appeals either a permit denial or a proffered permit with conditions based on a preliminary JD, an approved JD can be requested and the Corps is required to provide such. In this situation, an approved JD should be necessary only where jurisdictional issues formed a basis for the appeal. Any changes in the jurisdictional nature of the aquatic resources as a result of an approved JD being issued may result in a reduction of impacts to jurisdictional waters and a corresponding reduction in mitigation requirements.

Voluntary acceptance of jurisdiction over all aquatic resources might expedite permit processing by several months and could be an attractive consideration for State Departments of Transportation. While the RGL states that the Corps is committed to finalizing both preliminary and approved JDs within 60 days of submittal, factors such as Corps work load and complexity of the aquatic resource delineation may delay a decision from the Corps. Furthermore, some jurisdictional determinations are subject to the U.S. Environmental Protection Agency (EPA) review which may extend final approval time. Preliminary JDs are not subject to EPA review.

The Executive Order 11990 requires Federal agencies to avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use (the Wetlands Finding). State and local laws may cover impacts to wetlands and other aquatic resources regardless of Federal jurisdiction under the Clean Water Act. Therefore, Division Offices and Federal Lands Divisions should consider using preliminary JDs for permit applications when time and/or resource commitments are issues in project implementation.

The RGL encourages the use of approved JDs to support individual permit applications, however, there is no requirement to do so and permit applicants have the option of proceeding with an individual permit application using a preliminary JD.

The RGL also provides guidance on the type of information needed to process a preliminary JD and includes a form required to be submitted along with the preliminary JD request.

Questions should be directed to Mrs. Carol Adkins, HEPE-30, (202) 366-2054 ([Carol.Adkins@dot.gov](mailto:Carol.Adkins@dot.gov)), or Dennis Durbin, 202-366-2066, ([dennis.durbin@dot.gov](mailto:dennis.durbin@dot.gov)).