

Questions and Answers on Regulatory Guidance Letter 08-02

General Questions

Question 1: What is the effective date of this guidance?

Answer 1: June 26, 2008. Preliminary JDs may be prepared, consistent with this guidance, for permit applications, and for requests for JDs, received prior to June 26, 2008, unless the applicant exercises his or her option to request and obtain an approved JD.

Question 2: When is it appropriate to not prepare any JD whatsoever?

Answer 2: For situations where there is no activity jurisdiction or an activity is exempt under Section 404(f) of the Clean Water Act and not recaptured, preparation of a “no permit required” letter is adequate, and no JD is required, so long as that letter makes clear that it is not addressing geographic jurisdiction. If an activity is exempt from the requirement to obtain a Department of the Army permit, it is not necessary to do a formal JD because the jurisdictional status of the affected aquatic feature(s) does not weigh into the exemption decision. As stated in paragraph 4(h), the Corps may authorize an activity with a general permit, letter of permission, or standard permit with no official JD of any type, as long as the circumstances do not necessitate an approved JD. Every year the Corps authorizes many activities with non-reporting general permits, using no form of official JD whatever.

Question 3: Can a preliminary JD ever be used to identify potentially non-jurisdictional waters?

Answer 3: No. Preliminary JDs, as defined by our regulations, state that there “may be” waters of the United States present. To document a finding that a particular aquatic feature is not a water of the United States, an approved JD must be used.

Question 4: Can a “no permit required” letter be used to describe the presence of non-jurisdictional waters?

Answer 4: No. An approved JD must be used to make a finding that an aquatic feature is not a water of the United States. A “no permit required” letter is used to acknowledge that a Department of the Army permit is not required for a particular activity.

Question 5: If the aquatic feature “looks like a water of the United States,” but the proposed activity is one that does not require authorization, should we prepare a JD?

Answer 5: An approved JD is necessary to make a definitive finding that a particular aquatic feature is not a water of the United States. If a proposed activity does not require a DA permit, then a “no permit required” letter can be issued.

Question 6: Can the preliminary JD form be modified by districts to flow better and more clearly describe potentially jurisdictional features?

Answer 6: No. The form provided with RGL 08-02 is to be used for preliminary JDs. To more clearly describe potentially jurisdictional aquatic features, supporting documentation may be attached to the form.

Question 7: For the purposes of this RGL, how is the “review area” defined, and how are multiple water bodies and wetlands within a review area documented?

Answer 7: The review area for jurisdictional determinations is at the discretion of the district. It may consist of the entire parcel of land, or a portion of that parcel. The review area should be clearly marked on any plans or maps accompanying a JD or “no permit required” letter. When there are multiple water bodies or wetlands within the review area, their location and extent may be summarized in the table provided in the RGL.

Question 8: Can preliminary JDs be used on a “project specific basis” or must the review area encompass an entire tract of land? For example, if an applicant submits a PCN for an outfall and requests a preliminary JD for that project area, but the outfall is part of a larger residential development that will impact other apparently jurisdictional water bodies or wetlands, should a regulatory project manager evaluate just the project area or the site as a whole?

Answer 8: The review area for the JD is at the discretion of the district, and should be clearly documented in the administrative record for the permit action or JD. It does not need to encompass the entire parcel. When determining the review area for a multi-phase project, you should consider which activities may have independent utility, and the appropriate means for authorizing those activities. Districts should also consider potential risks of unauthorized activities occurring when determining the review area for a JD.

Question 9: If an applicant sends in a wetland delineation report, must we respond by preparing an approved JD?

Answer 9: It depends on whether the applicant is requesting an approved JD. The procedures in RGL 08-02 should be followed to make the applicant aware of his or her right to obtain an approved JD. A wetland delineation can be used to support a permit decision based on either a preliminary or an approved JD.

Question 10: Is a final preliminary or approved JD necessary for a complete DA permit application?

Answer 10: No. A final JD is not among the required contents of a complete application described at 33 CFR 325.1(d). Permit review may begin, and public notice published, before a JD is finalized.

Question 11: Can special conditions requiring compensatory mitigation be attached to an individual permit or a general permit verification, regardless of whether a preliminary or approved JD was prepared?

Answer 11: Yes. Paragraph 4(d) of RGL 08-02 states that waters that “may be” jurisdictional will be treated as if they are jurisdictional for purposes of calculating impacts and determining mitigation requirements.

Determining Whether to Use a Preliminary or Approved JD

Question 12: Which type of JD should be used, absent any of the factors described at paragraphs 2(a) and 4(c)?

Answer 12: An approved JD should be used in the circumstances described in paragraph 2. Otherwise, districts have the discretion to use preliminary JDs or to do no JD whatsoever to support a decision on a permit application.

Question 13: Which carries more weight, the Corps' discretion regarding the use of approved JDs (paragraphs 2(c) and 3) or the affected party's preference for a particular type of JD?

Answer 13: If an approved JD is requested, one must be prepared. However, if a preliminary JD is requested, the Corps has the discretion to do an approved JD instead, but in most circumstances we would expect the wishes of the landowner or permit applicant to be honored. Thus, usually if a preliminary JD is requested, a preliminary JD would be provided.

Question 14: For large projects that require multiple JDs, or for situations where an affected party requests preliminary and approved JDs for different parts of a review area, can a combination of preliminary and approved JDs be used?

Answer 14: A combination of preliminary and approved JDs can be used, as long as the review areas for each type of JD are clearly designated.

Question 15: If a review area includes an upland drainage ditch, can we say that it is upland, have it removed from the report, and continue with preparation of a Preliminary JD?

Answer 15: If you are making a definitive determination that a potential aquatic feature is not a water of the United States, then you have to do an approved JD. If the proposed activity does not require DA authorization, then you can issue a "no permit required" letter.

Question 16: Paragraphs 4(c) and 2(a) (3) seem to contradict one another. Paragraph 2(a)(3) indicates that an approved JD must be issued when the Corps determines that jurisdiction does not exist over a particular water body or wetland, regardless of whether or not the affected party has requested an approved JD. Presumably, this also means that coordination with the EPA and/or USACE HQ must be done. However, paragraph 4(c) states that a landowner may elect to use a preliminary JD even where initial indications are that the waters on the site may not be jurisdictional. Please clarify.

Answer 16: A preliminary JD cannot be used to make an official Corps determination that a particular waterbody or wetland is not jurisdictional. An approved JD must be issued in those cases. However, a landowner, permit applicant, or other affected party may decide that it would be in his or her best interests to proceed with submitting a permit application based on a preliminary JD, and receiving a permit decision based on that preliminary JD. The permit decision would be based on the assumption that the waters and wetlands are jurisdictional, even though an approved JD done at a later time could result in a finding that some or all of those aquatic areas are not jurisdictional. The

district needs to make an effort to explain the consequences of using a preliminary JD in such cases.

Required Documentation for Preliminary JDs

Question 17: What are the documentation requirements associated with wetlands/waters for which a significant nexus must exist between the water(s) and the downstream TNW in order for the Corps to assert jurisdiction, but which are being documented using a preliminary JD?

Answer 17: The preliminary JD should include only that information which describes the extent and location of wetlands and waters in the review area (see paragraph 8). Additional documentation supporting the determination that there may be waters of the United States in the review area should be included in the administrative record as appropriate. Such supporting documentation may include descriptions of the characteristics of wetlands and waters or information about nearby waters. A significant nexus evaluation is not necessary for a preliminary JD, since the Corps is not making an official determination regarding jurisdiction. In cases where a significant nexus evaluation is necessary to make a definitive finding regarding Clean Water Act jurisdiction over a wetland or other aquatic feature, an approved JD must be made.

Question 18: Can a preliminary JD include a map?

Answer 18: Yes, provided waters on the project site are clearly marked as “potential jurisdictional waters” and any boundaries are marked as “approximate”. This mapping standard may also be used for preliminary JDs that support decisions on permit applications.

Coordination with Affected Parties for Preliminary JDs

Question 19: Regarding paragraph 4(c), what is the appropriate way to document an affected party’s “informed” and “voluntary” decision not to request an approved JD?

Answer 19: Documenting an affected party’s decision not to request an approved JD is most easily accomplished by obtaining his or her signature on the preliminary JD form. Receipt of a preliminary JD signed by the affected party, or lack of response to a request for such signature, may be taken as an informed and voluntary decision to not request an approved JD. Corps project managers may also document the affected party’s decision with notes from a meeting or telephone conversation, electronic mail, or other communication regarding an affected party’s decision. In cases where a project proponent has requested a general permit verification, the district may add a paragraph to the verification letter informing the permittee of his or her right to obtain an approved JD if he or she does not agree with the extent of waters or wetlands and the preliminary JD upon which the general permit verification was based.

Question 20: At what point during the permit review process should the preliminary JD form be sent to the affected party?

Answer 20: The preliminary JD form may be provided to the affected party for his or her signature at any appropriate time after the form has been filled out by the project manager. It is recommended that the affected party's signature be obtained as early in the permit review process as possible, so that if the affected party later decides to obtain an approved JD, it can be completed before the permit decision is made.

Question 21: In providing an opportunity for the affected party to sign the preliminary JD, what level of effort is expected from Corps project managers?

Answer 21: The district should make a reasonable effort to obtain the affected party's signature on the preliminary JD form. If it is impractical to obtain the affected party's signature, then the signature is not necessary. Alternative forms of obtaining agreement, such as an e-mail sent from the affected party stating his or her preference for proceeding with the permit evaluation and decision based on a preliminary JD or documentation of a phone conversation, may be used. Signed copies of the preliminary JD form may also be exchanged through e-mail (i.e., scanned copies) or by facsimile machine. Districts may also establish timeframes for affected parties to return signed preliminary JD forms. If the affected party does not respond within the established time frame, the district may presume concurrence and no additional follow up is necessary prior to finalizing a permit action. Permit decisions should not be delayed unnecessarily.

Question 22: Should the preliminary JD provided to the affected party be signed by a Corps project manager prior to being sent, or only after the affected party has signed and returned the document?

Answer 22: The preliminary JD should be signed by the Corps project manager prior to being sent to the affected party.

Question 23: If an affected party does not respond to the request for signature of the preliminary JD, can they still request an approved JD at a later date?

Answer 23: Yes. As discussed in paragraph 4(g), an affected party can later request an approved JD. The affected party has to request and obtain the approved JD prior to commencing work in the waters and wetlands identified by the preliminary JD.

Question 24: Should the transmittal letter that accompanies a preliminary JD advise the applicant to not start work in the wetlands and waters indicated in the preliminary JD if he or she intends to request an approved JD?

Answer 24: Yes, the transmittal letter should advise the applicant to not start work in the wetlands and waters indicated in the preliminary JD if he or she intends to request an approved JD at a later time.

Appeals and Expiration of Preliminary JDs

Question 25: Are we to send an appeals form along with the preliminary JD?

Answer 25: In cases where a preliminary JD is issued or where a preliminary JD is used to support a permit decision, a Notification of Applicant Options (NAO) form should be

sent to the affected party. The NAO form helps explain the affected party's options under the administrative appeal process.

Question 26: Does the 5 year time period apply to preliminary JDs as it does to approved?

Answer 26: No, preliminary JDs are non-binding actions and have no expiration date (see RGL 05-02, paragraph 1(a)).

Requirements for Approved JDs

Question 27: Is a field visit by the Corps necessary to “precisely identify” the limits of waters of the United States for approved JDs?

Answer 27: No, it is not. Districts may continue to set their own criteria regarding the need for field visits. Approved JDs that identify the limits of waters of the United States may be based on site visits or desktop reviews. Desktop reviews are sufficient in cases where the district has a high degree of confidence in the information used to identify the limits of jurisdictional waters. For example, desktop reviews may be based on detailed delineation reports prepared by professional wetland consultants. The level of mapping precision for an approved JD that identifies the limits of waters of the United States is at the discretion of the district. In some cases, districts may need to require professional surveys of jurisdictional boundaries, but in other cases, other mapping techniques may be adequate.

Question 28: The definition of the term “approved JD” given in paragraph 2 does not make a clear distinction between a “jurisdictional determination” and a “wetland delineation.” This distinction is clearly made in 33 CFR 331.2. Also, paragraph 2(d) appears to require that approved JDs be documented with delineations. This requirement does not appear in the Corps regulations. Is the definition of an approved JD or the documentation requirements for an approved JD changed by the RGL?

Answer 28: No. The definition of the term “approved JD” in paragraph 2 does not change the definition provided at 33 CFR 331.2. It should be noted that for the purposes of documenting approved JDs to support permit decisions (which is the focus of RGL 08-02), it is often necessary to precisely identify the limits of waters of the United States, to determine the amounts of waters impacted by the proposed activity. The guidance provided by paragraph 2(d) applies to approved JDs that will be used to support permit decisions.

JDs for Enforcement Actions

Question 29: Is an alleged violator afforded the opportunity to request an approved JD?

Answer 29: Yes, but only to the extent that, and only in circumstances where: (1) preparation of an approved JD would not interfere with the enforcement action and (2) preparation of an approved JD would not interfere with protecting the public interest, including protecting the environment. As a general rule, any “affected party” at any time

can request an approved JD. In most circumstances the Corps would try to honor such a request, with the limitations noted above. A violator cannot be allowed to disrupt or delay time-sensitive aspects of an enforcement action by requesting an approved JD. Appeal rights associated with an approved JD associated with an enforcement action are at the sole discretion of the Division Engineer. Check with your Division Review Officer prior to issuing an approved JD associated with an alleged violation/unauthorized activity if you have any questions regarding the language explaining appeal rights or the appeal process itself.

Question 30: If an alleged violation is investigated and the waterbody is determined not to be a water of the United States, is an approved JD required? In past practice, an enforcement action would typically be terminated upon making that finding. The RGL provides little guidance on how these types of situations should be handled in the enforcement arena.

Answer 30: An approved JD is not required in those situations. The district engineer may use his or her enforcement discretion, and either terminate the enforcement action without making a final JD or issue an approved JD.

Question 31: There appears to be an inconsistency in the RGL, because paragraph 4(e) states that a preliminary JD can serve as a basis to issue a C&D, but paragraph 7 says that a preliminary JD can only reference waters that “may” be jurisdictional. A definitive determination can only be made with an approved JD. How can we stop a project and identify a violation if we aren’t saying it’s jurisdictional for certain?

Answer 31: Warning letters and other enforcement actions aimed at making initial contact with an alleged violator can normally be supported with a preliminary JD. Districts should support enforcement action with approved JD when that is practicable, but preliminary JDs are appropriate if it is not possible to prepare an approved JD. For example, if a landowner refuses to allow access to the site of a violation, or if time is of the essence, preparing an approved JD might not be practicable in an enforcement situation.

ORM Data Entry

Question 32: Until ORM2 is changed to accommodate PJD info, we use the “old JD” tab and choose PJD. Can ORM2’s search capability retrieve JD info from that location?

Answer 32: ORM 2 reports and search functions look at both the “old JDs” and “new JDs” to distinguish between old and new in reports, new JDs have JD suffixes in the DA number column (e.g., NWK-2008-001123-JD1) When searching spatially, the waters and associated JD(s) can be found.

Question 33: How does this RGL affect counting workload and program performance in ORM?

Answer 33: As a result of RGL 08-02 we will count preliminary JDs separately again. The FY08 task tables and hour counts are being updated to reflect this for future reporting.

Question 34: Do we enter each “reach” for preliminary JDs in ORM?

Answer 34: Once ORM2 has been modified to collect data regarding preliminary JDs, further guidance and perhaps online training will be provided. We are working on ORM2 enhancements so you can enter one preliminary JD for many waters within a reach. Currently, in the old preliminary JD path, you need to enter one JD for each Water. For approved JDs, you can use one JD for many Waters, but it will be necessary to know how many different JDs you need within a reach. For example, you could do one approved JD for all those waters/wetlands that are determined to be jurisdictional, a second approved JD for all those waters/wetlands that are determined not to be jurisdictional, and a third approved JD for any isolated waters. Once the enhancements take effect, the same process can be used for both approved and preliminary JDs.

Miscellaneous

Question 35: While paragraph 2(a) (2) acknowledges that the Corps is ultimately responsible for completing an approved JD when necessary, should this paragraph be interpreted to suggest that the Corps, rather than applicants and their consultants, should be conducting wetland delineations?

Answer 35: No. While the Corps is responsible for issuing approved JDs, districts can continue to rely on information provided by applicants and their consultants, such as wetland delineation reports, so long as the Corps has reason to believe that such information is accurate and reliable. Paragraph 2(a) (2) simply recognizes that there may be a need for the Corps to have access to project sites when preparing approved JDs.

Question 36: While it may be appropriate to use preliminary JDs for some individual permits, won't we need some of the information used to prepare an approved JD (e.g., wetland area, type, and function) to analyze environmental impacts and mitigation needs?

Answer 36: Yes. Such information may be requested and obtained during evaluation of the permit request, regardless of whether it is necessary for preparation of the JD, and regardless of whether we are using an approved JD or a preliminary JD.

Question 37: Paragraph 5(a) indicates that Project Managers should notify their supervisors and develop a schedule for completion of a JD if it is over the 60-day time period. How much documentation regarding this timeframe is required?

Answer 37: The appropriate amount of documentation is at the discretion of the district.

Question 38: Some states require approved JDs for complete applications and base their fees for water quality certifications on the extent of impacts to waters of the United States. How do we address States' concerns about not having approved JDs?

Answer 38: In accordance with paragraph 2(a)(1), permit applicants may request approved JDs, and districts are to honor such requests, even though they may be made solely to apply for water quality certifications. The affected party has the right to decide which JD type is appropriate for his or her needs. If a permit applicant does not specifically request an approved JD, then the district has the discretion to base its permit

decision on a preliminary JD or no JD whatsoever, even in cases where a state may want an approved JD for making its decisions regarding water quality certification. Districts are encouraged to work with State and other local agencies to develop operating procedures to facilitate this issue.

Question 39: Should preliminary JD forms be posted on District web sites?

Answer 39: As stated in paragraph 10, preliminary JDs do not need to be posted on District web sites.

Question 40: Since section D of the preliminary JD form provides spaces for listing Section 10 waters on the site, can districts make preliminary JDs for section 10 waters?

Answer 40: Section D of the preliminary JD form is to be used to list previously identified section 10 waters. When conducting preliminary JDs, districts may identify waters that may be subject to section 10 jurisdiction.