



REPLY TO  
ATTENTION OF

**DEPARTMENT OF THE ARMY**  
SOUTH PACIFIC DIVISION, CORPS OF ENGINEERS  
1455 MARKET STREET  
SAN FRANCISCO, CALIFORNIA 94103-1399

**Public Comment**  
**Statewide Dredged or Fill Procedures**  
**Deadline: 9/18/17 by 12 noon**



Ms. Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, California 95812-2000

Dear Ms. Townsend:

The U.S. Army Corps of Engineers (USACE), South Pacific Division is responding to your July 21, 2017, *Notice of Opportunity for Public Comment and Notice of Public Comment Workshops, Public Hearing, and Filing* for the *Proposed Amendments to the California Ocean Plan and Inland Surface Waters, Enclosed Bays, and Estuaries of California Plan to Include Statewide Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State* (Proposed Dredge/Fill Procedures). We previously commented on the Proposed Dredge/Fill Procedures in August 2016.

We appreciate the refinements the State has made to the Proposed Dredge/Fill Procedures to more closely align with the USACE's Regulatory Program. In addition, we look forward to continued coordination with the State to ensure the Dredge/Fill Procedures, if implemented, do not affect the USACE's ability to balance economic development while protecting important aquatic resources without duplicative processes and delays in making decisions. Although there have been improvements made to the Proposed Dredge/Fill Procedures since August 2016, attached please find our comments on the current version of the Proposed Dredge/Fill Procedures for your consideration.

Thank you for the opportunity to comment on this important matter. We are available to discuss the above comments at your convenience. If you have any questions, please contact Mr. Wade Eakle at the letterhead address, by email at [Wade.L.Eakle@usace.army.mil](mailto:Wade.L.Eakle@usace.army.mil) or telephone at (415) 503-6577.

***BUILDING STRONG!***

Sincerely,

TOWNSLEY.EDWI  
N.STUART.125522  
7412

Digitally signed by  
TOWNSLEY.EDWIN.STUART.1255227412  
DN: c=US, o=U.S. Government, ou=DoD,  
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Date: 2017.09.14 14:25:06 -0700

Encl

Edwin "Stu" Townsley  
Chief, Operations and Regulatory  
Division

**USACE South Pacific Division Comments on the *Proposed Amendments to the California Ocean Plan and Inland Surface Waters, Enclosed Bays, and Estuaries of California Plan to Include Statewide Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State (Proposed Dredge/Fill Procedures)***

**A. Overall Comments**

1. We'd like to reiterate/reemphasize the following comments from our August 2016 comment letter: 4, 6, 7(a)(1), 7(a)(4), 7(b), 7(c)(1) – (2), 7(d)(2) – (3), 7(e)(3), 7(e)(5), 7(e)(9), 7(e)(10), 7(e)(11), 7(e)(13)(a), 7(e)(13)(c), 7(e)(17), 7(e)(18), 7(e)(19), 7(f)(1)-(4), 7(g)(1), 7(g)(5), 7(g)(6), 7(g)(7), 7(g)(9), 7(g)(12). We respectfully request your continued review and resolution of these comments.

2. After issuance of our August 2016 comment letter, USACE Headquarters published Regulatory Guidance Letter (RGL) 16-01 in October of 2016. (See attached) RGL 16-01 at paragraph 5 provides that USACE generally does not issue an approved or preliminary jurisdictional determination (JD) where an applicant has not requested a JD. Additionally, RGL 16-01 at paragraph 5 noted that under certain circumstances, a JD is not required. However, USACE would require an aquatic resources delineation, conducted in accordance with regulation, policy, and guidance, clearly depicting the location and amount of aquatic resources within a review area. We recommend the State update Sections VI(A)(1)(b), IV(A)(1)(d), and other applicable sections, to allow for the submittal of a Final aquatic resources delineation verified by USACE, without a requirement for an approved or preliminary JD from USACE.

3. While it is our understanding the State does not intend for the Proposed Dredge/Fill Procedures to affect the time for completing the USACE permit review process, we believe this intent is not clearly captured in the Proposed Dredge/Fill Procedures. For example, the additional requirements imposed by the Dredge/Fill Procedures, lack of complete deference to USACE with regards to waters of the U.S., and failure to identify clear timelines, has the potential to adversely impact operations of the USACE Regulatory and Civil Works Programs (see more detailed comments in "Section B" below). The USACE permit review process must not be impacted by the State's Proposed Dredge/Fill procedures. Please note USACE will not agree to additional coordination and requirements that extend our permit review process. We recommend the State provide timelines in the Proposed Dredge/Fill Procedures for when State or Regional Board staff should typically begin to be involved in the USACE permit review process and a time when USACE may assume State or Regional Board staff do not have concerns regarding a proposed activity, with the understanding that there may be rare instances where an activity may violate State water quality standards based on information that was not known earlier in the process.

4. We recommend the State be consistent with the use of "dredge" or "dredged" throughout the Proposed Dredge/Fill Procedures.

## B. Specific Comments:

### 1. Section I:

a. We recommend the State be clear on the purpose of the Proposed Dredge/Fill Procedures, including the reason for the proposal, the anticipated benefits to the public, and whether they will result in greater consistency among the Regional Boards.

b. We recommend the State explain the origin of the Proposed Dredge/Fill Procedures and rationale for expanding from isolated waters to all waters of the state, within a Background Paragraph.

### 2. Section II:

a. We continue to have concerns regarding the definition of "wetlands" in the Proposed Dredge/Fill Procedures, and believe the State should use the USACE definition of "wetlands". Two different definitions of "wetlands" has a potential to result in an increased burden on applicants to produce multiple aquatic resource delineations, increased inconsistency between the USACE Regulatory Program and State procedures, and conflicting federal and state decisions. When verifying aquatic resources, USACE will only verify the location and extent of those features that meet the USACE definition of wetland, or are an "other" type of aquatic resource containing a mean high water mark, high tide line, or ordinary high water mark. Those features that do not meet the USACE definition of wetland or do not have an ordinary high water mark, would not be identified by USACE as an aquatic resource in a verified aquatic resources delineation. In addition, the Section 404(b)(1) Guidelines provide additional criteria for activities resulting in a discharge of dredged and/or fill material into special aquatic sites, including wetlands. With the different definition of wetlands, there are instances where an aquatic resource could be identified as a wetland by the State (and therefore a special aquatic site), but be identified as a non-wetland aquatic resource by USACE (and therefore not a special aquatic site). In these cases, USACE and the Regional Board may not be able to utilize the same Alternatives Information report prepared by the applicant, resulting in additional time and cost to the applicant.

b. "Artificial wetlands" are often difficult to identify and delineate, especially as it relates to agricultural land. In the experience of USACE, many sites with wetlands that appear to be "artificial" actually consist of natural wetlands that have been supplemented by irrigation or other human-created sources of water. For example, irrigated rice fields are often located in floodplains that historically supported wetlands. In delineating wetlands in these areas under the Federal definition, USACE often finds that the natural wetlands are generally substantially less than the entire rice field. Under the proposed definition, the entirety of the rice field could be considered a water of the state if it is determined the rice field meets the requirements of 4(c). The USACE procedures on wetland determination and delineation procedures for irrigated lands should be considered (see <http://www.spd.usace.army.mil/Portals/13/docs/regulatory/qmsref/Irrigated/Irrigated.pdf>). In addition, we recommend the State review the preamble to the USACE 1986 regulations (51 Fed. Reg. 41,206, 41,217 (1986)), for features that are "generally" not considered to be waters of the U.S., and incorporate these features into the Proposed Dredge/Fill Procedures, to the extent applicable.

3. Section III:

a. In addition to preliminary and approved JDs, the State should rely upon all “aquatic resource delineation verifications,” completed by USACE (see Comment A(2)).

b. We recommend the State align with the Federal Wetlands Delineation manual and Regional Supplements as it relates to vegetative cover (see Comment B(2)(a)).

4. Section IV:

a. We continue to have concerns that the State’s incorporation and modification of certain “relevant portions” of the Section 404(b)(1) Guidelines has the potential to produce different and potentially conflicting decisions between the Regional Boards and USACE, as well as adversely affect timelines for USACE permit decisions.

b. We recommend additional emphasis is added to encourage applicants to engage the Regional Board prior to submitting an application for water quality certification. In its Regulatory Programs, USACE has found such “pre-application meetings” to be extremely beneficial to both the applicant, USACE, and other agencies, and generally have the effect of reducing the application review time.

c. The State’s reliance on Clean Water Action Section 313 in their response to our August 2016 comments is misplaced. As the more specific provision of the statute, Section 404(t) not Section 313, governs federal immunity with respect to dredge and fill. The State cannot regulate USACE Civil Works projects for dredge and fill activities where no 404 jurisdiction exists. Further, Rivers and Harbors Act Section 10, 33 U.S.C. § 403, does not apply to USACE’s operations and maintenance dredging activities, which are affirmatively authorized by Congress.

d. The participation of a non-Federal sponsor in a USACE Civil Works project does not provide a waiver of sovereign immunity, allowing the State to impose regulations beyond Section 404(t).

e. USACE expects the State to defer to USACE with respect to USACE’s application of Section 404 to USACE Civil Works projects, despite the fact that USACE does not formally issue itself a Section 404 permit.

f. Section IV(A): USACE Civil Works projects are not subject to waste discharge requirements. The USACE must comply with 401 water quality certification, when applicable. This section needs to make clear that the application provisions for federal projects is limited to waters of the US and any application materials related to non-waters of the US or other state law for which sovereign immunity has not been waived, is not required.

g. Section IV(A)(1)(b): USACE often completes verification of an aquatic resources delineation or preliminary/approved jurisdictional determination during the permit review process (i.e. after a complete application is submitted), and sometimes near the end of the permit process. Requiring a USACE verified aquatic resources delineation and/or

approved/preliminary JD with the application as identified in the Proposed Dredge/Fill Procedures, could affect the timeline for issuance of a Section 401 WQC, thereby affecting the USACE permit processing timelines, which is not acceptable (see Comment A(3)).

h. Section IV(A)(1)(e): We recommend the Proposed Dredge/Fill Procedures align with the USACE South Pacific Division Map and Drawing Standards (see <http://www.spd.usace.army.mil/Missions/Regulatory/Public-Notices-and-References/Article/651327/updated-map-and-drawing-standards/>).

i. Section IV(A)(1)(g): As identified in Comment 7(e)(13)(c) of our August 2016 comments, USACE conducts the analysis of alternatives under the Section 404(b)(1) Guidelines based on information submitted by the applicant. The applicant does not submit an alternatives analysis, but submits the information necessary for USACE to conduct the alternatives analysis. In addition, the use of the term "exemption" could result in confusion for our customers. Under the USACE Regulatory Program, activities covered under the Section 404(f) exemptions are discharges that do not require a permit. We recommend the State modify the Proposed Dredge/Fill Procedures to use the term "exception." In addition, please consider adding Clean Water Act statutory exemptions under section 404(f) and exclusions from 404 permitting specified in USACE regulations at 33 CFR 323.2(d)(3), for discharges of dredged or fill material within waters of the US.

j. Section IV(A)(1)(h): See Comment B(4)(e). In addition, we recommend the "tiers" align with the USACE procedures as it relates to evaluating alternatives. As a general matter, USACE only conducts a full evaluation of alternatives, including off-site alternatives, when an individual permit is required. For actions that fall under a General Permit, including the Nationwide Permit Program, applicants are required only to demonstrate how they have avoided and minimized adverse effects to waters of the U.S. on the project site. Virtually all actions that fall under a general permit in California have less than 0.50 acre of permanent adverse effects to waters of the U.S. Many of the activities identified as Tier 3 in the Proposed Dredge/Fill Procedures would qualify for authorization under a General Permit, which would not require a full evaluation of alternatives by USACE. Requiring both on-site and off-site alternatives information for these activities that result in no more than minimal adverse effects to the aquatic environment may result in unnecessary delays and cost burden to the applicant.

k. Section IV(A)(2)(a): Delineations of aquatic resources conducted during the dry season should be addressed as a protocol for conducting the delineation. Currently, USACE does not require supplemental field data from the wet season to be submitted for aquatic resource delineations conducted during the dry season, even on a case-by-case basis. Other data sources, including, but not limited to, soil surveys, satellite imagery, and LiDAR, can assist in supplementing a dry season delineation to estimate boundaries that would be identified during the wet season. Requiring supplemental field data from the wet season may result in unnecessary delays and regulatory burden for applicants.

l. Section IV(A)(2)(c):

(1) For permittee responsible compensatory mitigation associated with the discharge of dredged and/or fill material into waters of the U.S., we recommend the State require the information identified in 33 CFR 332.4, and the South Pacific Division *Regional*

*Compensatory Mitigation and Monitoring Guidelines* (see <http://www.spd.usace.army.mil/Portals/13/docs/regulatory/mitigation/MitMon.pdf>) and defer to the USACE District's review and approval of the final mitigation and monitoring plan for permittee responsible compensatory mitigation associated with the loss of waters of the U.S. As proposed, the State may require information different than required by USACE, which may result in the preparation of multiple mitigation and monitoring plans and/or unnecessary delay in the USACE permit evaluation process.

(2) We believe it is unnecessary for the applicant to be required to provide items (i) and (ii) for proposals to compensate for impacts to waters of the state through purchase of credits from an approved mitigation bank or in-lieu fee program. We do not currently require such information, as mitigation banks and in-lieu fee programs are approved through a rigorous process with agency input through the interagency review team (IRT). The process of approving a mitigation bank or in-lieu fee program includes a review of the proposed service area, and determination of the appropriate service area based on the needs of the watershed, economic, and other factors, as identified in 33 CFR 332.8. In addition, because mitigation banks and in-lieu fee programs are developed and implemented by a sponsor, the information required in (i) and (ii) may not be available to an applicant for an individual proposed activity.

(3) Compensatory mitigation plans should not be required for ecosystem restoration projects undertaken by the USACE.

m. Section IV(B)(3)(b): We recommend the Regional Boards always defer to the USACE evaluation of alternatives and determinations of the least environmentally damaging practicable alternative (LEDPA). However, please note USACE makes a determination of the LEDPA based on alternatives information submitted by the applicant (see Comment B(4)(i)), at the time a permit decision is made, not before. For individual permits, we do not complete the permit decision documentation, including the LEDPA determination, until after a CWA 401 Water Quality Certification is issued. In addition, we recommend eliminating the caveats to deferring to USACE determination, as they provide uncertainty and leave much discretion to local authorities, with the potential to create inconsistent application. Finally, we encourage the State to reconsider exceptions to the alternatives information requirements, especially in situations where waters of the U.S. and waters of the state are the same and where alternatives were considered under the California Environmental Quality Act (see Comments B(4)(i) and (j)).

n. Section IV(B)(4): See comment 7(e)(17) of our August 2016 comments. For the Civil Works program, the USACE determines and approves the final restoration plan, not the State. As noted in our August 2016 comments, the USACE welcomes the permitting authority's suggested edits and comments on the USACE's restoration plan for temporary impacts.

l. Section IV(B)(5): We recommend the Regional Boards always defer to USACE on determining appropriate and acceptable compensatory mitigation for waters of the state that are also waters of the U.S. As such, the state would only review proposals for non-waters of the U.S. Not deferring, especially in light of the additional requirements identified in (c)-(g) has the potential to produce different and potentially conflicting decisions made by the Regional Boards and USACE District. Lastly, it is not clear when the Regional

Boards would approve the compensatory mitigation plan. USACE District approval of such plans normally occurs just prior to a permit decision being made.

k. Section IV(D): We strongly recommend the State consider applying the Proposed Dredge/Fill Procedures only to waters of the state that are not also waters of the U.S. In addition, see Comment 7(e)(19) in our August 2016 comment letter, identifying we recommend deletion of all references to the USACE RGLs. We note also, if the State retains the list of RGLs in the Final Dredge/Fill Procedures, some of the RGLs identified in Table 2 are not identified on RGL 05-06 as generally still applicable to the USACE Regulatory Program.

5. Section V: We recommend the State define “relatively permanent part of the natural landscape.”

6. Appendix A:

a. Under Subpart J, 230.92, the definition of “debit” is normally applied to a reduction of credits from a mitigation bank or in-lieu fee program. For example, a bank ledger is debited when a bank credit is sold. We recommend the use of a different term of the unit of measure representing the loss of aquatic functions at an impact sites. Furthermore, we recommend “mitigation banking instrument” be changed to “bank enabling instrument,” to be consistent with the nomenclature used statewide by eight federal and state agencies.

b. We recommend all elements of Subpart J be consistent with 33 CFR 332, the South Pacific Divisions *Regional Compensatory Mitigation and Monitoring Guidelines* (see <http://www.spd.usace.army.mil/Portals/13/docs/regulatory/mitigation/MitMon.pdf>) and the South Pacific Divisions Uniform Performance Standards for Compensatory Mitigation Requirements (see <http://www.spd.usace.army.mil/Portals/13/docs/regulatory/qmsref/ups/12505.pdf>).



US Army Corps  
of Engineers ®

# REGULATORY GUIDANCE LETTER

No. 16-01

Date: October 2016

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SUBJECT: Jurisdictional Determinations

1. **Purpose.** Approved jurisdictional determinations (AJDs) and preliminary JDs (PJDs) 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). Both types of JDs specify what geographic areas will be treated as subject to regulation by the Corps under one or both statutes. This Regulatory Guidance Letter (RGL) explains the differences between these two types of JDs and provides guidance to the field and the regulated public on when it may be appropriate to issue an AJD as opposed to a PJD, or when it may be appropriate to not prepare any JD whatsoever.

The Corps has long provided JDs as a public service. In U.S. Army Corps of Engineers v. Hawkes Co., 136 S.Ct. 1807 (2016), the Supreme Court held that AJDs are subject to judicial review, and several members of the Court highlighted that the availability of AJDs is important for fostering predictability for landowners. The Corps recognizes the value of JDs to the public and reaffirms the Corps commitment to continue its practice of providing JDs when requested to do so, consistent with the guidance below. This clarification RGL does not change or modify the definitions of AJDs and PJDs included in Corps regulations, the documentation practices for each type of JD, or when an AJD is required by the terms of its definition (e.g., only an AJD can be used to determine presence/absence of waters of the U.S.). This RGL also does not address which aquatic resources are subject to CWA or RHA jurisdiction.

The aim of this RGL is to encourage discussions between Corps districts and parties interested in obtaining the Corps views on jurisdiction to ensure that all parties have a common understanding of the different options for addressing CWA and RHA geographic jurisdiction so that the most appropriate mechanism for addressing the needs of a person requesting a JD can be identified. This RGL does not limit the discretion afforded a district engineer by the regulations to ultimately determine, consistent with the guidance below, how to respond to a request for a JD. After a requestor is fully informed of the options available for addressing geographic jurisdiction, the Corps will continue its current practice of providing an AJD consistent with this guidance if the party continues to request one. The uniform understanding of the different types of JDs and the well-reasoned use of discretion in the manner described in this guidance is of substantial importance within the Regulatory Program. The district engineer should set reasonable priorities based on the district's workload and available regulatory resources. For example, it may be reasonable to give higher priority to a JD request when it accompanies a permit request. This RGL addresses similar issues included in RGLs 07-01 and 08-02. Both RGL 07-01 and 08-02 are hereby superseded by this RGL.



2. Background. The regulations implementing the CWA and RHA introduced the concept of JDs when they "...authorized its district engineers to issue formal determinations of the applicability of the [CWA or RHA] to . . . tracts of land." 33 C.F.R. 320.1(a)(6). The use of such determinations was not addressed by either statute, and the regulations make their use discretionary and do not create a right to a JD. The regulations authorize their use as a service to the public, and the Corps has developed a practice of providing JDs when requested, and in appropriate circumstances.

Corps practice has evolved to address questions of jurisdiction through the use of AJDs and PJDs. However, some jurisdictional inquiries may be resolved without a JD. For example, a letter confirming that no Corps permit is required for activities on a site may be sufficient for responding to requests in a particular case. These different means of addressing questions of jurisdiction are discussed further below.

It is the Corps responsibility to ensure that the various types of JDs, their characteristics, and the reasons behind the JD request, have been adequately discussed with the requestor so requestors can make an informed decision regarding what type of documentation will best serve their needs. The JD requestor, after being advised by the Corps, will determine what form of JD, if any, is best for his/her particular circumstance, based on all the relevant factors. These factors include, but are not limited to, the requestor's preference and reasons for the request, whether any kind of permit authorization is associated with the request for a JD (e.g., individual permit or general permit), and the nature of any proposed activity needing authorization. Such factors are also relevant to how such requests are prioritized by the district engineer. The Corps regulations implementing the CWA and RHA leave the decision of whether to issue a JD to the discretion of the district engineer. However, it will continue to be the agency's practice to honor requests for JDs unless it is impracticable to do so, such as when the Corps is unable to gain access to a site to complete a JD or the Corps lacks other information necessary to respond to the request based on a sound technical record.

3. Approved JDs. An AJD is defined in Corps regulations at 33 CFR 331.2. A definitive, official determination that there are, or that there are not, jurisdictional aquatic resources on a parcel and the identification of the geographic limits of jurisdictional aquatic resources on a parcel can only be made by means of an AJD. AJDs may be either "stand-alone" AJDs or AJDs associated with permit actions. Some "stand-alone" AJDs may later be associated with permit actions, but at time of issuance are not related to a permit application. A "stand-alone" AJD may be requested so that impacts to jurisdictional aquatic resources may be avoided or minimized during the planning stages of a project, or it may be requested in order to fulfill a local/state authorization requirement.

- a. Except as provided otherwise in this RGL, and provided that the Corps is allowed legal access to the property and is otherwise able to complete an AJD, the Corps will issue an AJD upon receiving a request for a formal determination regarding the jurisdictional status of aquatic resources on a parcel, whether or not the request specifically refers to an "AJD."

- b. An AJD:

- (1) will be used if the Corps is determining the presence or absence of jurisdictional aquatic resources on a parcel;
- (2) will be used if the Corps is identifying the geographic limits of

jurisdictional aquatic resources on a parcel;

(3) will remain valid for a period of five years (subject to certain limited exceptions explained in RGL 05-02);

(4) can be administratively appealed through the Corps administrative appeal process set out at 33 CFR Part 331; and,

(5) may be requested through the use of the enclosed "Request for Corps Jurisdictional Determination (JD)" in Appendix 1. Even if the JD requestor does not use the enclosed "Request for Corps JD", the same information and signature provided in the "Request for Corps JD" should be submitted to the Corps district with each JD request.

4. Preliminary JDs. A PJD is defined in Corps regulations at 33 CFR 331.2. When the Corps provides a PJD, or authorizes an activity through a general or individual permit relying on an issued PJD, the Corps is making no legally binding determination of any type regarding whether jurisdiction exists over the particular aquatic resource in question. A PJD is "preliminary" in the sense that a recipient of a PJD can later request and obtain an AJD if that becomes necessary or appropriate during the permit process or during the administrative appeal process. See Appendix 2 for the PJD form.

a. A PJD:

(1) may be requested in order to move ahead expeditiously to obtain a Corps permit authorization where the requestor determines that it is in his or her best interest to do so;

(2) may be requested even where initial indications are that the aquatic resources on a parcel may not be jurisdictional, if the requestor makes an informed, voluntary decision that it is in his or her best interest not to request and obtain an AJD;

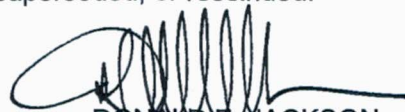
(3) may be used as the basis for a permit decision; however, for purposes of computation of impacts, compensatory mitigation requirements, and other resource protection measures, a permit decision made on the basis of a PJD will treat all aquatic resources that would be affected in any way by the permitted activity on the parcel as jurisdictional;

(4) may include the delineation limits of all aquatic resources on a parcel, without determining the jurisdictional status of such aquatic resources; and,

(5) may be requested through the use of the enclosed "Request for Corps Jurisdictional Determination (JD)" in Appendix 1. Even if the JD requestor does not use the enclosed "Request for Corps JD", the same information and signature provided in the "Request for Corps JD" should be submitted to the Corps district with each JD request.

5. No JD Whatsoever. The Corps generally does not issue a JD of any type where no JD has been requested and there are certain circumstances where a JD would not be necessary (such as authorizations by non-reporting nationwide general permits). In some circumstances, including where the Corps verifies general permits or issues letters of permission and/or standard permits, jurisdictional questions may not arise. In other circumstances, where no DA permit would be required because the proposed activity is not a regulated activity or is exempt under Section 404(f) of the CWA and is not recaptured, preparation of a "no permit required" letter may be appropriate, and no JD is required, so long as that letter makes clear that it is not addressing geographic jurisdiction.

6. Processing. The "Request for Corps Jurisdiction (JD)" in Appendix 1 of this RGL is intended to help both the requestor and the Corps in determining which type of JD, if any, is appropriate. When the Corps receives a request for a JD, the Corps should first explain to the requestor the various types of JDs and their characteristics to ensure that an informed decision is made by the requestor as to the type of JD the Corps will issue, if any. The Corps should discuss with the requestor the intent and purpose of the JD request rather than responding to the request through issuance of a JD without such understanding. Providing an explanation upfront as to the differences between the types of JDs and discussing what the requestor may need can help clarify which JD type may be appropriate for the requestor, if any. It is agency practice to honor requests for JDs unless it is clearly impracticable to do so, such as when the Corps is unable to gain access to a site to complete a JD or the Corps lacks other information necessary to respond to the request based on a sound technical record.
7. Coordination with U.S. Environmental Protection Agency (EPA) and posting. The Corps will continue to coordinate with EPA per applicable memoranda. The Corps will also continue to post final AJDs on Corps websites until the AJDs expire (generally five years, see RGL 05-02). PJDs will not be coordinated with EPA or posted on Corps websites.
8. This RGL remains in effect unless revised, superseded, or rescinded.



DONALD E. JACKSON  
Major General, USA  
Deputy Commanding General  
for Civil and Emergency Operations

31 Oct 2016

\_\_\_\_\_  
Date

Appendices

**Appendix 1 - REQUEST FOR CORPS JURISDICTIONAL DETERMINATION (JD)**

To: District Name Here

- I am requesting a JD on property located at: \_\_\_\_\_  
(Street Address)  
City/Township/Parish: \_\_\_\_\_ County: \_\_\_\_\_ State: \_\_\_\_\_  
Acreage of Parcel/Review Area for JD: \_\_\_\_\_  
Section: \_\_\_\_\_ Township: \_\_\_\_\_ Range: \_\_\_\_\_  
Latitude (decimal degrees): \_\_\_\_\_ Longitude (decimal degrees): \_\_\_\_\_  
(For linear projects, please include the center point of the proposed alignment.)
- Please attach a survey/plat map and vicinity map identifying location and review area for the JD.
- I currently own this property.  I plan to purchase this property.  
 I am an agent/consultant acting on behalf of the requestor.  
 Other (please explain): \_\_\_\_\_
- Reason for request: (check as many as applicable)  
 I intend to construct/develop a project or perform activities on this parcel which would be designed to avoid all aquatic resources.  
 I intend to construct/develop a project or perform activities on this parcel which would be designed to avoid all jurisdictional aquatic resources under Corps authority.  
 I intend to construct/develop a project or perform activities on this parcel which may require authorization from the Corps, and the JD would be used to avoid and minimize impacts to jurisdictional aquatic resources and as an initial step in a future permitting process.  
 I intend to construct/develop a project or perform activities on this parcel which may require authorization from the Corps; this request is accompanied by my permit application and the JD is to be used in the permitting process.  
 I intend to construct/develop a project or perform activities in a navigable water of the U.S. which is included on the district Section 10 list and/or is subject to the ebb and flow of the tide.  
 A Corps JD is required in order to obtain my local/state authorization.  
 I intend to contest jurisdiction over a particular aquatic resource and request the Corps confirm that jurisdiction does/does not exist over the aquatic resource on the parcel.  
 I believe that the site may be comprised entirely of dry land.  
 Other: \_\_\_\_\_
- Type of determination being requested:  
 I am requesting an approved JD.  
 I am requesting a preliminary JD.  
 I am requesting a "no permit required" letter as I believe my proposed activity is not regulated.  
 I am unclear as to which JD I would like to request and require additional information to inform my decision.

By signing below, you are indicating that you have the authority, or are acting as the duly authorized agent of a person or entity with such authority, to and do hereby grant Corps personnel right of entry to legally access the site if needed to perform the JD. Your signature shall be an affirmation that you possess the requisite property rights to request a JD on the subject property.

\*Signature: \_\_\_\_\_ Date: \_\_\_\_\_

- Typed or printed name: \_\_\_\_\_  
Company name: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Daytime phone no.: \_\_\_\_\_  
Email address: \_\_\_\_\_

**\*Authorities:** Rivers and Harbors Act, Section 10, 33 USC 403; Clean Water Act, Section 404, 33 USC 1344; Marine Protection, Research, and Sanctuaries Act, Section 103, 33 USC 1413; Regulatory Program of the U.S. Army Corps of Engineers; Final Rule for 33 CFR Parts 320-332.

**Principal Purpose:** The information that you provide will be used in evaluating your request to determine whether there are any aquatic resources within the project area subject to federal jurisdiction under the regulatory authorities referenced above.

**Routine Uses:** This information may be shared with the Department of Justice and other federal, state, and local government agencies, and the public, and may be made available as part of a public notice as required by federal law. Your name and property location where federal jurisdiction is to be determined will be included in the approved jurisdictional determination (AJD), which will be made available to the public on the District's website and on the Headquarters USACE website.

**Disclosure:** Submission of requested information is voluntary; however, if information is not provided, the request for an AJD cannot be evaluated nor can an AJD be issued.



- 1) The Corps of Engineers believes that there may be jurisdictional aquatic resources in the review area, and the requestor of this PJD is hereby advised of his or her option to request and obtain an approved JD (AJD) for that review area based on an informed decision after having discussed the various types of JDs and their characteristics and circumstances when they may be appropriate.
- 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 AJD for the activity, the permit applicant is hereby made aware that: (1) the permit applicant has elected to seek a permit authorization based on a PJD, which does not make an official determination of jurisdictional aquatic resources; (2) the applicant has the option to request an AJD before accepting the terms and conditions of the permit authorization, and that basing a permit authorization on an AJD could possibly result in less compensatory mitigation being required or different special conditions; (3) 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) 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) undertaking any activity in reliance upon the subject permit authorization without requesting an AJD constitutes the applicant's acceptance of the use of the PJD; (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 PJD constitutes agreement that all aquatic resources in the review area affected in any way by that activity will be treated as jurisdictional, and waives 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 AJD or a PJD, the JD will be processed as soon as practicable. Further, an AJD, 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. If, during an administrative appeal, it becomes appropriate to make an official determination whether geographic jurisdiction exists over aquatic resources in the review area, or to provide an official delineation of jurisdictional aquatic resources in the review area, the Corps will provide an AJD to accomplish that result, as soon as is practicable. This PJD finds that there "may be" waters of the U.S. and/or that there "may be" navigable waters of the U.S. on the subject review area, and identifies all aquatic features in the review area that could be affected by the proposed activity, based on the following information:

**SUPPORTING DATA. Data reviewed for PJD (check all that apply)**

Checked items should be included in subject file. Appropriately reference sources below where indicated for all checked items:

- Maps, plans, plots or plat submitted by or on behalf of the PJD requestor:  
Map: \_\_\_\_\_.
- Data sheets prepared/submitted by or on behalf of the PJD requestor.
  - Office concurs with data sheets/delineation report.
  - Office does not concur with data sheets/delineation report. Rationale: \_\_\_\_\_.
- 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: \_\_\_\_\_.
- 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 Geodetic 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): \_\_\_\_\_.

**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.**

\_\_\_\_\_  
Signature and date of  
Regulatory staff member  
completing PJD

\_\_\_\_\_  
Signature and date of  
person requesting PJD  
(REQUIRED, unless obtaining  
the signature is impracticable)<sup>1</sup>

<sup>1</sup> Districts may establish timeframes for requestor to return signed PJD forms. If the requestor does not respond within the established time frame, the district may presume concurrence and no additional follow up is necessary prior to finalizing an action.