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Army Corps Offers More Flexibility In Obtaining Clean Water Act Section 404 Permits

Corps Issues New Regulatory Guidance Letter on Jurisdictional Determinations, Allowing Applicants to Secure More Expedited Permits

On June 26, 2008, the U.S. Army Corps of Engineers (Corps) released Regulatory Guidance Letter No. 08-02 ([RGL 08-02](#)), the latest in a series of agency actions intended to clarify how the Corps and the Environmental Protection Agency (EPA) will implement their permitting programs under the Clean Water Act (CWA) section 404 and the Rivers and Harbor Act (RHA) sections 9 and 10 in the wake of the Supreme Court ruling in *United States v. Rapanos*. RGL 08-02 should provide the Corps districts with needed flexibility to streamline the permit process for project developers and others who seek more expedited permit decisions and do not contest the agencies' jurisdiction over their projects.

More than a year ago, the Corps and EPA jointly issued guidance regarding CWA jurisdiction after *Rapanos* (Guidance), establishing a process for determining whether streams, wetlands and other waterways are "waters of the United States," and thereby subject to permitting under the CWA and RHA. As part of that Guidance, the Corps issued RGL 07-01, which required all CWA section 404 applicants to obtain an "approved jurisdictional determination" (approved

JD) for each water body impacted by a project. This was a significant change from the existing practice, where developers seeking expedited permits sought only non-binding "preliminary jurisdictional determinations" (preliminary JDs) from the relevant districts. However, under the new Guidance and RGL 07-01, every applicant had to go through a time and resource-consuming, formally approved JD process to determine jurisdiction, regardless of whether jurisdiction was contested.

The Corps has now revised its Guidance to restore the needed flexibility to streamline permitting. As to approved JDs, the new RGL:

- defines approved JDs;
- describes when approved JDs are necessary, for example, where jurisdiction is contested or does not exist, or a landowner, permit applicant, or other "affected party" requests one;
- gives the district discretion to use approved JDs where it determines appropriate; and

- requires approved JDs to be documented in accordance with the original Guidance and RGL 07-01.

At the same time, the new RGL:

- defines a preliminary JD as non-binding, advisory and non-appealable (a preliminary JD only determines if there “may” be jurisdictional waters at a site, and is not the definitive, official determination of the absence or presence of jurisdictional waters);
- gives a party the option of requesting an individual or general permit authorization based on a preliminary JD, or in appropriate circumstances such as non-report-

ing nationwide permits, no JD whatsoever;

- allows a party to voluntarily waive or set aside questions of jurisdiction to expedite permitting;
- allows a preliminary JD to cover multiple water bodies or multiple sites; and
- sets forth a form that must be used for a preliminary JD.

Approved and preliminary JDs are both to be completed within 60 days of receipt of the request, and a preliminary JD should not be given priority over an approved JD. Parties receiving preliminary JDs can later request an approved JD.

The new RGL is effective immediately and supersedes any inconsistent guidance contained in RGL 07-01. It does not address what water bodies are subject to CWA and RHA jurisdiction, which is still governed by the Guidance.

Hunton & Williams’ Environmental practice professionals have extensive experience providing guidance to clients regarding all aspects of the federal Clean Water Act. Hunton & Williams participated in comments on the Guidance and RGL 07-01 (click [here](#) or [here](#) to view comments), and in particular focused on the need for greater flexibility with a preliminary JD. If you have questions about the U.S. Army Corps of Engineers’ new guidance, or any other environmental issues, please contact us.

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