



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.



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31 Oct 2016

Date

Appendices