



US Army Corps
of Engineers®

REGULATORY GUIDANCE LETTER

No. 16-01

Date: October 2016

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)¹

¹ 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.