

RGL 16-01

JURISDICTIONAL

DETERMINATIONS

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Regulatory Program Workshop
Sacramento District
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HAWKES SUPREME COURT DECISION

- Supreme Court –U.S. Army Corps of Engineers v. Hawkes Co., 136 S.Ct. 1807 (2016)
- *Held:* Corps' Approved Jurisdictional Determinations (AJDs) are a final agency action and are judicially reviewable under the APA
- Immediate Implications: AJDs may now be challenged in court without completing either the permit process or administrative appeal process



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REGULATORY GUIDANCE LETTER (RGL) 16-01

- October 2016
- RGL 16-01 explains differences between an approved JD and preliminary JD
- Provides guidance on which type of JD, if any, is appropriate to issue
- Both RGL 07-01 and 08-02 are superseded by this RGL



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WHAT DOES THE RGL NOT DO?

- Does not change or modify definitions of AJD and PJD included in Corps regulations
- Does not change or modify 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.)
- Also does not address which aquatic resources are subject to CWA jurisdiction



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NO JD WHATSOEVER

- Corps generally does not issue a JD of any type where no JD has been requested
- Certain circumstances where a JD would not be necessary (such as authorizations by non-reporting nationwide general permits)
- Certain circumstances, including where the Corps verifies general permits or standard permits, where jurisdictional questions may not arise



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APPROVED JDS

- Corps will issue an AJD upon receiving a request for a formal determination regarding the jurisdictional status of aquatic resources on a parcel
- Must have legal access to the property
- Approved JDs remain valid for a period of five years (see exceptions in RGL 05-02)
- Approved JDs can be administratively appealed (see 33 CFR Part 331)

PRELIMINARY JDS

- May be requested in order to move ahead expeditiously in permit process where requestor determines in best interest to do so, even where initial indications are that the aquatic resources on a parcel may not be jurisdictional.
- When used as basis for permit decision, for purposes of computation of impacts and compensatory mitigation requirements, all aquatic resources that would be affected by the permitted activity on the parcel will be **treated** as jurisdictional.



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REQUEST FOR DELINEATION VERIFICATION OR JD FORM



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**REQUEST FOR AQUATIC RESOURCES DELINEATION VERIFICATION
OR JURISDICTIONAL DETERMINATION**

A separate jurisdictional determination (JD) is not necessary to process a permit. An Approved Jurisdictional Determination (AJD) is required to definitively determine the extent of waters of the U.S. and is generally used to disclaim jurisdiction over aquatic resources that are not waters of the U.S., in cases where the review area contains no aquatic resources, and in cases when the recipient wishes to challenge the water of the U.S. determination on appeal. Either an Aquatic Resources Delineation Verification or a Preliminary Jurisdictional Determination (PJD) may be used when the recipient wishes to assume that aquatic resources are waters of the U.S. for the purposes of permitting. In some circumstances an AJD may require more information, a greater level of effort, and more time to produce. If you are unsure which product to request, please speak with your project manager or call the Sacramento District's general information line at (916) 557-5250.

I am requesting the product indicated below from the U.S. Army Corps of Engineers, Sacramento District, for the review area located at:

Street Address: _____ City: _____ County: _____
 State: _____ Zip: _____ Section: _____ Township: _____ Range: _____
 Latitude (decimal degrees): _____ Longitude (decimal degrees): _____ The
 approximate size of the review area for the JD is _____ acres. **(Please attach location map)**

Choose one: <input type="radio"/> I own the review area <input type="radio"/> I hold an easement or development rights over the review area <input type="radio"/> I lease the review area <input type="radio"/> I plan to purchase the review area <input type="radio"/> I am an agent/consultant acting on behalf of the requestor <input type="radio"/> Other: _____	Choose one product: <input type="radio"/> I am requesting an Aquatic Resources Delineation Verification <input type="radio"/> I am requesting an Approved JD <input type="radio"/> I am requesting a Preliminary JD <input type="radio"/> I am requesting additional information to inform my decision about which product to request
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Reason for request: (check all that apply)

need information concerning aquatic resources within the review area for planning purposes.

intend to construct/develop a project or perform activities in this review area which would be designed to avoid all aquatic resources.

intend to construct/develop a project or perform activities in this review area which would be designed to avoid those aquatic resources determined to be waters of the U.S.

intend to construct/develop a project or perform activities in this review area which may require authorization from the Corps; this request is accompanied by my permit application.

intend to construct/develop a project or perform activities in a navigable water of the U.S. which is included on the district's list of navigable waters under Section 10 of the Rivers and Harbors Act of 1899 and/or is subject to the ebb and flow of the tide.

My lender, insurer, investors, local unit of government, etc. has indicated that an aquatic resources delineation verification is inadequate and is requiring a jurisdictional determination.

intend to contest jurisdiction over particular aquatic resources and request the Corps confirm that these aquatic resources are or are not waters of the U.S.

believe that the review area may be comprised entirely of dry land.

Other: _____

Attached Information:

Maps depicting the general location and aquatic resources within the review area consistent with Map and Drawing Standards for the South Pacific Division Regulatory Program (Public Notice February 2016, <http://www.spd.usace.army.mil/Missions/Regulatory/Public-Notices-and-References/Article/651327/updated-map-and-drawing-standards/>)

Aquatic Resources Delineation Report, if available, consistent with the Sacramento District's Minimum Standards for Acceptance (Public Notice January 2016, <http://1.usa.gov/1V681Ya>)

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 review area. Your signature shall be an affirmation that you possess the requisite property rights for this request on the subject property.

*Signature: _____ Date: _____
 Name: _____ Company name: _____
 Address: _____
 Telephone: _____ Email: _____

***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.



Questions?



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