

QUESTIONS AND ANSWERS for RGL 16-01

Q #1) What is an AJD and what is a PJD?

A #1) An AJD and a PJD are defined in Corps regulations at 33 CFR 331.2. See Sections 3 and 4 of RGL 16-01 for additional information.

Q #2) What are the key distinctions between an AJD and a PJD?

A #2) A PJD can only be used to determine that aquatic resources that exist on a particular parcel “may be” subject to regulatory jurisdiction. A PJD cannot be used to determine either that there are no jurisdictional aquatic resources on a parcel at all (e.g., the entire parcel consists of dry land or the parcel only includes non-jurisdictional aquatic resources), or that only a portion of the aquatic resources on a parcel are jurisdictional. A PJD, however, may include the delineation limits of all aquatic resources on a parcel as long as the PJD does not determine the jurisdictional status of such aquatic resources. A definitive, official determination that there are, or that there are not, jurisdictional aquatic resources on a parcel, or the identification of the geographic limits of jurisdictional aquatic resources on a parcel, can only be made by means of an AJD.

Q #3) Are there timeframes associated with issuing JDs?

A #3) Every AJD and PJD should be completed and provided to the requestor as promptly as practicable in light of the district’s workload, efficient processing of any related permit actions, and site and weather conditions if a site visit is determined necessary. Moreover, every Corps district should ensure that a permit applicant’s request for an AJD rather than a PJD will not prejudice the timely processing of that permit application, noting that an AJD may take longer to issue. JDs associated with permit actions may be finalized and sent with the issued permit/verification package if the applicant concurs that is appropriate and acceptable. The data necessary to quantify and defend the Corps Regulatory Program’s performance will be available for a permit application regardless of whether it was supported by an AJD, a PJD, or no JD whatsoever.

Q #4) Is the information used to support a permit decision the same whether the application is supported by an AJD or a PJD or even no JD?

A #4) Similar information is needed for an AJD as is needed for impacts and compensatory mitigation calculations during the permit process. However, the permit applicant has the right to request a PJD at any time (see Section 4 of RGL 16-01), or even no JD whatsoever. Regardless of the type of JD that is completed, permit applicants must submit the necessary information required to review their application and complete a permit decision. Applicants should provide a delineation of aquatic resources in support of an individual permit or “letter of permission” application. Also, a delineation of aquatic resources is required in order to determine that a pre-construction notification is complete per the nationwide permits general condition. Corps regulatory personnel are expected to continue to exercise appropriate judgment and use appropriate information when making technical and scientific determinations as to what areas on the parcel qualify as aquatic resources.

Q #5) Should the Corps complete JDs for use related to other CWA programs?

A #5) The Corps should consider workload and appropriately prioritize the response to requests for either an AJD or a PJD if the Corps has reason to believe that person is seeking a JD for any purpose relating to a CWA program not administered by the Corps (e.g., CWA Section 402, 303, or 311). The Corps should be cognizant that some states and local governments require AJDs in order to provide water quality certifications or for

other purposes. Depending upon the basis for the need for the JD and the district's workload, it may be appropriate for the Corps to deny requests for JDs to address a need not related to a Corps program. That justification should be appropriately documented. Districts are encouraged to work with state and other local agencies to develop operating procedures to facilitate this issue.

Q #6) Is the enclosed PJD form to be used for all PJDs?

A #6) In general, where a PJD is used the Corps district should complete the enclosed "Preliminary Jurisdictional Determination Form" in Appendix 2, which sets forth in writing the minimum requirements for a PJD and important information concerning the requesting party's option to request and obtain an AJD, and subsequent appeal rights. The PJD form must be sent to the requestor of the PJD and the signature of the requestor should be obtained on the PJD form wherever practicable. Where a PJD form covers multiple aquatic resources or multiple parcels, the information for each can be included in the table provided with the PJD form. Information in addition to the minimum of data required on the PJD form can be included on that form, but only if such information pertains to the amount and location of aquatic resources on the parcel. Information should be sufficiently accurate and reliable that the effective presumption of jurisdiction over all of the aquatic resources at the site will support a reliable and enforceable permit decision. Any such additional information included on the PJD form should not purport, or be construed, to address any legal determination involving jurisdiction on the parcel. Such supporting documentation may include descriptions of the characteristics of aquatic resources or information about nearby aquatic resources. Data developed and relied upon to support the Corps permit decision should be carefully documented as part of the permit process and should not be included in the PJD form.

Q #7) Are site visits necessary for an AJD?

A #7) The information used to support an AJD should be reliable and verifiable. Traditionally, this information has been obtained or verified through a site visit, but now, with information from new, highly sensitive technology and imaging, site visits are not always required for AJDs. However, certain AJDs, including those that are complex and challenging (e.g., some adjacency determinations, significant nexus determinations) may still require a site visit. Corps staff should ensure they have appropriate authorizations to enter sites legally when conducting a site visit.

Q #8) How are AJDs to be documented?

A #8) Documentation of an AJD generally requires the use of the AJD form published on 05 June 2007, or as modified by subsequent revisions developed by Corps Headquarters, in order to provide the "basis of jurisdictional determination" as per 33 CFR 331.2. A "basis of jurisdictional determination" is a summary of the indicators used to support the Corps AJD.

Corps districts will ensure that the information in the file adequately supports any AJD. The file shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination. The district should ensure the AJD form and associated documentation adequately demonstrates, when applicable, the tributary connection to the traditional navigable water, adjacency (including consideration of all adjacency factors), and the significant nexus determination. The level of documentation may vary among projects. For example, AJDs for complex review areas may require additional documentation by the districts.

Districts should ensure the documentation used to support the AJD addresses any objections from AJD requestors and/or consultants, when applicable. If the requestor submits materials with which the districts do not agree or do not concur (e.g., wetland delineation report), the districts should clearly document the reasons for reaching a contrary conclusion.

Copies of all supporting documents for the AJD should be included in the file, including, where applicable: resources referenced in the check boxes of the AJD form, or any other additional information used to support the determination, and documentation should clearly state any conclusions formulated from this information; print-outs or screen shots of remotely-sourced information (e.g., GIS, Google Earth); identification of the review area; field notes and complete wetland delineation data sheets; identification and rationale for determining the ordinary high water mark, mean high water line, and/or high tide line; and all other related documents and correspondence (emails, phone records, meeting records, *etc.*). It is typically not necessary to include in the file copies of readily available regulations, policy documents, guidance, and manuals utilized in the decision-making process; however, districts may include a copy of the title page and other relevant pages for clarity.

Q #9) For large projects that require multiple JDs, or for situations where a requestor asks to utilize PJDs and AJDs for different parts of a review area, can a combination of types of JDs be used?

A #9) A combination of PJDs and AJDs can be used, as long as the review areas for each type of JD are clearly designated.

Q #10) For the purpose of JDs, how is the "review area" defined, and how are multiple water bodies and wetlands within a review area documented?

A #10) The review area for JDs is at the discretion of the district, and should be clearly documented in the file for the JD. It may consist of the entire parcel of land, or a portion of that parcel. The review area should be clearly marked on any plans or maps accompanying a JD. When there are multiple water bodies or wetlands within the review area of a PJD, their location and extent may be summarized in the table provided in the PJD form.

Q #11) How are aquatic resources that are designated as "navigable waters of the U.S." under Section 10 of the RHA to be documented for jurisdiction if they are the only aquatic resources present in a JD review area?

A #11) For JDs with review areas which only include aquatic resources which are subject to the ebb and flow of the tide and/or have been designated as "navigable waters of the U.S." under Section 10 of the RHA and are included on Corps district lists of such aquatic resources (i.e., aquatic resources that have been determined navigable through 33 CFR Part 329 or through determinations made by the federal courts), no official JD of any kind is required. The Corps need only document in the file that the aquatic resources are included in the district section 10 navigable waters of the U.S. list and/or that the aquatic resources are subject to the ebb and flow of the tide. As such, the aquatic resources are clearly section 10 navigable waters of the U.S. and, therefore, those aquatic resources are also considered to be CWA Section 404 traditional navigable waters. This provision excludes "historic" section 10 aquatic resources that are now "fast land"/dry land and not considered jurisdictional under section 404. The district should inform the landowner that their parcel includes such aquatic resources subject to Corps authorities under section 10 and section 404 and include documentation in the file that such conversation occurred (e.g., email; phone record, *etc.*). The Corps will continue to provide an AJD when requested per Section 3 of this RGL after having the conversation with the requestor about their options (see Sections 2 and 6 of this RGL); for example, if the requestor wants to contest the lateral limits of jurisdiction in such aquatic resources the Corps may provide an AJD. In addition,

districts may continue to provide a "case-specific" AJD for aquatic resources subject to both section 10 and section 404 authority (e.g., those aquatic resources subject to the ebb and flow of the tide) when requested. When a PJD form is used to identify aquatic resources which "may be" subject to both section 10 and 404 authority on a parcel it may only list previously identified "navigable waters of the U.S." and/or those aquatic resources which may be subject to the ebb and flow of the tide.

Q #12) What type of JDs are to be used for enforcement actions?

A #12) A JD is not required in connection with an enforcement action. PJDs are sometimes used in enforcement situations because access to a site may be impracticable or unauthorized, or for other reasons an AJD cannot be completed in a timely manner. In such circumstances, a PJD may serve as the initial step for Corps enforcement actions. The Corps may also support an enforcement action with an AJD; however, in some circumstances, an enforcement action may be supported by no official JD whatsoever as long as there is adequate documentation in the file to support jurisdiction over the site, and as long as the other elements required to demonstrate that a violation has occurred exists in the file. Regardless of how the Corps documents jurisdiction related to an enforcement action, the Corps primarily must ensure sufficient evidence and support is provided in the file to enable a conclusion regarding geographic jurisdiction for a complete administrative record and for potential litigation purposes. Consistent with Section 3 of this RGL, if the alleged violator requests an AJD because they want to contest jurisdiction, for example, the Corps will issue an AJD. See 33 CFR 326 and 331 for additional information on such requests.