

Regulatory Guidance Letter 16-01: U.S. Army Corps of Engineers Jurisdictional Determinations



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The United States Army Corps of Engineers ("Corps") issued an October 2016 Regulatory Guidance Letter ("RGL") addressing "Jurisdictional Determinations."

This is the first Corps RGL issued in eight years.

The Corps utilizes RGLs as a system to organize and track written guidance issued to its field agencies.

RGLs are typically issued due to:

- Evolving policy
- Judicial decisions
- Changes to Corps or other agency regulations affecting its permit program

The Corps states that RGLs are used to interpret or clarify existing Regulatory Program policy.

RGL 16-01 is notable for a couple of reasons.

First, it is the first and only RGL issued to date by the Obama administration. The prior most recent RGL was 08-03 issued in 2008.

Second, RGL 16-01 supersedes 08-02 which also addressed "Jurisdictional Determinations."

RGL 16-01 addresses jurisdictional determinations ("JDs") in the context of the Section 404 Clean Water Act ("CWA") and Sections 9 and 10 of the Rivers and Harbors Act ("RHA") of 1899. A JD is a determination by the Corps as to whether a particular geographic area is subject to regulation under either the CWA or RHA. The Corps issues both approved jurisdictional determinations ("AJDs") and preliminary JDs ("PJDs").

The Corps states that RGL 16-01 explains the difference between AJDs and PJDs. Further, it is stated to provide guidance to Corps field personnel and the regulated public on the circumstances for issuance of either of the two types of JD. It also notes that circumstances may exist when it may not be appropriate to issue a JD.

The Corps references the 2016 United States Supreme Court decision *U.S. Army Corps of Engineers v. Hawkes Co.* The decision held that a Federal District Court could review a Corps Clean Water Act jurisdictional determination. The basis for this was its holding that an AJD is a final action jurisdictionally reviewable under the Administrative Procedures Act. The Court determined the action to be final under the Administrative Procedure Act because:

- The action marked the consummation of the agency's decision-making process

- The action is one by which rights or obligations have been determined, or from which legal consequences will flow

The Corps states in RGL 16-01 that it:

. . .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.). . .

The RGL also states the Corps District Engineer should set reasonable priorities based upon 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.

Joseph P. Koncelik in a November 3rd blog post cites the previous quote and expresses the following opinion in regards to RGL 16-01's purpose, stating:

This statement makes clear that the ACOE will prioritize processing "Approved JD" requests with a permit application versus "Stand Alone Approved JD" requests. The goal is to avoid issuing "Approved JDs" to landowners who may be making the request simply to challenge the JD in court and avoid permitting altogether if the court challenge is successful. Those seeking an "Approved JD" without submitting a permit application may be waiting a long time to get their determination.

[A copy of RGL 16-01 can be downloaded here.](#)