NWPR: IMPLEMENTATION IN THE STATE OF MAINE

Shawn Mahaney
Senior Project Manager
New England District Regulatory Division
– Maine Project Office
December 17, 2020
Shawn.B.Mahaney@usace.army.mil
(978) 318-8492

US Army Corps of Engineers®

IMPLEMENTATION

WHAT ARE THE IMPLICATIONS OF NWPR?

The NWPR clarifies the definition of Waters of the U.S.

- Does **not** change the way that wetlands and waters are delineated.
- Does **not** change the types of activities regulated under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.
- Does **not** change the USACE permitting process.
- Does **not** affect State (DEP & LUPC) or local permitting processes or jurisdiction.

4

IMPLEMENTATION OF NWPR IN MAINE

NWPR became effective 22 June 2020 in Maine. The Corps has been processing permits and reviewing requests for jurisdictional determinations under the NWPR since June. Most applicants have not noticed any major changes in the Corps jurisdiction of Waters of the United States ('WOTUS") as most of the waters and wetlands in Maine are still jurisdictional under NWPR.

The only wetlands and waters that are not jurisdictional in Maine are waters that do not contribute surface water flow to an (a)(1) water in a typical year either directly or through one or more paragraph (a)(2)-(4) waters or are one of the listed exclusions.

Because of snowpack melt, most wetlands that appear to be isolated are actually abutting an (a)(2) water (Tributaries).

"Tributary" means a naturally occurring surface water channel that contributes surface water flow to a paragraph (a)(1) water in a typical year either directly or through one or more paragraph (a)(2)-(4) waters. A tributary must be perennial or intermittent in a typical year.

The term snowpack means layers of snow that accumulate over extended periods of time in certain geographic regions or at high elevation (e.g., in northern climes or mountainous regions).

SNOWPACK MELTWATER AS TRIBUTARIES

"Tributary" means a naturally occurring surface **water channel** that contributes surface water flow to a paragraph (a)(1) water in a typical year.

Snowpack meltwater can meet the definition of an intermittent stream provided it flows in a discreet surface channel:

Most snowmelt forms channels on the surface of the snowpack. The definition of "water channel" does not state that the channel must be on the ground surface. The defined path or course may be present on the surface of the snowpack. The presence or absence of a channel on the surface of the snowpack can only be verified in the field during spring melt. Our District has a long history of interpreting meltwater from snowpack that forms a discreet, observable stream in the snow/ice surface as a stream. In some of these areas, the meltwater streams occur in the same locations year after year, guided by the topography. In some cases, these seasonal streams may shift locations in different years, depending on the amount or distribution of snow. The water source for these carved in snow/ice channels is meltwater from the snowpack, not simple melt from an individual storm, and may flow for weeks in some locations:

MELT WATER CHANNEL IN THE SNOW

JURISDICTIONAL DETERMINATION PROCESS

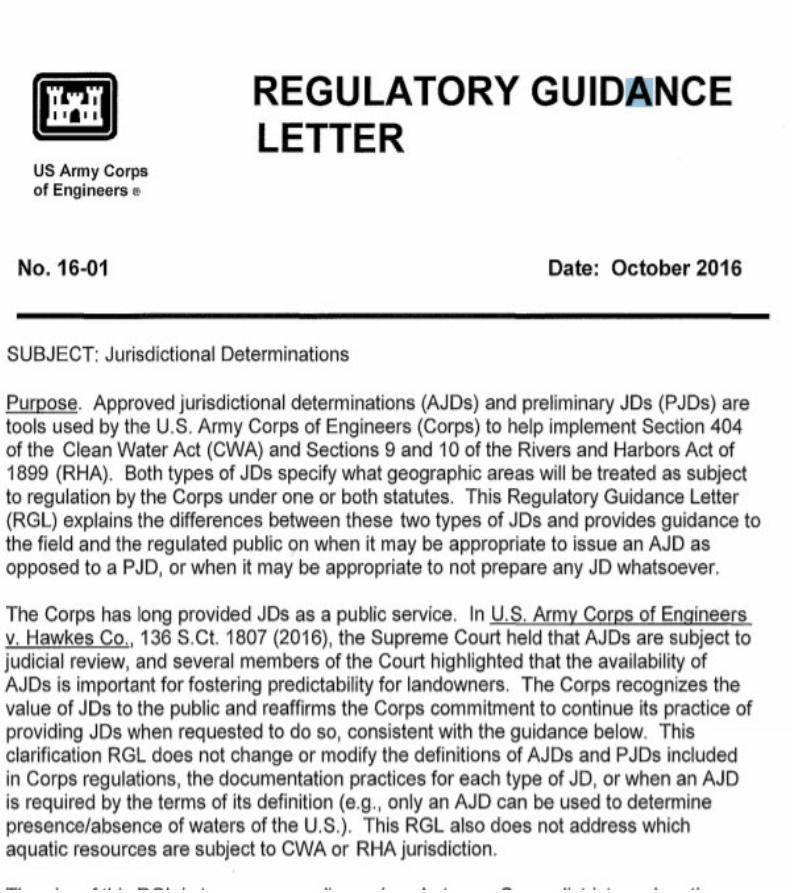
JURISDICTIONAL DETERMINATIONS (JDS)

APPROVED JD (AJD): Used to make a definitive, official determination that an aquatic resource is or is not jurisdictional (33 CFR 331.2).

PRELIMINARY JD (PJD): A determination that does not address questions of jurisdiction thereby treating all aquatic resources that could be jurisdictional as if they are jurisdiction for purposes of permit processing (i.e. impacts and compensatory mitigation) (33 CFR 331.2).

JD request form found in RGL 16-01

For both AJDs and PJDs aquatic resources must meet the definition of a wetland or contain an ordinary high water mark (OHWM) as defined by USACE methodology.



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.

PRELIMINARY VS. APPROVED JDS

PRELIMINARY JD

- All potential jurisdictional aquatic features are included in a PJD and treated as if they are jurisdictional, even where initial indications are that a feature may not be jurisdictional were the District to complete an AJD
  - To assist the requestor in planning for a proposed project (i.e. avoidance and minimization)
- Not appealable
- Applicant may request an AJD at any time

APPROVED JD

- Only way to determine an aquatic feature is not jurisdictional
- Valid for 5 years
- Appealable
- Includes a basis of jurisdiction with the document, providing the indicators that support the approved JD
- May take up to 180 days or longer depending on the time of year request was submitted and if snowpack melt may be required to confirm jurisdiction.

NWPR AND PRE-EXISTING AJDS

The possessor of a valid AJD may request that USACE reassess a parcel and issue a new AJD before the five-year expiration date.

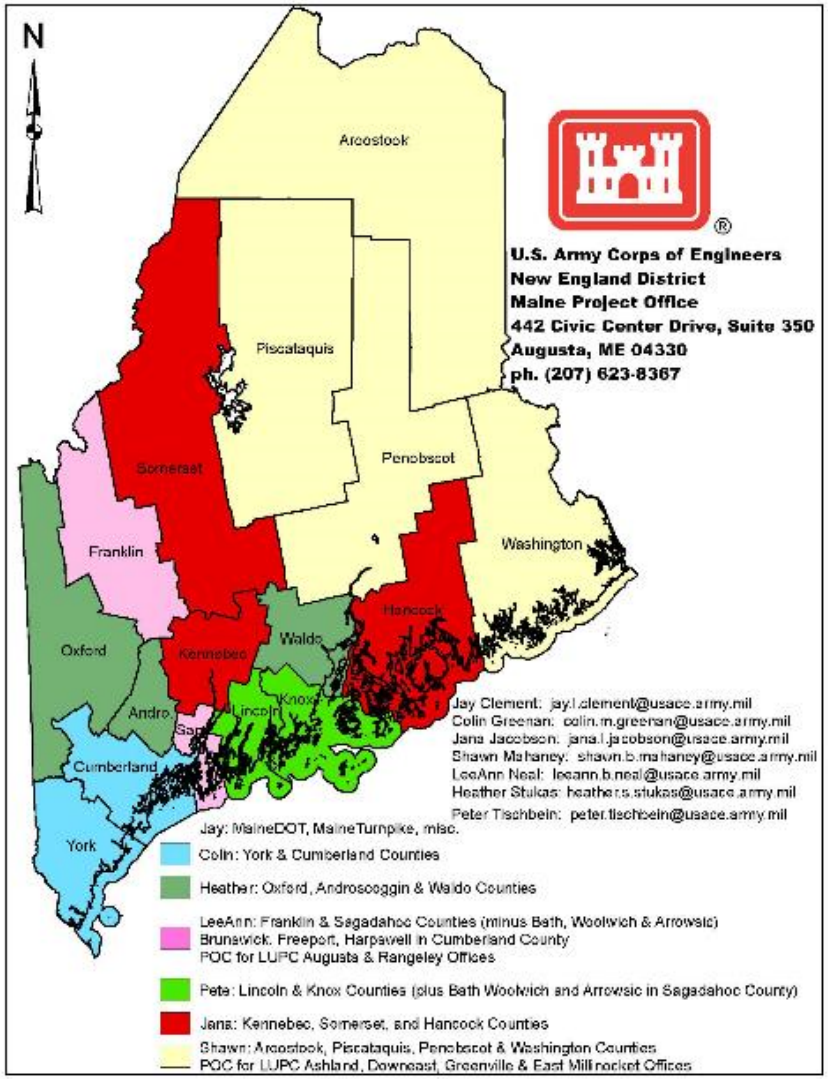
The NWPR does not invalidate an AJD that was issued before the rule was effective. As such, these AJDs will remain valid until the expiration date unless one of the criteria for revision is met under RGL05-02, or the recipient of such an AJD requests that a new AJD be issued.

- New information may warrant revision of the determination before the expiration date.
- District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis.

JD RESOURCES

- USACE Regulations at 33 CFR 331.2
- USACE Jurisdictional Information Website: https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/juris_info/
- USACE Regulatory Guidance Letter (RGL) 16-01: https://www.spn.usace.army.mil/Portals/68/docs/regulatory/resources/RGL/RGL16-01.pdf
- USACE Jurisdictional Determinations and Permit Decisions Public Interface: https://permits.ops.usace.army.mil/orm-public
- EPA's CWA Approved Jurisdictional Determination website: https://watersgeo.epa.gov/cwa/CWA-JDs/

CONTACT INFO AND AREAS COVERED BY PROJECT MANAGERS IN MAINE



RULE TEXT AND DOCUMENTATION AVAILABLE AT :

HTTPS://WWW.EPA.GOV/NWPR