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Update on Section 404/Wetland Permitting: Jordan Wimpy (Mitchell Williams Law Firm) Arkansas Environmental Federation Convention Presentation

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My law firm colleague, Jordan Wimpy, undertook a virtual presentation at the October 6th Arkansas Environmental Federation Convention titled:

Updates on Section 404 ("Presentation")

The *Presentation* undertook an analysis of the litigation and various regulatory developments associated with Section 404 of the Clean Water Act.

Jordan initially undertook a survey of the history of the Clean Water Act definition of waters of the United States ("WOTUS"), noting:

- 1980s – WOTUS defined in the Code of Federal Regulations
- 2001-2006 – Judicial Review
- SWANCC
- Rapanos
- Post-Rapanos
- 2008 – United States Corps of Engineers Guidance
- 2015 – Obama Rule
- 2020 – Trump Rule

The *Presentation* then addressed the decision in *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*, No. CV-020-00266-TUC-RM, Doc. 99, Order (August 30, 2021).

- Granted EPA/U.S. Corps of Engineers voluntary remand of NWPR (Trump Step 2)
- Vacated NWPR (Trump Step 2)
- Considering remand and vacatur of Trump Step 1

As a result, EPA and the Corps of Engineers halted implementation of the NWPR and are interpreting WOTUS consistent with pre-2015 regulatory regime until further notice.

The *Presentation* then addressed approved jurisdictional determinations between June 22, 2020, and April 15, 2021, under the NWPR of 40,211 aquatic resources, and found that 76% were non-jurisdictional. Also, the Agencies are stated to have identified 333 projects that would have required Section 404

permitting under the Clean Water Act prior to the NWPR but no longer do so. In New Mexico and Arizona, Jordan noted that nearly every one of over 1,500 streams assessed under the NWPR were found to be non-jurisdictional.

The *Presentation* subsequently addressed the Biden Administration Executive Order 13390 noting that the NWPR must be replaced, which cited the intent to revise WOTUS which was announced on June 9, 2021, (including public meetings that were held).

Finally, the *Presentation* referenced Act 285 of 2021 enacted by the Arkansas General Assembly which authorizes the Arkansas Department of Energy and Environment – Division of Environmental Quality (“DEQ”) to seek and accept delegation of the Section 404 Clean Water Act program. Note that this simply authorizes such delegation but does not mandate it. DEQ is presumably considering the merits of such delegation.

A copy of the *Presentation* slides can be downloaded [here](#).