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Approved Jurisdictional Determinations/Clean Water Act 404 Program: U.S. Army Corps of Engineers Announcement Addressing AJD's Issued Under the Navigable Waters Protection Rule

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The United States Army Corps of Engineers ("Corps") issued a January 5th announcement addressing the status of approved jurisdictional determinations ("AJDs") issued under the Navigable Waters Protection Rule ("NWPR").

In part, the Corps states it:

... will not rely on an AJD issued under the NWPR (a "NWPR AJD") in making a new permit decision.

The Corps describes an AJD as a process it utilizes to make a definitive, official determination whether aquatic resources in the review area are or are not jurisdictional for purposes of Clean Water Act jurisdiction. See 33 CFR 331.2. In other words, they are utilized to determine whether the Corps believes a water will be regulated under Section 404 of the Clean Water Act. AJDs are often determined by performing a jurisdictional delineation of waters on a property.

The NWPR was promulgated during the Trump Administration and arguably reduced the scope of the key Clean Water Act jurisdictional term "waters of the United States" ("WOTUS").

A United States District Court in Arizona on August 30th vacated the NWPR. See *Pascua Yaqui Tribe, et al. v. EPA, et al.*, Case No. 4:20-cv-00266-RM Dkt. 99.

In response to the vacatur the Corps and the United States Environmental Protection Agency had halted implementation of the NWPR nationwide. Further, they announced an intent to interpret WOTUS consistent with the pre-2015 regulatory regime. In addition, the NWPR was rescinded.

The key language from the January 5th Corps announcement addressing the status of AJDs issued during the NWPR states:

As the agencies' actions are governed by the regulatory definition at the time of the action, permit decisions made prior to the court's decision that relied on a NWPR AJD will not be reconsidered in response to the NWPR vacatur. Permit decisions may be modified, suspended, or revoked per 33 C.F.R. § 325.7 where the regulatory criteria are met. The Corps will not rely on an AJD issued under the NWPR (a

“NWPR AJD”) in making a new permit decision. The Corps will make new permit decisions pursuant to the currently applicable regulatory regime (i.e., the pre-2015 regulatory regime). Therefore, for any currently pending permit action that relies on a NWPR AJD, or for any future permit application received that intends to rely on a NWPR AJD for purposes of permit processing, the Corps will discuss with the applicant, as detailed in RGL 16-01, whether the applicant would like to receive a new AJD completed under the pre-2015 regulatory regime to continue their permit processing or whether the applicant would like to proceed in reliance on a preliminary JD or no JD whatsoever.

A copy of the January 5th announcement can be downloaded [here](#).