



USACE Changes Course on CWA Approved Jurisdictional Determinations

Update

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On January 5, 2022, the United States Army Corps of Engineers (USACE) announced that Approved Jurisdictional Determinations (AJDs) issued before August 30, 2021, are no longer valid for new permit decisions. USACE uses AJDs to make final determinations regarding the geographic reach of the Clean Water Act (CWA). AJDs were previously good for 5 years, unless USACE found that new information warranted re-visiting their earlier determinations. While not required by law, USACE has, as a policy, issued these 5-year AJDs at the request of applicants for nearly three decades. USACE's longstanding practice of issuing 5-year AJDs has provided certainty to the regulated public as landowners and project proponents develop and execute projects.

USACE cited a recent court order in explaining this significant policy change. On August 30, 2021, the United States District Court for the District of Arizona vacated the 2020 Navigable Waters Protection Rule (NWPR). The NWPR's redefinition of "waters of the United States," a phrase which dictates the geographic extent of jurisdiction under the CWA, had excluded some previously jurisdictional waters from the CWA's reach. After the District of Arizona's decision, the government concluded that jurisdiction reverted to the 1986 WOTUS definition as implemented via guidance that followed certain Supreme Court decisions (EPA and Army have since proposed a rule to codify this formulation). Many landowners or project proponents planning complex projects had sought AJDs under the NWPR anticipating such potential swings in jurisdiction. Securing an AJD had been a way to establish some regulatory certainty to facilitate long term project planning—essentially smoothing out the transition between administrations or regulatory frameworks for regulated entities.

For example, when the prior Administration finalized the NWPR in 2020, it explained: "This final rule does not invalidate an AJD that was issued . . . under

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the 2015 Rule or the 2019 Rule. As such, these AJDs will remain valid until the expiration date unless one of the criteria for revision is met under RGL 05-02, or the recipient of such an AJD requests that a new AJD be issued pursuant to this final rule.” In other words, the previous administration’s regulatory changes to the reach of the CWA did not disturb settled AJDs, even if those AJDs determined that water features were WOTUS and the NWPR would not. Then it was up to the AJD recipient to decide whether to ask USACE to reconsider the AJD. And this was the same approach taken under the more inclusive “Clean Water Rule” in 2015 —EPA and USACE treated completed AJDs under prior regulations as still valid under the Clean Water Rule.

In its recent statement the agency changes this longstanding practice. USACE explains that different types of AJDs will be treated differently in light of the change in jurisdiction. First, “standalone” AJDs will not be reopened during their 5-year term. USACE policy describes a “standalone” AJD as a JD *not associated with a permit action* either at the time the AJD is issued or later in time when a project applicant applies for a permit relying on that earlier-issued AJD. Second, USACE states that it will not rely on AJDs issued under the NWPR to make permit decisions – whether for pending applications or applications yet to be filed. In other words, those planning projects in reliance on AJDs issued under the NWPR and still in need of a USACE permit will have to proceed based on jurisdiction as *currently* defined.

This departure from normal policy will have implications for many who secured AJDs in reliance on previous practice and the provisions of the NWPR. Contact Ann Navaro or Daniel Pope with any questions.