



Decision by Army Corps Could Affect Development Projects With Wetlands or Waterbodies, Effectively Voiding Previous Jurisdictional Determinations

In a [January 5, 2022, press release](#), the U.S. Army Corps of Engineers announced it will not make permitting decisions based on certain Approved Jurisdictional Determinations (AJDs) rendered under the 2020 Navigable Waters Protection Rule or NWPR, which was the Trump Administration's regulatory definition of Waters of the United States (often referred to as "WOTUS"). AJDs provide the Corps' project-based regulatory determinations whether certain development and construction projects impact WOTUS and, therefore, require Clean Water Act 404 permits to authorize such impacts. Because the NWPR was thought to reduce the number and extent of water bodies subject to Clean Water Act regulation and the durability of the NWPR was uncertain, the conventional wisdom was to request AJDs while the NWPR was in effect, allowing developers to lock in a more favorable AJD and thereby reduce potential constraints and mitigation work required for development activities impacting WOTUS. However, as a result of the Corps' change of direction, general contractors, property owners, developers, and related construction companies that followed the conventional wisdom will need to pay careful attention for any projects for which a 404 permit has not been issued.

The Corps states in its January 5 press release that the AJDs based on the NWPR remain valid but that the Corps "will not rely on" such AJDs for new permitting decisions. Instead, "[t]he Corps will make new permit decisions pursuant to the currently applicable regulatory regime." For now, that means the regulatory regime based on the pre-2015 definition of WOTUS and associated guidance and case law, but the Biden administration EPA has proposed a more expansive definition and the Supreme Court has taken a 404 permitting case that likely will define the term as

well. By requiring projects that have NWPR AJDs to obtain new AJDs or Preliminary Jurisdictional Determinations (PJDs), under which all waters are presumed to be jurisdictional, or to proceed without any Jurisdictional Determination for new permitting decisions, the Corps is effectively voiding those NPWR AJDs.

The Corps' new approach should *not* impact projects covered by an NWPR-based AJD for which a permit is already issued. Similarly, projects that are completed before a "negative AJD" (finding that no waters on the site are regulated by the Clean Water Act) expires should not be affected, as no permitting decision would be needed. But for a project with an NWPR-based AJD that the project team planned to rely on for a later permit application, expect a fight and keep an eye on how the Corps and EPA are implementing this approach. An example is the Okefenokee titanium mine case in Georgia.

The Corps' announced approach to NWPR AJDs raises questions about the reliability and utility of stand-alone AJDs that are not made in conjunction with a permitting decision. If the Corps' approach reflects a new policy to effectively set aside stand-alone AJDs based on rules that are no longer in effect, one would expect the Corps will also set aside stand-alone AJDs based on the pre-2015 regulatory regime after the Biden Administration's regulatory redefinition^[1] of WOTUS becomes effective, as well as AJDs premised on portions of the pre-2015 regulatory regime that may be vacated when the Supreme Court decides [*Sackett v. United States Environmental Protection Agency*](#). Significant delays can be expected associated with these two developments, which will affect projects where permitting decisions require a new AJD.

What this Means for You

Given the Corps' apparent new practice of effectively voiding previously issued stand-alone AJDs, project teams should consider applying for a permit or a letter confirming no permit is required rather than seeking a stand-alone AJD. As noted above, we suggest project teams closely watch how the regulators implement the Corps' January 5 statements at specific projects. Parties facing significant delays and disruption by the Corps' decision to not rely upon a NWPR AJD should consider the costs and benefits of seeking judicial review of that decision or pivoting to seek a permit under the current regulatory scheme.

This blog post was drafted by [Coty Hopinks-Baul](#), an attorney in the Austin, TX office of Spencer Fane. For more information, please visit www.spencerfane.com.

[\[1\]](#) The proposed redefinition of WOTUS was published in the [Federal Register on Dec. 7, 2021](#).