



April 14, 2022

VIA ELECTRONIC MAIL

The Honorable Michael Connor
Assistant Secretary of the Army for Civil Works
United States Department of the Army, Corps of Engineers
441 G Street NW
Washington, DC 20314

Re: Army Corps of Engineers' January 5th Announcement – Approved Jurisdictional Determinations Under the Navigable Waters Protection Rule

Dear Assistant Secretary Connor:

On January 5, 2022, the U.S Army Corps of Engineers (Corps) published an announcement on its website regarding the status of the Navigable Waters Protection Rule (NWPR)¹ and Approved Jurisdictional Determinations (AJDs) finalized by the Corps under the NWPR. The Office of Advocacy is concerned about the effects on small businesses and other small entities resulting from the Corps' announcement and recommends modifications to the announcement and further outreach to affected small entities.

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

Background of the Clean Water Act

The Clean Water Act (CWA) was enacted in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”² The Act accomplishes this by regulating the “discharge of pollutants into the navigable waters.”³ The CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.”⁴ Additionally, the Act

¹ 5 January 2022 – *Navigable Waters Protection Rule Vacatur*, US Army Corps of Engineers, <https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur/> (last visited January 20, 2022).

² 33 U.S.C. § 1251(a) (1987).

³ 33 U.S.C. § 1251(a)(1) (1987).

⁴ 33 U.S.C. § 1362(7) (2019).

requires a permit in order to discharge pollutants, dredged, or fill materials into any body of water deemed to be a “water of the United States.”⁵ The extent of the Act’s jurisdiction has been the subject of much litigation and regulatory action, including three Supreme Court decisions.

In response to the confusion over whether certain water features are considered “waters of the United States” under the Clean Water Act, the Corps has established a program for project proponents to obtain certainty about such status. Project proponents can obtain an approved jurisdictional determination (AJD) from the Corps, which is “a Corps document stating the presence or absence of waters of the United States on a parcel or written statement and map identifying the limits of waters of the United States on a parcel.”⁶ An AJD, generally valid for five years⁷, is considered a final agency action that prevents both the U.S. Environmental Protection Agency (EPA) as well as the Corps from taking any action contrary to the AJD.⁸ The time and resources expended to obtain an AJD can be significant, ranging in time from weeks to several months and in cost from tens of thousands to hundreds of thousands of dollars.⁹

On April 21, 2020, EPA and the Department of the Army promulgated the Navigable Waters Protection Rule (NWPR), which attempted to define “the waters of the United States.”¹⁰ However, as the Corps stated in its announcement, the U.S. District Court for the District of Arizona vacated the NWPR on August 30, 2021.¹¹ Importantly, the vacatur order did not state that all agency actions taken under the NWPR, including AJDs, were to be similarly vacated.¹² Believing the vacatur order to be applicable nationwide, the Corps has stopped implementing the NWPR.¹³ However, under the NWPR from June 22, 2020 to August 30, 2021, the Corps finalized a number of AJDs requested by small entities, among others. Such AJDs either conclude that subject areas have no “waters of the United States” (negative AJDs) or the extent to which any subject area has a “water of the United States” (affirmative AJDs). If a negative AJD is provided, no further agency action or involvement is typically warranted. If an

⁵ 33 U.S.C. § 1341 et. seq. (2019).

⁶ 33 CFR § 331.2 (2000).

⁷ Regulatory Guidance Letter No. 05-02 (June 2005), available at <https://usace.contentdm.oclc.org/utills/getfile/collection/p16021coll9/id/1246> (last visited January 23, 2022).

⁸ See 33 CFR § 320.1(a)(6) (2000). See also *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590 (2016).

⁹ Although there is no direct cost an entity must pay to the Corps to obtain an AJD, costs are incurred by the entity to obtain the necessary technical and legal experts to assist in obtaining an AJD. In addition, if an entity is expected to obtain a new AJD, the entity will inherently incur costs from the delay of the implementation of the project until a new AJD is finalized.

¹⁰ 85 Fed. Reg. 22250 (April 21, 2020).

¹¹ See *5 January 2022 – Navigable Waters Protection Rule Vacatur*, US Army Corps of Engineers, <https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur/> (last visited January 20, 2022).

¹² See *D.A.M. v. Barr*, 486 F.Supp.3d 404 (D.C. Circuit 2020). A “judicial order vacating an agency rule does not automatically void every decision the agency made to the invalid rule.” See also *Western Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042 (D. Idaho 2020). (Vacating a BLM policy, then separately analyzing whether lease sales conducted under the vacated policy should themselves be vacated). See also *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Circuit 1989). See also *National Mining Ass’n v. United States Army Corps of Eng’rs*, 145 F.3d 1399 (D.C. Circuit 1998). See also *Comm. Overseeing Action for Lumber Int’l Trade Investigations v. United States*, 535 F. Supp. 3d 1336 (Ct. Int’l Trade 2021). (Stating that although vacatur of a regulation restores the prior regulatory status quo, vacatur does not necessarily erase from legal existence all past adjudications under the vacated rule).

¹³ See *id.*

affirmative AJD is provided, the Corps relies on it when issuing any final permit under the Clean Water Act.

The Corps' January 5th Announcement

On January 5, 2022, the Corps posted an announcement on its website regarding the status of AJDs finalized under the NWPR. In the January 5th announcement, the Corps concluded that all permit decisions made under the NWPR would not be reconsidered.¹⁴ At the same time, the Corps concluded that it would not reopen any AJD completed under the NWPR.¹⁵ In testimony before the Senate Committee on Environment and Public Works you comparably stated that the Corps is “not going to go back and revisit all decisions that were made [under the NWPR].”¹⁶ Your testimony concluded that the Corps “ha[s] always held to the position that decisions made under the appropriate rules at that time are valid. We’re not going to go back.”¹⁷

Despite these statements, the Corps also stated in its January 5th announcement that it has decided not to rely on AJDs issued under the NWPR when making any new permit decisions.¹⁸ These forthcoming permit decisions by the Corps could include enforcement actions for violations of the Clean Water Act for projects begun in reliance on negative AJDs finalized under the NWPR. They could also include enforcement actions against projects begun in reliance on affirmative AJDs finalized under the NWPR where the Corps decides the scope of “the waters of the United States” is different from what was decided by the Corps in the affirmative AJD.

Advocacy has been made aware of two instances¹⁹ in which the Corps has communicated to the regulated community that the Corps may choose to take enforcement actions against those relying on negative AJDs finalized under the NWPR.

Advocacy's Recommendations

Because the costs of this policy will be disproportionately borne by small entities, Advocacy makes the following recommendations. First, Advocacy recommends that the Corps directly

¹⁴ See id.

¹⁵ See id. Under Regulatory Guidance No. 05-02, AJDs may be re-opened under exceptional circumstances if “new information warrants revision of the determination . . . or geographic areas [have] rapidly changing environmental conditions.”

¹⁶ Business Meeting & Water Resources Development Act Oversight: USACE Implementation of Water Infrastructure Projects, Programs and Priorities: U.S. Senate on Environment and Public Works, 117th Cong. (2022) (Testimony of Michael Connor). https://www.epw.senate.gov/public/_cache/files/3/5/3596b123-2d78-4289-9ac7-9e74b5aedef40/E126D500014196035DD25BE108882752.01-12-2022-connor-testimony.pdf

¹⁷ Id.

¹⁸ See *5 January 2022 – Navigable Waters Protection Rule Vacatur*, US Army Corps of Engineers, <https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur/> (last visited January 20, 2022).

¹⁹ In the first instance, the Corps has directly informed a recipient of a negative AJD that they may be subject to an enforcement action by the Corps if they fail to obtain a new AJD or obtain a permit under the Clean Water Act. In the second instance, the Corps disclosed at an environmental conference attended by environmental engineers and other environmental consultants that any recipient of a negative AJD under the NWPR should not rely on it and may be subject to enforcement action by the Corps if they attempt to do so.

contact each recipient of an AJD finalized under the NWPR to ensure that each is made fully aware of the Corps' decision not to rely on these previously finalized AJDs for future agency action. The announcement was posted only on the Corps' website in early January, and the policy change regarding AJDs was ambiguously described in a single short paragraph, failing to highlight the operational and regulatory consequences for affected entities. The Corps has not published the change in the *Federal Register*, nor has it hosted any public meetings or webinars about the change. To Advocacy's knowledge, the Corps has not taken reasonable steps to ensure the regulated community is made aware of the Corps' announced policy.

Secondly, Advocacy encourages the Corps to modify its announcement by confirming that it will not take any enforcement actions under the Clean Water Act against entities who have already moved forward with a project relying on a negative AJD finalized under the NWPR. A negative AJD is a determination considered a final agency action made by the Corps that the subject area of the project has no "waters of the United States." If a project area has no "waters of the United States," EPA and the Corps would have no jurisdiction under the Clean Water Act and would be generally prohibited from taking enforcement action against those relying on the negative AJD.

Third, Advocacy encourages the Corps to engage directly with small entities to learn about the impacts to small entities from the Corps' decision not to rely on affirmative AJDs finalized under the NWPR when making subsequent permit decisions. This is especially important after an affirmative AJD has been provided to an entity and, relying on that affirmative AJD, plans have been undertaken and resources expended to move forward with a viable project plan that complies with the Clean Water Act. If the affirmative AJD finalized under the NWPR cannot be relied upon by small entities as confirming where a "water of the United States" may sit on a project site, the affected entity will need to expend additional resources and time to re-determine those locations and whether the project remains viable.

Conclusion

The Office of Advocacy is concerned about the impact of the Corps' January 5th announcement on small entities that have moved forward with projects in reliance on AJDs issued under the NWPR. Advocacy recommends modifications to the announcement and specific outreach to the regulated small entities to determine the extent of that reliance and to provide actual notice of the announced policy. My office would be happy to provide assistance in any such outreach effort. Should you have any questions or concerns, please let me or Assistant Chief Counsel Astrika Adams (Astrika.adams@sba.gov) know.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Astrika W. Adams
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: Dominic Mancini, Deputy Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget