

Advocacy Recommends Changes to Army Corps of Engineers' Policy on Approved Jurisdictional Determinations (AJDs) Finalized Under the Navigable Waters Protection Rule (NWPR)

On April 14, 2022, the Office of Advocacy sent a letter to the U.S. Army Corps of Engineers (Corps) on the Corps' January 5, 2022 announcement of its policy regarding the status of Approved Jurisdictional Determinations (AJDs) finalized under the Navigable Waters Protection Rule (NWPR). The new policy prohibits entities from relying on AJDs finalized under the NWPR.

- Under the Clean Water Act (CWA), a discharge into a “navigable water” must be authorized by the Environmental Protection Agency (EPA) and, for certain dredge and fill activities, by the Army Corps of Engineers (Corps). The CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.” EPA and the Department of the Army have attempted to clarify what a “water of the United States” is multiple times in the last decade. The two most recent attempts have been either enjoined or vacated by courts.

In response to the confusion over whether certain water features are considered “waters of the United States” under the CWA, the Corps established the Approved Jurisdictional Determination (AJD) program for project proponents to obtain certainty about the existence of “waters of the United States” on a project site. A negative AJD is a determination by the Corps that no “waters of the United States” exist on a site. An affirmative AJD is a determination by the Corps of the extent “waters of the United States” exist on a site. Small entities rely upon AJDs when moving forward with projects.

- On January 5, 2022, the Corps announced on its website that they would no longer rely on AJDs finalized under NWPR when making future permit decisions. The Corps has communicated to certain members of the regulated community that they may choose to take enforcement actions against any entity relying on AJDs finalized under the NWPR.
- The Corps' new policy will have a direct and potentially costly impact on small entities. Advocacy is concerned about the impact of the Corps' new policy on small entities that have moved forward with projects in reliance on AJDs finalized under the NWPR. Advocacy advises the Corps to modify its announcement by confirming that the Corps will not take any enforcement actions against entities that have already moved forward with a project relying on an AJD finalized under the NWPR. Similarly, Advocacy advises the Corps to directly contact each entity that received an AJD finalized under the NWPR to ensure the Corps' new policy is adequately communicated to those entities.



For more information visit Advocacy's web page at advocacy.sba.gov or contact Astrika Adams at (202) 798-7750 or astrika.adams@sba.gov.