

5 January 2022 – Navigable Waters Protection Rule Vacatur

The Environmental Protection Agency and U.S. Army Corps of Engineers (“the agencies”) are in receipt of the U.S. District Court for the District of Arizona’s August 30, 2021, order vacating and remanding the Navigable Waters Protection Rule in the case of *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*. In light of this order, the agencies have halted implementation of the Navigable Waters Protection Rule (“NWPR”) nationwide and are interpreting “waters of the United States” consistent with the pre-2015 regulatory regime until further notice. The agencies are working expeditiously to move forward with the rulemakings [announced on June 9, 2021](#), in order to better protect our nation’s vital water resources that support public health, environmental protection, agricultural activity, and economic growth. The agencies remain committed to crafting a durable definition of “waters of the United States” that is informed by diverse perspectives and based on an inclusive foundation.

On November 18, 2021, the agencies announced the signing of [a proposed rule to revise the definition of “waters of the United States.”](#) This proposal marks a key milestone in the regulatory process announced in June 2021. The agencies propose to put back into place the pre-2015 definition of “waters of the United States,” updated to reflect consideration of Supreme Court decisions. This familiar approach would support a stable implementation of “waters of the United States” while the agencies continue to consult with states, tribes, local governments, and a broad array of stakeholders in both the current implementation and future regulatory actions.

A durable definition of “waters of the United States” is essential to ensuring clean and safe water in all communities—supporting human health, animal habitat, agriculture, watersheds, flood management, local economies, and industry. This rulemaking process follows a review conducted by the agencies as directed by the January 20, 2021 [Executive Order 13990](#) on “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.”

Further details about the agencies’ plans, including information regarding the upcoming public meetings and proposed rule docket, [can be found here](#).

An approved jurisdictional determination (“AJD”) is a document provided by the Corps stating the presence or absence of “waters of the United States” on a parcel or a written statement and map identifying the limits of “waters of the United States” on a parcel. See 33 C.F.R. § 331.2. Under existing Corps’ policy, AJDs are generally valid for five years unless new information warrants revision prior to the expiration date. See U.S. Army Corps of Engineers, [Regulatory Guidance Letter No. 05–02](#), § 1(a), p. 1 (June 2005) (Regulatory Guidance Letter (RGL) 05–02).

As a general matter, the agencies’ actions are governed by the definition of “waters of the United States” that is in effect at the time the Corps completes an AJD, not by the date of the request for an AJD. AJDs completed prior to the court’s decision and not associated with a permit action (also known as “stand-alone” AJDs under [RGL 16-01](#))

will not be reopened until their expiration date, unless one of the criteria for revision is met under RGL 05-02. A NWPR AJD could also be reopened if the recipient of such an AJD requests a new AJD be provided pursuant to the pre-2015 regulatory regime. In that case, the Corps will honor such request recognizing that if the recipient of a NWPR AJD intends to discharge into waters identified as non-jurisdictional under the NWPR but which may be jurisdictional under the pre-2015 regulatory regime, such recipient may want to discuss their options with the Corps. AJD requests pending on, or received after, the Arizona court's vacatur decision will be completed consistent with the pre-2015 regulatory regime.

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.