

REGULATORY COMPLIANCE UPDATE

Michael Brandman Associates (MBA) is committed to keeping you informed of significant Clean Water Act (CWA) regulatory compliance changes potentially affecting your business. Last November, we informed you of a recent court action that might affect the CWA jurisdictional status of some areas; this Regulatory Compliance Update furthers that discussion.

MBA will continue to monitor this and other issues and is available to provide assistance to ensure your project is processed in a cost effective and timely manner.

Rapanos Guidance Document Issued by the Army Corps of Engineers

After the U.S. Supreme Court handed down a decision clarifying what authority the federal government has regarding waters and wetlands of the United States (*Rapanos vs. United States and Carabell vs. United States*), the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) declared how they plan to interpret that ruling in a joint guidance document they issued earlier this month.

The Corps will continue to maintain jurisdiction over traditional navigable waters of the United States and wetlands adjacent to those waters (adjacent means ‘bordering, contiguous, or neighboring’) and over non-navigable tributaries with relatively permanent flows. (The Corps suggests relatively permanent means either continuous flows or seasonal flows lasting at least 3 months). The tributaries with relatively permanent flows will be jurisdictional if they have direct or indirect connectivity to traditional navigable water or navigable-in-fact water. Wetlands that directly abut these tributaries will also be jurisdictional. Additionally, the Corps still maintains jurisdiction over many ephemeral drainages.

The Corps has now identified some situations in which Federal Jurisdiction will not be asserted over tributaries and wetlands, unless a “significant-nexus” to downstream navigable waters can be established. These situations have been classified into three categories: (1) Non-navigable tributaries that are “not-relatively permanent”, including ephemeral drainages and those intermittent streams that lack continuous flow (less than three months of the year); (2) Wetlands adjacent to tributaries that are “not relatively permanent”; and (3) Wetlands that are adjacent to, but “do not directly abut a relatively permanent” non-navigable waterway.

What does this mean?

- Features that were traditionally considered jurisdictional are still jurisdictional (i.e. – rivers, streams that have water in them most of the year).
- Features that have water in them at least three months of the year and connect to a jurisdictional feature are also jurisdictional.
- Other features *may* be jurisdictional based on “significant nexus”.

What is significant nexus?

Significant nexus looks at different parameters of a feature to determine if it is jurisdictional. These parameters include

- Average rainfall, flow characteristics and watershed size;
- Distance of the tributary to the traditionally navigable water;
- Channel slope and dimensions; and
- Capacity or potential of a channel to carry pollutants, nutrients, organic carbon, and sediment.

Will significant nexus reduce the waters that are under Corps jurisdiction?

- The guidance does seem to create a few bright-line rules suggesting that it will no longer assert jurisdiction over “swales or erosional features” (such as gullies or small washes) or roadside ditches lacking permanent flow that drain upland areas.
- The guidance does not set forth specific metrics by which significant nexus will be assessed.
- It is not yet known how broad the Corp’s discretion is in making significant nexus determinations.
- Based on the guidance document, it appears that most ephemeral drainages are still jurisdictional. A significant nexus determination form must be filled out to document that a feature is/is not jurisdictional.

Will anything change in completing jurisdictional delineations?

The Corps has put together a new seven-page “Jurisdictional Determination Form” which will be completed by the Corps when it verifies jurisdictional determinations. The Corps has requested that consultants complete this form when submitting jurisdictional delineations to the Corps for concurrence. This may also require completion of the Form for some delineations already submitted.

The EPA will be serving an over-site role, reviewing the Corps Jurisdictional Determinations with the intent of providing consistency. The EPA has 21 days to review a jurisdictional determination issued by the Corps. This may increase the Corps review time on delineations and Nationwide Permit acceptance.

Until the Corps publishes some of its jurisdictional determinations, it is difficult to know with certainty if the *Rapanos* decision has served to effectively narrow federal jurisdiction. MBA will be monitoring determinations as they are published on the Corps District websites to ascertain if the Corps is using a standard to determine significant nexus.

If you have any questions or require additional information, please feel free to contact Linda Archer at 909.884.2255 or via email at larcher@brandman.com. Full information on all our services, as well as the phone numbers and locations of all of MBA’s offices, are available on our website: www.brandman.com.