



Important Changes:

U.S. Army Corps of Engineers Alters Jurisdictional Determination Procedures and Requirements

The U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) have issued joint guidance in order to clarify the limits of jurisdictional waters of the U.S., including wetlands, under Section 404 of the Clean Water Act (CWA) following the *Rapanos v. U.S.* and *Carabell vs. U.S.* This guidance upholds CWA jurisdiction on a National level over traditional navigable waters (TNW), water bodies with “relatively permanent flow”, and any adjacent wetlands that directly abut these features. Furthermore, the guidance clarifies federal jurisdiction over water bodies, in combination with all wetlands adjacent to those water bodies that have a “significant nexus” with traditional navigable waters. A significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or an insubstantial effect on the chemical, physical, and/or biological integrity of a TNW. Principal considerations that may be used to evaluate whether a significant nexus exists can include the volume, duration, and frequency of the flow in the tributary, the proximity of the tributary to a TNW, in addition to any hydrologic, ecologic or other functions performed by the tributary and all of its adjacent wetlands.

In combination with this guidance, the Corps is requiring an approved jurisdictional determination form be completed to assist in the implementation of this guidance and to document the basis for asserting or declining jurisdiction over waters regulated by the Corps through the CWA. Until further clarification is received on the use of this form and the actual processes that may be involved in determining whether a significant nexus exists on a specific site, it is not exactly clear to what extent this guidance may affect the wetland delineation process at WEG and as a result, our clients. It is apparent, however, that significantly more time both in the field during onsite reconnaissance and in the office processing data and submitting jurisdictional determination requests will be required. Furthermore, if a significant nexus evaluation is required for determining CWA jurisdiction, or wetlands identified within the project area appear isolated, the jurisdictional determination form will be submitted to the EPA and potentially forwarded to the Corps’ Headquarters for a final determination, which will further delay the receipt of the final confirmation of the jurisdictional boundaries.

During the first six months of implementation, the Corps and EPA are requesting public comments on case studies and experiences with the use of this guidance. Within nine months from the date of issuance, the agencies will reissue, revise or suspend the guidance after carefully considering the public comments received and field experience with implementing the guidance. A copy of the guidance can be found on EPA’s website at <http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html> and on the Corps’ website at <http://www.usace.army.mil/cw/cecwo/reg>.

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