

# Wetland Notes

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## Ditches and Wetlands: Defining Corps Jurisdiction in Artificial Channels

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Debate continues over whether ditches (man-made channels that carry water) are subject to the Corps' jurisdiction. In the past, the Corps often disclaimed jurisdiction over ditches, at least those constructed in uplands. Corps regulations from November 13, 1986, state..." we generally do not consider the following waters to be Waters of the United States.... (a) non-tidal drainage ditches and irrigation ditches excavated on dry land". Until about 2000, the Corps in northern and central California (the San Francisco and Sacramento Districts) routinely disclaimed jurisdiction over irrigation and roadside ditches.

One of the exceptions was ditches constructed in the diked historic Baylands (DHB) of SF Bay, the Delta or the Santa Rosa Plain. These landscapes were once wholly or in large part wetlands and the Corps almost always took jurisdiction over ditches in these areas, even if the ditches had demonstrably been built after the local landscape had been drained. At a south Sonoma County site within the DHB, for example the Corps defined the drainage ditches, which had been constructed after draining of the local fields, as jurisdictional even though, these ditches did not gravity drain to the nearby sloughs but were pumped into the local navigable waters. See [Administrative Appeal Decision: Port Sonoma.pdf](#)<sup>1</sup>.

Since the 2001 SWANNC decision, routine disclaiming of ditches has halted (see [SWANCC and other Corps guidance](#)); the "Corps is asserting jurisdiction over ditches and swales, including those constructed in uplands, more consistently" (SWS forum comment; see the [Society of Wetland Scientists \[SWS\] Forum page](#)) for this and other interesting perspectives). SWANCC essentially provided for the exclusion of isolated wetlands from the Corps jurisdiction and it should not be surprising that Corps staff reacted by examining the landscape around potentially isolated wetlands and re-assessing the role of ditches in

providing a critical connection to traditional navigable waters (see [Administrative Appeal Decision Swenson Property.pdf](#).)



*Roadside ditch with ordinary high water mark (OHWM); these were typically disclaimed before SWANNC but they're often jurisdictional today.*

The debate isn't limited to California. The Philadelphia District began asserting jurisdiction consistently over ditches, whether in uplands or wetlands, but reversed itself after the local NAHB sued. The New England District then determined in a 2007 GP for New Hampshire that "non-tidal drainage and irrigation ditches excavated on dry land are not Federally-regulated" ([General Permit No: NAE-2007-461; Expiration Date: June 28, 2012](#)).

In short, different Districts regulate ditches differently; further, ditches have been and probably will be treated differently over time within any one District. This was verified by a 2004 GAO report (see [GAO Corps and Jurisdictionals.pdf](#)).

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<sup>1</sup> This link provides access to the Division appeals table, a very useful tool in assessing Corps practices.

A good deal of this variability stems from the inability of the national offices of Corps and EPA to jointly agree on clear direction to the Districts. This has become especially clear after the publication of their guidance following the Rapanos/Carabell decision (see [Memorandum Re: CWA Jurisdiction the Rapanos v. United States](#)).

Examined on its face, Corps and EPA post-Rapanos guidance seems to provide that the Corps will not assert jurisdiction over swales, erosional features or drainage ditches (“including roadside ditches”). However, the national guidance comes with important and undefined qualifiers; for example, these features cannot “carry a relatively permanent flow of water”, etc. but the lack of clear guidance in this exception should be enough to give anyone pause. This guidance (or lack thereof) is further complicated by the Corps/EPA decision to individually review areas such as “non-navigable tributaries that are not relatively permanent” (read ditches or ephemeral streams) to determine whether they have “a significant nexus with a traditional navigable water”. In short, if a ditch has a “significant connection” (still undefined) to a navigable water, it’s jurisdictional.

In northern California, Corps staff have collected the assembled wisdom of the Beltway and come up with the following:

1. The Corps generally considers tributary ditches that drain wetlands or other waters, and/or those that are straightened, natural or preexisting tributary streams to be likely jurisdictional waters.
2. The Corps is likely to take jurisdiction over a tributary ditch or ephemeral channel if it has an ordinary high water mark (OHWM). This implies that at least a mean annual flow occurs in the channel, i.e., the flow level generally thought to be the channel-forming flow and evidence of a connection between up- and downstream waters.

3. However, the ditch or channel may not always have an OHWM, that is, there may be interruptions of an indeterminate length, but these are not of themselves grounds for disclaiming jurisdiction over those parts which do have an OHWM.
4. Ditches or channels, e.g. canals, culverts, etc. may not have an OHWM and may not be jurisdictional but may still serve as conduits of jurisdiction, such that upstream channels or wetlands adjacent to these non-jurisdictional channels could be jurisdictional.



*Roadside ditch without OHWM – may not jurisdictional but can serve as a conduit for jurisdiction.*

**Wetland Notes** provides summaries and opinions on matters affecting wetlands, endangered species, and related issues as a public service to foster communication and discussion on these issues. We recommend readers seek specific professional advice before applying the information presented herein to any specific project.

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