

CWA JURISDICTION



**Regulatory Program
U.S. Army Corps of Engineers**

USACE HQ Regulatory Web Page:

Link: www.usace.army.mil/inet/functions/cw/cecw/reg/

2007



Presentation Summary

- **CWA and Waters of the U.S.**
- ***SWANCC* decision**
- **GAO reports on post-*SWANCC* activities**
 - Reports in 2004, 2005
 - Corps surveys and other responses
- **Rapanos & Carabell decision**



CWA & Waters of the U.S.

- **CWA goal:**
 - Protect the biological, chemical and physical functions of our nation's waters of the U.S.
- **Waters of the U.S.**
 - Traditional navigable waters
 - Interstate waters including interstate wetlands
 - Other waters including intrastate, non-navigable waters with interstate/foreign commerce connections
 - Impoundments of waters otherwise defined as waters of the U.S.
 - Tributaries of the above
 - Territorial seas
 - Adjacent wetlands



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CWA Section 404: A Short History

- **1972 Enacted**
- **1974 Regulation**
- **1975 NRDC vs. Calloway. Interim regulation**
- **1977 Regulation & Congressional Amendments**
- **1979 Civiletti decision**
- **1985 Riverside v. Bayview Homes.
EPA's Migratory Bird Memo**
- **1986 Preamble on "Migratory Bird Rule"**
- **2001 Supreme Court decision in *SWANCC v. USACE***
- **2003 ANPRM & Rulemaking**
- **2004/5 GAO reports**
- **2006 Rapanos & Carabell U.S. Supreme Court cases**



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SWANCC

2001 Supreme Court Decision in *Solid Waste Agency in Northern Cook County (SWANCC) vs. USACE.*

- Proposal for site development of a landfill
- Corps determined CWA jurisdiction over abandoned gravel pits by use of Migratory Bird Rule (MBR)
- MBR based on blue heron use of ponds.



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Supreme Court & SWANCC

Holding: CWA not intended to regulate isolated intrastate non-navigable waters based solely on their use by birds

- Reasoning could be extended further: CWA intended some connection to navigability
- Did not invalidate existing regulations
- Has implications for all CWA programs, not just §404





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SWANCC Jurisdictional Issues

Migratory Bird Rule

Adjacent Wetlands: Proximity or Hydrology ?

Hydrology: Direct & immediate subsurface infiltration (not groundwater)?

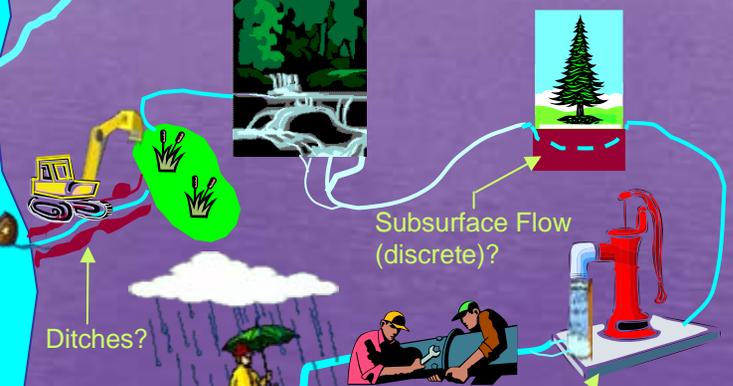
No connection to Aquifer



How Far Upstream ?

Ephemeral
Intermittent
Perennial

Erosional Features
Sheetflow or snowmelt



Sheetflow over upland?

Storm Drain Systems?

Included as "Tributaries" / Waters of U.S. ?





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SWANCC & Rulemaking

Jan 03: ANPRM solicited public comments on issues associated with CWA jurisdiction

– Appendix A

– 130,000 comments received on notice; majority opposed rulemaking

Dec 03: Administration announcement to discontinue rulemaking





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GAO Studies on CWA Post-*SWANCC* Implementation Procedures

2004 Study

JD Consistency?

Request by:

Congressman Ose

2005 Study

N-JD Consistency?

Request by:

Senator Lieberman



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GAO 2004 Study -- Findings

Report finalized in February 2004

- www.gao.gov/cgi-bin./getrpt?GAO-024-297

GAO conclusions:

- Corps jd practices are inconsistent
- Insufficient documentation practices

Report recommendations

- Require more documentation on district jd decisions
- Survey all district jd practices
- Evaluate whether and how differences resolved



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Army/Corps Response to 2004 GAO Report

- **Consistency: partially concurred with findings**
- **Agreed to:**
 - **Conduct a comprehensive survey to inventory district practices**
 - **Develop an adaptive management plan to provide clarity on JD practices**



Corps Actions

- **Created standardized jd/njd reporting forms**
- **Required districts to post final actions on their web sites**
- **Collected and analyzed data on njd waters**
- **Revising jd/njd forms**



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Survey # 1

First Survey: All 38 Districts Queried Qualitatively [May 2004]

- Identify district procedures for JDs
- Compare/contrast district level case studies
- Determine ruling litigation cases

Results:

- More questions than answers
- Another survey?





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Survey # 2

Define nature and extent of regional variation for tributaries, connections, and adjacency

- Define practices**
- Identify practices**
- Review legal applications**





Survey #2, cont.

Survey: 100 pages

- Districts provided 30 days to complete**

Survey is:

- A data inventory tool**
- Not guidance**
- Not to expand/contract jurisdiction**



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Survey #2, cont.

Data

- 3800+ pages of data

Draft technical findings

- 80% draft provided to ASA(CW)
 - Intro w/ review of applicable CWA documents in effect
 - Tributary systems
 - Adjacency
 - Legal analysis
 - Appendices



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Survey #2: Proposed Strategy





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Survey #2: Proposed Strategy

Technical Manual

National strategy

Regional variation

Supporting documents

- Living Document -



GAO 2005 Study

The 2005 study requested by Senator Lieberman:

- Mapped and identified data collection efforts to support JD process
- Summarized actions taken under 33 CFR 328.3(a)(3)
- Reviewed data collection efforts taken to comprehensively characterize the aquatic resource losses associated with SWANCC



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GAO 2005 Study -- Findings

GAO report publicly released October 2005

– Available at

www.gao.gov/new.items/d05870.pdf

GAO recommendations

- Corps and EPA finalize guidance establishing process for HQ approval of JD calls based solely on (a)(3)**
- Corps require detailed rationales for no-JD decisions**



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2 U.S. Supreme Court decision (21 Feb 06)

Rapanos. Determine if wetlands having a surface hydrologic connection to a man-made ditch that drains into traditional navigable waters are waters of the U.S.

Carabell. Determine if a wetland is "adjacent" if separated by a man-made berm from a tributary (i.e., a man-made ditch) to navigable waters.



Rapanos & Carabell

- A split Supreme Court vacated and remanded the judgments back down to the Sixth Circuit Court of Appeals.
- The justices issued five opinions in Rapanos (one plurality opinion, two concurring opinions, and two dissenting opinions), with no single opinion commanding a majority of the Court.



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Rapanos & Carabell

The plurality concluded that the agencies' regulatory authority should extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters.



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Rapanos & Carabell

Justice Kennedy agreed with plurality that the statutory term “waters of the United States” extends beyond water bodies that are traditionally considered navigable.



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Rapanos & Carabell

Justice Kennedy concluded that "wetlands" are "waters of the United States" "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'



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Rapanos & Carabell

Dissenting opinion – Corps regulations are reasonable interpretation of CWA

TNWs and Wetlands adjacent to TNWs

Decision/guidance does not address SWANCC nor does it affect the Joint Memorandum issued by the General Counsels of EPA and the Army dated January 10, 2003.



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Survey #2: Proposed Strategy

Guidance Documents

2 Memos

Key Points

Talking Points

Qs & As (60)

Media Release



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Interagency Guidance on

CWA Jurisdiction

Following the U.S. Supreme Court's Decision
in Rapanos v. U.S. & Carabell v. U.S.

Summary of Key Points

- The agencies will assert jurisdiction over the following waters:
- The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:
- The agencies generally will not assert jurisdiction over the following features:
- The agencies will apply the significant nexus test as follows:



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Coordination/Elevation Process

Significant Nexus Evaluation

15 days - District/Regional Office

15 days - DE/Regional Administrator

14 or 21 days – HQ EPA/Corps/DA

Isolated Waters

Process above with copy sent directly
to HQ (HQ review – 21 days)



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Survey #2: Proposed Strategy

JD Form (7 pages)

Guidebook

RGLS (2)

Supporting Documents



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JD Form

I: BACKGROUND INFORMATION

II: SUMMARY OF FINDINGS

III: CWA ANALYSIS

IV: DATA SOURCES



JD Form

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [Required]

Waters subject to the ebb and flow of the tide

Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. Explain: .

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [Required]

1. Waters of the U.S.

a. Indicate presence of waters of U.S. in review area:

TNW, including territorial seas

Wetlands adjacent to TNW

Non-navigable RPWs that flow directly or indirectly into TNW

Wetlands abutting non-navigable RPWs that flow directly or indirectly into TNW

Wetlands adjacent to but not abutting non-navigable RPWs that flow directly or indirectly into TNW

Non-navigable not-RPWs that flow directly or indirectly into TNW

Wetlands adjacent to non-navigable not-RPWs that flow directly or indirectly into TNW

Impoundments of jurisdictional waters

Isolated intrastate waters, including wetlands

Isolated interstate waters, including wetlands

2. Non-regulated waters/wetlands (check if applicable)

Potential waters and/or wetlands were assessed within the review area and determined to be not jurisdictional. Explain: .



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JURISDICTIONAL DETERMINATION FORM

INSTRUCTIONAL GUIDEBOOK

This document contains instructions to aid field staff in completing the Approved Jurisdictional Determination Form ("JD form"). This document is intended to be used as the U.S. Army Corps of Engineers Regulatory National Standard Operating Procedures for conducting an approved jurisdictional determination (JD) and documenting practices to support an approved JD until this document is further revised and reissued.

Caribbean Sea, St. Thomas, U.S. Virgin Islands.



This document was prepared in development with the Environmental Protection Agency and in coordination with the Department of the Army.



CWA Jurisdiction

The agencies will assert jurisdiction over the following waters:

- TNWs and wetlands adjacent to TNWs
- Non-navigable tributaries of TNWs that are relatively permanent (i.e., the tributaries typically flow year-round or have continuous flow at least seasonally) and wetlands that directly abut such tributaries
- In addition, the following waters will also be found jurisdictional based on a fact-specific analysis that they have a significant nexus with a TNW:
 - Non-navigable tributaries that are not relatively permanent
 - Wetlands adjacent to non-navigable tributaries that are not relatively permanent
 - Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary



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CWA Jurisdiction

The significant nexus evaluation will include:

An assessment of the flow characteristics and functions of the tributary, itself, in combination with the functions performed by any wetlands adjacent to the tributary to determine if they have more than an insubstantial or speculative effect on the chemical, physical and/or biological integrity of TNWs.

A consideration of hydrologic factors such as:

- volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary
- proximity to the traditional navigable water
- size of the watershed
- average annual rainfall
- average annual winter snow pack

A consideration of ecologic factors such as:

- the ability of the tributary and its adjacent wetlands (if any) to carry pollutants and flood waters to traditional navigable waters
- the ability of the tributary and its adjacent wetlands (if any) to provide aquatic habitat that supports biota of a traditional navigable water
- the ability for adjacent wetlands to trap and filter pollutants or store flood waters
- the ability to maintain water quality



CWA Jurisdiction

Certain ephemeral waters in the arid west are distinguishable from the geographic features described below where such ephemeral waters are tributaries and may have a significant nexus to TNWs.

Certain geographical features (e.g., ditches, canals) that transport relatively permanent (continuous at least seasonally) flow directly or indirectly into TNWs or between two (or more) waters of the U.S., including wetlands, are jurisdictional waters regulated under the CWA.

Certain geographic features (e.g., swales, ditches, pipes) may contribute to a surface hydrologic connection where the features:

- replace or relocate a water of the U.S., or
- connect a water of the U.S. to another water of the U.S., or
- provide relatively permanent flow to a water of the U.S.

Certain geographic features generally are not jurisdictional waters:

- Swales, erosional features (e.g. gullies) and small washes characterized by low volume, infrequent, and short duration flow
- ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water
- uplands transporting over land flow generated from precipitation (i.e., rain events and snowmelt)



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Traditional Navigable Waters (TNWs)

Yellowstone River, MT

Pacific Ocean, OR



TNWs are jurisdictional under the CWA.



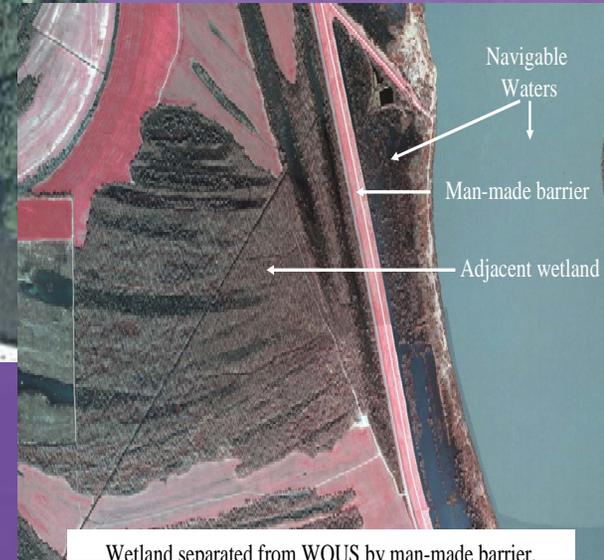
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Wetlands Adjacent to TNWs

Mississippi River, MN



Mississippi River, LA



Pacific Ocean, HI



Wetlands adjacent to TNWs are
jurisdictional under the CWA.



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RPWs: Perennial & Seasonal

Wolf Trap Creek, Vienna, VA



Grindstone Creek, MO



RPWs are jurisdictional under the CWA. As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus between a TNW and an RPW that is not perennial.



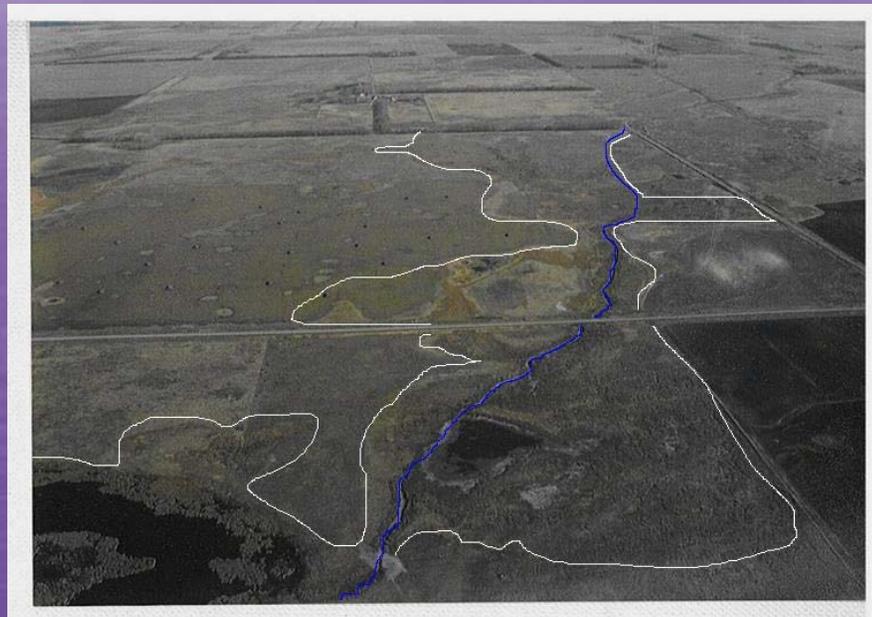
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Wetlands Directly Abutting RPWs

Un-named water & wetlands, AK



Un-named water & wetlands, ND



Wetlands directly abutting RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA. As a matter of policy, field staff will include in the record any available information that documents the existence of a significant nexus for a wetland directly abutting an RPW that is not perennial.



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Wetlands Not-Directly Abutting RPWs

Un-named water & wetlands, IL



Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA where there is a "significant nexus" with a TNW. For each specific request for wetlands adjacent but not directly abutting RPWs, field staff will need to perform significant nexus evaluation to determine if tributary is jurisdictional under the CWA.



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Non-RPWs

Desert ephemeral tributary, CA



Unnamed ephemeral tributary, ID



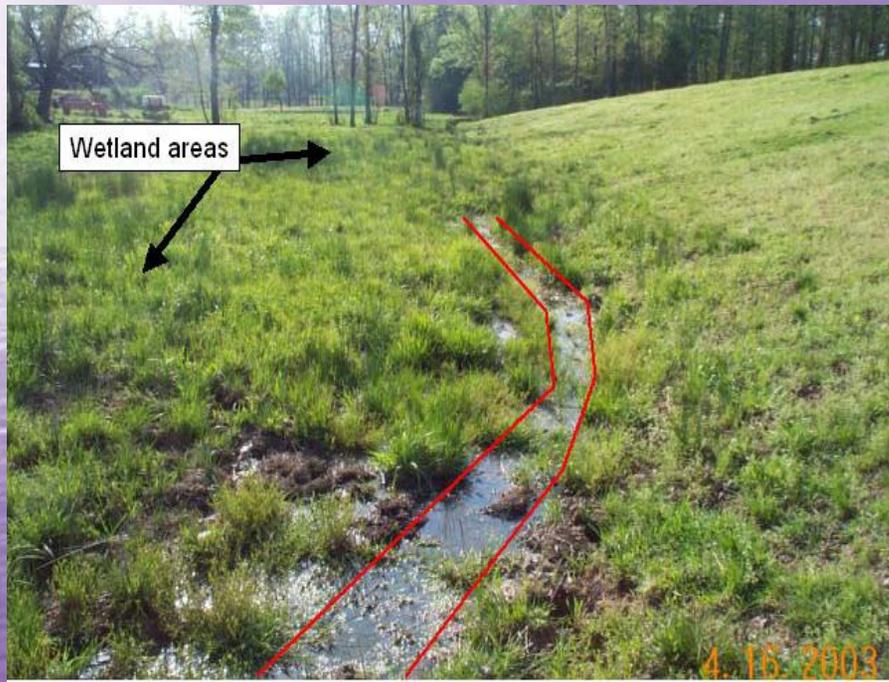
Non-RPWs are jurisdictional under the CWA where there is a "significant nexus" with a TNW. For each specific request for non-RPWs, field staff will need to perform significant nexus evaluation to determine if tributary in combination with its adjacent wetlands (if any) is jurisdictional under the CWA.



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Wetlands Adjacent to Non-RPWs

Adjacent wetland, AR



Adjacent wetland, SAD



Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs are jurisdictional under the CWA where there is a "significant nexus" with a TNW. For each specific request, field staff will need to perform significant nexus evaluation to determine if tributary is jurisdictional under the CWA.



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Isolated Waters & Wetlands



Isolated wetland, IA

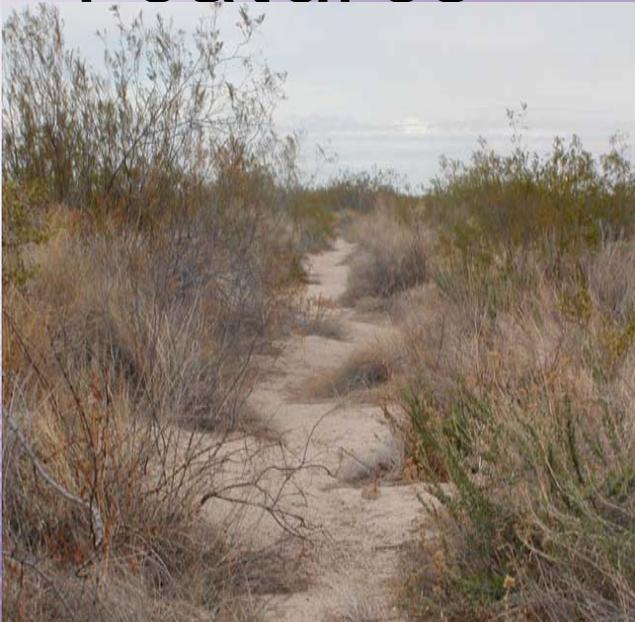


For each specific request for isolated waters (including isolated wetlands), field staff will need to make a case-by-case determination on jurisdictional status of resource. HQ concurrence required.



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Ditches, Swales, & Erosional Features





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RGLs

Documentation Practices

- Approved JDs
 - Prioritization
 - Field Visits
 - Coordination for NWP
- **Ditches**
 - Irrigation: Construction & Maintenance
 - Drainage: Maintenance