

**Corps of Engineers Issues New Guidance for
Exempting Ditch Maintenance and Construction Activities**

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Earlier this month, the U.S. Army Corps of Engineers (Corps) issued a Regulatory Guidance Letter (RGL No. 07-02) intended to clarify when the Clean Water Act (CWA) exempts from permitting requirements discharges of dredged or fill material associated with ditch maintenance and construction activities into waters of the U.S. Released on the heels of EPA and the Corps' new wetlands regulatory guidance (see detailed analysis at <http://www.bdlaw.com/news-59.html>), it represents another attempt by the agency to respond to last year's Supreme Court decision in *Rapanos v. United States* which created two different tests for CWA jurisdiction.

Among other things, the RGL sets forth definitions for several terms applicable to the CWA Section 404 program. Terms defined include those for "irrigation ditch," "drainage ditch," "construction," and "maintenance." Notably, if a ditch is used for both drainage and irrigation, it would be considered a drainage ditch if it would have the effect of more than minor drainage. The RGL also sets forth a framework for analyzing whether the Section 404(f)(1) exemption or Section 404(f)(2) recapture provisions apply to a particular discharge. The first issue to be analyzed is whether there is a discharge of dredged or fill material into a water of the U.S. The next step is to identify the type of ditch and activity and whether the activity is eligible for the Subsection 404(f)(1) exemption, taking into account that there are differences between irrigation ditches and drainage ditches for purposes of applying the statutory exemption. If an activity is subject to the exemption, the final step is to determine whether the recapture provisions of Section 404(f) apply.

The RGL was not adopted as a regulation and therefore is not legally binding on the regulated community. It is, however, intended to guide the Corps' district offices in implementing the Section 404 program. A copy of the RGL is available at <http://www.usace.army.mil/cw/cecwo/reg/rglsindx.htm#2007>.