

Farming and Ranching Under the New “Waters of the U.S.” Rule

On August 28, 2015, the new rule recently issued by EPA and the Army Corps of Engineers defining “waters of the U.S.” (WOTUS) will officially go into effect. The rule expands federal Clean Water Act (CWA) jurisdiction over many landscape features found on private lands—including farm, ranch and forest lands across the nation. As a result, many essential and commonplace farming, ranching and forestry practices may now result in “discharges” of “pollutants” into WOTUS that require a CWA permit. Unauthorized discharges to WOTUS will be a violation of federal law, subject to large potential penalties in enforcement by the government or private citizens. This document¹ provides information to help farmers and ranchers understand which features on their lands may be WOTUS, which activities may cause a violation of the law and where to go for help.

Why should I try to identify WOTUS on the land I farm?

The CWA provides a powerful incentive to learn the status of water features near where you farm or ranch. Unpermitted discharges of “pollutants” into WOTUS are unlawful—and carry large potential penalties—even if the farmer or rancher has no knowledge that a feature is WOTUS. In addition, if a feature is later determined to be WOTUS, government or citizen enforcers could “reach back” and impose penalties for any discharge that occurred over the past five years.

Because the WOTUS rule is so broad and complex, however, it will be almost impossible for farmers and ranchers to determine with confidence that any potential “water” feature is not WOTUS. Consultants may provide useful advice on identifying wetlands, measuring distances, locating available floodplain maps and searching publicly available historical records. But the only way to be confident that any water feature is not WOTUS is to request a jurisdictional determination or “JD” from the Corps of Engineers.

Below we describe the types of features that may be WOTUS and the types of farming and ranching activities that may result in a regulated “discharge” under the CWA. Each farmer or rancher must assess his own circumstances to determine how to manage and minimize the risk of an unintentional CWA violation.

What features on my lands may be WOTUS?

1. The first question is whether a feature is a “water.” Although the term is not defined in the rule, the following features may be “waters” for purposes of identifying a WOTUS: wetlands, ponds, lakes, creeks, streams, rivers, ephemeral drainages, ditches and seasonally ponded areas.

¹ This paper is intended to provide a basic guidance to farmers and ranchers, but it does not provide legal advice. Farmers should consult with a lawyer if they need legal advice.

2. The following features are relatively easy to identify as WOTUS:

- Waters (including wetlands) that cross state lines (interstate waters) or that can be used for navigation (navigable waters).
- Rivers, streams and creeks that flow directly into any navigable or interstate waters.
- Impoundments of rivers, streams and creeks that flow directly into any navigable or interstate waters.
- Wetlands directly adjoining any of the above.

3. The following features are also very likely WOTUS:

- Any other rivers, streams or creeks that flow to another water.
- Ephemeral drains (meaning water flows only after rain) that have a bed (lower area of elevation), banks (areas of higher elevation on each side), and ordinary high water mark (meaning flowing water leaves a mark in the soil or vegetation) and that flow to another water.
- Erosional features (such as gullies, rills and arroyos) if they have a bed, banks and ordinary high water mark and flow to another water.
- Ditches that were dug in or used to divert a river, stream, creek or ephemeral drain.
- Impoundments of any rivers, streams, creeks or ephemeral drains—including farm ponds.
- Wetlands, lakes, ponds,² ephemerally ponded areas that are within 100 feet³ of any river, stream, creek, ephemeral drain, WOTUS ditch or impoundment.
- Wetlands, lakes, ponds and ephemerally ponded areas within 1,500 feet (about ¼ mile) of any interstate or navigable water.
- Wetlands, lakes, ponds and seasonably ponded areas at least partially within the first 1,500 feet of a known 100-year floodplain of any river, stream, creek, ephemeral drain, WOTUS ditch or impoundment (see FEMA 100-year Flood Zone maps at <https://msc.fema.gov/portal> or your local water/conservation district).
- Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools and Texas coastal prairie wetlands.

4. The following features also may be WOTUS, but only if the Corps or EPA finds a “significant nexus” to downstream waters:

- Any other wetlands, lakes, ponds or ephemerally ponded areas within 4,000 feet (about ¾ mile) of any river, stream, creek, ephemeral drain, WOTUS ditch or impoundment.
- Any other wetlands, lakes, ponds or ephemerally ponded areas at least partially within the 100-year floodplain of any interstate or navigable waters.

² Note: some farm ponds may be excluded from WOTUS status, but only if they were constructed in “dry land” (not waters/wetlands and not by impounding streams).

³ References to distances in feet mean linear feet—i.e., a straight line in the air or on a map.

What types of farming or ranching activities may trigger CWA liability and permit requirements?

1. The application from a mechanical applicator (sprayer/spreader/nozzle) of any “pollutant” *in any amount* into a WOTUS requires a section 402 NPDES permit issued by state regulatory agencies or directly from EPA. A permit is required even if the WOTUS is dry at the time of application. Pollutants include, among other things,
 - chemical or biological pesticides (herbicides, insecticides, fungicides and coated seeds);
 - fertilizers (nitrogen, phosphorus, potassium and micro nutrient); and
 - manure and manure products (including compost).
2. A discharge of “dredged or fill material” can occur as a result of farming or ranching activities that involve moving dirt in a WOTUS. These discharges require a section 404 “dredge and fill” permit issued by the Corps of Engineers (again, even if the feature is dry at the time)—unless the activity qualifies for an exemption explained below. Activities that might be regulated include
 - manipulating the soil on a field, such as grading, laser leveling, terracing, plowing, deep ripping, etc.; and
 - construction and maintenance of roads, fences, ditches, ponds and culverts.
3. Congress established several exemptions from the section 404 “dredge and fill” permit requirement described above. Under these exemptions, farmers and ranchers may not need a permit for plowing, seeding, cultivating and harvesting (defined as “normal” farming practices), or for certain other activities such as minor drainage, upland soil and water conservation practices, drainage ditch maintenance, maintenance of levees/dams and construction and maintenance of irrigation ditches, farm/stock ponds and farm/forest roads.

It is very important to understand that the Corps of Engineers has interpreted these exemptions *very narrowly* and its interpretations will generally be controlling in any enforcement action. As a result, many common farming practices that involve moving dirt in a WOTUS will NOT qualify for an exemption and will trigger a need for a 404 permit.

The following list provides examples of some factors the Corps of Engineers may see as *disqualifying* your activities from the 404 exemptions:

- Farming began at the location after 1977 (the more recently farming began, the less likely that plowing, seeding, cultivating, etc., will be seen as exempt “normal” farming activities).
- Plowing techniques (1) manipulate deeper than the surface of the soil in the upper root zone, (2) gradually drain a wetland or (3) improve site drainage, breakup hardpans or other restrictive soil layers, facilitate deep root growth or require “heavy machinery.”



- The soil-moving activity is related to a “change in use” of the land (such as a change from grazing to crops, or from commodity crops to orchards or vineyards).
- You are constructing or maintaining a farm pond built by impounding an ephemeral stream.
- Your agricultural activities are on land that was fallow for a period of time and not as part of a normal rotational cycle (so that the agency finds it was no longer an “ongoing” operation), due to drought or other reasons.

What are my options if I farm areas that I believe may include WOTUS?

To minimize the risk of violating the CWA, farmers and ranchers have several options:

1. Request a Jurisdictional Determination (JD) from the Corps of Engineers to definitively identify WOTUS on land you farm or ranch.
2. Alternatively, for certain features, you may choose to assume they are WOTUS and avoid anything that might result in a discharge to those features.
3. Seek clarification from the Corps of Engineers about whether your dirt-moving activities in or near WOTUS qualify for one of the section 404 permitting exemptions.
4. Apply for a Section 402 or 404 permit when conducting activities that could result in a regulated discharge.

Where can I get more information?

As a landowner, you can request a JD from the Corps of Engineers by contacting your local Corps office (see <http://www.usace.army.mil/Contact/OfficeLocator.aspx>). The Corps will ask for information about your lands to complete the JD. Some landowners seek the assistance of a consultant to answer those questions, but it may not be necessary. The Corps is required to complete the JD within 60 days, but delays are common. For more information on the process for obtaining a JD, see <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.pdf>. Please be aware, however, that the JD form on the website as of the time of this writing is not based on jurisdictional criteria established in the new rule. An updated form is expected in the near future.

For more information on the section 402 permitting process (for application of pesticide, fertilizer, etc., in or near WOTUS), see <http://water.epa.gov/polwaste/npdes/Agriculture.cfm> and <http://water.epa.gov/polwaste/npdes/pesticides/index.cfm>.

For more information on section 404 “dredge and fill” permitting and exemptions, see <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx> and <http://water.epa.gov/lawsregs/guidance/wetlands/agriculture.cfm>.