



August 27, 2015

TO: Corn Board, State Corn Grower Organizations, NCGA Action Teams
FROM: NCGA Staff
SUBJECT: Farming under the Final “Waters of the US” (WOTUS) Rule

SUMMARY: Subject to certain possible qualifications, the final WOTUS rule is set to take effect tomorrow, August 28, 2015. It is quite possible that many common farm drainage and water features are now WOTUS under this rule, and as a result farmers could face significant legal and financial liabilities. Farmers should consider the rule and make an assessment of what it means for their farms, and then decide a proper course of action.

At this moment, EPA’s final Waters of the US rulemaking is set to take effect, Friday, August 28, 2015. This start date may yet be delayed by a preliminary injunction (PI) that could be issued by a federal district court in Georgia that is hearing a petition from five states. That petition asks that the rule be delayed indefinitely pending legal challenges to its substance. While this PI may be granted, our lawyers tell us that it is likely to last only until mid-October to give time for some complicated legal jurisdictional proceedings to play out. In general, the lawyers tell us that the odds are not good for an indefinite stay of the rulemaking. As a result, it is prudent that corn growers take a hard look at the rule, make an assessment of what it means for their farms, and then take further action. The purpose of this memo is to provide you with general information and guidance to assist you in this effort.¹

Please note that the general, basic guidance to farmers that this memo provides does not constitute legal advice. Farmers should consult with a lawyer if they have legal questions or need legal advice about how the rule might apply to them specifically.

Are potential liabilities created the moment the rule takes effect?

Yes. US EPA has stated numerous times that it is not their intention to use the rule to impose new and greater CWA liabilities on farmers. Yet it is clear that under the plain English of the rule many farm drainage features could be interpreted as WOTUS. The EPA or the Corps currently will not be taking new and expanded compliance actions against farmers under the

¹ This memo draws heavily from the work of the American Farm Bureau Federation on this topic and we thank them for their effort and making it publicly available.

rule; farmers should judge for themselves the probabilities they assign to this. Whether the agencies take action or not, though, it remains a distinct possibility that citizen activists will take legal action against individual farmers (under the CWA's aggressive "citizen suit" provisions). It is not known when such a suit would occur. It is prudent, though, to anticipate it would be soon.

What is the source of CWA liabilities as a result of this rule?

The rule defines for the first time what is a jurisdictional tributary, and it expands on the definition of the waters adjacent to those tributaries that are also jurisdictional. As a result, the lawyers tell us that many essential and commonplace farming practices may now result in "discharges" of "pollutants" into WOTUS that require a CWA permit. Unauthorized discharges to WOTUS are a violation of federal law, subject to large potential penalties in enforcement by the government or private citizens.

Why should farmers 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 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 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. Each farmer must assess their own circumstances to determine how to manage and minimize the risk of an unintentional CWA violation.

What features on my farm may be WOTUS?

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.

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.

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, ephemerally ponded areas that are within 100 feet 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.

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).

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.

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

The application from a mechanical applicator (sprayer/spreader/nozzle) of chemical or biological substances (pollutants) in any amount into a WOTUS requires a Section 402 National Pollution Discharge Elimination System (NPDES) permit issued by state regulatory agencies or directly from the US 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).

In addition, a “discharge” of “dredged or fill material” can occur as a result of farming 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.

Congress established several exemptions from the section 404 “dredge and fill” permit requirement described above. Under these exemptions, farmers 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 that (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 generally have at least four options:

1. Request a Jurisdictional Determination (JD) from the Corps of Engineers to definitively determine whether there are WOTUS on land your farm.
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 (use this link below to locate the appropriate office for your location: <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 private 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>.