

AMERICAN FARMERS WEIGH IN ON WOTUS JURISDICTION QUESTION

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The American Farm Bureau Federation and other industry groups have asked the [U.S. Supreme Court](#) to review the Sixth Circuit decision to assert exclusive jurisdiction to review the controversial Clean Water Rule concerning the new definition of “waters of the United States.” - On Friday, October 8, 2016, the AFB filed a brief in the following case petitioning for writ of certiorari.

In its brief, the AFB argue that the Clean Water Act does not grant appellate court jurisdiction over challenges to the WOTUS rule.- In particular, the AFB asserts that a conflict exists among the circuits that “perpetuates uncertainty and will continue to waste court and party resources.” -

The AFB point out in its brief that WOTUS “is one of the most consequential CWA regulations ever promulgated.”- Proponents of the rule insist that farmers will not be impacted because of continuing exemptions under the new rule that carry over from the existing rule.- EPA and the Army Corps of Engineers claim that the proposed rule preserves existing Clean Water Act exemptions and exclusions for agricultural activities. -

The Current Rule

Under the existing CWA section 404(f)(1), discharges of dredged or fill material are not prohibited if they are:

- (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
- (B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;
- (C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
- (D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;
- (E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;
- (F) resulting from any activity with respect to which a State has an approved program under [section 1288\(b\)\(4\) of this title](#) which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under [section 1317 of this title](#)).

What Does the Proposed Rule Seek to Change?

The proposed rule redefines “waters of the United States” to exclude: “prior converted cropland.”

Although the rule specifically excludes certain types of ditches and stormwater control features created in dry land, which tend to be prevalent in agricultural operations, it does not exclude all of the types of ditches for agricultural purposes as currently provided in section 404(f)(1).- For example, the current CWA regulations allow “minor drainage” associated with “normal farming” activities that are part of an established, ongoing farming or forestry operation.- The new rule limits the exclusion to the following specific ditches:

1. Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
 2. Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
- Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

All other ditches would be covered by the rule if they are not otherwise exempt, and fall within the definition of “waters of the United States,” which include all waters that are:

1. Subject to the ebb and flow of the tide;
2. Interstate waters/wetlands;
3. Territorial seas;
4. Impoundments of water;
5. Tributaries of waters listed in 1-3 above;
6. Adjacent to any of the previously listed waters (1-5)
7. Prairie potholes, Carolina bays, pocosins, Western vernal pools, and Texas coastal prairie wetlands, which are determined on a case-by-case basis to have a significant nexus to any of the waters listed in 1-3 above; and
8. Located within the 100-year floodplain of a water listed in 1-3 above and all waters located within 4,000 feet of the high tide line or ordinary high water mark of water listed in 1-5 above.

What Does it All Mean?

It is conceivable that agricultural activities could result in roadways or ditches for drainage that are not otherwise exempt and which fall into one of the above categories. -Even without ditches that fall outside of the exemption, agricultural land is likely to fall outside of the exemption to the extent “waters of the United States” as defined are on their property.-

it is well known, for example, that existing farmland in California, including vineyard lands for example, often contain Western vernal pools, which would be covered by the rule.- The pre-existing exemption for discharges of material from “normal farming” activities will no longer apply if the new rule becomes effective.- For that reason, it is entirely plausible that the Army Corps of Engineers will be able to assert jurisdiction over any farming activity on land that contains Western vernal pools if the Corps and/or EPA determine that the Western vernal pools have a significant nexus with water subject to ebb and flow of tide, interstate waters/wetlands, or territorial seas.

Proponents of the rule insist that farmers will not be impacted because of continuing exemptions under the new rule that carry over from the existing rule.- Our California water attorneys believe that is simply not the case.- The Corps and EPA will determine a significant nexus exists, make a jurisdictional determination to that effect, and then and only then will a property owner or farmer be able to challenge that determination.- There is a real fear that EPA and the Corps will overreach their authority with this jurisdictional determination.- Nothing in the new rule will stop them.-

The American Farm Bureau is seeking review by the Supreme Court of the jurisdictional question to expedite a resolution of the outstanding uncertainty surrounding the implementation of the Clean Water Act and the limits to EPA and the Corps' jurisdiction thereunder.