



Navigable Waters Protection Rule

Rural America and the Navigable Waters Protection Rule

On January 23, 2020, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) fulfilled yet another promise of President Trump by finalizing the Navigable Waters Protection Rule to define “waters of the United States” (WOTUS). For the first time, the agencies are streamlining the definition so that it includes four simple categories of jurisdictional waters, provides clear exclusions for many water features that traditionally have not been regulated, and defines terms in the regulatory text that have never been defined before. Congress, in the Clean Water Act, explicitly directed the Agencies to protect “navigable waters.” The Navigable Waters Protection Rule regulates these waters and the core tributary systems that provide perennial or intermittent flow into them. The final rule fulfills [Executive Order 13788](#) and reflects legal precedent set by key Supreme Court cases as well as robust public outreach and engagement, including pre-proposal input and comments received on the proposed rule.

The Navigable Waters Protection Rule protects the environment while respecting states, localities, tribes, and private property owners. It clearly delineates where federal regulations apply and gives state and local authorities more flexibility to determine how best to manage waters within their borders. Assertions have been made that the new rule will reduce jurisdiction over thousands of stream miles and millions of acres of wetlands. These assertions are incorrect because they are based on data that is too inaccurate and speculative to be meaningful for regulatory purposes. The final rule along with state, local, and tribal regulations and programs provide a network of protective coverage for the nation’s water resources.

THE FINAL RULE IS GOOD FOR RURAL AMERICA

- The Navigable Waters Protection Rule gives landowners in rural America—including the agricultural community—clarity, predictability, and consistency under the Clean Water Act to understand where federal jurisdiction applies and where it does not.
- This straightforward regulation continues to protect the nation’s navigable waters while reducing bureaucratic barriers to agricultural production and growth and helping farmers and ranchers feed our nation and manage their land.
- The Navigable Waters Protection Rule provides a common-sense approach to the regulation of waters and implementation of the “waters of the United States” definition and preserves and protects the primary authority of states and localities over land and water resources within their borders.
- The agencies received many comments from the agricultural community on the proposed rule and made certain updates based on that and other stakeholder feedback.

THIS FINAL RULE IMPROVES REGULATORY CLARITY FOR KEY AGRICULTURAL WATERS AND FEATURES

Ditches

- The agencies recognize that the regulatory status of ditches has long created confusion. For the first time, the agencies have provided a definition of “ditch” to mean a constructed or excavated channel used to convey water.
- Under this final rule, upland ditches, regardless of flow, do not fall within the scope of the Clean Water Act.
- Only certain ditches are covered under the final rule, including:
 - Ditches—such as the Erie Canal—are considered traditional navigable waters where they meet the terms of that definition.
 - Ditches may be considered tributaries where they satisfy the flow conditions of the “tributary” definition and either were constructed in or relocate a tributary or were constructed in an adjacent wetland and provide perennial or intermittent surface water flow to a traditional navigable water in a typical year.
- Consistent with longstanding agency practice, the burden of proof lies with the agencies to demonstrate whether a ditch relocated a tributary or was constructed in a tributary or an adjacent wetland. Absent such evidence, the agencies will determine the ditch is non-jurisdictional.

Prior Converted Cropland

- In the final rule, the agencies are maintaining the longstanding exclusion for prior converted cropland.
- Under prior practice, the agencies would apply two different tests to evaluate whether a parcel of land was prior converted cropland. The final rule includes a single, clear test that the agencies will use to evaluate whether the prior converted cropland exclusion applies to agricultural land.
- This rule represents the first time the agencies are promulgating regulatory language to clarify the meaning of “prior converted cropland” for Clean Water Act purposes.
- Under the final rule, the prior converted cropland exclusion ceases to apply when the cropland is abandoned (*i.e.*, not used for, or in support of, agricultural purposes in the immediately preceding five years). Those lands are then only subject to the Clean Water Act if or when they have reverted to wetlands and meet the conditions of the “adjacent wetlands” category under this final rule.
- The agencies clarify in the final rule preamble what they mean by “agricultural purposes” that will maintain a prior converted cropland exclusion:
 - Land use that makes the production of an agricultural product possible is “for or in support of agricultural use.”
 - Cropland that is left idle or fallow for conservation or agricultural purposes for any period or duration of time remains in agricultural use, and therefore maintains the prior converted cropland exclusion, such as cropland enrolled in long-term and other conservation programs administered by the federal government or by state and local agencies that prevents erosion or other natural resource degradation. The United States Department of Agriculture (USDA) supports a wide range of conservation

- programs for agricultural land. For more information, see <https://www.fsa.usda.gov/programs-and-services/conservation-programs/>.
- There are many uses that may be considered “for or in support of agricultural purposes,” including irrigation tailwater storage; crawfish farming; cranberry bogs; nutrient retention; and idling land for soil recovery following natural disasters like hurricanes and drought.
 - Conservation practices are critical to the success of agricultural systems across the country and are implemented “for or in support of agricultural purposes.”
 - The agencies will work closely with USDA and will consider documentation from other federal, state, or local agencies to determine whether cropland qualifies for the prior converted cropland exclusion.

Artificial Lakes and Ponds and Artificially Irrigated Areas

- Under the final rule, artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters are not jurisdictional.
- An artificial lake or pond is excluded under the final rule even if it satisfies the rule’s definition of “lakes, ponds, and impoundments of jurisdictional waters,” so long as it was constructed or excavated in upland or in non-jurisdictional waters and is not a jurisdictional impoundment. In other words, artificial lakes and ponds that are constructed in upland or non-jurisdictional waters are excluded even where they may have a surface water connection to a downstream jurisdictional water in a typical year.
- The final rule also excludes artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease.

Additional Exclusions from “Waters of the United States”

- Under the final rule, waterbodies not included in the four categories of “waters of the United States” are not jurisdictional, which provides additional clarity.
- Groundwater, including groundwater drained through subsurface drainage systems, such as tile drains in agricultural land, is excluded under the rule.
- Ephemeral features common across the landscape, such as ephemeral streams, swales, gullies, and rills, are also excluded.

Activity Exemptions Under Clean Water Act Section 404(f)

- This rule does not change the exemptions under the Clean Water Act section 404(f), relieving farmers and ranchers of the need for authorization for many types of agricultural discharges into “waters of the United States.”
- The agencies note that Congress expressly excluded the construction and maintenance of irrigation ditches and the maintenance of drainage ditches from permitting requirements under sections 301, 402, and 404 of the Clean Water Act. Discharges of dredged or fill material associated with those exempt purposes into a ditch constructed in an adjacent wetland are therefore exempt from permitting, even if those materials are transported down the ditch to jurisdictional waters.