



## **Final Rule:**

# **Revised Definition of “Waters of the United States”**

## **A Guide for Landowners**

### **December 2022**

On Dec. 30, 2022, the U.S. Environmental Protection Agency (EPA) and Department of the Army (the agencies) announced a final rule defining “waters of the United States.” The final rule establishes a durable and implementable approach to determining which waters are jurisdictional under the Clean Water Act, and which are not. The following brief guide is intended to assist landowners in determining whether activities on their land require a Clean Water Act permit.

#### **Step 1:**

**Is the activity I want to carry out on my property exempt from needing a Clean Water Act permit?**

The following activities are exempt from the Clean Water Act’s dredged and fill permit requirements,<sup>1</sup> even if they take place in “waters of the United States:”

- Established (ongoing) farming, ranching, and silviculture 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;
- Maintenance (but not construction) of drainage ditches;
- Construction and maintenance of irrigation ditches;
- Construction and maintenance of farm or stock ponds;
- Construction and maintenance of farm and forest roads, in accordance with best management practices, and
- Maintenance of structures such as dams, dikes, and levees.

Additionally, many discharges of pollutants other than dredged or fill material do not require permits:<sup>2</sup>

- Pollutants from nonpoint-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands;
- Return flows from irrigated agriculture, and
- Discharges from a water transfer.

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<sup>1</sup> Note, however, that Clean Water Act section 404(f) establishes circumstances (based on certain effects on “waters of the United States”) under which an activity listed as exempt is no longer exempt. For more detail, see section 404(f) and the regulations on “discharges not requiring a permit” at 33 CFR 323.4.

<sup>2</sup> See 40 CFR 122.3 for the regulatory provisions.

## Step 2:

### Is the water on my property covered by this rule?

The Clean Water Act does not cover every geographic feature with water in it, nor does it subject all activities in waters meeting the definition of “waters of the United States” to regulation (as discussed in Step 1). Puddles are not “waters of the United States.” The rule also has a well-established, very specific definition of wetlands. That definition requires the presence of particular wetland hydrology, soils, and vegetation. If a landowner’s property does *not* contain the types of waters, including wetlands, covered by this rule, it is not jurisdictional.

## Step 3:

### Is the water on my property excluded from the definition of “waters of the United States”?

#### 1) *What are the exclusions in the final rule?*

The rule excludes certain features that commonly contain water but are not “waters of the United States”:

- Prior converted cropland;
- Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
- Artificially irrigated areas that would revert to dry land if the irrigation ceased;
- Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of “waters of the United States;”
- Swales and erosional features (*e.g.*, gullies, small washes) characterized by low volume, infrequent, or short duration flow, and
- Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

Where a feature located on a landowner’s property satisfies the terms of an exclusion, it is not jurisdictional under the Clean Water Act, and does not require a federal permit, even where the feature would otherwise be jurisdictional. However, certain types of waters—traditional navigable waters, the territorial seas, and interstate waters—are always jurisdictional, even if they satisfy the terms of an exclusion.

#### 2) *How do I know if areas on my property satisfy the prior converted cropland exclusion?*

Prior converted cropland under the Clean Water Act encompasses all areas designated by the United States Department of Agriculture (USDA) as prior converted cropland under the Food Security Act.<sup>3</sup> Areas USDA has not so designated are **not** eligible for this Clean Water Act exclusion. The Clean Water Act exclusion for prior converted cropland only covers wetlands and does not exclude other types of aquatic resources (*e.g.*, tributaries, ponds, ditches) that are located within the prior converted cropland area.

The prior converted cropland exclusion would no longer apply if the land use changes so that it is no longer available to produce agricultural commodities. This would include a proposed or planned modification of prior converted cropland for filling and development, so that the area would no longer be available for commodity crop production after development. For example, if prior converted cropland is left idle for several years and reverts to wetland, and the property is then sold for conversion to a residential development, the exclusion no longer applies and the discharge of dredged or fill material from development would require prior authorization under Clean Water Act section 404.

Changes in use do not include idling land for conservation uses (*e.g.*, habitat; pollinator and wildlife management; and water storage, supply, and flood management); irrigation tailwater storage; crawfish farming; cranberry bogs; nutrient retention; idling land for soil recovery following natural disasters like hurricanes and drought; crop production, haying, and grazing, so long as the area remains available for the production of agricultural commodities. An area has not experienced a change in use if, for example, it transitions into a long-term rotation to agroforestry or perennial crops, such as vineyards or orchards. Generally speaking, idle land retains its availability to produce an agricultural commodity. Areas used in any of these ways can retain their availability for commodity crop production and therefore their prior converted cropland designation.

Additionally, if the agencies determine that a land area does not meet the prior converted cropland exclusion because of a planned or proposed “change in use,” this does not necessarily mean the area contains “waters of the United States.” Any area that has not reverted to a wetland that meets this rule’s jurisdictional requirements will not be regulated as a “water of the United States.”

#### **Step 4:**

**If the activity I want to carry out on my property is not exempt from permitting requirements, and the feature on my property is likely a water for purposes of the rule (and is not excluded), what do I do next?**

If a landowner’s property is not covered by one of the exclusions and an activity is not covered by one of the exemptions, the next step is to determine if the water is a “water of the United States” under one of the longstanding categories in the rule: (1) traditional navigable waters, the territorial seas, and

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<sup>3</sup> USDA interprets prior converted cropland to be a “converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and did not meet the hydrologic criteria for farmed wetland.” 7 CFR 12.2.

interstate waters; (2) jurisdictional impoundments of “waters of the United States”; (3) jurisdictional tributaries; (4) jurisdictional adjacent wetlands; and (5) intrastate lakes and ponds, streams, or wetlands not identified in categories (1) through (4) that meet either the relatively permanent standard or the significant nexus standard.

**1) *What is the relatively permanent standard?***

Waterbodies that meet this standard are relatively permanent, standing, or continuously flowing waters connected to traditional navigable waters, the territorial seas, and interstate waters. Waters that meet this standard also include waters with a continuous surface connection to such relatively permanent waters or traditional navigable waters, the territorial seas, and interstate waters.

**2) *What is the significant nexus standard?***

Certain waterbodies, such as tributaries and wetlands, can have the required connection to and affect larger downstream waters that Congress fundamentally sought to protect. The significant nexus exists if the waterbody (alone or in combination) significantly affects the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters.

If the water feature fits one of the categories of “waters of the United States” and the activity is not covered by one of the exemptions, the landowner will need to seek a permit to carry out the activity.

**Step 5:**

**Are there resources or help from the agencies to aid me in this process?**

**1) *Publicly available tools and resources***

Publicly available tools and resources can assist landowners in understanding the jurisdictional status of waters, including tributaries and wetlands, that may be present on their lands. For example, EPA’s EnviroAtlas ([available on EPA’s website](#)) is a map viewer that facilitates surface water assessments using data such as land cover, stream hydrography, soils, and topography. Users can quickly and easily input a location (*e.g.*, a city and state, or latitude and longitude) and select relevant map layers.

**2) *Jurisdictional determinations***

There are circumstances under which it may be difficult for landowners to determine on their own whether a water on their land is jurisdictional. If landowners want certainty as to whether areas on their property meet the definition of “waters of the United States,” they may request an approved jurisdictional determination from their local Corps district regulatory office at any time. The Corps has long provided jurisdictional determinations as a public service and does not charge a fee for

this service. A landowner who would like to know whether areas on their property meet the definition of “waters of the United States” may contact their local Corps district regulatory office at any time. The list of local district regulatory offices and their contact information is [available on](#) the Corps’ website.

**3) *Are there general permits under section 404 of the Clean Water Act for individual landowners? How do I obtain coverage under a nationwide permit?***

Even if landowners wish to pursue activities that are or may be subject to the permit requirements of the Clean Water Act and that will impact “waters of the United States” on their property, they may be able to obtain coverage under a general permit. General permits are issued on a nationwide, regional, or statewide basis for specific categories of activities that have minimal individual or cumulative adverse environmental effects. The general permit process allows certain activities to proceed with little or no delay if the conditions of the general permit are met. For example, nationwide permit (NWP) 18 authorizes minor discharges of less than 25 cubic yards that result in the loss of no more than 1/10-acre of “waters of the United States.” Corps personnel in the local district office can help explain the requirements of each NWP. Information on NWPs is also [available on](#) the Corps’ website.

**4) *If I need an individual section 404 permit, how do I obtain coverage?***

The vast majority of activities subject to Clean Water Act section 404 permits are authorized under general permits; however, some activities do require authorization under an individual permit (generally because of a high level of impact on “waters of the United States” or because the applicant cannot comply with all conditions of a general permit). Landowners may reach out to their local Corps district regulatory office, who will help them determine how to request an individual permit.