



## Final Rule: Revised Definition of "Waters of the United States" Fact Sheet for the Agricultural Community December 2022



### Overview

On Dec. 30, 2022, the U.S. Environmental Protection Agency (EPA) and Department of the Army (the agencies) announced a final rule founded upon the pre-2015 definition of "waters of the United States," updated to reflect consideration of Supreme Court decisions, the science, and the agencies' technical expertise.

The agencies chose the familiar, pre-2015 definition as a foundation because it has supported decades of clean water progress and has been implemented by every administration in the last 45 years. This action establishes a durable and reasonable definition of "waters of the United States."

The approach provides clear rules of the road to advance agricultural activities, infrastructure projects, and economic investments while protecting water quality. EPA and Army are prioritizing practical, on the ground implementation by providing tools and resources to support timely and consistent jurisdictional determinations under this definition of "waters of the United States."

### Exemptions in the Clean Water Act

The agencies' definition of "waters of the United States" does not affect the longstanding activity-based permitting exemptions provided to the agricultural community by the Clean Water Act.

Agricultural activities that are exempt from section 404 permitting include:

- 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;
- Maintenance of dikes, levees, groins, riprap, and transportation structures;
- Construction of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches, and
- Construction or maintenance of farm roads, in accordance with best management practices.



## Exclusions in the Final Rule

The final rule codifies exclusions from the definition of “waters of the United States” in regulatory text—delivering clarity to the agricultural community. The final rule includes two longstanding exclusions from the definition of “waters of the United States.”

- **Prior converted cropland.** The final rule defines prior converted cropland consistent with the U.S. Department of Agriculture’s (USDA) definition. Prior converted cropland remains excluded from the definition of “waters of the United States” as long as it is available for agricultural commodity production. The agencies interpret availability for agricultural commodity production to include uses such as crop production, haying, grazing, agroforestry, or idling land for conservation uses.
- **Waste treatment systems.** Features excluded under this category include treatment ponds or lagoons that are designed to meet the requirements of the Clean Water Act.

The final rule includes six additional exclusions from the definition of “waters of the United States” to further increase regulatory certainty.

- **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 that are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- **Artificial reflecting pools or swimming pools** and other small ornamental bodies of water created by excavating or diking dry land.
- **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 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) that are characterized by low volume, infrequent, or short duration flow.

## Jurisdictional Waters in the Final Rule

The agencies’ definition of “waters of the United States” provides jurisdiction over waterbodies that Congress clearly intended to protect under the Clean Water Act, such as traditional navigable waters (e.g., certain large rivers and lakes), territorial seas, and interstate waters. For upstream waters that may significantly affect the integrity of the downstream waters that Congress clearly intended to protect, the rule provides a reasonable approach that recognizes geographic differences in waters. The rule accounts for regional differences in waters because regionally tailored implementation tools as well as local and regional conditions help determine whether waters are covered under this rule.

The final rule includes the longstanding categories for: (1) traditional navigable waters, the territorial seas, and 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 the rule's jurisdictional criteria.

### **Outreach on the Final Rule**

*Pre-proposal*

The final rule is based on extensive outreach and engagement that began before the rule was proposed and continued through the public comment period of the proposed rule. The agencies received input from farmers and ranchers through pre-proposal public meetings, pre-proposal written recommendations, public hearings, public comments, and meetings specifically for small entities.

### **For More Information**

Additional information, along with copies of the final rule and supporting analyses, are available on EPA's website at <https://www.epa.gov/wotus>.