The Clean Water Act’s Agriculture Exemptions

Mark Ryan

It is axiomatic that water is part and parcel of agriculture, both on the front and back ends. Farmers and ranchers in Idaho depend on water to grow their crops and water their animals, and the wastewater from those operations often ends up in the nearby creek or lateral. Because water is such a critical part of our agricultural economy, Congress wrote the Clean Water Act (CWA) to deal with discharges from agricultural operations differently than any other class of dischargers. Agriculture is the only category that is largely and specifically exempt from most regulation under the Act.

This article summarizes the principle provisions of the CWA and its implementing regulations dealing with the regulation of agriculture, with a special emphasis on the agricultural exemptions. Because the exemptions are so important to the agriculture industry in Idaho, all farmers, feedlot operators and irrigators in the state should understand both the breadth of the exemptions and their limitations.

To understand the importance of the agriculture exemptions, one needs to understand the prima facie elements of CWA jurisdiction. For a CWA permit requirements to kick in, there has to be (1) a discharge, (2) of a pollutant, (3) from a point source, (4) by a person to (5) a water of the United States. Unless all five elements are present, none of the CWA permitting requirements apply.1

The agriculture exemption

With the prima facie elements in mind, let’s look at number (3), point sources. The agriculture exemptions are found largely in the point source definition in the CWA. Section 502(14) of the Act states:

The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

This term does not include agricultural storm water discharges and return flows from irrigated agriculture.

(emphasis added).

Congress reemphasized the point source agriculture exemption in section 402, the National Pollutant Discharge Elimination System (NPDES) permitting provision of the CWA. Subsection (l) states: “The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the administrator directly or indirectly, require any state to require such a permit.” (emphasis added).

This means is that stormwater and snow melt running off of a farm field is exempt from regulation under the CWA. The same thing applies to return flow from irrigated agriculture. If a farmer irrigates his fields, and that irrigation runoff containing sediment, pesticide or fertilizer residues enters a water of the United States (WOTUS), it is not a point source discharge. If no point source is involved, a CWA permit is not required.

Because agricultural return flow is exempt, and because the exemption applies only to flows that are comprised entirely of return ag flow, it is important for farmers to keep their return flows from being contaminated by third parties. For example, any runoff from parking areas or adjacent streets or housing developments that co-mingles with the return agricultural return flow could jeopardize the exemption under section 402(l).

The agriculture exemption is embedded in the CWA. The EPA regulations on point sources, found at 40 C.F.R. § 122.2, mirror the language in the CWA. Since the exemption is in the statute, the implementing federal agencies cannot remove or amend it by regulation. (States are allowed to cover more than the CWA, but Idaho environmental law seldom, if ever, exceeds minimum federal standards.) And of recent interest, the controversial new rule defining waters of the United States (aka The Clean Water Rule) does not amend or remove the point source agriculture exemption.

It is important to recognize that the agriculture exemption is unique.
Congress wrote the point source definition to apply to a broad class of dischargers. Over the last 44 years, the courts have considered almost every type of “discrete conveyance” to be a point source subject to regulation. Except for agriculture. Stormwater and agricultural return flow from farm fields have always been exempt, and always will be unless Congress decides to change the law, which is very unlikely.

The Agriculture exemption is also of significance for canal operators. The new WOTUS Rule aside, irrigation canals and ditches that discharge back into natural water bodies such as the Snake or Boise Rivers have long been considered to be WOTUS. As a result, discharges into canals and laterals are considered point source discharges which must be regulated under the NPDES permitting program. Non-agricultural point source discharges of a pollutant into ditches that are WOTUS require a permit. But runoff from farm fields into those ditches is exempt as nonpoint source pollution.

The exceptions to the exemption

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Low, subsurface aquifers can result in a finding of a point source discharge. The careful practitioner should be aware of the few exceptions to the general agriculture exemption. For example, many CAFOs apply their manure on farm fields. CAFOs are point sources and the application of CAFO’s wastes to farm fields be done pursuant to a nutrient management plan and not exceed agronomic rates. There are a few cases outside of Idaho holding that CAFO waste runoff from farm fields is a point source discharge that falls outside of the normal agriculture exemption. It is important to recognize that these cases represent relatively rare circumstances of successful enforcement actions against farmers related to manure runoff from farm fields.

There are been a few other isolated cases of farmers being held liable for discharges from their farming operations. These cases are, however, outliers, and most are very old. In the 44 years since the CWA was passed, only a small handful of cases have chipped away at the generally broad agriculture exemption.

TMDLs

The only CWA hook into agriculture is through the total maximum daily load (TMDL) program in section 303 of the Act. TMDLs can assign pollution reduction targets for nonpoint source pollution such as runoff from agricultural areas. But the CWA does not provide any enforcement mechanisms for regulating nonpoint source pollution. Any regulation of agriculture under a TMDL would have to occur under state law, and Idaho does not provide for any enforcement mechanisms against farmers for dischargers off of their fields that do not comply with a TMDL load allocation.

City of Des Moines litigation

Board of Water Works Trustees of the City of Des Moines, Iowa v. Sac County Board of Supervisors, No. 5:15-cv-04020, is a case to watch. The City of Des Moines filed a complaint in federal court on March 16, 2015, alleging that farm field runoff through tile drains is causing the nitrate pollution in the city’s drinking water source. The city alleges that the tile drain discharges to the Raccoon River are point source discharges because they emanate from pipes, which are classic point sources. The city will argue that the agriculture exemptions do not apply because the...
discharges come from contaminated groundwater, not surface runoff.

A procedural motion to dismiss on state-law grounds currently is pending before the court, and trial is set for this fall. On the substantive CWA law, the court will have to decide an interesting issue: do agricultural return flows and agricultural storm water lose their point source exemptions once they soak into the ground and reach a pipe that puts the water in the same place it would have ended up without the pipe? Put another way, how will the court address the internal tension in section 502(14) between the reference to a pipe as a point source and the exemption of agricultural return flow and agricultural storm water.

Most agricultural runoff travels over the surface or seeps into nearby water bodies via diffuse shallow, subsurface aquifers, which is nonpoint source pollution. Tile drains add a new dimension to the problem that Congress did not squarely address when it passed the CWA. Given how pervasive tile drains are, especially in the Midwest, it is surprising how little case law there is on this issue.9

While tile drains are less common in Idaho than in Iowa, a ruling in favor of the City of Des Moines would, for the first time, expose farmers to CWA liability for nutrient contamination coming off of their fields. EPA has not yet taken a position in this litigation, but will likely side with the agriculture industry.

The Waters of the United States Rule

The newly proposed WOTUS definition is currently stayed, pending review on the merits by the Sixth Circuit Court of Appeals.10 There is a very high likelihood that the Sixth Circuit will remand the rule to EPA and the Corps. It is nevertheless worth noting several of the important agriculture-specific provisions of the new rule, should it become law. [In the interest of full disclosure, I was one of the authors of the draft WOTUS rule. I left EPA before the final rule was promulgated.]

Section 230.3(o)(2) sets out which waters are not WOTUS. That list includes: prior converted croplands; ditches with ephemeral flow not located in tributary; ditches with intermittent flow that are not located in a tributary; ditches that do not flow back into traditional navigable waters; artificially-constructed lakes and ponds created in dry land such as farm and stock water ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds; and groundwater, including groundwater drained through subsurface drainage systems.

It is interesting to note that the intermediate-flow ditch exemption in the new WOTUS rule may put those ditches at risk of being regulated. The new rule classifies ditches with intermittent flow (e.g., those that flow April to October) that are constructed in uplands (e.g., the New York Canal near Boise) as non-WOTUS. Such ditches are common in Idaho. If a ditch is a WOTUS, when it flows back into a natural water body such as the Snake River, it’s simply one WOTUS flowing into another, and no liability attaches.

If those ditches are not WOTUS, then arguably they are point sources at the point where they reenter the Snake River, especially if they are carrying any non-ag return flow. That could make the ditch owner liable for anything being discharged from the ditch into a downstream water. Let’s hope EPA clarifies that ambiguity if the Sixth Circuit Court remands the rule. If the rule is not remanded, expect that issue to be litigated.

Conclusion

It would be easy to take away from this article that liability traps abound for farmers under the CWA. While it is true that a few courts have found liability in a limited number of cases, those findings are relatively few and far between. By and large, farmers continue to enjoy a special exemption under the CWA that no other dischargers have, and few plaintiffs have successfully brought cases against farmers under the CWA. If a farmer is careful to avoid the few pitfalls outlined above, he or she can stay clear of the enforcement provisions of the Act.

Endnotes

2. See, e.g., Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001);
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