

# ENVIRONMENTAL LAWS AFFECTING UTAH AGRICULTURE

**Producer Note:** Agricultural producers are faced with many challenges in today's rapidly changing world. Changes in industrialization, use of computer-based technology, governmental involvement in market dynamics, and environmental regulation are affecting producers in a number of ways. Environmental regulation is a complex area with both federal and state government involvement. Keeping informed is the producer's most useful instrument for meeting the challenges of today's agriculture. This information on environmental regulation is provided to inform producers of the breadth and scope of environmental laws which may impact daily production activities.

## I. WATER QUALITY

### A. Federal Clean Water Act

#### 1. Overview

The Clean Water Act<sup>1</sup> (CWA) is an important federal environmental statute affecting agriculture. The law was originally enacted by Congress in 1972 and has been amended several times since. Its objective is to reduce or eliminate water pollution in the nation's rivers, streams, lakes, and coastal waters. A variety of mechanisms are employed by the CWA to control domestic, industrial, and agricultural pollution. Several types of agricultural activities and practices are regulated under the statute. Direct discharges from feedlots are an example. The U.S. Environmental Protection Agency (EPA) is charged with enforcing the CWA.

#### 2. Water Quality Standards

The CWA requires each state to adopt water quality standards for most water bodies located within the state's borders. Rivers and streams are often divided into segments for this purpose. The water quality standards specify appropriate uses to be achieved and protected for each segment of water, such as public water supplies; protection and propagation of fish, shellfish, and wildlife; recreation in and on the water; agricultural uses such as irrigation or livestock watering; and navigation. Each state's water quality standards also include numerical or narrative criteria that are designed to protect these uses. The standards are then used to establish treatment controls and strategies to protect the water quality, and may include specific requirements placed in permits issued to point sources. However, there are no federal laws or regulations that require the control of nonpoint sources to achieve water quality standards. In addition, as an anti-degradation policy, water quality standards may also prohibit new waste discharges into waters of exceptionally high quality.

#### 3. NPDES Permits

Discharges of waste from point sources into navigable waters are regulated through a permit system known as the National Pollutant Discharge Elimination System (NPDES). Permits are issued either by EPA or by the state under a program approved by EPA. It is illegal to discharge waste from point sources into navigable waters without a permit or in violation of the terms of the permit. The CWA defines a point source as the following:

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

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<sup>1</sup> 33 U.S.C. § 1251 *et seq.* (1994).

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 stormwater discharges and return flows from irrigation.

Navigable waters are defined by the CWA as "waters of the United States." This phrase has been interpreted broadly by EPA regulations and the courts to include most rivers, streams, lakes, and wetlands. Navigable waters do not have to be accessible by boats to meet the definition.

NPDES permits contain effluent limitations specifying the amounts of pollutants which may also be discharged. The permits contain other terms and conditions as well. Operational practices may also be specified. Monitoring, record keeping, and reporting requirements are usually included. If EPA is issuing the permit, a state certification that the permit complies with the CWA and state laws is required. In some cases, a permit may prohibit all discharges into water.

The permit issuance process normally involves the submission of an application, agency review of the application for completeness, a tentative permit decision by the agency, time for public comment or a hearing, and the final permit decision.

**Producer Note:** Many animal feeding operations and aquatic feeding operations are considered point sources and therefore require permits. If a pollutant discharge into waters of the U.S. occurs and the operation does not have a required permit, an owner or operator may be exposed to serious penalties. Producers may contact state and federal authorities to determine if a permit is required for a particular operation. Generally, an NPDES permit application will request information concerning activities occurring at the facility, including a description of the nature of the business. In addition, the name, address, telephone number, and ownership status of the operation will be required, along with a list of all other environmental permits or construction approvals which have been received or for which application has been made, a topographical map, and whether the facility is located on tribal land.

Concentrated animal feeding operations (CAFOs) are required to obtain an NPDES permit. A facility is a CAFO if it has more than 300 animal units and discharges directly into navigable waters, or if the operation has more than 1,000 animal units. A feeding operation does not need a permit, however, if it only discharges as a result of a 25-year, 24-hour storm event. An animal unit is defined as 1.0 unit per animal for slaughter and feeder cattle, 1.4 units per animal for mature dairy cattle, 0.4 unit per animal for swine, 0.1 unit per animal for sheep, and 2.0 units per animal for horses.<sup>2</sup>

Generally, 1,000 animal units is the equivalent of 1,000 slaughter and feeder cattle, 700 mature dairy cattle, 2,500 swine which are over 55 pounds, 500 horses, 10,000 sheep or lambs, 55,000 turkeys, 100,000 laying hens or broilers with continuous overflow watering, 30,000 laying hens or broilers with a liquid manure system, or 5,000 ducks. In addition, 300 animal units is the equivalent of 300 slaughter or feeder cattle, 200 mature dairy cattle, 750 swine over 55 pounds, 150 horses, 3,000 sheep or lambs, 16,500 turkeys, 30,000 laying hens or broilers with overflow watering, 9,000 laying hens or broilers with a liquid manure system, or 1,500 ducks.

Concentrated aquatic feeding operations require an NPDES permit if they produce more than 9,090 harvest weight kilograms per year of cold water fish or 45,454 harvest weight kilograms per year of warm water fish. Discharges into aquaculture projects also require a permit. An aquaculture project is a "defined managed water area which uses discharges of pollutants into that designated area for the maintenance or production of harvestable freshwater, estuarine, or marine plants or animals."

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<sup>2</sup> 40 C.F.R. § 122.23, app. B to pt. 122 (1996).

#### 4. Wetlands

**Producer Note:** When agricultural operators conduct dredging and filling activities which affect water sources, these activities may require a permit. Careful attention to these activities is required as the lack of a required permit may expose the operator to serious penalties.

A separate permit, known as the section 404 permit,<sup>3</sup> is required by the CWA for discharges of dredge and fill materials into navigable waters. These permits are issued by the U.S. Army Corps of Engineers and are subject to review and approval by EPA and the state. The filling of wetlands and the construction of structures in streams, such as irrigation gates or docks, will often require a section 404 permit.

Although minor wetlands filling activities may be covered by a section 404 General or Nationwide Permit, substantial dredging or filling will usually require an individual permit. Permits may be denied if the activity causes significant adverse effects on the water body or the surrounding environment and there are practical alternatives available.

There are 36 section 404 General or Nationwide Permits.<sup>4</sup> In addition, a General Permit for prior converted cropland has been proposed. The following agricultural activities are allowed under the permits:

- Fish and wildlife harvesting, enhancement, and attraction devices and activities (permit #4);
- Wetland restoration activities (permit #27);
- Cranberry production activities (permit #34);
- Emergency watershed protection and rehabilitation (permit #37); and
- Farm buildings (permit #40).

In addition, a number of permitted activities may relate to a farming operation, including maintenance, utility line backfill and bedding, bank stabilization, road crossing, return water from upland contained disposal areas, minor discharges, minor dredging, oil spill cleanup, headwaters and isolated waters discharges, temporary construction and access, and cleanup of hazardous and toxic waste. On December 13, 1996, the Army Corps of Engineers reissued the existing Nationwide Permits with some modifications and issued two new Nationwide Permits.<sup>5</sup> The two new permits were for moist soil management for wildlife (permit #30) and maintenance of existing flood control facilities (permit #31). In addition, changes to headwaters and isolated waters discharges (permit #26) will cause an increase in review time for some activities and more clearly define the activities allowed under the permit.

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<sup>3</sup> 33 U.S.C. § 1344 (1994).

<sup>4</sup> 33 C.F.R. app. A to pt. 330 (1996).

<sup>5</sup> 61 Fed. Reg. 65,874 (1996).

**Producer Note:** All producers are encouraged to check with state and federal environmental officials to determine if a specific farming activity will be covered by a section 404 General or Nationwide Permit, or if the activity needs an individual permit. Should the activity be covered by a permit, a producer should obtain a copy of the permit for reference and guidance. Copies can be requested from the U.S. Army Corps of Engineers.

A permit may include either onsite or offsite mitigation requirements. Mitigation requirements include restoring altered wetlands and permanently protecting other wetlands from alteration.

Many normal farming, ranching, and logging practices, such as plowing, seeding, cultivating, minor drainage, and harvesting, are exempt from permit requirements under section 404(f) of the CWA if the activities are already occurring and will be ongoing and continuous.<sup>6</sup> However, a permit may still be required if major changes to the operation occur.

### **5. *Nonpoint Source Pollution***

**Producer Note:** Section 319 of the CWA was enacted in 1987 and guides the states in conducting nonpoint source assessments, developing nonpoint source management programs, and, as of 1990, beginning implementation of those programs. There are no federal regulatory requirements in section 319.

Nonpoint source pollution is generally caused by runoff or snowmelt from cropland, pastures, barnyards, and impervious surfaces such as roads, parking lots, and roofs. The runoff may carry sediment, pesticides, herbicides, fertilizers, and other chemicals into adjacent waters, causing pollution. The CWA recognizes that cleaning up the nation's waters requires control of nonpoint as well as point source pollution, and regulation of nonpoint source pollution involves cooperative programs with the states.

The plan will generally provide for the development of best management practices (BMPs) as a means of controlling nonpoint sources of pollution. Cost sharing programs to help farmers and ranchers implement BMPs on their operations are also authorized. To assist states implementing their approved programs, states have received a total of about \$470 million in the years 1990-1996 to implement programs, including cost share for demonstration projects, technical assistance, education, training, and enforcement.

### **6. *Oil Spill Liability***

The CWA imposes strict liability on the operators of facilities that spill oil or other hazardous wastes into navigable waters. This would include spills from petroleum storage tanks located on farms. The CWA requires that the operator promptly notify EPA of any spill. A failure to give EPA notice of the spill is a violation of the statute.

### **7. *Enforcement and Judicial Review***

Persons who violate the regulatory requirements of the CWA may face substantial penalties. These include both civil and criminal fines. Incarceration is possible for severe violations. EPA or the state can enjoin or stop producers' activities in order to force compliance with the statute. The CWA allows citizens to file suits to enforce CWA requirements in certain circumstances. However, if a producer disagrees with the way CWA

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<sup>6</sup> 33 C.F.R. § 323.4 (1996).

requirements are applied to an operation, opportunities for both administrative and judicial review of EPA and state decisions are available.

**Producer Note:** In order for producers to maintain compliance with water quality legislation, they must be aware of state water quality standards, NPDES permit requirements, state and local nonpoint source pollution programs, wetlands permits, oil spill liability, and whether there are waters requiring special protection in their area. The states take active roles in ensuring that producers comply with these requirements.

## **B. State Water Quality Laws and Regulations**

Most states have enacted clean water legislation. Many of these state statutes contain similar requirements to the CWA, but some impose more restrictive requirements than the federal law. The CWA authorizes EPA to delegate the NPDES permit program to individual states. However, where states have this responsibility, EPA requires enactment of statutes closely tracking the CWA. In these states, CWA enforcement requirements often come through state statutes and procedures, and states can also pass their own state water quality legislation. State administrative agencies promulgate regulations to implement the state laws. These regulations usually contain provisions similar to those found in the parallel federal regulations, but there may be significant differences.

**Caution:** Because environmental laws and regulations change frequently, all producers must stay in contact with both state and federal officials in order to remain aware of and in compliance with changes in the law.

Utah is dependent upon rivers, streams, lakes, and subsurface waters for both public and private water supplies, as well as for agricultural, industrial, and recreational uses. To maintain a reasonable degree of purity in the waters, to assure an adequate supply of those waters, and to require reasonable use of the waters where necessary, Utah has established a water quality control program through the Utah Water Quality Act.<sup>7</sup>

**Producer Note:** The Utah Water Quality Act is administered through the Utah Department of Environmental Quality (DEQ) and the Water Quality Board (Board). At least one member of the Board must represent agricultural and livestock interests.

### ***1. UPDES Permit Programs***

Any person or company discharging or proposing to discharge any pollutant from a point source into state waters must first obtain a Utah Pollution Discharge Elimination System (UPDES) permit from the Board. A discharge permit is defined as a permit issued to a person who discharges or whose activities would probably result in the discharge of pollutants. A point source is any discernible, confined, and discrete conveyance from which pollutants may be discharged. Pollutant is very broadly defined to include dredged spoil, solid waste, incinerator residue, sewage, garbage, munitions, chemical wastes, biological materials, radioactive materials, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into waters of the state. However, a permit is not required for return flows from irrigated agriculture because those discharges are not considered to have arisen from a point source. The permits are issued for a period of five years. The permits may be revoked, modified, or suspended for:

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<sup>7</sup> UTAH CODE ANN. § 19-5-101 *et seq.* (1995).

- Violating any condition of the permit;
- Obtaining a permit by misrepresentation; or
- A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

**Producer Note:** A Utah producer who discharges pollutants into the water will be required to obtain a discharge permit for all or a portion of an operation. The producer must contact DEQ and make all appropriate applications for permits.

## 2. *Concentrated Animal Feeding Operations*

Any concentrated animal feeding operation (CAFO) from which pollutants may be discharged is considered a point source and any discharge of pollutants from a point source requires a discharge permit.<sup>8</sup> The permit is issued to any person who discharges pollutants into state waters and is obtained from the Board. Utah defines CAFOs according to very detailed state regulations which must be consulted to determine if the animal feeding operation in question needs a permit.<sup>9</sup> However, the basic definition of a CAFO is an animal feeding operation where a specified number of animals, usually defined as 1,000 animal units, are fed and crops or vegetation are not grown on the portion of the operation where the animals are raised and fed. Any discharge of pollutants into state waters is unlawful unless the appropriate permit is obtained. The term pollutant is defined to include agricultural waste discharged into water.

**Producer Note:** Often the specifics of environmental laws are found in agency regulations. In addition, regulations are likely to be amended frequently. As a result, a producer must keep in contact with offices administering specific programs in order to keep up with all changes which may occur in a particular program.

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<sup>8</sup> UTAH CODE ANN. § 19-5-101 *et seq.* (1995).

<sup>9</sup> UTAH ADMIN. R. R317-8-3.5(5)(a).

<sup>10</sup> 42 U.S.C. § 300g-1 *et seq.* (1996).