

*Navigating the Waters:  
Advice for Farmers on the Clean Water Act  
Exemption for Normal Farming Activities*

American Agricultural Law Association  
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Presentation Outline for Tony Francois  
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I. Introduction

II. Agency Interpretation of Exemption

A. Regulations: 33 C.F.R. Section 323.4(a)(1)(ii); 323.4(c).

B. Regulatory Guidance Letters: 86-01; 96-02

Enforcement Memoranda: May 3, 1990; January 3, 1993 (EPA/Army)

III. Case Law

- *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983)
- *U.S. v. Akers*, 785 F.2d 814 (9th Cir. 1986)
- *U.S. v. Cumberland Farms*, 826 F.2d 1151 (1st Cir. 1987)
- *U.S. v. Larkins*, 852 F.2d 189 (6th Cir. 1988)
- *U.S. v. Brace*, 41 F.3d 117 (3rd Cir. 1994)
- *Borden Ranch v. Army Corps*, 261 F.3d 810 (9th Cir. 2001)
- *U.S. v. Cundiff*, 555 F.3d 200 (6th Cir. 2009)

IV. Farm Settings

- Estates
- Bankruptcy
- Ownership Changes
- Conservation Programs
- Markets

V. "Pre-conversion"

A. Record Keeping – documenting past uses and reasons for changes in uses.

B. Determination of Exemption – 33 C.F.R. Section 320.1(a)(6) (“The Corps has authorized its district engineers to issue formal determinations concerning the applicability of ... statutory exemptions to proposed activities.”)

## VI. Enforcement

A. Distinguishing Case Law: scale of actions relative to actions in leading cases.

### B. Challenging Case Law

1. Changing view of deference to agency regulations under *Chevron* and to guidance under *Auer/Kisor*

2. *Rapanos* – plurality or Kennedy concurrence?

3. Non-Delegation and Void for Vagueness Arguments