

**Testimony by
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National Corn Growers Association**

**Submitted to the
House Agriculture Subcommittee on
Conservation, Energy and Forestry**

**Regarding the
Interpretive Rule on the
Application of Clean Water Act Section 404
Agricultural Exemptions
June 19, 2014**



Chairman Thompson, Ranking Member Walz, and members of the House Agriculture Subcommittee on Conservation, Forestry and Energy, on behalf the National Corn Growers Association (NCGA), I appreciate the opportunity to share with you our views on the U.S. Environmental Protection Agency's Interpretive Rule regarding the applicability of Clean Water Act agricultural exemptions. My name is Chip Bowling. I am the 3rd generation on our family farm in Newburg, Maryland about 45 miles south of Washington, D.C. where we raise corn, soybeans, wheat and grain sorghum on 1700 acres. I currently serve as the First Vice President for NCGA.

The National Corn Growers Association represents more than 40,000 corn farmers from 48 states. NCGA also represents more than 300,000 corn growers who contribute to check off programs and 27 affiliated state corn organizations across the nation for the purpose of creating new opportunities and markets for corn growers.

The Interpretive Rule recently issued by the U.S. Environmental Protection Agency and the US Army Corps of Engineers ("Agencies") specifies what farmers must do to qualify for the Clean Water Act's normal farming exemptions from dredge and fill (Section 404) permitting under certain wide ranging circumstances. While the policy may have been intended to be relatively limited in effect and to be of assistance to farmers by making the exemption's process more efficient, in practice something very different will happen. Even if implemented in the most practical and flexible manner possible, the fact remains that we are dealing with the Clean Water Act and its citizen enforcement provisions that encourage legal actions against individuals. Tens of thousands of dollars a day in penalties are possible under the Clean Water Act, hundreds of thousands of dollars or even far more in total. These citizen suits commonly hinge on technical, paper violations of the Clean Water Act, and persons seeking to stop a business activity can use technical and even imaginary violations as pretexts for lawsuits that can cripple a business. We have seen this very recently with one of my Maryland neighbors, a broiler farm. Fortunately, in this specific case the courts ruled in favor of the farmer, but at tremendous expense to the defendant which nearly resulted in bankruptcy. Legal liabilities such as these are always possible when dealing with the mandatory provisions of the Clean Water Act. In the case of the Interpretive Rule we see large potential for this same type of risk. This policy creates the real possibility that farmers engaged in numerous otherwise normal

farming activities will face far greater constraints than before to qualify those activities for the Section 404 exemptions. Producers will also face far greater federal regulatory liabilities, either through the policy's errant implementation by the Agencies in the field, or as the result of Clean Water Act citizen enforcement suits against farmers. For these reasons as well as others that are explained in this testimony we appreciate that you have called for this hearing and for allowing us the opportunity to provide you with our views and suggested actions that the Agencies could take to rectify these problems.

Corn Growers' Conservation Accomplishments

Corn growers are proud of their soil, water and nutrient conservation efforts and the substantial benefits of that work. Between 1980 and 2011 soil erosion was reduced by 67 percent per bushel of corn produced and by 43 percent per acre of corn planted.¹ Excess sediment lost to waterways from farmland is one of the nation's top water quality concerns, and corn producers have reduced these losses by 147 tons per year in 2011 relative to 1980. Phosphorous loss from farm land often is directly related to sediment losses, and corn growers' erosion reduction accomplishments translate directly into less phosphorus in runoff reaching surface waters.

Corn yields per acre over this period have gone up by more than 60 percent, about 60 bushels of corn per acre. Yet at the same time the rates at which the primary corn nutrients (nitrogen, phosphorous, and potassium) have been applied per acre have declined. U.S. corn farmers produced 6.64 billion bushels of corn in 1980 and used 3.2 pounds of primary nutrients per bushel. By 2010 we produced 12.45 billion bushels of corn, but used only 1.6 pounds of nutrients per bushel. This equates to an 87 percent increase in nutrient use efficiency and translates directly into far greater quantity of nutrients being removed from the land in the form of corn grain than was the case in 1980. The net effect of this is fewer nutrients in the soil profile that might move into surface water.²

These data clearly show the practical, extensive benefits of corn growers' commitment to practicing sound soil, water and nutrient conservation on their farms. Farmers recognize that in

¹ Field to Market (2012 V2). Environmental and Socioeconomic Indicators for Measuring Outcomes of On-Farm Agricultural Production in the United States: Second Report, (Version 2), December 2012. Available at: www.fieldtomarket.org. See pages 41-50 for the results for corn.

² See The Fertilizer Institute, U.S. Fertilizer Consumption Table and U.S. Consumption of Primary Plant Nutrients. Derived from USDA NASS data (2011). Available at: <http://www.tfi.org/statistics/fertilizer-use>.

important ways their partnerships with federal and state agencies like USDA's Natural Resources Conservation Service (NRCS) and the Farm Service Agency, as well as their local soil and water conservation districts, has helped make these accomplishments possible. But without question it is the farmers themselves that are the single most important factor that makes these good things happen. Farmers, working as innovative and diligent business people, are the foundation for agricultures' conservation accomplishments on private land.

These gains are possible because of farmers' overall success. This necessarily means carrying out a host of normal farm and land management activities that are not in and of themselves conservation practices. Conservation on farms is simply not possible without farmers having the flexibility and latitude to carry out all of these other critical farming practices without unnecessary impediments. This is the perspective that we bring to this Interpretive Rule. A successful farmer must have the latitude to carry out all of their normal farming practices alongside and in coordination with, but not always directly related to, their strong conservation activities.

Farming in the Chesapeake Bay

As a farmer in Maryland, I know what it means to be regulated. There are very few actions that I take as a farmer where I do not first consider how they relate to my state's regulatory requirements. As I work to maintain a profitable and productive farming operation, I view my farm as a system that must incorporate mandatory measures dealing with erosion control, buffer establishment and maintenance, and nutrient management. These requirements are simply realities for farmers in Maryland. We hope, given the level of effort and the cost they entail, that these practices are benefitting water quality in the Chesapeake Bay. Recent science has made it clear that there can be decades' long lag times between what we do on the land and nutrients entering the Bay. Those lags make it difficult to determine if water quality benefits are occurring; but what we do know is that regulatory requirements, implemented inflexibly and without due consideration to farming practicalities, add undue cost and burden and will lead to some farmers choosing to leaving the business.

Waters of the US Rulemaking

Our evaluation of the Interpretive Rule is taking place against a backdrop of great policy uncertainty. The proposed rule on what are CWA waters of the US ("WOTUS") makes it extremely challenging for us to determine with precision how the Interpretive Rule will apply to

us on the ground. Even when the WOTUS rulemaking is done, we will still face great uncertainty as in innumerable instances a formal determination from the Agencies will be necessary for us to know the drainage features, wet areas or other characteristic on our farms are jurisdictional waters to which this Interpretive Rule applies. We believe that the scope of the WOTUS rule will be quite broad, given its classification of all ephemeral streams, many ditches, and wet areas in the floodplain, as jurisdictional and possibly even isolated waters that lie further upland. We offer you these views with examples from my farm, applying our best judgment as to what might be WOTUS on the land I farm.

The Interpretive Rule

The Interpretive Rule establishes how the exemptions from Section 404 permitting will apply to certain agricultural practices carried out under NRCS conservation practice standards. Specific agricultural practices, identified by the EPA, the Army, and USDA-NRCS, that could include the discharge of dredged or fill material in a WOTUS are deemed to be exempt "normal farming" activities if the activities are part of an "established (i.e., ongoing) farming, silviculture, or ranching operation" and implemented in conformance with NRCS technical standards. The Agencies and USDA have entered into a Memorandum of Agreement (MOA) to develop and implement a process for identifying, reviewing and updating NRCS agricultural conservation practices and activities that could qualify for the exemption. To date some 56 practices have been identified for this purpose.

NCGA is concerned that the Rule will, in effect, require producers to follow USDA-NRCS conservation practice standards when they carry out certain activities even though many of the covered activities are long-used, normal farming practices commonly conducted for reasons unrelated to conservation and water quality goals. The current list of covered practices includes the following activities:

- Brush Management
- Herbaceous Weed control
- Prescribed Burning
- Stream Crossing
- Windbreak/Shelterbelt
- Fencing
- Fuel Break
- Field Border

- Firebreak
- Grassed Waterway
- Hedgerow Planting
- Hillside Ditch
- Land Clearing
- Mulching
- Tree Site Preparation
- Forage Management
- Forage Planting
- Prescribed Grazing
- Grazing Land Treatment
- Range Planting
- Tree/Shrub Establishment
- Windbreak/Shelterbelt Renovation
- Tree Pruning
- Forest Stand Improvement

These practices have always been, and will need to continue to be, regularly carried out on farms and ranches for purposes that are unrelated to “benefitting” WOTUS. Not that they are being carried out to the detriment of a WOTUS, but simply because building a fence, or managing brush or weeds, planting or trimming trees, planting and managing forage and all of these other farming activities are just what are required to manage and operate a farm. The question is, will the practical consequence of the Rule be, either through its interpretation in the field or as a result of legal actions, that farmers must follow closely the applicable NRCS technical standard anytime they are engaged in one of these activities?

If so, this is major cause for concern. Not only is this essentially a permit-like requirement for what should be an exempt activity, the everyday use of these standards is simply impractical. NRCS conservation practice standards for each of these practices are highly detailed, rely heavily on extensive planning involving highly specific processes, and they often cross reference each other. Not only is this unlawful policy relative to the stated purpose of exempting from permitting these normal activities, the possibilities for simple paper, technical violations are immense and lead directly to legal liabilities.

For example, the standard for “brush management” (# 314) is four pages long and requires the practitioner, among other things, to “(u)se applicable Ecological Site Description (ESD) State and Transition models, to develop specifications that are ecologically sound and defensible. Treatments must be congruent with dynamics of the ecological site(s) and keyed to state and plant community phases that have the potential and capability to support the desired plant community. If an ESD is not available, base specifications on the best approximation of the desired plant community composition, structure, and function.” Furthermore, this standard calls for plans and specifications to be clearly spelled out and recorded for each field being treated. The plans must contain at a minimum “Clearly stated goals and objectives...The pre-treatment cover or density of the target plant(s) and the planned post-treatment cover or density and desired efficacy...Maps, drawings, and/or narratives detailing or identifying areas to be treated, pattern of treatment (if applicable), and areas that will not be disturbed...A monitoring plan that identifies what should be measured (including timing and frequency) and that documents the changes in the plant community (compare with objectives) will be implemented.”³ Brush management on my farm is a normal practice that I carry out all year long. We scout our fields at least 4 to 6 times a year around field edges and hedgerows. I find it hard to conceive of what it would entail for me to have a written or recorded plan for each of the approximately 150 fields I have under cultivation.

If these activities are being carried out as part of a USDA NRCS conservation program where federal funds and assistance were being utilized to help the farmer achieve a specific conservation purpose in the field in question, meeting such a standard is sensible and good policy. NRCS would be committed to working with the farmer to these ends, and NRCS field staff would have the usual and customary flexibility to support the farmer through this process without worry of third party suits seeking to interrupt that work, often for reasons that are at best indirectly related to the natural resource issues at hand. But NCGA believes that requiring farmers to meet such standards as part of an everyday, farming operation when carrying out normal farming activity is unreasonable, bad policy, and unlawful.

In reviewing the other covered practices we find several that create this same kind of impossible compliance situation, or very well could do so. Grass waterways are a good example. Most landowners and farmers have grass waterways on their farms, and most of

³ See pages 1 and 2 at “USDA NRCS CONSERVATION PRACTICE STANDARD, BRUSH MANAGEMENT, CODE 314,” September 2009. For links to all of these standards see http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/null/?cid=nrcs143_026849.

these were developed and installed without any assistance from NRCS. The NRCS standard in this instance is three pages long, with very specific design criteria and engineering standards, planted species requirements, all to be carried out under a detailed written plan, with limitations on how the waterway can be used and with detailed operations and maintenance requirements. Portions of this standard are good practice and frankly, common sense. However, if a farmer must now develop a plan for all of these and meet the detailed NRCS requirements, or face possible litigation under the CWA, the expense in time and money will be enormous and prohibitive.

The same is true for the herbaceous weed control standard. This section contains a great deal of helpful, practical guidance, but it also contains a requirement that a farmer prepare a plan for each field. On a farm such as mine that consists of over 150 fields, this requirement becomes incredibly burdensome. Perhaps not all of these fields are WOTUS, but almost all of them have surface drainage systems with a bed, bank and some kind of channel. Other conservation practice standards have similar problems. In the case of obstruction removal, something as simple as removing sticks or vegetation from a drainage feature could easily become a long and detailed process. Under this new system, what would otherwise be a 10 minute job would require hours of paperwork.

One of the primary conclusions from these observations is that the NRCS conservation practice standards must not and cannot be used for purposes for which they were not designed. They are standards designed to be used when working cooperatively with producers on a voluntary basis. They allow NRCS staff to use flexibility in the field to adjust the application of the standard to meet circumstances, provided the goals and objectives of the standard are met. They were not designed for, nor can they be easily adapted to, use as regulatory, mandatory standards that can be used practically in the field while also providing the legal protections needed under a statute like the Clean Water Act. Any effort to use them in this manner will place the producer and the NRCS field personnel in a highly untenable situation.

The Rule language states it is being applied in those instances where the conservation practice is being carried out “for the purposes of benefitting” WOTUS. Presumably this means that farmers carrying out such activities **not** for the purpose of benefitting a WOTUS but simply as part of their normal farming operation need not meet the NRCS technical standard to qualify for the exemption. But the referenced MOA that the Agencies and USDA have entered into in accordance with this Rule gives the clear, stated indication that the Agencies expect farmers to meet these standards anytime they are carrying out these activities in a WOTUS.

For example, the MOA states that “(D)ischarges in waters of the U.S. are exempt only when they are conducted in accordance with NRCS practice standards” and that (W)here NRCS is not providing technical assistance, the landowner has the responsibility to ensure that implementation of the conservation practice is in accordance with the applicable NRCS conservation practice standard.” Furthermore, the MOA states that “(E)ven where NRCS is not providing technical assistance, the agency plays an important role in helping to respond to issues that may arise regarding project specific conformance with conservation practice standards.”⁴ The implication is clear; farmers carrying out these activities in WOTUS must conform to the NRCS practice standard or be subject to CWA enforcement.

In innumerable instances, when farmers are carrying out normal farming activities like brush management they are not doing it for conservation purposes. They will not be working with NRCS on a conservation practice to benefit a WOTUS, nor will they be doing this on their own as a conservation practice. It is simply a normal farming activity. In those instances, farmers must not be required to meet the NRCS conservation practice standard or, in reasonably not doing so, be subject to CWA 404 permitting or enforcement. To require adherence to the conservation practice standard in such instances is well outside anything contemplated by Congress when the Section 404(f) exemption was created.

Conclusion

In summary, the reasons for our serious concerns are as follows:

1. The Rule encompasses a host of practices with a long history of being an ordinary part of a normal, ongoing farming operation and that are sensible and absolutely lawful for farmers to use for reasons not related to conservation and water quality goals;
2. The Rule will result in producers possibly being subject to CWA enforcement anytime they do not follow NRCS standards when they carry out in a WOTUS these specific practices as long-used, normal farming activities commonly conducted for reasons unrelated to conservation and water quality goals;

⁴ See pages 3 and 4 of “Memorandum of Understanding Among the U.S. Department of Agriculture, the U.S. Environmental Protection Agency, and the U.S. Department of the Army, Concerning Implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards

3. The Rule creates the logical policy presumption that any other normal farming activity must be conducted in conformance to an NRCS practice standard, if an applicable one exists, when carried out in a WOTUS;
4. In effect, the Rule will mean that producers, in order to be certain they are not operating in violation of the CWA and liable for the resulting and considerable penalties, must conduct these practices under some form of NRCS supervision or accountability, and with a complete and accurate documentary record that could withstand a serious legal challenge; and
5. In light of the above, it will cause considerable friction between farmers and USDA-NRCS, given the new mandatory regulatory role USDA-NRCS would have in overseeing farmer practices, and the fact that USDA-NRCS conservation practice standards were devised for use in a voluntary, farmer-driven context and are ill-suited for use as permit terms and conditions.

We believe that these concerns are serious and important enough to require that this Interpretive Rule be withdrawn. There may be some soil and water conservation practices which are unique enough and intended solely for conservation benefits for which this policy might be suited. Should this be possible, we strongly urge the Agencies only to pursue that policy through normal Administrative Procedures Act processes involving formal notice and comment so as to afford farmers the opportunity to protect their interests.

In withdrawing the rule, it is imperative that it be made absolutely clear that this policy, in its original form, was meant to address only those circumstances where a practice was being adopted for conservation purposes to achieve specific water quality objectives. That notice of withdrawal must also specify that such normal farming activities, when carried out as part of an ongoing operation, will qualify for the Section 404(f) exemption.

Once again, we thank you for the opportunity to provide you with this testimony and for your decision to hold this hearing so that these important policy matters can be thoroughly reviewed and discussed. Corn growers will continue their efforts to conserve soil, water and nutrient resources and protect water quality, and we look forward to working with you and the Administration to support that good work.