



July 7, 2014

U.S. Environmental Protection Agency  
Office of Environmental Information Docket  
1200 Pennsylvania Avenue NW.  
Washington, DC 20460

RE: Comments on the Interpretive Rule regarding the exemption from permitting under Section 404(f)(1)(A) of the Clean Water Act when certain agricultural conservation practices are used, **Docket Identification Number EPA-HQ-OW-2013-0820 9912-30-OW**

Dear Sir or Madam:

The National Corn Growers Association (NCGA) offers below comments on the final Interpretive Rule (IR), effective on March 25, 2014, addressing matters related to the exemption from permitting under Section 404(f)(1)(A) of the Clean Water Act (CWA). The exemption applies where certain agricultural conservation practices are used under certain circumstances. NCGA represents approximately 41,000 dues-paying corn growers and the interests of more than 300,000 farmers who contribute through corn check-off programs in their states. Thank you for this opportunity to submit these comments for your consideration.

NCGA appreciates the efforts of the US Environmental Protection Agency and the US Army Corps of Engineers (Agencies), working in cooperation with the US Department of Agriculture (USDA), to develop this rule. The concerns we offer below does not diminish the importance of your efforts to recognize the value of farmers' conservation work in the context of the CWA's Section 404 program, or your efforts to give farmers more certainty as they work with USDA on conservation matters.

Our concerns, though, are quite serious. For the reasons below, we are very worried that this IR, in practice, will require farmers to take certain actions, and if these actions are not taken or if they are taken in the wrong manner those farmers will face significant legal liabilities. We believe that these concerns are serious and important enough to require that the IR be withdrawn. If, after consultation with the farming community and other stakeholders it is determined a rule is in fact needed, such action must be taken as a proposal under normal Administrative Procedures Act notice and comment to afford farmers that processes' opportunities to protect their interests.

In addition, we do not believe it possible to fairly and properly evaluate the practical implications of this IR without a clear notion of what in fact is a water of the US (WOTUS) under the CWA. Given that the lawful definition of a WOTUS is currently under development we are forced into a considerable degree of speculation as to the IR's practical effects in light of the current list of covered conservation practices. For example, we believe that the details concerning normal farming activities or conservation work carried out in the context of an intermittent stream and its riparian zone will in certain instances be considerably different than those for when the work is carried out in an ephemeral drainage feature in an upland area in a farm field. We are profoundly concerned that the proposed WOTUS rule as it is currently drafted encompasses both of these features as WOTUS, and we and many others will object as a matter of law and policy to such a definition in comments submitted on the proposed WOTUS rule.

While many of the concerns and comments we offer below concerning the IR will be equally applicable under both the jurisdictional situations outlined above, others may not. We do not think it wise or proper to have to offer views on this IR while such major policy matters are yet undecided.

As a result, we strongly urge the Agencies hold off on any notice and comment rulemaking on this policy pending the completion of the WOTUS rulemaking effort. At that point these policy matters can be properly addressed.

The reasons for our serious concerns with the IR can be summarized as follows:

1. The IR 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 IR will result in producers possibly being subject to agency or citizen CWA enforcement actions according to the bright line specifications laid out in the conservation practice standard if they conduct one of the listed activities in a WOTUS, even though the activity is a long-used, normal farming practice commonly conducted for reasons unrelated to conservation and water quality goals. These enforcement actions or citizen suit actions can be taken even if the producer has attempted to scrupulously follow the standards as technical variances from the standard are made Clean Water Act violations and would not qualify for the normal farming exemptions under Section 404;
3. The IR creates the logical policy presumption that any other normal farming activity must be conducted in conformance with an NRCS practice standard, if an applicable one exists, when carried out in a WOTUS;
4. In effect, the IR 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.

Before we address these concerns and our substantive suggestions we first discuss corn growers' conservation efforts and accomplishments.

### **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.<sup>1</sup> 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 increase. Yet at the same time, the rates at which the primary corn nutrients (nitrogen, phosphorous, and potassium) have been applied **per acre** have declined. We 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.<sup>2</sup>

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 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

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<sup>1</sup> 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](http://www.fieldtomarket.org). See pages 41-50 for the results for corn.

<sup>2</sup> 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>.

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 IR. 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.

### **Detailed Comments**

NCGA is concerned that the IR will, in effect, require producers to follow USDA-NRCS conservation practice standards when they carry out certain activities in a WOTUS 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 IR and the supporting documentation are structured in such a way to lead us to this conclusion.

The IR addresses farmers' use of certain NRCS conservation practices (jointly identified through a memorandum of understanding (MOU) among the Agencies and NRCS) "that could include the discharge of dredged or fill material in a waters of the U.S." and that are being carried out "for the purposes of benefitting those waters." The IR states that these activities qualify for the Section 404 "normal farming exemption" if the practices are carried out in conformance with the applicable NRCS technical standards.

The confusion starts because a number of the covered practices agreed to in the referenced MOU process are straightforward and ordinary, normal farming work. For example, the list of 56 conservation practices that the referenced MOU process has identified includes the following:

- 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 IR 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?

Based on the plain language of the IR and the MOU it is clear that the answer to this question is yes, and this is cause for major concerns to corn growers. 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 things, and they 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” 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.”<sup>3</sup>

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.

The IR 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 MOU that the Agencies and NRCS have entered into in accordance with this IR 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 MOU 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 MOU 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.”<sup>4</sup> 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

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<sup>3</sup> 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](http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/null/?cid=nrcs143_026849).

<sup>4</sup> 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

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.

If it the Agencies intention is that farmers, when working in WOTUS, must always carry out the listed activities in conformance with the NRCS standard or be subject to Section 404 permitting or enforcement, then that policy must be rejected. Even if that was not the intent, we believe the language of the IR will invite this interpretation and spawn a host of legal challenges to farmers carrying out what should be unquestionably a normal farming activity. As a result, we urge the Agencies to withdraw the IR, and work with the regulated community and stakeholders to develop an alternative approach, should one even be needed, and promulgate that through a formal notice and comment rulemaking.

In withdrawing the IR, it is imperative that it be made absolutely clear that this policy was in its original form as it was stated in the IR 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, qualify for the Section 404(f) exemption.

Once again, thank you for the opportunity to provide you with these comments. We look forward to further engagement with you on these matters to support corn growers' ongoing substantial and successful efforts to conserve soil, water and nutrient resources and protect water quality.

Sincerely,



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