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Re: EPA–HQ–OW–2013–0820

Secretary Darcy, Secretary Bonnie, and Administrator Stoner:

The undersigned organizations submit these comments on the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) "Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices", 79 Fed. Reg. 22276 (April 21, 2014). These comments address the *"Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A)"* (Interpretive Rule) and the associated memorandum of understanding, fact sheets, and questions and answers posted on EPA's waters of the U.S. website. http://www2.epa.gov/uswaters

We read the Interpretive Rule and associated materials to reflect a view of the world where Clean Water Act jurisdiction is greatly expanded and NRCS conservation measures have become a yardstick for measuring the scope of the 404(f) permit exemptions for normal farming, silviculture, or ranching activity. We also read the rule to provide little or no protection to conservation practices as a result of the recapture provision of section 404(f)(2). For these reasons, we are deeply concerned and believe that the Interpretive Rule is in fact a legislative rule that must go through notice and comment rulemaking.

I. De facto Expansion of Regulatory Authority.

EPA argues that the Interpretive Rule provides a safe harbor for agricultural producers undertaking conservation measures in compliance with NRCS standards and is neither regulatory nor binding. However, that is not what is communicated in the rule itself or in the information provided on EPA's website and it is not how it is being interpreted by EPA Regions and Corps Districts.

A. The Interpretive Rule is binding.

The Interpretive Rule states that compliance with NRCS standards is required:

> *To qualify for this exemption, the activities must be part of an "established (i.e., ongoing) farming, silviculture, or ranching operation," consistent with the statute and regulations. The activities must also be implemented in conformance with NRCS technical standards. So long as these activities are implemented in conformance with NRCS technical standards, there is no need for a determination of whether the discharges associated with these activities are in "waters of the United States."*

The Fact Sheet entitled "Clean Water Act Exclusions and Exemptions Continue for Agriculture" (http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_ag_exclusions_exemptions.pdf) also makes it clear that the use of NRCS practices is binding. According to the fact sheet:

> *To qualify for this exemption, the activities must be part of an established farming, forestry, or ranching operation, consistent with the statute and regulations and be implemented in conformance with Natural Resource Conservation Service technical standards.*

Similarly, the agency memorandum of understanding (MOU) asserts that: "*Discharges in waters of the U.S. are exempt only when they are conducted in accordance with NRCS practice standards.*" MOU at 3. (http://www2.epa.gov/sites/production/files/2014-03/documents/interagency_mou_404f_ir_signed.pdf)

These statements communicate three messages: (1) comply with NRCS standards and we won't question whether your activities are in a water of the U.S., (2) if you don't comply with NRCS standards, we will question whether your activity is resulting in a discharge to a water of the U.S., and (3) if you can't demonstrate compliance with the NRCS standards we could find that you are in violation of the Clean Water Act.

Thus, the practical effect of the Interpretive Rule is to require compliance with NRCS standards when undertaking any of the listed activities (whether for conservation purposes or for non-conservation farming or ranching purposes) if it is possible that federal officials, exercising their best professional judgment, might consider the activity to take place in a water of the U.S.

B. The Interpretive Rule has regulatory effect.

Without any discussion, the Interpretive Rule restricts the activities that are covered by the section 404(f)(1) exemption.

First, the Interpretive Rule states that some, but not all, conservation practices are exempt from permitting under section 404(f)(1)(A). Section 404(f)(1)(A) exempts "upland soil and water conservation practices." Nowhere does the statutory text limit the exemption to those practices identified by NRCS in its duties under the Food Security Act. Yet, without discussion, the agencies are reading into the statutory language a limitation that only NRCS-identified practices are covered. This is inconsistent with thirty years of agency interpretations of section 404(f)(1)(A) in Title 33 and 40 of the Code of Federal Regulations, where the agencies never restricted the types of conservation practices covered by exemption. Worse, the agencies are reading in a further limitation, by only including certain listed NRCS practices which "are designed to protect and enhance the waters of the U.S." and which are "designed and implemented to protect and enhance water quality." By limiting the exemption in this way, again without any justification, the agencies are implying that NRCS conservation practices omitted from the list are not covered by section 404(f)(1)(A). Since the statute contains no such limitations, the agencies are not interpreting the statute, but rewriting it. This is improper, and will discourage farmers from implementing the omitted conservation practices because they reasonably could believe that they now need Clean Water Act permits.

Second, by identifying the 56 listed practices as "additional" the Interpretive Rule suggests that any farming or ranching activity other than those specifically listed in Section 404(f)(1) or specifically identified by the agencies in an interpretive rule are not currently viewed as a "normal" farming or ranching activity. We dispute this interpretation of the statute. To avoid subjecting farmers and ranchers to enforcement action for non-listed activities, the agencies must clarify that activities not specifically listed in Section 404(f)(1) or in the Interpretive Rule may nevertheless be normal farming or ranching activities. Alternatively, if it is the agencies' intent that non-listed activities should be viewed as non-exempt, that interpretation must be adopted through notice and comment rulemaking, not a so-called interpretive rule.

C. The Interpretive Rule assumes expanded Clean Water Act jurisdiction.

The agencies selected the 56 conservation practices listed in the Interpretive Rule based on their belief that these practices may take place in waters of the U.S. (http://www2.epa.gov/uswaters/questions-and-answers-march-2014-interpretive-rule-and-applicability-clean-water-act) However, in many cases an activity, such as fencing or grassed waterways in a flood plain or riparian area, would not take place in jurisdictional waters but for the proposed expansion of the definition of waters of the U.S.

The proposed expansion of the definition of waters of the U.S. relies extensively on the best professional judgment of agency staff to identify such waters. See 79 Fed. Reg. 22,188, 22,208 (Apr. 21, 2014) ("Application of the terms 'riparian area,' 'floodplain,' and 'hydrologic

connection' would be based in part on best professional judgment and experience applied to the definitions contained in this rule."). If that proposal is finalized, we expect the Interpretive Rule will create a presumption in the minds of agency staff (the same ones whose "best professional judgment" we are relying on) that the areas where conservation activities take place are "waters of the U.S."

The Interpretive Rule does not assert such a presumption. But, it does assert that: *"So long as these activities are implemented in conformance with NRCS technical standards, there is no need for a determination of whether the discharges associated with these activities are in 'waters of the United States.*'" Thus, the Interpretive Rule itself creates a separate status for the 56 listed conservation measures. We are concerned that, as a result, EPA Regions and Corps Districts will start with the presumption that all other conservation measures and normal farming and ranching activities are taking place in waters of the U.S.

Please remember that we have seen this type of expansion before, in the context of drainage ditches. In the preamble to its 1986 regulation, the Corps noted that upland ditches were "generally" not jurisdictional. 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). In 2000, in a preamble to a nationwide permit rule, the Corps removed the presumption that upland ditches are not jurisdictional by saying that: "Drainage ditches constructed in uplands that connect two waters of the United States may be considered waters of the United States if those ditches constitute a surface water connection between those two waters of the United States." 65 Fed. Reg. 12,818, 12,823-24 (Mar. 9, 2000). In 2007, the Corps issued nationwide permit 46 for discharges into upland ditches. The existence of that nationwide permit created the presumption that every upland ditch could be a water of the U.S. and landowners are told to simply apply for a permit. We expect the same result from the so-called safe harbor of the Interpretive Rule.

II. The Interpretive Rule Provides Little or No Protection to Conservation Measures Due to Section 404(f)(2).

In both the Interpretive Rule and the accompanying MOU, the agencies note that they are not changing their interpretation of the Clean Water Act section 404(f).

Under section 404(f)(1) no permit for the discharge of dredge or fill material into waters of the U.S. is needed for normal farming, silviculture, and ranching activities. However, section 404(f)(2) "recaptures" regulatory authority over these activities if their purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such water reduced. The agencies have asserted in the past that the "recapture" provision applies if there is any change in hydrology because they view a change in hydrology as a change in the use of a "water of the U.S."[1] Many conservation practices are designed to control the movement of water

[1] United States Environmental Protection Agency & United States Dep't of the Army, Memorandum: Clean Water Act Section 404 Regulatory Program and Agricultural Activities (May 3, 1990), (http://water.epa.gov/lawsregs/guidance/wetlands/cwaag.cfm). Some courts have upheld that view. United States v. Akers, 785 F.2d 814, 820 (9th Cir.), cert. denied, 479 U.S. 828 (1986)("Provided the structure has the effect of keeping water from [a water of the U.S.], its construction requires a permit").

and thus could be considered changes in hydrology. If these practices are carried out on land that is now considered a water of the U.S. and the practices involve the movement of dirt (such that they may be considered dredging or filling) then the agencies may assert that these conservation practices would not be exempt under the agencies' current interpretation of section 404(f)(2). For this reason, to protect farmers and ranchers from enforcement related to those conservation practices, even if they are listed and conducted in conformance with NRCS standards, the agencies must modify their previous interpretation of the "recapture" provision.

III. The Risk of Burdensome Litigation is Real.

It is apparent from dialogue with agency officials that they do not appreciate the real and significant risk of litigation that is being created by an expanded definition of waters of the U.S. coupled with the agencies' narrow interpretation of the 404(f)(1) exemptions. They appear to forget the many legal actions brought by federal agencies and citizens groups that have challenged the use of such exemptions. Unfortunately, such challenges are frequent.[2]

Fighting such challenges is very costly and beyond the resources of most farmers and ranchers. And, even those who fight and prevail will still lose significant time and money. For example, in *U.S. v. Sargent County Water Resource District*, 876 F. Supp. 1081 (D. N.D. 1992) (Sargent I) the United States challenged the maintenance of a county drainage ditch alleging that side casting into three sloughs ran afoul of the 404(f)(2) recapture provision. The United States based its jurisdiction on use of the sloughs by migratory birds, a claim the court upheld.[3] The United States also claimed that the sloughs were adjacent waters, a claim that was rejected by the court:

> Upon a finding of adjacency, that distinction only makes sense if all the farmland between the Wild Rice River and the farthest slough, Bruns, is considered within the limits of non-tidal waters jurisdiction. Most of western Sargent County would suddenly become the "Wild Rice River Wetlands Complex." This is an absurd result and clearly not contemplated under the regulatory scheme. Big, Bruns, and Meszarous Sloughs are not "adjacent" wetlands." 876 F. Supp. at 1087.

Unfortunately, under the proposed definition of waters of the U.S., the sloughs at issue in Sargent I would likely be considered adjacent water, and therefore a water of the U.S., making the court's "absurd result" a reality.

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[2] There have been many cases involving 404(f). Borden Ranch P'ship v. United States Army Corps of Eng'rs, 261 F.3d 810, 815 (9th Cir. 2001) (addressing change from one agricultural use to another and impairment of flow due to plowing), aff'd, 537 U.S. 99 (2002); United States v. Brace, 41 F.3d 117, 129 (3d Cir. 1994) (burden is on person claiming the exemption); United States v. Akers, 785 F.2d 814, 819 (9th Cir.), cert. denied, 479 U.S. 828 (1986); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 926 (5th Cir. 1983); United States v. Cumberland Farms, 647 F. Supp. 1166, 1176 (D. Mass. 1986), aff'd, 826 F.2d 1151 (1st Cir. 1987), cert. denied, 484 U.S. 1061 (1988).

[3] Following SWANCC, this basis for jurisdiction is no longer available. 531 U.S. 159 (2001).

In Sargent II, the United States claimed that the County had the burden of proof to show that the 404(f)(1) exemption was applicable, and therefore the United States was entitled to summary judgment. After several years of litigation, the court sided with the County and found the work to be exempt. But, the court also noted that the case resulted in considerable expense and chided the United States for bringing the case.[4] Farmers and ranchers fear similar prosecutorial excess.

IV. **The Agencies Cannot Address These Issues In an Interpretive Rule**.

The Interpretive Rule is a regulation that must be promulgated under the APA because it binds farmers and ranchers with new, specific legal obligations under the Clean Water Act. It modifies existing regulations interpreting the statutory term "normal farming, ranching and silviculture." 40 C.F.R. § 232.3(c)(1)(ii)(A); 33 C.F.R. § 323.4(a)(1)(ii). The agencies purport to continue existing statutory and regulatory exemptions, but instead they narrow the 404(f)(1)(A) exemption by identifying 56 activities that will be exempt only if they are conducted consistent with NRCS conservation practice standards and as part of an established (i.e., ongoing) farming operation. Under the Interpretive Rule, previously voluntary NRCS conservation standards are made fully enforceable under the Clean Water Act if they are carried out in locations where jurisdictional waters may be present. The legal obligations to comply with the Interpretive Rule fall squarely on farmers and ranchers and not the agencies.

If the agencies wish to encourage farmers and ranchers to continue conservation practices, they should forgo a sweeping expansion of Clean Water Act jurisdiction and they should promulgate a rule that reasonably interprets the section 404(f)(1) exemptions and the section 404(f)(2) recapture provision to provide for meaningful protection for these activities.

IV. Conclusion.

For all these reasons, we urge the agencies to withdraw the Interpretive Rule immediately and avoid the problem that the Interpretive Rule is attempting to fix by forgoing changes to Clean Water Act jurisdiction that would challenge long-standing farm practices and increase legal jeopardy.

[4] "In the court's view, this case was brought by the government as an opportunity to establish precedent, rather than to resolve a true controversy. That is wrong." U.S. v. Sargent County Water Resource District, 876 F. Supp. 1090, 1103 (D. N.D. 1994).

Sincerely,

American Farm Bureau Federation
National Pork Producers Council
Agricultural Retailers Association
Agri-Mark Dairy Cooperative
Alabama Pork Producers Association
American Horse Council
American Meat Institute
American Sugar Cane League
American Sugarbeet Growers Association
Arizona Pork Council
Arkansas Pork Producers Association
Colorado Pork Producers Council
CropLife America
Dairy Producers of New Mexico
Dairy Producers of Utah
Delaware/Maryland Agribusiness Association
Earthmoving Contractors Association of Texas
Florida Sugar Cane League
Georgia Pork Producers Association
Idaho Dairymen's Association
Illinois Fertilizer and Chemical Association
Illinois Pork Producers Association
Independent Cattlemen's Association of Texas
Indiana Pork Producers Association
Indiana State Poultry Association
Iowa Turkey Federation
Kansas Pork Association
Kentucky Pork Producers Association
Maryland Pork Producers Association
Michigan Pork Producers Association
Mid America Croplife Association
Minnesota Agri-Growth Council
Minnesota Pork Producers Association
Mississippi Pork Producers Association
Missouri Agribusiness Association
Missouri Cattlemen's Association
Missouri Corn Growers Association
Missouri Dairy Association
Missouri Pork Association
Missouri Soybean Association
Montana Pork Producers Council
National Association of State Departments of Agriculture
National Cattlemen's Beef Association
National Chicken Council
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Turkey Federation
Nebraska Pork Producers Association, Inc.
North Dakota Pork Council
North Carolina Pork Producers
Northeast Dairy Farmers Cooperatives
Ohio AgriBusiness Association
Ohio Corn & Wheat Growers Association
Ohio Pork Producers Council
Oklahoma Pork Council
Plains Cotton Growers, Inc.
Public Lands Council
Riverside & Landowners Protection Coalition
South Carolina Pork Board
South Dakota Agri-Business Association
South Dakota Pork Producers Council
South East Dairy Farmers Association
St. Albans Cooperative Creamery, Inc.
Tennessee Pork Producers Association
Texas Association of Dairymen
Texas Broiler Council
Texas Egg Council
Texas Forestry Association
Texas Grain and Feed Association
Texas Pork Producers Association
Texas Poultry Federation
Texas Rice Producers Legislative Group
Texas Sheep and Goat Raisers Association
Texas Turkey Federation
The Poultry Federation
United Egg Producers
Upstate Niagara Cooperative, Inc.
U.S. Cattlemen's Association
U. S. Poultry & Egg Association
USA Rice Federation
Utah Pork Producers
Virginia Agribusiness Council
Virginia State Dairymen's Association
Virginia Pork Industry Association
Virginia Poultry Federation
Washington State Dairy Federation
Western United Dairymen
Wisconsin Pork Producers Association
Wyoming Ag-Business Association
Wyoming Crop Improvement Association
Wyoming Wheat Growers Association