



National Association of Conservation Districts

June 13, 2014

Ms. Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460-0001

Ms. Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
U.S. Department of the Army
441 G Street, N.W.
Washington, DC 20314-1000

Docket No. EPA-HQ-OW-2013-0820

Re: Comments on the Interpretive Rule Regarding Applicability of the Exemption from Permitting under Section 404(f)(1)(A) of the Clean Water Act.

Dear Administrator McCarthy and Assistant Secretary Darcy:

The National Association of Conservation Districts (NACD) represents America's 3,000 conservation districts working with millions of landowners and operators to help them manage and protect land and water resources on private and public lands in the United States. Established under state law, conservation districts share a single mission: to work cooperatively with federal, state and other local resource management agencies and private sector interests to provide technical, financial, and other assistance to help landowners and operators apply conservation to the landscape.

For more than 75 years, conservation districts have been leaders in locally-led efforts to ensure a clean and sustainable water supply for the nation. By engaging private landowners, conservation districts proactively put voluntary practices on the ground that benefit water quality and mitigate the effects of climate events, including drought and flooding.¹ Conservation districts provide leadership in water quality assessment, planning and implementation. With earned trust and a proven ability to form partnerships at the local level, conservation districts are well positioned to play a key role in addressing water quality challenges in local communities.

NACD acknowledges the successes of the Clean Water Act (CWA) over its 40- year existence. Clean water is critical for farmers, ranchers, foresters, and other landowners across the urban and rural landscapes that conservation districts serve. We appreciate the Environmental Protection Agency's

¹ Conservation practices also minimize major weather events, for example keeping snow where it falls instead of drifting on roadways causing human danger as well as promoting artificial melting practices that greatly impact water quality and magnify flooding.

(EPA) acknowledgement of the value of voluntary application of conservation practices, as stated in its recent guidance outlined in our comments.

As you know, the United States Department of Agriculture (USDA) joined EPA and USACE in signing an MOU² further explaining the Interpretive Rule (IR)³ clarifying the applicability of the exemption from CWA Section 404 permitting provided by CWA Section 404(f)(1)(A) for “discharges to waters of the United States (WOTUS) associated with certain conservation practice standards where they are undertaken as part of an established farming operation.”⁴ Since then, NACD has appreciated the release of additional guidance.⁵ It would be our request that the clarifying Question and Answers document be incorporated by reference as part of the IR.

The role of the federal government in water resources policy should be one of cooperation, allowing states and citizens to provide their input early and throughout the planning process. On behalf of the nation’s 3,000 conservation districts, we acknowledge that an IR is substantive, nonlegislative rulemaking,⁶ and we thank you for offering a comment period even though it is not required by the Administrative Procedure Act (APA) and although this IR became effective on April 3, 2014.⁷ We also sincerely appreciate the webinar you presented to our membership on May 7, 2014, where more than 40 states participated in the live discussion.

NACD acknowledges that this IR created some concern and confusion across the country; therefore we hope some clarifying thoughts expressed here may be used to demonstrate the scope of the IR. If we are incorrect in our analysis, then we think the APA requires formal rulemaking on this IR.

1. This IR is not meant to put NRCS in a compliance or regulatory role.

We recognize the nature of the IR as a living document, and we look forward to remaining engaged as it is reviewed at least annually.⁸ Since 1991, it has been the policy of NACD to offer assistance to the USACE and EPA, in consultation with the USDA Natural Resources Conservation Service (NRCS), to develop and distribute a single guidance document on handling agricultural activities and the 404 permit program. Almost 25 years later, we are interested to see guidance and offer our ability to provide input moving forward during the revision process. As part of that process, NRCS has sole responsibility for developing and revising its conservation practice standards through its existing science-based and public process.⁹

We appreciate that “[n]othing in the IR changes the roles or responsibilities of any of the three agencies”¹⁰ and do not view this IR in any way as a mechanism to change the current status quo nor the role of states in CWA jurisdiction. As a conservation organization promoting voluntary stewardship, we think it is critical that NRCS not act as nor be perceived as remotely regulatory in the agricultural community.

It is our understanding that nothing in the IR suggests that NRCS will be placed in a regulatory role, however the language in the MOU states “Landowners not relying on NRCS for technical assistance have the responsibility to ensure that implementation of the conservation practice is in accordance

² “MOU among USDA, EPA, and USACE Concerning Implementation of Section 404(f)(1)(A) Exemption of Certain Agricultural Conservation Practice Standards” (March 25, 2014) http://www2.epa.gov/sites/production/files/2014-03/documents/interagency_mou_404f_ir_signed.pdf.

³ Docket Number: EPA-HQ-OW-2013-0820; 9908-97-OW <http://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07131.pdf>.

⁴ “EPA and USACE Interpretive Rule Regarding the Applicability of CWA Section 404(f)(1)(A)” (March 25, 2014)

http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_section404f_interpretive_rule.pdf.

⁵ “Questions and Answers (Q&A), The March 2014 Interpretive Rule and the Applicability of the CWA Section 404(f)(1)(A)” (April 22, 2014).

⁶ Anthony, Robert A. *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like-Should Federal Agencies Use Them to Bind the Public?* *Duke Law Review*, Vol. 41 No. 6 (1992). <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3188&context=dli>.

⁷ Q&A page 2.

⁸ Q&A Page 3 citing “At least annually NRCS, USACE, and EPA will coordinate and meet to evaluate and determine whether to make any changes to the list of exempt conservation practices.”

⁹ *Id.*

¹⁰ *Id.* at 1.

with applicable NRCS conservation practice standard. It is important to emphasize that practices are exempt only where they meet conservation practice standards.”¹¹ The MOU goes on to read, “Even 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.”¹² We have concerns about the way in which NRCS will be required to respond to questions from the USACE, EPA, or the courts. For example, could the rule result in EPA or USACE staff making determinations in the field (or on paper) about what does or does not meet NRCS technical standards? Could the rule result in regulatory agency requests to NRCS to review permits? Or might the rule draw regulators’ or stakeholders’ insistence for regulatory agency access or public access to producers’ conservation plans as a regulatory accountability measure – a serious impediment to voluntary conservation program participation.

This area of concern is a central issue that relies heavily on the history of NRCS as an incentive-based, working lands, voluntary program conservation agency. NRCS priorities have been historically driven by local resource priorities and in more recent years by priorities established through Farm Bill conservation program implementation. There has been a shortage of NRCS field technical personnel for some time, especially for non-farm bill related conservation projects and activities. Conservation efforts will be hurt if an already stretched agency takes on additional paperwork and spot checking because of this rule, and producers will be skeptical of working with NRCS in the future if they view them as overseers rather than implementers of conservation program delivery.

2. The list of NRCS conservation practice standards is not exhaustive of conservation practices that are exempt from Section 404(f)(1)(A) permitting. This list falls under the statute but is not the complete definition of “normal farming, silviculture, or ranching” activities.

The IR sets out specific NRCS conservation practice standards that are exempt from permitting under Section 404(f)(1)(A).¹³ “Upland soil and water conservation practices” are covered under the statute, as are “normal farming, ranching, and silvicultural activities.”¹⁴ In addition to the umbrella definition of “normal...” under which we currently operate, the IR specifically exempts 56 NRCS conservation practices¹⁵ where they are being implemented in WOTUS for water quality purposes and are associated with an established (i.e. ongoing) farming, ranching, or silviculture operation.¹⁶ These 56 practices are not exhaustive of exemptions in WOTUS, and references to NRCS practice standards should not be limiting. For example, we think commonly used NRCS practice standards that should also be included are: 340-cover crops; 378-pond; 410-grade stabilization structure; 600-terrace; 638-water and sediment control basin.

We appreciate your acknowledgement of the water quality benefits resulting from voluntary conservation practices¹⁷ as well as the inclusion of this exempted list. We find it important to highlight that this list is in addition to other activities that fall under the statutory exemption of

¹¹ MOU Page 3.

¹² MOU Page 4.

¹³ IR.

¹⁴ CWA Section 404(f)(1)(a) and noting Q&A Page 2 clarifies “upland soil and water conservation practices” as identified as “normal” but the statute states “normal...” or “upland...” and Snider, Annie “Obama admin’s bid for regulatory ‘certainty’ baffles farm interests” *Environment & Energy Publishing*, noting that Patty Lawrence, Chief of Staff at NRCS and friend to NACD, said “Conservation practices generally used in upland areas are not addressed under the interpretive rule because they are covered under the existing exemption for normal farming, ranching and silvicultural activities and upland soil and water conservation practices” (April 4, 2014).

¹⁵ List of exempted conservation practices (March 24, 2014)http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_404_exempt.pdf.

¹⁶ IR and Q&A Page 2 and noting that “established” will likely be an issue in our comments of the Proposed Rule.

¹⁷ “Exemptions to Permit Requirements” <http://water.epa.gov/type/wetlands/outreach/fact20.cfm> (March 6, 2014) and Q&A, Page 1, EPA and USACE “recognize[e] that agricultural conservation activities implemented consistent with [NRCS] conservation practice standards provide many benefits for water quality.”

“normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.”¹⁸

From our comments on the EPA Report, “*Connectivity of Streams and Wetlands to Downstream Waters: a Review and Synthesis of the Scientific Evidence*” (Connectivity Report), we use the § 319 NPS Program to increase the utilization of agricultural Best Management Practices (BMPs) such as buffer strips, conservation tillage, and nutrient management, as well as to implement low impact development and stormwater management practices to protect urban water quality. BMPs, in certain instances, will be in addition to the list of conservation practice standards. We suggested the IR delete reference to “qualifying” for exemption status through conforming to listed NRCS practices. EPA itself states many broad and clearly exempted areas that do not necessarily correlate with NRCS practice standards:

- o Normal farming, silviculture, and ranching practices. Those activities include plowing, seeding, cultivating, minor drainage, and harvesting for production of food, fiber, and forest products.
- o Upland soil and water conservation practices.
- o Agricultural stormwater discharges.
- o Return flows from irrigated agriculture.
- o Construction and maintenance of farm or stock ponds or irrigation ditches on dry land.
- o Maintenance of drainage ditches.
- o Construction or maintenance of farm, forest, and temporary mining roads.
- Provide greater clarity and certainty to farmers.
- Avoid economic burden on agriculture.
- Encourage the use of voluntary conservation practices.
- Be consistent with and support existing USDA programs.

The proposed rule will NOT:

- Cover groundwater
- Cover tiles drains
- Increase regulation of ditches
- Protect any new types of waters
- Affect areas generally previously excluded from jurisdiction, including:
 - o Artificially irrigated areas that would revert to upland if irrigation stops.
 - o Artificial lakes or ponds created by excavating and/or diking dry land and used for purposes such purposes as rice growing, stock watering or irrigation.
 - o Artificial ornamental waters created for primarily aesthetic reasons.
 - o Water-filled depressions created as a result of construction activity.
 - o Pits excavated in upland for fill, sand, or gravel.
 - o Prior converted cropland.
 - o Waste treatment systems (including treatment ponds or lagoons).¹⁹

The IR states, “It is important to emphasize that this IR identifies additional activities considered exempt from permitting under section 404(f)(1)(A), but does not affect, in any manner, the scope of agriculture, silviculture, and ranching activities currently exempt from permitting under section 404(f)(1)(A).²⁰ EPA also states that “it is reasonable to conclude that agricultural conservation practices that are associated with waters and where water quality benefits accrue are similar enough to also be exempt from the section 404 permitting requirements. This interpretation preserves congressional intent of the CWA by ensuring that beneficial agricultural conservation practices will

¹⁸ CWA Section 404(f)(1)(A).

¹⁹ “Clean Water Act Exclusions and Exemptions Continue for Agriculture” http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_ag_exclusions_exemptions.pdf (March 25, 2014).

²⁰ IR Page 1.

not be unnecessarily restricted so long as those activities are designed and implemented to protect and enhance water quality and do not destroy waters.”²¹ This portion of the IR is clear, and we would like emphasize the importance of this flexibility.

This list of 56 conservation practices was created to reflect “conservation practices that occur in waters of the United States and contribute to water quality improvements.”²² Two criteria were used to select the exempted conservation practices: (1) The conservation practice could be applied in waters of the United States (i.e., it is not entirely an upland-located conservation practice); and (2) The conservation practice is designed to enhance and protect water quality.²³ Though this method seems to make sense for conservation districts, we feel that the term “based on NRCS standards” should be taken in the spirit of the intent of NRCS engagement in the CWA where there is no statutory obligation to do so, in line with the flexibility highlighted in the IR. This will also provide for functionally equivalent conservation structures and practices, and for generally accepted local conservation standards in addition to the practices that readily fall under the statutory exemption in Section 404(f)(1)(A).

Clearly, conservation districts prefer (and even require) that cooperators implement conservation practices according to NRCS technical standards when working with conservation programs (e.g., EQIP contracts). However, not every practice is installed under a cooperator contract. Many states have conservation practice standards of their own. Conservation districts have a long and successful partnership with the USDA and understand that if producers apply for and receive financial assistance to implement conservation practices then NRCS standards must be met. These standards do not fit all situations nor should they, especially when the taxpayer incentive is not involved. There are many times that producers implement land and water management practices on their own that are considered normal farming, ranching, and silviculture activities that benefit natural resources. Voluntary conservation programs do not include sufficient resources to allow follow-up at a regulatory scope and scale—in order to determine that the practice is implemented in conformance with [listed] NRCS technical standards— at every site where a practice is installed.

3. Producers will not need to notify regulatory agencies when they self-implement conservation practices in WOTUS. Reducing uncertainty and the administrative burdens of applying for permits will increase conservation application.

It is clear that producers will continue to self-implement the exemptions and in no way should they become a regulatory requirement. “The exemption for these identified conservation practices is self-implementing, meaning that a producer does not need to notify the regulatory agencies, seek a jurisdictional determination, or submit an application for a CWA section 404 permit.”²⁴

If a producer already has an NRCS conservation plan with listed exempt practices, they need only to follow the national conservation practice standard, design procedures, specifications, job sheets, or any other implementation requirements set forth in the plan.²⁵ Site-specific pre-approval from either USACE or EPA is not necessary before implementing any of the exempted conservation practices.²⁶ As current exemptions apply, we anticipate and appreciate that nothing is changing in terms of certification for exemptions. We also note that conservation planning is voluntary. Multiple generations of local perspectives allow for practical conservation practices that adjust to fit different

²¹ *Id.* at 2.

²² *Id.* at 1.

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ *Id.* at 3.

²⁶ *Id.* at 4.

landscapes, which often vary across any given farm, ranch, or forest, and state conservation standards also vary across the nation.


Because of the voluntary nature of conservation planning, we see this IR is an assurance that producers will not be concerned with permitting if engaging in conservation efforts. Emphasizing practicality, flexibility and local control in our understanding of conservation plans maximizes their usefulness. We highlight the importance of the role that conservation districts play in conservation planning. Conservation planning is extremely important, because what we invest in our water resources today will reduce our need for clean-up efforts in the future. It is our philosophy that an ounce of prevention is worth a pound of cure. Less-costly preventative measures are being implemented on the ground every day driven by voluntary and incentivized conservation planning.

Finally, as we noted in our November 2013 comments on the Connectivity Report, we are concerned that if more waters are considered navigable waters due to the Proposed Rule on the Definition of Waters of the United States,²⁷ then landowners will have to obtain additional §404(d) permits for work they have historically performed for the good of this country's natural resources. The administrative process of applying for permits may slow the application of conservation to the landscape, ultimately leading to less conservation getting on the ground. We do not support overloading the permitting process, and we appreciate your focus on providing clear exemptions from the permitting process in this IR.

May we offer one suggestion? Per NACD policy, we promote the idea that the nation's conservation districts receive a general permit allowing the districts to implement any and all agricultural BMPs and/or practices in the NRCS Field Office Technical Guide (FOTG) on public and private lands without USACE review or approval. We would like the idea of a general permit to remain on the table in future discussions. A general permit would acknowledge the benefits of conservation practices and take a less complicated approach to exempting conservation work from 404 permits, which also reinforces that the role of NRCS cannot be regulatory.

Thank you very much for your attention to our comments. We sincerely appreciate your consideration and would welcome the opportunity to provide more information in the future.

Sincerely,



Earl J. Garber

cc: Acting Assistant Administrator for Water, Nancy Stoner

²⁷ Docket Number: EPA-HQ-OW- 2011-0880; FRL-9901-47-OW <http://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07142.pdf>.