



July 3, 2014

Water Docket, EPA Docket Center
EPA West, Room 3334
1301 Constitution Ave. NW
Washington, DC 20004

Docket No. EPA-HQ-OW-2013-0820; submitted via regulations.gov

RE: Comments on Notice of Availability Regarding the Exemption from Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices

On behalf of the National Sustainable Agriculture Coalition's represented member organizations,¹ we submit these comments on the Interpretive Rule that accompanies the proposed rule defining the Waters of the U.S., and which addresses exemptions from permitting under Section 404(f)(1)(A) of the Clean Water Act (CWA) for discharges of dredged or fill material associated with certain agricultural conservation practices based on the Natural Resources Conservation Service (NRCS) conservation practice standards.

The National Sustainable Agriculture Coalition (NSAC) and our family farm, rural, and conservation member organizations around the country share a commitment to federal policy reform to advance the sustainability of agriculture, food systems, natural resources, and rural communities. A constant priority among our members and the farmers they serve are NRCS working-lands conservation programs. NSAC was instrumental in the initial authorization of the Conservation Reserve Program's conservation buffer initiative (continuous sign-up), the Wetlands Reserve program, and

¹ Agriculture and Land-Based Training Association - Salinas, CA; Alternative Energy Resources Organization - Helena, MT; California Certified Organic Farmers - Santa Cruz, CA; California FarmLink - Santa Cruz, CA; C.A.S.A. del Llano (Communities Assuring a Sustainable Agriculture) - Hereford, TX; Center for Rural Affairs - Lyons, NE; Claggett Farm/Chesapeake Bay Foundation - Upper Marlboro, MD; Community Alliance with Family Farmers - Davis, CA; Dakota Rural Action - Brookings, SD; Delta Land and Community, Inc. - Almyra, AR; Ecological Farming Association - Soquel, CA; Farmer-Veteran Coalition - Davis, CA; Fay-Penn Economic Development Council - Lemont Furnace, PA; Flats Mentor Farm - Lancaster, MA; Florida Organic Growers - Gainesville, FL; GrassWorks - New Holstein, WI; Hmong National Development, Inc. - St. Paul, MN and Washington, DC; Illinois Stewardship Alliance - Springfield, IL; Institute for Agriculture and Trade Policy - Minneapolis, MN; Iowa Natural Heritage Foundation - Des Moines, IA; Izaak Walton League of America - St. Paul, MN/Gaithersburg, MD; Kansas Rural Center - Whiting, KS; The Kerr Center for Sustainable Agriculture - Poteau, OK; Land Stewardship Project - Minneapolis, MN; Michael Fields Agricultural Institute - East Troy, WI; Michigan Food & Farming Systems (MIFFS) - East Lansing, MI; Michigan Organic Food and Farm Alliance - Lansing, MI; Midwest Organic and Sustainable Education Service - Spring Valley, WI; National Catholic Rural Life Conference - Des Moines, IA; The National Center for Appropriate Technology - Butte, MT; Nebraska Sustainable Agriculture Society - Ceresco, NE; Northeast Organic Dairy Producers Alliance - Deerfield, MA; Northern Plains Sustainable Agriculture Society - LaMoure, ND; Northwest Center for Alternatives to Pesticides - Eugene, OR; Ohio Ecological Food & Farm Association - Columbus, OH; Organic Farming Research Foundation - Santa Cruz, CA; Rural Advancement Foundation International - USA - Pittsboro, NC; Union of Concerned Scientists Food and Environment Program - Cambridge, MA; Virginia Association for Biological Farming - Lexington, VA; Wild Farm Alliance - Watsonville, CA.

the Conservation Stewardship Program (CSP), and has closely engaged in the development of these programs and the Environmental Quality Incentives Program (EQIP) closely over the years – from farm bill and appropriations campaigns to streamline, improve upon, and ensure funding for these programs at the legislative level; to working with NRCS to enhance program delivery at the administrative level; to working with our member organizations and farmer networks to do outreach, promotion, and program analysis at the state and local level.

NSAC regularly creates guides to assist producers in accessing conservation financial and technical assistance, analyzes data, and publishes reports on federal conservation program usage. NSAC also meets frequently with NRCS program leaders to discuss programmatic changes and improvements. Additionally, NSAC regularly participates in the review of conservation practice standards – recommending new practices and enhancements, and changes to existing practices and enhancements, to meet the programs’ conservation goals.

In 2010, NSAC and ten of our member organization received a Conservation Innovation Grant (CIG) through NRCS to provide advice and assistance to NRCS on how to better integrate sustainable and organic agriculture into NRCS programs. We recently received an extension of the grant to continue this work. A major component of the CIG project was to evaluate and revise 35 NRCS conservation practice standards (CPS) and to propose modifications and additions to facilitate participation in NRCS programs by sustainable and organic producers. The project is still underway, but NRCS has adopted over 60 percent of our recommendations for the standards that they have finalized to date.

It is with this experience and perspective on NRCS conservation programs, and conservation practice standards in particular, that we provide the following comments and recommendations on the Interpretive Rule. Our major and numerous recommendations for substantive changes to the Interpretive Rule should not be construed to indicate any broad disapproval of the proposed rule defining Waters of the US. NSAC is generally supportive of direction the agencies have taken in the proposed rule, and intends to submit comments to the proposed rule docket as well. We would have preferred a comment period, or the very least a stakeholder consultation process, prior to the issuance of the Interpretive Rule, but trust the agencies can and will make the necessary modifications as they moves forward with the Interpretive rule and the practice list.

Below, we provide comments on the scope of the Interpretive Rule, the list of exempt practices, and the process for revisiting and revising the list.

I. Scope of the Interpretive Rule

The agencies seek comment on the Interpretive Rule, which “clarifies the scope”² of existing statutory exemptions for discharges related to “normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting . . . or upland soil and water conservation practices.”³ The Interpretive Rule specifies a list of NRCS practice standards that it will consider “‘normal farming’ when conducted as part of an ongoing farming operation,” thus

² U.S. EPA and U.S. Dept. of Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A) at 1. (Hereinafter “Interpretive Rule”).

³ Interpretive Rule at 1.

exempting it from permitting under CWA section 404(f)(1)(A).⁴ These exemptions do not affect CWA Section 404(f)(2), known as the recapture provision.⁵ NSAC is encouraged to see the agencies working with NRCS toward the goal of encouraging greater participation in NRCS conservation programs to address water quality concerns.

The Interpretive Rule explains that “normal farming necessarily includes conservation and protection of soil, water and related resources in order to sustain agricultural productivity, along with other benefits to environmental quality and continued economic development,” therefore, “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 section 404 permitting requirements.”⁶ The agencies explain that, “so long as those [practices] are designed *and implemented* to protect and enhance water quality, and do not destroy waters,”⁷ then they should be exempt as normal farming activities. The exemption for upland soil and water conservation activities can extend to “other activities of essentially the same character,” but “precludes the extension of the exemption . . . to activities that are unlike those named.”⁸

We agree that, under existing authority, the agencies do not have the authority to exempt additional activities outside of the statutory exemptions in 404(f)(1). However, as currently drafted, many exempt practices on the list appear to do just that. We provide more detail in Part II of these comments.

We also agree that conservation practices that are beneficial to water quality should be encouraged, and the regulatory burden on implementing or installing such practices should be minimized, where such practices are installed or implemented according to NRCS conservation practice standards. However, many NRCS conservation practice standards require significant technical assistance and training to be implemented properly and effectively. We are therefore also concerned that the scope of the Interpretive Rule may be abused if producers can self-certify compliance with NRCS conservation practice standards without actually receiving NRCS technical assistance. In Part II, therefore, we propose a set of conservation practices that should only be exempt if applied under NRCS guidance and technical assistance.

II. List of Practices

The agencies seek comment on the list of exempt practices. NSAC is generally supportive of the agencies’ collaborative effort to encourage the adoption of conservation practices; however, we are concerned that the list of exemptions contains practices that do not belong on the list because they are already exempt; do not fall within the statutory exemptions; could be done in a way that results in significant water quality impairment without proper technical assistance or oversight; or could cause confusion regarding compliance with applicable state standards.

⁴ Memorandum of Understanding Among the U.S. Dept. of Agriculture, Env’tl. Protection Agency, and Dept. of Army Concerning Implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards (March 25, 2014) at 2 (Hereinafter “MOU”).

⁵ MOU at 2.

⁶ Interpretive Rule at 2.

⁷ MOU at 2 (emphasis added).

⁸ Interpretive Rule at 2.

Our comments are structured as follows:

- A. Comments on practices that are upland soil and water conservation activities. These practices should be removed from the list for clarity, because they are already exempt under section 404(f)(1)(A).
- B. Comments on practices that create new exemptions unrelated to upland soil and water conservation practices or unrelated to an ongoing farming operation. These practices should be removed from the list unless and until the agencies submit them as a proposed rule for public comment.
- C. Comments on practices that could result in severe water quality impairment if implemented incorrectly. These practices should remain on the list only if implemented or installed with NRCS technical assistance and training.
- D. Comments on the remaining water and wetland practices. Practices that remain on the list should include any necessary and appropriate guidance regarding the limitations on their implementation or installation.

A. Practices that are already exempt as upland soil and water conservation activities.

The list includes practices that are properly characterized as upland soil and water conservation practices. These activities are already exempt under section 404(f)(1)(A). These are important conservation activities, to be sure, but including these practices on the list has resulted in confusion regarding the permitting requirements that may or may not be needed for other upland conservation practices that are not on the list, and has only added to the vitriol and rhetoric of those who oppose the proposed rule itself.

We understand that the list was created based on practice standards that could theoretically, conceivably, be done on or near U.S. waters. However, for certain standards, in actuality it is highly unlikely that this would occur – or it would be inappropriate for it to occur – on or near U.S. waters. Where these upland soil and water conservation practices are used in or near waters of the U.S., regulatory agencies could make a case-by-case determination as to whether an exemption is appropriate.

Recommendation: For clarity, remove practices from the list that are already exempt as normal farming activities because they are upland soil and water conservation practices. This includes, but is not limited to:

- #314 – Brush Management;
- #327 – Conservation Cover;
- #380 – Windbreak/Shelterbelt Establishment;
- #382 – Fences;
- #422 – Hedgerow Planting;
- #460 – Land Clearing.
- #484 – Mulching;

- #512 – Forage and Biomass Planting;
- #528 – Prescribed Grazing;
- #612 – Tree/Shrub Establishment;
- #650 – Windbreak/Shelterbelt Renovation;
- #660 – Tree/Shrub Pruning; and
- #666 – Forest Stand Improvement.

B. Practices that are not related to upland soil and water conservation and are not currently exempt as normal farming practices under section 404(f)(1).

The list includes practices that are not currently exempt under section 404(f)(1) and that could potentially cause significant water quality impairment or lead to a violation of state water quality standards. Some of these are in-stream practices. Many are not associated with ongoing farming operations. In either case, they should not be broadly exempt as normal farming practices. Conservation practices that are not used in association with ongoing farming, ranching or silvicultural operations would not meet the Section 404(f)(1) exemption criteria and should not be on the list. The inclusion of such practices on the list of exemptions may lead other landowners to believe that no permit is required for them, even though they do not run a farming, ranching or silviculture operation, resulting in violations of state and federal regulations.

Moreover, these practices are unlikely to be easily limited by use of the recapture provision. If producers believe that no additional review or approval is required before implementing one of these practices, it is possible that producers will violate both state and federal regulations, including state water quality standards. Such practices are not natural extensions of existing exemptions and, as new exemptions, should be submitted as a proposed rule for public comments prior to their inclusion on the list.

Recommendation: Remove practices from the list that fall outside the scope of current exemptions for normal farming practices, unless and until the agencies submit them in a proposed rule for public notice and comment. If any of these practices remain on the list, then these practices should be eligible for exemption only where NRCS technical assistance is provided for installation or implementation. This includes, but is not limited to, the following practices:

- #396 – Aquatic Organism Passage

We have concerns regarding this category because it provides for actions with a potentially significant impact, such as dam removal. However, by definition it does not appear that the practice is associated with ongoing farm, ranch and forestry operations. If included on the list, please define specific actions that are related to farming and forestry that would be exempted.

- #453 – Land Reclamation – Landslide Treatment

This practice does not appear to be generally associated with ongoing farming, ranching, or silviculture operations. In the event of a landslide that impacts rivers, lakes, or wetlands, restoration of the impacted watercourse should be carried out in cooperation

with other agencies through the section 404 permitting process.

- #455 – Land Reclamation – Toxic Discharge Control

This practice does not appear to be associated with ongoing agricultural, ranching, and forestry operations.

- #543 – Land Reclamation – Abandoned Mine Land

This practice does not appear to be associated with ongoing agricultural, ranching, and forestry operations.

- #544 – Land Reclamation – Currently Mined Land

If the land is currently mined, it is not associated with an ongoing farming, ranching or silviculture operation.

C. Practices that could result in severe water quality impairment if implemented incorrectly, and should not be exempt without NRCS technical assistance.

The list includes practices that could provide water quality benefits, but could also cause severe water quality impairment if they are not implemented properly. The agencies recognize the exemption should only extend to those practices that are “designed *and implemented* to protect and enhance water quality, and do not destroy waters.”⁹ Given the highly technical nature of some of the more complex practices on the list, such practices should only be exempt with NRCS technical assistance and training to ensure proper implementation.

Recommendation: The agencies should revise the list to require NRCS technical assistance for practices that are complex and highly technical, and that could result in severe water quality impairment if implemented or installed improperly. This includes, but is not limited to, the practices listed above in Section B and the following:

- #326 – Clearing and Snagging

This practice allows the use of heavy mechanical equipment in existing streams, and allows significant alteration of natural habitat. It should not be broadly exempted as a normal farming practice.

- #395 – Stream Habitat Improvement and Management

Poorly planned or executed stream habitat alteration could not only degrade the section of the stream directly altered, but also destabilize a stream system causing significant upstream and downstream impacts. This practice is very broadly defined and could result in major harm to waters of the US.

⁹ MOU at 2 (emphasis added).

- #578 – Stream Crossings

This practice is broadly written, allowing stream crossings (bridges) for “people, livestock, equipment, and vehicles.” This practice closely parallels and should be treated in the same manner as stream crossings for other transportation purposes. A more limited exemption for stream crossings for livestock would still have to consider factors such as fish spawning and ability to pass flood flows.

- #587 – Structure for Water Control

This practice specifies that it may be applied to achieve a wide array of function, including removal of surface or subsurface water from adjoining land, to control the direction of channel flow resulting from tides and high water. These practices have the potential to convert wetland to upland, and may have other significant adverse impacts on water quality.

- #657 – Wetland Restoration

Although we strongly support well-designed and executed wetland restoration to meet a number of objectives, this practice is broadly written, and includes actions that could result in significant adverse impacts and conversion of one type of water to another. Some level of regulatory review is essential.

- #659 – Wetland Enhancement

This practice is broadly written, and includes actions that could result in significant adverse impacts and conversion of one type of water to another. While a wetland may be enhanced in terms of one function, it may be degraded in terms of others, and interagency coordination and agreement through a regulatory review process is essential.

D. Practices that are wetland and water quality practices and should be accompanied by necessary and appropriate guidance regarding any limitations on their implementation or installation.

Section 404(f)(1) exemptions are still subject to the section 404(f)(2) recapture provision. The recapture provision prohibits the use of a practice standard to exempt an activity where the practice would result in a new use, or reduce the scope and circulation of US waters. However, it is highly unlikely that individual landowners will have the understanding necessary to interpret and apply this regulatory language. As a result, landowners may inadvertently violate the Clean Water Act, as well as other state or federal regulations. For practices that could trigger the recapture provision, it is critical that these limitations be specifically defined, or that the installation or implementation of the practice be done under NRCS supervision.

In the current list, the agencies did this for #412 – Grassed Waterways and #548 – Grazing Land Mechanical Treatment by indicating in the notes column that certain activities that could fall within that practice standard are not exempt. These explanations should be provided for all the practices listed below and be discussed in a way that farmers and landowners can understand, particularly

where the activity is being done without NRCS oversight or technical assistance. This can be accomplished through additional guidance developed at the national level, but with state-specific information provide at the state level, and should be made available through all three agencies' websites and outreach materials.

Recommendation: Any practices that remain on the list should be accompanied by a description of any limitations on the practice that could make it ineligible for an exemption. This information should be provided in any outreach done by EPA, the Corps, or NRCS on the Interpretive Rule, and should be written for a farmer audience. The following list is an example of practices that should be accompanied by additional information or guidance on their limitations.

- #315 – Herbaceous Weed Control

Guidance should clarify that this practice is not exempt where it would result in establishment of a new use in waters or wetlands, or would reduce the flow and circulation of waters of the United States.

- #320 – Irrigation Canal or Lateral; and #388 – Irrigation Field Ditch.

The construction of new irrigation canals, laterals, and field ditches has the potential to cause adverse draining, flooding, alteration of surface water flows, and alteration of water resources. At a minimum, the scope of these practices should be clarified to exclude the use of jurisdictional waters as irrigation canals; prohibit redirection of flow from a jurisdictional water resulting in secondary impacts; prohibit installation of canals through a wetland in a manner that would alter wetland hydrology; and prohibit side-casting of spoil material in a wetland.

- #342 – Critical Area Planting

Placement of fill material to facilitate planting below the ordinary high water mark of lakes and streams should not be exempted.

- #398 – Fish Raceway or Tank

Guidance should clarify that this practice is not exempt if it involves construction of a fish raceway or tank in existing waters or wetlands, which would result in the establishment of a new use in waters of the U.S.

- #412 – Grassed Waterways

In some areas, there is confusion between grassed waterways, wetlands and intermittent streams. Although this practice is specifically not exempted in the event of conversion of waters to non-waters, additional clarification and limits are needed. For example, the practice allows placement of subsurface drains to lower the water table; lowering the water table in an adjacent wetland should not be exempt.

- #500 – Obstruction Removal

Removal of structures on the shoreline of a lake or stream involving alteration of the bank (e.g. piers, seawalls, groins) should not be exempted.

- #533 – Pumping Plant.

Guidance should clarify that this practice is not exempt if it would reduce the reach and circulation of waters of the United States, including wetlands.

The Interpretive Rule also does not address the fact that final decisions about conservation practice standards are decided at the state level based on regional and local conditions. The state office cannot weaken the national CPS, but it can make it more stringent. This means that state conservation practice standards often require more from the producer than the national standard to appropriately respond to local and regional resource concerns and climatic conditions, and to comply with state water quality requirements.

Recommendation: To address this issue, the agencies immediately issue a statement to accompany the list that clarifies that producers are exempt where practices are done in accordance with state conservation practice standards, not national conservation practice standards.

III. Process for Revisiting and Revising the List

EPA, the Corps, and NRCS “intend to periodically revisit and revise, if necessary, the list of exempt NRCS conservation practice standards.” The agencies seek comment on “how they might most effectively and efficiently conduct this periodic review and how best to revise the list of exempt NRCS practice standards,” and also seek comment on “how they can best work together and with NRCS to provide clarity to the regulated community and the public on the exemption.”¹⁰

A. Memorandum of Understanding and the Roles of EPA, the Corps, and NRCS

EPA, the Corps, and NRCS entered into a Memorandum of Understanding (MOU) to implement the Interpretive Rule; however, many questions and concerns remain regarding the collaboration and responsibilities of the agencies.

Recommendation: The agencies should update the MOU to reflect responses to the questions and concerns they have heard throughout the stakeholder outreach sessions and in this docket.

In particular, it is critical that the agencies clarify through an updated MOU:

- which agency will require and provide the technical support that should be required under some practice standards;
- who will address landowner questions regarding potential exemptions;
- the criteria that will be used to make a determination that an activity is exempt, particularly where undertaken without NRCS or other state or federal agency oversight;

¹⁰ 79 Fed. Reg. 22276 (April 21, 2014).

- whether the Corps District, EPA Region, and NRCS state offices are coordinating to develop implementation plans, and whether those meetings and plans will be open to public participation and input; and
- how the Interpretive Rule will account for additional limits that states may place on eligible conservation practices to ensure compliance with state water quality standards.

B. Periodic Review of the Exempt Practices List

The agencies request comment on the process for periodically reviewing and revising the list of exempt practices. As stakeholders in the efficacy of NRCS conservation programs, we strongly believe that ongoing stakeholder involvement in this process is critical, and that a transparent process must be instituted immediately.

Recommendation: The initial review of the exempted practice standards should commence immediately upon the close of the public comment period for this docket. The MOU currently states that review of the exempted practices will occur *at least* annually, but it does not limit more frequent review or specify the time for the first review. Given that the opportunity to comment on the Interpretive Rule was only provided after it had already taken effect, and that the list contains a number of concerning practices and practices requiring further explanation, it is both necessary and appropriate for the agencies to promptly undertake an initial review of the list based on all submitted public comments.

Recommendation: The review process should be a public process, whereby all stakeholders are provided the opportunity to provide input. The review process should not only be a review of the specific conservation practices up for review, but should include an assessment of the efficacy of the Interpretive Rule in obtaining beneficial water quality outcomes.

Recommendation: Amended conservation practices standards should be subject to review prior to being considered exempt. CPS are subject to an NRCS five-year review process, and states may change the national practice standard to such an extent that the practice may no longer be considered exempt. The review process must ensure that amended practices continue to meet the statutory exemption requirements before being reinstated on the list.

Recommendation: Additional practices should not be added to the list of exempt practices until the state and federal agencies have had sufficient time to evaluate the impact of the Interpretive Rule, and to develop procedures to coordinate among the agencies. The agencies will need time to evaluate the effects of the initial list of exemptions without the added complexity of a new list. Additionally, consistent with our comments above, new practices added to the list should not be already exempt upland practices; should be associated with an ongoing agricultural operation; should include the requirement for NRCS oversight where necessary; and, should provide and explain any appropriate limitations to help guide the farmer and landowner in implementing these practices.

C. Providing Clarity to the Regulated Community and the Public

The agencies request comment on how to provide clarity to the regulated community and the public regarding the scope and extent of the Interpretive Rule. Farmers would likely turn to NRCS first with questions about conservation practice standards, but currently there is no information or outreach from NRCS regarding this collaboration. Similarly, EPA and the Corps are not promoting

specific NRCS conservation programs. More collaboration is needed between the agencies to provide a concerted message to the agricultural community, and to achieve the goal of this collaboration to increase participation in NRCS conservation programs.

Recommendation: Revise EPA and the Corps' materials to include specific reference to applicable NRCS conservation programs, and provide contact information so that producers can obtain more information regarding conservation programs and contact the NRCS offices near them. Work with USDA to develop a website landing page and an outreach campaign to deliver a concerted messages to producers that technical assistance is available, and in some cases necessary, to receive a section 404(f)(1)(A) exemption.

Recommendation: Avoid all reference to the Interpretive Rule as providing "certainty" to agricultural producers. Certainty in the farming community typically implies broad regulatory protection or safe harbor across an operation or for a period of time. The Interpretive Rule must be clear that the Section 404(f)(1)(A) exemption applies only to specific practices, only when done in accordance with NRCS conservation practice standards, and should provide information for farmers and the public regarding how to obtain NRCS financial and technical assistance to adopt these practices.

We welcome the opportunity to submit comments, and look forward to working with the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps), in addition to our ongoing work with NRCS, to ensure that this Interpretive Rule is implemented in a way that is truly protective of water quality.

Sincerely,



Ferd Hoefner
Policy Director



Sophia Kruszewski
Policy Specialist