November 14, 2014

Ms. Gina McCarthy
Administrator, Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Ms. Jo Ellen Darcy
Assistant Secretary (Civil Works)
Department of the Army
441 G Street N.W.
Washington, D.C. 20314

Docket ID No. EPA–HQ–OW–2011–0880

Re: Comments on the Proposed Rule Defining "Waters of the United States" Under the Clean Water Act

Dear Administrator McCarthy and Assistant Secretary Darcy:

The National Sustainable Agriculture Coalition (NSAC) welcomes the opportunity to provide comments on the Environmental Protection Agency and Army Corps of Engineers' proposed rule defining Waters of the United States under the Clean Water Act (WOTUS). NSAC has followed this issue over the years as Supreme Court cases have cast confusion over which waters are jurisdictional under the CWA, and previously submitted comments on the Interpretive Rule[1] that accompanied the release of the WOTUS rule. NSAC is an alliance of over 100 member organizations across all regions of the country, representing grassroots and community-based farm, conservation, and rural interests. Our inclusion of both agricultural and environmental values positions us well to provide a common sense, middle ground perspective on this controversial policy topic.

Conservation and environmental stewardship are core values of NSAC and our member organizations. As such, we have a long history of advocating for federal conservation programs that support both farmers and natural resources. Our commitment to conservation dates back to 1988 when NSAC developed the first legislative proposal for the Wetlands Reserve Program and the Conservation Reserve Program buffer initiative in a pre-1990 Farm Bill marker bill. NSAC was the leading national organization involved with establishing the Conservation Stewardship Program, and advocates for working lands conservation program funding in each farm bill and appropriations bill. Furthermore, we continue to promote water quality protection and improvement through our advocacy for other conservation programs, including the newly established Regional Conservation Partnership Program and the Agricultural Conservation Easement Program, to name a few.

[1] Interpretive Rule comments submitted July 3, 2014. See attached Appendix A.

Throughout this heated rulemaking process, many agricultural, manufacturing, and construction organizations have advocated for the withdrawal of the proposed rule. It is worth clarifying that NSAC is fully supportive of the formal rulemaking process, as it provides the opportunity to craft a stronger and more suitable rule through increased stakeholder input and engagement. The organizational and Congressional efforts to intervene in the rulemaking process are troubling, and threaten to eliminate a rule that, while flawed, could reduce confusion by providing clarity to regulated entities including farmers, and ultimately improve the quality of the nation's waters. We are far more interested in being part of a solution than contributing to the problem by vocally clamoring for inaction.

We appreciate that the agencies are attempting to bring clarity to a long-confused issue. The four decades since the passage of the Clean Water Act saw several Supreme Court decisions that created confusion surrounding what constitutes a "water of the United States." Cases like Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) and Rapanos v. United States, 547 U.S. 715 (2006) created a muddled definition of "waters of the United States" relying on undefined terms like "significant nexus." This lack of regulatory clarity is confusing and costly for the regulated community and government agencies alike. Although the EPA and Corps' attempt to provide clarity regarding jurisdictional waters through the WOTUS proposed rule is laudable, there remains ample room for improvement on this front. We offer the following comments in an effort to meaningfully contribute to the dialogue surrounding the proposed rule and help the agencies achieve their goal of protecting our nation's waters in a way that satisfies the agricultural community's need for clarity and consistency in this rule's interpretation and implementation.

I. Clarifying Definitions

1. Tributaries

➢➢ Wetlands as Tributaries

The agencies propose including all tributaries to traditionally navigable waters, interstate waters, territorial seas, and impoundments as "waters of the United States," and offer the first regulatory definition of *tributary* as follows:

> "*Tributary*. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4) of this section."[2]

[2] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22187, (April 21, 2014) (amending

We are generally supportive of providing clarity to the regulated community by establishing tributaries to traditionally navigable waters, interstate waters, territorial seas, and impoundments ((a)(1) through (4) waters) as *per se* jurisdictional. Tributaries, especially headwater tributaries, greatly affect the chemical, physical, and biological integrity of (a)(1) through (4) waters by contributing flow and pollutants, impacting the geomorphology of the water bodies, and providing additional aquatic habitat. Given the impact of tributaries, it would be unreasonable to argue that they lack a significant nexus to waters of the United States.

The current definition of *tributary* in the proposed rule provides descriptions of physical demarcations—a bed and banks along with an ordinary high water mark—that would help landowners easily identify a tributary on their property. The inclusion of wetlands as potential tributaries, however, introduces more confusion than clarity. As acknowledged in the rule, wetlands can serve as tributaries by contributing flow to a jurisdictional water either directly or through another water. Although these wetlands may warrant jurisdiction, not all wetlands contribute flow to (a)(1) through (4) waters and, as such, could not be classified as tributaries. The inclusion of wetlands as possible tributaries effectively rescinds any clarity provided by the bed, banks, and ordinary high water mark criteria previously established.

While this vagueness may work for lakes or ponds lacking an ordinary high water mark where contribution of flow to a jurisdictional water would be more obvious, such a connection would be less apparent when it comes to wetlands. We do not dispute that wetlands can contribute flow—either directly or through another water—and act as a tributary, but for the sake of reducing ambiguity, it would be best to reconsider this addition of wetlands to the *tributary* definition. Wetlands directly contributing flow to a traditionally navigable water would be considered adjacent waters and would therefore remain jurisdictional. Non-adjacent wetlands with a more obscure connection to traditionally navigable waters could still be jurisdictional as "other waters" pending a significant nexus determination.

Recommendation: Remove wetlands from the definition of *tributary*, covering them instead as either adjacent waters or other waters subject to a significant nexus test.

- **Ordinary High Water Mark Definition**

The proposed rule defines ordinary high water mark (OHWM) by reference only[3], directing readers to 33 CFR 328.3(e) and the following definition:

> "The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas."[4]

The EPA and the Corps should incorporate this definition into the proposed rule. Failing to include this definition in the rule requires readers to dig deeper for a term that is integral to the rule's implementation—an unnecessary hoop through which the regulated community must jump. This

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33 CFR pt. 328 and 40 CFR pt. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401) at 77. (Hereinafter "Proposed Rule")
[3] Proposed Rule at 77
[4] 33 C.F.R. § 328.3(e)

simple solution reiterates and solidifies one of the criteria for the definition of *tributary*, and could help alleviate the regulated community's concerns that temporary, precipitation-induced hydrologic features lacking an OHWM would be jurisdictional.

Recommendation: Include the definition of ordinary high water mark in the proposed rule to provide greater clarity and easier access to key terms.

➢➢ **Ephemeral and Intermittent Flow**

The preamble to the proposed rule states that, "The flow in the tributary may be ephemeral, intermittent or perennial, but the tributary must drain, or be part of a network of tributaries that drain, into an (a)(1) through (a)(4) water under today's proposed rule."[5] Including ephemeral and intermittent streams as potential tributaries while failing to define these terms has been a source of confusion in the rule and remains a significant barrier to achieving the agencies' goals of greater regulatory clarity. Ephemeral and intermittent streams can have a significant impact on the water quality of downstream water bodies, but the regulated community needs assurance that this language will not be used to declare insignificant, precipitation-induced water features jurisdictional.

The preamble later states that, "ephemeral features located on agricultural lands that do not possess a bed and bank are not tributaries."[6] The EPA and the Corps should clarify that features like a bed, banks, and an OHWM take years to form, and should consider including definitions of *ephemeral* and *intermittent flow* in the final rule.

Recommendation: Clarify that features like a bed, banks, and ordinary high water mark take years to form, and consider providing definitions for key terms like *ephemeral* and *intermittent* streams and flow in the final rule.

2. Adjacent Waters

➢➢ **Wetlands as Adjacent Waters**

The proposed rule states that, "all waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) [traditionally navigable waters, interstate waters, territorial seas, impoundments, and tributaries of these waters] of this section" constitute waters of the United States under the CWA.[7]

NSAC supports the inclusion of wetlands as possible adjacent waters covered under section (a)(6) of the proposed rule. While some have argued that wetlands should never be considered adjacent waters, we recognize the interconnected nature of hydrologic systems and that wetlands adjacent to a jurisdictional water will have a significant effect on the water's chemical, physical, and biological integrity.

Recommendation: Keep wetlands as possible adjacent waters covered in section (a)(6) of the proposed rule.

[5] Proposed Rule at 16.
[6] Proposed Rule at 18.
[7] Proposed Rule at 77.

➢➢ Shallow Subsurface Hydrologic Connection

The proposed rule incorporates a "shallow subsurface hydrologic connection" as a factor that could be used to determine adjacency to a jurisdictional water, thereby making the water body in question jurisdictional. The agencies present the following definition of *neighboring*, a key term used to define *adjacent*:

> "*Neighboring*. The term *neighboring*, for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a **shallow subsurface hydrologic connection** or confined surface hydrologic connection to such a jurisdictional water"[8]

We agree that the impact of subsurface flow on surface water cannot be ignored. Unfortunately, incorporating something as vague and variable as a "shallow subsurface hydrologic connection" into something as rigid as *per se* jurisdiction is challenging, at best. The presence and extent of subsurface connections between waters can be heavily influenced by variables such as antecedent moisture condition or soil type. Establishing adjacency, and subsequently *per se* jurisdiction, based on this temporally and geographically variable parameter creates tremendous confusion and concern throughout the regulated community. We present two recommended potential outcomes for the agencies regarding the proposed inclusion of a shallow subsurface hydrological connection as a criterion for establishing adjacency.

First, in the interest of clarity, the EPA and Corps should establish parameters for what constitutes a "shallow subsurface hydrologic connection." The word "shallow" is not defined in the rule, and while the preamble attempts to clarify what is meant by a "shallow subsurface hydrologic connection," several questions remain. For example, the preamble states that a shallow subsurface hydrologic connection is "lateral water flow through a shallow subsurface layer, such as can be found, for example, in steeply sloping forested areas with shallow soils, or in soils with a restrictive layer that impedes the vertical flow of water, or in karst systems, especially karst pans."[9] Additionally, the preamble goes on to state that a shared shallow aquifer between a jurisdictional water and an adjacent water constitutes a "shallow subsurface hydrologic connection."

We do not dispute that such connections would likely impact the chemical, physical, and biological integrity of the jurisdictional water, but more specific parameters—such as a maximum aquifer depth, or minimum contribution of flow measured by a hydrograph increase in the absence of tributaries—should be outlined in order to truly provide clarity to the regulated community. If the agencies intend to use this criterion to determine adjacency, they should codify a definition and process for identifying a shallow subsurface hydrological connection. Absent specific parameters, farmers, county governments, developers, even hydrologists will be playing a guessing game as to what the agencies consider a valid shallow subsurface hydrologic connection.

While our preference would be that the agencies develop these specific parameters, if the agencies are unable to do this, "shallow subsurface hydrologic connection" should be removed from the definition of *neighboring*. Providing little to no guidance in the rule regarding how a "shallow subsurface hydrologic connection" would be determined only creates unnecessary confusion. This is not to suggest that subsurface connections to jurisdictional waters should be overlooked and never used to determine jurisdiction, but rather that the determination should continue to be made on a case-by-case basis. Waters falling outside the floodplain or riparian area of a jurisdictional water and

[8] Proposed Rule at 77. (Emphasis added)
[9] Proposed Rule at 22.

lacking a confined surface connection to such a water could still be considered jurisdictional as "other waters" using a case-specific significant nexus test. This would provide necessary flexibility for the agencies and the regulated community when determining the significance of a shallow subsurface connection between a jurisdictional water and an otherwise non-jurisdictional water.

Recommendation: Clarify specific parameters that will be used to determine the existence of a "shallow subsurface hydrologic connection" for adjacent waters. Or, if such parameters can not be articulated, remove this criterion from the definition of *neighboring*.

- **Floodplains and Riparian Areas**

If specific parameters for what constitutes a "shallow subsurface hydrologic connection" cannot be determined and the criterion is removed from the definition of *neighboring*, it may prove helpful to limit adjacent waters to include only waters located in floodplains and riparian areas of jurisdictional waters. Floodplains and riparian areas provide clear, water body-specific, physical boundaries for jurisdiction, whereas confined surface—and certainly shallow subsurface—hydrologic connections are less clear. This action would tighten the scope of section (a)(6) in determining what constitutes adjacent waters, but, again, would not necessarily sacrifice jurisdiction for waters with a confined surface or shallow subsurface hydrologic connection to other jurisdictional waters, as these waters could be jurisdictional if found to have a significant nexus to waters listed in (a)(1) through (5).

Recommendation: Consider limiting adjacent waters to include only waters located in floodplains and riparian areas of jurisdictional waters if specific parameters for confined surface and shallow subsurface connections cannot be codified in the final rule.

3. Other Waters

- **Similarly Situated Waters**

In Justice Anthony Kennedy's concurring opinion in the *Rapanos* case, he presents the concept of "similarly situated" waters, writing:

> "[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[10]

In order to incorporate this concept of "similarly situated" waters into the proposed rule, the agencies include a reference to similarly situated waters in the definition for *significant nexus*, a key term used to determine "other waters" warranting jurisdiction under section (a)(7):

> "*Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other **similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this**

[10] *Rapanos v. United States*, 547 U.S. 715 (2006) (Kennedy, concurring) at 23.

section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section."[11]

Science supports the assertion that wetlands can function in concert with each other, in ways they might not individually, to significantly impact the chemical, physical, and biological integrity of a jurisdictional water. The agencies seek public comment regarding waters that should be considered "similarly situated," proposing geographic delineations like ecoregions or watersheds. The EPA's ecoregions, even at their most specific level, generally cover larger swaths of land and while they denote similarities in regional ecosystems, they may not be the best indicator of hydrologic connectivity. For this reason, a watershed approach to "similarly situated" waters is more reasonable.

We recommend that the agencies propose a process for determining when a designation of "similarly situated" waters is appropriate for a watershed or sub-watershed. Such a process might include listing functions wetlands in the watershed perform collectively that would significantly impact the chemical, physical, and biological integrity of a(1) through a(3) waters. The agencies should also determine an appropriate watershed or sub-watershed size for "similarly situated" waters. For example, the designation of "similarly situated" other waters could be limited to 12-digit Hydrologic Unit Code (HUC) sub-watersheds draining directly to a(1) through a(3) waters.

Additionally, many in the agricultural community have expressed concern that surface connections like overland flow, or "fill-and-spill" events, could be used to make otherwise isolated unidirectional wetlands jurisdictional. Fill-and-spill events are generally the result of one or several intense precipitation events. Therefore, this surface connection between wetlands is not perennial in nature and should not warrant a designation of "similarly situated" as jurisdictional other waters.

Recommendation: Clarify the functions that waters perform collectively in order to be considered "similarly situated" and create a watershed-based geographic limit for this designation, such as a 12-digit Hydrologic Unit Code sub-watershed of an a(1) through a(3) water. Explicitly state that overland "fill-and-spill" events are not sufficient connections to warrant a designation of "similarly situated."

4. Ditches

➢➢ Ditch, Upland, and Perennial Flow Definition

A primary concern among those in the agricultural community is the potential inclusion of drainage and irrigation ditches as jurisdictional under the proposed rule. Section (b) is helpful in alleviating some concerns for farmers by excluding prior converted cropland and some ditches from the definition of waters of the United States. The section states that the following ditches are excluded from jurisdiction:

[11] Proposed Rule at 77. (Emphasis added)

(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.[12]

While we welcome the clarity regarding excluded ditches, certain key definitions are missing in this section. First and foremost, the rule fails to define *ditch*. One of the most contentious points of this proposed rule has been a lack of clarity surrounding regulation of agricultural ditches. While it may seem unnecessary to explicitly define something as basic as a ditch, given the concern surrounding the ambiguity of the proposed rule it would be better for the agencies to err on the side of clarity. Therefore, we recommend the following definition of *ditch* informed by a Corps regulatory guidance letter[13]:

> *Ditch*. The term *ditch* means a man-made water conveyance used for drainage or irrigation purposes.

The terms *upland* and *perennial flow* are key to determining exemptions for certain ditches in section (b) discussed above. The preamble to the proposed rule as well as the EPA's Question and Answer document (from September 8, 2014)[14] address these concepts, but the rule does not provide clear definitions to either term. "Upland" should be defined as any area that is not a wetland, stream, lake, or other water body, and clarify that uplands can be located in floodplains[15] and that these areas are not jurisdictional.

Determining an appropriate flow regime standard for jurisdictional ditches is critical when it comes to providing clarity to the regulated community. We agree with the agencies that *perennial flow* is the appropriate standard for jurisdictional ditches, and not a more ambiguous standard like *intermittent* or *ephemeral flow*. Defining *perennial flow* is therefore essential to achieve the proposed rule's goal of clarity. The preamble states that perennial flow is characterized by the presence of flow year-round when rainfall is normal or above normal.[16] This language should be codified as a definition in the proposed rule.

Recommendation: Codify definitions addressed in the preamble and Question and Answer document for *upland* and *perennial flow* and develop a clear definition for *ditch* in section (c) of the proposed rule.

II. Role of the Natural Resources Conservation Service

➢➢ Encourage Inter-Agency Coordination

The United States Department of Agriculture's Natural Resources Conservation Service (NRCS) is an invaluable ally for farmers in the realm of conservation. Many farmers have close relationships with their NRCS field office and have developed a certain level of trust with NRCS staff. Given the

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[12] Proposed Rule at 77.
[13] Regulatory definitions of the word *ditch* were reviewed from U.S. Army Corps of Engineers Regulatory Guidance Letter 07-02 *Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act*, July 4, 2007.
[14] Questions and Answers – Waters of the U.S. Proposal (September 8, 2014) (Hereinafter "WOTUS Q&A")
[15] WOTUS Q&A at 6.
[16] Proposed Rule at 17.

heated debate surrounding this proposed rule, those in the agricultural community are likely to turn to NRCS for assistance in understanding and interpreting this rule, rather than EPA or Corps' staff.

It is important for the two agencies proposing this rule to interact with NRCS and ensure all three organizations are confident and consistent in their communication with farmers. The rule's attempt to provide clarity will be futile if NRCS, the EPA, and Corps are communicating mixed messages to the regulated community due to inadequate coordination. Just increasing the profile of and communications surrounding the regulations, even without much additional regulatory action, will push farmers toward NRCS for technical assistance. EPA and the Corps must recognize this reality, and take appropriate steps to help NRCS maintain and build the necessary capacity to respond to increased requests for technical assistance. In March 2014, the agencies issued a Memorandum of Understanding (MOU) regarding implementation of the WOTUS Interpretive Rule[17]. Moving forward, appropriate coordination might include an additional Memorandum of Understanding between the involved agencies outlining a framework for providing farmers and ranchers with appropriate technical assistance relating to the WOTUS proposed rule. Additionally, those in the agricultural community may be less hostile to the proposed rule knowing that there is a clear plan for implementation and that they have a voice through NRCS.

Recommendation: Facilitate ongoing inter-agency coordination between the EPA, the Corps, and the Natural Resources Conservation Service to deliver consistent information and technical assistance to those in the agricultural community.

➢➢ Need for Additional Resources

As previously stated, those in the agricultural community are likely to turn to NRCS for information and assistance on the WOTUS rule. Therefore, the EPA and Corps must not only coordinate with NRCS, but must also recognize the strain on NRCS resources associated with the rule. NSAC is supportive of moving forward with the rulemaking process, but adequate resources must be available for NRCS to provide consistent and helpful service to farmers and ranchers.

For this reason, we have written a letter[18] to the White House Office of Management and Budget to encourage additional funding for NRCS dedicated to providing technical assistance regarding the WOTUS rule. While NRCS will not have a regulatory responsibility, offering the agency adequate resources to provide technical assistance and educate farmers on the rule can result in smoother, more consistent implementation for the EPA and Corps and, ultimately, improved water quality. We urge the agencies to support this effort and come together in support for increased NRCS funding for WOTUS implementation.

Recommendation: Support efforts to provide additional funding for the Natural Resources Conservation Service to meet the predicted increase in requests for technical assistance regarding the WOTUS rule.

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[17] Memorandum of Understanding Among the U.S. Dept. of Agriculture, Envtl. Protection Agency, and Dept. of Army Concerning Implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards (March 25, 2014)

[18] Letter sent October 29, 2014. See attached Appendix B.

III. Stakeholder Communication

➢➢ Stakeholder Engagement

The agencies have come under fire throughout the rulemaking process for their communication with stakeholders. Some have argued that the EPA has been defensive or noncommittal when responding to stakeholder concerns, or that the Corps has been largely absent from efforts to reach out to the regulated community. While we agree that more can be done to engage stakeholders, we commend the agencies for some of their efforts to address concerns among those in the agricultural community. Administrator McCarthy's visit to Missouri is a good example. It showed that the EPA is committed to getting out of Washington and understanding how the rule will impact farmers on the ground. A primary complaint throughout the agricultural community is that the EPA does not recognize the impact regulations have on farming families in rural America. More visits by high-level EPA administrators like McCarthy's trip to Missouri would be a step toward building a stronger, more productive rapport between the agency and farmers. Furthermore, the agencies could jumpstart their coordination with NRCS by hosting regional events bringing together regional EPA, Corps, and NRCS representatives to interact with stakeholders.

Additionally, the EPA's WOTUS Question & Answer document, issued in September 2014 in response to key concerns made apparent during the public comment period, is helpful in that it provides clear answers to stakeholder concerns. We urge the agency to continue releasing documents and additional information on the proposed rule and its implementation. Critics of the WOTUS rule have argued that the agency has been unable to verify which waters would be jurisdictional when asked. We recognize that speaking in hypotheticals around a regulation is challenging, but complaints that the agency is unclear on the scope of its own rule could be addressed by releasing in-depth case studies or examples of what would constitute a water of the United States under the proposed rule.

Finally, the agencies should work with farmer and community-based organizations at the regional, state, and local levels as part of their outreach efforts. Community-based organizations, especially farmer-based organizations or associations with personal relationships to farmers, can provide a valuable, rational voice to this issue. NSAC is a leader in the sustainable agriculture movement, together with our member groups located throughout the country. We would gladly help facilitate connections between the agencies and regional and local sustainable agricultural interests in any way possible.

Recommendation: Continue to promote stakeholder engagement through visits to rural farms, publication of case studies, and work with regional, state, and local-level community-based organizations.

➢➢ Helping Beginning Farmers Navigate the Rule

The agencies have an opportunity to improve stakeholder engagement and potentially build support for the rule by increasing outreach to beginning farmers. A targeted outreach effort by the EPA and the Corps to beginning farmers and ranchers, including a guide to the rule targeted toward beginning farmers that lays out background information and the impacts of the rule, would provide a valuable resource. NSAC is happy to offer assistance on this issue.

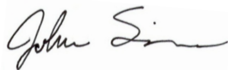
Recommendation Target outreach efforts to address concerns and deliver accurate information to beginning farmers.

We greatly appreciate your time and consideration regarding the above comments. NSAC welcomes the opportunity to work with the EPA and the Corps throughout the rulemaking process to protect water quality while representing sustainable agricultural interests.

Sincerely,

Ferd Hoefner
Policy Director

Sophia Kruszewski
Policy Specialist



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APPENDIX A

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

[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; Clagett 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.

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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 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 disproval 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

[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.

will consider "'normal farming' when conducted as part of an ongoing farming operation," thus 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.

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[4] Memorandum of Understanding Among the U.S. Dept. of Agriculture, Envtl. 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 that 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

National Sustainable Agriculture Coalition

October 29, 2014

The Honorable Shaun Donovan
Director, Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

Dear Director Donovan:

On behalf of our 40 farm, conservation, and rural member organizations, the National Sustainable Agriculture Coalition urges you to consider significant additional funding for NRCS in the Fiscal Year 2016 budget in order to provide appropriate education and technical assistance to farmers impacted by the WOTUS proposed rule. Environmental soundness is an inherent element of sustainable agriculture. As such, we are quite concerned by the drain on Natural Resources Conservation Service (NRCS) resources that will occur as a result of the Environmental Protection Agency (EPA)/Army Corps of Engineers' proposed WOTUS rule.

Published in the Federal Register in April 2014, the EPA and Corps' proposed rule attempts to provide clarity to the regulated community regarding which waters are jurisdictional under the Clean Water Act. While the rule has been met with harsh criticism by some of those in agriculture, we are generally supportive of the proposed rule, and strongly supportive of a transparent public rulemaking process. We have participated in stakeholder sessions with the agencies, submitted comments on the agencies' interpretive rule, and will be submitting comments on the proposed rule in an effort to provide more clarity for farmers impacted by the rule. It is critical that the agencies involved in implementing this rule have the resources and capacity necessary to do so.

Agricultural producers generally have a strong rapport with their local and regional NRCS staff. It is highly likely that the agricultural community will turn to NRCS, not EPA or the Corps, for guidance on how to interpret and comply with the rule. This will require NRCS staff to engage in field visits, in-person meetings, inter-agency coordination efforts, educational outreach, and more—all of which will consume limited financial and human capital. Given this strain on NRCS' already limited resources, and to avoid what could ultimately become an unfunded mandate, we urge you to work with NRCS, EPA, and the Corps to provide additional funding for WOTUS implementation at NRCS in the 2016 budget.

We believe this rule has potential to achieve its goal of providing greater clarity to the regulated community regarding jurisdictional waters under the Clean Water Act, while improving the quality of

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our nation's water. With that in mind, we must identify indirect strains on agency resources as a result of the WOTUS rule's implementation. Please consider the need for increased demand for technical assistance and education regarding implementation of the WOTUS rule at NRCS in the 2016 budget.

Sincerely,

Ferd Hoefner, Policy Director

Sophia Kruszewski, Policy Specialist

cc: The Honorable Tom Vilsack