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Another EPA and Army Corps Power Grab: Limiting Exemptions for Agriculture Under the CWA

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Agricultural activities will likely be far more costly and difficult, at least if the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) get their way. In addition to their controversial "waters of the U.S." proposed rule that would expand the waters that the federal government can regulate under the Clean Water Act (CWA), the EPA and Corps simultaneously released an interpretive rule[1] with the proposed rule. An interpretive rule, unlike this specific interpretive rule, is supposed to be a non-binding interpretation of law that makes no substantive changes to the regulations.[2]

This so-called interpretive rule allegedly helps agriculture by expanding CWA exemptions from permitting requirements for agricultural activities. As the EPA argues, "The IR [Interpretive Rule] does not eliminate or limit any existing exemptions, it only adds to the existing exemptions."[3] Despite this claim, the interpretive rule as written will actually *narrow* the existing exemptions for agriculture.

Existing Law (The "Normal Farming" Exemption)

Generally, property owners have to secure a CWA Section 404 permit when they discharge dredged material (material excavated or dredged from waters of the U.S.) or fill material ("material placed in waters such that dry land replaces water—or a portion thereof—or the water's bottom elevation changes"[4]) into a "water of the U.S." An important exemption from this permitting requirement exists for "normal farming" activities.

Under Section 404(f)(1)(A) of the Clean Water Act (the "normal farming" exemption), dredge-and-fill permits are not required when the discharge into a covered water is "from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices."[5] The examples of "normal farming, silviculture, and ranching activities" that are listed are not exhaustive.[6] Despite this broad language, the interpretive rule puts the "normal farming" exemption at risk.

The Interpretive Rule Narrows the "Normal Farming" Exemption

Imposes Conditions. The interpretive rule, along with an accompanying memorandum of understanding (MOU) between the EPA, Corps, and the U.S. Department of Agriculture (USDA), has identified 56 Natural Resources Conservation Service (NRCS) agricultural conservation practices[7] that fall under this "normal farming" exemption.[8] However, to be eligible for this exemption as it applies to the 56 conservation practices, farmers and ranchers would have to meet very detailed conservation standards. Under existing law, as written, the "normal farming" exemption would likely already exempt many of these 56 practices without any detailed conservation standards.

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The 56 conservation practices consist of normal farming activities, such as building a fence, mulching, and grazing cattle. As can be seen from these examples, many of the conservation practices are common and critical activities that farmers and ranchers engage in unrelated to conservation, making the impact of the interpretive rule even greater.[9] The potential overreach is alarming. Farmers who build a fence, for example, could be subject to Section 404 permit requirements unless they meet the required standards. As explained in the MOU, "It is important to emphasize that prac-

1. U.S. Environmental Protection Agency and U.S. Department of the Army, "Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A)," March 25, 2014, http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_section404f_interpretive_rule.pdf (accessed September 29, 2014).
2. Office of the Federal Register, "A Guide to the Rulemaking Process," https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (accessed September 29, 2014), and Vanessa Burrows and Todd Garvey, "A Brief Overview of Rulemaking and Judicial Review," Congressional Research Service *Report for Congress*, January 4, 2011, http://www.wise-intern.org/orientation/documents/CRSrulemakingCB.pdf (accessed September 29, 2014). An interpretive rule has been defined as a rule in which the agency states what it "thinks the statute means and 'only reminds affected parties of existing duties.'" These rules allow agencies "to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings." Interpretive rules do not "effect a substantive change in the regulations."
3. "Questions and Answers: The March 2014 Interpretive Rule (IR) and the Applicability of the Clean Water Act, Section 404(f)(1)(A)," U.S. Department of Agriculture, U.S. Environmental Protection Agency, and Office of the Assistant Secretary of the Army, April 22, 2014, http://www2.epa.gov/sites/production/files/2014-04/documents/interpretiverule_qa.pdf (accessed September 26, 2014).
4. "Managing Your Environmental Responsibilities: A Planning Guide for Construction and Development," U.S. Environmental Protection Agency, June 13, 2012, http://www.epa.gov/compliance/resources/publications/assistance/sectors/constructmyer/ (accessed September 26, 2014). Also, please see the EPA regulations at 33 U.S. Code §323.2, http://www.law.cornell.edu/cfr/text/33/323.2 (accessed September 29, 2014). The regulations provide more specific definitions of dredged material, fill material, and discharge of dredged or fill material. It should be noted that the precise definitions of terms such as "fill material" are in controversy. See Claudia Copeland, "Controversies over Redefining 'Fill Material' Under the Clean Water Act," Congressional Research Service, *Report for Congress*, August 21, 2013, http://fas.org/sgp/crs/misc/RL31411.pdf (accessed September 26, 2014).
5. "Clean Water Act, Section 404," U.S. Environmental Protection Agency, March 6, 2014, http://water.epa.gov/lawsregs/guidance/wetlands/sec404.cfm (accessed September 26, 2014). Section 404(f)(2) is an exception to when 404(f)(1)(A) applies. The so-called "recapture provision" states: "Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit." In addition, as interpreted by the EPA and Corps, the 404(f)(1)(A) exemption only applies to established or ongoing operations.
6. As explained in the interpretive rule, "The words 'such as' have been consistently interpreted as meaning the section applies 'to the activities named in the statute and other activities of essentially the same character as named,' and 'preclude[s] the extension of the exemption…to activities that are unlike those named.' (44 FR 34264)."
7. The MOU does not list 56 exceptions—it lists 55. However, the EPA commonly refers to the 56 exemptions (see e.g., the EPA's "Waters of the United States" web page, U.S. Environmental Protection Agency, September 26, 2014, http://www2.epa.gov/uswaters (accessed September 26, 2014).), and the EPA has published this corrected document listing the 56 exemptions, "List of Conservation Practices Considered 'Normal' Farming Under Clean Water Act Section 404," U.S. Environmental Protection Agency, August 26, 2014, http://www2.epa.gov/uswaters/list-conservation-practices-considered-normal-farming-under-clean-water-act-section-404 (accessed September 26, 2014).
8. The interpretive rule explains: "To qualify for this exemption, the activities must be part of an 'established (i.e., ongoing) farming, silviculture, or ranching operation,' consistent with the statute and regulations. The activities must also be implemented in conformance with NRCS technical standards. So long as these activities are implemented in conformance with NRCS technical standards, there is no need for a determination of whether the discharges associated with these activities are in 'waters of the United States' nor is site-specific pre-approval from either the Corps or the EPA necessary before implementing these specified agricultural conservation practices."
9. Many of the NRCS practices (not just the 56 identified practices), as can be seen by these examples, would be carried out regardless of conservation objectives. Chip Bowling, "Regarding the Interpretive Rule on the Application of Clean Water Act Section 404 Agricultural Exemptions," testimony before the Subcommittee on Conservation, Energy and Forestry, Committee on Agriculture, U.S. House of Representatives, July 19, 2014, http://docs.house.gov/meetings/AG/AG15/20140619/102348/HHRG-113-AG15-Wstate-BowlingC-20140619.pdf (accessed September 26, 2014). As explained in the testimony, "NCGA is concerned that the Rule will, in effect, require producers to follow USDA-NRCS conservation practice standards when they carry out certain activities even though many of the covered activities are long-used, normal farming practices commonly conducted for reasons unrelated to conservation and water quality goals."

tices are exempt only where they meet conservation practice standards."[10]

Excludes Conservation Practices. There are over 100 other NRCS conservation practices that have not been listed.[11] The MOU explains:

> The NRCS conservation practices standards considered as of the date of this MOU to be "normal farming" when conducted as part of an ongoing operation and thus exempt from permitting under CWA section 404(f)(1)(A) are listed in Attachment A to this MOU. Note that the agencies expect this list to evolve over time as NRCS modifies or develops new conservation practice standards.[12]

This language suggests that the 56 listed practices are the only ones exempt from permitting and are the exhaustive list of practices that are "normal farming," at least until the agencies make changes to the list. Therefore, the other NRCS practices, such as water wells and sprinkler systems, would likely not be considered "normal farming" and could be subject to Section 404 permitting requirements.

Unintended Consequence

Farmers and ranchers will likely avoid engaging in conservation practices, as much as feasible, if it will involve new and complicated technical conservation standards or having to secure a Section 404 permit. The National Association of State Departments of Agriculture wrote in a comment on the interpretive rule, "We are concerned that the Interpretive Rule could unintentionally result in a reduction in conservation program participation and the installation of fewer water quality-enhancing conservation practices."[13]

Additional Problems and Limitations of the Interpretive Rule

The Interpretive Rule Can Easily Change. Unlike the proposed rule, the interpretive rule went into effect immediately without an opportunity for public comment, and the EPA and Corps can change it whenever they deem fit. The MOU makes it clear that the addition and even removal of conservation practices is a real possibility, making compliance difficult.[14]

The Interpretive Rule Covers Only Section 404 Permits. The interpretive rule covers only Section 404 dredge-and-fill permits, not other requirements of the CWA, including other permitting requirements. Therefore, farmers and ranchers should not look to the interpretive rule for protection against the proposed "waters of the U.S. rule" in relation to non–Section 404 issues.

The Interpretive Rule Covers Only Ongoing Operations. The EPA and Corps have long interpreted the "normal farming" exemption as covering only operations that have been "ongoing."[15] The MOU indicates that the exemptions identified for conservation practices are no different; they are applicable only to ongoing operations.[16] While this interpretation is nothing new, it does highlight a

10. U.S. Department of Agriculture, U.S. Environmental Protection Agency, and U.S. Department of the Army, "Concerning Implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards," Memorandum of Understanding, March 25, 2014, http://www2.epa.gov/sites/production/files/2014-03/documents/interagency_mou_404f_ir_signed.pdf (accessed September 29, 2014).
11. To read the complete list of the NRCS conservation practice standards, please see U.S. Department of Agriculture, Natural Resources Conservation Service, Conservation Practices, http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/technical/references/?cid=nrcs143_026849 (accessed September 26, 2014).
12. USDA, EPA, DOA, "MOU."
13. Stephen Haterius, Chief Executive Officer, National Association of State Departments of Agriculture, public comment to Nancy Stoner, U.S. Environmental Protection Agency; Jo-Ellen Darcy, U.S. Army Corps of Engineers; and Robert Bonnie, U.S. Department of Agriculture, July 7, 2014, EPA-HQ-OW-2013-0820, http://www.nasda.org/Policy/9617/10937/28232.aspx (accessed September 29, 2014).
14. USDA, EPA, DOA, "MOU," Section V. "The Army, the EPA, and NRCS intend to meet and discuss appropriate changes to the list of practice standards exempt from permitting at a frequency agreed upon by the agencies, but at least annually. The discussion will consider potential addition to this list of practice standards of new or revised NRCS conservation practice standards as well as potential deletion of conservation practice standards based on available data regarding water quality effects or other relevant implementation information."
15. To learn more, see e.g., Don Parrish, "Regarding: A Review of the Interpretive Rule Regarding the Applicability of Clean Water Act Agricultural Exemptions," testimony before the Subcommittee on Conservation, Energy and Forestry, Agricultural Committee, U.S. House of Representatives, June 19, 2014, http://agriculture.house.gov/sites/republicans.agriculture.house.gov/files/pdf/hearings/Parrish140619_Supplemental.pdf (accessed September 29, 2014). The regulations can be found at 33 U.S. Code §323.4, http://www.law.cornell.edu/cfr/text/33/323.4 (accessed September 29, 2014).
16. USDA, EPA, DOA, "MOU."

potentially major limitation of the interpretive rule and weakens any claim that the interpretive rule provides significant protection for farmers.

Currently, there is significant confusion even within the EPA regarding what "ongoing" means, which the American Farm Bureau Federation (AFBF) highlights in their comment on the interpretive rule.[17] AFBF also explains: "Our research indicates that only farming 'ongoing' since 1977 would qualify."[18] If true, this would mean newer farms would not qualify for the "normal farming" exemption, including in connection to the 56 conservation practices.

What Needs to Be Done

While the proposed rule properly receives most of the attention, problems for agriculture are exacerbated by this interpretive rule. The interpretive rule is already in effect so addressing it immediately should be a major priority. Specifically:

1. **The EPA and Corps should repeal the interpretive rule.** If they really seek to provide some clarification to farmers, they should obtain proper feedback and then go through a proper notice-and-comment rulemaking process.

   If the EPA and Corps really want to clarify that conservation practices are exempt under the "normal farming" exemption, then they should state that simple point in a rule.[19] They should not add conditions to meeting the conservation practices, because in so doing, they are narrowing existing law by limiting when conservation practices are exempt. They should also be careful not to select a subset of conservation practices because it immediately draws into question practices that fall out of that subset. The EPA and Corps should not overstate the scope of what they are doing. Explaining that conservation practices are exempt does not add any protections, but merely clarifies the law.

2. **Congress needs to rein in the EPA and the Corps and prohibit implementation of the interpretive rule and the proposed rule.** Realistically, the EPA and the Corps will not take any action, especially when it comes to the proposed rule. The House recently passed legislation entitled "The Waters of the United States Regulatory Overreach Protection Act of 2014" (H.R. 5078)[20] that would prohibit implementation of these rules. In addition to trying to repeal the rules, Congress should use the appropriations process to withhold funding for these rules.

Conclusion

The proposed "waters of the U.S. rule" is bad for farmers and ranchers; the interpretive rule only makes matters worse. Farmers and ranchers should not have to be concerned about engaging in normal farming activities under the "normal farming" exemption, yet this interpretive rule would create justified concern when carrying out even the most basic agricultural practices. This would not only affect agricultural producers but also everyone who relies on the agricultural sector for food—in other words, all Americans.

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17. Dale Moore, Executive Director of Public Policy, American Farm Bureau Federation, letter to Damaris Christensen, Environmental Protection Agency; Chip Smith, Office of the Deputy Assistant Secretary of the Army; and Stacey Jensen, U.S. Army Corps of Engineers, July 7, 2014, http://op.bna.com/env.nsf/id/rlen-9ltnxs/$File/cwa-ir14%200707.pdf (accessed September 29, 2014).
18. Ibid.
19. An interpretive rule could be appropriate if the EPA and Corps are genuinely making a simple clarification of the regulations, as opposed to creating substantive changes, which they are doing under the existing interpretive rule.
20. Waters of the United States Regulatory Overreach Protection Act of 2014, H.R. 5078, 113th Congress, Cong. 2nd Sess., https://beta.congress.gov/bill/113th-congress/house-bill/5078?q=%7B%22search%22%3A%5B%22h.r.+5078%22%5D%7D (accessed September 29, 2014).