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The EPA and the Corps's CWA Interpretive Rule: A Regulatory End Run

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The Environmental Protection Agency (EPA) and the Army Corps of Engineers released an interpretive rule¹ narrowing an important Clean Water Act (CWA) exemption for agricultural activities. It was released at the same time they released their proposed “waters of the U.S.” rule that would greatly expand the waters the federal government can regulate under the CWA.

By publishing an interpretive rule instead of a substantive rule (i.e., legislative rule),² the agencies did not obtain public feedback before issuing their interpretive rule. Instead, they immediately implemented their policies without giving farmers and ranchers proper notice. By improperly classifying this substantive and binding rule as an interpretive rule, they have attempted to do an end run around the regulatory process.

What Is an Interpretive Rule?

Most rules are considered substantive or legislative rules that have the force of law, create new duties on regulated entities, and must first go through a public notice and comment process.³ However, there are exceptions to such requirements, such as with interpretive rules. An agency can issue an interpretive rule to “interpret” existing regulations. Unlike

legislative rules, these actions do not require a notice-and-comment period.

Furthermore, an interpretive rule does not have the force of law.⁴ The U.S. Supreme Court has noted that interpretive rules do not “effect a substantive change in regulations.”⁵ Additionally, an interpretive rule should “only remind[] affected parties of existing duties.”⁶

What Does This Interpretive Rule Do?

Generally, property owners must 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”⁷) into a “water of the U.S.” An exemption from this permitting requirement currently exists for “normal farming” activities.

Under this 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.”⁸

The interpretive rule, along with an accompanying memorandum of understanding (MOU)⁹ among the EPA, the Corps, and the U.S. Department of Agriculture (USDA), has identified 56 Natural Resources Conservation Service (NRCS) conservation practices¹⁰ that fall under this normal farming exemption.

The problem is that many, if not all, of the 56 NRCS practices would already have been covered by the existing normal farming exemption. By indicat-

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ing that only 56 practices fall under this exemption, such as building a fence and grazing cattle, it suggests that the other 100 or so NRCS practices,¹¹ such as water wells and sprinkler systems would not fall under the exemption. In addition, the 56 practices would be exempted only if farmers and ranchers meet detailed conservation standards.

Why Is This Interpretive Rule Improperly Classified as an Interpretive Rule?

The interpretive rule makes substantive changes to existing regulations and creates binding new obligations on farmers and ranchers. Specifically, it:

- **Excludes conservation practices.** The exclusion of more than 100 NRCS conservation practices from the normal farming exemption was a sub-

stantive decision that will have a major impact on farmers and ranchers. A practice, such as water wells, that was already likely exempted is now not exempt and could subject farmers and ranchers to Section 404 permitting requirements.

- **Places conditions on the 56 exempted conservation practices.** Nothing in the Clean Water Act statute or regulations exempts the 56 conservation practices *only* if farmers and ranchers meet NRCS technical standards. Yet the interpretive rule creates this clear, new mandate that to be exempt the “activities [56 conservation practices] must also be implemented in conformance with NRCS technical standards.”¹² Even common and critical farming and ranching activities that are performed unrelated to conservation, such as building a fence,

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 November 5, 2014).
2. Vanessa K. Burrows and Todd Garvey, “A Brief Overview of Rulemaking and Judicial Review,” Congressional Research Service *Report for Congress*, January 4, 2011, p. 6, <http://www.wise-intern.org/orientation/documents/crsrulemakingcb.pdf> (accessed November 5, 2014).
3. *FindLaw Legal Dictionary*, s.v. “Legislative Rule,” <http://dictionary.findlaw.com/definition/legislative-rule.html> (accessed November 5, 2014).
4. Burrows and Garvey, “A Brief Overview of Rulemaking and Judicial Review,” p. 7.
5. *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 100 (1995) (quoting *Guernsey Memorial Hospital v. Secretary of Health and Human Services*, 996 F.2d 830,832 (6th Cir. 1993)).
6. *General Motors Corporation v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc); see also *SBC Inc. v. Federal Communications Commission*, 414 F.3d 486 (3d Cir. 2005).
7. U.S. Environmental Protection Agency, “Managing Your Environmental Responsibilities: A Planning Guide for Construction and Development,” June 13, 2012, <http://www.epa.gov/compliance/resources/publications/assistance/sectors/constructmyer/> (accessed November 5, 2014). See also the EPA regulations at 33 U.S. Code § 323.2, <http://www.law.cornell.edu/cfr/text/33/323.2> (accessed November 5, 2014). The regulations provide more specific definitions of dredged material, fill material, and discharge of dredged or fill material. The precise definitions of terms such as “fill material” are in dispute. 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 November 5, 2014).
8. U.S. Environmental Protection Agency, “Clean Water Act, Section 404,” March 6, 2014, <http://water.epa.gov/lawsregs/guidance/wetlands/sec404.cfm> (accessed November 5, 2014). Section 404(f)(2) is an exception to when § 404(f)(1)(A) applies. The “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 applies only to established or ongoing operations.
9. 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,” March 25, 2014, http://www2.epa.gov/sites/production/files/2014-03/documents/interagency_mou_404f_ir_signed.pdf (accessed November 5, 2014).
10. The MOU does not list 56 exceptions—it lists 55. However, the EPA commonly refers to the 56 exemptions. For example, see U.S. Environmental Protection Agency, “Waters of the United States,” <http://www2.epa.gov/uswaters> (accessed November 5, 2014). For the corrected document listing the 56 exemptions, see U.S. Environmental Protection Agency, “List of Conservation Practices Considered ‘Normal’ Farming Under Clean Water Act Section 404,” August 26, 2014, <http://www2.epa.gov/uswaters/list-conservation-practices-considered-normal-farming-under-clean-water-act-section-404> (accessed November 5, 2014).
11. For the complete list of the NRCS conservation practice standards, see U.S. Department of Agriculture, “Conservation Practices,” http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/technical/references/?cid=nrcs143_026849 (accessed November 5, 2014).
12. U.S. Environmental Protection Agency and U.S. Department of the Army, “Interpretive Rule.”

could be subject to Section 404 permit requirements (and CWA penalties) if a farmer or rancher does not meet the NRCS technical standards.

These conditions also use the CWA to make voluntary standards coercive. Currently, many farmers and ranchers voluntarily meet NRCS standards. Practically speaking under the new interpretive rule, though, many farmers and ranchers will not want to risk being required to secure a Section 404 permit and, as a result, will likely feel compelled to meet the technical standards for the 56 conservation practices. Since many of the practices are common and necessary farming activities, farmers will not be able to easily avoid the NRCS technical standards. For practices that may not be as common, but are primarily for conservation, farmers and ranchers will now have a major disincentive to not participate in these practices.

- **Appears to give NRCS an enforcement role.** Nothing in existing law states that the NRCS has any enforcement role connected to the CWA, but the interpretive rule and MOU appear to make a major substantive change by creating such a role. The MOU explains:

Where NRCS is supplying the technical assistance for a particular conservation activity, the agency has the lead responsibility to work with landowners and managers to ensure that practices are applied in accordance with standards and to address and correct issues that may arise regarding the consistency of a particular project with conservation practice standards. Where NRCS is not providing technical assistance, the landowner has the responsibility to ensure that implementation of the conservation practice is in accordance with the applicable NRCS conservation practice standard. Even where NRCS is not providing technical assistance, the agency plays an important role in helping to respond to issues that may arise regarding project specific conformance with conservation practice stan-

dards. EPA and the Corps are responsible for responding to project specific issues that may arise associated with compliance with section 404(f), including concerns that are raised by states or federally recognized tribes.¹³

While enforcement roles are not clearly and fully defined, the NRCS will ensure that farmers and ranchers are meeting conservation standards when the agency is providing technical assistance. The NRCS also will play some type of role even when not providing technical assistance. Logically, the NRCS would be best-suited to understand whether farmers and ranchers are meeting NRCS conservation standards. If the EPA and the Corps made such a determination regarding compliance with another agency's requirements, that would likely not be authorized by law (or appropriate).

What Should Be Done?

The agencies should withdraw the rule entirely because they should not be narrowing the exemptions that exist for normal farming activities through any type of rule. Most likely, Congress will need to take action to prohibit implementation of this problematic interpretive rule.

If the EPA and the Corps intend to move forward with the substance of the interpretive rule, they should withdraw the interpretive rule and go through the proper notice and comment rulemaking process. Any such changes should be made in a legislative rule. Farmers and ranchers would then have some voice in the process.¹⁴

Conclusion

The EPA and the Corps are improperly making major substantive decisions in an interpretive rule that creates out of nowhere new and significant requirements on farmers and ranchers. Their policy choices are problematic enough, but the legitimacy of the process is also in question. If they had followed the law, the EPA and Corps would have received important feedback that would have clearly indicated that their interpretive rule was misguided.

13. U.S. Department of Agriculture et al., "Concerning Implementation."

14. On April 21, 2014, the EPA and the Corps published a notice announcing the interpretive rule and seeking public comment on the rule. However, the interpretive rule was already in effect, and the public was invited to provide comments after the fact, which did not give the public a meaningful voice in the process. See *Federal Register*, Vol. 79, No. 76 (April 21, 2014), p. 22276, <http://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07131.pdf> (accessed November 5, 2014).

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