

TESTIMONY OF ROBERT BONNIE
UNDER SECRETARY, NATURAL RESOURCES AND ENVIRONMENT
U.S. DEPARTMENT OF AGRICULTURE

BEFORE THE COMMITTEE ON AGRICULTURE
SUBCOMMITTEE ON CONSERVATION, ENERGY, AND FORESTRY
UNITED STATES HOUSE OF REPRESENTATIVES

June 19, 2014

Good morning Chairman Thompson, Ranking Member Walz, and members of the Subcommittee. Thank you for the opportunity to be here today to discuss the Interpretive Rule (IR) regarding the applicability of certain agricultural exemptions from Section 404 permitting under the Clean Water Act (CWA).

The IR was released by the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army, Civil Works (Army) at the same time that the agencies released their proposed rule on the jurisdiction of the CWA. While the IR stands on its own, it has been viewed in the context of the CWA proposed rule, resulting in widely divergent perspectives on the impact and role of the IR. Today, I would like to describe the IR, USDA's role in helping to shape the IR, and the benefits USDA anticipates for agriculture, conservation, and the nation's waters.

The Interpretive Rule

When a federal agency provides a statement of how it interprets a statute, that statement is called an interpretive rule. The IR relates to the existing exemption for normal farming, ranching, and silvicultural practices under section 404 (f)(1)(A) of the CWA regarding discharges

of dredged and fill material into waters of the United States. With the IR, EPA and Army are recognizing shifts in agriculture since the 1970s when the CWA came into effect, and clarifying that certain conservation activities in waters of the US following Natural Resources Conservation Service (NRCS) conservation practice standards are also exempt from CWA Section 404 dredge and fill permitting requirements as “normal farming” activities.

The CWA exempts normal farming, ranching, and silvicultural activities, such as plowing, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, and upland soil and water conservation practices when they are part of an established farming operation and do not change use of waters, and where the flow or circulation of those waters may not be impaired or the reach reduced. The IR clarifies that this existing exemption also includes 56 conservation practices, from stream crossings to wetland enhancement, which can occur in waters of the US. To be exempt, these practices must be implemented in accordance with the applicable NRCS conservation standards.

Specifically, the IR provides 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. ‘Upland soil and water conservation practices’ are explicitly identified in the statute as ‘normal’ farming activities, and conservation activities within the waters of the U.S. that includes discharges in waters of the U.S. and that are designed to protect and enhance the waters of the U.S. have been determined to be of essentially the same character.”* [emphasis added] Just to be clear, the IR

clarifies that the 56 additional agriculture conservation practices fall under the statutory exemption and do not require a section 404 permit.

The IR exemption is “self-implementing” meaning that producers do not need to notify the regulatory agencies or seek review or certification. This means that producers can follow the conservation practice standard and implement practices on their own, without NRCS involvement, and not be required to seek a 404 permit. Producers may choose to seek technical advice or assistance from NRCS, conservation districts, technical service providers, or others with agricultural conservation expertise to implement covered practices, but they are not required to do so. Further, there is no requirement that a producer choose to exercise the exemption. They may consult with the Army regarding how the CWA applies to their activities if that is their preference. The benefit of the IR is that it provides clarity for agricultural producers, promotes conservation, and benefits agriculture and water resources.

USDA Role in the IR

USDA worked closely with EPA and Army to evaluate opportunities to clarify the type of practices that occur in waters of the U.S. that may involve a discharge of dredge or fill material and result in water quality benefits, so that producers can more easily implement conservation measures that achieve their operational objectives.

USDA assisted EPA and Army by identifying NRCS conservation practices to be considered as exemptions through the IR. NRCS has over 160 conservation practices, which are designed and

developed to assist producers in their voluntary conservation efforts to address their natural resource and operational objectives. NRCS conservation practice standards are science-based – drawing upon research, academic, and agricultural expertise. The standards are reviewed and updated on a scheduled basis, and are subject to public notice and comment to ensure wide opportunity for input. Final standards reflect public input and the best science – basic and applied – at the time.

In recommending specific practices to be exempt through the IR, NRCS evaluated if:

- The conservation practice could be applied in waters of the United States (i.e., it is not entirely an upland-located conservation practice); and
- The conservation practice is designed to enhance and protect water quality.

The resulting list of practices complements the previously recognized exemptions for normal farming and ranching activities and upland soil and water conservation practices and provides new flexibility for agriculture.

A Memorandum of Understanding (MOU) signed by EPA, Army, and USDA outlines how the three agencies will collaborate on maintaining and managing the list of conservation practices exempted under the IR. The cooperating agencies will convene on at least an annual basis to review the practice list and decide on any modifications to the list to ensure the rule continues to provide additional clarity to the agriculture community while achieving water quality benefits.

The MOU also clarifies the roles and responsibilities of each agency to ensure that there is a clear distinction between the regulatory and technical assistance responsibilities. NRCS responsibilities outlined in the MOU focus on working with farmers, ranchers, and other land managers to assist with their voluntary efforts to plan and install conservation practices that meet their needs and objectives. The development, review, and revision of the NRCS conservation practice standards themselves are the sole responsibility of NRCS. Finally, I want to make clear that the IR and the MOU in no way affect the voluntary nature of NRCS work with producers in implementing conservation practices and programs.

Benefits for Agriculture

The IR signals a new opportunity for recognizing the value of producers' conservation efforts across the Nation. We know that voluntary conservation works and that it is delivering benefits for agriculture and natural resources. USDA's Conservation Effects Assessment Project (CEAP) provides ample evidence of the water quality benefits of conservation practices. These scientific assessments are borne out by evidence on the ground. Consider the recent Southwest Farm Press report that highlights

“Voluntary conservation practices place Oklahoma among the water quality elite for another year. Farmers, ranchers and other landowners have helped remove nine more streams from Oklahoma's 303(d) list of impaired streams.”

The April 3rd IR streamlines the regulatory landscape. For example, landowners who are following NRCS practice standards to implement a stream channel restoration project in North Carolina are able to move forward without going through a notification or permitting process.

The benefit – they can move more quickly to restore the channel and deliver intended water quality benefits, and technical staff time is freed up to provide direct technical assistance to other producers.

Conclusion

Thank you again for this opportunity to discuss the Interpretive Rule, which recognizes the value of agricultural conservation efforts in benefitting water resources and brings additional flexibility for producers. The list of successes will grow as the agencies and producers gain more understanding of the opportunity provided by the IR. There is no sector of the economy that cares more about water than agriculture. America's farm and ranch families make decisions every day that help to protect and ensure our water resources. The IR will make those decisions and actions a little easier and produce a benefit for farms and ranches, their communities, and the nation as a whole. USDA looks forward to continuing to work with EPA and Army to achieve positive outcomes for agriculture, conservation, and the nation's waters.

Mr. Chairman, this concludes my statement. Thank you again for the opportunity to be here today and I will be happy to answer any questions you may have.