

Office of the Governor

July 7, 2014

Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310

Re: Docket Number EPA-HQ-OW-2013-0820

Dear Administrator McCarthy and Assistant Secretary Darcy,

Thank you for the limited extensions to allow for additional comments on this matter. My comments on the proposed Interpretative Rule follow.

The agencies have stated publicly, and continue to state publicly, that their goals related to the Waters of the United States are not new protections, expansion, broadening of coverage, or expanded jurisdiction and regulatory authority. Your agencies have indicated their intention is to save time and money, provide more benefits than cost, and reduce confusion. Given these stated outcomes, the new Interpretive Rule (IR) is way off the mark. It significantly expands the scope of government oversight, effectively restricts the normal farming exemption, and creates new regulatory hurdles. In addition, it increases time and costs to landowners, and would require additional federal funding, not previously required, to provide technical assistance to insure compliance with new requirements.

At the heart of the issue is the definition of the exemption using the USDA Natural Resources Conservation Service (NRCS) standards and specifications for conservation practices. The standards are quantitative, measurable, and technically robust. That is appropriate when creating expectations related to joint investments in conservation where federal dollars are expended.

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However, those are voluntary and incentive-based actions. The IR requires the same level of diligence on all of the 56 proposed activities, regardless of the implementing party or funding source.

In order to comply with the new requirements, parties would need to become proficient with the NRCS standards and specifications. They are complex. The NRCS provides multiple levels of training and certification to verify that its conservation planners understand and apply them appropriately. The NRCS has a network of quality control professionals and engineers dedicated to oversight. Private individuals would need to access a similar resource or risk non-compliance. Practices previously exempt such as planting a filter strip or field border, building a forest trail, or creating a firebreak, would now require instructions and documentation. Creating a vegetative filter strip, for example, would have four pages of criteria, considerations, minimum requirements, plans and specifications, operation and maintenance guidelines, and additional technical references. This is not simplification.

Unintended consequences of the application of this IR will be a net reduction in conservation activities. Individuals will face additional time, cost, and complexity in planning and applying conservation practices in farming, if they wish to have assurance that they are in compliance with agency requirements. The hurdles created are disincentive to applying any of the identified practices.

A large number of those individuals who do try to continue with these practices will likely choose to do so with the financial assistance and oversight of the NRCS. "Certification" of adequate adherence to standards and specifications would logically come from that agency. The NRCS is poorly equipped to provide certification effectively in areas where they do not provide significant levels of financial assistance through application of farm bill dollars. NRCS staffing ability to provide "free" technical assistance is limited by budgets. The vast majority of technical assistance the NRCS provides goes to cooperators who have secured financial assistance from the agency. Increases in the amount of funding available for technical assistance to non-farm bill projects will need to be provided, or individuals will be at risk of being non-compliant. The IR will require a significant expansion of the NRCS to provide planning, oversight, and certification. As of now, another agency would be drawn into enforcement without adequate resources.

The IR changes the farming exemption: what was an exemption for normal farming is now application and construction requirements for specified conservation practices. The change is three-fold – to the exemption, to the fundamental role of NRCS conservation standards and specifications, and to the agency itself. NRCS standards and specifications have never been mandatory; they are best practices employed on a voluntary and incentive-based paradigm. Working under the standards and with the agency has always been an optional choice. The proposed IR changes that paradigm. Failure to follow NRCS standards, or equivalents as

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determined by the agencies, would result in non-compliance. These standards and specifications would become regulatory thresholds. The NRCS *de facto* becomes a regulatory compliance agency.

The scope and breadth of this IR, as well as the possible changes that would follow its implementation, are beyond what the agencies have anticipated. It is expansive, obtrusive, expensive, and substantive. The IR requires more thorough consideration, and possibly Congressional action, prior to implementation. It goes beyond Congressional purpose and intent of the legislation it is intended to support. It should be withdrawn.

Sincerely,



Matthew H. Mead
Governor

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