



MEMORANDUM OF UNDERSTANDING
Among the U.S. Department of Agriculture,
The U.S. Environmental Protection Agency, and the U.S. Department of the Army

Concerning Implementation of the 404(f)(1)(A) Exemption for
Certain Agricultural Conservation Practice Standards

I. Purpose and Scope

The Environmental Protection Agency (EPA) and the Department of the Army (the Army) issued, in March 2014, an interpretive rule clarifying the applicability of the exemption from Clean Water Act (CWA) section 404 permitting provided by CWA section 404(f)(1)(A) for discharges to waters of the United States associated with certain conservation practice standards where they are undertaken as part of an established farming operation. This Memorandum of Understanding (MOU) describes how the three agencies will work together to implement the interpretive rule, to protect and enhance water quality and ensure consistency and predictability for the public. This MOU also identifies the procedures for coordinating to maintain the list of conservation practice standards exempt from section 404 permitting, including revisions to the list. This list is included as Attachment A to this MOU.

II. Authorities

EPA and the Army enter into this MOU pursuant to their responsibilities and authorities under the Clean Water Act, and specifically section 404. 33 U.S.C. § 1251, et seq. NRCS enters into this MOU pursuant to its responsibilities and authorities under the Soil Conservation and Domestic Allotment Act. 16 U.S.C. §590 a-f.

III. Background

CWA section 404(f) provides that the discharge of dredged or fill material into waters of the United States in connection with certain activities is exempt from CWA section 404 permitting requirements. These activities include "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." CWA section 404(f)(1)(A).

EPA and the Army issued, in March 2014, an interpretive rule clarifying that certain NRCS conservation practice standards designed and implemented to protect and enhance water quality

are considered “normal farming” activities when conducted as part of an established farming operation, and are discharges therefore exempt under CWA section 404(f)(1)(A) from CWA section 404 permitting requirements. The CWA section 404(f) exemptions also have been previously addressed by agency regulations. 40 C.F.R. §232.3; 33 C.F.R. §323.4. The interpretive rule does not change the agencies’ regulations, including those addressing CWA section 404(f)(2)¹.

NRCS works with partners and private landowners and managers on conservation planning and assistance designed to result in productive lands and healthy ecosystems. The foundation for this assistance is science-based conservation practice standards that guide the design and implementation of measures to address natural resource concerns, including water quality and quantity. These standards provide technical requirements, which are tailored to state and local conditions and provide specifications for installation of conservation measures. NRCS worked with the EPA and the Army to evaluate its list of conservation practice standards and identify those designed and implemented to protect and enhance water quality when implemented in waters of the United States.

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. The agencies intend periodically to update the list consistent with section V. of this MOU.

IV. Agricultural Conservation Practice Standards Considered Exempt as “Normal Farming” under CWA §404(f)(1)(A).

The Army, the EPA, and NRCS have examined NRCS’ conservation practice standards, and identified those being designed and implemented to protect and enhance water quality that, when they involve a discharge of dredged or fill material to waters of the United States and are conducted as part of an ongoing farming operation, are exempt from permitting under CWA section 404(f)(1)(A). The current list of identified conservation practice standards that are exempt can be found on the EPA’s website at

<http://water.epa.gov/lawsregs/guidance/wetlands/agriculture.cfm>. EPA will update the list on its website to reflect any future changes made as a result of the process in Section V. below. The agencies agree that the list on EPA’s website will guide their implementation of the interpretive rule. Details regarding conservation practice standards are available on NRCS’ website at http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/technical/cp/ncps/?cid=nrcs143_026849

¹ CWA Section 404(f)(2) is the so-called “recapture” provision. Section 404(f)(2) requires that activities are not exempt where they have certain effects on waters, including wetlands. For example, a proposed discharge to waters of the U.S. is not exempt where it is associated with an activity that would convert waters to non-waters.

V. Management of the List of Exempt Practice Standards

NRCS reviews its existing conservation practice standards every five years on a rolling schedule, and through a public process, modifying the practice standards where appropriate, and also develops new conservation practice standards as needed.

The agencies will manage the list of NRCS conservation practice standards considered as “normal farming,” as needed. Revisions may become necessary because, for example, NRCS has modified an existing conservation practice standard to enhance its water quality benefits in a way that makes it appropriate for the agencies to add the conservation practice standard to the list of those considered as “normal farming.” Similarly, it may be appropriate to remove a conservation practice standard from the list if the agencies observe implementation of the practice standard is not resulting in anticipated water quality benefits.

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. To ensure effective implementation of the interpretive rule, the agencies will regularly share information, as appropriate, regarding the use of exempt conservation practices in aquatic areas. The agencies will reach out to other interested entities, including states, as the list of exempt practices is regularly reviewed.

The agencies will coordinate to seek consensus on any modifications to the list of exempted agricultural conservation practice standards, consistent with agency responsibilities established under Federal statutes and regulations.

VI. Other Roles and Responsibilities

A. Working with Landowners and Land Managers -- NRCS retains the primary federal role of working with landowners and land managers, state agencies, private organizations, etc., regarding the use of conservation practices. Where NRCS is the technical assistance provider, the agency has the responsibility to appropriately identify and implement conservation practices in a manner consistent with the applicable conservation practice standards. Landowners not relying on NRCS for technical assistance have the responsibility to ensure that implementation of the conservation practice is in accordance with the applicable NRCS conservation practice standard. It is important to emphasize that practices are exempt only where they meet conservation practice standards.

B. Applicability of the Exemption to a Particular Project-- Discharges in waters of the U.S. are exempt only when they are conducted in accordance with NRCS practice standards. Landowners are not required, however, to obtain preapproval from the Corps or EPA for the exemption to apply to implementation of a practice standard identified in the list of exempt practices. 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 standards. 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.

C. Development of New Conservation Practice Standards -- NRCS remains solely responsible under its authority for developing agricultural conservation practice standards. However, if NRCS anticipates a new or modified practice standard could be a candidate for the list of "normal farming" practices exempt from permitting, NRCS will coordinate with the Army and the EPA as the conservation practice standard is being developed to help facilitate agreement among the agencies to add the practice to the list of conservation practice standards exempt from permitting as described in section V above.

D. Outreach and Training -- Although the interpretive rule is effective immediately, Headquarters offices will work with field offices to educate and train their staffs on the implementation of the interpretive rule. The agencies will use their best efforts to accomplish this education and training in the most efficient and timely manner. To the extent funds and staffing allow, the three agencies will work together to develop any fact sheets, bulletins, and webinars for agencies' staff and agricultural producers, explaining the CWA section 404(f) exemption, the March 2014 interpretive rule and its application to conservation practice standards. Where appropriate and feasible, the agencies will conduct joint training on these provisions.

E. CWA Responsibilities -- Nothing in this MOU affects the authorities of the EPA, Army, or authorized states, or federally recognized tribes to implement or enforce CWA provisions.

VII. Additional Provisions

A. The policies and procedures contained within this MOU do not create any rights, either substantive or procedural, enforceable by any party regarding an enforcement action brought by the United States. Deviation or variance from the administrative procedures included in this MOU will not constitute a defense for violators or others concerned with any Section 404 action.

B. This MOU does not create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity, by a party against the United States, its agencies, its officers, or any person.


C. Nothing in this MOU is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of any of the signatory agencies. The agencies will handle their own activities and utilize their own resources, including the expenditure of their own funds, in pursuing these objectives. Each agency will carry out its separate activities in a coordinated and mutually beneficial manner.

D. As required by the Antideficiency Act, 31 U.S.C. 1341 and 1342, all commitments made by the EPA, NRCS or the Army in this MOU are subject to the availability of appropriated funds and budget priorities. Nothing in this MOU, in and of itself, obligates the EPA, NRCS or the Army to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations. Any activities that involve the transfer of funds, services, or property among the agencies will require execution of separate agreements and be contingent upon the availability of appropriated funds. Such activities must be independently authorized by appropriate statutory authority. This MOU does not provide such authority. Negotiation, execution, and administration of each such agreement must comply with all applicable statutes and regulations.

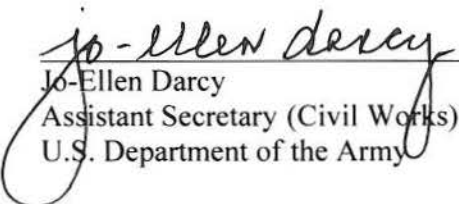
VIII. Effective date and Modification of the MOU

A. This MOU will take effect on the date of the last signature below and will continue in effect until modified or revoked by agreement of all signatory agencies, or until revoked by any of the signatory agencies alone upon 90 days written notice.

B. Modifications of this MOU may be made by mutual agreement and Headquarters-level approval by all the signatory agencies. Such modifications will take effect thirty (30) days from the last signature of the modified document by all the signatory agencies.

 for (Date) 3/25/14
Robert Bonnie
Under Secretary for Natural Resources and Environment
U.S. Department of Agriculture

 (Date) 3/25/14
Nancy K. Stoner
Acting Assistant Administrator for Water
U.S. Environmental Protection Agency

 (Date) MAR 25 2014
Jo-Ellen Darcy
Assistant Secretary (Civil Works)
U.S. Department of the Army

Attachment A

NRCS CONSERVATION PRACTICE STANDARDS EXEMPT FROM PERMITTING UNDER CLEAN WATER ACT SECTION 404(f)(1)(A)

Practice #	Practice Name	Creation Date	Notes
314	Brush Management	Sep-09	
315	Herbaceous Weed control	Apr-10	
320	Irrigation Canal or Lateral	Sep-10	
326	Clearing and Snagging	Jul-10	
327	Conservation Cover	Sep-10	
338	Prescribed Burning	Sep-10	
342	Critical Area Planting	Dec-13	
353	Monitoring Well	Sep-10	
380	Windbreak/Shelterbelt Establishment	May-11	
382	Fence	Apr-13	
383	Fuel Break	Apr-05	
386	Field Border	Dec-13	
388	Irrigation Field Ditch	Apr-11	
390	Riparian Herbaceous Cover	Sep-10	
391	Riparian Forest buffer	Jul-10	
393	Filter Strip	Dec-13	
394	Firebreak	Sep-10	
395	Stream Habitat Improvement and Management	Sep-10	
396	Aquatic Organism passage	Apr-11	
398	Fish Raceway or Tank	Sep-09	
399	Fishpond Management	Sep-11	
400	Bivalve Aquaculture Gear and Biofouling Control	Apr-11	
412	Grassed Waterway	Apr-10	activities that convert waters to non-waters are not exempt
422	Hedgerow Planting	Sep-10	
423	Hillside Ditch	May-08	
453	Land Reclamation, Landslide Treatment	Feb-05	
455	Land Reclamation, Toxic Discharge Control	May-05	
460	Land Clearing	Sep-11	
484	Mulching	May-11	
490	Tree/Shrub Site Preparation	Jan-06	
500	Obstruction Removal	Jan-10	
511	Forage Harvest Management	Apr-10	

512	Forage and Biomass Planting	Jan-10	
528	Prescribed Grazing	Sep-10	
533	Pumping Plant	May-11	
544	Land Reclamation, Abandoned Mined land	Aug-06	
548	Grazing Land Mechanical Treatment	Sep-10	chiseling or deep ripping in wetlands is not exempt
550	Range Planting	Apr-10	
568	Trails and Walkways	Jan-10	
575	Animal Trails and Walkways	Apr-10	
578	Stream Crossing	Sep-11	
587	Structure for Water Control	Apr-10	
601	Vegetative Barrier	Jan-10	
612	Tree/Shrub Establishment	May-11	
643	Restoration and Management of Rare and Declining Habitats	Sep-10	
644	Wetland Wildlife Habitat Management	Sep-10	
646	Shallow Water Development and Management	Sep-10	
647	Early Successional Habitat Development / Management	Sep-10	
650	Windbreak/Shelterbelt Renovation	Jul-10	
654	Road/Trail/Landing Closure and Treatment	Nov-08	
655	Forest Trails and Landings	Sep-11	
657	Wetland Restoration	Sep-10	
659	Wetland Enhancement	Sep-10	
660	Tree/Shrub Pruning	Jan-06	
666	Forest Stand Improvement	May-11	