



## **Questions and Answers**

### **The March 2014 Interpretive Rule (IR) and the Applicability of the Clean Water Act, Section 404(f)(1)(A)**

**Overview:** The Interpretive Rule (IR) published by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) recognizes that agricultural conservation activities implemented consistent with Natural Resources Conservation Service (NRCS) conservation practice standards provide many benefits for water quality. The IR interprets the provisions of the Clean Water Act (CWA) designed to exempt from the section 404 permit requirements certain agricultural conservation practices that enhance or protect water quality. The Agencies collaborated with the U.S. Department of Agriculture (USDA) to identify conservation practices that occur in waters of the United States and contribute to water quality improvements. The exemption for these identified conservation practices is self-implementing, meaning that a producer does not need to notify the regulatory agencies, seek a jurisdictional determination, or submit an application for a CWA section 404 permit. However, a producer must ensure that the practice is implemented in accordance with the applicable NRCS technical standards to be covered by the exemption. Nothing in the IR changes the roles or responsibilities of any of the three agencies, each of which have a role to play in ensuring that the IR is implemented effectively in a fair and consistent manner that encourages the adoption of these agricultural conservation practices.

#### **Q. 1. What part of the CWA does the IR address?**

A. 1. The IR addresses section 404(f)(1)(A) of the CWA, which outlines exemptions from section 404 permitting requirements for discharges of dredged or fill material into waters of the United States,<sup>1</sup> including wetlands. These exemptions are often referred to as the “agricultural” or “normal farming” (including silviculture and ranching) exemptions. Section 404(f)(1)(A) allows discharges of dredged or fill material into waters of the United States without a section 404 permit when such discharges are associated with ongoing 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.

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<sup>1</sup> The definition of “Waters of the United States” can be found at 33 CFR part 328 and may include the territorial seas, rivers, most streams, lakes, wetlands, many ditches, channels, and other small drainage ways. The definition of “dredged and fill material” can be found at 33 CFR part 323.2. Examples of fill material include, but are not limited to, soil, rock, sand, clay, construction debris, wood chips, and materials used to create any structure or infrastructure in the waters of the United States.

**Q. 2. What does this IR do?**

A. 2. The IR clarifies section 404(f)(1)(A) by recognizing that specific NRCS conservation practices implemented in waters of the United States are exempt from permitting requirements under CWA section 404.

The list of exempt conservation practices clarified by the IR can be found at: <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>. It is critical to emphasize that this list is in addition to all previously exempt agriculture, silviculture, and ranching practices covered by section 404(f). The IR does not eliminate or limit any existing exemptions, it only adds to the existing exemptions.

**Q. 3. When do the IR and associated Memorandum of Understanding (MOU) take effect?**

A. 3. The IR and associated MOU became effective April 3, 2014. EPA and USACE are also making the IR available to the public for their review through notice in the Federal Register. The agencies expect this notice to be published shortly, and the public will have 45 days to provide comments, which may generate revisions to the list of activities.

**Q. 4. Where does this IR apply?**

A. 4. The IR applies to the 56 NRCS conservation practices listed and attached to the March 25, 2014, MOU where they are being implemented in waters of the United States for water quality purposes, and are associated with an established (i.e., ongoing) farming, ranching, or silviculture operation.

**Q. 5. Does the interpretive rule affect the CWA section 404(f) “recapture” clause?**

A. 5. No. CWA section 404(f)(2) continues to apply.<sup>2</sup>

**Q. 6. Does this interpretive rule change existing agricultural exemptions?**

A. 6. No. The IR does not change any of the current agricultural exemptions or provisions of the exemptions, and 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.”* There are six parts (A-F) under section 404(f)(1). The IR only addresses exemptions under part A. The IR does not change or otherwise affect the applicability of the exemptions under B through F or the process

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<sup>2</sup> For all exemptions, if the activity would change the use, and either impair the flow or circulation, or reduce the reach of waters of the United States, it would not be exempt and would, therefore, require a section 404 permit prior to construction or any work in waters. This provision is in section 404(f)(2) of the CWA and is often referred to as the “recapture” clause.

for obtaining such exemptions. Parts B, C, and E also cover several exemptions important to agriculture, such as maintenance of levees and drainage ditches, construction of farm and stock ponds, irrigation ditches, and farm and forest roads. The interpretive rule also does not affect the recapture provision contained in section 404(f)(2).

**Q. 7. Does the IR affect normal farming and soil and water conservation activities in upland and dryland areas?**

A. 7. No. The CWA does not apply outside of jurisdictional waters of the United States.

**Q. 8. Why were not all of NRCS conservation practices listed?**

A. 8. Two criteria were used to select the exempted conservation practices:

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

**Q. 9. Who manages the conservation practice standard development and revision?**

A. 9. NRCS has sole responsibility for developing and revising the NRCS conservation practice standards through its existing science-based and public process.

**Q. 10. Will there be opportunities to change the exempt conservation practice list (add or delete certain conservation practices)?**

A. 10. Yes. At least annually NRCS, USACE, and EPA will coordinate and meet to evaluate and determine whether to make any changes to the list of exempt conservation practices.

**Q. 11. How does a producer implement an exempt practice?**

A. 11. The listed conservation practices are exempt when they are implemented in accordance with the applicable NRCS technical standards. Like all section 404(f) exemptions, the listed exemptions are self-implementing, which means that producers are not required to obtain approval from EPA or USACE to use them. While not a requirement, producers may wish to contact a technical expert, such as an NRCS planner, technical service provider, conservation district, resource planner, or other party with similar planning and technical capabilities.

If a producer already has an NRCS conservation plan with listed exempt practices, they need only to follow the national conservation practice standard, design procedures, specifications, job sheets, or any other implementation requirements set forth in the plan. As defined in the standard, this may require following temporary erosion and sediment control best management practices or implementation at appropriate times to avoid disturbance of nesting and migrating species.

**Q. 12. Do farmers, ranchers, and silviculturists need to notify the agencies, USACE or EPA, to receive a 404 determination and exemption or to proceed with project implementation?**

A. 12. No. Site-specific pre-approval from either USACE or EPA is not necessary before implementing any of the exempted conservation practices. This IR does not change exemption authorities or roles of the agencies.

**Q. 13. What is the purpose of the MOU?**

A. 13. The MOU further explains the intent of the IR and describes how the three agencies will work together to implement the IR to protect and enhance water quality, ensure consistency and predictability for the public, as well as to describe future efforts to ensure the exemption list is maintained and modified, as appropriate. The MOU also identifies the initial list of exempt conservation practices which can be found at:

<http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>.

**Q. 14. How does the statement in the MOU: “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” apply?**

A. 14. NRCS will continue to provide technical assistance for producers to assist with voluntary conservation activities and to help them with their natural resource management decisions on private, Tribal, and other non-Federal lands, including instances when a producer is planning to implement or is in the process of implementing a conservation practice and wishes to engage NRCS technical assistance to meet the requirements of the conservation practice. NRCS is also available to respond to questions from landowners regarding the implementation of conservation practices. As with all existing CWA section 404(f) exemptions, NRCS will not function in a CWA section 404 compliance role. EPA and USACE determine compliance with CWA section 404(f).