Statement of the American Farm Bureau Federation

BEFORE THE HOUSE AGRICULTURE COMMITTEE
SUBCOMMITTEE ON CONSERVATION, ENERGY, AND FORESTRY

REGARDING: A REVIEW OF THE INTERPRETIVE RULE REGARDING THE APPLICABILITY OF CLEAN WATER ACT AGRICULTURAL EXEMPTIONS

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Thank you, Mr. Chairman and members of the subcommittee, for holding today's hearing and for inviting me to testify. I am Don Parrish, senior director of regulatory affairs for the American Farm Bureau Federation (AFBF). I have been employed at AFBF for more than 20 years, for much of the time focused on issues related to the Clean Water Act, including the issues involved in the interpretative rule which is the subject of today's hearing. I am pleased to share my perspective on that rule and its potential impact on agricultural producers and I would like to underscore that the views I express are my own.

The proposal that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers published in the *Federal Register* on April 21 ostensibly seeks to "clarify" the authority of these two agencies to regulate "navigable waters" which are defined in the Clean Water Act as the "waters of the United States." The proposal has broad implications for many sectors of the economy, and in particular for agriculture. Just last week, the president of the American Farm Bureau Federation, Bob Stallman, testified before the Water Resources Committee of the House Transportation and Infrastructure Committee on the impact this rule would have on growers. I have attached a copy of Mr. Stallman's testimony to this statement and would like to request that it be included in the record of this hearing.

The rule proposed by the agencies would affect all Clean Water Act programs. This assertion of authority is critically important, and while it goes beyond the subject of today's hearing, I would strongly encourage the members to examine its potential impact on all these programs.

My testimony today, however, will focus on the *Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A) (IR)* and the *Memorandum of Understanding (MOU) among EPA, the Corps and USDA.* With respect to these matters, I would like to make two initial observations:

- The interpretative rule is not a proposal: it became effective immediately upon publication in the *Federal Register*, without advance public notice and comment, and it establishes binding and enforceable requirements for farmers. For these reasons, the IR, in the view of many legal experts, is unlawful.

- By this action, EPA and the Corps have effectively limited congressionally authorized exemptions that have been in place for 37 years. They have done this in several ways:

    - First, for the listed practices, the IR explicitly limits the exemption to circumstances where the farmer or rancher has complied with what are otherwise voluntary conservation standards. Even "landowners not relying on NRCS for technical assistance have the responsibility to ensure the implementation of the conservation practices 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."
    - Second, for practices that are *not* listed and that also are not specifically listed in the statute (for example, practice #378 ponds, #600 terraces and#635 vegetative treatment areas), the IR creates a new cloud of doubt about the exempt status of those activities. If clarification was required as to the exempt status of these

practices, one must wonder why the agencies chose not to clarify the exempt status of other practices. In addition, since the IR and the listed practices could be changed by the agencies any time, farmers and ranchers have no assurances that the list of 56 practices will not be further curtailed in the future.

- Third, the agencies have given NRCS an unprecedented role in Clean Water Act enforcement: "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." There is nothing in the law granting NRCS this authority.
- Fourth, NRCS has allowed the Corps and the EPA an unprecedented role in identifying, reviewing and updating NRCS agricultural conservation practices and activities. Nothing in the law justifies that role.

These actions by the agencies create tremendous uncertainty and risk for farmers and ranchers—especially in light of the proposed rule's broad expansion of "navigable waters." Congress provided broad statutory exemptions for normal farming, silviculture and ranching activities. However, Congress also limited those exemptions, so that even "normal" farming, silvicultural and ranching activities require a Clean Water Act section 404 permit if the activity may impair the flow or circulation of navigable waters or reduce the reach of navigable waters.

The proposed rule would categorically regulate as "navigable waters" countless ephemeral drains, low spots, ditches and other features across the countryside—features that are wet only when it rains and features that may be miles from the nearest truly "navigable" water. These features intersect and crisscross the land that farmers and ranchers use to grow food, fiber and fuel. If the proposed rule is finalized, even otherwise exempt activities such as plowing or discing—or the 56 listed practices—will require a section 404 permit if the "flow or circulation" of these ephemeral features "may be impaired" or the reach of these features may be reduced.

I have attached comments on the Interpretive Rule and request that they be included as part of the hearing record.

Let me, however, lay out concerns that are broadly felt in the agricultural community:

1. Farmers and ranchers as well as the public deserve direct and clear communications from the agencies on highly technical and complex regulatory issues. The Clean Water Act is a strict liability statute that can carry significant criminal and civil liabilities and can bring with it citizen lawsuits by activist organizations.

2. The IR and MOU are insufficient notice to farmers and ranchers of an enforceable change to the congressionally authorized exemptions for "normal" agricultural practices. It is clear from the IR, MOU and fact sheets that the legal obligations to comply with the IR fall squarely on farmers and ranchers and not the agencies.

3. Even if farmers and ranchers are able to comply with the complicated NRCS practice standards, such compliance does not insulate their land from any section 402 permitting requirements or other regulatory impacts resulting from the agencies' proposed broadened definition of "waters of the United States." In other words, while "normal farming exemptions" exempt certain agricultural activities it does not exempt or exclude any newly defined water from CWA jurisdiction.

4. The agencies have confused policymakers, the media, and farmers and ranchers by claiming that the IR provides additional exemptions when it actually narrows the "normal" farming and ranching exemption by imposing otherwise voluntary technical standards and burdensome new requirements for farmers and ranchers.

5. The agencies' decision to accept comments only after the IR is fully effective and enforceable precludes any meaningful public participation and is clearly in conflict with the Administrative Procedure Act (APA).

6. The IR does not provide farmers and ranchers with additional permit exemptions beyond what has already been authorized by Congress. Congress amended the CWA in 1977 to exempt "normal" farming, ranching and silviculture activities from section 404 "dredge and fill" permit requirements.

7. Despite the agencies' characterization, the IR is a legislative rule and is thus inconsistent with the APA.

The Interpretive Rule is a Legislative Rule that is Subject to APA Requirements

AFBF does not agree with the agencies' characterization of the 404(f)(1)(A) IR as "interpretive." Despite the agencies' characterization, the IR is a legislative rule. The APA draws a distinction between legislative rules, which are subject to notice and comment requirements, and interpretive rules or IRs, which are not subject to such requirements. 5 U.S.C. § 553(b)(3)(A). Interpretive rules merely interpret existing law and policies; legislative rules establish new policies that an agency treats as binding. Actions that are binding must comply with the APA, regardless of how they are labeled.

The IR is a regulation that must be promulgated under the APA because the IR clearly binds farmers and ranchers with new, specific legal obligations under the Clean Water Act. The IR modifies existing regulations interpreting the statutory term "normal farming, ranching and silviculture." 40 C.F.R. § 232.3(c)(1)(ii)(A); 33 C.F.R. § 323.4(a)(1)(ii). The IR purports to continue existing statutory and regulatory exemptions, but instead the IR narrows the 404(f)(1)A) exemption by identifying 56 activities that will be exempt only if they are conducted consistent with NRCS conservation practice standards and as part of an established (*i.e.*, ongoing) farming operation. Under the IR, previously voluntary NRCS conservation standards are made fully enforceable as part of the CWA regulatory program. The legal obligations to comply with the IR fall squarely on farmers and ranchers and not the agencies.

If a farmer operating an "established" farming operation conducts a farming activity or conservation practice that results in a discharge of dredge or fill material into a water of the U.S,

the IR clearly states that the activity "must be implemented in conformance with NRCS technical standards." Failure to comply with the standards results in an unlawful discharge in violation of the CWA. This could subject the farmer to CWA penalties. Therefore this so-called interpretive rule is a legislative rule that imposes binding legal obligations on farmers and ranchers.

Contrary to the Agencies' Statements, the IR Does Not Provide Additional Exemptions for Farmers and Ranchers.

Contrary to the agencies' statements, the IR does not provide any additional exemption for farmers and ranchers beyond what Congress authorized. In fact, as a matter of separation of powers, members of Congress should be skeptical that the agency even has the authority to provide additional or expanded exemptions. Since the publication of the IR, agency officials and agency websites have claimed that there is no change to the existing CWA section 404(f)(1) exemption for "normal" agricultural activities on "established" operations and that somehow the IR is providing additional protections for agriculture. See Op-Ed on agriculture by Administrator McCarthy, March 25, 2014 ("But it doesn't stop there—[the rule] does more for farmers by actually expanding those exemptions.") However, the IR does not provide farmers and ranchers with additional permit exemptions beyond what has already been authorized by Congress. Congress amended the CWA in 1977 to exempt "normal" farming, ranching and silviculture activities from section 404 "dredge and fill" permit requirements. 33 U.S.C. §1344(f)(1). Contrary to the agencies' assertions, the IR has effectively narrowed, rather than expanded the current exemptions, and NRCS conservation standards that were previously voluntary are now fully enforceable as part of the CWA regulatory program. As the MOU notes, "[d]ischarges in waters of the U.S. are exempt only when they are conducted in accordance with NRCS practice standards." MOU at 3. Thus, the agencies' public statements about the IR are not only misleading but contradict the actual language of the IR documents.

The IR Applies only to the Section 404 Program.

It appears that the agencies are overstating the significance of the "normal" farming exemption, which does not apply to discharges regulated under the CWA National Pollutant Discharge Elimination System (NPDES) program. Even if the IR would somehow benefit some farmers or ranchers, it cannot insulate any farm or ranch from any Section 402 NPDES permitting requirements that may now result from the expansive definition of "waters of the United States" under the agencies' proposed rule to redefine the scope of jurisdiction under the CWA. The exemption is simply inapplicable to that separate permitting program. Thus, while a farmer may be able to plant cover crops in jurisdictional waters under the IR without a 404 permit (assuming compliance with NRCS standards), that same farmer would face CWA liability for applying fertilizer or pesticide to those same fields without a Section 402 NPDES permit.

The IR will Result in More Time-Intensive and More Costly Requirements for Farmers and Ranchers.

Before the IR, farmers and ranchers did not need to satisfy federally mandated practice standards for "normal" agricultural activities subject to CWA section 404(f)(1)(A) exemptions. Farmers could engage in ordinary farming activities without the need for a section 404 permit, a jurisdictional determination as to whether the discharges were occurring in waters of the United

States, or a site-specific pre-approval. As a result of this IR, it may be more onerous to qualify for 404(f)(1)(A) exemptions.

The IR Adds Confusion and the Agencies Have Failed to Clarify Key Issues Regarding the Application of the 404(f)(1)(A) Exemptions.

The IR provides little context or explanation regarding how the EPA and the Corps interpret the 404(f)(1) exemptions – an area already associated with great confusion within the agricultural community.

The agencies have also failed to provide clarity on the following important issues:

1. Whether a farmer needs pre-approval for any normal farming activities not listed;
2. Whether pre-approval is required if the farmer implements one of the 56 listed practices in "waters of the U.S." without complying with NRCS conservation practice standards;
3. Whether the 124 NRCS conservation practices not specifically listed are also exempt from section 404 permit requirements as "normal" farming activities if they incidentally result in a discharge of dredged or fill material;
4. How the IR will be enforced;
5. Whether and how a farmer should ensure compliance with the NRCS conservation standards (according to the MOA, if the farmer does not seek technical assistance from NRCS in identifying and implementing the conservation standards, the farmer has the responsibility to ensure that implementation of the conservation practices is in accordance with the applicable NRCS standard or the practice will not be exempt);
6. The interplay between the IR and state agricultural programs and requirements;
7. The interplay between the NRCS (authority for agricultural programs and technical assistance with implementing the NRCS standards) and the Corps and EPA (CWA authority); and
8. Whether the regulated community and the public will have any opportunity for comment on changes to the list of covered conservation practices as the agencies consider additions or deletions in the future.

Conclusion

Farmers and ranchers are concerned that the agencies have taken otherwise voluntary conservation standards and turned them into what are now Clean Water Act compliance tools. It is also unthinkable to have NRCS become the "normal farming police" or an enforcement agency for EPA and the Army Corps.

[Enclosures for the Record: 2 Submitted Electronically]