



James Mulhern, *President & Chief Executive Officer* | Randy Mooney, *Chairman*

Agri-Mark, Inc.
Arkansas Dairy Cooperative Association
Associated Milk Producers Inc.
Continental Dairy Products, Inc.
Cooperative Milk Producers Association
Dairy Farmers of America, Inc.
Dairymen's Marketing Cooperative, Inc.
Ellsworth Cooperative Creamery
Farmers Cooperative Creamery
FarmFirst Dairy Cooperative
First District Association
Foremost Farms USA
Land O'Lakes, Inc.
Lone Star Milk Producers
Maryland & Virginia Milk Producers Cooperative Association
Michigan Milk Producers Association
Mid-West Dairymen's Company
Northwest Dairy Association
Prairie Farms Dairy, Inc.
Premier Milk Inc.
Scioto County Cooperative Milk Producers' Association
Select Milk Producers, Inc.
Southeast Milk, Inc.
St. Albans Cooperative Creamery, Inc.
Swiss Valley Farms Company
Tillamook County Creamery Association
United Dairymen of Arizona
Upstate Niagara Cooperative, Inc.
Zia Milk Producers, Inc.

Water Docket
Environmental Protection Agency
Attention: Docket ID No. EPA-HQ-OW-2013-0820
Mail Code 2822T, 1200 Pennsylvania Ave. NW.
Washington, DC 20460

July 7, 2014

Re: Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices (Docket ID No. EPA-HQ-OW-2013-0820)

To whom it may concern:

The National Milk Producers Federation (NMPF), based in Arlington, VA, develops and carries out policies that advance the well-being of dairy producers and the cooperatives they own. NMPF's member cooperatives produce the majority of the U.S. milk supply, making NMPF the voice of more than 32,000 dairy producers on Capitol Hill and with government agencies. Our members' productivity is a critical component in maintaining a safe, abundant food supply for an ever-increasing world population.

NMPF and its members are committed to protecting U.S. waterways through voluntary efforts, as well as through regulatory compliance with the Clean Water Act (CWA). Clean water is central to healthy ecosystems, secure water supplies for human and animal consumption, and to the production of milk and other dairy products. We support the continued efforts of the U.S. Environmental Protection Agency (EPA) to keep our waters clean and are committed to working with EPA to find effective ways to achieve these important goals.

For this reason, NMPF has taken great interest in the Interpretive Rule Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices (Docket ID No. EPA-HQ-OW-2013-0820). In light of the potential impact of this measure on dairy farmers, it is imperative that the EPA and the U.S. Army Corp of Engineers (Army Corps), in cooperation with the U.S. Department of Agriculture (USDA) Natural Resource Conservation Service (NRCS), go about this effort in the right way. Unfortunately, neither the proposed rule defining waters of the United States nor the interpretive rule explaining the availability of an exemption from dredge and fill permitting requirements for producers who install certain conservation practices according to NRCS standards meets the test of effectively protecting water quality.

Regulatory Role of NRCS

The Natural Resources Conservation Service (originally known as the Soil Conservation Service) was established in 1935 to help prevent a recurrence of the catastrophic loss of soil like that which occurred during the Dust Bowl period. NRCS succeeded in its mission by making its experts available to provide technical advice to producers on how to conserve their soil resources. Through the decades, the scope of its programs has tremendously increased, but this basic model for working with producers has not. NRCS continues to provide voluntary technical assistance to producers who want to conserve the resources on their operation.

Under this model, NRCS presence on a farm is at the request of a producer and does not result in coercive government action. Producers have appreciated the confidence of working with an agency they could turn to solely for conservation advice without fear that their operations would be scrutinized for compliance with all the potential applicable environmental and workplace laws. Other arms of the government such as the EPA and the Department of Labor are charged with enforcing compliance with these types of laws.

This is a basic practice that deserves to be respected and upheld. It increases the likelihood that producers will install beneficial practices because NRCS advice will make it easier to do so. This is a goal shared by all stakeholders. Unfortunately, the interpretive rule obfuscates this historic division of labor within the federal government, potentially setting back conservation efforts by moving NRCS into an apparent enforcement role for CWA compliance as will be explained more fully below.

Interpretive Rule (IR)

Under the interpretive rule (IR), producers may qualify for the section 404 exemption by implementing one of 56 conservation practices included on a list published by the EPA in conformance with NRCS technical standards. So long as these practices are in conformance with the provisions of these standards, there is no need for a determination of whether the discharges are in waters of the United States nor is site-specific pre-approval required.

The MOU signed by NRCS and EPA reinforces the requirement that conservation practices have to be installed in conformance with the NRCS standards. Even for practices for which NRCS is not providing technical assistance, the landowner is responsible for ensuring that implementation of the conservation practice is in accordance with the applicable practice standard.

Technical standards produced by NRCS now form the foundation for the only IR published on how to gain a 404 exemption for normal farming practices. Prior to

the IR, 404 exemptions were granted without reference to NRCS technical standards.

Effect of the Interpretive Rule

Using the harvesting of hay as an example, it becomes apparent how a very ordinary farming practice could be affected by the IR's listed practices. After the IR, a producer apparently can only gain a 404 exemption by following NRCS Conservation Practice Standard #511, "Forage Harvest Management". This four-page standard contains criteria for timing of harvest (no compromising plant vigor and stand longevity); for mandatory recommendations for optimum moisture content and levels as well as methods and techniques to monitor and/or determine moisture content and levels; for length of cut as well as the converse for stubble height; for a bar on contaminants. Additional criteria are prescribed to improve or maintain stand life, plant vigor, and forage species mix; to use forage as a nutrient uptake tool; to control disease, insect, weed and invasive plant infestations; and to improve wildlife habitat values.

A very significant portion of conservation and ordinary farming practices are carried out in this country without any reference to NRCS practice standards. For producers who harvest hay utilizing other information or standards, will they now be required to only do so in conformance with standard #511? If they reasonably choose not to, or for the many producers who simply do not work with NRCS on their operations, they will not qualify for a 404 exemption as they would have before the issuance of the IR.

The vagaries of making good decisions about complying with NRCS technical standards are not a theoretical exercise for the dairy industry. Together with NRCS, NMPF published a "Dairy Environmental Handbook: Best Management Practices for Dairy Producers" of farm management practices which are based on the NRCS standards but are almost universally tailored to meet the needs of dairy operations (http://www.nmpf.org/publications/dairy_handbook). Under the IR, dairy producers who follow their industry standard will apparently not qualify for a 404 exemption. A dairy producer would understandably be confused about which standard to follow even though the NMPF handbook may prescribe the practices that best meet the needs of dairy operations.

Impeding the effective use of the "Dairy Environmental Handbook" would seem to run counter to the Administration's goal to encourage conservation and responsible farming practices. NMPF and the dairy industry have invested a great deal of time and money in working with NRCS to produce the Handbook for dissemination among its members. Now that the practices in the Handbook cannot be used to secure 404 compliance, the industry will rightfully ask itself whether it was worth

the investment to try to do the right thing. It seems illogical that this is the message EPA intended by imposing the procedures required in the IR.

Is Compliance with NRCS Standards Voluntary?

Deciding not to comply with the identified practice standards is a difficult choice to make, because doing so will expose the producer to legal liability. Choosing to conform to the standards is hardly voluntary under these circumstances notwithstanding EPA's insistence to the contrary. Choosing not to conform means the producer will not gain the 404 exemption for the broad scope of practices EPA has included on its list. In this sense, the IR has the potential to coerce conduct among those producers. NRCS activities, in this case, production of the technical standards, are central to the administration of this regulatory scheme.

According to those who assert that conformance with the practice standards is voluntary, dairy producers will continue to have the option of implementing practices from the "Dairy Environmental Handbook", even though these practices do not conform to NRCS practice standards. Should a producer choose this course of action and later be challenged in court, the only legal recourse will be to challenge the legality of requiring use of the technical standards as a necessary predicate for gaining a 404 exemption. Common understanding would not recognize this option as providing a "voluntary" course to follow.

The potential for coercion is particularly worrisome given the very uneven track record of the federal government in asserting jurisdiction over waters of the U.S. Some federal personnel will invariably tell producers that conformance with the practice standards is the only sure route to avoiding legal liability for a 404 discharge. This is an accurate statement for the practices listed by EPA, and similar practices.

Unlisted Practices

Further troubling is the status of 404 exemptions for normal farming practices that are not included on the EPA list and which are not required to be installed in conformance with the NRCS standards. One interpretation of the IR would be that 404 exemptions continue to be available for these practices in the exact measure they were available prior to the issuance of the IR. Another interpretation would be that these practices will be under a cloud of suspicion. If they are not installed according to the exacting criteria in the NRCS standards, will government officials and interested members of the public deem the non-listed practices to cause unacceptable environmental degradation?

This question only arises because of the insertion of the IR into the normal farming practice arena and the creation of two classes of practices. To be more precise, NRCS includes approximately 170 practices in its practice manual. The EPA is

including only 56 of these on its list of practices through which it prescribes the procedure for gaining a 404 exemption. The IR leaves unaddressed the question of whether exemptions are available for the remaining 114. This will place a significant amount of normal agricultural activity under the IR cloud of legal suspicion. Although fact sheets and Question and Answer documents try to make clarifying statements regarding the Agency's intent and purpose of the IR, these statements are not reflected in the specific language of the IR thus lending support to our claim that the IR narrows the agricultural exemptions allowed under section 404 (f)(1)(A) and places additional requirements on producers to operate under those exemptions. Clearly, the IR does not meet its stated purpose to "clarify the applicability of the exemption from permitting." The IR adds confusion to the issue and generates additional concerns regarding interpretation of "normal" farming practices.

Fear of litigation is not groundless. Producers face it all the time, using precious resources they would rather apply toward improving their operations. In the new world resulting from effectuation of the IR, compliance with NRCS practice standards will inevitably arise as an issue in litigation. It will be resolved by NRCS officials providing testimony on the adequacy of the compliance with very detailed requirements as indicated with the hay harvesting example. In this manner, NRCS will be a direct partner with EPA in enforcing regulatory standards. Producer reliance on NRCS as a trusted partner in conservation will suffer as a result. In the meantime, NRCS will need to determine how it will handle this new responsibility and conduct the necessary staff training.

Administrative Procedure Act

Some of the confusion created by the IR may have been alleviated had EPA issued the IR as a proposed rule and given stakeholders a chance to comment on the rule before it was made effective. Doing so would have met the requirements of the law. Under 5 U.S.C. § 551(4) of the Administrative Procedure Act, a rule is defined as:

"the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy

Rules are required to be published in accordance with the procedures specified at 5 U.S.C. § 553."

The agency statement of policy contained in the IR is a rule that is required to be published in accordance with § 553. The statement is of general applicability and future effect and prescribes a new, detailed procedure for securing an exemption from the requirements of section 404 of the CWA. EPA is not relieved of this duty because the procedure is arguably voluntary. Moreover, there are potential

adverse legal consequences for those members of the public who fail to comply with the procedure. As such, it affects the substantive interests of the public, further strengthening the obligation of EPA to issue the rule in compliance with the law.

Conclusion

NMPF and its members are committed to protecting U.S. waterways through voluntary efforts and regulatory compliance with the Clean Water Act, and we appreciate consideration of these important comments. We believe that our members will be adversely affected by the IR and that the IR will have the perverse impact of harming the longstanding trust and cooperative relationship between dairy producers and NRCS. Consequently, water quality improvements will be adversely impacted. For the reasons stated above, water quality will be better served if the IR is withdrawn and the agencies' policy on establishing eligibility for the 404 exemption is reformulated with the benefit of more stakeholder engagement. NMPF and its members are very willing to work with the agencies and other stakeholders in this regard to ensure our mutual goal of attaining and maintaining water quality in our nation's waters.

We welcome the opportunity to meet with you to discuss how we can work together to meet our mutual goals. If you wish to discuss any of these concerns, please contact me at (703)-243-6111.

Sincerely,

A handwritten signature in purple ink that reads "Jamie Jonker". The signature is written in a cursive, flowing style.

Jamie Jonker, Ph.D.
Vice President, Sustainability & Scientific Affairs