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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 2, 2014

Water Docket
U.S. Environmental Protection Agency
Mail Code: 4203M
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2013-0820

The Texas Commission on Environmental Quality (TCEQ) is providing comments on the U.S. Environmental Protection Agency (EPA) and Department of Defense's (DOD) Notice of Availability regarding the Exemption from Permitting under Section 404(f)(1)(A) of the Clean Water Act of Certain Agricultural Conservation Practices. The TCEQ appreciates the opportunity to comment.

The Natural Resource Conservation Service's (NRCS) conservation standards were not designed to be a binding regulatory instrument; they are guidance and voluntary practice. Using the NRCS conservation practices in this manner creates uncertainties that should be examined by EPA and USACE through outreach efforts. The Interpretive Rule was not anticipated by states – neither EPA nor USACE did any degree of public outreach prior to finalizing the rule. Outreach for this rule is critical, and would allow EPA and USACE to examine important compliance, enforcement, and regional variation issues. This is particularly important because the NRCS conservation standards were not developed for regulatory use. EPA and USACE should delay implementation of the Interpretive Rule until after *Definition of "Waters of the United States" Under the Clean Water Act (WOTUS)* is finalized, and use the interim time to conduct public outreach on the Interpretive Rule.

Additional comments/details on this position are as follows:

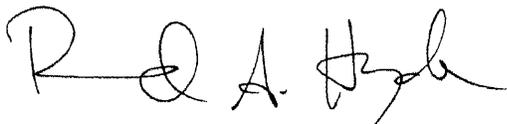
1. The interpretive rule should be delayed until the WOTUS rule is finalized. EPA and USACE's sequencing of the intertwined WOTUS and Interpretive Rule gives the impression that revisions to the WOTUS rule are unlikely to affect the Interpretive Rule. The Interpretive Rule deals with the exemption from permitting requirements for discharges of dredged or fill material into WOTUS. The proposed rulemaking to define the jurisdictional reach of WOTUS may impact the scope of the Interpretive Rule. The WOTUS rulemaking should be concluded before the Interpretive Rule is finalized so that regulated entities and individuals would know if the Interpretive Rule applies to their farming, ranching or silviculture activities. EPA and USACE should use this additional time to conduct extensive outreach to landowners and producers.
2. NRCS conservation standards were not designed to be a binding regulatory instrument; they are guidance and voluntary practice. The Interpretive Rule identifies 56 conservation

practices approved by the USDA, USACE, and EPA which would qualify for a CWA Section 404 “dredged or fill” permitting exemption under the exclusion of “normal farming” activities. The Interpretive Rule could result in making those practices binding. There will be a great deal of subjectivity in compliance determinations, contrary to EPA and USACE’s goals of creating certainty and clarity through the WOTUS and Interpretive Rule rulemaking efforts. Consistent and predictable compliance and enforcement is an essential component in any rulemaking of this type.

3. It is unclear if farmers who previously demonstrated compliance with NRCS standards would be subject to enforcement if a particular practice is removed from the list of exempt conservation practices. EPA and USACE need to clarify how an implemented conservation practice will be treated if the practice is removed from the approved list of exempt conservation practices.
4. There may be regional practices that would be considered “normal farming” activities yet are not included in the current list of 56 conservation practices and, therefore, would not meet the criteria for exemption. EPA and USACE should include a variance procedure in the interpretive rule to accommodate regional differences in agricultural practices. Farmers and ranchers who comply with the variance procedures with respect to practices not included in the list of exempt practices should be entitled to exemption from permitting for localized normal farming practices which are consistent, but slightly different, from the NRCS standards.
5. Currently, public participation is not required for the addition or removal of items from the list of approved conservation practices. The *Memorandum of Understanding among the USDA, the EPA, and the USACE concerning implementation of the 404(f)(1)(A) Exemption for Certain Agricultural Conservation Practice Standards* (MOU), merely states that “the agencies will reach out to other interested entities, including states, as the list of exempt practices is regularly reviewed.” EPA and USACE did not seek public input before it promulgated the Interpretive Rule, and the Interpretive Rule was made effective before it was made available for public comment. The TCEQ is concerned that EPA and USACE will not seek public input in updating the list of exempt conservation practices in the future, which would be of particular concern if practices are removed from the list.

If you have questions concerning the comments, please contact David Galindo at (512) 239-0951 or by e-mail at David.Galindo@tceq.texas.gov.

Sincerely,



Richard A. Hyde, P.E., Executive Director
Texas Commission on Environmental Quality