November 14, 2014

Gina McCarthy, Administrator
U.S. Environmental Protection Agency
Water Docket
Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy:

The National Association of State Foresters (NASF) appreciates the opportunity to provide comment on the U.S. Environmental Protection Agency (EPA) proposed rule to define “Waters of the United States” (WOTUS) under the Clean Water Act (CWA) published on April 21, 2014 (79 FR 22188). NASF represents the directors of state forestry agencies from all 50 states, eight U.S. territories, and the District of Columbia. State foresters manage and protect, or assist private landowners in the management and protection of more than two-thirds of the nation’s forests; more than 500 million acres. State foresters have primary responsibility for the development and implementation of state non-point source pollution control programs for silviculture, commonly referred to as forestry best management practices, or “BMPs.” The primary focus of forestry BMPs is the protection of water quality.

NASF members work to ensure the continued flow of benefits from the nation’s forests; which include clean air, forest products and jobs, wildlife habitat, aesthetic values, and clean water. NASF appreciates the acknowledgement in the proposed rule that the longstanding permitting exemption in Section 404 of the CWA for silviculture is not affected by the proposed rule. The silviculture exemption is an important tool that supports sustainable forest management, which is critical to ensuring that private landowners have an incentive to retain forests. Conversion of forests to alternative land uses is the greatest threat our private forest lands face.

We recognize that the EPA proposed this new definition in response to direction from the Supreme Court of the United States and in hopes of providing more clarity for stakeholders. However, we have concerns that the proposal as written will do just the opposite and generate uncertainty and complicate existing procedures under the CWA. As such, NASF does not support the proposed rule as it currently is drafted and offers these comments on ways to improve the portions of the rule that we find particularly problematic.
In particular, the proposed rule’s attempt at categorically defining “all tributaries” as WOTUS including man-made ditches, and certain lands adjacent to tributaries such as riparian areas and floodplains, would seem to result in a much broader reach of federal jurisdiction, regardless of whether or not the tributary has a significant nexus to, or relative permanence of, water. We propose that if a new definition of the term tributary is necessary, then that new definition needs to be more precise than what is currently proposed as “all tributaries.”

Furthermore, it is our contention that attempting to codify and define such broad and diverse terms as riparian area and floodplain will not bring clarity or consistency to the implementation of the proposed WOTUS rule. If such terms are deemed necessary, then each term must be defined with specific, measurable, repeatable, and science-backed metrics that can be easily understood and quickly derived when assessing all possible landscape features across the United States. This is the only way that use of these terms can lead to the consistency in application of the CWA, which is the goal of this rule. In practical application, neither of these terms is appropriate for inclusion in a regulatory framework that is intended for national implementation, and ultimately, we suggest that these two terms be excluded from the proposed rule.

While the concepts of significant nexus, ecoregion, and other situated waters attempt to address scale and specific conditions, they tend to produce generalized findings and potentially unnecessary conclusions about the need for federal jurisdiction. Due to the high variability in water features across the United States, the rule should provide some flexibility for regional or state-specific criteria rather than a one size fits all national standard. Such an approach is needed to maintain the role of local knowledge and to provide managers with flexibility while ensuring program consistency.

Positively, we support the recognition and continuation in the rule of the historic exemption from WOTUS for prior-converted cropland. In this vein, and to promote consistency and to provide clarity going forward, we recommend adding “Prior-converted forestlands and associated legacy ditches” to this exclusion list. Without this provision added, there is concern that forestlands converted prior to July 1, 1977\(^1\) could be recaptured by the newly proposed WOTUS rule as a result of the attempts to broadly define the terms tributary, adjacent, riparian area, floodplain, etc.

To reiterate, the proposed rule in its current form will likely create more instead of less confusion in implementation, and thus NASF does not support it as currently drafted. A number of other factors regarding the proposed rulemaking process are also troubling. First, EPA’s recognition that the draft language may not adequately convey the principles that the rule is intended to achieve leads us to believe that there may (and hopefully will) be significant changes to the draft language. Second, the public has not had sufficient time to review the findings of the Science Advisory Board (SAB) on this issue and their justifications. The SAB findings suggest a broadening of jurisdiction and more specific changes to exclusions as well as to definitions of terms such as tributary, which if EPA incorporates will significantly change the draft rule. We

\(^1\) Using this date would create consistency between WOTUS and the language contained in 33 CFR 330.3(a) (Nationwide Permit Program) regarding dredge and fill activities prior to this date being exempt from additional permitting requirements.
suggest that it is inappropriate to release a draft rule for public comment before SAB findings that may lead to significant changes in the rule have been fully considered by the Agency.

Given all of these factors and the likelihood that the rule will undergo significant changes based on the comments received from the public and the SAB, NASF requests that EPA reoffer for comment a modified proposed rule once all revisions and needed clarifications have been addressed.

We appreciate the opportunity to provide comment on the proposed WOTUS definition and look forward to providing any additional information, technical assistance, and support that the EPA may require as this rulemaking is considered.

Sincerely,

Jim Karels
Florida State Forester
NASF President