



April 15, 2019

U.S Environmental Protection Agency
EPA Docket Center, Office of Water Docket, Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Subject: Docket ID No. EPA-HQ-OW-2018-0149
Definition of Waters of the US

Dear Sir/Madam:

The National Association of State Foresters (NASF) appreciates the opportunity to provide comments on the proposed definition for jurisdictional Waters of the U.S. (WOTUS). NASF represents the heads of the state forestry agencies for all fifty states, the US territories and the District of Columbia. Our members are responsible for the promotion of sustainable forest management on nearly 300 million acres of family-owned or state/locally-owned forest land. State forestry agencies also provide, or assist in providing, forest health and fire protection on those lands plus another 130 million acres owned by corporations. Our members are also frequent cooperators on the remaining 250 million acres of forest land owned by the federal government.

Over half of the nation's drinking water supply comes from forested landscapes. We know that forested land uses are clearly the most protective of water quality and are key to the seasonal metering of water quantity. For these reasons NASF members play a key role in achieving the goals of the federal Clean Water Act under which Waters of the U.S. are regulated. We support the stated goals of this proposed rule relative to establishing clarity and reducing inconsistent interpretation and implementation on the ground.

Each state has published a set of "Forestry Best Management Practices" (BMPs) for the protection of water quality and quantity. State foresters promote the use of BMPs through various means during the conducting of forest management operations. The NASF website houses a comprehensive data set and interactive map providing significant detail on each state's forest water quality protection program that is updated annually. Data shows that nationwide implementation and effectiveness of BMPs is high. Accordingly, any rule-making activity should reaffirm the long standing, now codified, exemption of normal silvicultural activities under section 404(f)(1)(A) of the Clean Water Act. WOTUS exclusions and exemptions are well known, understood, and have little negative impact on traditional navigable waters.

Executive Director
Jay Farrell

2018-19 Executive Committee

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We appreciate the Administration’s position for avoiding the categorical inclusion of ephemeral streams. We do not believe that federal jurisdiction should extend to non-navigable, isolated/intrastate waters and wetlands or ordinarily dry features, such as ephemerals. Congress intended to leave these features to the States to address, which makes sense since they may be unique to their geography.

We support the decision to avoid attempts at national definitions for terms such as “floodplain” and “riparian area” which have significant variation across the country. We appreciate the recognition by the Administration of comments previously made by NASF in its federalism consultation that rule-making needs to recognize there is tremendous variation in watershed characteristics across the country, the definition of WOTUS needs to acknowledge this variability, and program administration needs to be tailored to what achieves the best result in any given locale. In the spirit of cooperative federalism, we welcome a more active role delegated to the states in determining if additional waters warrant protections beyond a federal “Waters of the US” designation.

We note this rulemaking is the first time to our knowledge, there have been federal stream definitions proposed in the Clean Water Act. It is critical that included in these definitions are clear and measurable field indicators to help federal and state personnel make jurisdictional determinations. From a technical standpoint, including evidence of features such as bed, bank, and high-water mark alongside evidence of perennial or intermittent flow in the definition, is necessary to make this rule implementable on the ground with the desired level of clarity and consistency. We also appreciate these definitions remaining broad enough to allow for the diversity of state program definitions already in place (for example, definitions used in each State’s silvicultural BMP manual) to continue without undue confusion. State implementation and addition of specificity to the overarching federal definitions would be an excellent example of cooperative federalism at work. To respond to questions posed in the proposal on pg. 4174 relative to these definitions, we suggest the Administration not apply a fixed number of days in the rule to determine Intermittent or Perennial flow. Diversity of hydrology nationwide does not allow for that.

The rule’s applicability to ditches requires additional clarification. We support the proposed exclusion of upland ditches, such as road ditches and stormwater ditches. While we support jurisdictional WOTUS status on ditches (canals) that are intended for commerce and ditches that are channelized stream tributaries, it is unclear how existing or new silvicultural minor drainage ditches in wetlands would be classified. It is unclear if such wetland ditches would themselves be considered as individual, discrete tributaries, or simply as an extension of the adjacent wetland. For the sake of consistency and clarity, it would seem most appropriate to consider wetland silvicultural ditches as an extension of the wetland, rather than having created a new artificial

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‘tributary.’ Our proposed interpretation would be consistent with the silvicultural exemptions codified in Section 404(f) of the Clean Water Act and align with institutionalized, state-adopted BMPs.

On Page 4190, the proposal states, “The proposed rule would also exclude (from the definition of WOTUS) water-filled depressions created in uplands incidental to mining or construction activity”. While the definition of "incidental" in this statement is unclear, we would take it to mean depressions created by the activity of equipment, and as such we wonder why this would not also apply to silviculture, considering the equipment footprint is similar. If this indeed is the intended meaning of "incidental depressions," we ask that the final rule include silviculture alongside mining and construction in the exclusion.

To respond to the question posed in the proposal on pg. 4177, we suggest the Administration not use ‘blueline streams’ or the National Hydrography Dataset as the sole indicator of a WOTUS. These maps are known to be inaccurate and underestimate the number of streams.

One of the conclusions we draw from our annual evaluation of state BMP programs is that one size does not fit all for water quality policy and regulation. State approaches are tailored to the varied ecological conditions that exist across the country, as well as to the socio-political environment that defines each state’s most likely pathway to success. We appreciate this proposed rule in many ways reflects that same view and look forward to its implementation.

Sincerely,

Lisa Allen
NASF President
Missouri State Forester

Executive Director

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