



## SOUTHERN GROUP OF STATE FORESTERS

Wib L. Owen, RF 1094, Executive Director  
1109 Woodbrook Way, Garner, NC 27529  
wib.owen@southernforesters.org  
office 919-779-6091, mobile 919-218-7321

August 3, 2015

The Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Re: Need for additional clarification on forestry impacts from the final WOTUS rule

Dear Administrator McCarthy,

I am writing this letter seeking clarification around a number of elements of the Final Clean Water Rule defining the “Waters of the United States” (WOTUS), published in the federal register on June 29, 2015, and scheduled to become effective on August 28, 2015. The SGSF is a non-profit organization representing the state forestry agencies from 13 southern states, Puerto Rico and the U.S. Virgin Islands, which stretch across four EPA regions (2, 3, 4 and 6). Our member States have responsibility for managing their respective State Best Management Practices (BMP) programs, aimed at maintaining water quality during silvicultural operations. Through these BMP programs, States have a proven track record of monitoring and preserving water quality<sup>1</sup>, and thus have a vested interest in the how this rule will change our role in the management of water quality from forestry operations in the South.

We are pleased to see multiple references in the rule in recognition of the fact that the silvicultural exemption from Section 404(f) of the Clean Water Act will still be in effect. However, a thorough reading of the 300 page rule preamble has led many of our state forestry water experts to question how exactly all the direction contained within this rule would be implemented, and to worry that confusion from inconsistent application could lead to impacts on forestry operations despite the recognition of the silvicultural exemption. In this vein, I am writing to you on behalf of our member states to ask for clarification on the issues outlined below before August 28, 2015, and to begin a dialogue with State Forestry Agencies that will hopefully lead to less confusion if and when the rule begins to be implemented.

1. The rule establishes that all defined tributaries are now WOTUS, and that all adjacent wetlands to those tributaries are also WOTUS. However, the rule at (c)(1) goes on to state that “*Waters being*

---

<sup>1</sup> Implementation of Forestry Best Management Practices: 2012 Southern Region Report, Southern Group of State Foresters, 2012. <http://www.southernforesters.org/water/SGSF%20BMP%20Report%202012.pdf>

*used for established normal farming, ranching, and silviculture activities are not adjacent.*” We interpret this to mean that even if now a ditch or stream is a protected WOTUS under the rule, the lands adjacent to that tributary are deemed to not be an adjacent WOTUS, so long as the land is being used for normal established silviculture. **Please confirm our interpretation of this section of the rule, especially as it was added between the draft rule and the final rule and thus we had no ability to offer this question in public comment.**

Additionally, the statement at (c)(1) uses the term “established normal” silviculture, but does not include the word “ongoing” as has been used for some time through interpretation and guidance regarding Section 404. **Please provide information on how a determination of “established normal” may differ from the determination of “normal and ongoing” silviculture that traditionally has been evaluated for applicability under Section 404 guidance.**

2. Under the rule, most ephemeral streams will likely now be considered tributaries and thus a WOTUS. Given the nature of ephemeral stream geometry (many ephemerals have gradual transitions to the adjoining upland), we wonder how much of the ephemeral stream channel will actually be considered a WOTUS. **Does the limit of WOTUS extend to the ordinary high water mark for an ephemeral stream, or to the top of the physical indicator of a bank?**
3. Some state BMPs encourage loggers to leave, drop, spread-out, or pile-up leftover tree tops & branches (called laps or logging slash) within ephemeral streams as a way to slow runoff and catch sediment before it can flow downhill into an intermittent or perennial stream. This practice is done to improve water quality. **Please confirm that if an ephemeral stream is now a WOTUS tributary, this BMP will not violate water standards for discharge or deposit of dredge/fill material into a tributary stream, and would be appropriately exempt under Section 404 as “normal, ongoing, established silviculture”.**
4. Part (b)(3)(ii) of the rule states “*Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands*” are not a WOTUS. In addition to being grammatically confusing (ie – does the “not” qualifier apply to all three items in the list, as would be clear if the sentence used “nor” instead of “or?”), this statement needs further clarification on what the agencies mean by “drain wetlands”. We interpret this to mean that a ditch would have to drain wetlands sufficiently to convert the site to a non-wetland for it to not be captured by this statement, and thus be jurisdictional as a WOTUS. **Please confirm our interpretation of this statement, as this is an important verification for landowners that they would not be creating a new artificial WOTUS on their land through minor silvicultural drainage ditching in wetlands that doesn’t convert the wetland (as allowed under section 404).**
5. In the rule’s list of exclusions at (b)(4)(ii), it includes “log cleaning ponds” as features that are not a WOTUS. This is not a common term in the forestry industry across the Southern U.S., so **please clarify what the agencies interpretation or definition of a “log cleaning pond” is.**

Thank you in advance for your attention to these issues, and your timely response before August 28, 2015. I recognize that these are highly nuanced questions, but they are posed in response to an equally nuanced rule. Thus, if an in-person meeting in response to this letter is more appropriate and beneficial for all parties, please let me know and I will make sure the right SGSF representatives are available for such a meeting. In addition, my understanding is that your agency will be creating a “Questions and Answers” document for field staff and the public on the final rule, and I recommend that these issues also be addressed in that document.

The management of water quality impacts from silvicultural operations in the South through state BMP programs has been a great success story. The rule's recognition of the silvicultural exemption and the documented monitoring work done by States under BMP programs prove that point. I ask that you work with us to alleviate confusion around the intentions of this rule should it proceed to implementation, and potential impacts on forestry operations.

Sincerely,



George L. Geissler, CF  
State Forester, Oklahoma  
Chair, Southern Group of State Foresters

CC: Ken Kopocis, Deputy Assistant Administrator, EPA Office of Water  
Judith Enck, Regional Administrator, US EPA Region 2  
Shawn M. Garvin, Regional Administrator, US EPA Region 3  
Heather McTeer Toney, Regional Administrator, US EPA Region 4  
Ron Curry, Regional Administrator, US EPA Region 6  
Joan Matthews, Director, Clean Water Division, US EPA Region 2  
José Font, Director, Caribbean Environmental Protection Division, US EPA Region 2  
Jon M. Capacasa, Director, Water Protection Division, US EPA Region 3  
James Giattina, Director, Water Protection Division, US EPA Region 4  
Bill Honker, Director, Water Quality Protection Division, US EPA Region 6  
Mike Wylie, 404 Enforcement Expert, Water Enforcement Programs, US EPA Region 4