November 14, 2014

(Via e-mail)

Water Docket
Environmental Protection Agency
Mail Code 2822 T
1200 Pennsylvania Ave., N.W.
Washington D.C. 20460

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

Re: Comments on Proposed Definition of Waters of the United States (WOTUS) ("Proposal") (79 *Fed. Reg*. 22,188 (April 21, 2014))

To Whom It May Concern:

The undersigned forest products industry associations and forest landowners offer the following comments on the WOTUS Proposal published by the Environmental Protection Agency and the U.S. Army Corps of Engineers (together, the agencies). The agencies are soliciting comments on a Proposal that redefines WOTUS under all Clean Water Act (CWA) programs. The proposed regulations broaden the scope of CWA jurisdiction beyond constitutional and statutory limits established by Congress and recognized by the Supreme Court. In addition to raising serious legal issues, the Proposal fails to provide clarity or predictability and raises practical concerns with regard to how the rule will be implemented. The Proposal will result in duplicative and incongruent regulatory requirements that are inconsistent with the purpose and structure of the CWA and have not been adequately considered by the agencies. We request that the agencies withdraw the Proposal, consult with stakeholders, and work to revise the Proposal to resolve these important issues.

I. The Proposal Expands Clean Water Act Jurisdiction Beyond Current Rules

A. The Change from "Wetlands" to "Waters" and the Expansive Definitions of "Tributaries," "Adjacent," and "Neighboring" Expand CWA Jurisdiction

Under the existing WOTUS rule, *wetlands* adjacent to "waters of the United States" are explicitly listed as "waters of the United States." In the Proposal, however, "*all waters,* including wetlands, adjacent to" the waters covered by the first five categories of the proposed definition, *i.e*. traditional navigable waters through tributaries, are defined as WOTUS. In addition to changing "wetlands" to "all waters," the Proposal expands the concept of adjacency considerably. Current regulations define "adjacent" as "bordering, contiguous, or neighboring," and state that "*[w]etlands* separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" See, e.g., 33 C.F.R. § 328.3(c). The Proposal, however, (1) states that "*[w]aters*, including wetlands, separated from other waters of

the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent waters,'" and (2) adds a definition of "neighboring" that may expand CWA jurisdiction over "adjacent" waters beyond what a court might have otherwise interpreted to be "bordering, contiguous, or neighboring."

Specifically, the Proposal defines "neighboring" to include waters located within the riparian area or floodplain of a traditional navigable water or its tributary, "or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." Agency staff have asserted in outreach meetings that there is a geographic limitation on the subsurface connection, but it is not in the proposed rule text itself. A "floodplain" is an area that, among other things, "is inundated during periods of moderate to high water flows," although the definition does not reference a particular year flood interval but leaves it to the agencies' "best professional judgment" to determine the appropriate area or flood interval. "Riparian area" is defined as "an area bordering a water where surface or subsurface hydrology directly influence [*sic*] the ecological processes and plant and animal community structure in the area." Because interpretation and application of these vague and expansive concepts is left in the hands of individual regulators and ultimately the federal courts, the rule provides us with no clarity or certainty.

B. <u>The "Significant Nexus" Provisions Significantly Expand CWA Jurisdiction</u>

Aside from the waters discussed above that are *per se* jurisdictional, the Proposal also includes "significant nexus" provisions that allow the agencies to determine on a case by case basis, that waters that are not traditional navigable waters, are not tributaries to traditional navigable waters, and are not "adjacent" to either (so-called "isolated waters") are WOTUS. Further it provides that the significant nexus can be found based not only on the effect of the particular water at issue, but also the effect in combination with other similarly situated waters located in the same region. These provisions expand existing CWA jurisdiction and do not provide certainty or clarity—two of the agencies' stated goals for the rulemaking.

II. The Changes and Definitions in the Proposal Could Subject Mills and Forest Owners to Arguments that Any Waters on Their Property are WOTUS

Since under the Proposal all waters, not just wetlands, are WOTUS if they are adjacent to a traditional navigable water or its tributary, and since "adjacent" means within the floodplain or within a riparian area -- an area with a surface or subsurface hydrological influence on a jurisdictional water -- many wetland areas, ponds, ditches, ephemeral drainages, and other water features that are located anywhere in the vicinity of a traditional navigable water or tributary system could arguably be considered WOTUS unless covered by an exemption.

Water is an important component of forest products manufacturing, and member manufacturing facilities are typically sited near water resources. Further, mills may have numerous "isolated waters" on their property. Accordingly, under the Proposal, those facilities are susceptible to unfounded claims by regulatory agencies or third parties that waters on their property are WOTUS.

Forestry operations occur on vast areas of land, often where rainfall is plentiful and where various water features (*e.g.*, wetlands, ditches, and ephemeral drainages) dot the landscape. Under the proposal, many previously non-jurisdictional water features will categorically be WOTUS under the new definitions of "tributary" and "adjacent." Forest landowners will be vulnerable to unfounded claims by regulators or third parties that waters on their lands are WOTUS and therefore subject to regulatory controls not previously applicable to these features.

III. The Agencies Should Clearly Exempt Waters on Manufacturing Facilities Used for Commercial Purposes

The broad language of the Proposal would leave mills subject to unwarranted claims of jurisdiction for water bodies on mill property that are part of the commercial activities on that property. The final rule needs to unequivocally avoid that result, for three reasons:

(1) Treating such water bodies as subject to federal jurisdiction and covered by the various requirements of the CWA would be contrary to decades of agency practice in application of the CWA. It also would be contrary to both the agencies' stated intentions with respect to the Proposal and the reasonable expectations of those who own and operate industrial and other commercial facilities.

(2) Treating such water bodies as WOTUS would greatly interfere with the operation of industrial and other commercial facilities, imposing excessive costs, regulatory delays, and other constraints. In many cases, literal application of CWA requirements to such a water body could render its use for commercial purposes difficult or impossible.

(3) Most importantly, treating such water bodies as WOTUS would do little, if anything, to further the goals of the CWA, and it would impose excessive regulatory burdens on both facility operators and CWA permitting and enforcement authorities. A prohibition on discharge of fill material into, or dredging fill material out of, a water body without a permit makes no sense when that water body was created for the purpose of storing water containing suspended solids, or of settling solids out of that water, for example. Water quality standards designed to protect aquatic life in, or to assure the aesthetics of, a natural water body serve no purpose if applied to a water body that is part of an industrial operation. Maintaining healthy aquatic organisms in a water body may be the opposite of what is needed in ponds used to store water to be used for commercial purposes, such as for cooling water or for water used to process food or manufacture drugs. If EPA were to claim WOTUS jurisdiction over such ponds, EPA and state agencies would take on a tremendous burden of having to develop new water quality standards that would be appropriate for such uses, as well as issue CWA section 402 or

section 404 permits for discharges into or activities related to maintenance of those waters—and for little or no regulatory benefit.

Finally, a number of existing exemptions (e.g., the exemption for artificial lakes and ponds) should be clarified to ensure that certain waters on manufacturing sites are not subject to CWA jurisdiction. As described above, there is no environmental benefit in regulating such waters, and their regulation would subject owners and operators of manufacturing facilities to needless costs and resource expenditures.

IV. Impacts on Forest Management

The Proposal will have a number of significant consequences for forest owners, including uncertainty whether water features on forest lands are jurisdictional; new or additional permitting obligations; new requirements to meet water quality standards or total maximum daily loads (TMDLs); and increased exposure to citizen suit litigation. The Proposal does not serve the agencies' goal of providing clarity as to whether a given parcel of land contains WOTUS. Forest owners cannot reliably predict whether a seemingly isolated waterbody on their land will be deemed as lying within a "riparian area" or "floodplain" of jurisdictional water. Nor can they confidently distinguish between an excluded erosional feature and a jurisdictional ephemeral tributary. Given the ambiguity and lack of clarity in the proposal, forest owners will be put in a position of trying to account for extensive tributary systems, riparian areas, floodplains, and the extent of subsurface hydrologic connections that extend far beyond the boundaries of their lands. This may not be possible for landowners who are carrying out normal silvicultural activities that do not produce sufficient financial returns to justify the analysis. As a result, forest owners could lose the ability to manage lands and may seek other less benign uses for their land.

The Proposal also poses a significant problem for forestry operations subject to best management practices. Categorical designation of ditches and ephemeral streams, in particular, will cause considerable confusion as to how forest owners are to implement best management practices like buffers along roadside ditches. Moreover, despite existing exemptions in CWA Sections 404(f) and 402(l) for certain activities in the forest, the Proposal's expansion of WOTUS could mean that non-stormwater discharges of pollutants into newly jurisdictional ditches and ephemeral drainages could be considered unlawful discharges without an NPDES permit, thereby potentially triggering daily penalties.

The expansion of jurisdiction under the Proposal could also trigger new obligations under CWA Section 303 relating to water quality standards and TMDLs. For example, an impaired waters listing and the regulatory restrictions resulting from the TMDL process could negatively impact private forest owners, who must comply with any resulting land use restrictions and may see a reduction in their property values.[1]

[1] *Cf. Barnum Timber Co. v. EPA*, 633 F.3d 894 (9th Cir. 2011).

Finally, forest owners have long had to defend against citizen suits such as the "forest roads" case that took almost a decade to resolve. The Proposal would invite similar citizen lawsuits against forest landowners seeking to halt operations. Given the vague terms in the proposal, citizen plaintiffs could find any number of ways to allege that a given silvicultural activity results in a direct discharge to some water feature that is purportedly a WOTUS. Regardless of whether such allegations have any merit, they cost time and money to resolve and they disrupt forestry operations.

* * *

Thank you for the opportunity to comment on the Proposal. If you have any questions, please contact Jerry Schwartz (202-463-2581; jerry_schwartz@afandpa.org) or Chip Murray (202-742-0742; cmurray@nafoalliance.org).

Sincerely,

Kitchen Cabinet Manufacturers Association
Alabama Forestry Association
Allegheny Hardwood Utilization Group, Inc.
American Forest & Paper Association
American Loggers Council
Appalachian Hardwood Manufacturers, Inc.
Arkansas Forestry Association
Arkansas Timber Producers Association
Associated Logging Contractors- Idaho
Associated Oregon Loggers, Inc.
Association of Consulting Foresters
Black Hills Forest Resource Association
California Forestry Association
Carolina Loggers Association
Colorado Timber Industry Association
Composite Panel Association
Empire State Forest Products Association
Florida Forestry Association
Forest Landowners Association
Forest Resources Association
Georgia Forestry Association
Hardwood Federation
Hardwood Plywood & Veneer Association
Idaho Forest Owners Association
Idaho Women in Timber
Intermountain Forest Association
Kentucky Forest Industries Association
Labor Management Committee
Louisiana Forestry Association
Massachusetts Forest Alliance

Michigan Association of Timbermen
Michigan Forest Products Council
Minnesota Forest Industries
Minnesota Timber Producers Association
Mississippi Forestry Association
Missouri Forest Products Association
Montana Logging Association
Montana Wood Products Association
National Alliance of Forest Owners
National Wood Flooring Association
National Wood Pallet and Container Association
New Hampshire Timberland Owners Association
North Carolina Forestry Association
Northeastern Logger's Association
Northeastern Retail Lumber Association
Oklahoma Forestry Association
Oregon Forest Industries Council
Oregon Small Woodlands Association
Oregon Women in Timber
Pennsylvania Forest Products Association
Professional Logging Contractors of Maine
Railway Tie Association
South Carolina Forestry Association
South Carolina Timber Producers Association
Southeastern Lumber Manufacturers Association
Tennessee Forestry Association
Tennessee Paper Council
Texas Forestry Association
The Great Lakes Timber Professionals Association
The Northeast Master Logger Certification Program
The Trust to Conserve Northeast Forestlands
Treated Wood Council
Virginia Forest Products Association
Virginia Forestry Association
Washington Forest Products Association
West Coast Lumber & Building Material Association
West Virginia Forestry Association
Wisconsin County Forests Association
Wisconsin Paper Council