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RE: Docket ID No. EPA-HQ-OW-2021-0328
Request for Recommendations Regarding "Waters of the United States"

To Whom It May Concern:

The undersigned forestry and forest products organizations submit the following comments for the U.S. Environmental Protection Agency's ("EPA") and U.S. Army Corps of Engineers' ("Corps") (together, "Agencies") consideration in response to the Agencies' Notice requesting recommendations on the meaning of "Waters of the United States" ("WOTUS"). 86 Fed. Reg. 41,911 (Aug. 4, 2021) ("Notice"). In the Notice, the Agencies have indicated that they intend to revise the definition through two rulemakings: a "foundational rule" that restores the pre-2015 definitions; and (ii) a second rulemaking that "builds on that regulatory foundation." We prefer the definition of WOTUS set forth in the Navigable Waters Protection Rule ("NWPR"), 85 Fed. Reg. 22,250 (Apr. 21, 2020), over the pre-2015 definition, and we believe the NWPR is a defensible rule that provides clear definitions that achieve the goals of the Clean Water Act ("CWA"), while respecting the states' primary authority over water pollution control and over land and water use. Nonetheless, if the Agencies are determined to once again return to the rulemaking process, we provide the recommendations below. We appreciate the opportunity to provide these recommendations on behalf of our members.

RECOMMENDATIONS

1. **Congress's Stated Policy in CWA Section 101(b) Must Guide Any Revision of the Definition of "Waters of the United States."**

While recognizing the importance of the congressional objective in CWA section 101(a) to "restore the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), we emphasize that Congress also clearly set forth in section 101(b), 33 U.S.C. §

1251(b), its "policy to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and elimination pollution" and "to plan the development and use . . . of land and water resources." Equally important, the CWA's operative provisions place noteworthy limits on the federal government's authority and reserve for states the primary authority to decide how to address water pollution. Any new rulemaking to revise the definition of "waters of the United States" therefore must discuss and explain implementation of the policy set forth in section 101(b) in the development of the delineation of federal jurisdiction under the CWA. Appropriately respecting the traditional authority of States would in no way work at cross-purposes with Executive Order 13990, which the Notice references as prompting this review.

2. Any Revisions the Agencies Make Should Include Clear Definitions that Allow for Consistent Application.

An interpretation of "waters of the United States" that does not test the outer bounds of Congress's authority (like that in the NWPR) is more likely to provide clarity and be consistently administered than a broad interpretation (like the 2015 WOTUS Rule and pre-2015 framework) that is based on an expansive view of what constitutes "significant nexus." The term "significant nexus" appears nowhere in the statute, and it was mentioned once in passing in the majority's opinion in *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* ("*SWANCC*"), 531 U.S. 159, 167 (2001), yet is looked at as the default criterion to describe a WOTUS. The "significant nexus" concept is largely an outgrowth of Justice Kennedy's concurring opinion in *Rapanos v. United States,* 547 U.S. 715 (2006). Neither the Agencies nor courts have consistently applied that term, and it has proven to be an unworkable standard. The NWPR appropriately departed from this construct, and the Agencies should not revive it.

3. Only Non-Navigable Waters that Are Relatively Permanent Tributaries to, and Have a Clear Surface Connection with, Traditional Navigable Waters Should Be "Waters of the United States."

Forestry operations are routinely undertaken near intermittent and ephemeral streams, as well as many other drainage features that can be in close proximity to each other. If some or all of those features are subject to CWA jurisdiction, forest owners would likely no longer be able to rely on state-approved best management practices (BMPs) and forest practice rules but would need to respond, likely by establishing expanded riparian management zones. This would remove additional acreages from forest management beyond those acres already set aside through BMP compliance and cause significant financial hardship for forest owners. Finally, forest owners would have tremendous difficulty determining whether water features on their lands are jurisdictional if the Agencies define "waters of the United States" so broadly as to include ephemeral streams or streams that infrequently flow into traditional navigable waters.

4. Most Ditches Should Remain Non-Jurisdictional.

Ditches are common on forested landscapes, where forest owners construct, maintain, and utilize them to support their operations, not to mention a variety of abandoned ditches from previous land use activities. Among other things, ditches help prevent flooding and ensure that rainwater runoff is diverted away from areas where it would otherwise collect or is managed to avoid erosion. Many are legacy ditches from when the land was farmed long ago, including now-

abandoned ones. While present on the ground, they may be invisible from the air or on aerial photographs and therefore may not be included on maps. In other cases they may be part of "minor drainage" ditch systems that are statutorily considered outside of CWA jurisdiction. The assertion of CWA jurisdiction over ditches, along with the eventual riparian management measures that must follow, would take extensive acreage out of forest production, making it more difficult to maximize environmentally beneficial forest management while creating a significant financial hardship for forest owners.

5. Only Wetlands that Directly Abut Other "Waters of the United States" Should Be Jurisdictional.

Section 404(g)(1) of the CWA, 33 U.S.C. § 1344(g)(1), refers to certain adjacent wetlands as a subset of "navigable waters." The statute does not define "adjacent," and neither the legislative history nor the underlying policies of the Corps' statutory grants of authority compel the Agencies to define adjacent wetlands in a particular manner. Given the importance of the explicit Congressional policy in section 101(b) and the need for a clear and administrable rule, EPA and the Corps should assert jurisdiction over only those wetlands that directly abut other WOTUS.

The Agencies should not resurrect terminology used in prior iterations of the adjacency definition such as "bordering, contiguous, or neighboring." Unfortunately, the term "neighboring" has long been susceptible to overly broad interpretations. For instance, the Corps and lower courts deemed wetlands to be "adjacent" simply because they are hydrologically connected "through directional sheet flow during storm events," lie within the 100-year floodplain, or are located within 200 feet of a tributary. Moreover, under the 2015 WOTUS Rule, a wetland (or any "water" for that matter) was defined as "neighboring, and hence "adjacent," so long as any portion of it is within 100 feet of the ordinary high water mark of a jurisdictional tributary or within the 100-year floodplain of certain other jurisdictional waters. Such ambiguous targeting of distant wetlands only creates uncertainty and arbitrary enforcement.

6. The Agencies Should Maintain Specific Exclusions in Any Revision.

All of the WOTUS rules over the years, including the 2015 rule, have excluded wastewater treatment systems from the definition of WOTUS. We strongly support continuing these exclusions and the additional clarifications included in the NWPR, as they added greater certainty for regulated parties.

CONCLUSION

We appreciate the opportunity to provide these written comments and thank you in advance for your consideration.

Sincerely,

Alabama Forestry Association
American Forest Resource Council
Arkansas Forestry Association

Associated California Loggers
Association of Consulting Foresters
Black Hills Forest Resource Association
California Forestry Association
Colorado Timber Industry Association
Empire State Forest Products Association
Federal Forest Resource Coalition
Florida Forestry Association
Forest Landowners Association
Forest Resources Association
Forestry Association of South Carolina
Georgia Forestry Association
Hardwood Federation
Intermountain Forest Association
Louisiana Forestry Association
Louisiana Logging Council
Massachusetts Forest Alliance
Maine Forest Products Council
Michigan Forest Products Council and AJD Forest Products
Minnesota Forest Industries
Mississippi Forestry Association
Montana Wood Products Association
National Alliance of Forest Owners
National Woodland Owners Association
New Hampshire Timberland Owners Association
North Carolina Forestry Association
Ohio Forestry Association
Oregon Forest & Industries Council
Pennsylvania Forest Products Association
Society of American Foresters
Southeastern Lumber Manufacturers Association
Tennessee Forestry Association
Texas Forestry Association
Virginia Forestry Association
Washington Forest Protection Association
West Virginia Forestry Association