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Re: *Revised Definition of "Waters of the United States*," 86 Fed. Reg. 69372 (December 7, 2022), Docket No. EPA-HQ-OW-2021-0602

To Whom It May Concern:

The undersigned forestry associations offer the following comments on the proposed *Revised Definition of "Waters of the United States*," 86 Fed. Reg. 69372 (December 7, 2022), Docket No. EPA-HQ-OW-2021-0602 (Proposed Rule), published by the Environmental Protection Agency and the U.S. Army Corps of Engineers (together, the Agencies). The agencies are soliciting comments on a Proposed Rule that redefines waters of the United States (WOTUS) under all Clean Water Act (CWA) programs.

U.S. forest owners are international leaders in sustainable forestry—private forest owners today are growing 40% more wood than they remove.[1] Individual states administer the world's most effective framework of forestry laws, regulations, and agreements in a way that is carefully tailored to local conditions and needs. NAFO works within this framework to assure an abundance of healthy and productive forest resources for present and future generations that support clean water, clean air and wildlife habitats. While employing these sustainable forestry management practices, 11.3 million private working forest owners in the U.S. support 2.5 million U.S. jobs and $109 billion annually in payroll.

[1] Jeffries, H., Forest2Market, Inc., United States Forest Inventory and Harvest Trends on Privately-Owned Timberlands 19 (2016), *available at* https://nafoalliance.org/wp-content/uploads/Carbon/F2M-inventory-harvest-trends-20160620.pdf.

The Agencies are proposing to codify the pre-2015 regulatory regime, which they characterize as a combination of the 1986 regulatory text, 2003 Guidance (issued after the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*")) and 2008 Guidance (issued after the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006)). We have serious concern that this current framework is inconsistent with Supreme Court precedent and ignores the multiple admonishments that Congress used the term "navigable" as a limitation on federal jurisdiction to a far greater degree than the Agencies recognize. Moreover, the Proposed Rule does not, as claimed by the Agencies, merely codify current practice. On the contrary, it significantly broadens the Agencies' approach to implementing the significant nexus standard; creates an entirely new "other waters" category; and narrows the universe of non-jurisdictional ditches. All of these changes venture far afield from the current regulatory regime that the Agencies say they are implementing under the 2008 *Rapanos* Guidance. The Agencies should do nothing more in the Proposed Rule than they have assured the public they are doing, which is to codify the pre-2015 regulatory regime that they are currently implementing.

The Supreme Court has twice rebuffed the Agencies on their interpretation of the term "waters of the United States." The Proposed Rule effectively circumvents those decisions and establishes jurisdictional tests that are essentially coextensive with the Agencies' positions before the Supreme Court spoke. The Agencies must revise the Proposed Rule to reflect the actual limits that Congress placed on CWA jurisdiction by using the term "navigable," as well as the limits set forth in the majority opinion in *SWANCC* and in the plurality and concurring opinions in *Rapanos*.

The Proposed Rule should establish clearer standards for identifying jurisdictional tributaries and should not expand the current approaches to determining jurisdiction under the 2008 *Rapanos* Guidance. The Proposed Rule's subjective analysis of the collective impact of all tributaries in a watershed will lead to uncertain results and will result in an over-inclusive exercise of jurisdiction. The Agencies' proposal erroneously extends the "significant nexus" discussions in prior Supreme Court precedents to waters other than wetlands. The lack of clear, workable methods for evaluating significance leaves forest owners vulnerable to unpredictable, inconsistent decisions about what constitutes a "water of the United States" as well as potentially arbitrary attempts to enforce the CWA. The Agencies should exercise particular caution with respect to asserting jurisdiction over non-relatively permanent tributaries, especially ephemeral streams in the forest. Declaring such tributaries to be "waters of the United States" has far-reaching impacts on regulated entities, as well as agency and State resources, so it is important that the Agencies exercise restraint in applying the significant nexus test in what is, ultimately, a legal and policy decision.

The Agencies also improperly interpret "relatively permanent." Under *Rapanos*, a relatively permanent non-navigable water has to be connected to a "traditional interstate *navigable* water" to be jurisdictional. *Id.* at 742 The Proposed Rule, however, removes the term "navigable" from that requirement and allows connections to waters that are merely interstate. The Proposed Rule also interprets the phrase "relatively permanent, standing or continuously flowing" too broadly. In the Agencies' view, that phrase means a water must "flow at least seasonally," which is far from the Supreme Court's acknowledgment that this phrase might cover a river that flows only *290 days a year*. *Id*. at 732 n.5 (emphasis added.) This cannot be reconciled with the Agencies' proposal.

The Proposed Rule should establish objective standards for determining whether a wetland is "adjacent" and thus, jurisdictional. Like the Proposed Rule's approach to tributaries, allowing the Agencies to analyze the collective impact of all wetlands in a watershed will lead to uncertain results and will result in an over-inclusive exercise of jurisdiction. This approach is not consistent with the 2008 Guidance, which focused on wetlands adjacent to a specific reach of a tributary, not an entire watershed. The Agencies should return to current policy under the 2008 Guidance.

The Agencies should not finalize the new "other waters" category. That category misapplies both the plurality's relatively permanent standard and Justice Kennedy's significant nexus standard and would effectively allow the Agencies to claim as jurisdictional a broad variety of isolated water features in contravention of the holding in *SWANCC*. The Agencies also acknowledge that they have not issued any determinations under this category since the 2003 decision in the *SWANCC* case, 86 Fed. Reg. at 69419, making this revised category inconsistent with following the current framework. Unless the Agencies do not plan to ever use this new "other waters" category, it is incorrect for the Agencies to assert there are no costs or benefits as the regulatory scope between the presently implemented pre-2015 regulatory regime is approximately the same as the proposed rule. 86 Fed. Reg. at 69446.

The final rule should clarify that it does not expand the Agencies' jurisdiction over ditches and that non-tidal, upland ditches are not "waters of the United States." The Proposed Rule appears to expand the Agencies' jurisdiction over ditches by allowing them to claim jurisdiction over *any* upland ditches with intermittent flow. 86 Fed. Reg. at 69433. As we have commented in the past, even the *Rapanos* Guidance went too far in asserting jurisdiction over ditches by requiring that ditches carry less than relatively permanent flow to be non-jurisdictional. The Agencies should take a step back in this Proposed Rule and exclude non-tidal upland ditches regardless of flow characteristics or connections to downstream navigable waters.

The Agencies appropriately propose to retain the longstanding express exclusion for waste treatment systems and to make minor changes to improve clarity and consistency. The Agencies should also make refinements to their discussion of which

artificial lakes and ponds are excluded to make clear that (i) such ponds can be excluded even if they are used for more than one purpose; and (ii) the list of uses for excluded ponds was intended to be illustrative and not exclusive. Our concern is to ensure that fire suppression ponds are covered by the exclusion.

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Thank you for the opportunity to comment on the Proposal.

Sincerely,

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On behalf of:

Alabama Forestry Association
Arkansas Forestry Association
Association of Consulting Foresters
Calforests
Empire State Forest Products Assn.
Florida Forestry Association
Forest Landowners Association
Forest Resources Association
Forestry Association of South Carolina
Georgia Forestry Association
Idaho Forest Owners Association
Louisiana Forestry Association
Louisiana Logging Council
Maine Forest Products Council
Massachusetts Forest Alliance
Michigan Forest Products Council
Minnesota Forest Industries
Minnesota Timber Producers Assn.
Mississippi Forestry Association
National Alliance of Forest Owners
National Woodland Owners Association
New Hampshire Timberland Owners Assn.
North Carolina Forestry Association
Ohio Forestry Association, Inc.
Oregon Forest & Industries Council
Pennsylvania Forest Products Assn.
Society of American Foresters
Southeastern Lumber Manufacturers Assn.
Tennessee Forestry Association
Texas Forestry Association
Virginia Forestry Association
Washington Forest Protection Assn.
West Virginia Forestry Association