

**Written Public Testimony of Joe Fox, Arkansas State Forester, on behalf of the
National Association of State Foresters**

**Submitted to the House Committee on Agriculture, Subcommittee on
Conservation and Forestry**

March 5, 2015

Good morning, Chairman Thompson, Ranking Member Lujan Grisham, and members of the Subcommittee. I am Joe Fox, Arkansas State Forester, and I thank you for the opportunity to appear before the Subcommittee today on behalf of the National Association of State Foresters. I am pleased to provide testimony to the Subcommittee on Conservation and Forestry concerning the U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) proposed rule to define "Waters of the United States" (WOTUS) under the Clean Water Act (CWA). The National Association of State Foresters (NASF) represents the directors of state forestry agencies from all 50 states, eight U.S. territories, and the District of Columbia. State foresters direct programs that assist landowners in the management and protection of more than two-thirds of the nation's forests; over 500 million acres of private forestland. State foresters have primary responsibility for the development and implementation of state non-point source water pollution control programs for silviculture, commonly referred to as forestry best management practices, or "BMPs."

BMPs have been an integral part of state forestry agency programs since the 1970s and have provided effective, affordable, and practical measures that protect water quality when managing forests through harvesting, thinning, replanting, construction and maintenance of forest roads, and related silvicultural activities. NASF's latest report examining the effectiveness and implementation rates of state BMP programs is nearly complete. I am pleased to report to the Subcommittee that the findings indicate high rates of implementation and successful performance in protecting water quality nationwide.

I would also like to thank the Subcommittee for the strong, bi-partisan support you demonstrated in the 2014 Farm Bill by including a provision to preserve the exclusion of forest roads from point source permitting under the CWA. Such action acknowledges the efficacy of BMP measures and reaffirms the significant role of state forestry agencies in protecting water quality.

NASF members work to ensure the continued flow of benefits from the nation's forests including clean air and water, forest products and jobs, wildlife habitat, and aesthetic values. These forests face many threats including wildfire and damaging insects and disease, but permanent loss of forestland from conversion to other land uses is an issue of increasing national significance. Barriers to long-term management such as inadequate markets for forest products can increase the likelihood of conversion. Similarly, confusing or complex regulatory policy can create uncertainty and administrative burdens that frustrate a landowner's inclination to invest in forest management and thereby consider other land use options

I recognize that the EPA and the Corps proposed the new definition of waters of the United States in response to direction from the Supreme Court of the United States and in hopes of providing more clarity for landowners and stakeholders. However, I am concerned that the proposal, as written, will do just the opposite and generate uncertainty, complicate existing

procedures, and result in new legal exposure for forest landowners under the CWA. As such, NASF communicated to the EPA and Corps through comments filed in November 2014 that the association did not support the proposed rule as drafted and offered comments on specific concerns within the proposed rule.

In particular, the proposed rule's categorical definition of "all tributaries" as WOTUS, including man-made ditches and certain lands adjacent to tributaries such as riparian areas and floodplains, would seem to result in a much broader reach of federal jurisdiction, one that distorts the concept of "significant nexus to" and ignores whether there is relative permanence of water. We propose that if a new definition of the term *tributary* is necessary, then that new definition needs to be more precise than what is currently proposed as "all tributaries."

Furthermore, NASF shared concern with the EPA and the Corps that attempting to codify and define such broad and diverse terms as *riparian area* and *floodplain* in a national rule is problematic and will not bring clarity or consistency to the implementation of the proposed WOTUS rule. If such terms are deemed necessary, then each term must be defined with specific, measurable, repeatable, and science-based metrics that can be easily understood and quickly derived when assessing all possible landscape features across the United States. This is the only way that use of these terms can lead to the consistency in application of the CWA which is the goal of this rule. In practical application, neither of these terms is appropriate for inclusion in a regulatory framework intended for national implementation, and ultimately, NASF suggests that these two terms be excluded from the proposed rule.

While the concepts of *significant nexus*, *ecoregion*, and *other situated waters* attempt to address scale and specific conditions, they tend to produce generalized findings and potentially unnecessary conclusions about the need for federal jurisdiction. Due to the high variability in water features across the United States, the rule should provide some flexibility for regional or state-specific criteria rather than a one size fits all national standard. Such an approach is needed to maintain the role of local knowledge and to provide managers with flexibility while ensuring program consistency.

NASF appreciates the acknowledgement in the proposed rule that the longstanding permitting exemption in Section 404 of the CWA for silviculture is not affected by the proposed rule. The silviculture exemption is an important tool that supports sustainable forest management which is critical to ensuring that private landowners have an incentive to retain forestland.

To reiterate, I am concerned that the proposed rule in its current form will likely create circumstances of more confusion rather than clarity in implementation. EPA's public acknowledgment that the proposed language may not adequately convey the principles as intended suggests that significant revisions to the proposed language will be forthcoming. Incorporating such findings will significantly change the proposed rule that NASF and many other stakeholders considered in submitting comments to the EPA and the Corps and it remains unclear if the agencies will seek additional comments from stakeholders.

Thank you, Chairman Thompson, Ranking Member Lujan Grisham, and members of the Subcommittee for the opportunity to provide testimony this morning. I look forward to answering any questions you may have.