



September 3, 2021

(Via e-mail)

Office of Water - Docket
U.S. Environmental Protection Agency
1200 N. Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: AF&PA Comments on EPA and Army Corps of Engineers' (the Agencies) Request for Recommendations Regarding "Waters of the United States"; Docket ID No. EPA-HQ-OW-2021-0328; 86 Fed. Reg. 41912 (August 4, 2021)

To Whom it May Concern:

The American Forest & Paper Association (AF&PA) is pleased to respond to the Agencies' request for recommendations regarding potential future approaches to a Waters of the U.S. (WOTUS) rulemaking. AF&PA is providing high-level recommendations on some of the issues raised in the Agencies' request for comments. We also are members of the Waters Advocacy Coalition (WAC) and the Federal Water Quality Coalition (FWQC) and we support their more detailed comments in their entirety.

AF&PA serves to advance U.S. paper and wood products manufacturers through fact-based public policy and marketplace advocacy. The forest products industry is circular by nature. AF&PA member companies make essential products from renewable and recycle resources, generate renewable bioenergy and are committed to continuous improvement through the industry's sustainability initiative — [*Better Practices, Better Planet 2030: Sustainable Products for a Sustainable Future*](#). The forest products industry accounts for approximately four percent of the total U.S. manufacturing GDP, manufactures nearly \$300 billion in products annually and employs approximately 950,000 people. The industry meets a payroll of approximately \$60 billion annually and is among the top 10 manufacturing sector employers in 45 states.

AF&PA's sustainability initiative — *Better Practices, Better Planet 2030: Sustainable Products for a Sustainable Future* — comprises one of the most extensive

quantifiable sets of sustainability goals for a U.S. manufacturing industry and is the latest example of our members' proactive commitment to the long-term success of our industry, our communities and our environment. We have long been responsible stewards of our planet's resources. AF&PA members met or surpassed many of the goals outlined in our previous sustainability initiative, *Better Practices, Better Planet 2020*, including a 23.2 percent reduction in GHG emissions; 13.3 percent improvement in purchased energy efficiency; 38.4 percent reduction in workplace injuries; and 12 percentage point increase in wood fiber procurement from certified forestlands.

I. Support for a Durable WOTUS Rule

AF&PA supports the Agencies' intention to develop a durable rule that withstands judicial review and avoids the recent history of each administration repealing and replacing the rule of the previous administration. Below we discuss several key principles that should be the foundation of any durable rule and that industry stakeholders have consistently backed for well over a decade (see Section III., below). The Navigable Waters Protection Rule (NWPR) fulfilled each of these key principles, and we believe the rule is protective and legally defensible on the merits, notwithstanding the concerns the Agencies have expressed about the rule and even though the U.S. District Court for the District of Arizona recently granted the Agencies' request for a voluntary remand *and* ordered that the NWPR be "vacated and remanded for reconsideration."

The Agencies' announcement of its Request for Information also stated their intent to develop a new rule and that a "forthcoming foundational rule would restore the regulations defining WOTUS that were in place for decades until 2015, with updates to be consistent with relevant Supreme Court decisions." As an initial matter, it is unclear what is the Agencies' intent with this language. As noted in the FWQC comments, the "2020 Rule already codifies the longstanding Clean Water Act regulations that were in place prior to 2015 and adheres to relevant Supreme Court decisions." In any event, we believe that any attempt to revise the definition of jurisdictional waters must be consistent with the principles below.

II. Key Principles for a Durable Rule

As stated, we support development of a durable rule consistent with the principles stated below. Further, any rule should not test the limits of jurisdiction under the CWA, nor should it attempt to sweep in all waters or waterbody types in the U.S. This would only invite continued litigation in which such a rule would be extremely vulnerable, and not accomplish the Administration's goal of adopting a durable rule. The following are the key principles:

- Give proper weight to the CWA § 101(b) policy of preserving states' primary responsibilities over water pollution control and over land and water use; recognize that the CWA does not confer federal jurisdiction over all water features.
- Write clear definitions that give fair notice of what is regulated.
- Adhere to all relevant Supreme Court holdings.
- Give meaning to the term "navigable".
- Account for the relevant role of science in this issue. Recognize that the definition of waters of the United States is a legal question and that science provides valuable information to decision making, but it does not dictate where the line is drawn between Federal and State jurisdiction.

III. Specific Issues

While both the WAC and FWQC are providing detailed comments on exclusions and specific water features, we would like to emphasize two points below.

- Wastewater Treatment Exclusion. Every one of the WOTUS rules and revisions 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. If the Agencies do decide to revise the NWPR, we have additional clarifications to this and other exclusions that we will offer.
- Ephemeral Waters. 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, cause significant financial hardship for forest owners, and could drive up fiber costs for AF&PA members, adversely affecting their competitiveness. 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

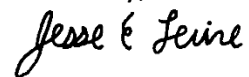
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include ephemeral streams or streams that infrequently flow into traditional navigable waters.

Thank you for the opportunity to comment on the Proposal. If you have any questions, please contact Jesse Levine at 202/463-2581 or Jesse_Levine @afandpa.org.

Sincerely,

A handwritten signature in black ink that reads "Jesse Levine". The signature is written in a cursive, slightly slanted style.

Jesse Levine

Senior Director

Energy & Environmental Programs