



December 7, 2009

The Honorable James L. Oberstar  
 United States House of Representatives  
 Washington, DC 20515

Dear Chairman Oberstar:

As the House Transportation and Infrastructure Committee prepares to consider legislation regarding reformulation of federal authorities under the Clean Water Act (CWA), the National Association of State Foresters would like to offer guidance and assistance on this matter. NASF is a non-profit organization composed of the directors of forestry agencies from the fifty states, eight U.S. territories and associated states, and the District of Columbia. NASF members are committed to water quality protection and are significant participants in the federal-state partnership to implement the provisions of the CWA. State-level forestry Best Management Practice (BMP) programs per Section 319 of CWA are one of the nation's great environmental success stories. Likewise, NASF's commitments to cooperation with federal agencies responsible for the regulatory provisions of the CWA, such as Section 404, are an essential feature of successful national policy on water resource protection.

NASF recognizes the challenges created by incremental court and administrative decisions regarding the CWA. Some of those decisions have arguably frustrated or pre-empted the original intent of the CWA and complicated its effective implementation, potentially placing important water resources such as forested wetlands at risk of pollution or loss. NASF is a strong advocate of maintaining a healthy forest base and thus support laws, regulations and policies that contribute to that end. In that regard, NASF advocates a careful review of those CWA issues to determine the best combination of regulatory and non-regulatory policy that can achieve protection and encourage appropriate management without the unintended consequences of imposing undue cost or burdensome protocols on forest landowners and practitioners and even more confusing litigation.

As you re-examine the CWA and the need for adjusting regulatory authority, definitions and federal jurisdiction, NASF recommends the following:

Maintain the Silvicultural Exemptions in Section 404

Section 404 and accompanying regulations have historically afforded the forestry community appropriate flexibility to manage forested wetlands in ways that maintain their ecological integrity and productive capacity. This has served to encourage their retention in forest condition by allowing landowners to benefit from their commercial and non-commercial values. It is critical that the existing silviculture and forest road exemptions be maintained in any revisions of the CWA.

Likewise, the non-point source origins of potential pollution from silvicultural activities are effectively managed through state forestry BMP programs such as those supported through Section 319 of CWA.

**Executive Director**  
 Jay Farrell

**2010 Executive Committee**

*President* Steven W. Koehn, Maryland  
*Vice President* Jeff Jahnke, Colorado  
*Treasurer* John Shannon, Arkansas  
*Past President* Leah W. MacSwords, Kentucky

*Northeastern Representative*  
*Western Representative*  
*Southern Representative*

Jim Barresi, New Jersey  
 Arthur "Butch" Blazer, New Mexico  
 Carl E. Garrison III, Virginia

As a condition of the Section 404 exemption, silvicultural activities are considered acceptable or “normal” when they incorporate BMPs to ensure that water quality will not be compromised. Monitoring and assessment of BMP programs and practices have verified their effectiveness, and NASF encourages retention of those Section 404 provisions. Similarly, Section 402 (National Pollutant Discharge Elimination System) should continue to recognize qualifying forestry activities as non-point sources.

#### Establish Appropriate and Defensible Federal Jurisdiction

A justification for considering amendments to the CWA has been the view that current regulatory jurisdiction is inadequate as defined by determinations of “navigability.” It has been proposed that “waters of the United States” be substituted in the CWA. This proposed change would be far more inclusive of water resources and would not be limited by standards of commerce. This approach is problematic for the following reasons.

NASF concurs that there are important water resources, such as certain forested wetlands, that are geographically separated and have no nexus with navigability or other navigable waters. NASF would also acknowledge that their protection from conversion and permanent loss is desirable, and that recent litigation has degraded such protections in some cases. To the extent that these waters may become the subject of expanded jurisdiction in the CWA, NASF supports regulatory oversight that is based on compelling evidence that their hydrologic functionality and ability to maintain or improve water quality is at risk of permanent loss through conversion to another land use. NASF would also assert that silvicultural activities on such sites can occur without significant disruption of functionality, via the criteria and conditional exemptions currently in the CWA. Therefore, NASF asserts that the silvicultural exemptions and the conditions under which they apply, should, as with other waters, apply to these geographically separated waters.

Another concern with expanding jurisdiction to all “waters of the U.S.” (S. 787 as proposed by Senate Environment and Public Works) is the explicit inclusion of “ephemeral streams” or streams that originate and persist only in immediate response to rainfall events. While ephemeral waters are important to overall watershed condition, their temporary function and poorly-defined dimensions present an extremely complicated challenge for regulatory agencies and practitioners alike. Ephemeral channels can be quite numerous, especially in sloping terrain, and are neither easily nor consistently recognized as principal hydrologic features, even by professional forest hydrologists. Therefore, managing forestry operations in and around such “streams” would be highly restricted yet not predictable or precise. Further, these consequences would occur with a high degree of uncertainty that such an expansion of jurisdiction would result in any improvements in the water resource conditions (i.e. improved water quality). Given the proven track record of successful non-regulatory Silviculture Best Management Practice programs, NASF contends that the risks of impairment to ephemeral streams from silvicultural activities does not justify the costs and complications of additional regulatory oversight and enforcement.

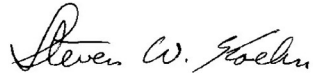
NASF is also concerned about the potential use of the term “activities” as it might be referenced as an enforceable action under CWA. Earlier drafts of legislation in the Senate included this terminology within the definition of “waters of the United States,” but the term was appropriately deleted in the final Committee bill. References to “activities”, however, are still contained in the Findings section of the bill which NASF believes is problematic. NASF believes that regulatory oversight of activities should be restricted to those activities that directly result in a discharge or creates conditions that are highly likely to result in a discharge of pollution that could threaten beneficial uses. Such a context would be

consistent with Section 404 provisions that regulate activities only if they result in the discharge of dredged or fill material into waters of the United States.

In summary NASF strongly advocates water pollution control policy that effectively incorporates technical assistance and support programs with appropriate regulatory measures. Any expansion of federal jurisdiction should be based on careful deliberation and defensible rationale that considers both the costs and expected water resource benefits. Some thoughtful step-wise analysis to address the highest risks and compelling needs would be preferable to broad-sweeping revisions in the CWA. Wholesale repeal of navigability criteria and replacement with more inclusive authority will likely create more inefficiencies and challenges than current law. Almost certainly, the propensity for regulatory challenge and litigation would be greater. NASF concedes that the sequence of court decisions and subsequent regulatory adjustments has created distortions in policy, but we encourage a cautious, thoughtful and measured approach to correcting those distortions. Moreover, an expanded and enhanced role for Section 319 capability would seem to be an appropriate part of any national initiative to achieve the purposes of the CWA.

NASF appreciates your consideration and looks forward to having further discussions with you about the CWA authorities and policies.

Sincerely,

A handwritten signature in cursive script that reads "Steven W. Koehn".

Steven W. Koehn  
NASF President

Cc: House Transportation and Infrastructure Committee Members