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U.S. Environmental Protection Agency
Office of Water; Water Docket
Mailstop 28221T
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

ATTN:Docket ID No. EPA-HQ-OW-2015-0668

RE: Notice of Opportunity to Provide Information on Existing Programs that Protect Water Quality from Forest Road Discharges - 80 Fed. Reg. 69,653 (Nov. 10, 2015)

Dear Sir or Ma'am:

The Utility Water Act Group ("UWAG") is pleased to provide the following comments in response to the U.S. Environmental Protection Agency's ("EPA") Notice of Opportunity to Provide Information on Existing Programs that Protect Water Quality from Forest Road Discharges (70 Fed. Reg. 69,653) ("Notice").

UWAG's Interests

UWAG is a voluntary, *ad hoc*, non-profit, unincorporated group of 213 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. The Edison Electric Institute is the association of U.S. shareholder-owned energy companies, international affiliates, and industry associates. The National Rural Electric Cooperative Association ("NRECA") is the association of not-for-profit energy cooperatives supplying central station service through generation, transmission, and distribution of electricity to rural areas of the United States. The American Public Power Association is the national service organization for the more than 2,000 not-for-profit, community-owned electric utilities in the U.S. Collectively, these utilities serve millions of Americans throughout the country. UWAG's purpose is to participate on behalf of its members in EPA's rulemakings under the Clean Water Act ("CWA") and in litigation arising from those rulemakings.

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UWAG's members operate and maintain electric generation facilities, including renewable energy facilities, as well as transmission and distribution lines across the country, including in areas that are or could be deemed "forested," depending on how that term is defined.¹ By law, they are required to ensure the reliability of these facilities and lines (to ensure the reliable provision of electricity, an essential public service). That requires the ability to have continuous access to the facilities and lines for maintenance, repair, replacement, and power restoration work, among other things. To do so, UWAG's members rely on access roads that may be the electricity provider's responsibility or the responsibility of other private or public owners, or both. These roads also often traverse numerous states, Indian lands, and municipal entities.

Closer to power generation facilities, UWAG's members also use similar roads or rights-of-way for the periodic inspection and maintenance of pipelines (*e.g.*, make-up water pipelines). Similarly, electricity providers also use roads along or near the perimeters of facility properties to maintain security fencing or make security patrols, as well as to access and perform work at, for example, reservoirs, dams, shorelines, and sample points periodically. Some of these roads also are in areas that are or could be deemed "forested."

In light of the foregoing, EPA's decision about what constitutes a "forest road" and whether to regulate "forest roads" under CWA § 402(p)(6) could lead to future regulations that adversely affect UWAG's members and, depending on the nature and extent of such regulations, impact electric service reliability and/or result in increased costs for electricity and electricity providers.

EPA Should Focus Its Evaluation on Stormwater Discharges from Forest Roads Used in Forestry Operations.

As EPA acknowledges in the legal background section of the Notice, the stormwater program under CWA § 402(p) and EPA's implementing regulations focus on stormwater discharges from specific types of activities, such as municipal stormwater systems and stormwater discharges by particular industrial classes of activities. 80 Fed. Reg. at 69,654-55. This activity-based approach to managing potential water quality impacts of stormwater makes sense, because the nature of potential impacts and measures to address them is a direct

¹ For example, NRECA's members alone own and maintain 2.5 million miles of distribution lines that traverse 75% of the nation's landmass, some of it in areas that are or could be deemed "forested."

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function of the nature of the activity being regulated. Indeed, this is the approach EPA and states have taken to manage the implementation of the CWA overall, including the Act's effluent limitation guidelines and permit requirements – and properly so.

UWAG encourages EPA to maintain this activity-based approach in this current proceeding by staying focused on roads used for forestry activities – not more broadly on roads that happen to be located in forested areas – for several reasons. First, the proceedings that led to the Notice, including the underlying court cases and prior EPA regulations and guidance, have focused on potential water quality impacts of roads used for forestry activities, not roads in general whether in forested areas or not. Second, staying focused on roads used for forestry activities will allow EPA to evaluate better the need, if any, for additional measures to address stormwater discharges from forest roads beyond the full array of measures currently being implemented under federal, state, tribal, and forestry industry programs. *See id.* at 69,657-58. Third, by expanding beyond roads used for forestry activities, EPA would sweep in a diverse array of types of roads and uses of roads that is too broad to allow EPA properly to evaluate potential impacts and provide focused additional regulatory measures, if needed.

Therefore, the remainder of these comments focus on EPA's request for input regarding the regulatory definitions of the terms "forest road" and "forested land." 80 Fed. Reg. at 69,660. In addition to our comments below, UWAG supports and joins the comments submitted by the National Alliance of Forest Owners ("NAFO") and the National Council for Air and Stream Improvement, Inc. ("NCASI"), which also encourage EPA to stay properly focused on roads used for forestry activities and note the extensive measures in place to address water quality issues related to such roads.

UWAG urges EPA to begin its consideration of these issues with the decision that prompted this review in the first instance, *Environmental Defense Center v. EPA*, 344 F.3d 832 (2003) ("*EDF*"). There, the Court held that EPA failed to adequately explain its decision not to regulate forest roads under CWA § 402(p)(6) given the potential erosion and sedimentation impacts from drainage from such roads to water quality *due to forestry operations*. *Id.* at 861-62. EPA's defense to the challenge also centered on forest roads used in forestry operations, focusing as it did on the procedural argument that the case amounted to an untimely challenge to EPA's regulations for silviculture activities and its decision to exclude forest roads from those regulations. *Id.* It also is noteworthy that the *EDF* approved EPA's decision not to regulate thousands of facilities/activities on a nation-wide basis under CWA § 402(p)(6) due to a lack of data at the national level, and instead deferred any consideration of such issues to

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regional or more localized consideration. *Id.* at 859-60 (also holding that CWA § 402(p)(6) does not require EPA to make individualized findings regarding each category of facility or activity).

UWAG agrees with EPA's clear focus on stormwater discharges from roads in forested areas used for and by forestry operations (including logging roads), and not stormwater discharges from *any* road that happens to be in a treed area or roads in some other terrain used for some other purpose. This focus is evident from both the Notice, in which EPA discusses these issues as "forest" issues, as well as the record in this docket. *See e.g.*, 80 Fed. Reg. at 69,655-57 (referencing forestry operations' use of forest roads and state programs addressing discharges from roads used in timber operations). This focus also is consistent with the *EDF* Court's and Petitioners' framing of the issue. Indeed, aside from focusing on roads used in forestry operations, neither EPA's Notice nor the record provides any principled reason to expand the focus of the inquiry on forest roads to roads anywhere else in the country used for any other reason.

Near the end of the Notice, however, EPA says it "uses the term 'forest road' to mean a road located on forested land, and the term 'logging road' to mean a forest road that is used to support logging activities. That is, as used in this notice, logging roads are a subset of forest roads." *Id.* at 69,660. EPA goes on to acknowledge that it has not defined these terms in its regulations and invites input on how they should be defined. Taken literally, considering a "forest road" to be any road located on forest lands could sweep in any road with trees growing on lands where the road is located. This would undermine a focus on roads used for particular activities and raise a host of questions, starting with what constitutes "forest lands." Moreover, ironically, roads with tree canopy and/or adjacent forested lands, with their attendant ground vegetation, probably present far less chance of downstream water quality impacts than roads lacking such vegetative cover and buffer, suggesting a misdirected, and likely unsupportable, focus factually. UWAG encourages EPA not to sweep its review and decision in this proceeding so broadly and, consistent with *EDF* and the focus of the Notice, focus on stormwater discharges from roads used in forestry operations.

The foregoing makes clear that EPA's consideration of whether stormwater discharges from forest roads should be regulated under CWA § 402(p)(6) is intrinsically bound up with whether those roads are used for or by forestry operations. Therefore, and consistent with the requirements of *EDF*, EPA should define the terms "forest roads" and "forested areas" in direct reference to their use in forestry operations. Such a focus necessarily would entail

excluding roads, including those in forested areas, not used for forestry operations. For example, such roads might be used for occasional access to recreational endeavors or, in the case of the power industry, for periodic access to transmission and distribution lines for construction, maintenance, or repair.

Unlike the high intensity, frequent use of forest roads by the forestry industry as part of their work, electricity providers use roads primarily to access their facilities where their work is performed, and, in addition to being far less intense, that use is episodic (and comparatively infrequent). Treating utility access roads that happen to traverse treed areas in a manner similar to forest roads used in forestry operations is unsupportable factually. This is even more the case in situations in which the access roads may be public or public/private roads used by numerous motorists for any number of reasons (*e.g.*, travel, recreation, accessing local lands). In short, without linking the terms “forest roads” and “forested areas” directly to forestry operations for purposes of EPA’s inquiry under CWA § 402(p)(6), the inquiry becomes boundless and wholly beyond what *EDF* contemplated or required: it would be an evaluation of whether to regulate stormwater discharges from all roads that happen to be located in or pass through a treed area regardless of why the road is there, who uses it, who maintains it, how often it is used, and what the nature of that use may be. Indeed, under such circumstances, there would be little reason to limit the inquiry to roads in forested areas because there would not be any non-arbitrary reason to view roads in forested areas from those in any other area.

Focusing On Stormwater Discharges from Roads in Forested Areas Used in Forestry Operations Creates a Manageable, Rational Scope of Analysis.

Focusing the definitions of “forest roads” and “forested areas” with direct reference to forestry operations also will help EPA solve the practical problem of what qualifies as a forest or forested. As NAFO discusses, without such a tether, these terms are far too imprecise to provide any useful guidance to EPA’s inquiry. For example, NAFO cites the U.S. Forest Service definition of the term “forest roads” as roads serving the National Forests. While that definition may be helpful to the Forest Service for jurisdictional and regulatory purposes, it is unhelpful here, as it does not provide any governing principles or guidelines, for example, about how many trees in an area are enough to qualify the area as forested and, thus, deem roads that traverse the area as forest roads. It also does not provide any guidance for areas outside of National Forests. It certainly does not help the EPA in distinguishing between forest roads and non-forest roads for purposes of considering whether regulation under CWA

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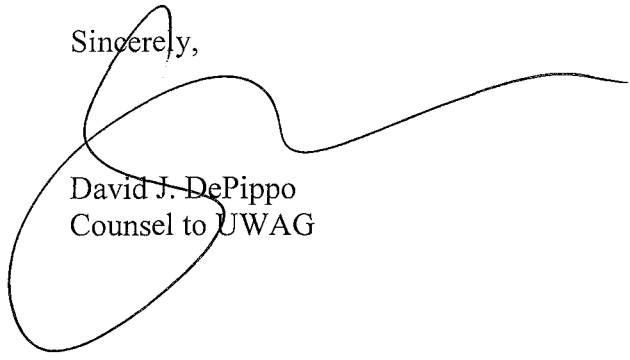
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§ 402(p)(6) is appropriate. In addition to its comments here, UWAG urges EPA to follow NAFO's recommendations for defining these terms and the scope of its inquiry. Doing so will provide EPA with a manageable, rational scope of analysis that also is consistent with *EDF*.

When the terms "forest roads" and "forested areas" are defined properly in direct reference to forestry operations, the information provided by NAFO and NCASI makes clear that existing programs focused on addressing the impacts from forestry operations adequately address stormwater discharges from forest roads. EPA should conclude that it does not need to regulate these discharges under CWA § 402(p)(6).

Sincerely,



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