November 14, 2014

Environmental Protection Agency
Water Docket
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments on the U.S. Environmental Protection Agency’s and U.S. Army Corps of Engineers’ Proposed Rule to Define “Waters of the United States” Under the Clean Water Act, Docket ID No. EPA-HW-OW-2011-0880

To the Docket:

Thank you for the opportunity to provide comments the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) proposed rule to define “Waters of the United States” under the Clean Water Act. The proposed rule will negatively impact the vertically integrated horticulture industry, from nursery and greenhouse plant production through the installation and maintenance of residential and commercial landscapes. AmericanHort and many of its state affiliates, the National Christmas Tree Association, and the Society of American Florists join to respectfully urge you to withdraw this proposed rule.

AmericanHort was formed in 2014 by the consolidation of the American Nursery & Landscape Association and OFA – The Association of Horticulture Professionals. With a combined history of over 220 years, AmericanHort supports nearly 16,000 member and affiliated businesses that include breeders, greenhouse and nursery growers, garden retailers, distributors, interior and exterior landscape professionals, florists, students, educators, researchers, manufacturers, and all of those who are part of the industry market chain.

SAF, a national trade association representing the floriculture and
greenhouse industry, includes 10,000 small business members: growers, wholesalers, retailers, importers and related organizations, located in communities nationwide and abroad. The industry produces and sells cut flowers and foliage, foliage plants, potted flowering plants, and bedding plants, which compete in the international marketplace.

The National Christmas Tree Association is the national trade association representing the farm-grown Christmas Tree industry. NCTA represents more than 600 active member farms, 29 state and regional associations, and 4,000 affiliated businesses that grow and sell Christmas Trees or provide related supplies and services.

In terms of scope and impact, nursery, greenhouse, and Christmas tree production together comprise roughly one-third of the annual production value of specialty crops, and 10 percent of total U.S. crop production. The horticulture industry's production, wholesale, retail, and landscape service components have annual sales of $163 billion, and sustain over 1,150,000 full- and part-time jobs.

Water is essential to the horticultural industry. Our members strive to be responsible water users, to protect both water quality and supply. As an industry, we have sourced and leveraged many dollars of investment toward water-related best practices research, development and education. The proposed rule could negatively impact resulting stewardship efforts by creating confusion and requiring new and in our view needless permits that do not enhance environmental protection.

The proposed rule is a significant jurisdictional expansion of the Clean Water Act that could have a major negative impact on our members and communities across the country. The rule could complicate and impede implementation and maintenance of "best management practices," measures we take on nursery and greenhouse farms and facilities, to ensure that rainwater and runoff are not inadvertently carrying unacceptable levels of nutrients or sediment. For landscape professionals, the simple act of digging a hole to plant a tree might become an activity that requires a federal permit.

**The Proposed Rule Will Create Confusion, Not Clarity**

EPA and the US Army Corps of Engineers have suggested that the proposed rule is needed to bring clarity to Clean Water Act jurisdictional determinations. Unfortunately, the proposed rule would do just the
opposite. The proposal includes a number of imprecise and broadly defined terms, such as “adjacent,” “riparian area,” and “floodplain,” that do not clearly delineate which waters are covered. For the first time, “tributary” is defined and includes bodies of water such as man-made and natural ditches. “Other waters” also may be subject to the jurisdiction of the CWA on a case-by-case basis if there is a “significant nexus” to traditional navigable water. The lack of clear definitions will make it more difficult for horticultural and landscape professionals to determine if Clean Water Act (CWA) permits will be needed to install landscapes or to apply fertilizer or pesticides. The vague definitions and concepts will likely result in litigation over their proper meaning. These murky definitions will make it extremely difficult for nursery and greenhouse growers and landscape professionals to understand and comply with the law.

**The Proposed Rule Will Expand Permit Requirements**
Under the proposed rule, permits may be required for activities such as removing debris and vegetation from a ditch, applying pesticides and fertilizer, and building a patio, fence or pond. Permitting can be a costly and time-consuming process that requires small businesses to hire attorneys and environmental consultants. Businesses also could be subjected to litigation under citizen suit provisions of the CWA.

EPA and the Corps fail to assess the impacts of the proposed rule on the public health and our nation’s infrastructure. The proposed rule would expand current NPDES permit requirements for mosquito and aquatic weed control to roadside ditches, rights-of-ways, small stormwater retention ponds, and man-made water features. Efforts to fight invasive species could also be hampered by new permit requirements.

Under the proposed rule, Clean Water Act Section 404 permits could be required to install trees, plants, and other landscape features on private property that includes “Waters of the United States” or is deemed to be in a floodplain. The installation of trees and plants protects water quality and provides other environmental benefits. The EPA and the Corps should encourage these activities, rather than subject them to permits.

**The Proposed Rule Fails to Assess Its Impact on Small Businesses.**
The majority of horticultural industry professionals are small businesses that do not have in-house attorneys or hydrology professionals on staff to help them make the very complicated assessment about whether their land or a
customers’ property includes a “Water of the US.” There are also significant costs associated with expanded permit requirements including the assessments that need to be conducted and the staff time associated with planning, monitoring and reporting. In addition, some customers could choose to forgo professional landscape services due to the potential litigation associated with Clean Water Act permits.

The Small Business Administration’s Office of Advocacy recognized these significant costs in a letter submitted to the agencies on October 1. The Office of Advocacy found that the rule would have a significant economic impact on a substantial number of small businesses. Feedback from our own memberships supports this conclusion. We agree with the Office of Advocacy’s finding that the EPA and the Corps should have conducted a Small Business Advocacy Review Panel prior to releasing the rule for comment.

**Conclusion**

On behalf of the horticultural industry, we the undersigned respectfully urge EPA and the Corps to withdraw the proposed Waters of the U.S. rule. The rule’s expanded Clean Water Act permitting and associated direct costs and delays could affect all work performed near water, including ditches, irrigation ponds and golf course ponds. It will also expose horticultural farms and businesses to the threat of increased nuisance lawsuits by private citizens and activists and make it harder to protect green spaces and infrastructure from invasive species, including invasive aquatic plants.

Sincerely,

AmericanHort (American Horticulture Industry Association)  
National Christmas Tree Association  
Society of American Florists  

Arizona Nursery Association  
California Association of Nurseries and Garden Centers  
Colorado Nursery & Greenhouse Association  
Florida Nursery, Grower & Landscape Association  
Georgia Green Industry Association  
Idaho Nursery & Landscape Association  
Illinois Green Industry Association  
Indiana Nursery and Landscape Association
Kentucky Nursery & Landscape Association
Massachusetts Nursery and Landscape Association
Maine Landscape and Nursery Association
Michigan Nursery & Landscape Association
Minnesota Nursery & Landscape Association
Mississippi Nursery & Landscape Association
New Jersey Nursery & Landscape Association
Ohio Nursery & Landscape Association
Oklahoma Nursery and Landscape Association
Oregon Association of Nurseries
South Carolina Nursery & Landscape Association
Tennessee Nursery & Landscape Association
Texas Nursery & Landscape Association
Virginia Nursery & Landscape Association
Washington State Nursery & Landscape Association
Wisconsin Green Industry Federation