75 Years of Service
NRECA
America's Electric Cooperatives

August 13, 2018

Submitted Electronically to Docket No: **EPA-HQ-OW-2017-0203**

Comments of the National Rural Electric Cooperative Association (NRECA)

RE: U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules; Supplemental Notice of Proposed Rulemaking, 83 Fed. Reg. 32227 (July 12, 2018)

The National Rural Electric Cooperative Association (NRECA) submits these comments in support of the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Corps) supplemental notice of the agencies' proposed Definition of "Waters of the United States"—Recodification of Pre-existing Rules (83 Fed. Reg. 32227, July 12, 2018). NRECA is a member of the Utility Water Act Group (UWAG) and the Waters Advocacy Coalition (WAC), and these comments hereby incorporate by reference the comments submitted by those organizations. NRECA supports the current proposal by EPA and the Corps (collectively, "the Agencies") to rescind the 2015 rule (80 Fed. Reg. 37,054, June 29, 2015) and to codify the prior regulations that are now being implemented under the final Definition of "Waters of the United States" – Addition of an Applicability Date to 2015 Clean Water Rule (83 Fed. Reg. 5200, Feb. 6, 2018).

The definition of "waters of the United States" (WOTUS) is important to the utility sector, and especially rural electric cooperatives which own and maintain 2.6 million miles or 42 percent of the nation's electric distribution lines serving 56 percent of the nation and 88 percent of all counties.

NRECA is the national service organization for America's electric cooperatives. The nation's member-owned, not-for-profit electric co-ops constitute a unique sector of the electric utility industry – and face a unique set of challenges. NRECA represents the interests of the nation's more than 900 rural electric utilities responsible for keeping the lights on for more than 42 million people across 47 states. Cooperatives serve an average of 7.4 consumers per mile of line and collect an annual revenue of approximately $16,000 per mile of line, as compared to the industry average of 34 customers and annual revenue of between $75,500 per mile of line for investor-owned and 48 consumers and $113,000 per mile of line for publicly owned utilities or municipals.

NRECA's member cooperatives include 63 generation and transmission (G&T) cooperatives and 834 distribution cooperatives. The G&Ts are owned by the distribution cooperatives they serve. The G&Ts generate and transmit power to nearly 80 percent of the distribution cooperatives, those cooperatives that provide power directly to the end-of-the-line consumer-owners. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service.

Electric cooperatives are private, independent electric utilities, owned by the members they serve. Most are small businesses (as defined by the Small Business Administration) and don't have investors to help defray the costs of regulations. The costs are borne directly by the farmers, ranchers, small businesses and other residents of the nation's rural communities – including those in 93 percent of the nation's persistent poverty counties – who write a check each month to their co-op to pay for their electric service.

NRECA supports the arguments presented by UWAG and WAC that the Agencies should rescind the 2015 WOTUS rule, including, in particular:

(1) The 2015 WOTUS Rule is inconsistent with statutory limits on Clean Water Act (CWA) jurisdiction recognized by the Supreme Court's holdings in *Riverside Bayview* (establishing jurisdiction over wetlands that actually abutted a navigable water), *SWANCC* (rejecting federal jurisdiction over open ponds not adjacent to open waters, regardless of their use by migratory birds), and *Rapanos* (rejecting federal jurisdiction based on any hydrological connection to a navigable water). These cases recognize that Congress's use of the term "navigable waters" reflects a fundamental limit on the Agencies' permitting authority. The 2015 Rule ignores and misinterprets the limits set forth by the Supreme Court, reads the term "navigable" out of the statute, and instead adopts an overly expansive view of federal CWA authority.

(2) The 2015 WOTUS Rule would assert jurisdiction over features with little or no relationship to navigable waters (e.g., channels that infrequently host ephemeral flows, non-navigable ditches, and isolated waters). As such, the 2015 Rule is tantamount to the broad theories of jurisdiction rejected by the Supreme Court in *SWANCC* and *Rapanos*. The Supreme Court has been clear that allowing federal regulation over such remote and isolated waters raises constitutional questions. Indeed, it goes well beyond the limits of the Commerce Clause to assert jurisdiction over such features, which do not have the requisite effect on channels of interstate commerce.

(3) The Science Report[1] issued during the rulemaking process for the 2015 WOTUS Rule does not answer the question of the scope of CWA statutory authority. In the 2015 Rule and its preamble, the Agencies mischaracterized the findings of the Science Report and the extent to which they dictated a particular result. The Science Report essentially concluded that all waters are connected and that connectivity exists on a gradient, but, importantly the report does not draw lines or address the *legal question* of what should be jurisdictional under the statute.

(4) The 2015 Rule is inconsistent with the policy goals of CWA § 101(b) and fails to preserve the States' traditional and primary authority over land and water use. The 2015 Rule would allow the federal government to take control of land use and planning by extending jurisdiction to essentially all wet and potentially wet areas. Many types of waters and features that were previously regulated as "waters of the state" or that states purposely chose not to regulate (e.g., roadside ditches, channels with ephemeral flow, arroyos, industrial ponds) would be subject to federal regulation as "waters of the United States." Attached to these comments are examples demonstrating of the potential extent and impact of the 2015 rule on eight federal projects (used because their Environmental Impact

[1] "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence," (September 2013, EPA/600/R-11/098B).

Statements, EIS, are public documents). The Agencies should rescind the 2015 Rule so that they can, among other things, reevaluate the best means of balancing the Act's statutory goals to "restore and maintain" the integrity of the nation's waters, as well as to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.

(5) The 2015 WOTUS rule fails to provide needed clarity and certainty. The CWA's reach is notoriously unclear, and the consequences to cooperatives even for inadvertent violations can be crushing. Under the 2015 rule, definitions of key terms and concepts, such as "impoundments," "floodplain," "ordinary high water mark," and "significant nexus," are vague, inconsistent with case law, and/or would likely lead to more regulatory uncertainty. This ambiguity creates a rule that fails to give the public fair notice of when and where discharges are unlawful and gives standard-less discretion to agency staff to determine which waters are jurisdictional and which are not.

NRECA wishes to emphasize two particularly troubling features of the 2015 WOTUS Rule that especially affect electric cooperatives.

(1) The 2015 Rule would expand WOTUS jurisdiction to man-made industrial features on cooperative facility sites. The 2015 Rule would consider many industrial features located inside the fence line of an electrical generating plant that are actually designed and operated to manage wastewater and are themselves regulated under the CWA as point sources. If such a feature were deemed jurisdictional, such as through "adjacency" to jurisdictional water, the plant would be placed in the untenable position of being required to treat wastewater before it enters the wastewater treatment systems designed to treat it. Not only is such an outcome patently ridiculous, but all costs would be borne by our member-owners – for no positive or improved environmental outcome.

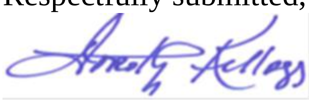
(2) The 2015 Rule would expand WOTUS jurisdiction over remote features with little connection to larger waters traditionally understood as navigable. It would extend federal CWA jurisdiction to various remote water features such as ditches, ephemeral washes, isolated ponds, and erosional features (i.e., gullies, rills, and swales). It would also allow for ditches, groundwater, and erosional features to serve as a hydrological connection that could demonstrate that a feature has a "significant nexus" and therefore become jurisdictional. These and similar features are common across the type of rural terrain often crossed by cooperative transmission and distribution lines. Cooperatives that endeavor to apply the 2015 Rule's definitions for themselves could face civil penalties of up to $51,570 per day for unauthorized discharges to "waters of the United States" should their assessment prove incorrect, and, again, those costs would be borne directly by our member-owners.

NRECA supports the UWAG and WAC positions that rescinding the 2015 Rule and recodifying the pre-existing regulations is the best and most efficient option to ensure regulatory certainty. Alternative approaches, such as revising specific provisions of the 2015 Rule or issuing implementation guidance, would result in confusion and inconsistency. As the Agencies' supplemental notice recognizes, all of the courts that have examined the merits of the 2015 Rule have indicated that it is unlawful and exceeds the Agencies' CWA authority. While the 2015 Rule would not be applicable until February 2020, the flawed regulatory text remains in the Code of Federal Regulations. Rescinding the 2015 Rule and recodifying the regulations that were in place prior to the 2015 Rule would maintain the pre-existing regulatory framework, ensure that the Code of Federal Regulations reflects the current legal regime under which the Agencies are operating, and provide certainty and regulatory continuity for electric cooperatives and the rest of the regulated community.

All Americans value and deserve a healthy environment. However, the economic challenges NRECA and our member-owners face underscore the importance of cost-effective regulation. We believe that the 2015 WOTUS Rule was not cost-effective, and we support the current proposal by the Agencies to rescind the 2015 Rule and to recodify the prior regulations until such time as the Agencies can undertake a subsequent rulemaking to propose a new definition of WOTUS.

If you have any questions regarding these comments, please contact me at Dorothy.kellogg@nreca.coop.

Respectfully submitted,



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Attachment