April 15, 2019

Submitted Electronically to Docket No: EPA-HQ-OW-2018-0149

Comments of the National Rural Electric Cooperative Association (NRECA)

RE: U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Rule, Revised Definition of "Waters of the United States" (84 Fed. Reg. 4154, February 14, 2019)

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) proposed "Revised Definition of "Waters of the United States" (84 Fed. Reg. 4154, February 14, 2019)." 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 UWAG and WAC as well as those submitted by the Federal Water Quality Coalition (FWQC).

The definition of "Waters of the United States" (WOTUS) is important to the utility sector, and especially rural 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 representing nation's more than 900 rural electric cooperatives responsible for keeping the lights on for more than 42 million people across 47 states. Our 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. 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) $113,000 per mile of line for publicly owned utilities or municipals.

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 or access to large cash surpluses 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.

All electric cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service. The cooperative business model and the economic challenges many co-op member-owners face underscores the importance of cost-effective regulation. Cooperative members – like all Americans – value and deserve a clean, healthy environment, but we can't afford – our members can't afford – to spend scarce resources in manners that do not provide a significant environmental bang for the regulatory compliance buck.

The Proposed Rule strikes an appropriate balance between protecting waters and wetlands and providing clarity and predictability to stakeholders and regulators. For too long, the Agencies' regulations and guidance documents have steadily expanded the definition of WOTUS beyond statutory and constitutional limits, twice resulting in the Supreme Court rejecting those attempts to expand federal authority. The Proposed Rule would bring an end to this decades-long regulatory creep by, in particular, giving effect to statutory terms such as "navigable" and "waters" and respecting Congress's policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).

The proposed definition also better aligns with Supreme Court precedent than current and prior agency interpretations of WOTUS and is appropriately grounded in science. The 2015 rule defining WOTUS recognized that science can inform, but cannot dictate, where to draw the line between federal and state authority over water resources. The Proposed Rule takes into account relevant scientific considerations – especially that connections between water features occur along a gradient – and appropriately makes a legal and policy determination to assert federal regulatory authority over only those features along the gradient that exert the strongest influence on downstream navigable waters.

Contrary to what critics are claiming, the Proposed Rule would not "roll back" or weaken environmental protections. Rather, the proposed definition is protective of water resources, while respecting the states' traditional authority over land and water resources. When Congress enacted the Clean Water Act, it did not intend to subject all forms of water pollution in any water feature to federal regulatory authority. Rather, Congress distinguished between pollution of the Nation's waters generally and a subset of those waters it referred to as "navigable waters." Congress intended to protect all of the Nation's waters from pollution through different federal, state, and local mechanisms, but only the "navigable waters" would be subject to federal regulatory authority. This basic structure is consistent with Congress's express policy, in Clean Water Act section 101(b), to preserve and protect the states' primary responsibility over abating water pollution and over the use and planning of land and water resources. It is important to underscore that even though some of the Nation's waters are not subject to *federal* regulatory authority under the Clean Water Act, they are still protected under various federal, state, and local laws, such as the Resource Conservation and Recovery Act, the Safe Drinking Water Act, state wetlands protection statutes, and other laws.

Jurisdictional Waters: NRECA is pleased that the Agencies propose to narrow the scope of federally jurisdictional waters to align more closely with the Clean Water Act (CWA), congressional intent, the Commerce Clause, and case law by removing the 2015 rule's asserted federal jurisdiction over remote features with little connection to Traditional Navigable Waters (TNWs), including many ditches and erosional features. These features, many of which only contain water after a rain, have a limited hydrological connection, but could still have been considered to have a "significant nexus," and thus federal jurisdiction, under the 2015 rule. Such features are common across the type of rural terrain commonly crossed by cooperative transmission and distribution lines. This would have put electric cooperatives in a difficult position – assume each gully, rill or swale is jurisdictional and pursue 404 permits for construction and maintenance activities, or guess wrong and run the risk of civil penalties of $50,000 per day or more for unauthorized discharges to Waters of the United States should their assessment prove incorrect. Again, those costs would be borne directly by our rural member owners.

Not only that, but increasing the number of jurisdictional waters in close proximity to one another could have made it increasingly difficult for cooperatives to use general, nationwide, CWA permits instead of the

significantly more expensive and time consuming individual permits for power line and right-of-way maintenance and construction. An individual permit can be expected to cost ten times as much as a general (nationwide) permit and take twice as long to obtain. Cooperatives expect to spend approximately $7 billion over the next 10 years on transmission, and a ten-fold increase in the cost of permitting to construct and maintain critical infrastructure with no appreciative environmental benefit is not cost-effective.

While NRECA generally supports the scope of jurisdictional waters in the proposed rule, we do have some suggestions to improve upon certain jurisdictional and non-jurisdictional categories and key terms that appear in those categories:

(1) Traditional Navigable Waters (TNWs): The Agencies have steadily expanded their interpretation of what constitutes TNWs, such as through Appendix D to the *Rapanos* guidance. The Proposed Rule carries forward those overly broad interpretations. NRECA recommends that the Agencies adopt an interpretation of TNWs that is more in line with what Congress had in mind when it enacted the CWA, which is Congress's commerce power over navigation. The regulatory text of the TNW category should be amended to encompass "waters which are currently used, or were used in the past, or may be susceptible to use *to transport* interstate commerce" rather than applying more broadly to waters "*used in* interstate commerce." Making this change would *not* mean that all non-navigable waters that are not used or capable of being used to transport interstate commerce are beyond the Clean Water Act's reach. Non-navigable waters could still be jurisdictional under one of the other categories below, most notably the proposed definition of tributary. They just would not be TNWs. In addition to changing the regulatory text in this way, the Agencies should revoke or change Appendix D to the *Rapanos* guidance to make it clear that they are no longer interpreting TNW as broadly as they have over the past decade or so. Finally, NRECA supports the proposal to remove "interstate waters" as a separate category. Again, interstate waters could still be jurisdictional under one of the other categories while those without a connection to TNW would fall under state and tribal jurisdiction. If the "interstate waters" category were to be retained, it could result in clearly isolated features, such as those which were at issue in SWANCC, being considered WOTUS simply because they were located on state boundary rather than based on connection to downstream TNWs.

(2) Tributaries: The "tributary" definition contains a number of important terms and statements that could benefit from additional clarification. First, the Agencies should make it clear that if a water feature meets the definition of "ephemeral," it is not jurisdictional, even if it could conceivably be interpreted to fall into any of the other categories of WOTUS. Second, the Agencies should revise critical definitions:
   a. "Intermittent" should be revised to eliminate the uncertainty inherent in the undefined term "certain times of a year," replacing it with the more a more technical, scientific, and less arbitrary definition of intermittent flow: "surface water flowing in a typical year as a result of melting snowpack or when the groundwater table is elevated."
   b. "Typical year" needs further explanation regarding how to calculate what constitutes the "normal range of precipitation over a rolling 30-year period," specifically what data they will use and how large a "particular geographical area" will be considered when identifying a "typical year." As a first step, the Agencies should identify the data sources to be used for these assessments.
   c. "Channel" should be clarified regarding the types of features that are sufficiently channelized to qualify as jurisdictional tributaries.

(3) Ditches: NRECA supports the Agencies' proposal to generally exclude ditches from jurisdiction unless they were constructed in a jurisdictional tributary or jurisdictional wetland or they relocate or alter a jurisdictional tributary and they otherwise satisfy the requirements of the tributary definition. We also support the Agencies' decision to place the burden of proof on the regulators to establish whether a ditch was, at some point in the past, constructed in a jurisdictional tributary or wetland or if it relocated or altered a jurisdictional tributary. Finally, we urge the Agencies to explicitly confirm that ditches constructed in uplands are not WOTUS.

NRECA believes that the Agencies can achieve that outcome without having to designate "ditches" as a standalone category of WOTUS. Having ditches as a separate category could create the impression that the default status of ditches is that they are jurisdictional. The Agencies can still assert jurisdiction over modified tributaries or ditches that are constructed in jurisdictional wetlands by including additional language in the "tributary" definition and/or in the ditch exclusion category or definition of "ditch."

(4) Lakes and Ponds: NRECA supports the Agencies' approach to lakes and ponds, which is to assert jurisdiction over lakes and ponds that: (a) are TNWs; (b) contribute perennial or intermittent flow to a TNW in a typical year; or (c) are flooded by another WOTUS in a typical year. We support this approach as superior to the more nebulous "significant nexus" approach.

The approach to lakes and ponds reinforces the need for the Agencies to clarify the term "intermittent" for the reasons discussed in our comments on tributaries. We further recommend that the Agencies better explain how stakeholders and regulators are supposed to determine when a lake or pond is "flooded by" another WOTUS "in a typical year." We recommend that, to be considered a WOTUS, a lake or pond must be indistinguishable from, inseparably bound up, and exchange water with a TNW (e.g., the water would need to flow in both directions between the jurisdictional water and the lake or pond) on a sufficiently frequent basis.

(5) Impoundments: NRECA recommends that the Agencies eliminate the impoundments category. It is unnecessary to have this as a standalone category of WOTUS, and waters that would fall under this category would be covered by the new lakes and ponds category or one of the other jurisdictional categories.

If the Agencies are unwilling to eliminate this category, they should at least promulgate a definition of "impoundment" to make it clear what sorts of water features the Agencies are asserting jurisdiction over. The Agencies should confirm that impoundments of waters that predate enactment of the CWA or were not jurisdictional at the time the feature was created should not be jurisdictional. To avoid a retroactive application of new law, the agencies should explicitly exclude private, man-made waters that were created in or by impounding waters that were not considered to be WOTUS at the time they were created even if they might be considered a WOTUS under a new definition.

(6) Adjacent wetlands: NRECA supports the Agencies' approach which focuses on wetlands that are truly adjacent to jurisdictional waters, those that abut or have a direct hydrologic surface connection to other WOTUS in a typical year. We also support the Agencies' decision to do away with terms such as "bordering, contiguous, or neighboring," and to avoid including isolated wetlands within the adjacent wetlands category, such as through an expansive interpretations of the term "neighboring." The adjacent wetlands category in the Proposed Rule is more in line with Supreme Court precedent and avoids raising

the significant constitutional questions that current definitions of "adjacent" raise by encompassing non-navigable, isolated, intrastate features.

We also support the Agencies' intent to clarify that wetlands must satisfy *all three delineation criteria* (hydrology, hydrophytic vegetation, and hydric soils) to be jurisdictional. The Agencies do this by promulgating a new definition of "upland," but they should also include this requirement in the definition of "wetlands."

Exclusions: The Agencies propose a number of exclusions from the WOTUS definition, many of which are longstanding exclusions. We support these exclusions, and we offer some general recommendations that the Agencies:

(1) Clarify that features that meet any of the exclusions are non-jurisdictional even if they might otherwise meet the requirements of one of the jurisdictional categories.
(2) Make explicit in the regulatory text that excluded features remain non-jurisdictional even if they develop wetland characteristics within the confines of the water/feature or in the vicinity.
(3) Expressly state that features are excluded even if they were created in something other than upland. For instance, features should be exempt if they were constructed in a non-jurisdictional, isolated wetland or if they were constructed in an ephemeral drainage, even if those might not satisfy the definition of "upland."

Waste Treatment Systems: The waste treatment system (WTS) exclusion is particularly important to electric cooperatives, and we are pleased that the Agencies propose to retain the exclusion and, more importantly, clarify the exclusion by providing a definition of "waste treatment system" as well as making the two ministerial changes to the exclusion that provide much needed clarity. The proposed definition – which NRECA supports – clarifies that waste treatment systems include *all* components of the system preforming multiple functions at different phases over the life of the system, including active and passive treatments and that the proposed definition also applies to the systems as a whole, including related conveyances.

NRECA does recommend additional clarifications to the proposed regulatory text and preamble. First, the term "designed" should be replaced with "used" in the definition to clarify that the exclusion applies to the role in managing wastewater that the structure actually performs. Second, we recommend that the Agencies clarify in the preamble to the final rule that CWA and state permits can be used to *indicate* that a feature is used to perform a waste treatment function (e.g. showing a feature as part of an NPDES-permitted system indicates it is part of a system used for treatment), but such a permit is *not required* for showing that the WTS exclusion applies. Third, the Agencies should also clarify in the preamble that the WTS continues to apply to features are closed in place and retain waste. Such an interpretation is consistent with the proposed definition of "waste treatment system," which includes WTS components that, actively or passively retain pollutants.

Waste treatment systems vary by facility, and include wastewater collection features, wastewater treatment facilities, storm water sedimentation ponds, cooling ponds and associated conveyances to and from those features. These features provide important environmental benefits by facilitating the proper handling and treatment of wastes produced during the process of generating, transmitting, and distributing electricity, and ensuring that pollutant discharges are properly controlled before they discharge through a regulated point source to a WOTUS. Discharges from these features that introduce pollutants into WOTUS are regulated by

the NPDES program. The waste treatment system exclusion properly excludes these types of features from the definition of WOTUS.

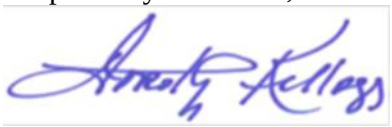
Cooperatives own or operate over 360 power plants in 43 states and expect to spend $18 billion over the next 10 years on new generation including natural gas and renewables. The ability to manage existing generation as well as bring new generation on line will require new permitting. Like power line construction and maintenance, permitting costs for new generation can make the difference between a successful project and one that is mothballed or even cancelled.

Conclusion: NRECA generally support the Agencies' proposal which, among other things emphasizes clarity, regulatory certainty, and simplicity; respects the limited powers of the Executive Branch under the Constitution and the Clean Water Act to regulate navigable waters; reflects the shared authority and responsibility that law provides to the federal government as well as states and tribes; accounts for *all* Supreme Court decisions on the geographic reach of WOTUS, including Justice Scalia's plurality *and* Justice Kennedy's concurring opinions in *Rapanos*.

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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