



**National Rural Electric  
Cooperative Association**

A Touchstone Energy® Cooperative 

Comments on

**Definition of “Waters of the United States” Under the  
Clean Water Act**

Submitted Electronically to:

The Environmental Protection Agency  
The United States Army Corps of Engineers

**Docket ID No. EPA-HQ-OW-2011-0880**

November 14, 2014

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The National Rural Electric Cooperative Association (NRECA) submits these comments on the “Definition of ‘Waters of the United States’ Under the Clean Water Act” proposed jointly by the US Environmental Protection Agency (EPA) and the US Army Corps of Engineers (Corps) (76 Fed Reg 22187, April 21, 2014). NRECA appreciates the opportunity to provide comment on the potential implications of the proposed rule on the hundreds of electric utility cooperatives throughout the nation. These comments hereby incorporate by reference and expand upon the comments submitted by the Utility Water Act Group (UWAG), the Water Advocacy Coalition (WAC), the US Chamber of Commerce, the Federal Water Quality Coalition (FWQC), and especially those submitted by the US Small Business Administration Office of Advocacy.

#### **I. The National Rural Electric Cooperative Association and Its Members**

NRECA is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to approximately 42 million people in 47 states. Electric cooperatives are private, independent electric utilities owned by the members they serve. Each is governed by a board of directors elected by and from the membership and established to provide reliable electric service to their owner-members at the lowest reasonable cost, especially those members who are residents of rural communities who already spend more per capita on energy than citizens in other parts of the country.

NRECA’s members include distribution cooperatives that provide electric power to 19 million businesses, homes, schools, farms, and other establishments in 80 percent of U.S. counties and generation and transmission cooperatives (“G&Ts”) that provide wholesale power to their distribution cooperative owners.

Rural electric cooperatives are small businesses. The vast majority of NRECA’s members – all distribution cooperatives and all but four G&Ts – meet the Small Business Administration definition of a small business. The typical distribution co-op has 13,000 consumers and 46 full time employees; the typical G&T has approximately 122 employees.

Cooperatives, on average, serve seven customers per mile of electric distribution line – far fewer than the national average of 34 customers per mile of distribution line for investor-owned utilities and 48 customers per mile for publicly owned utilities (municipals). Low population densities translate to average revenues of \$15,000 per mile of line, compared with \$75,500 per mile for investor owned utilities and \$113,000 per mile for municipal utilities. These factors, compounded by the difficulties associated with traversing vast expanses of remote and often rugged topography, present significant economic, logistical, and reliability challenges for electric cooperatives.

Many cooperative member-owners, especially those in rural areas, face economic challenges themselves. Nine out of ten electric cooperative member-owners have average household incomes below the national average, and more than 7 million Americans served by electric cooperatives live below the poverty line. In fact, cooperatives serve 90 percent of the nation’s persistent poverty counties (i.e., those with deeply entrenched poverty rates consistently 20 percent above the national average for the last three decades).

Electric cooperative members value, and deserve, a healthy environment. Indeed, electric cooperatives comply with the same Clean Water Act (CWA) regulations as their investor-owned or municipal utility counterparts. Nonetheless, the economic challenges faced by so many cooperatives and their member-owners underscore the importance of a cost-effective regulation. NRECA believes that the “waters of the US” (WOTUS) rule proposed by EPA and the Corps is not cost-effective. It will impose significant economic impact on a substantial number of small entities, including electric cooperatives, with little if any enhanced protection for the nation’s waters.

#### **I. Impacts on Rural Electric Cooperatives**

NRECA has significant concerns with the proposed rule, especially the expanded universe of features that would become “waters of the US.” This expansion in federal CWA jurisdiction presents significant challenges to cooperatives as we strive to provide our member-owners with reliable and affordable energy. Operating under the business model described

above, operating costs are borne largely by our member-owners – not investors – and many of our member-owners already experience challenging economic circumstances.

Cooperatives own and maintain 2.5 million miles, or 42 percent of the nation’s electric distribution lines and own or jointly own 366 generating facilities in 43 states. Several activities associated with the transmission, distribution, and generation of energy require federal CWA permits. The proposed rule would necessitate even more permits – both general and individual. More permitting – especially more individual permitting – increases uncertainty, delay, and ultimately cost. In many cases, increased delay and increased costs can make the difference between proceeding with, delaying, or cancelling a project.

Expanded CWA jurisdiction, as would occur if the proposed rule is finalized without significant change, would affect cooperatives by delaying and increasing the costs for (1) constructing and maintaining power lines; (2) operating and maintaining existing and new generation, including generation from both traditional fuels like natural gas and renewable sources; and (3) decommissioning existing generating facilities.

#### **a. Transmission and Distribution Issues**

As stated above, cooperatives supply electricity to our member-owners in 47 states, covering 75 percent of the U.S. landmass, including most of rural America. Serving some of the least densely populated areas of the country requires an expansive network of power lines for both transmission and distribution. As NRECA members increase generating capacity to meet the growing demands of our members and to invest in generation from other fuels including renewables, cooperatives will need to build new transmission and distribution infrastructure.

##### **i. Power Line Construction and Maintenance**

Power lines require regular maintenance, including necessary repair and replacement of lines, poles, and towers. In addition, these facilities require upgrades to make the system more resilient in the event of extreme weather events. Cooperatives expect to spend approximately \$7 billion over the next 10 years on transmission.

A reliable and resilient electric grid is part of our nation’s essential critical infrastructure. The White House Rapid Response Team for Transmission (RRTT) was, in fact, created to identify mechanisms to streamline electric transmission projects and cut permitting timelines, reduce red tape, and promote federal/state/local cooperation. One way to streamline permitting is by relying on nationwide permits – especially the Corps’ Nationwide Permit 12 (NWP 12) for utility lines and associated access roads.

Under NWP 12 cooperatives are able to construct, maintain, and repair power lines, access roads, poles, towers, and substations so long as each “single and complete” project – each separate and distinct crossing of a WOTUS – does not result in the loss of more than one-half acre of WOTUS. Cooperatives endeavor to configure lines and structures to avoid many wetland and streams to stay within the half acre limit.

The broad proposed definition of “tributary” and assertion that all water in floodplains and riparian areas are “adjacent” waters would capture many features commonly found on rural land spanned by cooperative power lines including ditches, ponds, washes, and ephemeral streams. Such a broad expansion of jurisdictional waters would significantly limit, if not eliminate, cooperatives’ ability to stay within the NWP 12 limits.

Cooperatives are also concerned that the asserted authority to aggregate “similarly situated” waters in a “single landscape unit” would no longer allow them to consider each WOTUS crossing as a “single and complete” project, potentially rendering NWP 12 useless. UWAG, WAC, and the FWQC have all addressed how such a position is confusing and not justified by the science or law.<sup>1</sup> NRECA agrees. In addition, the Corps considers potential cumulative effects in promulgating NWP 12, and NWP 12 itself provides mechanisms for district engineers to evaluate individual pre-construction notifications to assure that both individual and cumulative effects on WOTUS are minimal. The courts have upheld the reasonableness of evaluating crossings individually.<sup>2</sup> The agencies should clarify that the concept of “similarly

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<sup>1</sup> See FWQC comments section II.D.; UWAG comments section II.C.; WAC comments section III.E.

<sup>2</sup> See *Sierra Club, Inc. v. Bostick*, 5:12-cv-00742 (W.D. Okla. 2012) and *Mobile Baykeeper v. U.S. Army Corps of Eng’rs*, No. 1:14-cv-00032, 44 ELR 20233 (S.D. Ala. Oct. 16, 2014)

situated” waters in a “single landscape unit” has no applicability when evaluating individual crossings under NWP 12.

To maintain the reliable delivery of electricity, cooperatives must maintain rights of way, keeping them clear by controlling vegetation which may include the use of herbicides. Cooperatives must control vegetation around generating facilities and substations as well. Permits are required if herbicides may reach WOTUS, so an expansion of WOTUS as described the proposal will also increase the requirement for vegetation control permits.

An individual permit can be expected to cost ten times as much as a general (nationwide) permit, and take twice as long to obtain.<sup>3</sup> As noted above, cooperatives are small businesses and their operating costs must be largely borne primarily by their member-owners. The economic challenges faced by so many cooperatives and their members underscore the importance of a cost-effective regulatory program. A ten-fold increase in cost of permitting to construct and maintain critical infrastructure with no appreciative environmental benefit is not cost-effective.

## **ii. Spill Prevention, Spill Response and Rights of Way**

Electrical substations are critical parts of the electrical transmission and distribution system. Substations contain electrical transformers and other oil filled equipment and, as such, are subject to SPCC (spill prevention, control and countermeasure) regulations if oil released from the equipment could reach a WOTUS. The proposed expansion of features considered WOTUS will significantly increase the number of substations requiring SPCC plans, especially substations located in arid or semi-arid where any release would be to generally dry land or areas with scarcely more than speculative connections to traditional navigable water.

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<sup>3</sup> See Comments of the Utility Water Act Group, Section III. F “Applying the current definition of WOTUS, the permit cost would be between \$30,000 and \$45,000, and the mitigation costs would be \$75,000. Applying the Proposed Rule’s definition, the estimated permitting costs would be five times greater: between \$150,000 and \$200,000 (for Corps and associated state permitting), and the mitigation costs would be \$422,000.” And comments of the Water Advocacy Coalition, Section IV. A. (pg. 65) “the average cost to prepare an NWP application is \$35,954, but the average cost to prepare an individual permit application is \$337,577.”

Constructing and maintaining power lines requires vehicles, and vehicles require oil and other fluids. Access to power lines and associated rights of way may be rough and even dangerous, such as when responding to outages caused by weather events. Cooperatives endeavor to operate vehicles safely and keep them in good working order; however, vehicle leaks can happen. A vehicle may be damaged in an accident while traveling on icy roads, a hose may release or rupture; any number of vehicle-related incidents could cause the release of material. Under current protocols, measures are taken to contain the spill and remove the contaminated soil – absorbent materials or diking materials may be employed contain the spill until the contaminated soil or other material is removed for proper disposal. If, however, a roadside ditch or other feature is a WOTUS, would the placement of absorbent constitute a “fill”? Would removal of contaminated media constitute “dredging” thus triggering a 404 permit? While NWP 20 authorizes oil spill response activities carried out under an SPCC plan, the SPCC program does not apply to transportation related spills such as these. Clearly, spill cleanup protects the environment, but the proposed expansion of CWA jurisdiction may create a barrier to ordinary spill response activities.

**b. Generation Issues at Existing and New Power Plants**

NRECA members provide electricity at 366 power plants in 43 states. Cooperatives expect to spend \$19 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 the construction and maintenance of new transmission and distribution lines, permitting costs can make the difference between a successful project and one that is mothballed or one that is cancelled.

**i. Current Generation Facilities**

Generating facilities rely on multiple water management features located within the plant footprint including stormwater conveyances (i.e., canals, ditches, washes, swales, arroyos, containment basins, and ponds); other water management features (e.g., cooling ponds, spill diversion ditches, raw water and service water ponds, intake and discharge canals, construction

pond, roadside and other ditches); waste and wastewater treatment systems; building and equipment pads; and SPCC containment areas. By in large, these on-site structures and features have not been considered jurisdictional by the EPA, the Corps, or state water regulatory agencies.

Such features function to control and manage wastewater, stormwater, and other waters in order to prevent pollutants – including heat – from reaching WOTUS. They may be part of the water management system at any power plant including those fueled by coal, natural gas, and nuclear. Just because a feature or conduit conveys a pollutant to a downstream waterbody should not justify asserting that a feature or conduit itself is jurisdictional.

Many are currently, and appropriately, covered by the waste treatment system exclusion. The agencies state that they do not propose any substantive changes in the exclusion. Unfortunately, the existing exemption has not always been implemented consistently – the same type of feature being excluded in one instance but treated as jurisdictional in another. The treatment of the exclusion in the proposal may actually add to the current ambiguity, confusion, and inconsistency.<sup>4</sup>

The addition of a comma after “lagoons” could be misinterpreted as limiting the scope of the exclusion to systems that were constructed with the *intention* of meeting CWA requirements, rather than systems that *function* to meet CWA requirements. In addition, the retention of long-suspended language included only in the NPDES version of the exclusion, contributes to ambiguity over what is covered by the exclusion. NRECA is concerned that the proposed punctuation change and the retention of the suspended language will create or exacerbate current confusion and uncertainty for the regulated community. Removing the new comma and the suspended language would actually provide the increased clarity and certainty that the proposal purports to do.

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<sup>4</sup> See extensive discuss of the exclusion in the UWAG comments, Section V.



Were such water management features and conveyances to become WOTUS, facilities would be confronted with additional permitting issues. Water management structures determined to be WOTUS would require permits for a discharge *to* the water management system, thus creating a scenario in which water would have to be treated *before* it is sent to the treatment system designed to treat the water in the first place. Not only that, but 404 permits could be required to maintain the water management systems themselves. Would cleaning the systems to remove sediment or scale be considered “dredging;” would modifying any part of the system be considered “filling”?

In comments on the EPA’s proposed steam electric effluent limitation guidelines (Docket No. EPA-HQ-OW-2009-0819), NRECA encouraged the Agency to establish “water bubbles” over power plants, similar to those promulgated for the iron and steel industry. Within the bubble, the plant would be able to manage its water—possibly even trading between and among sources – so long as discharges from the plant met applicable limits. A similar concept could apply more broadly to water managed at generating facilities – in essence exempting industrial waters used within the plant.<sup>5</sup> Such waters would not be WOTUS, though waters that flow into the plant might be and discharges from the plant would be regulated through appropriate permits prior to discharge to a WOTUS. Retaining, and in fact encouraging, plant-wide water management systems and centralized wastewater treatment would actually contribute to improved environmental performance and water quality by encouraging water recycling, re-use and conservation.

## ii. New Generation

Currently cooperatives rely on coal as the primary source of generation, but looking forward, NRECA’s members will continue to invest in a broad portfolio of energy resources including wind, solar and natural gas. In the same way cooperatives try to avoid affecting WOTUS when siting power lines, they also try to minimize impacts when siting new generation. The proposed expansion of jurisdiction will make such avoidance efforts virtually impossible.

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<sup>5</sup> See UWAG comments at section VI; FWQC comments at section VIII.B.

Nationwide Permit 51 (NWP 51) authorizes land-based renewable energy generation facilities – including construction, expansion or modification and attendant features. However, NWP 51 allows no more than one-half acre of non-tidal WOTUS to be lost and no more than 300 linear feet of stream bed (unless the Corps waives the 300 feet limit). Given the proposed expansion of jurisdiction, many renewable energy projects would exceed a half acre so this nationwide permit may have little practical application.

Although NWP 51 specifically authorizes renewable energy sources, no nationwide permit exists specifically for new fossil fuel generation capacity. Rather than planning for CWA permit compliance at the plant boundary – such as a cooling water intake or NPDES outfall – a proposed plant would be confronted with internal permitting for stormwater management, spill control, and any other water movement.

Plants relying on natural gas could face even more challenges. New natural gas pipelines could be confronted with the same permitting issues as new distribution and transmission lines and become subject to more expensive and time consuming individual permits rather than the more expeditious NWP 12. As we look to bring new sources of generation on line, we are concerned that the siting and permitting of new natural gas pipelines will be further delayed.

### **c. Decommissioning Retiring Sites**

As the electric utility industry brings new generation resources online, older plants are being decommissioned and their sites are frequently remediated for other uses. Such “brownfields” development has been encouraged for years by the EPA as well as state and local parties interested in economic development. The proposed rule would hamper efforts to make these sites available for continued, productive use.

Decommissioning often requires cleaning and filling ditches, canals, and treatment ponds on the site, as well as grading and other groundwork. Most of these features have not been treated as jurisdictional in the past, but might be deemed WOTUS under the proposed rule. Remediation work could require a section 404 permits and compensatory mitigation (in

essence requiring mitigation for mitigation). The added costs and delays could result in companies electing to mothball rather than restore sites, thus reducing the site’s value and utility for all.

## **II. Significant Concerns with the Proposed Rule**

### **a. Small Business Concerns**

From the description of cooperative concerns described above, NRECA clearly believes the proposed rule would impose significant costs on and have a significant economic impact on rural electric cooperatives, the vast majority of which are small businesses. NRECA concurs with the findings of the Small Business Administration Office of Advocacy (SBA Advocacy) that the EPA and the Army Corps of Engineers improperly certified the rule as not posing a significant economic impact on a substantial number of small entities.

NRECA agrees with SBA Advocacy that the agencies should have prepared and made available in the rulemaking record an initial regulatory flexibility analysis (IRFA) describing the impact of the proposed rule on small entities. Furthermore, the EPA erred in not conducting a small business advocacy review (SBAR) panel in accordance with the requirements of the Small Business Regulatory Enforcement Fairness Act (SBREFA).

### **b. Broad Industry Concerns**

The preamble claims that the proposed rule will “enhance protection for the nation’s public health and aquatic resources . . . by increasing clarity” regarding what is and what is not jurisdictional under the Clean Water Act as a “water of the United States.” The proposal, however, does little to resolve inconsistency and confusion surrounding CWA jurisdiction. Rather, the proposed broad categories and ambiguous definitions actually increase ambiguity and uncertainty.

As stated above, NRECA explicitly endorses and incorporates by reference comments submitted by the Utility Water Act Group (UWAG), the Water Advocacy Coalition (WAC), the Federal Water Quality Coalition (FWQC), and the US Chamber of Commerce.

NRECA is concerned that:

- The rule does not provide clarity and indeed creates confusion. Definitions of numerous key terms and concepts, like “uplands,” “floodplain,” “shallow subsurface connection,” “waters,” and “waste treatment” are unclear.
- The proposed rule unlawfully expands CWA jurisdiction beyond the limits intended by Congress and recognized by the U.S. Supreme Court.
- The proposed rule ignores the *Rapanos* plurality opinion and misinterprets Justice Kennedy’s significant nexus standard.
- By its terms, the proposed rule expands CWA jurisdiction to ephemeral drainages, ditches (including roadside, flood control, irrigation, stormwater, railroad right of way, and agricultural ditches), waters in riparian and floodplain areas, industrial ponds, and isolated waters that have not previously been regulated as “waters of the U.S.”
- The proposed rule applies the new definition of “waters of the U.S.” throughout all CWA programs and will result in fundamental changes to those programs. The agencies have not considered the implications of this application.
- The proposed rule will have unintended consequences and adverse economic impacts because it allows for the agencies to treat ditches, stormwater drainages, and water supply and flood control structures, as waters of the U.S.
- The proposed rule federalizes waters (and “aquatic systems”) not intended to be covered by CWA, thereby impinging on the states’ traditional and primary power over land and water use.
- The agencies have ignored federalism policies and have not consulted with their state partners. Nor have they consulted with small businesses as required by the Regulatory Flexibility Act.
- The proposed rule improperly removes jurisdictional authority of local regulatory authorities over their local land and waters.

- The proposed rule was developed through a flawed process, where the rule was developed before review of the underlying science was complete.

### **III. Conclusion**

- a. The Agencies should withdraw the proposed rule and engage in meaningful dialogue with the regulated community and states about more reasonable, focused, and clear changes to existing regulations; and initiate a replacement advanced notice of proposed rulemaking or notice of proposed rulemaking that reflects those consultations and is supported by science and case law.
- b. The Agencies must fully comply with the RFA and take into account the impacts and concerns of small businesses. They should withdraw the proposal, convene an SBAR panel and complete a thorough RFA analysis prior to any reproposal.
- c. The Agencies should preserve an inclusive wastewater treatment system exclusion – and provide an on-site water and wastewater management exclusion – to avoid disrupting hundreds of thousands of existing industrial operations nationwide, impeding development of needed new infrastructure, and imposing substantial new regulatory burdens on the regulated community, states, and the agencies themselves.