



N A R U C
National Association of Regulatory Utility Commissioners

September 1, 2016

The Honorable Gina McCarthy
Environmental Protection Agency
Office of the Administrator, 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

The Honorable John M. McHugh
Secretary
U.S. Department of the Army
The Pentagon, Room 3E700
Washington, DC 20310

Re: Definition of Waters of the United States (WOTUS) under the Clean Water Act

Dear Administrator McCarthy and Secretary McHugh:

The Environmental Protection Agency (EPA) has long-time working relationship with the National Association of Regulatory Commissioners (NARUC). We appreciate that relationship.

However, the EPA and U.S. Army Corps of Engineers clarification of the scope of waters protected by the Clean Water Act raises real concerns.

NARUC generally supports the protections of the Clean Water Act. However, the revisions of the WOTUS definition are overly broad. There is no question both that (1) the rule expands federal jurisdiction and (2) will negatively impact power generators and utilities regulated by NARUC member State commissions.

NARUC is a bipartisan organization that represents commissions in all 50 States and U.S. territories that regulate the utilities that provide essential water, energy, telecommunications, and transportation services. At the July 2016 NARUC Summer Meeting, a resolution was unanimously adopted that specified crucial concerns with the EPA's final rule:

[E]ntities that fall within the purview of the [NARUC] may be affected by the final rule as a result of the expansion of federal jurisdiction over: 1) pollutant discharges into jurisdictional waters, especially in the oil and gas industries; 2) storm water management related to the construction of new utility facilities; and 3) infrastructure improvements, pipeline construction, and utility crossings in and around jurisdictional waters.

That resolution is appended to this letter.

Congress already sent a strong signal to EPA and the Corps of Engineers passing a Joint Resolutions of Disapproval (S.J. Res. 22 of 2015). Although S.J. Res. 22 was vetoed, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay. NARUC remains concerned that the rule might survive legal challenge.

Quite a few States have registered concern with the stayed rule. NARUC's resolution builds on those concerns by specifically urging the EPA and Army Corps of Engineers:

to withdraw the final rule relating to the definition of WOTUS under the Clean Water Act or to propose a supplemental rule subject to additional public comment and cost benefit.

It also respectfully requests Congress to "take any additional actions necessary to prevent implementation of the final rule." NARUC has already asked Congress to make sure the final rule in its current form is not implemented.¹

This letter is to respectfully request the withdrawal of the current rule or for both the EPA and the Corps to propose a supplemental rule as per our resolution.

NARUC is committed to working with Congress, the EPA, the Army Corps of Engineers, industry, environmental representatives, and other interested parties to find reasonable compromise definition of the "waters of the United States." If you have any questions please contact NARUC's General Counsel – Brad Ramsay, at 202-898-2207, jramsay@naruc.org.

Sincerely,

Travis Kavulla
NARUC President

Alaina C. Burtenshaw
Chair, NARUC Committee on Water

cc: The Honorable Jo-Ellen Darcy, Assistant Secretary of the Army
Deputy Assistant Administrator Joel Beauvais, EPA Office of Water
Benita Best-Wong, Director, EPA Office of Wetlands, Oceans, and Watersheds

¹ See, August 10, 2016 *Letter from the Honorable Travis Kavulla, NARUC President, and the Honorable Alaina C. Burtenshaw, Chair, NARUC Committee on Water to The Honorable Mitch McConnell, Marotirty Leader, U.S. Senate, The Honorable Harry Reid, Minority Leader, US Senate, the Honorable Paul Ryan, Speaker, U.S. House of Representatives, the Honorable Nancy Pelosi, Minority Leader, U.S. House of Representatives*, online at: <http://pubs.naruc.org/pub/CC7111A0-C2D8-2B97-3CFF-2934A416136B>.

Resolution Urging the United States Environmental Protection Agency and Army Corps of Engineers to Withdraw the Final Rule Relating to the Definition of “Waters of the United States” Under the Clean Water Act or to Propose a Supplemental Rule Subject to Additional Public Comment and Cost-Benefit Analysis

WHEREAS, On June 29, 2015, the United States Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) published a final rule (EPA Docket Id. No. EPA-HQ-OW-2011-0880) relating to the definition of “waters of the United States” (WOTUS) under the Clean Water Act; *and*

WHEREAS, By revising the existing definition of WOTUS under the Clean Water Act, the final rule threatens to expand federal jurisdiction over three to five percent more water bodies, which may include nearly all waters in the Nation; *and*

WHEREAS, The expansion of federal authority over additional waters under the final rule will burden property owners with high federal permitting costs and requirements, in addition to those already applicable at the State and local levels of government; *and*

WHEREAS, Entities that fall within the purview of the National Association of Regulatory Utility Commissioners (NARUC) may be affected by the final rule as a result of the expansion of federal jurisdiction over: 1) pollutant discharges into jurisdictional waters, especially in the oil and gas industries; 2) storm water management related to the construction of new utility facilities; and 3) infrastructure improvements, pipeline construction, and utility crossings in and around jurisdictional waters; *and*

WHEREAS, The final rule may negatively affect power generators and regulated utilities when implementing necessary infrastructure improvements, including the construction of new pipelines for natural gas fired generation, which may be required to comply with the EPA’s Clean Power Plan under Section 111(d) of the Clean Air Act; *and*

WHEREAS, Landowners, development companies, local governments, and businesses investing in infrastructure, and industries involved in natural resource extraction may also be impacted by the extensive permitting procedures set forth in the final rule; *and*

WHEREAS, The United States Court of Appeals for the Sixth Circuit and the United States District Court for the District of North Dakota have found that the public was deprived of a meaningful opportunity to comment on the final rule because the final rule that was ultimately adopted is very different from what the public was allowed to consider (*In re E.P.A.*, 803 F.3d 804 (6th Cir. 2015); *N. Dakota v. U.S. E.P.A.*, 127 F. Supp. 3d 1047 (D.N.D. 2015)); *and*

WHEREAS, The United States Government Accountability Office (GAO) found that the EPA violated publicity or propaganda and anti-lobbying provisions contained in federal appropriations acts with its use of certain social media platforms aimed to suppress opposition to the final rule (GAO Docket No. B-326944; December 14, 2015); *and*

WHEREAS, No cost-benefit analysis with respect to the impact of the final rule on entities within the purview of NARUC appears in the Economic Analysis document accompanying the final rule; *and*

WHEREAS, The United States Court of Appeals for the Sixth Circuit has issued a nationwide stay on the final rule, in recognition that the final rule likely exceeds the EPA's authority under the Clean Water Act (*In re E.P.A.*, 803 F.3d 804 (6th Cir. 2015)); *and*

WHEREAS, The United States District Court for the District of North Dakota has also held that the final rule is likely illegal (*N. Dakota v. U.S. E.P.A.*, 127 F. Supp. 3d 1047 (D.N.D. 2015)); *and*

WHEREAS, The United States House and Senate passed a Joint Resolution of Disapproval (S.J. Res. 22 of 2015) providing for Congressional disapproval of the final rule pursuant to Chapter 8 of Title 5 of the United States Code; *and*

WHEREAS, NARUC is concerned that the expansion of federal power under the final rule will: 1) usurp States' power to manage their local land and water resources; 2) negatively impact regulated utilities when developing the necessary infrastructure required to comply with federal carbon emission standards; and 3) result in additional and extensive permitting costs and requirements for property owners, including entities within the purview of NARUC; *now, therefore, be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2016 Summer Meetings in Nashville, Tennessee, hereby: 1) respectfully requests that the United States Congress take any additional actions necessary to prevent implementation of the final rule; and 2) urges the EPA and Corps to withdraw the final rule or, in the alternative, to propose a supplemental rule, subject to another round of public comments and additional cost-benefit analysis studies, particularly with respect to the effect of the rule on the activities of power generators and regulated utilities.

Sponsored by the Committee on Water

Adopted by the NARUC Board of Directors on July 27, 2016