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

Dear Majority Leader McConnell, Minority Leader Reid, Speaker Ryan, and Minority Leader Pelosi:

We are writing to urge Congress to prevent implementation of the Environmental Protection Agency (EPA) and Army Corps of Engineers’ final rule redefining the “Waters of the United States” (WOTUS). The revision of the existing definition of WOTUS under the Clean Water Act is overly broad. It clearly expands federal jurisdiction and will impact power generators and utilities regulated by NARUC member State commissions.

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

Entities 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 this harmful rule might survive legal challenge.

The resolution also urges “the U.S. 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.” The association will be filing appropriate requests with both agencies.

It also respectfully requests Congress to “take any additional actions necessary to prevent implementation of the final rule.” We therefore respectfully request Congress act to makes sure the final rule is not implemented.

NARUC is committed to working with Members of Congress, the U.S. EPA, the Army Corps of Engineers, industry, environmental representatives, and other interested parties to find reasonable compromise on defining the waters of the United States. If you have any questions please contact NARUC’s Legislative Director – Water, Brian O’Hara, at 202-898-2205, bohara@naruc.org or General Counsel – Brad Ramsay, at 202-898-2207, jramsay@naruc.org.

Sincerely,

Travis Kavulla
NARUC President

Alaina C. Burtenshaw
Chair, NARUC Committee on Water
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 an
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