MJB & A

*CONCORD, MA - WASHINGTON, DC*

47 Junction Square Drive
Concord, MA 01742

978-369-5533
www.mjbradley.com

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Docket ID No. EPA-HQ-OW-2018-0149
Office of Water, Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Regulatory Community of Practice, U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314
(submitted via regulations.gov)

Re: Revised Definition of "Waters of the United States"

To Whom It May Concern:

On February 14, 2019, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (together, the "Agencies") published the *Revised Definition of "Waters of the United States"* (Proposed Rule), which proposes revisions to the scope of federal authority under the Clean Water Act (CWA). Specifically, it proposes to define Waters of the U.S. (WOTUS) as traditional navigable waters, including the territorial seas; tributaries of navigable waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetlands adjacent to other jurisdictional waters. The MJB&A Permitting and Infrastructure Coalition[1] appreciates the opportunity to comment on the Proposed Rule.

MJB&A Permitting and Infrastructure Coalition member companies collectively engage the Administration and Agencies on potential permitting modernization as well as regulatory and legislative opportunities to ensure energy infrastructure projects can proceed in a timely and cost-effective manner. Our companies design, permit, and operate fossil fuel-fired and nuclear power plants; electric and natural gas transmission and distribution systems; and solar, wind, and other renewable generation projects. Nearly all of these facilities or proposed projects are affected by the definition of WOTUS.

## I. We support the Proposed Rule as it would provide enhanced business certainty by correcting several deficiencies of the 2015 Rule that created legal risks and regulatory uncertainty.

Our member companies have long advocated for a definition of WOTUS that provides clear direction on which waters are jurisdictional under the CWA. Due to the investment-intensive nature of our industry, timeliness and certainty in the permitting process are crucial to provide our industry with the confidence to continue to make long-term investment decisions. The definition of WOTUS, and particularly its degree of clarity or ambiguity, largely impacts the certainty and efficiency of the federal permitting process. We support the Proposed Rule in that it would correct several deficiencies of the 2015 Rule, such as its reliance on the significant nexus test, to provide a clearer and more predictable regulatory framework. The proposed approach can help to encourage long-term investment decisions and business planning.

[1] The MJB&A Permitting and Infrastructure Coalition member companies include: Entergy Corporation, NextEra Energy, PG&E Corporation, and Southern California Edison.

As we have stated in previous comments,[2] we agree with the Agencies that the 2015 Rule, particularly in its interpretation of "significant nexus," significantly increased the regulatory ambiguity and legal risks of the rule, thus warranting a revised definition of WOTUS. The Agencies' application of the significant nexus test led to regulatory confusion, added permitting delays and costs, and increased risk of third-party litigation, all hampering business certainty needed for long-term investment decisions. For example, as discussed in our comments for the 2015 rulemaking, a member company's project involved a jurisdictional field survey and significant nexus analysis for approximately 4,000 acres of Bureau of Land Management (BLM) land. Under the 2015 Rule, the ephemeral washes inspected in the survey could be considered tributaries and classified as WOTUS, which would require the project to obtain a Section 404 authorization. However, prior to the 2015 Rule, the Corps issued an approved jurisdictional determination that no WOTUS were present on the proposed site and that the project did not require a nationwide or individual permit. The Proposed Rule would make clear, consistent with pre-2015 determinations, that such ephemeral washes are not jurisdictional, in a manner that is consistent with the CWA.

As the Agencies observed in the 2015 Rule, a "significant nexus" is not in itself a scientific term, but rather a case-by-case determination reached by the Agency staff that is informed by their scientific and policy judgments, as well as their technical expertise and practical experience in implementing the CWA.[3] As such, it is reasonable that other approaches and methods can replace the significant nexus test to fulfill the purposes of the CWA. In the Proposed Rule, the Agencies propose to establish categories of jurisdictional waters and add regulatory definitions to delineate waters that are significantly connected to a navigable water from those that are not. We support replacing the case-by-case application of the significant nexus test with clear categories of jurisdictional waters that are consistent with Congress's statutory authority and the relevant case law.

## II. We support the continued exemption for waste treatment systems and the added definition to clarify what elements of waste treatment systems qualify for the exclusion.

The waste treatment system exemption currently is, and will remain, an important tool to allow compliance with the CWA, including treatment of stormwater, thermal, and effluent discharges, and oil spill prevention and containment. While we supported the 2015 Rule's continued exemption for waste treatment systems, we had urged the finalization of the regulatory text to add clarity and regulatory certainty that waste treatment systems would continue to be exempted from treatment as a WOTUS.

Thus, we support the Proposed Rule's definition of "waste treatment system" to make clear that it includes all related features of the system, including cooling ponds. As proposed, the added definition would enhance clarity as to what activities comprise waste "treatment" and what features comprise a "system."

Additionally, the exemption with the proposed clarifying definitions will help to ensure that the exemption can continue to be implemented consistent with how the Agencies have historically implemented it. For example, many power plants use large man-made reservoirs for cooling water as part of a closed-cycle recirculating system (CCRS). These reservoirs allow water heated by generation equipment to cool off before being reused. Additionally, utilities also use surface drainage ditches and ponds to ensure compliance with existing Spill Prevention, Control and Countermeasures (SPCC) regulations and to comply with both the CWA and the Oil Pollution Act as well as state and local-level water quality laws. In some cases, the ditches are part of an overall system to capture oil and other spills well before reaching regulated WOTUS. We support the Proposed Rule in

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[2] Comments of MJB&A Permitting and Infrastructure Coalition on *Definition of WOTUS – Recodification of Pre-Existing Rules*, available at https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-11028.

[3] Final Rule: Clean Water Rule, 80 FR 37057 (June 29, 2015), available at https://www.govinfo.gov/content/pkg/FR-2015-06-29/pdf/2015-13435.pdf.

that it would allow these water bodies, acting as components of as waste treatment systems, to remain expressly exempted from WOTUS.

To further increase business certainty, we recommend that the final rule clarify the applicability of the jurisdictional exemption for waste treatment systems based on their time of construction of the system. This approach is consistent with other regulatory approaches of EPA, and regulatory language that ensures those systems remain exempted if they were constructed in accordance with the requirements of the CWA or lawfully constructed prior to the 1972 CWA amendments is important. These added clarifications will further minimize both the legal risk of the definition of WOTUS and regulatory uncertainty in its application.

## III. Additional Key Terms for Electric Sector

We also support the proposed definitions of "adjacent wetlands" and "tributaries." These definitions would lend to a more balanced level of jurisdiction between federal and state entities and are consistent with case law and the CWA.

The Agencies propose to define "adjacent wetlands" as wetlands that "abut or have a direct hydrological surface connection" to a water under federal jurisdiction in a typical year. In comparison, the 2015 Rule's definition relied on mere adjacency to another water under federal jurisdiction. Given that adjacency alone does not determine whether a water has a significant hydrological connection to a water under federal jurisdiction, our member companies viewed this prior definition as too expansive to determine the jurisdiction of a wetland. By comparison, the definition in the Proposed Rule more appropriately considers a wetland's physical connection to a water under federal jurisdiction.

Similarly, the Agencies propose to define a jurisdictional tributary as a "river, stream, or similarly occurring surface water channel that contributes perennial or intermittent flow" to a traditional navigable water in a typical year. This proposed definition moves away from the 2015 Rule's definition, which relied on water bodies' physical characteristics regardless of their connection to a navigable water, to a definition that is based on contribution of flow to a navigable water. Thus, we support this proposed definition as a more appropriate way to determine the jurisdiction of surface water channels.

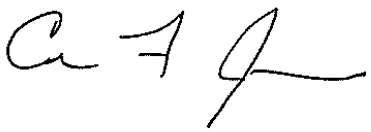
However, we are concerned that the definition of "intermittent" as surface water that flows "continuously during certain times of a typical year" may not offer sufficiently distinct criteria to distinguish "intermittent" from "ephemeral" waters. The definition's focus on the duration of continuous flow in a typical year without adding additional detail related to the duration may lead to additional regulatory uncertainty and varying application of the definition. The Agencies also request comment on an alternative definition that would be based on "seasonal flow." We would support shifting the definition of intermittent to be more focused on certain times in a typical year when the water table is seasonally high. Such a definition is more consistent with current practices and less dependent on the potential interpretation of "typical," which could lead to regulatory uncertainty and inconsistent application.

The exemption for stormwater control features also remains an important tool for the electric sector. We support the Agencies' proposal to continue to exempt from federal jurisdiction "stormwater control features." The Agencies note in the regulatory preamble that "the mere interface between the excluded feature constructed wholly in upland and a jurisdictional water would not make that feature jurisdictional." We support this guidance, but we also recommend the final rule recognize that some stormwater control features may not be constructed wholly in upland but should continue to be exempted consistent with historic practice. Thus, while any jurisdictional waters, such as

a wetland, would remain jurisdictional, the manmade features of a stormwater control system should also be exempted even if not wholly constructed in upland.

We look forward to continuing to engage with the Agencies on this rulemaking. If you have any questions about these comments, please do not hesitate to contact me at cjenks@mjbradley.com.

Sincerely,



Carrie Jenks
MJB&A Permitting and Infrastructure Coalition