

**Testimony of Mac McLennan
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Before the Senate Committee on Agriculture, Nutrition and Forestry**

Waters of the United States: Stakeholder Perspectives on the Impacts of EPA's Proposed Rule.

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Introduction

Chairman Roberts, Ranking Member Stabenow, members of the Committee, thank you for inviting me to testify today on “Waters of the United States: Stakeholder Perspectives on the Impact of EPA’s Proposed Rule.” My name is Mac McLennan, and I am President and CEO of Minnkota Power Cooperative, Inc. Minnkota is a generation and transmission cooperative headquartered in Grand Forks, North Dakota, supplying wholesale electricity to 11 member distribution cooperatives, three in eastern North Dakota and eight in northwestern Minnesota. Minnkota serves nearly 128,000 residential, commercial and industrial consumers and also serves as operating agent for the Northern Municipal Power Agency (NMPA), an association of 12 municipal utilities. Combined, the Minnkota/NMPA Joint System serves about 140,000 consumers over a 34,500 square mile area.

Seventy-five years ago, rural residents in northwestern Minnesota and eastern North Dakota joined together to form Minnkota Power Cooperative. They realized the value of electricity and its ability to bring a better quality of life to homes and farms in the region. Since those early days, the use of electricity has grown far beyond what organizers could have ever imagined. But what has not changed in the passing decades is the foundation of Minnkota: its members. Minnkota would not exist today without the ongoing support and resiliency of its 11 member distribution cooperatives. Together, we have built power plants, thousands of miles of transmission line and one of the nation’s best demand response programs. These accomplishments do not happen by chance. It starts with leadership from our elected board of directors and the commitment from Minnkota employees to meet challenges, seize opportunities and ensure that the consumer at the end of the line is receiving affordable and reliable electricity.

Throughout our history, our members have faced considerable challenges in bringing electricity to the countryside, raising the standard of living and providing the engine for rural development along the way. This challenge and our sense of obligation to the mission we serve is unwavering. However, numerous challenges stand in our path as we strive to meet the growing needs of our membership. As if delivering safe, reliable and affordable electricity to remote regions in North Dakota and Minnesota was not difficult enough, electric cooperatives have risen to the challenge of increasingly stringent state and federal environmental regulations over the years. Minnkota has, within the last decade, invested nearly \$425 million into environmental upgrades at our lignite fired coal plant, the Young Station in Center, North Dakota, which serves to highlight our strong track record of environmental stewardship and solid foundation of environmental compliance. Nevertheless, federal environmental regulations continue to compound costs with significant impacts to Minnkota and the member-consumers we serve. And while much of our attention has been devoted to efforts to mitigate ever-tightening clean air

regulations, we maintain a watchful eye on the rule proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to revise the definition of Waters of the United States (WOTUS) under the federal Clean Water Act.

Minnkota's Concerns with the "Waters of the United States" Proposed Rule

Minnkota has substantial concerns with the WOTUS rule because it will dramatically expand the scope of jurisdiction of the Clean Water Act. Electric cooperatives engage in numerous activities that require us to obtain permits under the Clean Water Act. Minnkota provides service to areas marked by low consumer density which necessitates an expansive network of transmission facilities that safely and efficiently deliver electricity over long distances to reach the far corners of our territory. Power lines require regular maintenance, including necessary repair and replacement of poles and towers. In addition, these facilities require upgrades to make the system more resilient in the event of severe weather events.

I think everyone here will agree there is a strong national interest in a reliable and resilient electric grid. The White House Rapid Response Team for Transmission is tasked with the challenge of improving the overall quality and timeliness of electric transmission infrastructure permitting. Consistent with this objective, the Corps administers a nationwide permit (NWP 12) for utility line activities that allows for the construction and maintenance of power lines so long as each "single and complete" project does not result in the loss of more than one half acre of WOTUS. When configuring transmission facilities, engineers take into consideration the location of wetlands and streams in order to stay within the half acre limit. However, the broad 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.

The EPA and Corp attempt to assert jurisdiction by using "tributaries" that directly or indirectly contribute flow to a navigable body of water. Yet the proposed rule fails to consider the frequency, duration, or amount of flow the tributary provides or the tributary's proximity to the navigable water. Further, a wider variety of wetlands and even man-made features are now included within this proposed definition of tributaries. Minnkota has seen borrow pits from substation construction in the past that have since been included in the National Wetland Inventory (NWI) which would likely be considered a tributary, and thus by significant nexus, a WOTUS. This proposed rule would result in numerous additional facilities and construction projects, including small projects to now be regulated. The resulting burden of time and resources on behalf of the regulated community would be substantial for a very minimal or non-existent environmental benefit. The economic impact would add to ever increasing costs to Minnkota and its members.

Additionally, the rule attempts to assert jurisdiction over "other waters" such as the waters of the Prairie Pothole Region. This terrain is common in our service territory and transmission delivery system. The assumption is made that the isolated wetlands, when aggregated, have a more than speculative or insubstantial effect on traditional navigable waters – even if the isolated wetland is miles from the traditionally navigable water. This assumption is based on an extremely tenuous

connection and should be abandoned in the proposed rule. Given the wide swaths of flat terrain that flood seasonally within our service territory, much of the Red River Valley in North Dakota and Minnesota could be designated as wetlands subject to this rule. If that scenario materialized, as referenced above, utilization of NWP 12 would become increasingly difficult and such a broad expansion of jurisdictional waters will interfere with our ability to stay within the nationwide permit limits. An increase in permit requirements will result in increased uncertainty, delay, and cost when it comes to constructing and maintaining power lines. In many cases, permitting delays and cost overruns can doom critical investments in infrastructure. The potential for the proposed rule to increase the cost of permitting with no appreciable environmental benefit is not my idea of good regulatory policy.

Under the proposed rule, our rights of way may be considered WOTUS, even though they are often simple ditches alongside roads that receive road run-off and infrequently hold water. EPA and the Corps have said that they are exempting ditches that drain only upland and are constructed in uplands, but the term “upland” is not defined. This gives the federal government the final say on whether or not ditches are eligible for the exemption. Minnkota diligently maintains its rights of way by controlling vegetation which may include the use of herbicides and we must control vegetation around generating facilities as well. Permits are required if herbicides are applied in jurisdictional waters, so the expansion of WOTUS set forth in the proposed rule will also increase the requirement for vegetation control permits. EPA and states have issued general permits for vegetation, but if you spray more than 20 linear miles, there are added burdens.

Minnkota has a diverse mix of baseload and intermittent generation resources. Two lignite coal-fired facilities – the Milton R. Young Station near Center, North Dakota, and the Coyote Station near Beulah, North Dakota, along with wind and hydro are the primary sources of generation for the Minnkota/NMPA Joint System. While Minnkota does not forecast a need for new generation for the next decade or so, when we do look to increase generating capacity to meet future demands of our members and invest in generation from other fuels including renewables, we will need to build new transmission facilities. Projects such as these often require miles of new transmission lines to connect to the grid, meaning both the generation resource and its transmission lines are likely to face increased costs and delays if the rule is finalized in its current form.

The proposed rule will impose significant costs on small businesses, including electric cooperatives. All distribution cooperatives, and all but three generation and transmission cooperatives, meet the Small Business Administration definition of a small business, including Minnkota . We agree with the findings of the Small Business Administration Office of Advocacy that the proposed rule may pose significant economic impact on a substantial number of small entities and that the EPA and the Army Corps of Engineers improperly certified the rule as not affecting small businesses. The agencies should have prepared and made available in the rulemaking record an initial regulatory flexibility analysis 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).

Conclusion

Affordable and reliable electricity is an interest of critical importance to our members and the nation. In the effort to maintain the critical infrastructure on which our member owners rely, Minnkota does not believe the substantial expansion of the delays and the added cost this proposed rule would create are appropriate in its current form. The increased costs and lengthy permitting for constructing and maintaining power lines and new generation – including renewables - imposed by the proposed rule would result in little – if any – enhanced protection for the nation’s waters. The preamble to the rule claims that it 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. However, the proposal does little to resolve inconsistency and confusion surrounding the jurisdiction of the Clean Water Act. Rather, the broad categories and ambiguous definitions increase confusion and uncertainty. The proposed rule is not cost-effective and will impose significant economic impacts on a substantial number of small entities, including electric cooperatives.

In conclusion, it is our position that EPA and the Corps should withdraw the proposed rule and engage in a meaningful dialogue with all stakeholders, including small businesses, prior to the issuance of a subsequent proposal that will reflect those consultations. I appreciate the invitation to testify and would be happy to address questions from the Committee on this important issue.