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To the United States House of Representatives
Committee on Transportation & Infrastructure
Subcommittee on Water Resources and Environment

"America Builds: Clean Water Act Permitting and Project Delivery"

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Introduction

Chairman Collins, Ranking Member Wilson, and Members of the Water Resources and Environment Subcommittee, thank you for the opportunity to testify before you today. My name is Buddy Hasten, and I serve as President and CEO of Arkansas Electric Cooperative Corporation (AECC) and Arkansas Electric Cooperatives, Inc. (AECI), which along with Arkansas' 17 electric cooperatives are collectively known as the Electric Cooperatives of Arkansas. I am testifying today to provide my own insights as a co-op leader but also representing the National Rural Electric Cooperative Association (NRECA) and the nearly 900 electric cooperatives across the country it represents.

AECC is a generation and transmission (G&T) cooperative based in Little Rock, Arkansas that was established in 1949. AECC proudly provides power for approximately 1.2 million members of Arkansas' 17 electric distribution cooperatives. Specifically, AECC generates, sells, and delivers reliable and affordable wholesale electric energy, along with related services to Arkansas' electric distribution co-ops. AECI, formed in 1942, is the Arkansas statewide trade association, which provides education, public relations, government relations, and other support to the electric distribution co-ops in Arkansas. AECI also sells electric utility materials and equipment and provides related services to and for electric utilities across the United States.

NRECA is the national trade association representing nearly 900 rural electric cooperatives across the country including 64 G&T cooperatives and 832 distribution cooperatives. America's electric co-ops comprise a unique sector of the electric industry. These not-for-profit entities are independently owned and governed by the people they serve. From growing exurban regions to remote farming communities, electric co-ops provide power to 42 million Americans across 48 states. They keep the lights on across 56% of the American landscape – areas that are primarily residential and sparsely populated. Those characteristics make it comparatively more expensive for electric co-ops to operate than the rest of the electric sector, which tends to serve more compact, industrialized, and densely populated areas. This means that co-ops are constantly asked to do more with less, and they deliver.

Reliable and affordable electricity is essential to America's economic growth. And as our nation increasingly relies on electricity to power our economy, keeping the lights on has never been more important – or more challenging. For example, Arkansas is losing approximately 3,800 megawatts of baseload power in the near future while simultaneously facing a tremendous increase in electricity demand from data centers and manufacturing facilities.

Reasonable and efficient environmental regulations, including permitting programs under the Clean Water Act (CWA), are often the critical link in being able to successfully complete a project on time in order to meet the growing generation demands on AECC. It takes several years to plan a transmission route or pick a viable property site to build a new power plant. It is essential that federal permitting programs – including those under the CWA – are implemented as intended by Congress and do not unnecessarily delay or hinder critical infrastructure projects essential to delivering electricity to homes, businesses, and farms across the country.

Because electric co-ops are owned and governed by the consumer-members that we serve, we are committed to protecting and maintaining clean water within our communities. However, having clean water is not and should not be mutually exclusive with having CWA permitting programs that are reasonable, efficient, and meet the needs of our growing and ever-changing economy. Congress can and should address the difficulties that the regulated community is facing with permitting under the CWA.

Section 404 Permits

Nationwide Permits

While providing electricity over long distances, power lines must occasionally cross wetlands and other "waters of the U.S." (WOTUS), requiring authorization under CWA Section 404. Nationwide Permits (NWPs) are developed and issued by the U.S. Army Corps of Engineers (Corps) and authorize activities that have minimal individual and cumulative adverse effects on the aquatic environment. Electric co-ops depend on CWA Section 404 permits, and on NWPs in particular, to build transmission and distribution lines in a timely manner; perform routine maintenance or repair work on those lines; restore service after hurricanes or other natural disasters; and to undergo certain vegetation management practices along electric utility rights of way to prevent damage and wildfires.

The availability of NWPs is critically important to electric co-ops as an environmentally protective means to streamline work on critical infrastructure while controlling unnecessary costs. Without NWPs, electric co-ops would be required to coordinate every planned utility line project with the Corps to find alternative CWA authorizations such as individual Section 404 permits. This could result in years of additional delays and substantial additional costs. For example, the Corps reported that in fiscal year 2018, the average time to process a standard individual permit application under Section 404 was 264 days, while the average time to process a NWP authorization was 45 days. Increased costs that result from delays are passed directly on to co-op consumer-members.

Because NWPs are issued by the Corps for a period of no more than five years, fifty-seven NWPs are set to expire in March of 2026. It is essential that the Corps prioritizes reauthorizing the expiring NWPs. This requires time-consuming steps like complying with CWA section 401 requirements and working with Corps districts to add regional conditions which are critical for complying with statutes like the Endangered Species Act (ESA). We look forward to working with the Committee and the new administration to ensure that such permits are reauthorized expeditiously so that electric co-ops can continue to provide reliable and affordable electricity to our consumer-members without undue costs and delays.

Electric co-ops also support needed efforts to streamline the NWP program. For example, in 2023, AECC was required to perform repairs on one of its hydropower plants, which had been previously permitted under a Section 404 permit when the plant was built. Due to the nature of hydropower plants, repairs must be performed quickly when low river water levels in the Arkansas River allow. AECC met with the Little Rock District of the Corps and determined that a NWP 3 was needed. NWP 3s are for "maintenance" repairs and are designed to speed up the CWA permitting process for projects with minimal environmental impacts. Nevertheless, the permitting and review process to receive temporary construction authorization under NWP 3 took nine months. During that time, the river water levels rose to historically high levels, causing the repair window to close and exposing AECC's hydropower plant to increased risks of damage. Furthermore, because the temporary construction authorization that AECC received in compliance with the CWA is valid for only five years, AECC has no guarantee that it will be able to utilize the approval, should river conditions not be satisfactory for repair work within the remaining short timeframe.

Additionally, many electric co-ops apply for Rural Utilities Service (RUS) loans under the U.S. Department of Agriculture to support critical generation and transmission projects. Electric co-ops are required to comply with National Environmental Policy Act (NEPA) reviews when RUS funded projects require wetland delineations, endangered species reviews, and other possible project surveys. If a RUS-funded project requires a Section 404 permit, the Corps will require the submission and processing of much of the same information required by and submitted to RUS. This process creates additional barriers without assurance that the federal agencies will align. Improvements to communication and collaboration between federal agencies would better streamline this process.

NRECA supports provisions in last Congress's House-passed H.R. 7023, Creating Confidence in Clean Water Permitting Act, that would provide additional certainty regarding required ESA and NEPA reviews for Section 404 permits, prevent the EPA from vetoing a Section 404 permit before a permit application has been filed or after a permit has already been issued by the Corps, set reasonable judicial review timelines for Section 404 permits, and other provisions that would ensure the continued use of NWPs for linear projects like transmission lines. We look forward to working with the Committee to advance similar and additional policies to streamline the NWP permitting process.

Approved Jurisdictional Determinations

Obtaining Approved Jurisdictional Determinations (AJDs) is an essential step in the CWA 404 permitting process. The AJD process is used by the Corps to determine whether aquatic resources in a given area are jurisdictional under the CWA and therefore must require CWA permits. NRECA is aware of some instances in which AJD applicants have had to wait over 18 months just for a decision from the Corps, which only then determines whether the waterbody in question is jurisdictional and whether the applicant must undergo the CWA 404 permitting process which can take another couple years. Such delays impede the ability of electric co-ops to begin critical infrastructure projects and make investment decisions needed to meet rising electricity demands.

For example, AECC met with the Little Rock District of the Corps to discuss whether a CWA permit would be needed for a new electrical transmission switching station AECC planned to build. Based on the initial meeting, AECC was not told one way or another whether we should submit a formal permit application but gathered that a CWA permit would be needed. To be good actors and act in good faith, AECC submitted a formal AJD request. Based on information provided by the Corps, AECC expected that the Corps would issue a permit decision in approximately nine months from the application date. AECC did not end up receiving a permit decision within the nine-month timeframe initially predicted by

the Corps, resulting in a delayed start date for AECC's project. Then, over one year after AECC's original CWA permit application, the Corps informed AECC that a CWA permit was not needed for the project.

Ultimately, AECC was subjected to Corp's application requirements, construction delays and increased costs, and the associated risks of a CWA permit denial, for the Corps to determine that no CWA permit would be needed for the project – a decision that could have easily been determined as early as AECC's first meeting with the Corps over one year earlier. To be clear, AECC had to wait for over a year just to be told that we could have proceeded with the project from the beginning without any CWA permit.

To prevent similar delays in the CWA permitting process, electric co-ops are eager to work with this Committee and the new administration to ensure that the Corps immediately prioritizes responding to AJD requests.

Section 402 Permits

Electric co-ops build and maintain power plants, substations, and other infrastructure to meet increasing electricity demands and provide reliable and affordable electricity to their consumer-members. These facilities usually need to obtain a National Pollutant Discharge Elimination System (NPDES) permit under section 402 of the CWA. NPDES permits regulate discharges of pollutants through a point source into WOTUS and reflect both technology-based controls – known as Effluent Limitation Guidelines - and Water Quality Standards determined by the U.S. Environmental Protection Agency (EPA) through notice-and-comment rulemakings. However, EPA also issues guidance documents – known as water quality *criteria* – that do not always solicit or receive public input that can have a significant influence on the requirements incorporated into NPDES permits.

Except in a small number of instances, NPDES permits are issued by states which have delegated authority from EPA to perform relevant administrative, permitting, and enforcement aspects of the program. State governments must meet rigorous requirements to be authorized to run permitting programs and must follow EPA regulations when issuing individual permits. The Electric Cooperatives of Arkansas are fortunate to have a positive relationship with the State of Arkansas when it comes to state-administered CWA permits.

Last Congress' H.R. 7023 would improve the NPDES permitting process. Specifically, the bill would require EPA to seek public comment on new or revised water quality criteria. This policy would increase stakeholder engagement and overall transparency in the CWA permitting process. It would also help ensure EPA policy can be informed by actual on-the-ground experiences and help ensure that unnecessarily burdensome water quality criteria do not impact a co-op's ability to comply with NPDES permits. Furthermore, H.R. 7023 would provide additional regulatory certainty by clarifying that holders of NPDES permits are only responsible under their permits for discharges of pollutants that are specifically identified by the federal or state agency during the permitting process.

Waters of the United States

Under the CWA, the EPA and the Corps have jurisdiction to regulate "navigable" waters, which are defined in the law as "the waters of the United States," or WOTUS. The statute does not specifically define WOTUS but instead grants EPA and the Corps the responsibility to develop a definition through rulemaking. The definition of WOTUS under the CWA is significant because it determines which bodies of water are protected under the CWA, and therefore, whether certain activities that co-ops engage in that impact waterways will require a CWA permit. Broader CWA jurisdiction would increase costs associated with co-op activities in marginal areas, including construction and maintenance of transmission and

distribution corridors, stormwater control, and plant construction, operation, maintenance, and decommissioning.

In *Sackett v. EPA*, decided in May 2023, the U.S. Supreme Court provided regulated entities much needed clarity by narrowing the EPA and Corp's overly broad interpretation of WOTUS under the CWA. Unfortunately, the Biden Administration EPA and Corps did not faithfully comply with or implement the *Sackett* decision in issuing a revised WOTUS regulation or determining which waterbodies require a CWA permit. For example, they have issued "Field Memos" - essentially, guidance documents to Corps staff in the field on how to interpret the WOTUS regulation - with overly broad interpretations of key terms which do not accurately reflect *Sackett*. This refusal to comply with the Supreme Court's decision has created uncertainty, litigation, and delays which are directly hurting co-ops and other businesses.

Now is the time to correct the failure of the previous Administration and provide the regulatory clarity that electric co-ops and other businesses need.

Conclusion

As the electricity demands of our nation continue to grow, electric co-ops are committed to meeting increasing demand while continuing to provide reliable and affordable electricity to their consumer-members and promoting clean water within the communities they serve.

Permitting programs under the CWA directly impact electric co-op's ability to invest in and build critical infrastructure needed to meet growing demand. Electric co-ops support efforts to streamline CWA permitting programs and look forward to working with members of the Committee to advance policies that will result in a more reasonable and efficient CWA permitting process.

I thank the Subcommittee for its important work on this issue and look forward to answering your questions.