



April 15, 2019

**Via Electronic Filing**

U.S. Environmental Protection Agency  
EPA Docket Center (EPA/DC)  
Office of Water Docket  
Mail Code 28221T  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

**Attn: Docket ID No. EPA-HQ-OW-2018-0149**

**Re: Comments of AMP and OMEA on EPA and Army Corps' Proposed Rule Defining Waters of the United States ("WOTUS") Under the Clean Water Act ("CWA") - 84 Fed. Reg. 4154 (February 14, 2019)**

Dear Administrator Wheeler and Staff:

In response to the above-referenced notice of proposed rulemaking, American Municipal Power, Inc. ("AMP") and the Ohio Municipal Electric Association ("OMEA") hereby jointly submit the following comments for the record. AMP/OMEA believe the proposed revisions to the WOTUS rule ("the rule") a strike a balance between protection of surface waters and states' obligations to implement the Clean Water Act and their inherent right to regulate land use.

**Background on AMP/OMEA**

AMP is a non-profit wholesale power supplier and service provider for 135 members, including 134-member municipal electric systems in the states of Ohio, Pennsylvania, Michigan, Virginia, Kentucky, West Virginia, Indiana, and Maryland and the Delaware Municipal Electric Corporation, a joint action agency with nine members headquartered in Smyrna, Delaware. AMP's members collectively serve more than 650,000 residential, commercial, and industrial customers and have a system peak of more than 3,400 megawatts (MW). AMP's core mission is to be public power's leader in wholesale energy supply and value-added member services. AMP offers its members the benefits of scale and expertise in providing and managing energy services.

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**MARYLAND** BERLIN **MICHIGAN** CLINTON • COLDWATER • HILLSDALE • MARSHALL • UNION CITY • WYANDOTTE **OHIO** AMHERST • ARCADIA • ARCANUM • BEACH CITY • BLANCHESTER  
BLOOMDALE • BOWLING GREEN • BRADNER • BREWSTER • BRYAN • CAREY • CELINA • CLEVELAND • CLYDE • COLUMBIANA • COLUMBUS • CUSTAR • CUYAHOGA FALLS • CYGNET • DELTA  
DESHLER • DOVER • EDGERTON • ELDORADO • ELMORE • CALION • CENOA • CEORGETOWN • CLOUSTER • CRAFTON • GREENWICH • HAMILTON • HASKINS • HOLIDAY CITY • HUBBARD  
HUDSON • HURON • JACKSON • JACKSON CENTER • LAKVIEW • LEBANON • LODI • LUCAS • MARSHALLVILLE • MENDON • MILAN • MINISTER • MONROEVILLE • MONTEPELLIER • NAPOLEON  
NEW BREMEN • NEW KNOXVILLE • NEWTON FALLS • NILES • OAK HARBOR • OBERLIN • OHIO CITY • ORRVILLE • PAINESVILLE • PEMBERVILLE • PIONEER • PIQUA • PLYMOUTH • PROSPECT  
REPUBLIC • SEVILLE • SHELBY • SUILOH • SOUTH VIENNA • ST. CLAIRSVILLE • ST. MARYS • SYCAMORE • TIPP CITY • TOLEDO • TONTOGANY • VERSAILLES • WADSWORTH • WAPAKONETA  
WAYNESFIELD • WELLINGTON • WESTERVILLE • WILARTON • WOODSFIELD • WOODVILLE • YELLOW SPRINGS **PENNSYLVANIA** BERLIN • BLAKELY • CATAWISSA • DUNCANNON  
EAST CONEMAUGH • FILWOOD CITY • EPHRATA • GIRARD • GOLDSBORO • GROVE CITY • HATFIELD • HOOVERSVILLE • KUTZTOWN • LANSDALE • LEHIGHTON • LEWISBERRY • MIFFLINBURG  
NEW WILMINGTON • PERKASIE • QUAKERTOWN • ROYALTON • SAINT CLAIR • SCHUYLKILL HAVEN • SWEITHPORT • SUMMERHILL • WAMPUM • WATSONTOWN • WEATHERLY • ZELIENOPLE  
**VIRGINIA** BEDFORD • DANVILLE • FRONT ROYAL • MARTINSVILLE • RICHLANDS **WEST VIRGINIA** NEW MARTINSVILLE • PHILIPPI

AMP's diverse energy portfolio makes the organization a progressive leader in the deployment and procurement of renewable and advanced power assets that includes a variety of base load, intermediate and distributed peaking generation. AMP and its members own or have long term contracts for approximately 1,900 megawatts (MW) of generation and AMP members have diverse resource portfolios that include coal, natural gas, hydro, solar, wind, landfill gas, diesel and wholesale market purchases. AMP's renewable resources made up approximately 18 percent of its members' energy needs in 2018. In Ohio, AMP owns or operates on behalf of members, the 707 MW (fired) natural gas combined cycle AMP Fremont Energy Center in Fremont, along with 51 diesel-fired generators and 9 single cycle natural gas-fired turbines used for peak shaving at multiple sites. This rule has a direct impact on AMP and AMP member generating assets and we appreciate the opportunity to provide comments on this proposed action.

The OMEA represents the Ohio and federal legislative interests of AMP and member Ohio municipal electric systems. Subsequent "AMP" references herein also represent the interests and comments of OMEA.

### **Impact of the Proposed Rule on AMP and its Members**

The proposed revisions to the WOTUS rule would have a direct impact on AMP's members. Their assets include new and expanding power generating facilities and electric distribution systems, and construction of these assets can involve impacts to surface waters. Our members' economic development activities are affected, in part, by their ability to provide electrical services to new or expanding businesses and residential areas. Understanding whether, and how, the construction of new generation and distribution facilities are regulated under the Clean Water Act (CWA) is critical to the planning, timing, and cost of these important economic development activities.

### **AMP/OMEA Comments**

AMP appreciates the effort required by EPA and the Army Corps in developing a proposed a definition for "waters of the United States" that incorporates the guiding principles behind the CWA's Section 404 permitting program, as well as holdings from previous Supreme Court decisions, yet remains clear enough to be applied consistently by regulatory personnel.

AMP supports EPA and the Army Corps efforts to strike a reasonable balance in this new rule by remaining cognizant of the important role Congress reserved to the States under the CWA. AMP also supports the determination that the States are primarily responsible for implementation of many aspects of the CWA, including the regulation of ephemeral streams and other waters excluded from the revised WOTUS definition.

EPA and the Army Corps have proposed that their jurisdiction will attach only when a wetland abuts a traditional jurisdictional water or has a direct, hydrologic surface connection with such water. This position clearly follows from Justice Scalia's opinion in *Rapanos* (see *Rapanos v. United States*, 391 F. 3d 704). *Rapanos* in turn bears the imprimatur of earlier cases exploring the contours of agency authority when discerning the reach of the Clean Water Act and extent of "waters of the United States" (see generally *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159 and *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121). AMP is hopeful this adherence to established precedent will result in a rule that is legally defensible and easier to understand and apply in practice.

AMP and OMEA thank EPA and the Army Corps for the opportunity to provide input on this important proposed rulemaking. Please let us know if the Agencies have any questions or need any additional information.

Respectfully submitted,

A handwritten signature in black ink that reads "Jolene M. Thompson". The signature is written in a cursive, flowing style.

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& OMEA Executive Director  
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