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IMPACTS OF THE PROPOSED WATERS OF THE UNITED STATES RULE ON STATE AND LOCAL GOVERNMENTS AND STAKEHOLDERS

FIELD HEARING

BEFORE THE

SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

APRIL 8, 2015—FAIRBANKS, AK

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C O N T E N T S

IMPACTS OF THE PROPOSED WATERS OF THE UNITED STATES RULE ON STATE AND LOCAL GOVERNMENTS AND STAKEHOLDERS

WEDNESDAY, APRIL 8, 2015

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE
Fairbanks, AK.

OPENING STATEMENT OF HON. DAN SULLIVAN, U.S. SENATOR FROM THE STATE OF ALASKA

Senator SULLIVAN. The Subcommittee on Fisheries, Water, and Wildlife will now come to order, and I would please ask all the witnesses to take their seats up front at the witness stand, please. And we have two witnesses on the line from Barrow and Juneau.

I want to thank everybody for being here. I'm Senator Dan Sullivan, Senator from Alaska. We are here to discuss the proposed Waters of the United States rule by the Environmental Protection Agency. I know that some of you have had to travel to be here. Most of you had to shuffle competing schedules, so I want to thank everybody. I appreciate all of you for participating today.

This is an official hearing of the U.S. Senate Environment and Public Works Committee. I serve as the chair of the Subcommittee on Waters, Wildlife, and Fisheries. In Washington, DC, we have held numerous hearings with the EPA Administrator, Assistant Secretary of the Army, State government representatives, and stakeholders about this issue. This hearing is a continuation of these efforts, and it will also give voice to a cross-section of Alaskans on this proposed rule and its possible impacts.

Beyond those testifying today, the subcommittee heard testimony from many Alaskans in Anchorage 2 days ago, including the Resource Development Council, Alaska Municipal League, Arctic Slope Regional Corporation, Alyeska Pipeline. They joined three-fifths of States in the United States that oppose the rule and more than 300 trade groups and associations from across the Country that oppose the rule.

I want to state at the outset, certainly, as Alaska's Senator, the obvious, but sometimes I think it needs to be stated: We clearly, as Alaskans, believe in the importance of clean water. We've seen the Clean Water Act over the years do many important positive things. I think we certainly have some of the cleanest water, the most pristine environment of any place in the world, and Alaskans

cherish that. I've also told the EPA administrator we probably care about that living here more than any EPA official in Washington, DC, does. So I think that's important.

I also think that it's important today to emphasize that this hearing is also about respecting our citizens, as I think almost every witness will testify. Certainly, they all did in Anchorage. This is a unique rule that will impact Alaska more than any other State by far. And we have certainly unique aspects of our State that have not been taken into consideration with regard to this rule, and it's important for us in Washington, the Senators in Washington, to bring Washington, DC, to Alaska, to the State, so we can hear directly from you as opposed to having everybody have to fly thousands of miles to Washington to testify on this rule.

Alaska is no stranger to overreaching Federal agencies; however, it should be stressed that the proposed Waters of the U.S. rule may be one of the most massive expansions of Federal jurisdiction we have seen to date. Unlike much of the Federal overreach that has impacted Alaska, the tentacles of the Clean Water Act extend far beyond Federal lands and this rule would impact the ability for State and private landowners to use their land.

Already a huge percentage of Alaska falls under the Clean Water Act jurisdiction. Alaska has 43,000 miles of coastline, millions of lakes, more than 43 percent of our State's surface area is composed of wetlands, which accounts for 65 percent of all the wetlands in the United States. A whopping 63 percent of the Nation's jurisdictional waters under the Clean Water Act are in Alaska, meaning those who are building or doing business on or near those waters have to wrangle with the Federal Government to get permits or approval.

Let me be clear, there is no doubt that many of our wonderful lakes and rivers, such as the Yukon and Chena and their tributaries are jurisdictional under the Clean Water Act. No one is suggesting otherwise. Instead, we are here to talk about the proposed rule and regulations of waters that I believe Congress never intended to be jurisdictional under the act. As I mentioned earlier, Alaska has some of the cleanest waterways in the world, leading to our vibrant world-class fisheries and award-winning drinking water. Concerns over this rulemaking are not at all aimed at jeopardizing those characteristics which we all hold dear and that are fundamental to the identity of Alaska.

Instead, our efforts are about clarifying jurisdiction and, if it's a major expansion of Federal jurisdiction, pushing back on Federal agencies that are asserting such authority, such authority over even the possibility of roadside ditches, culverts, stormwater systems, isolated ponds, and activities on adjacent lands, bypassing Congress and ducking Supreme Court rulings. Regardless of this rule, discharge of pollutants into these features would remain subject to Clean Water Act regulations.

If the rule is finalized in its current form, it would mean that many Alaskans could be subject to having to get a permit from the EPA in order to do things such as dig ditches in their backyards; it would mean that a farmer might have to get a permit to plow new land. It would be a huge burden possibly on our placer miners in the Interior. It would mean that harbors, roads, pesticide con-

trol, and certainly natural resource development could fall under a more rigorous Federal permitting process, effectively granting the EPA the power to dictate energy and infrastructure policy in most of Alaska. This is not hyperbole. Just ask the Idaho couple who wanted to build a house on just over a half-acre of their own private land that happened to be near a lake. The EPA determined that their property was a wetland and forced them to stop development, rehabilitate the property to its natural state, or face tens of thousands of dollars in fines a day. With this rulemaking, more landowners across the U.S. would be subject to the same treatment.

Just a couple of weeks ago, the Senate passed by a strong bipartisan vote an amendment that I co-sponsored with Senator John Barrasso of Wyoming that would rein in the scope of this rulemaking. This amendment was an important bipartisan first step as we craft legislation to ensure that the Clean Water Act is focused on maintaining pristine water quality. We sent a strong bipartisan message that the Clean Water Act should not be transformed into a tool to expand the authority of the EPA without congressional authority and control entirely unrelated activities.

So, again, I want to thank everybody for being here. We have a very distinguished panel of witnesses. As the chair, I want to emphasize that we have selected witnesses, both here and in Anchorage, who are opposed to this rule and who are in favor of this rule, and we want to be respectful of all viewpoints. We will have two panels today to discuss this, and we will begin here in a minute. I just want to mention one final thing. Yesterday, in a presentation that I gave, there were questions on whether other Alaskans, other Fairbanksans could weigh in on this proposed rule in addition to the invited witnesses that we have here today. And, as chair of the subcommittee, I am requesting to keep the record of this hearing open for the next 10 days for all additional written testimony from any Alaskan, whether they support or oppose this rule, so all of your voices can be heard.

I'm going to provide for the record an address to send any additional written testimony from anybody here or other Alaskans who want to participate. The address would be to my office: Senator Dan Sullivan, Chair of the Subcommittee on Fisheries, Wildlife, and Waters of the Environment and Public Works Committee, and that is in the Dirksen Senate Building, room number SDB–40A, Washington, DC, 20515. And, again, we want to encourage all Alaskans to participate with regard to the importance of their voices being heard with regard to this rule.

So we will begin with our first panel and that—again, we're very, very pleased with the distinguished witnesses that we have. The first panel is going to be remotely testifying, first, from Senator Click Bishop who is obviously the State senator from the Interior; and, Charlotte Brower, the mayor of the North Slope Borough. I believe that both Senator Bishop and Mayor Brower are on the line. We will begin with the testimony of Senator Bishop and we'll move to the testimony of Mayor Brower, and then I'm going to ask them a few questions, and then we will turn to our second panel of distinguished witnesses.

Senator Bishop, if you're on the line, the floor is yours.

STATEMENT OF HON. CLICK BISHOP, ALASKA STATE SENATOR FROM SENATE DISTRICT C

Senator BISHOP. Thank you, Chairman Sullivan, and welcome home.

Senator SULLIVAN. Thank you.

Senator BISHOP. As previously stated, my name is Click Bishop, currently serving as Alaska State senator representing west Fairbanks and a broad sweep of rural Alaska, including 63 small villages situated in the Yukon-Koyukuk, Tanana, and Copper River Valleys. As former labor commissioner, I am intimately familiar with the impacts of Government decisions on our economy and on our working families through delay or outright denial of resource development projects.

My previous career was a heavy equipment operator working on the TransAlaska Pipeline and many other associated construction projects throughout Alaska. In my younger life, I spent over 18 years racing Yukon 800 style outboard riverboats on Alaska's Interior rivers, the Tanana and the Yukon. So it's safe to say that everything I've been involved in was, since I got out of high school and quite a bit of what I did before, has taken place on or near waters of the United States, especially under these new definitions.

In speaking with you today, it's not my intention to regurgitate a long list of facts and counter-arguments showing how and where Federal agencies have overstepped their boundaries in this action. Those have been entered into the record hundreds of times after the proposed rule was published in the Federal Record over a year ago. Instead, I want to sound a warning that there will be a huge negative impact on the Nation and Alaska's economy if the EPA and the Corps adopt these definitional changes, which it appears they are proceeding to do. I fear the impacts of the EPA's new enhanced and onerous powers generated by these proposed changes, impacts on small family owned and operated businesses as well as large projects proposed in Alaska.

It's interesting to note that whenever a Government agency like the EPA or the Corps of Engineers seeks to clarify the meaning or a definition of a term or a phrase, it very seldom narrows its definition, but rather broadens it to areas never envisioned by those who passed the Clean Water Act in 1972. Wouldn't it be more honest to look at the programs enabling legislation and keep any clarifications as true to the original intent of what Congress passed? As so often happens, we also see that the words agencies are proposing to use to clarify and better define their regulations only further muddy the waters. How will they determine what is a significant connection to downstream water quality? What is a significant nexus?

I note, also, that agencies are headlong rushed to impose this rule, ignoring the public process, in the case of their Connectivity Report, getting the decision done before the so-called science upon which this decision is supposed to be made, is available. While stakeholders from State agencies to local governments express their concerns about this cart-before-the-horse process, the EPA and the Corps move forward regardless. The agencies have moved forward their proposed changes without consultation with State and local agencies that will be required to implement and enforce

the changes. In addition, they have moved forward with no regard or meaningful analysis of the fiscal impact to State and local agencies.

It's clear to me the EPA in lockstep with the Corps view it as their mission to control every human activity within the water column, from the moment the raindrop hits the earth until it diffuses into the ocean. We, in Alaska, we take great pride in our State's superlatives, which set us apart from our sister States. Little things like our millions of acres of wetlands, millions of lakes, 30,000 miles of shoreline. We know it's cold and dark here and there's midnight sun in the summer. I see no evidence that the agencies will accommodate our unique features such as permafrost, a pervasive feature found in 63 percent of the State, yet unacknowledged in the new proposed regulatory scheme. Permafrost is an inhibitor of water flow; it's a sink for the storage of water. It should be specifically excluded from these regulations.

Again, we are not sure how the agencies will determine what is a significant nexus, but there is simply no nexus between cryogenically isolated permafrost and waters of the United States. Unique as we may be in Alaska in regard to this new definition of waters of the United States, we are truly in the same boat as all our sister States and territories. With this definition change, we will see projects shut down in Anchorage, Sheridan, Wyoming, Seattle, Washington, and Topeka, Kansas.

With that being said, I'd just like to wrap up in summary. This whole wetlands adjacent regulation is the EPA's attempt to circumvent the Supreme Court. I don't know if the EPA knows this or not, but the Supreme Court is the highest law in the land. They get the last word and they have spoken. Implementing this adjacent regulation would overturn the Great Northwest decision and that has terrible implications for Alaskans all over the State.

Thank you, Mr. Chairman.

[The prepared statement of Senator Bishop follows:]

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Senator Click Bishop

Comments on EPA/Corps of Engineers

Proposed Rule Defining "Waters of the United States"

April 8, 2015

Thank you, Mr. Chairman – and Welcome Home!

I am Click Bishop, currently an Alaska State Senator, representing West Fairbanks and a broad sweep of rural Alaska, including 63 small villages situated in the Yukon, Tanana and Copper River valleys.

As a former commissioner of labor and workforce development, I am intimately familiar with the impacts of government decisions on our economy – and on working families – through delay or outright denial of resource development projects.

My previous career was as a heavy equipment operator, working on the Trans Alaska Pipeline construction, and other heavy construction projects throughout Alaska. I currently operate a placer mine in the vicinity of Manley Hot Springs.

In my younger adult life, I spent quite a few enjoyable hours racing high speed outboard-powered boats on Interior rivers.

So, it is safe to say that everything I have been involved with since I got out of high school, and quite a bit of what I did before, has taken place on or near "waters of the United States," especially under these new definitions.

In speaking to you today, it is not my intention to regurgitate a long list of facts and counterarguments showing how and where the federal agencies have overstepped their boundaries in this action. Those have been entered into the record hundreds of times after the proposed rule was published in the Federal Record a year ago.

Instead, I want to sound a warning that there will be huge negative impacts on the nation's and Alaska's economy if the EPA and the Corps adopt these definitional changes, which it appears they are proceeding to do.

E-Mail: Sen.Click.Bishop@akleg.org
Website: www.alaskasenate.org/bishop/

I fear the impacts of the EPA's new, enhanced and onerous powers generated by these proposed changes – impacts on small, family-owned and operated businesses, as well as large projects proposed in Alaska.

It's interesting to note that whenever a government agency like the EPA or the Corps of Engineers seeks to "clarify" the meaning or definition of a term or phrase, it very seldom narrows its definition, but rather broadens it to areas never envisioned by those who passed the Clean Water Act in 1972. Wouldn't it be more honest to look at a program's enabling legislation and keep any "clarifications" as true to the original intent of Congress as possible?

As so often happens, we also see that words the Agencies are proposing to use to clarify and better define their regulations only further muddy the water, so to speak. How will they determine what is a "significant" connection to downstream water quality? What is a "significant nexus?"

I note, also, that the Agencies are in a headlong rush to impose this rule, ignoring the public process and, in the case of their Connectivity Report, getting the decision done before the so-called science, upon which the decision is supposed to be made, is available. While stakeholders - from state agencies to local governments - expressed their concern about this "cart-before-the-horse" process, the EPA and Corps moved forward regardless.

The Agencies have moved forward their proposed changes without consultation with state and local agencies that will be required to implement and enforce the changes. In addition, they have moved forward with no regard or meaningful analysis of the fiscal impact to state and local agencies.

It is clear to me that the EPA, in lock-step with the Corps of Engineers, view it as their mission to control every human activity within the water column, from the moment the raindrop hits the earth until it diffuses into the ocean.

We in Alaska take great pride in our state's superlatives, which set us apart from our sister states. Little things like our millions of acres of wetlands… millions of lakes… 30,000 miles of shoreline… it's cold and dark here in the winter… there's midnight sun in the summer…

I see no evidence that the Agencies will accommodate our unique features, such as permafrost, a pervasive feature found in 63 percent of the state, yet unacknowledged in the proposed new regulatory scheme. Permafrost is an inhibitor of water flow – it is a "sink" for the storage of water. It should be specifically excluded from these regulations. Again, we are not sure how the Agencies will determine what is a "significant nexus," but there is simply no nexus between cryogenically isolated permafrost and "waters of the United States."

Unique as we may be in Alaska, in regard to this new definition of "waters of the United States," we are truly in the same boat as all our sister states and territories. With this

definition change, we will see projects shut down in Anchorage, Alaska, as well as Sheridan, Wyoming… Seattle, Washington… Topeka, Kansas… etc.

It is my understanding that the EPA and the Corps will adopt these changes by the end of this month, and in substantially the same form as they have been presented to the public. In other words, the thousands of comments and reams of paper submit submitted to the federal agencies by concerned citizens who will be negatively impacted have been, apparently, window dressing.

This attempted rule-making by the EPA and Corps of Engineers is beyond "clarification;" it is, rather, a flagrant assault on the intent and plain language of the Clean Water Act, a law that was passed by your predecessors in Congress. It represents a power grab by those two Agencies, at a high cost to the freedoms of the people of the U.S.

The US Senate has the power to stop implementation of these onerous definition changes. I strongly encourage you and your colleagues to do so.

Sincerely,

Senator Click Bishop

E-Mail: Sen.Click.Bishop@akleg.org
Website: www.alaskasenate.org/bishop/

Senator SULLIVAN. Thank you, Senator Bishop, for that very powerful testimony. I look forward to digging a little deeper with some of the questions.

Mayor Brower, if you're still on the line, the floor is yours.

STATEMENT OF CHARLOTTE E. BROWER, MAYOR, NORTH SLOPE BOROUGH

Mayor BROWER. Chairman Sullivan, good morning [speaks in Inupiat language].

Senator SULLIVAN. Good morning.

Mayor BROWER. My name is Charlotte Brower. I am mayor of the North Slope Borough. I am also an Inupiat, the wife of a whaling captain, and mother to 6 children and 26 grandchildren ranging from 21 years old to 2 weeks old.

Thank you for the invitation to address the subcommittee today regarding the proposed rule put forward by the EPA and the Corps of Engineers, which they define the jurisdiction of those two agencies to regulate waters of the United States under the Clean Water Act.

I understand the proposed rule was submitted yesterday to the White House Office of Information and Regulatory Affairs, which is typically one of the last steps taken before a proposed rule is finalized. It is our sincere hope that the agencies have taken into consideration the comments we submitted jointly with the Inupiat Community of the Arctic Slope and the Arctic Slope Regional Corporation to the agencies in the record, which expressed our serious concerns with the proposed rule and the disproportionate impacts that the proposed rule would have on our community.

As you know, the North Slope Borough is the largest municipality in the United States in terms of land mass and serves as the regional government for eight villages within 89,000 square miles of the Alaska Arctic. Over 70 percent of our nearly 8,000 full residents are Inupiat Eskimo who continue to rely heavily on the natural environment for subsistence and for food security. While the borough believes it is very important to protect our waters and wetlands, we also believe that the proposed rule will cause much more harm to the borough and its residents than the EPA and the Corps of Engineers understand.

The scope of the proposed rule's impact on Alaska is immense and its impact on Alaskans, Alaska Natives, and the North Slope is disproportionate to the rest of the country. 43.3 percent of Alaska's surface area is wetlands. In the Lower 48, wetlands only occupy 5.2 percent of the surface area. The U.S. Fish and Wildlife Service calculates that 47 million acres in the Arctic foothills and the coastal plains are wetlands. Together, these areas correspond roughly with the borders of the North Slope Borough.

It appears that all 47 million acres, more than 80 percent of the entire North Slope region, could be considered jurisdictional waters of the United States under the proposed rule. I am a mayor of a borough that is larger than the State of Utah. Most of the North Slope region is characterized by tundra and permafrost, yet the proposed rule has left no consideration for any of the unique aspects of Alaska's wetlands. Neither the word "tundra" nor the word "permafrost" appears anywhere in the proposed rule. Unlike the

many exceptions in the proposed rule that are created for farming and other preferences, the proposed rule creates no exception for any material portions of the wetlands in Alaska, yet Alaska's waters and wetlands are unusual in many ways that may make them unsuitable for this broad view assertion of jurisdiction by the agencies. For one thing, many of Alaska's wetlands are frozen for 9 months out of the year and lie on top of permafrost. Also, unlike wetlands in temperate zones, Arctic wetlands which lie above thousands of feet of frozen permafrost are not connected to apply for—subject to water flow.

As one more example, because water on top of permafrost travels across frozen tundra surface in sheet flows, these wetlands provide little function in controlling the runoff.

To conclude, we believe that the proposed rule in its truest form will impose enormous burdens on the North Slope with very little benefit to the environment. For thousands of years our people have relied on the natural environment for subsistence purposes and the social fabric of our community revolves around subsistence traditions. But the ability of the Inupiat to maintain our traditions, our communities, and the rudimentary services that make it possible for us to survive and thrive on the North Slope all depends upon our access to and our ability to use natural resources.

The borough is the sole provider for nearly every essential service available to Alaska Natives and other residents on Alaska's North Slope such as housing, utilities, first responders, health care, and education. Over 97 percent of the municipal budget used to provide these services is derived from property taxes collected on oil and gas infrastructure. Consequently, any [inaudible] defining natural resource development attributable to [inaudible] permitting or mitigation requirements will have a direct and immediate impact on the borough's ability to pay for the services on which the health and welfare of residents depends. And because most of the land around the communities we serve would be classified as wetlands under the new regulation, the borough will face steep costs any time it attempts to provide new services or infrastructure that impacts wetlands.

Under the proposed rule, 80 percent of the North Slope could be considered waters of the United States as compared to 5 percent in the rest of the Country. Imagine how the Governor of New York State would react if 80 percent of the State of New York was suddenly considered waters of the United States [inaudible] regulation under the Clean Water Act. We're almost twice the size of New York and yet the EPA and Corps of Engineers did not bother to tailor their rule in a way that would make sense for our State and our region. At the very least, the proposed rule needs to be rewritten to clearly and unambiguously address the unique nature of wetlands that lies on top of permafrost.

Bottom line, the proposed rule would have a disproportionate and entirely negative impact on the North Slope Borough and the Inupiat people. This is why we stand unified with all of our sister regional organizations in opposition to this proposed rulemaking and [inaudible] constituents. We thank you for the opportunity to testify this morning.

[The prepared statement of Mayor Brower follows:]

Testimony of

Charlotte E. Brower, Mayor of the North Slope Borough

***before the* Senate Committee on Environment and Public Works**
Subcommittee on Fisheries, Water, and Wildlife

***on the* U.S. Environmental Protection Agency and U.S. Army Corps of Engineers Proposed Rule Defining the Scope of Waters Protected under the Clean Water Act**

April 8, 2015

Chairman Sullivan, on behalf of the North Slope Borough ("Borough"), I am pleased to submit the following comments on the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers' ("Army Corps"), (the "Agencies") proposed rule (the "Proposed Rule")[1] redefining jurisdictional "waters of the United States" under the Clean Water Act ("CWA").

Overview of the Borough

The Borough is the largest municipality in the United States in terms of landmass. It is the regional government for eight villages within the 89,009 square miles of the Alaskan Arctic, north of the Brooks Mountain Range to the Arctic Ocean. The 2011 populations of the North Slope villages ranged from under 300 in Point Lay to just over 4,800 in Barrow. Barrow is the seat of the Borough government and is the northernmost community in the country. In total, the Borough has a population of approximately 7,840 residents, of whom nearly 70 percent are Iñupiat Eskimo. The Borough provides essential services to Alaska Natives and other residents, including: housing, utilities, health care, and education. Additionally, many North Slope residents rely on the natural environment for subsistence and food security. While the Borough believes it is very important to protect our waters and wetlands, we believe that the Proposed Rule will cause much more harm to the Borough and its residents than the Agencies understand.

For thousands of years, our people have relied on the natural environment for subsistence purposes, and the social fabric of our communities revolves around subsistence traditions. Our

[1] Definition of "Waters of the United States" under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014). The Borough understands that the Proposed Rule was submitted to White House's Office of Information and Regulatory Affairs on April 7, 2015, which is typically one of the last steps prior to a proposed rule being finalized.

residents depend on subsistence resources for their physical and cultural health. Yet in the 21st century and into the future, the ability of the Iñupiat to maintain our traditions, our communities, and the rudimentary services and amenities that make it possible for us to survive and thrive on the North Slope all depend upon our access to and ability to use our natural resources.

Taxes derived from resource development activities are the primary source of municipal revenues that provide jobs and essential services for our residents. Nearly all of the water, sewer, solid waste, and electrical utility services across the North Slope are provided by the Borough. The Borough is also responsible for all road maintenance and construction across the region with the exception of private roads used for oil and gas development and state-maintained roads such as the Dalton Highway. Taxes derived from oil and gas infrastructure are the primary source of municipal revenues that provide jobs and essential services for North Slope residents.

The Borough believes that if the Proposed Rule is adopted in its current form, it will hamper the Borough's ability to provide essential services to Alaska Natives and other residents of the region, putting the recipients of those services at risk because the Proposed Rule will deleteriously impact the development of resources on Alaska's North Slope.

The Borough, the Arctic Slope Regional Corporation, and the Iñupiat Community of the Arctic Slope—the three organizations representing the entire North Slope region—have submitted a joint letter to the Agencies expressing our concerns regarding the Propose Rule. Many of the concerns highlighted in this testimony are shared by all three organizations.

Summary of the Proposed Rule's Potential Impacts on Alaska

According to the U.S. Fish and Wildlife Service ("USFWS"), "Alaska encompasses an area of 403,247,700 acres, including offshore areas involved in this study. Total acreage of wetlands is 174,683,900 acres. This is 43.3 percent of Alaska's surface area. In the lower 48 states, wetlands only occupy 5.2 percent of the surface area."[2] Put differently, nearly half of Alaska—the largest state in the United States, by a wide margin—stands to be affected by this Proposed Rule. Alaska has more wetlands than all of the other states combined.[3]

While USFWS uses an expansive definition of "wetlands" in its study, it may be no more expansive than the jurisdictional waters categories created by the Proposed Rule. Compare, for example, the USFWS's definition of "wetlands" with the Agencies' definition of "riparian area":

Definition of wetlands used by USFWS in *Status of Alaska Wetlands*[4]	**Definition of "riparian area" proposed by the Agencies[5]**

[2] Jonathan V. Hall, W.E. Frayer and Bill O. Willen, *Status of Alaska Wetlands* at 3 (U.S. Fish and Wildlife Service 1994).
[3] *Id.*
[4] *Status of Alaska Wetlands* at 11 (emphasis added).
[5] 79 Fed. Reg. at 22,271 (emphasis added).

"Technically, wetlands are *lands transitional between terrestrial and aquatic systems* where the water table is usually at or near the surface or the land is covered by shallow water. Wetlands must also have one or more of the following three attributes: 1) at least periodically, the land supports predominantly hydrophytes; 2) the substrate is predominantly undrained hydric soil; and 3) the substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season of each year."	"The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are *transitional areas between aquatic and terrestrial ecosystems* that influence the exchange of energy and materials between those ecosystems."

If anything, the USFWS definition of wetlands is narrower than the Agencies' definition of "riparian area," because the former does not include the Agencies' additional jurisdictional water categories of "tributaries" and bordering, contiguous and "floodplain" areas. So the size of Alaska's wetlands is roughly equivalent to, or perhaps slightly *smaller* than, the area the Proposed Rule would regulate as "riparian areas."

Under the Proposed Rule, "riparian areas" adjacent to traditionally navigable waterways would be by-rule jurisdictional waters.[6] As the Agencies make clear, once waters are jurisdictional "waters of the United States," no further analysis would be required:

> The agencies propose to define "waters of the United States" in section (a) of the Proposed Rule for all sections of the CWA to mean: Traditional navigable waters; interstate waters, including interstate wetlands; the territorial seas; impoundments of traditional navigable waters, interstate waters, including interstate wetlands, the territorial seas, and tributaries, as defined, of such waters; tributaries, as defined, of traditional navigable waters, interstate waters, or the territorial seas; and adjacent waters, including adjacent wetlands. Waters in these categories would be jurisdictional 'waters of the United States' by rule—no additional analysis would be required.[7]

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[6] In the Proposed Rule, the Agencies propose to create a "by rule" jurisdictional determination—a category for which "no additional analysis would be required" —for all "tributaries" to traditionally navigable waters as well as adjacent waters to traditionally navigable waters (i.e., bordering, contiguous, "riparian" and "floodplain" areas). The Agencies also propose a significant expansion of "other waters"—which may be determined to be jurisdictional waters of the United States based on a case-specific evaluation with respect to whether such water or wetland "significantly affects the chemical, physical, or biological integrity" of any of the expanded jurisdictional waters.

[7] 79 Fed. Reg. at 22,188-89.

As such, the Agencies' proposed definition of "riparian area" creates the very real risk that, through the mere issuance of a final rule that includes such a "by-rule" designation of riparian areas, any development within more than 43% of Alaska—that is, Alaska's wetlands—would immediately fall within CWA §404 jurisdiction for dredge and fill permits and CWA §402 jurisdiction for pollutant discharges.[8] Even under their most aggressive rules, interpretations, policies and practices in the past, including those struck down by the U.S. Supreme Court in *SWANCC* and *Rapanos*,[9] the Agencies have never before extended their reach to such extraordinary extent.

The risks are only somewhat reduced if the definition of "riparian area" is narrowed. That is because wetlands that might be excluded by a refinement of the "riparian area" definition would still be exposed to categorization as "other waters," which would be subject to a case-by-case determination of whether they are within the WOTUS definition. The "other waters" classification includes "waters [that] alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to [jurisdictional waters]."[10] "Significant nexus" exists, according to the Proposed Rule, if

> a water, including wetlands, either alone or in combination with other similarly situated waters in the region . . . significantly affects the chemical, physical, or biological integrity of a [jurisdictional water]. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a ''water of the United States'' so that they can be evaluated as a single landscape unit with regard to their effect on

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[8] *See, e.g.*, 79 Fed. Reg. at 22,215-16 (noting that the list of proposed ecoregions for the analysis of "other waters" "does not include regions in Alaska or Hawaii . . . .") and at 22,231 (explaining that approximately "59% of streams across the United States (excluding Alaska) flow intermittently or ephemerally" but failing to explain why statistics excluding Alaska should be used to justify regulations that *will not* exclude Alaska).

[9] In 2001, the U.S. Supreme Court, in a 5-4 decision, held that Congress did not authorize the Agencies to regulate isolated, intrastate waters—invalidating the so-called Migratory Bird Rule. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC"). Five years later, the Court held that "navigable waters" regulated under the CWA are limited to "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features,'" such as streams, oceans, rivers and lakes. The Court held that wetlands with a "continuous surface connection" to such bodies of water, so that "there is no clear demarcation between them," are also covered. Justice Kennedy concurred in the judgment of the plurality, but on different grounds, arguing that there must be a "significant nexus" with traditional navigable waters. *Rapanos v. United States*, 547 U.S. 715 (2006).

[10] 79 Fed. Reg. at 22,271.

> the chemical, physical, or biological integrity of [jurisdictional water].[11]

The vagueness in this significant nexus test is noteworthy. Waters are included if they "significantly affect" the chemical, physical, or biological "integrity" in a way that is not "speculative or insubstantial" and if they perform "similar functions" and are located "sufficiently close together" as part of a single "landscape unit." Regulators and regulated parties who would have to apply these tests will understandably have difficulty finding certainty and predictability in this definition.

Unlike the many exceptions in the Proposed Rule created for agricultural and other uses,[12] the Proposed Rule creates no exception for any material portion of the wetlands in Alaska. Yet Alaskan waters and wetlands are unusual in many respects that may, in many cases, make them unsuitable for this broad assertion of jurisdiction by the Agencies. Many of Alaska's wetlands are frozen for nine months out of the year and lie on top of a layer of permafrost. Their hydrologic functions are different from those in other parts of the country. The water table is also commonly situated on permafrost, resulting in saturated soils that support hybrid vegetation, but limiting connectivity to navigable waters. Unlike wetlands in temperate zones, Arctic wetlands, lying above of thousands of feet of frozen permafrost, are not connected to aquifers subject to water flow. Because water on top of permafrost travels across the frozen tundra surface in "sheet flow," these wetlands provide little function in controlling runoff.

The Proposed Rule reflects no consideration for *any* of these unique aspects of Alaskan wetlands. Indeed, neither the word "tundra" nor the word "permafrost" appears anywhere in the 88 pages of the Proposed Rule.

Impacts of the Proposed Rule on Alaska's North Slope

The Proposed Rule creates problems throughout the State of Alaska; however, the problems are especially harsh on Alaska's North Slope. The USFWS calculates that 46.9 million acres in the Arctic Foothills and Coastal Plain are wetlands. Together these areas correspond roughly with the borders of the Borough. This is 83.1% of the total acreage (56.4 million acres) of those two areas.[13] In other words, more than four-fifths of the entire region is potentially affected by the Proposed Rule.

While 47 million acres on the North Slope are wetlands, only a small fraction of these are "traditional navigable waters." The North Slope has 23,300 lakes, which range from a few yards

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[11] *Id.*
[12] 79 Fed. Reg. at 22,264.
[13] *Status of Alaska Wetlands*, at 20.

in width to over 20 miles in width and are seldom deeper than 10 feet.[14] There are 2,450,858.5 acres of lakes on the North Slope larger than 50 acres.[15] There are another 260,629 acres of rivers.[16] Not all of these larger lakes and rivers are "traditional navigable waters," but we think their total acreage—2.7 million acres—represents the outside limit of what conceivably could be regarded as "traditional navigable waters."

This high-end estimate of "traditional navigable waters" is less than 6% of the total acreage of wetlands identified by the USFWS. The possibility that the Proposed Rule could expand EPA's jurisdiction from an estimated 2.7 million acres of "traditional navigable waters" to an estimated *47 million acres* of jurisdictional or "other" waters is a demonstration of the massive overreach represented by the Proposed Rule. Put differently, the Proposed Rule has the potential to multiply the area of federally regulated "waters of the United States" by more than *sixteen hundred percent* (1600%)!

Land owners and communities on the North Slope are left asking many questions. For example:

- Are all of the 56.4 million acres of wetlands on the North Slope (as identified by the USFWS) jurisdictional waters under the Proposed Rule and, if so, are they jurisdictional because they are "traditional navigable waters" or are they jurisdictional because they are riparian areas that are "adjacent" to traditional navigable waters?
- If less than the 56.4 million acres of wetlands on the North Slope (as identified by the USFWS) would be jurisdictional under the Proposed Rule, what guidelines within the Proposed Rule clearly relieve specific lands of the regulatory burdens imposed by the Proposed Rule? What guidelines are in place to prevent Agency officials from misconstruing the Proposed Rule? How will landowners know which wetlands are jurisdictional waters, given the ambiguities in the Proposed Rule?
- For those wetlands that are not jurisdictional waters, will such lands be considered "other waters" because they are, under the Proposed Rule, "located sufficiently close together or sufficiently close to a 'water of the United States' so that they can be evaluated as a single landscape unit", or, because migratory birds or insects "opportunistically use both river and wetland . . . habitats?"

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[14]"Digital Data Base of Lakes on the North Slope, Alaska," U.S. Geological Survey Water-Resources Investigations Report 86-4143 (1986).
[15]Estimated by Marie Walker, a remote sensing consultant and principal author of the USGS Water Resources Division report cited above.
[16]Estimated by the Arctic Slope Consulting Group based on Landsat image maps.

The Proposed Rule is Inconsistent with the CWA's Policy to Allow States Primacy Over Development and Use of Land and Water Resources

The Proposed Rule is inconsistent with the CWA policy to preserve the primary responsibilities and rights of states over land and water resources. The rule asserts that it "does not affect" this policy because states "retain full authority to implement their own programs to more broadly or more fully protect the waters in their state."[17] This statement ignores the scope of Congress' policy statement, which applies not only to the rights of states "to prevent, reduce, and eliminate pollution," but also to state's rights "to plan the development and use . . . of land and water resources."[18] While the Proposed Rule may preserve states' rights to address pollution by adopting more stringent regulations than the Agencies, it does not preserve the primary authority of states to plan the development and use . . . of land and water resources," as Congress intended when it adopted the CWA. On the contrary, the Proposed Rule asserts authority over isolated, non-navigable water bodies and land areas that Congress never intended to be regulated under the CWA. By eliminating the discretion of states to leave such areas unregulated, the Proposed Rule would invade the primary authority of Alaska to plan for the development and use of its resources.

As such, the rule is contrary to CWA as well as the state consultation criteria set forth in Executive Order 13132. As explained by the Western States Water Council and many other parties,[19] the statement in the Proposed Rule that Executive Order 13132 "does not apply" is simply incorrect, and the Agencies' "voluntary federalism consultation" regarding the Proposed Rule was clearly inadequate, as reflected in the surprise and concern being expressed by states across the country.[20]

The Agencies Should Have Abandoned or Clarified their Proposed Watershed Approach

In the Proposed Rule, the Agencies propose to evaluate the significance of a nexus to other waters "in the region" by evaluating all other waters located in an entire watershed. The Agencies plan to use the "single point of entry watershed as the appropriate scale for the region."[21] The Proposed Rule's single-point of entry watershed approach will be used by the Agencies to determine the watershed's drainage basins, which the Agencies interpret to be

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[17] Proposed Rule, 79 Fed. Reg. at 22,194.
[18] 33 U.S.C. § 1251(b).
[19] *See, e.g.*, Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule: Testimony Before the Subcommittee on Water Resources and Environment (June 11, 2014), *available at* http://transportation.house.gov/uploadedfiles/2014-06-11-strong.pdf (statement of J.D. Strong, Western Governors' Association, Western States Water Council).
[20] Proposed Rule, 79 Fed. Reg. at 22,220-21.
[21] Proposed Rule, 79 Fed. Reg. at 22,212.

equivalent to "in the region" of the first three categories of jurisdictional waters under the proposed definition of "waters of the United States."[22]

If the Agencies insist on pursuing this watershed approach, at a minimum, they should clarify how they will use this approach to determine that "other waters" located in a particular watershed are jurisdictional. The Proposed Rule leaves un-answered a number of questions about how this "regional" approach would work in practice. For example, will the Agencies' approach require site-specific data regarding the specific waterbody in question, or can the agencies rely on data from other "similarly situated" waters? Will the Agencies apply any presumption to a particular water body if they have previously studied "similarly situated" waters? How will the Agencies provide meaningful opportunities for the public to comment before a jurisdictional determination is made in a particular watershed? The proposal to regulate areas on the basis of "regional," "similarly situated" waters rule raises significant questions about due process.

The Proposed Rule uses the terms "in the region" and "watershed" interchangeably and does not indicate how the specific geographic boundaries of a watershed will be determined. In particular, the Borough is concerned about the Agencies' proposal to determine watersheds in Alaska by using National Hydrography Dataset.[23] The Borough believes that any determination of this type should have been subject to separate public notice and comment so that interested stakeholders could have provided the Agencies with valuable information to make these assessments.

Conclusion

We appreciate and value our working relationship with the federal government and agencies like the EPA. However, in many cases, when folks in Washington, DC propose changes to established rules and regulations that *they* believe will help protect and conserve natural elements for the future enjoyment of *all* Americans, they in fact adversely affect the lives of the people who actually live in remote areas and depend on the ability to develop natural resources. The Borough is committed to continuing to support the economic well-being of our residents by pursuing responsible development of our resources. The Borough believes that the Agencies need to consider, and acquire a better understanding of, the impacts the Proposed Rule will have on Alaska, and specifically the North Slope region of Alaska.

We believe that the Proposed Rule, in its current form, will impose enormous burdens on the North Slope—with very little correlative benefit to the environment. At the very least, the Proposed Rule needs to be revised to clearly and unambiguously define how it will affect wetlands, particularly wetlands that lie atop permafrost. Further research and consideration may

[22] Proposed Rule, 79 Fed. Reg. at 22,212.
[23] Proposed Rule, 79 Fed. Reg. at 22,212.

well show that an exemption for permafrost areas is warranted. Regardless, because so many millions of acres of our lands are potentially affected, the Agencies should specify in greater detail how much of these lands they intend to regulate under the Proposed Rule.

I appreciate this opportunity to express the Borough's views on this topic of significant importance.

Senator SULLIVAN. Thank you, Madam Mayor, and thank you for that very powerful testimony. Congrats on the new grandchild. I hope the child and mother are doing well. I do want to just make a quick comment on your very insightful point about the State of New York and the Governor of New York and how they would feel if it wasn't 5 percent, but close to 85 percent of their territory being impacted. I think that it would be very different. And you're right, there's no element of addressing any aspect of the uniqueness of Alaska in this proposed rule. But you mentioned Governors. It should be noted that 35 States, including Alaska, a State official from DEC testified 2 days ago in Anchorage, 35 States oppose this rule and want it changed or either completely done away with, which I think speaks to your broader point about how Governors and States view this current proposed rule.

Well, Senator Bishop and Mayor Brower, I was going to ask a series of questions. I'll just make it easy, so they'll be really addressed to both of you so either of you can respond or build on the other's answers. Let me first by just asking, given that you represent very large parts of the State of Alaska, as you mentioned, Mayor Brower, and I'm sure it's the same with Senator Bishop, the geographic scope of the responsibilities that you cover is larger, both of you, than many States in the Lower 48.

Can you just briefly describe to the extent your constituents are aware of this rule and one of the—you know, one of the problems with a rule like this is that oftentimes our constituents are not aware and then all of a sudden it becomes a final rule and they're surprised. But to the extent your constituents are aware, what has been their reaction?

Senator BISHOP. Chairman Sullivan.

Senator SULLIVAN. Yes.

Senator BISHOP. I'll take the first stab at that. It—I would note, you know, even as late as last night at 9:30 after I got done here in the building, I'm still fielding phone calls from concerned citizens, business owners, and as early as 6:30 this morning I'm on my phone again. I've been contacted, you know, by all forms, e-mails, phones, faxes, et cetera, et cetera, postings on Facebook. They're all united in their opposition to this rule, which, you know, if you look up the definition of "Federal overreach" in the dictionary, you'll find a picture of the EPA extra—and in the original definition of "navigable waters" to eventually include every drop of water. They are not happy.

Senator SULLIVAN. Madam Mayor, how about your constituents?

Mayor BROWER. Senator Sullivan, thank you for that question. My constituents, who are predominantly Inupiat people, everyday common people, people who are involved also in their Native village corporations, in their tribes, in their cities, who thrive every day in hopes that the North Slope Borough would help in every way. We do help, and they're not fully aware of this proposed rule and the impacts that it would have for the future of the North Slope, not because of what we're going after for the North Slope Borough, but for the people, for the existence of the people and the ruling that it would make. And I'm afraid that once this is out as the way it is, what is going to come down the road that's going to

be like a big cannonball being thrown all over the North Slope, and that's the fear that I have.

Senator SULLIVAN. Thank you, Madam Mayor, and I will note in the testimony in Anchorage 2 days ago, there was a senior executive from Arctic Slope Regional Corporation who testified and they were very opposed and had very detailed concerns about the rule.

Let me turn to the issue—Senator Bishop, I know that you've been a leader on this throughout the State, the issue of federalism. You know, there's been a lot of concerns that this rulemaking process was very rushed and, indeed, it was very rushed. And there is an executive order; it's an executive order numbered 13132. It's called the federalism Executive Order and it states, "When undertaking to formulate and implement policies that have federalism implications, agencies shall, in determining whether to establish uniform national standards, they shall consult with appropriate State and local officials as to the need for national standards and any alternatives that would limit the scope of national standards or otherwise preserve State prerogatives and authority."

Madam Mayor, that federalism Executive Order is in addition to the trust responsibilities the Federal Government has with regard to consulting with Alaska's Native people. Do you believe that the federalism Executive Order in this case was abided by?

Mayor BROWER. Senator Sullivan, no, we were never properly consulted on this nor was it consulted to—directly to the tribes as well. So there is a failure of communication.

Senator SULLIVAN. Thank you, Madam Mayor. Senator Bishop.

Senator BISHOP. Senator Sullivan, I concur with Mayor Brower. No, they obviously didn't read their own memo down at the EPA.

Senator SULLIVAN. Thank you. I want to dig into an issue that you raised, which I think is very important for Alaskans to know about. Senator Bishop, if you could talk a little bit more about the Connectivity Report. And, just for the record, the Connectivity Report was a report that the EPA was using to base—as a basis of the science to move forward with the rule; however, the rule was promulgated well before the Connectivity Report was ever made public, which, as you can see, as you mentioned, is a bit of the cart before the horse.

Can you talk a little bit more about that issue? I think most people are unaware of that and it does show the rushed process.

Senator BISHOP. Yes. Briefly, I just—you know, in reviewing the three Supreme Court decisions as it relates to your question at hand, I just find it—I'm just—I'm flabbergasted at the EPA, you know, on these three Supreme Court decisions on the connectivity piece. The Supreme Court has spoken very clearly on this, but yet the EPA just doesn't get it and they're trying to circumvent the Supreme Court. And I just find it—I'm overwhelmed. I just can't believe that they can't—you've got three Supreme Court decisions that's written in plain English, even I understand it, but yet the EPA doesn't understand it and they still want to try to connect these waters.

Senator SULLIVAN. Let me ask a related question with regard to a simple but critical issue that I'm sure I'm going to dig into with regards to the next panel as well.

Do you see this, Mayor Brower and Senator Bishop, do you see this as an expansion of the EPA's jurisdiction over waters in Alaska as the rule is currently written?

Senator BISHOP. Chairman Sullivan, this is definitely, definitely a grab to include all waters, everything they can get their hands on.

Senator SULLIVAN. So you would see this as an expansion of the EPA's jurisdiction?

Senator BISHOP. Absolutely. Absolutely. You know, and furthermore I just—you know, what really floors me about this whole process is they have not done a cost-benefit analysis on what the impact is to the United States economy or the Alaskan economy.

Senator SULLIVAN. Madam Mayor, do you see this as an expansion of the EPA's jurisdiction over waters in Alaska?

Mayor BROWER. Yes. Senator Sullivan, this would have a tremendous impact on the lives of the whole North Slope, not only the North Slope, but the whole State of Alaska. Their continuous presence that they want to do, they're doing it in the wrong way. We hardly ever see EPA up in our area. The only time that EPA comes out is when they're having the Alaska Eskimo Whaling Commission meetings and they're there talking about rules that concerns [inaudible] or rules that they have to do. And they're not—they're just doing a textbook theory; it's not going to work. They need to come to us and face us and then turn every waters, every—all our land has been submerged in water, but yet they're not coming to us. They're not seeing the fact that we can live on top of snow, we can travel on top of snow, we can travel on frozen oceans and go out whaling, everything.

But, you know what, it does become spring and it does become water and it always appears like it's wetlands, but we've lived with it for ten thousands of years. They are not here; they're living in DC.

Senator SULLIVAN. Thank you for that very powerful testimony. Let me go on to another issue that, Senator Bishop, you raised and I would like again both of our distinguished witnesses to address this.

The EPA has stated in their cost-benefit that there would not be—there would not be—significant costs with regard to implementing this rule. Do you—Senator Bishop, do you agree with that? Do you agree that there would be no significant costs? And in particular with regard to the Interior, what do you think the impact would be on the small placer miners that are still trying to eke out a living in this part of the State?

Senator BISHOP. Oh, you know, and that's a good question, you know, because they haven't done a cost-benefit analysis. It would—I would say it would be in the millions of dollars and put—you know, it has the potential to put 360 to 460 small placer miners out of business, but bigger than that, we're trying to monetize Alaska's North Slope gas with the AK-Language project and to date just the impacts of the wetlands mitigation disturbance just on the route that's been identified to date has already added a quarter of a billion dollars to the project that's already—you know, it needs to be looking at every nook, cranny, and corner to save a nickel. And proposing this rule, who knows what it will add to the cost of

that pipeline, and that's Alaska's economic future for the next hundred years.

Senator SULLIVAN. Madam Mayor, do you agree with the EPA, there's no significant cost to this rule?

Mayor Brower, are you still with us?

Mayor BROWER. Yes. There will be a future where we'll struggle to provide basic services because of the increased cost of wetlands mitigation. We have already captured a glimpse of this future with our recent efforts to permit an expansion of a local landfill. The cost assessed on the borough for wetland mitigation exceeded $1 million, not including what we have to spend throughout the permitting process. That's 1 million less dollars to pay for teachers, health aides, for police officers, or to provide any number of other services.

Even worse, we know that much of this money won't be used to benefit the North Slope. Part of the reason is that we have been such good environmental stewards. We don't have toxic land to clean up like they do in the Lower 48. It seems like in some ways we're being penalized for being responsible. In addition, the borough's rural villages are mostly populated by the Inupiat Eskimos and they all lie in the areas that would be classified as wetlands. Nearly every kind of construction activity would be required from impact to wetlands. So our villages would be constrained by additional permitting requirements and mitigation if they required any additional infrastructure in their communities. There is no other place in America where the impacts of the proposed rule would fall so heavily on one minority.

Senator SULLIVAN. Thank you, again. That was very powerful testimony. And your point about wetlands mitigation came up in the Anchorage hearing and perhaps in the next panel we can discuss that because that is another area where Alaska is clearly, uniquely impacted.

I also want to just mention for the record with regard to the issue of cost, the Regulatory Flexibility Act, which is a Federal law, requires agencies to examine the impacts of a proposed regulation on small government entities, like we have in Alaska, and small businesses. The EPA and the Corps, under this rulemaking, instead certified that this proposed rule will not have significant impacts on small entities, businesses, or small communities. They certified that.

Kathie Wasserman, the executive director of the Alaska Municipal League, which represents over 130 small communities in Alaska, testified that that was completely incorrect. More importantly, in some ways, the Obama administration's own Small Business Association, the SBA, the chief counsel for the SBA Office of Advocacy, determined that this certification by the EPA and the Corps was in error and improper. Under the regulatory act, the Corps and the EPA are required to conduct small business advocacy review panels to determine costs, as Senator Bishop mentioned. They failed to do that on this rule, which led to the comments filed by the SBA of the Obama administration's Office of Advocacy, and they stated, "Advocacy, the SBA, and small businesses are extremely concerned about the rule as proposed. The rule will have a direct and potentially costly impact on small businesses. The lim-

ited economic analysis," which is what Senator Bishop mentioned, "which the agency submitted with the rule provides ample evidence of a potentially significant economic impact. The SBA Advocacy Office advises the agencies to withdraw the rule and conduct an SBAR panel prior to promulgating any further rule on this issue." This is the Obama administration's own Small Business Administration saying the rule needs to be withdrawn because of its negative impacts on small businesses.

So, Senator Bishop, Madam Mayor, I think that you even have elements of the Obama administration that are in agreement with you.

I'd like to conclude by asking a final question. Do you think the EPA would have benefited from the assistance of those with actual knowledge of wetlands, of the waters of Alaska in your communities and the unique hydrology and geographic features that we have here before promulgating a rule that is the classic Washington, DC, one-size-fits-all approach to clean water? We all want clean water. As I mentioned at the outset, Alaskans do a much better job than the EPA and Washington on keeping our waters clean.

Do you think that this rule would have benefited from the input of constituents from your senate district, Senator Bishop, or you, Madam Mayor, constituents from the North Slope Borough or you and your staff?

Senator BISHOP. Chairman Sullivan, it would behoove the department greatly to take into serious consideration with boots on the ground, I mean boots on the ground, not boots in Washington, DC, but boots on the ground walking from maybe Kaktovik to Barrow looking at what permafrost looks like, or walking from the Charlie River to Fort Yukon looking at what the ground looks like. And, I mean, I'm serious, this is—I'm just flabbergasted. You know, again, you said it very eloquently: it's done in Washington, DC, it's done in a vacuum. The people—if I would have proposed a regulation like this at the Department of Labor without giving the people of Alaska their full and just due or a proper hearing and proper notification, I would have been strung up by my bootstraps.

And the last thing I'd like to say in closing is—you might want to have your staff reference this and send a copy to the EPA. In President Obama's State of the State speech 4 years ago, on page 2 or page 3, he says, "Where my agencies are overreaching and stifling business in the United States, I'm going to work to lessen that impact."

They need to go read the President's own memo from his State of the State speech.

Senator SULLIVAN. Thank you, Senator Bishop. Madam Mayor, would the EPA have benefited from the very, very significant expertise and wisdom and traditional knowledge that exists on the North Slope before promulgating this rule?

Mayor BROWER. Yes, we'd like to say that Alaska is a unique and a special place, and that is especially true in the context of our geography and hydrology. No other State in our union has tundra or permafrost, and many people in the Lower 48 fail to grasp the sheer size and expanse of our State and regions. As I mentioned in my comments, the proposed rule does not even reference these critical features. On the North Slope, particularly, relatively little

is known about the nature and function of our Arctic wetlands and much of what we do know has come from studies conducted by the oil industry.

Given these facts, I don't believe that EPA has the information that's needed to make an informed ruling. It is important for the Federal Government to recognize the role that the State and local municipalities can play in the permitting process. Our local knowledge and expertise is critical in recognizing impacts and mitigating negative consequences associated with a potential project. State and local governments are also more in tuned with the desires of the local communities and are well-equipped to understand the proper balance between facilitating economic development and the protection of the environment.

Senator SULLIVAN. Well, I want to thank both of you for your very powerful testimony. I will note for the record, sometimes the written record doesn't convey the sense of frustration and exasperation that these two important witnesses have articulated, but it was clearly there. And they represent very, very important elements of the State, large swaths of the State. And, for the record, I want to note that.

Senator Bishop, Mayor Brower, do you have any concluding comments that you'd like to leave before we move to the next panel?

Senator BISHOP. Yes. Chairman Sullivan, thank you so much for coming home, holding this hearing in Fairbanks and throughout Alaska. It's greatly appreciated. And don't give up the fight. Keep fighting the fight and we're behind you 110 percent.

Senator SULLIVAN. Thank you, senator. Madam Mayor, any concluding comments?

Mayor BROWER. Thank you, Senator Sullivan. I personally want to thank you for [inaudible] me as mayor of the North Slope Borough and as an Inupiat woman, very strong in issues that you have in my region. And I think that the EPA needs to delay implementing this rule in Alaska until it conducts public meetings of which you are giving throughout the towns and villages that would be so heavily impacted by this rulemaking. I don't think our people understand the extent this rulemaking will impact their lives. I also think the agencies should conduct an extensive analysis of the Arctic hydrology environment and have a better understanding of our region before they implement this rule.

And thank you very much for having this in Fairbanks, and I apologize, I am between three meetings, and I thank you very much for allowing me to testify; although I would have loved to have testified in every one and be very vibrant in what I say. Thank you very much.

Senator SULLIVAN. Well, thank you both again for your powerful testimony and we really appreciate the insights that you provided to the EPW committee. These will be important as we move forward with regard to the national debate on this rule.

So we're going to move forward from the first panel and we're now going to move on to our second panel of distinguished witnesses. We have seven witnesses. We will have 5-minute statements from each, and then we will then conduct a series of questions and answers.

So why don't we begin with Sara Taylor, the executive director of the Citizens' Advisory Committee on Federal Areas.

STATEMENT OF SARA TAYLOR, EXECUTIVE DIRECTOR, CITIZENS' ADVISORY COMMISSION ON FEDERAL AREAS

Ms. TAYLOR. Chairman, thank you for allowing me to testify today and especially thank you for coming to Alaska to have hearings on this very important issue.

For the record, my name is Sara Taylor. I am the executive director of the Citizens' Advisory Commission on Federal Areas, commonly known as CACFA. The CACFA was established by the Alaska State Legislature in 1981 to monitor and mitigate negative impacts to Alaskans from the complex mandates, diverse management schemes, and highly discretionary rules and regulations that apply to just about 222 million acres of our State. We work with individuals and agencies to safeguard and preserve the rights and interests of Alaskans and we maintain decades of institutional memory of engagement with over a dozen Federal agencies.

I could explain in great detail how the proposed rule is legally indefensible or just really bad public policy, but I'd much rather spend the time talking about what it means to Alaskans. One recurring theme of management of Federal lands in Alaska is a manifest paternalism, blind to our needs and experiences which stifles our opportunity for social and economic autonomy and prosperity. We are quite accustomed to and frankly tired of being the subject of a table-top exercise thousands of miles away. In many ways, the proposed rule is very emblematic of this approach to Alaska.

When the agencies say that Alaskan waters require Federal protection, they mean protection from us, the people whose very survival depends on clean water. To most Americans, Alaska is an idea. It's a trophy hunt. It's a dream vacation. It's a post card. It's a reality show. It's a means of preservation and atonement for the industrialized state of our Nation. But Alaska is not an abstract concept to us. Alaska is our home. This is our being and water is the intravenous system which feeds us both spiritually and physically.

The Clean Water Act recognizes that there are no better stewards of clean water than the people who fish in it and swim in it and drink it, and the State of Alaska has the authority and the responsibility and the very detailed expertise to manage water regardless of jurisdiction in our State. And the regulation of water and land use is a very traditional State and local power that deserves both legal and intuitive deference, but the EPA and the Corps of Engineers did not even consult with the State in developing this rulemaking, and this rulemaking unapologetically hijacks those powers and obligations. But Alaskans do more than depend on our water. We also understand it and if our water needs protection, it's from administrators who do not understand it.

Alaska has more wetlands than all the other States combined. Alaska has more coastline than all the other States combined, but the proposed rule and the 2013 draft Connectivity Report completely failed to acknowledge our very unique geomorphological and hydrologic conditions. These would be the conditions that apply to

the vast majority of areas impacted by this rulemaking, things that have been mentioned like permafrost, like tundra, spruce bogs, muskegs, just those types of situations, ice fields, glaciers. It's confusing. It's very confusing to see how this proposed rule will actually impact Alaska, which begs the question as to why application of this rule is left to agencies who do not care or do not know enough to even include the consideration of these very unique conditions.

The proposed rule will not only deprive Alaska of its traditional and sovereign powers. It will also disproportionately impact our ability to grow and prosper. Out of 283 total communities in Alaska, 215 of them live within 2 miles of a navigable, in fact, water or coastline and the proposed rule expands the area that will be subject to Federal permitting authority to the point where the development and sustainability of these communities is going to be either subject to a very expensive jurisdictional question or a very expensive concession of jurisdiction, and both scenarios raise major due process concerns where private property owners, communities, and sovereign States need to pay to ask the Federal Government if permission is needed or pay the Federal Government for permission regardless of whether permission is actually needed just to safely avoid fines, penalties, even endless litigation. And what happens to your property rights when you can't afford to ask that question?

Alaskans are no strangers to Federal regulations governing essential aspects of our lives and I'm not sure how much more can be demanded of us, but I do know that this demand mischaracterizes the state of the law and unconstitutionally interferes with our authorities, but what's worse is it's not going to enhance the protection of our waters. Thank you very much.

[The prepared statement of Ms. Taylor follows:]

CITIZENS' ADVISORY COMMISSION ON FEDERAL AREAS

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UNITED STATES SENATE COMMITTEE ON ENVIRONMENT & PUBLIC WORKS
SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE

Field Hearing on Proposed Rulemaking to Define Jurisdiction Under the Clean Water Act
Fairbanks, Alaska | April 8, 2015

Testimony of Sara Taylor, Executive Director of the Citizens' Advisory Commission on Federal Areas

Chairman, Subcommittee Members, thank you for allowing me to testify today, and thank you foremost for holding public hearings in Alaska on this very critical issue. For the record, my name is Sara Taylor and I am the Executive Director of the Citizens' Advisory Commission on Federal Areas (CACFA). In 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA), which fundamentally changed the way the federal government manages its lands in Alaska. In 1981, CACFA was established by the Alaska State Legislature to monitor and mitigate negative impacts to Alaskans from implementation of ANILCA and the complex mandates and highly discretionary sets of laws, regulations and policies applicable to over 225 million acres of federal land. Primarily, CACFA works with individual Alaskans in navigating these rules and policies, safeguards and preserves their rights and interests and maintains a multi-decade institutional memory of engagement with federal agencies throughout the state.

One recurring theme throughout Alaskan history is a well-meaning paternalism which stifles our opportunity for social and economic autonomy and prosperity. In one way or another, Alaska has consistently been exploited to serve a national agenda without consideration or reverence for our needs, experiences, livelihood, circumstances or expertise. Before and during our territorial days, our abundant natural resources were unsustainably managed and siphoned off to line Outside pockets. While statehood accompanied ownership, representation and sovereignty, these concepts have eroded over time as Alaskans are systematically disenfranchised by Outside interests. For areas designated under or impacted by ANILCA, promises and guarantees made at passage have been compromised and subjugated to placate Outside ideologies. In short, Alaska has advanced from being depleted into worthlessness to being idealized into powerlessness.

In many ways, the Environmental Protection Agency (EPA) and Army Corps of Engineers (ACOE) proposed rulemaking on the extent of federal jurisdiction over waters in Alaska is emblematic of this patronizing and often oblivious approach to Alaska. From territorial management to ANILCA to the proposed rule, Alaska is thoroughly accustomed to and frankly tired of being the subject of a tabletop exercise in Washington D.C. The State of Alaska has the authority, responsibility and detailed expertise to protect all waters in the state regardless of jurisdiction. The regulation of water and land use is a traditional and primary state and local power demanding both legal and intuitive deference. Yet the EPA and ACOE did not even consult with the State in developing this rulemaking which unapologetically hijacks these powers and obligations.

When the agencies say Alaskan waters require federal protection, they mean protection from us, the people whose very survival depends on clean water. Alaskans do more than depend on our water, though – we understand it. If our water needs protection, it is from administrators who do not. Approximately 63% of the nation's wetlands are in Alaska. In other words, Alaska has more wetlands than all other states combined, yet the proposed rule completely fails to acknowledge our unique geomorphological and hydrologic conditions. Even though wetland and aquatic habitats like permafrost, tundra, muskegs, spruce bogs, glaciers, ice fields and others are rare or absent outside Alaska, these conditions are common in a majority of the areas impacted by this rulemaking but are not accounted for in the rulemaking or the 2013 Draft Connectivity Report.

As just one example, wetlands on the North Slope of Alaska are epitomized by relatively flat terrain and a seasonal snowmelt that cannot penetrate the frozen soil underneath. These areas can be hundreds of miles from the nearest navigable-in-fact water, but they could be jurisdictional under the proposed rule's expanded application of "adjacent" wetlands or its reliance on a "shallow subsurface hydrological connection." Further, a majority of waters in the state are frozen for the better part of each year, only exhibiting functions described in the rulemaking for brief periods; yet, the rulemaking does not address how connectivity and capacity to impact traditional navigable waters may be limited or foreclosed by this situation, or even whether a predominantly frozen stream is considered flowing, seasonal, intermittent or ephemeral. Not only is it confusing to see how the proposed rule would apply in Alaska – to two-thirds of the wetlands at issue – it begs the question as to why application of the rule is entrusted to agencies which did not care or know enough to even consider these conditions.

To most Americans, Alaska is an idea. Seward's Folly, furs, fish and gold, a postcard, a reality show, a trophy hunt, a lifestyle, a dream vacation, or an opportunity for preservation and atonement for the industrialized and developed state of our nation. But Alaska is not an abstract concept to us. This is our home, our being, and water is the intravenous network that feeds us, both physically and spiritually. The Clean Water Act recognizes that there is no more reliable steward of clean water than the people who fish in it, swim in it and drink it. Congress mandated that

> *[f]ederal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.*

33 U.S.C. § 1251(g). The Clean Water Act also explicitly stated Congress' policy to

> *recognize, preserve and protect the primary responsibilities and rights of the State to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources, and to consult with the Administrator in the exercise of [her] authority under this chapter.*

33 U.S.C § 1251(b). Pursuant to this policy, the Clean Water Act gives states clear regulatory responsibilities as well as mechanisms to assume primacy for regulating certain activities, including discharge, dredging and fill operations. *See, e.g.*, 33 U.S.C. §§ 1311, 1313, 1342, 1344, 1370. If the proposed rule is enacted, the scope for primacy assumption will be limited to the point where any attendant state program would be infeasible to maintain for so small an area. Such a scenario cannot be consistent with Congress' intent, the plain language of the Clean Water Act or basic tenets of federalism.

The proposed rule will not only serve to deprive Alaska of its traditional and sovereign powers, in spite of its superior capacity and expertise to manage and protect its waters, it will also disproportionately impact its ability to grow and prosper. Wetlands and waters cover approximately 43% of Alaska. Aquatic habitats nourish our world-class fish and wildlife populations. Water supports the responsible development of our abundant natural resources. Whether flowing or frozen, water also provides a vast statewide transportation network connecting otherwise isolated villages and providing access for traditional activities. We are not just surrounded by and infused with a lot of water potentially subject to federal jurisdiction under the proposed rule, we need and use our water in critical and unique ways which are not contemplated by the proposed rule.

Out of 283 total communities, 215 are located within two miles of a coastline or navigable waterway. Because the proposed rule expands the acreage and linear measure of waters subject to federal permitting authority under the Clean Water Act, conceivably well beyond two miles, the development and sustainability

of these communities will become hostage to either a very expensive jurisdictional question or a very expensive concession of jurisdiction. Determining jurisdiction includes expenses such as contractors, fees, studies, surveys and delays. Conceding jurisdiction can include many of the same costs, but also immediately incurs increasingly high compensatory mitigation fees. Both scenarios raise major due process concerns. Property owners, communities and sovereign states need to pay to ask the federal government if permission is needed, or pay the federal government for permission, regardless of whether permission is actually needed, just to avoid fines and penalties without efficient or cost-effective recourse.

While it would be fair to say the proposed regulations attempt to answer the jurisdictional question better than the current regulations, by making every possible nexus a significant one, this is not the case for Alaska where the nexus can be hypothetical and/or indeterminate. The proposed rule provides for attenuated jurisdiction as far away from navigable-in-fact waters as the potential for connectivity, but Alaska's distinctive hydrology is not addressed. At least under the current regulations, Alaskans have a chance at reasonably predicting and relying on a non-jurisdictional finding. Under the proposed rule, the only reliable prediction is conceding jurisdiction or abandoning the project, since even a non-jurisdictional finding would be primed for litigation.

The U.S. Constitution, the Clean Water Act and judicial precedent do not authorize or support the extent of jurisdiction claimed by the EPA and ACOE under the proposed rule, or the dire and disproportionate consequences to Alaskans and their interests from its implementation. Alaskans are no strangers to federal regulations governing essential aspects of their lives, from traditional practices to the ways they feed and warm their families to the mere exercise of their established property rights. I am not sure how much more could be demanded of us, but I do know this demand mischaracterizes the state of the law, unconstitutionally interferes with our authorities and will not enhance the protection of our waters.

If the EPA and ACOE would truly like to clarify and streamline implementation of the Clean Water Act, the Commission has some recommendations for how that could work. Starting with a draft of the existing regulations, add anything unquestionably jurisdictional and unquestionably non-jurisdictional under the Clean Water Act, as informed by United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159 (2001), and the narrowest grounds in Rapanos v. United States, 547 U.S. 715 (2006). The significant nexus test, as described in the proposed rule, is not the law established by these cases. Next, conservatively add things which might be jurisdictional under the law. Use of best available, peer-reviewed science is warranted, but only so long as it is informed by an understanding of the extent of jurisdiction available under the law.

Once these additions are developed, thoroughly review them to ensure consistency with the Commerce Clause of the U.S. Constitution. Require all remaining hydrologic features, pathways and scenarios to undergo a case-by-case determination to establish jurisdiction, recognizing that one-size-fits-all (e.g., *per se* jurisdiction) does not work for the nation's incomprehensible diversity of waters and wetlands. See if any terms require additional definitions, without making those additional definitions need additional definitions. Next, bring this revised draft of the existing regulations to the states, tribal governments and stakeholders for genuine and open consultation, regional insights and necessary edits. Lastly, propose these revisions to the public with sufficient justification and clear explanations to enable meaningful input.

Critical to this recommended approach is the idea that federal agencies start from a place of non-jurisdiction – a place of respect for the merits, common sense and practicality of local knowledge and control – and sensibly propose jurisdiction only where consistent with the law. The approach adopted for the proposed rulemaking worked from the opposite position of needing to establish jurisdiction everywhere with limited exceptions and no consultation or sincere attempt to evaluate impacts or engage stakeholders.

Thank you for this opportunity to testify.

Senator SULLIVAN. Thank you, Ms. Taylor. Very eloquent testimony there. Our next witness is Sue Mauger. She is a science director for Cook Inletkeeper.

STATEMENT OF SUE MAUGER, SCIENCE DIRECTOR, COOK INLETKEEPER

Ms. MAUGER. Chairman Sullivan, thank you for the opportunity to testify today. I've submitted written testimony and ask that it be included in the record.

My name is Sue Mauger and I am the science director for Cook Inletkeeper, which is a community-based non-profit organization started in 1995 and dedicated to protecting clean water and healthy salmon for Alaskans. Please accept this testimony on behalf of Cook Inletkeeper's staff, board of directors, and more than 2,000 members and supporters across Southcentral Alaska.

My comments and support for clarifying protections of Waters of the United States under the Clean Water Act are based on my experiences working in Alaska's fresh water systems for the last 15 years. Recently my work has involved using thermal infrared technology to identify and map shallow groundwater connections that provide key sources of cold water in the summer as well as warm water for juvenile salmon in the winter. Exploring these complex surface and subsurface connections reinforces to me that in Alaska, as in the rest of the United States, protecting tributaries and adjacent wetlands is vital for protection of the integrity of downstream waters.

In my opinion, the impact of the proposed rule will be decidedly positive for Alaskans and I'd like to share with you three reasons why. First, Alaskans rely on wild salmon and other cold water fish for commercial, economic, cultural, and nutritional health. Presently, Alaska's fresh water habitats are largely intact and support some of the most robust wild salmon populations in the world. This is, in part, due to the extensively connected systems of small headwater streams and supporting wetlands. State biologists down on the Kenai Peninsula are doing exciting research which shows how broader landscapes are linked to stream productivity and juvenile salmon densities. Through the delivery of alder-derived nitrogen and peatland-derived carbon into headwater streams, whole ecosystem responses are generated, which underscores the importance of landscape connectivity.

This makes me think of wetlands functioning like a coffee filter. Just as my morning cup of caffeine helps bring me back to life and increases my productivity, rich nutrient-laden waters percolating out of saturated wetlands helps drive stream productivities. The investment of nutrients from the landscape into the smallest of our streams pays off huge dividends in the form of vibrant fisheries. The proposed rule will clarify these protections for key habitats that help salmon and, in turn, helps Alaskans thrive.

Second, Alaskans rely on wetlands to reduce flood peaks, which put our heavily subsidized transportation infrastructure at risk. Fall storms are hard on our roads and bridges. I remember well the devastating floods of 2002 when sections of the Sterling Highway blew out, leaving the lower Kenai Peninsula cut off for days. We had two 100-year flood events within a month of each other. Poorly

placed inadequately sized culverts in the upper watersheds failed which resulted in pulses of debris torrents causing extensive damage downstream. Fall storms will continue; however, a decrease in wetland cover can greatly increase peak flows and increase downstream flood damage.

In fiscal year 2015, the Federal budget covers approximately 90 percent—90 percent—over $1 billion of Alaska's road costs. It hardly seems like Federal overreach for the EPA to implement a rule which will reduce flooding potential by keeping wetlands intact when the Federal budget is footing the bills to fix our flood damage.

Third, Alaskans rely on groundwater sources of drinking water. Across our rural landscape, the majority of Alaskans have private wells or use surface springs for drinking water. Our wetland-dominated landscape makes this possible by consistently recharging our aquifers. Most wells used to supply water to individual homes yield water from shallow aquifers, which were recharged within the last 25 years. Shallow aquifers contain groundwater that is primarily from infiltration of local rain and snow and discharge from streams, lakes, and wetlands and thus are susceptible to contamination. Keeping potential contaminants away from these water sources is by far less expensive than trying to remove contaminants once they move into the groundwater. The proposed rule, by clarifying protections for these water bodies, will reinstate Alaska's confidence that their drinking water is safe for their families.

One argument that some have made to delay or significantly alter the proposed rule is that Alaska's hydrologic circumstances are unique. And I couldn't agree more with that observation. Alaska's fresh water situation is unique, uniquely intact and connected. Rare circumstances for the Lower 48. But with the current uncertainty of what constitutes the waters of the United States, Alaskans' clean water and healthy salmon are at risk of a death by a thousand cuts.

Now the EPA and the Army Corps of Engineers, agencies not known for playing nicely together, have, in fact, come up with language that they can work with to fulfill the goal of the Clean Water Act. Congress ought to move forward now by approving the protections provided by the proposed rule. Alaskans will be better off for it. Thank you.

[The prepared statement of Ms. Mauger follows:]

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April 8, 2015

Testimony before the Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water and Wildlife; Fairbanks Field Hearing

RE: IMPACTS OF THE PROPOSED WATERS OF THE UNITED STATES RULE ON STATE AND LOCAL GOVERNMENTS AND STAKEHOLDERS

Chairman Sullivan:

My name is Sue Mauger. I am the Science Director for Cook Inletkeeper, which is a community based non-profit organization, started in 1995 and dedicated to protecting clean water and healthy salmon for Alaskans. Please accept this testimony on behalf of Cook Inletkeeper's staff, Board of Directors and more than 2,000 members and supporters across Southcentral Alaska.

My comments and support for clarifying protections for wetlands and headwater streams under the Clean Water Act are based on my experiences working in Alaska's freshwater systems for the last 15 years. Recently my work has involved using thermal infrared technology to identify and map shallow groundwater connections that provide key sources of cold water in the summer as well as warm water for juvenile salmon in the winter. Exploring these complex surface and sub-surface connections reinforces to me that in Alaska, as in the rest of the United States, protecting tributaries and adjacent wetlands is important for protecting the integrity of downstream waters.

In my opinion, the impact of the proposed rule will be decidedly positive for Alaskans and I'd like to share with you three reasons why.

1. **Alaskans rely on wild salmon and other cold water fish for economic, cultural, and nutritional health.**

Presently Alaska's freshwater habitats are largely intact and support some of the most robust wild salmon populations in the world.[i] This is in part due to the extensively connected systems of small headwater streams and supporting wetlands. State biologists on the Kenai Peninsula are doing exciting research which shows how broader landscapes are linked to stream productivity and juvenile salmon densities. Through the delivery of alder-derived nitrogen and peatland-derived carbon, whole-ecosystem responses are generated which underscores the importance of landscape connectivity.[ii,iii,iv,v] This makes me think of wetlands functioning like a coffee filter. Just as my morning cup of caffeine helps bring me to life, rich nutrient laden water percolating out of saturated wetlands helps drive stream productivity.

The investment of nutrients from the landscape into the smallest of our streams pays off huge dividends in the form of vibrant fisheries. Salmon are economically the most important renewable resource throughout Alaska—annually supporting commercial, recreational, subsistence, and personal use fisheries worth billions of dollars. The Alaska Department of Fish and Game estimated that in 2007 sport fishing alone was responsible for $1.6 billion in economic output, $545 million in regional income, and over 15,000 jobs.[vi] The economic impact of the Bristol Bay Commercial Salmon Industry in 2010 included an estimated $1.5 billion in output, $500 million in income and about 9,800 jobs.[vii]

Another reason salmon thrive on our landscape is because of the sponge-like behavior of wetlands. And this becomes increasingly important during snow-less winters like the last 2 years. Presently the Kenai Peninsula's snowpack is 15% of normal. Fairbanks has fared better with 65% of normal snowpack.[viii] You can think of snowpack as stored summer stream flow. The snow in our hills during the winter feeds our streams all summer long. With little snow, water levels this summer will likely be low, resulting in fish passage issues for spawning salmon as they move into smaller creeks and warmer water temperatures increasing physiological stress. Climate models point to this becoming a more typical pattern for us. As we lose snow storage, wetland storage will be even more critical for the health of our cold water fish and fisheries. The proposed rule will protect these key water storage and coffee filter-like areas that are so important for salmon.

2. Alaskans rely on wetlands to reduce flood peaks which put our heavily-subsidized transportation infrastructure at risk.

Fall storms are hard on our roads and bridges. I remember well the devastating floods of 2002 when sections of the Sterling Highway blew out leaving the lower Kenai Peninsula cut off for days. We had two, 100-year flood events within a month of each other. Poorly-placed and inadequately-sized culverts in the upper watersheds failed which resulted in pulses of debris torrents causing extensive damage to roads, bridges and property downstream. 2012 storms did similar damage to the Glenn Highway in the Mat-Su Basin. Fall storms will continue; however, a decrease in wetland cover can greatly increase peak flows and increase downstream flood damage. In FY2015, the federal budget covers approximately 90% (over $1 billion) of Alaska's road costs.[ix] It hardly seems like federal overreach for the EPA to implement a rule which will reduce flooding potential by keeping wetlands intact when the federal budget is footing the bills to fix flood damage.

3. Alaskans rely on groundwater sources of drinking water.

Across our rural landscape, the majority of Alaskans have private wells or use surface springs for drinking water. Our wetland-dominated landscape makes this possible by consistently recharging our aquifers. Most wells used to supply water to individual homes yield water from shallow aquifers which were recharged within the last 25 years.[x] Shallow aquifers contain groundwater that is primarily from the infiltration of local precipitation and water from streams, lakes and wetlands, and are susceptible to contamination. Keeping potential contaminants away from these water sources is by far less expensive than trying to remove contaminants from groundwater. The proposed rule, by protecting all of these water sources, would reinstate Alaskans' confidence that their drinking water is safe for their families.

One argument that some have made to delay or significantly alter the proposed rule is that Alaska's hydrologic circumstances are unique. I couldn't agree more with that observation. Alaska's freshwater situation is unique - uniquely intact and connected – rare circumstances for the lower 48. But with the current uncertainty of what constitutes the waters of the United States, Alaskans' clean water and healthy salmon are at risk of a death by a thousand cuts. Congress ought to move forward now with the protections provided by the proposed rule. Alaskans will be better off for it.

Thank you for the invitation to provide input on this important issue.

Sincerely,

Sue Mauger

Sue Mauger

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[viii] USDA Natural Resources Conservation Service (2015) Alaska Snow Survey Report, March 1, 2015. http://ambcs.org/pub/BasinRpt/2015/mar.pdf

[ix] State of Alaska Office of Management and Budget, FY 2015 Capital Budget – enacted. https://www.omb.alaska.gov/ombfiles/15_budget/PDFs/FY14_and_FY15_Projects_by_Department.pdf

[x] U.S. Geological Survey (2002) Ground-water age and its water management implications, Cook Inlet Basin, Alaska. USGS Fact Sheet 022-02. http://pubs.usgs.gov/fs/fs-022-02/

Senator SULLIVAN. Thank you, Ms. Mauger. Our next witness is Bryce Wrigley and Mr. Wrigley is president of the Alaska Farm Bureau. I've worked with him on many issues. So, President Wrigley, the floor is yours.

STATEMENT OF BRYCE WRIGLEY, PRESIDENT, ALASKA FARM BUREAU

Mr. WRIGLEY. Thank you, Senator Sullivan. I appreciate the opportunity to testify at this hearing.

The Clean Water Act regulates navigable waters and is defined as waters of the United States. It does not regulate all waters. The U.S. Supreme Court has recognized that the term "navigable" delineates what Congress had in mind when it enacted the Clean Water Act. That was its traditional jurisdiction over waters that were or had been navigable, in fact, or which could be reasonably made. In fact, it was very clear that Congress did not intend for the Clean Water Act to cover all waters. When it enacted the Clean Water Act, Congress explicitly recognized, preserved, and protected the States' primary authority and responsibility over local land and water resources. The proposed Waters of the U.S. rule attempts to usurp the States' traditional and primary authority over land and water use.

The EPA and the Army Corps have made several attempts to assert jurisdiction over waters and water bodies that the Supreme Court has found to be outside their jurisdiction. The agencies have demonstrated a continual pattern of pushing and bullying the State and local governments and intimidating private citizens as they have repeatedly sought to assert control over additional waters and land. For example, after the Supreme Court found that isolated waters fall outside the Clean Water Act jurisdiction, it clarified that in classifying a new area as a wetland, a significant nexus to an existing navigable water must exist. The agencies next asserted that the decision was limited to isolated waters and that if a water body had any connection to a navigable water, it was no longer an isolated water body and could therefore be regulated as a navigable water under the Clean Water Act. The agencies' rationale was that, in the end, all waters are connected, which essentially include all wet areas, including ditches, drains, desert washes, and ephemeral streams that flow infrequently and may be miles from traditional navigable waters.

The Supreme Court again rejected the Corps' broad interpretation and the court found that the plain language of the Clean Water Act does not authorize this expansion of Federal jurisdiction and that in applying the definition so broadly to seasonally wet features, the Corps had stretched the term "waters of the United States" beyond parody. Further, the court clarified that the act confers jurisdiction only over relatively permanent bodies of water.

The implementation of the rule as it now stands will expose farmers and ranchers to legal action if they engage in normal farming activities. If a low spot in a field is, indeed, determined to be a wetland under the expanded definition because it sometimes holds or sheds water, it may require dredge or fill permits to plant or harvest our fields. It may also require a discharge permit for applying fertilizer or pesticides to crops. And just because an oper-

ation is organic doesn't mean that it would get a pass. Organic operations would also need dredge and fill permits for planting and harvesting and would also need discharge permits to apply manure or compost to their fields.

I decided on the way in today that most of those listening have no idea of what I'm even talking about. Your experience with agriculture is through the food you eat, so you cannot understand the impact of this rule on America's farmers. So, in an effort to help you understand, I've decided that I'm going to start a project to redefine food.

According to the Supreme Court, a significant nexus must occur or be present. It is required to be able to—and that is required to be able to reclassify a substance as food. Applying EPA's logic to this model, I've determined, and I'm sure you'll agree, that what animals eat and then poop out meets the significant nexus requirement for human food. They eat the same things we do. Then, to make sure that these resources are not wasted, I'm going to impose a $37,000 fine per day on anyone who does not eat this new food. So your menu options at the restaurant will change. You can now choose chicken poop tenders, poop chops, or cow pie steak. Now, you laugh because you realize that I have no authority to implement these food changes. Imagine if I was a powerful Federal agency with the full power and backing of the U.S. Government behind it and decided to implement these changes. What would your reaction be?

Congress has allowed the creation of this vast bureaucracy which, in all practicality, is a fourth branch of the government. This fourth branch is not beholding to nor can it be removed by we, the people. Our only recourse is to rely on Congress to impose strict limits on their authority and their rulemaking. Both Congress and the Supreme Court have told EPA that this rule oversteps the intent of Congress.

I urge you in the strongest possible terms to confine EPA's authority to those navigable waters, as was clearly intended by Congress when the Clean Water Act was passed. Thank you.

[The prepared statement of Mr. Wrigley follows:]

The Clean Water Act (CWA) regulates "navigable waters," defined as "waters of the United States." 33 U.S.C. §§ 1344, 1362(7). It does not regulate all waters. The United States Supreme Court has recognized that the term "navigable" delineates what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.; *Rapanos v. United States*, 547 U.S. 715, 731 (2006) In fact, it is very clear that Congress did not intend for the CWA to cover all waters. When it enacted the CWA, Congress explicitly recognized, preserved, and protected the States' primary authority and responsibility over local land and water resources. 33 U.S.C. § 1251(b). The proposed Waters of the US Rule attempts to usurp the States' traditional and primary authority over land and water use.

The EPA and the ARMY Corps have made several efforts to assert jurisdiction over waters and water bodies that the Supreme Court has found to be outside their jurisdiction. This continuing effort to extend their jurisdiction clearly stems from a belief that the federal agencies know better than the States how to manage resources. They have demonstrated a continual pattern of pushing and bullying state and local governments and intimidating private citizens as the agencies have repeatedly sought to assert control over additional waters and land.

For example, after the Supreme Court found that isolated waters fall outside CWA jurisdiction, the agencies next asserted that the decision was limited to isolated waters, and that if a water body had any connection to navigable waters, it was no longer an isolated water and could therefore be regulated as a navigable water under the CWA.

The agencies' rationale was that in the end, all waters are connected, which essentially included all wet areas, including ditches, drains, desert washes, and ephemeral streams that flow infrequently and may be miles from traditional navigable waters.

The Supreme Court again rejected the Corps's broad interpretation that the CWA regulates any non-navigable water with "any connection" to navigable waters. The Court found that the plain language of the CWA "does not authorize this expansion of federal jurisdiction" and that in applying the definition so broadly to seasonally wet features "the Corps had stretched the term 'waters of the United States' beyond parody." Further, the Court clarified that the Act "confers jurisdiction over only relatively *permanent* bodies of water."

Implementation of the Rule as it stands now will expose farmers and ranchers to legal action if they engage in normal farming activities. If a low spot in a field is indeed determined to be a wetland under the expanded definition because it sometimes holds or sheds water, it may require dredge or fill permits to plant or harvest our fields. It may also require a discharge permit for applying fertilizer or pesticides to crops. And just because an operation is organic doesn't mean that it would get a pass. Organic operations would also need dredge and fill permits for planting and harvesting and would need discharge permits to apply manure or compost to their fields.

EPA hastens to assure farmers and ranchers that they will be exempt, however this does not prevent environmental organizations from filing suit and the recent EPA actions against farming operations have destroyed any trust that EPA or ARMY Corps would defend those exemptions in court. Remember that EPA has worked for many years and spent millions of dollars to assert jurisdiction over waters that both Congress and the Supreme Court have repeatedly said they did not have.

This Rule shows clearly the attitude of the vast bureaucracy we have created and that now governs every aspect of our lives. It is time for Congress to impose some restrictions on the agencies that are running roughshod over the farmers and ranchers who are growing our food.

Senator SULLIVAN. Thank you, President Wrigley, and thank you for all the work you do on behalf of Alaska's farmers. It's a group of our citizens that do incredible work for all of us, and I appreciate your testimony.

Our next witness is John MacKinnon, executive director of the Associated General Contractors of Alaska. Mr. MacKinnon, the floor is yours.

STATEMENT OF JOHN MacKINNON, EXECUTIVE DIRECTOR, ASSOCIATED GENERAL CONTRACTORS OF ALASKA

Mr. MACKINNON. Thank you, Chairman Sullivan. For the record, my name is John MacKinnon. I'm the executive director of the Associated General Contractors. The AGC is a construction trade association representing approximately 650 contractors, suppliers, manufacturers, and businesses in Alaska. Within our membership is the majority of Alaska's construction industry. AGC contractors are involved in the construction of Alaska's public and private buildings, highways, bridges, docks, and harbors, and the preparation of access roads and development pads necessary for the extraction of our natural resources.

The industry obtains general and individual permits to perform construction activities in or near waters of the United States and permits for stormwater discharges, both covered under the Clean Water Act. As such, this proposed guidance will pervade all stages of construction and will have a substantial impact on the construction industry.

Prior to joining AGC 8 years ago, I was—and becoming an advocate for the construction industry, I was a deputy commissioner of the Alaska Department of Transportation and an advocate for transportation projects in Alaska. During that time, you know, DOT oversees 249 airports throughout the State, 11 ferries serving 35 communities, 5,600 miles of highways, and 720 buildings throughout Alaska. And one of my responsibilities at DOT was overseeing the maintenance and construction programs for all of those facilities. Major projects in this State often require—trigger NEPA and require an environmental impact statement, and the challenge we had was that the average EIS for a federally funded transportation project takes about 5 years from beginning to reaching a record of decision. From that point of the record of decision, the project sponsor then begins to get the dozens and dozens of permits required in order to go to construction. The average time for a major highway project that requires an EIS from beginning the EIS to completion of the project—this is the average time—is 13 years. It's no wonder transportation projects take so long to deliver when you consider all of the permits and permissions required.

I have attached to my written testimony a graph like this which shows the Federal environmental requirements affecting transportation. That's about 1965 where it starts on that trajectory upward.

Senator SULLIVAN. We want to make sure that will be submitted for the record.

Mr. MACKINNON. Yes, thank you. You know, I might add that in—about 40 years ago, 1970 or so, approximately 90 cents out of every dollar for a construction project went out as a payment to contractors. That was dirt in the ground, pavement and that.

Today it's under 70 cents on every dollar of a construction project goes out as a payment to contractor. The balance in there, that twenty-some cents, is going into process and permits and much of it adds very little value to the project.

In Alaska, a lack of adequate transportation is one of the biggest impediments to our economy. Forty years ago, the biggest obstacle we had to doing something was scraping the money together. Today, the biggest obstacle is getting permission, and this will only exacerbate that.

Development of wetlands falls under the guideline hierarchy of avoid, minimize, and mitigate. And when designing a project, the first objective is to avoid any impact to wetlands. People don't set out to impact wetlands. It just happens because roads and airport construction, projects in general, prefer flat ground and in Alaska that's where you find wetlands. When avoidance isn't possible, you work to minimize the impact on wetlands and any wetlands impacted are subject to a fee-in-lieu mitigation payment. Depending on the class of the wetlands disturbed, mitigation can be up to $55,000 per acre. This is up from $10,000 an acre relatively few years ago. That makes Alaska's 170 million acres of wetlands worth over $9 trillion.

The simple conclusion to draw is that this proposed guidance is increased jurisdiction, it is increased permitting, it is increased mitigation, and it is increased cost.

The Clean Water Act has worked as intended in the 40-some years since it became law. We've corrected most of our environmental problems and degradation. We probably have the cleanest country on Earth. We've overcompensated in so many areas as the chart shows, and now the bureaucracy is again taking the law, and through regulations, stretching it beyond its original intent.

In conclusion, in Alaska's case, we're held to the same standard as the rest of the Country and we're not the same condition. The present jurisdiction exceeds what's necessary to protect the environment and maintain interstate commerce. The proposed changes will have a significant negative effect on the construction industry and the economy and the guidance under WOTUS will have a further material impact on permitting and enforcement nationwide. Thank you.

[The prepared statement of Mr. MacKinnon follows:]

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April 8, 2015

Testimony to the US Senate Environment and Public Works Committee's Subcommittee on Fisheries, Water and Wildlife on proposed rule to define Waters of the United States

I appreciate the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers (Corps) proposed rule defining the scope of "water of the United States." (WOTUS), protected under the Clean Water Act (CWA).

For the record, my name is John MacKinnon. I am the Executive Director of the Associated General Contractors of Alaska (AGC). The AGC is a construction trade association representing approximately 650 contractors, specialty contractors, suppliers and manufacturers in Alaska. Within our membership is a majority of Alaska's construction industry. AGC Contractors are involved in the construction of Alaska's public and private buildings, highways, bridges, docks and harbors and the preparation of access roads and the development necessary for the extraction of Alaska's vast natural resources.

On behalf of the AGC, those businesses and employees, I offer the following comments.
The construction and development industries obtain general and individual permits under many programs. These include permits to perform construction activities in or near waters of the United States and permits for storm water discharges, both covered under the CWA. As such, this proposed guidance will pervade all stages of construction operations, and will have a substantial impact on the construction industry.

Prior to joining the AGC 8 years ago and becoming an advocate for the construction industry, I had the honor and pleasure of being Deputy Commissioner of the Alaska Department of Transportation (DOT) where I was an advocate for transportation projects in Alaska. The DOT oversees 249 airports, 11 ferries serving 35 communities, 5,619 miles of highway and 720 public facilities throughout the state of Alaska. One of my responsibilities at DOT was overseeing the maintenance and construction programs for all of those facilities.

Much of the maintenance and construction involved some form of federal participation, thus NEPA was triggered. Major projects required an Environmental Impact Statement (EIS). The average EIS for a federally funded highway project today takes 5 years to reach a Record of Decision. From that point, the project sponsor then begins to get the dozens of required local, state and federal permits. The average time for a major highway project that requires an EIS, from beginning the EIS to completion of construction is 13 years. It is no wonder transportation projects take so long to deliver. The attached graph illustrates the impact of federal requirements on transportation projects.

In Alaska, lack of adequate transportation is one of the biggest impediments to our economy. Forty years ago, the biggest obstacle we had to getting a transportation project was scraping the money together. Today, the biggest obstacle we have is getting permission.

Development of wetlands falls under the guideline hierarchy of Avoid, Minimize and Mitigate. When designing a project, the first objective is to avoid any impact to wetlands. Roads and airports – construction projects in general - prefer flat ground. That is where you find wetlands, making them difficult to avoid. When avoidance is not possible, everything possible is done to minimize the impact on wetlands. Any wetlands impacted then require mitigation. Mitigation is the enhancement, restoration or creation of comparable habitat which offsets or compensates for the expected adverse impacts of the development. Mitigation is a fee-in-lieu-of payment. Depending on the class of wetland disturbed, mitigation can be up to $55,000 per acre. This is up from ten thousand dollars a decade ago.

According to the 2008 Mitigation Rule, mitigation dollars must be spent on land that is under direct threat of development. In Alaska, the non-profit Conservation Fund is the only Corps approved fee-in- lieu mitigation fund in Alaska. It is my understanding the Conservation Fund is under an audit investigation. They have been collecting money for many years and are not spending it. They have collected mitigation money and have not spent it to actually restore, enhance or conserve wetlands in the watershed where the impact is taking place. They have mainly purchased and preserved lands that are not under threat of development, essentially only expanding already protected areas. There are no mitigation projects on the North Slope right now that can be used. Lack of mitigation projects is currently stalling viable construction projects.

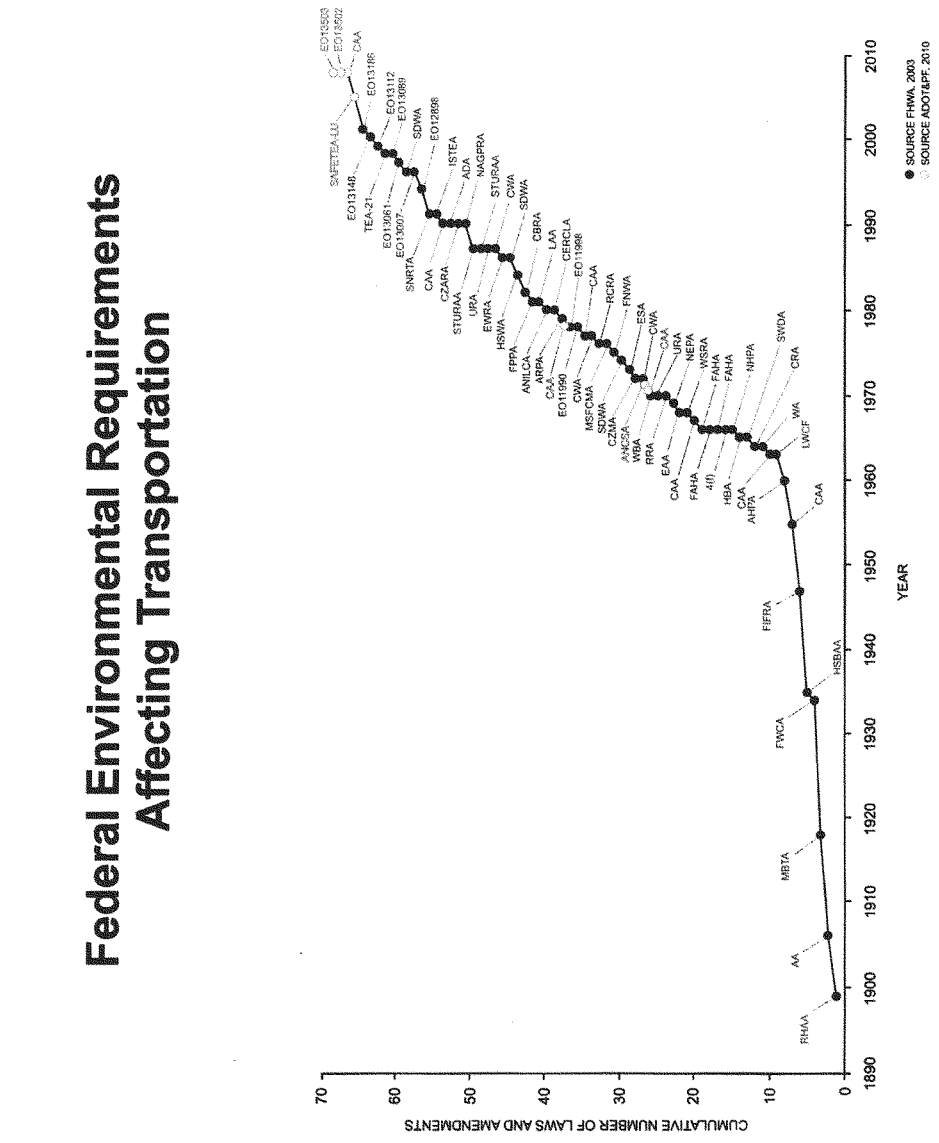
The EPA has identified the construction industry as one of the largest water polluters in the United States because of impact s to wetlands and the potential pollution from storm water runoff. They have targeted the industry for even further enforcement. On acreage alone, agriculture activities result in over ten thousand times the land under disturbance than construction activities, and presumably over ten thousand times the potential for pollution from those activities. But because agriculture is exempt from CWA compliance, the burden is all being directed at construction activities. I'm not suggesting that Congress eliminate the exemption and the EPA come down on our country's farmers, but let's put it in perspective, construction activities are not the problem.

The Clean Water Act is monumental and has worked as intended in the 45 years since it became law. We have corrected our environmental problems and probably have the "cleanest" country on earth. Now the bureaucracy and regulatory system is again taking the law and through regulation stretching them way beyond their original intent. Ronald Reagan once said "The tendency of government and its programs to grow is the closest thing to eternal life we have". Unfortunately this eternal life is strangling this country.

In conclusion, in Alaska's case, the present jurisdiction exceeds what is necessary to protect the environment and maintain interstate commerce. The proposed changes will have a significant negative effect on the construction industry and the economy. The Guidance under WOTUS will have a further material impact on CWA permitting and enforcement nation-wide because it broadly expands the Agencies' CWA jurisdiction.

John MacKinnon, Executive Director
ASSOCIATED GENERAL CONTRACTORS
OF ALASKA

Federal Environmental Requirements Affecting Transportation



Acronym – Description

4(f): Section 4(f) of the Department of Transportation Act of 1966

AA: American Antiquities Act of 1906

ADA: Americans with Disabilities Act of 1990 (also ADA Amendments Act of 2008)

AHPA: Archeological and Historic Preservation Act of 1974 (Expansion of Reservoir Salvage Act of 1960)

ANCSA: Alaska Native Claims Settlement Act, 1971

ANILCA: Alaska National Interest Lands Conservation Act, 1980

ARPA: Archaeological Resources Protection Act of 1979

CAA: Air Pollution Control Act of 1955 (later replaced by Clean Air Act of 1963, amended in 1970, 1977, 1990; Endangerment Finding regarding greenhouse gases, 2009)

CBRA: Coastal Barrier Resources Act of 1982

CERCLA: Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund)

CRA: Civil Rights Act of 1964 (Title VI)

CWA: Clean Water Act of 1972 (Amended in 1977; then amended to the Water Quality Act of 1987)

CZARA: Coastal Zone Act Reauthorization Amendments of 1990

CZMA: Coastal Zone Management Act of 1972

EAA: Export Administration Act of 1969

EO11990: Executive Order 11990 – Protection of Wetlands of 1977

EO11998: Executive Order 11998 – Floodplain Management of 1977

EO12898: Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, February 11, 1994

EO13007: Executive Order 13007 – Indian Sacred Sites, May 24, 1996

EO13061: Executive Order 13061 – Federal Support of Community Efforts Along American Heritage Rivers, Sept. 11, 1997

EO13089: Executive Order 13089 – Coral Reef Protection, June 11, 1998

EO13112: Executive Order 13112 – Establishes the National Invasive Species Council, February 3, 1999

EO13148: Executive Order 13148 – Greening the Government through Leadership in Environmental Management, April 21, 2000

EO13186: Executive Order 13186 – Responsibilities of Federal Agencies to Protect Migratory Birds, January 10, 2001

EO13502: Executive Order 13502 – Use of Project Labor Agreements for Federal Construction Projects, February 6, 2009

EO13503: Executive Order 13503 – Establishment of White House Office of Urban Affairs, February 19, 2009

ESA: Endangered Species Act of 1973

EWRA: Emergency Wetlands Resources Act of 1986, November 10, 1986

FAHA: Federal Aid Highway Act of 1960's

FIFRA: Federal Insecticide, Fungicide and Rodenticide Act of 1947

FNWA: Federal Noxious Weed Act of 1974

FPPA: Farmland Protection Policy Act of 1981

FWCA: Fish and Wildlife Coordination Act of 1934

HBA: Highway Beautification Act of 1965

HSBAA: Historic Sites, Buildings, and Antiquities Act of 1935

HSWA: Hazardous and Solid Waste Amendments of 1984

ISTEA: Intermodal Surface Transportation Efficiency Act of 1991, December 1991

LAA: Land Administration Act

LWCF: Land and Water Conservation Fund of 1965

MBTA: Migratory Bird Treaty Act of 1918

MSFCMA: Magnuson-Stevens Fishery Conservation and Management Act of 1976

NAGPRA: Native American Graves Protection and Repatriation Act, November 16, 1990

NEPA: National Environmental Policy Act

NHPA: National Historic Preservation Act of 1966

RCRA: Resource Conservation and Recovery Act 1976

RHAA: Rivers and Harbors Appropriation Act of 1899

RRA: Resource Recovery Act of 1970

SAFETEA-LU: Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, August 10, 2005

SDWA: Safe Drinking Water Act of 1974 (amended in 1986 and 1996)

SNRTA: Symms National Recreational Trails Act of 1991

STURAA: Surface Transportation and Uniform Relocation Assistance Act of 1987

SWDA: Solid Waste Disposal Act of 1965 (amended by RCRA, 1976)

TEA-21: Transportation Equity Act for the 21st Century, June 9, 1998

URA: Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

URA: Urban Redevelopment Authority Act of 1989

WA: Wilderness Act of 1964

WBA: Water Bank Act

WSRA: Wild and Scenic Rivers Act of 1968

Senator SULLIVAN. Thank you, Mr. MacKinnon, for that very powerful testimony.

Our next witness is Austin Williams. He is the Alaska Director of Law and Policy for Trout Unlimited. Mr. Williams, the floor is yours.

STATEMENT OF AUSTIN WILLIAMS, ALASKA DIRECTOR OF LAW AND POLICY, TROUT UNLIMITED

Mr. WILLIAMS. Thank you. Chairman Sullivan, my name is Austin Williams. I'm the Alaska Director of Law and Policy for Trout Unlimited, which I will abbreviate as TU.

Thank you for the opportunity to testify and please also include the written testimony that I have provided as part of the record.

TU is the Nation's largest sportsmen organization dedicated to cold water conservation, with more than 1,000 members in Alaska. They are passionate anglers, lodge owners, fishing and hunting guides, commercial fishermen, among various other occupations. In addition to our members in more remote parts of the State, we have active chapters in Fairbanks, Anchorage, and the Mat-Su, on the Kenai Peninsula, and in Southeast. TU supports the Clean Water Act rule because it will ensure protection of critical water resources, the Nation's millions of miles of headwater streams, and Alaska's most important and productive waterways. We cannot ensure clean water in our most valuable rivers and streams without also protecting the smaller waters that feed in to them, yet recent administrative guidance following two Supreme Court cases, SWANCC in 2001 and Rapanos in 2006, has thrown decades of precedence, logic, and stability on its head.

After repeated requests from TU, along with many other sportsmen organizations, businesses, and industry groups, the Corps and the EPA have finally taken the strong step to propose a fix that will help provide clarity and consistency within the act while ensuring clean water protections for our fish and wildlife, including Alaska's iconic salmon runs.

At the heart of the agencies' proposal is what every sportsman knows: that small streams influence the health of large rivers and that clean water for small streams help grow big fish. Like many Alaskans, I first came to our great State to experience its legendary fish and wildlife and, like many more Alaskans, these qualities are why I continue to call Alaska home, and why my wife and I choose to raise our family here. My son is only 3 and my daughter is not yet 2 months old, but my hope is that they can grow up and enjoy the same great fishing and hunting opportunities available to you and me, which all depend on clean water.

Fishing isn't just part of the Alaska way of life, it's also big business. Nearly $650 million a year is spent on sport fishing in Alaska. When you factor in multiplier effects, sport fishing accounts for more than a billion dollars in economic impact to Alaska communities. Add in hunting and other wildlife-related recreation, then the total climbs to $3.4 billion each year. Alaskans also commercially harvested 157 million salmon last year worth more than half a billion dollars at the dock and the number is projected to increase this year to more than $220 million—or 220 million salmon. I'm sorry. And all of this is possible because of clean water.

Those that claim the sky is falling with regard to the cost of complying with the proposed rule or that claim that development will come to a screeching halt fail to recognize that even greater value, clean water and the fish and wildlife it supports, provides to Alaskans. And, besides, before SWANCC, when the jurisdictional reach of the Clean Water Act was even greater than what is proposed under the current rule, Alaska's population nearly doubled from 324,000 to 633,000 people, and its gross domestic product nearly doubled from $15 billion to $29 billion per year. Oil, gas, and coal production all increased several times over during the same period. Economic development and clean water protections can co-exist under this proposed rule.

In a recent statewide poll, 96 percent of Alaskans said salmon are essential to the Alaskan way of life. Eighty-nine percent said that even in tough economic times, funding for salmon conservation should be maintained. Eighty percent said that protecting the forests, tundra, and wetlands around streams is as important as protecting the streams themselves. Seventy-nine percent of Alaskans were concerned about pollution in rivers, lakes, and streams, which is on par with issues like reducing the Federal budget deficit and unemployment.

TU is a science-driven organization and in this case the science is clear: headwater streams provide essential habitat for important fish and wildlife, contribute to the water quality of larger downriver streams. Better habitat means better fishing and better fishing is good for Alaska. Thank you.

[The prepared statement of Mr. Williams follows:]

Testimony of

Austin Williams, Esq.
Alaska Director of Law and Policy for Trout Unlimited

Before the

U.S. Senate Committee on Environment and Public Works

Field Hearing: Impacts of the Proposed Waters of the United States Rule

Fairbanks, Alaska
April 8, 2015

Chairman Sullivan:

My name is Austin Williams, and I am the Alaska Director of Law and Policy for Trout Unlimited (TU)—the nation's largest coldwater conservation organization. TU is dedicated to conserving, protecting and restoring North America's trout and salmon fisheries. I thank the committee for the opportunity to testify.

Clean water, and the abundant fish and wildlife it supports, is the lifeblood of Alaska. TU has more than 1,000 members in Alaska that are passionate anglers, lodge owners, fishing and hunting guides, and commercial fishermen among various other occupations. In addition to our members in more remote parts of the state, we have active chapters in Fairbanks, Anchorage and the Mat-Su, on the Kenai Peninsula, and in Southeast. Our way of life is directly tied to healthy watersheds and clean water. As in Alaska, most of our 150,000 nationwide members love to fish, and they give back to the rivers and streams they love by dedicating more than 600,000 volunteer hours each year to conserving streams and rivers, restoring damaged and polluted watersheds, and teaching young people how to fish and care for their local waters.

TU supports the proposed Clean Water Act rule because it will ensure protection of critical water resources, the nation's millions of miles of headwater streams, and Alaska's most important and productive wetlands and waterways. Headwater streams and wetlands are some of the most important components of a watershed, and are critically important to the overall health of downstream waters. We cannot ensure clean water in our most important rivers and streams without also protecting the smaller waters that feed into them.

Since its inception, the Clean Water Act has provided valuable protection for small headwater streams and wetlands, as project developers were required to get permits before they could dredge, dam, road or discharge pollutants into these streams. This broad jurisdictional scope is

central to the Act and necessary for ensuring water quality sufficient to maintain abundant fish and wildlife.

In rejecting a proposal to narrow the scope of the Act during debate over the 1977 amendments, both sides of the aisle acknowledged that a fundamental element of the Act was its broad application. Democrat Senator Bentsen observed that the Act covered "all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies."[1] Republican Senator Baker recognized that:

> A fundamental element of the Water Act is broad jurisdiction over water for pollution control purposes . . . . It is important to understand that toxic substances threaten the aquatic environment when discharged into small streams or into major waterways. Similarly, pollutants are available to degrade water and attendant biota when discharged in marshes and swamps, both below and above the mean and ordinary high water marks . . . . The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.[2]

Numerous similar statements can be found spanning the more than 40 years that the Clean Water Act has been in existence that recognize and reaffirm the need for protections for our headwaters and wetlands.

Like all Alaskans, hunters and anglers rely on clean water. Yet, recent administrative guidance following two Supreme Court Cases, *SWANCC* in 2001 and *Rapanos* in 2006, has thrown decades of precedence, logic and stability on its head and muddied the waters. As a result, 60 percent of stream miles in the United States, which provide drinking water for more than 117 million Americans, are at increased risk of pollution and destruction.[3] The rate of wetland loss increased by 140 percent during the years immediately following the Supreme Court decision from 2004-09, which was the first documented acceleration of wetland loss since the Clean Water Act was enacted more than four decades ago during the Nixon administration.[4]

Justice Roberts and dozens of stakeholders of all kinds have asked the agencies to fix the problem and clarify the jurisdiction of the Clean Water Act. TU, along with many other sportsmen organizations, businesses and industry groups, have been requesting a rulemaking

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[1] Congressional Record, August 4, 1977, at 26711.
[2] Congressional Record, August 4, 1977, at 26718.
[3] EPA, Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral and Headwater Streams in the U.S. at 1 (July 2009), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_12_28_wetlands_science_surface_drinking_water_surface_drinking_water_study_summary.pdf.
[4] U.S. Fish & Wildlife Service, Status and Trends of Wetlands in the Conterminous United States 2004 to 2009 at 45 (Sept. 2011), available at http://www.fws.gov/wetlands/Documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-2004-to-2009.pdf.

to resolve the confusion for years. Six Congresses and multiple agency chiefs have not stepped up to clarify the law. At last, in March, 2014, the Corps and EPA took the strong step to propose a fix that will help ensure clean water for our fish and wildlife, including Alaska's iconic salmon runs.

At the heart of the agencies' clean water proposal is what every angler knows: that small streams influence the health of larger rivers, and that clean water from small streams help grow big fish. The agencies have proposed reapplying protections to intermittent and ephemeral rivers and streams, and the trout and salmon habitat they support. This proposal seeks to restore jurisdiction to important headwaters without expanding the original authority of the Clean Water Act. It seeks to provide more regulatory certainty and more timely review of permit applications by doing away with the case-by-case jurisdictional determinations on intermittent and ephemeral streams, nearly all of which are ultimately found jurisdictional. By doing away with the case-by-case jurisdictional analysis, permit applicants should be able to more quickly obtain review of the substance of their proposal without lengthy delays.

Having grown up in the Pacific Northwest, I am all too familiar with the plight of salmon and how an action in one place can have large and long-lasting consequences far downstream. Salmon populations in Idaho and Oregon, the home states of my youth, are a fraction of their historic levels. While various factors affect salmon abundance and have contributed to these declines, one thing remains constant: salmon cannot survive without clean water.

Like many Alaskans, I first came to our great state to experience its legendary fish and wildlife, and like many Alaskans these same qualities are why I continue to call Alaska home and why my wife and I choose to raise our family here. My son is only three and my daughter is not yet two months old, but my hope is for them to grow up able to enjoy the same great fishing and hunting available to you and me—all of which depends on clean water.

Fishing isn't just an enjoyable pastime, it's also big business. Hunting and fishing collectively represent a $200 billion a year economy and support 1.5 million jobs nation-wide.[5] In Alaska, nearly $650 million a year is spent on sport fishing while another $425 million a year is spent on hunting.[6] When you factor in multiplier effects for local communities, sport fishing totaled more than $1 billion in economic impact to Alaska.[7] When hunting and other wildlife-related recreation is added in, Alaska received $3.4 billion in economic impact in 2011.[8] More than 500,000 people age 16 or older sport fish in Alaska each year while 125,000 people age 16 or older hunt.[9]

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[5] U.S. Fish & Wildlife Service, 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation (Feb 2014), available at http://www.census.gov/prod/2012pubs/fhw11-nat.pdf.
[6] U.S. Fish & Wildlife Service, 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation: Alaska at 4 (Feb. 2014), available at http://www.census.gov/prod/2013pubs/fhw11-ak.pdf.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 6.

In addition to sport fishing, Alaska's commercial fisheries are the underpinnings of many Alaska communities. In 2014, commercial salmon harvest totaled 157 million fish with a dockside value of nearly $577 million.[10] For 2015, the Alaska Department of Fish and Game projects the state-wide salmon harvest to increase to more than 220 million fish.[11] That is 220 million salmon that rely on clean water and functioning headwater systems. We are fortunate in Alaska to have such abundant and strong populations of fish and wildlife that contribute so much to our local economies and, if well cared for, can sustain themselves indefinitely; however, this economic engine runs on clean water.

Alaskans' widely recognize the importance of salmon to their economic wellbeing and lifestyle. Statewide polling by The Nature Conservancy shows that Alaskans have deep concern for salmon and salmon habitat. Ninety-six percent of Alaskans said salmon are essential to the Alaskan way of life, while 89 percent of Alaskans said that even in tough economic times it is important to maintain funding for salmon conservation.[12] More than 80 percent of Alaskans said protecting the forest, tundra and wetlands around streams is as important as protecting the streams themselves.[13] Seventy nine percent of Alaskans were concerned about pollution of rivers, lakes and streams, which ranked on par with issues like reducing the federal budget deficit and unemployment.[14] Two-thirds of Alaskans eat salmon at least once a month.[15]

TU is a science-driven organization, and in this case the science is clear. Headwater streams provide essential fish habitat and improve water quality in larger streams and rivers downstream. Better habitat translates to better fishing, and better fishing is good for Alaska. That's why TU and hundreds of other sportsmen's groups are applauding the agencies' proposal to reaffirm Clean Water Act protection to thousands of miles of headwater streams.

TU knows that the rule must work for industry. We work with farmers and ranchers across the country, from vintners in California, to ranchers in Colorado, to dairy farmers in Wisconsin, West Virginia and Pennsylvania, and we want this proposed rule to work for them. The proposal does not change any of the existing rules for regular farming activities, and makes clear that puddles in irrigated fields and ponds are not regulated by the Clean Water Act. No one is interested in regulating a farmer's swale or pond. And as important as farming is, remember that fishing is an industry, too—and it's worth $48 billion per year.

The rule must work to protect jobs in Alaska's fishing industries and it must also protect the way of life for the hundreds of thousands of people who fish Alaska's waters. Very directly and personally for me, the rule must work to ensure clean water for the many headwater streams

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[10] ADFG, Run Forecasts and Harvest Projections for 2015 Alaska Salmon Fisheries and Review of the 2014 Season, Special Publication 15-04 at 3 (Mar. 2015), available at http://www.adfg.alaska.gov/FedAidPDFs/SP15-04.pdf.
[11] *Id.* at 2.
[12] The Nature Conservancy, Nature Conservancy Releases Poll Showing Broad Support for Salmon in Alaska (June 2011), available at http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/alaska/newsroom/nature-conservancy-releases-poll-showing-broad-support-for-salmon-in-alaska.xml.
[13] *Id.*
[14] *Id.*
[15] *Id.*

and wetlands that produce and sustain Alaska's iconic salmon and trout populations—both for those that earn a living from fishing, but also for those that come to enjoy Alaska's bounty. Development must be balanced effectively with the need to protect Alaska's clean waters, and we need an effective Clean Water Act to ensure that development is done in a responsible manner that doesn't put at risk our streams, rivers and lakes.

I urge Congress to allow the agencies the opportunity to clarify the jurisdictional scope of the Clean Water Act, establish the certainty and reliability that the Act dearly needs, and ensure protections for small streams that existed for the first 30 years of the Clean Water Act. Fix the foundation. Mend the safety net. Do not kick the can down the road by gutting the proposal and sending it back to the starting line.

Allow this process to play out without delaying, derailing, or significantly altering the intent of the rule. Protect headwater streams, for healthy watersheds, healthy kids, and healthy communities. Thank you for the opportunity to provide this testimony.

Senator SULLIVAN. Thank you, Mr. Williams. I appreciate the testimony.

Our next witness is Deantha Crockett. She is the executive director of the Alaska Miners Association. And, Ms. Crockett, appreciate your testimony. Thank you.

STATEMENT OF DEANTHA CROCKETT, EXECUTIVE DIRECTOR, ALASKA MINERS ASSOCIATION

Ms. CROCKETT. Thank you very much. For the record, my name is Deantha Crockett and I'm the executive director of the Alaska Miners Association. AMA is a trade association. It represents all aspects of Alaska's mining industry.

As you mentioned, this rule is massive and, I'll add, inappropriate of an expansion. The reality here has been discussed, so I'll move on.

Aside from the legality issues, AMA has spent considerable amount of time in collaboration with our partners in other States to examine the impacts of this proposed rule. We found that no matter what geographic location with the constituency reviewing the proposal, all had significant issue with the proposed rule. Yes, what effects water permitting and mining operations in Nevada is significantly different than operations here in Alaska, but therein lies the complexity of this proposal. The Clean Water Act is explicit in governing how water is managed across the Nation and, since its passage, operations have understood the requirements of the act. This proposal dramatically shifts that understanding by redefining what a water actually is. Nevada, clearly a dry, arid region, is seeing the possibility of regulation of manmade water bodies at mining operations. Alaska, with water being one of our most plentiful resources, is seeing the possibility of having to regulate stormwater and diversion ditches.

You've asked me here today to discuss impacts of this proposed rule on Alaska's miners. First, I'd like to be clear and address our previous 2008 comments that were taken out of context at your hearing on Monday. The Trustees for Alaska indicated that we asked for clarity at that time, and they are correct, but this is not it. The lack of clarity throughout this document is actually our major concern. Definitions of key terms and concepts like waters, flood plain, wetlands, subsurface connection, et cetera, are completely ambiguous. There is no room for confusion when it comes to permitting and regulating mining projects in Alaska. We depend on, and we believe the public does, too, a rigorous science-based permitting system. Without explicit definition of all technical and enforceable terms we are left with an unpredictable and confusing proposed rule. We can only assume that we will also be left with undefined terms that will be subject to interpretation by the agencies.

To be perfectly frank, we fear this provides an avenue for our Federal agencies to take a large leap into overreach and place unreasonable regulations on mining projects simply because they can. Both agencies have hosted public forums in which stakeholders have posed questions about the rules and in the forums that I've participated in, the agencies could not provide definitions or responded that the intent of the proposed rule isn't actually what

they meant in the language, et cetera, and that we should put in our comments what our concerns are and allow them to address it at that time.

One of the instances I'm thinking of here is in July, the National Mining Association hosted a meeting with Greg Peck, he's the office—head of the Office of Water in—with EPA, excuse me, that proposes this rule and we spent a lot of time talking to him and asking him for clarification on these things, in which he responded, no, that's not what we meant and be sure to put that in your comments so we can address it. And we specifically asked, those of us participating from Alaska, for a lot more information because he didn't understand. At that time, AMA in conjunction with RDC who represents all of Alaska's resource industries, as well as all of Alaska's Native corporations, sent him a letter inviting him to Alaska and offered to hold some sort of public meeting with a lot of stakeholders to bring him up to speed on how this would affect Alaska. We didn't hear back. And in August, we asked Senator Murkowski and then Senator Begich and Congressman Young and they did remind Gregory Peck of that invitation, still never heard back and did not get any engagement from him.

So I bring that up because you asked the previous testifiers if it would have helped, and I think it would have helped EPA to consult with Alaskans and come see for themselves what they're proposing to do.

You, in talking with Senator Bishop and Mayor Brower, touched on this, but EPA didn't consult with the State on this proposed rule, nor did they consider a consult with the Alaska Native landowners. The Native landowners were granted 44 million acres of land that Congress intended to be a partial settlement of outstanding Native claims. The new definitions will undoubtedly have the direct result of significantly undermining the intent of Congress for these acres to be available for responsible resource development, including minerals, now owned in fee title by the corporations established by the Alaska Native Claims Settlement Act.

Furthermore, the rule encroaches on traditional power of the States to regulate land and water within our borders. It's just as vital to ensure that States' rights are not being violated. It's statutorily mandated and affirmed by our legal system that regulation of Interior waters is a quintessential State function.

Categorizing many new features as waters of the U.S. and determining that all adjacent features also qualify will consequently subject nearly every parcel of land to jurisdiction under the act. In Alaska, 175 million acres are classified as wetlands, thus 45 percent of our land base. We're the only State in the union with extensive permafrost and our coastline and tidally influenced waters exceed that of the rest of the Nation combined. Any regulation or rule addressing wetland and coastal environments will have a potentially greater effect in Alaska than anywhere else in the Nation, particularly if ill-conceived. The combination of these Alaska-specific issues and those that all stakeholders must manage means Alaska's miners have an enormous burden at stake.

AMA has recommended that the agencies table this proposed rule and engage in meaningful dialog with the regulated community and with the States about more appropriate and clear changes

to existing regulations. Only then should agencies replace the proposed rule with one that reflects those consultations and is supported by science and case law. Doing so will ensure responsible, legally defensible rulemaking that captures the intent of Congress and the Supreme Court and does not place unnecessary burdens on Americans.

Thank you, Senator Sullivan.

[The prepared statement of Ms. Crockett follows:]

ALASKA MINERS
ASSOCIATION

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Testimony of Deantha Crockett, Executive Director
Alaska Miners Association
April 7, 2015 Field Hearing
Senate Committee on Environment and Public Works; Subcommittee of Fisheries, Water, and Wildlife
"Impacts of the Proposed Waters of the United States Rule on State and Local Governments and Stakeholders"

Thank you for the opportunity to testify at this field hearing on the proposed rule to redefine 'Waters of the United States" under the Clean Water Act, being undertaken by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps).

AMA is a non-profit membership organization established in 1939 to represent the mining industry in Alaska. We are composed of more than 1,800 individuals and companies that come from seven geographically diverse statewide branches: Anchorage, Denali, Fairbanks, Juneau, Kenai, Ketchikan/Prince of Wales, and Nome. Our members include individual prospectors, geologists, engineers, vendors, suction dredge miners, small family mines, junior mining companies, and major mining companies. AMA works closely with the Federal and State agencies in Alaska to assure that the resources of Alaska can be developed in an economic and environmentally manner. We look for and produce gold, silver, platinum, molybdenum, lead, zinc, copper, coal, limestone, sand and gravel, crushed stone, armor rock, and other materials. These members are engaged in mineral development critical to the economies of local Alaskan communities, the State of Alaska, the United States of America, and the world.

AMA spent several months reviewing the Waters of the United States (WOTUS) proposed rule. The fact is, EPA and the Corps proposed a rule that radically redefines Waters of the U.S., under any program regulated by the Clean Water Act. This redefinition broadens the scope the Act's jurisdiction much further than what has been set in statute by Congress and recognized by the United States Supreme Court. The legality of this is questionable at best, and likely to result in intervention by the legislative and judicial branches - at least we certainly hope so. The Clean Water Act was explicitly limited to Waters of the United States as they had been historically designated - expanding jurisdiction by regulatory fiat beyond the limits of the Act as determined by the legislative and judicial branches is simply unlawful.

The proposed rule ignores decisions set out in the *Rapanos v United States* Supreme Court case, in which Justice Kennedy outlined a "significant nexus" standard. The legal proceedings that have taken place regarding the Clean Water Act are the very reason the agencies cite for the need to redefine Waters of the U.S. If that indeed is the case, then the outcomes of the cases need to be implanted into this proposed rule. Instead, tenuous but sweeping connections are made from "adjacent" water features to any navigable water, ensuring that waters clearly not intended for regulation by the Clean Water Act now qualify for jurisdictional determination. This is in direct conflict with Justice Kennedy's opinion. It would also be useful for the agencies to actually address the issue of significant nexus in a meaningful way by providing field-usable standards determining the difference between significant connections and mere connections. That EPA published this proposed rule in advance of the science being conducted to support the rule change being finalized is appalling.

The EPA and Corps argument that future "uncertainty" will be avoided, and the states and public be spared tedious case-by-case determination by widening the definition of waters of the U.S. is certainly true, but disingenuous. All certainty and discussion would be avoided by redefining every drop of surface water in the United States as "jurisdictional," but that is hardly the intent of the *Rapanos* decision.

Aside from legality issues, AMA spent considerable time in collaboration with our partners in other states to examine the impacts of this proposed rule. We found that no matter what the geographic location with a constituency reviewing the proposal, all had significant issue with the proposed rule. Yes, what affects water permitting at mining operations in Nevada is significantly different than at operations in Alaska. But, therein lies the complexity of this proposal: the Clean Water Act is explicit on governing how water is managed across the nation, and since its passage, operations have understood the requirements the Act places on that management. This proposal dramatically shifts that understanding by redefining what a "water" actually is. Nevada, clearly a dry, arid region, is seeing the possibility of regulation of man-made water bodies included in mine design. Alaska, with water being one of our most plentiful resources, is seeing the possibility of having to regulate stormwater and diversion ditches.

You have asked me here today to discuss the impacts of this proposed rule on stakeholders. Our major concern is the lack of clarity throughout the document. Definitions of numerous key terms and concepts, like waters, floodplain, wetlands, subsurface connection, etc. are ambiguous and unclear. There is no room for confusion when it comes to permitting and regulating mining projects in Alaska. We depend on, and believe the public does too, a rigorous, science-based permitting system. Without explicit definition of all technical and enforceable terms, we are left with an unpredictable and confusing proposed rule. We can only assume that we will also be left with undefined terms that will be subject to interpretation by the agencies. To be perfectly frank, we fear this provides an avenue for our federal agencies to take a large leap into overreach, and place unreasonable regulations on mining projects simply because they can.

Both agencies have hosted many public forums in which stakeholders have posed questions about the rule, and in many cases, the agencies could not provide definitions, or responded that the intent of the proposed rule is not captured in its language. The agencies must publish, communicate, and implement clear definitions of every single element within the proposed rule.

By its terms (or lack thereof), the proposed rule expands jurisdiction to waters, except decorative ponds, not previously regulated under the Clean Water Act, such as drainages, ditches, floodplain areas, industrial ponds, and more. These are not intended to be covered under the Act. Doing so will result in fundamental changes to many programs already being implemented under the Act, and we stand concerned that the agencies have not adequately considered the implications of doing so.

Also troubling to AMA is that two Federal agencies involved have not consulted with their state partners on this proposed rule. Likewise, the proposed definition has not considered, no consulted with the Alaska Native land owners in Alaska who have been granted 44 million acres of land that Congress intended to be a partial settlement of outstanding Native claims. It is our strong opinion that the new definitions will have the direct result of significantly undermining the intent of Congress for these 44 million acres be available for responsible resource development, including minerals, now owned in fee title by the Alaska Native Corporations established by the Alaska Native Claims Settlement Act. Furthermore, the rule encroaches on the traditional power of the states to regulate land and water within their borders. Coordination and consistency are crucial for any proposed rule defining waters of the U.S., and it is just as vital to ensure states' rights are not being violated. It is statutorily mandated, and affirmed by our legal system, that regulation of interior waters is a quintessential state function.

In the proposed rule, the agencies imply that states lack mechanisms and regulation to protect aquatic resources. In fact, the State of Alaska has a regulatory framework that meets or exceeds all federal water quality standards and a legal framework to support those standards.

Finally, the proposed rule structure of jurisdiction, and the associated definitions, will have negative impacts to Alaska's miners and to virtually any other economic development project. Categorizing many new water features as "waters of the U.S." and determining that all adjacent features also qualify would consequently subject nearly every parcel of land to jurisdiction under the Act. In Alaska, 175 million acres are classified as wetlands; this constitutes 45% of the land base. Alaska is the only state in the Union with extensive permafrost and Alaska's coastline and tidally influenced waters exceed that of the rest of the nation combined. Thus any regulation or rule changed addressing wetland and coastal environments will have a potentially greater effect in Alaska than anywhere else in the nation, particularly if ill conceived. The combination of these Alaska-specific issues and those that all stakeholders must manage, and Alaska's miners have an enormous burden at

stake. Obscure and poorly defined changes and significant expansion of the Clean Water Act jurisdiction could result in conflict with other Federal regulations, such as 43 C.F.R. 3809 reclamation regulations, and will undoubtedly result in significant delay and additional cost burden in permitting.

If the agencies aim to develop a meaningful, balanced, and supportable rule, they must take a more precise and methodical approach, one that is supported by science, informed by a robust understanding of the State and local laws that address water issues, and is true to Congress' intent and Supreme Court precedent. The Alaska Miners Association has recommended that the agencies table this proposed rule and engage in meaningful dialogue with the regulated community and with the states about more appropriate and clear changes to existing regulations. Only then should the agencies replace the proposed rule with one that reflects those consultations and is supported by science and case law. Doing so will ensure responsible, legally defensible rulemaking that captures the intent of Congress and the Supreme Court, and does not place unnecessary burden on Americans.

Thank you for the opportunity to comment on this important issue.

Senator SULLIVAN. Thank you, Ms. Crockett.

Our final witness today before we have some Q and A is Shannon Carroll. He is an attorney and a commercial fisherman. Mr. Carroll.

STATEMENT OF SHANNON CARROLL, ATTORNEY AND COMMERCIAL FISHERMAN

Mr. CARROLL. Thank you. My name is Shannon Carroll. I'm a commercial fisherman and a solo practitioner attorney. I thank the committee for the opportunity to testify today.

My comments and support for the proposed regulations are based on my experience working in the commercial fishing industries in Alaska, Washington, and Maine. And as someone who has fished elsewhere in the Country, I am proud to live and work in a State that takes the health of its fisheries so seriously. I also want to thank you, Senator Sullivan, for supporting our industry during your time in office thus far.

In 1977, Congress re-examined the necessity of wetland protections within Section 404 of the Clean Water Act. Then, as now, commercial fisherman vocalized their support for the provision, coining the phrase "no wetlands, no seafood." I mention this phrase now because in the case of Alaska, it cannot be more apropos. With over 43 percent of our State covered in wetlands, it is not surprising that 76 percent of our State's seafood harvest comes from wetland-dependent fisheries each year. In addition to the State's iconic salmon fisheries, wetlands are also critical to other keystone fisheries such as halibut, pollack, herring, and crab.

I support the proposed rule because it clarifies protections to waters upon which these fisheries rely, all while reserving existing exemptions for farmers, ranchers, and foresters.

In addition to promoting the health of our fisheries, the proposed rule further protects the brand of Alaskan seafood. As the Alaska Seafood Marketing Institute noted, the perception of Alaskan stewardship is an immeasurable but important component of both the seafood and visitor industries. Millions of people eat Alaskan seafood for the same reason that over 1 million visitors travel to the State each year, because they value Alaska's pristine environment. By categorically including wetlands, the proposed rule ensures that Alaska's seafood sterling reputation will continue into the future.

My support of healthy fisheries is not entirely out of self-interest. Fishing means business and it means jobs in Alaska. As Alaska's third largest industry, recent figures place the combined value of Alaska seafood exports and domestic sales at $6.4 billion and when secondary economic output is included, the Alaska fishing industry accounts for $15.7 billion in economic production. That's over 94,000 jobs that are directly tied to the commercial fishing industry and an estimated $6.4 billion in labor wages. And, importantly, most of these jobs stay in Alaska, with nearly one in eight Alaskan workers earning at least a portion of their income directly from the fishing industry.

Fishing is also the backbone of Alaska's coastal communities employing 50 percent of private sector workers in coastal towns. And perhaps equally important in places like Kodiak, Petersburg, Dillingham, Cordova, commercial fishing is not just the engine that

drives the local economy, it's a means of opportunity and a means of mobility. These are good jobs that can provide high school-age kids with the opportunity to pay for college, a down payment on a boat or a permit. These are jobs that bestow self-worth amongst those in the industry and further a tradition that one is proud to pass down to the next generation. Most importantly, however, these are jobs that are built on the back of a sustainable resource, meaning that these jobs can, with proper management and self-restraint, support local communities for generations to come.

And there will, no doubt, be costs associated with the proposed rule, but it seems equitable that these costs at least be initially borne by those seeking to benefit from the proposed development. And just as before SWANCC and Rapanos, development and resource extraction will continue to occur and the economy will continue to grow. I will also add that having commercial fished in Washington and Maine, two States that previously held some of the world's largest salmon runs, that there are much greater costs associated with the restoration of a crippled fishery than there are with development fees and mitigation banks. To give you an example, Washington State has invested more than $1 billion in public funds to its hatchery program and continues to spend $60 million a year with little effect on its dwindling salmon fishery.

So, in closing, I urge Senator Sullivan and the members of this committee to consider the wide-reaching and economic and cultural benefits that this proposed rule will have for the State. Thank you.

[The prepared statement of Mr. Carroll follows:]

TESTIMONY OF
SHANNON CARROLL
COMMERCIAL FISHERMAN

BEFORE THE UNITED STATES SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

SUBCOMMITTEE ON FISHERIES, WILDLIFE AND WATER

FIELD HEARING: *IMPACTS OF THE PROPOSED WATERS OF THE UNITED STATES RULE ON STATE AND LOCAL GOVERNMENTS AND STAKEHOLDERS*

Fairbanks, Alaska

April 8, 2015

My name is Shannon Carroll, and I am a commercial fishermen and solo practitioner attorney. I thank the committee for the opportunity to testify. My comments and support for the proposed regulations are based on my experience working in the commercial fishing industries in Alaska, Washington, and Maine. As someone who has fished elsewhere in the country, I am proud to live and work in a state that takes the health of the commercial fishing industry so seriously. I also want to thank you, Senator Sullivan, for supporting the industry during your time in office thus far.

I support this rule because clean water and healthy wetlands are essential to a vital commercial fishing industry.

In 1977, Congress reexamined the necessity of wetland protections within section 404 of the Clean Water Act. Then, as now, commercial fishermen vocalized their support for the provision, coining the phrase "No wetlands, no seafood." I mention this phrase because, in the case of Alaska, it could not be more apropos: with over forty-three percent of our state covered in wetlands, it is not surprising that seventy-six percent of the state's seafood harvest comes from inshore, wetlands dependent fisheries each year.[1] In addition to the state's iconic salmon fisheries, wetlands are also critical to other keystone fisheries, such as halibut, pollock, herring, and crab. I support the proposed rule because it clarifies protections to waters upon which these fisheries rely, all while preserving existing exemptions for farmers, ranchers, and foresters that encourage responsible stewardship of land and water resources.

In addition to promoting the health of our fisheries, the proposed rule further protects the brand of Alaskan seafood. As the Alaska Seafood Marketing Institute noted, "[t]he perception of Alaskan stewardship is an immeasurable but important component to the seafood and visitor industries. Millions of people eat Alaska seafood for the same reason more than one million visitors travel to the state each year—because they value Alaska's

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[1] CLEAN WATER NETWORK, FISHERIES, WETLANDS AND JOBS: THE VALUE OF WETLANDS TO AMERICA'S FISHERIES 3 (1998), *available at* http://www.pcffa.org/wetlands.pdf.

pristine environment."[2] By categorically including wetlands, the proposed rule ensures that Alaskan seafood's sterling reputation will continue into the future.

Alaska benefits from a vital commercial fishing industry.

My support of healthy fisheries, and therefore the proposed rule, is not entirely out of self-interest. Fishing means business and jobs in Alaska. As Alaska's third largest industry, recent figures place the combined annual value of Alaskan seafood exports and domestic sales at $6.4 billion.[3] When secondary economic output is included, the Alaskan fishing industry accounts for $15.7 billion in economic production.[4] That equals over 94,000 jobs directly tied to the industry and an estimated $6.4 billion in labor income.[5] Importantly, most of these jobs stay in Alaska, with nearly one-in-eight workers in Alaska earning at least part of their income directly from the fishing industry.[6]

Fishing is also the backbone of Alaska's costal communities, employing than fifty percent of private sector workers in coastal towns.[7] Perhaps equally important, in places like Kodiak, Petersburg, Dillingham, and Cordova, commercial fishing is not just the engine that drives the local economy; it is a means of opportunity and mobility. These are good jobs that can provide high school-age kids with enough income to pay for college or for a down payment on a boat or a permit. These are jobs that bestow self-worth amongst those in the industry and further a tradition one is proud to pass down to the next generation. Most importantly, however, these are jobs that are built on the back of a sustainable resource, meaning that these jobs can—with proper management and self-restraint—support local communities for generations to come.

There will, no doubt, be costs associated with the proposed rule. But, it seems equitable that these costs be initially borne by those seeking to benefit from a proposed development. And, just as before *SWANCC* and *Rapanos*, development and resource extraction will continue to occur and the economy will continue to grow. I will also add that, having commercial fished in Washington and Maine, two states that formally had some of the world's largest salmon runs, I can personally attest to the fact that there are much greater costs associated with the restoration of a damaged watershed and crippled fishery than there are with development fees and mitigation banks. Washington State, for example, has invested more than $1 billion of public funds into its hatchery program, spending more than $60 million dollars a year.[8]

Finally, as a commercial fisherman, I understand concerns regarding undue regulatory burden and government overreach. However, I also understand that sometimes rules

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[2] ALASKA SEAFOOD MKTG. INST., ECONOMIC VALUE OF THE ALASKA SEAFOOD INDUSTRY 24 (2013), *available at* http://pressroom.alaskaseafood.org/wp-content/uploads/2013/08/AK-Seafood-Impact-Report.pdf.
[3] *Id.* at 1.
[4] *Id.*
[5] *Id.* at 57.
[6] *Id.* at 14.
[7] RES. DEV. COUNCIL, *Alaska's Fishing Industry*, http://www.akrdc.org/issues/fisheries/overview.html.
[8] WASH. DEPT. OF FISH & GAME, *Hatcheries*, http://wdfw.wa.gov/hatcheries/overview.html.

serve a purpose, particularly when they are based on common sense and sound science as I perceive to be the case here. The proposed rule also serves to provide clarity to potentially affected parties, which in turn will promote fairness and efficiency in application by the relevant agencies.

In closing, I urge the Senator Sullivan and members of the Committee to consider wide reaching economic and cultural benefits that this proposed rule will have for the State. Thank you for the opportunity to testify.

Senator SULLIVAN. Thank you, Mr. Carroll, and thank you for reminding us of the importance of the fishery—fishing communities and industry to our State. You're spot-on with regard to those comments.

We have about 20, 25 minutes until the hearing is supposed to adjourn and what I thought we would do is conduct some questions, follow up questions. And the way I like to do this is start with a question maybe of a certain witness, but I want to encourage everybody who wants to weigh in on any question to just be recognized. And certainly all of you can feel free to weigh in on any of the questions that are posed, even if they're initially posed for certain members of the panel.

I guess I'll start. And, Ms. Taylor, you, as I mentioned were very eloquent in terms of some of the things that you laid out with regard to the views that some of our Lower 48 citizens have with regard to Alaska. But, importantly, and there's a lot of lawyers on the panel, so feel free to weigh in, it's important to remind people what the Clean Water Act tried to do with regard to States' abilities to keep their waters clean.

So Section 101(b) of the Clean Water Act clearly states, "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, to plan the development and use in restoration, preservation, and enhancement of land and water resources, and to consult with the EPA administrator in the exercise of his authority under this chapter." His or her authority.

Do you think that the EPA is abiding by this directive of Congress under the Clean Water Act as making sure that the policy of the Congress is to protect, preserve, and recognize the primary responsibility of States and other entities to protect their waters? I'll start with you, Ms. Taylor, and then anyone else who wants to jump in on that issue. This is the law. This is the law.

Ms. TAYLOR. No, absolutely not. Not legally or even kind of holistically. If you look at this rule, it presumes that where Federal jurisdiction ends, complete and utter lawlessness exists thereafter, which is incredibly disrespectful to the States' management obligations and traditional and primary powers, and authorities to manage and protect its waters. But even on a legal basis, if you look at other parts of the Clean Water Act, like the—it gives the States regulatory responsibilities, significant regulatory responsibilities, and it gives opportunities to assume primacy over certain permitting aspects for discharge, for dredge and fill. But the primacy aspect exists, you know, where it's not waters of the U.S. I'm generalizing, but where the Federal Government has jurisdiction, it kind of keeps it, and then the States kind of get a little primacy, you know, left—it's very complicated. Sorry. But the whole aspect of primacy would mean nothing if there's nothing left.

So the Clean Water Act has created the system where States can assume primacy, but we would be paying millions of dollars to manage like a million acres. You know, so it wouldn't—it would read all of those provisions completely out of the law to assume that this regulation can go forward as written.

Senator SULLIVAN. Any other comments on that initial primacy directive from Congress to the EPA with regard to the States' primacy—primary responsibilities on these issues? Sir.

Mr. WRIGLEY. Yes. All the States have incentives to encourage and improve their water resources and water—and there are a lot of water success stories that are, in fact, featured on EPA's website. Those success stories came about without the heavy hand of EPA regulating and permitting. The success stories were due to voluntary conservation efforts under the existing definitions of the Clean Water Act. The presumption here is that without—and I agree with Sara. The presumption is that without this rule going forward, we are—in fact, do not have any Clean Water Act in place. And in reality, what we have is a Clean Water Act that is functioning and still allows the States to assert primacy, to control and to manage those waters within their jurisdiction.

Senator SULLIVAN. Let me ask another question with regard to the hearing today, the first panel, this panel, and the hearing we held 2 days ago in Anchorage. Two themes come out, I believe, and I believe that even though there's differing opinions, obviously from the witnesses here on their support or lack thereof of this rule, that there was agreement in Anchorage on two key issues. One is that Alaska, under this rule, given our size, given the huge amount of wetlands, given the huge amount of clean water that we have is uniquely impacted by this rule.

Is there general agreement among the witnesses on that issue? Say, we had a witness that mentioned some category, I think even a State park in our State, the Wood-Tikchik, which is larger than certainly Rhode Island and some other States. It's important for my fellow Senators in the Lower 48 to recognize this. But is there a general agreement among the witnesses here that we are uniquely impacted one way or the other with regard to this rule for all the reasons that have been discussed by the witnesses today? I see everybody's head nodding. Sue, is your head nodding?

Ms. MAUGER. I guess it's just a choice of words. We're impacted, but we're also protected.

Senator SULLIVAN. OK. And then I do want to get into the issue of consultation. This process, I believe, has been flawed, has been very rushed. I have raised this with the EPA administrator. The issue of getting the Connectivity Report that the rule is based upon out after the rule is promulgated is beyond bizarre in terms of a process that's supposed to work well.

Were any of your organizations or your members—do you think you had the proper consultation with the EPA? And, you know, Ms. Crockett, you mentioned how hard you worked to try to get an EPA administrator up here to try and understand Alaska. Do you think that the consultation that is required by the EPA and the whole host of Federal statutes and regulations was undertaken in a way that was sufficient, particularly to allow Alaskans to give their voice to what is going to be possibly a rule that can have enormous impact on our State?

Ms. CROCKETT. Absolutely not.

Senator SULLIVAN. Yes, Mr. Williams.

Mr. WILLIAMS. Senator, if I may, TU has participated throughout the public processes through development of this proposed rule,

and we had no special treatment beyond what any other member of the public had. But we found the EPA's procedures to be typical with what would be expected of a rulemaking process and felt that the opportunity to participate was adequate for our purposes and believe that the rule should go forward as currently proposed.

Senator SULLIVAN. OK. Let me turn to the impact on small entities. I read the rule. I read the SBA's—Obama administration's SBA's concerns. President Wrigley, Ms. Crockett, Mr. McKinnon, a lot of your members represent not huge organizations, but placer miners, small farmers, small contractors. Could you describe what you think is the impact on particularly small businesses, small farmers that I think is so often overlooked as really the backbone of our economy here in Alaska and throughout the Country.

Ms. CROCKETT. I'll go first. Thank you, Senator Sullivan. As you mentioned, I'm the representative on the panel here that represents placer miners and I can tell you that my very small placer mining operations that I represent, they're very scared. I do want to point out, at the end of 2014, AMA published a research survey we did with the McDowell Group here in Alaska to figure out what the economic impact of placer mining in the State of Alaska is. And we found out, and what we term it is, is that it's our seventh large mine in Alaska, meaning with all of the placer mines in Alaska, the job numbers, the economic procurement numbers, the revenues to local, State, and Federal Governments, is as much as one large operating mine, yet these are really small projects and very small parcels of acreage with real small amounts of employees.

I bring this up because a proposal like the waters of the U.S. proposal, these guys have been operating on their land, many of them, for three or four decades and they understand it better than nobody else, and they understand their permits and they understand specifically what every piece of land on their property—what permits go about it and how to work it and how to manage it in responsibility to the environment. So when a change like this comes along and they have a water body that for—whether it's the intent of the EPA or not the intent of the EPA, because this rule is so confusing, may become jurisdictional. Now they're entering into the realm of what Mr. MacKinnon described to you as wetlands mitigation. So now they have a body of water that they could be required to pay, like Mr. MacKinnon said, it used to be $11,000 an acre, now it could be up to $55,000 an acre for a very small placer mining operation in which very often is one or two, almost always no more than ten employees. Fifty-five thousand dollars an acre for a small business like that will absolutely put them out of business.

I don't think it's fair to say that we are claiming the sky is falling. The sky will fall for an operation like that if they have to start paying amounts on that, on a body of water on their property that they've been managing and treating and doing the right way for several decades.

Senator SULLIVAN. Thank you. Mr. MacKinnon.

Mr. MACKINNON. Senator Sullivan, I'll touch a little bit more on the mitigation aspect of it. You know, it goes by a number of different terms. Formally, it is mitigation and the fees can be quite onerous, relative to the size of the project. Mitigation dollars are intended to be spent to restore or enhanced damaged or impacted

wetlands within the same region, preferably watershed of where the proposed wetlands would be impacted. And it's very difficult to do in Alaska because we have such vast undeveloped acreage. When you want to develop in one particular area, there may be nothing nearby to mitigate. We've got situations right now that I've been told about where projects that are desired to go forward, going through the permitting process cannot find mitigation projects in order to offset. So we've got stalled projects, according to the rule.

This guidance—you know, we've got a difference of opinion. Some say it isn't an expansion and some say it is. I think, unfortunately, time will only tell as the expansion of the Clean Water Act has happened. You know, we're adding more acreage in there to potentially be mitigated and we're potentially shutting down a tremendous amount of development, of resource extraction, of jobs, of future. And I know Austin, to the left of me, wants his son to grow up here and enjoy the fish and game and I think everyone does want their children to grow up and have a good employment, fish and game, and the great outdoors, and no one wants to ruin that, but unless we have an economy to build upon, that's not going to happen.

Senator SULLIVAN. And who makes the—you talked about the increase in the mitigation per acreage from—what did you say, $10,000 to about——

Mr. MACKINNON. Ten thousand—again, it depends on the value of the wetlands.

Senator SULLIVAN. Right.

Mr. MACKINNON. There are high-value wetlands, lower-value wetlands, but there is a sum attached to each one of those. That comes from the Corps of Engineers through consultation.

Senator SULLIVAN. And they just do that—I mean, I've seen the numbers grow. They're just making—they just have the discretion to say, heh, here it's 10,000, over here it's going to be 100,000. Good luck. I mean, is that what happens?

Mr. MACKINNON. You know, they're the permitting agency. You don't have much opportunity or leg to stand on and argue against them. If they say the mitigation fee is $55,000 an acre, it's either pay up if you want to construct or go away.

Senator SULLIVAN. Just from my perspective, I think that's something that needs a lot more congressional oversight because in my experience in Alaska, it seems completely random and prohibitive in terms of some of the value that they've put on some of these projects that essentially make them uneconomic.

Mr. Wrigley, do you want to comment at all with regard to the cost to the small farmer? I know that the National Farm Bureau, in addition to the Alaska Farm Bureau, is very concerned about this rule.

Mr. WRIGLEY. Yes, thank you. Yes, I think of my operation. I've got a—and for the other members of your committee that probably have never been outside a city, I have a field that's 2 miles long, about a quarter-mile wide, so basically the size of the Washington Mall. So if you can picture that. Now, this field is not flat. It's got low undulating terrain that bisects that field on a diagonal. So every—you've got high spots and then you've got low spots, and then high spots and low spots.

During the wintertime, it obviously gets cold here, the ground freezes, and then when summertime comes or springtime comes, then the snow melts and it runs to the low spots. So the top, the high ground is free of snow and thaws out while the bottom ground is covered with snow and then ice and water and until that frost goes out of the ground, that area is wet. Now, because the ground is not flat, then this water that has melted and accumulated in these low spots, drifts toward the downstream side.

Two weeks later it's completely dry. I can farm it up and down, up and down, up and down. According to this rule, those low spots, and there's half a dozen of them in this field, I could not farm those low spots even though they're dry, I could not farm through those low spots unless I had a dredge and fill permit because, while we talk about the exemptions to agriculture that are within the Clean Water Act, in order to apply those exemptions, you have to have been farming that area continuously since 1977. Now, that area was cleared for agriculture in 1979 and 1980 and 1981, and so none of that area is even eligible for it. And the new ground that gets broken would also require a dredge and fill permit.

So what is the cost of those permits? If you make a mistake and don't get the right permit, then it's $37,500 a day. A day. And so how can a small farmer or small business afford those kinds of things? There's no way. And so what you're going to have is large, large corporations who can afford to hire somebody and chase these permits and make sure that the reporting is done, because getting the permit is only part of the process; you still have to report on it. And so the permitting and chasing these permits and reporting on that can be done by somebody who can do this for a large corporation because he can afford to do that. And that's going to result in—98 percent of our farmers in America are still family farms. That's going to completely change the dynamics of those numbers.

So I think that it's very clear that—again, I—and I state again, this rule has nothing to do with the Clean Water Act. The Clean Water Act is in place. We're not debating whether to drop it or throw it out or anything like that. We're just talking about Federal overreach because we're not just talking about the waters that EPA controls, we're talking about the land underneath those waters.

And so my field becomes land underneath those waters. Even though there's no water on it, that comes under the jurisdiction of the EPA now, or Army Corps.

Senator SULLIVAN. And we know that if that were the case, it would take some time just to be able to apply for and get the permits.

Mr. WRIGLEY. Yes, and there is no schedule as far as how long they can take to get those permits. You apply for a permit. What if you had—suddenly had a grasshopper infestation and now you need to apply a pesticide to kill the grasshoppers before they destroy your crop? How long does that take to get that permit? Because over a wetland you would not only need dredge and fill permits to do normal farming activities, put a fence in, pull weeds, all of this stuff is required for dredge and fill permits, but now you need a discharge permit to be able to kill the grasshoppers. And how long is that going to take? Your crop is gone before you can get that permit process through.

Senator SULLIVAN. Let me follow up on a—oh, go ahead, Mr. Carroll.

Mr. CARROLL. I just want to add since we're talking about small businesses that I think it's important for the record to note that every fishing vessel is quite literally a small business.

Senator SULLIVAN. I couldn't agree more.

Mr. CARROLL. They're all LLCs. And, you know, mitigation serves a purpose and while I can't speak to the difficulty of obtaining mitigation land in this State, I will say that fishermen will suffer if wetlands are not covered under this protection, and they will go out of business. I've seen it other States where I've lived. Those coastal communities shut down and people from out of State move in and those coastal communities change a lot in character.

So these are small businesses that are adversely affected by, you know, an effort to repeal this proposed rule.

Senator SULLIVAN. Well, trust me, there is an EPA reg right now that I'm trying to get excepted permanently. You're probably quite aware of it—we're making some good progress—that is directly impacting small businesses in the form of our fishermen, which is the discharge permit required for decks. Literally, hosing off the fish guts off your vessel after you're fishing.

Mr. CARROLL. Right.

Senator SULLIVAN. Lunacy, in my view, that's killing our small fishermen.

Mr. CARROLL. Yes, and I——

Senator SULLIVAN. And, by the way, we're making very good progress on getting rid of that one hopefully forever. So I certainly—you make a very good point. Our fishermen and women are classic—the definition of small businesses. They take risks, they create a great product, which is Alaska seafood, and they often pass on their businesses to their kids and grandkids. In my experience, they're impacted by EPA regulations in a negative way almost more than anybody, even our miners. So I certainly recognize that. It's a good point.

Let me just ask an issue that's related that I—it's actually one of the critical issues. We have a lot of lawyers on the panel. There's a big debate here. Is this an expansion of the EPA's jurisdiction under the Clean Water Act or not? If it is, if it's a major expansion, it is clear, it is clear, it's abundantly clear that the power to dramatically expand the jurisdiction of the Clean Water Act does not reside with the EPA. It resides with the Congress of the United States.

I was, as Alaska's attorney general, part of a lawsuit that went to the Supreme Court last year. It was a similar case in many ways. It was the EPA's rulemaking under the Clean Air Act, and they had promulgated a rule that would have negatively impacted the State of Alaska dramatically under the Clean Air Act and the Supreme Court reprimanded the EPA and essentially said, if you don't have—if you're expanding the jurisdiction of the Clean Air Act, you have to go to Congress to get permission to do that. You can't do that through a rulemaking. And they had some very strong language with regard to the EPA's overreach, saying it's a violation of the separation of powers.

So let me get to that issue. It's the critical issue. Right now the EPA is saying, no, no, no, this is not an expansion; this is a limitation, this is a clarification. And yet I think some of the testimony here believes that this is a massive expansion of the jurisdiction of the Clean Water Act.

Mr. Wrigley, your testimony just now in terms of what it would do to a family farm in Alaska certainly is powerful evidence that this is an expansion. Would anyone like to comment one way or the other? If it is an expansion, they have to go to Congress to get that permission, period. Which is why I think the administrator of the EPA is kind of playing a little bit footloose and fancy free with her depiction of what this rule would do by saying, no, it's a clarification, it's a limitation on us. I personally don't believe that, but I'd like any of the witnesses to opine either with regard to whether they see this as an expansion or—that's the critical issue that we're looking at. Mr. Williams. Oh, I'm sorry, Ms. Taylor, go ahead.

Ms. TAYLOR. I'm going to say that it's such an expansion if you look at what would be jurisdictional under the rule that I don't even think Congress could authorize the extent of that jurisdiction if they asked.

Senator SULLIVAN. Meaning it would violate the Constitution?

Ms. TAYLOR. That's correct. Yes.

Senator SULLIVAN. So you think it's not only within the realm of the EPA's because they're a—remember, they're a Federal agency that has to get its authority from Congress. You think it would be beyond the power of Congress even to expand it this far? What would—that would violate——

Ms. TAYLOR. That would violate the commerce clause of the U.S. Constitution. It would be too attenuated from a connection to interstate commerce because you'd be regulating very solely intrastate things that are under the sovereign power of the States.

Senator SULLIVAN. Thank you. Anyone else? Mr. Wrigley. Mr. Williams.

Mr. WILLIAMS. Yes, Mr. Chairman. I do not believe that the proposed rule is an expansion of jurisdictional reach of the Clean Water Act. In fact, as the Congressional Research Service report on the proposed rule shows, the proposed rule would bring into its scope 3 percent more area than the 2008 guidance. But as compared to the reach of the Clean Water Act prior to the Supreme Court cases in 2001 and 2006, the proposed rule would affect 5 percent less wetlands than were originally under jurisdiction of the Clean Water Act.

And I think it's important to also look at some of the Congressional Record that we have relating to when the Clean Water Act was initially passed and when the amendments of 1977 were considered. In particular—and I highlighted and referenced these in my written testimony, but if I may I'd like to read a short quote from Republican Senator Baker from the 1977 deliberations. "A fundamental element of the water act is broad jurisdiction over water for pollution control purposes. It is important to understand that toxic substances threaten the aquatic environment when discharged into small streams or into major waterways. Similarly, pollutants are available to degrade water and attendant biota when discharged into marshes and swamps, both below and above the

mean and ordinary high water marks. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource."

And I think it's also, when we're looking at this, important to remember that in the Rapanos decision, Justice Kennedy was very careful to describe the significant nexus requirement that bounds the EPA's and the Corps' jurisdictional reach on Clean Water Act issues, and to recognize that under the 2008 guidance, on a case by case basis, the Corps and the EPA applied the significant nexus test. What's new about the proposed rule is that there is clarity to the significant nexus test.

We no longer will have to go through the case by case determination for waters that have always been under Clean Water Act jurisdiction and now we only will have to mess with the complication of a case by case jurisdictional determination for those waters—the other waters category.

And so this is not an expansion of jurisdiction and, in fact, it's compared to application of the Clean Water Act prior to SWANCC and Rapanos; it's restricted by 5 percent.

Senator SULLIVAN. OK. I appreciate that. I just think for the record, the Rapanos/Kennedy opinion was a concurring opinion, so there's not a five justice majority on that test. And also for the record, the Congressional Research Service report that you cite states, "Changes proposed in the proposed rule would increase the assertive geographic scope of Clean Water Act jurisdiction, in part, as a result of the agencies expressly declaring some types of waters categorically jurisdictional and also by application of new definitions which give larger regulatory context to some types of waters such as tributaries."

So in my view and, more importantly, in the view of the Congressional Research Service, the rule does expand jurisdiction. And with regard to the EPA, I think you give them an inch, they're going to take a mile. And that's my concern. Mr. Wrigley, do you have a——

Mr. WRIGLEY. Yes, just a couple of comments with respect to clarity. Certainly, the rule provides clarity. If you make everything that rain touches or water touches a wetland, then there is clarity there. So from that standpoint, the rule does provide clarity. Is it an expansion? I don't think that there can be any dissent really, I mean, in all honesty, that it does expand that. I look at my farm, my field, if I have to leave those low spots or get a permit for them because they're under Clean Water Act jurisdiction now, where up until now they had not been, that's an expansion of that authority. I'm not required to do it right now.

And as far as the significant nexus requirement, the courts held that a significant nexus was required and EPA's interpretation of that was that essentially all waters are connected, therefore there is a significant nexus that exists. In my field when that water goes downstream until it's stopped by a road, which is in existence, and then the frost goes out and the water melts away, that's a significant nexus; it actually picks up underground at that point. But that would require me to have that permit.

So I don't think that there's any way that you can really state that it's not an expansion because that area is not under Clean Water Act jurisdiction right now—not under EPA jurisdiction right now. And we have talked a number of times about that the current amount of land under jurisdiction at this time is less than before SWANCC. The fact of the matter is that those Supreme Court decisions were in—were found to be there because they were already overstepping their bounds. That's why they were restricted. That's why they pulled back.

So we can't go back to pre-1977 and say, well, this is what the traditional interpretation was, because that was clarified by the court and now we are looking at not just the 3 percent increase—that's what EPA is saying, that we're going to increase that amount by 3 percent. In reality, we're talking about millions and millions and millions of acres across the Country.

Senator SULLIVAN. Well, even 3 percent in Alaska is huge.

Let me turn to another final couple of questions. I do want to—you know, Mr. Carroll, Mr. Williams, Ms. Mauger, you guys importantly, and I think it is important testimony, you raise the—you emphasize the importance of our fisheries and I think everybody in the room can agree on the importance of Alaska's fisheries. You know, you mentioned they're actually—the numbers I have seen, they're actually the No. 1 employer in State of Alaska, more than oil and gas. So incredibly important for all of us, for our heritage, for recreation, for livelihood.

But I want to ask you, can we make sure that we protect our fisheries without the Federal Government being involved in such a heavy-handed way? You know, the State actually has a—we're not perfect, certainly, but we have a pretty good record certainly relative to some of the States that you mentioned, Maine, Massachusetts, the sustainable fisheries at the Federal and the State level. Is this the kind of Federal intervention that we need to make sure our fisheries stay healthy or can we do this with regard to our own interests? In my view, we're better at this than anyone in Washington, DC, and you guys are very involved in this important part of our livelihood and life in Alaska.

Ms. MAUGER. Thank you for the question. With our current State government budget, I think the answer has to be no; that Alaska cannot protect its waterways sufficiently and that just as the Federal Government pays for the vast majority of our infrastructure and things that make living here possible, I think we need the benefit of being part of the larger Country and taking advantage of those resources. And I think personally that that is what the EPA is bringing to us, is bringing——

Senator SULLIVAN. But remember the Federal Government is not paying for this. We're going to pay for this, this regulation. I don't see the EPA doing anything in terms of additional expenditures. They're just going to promulgate a reg that we pay for. So, I don't see the connection to Federal spending in the rule.

Ms. MAUGER. Presently, the vast majority of efforts to monitor and research our water bodies in the State is from Clean Water Act money that is passed through to the States. The Alaska Clean Water Action program is one of the few pots of money available for monitoring of water quality issues. And in many cases, there are

infractions or lack of permits and discharges that can only be identified through the efforts of monitoring and the Federal Government is paying for that kind of oversight on what is actually getting into our water bodies through the Nonpoint Source Program.

And so I do think that the Federal Government is an important player in ensuring that those permits are being properly instituted and that there are plenty of examples where discharges are happening and they're only being identified by people monitoring. So I do think the Federal Government is playing an important piece in keeping the waters clean.

Senator SULLIVAN. OK. Mr. Williams.

Mr. WILLIAMS. I think some of the points that Ms. Mauger raised, especially regarding the difficulty—the difficult financial status of our State budget at the moment, really need to be given our consideration here. One of the initiatives that Trout Unlimited has throughout many parts of the Country, but that is particularly relevant in Alaska, is many of our members will go out and document the presence and absence of anadromous fishes and nominate waters to the State's anadromous waters catalog for—you know, that would then potentially benefit from our anadromous fish protection laws.

Most recently we submitted a handful of nominations as we do most years and these are nominations that include scientific documentation of the presence and absence of anadromous fishes, typically coho salmon, high in the watershed for spawning, rearing, or migration that have, in the past, been readily accepted as viable nominations. This past year, the Alaska Fish and Game denied our nominations on the grounds that they did not have the funds to process our nomination requests. These are waters that are not currently in the Anadromous Waters Catalog, but that nonetheless have coho salmon spawning, rearing, or migrating through. These are small headwater areas, areas that don't necessarily even flow continuously year-round, but nonetheless have coho juvenile salmon in them.

Senator SULLIVAN. That are not currently covered by the Clean Water Act?

Mr. WILLIAMS. These are areas that are not currently protected by our State's anadromous waters laws. If we did not have protections like those afforded by the Clean Water Act and we were relying exclusively on State protections, these are areas that would not be protected under State law, but that nonetheless contribute significantly to the production of salmon that support, as you, yourself, indicated, the largest employer in our State.

So if we want to repeal Clean Water Act protection——

Senator SULLIVAN. Nobody is talking about doing that, so that's not——

Mr. WILLIAMS. If——

Senator SULLIVAN. Let's not go there.

Mr. WILLIAMS. If we——

Senator SULLIVAN. That's an area that's a red herring. Nobody is talking about that.

Mr. WILLIAMS. If we are talking about the value or the potential for the State to provide the same clean water protective services that the EPA, under the Clean Water Act, or the Corps under the

Clean Water Act do, I think there's a real problem from a financial standpoint with our State being able to fund those programs in a way that meaningfully protects our fisheries.

Senator SULLIVAN. I just worry that the way this is being discussed, it's going to make farmers like, you know, Mr. Wrigley, be the one holding the financial costs, because it isn't—Mr. MacKinnon?

Mr. MACKINNON. Along the same lines, you know, I remember statehood, I remember before statehood. I'm probably one of the oldest ones up on this panel. You know, fisheries under Federal protection and Federal management were on a downhill trajectory and it didn't improve until the State took management over and that was in the late sixties. A number of programs the State put in place are the result—resulted in the vibrant fisheries we have today, and at the same time development occurred in Alaska, absent the Clean Water Act. And fisheries and development can co-exist, they do co-exist, and the development, you know, is one of those things that allows the fisheries to be here because without that development we wouldn't have shoreside facilities, roads to get to the boat launch facilities and everything else. They have to co-exist and they do co-exist.

Senator SULLIVAN. Listen, I want to end with one final—you've been very patient. I appreciate it. We've run over our time.

Ms. Taylor, your opening statement I thought was very powerful in terms of this idea that—and I'll let you articulate it because you'll do so way better than I would. But in some people minds, whether it's senators from the East Coast or outside environmental groups, that Alaska is some kind of snow globe, you know, some kind of dream destination that they can feel great about particularly given that some of these States with some of their policies over the years certainly have not done a good job of keeping their water as clean as ours or their air as clean as ours, or their environment as pristine as ours. So once they've kind of ruined—well, I shouldn't go that far, but they look at us as saying we have to preserve Alaska and nothing can happen. The 10–02 area of ANWR, several of my colleagues on the other side of the aisle have written the Secretary of Interior saying, keep it up, lock it up. That makes them feel good. My view is it hurts us. It hurts our future. It hurts my kids' future. It hurts your kids' future.

And can you comment about that, because it is something that I see, but you stated it so well and I think it's very important for our fellow Alaskans to hear about that. And I'd just like to conclude the hearing on kind of what you started with in regard to those issues. We all certainly want the cleanest water, the cleanest environment. We live here. We care more about it than the EPA administrator does, I guarantee you. But there is this notion to keep us down so they can feel good.

Ms. TAYLOR. Yes, you put it very well. There is a sense that, you know, it always comes from people who don't really understand how we are able to both thrive, survive; that there's a balancing act that we have to do as Alaskans because Alaska, it's not a place where we can just massively grow our own food, it's not a place where—we can hunt and we can fish, but so long as somebody lets us. You know, there is—I was talking to—actually, Mayor Brower

put it really well, too. I was talking to a group of people last weekend and I said, you know, if everybody outside wants us to go back to living in sod houses and heat it with whale oil and trying to kill our own food and feed our families, we couldn't do it because there's not a single way that any of that could happen anymore because of Federal permitting. We couldn't mine the sod, we couldn't actually kill the whales, we couldn't go and, you know, kill enough to feed a family to do it. So we're really kind of stuck in a situation where, and this is how I usually refer to it, we're kind of being idealized into powerlessness.

People have this ideation and they want to preserve Alaska, that they fail to recognize the fact that people live here and that we live in these communities. And the Alaska National Interest Lands Conservation Act was a really great opportunity where everybody got to kind of take a minute and realize this is what—this how we'll divide up Alaskans, but we will protect their lifestyle. And you don't see that anymore. You don't see that anymore at all.

Senator SULLIVAN. Well, listen, I want to thank all of you. This is a very informative panel. I want to thank those of you who attended the hearing today. Please, if you'd like to submit comments to the committee, we will keep the record open for the next 10 days to receive any other comments in addition to the comments from our two panels. And I really appreciate your interest in this important issue, and we look forward to hearing more as we move forward on this matter.

Thank you very much. The hearing is hereby adjourned.

[Additional material submitted for the record follows:]

FLOWLINE
ALASKA, INC

April 13, 2015

United State Senate Committee on Environment and Public Works
Subcommittee on Fisheries, Wildlife and Water
B40A Dirksen Senate Office Building
Washington, DC 20510

Subject: Impacts of Proposed Waters of the United State Rule

Senator Sullivan:

I am writing to express my firm's experience we have had in working with Army Corps of Engineers (ACOE) and EPA with permitting "wetlands" in the Fairbanks Area. Flowline Alaska operates a pipe coating and fabrication facility in the railroad industrial area of Fairbanks, primarily providing goods and services from our location in Fairbanks to the oil industry operating on the North Slope of Alaska.

In the mid to late 1990's we purchased through an affiliate company numerous contiguous parcels of land between Fairbanks and North Pole. The eventual long term plan is to move our current production and fabrication facilities to these fee simple parcels of land from our current location on leased ground in the railroad industrial area of Fairbanks.

The purchased parcels were carefully selected to allow for continued rail access, major highway access and room to grow our family owned business. In Fairbanks there were very few parcels of land which fit the criterion required for this business. Eventually we were able to accumulate roughly ~500 acres between Fairbanks and North Pole which fit the requirements. The parcel is bounded roughly by the Richardson Highway and spur line on the Alaska Railroad, two recycling businesses and a long established arterial roads. There are gravel pits, subdivisions and a host of other development within a 3 mile radius, including Fort Wainwright Army Base. Our parcels are definitely *not* what I would characterize in critical habitat such as river deltas, basins, wildlife sanctuaries, national parks, etc. My two closest neighbors operate sizeable "junk" yards.

In 2003 we applied for and received a "wetlands" permit to clear and fill a portion of the parcels. Unfortunately the permit expired in 2007 with very little construction activity occurring on the parcel. In May 2008 we re-applied for the exact same project/permit, expecting the permit to be issued fairly easily as we had already had a permit a year earlier. The ACOE indicated a permit could be issued quickly, ***if***, we agreed to some substantial mitigation requirements (deed restricting development on +100 acres of privately owned land), this deed restriction requirement was not included or part of the original permit issued in 2003.

We balked at the request and began a discussion with ACOE on what constituted actual "jurisdictional wetlands". In the ensuing timeframe since May 2008:

- ACOE has not followed their own adopted and congressionally authorized manual on determining what constitutes a significant nexus and hence "jurisdictional wetlands".

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- In 2002/2003 the initial jurisdictional determination, the ACOE indicated most of the 500+ acre parcel was "wetlands". In 2009, an updated "jurisdictional determination" process was requested as part of the second permit application and the ACOE reversed course on ~130 acres of the 500+ acres. ACOE deemed that roughly 130 acres was now "uplands". This is a definite benefit to us. However, the point is, that prior to reversal of jurisdiction in 2009 there was no substantial changes to the land. This 130 acres of land was cleared 20+ years prior to our purchase. The parcel was in roughly the same state in 2002/3 when the original determination was made and in 2009 when the reversal was obtained. Obviously the agencies "internal" definition changed of what is considered "wetlands".
- ACOE has reversed itself on which water body (Tanana River or Chena River) the parcel has significant nexus. Originally a significant nexus was claimed to the Tanana River. After the "Great Northwest" court decision, ACOE reversed course and indicated significant nexus from our parcel was to the Chena River.
- Timeliness in processing information. As the permit applicant we are required to follow ACOE guidelines on timeframes to replies and submittals. The ACOE has no equivalent requirement on timeliness. We are almost 7 years into this process. The majority of the time has been spent with ACOE's lack of timeliness in disposition and processing of submitted information.

This permitting process is broken. Any additional scope or expansion of the definition of "waters of the United States" will not make the process any better. If any changes need to be made it should be include the following:

- There needs to be clear and concise rules on what regulations to follow, what constitutes a wetland and how it relates to a navigable water body. There needs to be congressional approval/oversight for any changes to regulations. From our experience, the reversal of course on originally designated "wetlands" to "uplands", changes to significant nexus location (Tanana River to Chena River), indicates to us the agencies are "throwing everything they can in the regulations and see what sticks" approach. This process throws definite uncertainty into the permitting process. During one of the many site visits with agency personnel, they indicated that our land was designated as "Waters of the United States", I imagined myself bringing out my riverboat to recreate in my portion of the "Waters of the United States" only to be left high and dry in my boat on dirt while looking at black scrub spruce trees in the background.
- Time frames for permitting need to work both directions. A federal agency should be held to time frame standards for reply, if an agency can take its time in replying to permit applicants, it can essentially "wait out" the permit applicant to derive the agencies desired outcome. When we made an appeal over a decision we would have 60 days for response, ACOE would take 4-14 months for a reply. Expediency is *not* in the ACOE's repertoire. If permits are not issued or decisions not made by certain time frames, the applicant should be able to commence with construction. For example: If I had a son or daughter born in May 2008 (2nd permit application submittal date), that child would currently be in 2nd grade, that child would have learned to: walk, talk, use the bathroom, eat with a fork, read, write, ride a bicycle, ice skate, etc. But we are still in the permitting process with the ACOE. Timeliness and urgency needs to work for both ways.
- Mitigation requirements for ***privately owned land*** are somewhat overbearing. If we sign our final permit we would need to deed restrict from current and future development in perpetuity, *privately owned land.* I could not develop this portion of land *forever.* Yet, I still

bear ultimate responsibility for any mitigation requirements for upkeep and maintenance, liability for local property taxes and legal liabilities associated with the land. I wouldn't be able to sell the parcel has it has no underlying value based upon future liabilities. Deed restrictions on privately owned land dictated by government agencies could somewhat be construed as government taking of private land. The only "re-imbursement" we see is the agency ***"allowing"*** the property owned to use the other portion of "wetlands" they ***already own***. As an alternate, we were questioned about payment in lieu on a per acre basis for filling "wetlands". We have seen costs per acre range from $7,500 up to $55,000 per acre. If the agency believes that the privately owned land is that "*environmentally sensitive*" and should not be developed, then the agency should purchase the parcels and compensate the land owner for the underlying present and ***future economic losses*** of that parcel. I would be more than willing to entertain selling the entire 500 acre site to ACOE-EPA for that $55,000 equivalent mitigation per acre cost.

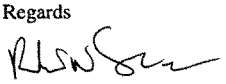
- To put our situation in perspective: There are 365 Million acres of land in Alaska and roughly 61% is owned by the federal government. If this were equated in dollar terms deposited in a banking institution: $100,000 being equivalent to the 365 million acres, the federal government would have ~$61,000 of the $100,000 in deposits. My portion of land, would equate to roughly 14 ½ cents ($0.145) of the total $100,000 deposited in the institution. The deed restricted portion of parcel would equate to an amount a little over 2 cents ($0.02). Granted 2 cents is not a sizeable sum, especially in comparison to $61,000 that the federal government owns, but when you only have ~14 ½ cents to begin with, it represents a sizable portion of my overall value. The federal government has spent countless man-hours of agencies time (ACOE, EPA, F&WS) in dictating what I should be allowed to do with my ~14 ½ cents, with the final objective of not allowing the use of "2 pennies of my 14 ½ cents". This seems somewhat overbearing and ridiculous waste of agencies time and resources, especially over 2 cents.

Currently we have exhausted all appeals with ACOE. We are in the final process of determining which is better for our firm either capitulate and sign the permit (with associated mitigation costs), or continue the fight through the judicial process.

With no clear and specific defined regulations outlining "wetlands", no firm agency time limits and burdensome mitigation costs any expansion of the current regulations will have definite detrimental effects on others in Alaska and elsewhere in the United States trying to permit "wetlands".

I appreciate you taking the time to allow me to offer my "2 cents" in this debate.

Regards



Richard N Schok Jr.
President
Flowline Alaska, Inc.

Senator Sullivan:

Thank you for bringing this hearing to Alaska. I hope that you have been provided a better understanding of the issues and impacts, and will be better able to educate other stakeholders on this important issue. I also thank you for keeping the record open to facilitate more public input.

My biggest beef with these issues is similar to the story you told about the Idaho couple who were refused authorization to build a house on their lakeside property. The Government, through these actions, is taking land for public benefit without any compensation to the landowner. In fact, landowners are now forced to pay compensatory mitigation to obtain permits to fill private wetlands at values that are multiples of the value of the property being filled.

For the past 20 years my firm has either had a controlling interest or outright ownership of 300 acres of land near Peger and Van Horn. This land is all wetlands. Originally, all that was required was to submit a written development plan to show a viable need and method of operation to insure no contaminants would be utilized and a permit would be granted. Over the years things became gradually more difficult. The first change was the requirement that any plan for pit development had to include a restoration plan to include littoral zones. Restricting development of a 20' wide zone around an old pit may not sound like much, but it adds up quick. A 20' strip around a 5 acre pond amounts to about 0.85 acres! That is gravel that is no longer mineable as it must remain to create the littoral zone.

Requirements gradually worsened to the point we are at today with the requirement of compensatory mitigation. With the help of the Pacific Legal Foundation we were able to fight the JD on our property which we won. This new definition will reverse that determination forcing us to re-enter the permitting process for our ongoing development.

This impact is not limited to private landowners. Our ability to improve public infrastructure is also impacted by these rules. It was interesting to hear Mayor Brower's testimony that the Barrow landfill project had to pay $1 million compensatory mitigation. I would like to add that Northern region transportation projects have paid $3,374,645 mitigation payments in 2014 alone. Central region transportation projects have paid $2,792,800 mitigation payments in 2014. It should be noted that $2,167,000 of those payments was for the Kodiak Airport Runway Safety Area Extension project. These payments are impacting our ability to deliver worthwhile infrastructure improvements, predominately within long dedicated rights of way. Additionally, these payments are re-directing taxpayer dollars to private organizations with their own self-serving interests, salaries and expenses.

These new regulations will take large tracts of land not under the authority of the Clean Water Act because of their connections to waters of the U.S. This will overreach the previous definition. This has more to do with the largest land grab in history than with expanding protection under the Clean Water Act.

This rulemaking has the net result of changing the Clean Water Act into a Wetlands Protection Act. If there is a need for a Wetlands Protection Act, then Congress should enact one. And leave public rights of way and privately held zoned properties out of it. If the public wants to set these areas aside then the public should purchase the land.

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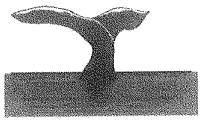

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April 15, 2015

United States Senate Committee on Environment and Public Works
Subcommittee on Fisheries, Wildlife and Water
B40A Dirksen Senate Office Building
Washington, DC 20510

Re: Proposed Waters of the United States Rule

Dear Senator Sullivan:

The proposal by the EPA and Corps of Engineers to include all waters of the United States EXCEPT decorative ponds clearly expands their jurisdiction beyond what the Clean Water Act envisioned. The past 43 years have experienced an incredible improvement in water quality because of public awareness, better pollution controls, and federal/state agency supervision. The proposed rule is unnecessary and will be costly. The direct costs include compensatory mitigation, writing Storm Water Pollution Prevention Plans (SWPPP), and writing Spill Prevention Containment and Cleanup (SPCC) Plans. The indirect costs include taking land out of production, reduction in employment, and the liability (fines) associated with SWPPP and SPCC Plans.

Congress needs to reaffirm the original CWA where the EPA was given jurisdiction over discharges to surface waters and the states had jurisdiction over discharges to the ground and to groundwater. Also, Congress needs to reassert that the 1987 Manual given to the Corps of Engineers to determine jurisdictional wetlands is the only "rule" to be used with regard to wetlands.

Sincerely,

Laurence A. Peterson
Operations Manager