THE STATE of ALASKA
GOVERNOR MIKE DUNLEAVY

Department of Environmental Conservation

Jason W. Brune
Commissioner

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October 4, 2021

Mr. Vance F. Stewart III
Office of the Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310

Mr. John Goodin
Office of Wetlands, Oceans and Watersheds, Environmental Protection Agency
1301 Constitution Ave. NW
Washington, DC 20460

Subject: State of Alaska WOTUS Federalism Consultation Comments

Dear Mr. Stewart and Mr. Goodin:

Thank you for the invitation to engage in a federalism consultation for a rulemaking "that restores the WOTUS regulations in place prior to the 2015 Clean Water Rule, with updates to be consistent with relevant Supreme Court decisions." The State of Alaska set out our initial advice and counsel to EPA and the Corps on the proposal to reopen "waters of the United States" (WOTUS) rulemakings in our September 3, 2021 public scoping comment letter, which is attached and incorporated as part of our consultation comments as well. In particular, if the rule is reopened at all, the agencies should include wholesale clarifying exemptions for permafrost, as groundwater, and permafrost wetlands, as generally distinct from adjacent waterbodies. Still, It bears repeating that the State of Alaska's advice is to not reopen the WOTUS rule yet again both for the reasons previously outlined and because doing so does not comport with President Clinton's Federalism Executive Order 13132 (Aug. 4, 1999) (Federalism EO).

The WOTUS rule, defining whether state or federal law govern discharges or fill of waterbodies, is a quintessential federalism issue and an outstanding opportunity for EPA and Corps to demonstrate their sincere commitment to working with states as partners and coregulators. "Partnership" and "cooperative federalism" should mean that EPA and the Corps accept that some policy determinations about how to best balance competing needs and resources can be left to the states – even if federal regulators disagree with the outcome. Unfortunately, much of the early rationale articulated by the Biden Administration indicates an intention to broaden the scope of federal control over waters. This would be inconsistent with the directives embodied in the Federalism EO.

I. The federal agencies should unambiguously acknowledge that the Federalism EO applies to the WOTUS rulemaking.

The federal agencies have appeared uncertain as to whether the Federalism EO, which requires this consultation as well as several critical decision-making considerations, applies to a rule expanding the WOTUS definition. In prior rulemakings under the Obama Administration, the federal agencies summarily concluded the action "does not have federalism implications."[1] In recent correspondence the federal agencies hedge their language, stating the Federalism EO "may apply." This confusion is perplexing.

The Federalism EO applies to rules with federalism implications that either (1) have substantial direct compliance costs on state and local governments and are not required by statute or (2) preempt state and local laws.[2] "Federalism implications" are those with "substantial direct effects on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."[3] The WOTUS rule – in defining which sovereign entity has authority to determine the appropriate level of protection for a water body, adjacent wetland, or occasionally damp soil – is the posterchild for these criteria.

It cannot be credibly asserted that expanding the application of a federal regulatory scheme, which preempts any less rigorous state or local standards, does not affect "the relationship between the national government and the states" and "the distribution of power and responsibilities among the various levels of government." In fact, in the context of the section 404 dredge and fill permits, whether a project impacts an area that meets the WOTUS definition is logically titled a "jurisdictional determination."

Alaska and other states will experience substantial direct compliance costs arising out of a broader WOTUS definition. For the Alaska Department of Environmental Conservation, these include, among others, incremental increases in costs associated with mandatory inspections and reporting to EPA in implementing the section 402 program, additional section 401 certification analyses, and accompanying litigation as third parties challenge the agency's work. For the Alaska Department of Transportation, these include increased costs associated with additional section 404 permits, associated NEPA analyses, and compensatory mitigation. For the Alaska Department of Natural Resources, federal application and implementation of the Clean Water Act (CWA) impedes the State's ability to develop resources on state-owned lands to secure rental, royalty, and tax revenues as well as the broader economic benefits to our residents and communities.

Financial impacts to the State are particularly pronounced where the agencies' implementation of compensatory mitigation policies require locking up other state-owned lands as an express condition to allow another project to progress through CWA permitting. This concern is very real as we witnessed the Corps call for such neutering in the compensatory mitigation requirements for the Pebble Project, which could have been met ONLY by placing limitations on other state-owned lands. Since only a small percentage of lands in Alaska are in private ownership, this type of regulatory extortion is likely to repeat (notwithstanding the Alaska Statehood Compact,

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1 Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054, 37102/3 (June 29, 2015) ("This rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.")

2 Federalism Executive Order 13132 (Aug. 4, 1999) ("Federalism EO"); also see, EPA Summary of Executive Order 13132 – Federalism, https://www.epa.gov/laws-regulations/summary-executive-order-13132-federalism.

3 *Id.* at Section 1.

Congressional commitment that the Alaska National Interest Lands Conservation Act established the appropriate balance of setting aside lands for conservation purposes, and Alaska's constitutional responsibility to develop resources for the maximum benefit of our residents).

Even if an expanded regulatory definition is a permissible interpretation of the ambiguous statutory language, such an expansion is not required by the statute. This principle is highlighted by the agencies' summaries of the *SWANCC* decision – that the Supreme Court found that the agencies "may" regulate wetlands as WOTUS. The Court did not find that the agencies must do so. Since even the more conservative interpretations proffered by the agencies in the past are broader than what is required by the statute, the WOTUS rule meets this requirement as well.

Finally, the rule also meets the second category of rules that are subject to the Federalism EO requirements because an expanded definition would preempt state law. While the CWA does not entirely preempt state law, states are precluded from implementing standards that are less strict, even if the overall benefits of an activity outweigh potential negative impacts to water quality.

Application of the EO to the WOTUS rule is so clear, in fact, that the agency's failure to plainly acknowledge applicability gives the sense that the consultation has been undertaken begrudgingly and without an intent to reach any conclusion other than what has already been decided.

II. The Federalism EO precludes further work to expand the WOTUS definition in Alaska.

Among other requirements, applying the Federalism EO to the WOTUS rule means EPA and the Corps must:

- pay for the state's compliance costs,
- consult with state officials early in the process before promulgation,
- adhere to the fundamental principles in §2 of the EO, and
- comply, to the extent permitted by law, with the general policymaking criteria in §3.

The federal agencies did open a consultation dialogue with states before formally promulgating a change to the regulations. However, leveraging court procedure, the agencies have declared that they are now disregarding the most recent final rule published in 2020. Between those actions and announcements and the open expression of an intent to broaden federal control, the federal administration seems to have decided on its course long before hearing from Alaska or other state governments, leaving us concerned that this consultation may be nothing but an empty gesture.

In considering whether to reopen the WOTUS rule, the federal agencies are bound by Section 2 of the EO to adhere to several fundamental principles, including:

> "(a) Federalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people.
>
> ...
>
> (f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public

> issues. One-size-fits-all approaches to public policy problems can inhibit the creation of effective solutions to those problems.
>
> ...
>
> (i) The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government."

The federal agencies must also adhere to Section 3 of the EO, including the directives to:

> "(a) ... closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and shall carefully assess the necessity for such action.
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> ...
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> (b) National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means."

Both sections require a problem of national significance and a true need for action for the federal executive branch to impede on state policymaking discretion. It is unclear what the true and legitimate issue of national scope or significance is for water quality beyond interstate disputes. For Alaska in particular activities affecting water quality simply will not affect another state's downstream water quality. Alaska's water quality concerns are Alaska's.

Rather than pointing to a concern of national significance or a legitimate federal interest, the Biden Administration has made clear that its intent in this rulemaking is centered on a raw concern for federal power. For example, in its primary press release, EPA expressed anxiety over a lack of federal control or permitting under the narrower 2020 WOTUS rule stating:

> "Upon review of the [2020] Navigable Waters Protection Rule, the agencies have determined that the rule is significantly reducing clean water protections. The lack of protections is particularly significant in arid states, like New Mexico and Arizona, where nearly every one of over 1,500 streams assessed has been found to be non-jurisdictional. The agencies are also aware of 333 projects that would have required Section 404 permitting prior to the Navigable Waters Protection Rule, but no longer do."[4]

Nowhere in its statement did the agencies identify a legitimate federal concern, only anxiety over a lack of federal control and shock that some activity might go unregulated. This, the agencies' best summary of the need for rulemaking did not highlight an interstate dispute needing federal intervention or even an impact (measurable or otherwise) to water quality in downstream traditional navigable waters. Absent some articulated federal concern or interstate dispute, the states of New Mexico and Arizona should be free to evaluate whether some form of additional regulatory oversight is necessary for those streams and projects.

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[4] News Release: EPA, Army Announce Intent to Revise Definition of WOTUS (June 9, 20201) available at https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus.

Launching an initiative to claim broader control over activities throughout the country based on a notoriously vague statutory term like "waters of the United States" is inconsistent with these federalism directives. Moreover, the existing partnerships with state water protection authorities provide "other means" by which Federal objectives to protect water quality can be attained. While EPA and the Corps might want to exert absolute control over activity in Alaska, leaving our scientists and environmental professionals to complete mere ministerial tasks in compliance with federal dictates, the Federalism EO precludes this approach. If the WOTUS rule is reopened at all, both substantive sections of the EO demand that the federal agencies look to limit the scope of the definition and limit the scope of federal control.

III. Conclusion

Advocates for a broader WOTUS definition point to interconnectivity of waterbodies as a reason for bringing as much activity under federal control as possible. Setting the data gaps and scientific uncertainties aside, we encourage the agencies to focus on the federalism concerns and the decision about who should most appropriately employ the available data and science to make management decisions. State regulators are better positioned to take a wholistic perspective on health of waterbodies and associated ecosystems within their jurisdictions. The shear geographic size of Alaska and the lack of interstate boundaries makes this especially true here.

Really, the most meaningful federal contribution to protecting all waters in all states would be to provide additional technical and financial support to state programs. For the reasons previously articulated in the state's scoping comment letter and to comport with the demands and spirit of the Federalism EO, EPA and the Corps should set aside the effort to reopen the WOTUS definition in regulation and instead support state policy makers and regulators.

Sincerely,

Jason Brune
Commissioner

Enclosure: State of Alaska WOTUS Comments – September 3, 2021

cc: The Honorable Lisa Murkowski, United States Senate
The Honorable Dan Sullivan, United States Senate
The Honorable Don Young, United States House of Representatives
Jaime A. Pinkham, Acting Assistant Secretary of the Army (Civil Works), U.S. Department of the Army
Michael S. Regan, Administrator, Environmental Protection Agency
The Honorable Doug Vincent-Lang, Commissioner, Department of Fish & Game
The Honorable Ryan Anderson, Commissioner, Department of Transportation & Public Facilities
The Honorable Corri A. Feige, Commissioner, Department of Natural Resources

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Mr. John Goodin
Office of Wetlands, Oceans and Watersheds, Environmental Protection Agency
1301 Constitution Ave. NW
Washington, DC 20460

Subject: State of Alaska WOTUS Comments – September 3, 2021

Dear Mr. Stewart and Mr. Goodin:

Thank you for the opportunity to provide recommendations on a refined definition of "Waters of the United States" (WOTUS). This definition, which establishes the scope of federal jurisdiction under the Clean Water Act (CWA), is important to Alaska because the scope of federal control under the definition can substantially affect the flexibility states have to make important decisions about land use and development.

The State of Alaska is concerned that the Department of Defense, Department of the Army, Corps of Engineers and the Environmental Protection Agency (collectively "federal agencies") are engaging in a new look at the definition of WOTUS less than 15 months into execution of the Navigable Waters Protection Rule (NWPR), promulgated on April 21, 2020. The federal agencies have not explained how the NWPR is not protective of the environment, how the NWPR failed to already consider the four listed tenants of the new rulemaking (ensure the rule will further the principle objective of the Act to "restore the chemical, physical, and biological integrity of the Nation's waters;" consider the latest peer-reviewed and relevant science; prioritize practical implementation approaches; and reflect experience and input from stakeholders), or why this new rulemaking is a necessary and an appropriate expenditure of the agencies and stakeholders resources. Less than 15 months into execution, Alaska and other stakeholders are just now gaining the experience of implementing the NWPR definition of WOTUS and have little to offer in terms of negative consequences.

Given that Alaska has 63 percent of the total wetlands in the country, more coastline than all Lower-48 states combined, 900,000 miles of navigable rivers and streams, and 40 percent of the nation's fresh water supply, the impact of a refined definition of WOTUS will be significant. If the federal agencies are intent on refining the definition of WOTUS, given the impact that definition has in Alaska, the federal agencies should be required to set up a rule-writing office in Alaska. The agencies' consultation with the State must be more involved and offer a more thorough dialogue.

Alaska's comments and recommendations provide some high-level feedback, and my administration stands ready to assist you in understanding the unique nature of Alaska's lands and waters, providing more detail on how the existing NWPR serves our needs, and what refinements could be made to the definition that would be appropriate for the nation and for Alaska specifically. If the rule is going to be reopened at this time, the attached comments outline changes that the agencies should make to continue the progressive work started by the NWPR, including

1. Growth of the economy and jobs rely on regulatory efficiency and certainty. This is especially true in Alaska where a large percentage of our land base is categorized as wetlands and projects located therein may require a federal permit based on the definition of WOTUS. Alaska permittees expect a fair, timely, and predictable permitting process that is efficient, flexible, and consistent depending on the nature and complexity of the permitted activity.

2. Given the impact of this rule on the State's ability to manage and develop resources, and the fact that such a substantial portion of the acreage potentially affected is in Alaska, it is critical that the agencies engage directly with the State and that Alaska's input is meaningfully considered and reflected in a refined definition.

3. Any change to the definition of WOTUS must address and limit the long-standing practice of federal overreach under the CWA. A refined definition of WOTUS should embrace the Rapanos plurality and focus on "waters" as "geographic features" instead of using the indirect flow of water to justify broader federal control. The existing NWPR definition continues to regulate "lands" as "waters" by including wetlands that can clearly be delineated from nearby or neighboring waters. Currently, broad swaths of Alaska's North Slope are included as "waters" because of seasonal connections among permafrost wetlands that eventually connect to a traditional navigable water many miles away.

4. Even if the agencies include certain wetlands in the WOTUS definition generally, a refined definition must categorically exclude permafrost wetlands from the definition. Permafrost itself is soil, rock, or sediment that is frozen for more than two consecutive years. In areas not overlain by ice, it exists beneath an "active layer" that is a layer of soil, rock, or sediment that freezes and thaws annually. The vegetation that lives above the permafrost in this active layer may exhibit some of the characteristics of wetlands with hydric soils, hydrology, and hydrophytic vegetation, but the extent or existence of any connection to downstream waters or other wetlands can be difficult to identify because of the very short growing season. In fact, the hydrology is more like groundwater flow, and in most cases, there is little evidence of a significant subsurface connection. The lack of clear and convincing evidence of a significant impact on a jurisdictional water necessitates the exclusion of permafrost wetlands from any refined definition.

5. In line with the plurality opinion in Rapanos, a refined definition of WOTUS should either exclude wetlands from the definition entirely or limit federal jurisdiction to wetlands that cannot be distinguished from a neighboring jurisdictional water.

6. Given the potential for civil and criminal sanctions - including jail time - for a violation of the CWA, it is essential that any refinement of the definition of WOTUS provide clarity to states and the regulated community.

The State of Alaska does not see a need for the federal agencies to refine the definition of WOTUS. However, if the agencies are compelled to do so, the State expects that any refined definition will more fully reflect the guidance provided by the Rapanos plurality and correct the long-standing imbalance between federal and state authority embodied in prior WOTUS definitions. Finally, given the proposed WOTUS definition has a disproportionate impact to Alaska, federal agencies must work with the State to ensure that a fair, timely, and predictable permitting process that is efficient, flexible, and consistent depending on the nature and complexity of the permitted activity is designed and employed.

Sincerely,

Jason W. Brune
Commissioner

Enclosure: State of Alaska Recommendations on a Refined Definition of WOTUS

cc: The Honorable Lisa Murkowski, United States Senate
The Honorable Dan Sullivan, United States Senate
The Honorable Don Young, United States House of Representatives
Jaime A. Pinkham, Acting Assistant Secretary of the Army (Civil Works), U.S. Department of the Army
Michael S. Regan, Administrator, Environmental Protection Agency
The Honorable Doug Vincent-Lang, Commissioner, Department of Fish and Game
The Honorable John Mackinnon, Commissioner, Department of Transportation & Public Facilities
The Honorable Corri A. Feige, Commissioner, Department of Natural Resources

State of Alaska
Recommendations on a Refined Definition of WOTUS

September 3, 2021

1. *Introduction*

Thank you for the opportunity to provide recommendations on a refined definition of 'Waters of the United States' (WOTUS), 86 Fed. Reg. 147 (August 4, 2021) ("Definition"). We are concerned that the Department of the Army, Corps of Engineers (COE) and the Environmental Protection Agency (EPA) (collectively "agencies") are engaging in a new look at the Definition. With less than 15 months of execution under the 2020 Navigable Waters Protection Rule (NWPR), we find no compelling reason to do so. In fact, the NWPR provided needed clarity, and in general, the changes made in the NWPR reflects a more reasonable approach than the WOTUS definition published in 2015 (2015 Rule).[1] In particular, the exclusion of ephemeral waters, a somewhat narrower scope of covered wetlands, correcting the past error of applying an "adjacency" standard to waters as well as wetlands, and stepping away from the aggregation and significant nexus standards mark important improvements.

However, the State believes that the NWPR did not go far enough to address and affect the needed fundamental shift in the long-standing practice of federal overreach under Clean Water Act (CWA). The NWPR did not adequately reflect the guidance provided by the plurality opinion in *Rapanos v. U.S.*, 547 U.S. 715 (2006) and continued the inclusion of an overly broad class of wetlands in the definition, reflecting little real change for Alaska.

For the reasons outlined below, if the agencies are compelled to refine the Definition, they should continue the progressive work started in the NWPR in the refinement of the Definition and make specific changes to the rule. First, WOTUS should be limited to waters that are identifiable as "geographic features" and that have a continuous jurisdictional link to a traditional navigable water (TNW); indirect connections should not serve to extend federal control. Second, a rule focused on the *Rapanos* plurality should include broader exclusion of wetlands from the definition of WOTUS. If the refined Definition continues to include wetlands, it should incorporate administrative boundaries. Third, explicit exclusions of specific Alaskan landscape features – including wetland mosaics, permafrost wetlands, and forested wetlands – should be added to the rule to provide as much clarity as possible. These changes would provide clearer sidebars on the extent of federal control and are consistent with the judicial directives to avoid infringements on traditional state authorities to manage land and water uses and to avoid the outer limits of federal authority under the Commerce Clause.

2. *Any refinement of the Definition demands adequate consultation with the State of Alaska*

In terms of geographic scope, the WOTUS definition has a disproportionate impact to Alaska. Alaska has more coastline than the entire conterminous United States (nearly 34,000 miles). Inland, there are nearly 900,000 miles of rivers and streams and 22,000 square miles of lakes in the state.[2] Alaska also boasts 174 million acres of wetlands, 63 percent of the total wetland acreage in the country and covering about 43 percent of the state's surface area.[3] With over half of the state covered by wetlands or deep-water habitat, the WOTUS definition has serious consequences for the State's authority to manage activity within state boundaries.

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1 EPA, Final Rule: Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015).

2 National Hydrography Dataset information from the Bureau of Land Management (March 2014).

3 Hall, Jonathan V, W.E. Frayer and Bill O. Wilen, *Status of Alaska Wetlands*, 1994, available at http://www.fws.gov/wetlands/Documents/Status-of-Alaska-Wetlands.pdf. The rest of the U.S. contains approximately 103 million acres of wetlands, comprising approximately four percent of the total surface area.

Particularly in light of the role of states in managing water resources – both through the exercise of traditional state authorities and in assuming primacy in implementing CWA programs – and the sheer geographic scope of the rule's potential impact in Alaska, it is critical that the agencies engage in a substantive consultation process and incorporate the State of Alaska's input.

Alaska is different than the Lower-48 and any refined Definition should reflect that. While there may be some flexibility for Alaska described in previous rule preambles or responses to comments, the practical reality is that no flexibility exists or is afforded in Alaska as the federal agencies are loathe to apply that discretionary authority. We need federal agency leadership in Alaska that recognizes our unique circumstances and vast resources and we need a WOTUS definition that codifies that. Collectively we can address our specific issues and ensure the appropriate protection of WOTUS under the CWA.

3. *The agencies should take a more conservative view of federal authority and responsibilities*

In line with controlling United States Supreme Court opinions and the Congressional intent articulated in the CWA, any refined Definition should better reflect certain underlying principles. The Definition should respect the role of states in managing land and water resources; this means resolving ambiguities in favor of preserving state authority. Judicial direction to define WOTUS in a manner that avoids raising any potential constitutional issues – to stay well within the limits of federal Commerce Clause authority – also weighs heavily in favor of a more constrained approach. Finally, for a Definition governing where substantial civil and criminal liability may attach to activity, clarity is key.

a. *The Definition must not infringe on traditional state authority to manage land and water uses*

A state's ability to manage and regulate water bodies within its boundaries is a fundamental aspect of statehood and state sovereignty. Congress and the United States Supreme Court have acknowledged the particular importance of Alaska's ability to use its resources for the economic security and social benefit of its residents.[4] The State of Alaska takes this responsibility seriously; Alaska law provides broad and clear authority to the State's administrative agencies to regulate all water, regardless of federal jurisdiction and regardless of whether it is considered groundwater or surface water.

Lack of federal jurisdiction does not leave Alaskan waters at risk. While the designation of a water as WOTUS clearly invokes the regulation of that water under the CWA, the lack of designation of that water does not leave it unregulated and therefore unprotected. Rather, non-WOTUS waters are regulated by the State without the oversight of the federal agencies. In fact, many states elect to issue the same permit for CWA or state permits and apply the same published and approved water quality standards and permit conditions regardless of jurisdiction. The CWA and the Definition are one strategy to manage water quality in Alaska, but they are not the only strategy.

The U.S. Supreme Court has recognized the importance of, and the deference due to, traditional state powers - including land and water use and management in the context of the CWA.[5] The Court has also made clear that these state authorities can only be overridden with a clear statement by Congress - a statement that is absent from the CWA.[6] Rather, the CWA envisions partnership with states and expressly recognizes the primary role of states in managing land and water resources.[7] As Justice Scalia noted in the *Rapanos* plurality opinion, that partnership means

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4 *See e.g.*, the Alaska National Interest Lands Conservation Act, 16 U.S.C. §3101 *et seq.*, and *Sturgeon v. Frost*, 587 U.S. ___, 2019 WL 1333260 (2019).

5 *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC").

6 *Id.*

7 33 U.S.C. §1251(b), (g).

more than assuming primacy of federal programs under the oversight of federal agencies.[8] Instead, the agencies must resolve any ambiguity in the scope of WOTUS in a manner that preserves state authority.[9]

Moreover, the states are best equipped to understand and manage their own unique circumstances. Because of the volume and variety of unique geographic and climate features, such as permafrost wetlands, this is particularly true for Alaska. Alaska has 40 percent of the fresh water in the United States and over 60 percent of the nation's wetlands – almost all of which have not been impacted by human activity. This is due to two facts: First, Alaska is a new state and is not heavily industrialized. Alaska's waters, wetlands, and vast natural areas remain largely in an undeveloped condition compared to those in the Lower-48 states. In fact, expansion of even basic transportation and utility networks and the development of industries remain in nascent stages in much of the state. Second, Alaska's constitution and statutes require a careful balancing of interests in the management of natural resources.[10]

A narrowed assertion of federal authority will not leave State waters unprotected; Alaska's resource agencies possess the authority and ability to preserve water quality. The State previously provided a sample summary of state laws and programs that protect water resources.[11] The authority of state agencies to protect and regulate waters in the state, including implementation of federally assumed programs, is rooted in state law. The federal agencies' concern that a narrower definition of WOTUS will somehow compromise the State's ability to manage and protect waters in the state does not apply here.[12] Given that the ability to manage land and water resources is a traditional state power, it would be surprising if other states could not similarly empower their executive branch agencies. More to the point, regardless of whether existing state laws provide additional or different protection to water resources, states should have the prerogative to weigh relative benefits and burdens and make those decisions based on the needs and priorities of their residents.

b. *The Proposed Rule must avoid approaching the limits of the federal Commerce Clause*

Courts have noted that Congress intended the CWA to apply to more than TNWs.[13] That acknowledgment is not a license to expand federal jurisdiction under the CWA without limit, however. First, as noted above, the Definition should avoid unnecessarily infringing on traditional state authorities. Second, independent of their concern for preserving state authority, the justices have not interpreted the statute to sanction agencies to explore the outer limits of federal constitutional authority (here, of the Commerce Clause) without an express directive from Congress. To the contrary, the courts have also directed that the WOTUS definition must be meaningfully anchored to the term WOTUS defines – navigable waters.[14] If the Definition is refined, the agencies should clearly articulate

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8 *Rapanos v. United States*, 547 U.S. 714, 737-739 (2006).

9 *Id.*

10 See Alaska Constitution, Article VIII: Natural Resources.

11 State of Alaska Comments on Proposed Revision of Federal Regulations Defining "Waters of the United States" under the Clean Water Act (June 19, 2018); State of Alaska letter re: Step 2 of WOTUS Rule Revision at n. 3 (Nov. 28, 2017). However, the Appendices to the Resource and Programmatic Assessment for the Proposed Revised Definition of Waters of the "United States" summary of Alaska's regulatory programs remains incomplete and incorrect. The following changes should be made: delete the definition of wetlands because 6 AAC 80.900(19) has been repealed; delete Alaska Coastal Zone Management Act because AS 46.40, 6 AAC §§50, 80, and 85 have been repealed; add the Alaska Water Use Act, codified at AS 46.15 and 11 AAC 93; add citations to AS 16.05.871-AS 16.05.901 and 5 AAC 95 to the Habitat Protection Program, which requires a permit for certain projects that impact rivers, lakes, and streams specified as anadromous fish habitat. DEC has also published guidance clarifying the process for designating Tier 3 waters in Alaska. ADEC, Policy and Procedure: Guidance Relating to the Nomination and Designation of Tier 3 Waters (Nov. 21, 2018) available at http://dec.alaska.gov/media/14389/final-tier-3-guidance-11-21-2018.pdf.

12 EPA, Appendices to the Resource and Programmatic Assessment for the Proposed Revised Definition of 'waters of the United States'" (Dec. 11, 2018). Appendix B: State-by-State Program Description. The agencies compiled this information to describe the breadth of state authorities and to provide a current picture of federal and state regulatory management of aquatic resources, noting that a revised WOTUS definition could have some effects on these CWA programs as implemented at the state level. But, the agencies also noted that the effect will vary based on state's independent legal authority to regulate aquatic resources beyond the jurisdictional scope of the CWA.

13 *Rapanos*, 547 U.S. at 732 (citing *SWANCC*, 531 U.S. at 167; *Riverside Bayview*, 474 US at 133).

14 *Id.* (citing *SWANCC*, 531 U.S. at 172).

where they view the bounds of the Commerce Clause and how the Definition avoids approaching that important limitation.

c. *A clear and easily applied standard is critical*

Violation of the CWA can carry substantial civil and criminal penalties, including imprisonment.[15] These penalties come with a relatively low bar for a defendant's awareness – requiring only negligence or knowledge of relevant facts. Even those relatively low bars apply only to a defendant's knowledge of their conduct; knowledge that the conduct violates the law is not required.[16] Thus, a CWA prosecution does not require proof that the defendant knew the legal status of a water or wetland or whether state or federal rules govern an activity. In addition, the statute empowers private citizens to bring suits alleging violations of the statute by other private parties.[17] Given this framework for enforcement of CWA standards, clarity in this definition is of paramount importance.

In the context of those potential civil and criminal penalties, ambiguity in the WOTUS definition, in practice, has become a tool for expanding federal jurisdiction even further. In the face of uncertainty and the costs associated with delaying a project for a formal jurisdictional determination, many regulated entities rationally select the more project-efficient route of moving forward with the permitting process despite doubtful grounds for federal jurisdiction. Particularly in a region where short construction seasons mean that a small delay can quickly turn into a much longer delay and escalate project costs, the delay involved with conducting necessary field work and debating jurisdiction with federal regulators – proving that a project is not subject to federal requirements – becomes more of a hurdle than compliance.[18] A regulatory framework that leverages uncertainty and delay to create a presumption of jurisdiction is poor public policy. The agencies should reverse the practice of placing the burden of uncertainty on the regulated public and instead assume the responsibility of establishing clear rules that the regulated public can easily follow.

The NWPR reflects some improvement over past iterations of the WOTUS definition. Requiring, for example, that a wetland directly abut or have direct hydrological surface connection will be easier to apply in practice than determining whether a subsurface hydrological connection exists. Likewise, the explicit enumeration of categories of waters features beyond the scope of the definition provides some helpful sidebars.

d. *The Definition should be narrower and better reflect the principles articulated by the Rapanos plurality*

As noted in prior comment letters, the State of Alaska strongly supports the federal agencies defining WOTUS consistent with the guidance provided by the plurality opinion authored by Justice Scalia in *Rapanos.* Eliminating coverage of ephemeral waters and limiting jurisdictional wetlands to those "adjacent" to jurisdictional waters, for example, certainly reflects some incremental progress towards a more appropriate definition.

However, the NWPR fell short of the fundamental reassessment of WOTUS called for by the plurality opinion. Expressing deep skepticism for the "lands as waters" approach and the geographic breadth of the WOTUS definition, the opinion clearly called for greater restraint. In addition to the direction to resolve ambiguity in favor of maintaining the traditional authorities of states, staying well within the Commerce Clause bounds, and the need for clarity, the opinion also provides concrete direction on how to define "waters" as well as the very limited circumstances under which wetlands might be within a reasonable interpretation of WOTUS.

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15 *See* 33 U.S.C. §1319; also see *Rapanos*, 547 U.S. at 721-722.

16 *U.S. v. Wilson*, 133 F.3d 251 (4th Cir. 1997); *U.S. v. Hopkins*, 53 F.3d 533 (2nd Cir. 1995).

17 33 U.S.C. §1365; *also see, e.g., San Francisco Baykeeper v. Cargill Salt Division*, 481 P.3d 700 (9th Cir. 2007).

18 This approach also conflicts with Congress' directive at 33 U.S.C. §1251 to implement the CWA in a manner that avoids unnecessary delays. The regulated public should be able to easily discern what rules apply to a given activity so they can avoid preparing and submitting unnecessary permit applications.

- Defining "waters" under the *Rapanos* plurality

Importantly, the opinion limits the definition of "waters" to geographic features:

> In sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams, ... oceans, rivers, and lakes." The phrase does not include channels through which water flows intermittently or ephemerally or channels that periodically provide drainage for rainfall.[19]

One of the primary implications of this distinction is that the term requires more than just the presence of water (as a substance) itself.[20] Contrary to the agencies' prior practice, a "hydrological connection," the flow of water, is not the sole jurisdictional touchstone.

Instead, the existence of a geographic feature identifiable as TNW is the threshold jurisdictional hook with other identifiable "geographic features" that have a continuous surface connection potentially falling under the umbrella of WOTUS. For example, the justices expressed skepticism about defining WOTUS to include ditches that were far away from a TNW, regardless of the character of the flow of water from the ditch to the TNW. The opinion is similarly skeptical of the practice of including wetlands in the definition based purely on proximity to a jurisdictional water without a showing of an actual and continuous surface connection.[21] Thus, following the plurality opinion, a break in the continuity of "waters," i.e., "geographic features," connected to downstream TNWs should result in a legal break in jurisdiction.

The NWPR did not define WOTUS in terms of "geographic features." Instead, it continues the agencies' practice of defining jurisdiction based only on the flow of water. For example, the NWPR defines *tributary* as:

> [A] river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a [traditional navigable water or territorial sea] in a typical year either directly or indirectly through [other jurisdictional waters] or through a [non-jurisdictional water].

The reliance on the contribution of flow, including indirect and through non-jurisdictional waters is inconsistent with the guidance provided in the *Rapanos* plurality and places an unreasonable burden on the potentially unregulated community of tracing the pathway of water flow indefinitely.

In addition, "waters," as "geographic features," should not include artificially constructed ditches. The agencies should specifically exclude ditches and modify the proposed definition of a "tributary" to clarify that no artificially constructed ditch can meet the definition of a "naturally occurring surface channel."

Roadside ditches, in particular, should be excluded from the definition because a large portion of the nation's public and private transportation infrastructure relies on structures that transport water away from facilities. Water quality concerns from roadside ditches are addressed in Section 402 permits and state Section 401 certification of Section 404 permits.

In many areas of the country, ditches constructed around infrastructure to carry rainfall would be excluded under the NWPR because the water flow would qualify as "ephemeral." However, in coastal Alaska where the annual

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19 *Rapanos*, 547 U.S. at 734.

20 *Rapanos*, 547 U.S. at 732-733; *also see id.* at 728-729 (indicating that a lower court case finding WOTUS based on ability of water molecule to travel from wetland at issue to a TNW downstream problematic).

21 *Rapanos*, 547 U.S. at 727.

rainfall is in the range of 80 to 160 inches per year, ditches constructed around infrastructure may have perennial or intermittent flow. Those areas experience precipitation; but, the purpose of these ditches to direct stormwater is the same. These ditches should be expressly excluded from the WOTUS definition.

In Anchorage and Fairbanks, ditches serve as storm water conveyances in the Municipal Separate Storm Sewer System (MS4). The State generally supports the NWPR's treatment of these ditches in the MS4 as storm water conveyances (under CWA Section 402) and regulated as part of the MS4 rather than independently qualifying as WOTUS.

- "Waters" must clearly end at the geographic feature's OHWM

The current definition of "ordinary high water mark" allows OHWM to be located considerable distances from the banks of rivers and streams as a result of seasonal snowmelt or flood events filling a floodplain. To limit the definition of OHWM to the lateral extent of the geographic feature of the jurisdictional water, Alaska offers the following modifications to the OHWM definition:

> (6) *Ordinary high water mark.* The term *ordinary high water mark* means the delineation of the lateral extent of a stream, river, ocean, lake or other body of water that forms a geographical feature. Ordinary high water mark is ~~that line on the shore~~ established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. Ordinary high water mark is not the line delineating the lateral extent of an adjacent wetland, nor a line created by seasonal runoff or seasonal flooding.

By defining the boundaries of a "water" more clearly, this language also more clearly defines the scope of "adjacent wetlands." This language would also provide a more definitive starting point for measurements required for the administrative boundary approach proposed as a potential alternative above.

- "Wetlands" are not "waters" under the plurality opinion

The plurality noted that wetlands are not, in their own right, WOTUS. Instead, wetlands may be regulated under the CWA only where they present a "boundary-drawing problem," i.e., it is impossible to define where the "water" ends and the "wetland" begins. Specifically, the justices concluded:

> [O]nly those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to [WOTUS] do not implicate the boundary-drawing problem of *Riverside Bayview* and thus lack the necessary connection to covered waters that we described as a "significant nexus" in *SWANCC*.[22]

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22 *Rapanos*, 547 U.S. at 742 ("Establishing that wetlands … are covered by the Act requires two findings: first, that the adjacent channel contains a 'water of the United States' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine whether the water ends and the wetland begins.").

Contrary to the approach proposed by the agencies, the *Rapanos* plurality reasoned that a hydrological connection by itself is not enough – ecological considerations cannot provide an independent basis for including "wetlands" or other features, but only relevant to resolve ambiguity.[23]

The definition of "adjacent wetlands" in the NWPR failed to limit coverage to wetlands involving the "boundary-drawing problem" discussed by the *Rapanos* plurality. Such ambiguity exists in the first instance only if it is impossible to delineate the jurisdictional water from an abutting wetland. Where a surface connection between a water body and a wetland is only intermittent, a clear boundary exists between the water and the wetland – there is no ambiguity to resolve through the application of agency expertise with respect to ecological considerations. Moreover, the plurality's discussion of the "intermittent" flow of water applied to identifying geographic features that qualify as "waters," not to identifying where collateral regulation of adjacent wetlands might be appropriate. Importing the "intermittent" flow concept to the analysis of whether wetlands may be regulated as WOTUS is not supported by the plurality opinion. The refined Definition should include wetlands in the definition of WOTUS only to the extent there is a "continuous surface connection" with a jurisdictional water and a legitimate difficulty in identifying where the water ends and the wetland begins.

For those wetlands that do present the "boundary-drawing" problem identified in the plurality opinion, the use of an administrative boundary would appropriately limit the extent to which the ambiguity about where the water ends and the wetland begins is used to justify further expansions of federal control. At some distance from a jurisdictional water body, it is clear that the landscape feature is no longer a "water," but a wetland. This approach would also be more consistent with the principles weighing in favor of a more conservative interpretation of the agencies' jurisdiction discussed above.

To the extent the agencies incorporate wetlands in the WOTUS definition, the refined Definition could be improved with the use of bright-line administrative boundaries. Such an approach would provide greater clarity.[24] An administrative boundary would be measured a set distance (potentially, up to 300 feet) from the ordinary high water mark (OHWM) of a jurisdictional water. As more fully described above, Alaska proposes edits to the definition of OHWM to establish a more certain and verifiable OHWM location. Projects beyond the administrative boundary would be subject only to the state regulatory requirements. Within the boundary, any wetland without a direct hydrological surface connection to a jurisdictional water would likewise remain beyond federal jurisdiction. Wetlands within the boundary that do have a direct surface connection to a jurisdictional water would be presumed to be WOTUS – but a permittee should have an opportunity to rebut that presumption of jurisdiction based on site-specific conditions for a specific waterbody or even a class of waterbodies. Finally, jurisdiction over a wetland that straddles the boundary would be divided at the line – the portion of the wetland inside the boundary could be WOTUS, the wetland beyond the boundary would be waters of the state. This approach would substantially reduce need for case-by-case field investigations to determine the extent and connectivity of large or expansive wetland systems. The establishment of a "bright line" would simplify administration of the statute by clearly distinguishing federal and state jurisdiction in a manner understandable to the regulated community, courts, and the public.[25]

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23 *Rapanos*, 547 U.S. at 741. While the *Rapanos* plurality, and the unanimous Court in *Riverside Bayview*, permitted ecological considerations to help resolve an ambiguity, the opinions were also somewhat skeptical that this was the best approach. The reach of federal jurisdiction based on ecological considerations, un-tempered by other limiting principles, reflected in the connectivity report relied on by the 2015 rule illustrates that this skepticism was well grounded.

24 See, e.g., *Final Report of the Assumable Waters Subcommittee* (May 2017) available at https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteefinalreprort_05-2017_tag508_05312017_508.pdf. See page 27 Figure 3 for a drawing of the proposed approach for Alaska. The Subcommittee established the adjacency work group to develop alternatives for the identification of wetlands adjacent to the navigable waters being retained by the U.S. Army Corps of Engineers under an assumed 404 permit program. While this is different from the WOTUS definition, the concept holds promise for application here.

25 However, this approach may not necessarily exempt every project affecting a water or wetland more than 300 feet from a jurisdictional water. Rather, activities occurring in state waters that impact downstream or adjacent to federal waters (e.g. water quality

Under any approach, the refined Definition should be clear with respect to how "direct" a connection must be for a wetland to be jurisdictional. A simple edit to resolve the ambiguity would be to require that an "adjacent wetland" both abut AND have a direct hydrologic surface connection to a jurisdictional water. This edit would ensure that only directly adjacent wetlands may be considered WOTUS. To the extent that wetlands are included in the refined Definition, the administrative boundary concept and requiring an adjacent wetland both abut and have a direct hydrologic surface connection would provide a clearer and more objective approach to defining a "direct" connection that justifies regulating wetlands as waters.

4. *Alaska-Specific Issues*

As discussed above, under the guidance provided by the *Rapanos* plurality, all wetlands could be beyond WOTUS. However, if the agencies decide to include wetlands in the refined Definition, specific exclusions should be identified.[26] These specific exclusions will improve the clarity of the Definition and provide greater certainty to the regulated community.

a. *Wetlands and Wetland Mosaics in Arctic and Western Alaska*

It is unclear whether the wetland mosaics in Western and Arctic Alaska, which can cover hundreds of acres, are WOTUS under the NWPR. But, the Supreme Court stated that federal jurisdiction has limits -- it did not say that federal jurisdiction extends to wetlands adjacent to wetlands, adjacent to wetlands, adjacent to a navigable water. There should be a limit on what constitutes a "direct" surface connection; it cannot go on for hundreds or thousands of feet. The potential irrationality of including wetland complexes would be resolved through a use of an administrative boundary measured from the associated "water."

b. *Permafrost Wetlands*

Even if the agencies include certain wetlands in the WOTUS definition generally, the refined Definition should categorically exclude permafrost wetlands from the definition. Permafrost wetlands are very dynamic systems that are not completely understood. Permafrost is soil, rock, or sediment that is frozen for more than two consecutive years. In areas not overlain by ice, permafrost exists beneath an "active layer" – a layer of soil, rock, or sediment that freezes and thaws annually. The vegetation that lives in this active layer may exhibit the characteristics of wetlands – hydric soils, hydrology, and hydrophytic vegetation.

The basis for federal jurisdiction under a "significant nexus" standard was questionable because of the unclear impact on downstream jurisdictional waters. The extent or existence of any connection to downstream waters or other wetlands can be difficult to identify because of the very short growing season (that may be interrupted with frosts), hydric soils that generally hover around a "biological zero" temperature, and the significant temporal lag in hydrology caused by the freeze-thaw cycle and lack of slope. In fact, the hydrology is more is equivalent to groundwater flow, and in most cases, there is little evidence of even a significant subsurface connection.

The NWPR appropriately sets aside subsurface connections as a basis for federal jurisdiction, but that may not change the approach to permafrost wetlands, particularly on the North Slope where seasonal sheet flow may establish a seasonal or intermittent surface hydrological connection. For the same reasons that permafrost wetlands should not have been included in the WOTUS definition under a "significant nexus" analysis – the lack of evidence

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criteria have not been met by the time the water exchange occurs at the federal and state demarcation) may still require CWA authorization for the impacts in the federal waters.

26 Specific exclusions would improve the clarity of the rule.

of a significant impact on a jurisdictional water – they should not be included in the refined Definition now because of a seasonal surface connection.

c. *Forested Wetlands*

Historically, under a significant nexus test, jurisdictional status of forested wetlands in Southeast and coastal Alaska has been difficult to determine. In these regions, precipitation rates can exceed 70 inches annually. In part due to the constant precipitation keeping the ground wet, hydrophytic vegetation and isolated pockets of hydric soils exist on hillsides and other slopes. These wetlands exist independently of any navigable waterways and regularly do not have a direct hydrologic connection other than groundwater flow. Thus, under the NWPR, these forested wetlands are beyond the scope of WOTUS.

However, as previously discussed, in part because of the threat of penalties and criminal liability, the regulated community often errs on the side of treating wetlands as jurisdictional. Thus, if the agencies include wetlands in the WOTUS definition, for the sake of clarity, the agencies should include an explicit exclusion of this category of forested wetlands.

d. *Historical Documentation of Ditches*

As discussed above, the WOTUS definition should exclude all ditches constructed in uplands. However, if any upland ditches are included in the definition, the rule should not involve a temporal component for distinguishing jurisdictional ditches. In most cases in Alaska, there is very little past aerial photography or documentation as to when ditches were constructed and what the conditions were like prior to construction. The cost associated with trying to "prove" that a ditch was constructed in an upland (which is not jurisdictional) appears to be neither warranted nor prudent.

e. *Regionalization*

As described above, Alaska boasts 174 million acres of wetlands which cover about 43 percent of the state's surface areas, equaling 63 percent of the total wetland acreage in the country. With over half of the state covered by wetlands or deep-water habitat, the WOTUS definition has significant consequences for the State's authority to manage activity within state boundaries.

Alaska is different – we are blessed with abundant and intact wetlands and yet burdened with overzealous federal authorities and agencies that do not recognize nor consistently apply the legal and logical flexibility afforded within the current WOTUS definition. The "one-size-fits-all" approach does not work in Alaska. We have vast areas with significant hydrologic differences just within Alaska, unparalleled in the Lower-48.

Alaska can be broken into a variety of different ecoregions that reflect different hydrological units with unique characteristics. One example of a potential service area model identifies ecoregions of Alaska to include the Alaska Range Transition, Aleutian Meadows, Arctic Tundra, Bering Taiga, Bering Tundra, Coastal Rainforests, and Intermontane Boreal (Alaska - Level II ecoregions). This is a vast and diverse state with some areas arid and receiving less than five inches of precipitation annually with other regions experiencing an excess of 150 inches of precipitation annually.

Any refined Definition must specifically address Alaska's uniqueness. Depending on the approach by the agencies, refined regionalization may be of value and use in Alaska. If the agencies were to consider more broadly regionalizing and refining the waters in Alaska, it is critical that the agencies engage in a substantive consultation process and incorporate the State of Alaska's input.