



## ASSOCIATED GENERAL CONTRACTORS of ALASKA

---

8005 Schoon Street • Anchorage, Alaska 99518  
Telephone (907) 561-5354 • Fax (907) 562-6118

3750 Bonita Street • Fairbanks, Alaska 99706  
Telephone (907) 452-1809 • Fax (907) 456-8599

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 impacts 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



## 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 21<sup>st</sup> 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