

In the Matter Of:
U.S. SENATE SUBCOMMITTEE

FIELD HEARING ON FISHERIES, WATER AND WILDLIFE

April 06, 2015

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TRANSCRIPT OF PROCEEDINGS

Field Hearing
of the
SUBCOMMITTEE ON FISHERIES, WATER AND WILDLIFE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

regarding
Impacts of the Proposed
Waters of the United States Rule
on State and Local Governments and Stakeholders



Held by United States Senator / Alaska
Daniel Scott Sullivan

April 6, 2015
10:00 a.m.
Loussac Library Assembly Chambers
3600 Denali Street
Anchorage, AK 99503

Reported by: Gail Ruth Peckham, RPR

	I-N-D-E-X	
		PAGE
1		
2		
3	Opening Statement:	
4	CHAIRMAN, SENATOR DAN SULLIVAN	4
5		
6		
7	Subcommittee Testimony:	
8		
9	Panel I	
10	MICHELLE HALE,	9
11	Director, Division of Water, Alaska Department of Environmental Conservation	
12		
13	Panel II	
14	TARA SWEENEY,	27
15	Executive Vice President, External Affairs, Arctic Slope Regional Corporation	
16	KARA MORIARTY,	33
17	President/CEO, Alaska Oil and Gas Association	
18	RICK ROGERS,	37
19	Executive Director, Resource Development Council for Alaska	
20	ROD HANSON,	42
21	Vice President, Alyeska Pipeline Service Company	
22	KATHIE WASSERMAN,	47
23	Executive Director, Alaska Municipal League	
24	LORALI SIMON,	53
25	Vice President External Affairs, Usibelli Coal Mine	

1	Panel II (Cont'd.)	
2		
3	TIM TROLL, Executive Director, Bristol Bay Heritage Land Trust	58
4		
5	SAMUEL KUNAKNANA, Tribal President, Native Village of Nuiqsut	63
6		
7	BRIAN LITMANS, Senior Staff Attorney, Trustees for Alaska	67
8		
9	MARK RICHARDS, Chairman, Alaska Backcountry Hunters and Anglers	71
10		
11		
12		
13	Field Hearing Q&A Session	77
14		
15	Closing Statement:	
16	CHAIRMAN, SENATOR DAN SULLIVAN	101
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 ANCHORAGE, ALASKA; MONDAY, APRIL 6, 2015

2 10:00 A.M.

3 P-R-O-C-E-E-D-I-N-G-S

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5 CHAIRMAN SULLIVAN: Good morning,
6 everybody.

7 The Subcommittee on Fisheries, Water and
8 Wildlife, under the Environment and Public Works
9 Committee of the United States Senate will now come
10 to order.

11 I'm Senator Dan Sullivan, Junior Senator
12 from Alaska. I want to welcome everybody to this
13 important hearing. I also want to give you kind of a
14 little bit of an overview of how we're going to
15 conduct the hearing today.

16 We're going to start -- we're actually
17 going to have two panels: Michelle Hale, from the
18 State of Alaska, will be testifying first; and then
19 we're going to take a quick recess and have a much
20 larger panel, of several Alaskans who represent
21 different organizations, who will be testifying in
22 the second panel.

23 I appreciate everybody coming here today,
24 and we will begin with my opening statement on the
25 very important issue of the impacts of the proposed

1 "Waters of the U.S." rule on state and local
2 governments.

3 So, good morning, again, and thanks for
4 being here to discuss the proposed "Waters of the
5 U.S." rule issued by the EPA. I know that some of
6 you have traveled very far to be here. We actually
7 have staff from Washington, D.C., both majority and
8 minority staff on the EPW Committee. I very much
9 appreciate everybody coming to this important
10 hearing.

11 In Washington, D.C., we have held several
12 hearings with the EPA administrator, the assistant
13 secretary of the Army, the state government
14 representatives and stakeholders on this proposed
15 rule.

16 This hearing is a continuation of these
17 efforts. It will also give voice to a cross section
18 of Alaskans on this rule and it's possible impacts.
19 And as Alaskans, we are the state that certainly will
20 be most impacted by this rule.

21 Beyond those testifying today, the
22 subcommittee will hear from the Farm Bureau, the
23 Associated General Contractors, the Alaska Miners
24 Association, the mayor of the North Slope Borough,
25 State Senator Click Bishop, and the Citizens'

1 Advisory Commission on Federal Areas in a hearing on
2 Wednesday in Fairbanks. They will join three-fifths
3 of the states who have now indicated opposition to
4 the proposed rule and more than 300 trade groups and
5 associations from across the country.

6 I also think it's very important to make
7 sure that as we conduct these hearings, it's not just
8 citizens coming to Washington, D.C. to hear concerns
9 and address their concerns but Washington, D.C.
10 coming to the states. And that's what we're trying
11 to do today with this field hearing.

12 Alaska's no stranger to overreaching
13 federal agencies. However, it should be stressed
14 that the proposed "Waters of the U.S." rule may be
15 one of the most important, significant expansions of
16 federal jurisdiction we have seen to date in Alaska.

17 Unlike most of the federal overreach that
18 has impacted Alaska, the tentacles of the Clean Water
19 Act extend far beyond simply federal lands, and it
20 would impact the ability of states and private
21 landowners to use their land.

22 Already a huge percentage of Alaska falls
23 under federal Clean Water Act jurisdiction. Alaska
24 has 43,000 miles of coastline, millions of lakes.
25 More than 43 percent of our state's surface area is

1 composed of wetlands, which accounts for 65 percent
2 of all the wetlands in the United States.

3 Let me be clear: There is no doubt that
4 many of these lakes and rivers, such as the Yukon,
5 Susitna and other tributaries, are jurisdictional
6 under the Clean Water Act. No one is suggesting
7 otherwise; instead, we're here to talk about the
8 regulations of waters that Congress never intended to
9 be jurisdictional.

10 Alaska has some of the cleanest waterways
11 in the world, leading to our vibrant, world-class
12 fisheries and award-winning drinking water. Concerns
13 over this rulemaking, with regard to the "Waters of
14 the U.S.," are not at all aimed at jeopardizing these
15 characteristics that are fundamental to the identity
16 of Alaska; instead, our efforts are about clarifying
17 jurisdiction and pushing back on federal agencies
18 that are asserting authority over even more features,
19 such as roadside ditches, culverts, stormwater
20 systems, isolated ponds and activities on adjacent
21 lands, bypassing Congress, and ducking Supreme Court
22 rulings.

23 Regardless of this rule, discharges of
24 pollutants into these features would remain subject
25 to Clean Water Act regulation. However, if the rule

1 is finalized in its current form, it would mean that
2 many Alaskans could be subject to having to get a
3 permit from the EPA in order to dig ditches even in
4 their own back yard. It would mean that a farmer
5 might have to get a permit to plow new land. It
6 would mean that harbors, roads, weed and pesticide
7 control, and certainly natural resource development,
8 would fall under even more extensive federal
9 permitting processes, effectively granting the EPA
10 power to dictate energy and infrastructure policy in
11 most of Alaska.

12 This is not hyperbole. Just ask the Idaho
13 couple who wanted to build a house on just over half
14 an acre that happened to be near a lake. The EPA
15 determined that their property was a wetland and
16 forced them to stop development and rehabilitate the
17 property to its natural state or face fines of
18 \$75,000 a day. With this rulemaking, more landowners
19 across the U.S. would be subjected to similar
20 treatment.

21 Just a couple weeks ago, the Senate passed,
22 by strong, bipartisan vote, an amendment that I
23 co-sponsored with Senator John Barrasso of Wyoming
24 that would rein in the scope of this rulemaking.
25 This amendment was an important, bipartisan step as

1 we craft legislation to ensure that the Clean Water
2 Act is focused on maintaining water quality. We sent
3 a strong message through the Senate that the Clean
4 Water Act should not be transformed into a tool to
5 expand the authority of the EPA and control entirely
6 unrelated activities.

7 Thank you again for being here. We have
8 several witnesses, who will be presenting on both
9 sides of this issue. We want to hear all views here
10 today in Alaska.

11 And I want to ask our first witness,
12 Michelle Hale, Director of the Division of Water at
13 the Department of Environmental Conservation for the
14 State of Alaska, to please take the stand on the
15 witness dais and present her testimony.

16 Miss Hale.

17

18 S-U-B-C-O-M-M-I-T-T-E-E T-E-S-T-I-M-O-N-Y

19 Panel I

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22

M-I-C-H-E-L-L-E H-A-L-E

23

24 MS. MICHELLE HALE: Good morning. My name
25 is Michelle Hale, and I'm Director of the Division of

1 Water of the Alaska Department of Environmental
2 Conservation. My commissioner, Larry Hartig, was
3 supposed to have been here, but he was needed down in
4 Juneau today. There's a lot going on down in Juneau.

5 The State of Alaska has submitted comments
6 to the U.S. EPA and the Army Corps of Engineers, and
7 I've submitted those comments for the record, as
8 well.

9 So the State of Alaska believes that the
10 "Waters of the U.S." rule will lead to a
11 significantly larger number of waters and wetlands
12 that are subject to federal jurisdiction that will be
13 considered "jurisdictional" and will require permits
14 for development and also require expensive
15 compensatory mitigation.

16 The high costs are already borne by all
17 permittees, and they'll be higher once this rule goes
18 into effect, we believe. That's our understanding of
19 the rule.

20 Currently the Army Corps of Engineers takes
21 about six months to issue a standard dredge and fill
22 permit. For larger projects, that can be many years.
23 So, in addition to high costs and permitting and
24 compensatory mitigation, often those costs include
25 missing entire seasons of development opportunity.

1 That will continue under the rule and become worse.

2 As you said, Senator Sullivan, Alaska has
3 more coastline than all the other states, all the
4 other lower 48 states combined. Alaska has more than
5 3 million lakes and more than 15,000 streams that
6 support anadromous fish. We also have somewhere
7 between 130 million and 170 million acres of the
8 wetlands, as you say. More than a third, close to a
9 half of the state is wet, and that's, again, more
10 wetlands than all the other states combined.

11 This information just demonstrates that
12 Alaska has more at stake for this rulemaking. This
13 rulemaking has more potential impacts on Alaska than
14 any other state. Yet, the published "Waters of the
15 U.S." rule was based on a Connectivity Study; a draft
16 Connectivity Study that made only glancing reference
17 to Alaska, contained no reference to permafrost, no
18 reference to tundra.

19 We commented significantly on that report,
20 and in the final report they did make more references
21 to Alaska, but astonishingly, as we're all accustomed
22 to the maps in the report, eliminated both Alaska and
23 Hawaii. We're not even included in any of the maps
24 in that draft -- in that final connectivity report.

25 EPA and the Corps failed to adequately

1 consult with the states in the development of the
2 rulemaking and the process for the development of
3 that rulemaking is flawed. The published rule was
4 published before the Connectivity Study was final.
5 So, before any of that information about Alaska was
6 able to make it into the rule, it was used to support
7 the draft rulemaking.

8 Interestingly, I'll use the national Office
9 of Management and Budget's own words and quote that
10 "when an information product, like the Connectivity
11 Study, is a critical component of lawmaking, it is
12 important to obtain peer review before the agency
13 announces its regulatory options, so that any
14 technical corrections can be made before the agency
15 becomes invested in a specific approach and the
16 positions of interest groups have hardened."

17 We have commented at every opportunity on
18 both the Connectivity Study and the rulemaking. We
19 commented on the Connectivity Study, we sent somebody
20 to Washington, D.C., to testify orally before the
21 Science Advisory Board, we have commented on the
22 draft rulemaking, and our comments seem like they're
23 falling on deaf ears. We're not hearing anything in
24 response to those comments.

25 The rule doesn't account for regional

1 differences and it doesn't seem to account for any of
2 the uniqueness of Alaska. It might be EPA's intent
3 to finalize the "Waters of U.S." rule and then
4 attempt to implement it in ways that will work in
5 Alaska, but this is unacceptable for us. If that
6 happened, there would have to be Alaska-specific
7 guidance, and that guidance would have to go through
8 some kind of a public process. That public process
9 would have to take into account Alaska's concerns.
10 However, the EPA's and the Corps' track record on
11 this is not very good. They don't seem to have been
12 good at taking those concerns into account.

13 We have long protected our waters
14 under statutory and regulatory authority. We've got
15 more authority than the federal government has now to
16 protect our waters. We don't believe there's any
17 need to expand the Corps' and EPA's regulatory reach
18 by increasing the numbers of waters that they
19 regulate.

20 Thank you.

21 CHAIRMAN SULLIVAN: Thank you, Ms. Hale.
22 And I really appreciate you coming and testifying
23 before the Committee today. I think it's very
24 important for Alaskans to hear exactly what the State
25 of Alaska's view is on this rule.

1 So let me just: More specifically, did we,
2 in our specific comments to the EPA, did we propose
3 that they withdraw the rule and start over?

4 MS. MICHELLE HALE: Yes, that's one of the
5 proposals. And we've also made a lot of comments
6 specifically about components of the rule, as well.

7 CHAIRMAN SULLIVAN: And do you think
8 that --

9 So were there any state officials involved
10 in actually drafting the proposals?

11 MS. MICHELLE HALE: No. There was what's
12 called a "Federalism Consulting Process" that EPA and
13 the Corps kicked off in 2011, and that process lasted
14 for a little more than a month. And it was supposed
15 to be this process where states were involved in the
16 development of the rule. But I participated in that
17 and I found that it was more EPA and the Corps
18 talking and states listening, and I did not find an
19 opportunity for Alaska to actually provide our
20 Alaska-specific comments and issues at that stage.

21 CHAIRMAN SULLIVAN: So, and just for the
22 record, I want it to be clear that Alaska has opposed
23 the rule and asked for its withdrawal and is one of
24 34 states in the United States that is opposing the
25 rule.

1 Are you familiar with what some of the
2 other states' concerns are?

3 MS. MICHELLE HALE: We've worked a lot with
4 multi-state agencies and organizations, and a lot of
5 the issues that we have are echoed throughout many
6 states, particularly western states.

7 CHAIRMAN SULLIVAN: And with regard to the
8 Clean Water Act, I want to read a section that is
9 very important.

10 Section 101(b) clearly states, quote:
11 "It is the policy of the Congress to recognize,
12 preserve and protect the primary responsibilities and
13 rights of the states to prevent, reduce, and
14 eliminate pollution, to plan the development and use
15 (including restoration, preservation, and
16 enhancement) of land and water resources, and to
17 consult with the Administrator" -- of the EPA -- "in
18 the exercise of his" -- or her -- "authority under
19 this chapter," unquote.

20 Why do you think the sovereign
21 State of Alaska was not treated as a critical
22 contributor to the rulemaking, particularly during
23 the public comment section; and, as you mentioned,
24 importantly, the study, on which the rule was based,
25 was promulgated to the public after the rule was

1 issued? Could you address those two questions.

2 MS. MICHELLE HALE: It's been our
3 experience that the federal government thinks that
4 they know how to regulate better than the state
5 governments, and that probably answers the first
6 question as well as I can. I don't remember the
7 exact sequence of events, but I think that the way it
8 worked was that a draft of the rulemaking was leaked,
9 but that draft was leaked -- and that was a complete
10 draft -- before that Connectivity Study was out. So
11 there is some kind of sequence of events, but the
12 rulemaking was intact before the Connectivity Study
13 was released.

14 CHAIRMAN SULLIVAN: But the rule itself is
15 based on the Connectivity Study, correct?

16 MS. MICHELLE HALE: Yes. It does seem to
17 be a bit of a "cart before the horse," Senator
18 Sullivan.

19 CHAIRMAN SULLIVAN: So, again, just so
20 everybody's clear, for the record: The Connectivity
21 Study, upon which the rule is based, came out several
22 months after the rule was proposed, correct?

23 MS. MICHELLE HALE: It was finalized after
24 the rule was proposed. The Connectivity Study -- and
25 again, I don't have the sequence of events, and I'll

1 get back to you with that. But a draft of the
2 rulemaking was leaked, I believe, before the final,
3 or before the draft Connectivity Study was released.
4 But again, I'll get back with you on the sequence of
5 dates there.

6 CHAIRMAN SULLIVAN: Great. Thank you.

7 And do you think that this rule, the way
8 it was promulgated, the jurisdictional reach of it,
9 do you think that -- and the process, which I think
10 is important for Alaskans to understand how it was
11 promulgated, do you think that this is consistent
12 with the spirit of the Clean Water Act provision that
13 I read, Section 101(b), that talks about the policy
14 of the Congress is to protect the primary
15 responsibilities and rights of the states to manage
16 Clean Water?

17 MS. MICHELLE HALE: Our experience with
18 EPA, in particular, especially at the headquarters
19 level, is that this rarely happens, that they
20 actually meaningfully consult with the states.
21 We have a different relationship with our Region 10
22 counterparts --

23 CHAIRMAN SULLIVAN: Right.

24 MS. MICHELLE HALE: -- our EPA Region 10
25 counterparts in Seattle. We're often -- when

1 national rulemakings don't work in Alaska, they work
2 closely with us. They recognize the uniqueness
3 of the state. We rarely find that with headquarters
4 rules.

5 CHAIRMAN SULLIVAN: So one of the things
6 that the EPA administrator and other officials in
7 Washington, as you mentioned, have stated about this
8 rule is that it's not intended to expand the
9 jurisdictional reach of the EPA's authority under the
10 waters of the Clean Air Act (as spoken), it's simply
11 meant to clarify existing law.

12 Do you see this as a significant expansion
13 of the EPA's jurisdictional authorities over waters
14 in Alaska?

15 MS. MICHELLE HALE: Senator Sullivan, as
16 written, we are very concerned that it will lead to
17 expansion of jurisdiction, yes.

18 CHAIRMAN SULLIVAN: So I think that it's
19 important for the record to indicate that your views
20 are similar to the views of the Congressional
21 Research Service, which in a report on March 27th,
22 2014, did say that this proposed rule would, quote,
23 "Increase the asserted geographic scope of Clean
24 Water Act jurisdictions." And it goes into a whole
25 host of areas where this would happen.

1 So, even the State of Alaska, but even the
2 Congressional Research Service seems to be at odds
3 with the administrator of the EPA and EPA officials,
4 who have stated on the record, before this Committee,
5 that this rule does not seek or will not expand the
6 jurisdiction of the "waters of the U.S." But the
7 State of Alaska believes otherwise; is that correct?

8 MS. MICHELLE HALE: Senator, that is
9 correct, yes.

10 CHAIRMAN SULLIVAN: So I also want to talk
11 just briefly, Ms. Hale. I know that Commissioner
12 Hartig was going to be here originally, and again, I
13 appreciate DEC testifying on this important issue.

14 As you know, Commissioner Hartig is
15 certainly one of the most impressive, in my view,
16 public servants in the State of Alaska, having now
17 served consistently as the commissioner of DEC for
18 over three different administrations in the State of
19 Alaska.

20 And there was a case that Commissioner
21 Hartig and I worked on, when we were both in state
22 government. It ended up going all the way to the
23 U.S. Supreme Court. It was called Utility Air
24 Regulator Group v. EPA. It was about another EPA
25 rule that dealt with the Clean Air Act in the

1 State of Alaska, similar to this rule. We challenged
2 that rule, because we thought that the EPA didn't
3 have the authority to issue that rule.

4 That case went all the way to the U.S.
5 Supreme Court, and in a decision last year, the
6 Supreme Court reprimanded the EPA for exceeding its
7 authority as an agency and actually ignoring the
8 separation of powers, because it was undertaking
9 authority that was the realm of the Congress, not a
10 federal agency.

11 I want to just briefly read what the
12 Supreme Court stated with regard to that rule.

13 They stated, quote -- the rule, in that
14 case, a Clean Air regulation -- "would place plainly
15 excessive demands on limited government resources,
16 and that is alone a good reason for rejecting it; but
17 that is not the only reason. The EPA's
18 interpretation is also unreasonable because it would
19 bring about an enormous and transformative expansion
20 in EPA's regulatory authority without clear
21 congressional authorization. When an agency claims
22 to discover in a long-extant statute an unheralded
23 power to regulate 'a significant portion of the
24 American economy,'" -- "we" -- the Supreme Court --
25 "typically greet its announcement with a measure of

1 skepticism. We expect Congress to speak clearly if
2 it wishes to assign to an agency decisions of vast
3 'economic and political significance.'"

4 Do you think that this rule would have
5 significant economic impact on business interests or
6 other interests, local communities, the
7 State of Alaska; do you think it would have
8 significant economic impact over such entities in the
9 state of Alaska if this rule was promulgated?

10 MS. MICHELLE HALE: Senator Sullivan, that
11 is our read of the rule as it is proposed. We think
12 that it could have impact on individuals, on
13 corporations, on municipalities, on the
14 State of Alaska, who, incidentally, the Department of
15 Transportation, has the largest number of 404 permits
16 and is thus affected by jurisdiction rules more than
17 anyone, and we think that it would have -- as
18 written, we believe it would have an impact on the
19 economy of the State of Alaska.

20 CHAIRMAN SULLIVAN: So my view is,
21 particularly given what you're talking about, that
22 despite having had the Supreme Court just a year ago
23 reprimand the EPA for taking over with regard to
24 regulatory authority that they did not have, because
25 there was not a clear instance of the Congress

1 granting them that authority, that they're ignoring
2 the Supreme Court, who issued this very important
3 ruling just a year ago, that the State of Alaska was
4 very involved with, and they're doing it again:
5 They're issuing a regulation that has significant
6 impact over the economy of the United States, the
7 economy of Alaska, without congressional
8 authorization.

9 Do you agree that that's what they're
10 attempting to do with this rule?

11 MS. MICHELLE HALE: Senator, I'm not an
12 attorney, so I can't really speak from a legal point
13 of view. I certainly agree that, as written and as
14 proposed, the rule did seem like it would expand
15 jurisdiction significantly.

16 I can get back to you, consult with my
17 supervisors and with the commissioner and get back
18 to you.

19 CHAIRMAN SULLIVAN: Great. Thank you very
20 much.

21 So, Ms. Hale, let me ask one other quick
22 question: What can be done, now that the rule has
23 been released, to ensure sufficient consultation with
24 the states, that that consultation is taken
25 seriously?

1 It sounds like this is a pattern that the
2 State of Alaska has been objecting to literally for
3 years, and yet, we do not seem to get the
4 consultation that is required and mandated from the
5 statutes.

6 What do you think can be done? And
7 obviously, the State wants this rule to be withdrawn
8 and to start over, but what else? Do you have any
9 other suggestions with regard to what Congress can do
10 in this regard?

11 MS. MICHELLE HALE: Senator, I'm not
12 certain exactly what Congress can do. I think we
13 need to leave that to you. However, EPA and the
14 Corps could restart and sit down and meaningfully
15 discuss the Alaska-specific issues, really talk about
16 what this kind of permitting means relative to
17 permafrost and relative to tundra and relative to the
18 state that we've got. They could meaningfully sit
19 down, start over and sit down with us and actually
20 consult with us so that we could come up with some
21 kind of a joint way of addressing the questions that
22 are raised by those Supreme Court decisions. They
23 could also just exempt Alaska from the rule.

24 CHAIRMAN SULLIVAN: Great. And let me ask
25 one final question.

1 You talked about consultation, you talked
2 about the process, the frustration the
3 State of Alaska has had with regard to the EPA on
4 this and other issues. There's many of us who
5 believe that this rulemaking process was a clear
6 example of Executive Order 13132, a very important
7 executive order called the Federalism executive
8 order, that was not abided by in this process.

9 Let me give you a quote, and for the
10 record, what portions of that Federalism executive
11 order state. Quote, "When undertaking to formulate
12 and implement policies that have federalism
13 implications, agencies shall" -- federal agencies
14 shall -- "in determining whether to establish uniform
15 national standards, consult with appropriate State
16 and local officials as to the need for national
17 standards and any alternatives that would limit the
18 scope of national standards or otherwise preserve
19 State prerogatives and authority," unquote.

20 Do you believe that the EPA clearly abided
21 by this Federalism executive order, which they are
22 required to do?

23 MS. MICHELLE HALE: Senator, I can't speak
24 to the exact letter of the law, but I can speak to
25 the process that occurred. And I do not believe

1 that the State of Alaska was meaningfully involved in
2 the development of that rule and even the decision to
3 make that rule, to develop that rule.

4 CHAIRMAN SULLIVAN: Great.

5 MS. MICHELLE HALE: We did not have an
6 opportunity.

7 CHAIRMAN SULLIVAN: Thank you for your
8 outstanding testimony.

9 Please give my regards to Commissioner
10 Hartig and the other members of DEC. You are doing
11 great work for the State of Alaska.

12 I try to remind the EPA, the administrator
13 and other senior members of the EPA in Washington,
14 D.C. that Alaskans love our environment. We care
15 more about having a clean environment, clean water,
16 pristine environment, than any federal bureaucrat in
17 Washington, D.C., and I think DEC does a great job in
18 representing the State.

19 So I appreciate your testimony.

20 We are going to recess for a short five
21 minutes, and we're going to call the next panelists
22 to come to the dais for your testimony.

23 Thank you, Ms. Hale.

24 MS. MICHELLE HALE: Thank you.

25 (A recess was taken.)

1 CHAIRMAN SULLIVAN: We are going to resume
2 the hearing, and if all the witnesses will please
3 have a seat at the dais.

4 So I just wanted to give just another quick
5 little update here. As you see, we have a fantastic
6 panel of witnesses, and I want to welcome all of
7 them. We have witnesses from both sides of the
8 debate here with regard to the rule. We certainly
9 want to hear all views with regard to the proposed
10 rule.

11 We have a setup that's a little unique
12 here. So what we're going to do is, we're going to
13 have each witness, when they're called, to present
14 their testimony from the dais in front of the
15 Committee, and then when they're all -- all the
16 testimony is complete, we will conduct some questions
17 and answers from the dais here.

18 So, again, I want to thank everybody for
19 coming. You'll have five minutes.

20 The witnesses will have five minutes to
21 read their testimony. If there's longer written
22 testimony, we can submit that for the record.

23 So for the first witness I'd like to have
24 Tara Sweeney, the executive vice president for
25 external affairs for ASRC, please proceed to the

1 witness stand and present your testimony.

2

3 S-U-B-C-O-M-M-I-T-T-E-E T-E-S-T-I-M-O-N-Y

4 Panel II

5

6 - -

7 T-A-R-A S-W-E-E-N-E-Y

8

9 MS. TARA SWEENEY: Chairman Sullivan, good
10 morning. I'm Tara Sweeney, Executive Vice President
11 of External Affairs for Arctic Slope Regional
12 Corporation or ASRC. ASRC is the Alaska Native
13 Corporation created under the terms of the Alaska
14 Native Claims Settlement Act of 1971.

15 Today I will highlight the main points of
16 my written comments, which I have submitted to the
17 Committee. Thank you for the opportunity to testify.

18 The proposed rule would designate riparian
19 areas as jurisdictional waters subject to regulation
20 by the federal government. The way the proposed rule
21 defines "riparian areas" makes it applicable to
22 virtually all wetlands in Alaska.

23 The size of the state of Texas is about 172
24 million acres. However, we have more wetlands in
25 Alaska than the size of the entire state of Texas.

1 According to Fish and Wildlife, Alaska is 403 million
2 acres, with almost 174 million acres of wetlands, or
3 43.3 percent of Alaska's surface area compared to
4 only 5.2 percent of wetland surface area in the Lower
5 48.

6 Their proposed rule creates the very real
7 risk that any development, with at least 43 percent
8 of Alaska, would immediately fall within the Clean
9 Water Act, Section 404 jurisdiction, for permits to
10 dredge, and the Clean Water Act, Section 402
11 jurisdiction, for discharge pollutants.

12 Closer to home, the Arctic Foothills and
13 the Coastal Plain are two areas that roughly
14 correspond with the area and the jurisdiction of the
15 North Slope Borough. Fish and Wildlife calculates
16 that 46.9 million acres of these areas are wetlands.
17 That's 83.1 percent of the lands that lie within the
18 boundaries of the North Slope Borough. Only a small
19 fraction of these are traditional navigable waters
20 that would have been subject to regulation prior to
21 the proposed rule.

22 There are over 2 million acres of lakes on
23 the North Slope larger than 50 acres. There
24 are another over 250,000 acres of rivers. Not all of
25 these larger lakes and rivers are traditional

1 navigable waters, but their total acreage, 2.7
2 million acres, represents the outside limit that
3 would conceivably -- that could conceivably be
4 regarded as traditional navigable waters.

5 The proposed rule expands the area of the
6 federally-regulated waters within the North Slope
7 from approximately 2.7 million acres to almost 47
8 million acres. This rule has the potential to
9 multiply the area of federally-regulated waters
10 on the North Slope more than 1600 percent.

11 The scope of the rule on Alaska Natives:
12 The U.S. Fish and Wildlife Study of Alaska Wetlands
13 calculates that 19.6 million acres of the lands owned
14 by Alaska Natives are wetlands, representing 44.5
15 percent of their ANCSA land entitlement, and are now
16 at risk to become jurisdictional wetlands, which
17 means that the burden on private landowners is
18 severe. Those lands are privately owned by Alaska
19 Natives who received them from the United States when
20 the federal government abolished Alaska Native rights
21 to claim land; and further mandated the use of those
22 lands and other corporate assets to facilitate the
23 self-determination, economic development and future
24 prosperity of Alaska Native people.

25 This rule is in direct conflict with the

1 congressional mandate handed down through ANCSA and
2 threatens the viability of Alaska Native corporations
3 to provide meaningful benefits to its members, its
4 Alaska Native shareholders.

5 The proposed rule does not take into
6 account Alaska's unique geography, and population
7 into account. It creates no exception for any
8 material portion of the wetlands in Alaska, yet,
9 provides many exceptions for other uses, like
10 agriculture. Alaskan waters are unusual in many
11 respects, and that may make them unsuitable for this
12 broad assertion of jurisdiction.

13 Many of Alaska's wetlands are frozen for
14 nine months out of the year and lie on top of a layer
15 of permafrost. Unlike wetlands in temperate zones,
16 Arctic wetlands, lying above thousands of feet of
17 permafrost, are not connected to aquifers subject to
18 waterflow. Because water on top of permafrost
19 travels across the frozen tundra surface in sheet
20 flow, these wetlands provide little function in
21 controlling runoff. The proposed rule reflects no
22 consideration for any of these unique aspects of
23 Alaskan wetlands. Indeed, neither the word "tundra"
24 nor the word "permafrost" appears anywhere in the 88
25 pages of the proposed rule.

1 The population of Alaska's remote regions
2 is particularly dependent on resource development,
3 which is jeopardized by the proposed rule. In our
4 region the only durable economic development is
5 resource development. No other use of land provides
6 the necessary funding that translates into
7 educational and employment opportunities,
8 infrastructures such as sewer systems, fire and
9 police protection. Shutting down development will
10 breed a cycle of displacement, which is antithetical
11 to the purpose of the Alaska Native Claims Settlement
12 Act and to this administration's commitment to
13 ensuring a bright future for Alaska Native youth.

14 In conclusion, ASRC believes that the
15 proposed rule, in its current form, will impose
16 enormous burdens on Alaska Natives, ASRC, our
17 shareholders, and all residents of the North Slope,
18 without any correlative benefit to the environment.

19 When the federal government proposes
20 changes to established rules and regulations that it
21 believes will help protect and conserve natural
22 elements for the future enjoyment of all people,
23 they, in fact, adversely affect the lives of those
24 people who actually live in those areas and depend on
25 those resources. This is particularly true in the

1 North Slope region of Alaska, where a long history of
2 subsistence overlaps with the legal imperative to
3 allow development within the region for the benefit
4 of our shareholders. Both elements define who we are
5 as Inupiat people and are important to the long-term
6 success of ASRC.

7 Further research and consideration may show
8 that an exemption for permafrost is warranted. In
9 addition, the federal government needs to provide
10 additional clarification on the lands as to which
11 areas within Alaska will be classified as
12 jurisdictional waters. Regardless, because so many
13 millions of acres of Alaska lands are potentially
14 affected, the Agencies should specify how they intend
15 to guarantee exemptions for private Alaska Native
16 landowners, like Alaska Native corporations, and for
17 the State of Alaska.

18 Thank you for the opportunity to provide
19 comments.

20 CHAIRMAN SULLIVAN: Thank you very much,
21 Ms. Sweeney. That was very powerful testimony.
22 Particularly the conflict with ANCSA, that's
23 something I'd like to explore in some of the Q&A, if
24 we have the time.

25 Thank you very much.

1 Our next witness will be Kara Moriarty,
2 President/CEO of the Alaska Oil and Gas
3 Association.

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K-A-R-A M-O-R-I-A-R-T-Y

7

8 MS. KARA MORIARTY: Good morning. My name
9 is Kara Moriarty, and I serve as President and CEO
10 of the Alaska Oil and Gas Association, commonly
11 referred to as AOGA. We are the professional trade
12 association for the industry here in Alaska.

13 Thank you for the opportunity, Senator, to
14 testify and explain what we view are the negative
15 consequences that will inevitably follow if the
16 proposed rule continues down this path.

17 As context for my testimony, Alaska has 63
18 percent of the Nation's jurisdictional waters and
19 represents 20 percent of the U.S. landmass. I cannot
20 emphasize enough that federal rules of the nature
21 proposed by EPA in this instance have a huge and
22 disproportionate impact on the Alaskan public,
23 private and Native interests, yet, EPA has given no
24 attention and attributed no significance of which I'm
25 aware to the unique and profound significance of

1 changes in the Clean Water Act jurisdiction proposed
2 here in Alaska.

3 The rule would serve to dramatically, and
4 we believe illegally, expand the Clean Water Act
5 jurisdiction here in the state. Enacted in 1972, the
6 Clean Water Act endeavored to create a workable
7 partnership between the states and federal agencies
8 to effectively manage identified pollution sources.
9 The proposed rule represents an unfortunate revision
10 to an agreement Alaskans have long honored.

11 The EPA has repeatedly suggested that the
12 rule is intended to simply provide "clarity" and
13 reduce "uncertainty." However, the rule has had just
14 the opposite effect, causing members of the regulated
15 community, and others, to have great and grave
16 concerns. We believe this rule will result in
17 significant regulatory burdens by causing water
18 features, such as canals and ditches with only remote
19 and speculative hydrological connections to
20 traditionally navigable and interstate waters, to
21 become "jurisdictional" under the Clean Water Act for
22 the first time.

23 Despite the EPA's statements to the
24 contrary, the EPA -- the rule will allow the EPA to
25 exercise authority under the act potentially on

1 virtually any water feature with any tentative or
2 hypothetical connection, directly or indirectly, to a
3 traditionally navigable or interstate water.

4 Despite the guidance of the Supreme Court
5 that has said, time and time again, that there are
6 limits to federal jurisdiction under the Clean Water
7 Act, the proposed rule will extend coverage to many
8 features that are remote and/or carry only minor
9 volumes. The proposed rule, read together, serve to
10 provide no meaningful limit to federal jurisdiction.
11 Understandably, all Alaskans should be concerned
12 that the EPA's proposed rule would allow it to
13 regulate far more bodies of waters than it attempted
14 to regulate prior to being rebuked by successive
15 Supreme Court decisions.

16 Moving past the issues of legality, another
17 primary concern remains that the proposed rule will
18 expand regulatory gridlock and uncertainty by
19 subjecting even more activities to permitting
20 requirements, NEPA analysis, mitigation requirements,
21 and citizen lawsuits challenging the applications of
22 new terms and provisions. Naturally, these impacts
23 will be felt by the entire regulated community, and
24 will result in an exponential increase in the costs
25 of projects large and small.

1 Nevertheless, the EPA has largely ignored
2 the potential adverse effect on economic activity and
3 job creation, by relying on its highly flawed
4 economic analysis for the proposed rule. Based on
5 the EPA's calculations, the total estimated cost
6 ranges from \$133 million to \$230 million, when, in
7 reality, private and public sectors spend
8 approximately \$1.7 billion a year today to obtain
9 Section 404 permits. It takes over two years to
10 obtain a 404 permit. It is impossible to understate
11 how significantly the proposed rule will affect
12 operations in Alaska, through both increased delay
13 and increased costs.

14 So, finally, despite the obvious
15 disproportionate and adverse effects in Alaska of a
16 dramatic expansion of Clean Water Act regulation, the
17 EPA has failed to include adequate analysis of how
18 the proposed rule will affect Alaska. The EPA should
19 be mandated to consider Alaska's unique
20 circumstances.

21 So, Senator, I encourage the committee to
22 consider the profound impacts this rule will have on
23 Alaska and its citizens. It is an ill-conceived rule
24 that serves only to frustrate state sovereignty and
25 local regulations.

1 Thank you.

2 CHAIRMAN SULLIVAN: Thank you,
3 Ms. Moriarty. And thank you, again: Powerful
4 testimony, particularly with regard to the issue of
5 costs, which I think, again, we should explore a
6 little bit more in the Q&A session.

7 Our next witness is Rick Rogers, Executive
8 Director of the Resource Development Council for
9 Alaska.

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12 R-I-C-K R-O-G-E-R-S

13

14 MR. RICK ROGERS: Good morning, Senator.
15 Welcome back home.

16 For the record, my name is Rick Rogers.
17 I'm Executive Director of the Resource Development
18 Council for Alaska. RDC is a membership-funded
19 statewide trade association. We represent oil and
20 gas, mining, fishery, tourism, and forest industries.
21 Our membership is really a broad cross section of
22 Alaska businesses and organizations. We include all
23 12 Alaska regional Native corporations, organized
24 labor, utilities, communities, and we all share the
25 common vision that resource development is vital to

1 the well-being for Alaskans and that responsible
2 resource development is essential for our well-being.

3 The EPA's proposed "Waters of the U.S."
4 rule will have a disproportionate impact on the
5 resource-dependent industries and on Alaska's economy
6 as a whole. It's appropriate that this field hearing
7 is being held in Alaska, because as other folks have
8 already stated, according to the U.S. Fish and
9 Wildlife Service, Alaska has 63 percent of the
10 nation's wetland ecosystems, and estimates place the
11 to total acreage at approximately 130 million acres.

12 The rule will have a disproportionate
13 impact on Alaska. Before commenting on the specific
14 problems we see with the proposed rule, it's
15 important to underscore how classification of a
16 wetland as jurisdictional or "waters of the U.S."
17 impacts community and resource development projects
18 in Alaska.

19 The federal government already enjoys a
20 disproportionate jurisdiction over land use and
21 economic development in our state. Approximately
22 222 million acres, or about 61 percent of Alaska, is
23 already under direct jurisdiction by the federal
24 government. Much of this is in conservation system
25 units and other land designations that are closed to

1 development. So Section 404 of the Clean Water Act
2 expands that federal reach to private, Alaska Native
3 corporation, State and municipal lands if wetlands
4 are determined to be jurisdictional and 404 permits
5 are required.

6 So, if you look at the cumulative impact of
7 both the vast federal lands, the fact that we have
8 ubiquitous wetlands in our state, and an
9 ever-expanding definition of which of those wetlands
10 fall under federal jurisdiction, it means that few
11 projects in Alaska are outside the reach of federal
12 oversight.

13 The rule fails to meet the EPA's stated
14 objectives. We are in agreement with the EPA in its
15 stated intent that the rule should remove uncertainty
16 and confusion in determining what lands and
17 activities require Section 404 permits. However,
18 rather than reducing confusion, the proposed rule, as
19 written, takes a very aggressive and broad
20 interpretation of federal jurisdiction, rendering
21 adjacent waters, floodplains, ephemeral streams,
22 tributaries, and ditches with limited exceptions as
23 jurisdictional.

24 Perhaps the EPA's vision of "clarity"
25 simply means defaulting on the side of federal

1 jurisdiction and broadening the definitions of
2 existing regulatory categories of tributaries and
3 regulating new areas that are not jurisdictional
4 under current regulations, such as adjacent
5 non-wetlands, riparian areas, floodplains and other
6 waters.

7 The EPA's assurances fall flat upon a plain
8 reading of the rule. The EPA has lost an aggressive
9 public relations campaign in an effort to refute the
10 concerns of RDC and other concerned members of the
11 public who have concluded, through a plain reading of
12 the rule, that it materially expands the scope and
13 reach of the Clean Water Act. The EPA's assurances
14 don't match with the plain language in the rule.

15 The "tributaries," the newly defined term,
16 automatically jurisdictional. Adjacent wetlands are
17 considered jurisdictional, the legal test of nexus
18 having all but been assumed. Many "other waters" are
19 likely to be jurisdictional under the rule. Even
20 ditches. And one thing that really concerns us is
21 this concept of "inside the fence," or a ditch within
22 a project that's already been developed could be
23 considered jurisdictional, even after you get your
24 permits.

25 And finally, we think the EPA grossly

1 underestimates the costs of the rule.

2 The EPA estimates that the rule will
3 increase jurisdictional wetlands by about 3 percent.
4 We think this is a gross understatement. The Waters
5 Advocacy Coalition refutes the EPA's methodology as
6 grossly understating this effect, both because of
7 flawed methodology as well as they failed to consider
8 the impacts of much of the new jurisdictional
9 technology: "neighboring," "adjacent," "tributary,"
10 "riparian areas," and "floodplain."

11 So, even assuming the EPA's conservative
12 estimate is correct, it would still increase
13 jurisdictional wetlands in Alaska by 3.6 million
14 acres, if you just take the 3 percent and apply it to
15 the 130 million. And of course, that -- I do note
16 your colleague, Senator Whitehouse isn't here today,
17 but that would be five times of his home state of
18 Rhode Island.

19 CHAIRMAN SULLIVAN: I'll make sure he's
20 aware of that when I go back and forth.

21 MR. RICK ROGERS: So we applaud the
22 congressional oversight on this issue, Senator
23 Sullivan, and as currently drafted we're concerned
24 the rule will have significant negative impacts on
25 Alaskans. And we really thank you for the

1 opportunity to comment on this very important
2 initiative.

3 Thank you.

4 CHAIRMAN SULLIVAN: Thank you, Mr. Rogers.
5 I appreciate the testimony.

6 Rod Hanson, Vice President of Alyeska
7 Pipeline Service Company, will be our next witness.

8 MR. Hanson.

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11 R-O-D H-A-N-S-O-N

12

13 MR. ROD HANSON: Senator Sullivan, thank
14 you for the opportunity to appear here today and
15 discuss the proposed rule regarding "waters of the
16 U.S." and its possible impact on Alyeska Pipeline
17 Service Company.

18 My full statement has been submitted in
19 writing, and so I'm offering an abbreviated version
20 for you here this morning.

21 CHAIRMAN SULLIVAN: Thank you.

22 MR. ROD HANSON: My name is Rod Hanson.
23 I'm Vice President for System Integrity, Engineering
24 & Projects with Alyeska. I joined Alyeska in 1991 as
25 a civil and structural engineer, and I've had a

1 variety of roles with the company over the years,
2 including Terminal Manager, Pipeline Manager. I
3 headed up our commercial and supply chain group for a
4 while, and also our HSE, health, safety and
5 environment group.

6 I'm proud to work for an Alaska company. I
7 came to Alaska in 1978. My wife was born and raised
8 here. We've raised our kids here, our kids are now
9 raising their kids here, and so it's great to be here
10 speaking not only as an employee of Alyeska but as an
11 Alaskan today.

12 I'm here representing 1,600 employees and
13 contractors who operate and maintain TAPS, the
14 800-mile Trans-Alaska Pipeline System, and our job is
15 transporting crude oil from the North Slope to
16 Valdez, where it's then put on tankers and sent south
17 to the Lower 48, to the West Coast. Since startup in
18 1977, we've moved over 17 billion barrels of crude
19 oil, and at peak production, we were moving 2.1
20 million barrels a day. However, that production has
21 been declining steadily over the years, and we are
22 currently transporting just over 500,000 barrels per
23 day.

24 This lower throughput creates serious
25 operational challenges for us. The oil takes much

1 longer to get to Valdez, and it loses heat rapidly.
2 Colder crude oil creates wax and ice and allows that
3 opportunity for wax and ice to build up in the system
4 and interfere with our operations.

5 While we're confident of our abilities and
6 our resources to meet these challenges, we know that
7 they will continue to grow as throughput declines.
8 We're committed to protecting the environment that we
9 operate in here in Alaska, and to this end we fully
10 support appropriate regulatory efforts to protect our
11 nation's waters.

12 There are 21 different federal and state
13 agencies that oversee our work. We work hard to
14 ensure that we comply with all regulations; we obtain
15 all required permits and authorizations, and we keep
16 our regulators very well informed of our activity.
17 Occasionally, though, a new regulation is proposed
18 which does not seem to consider the Arctic
19 environment here in Alaska or the practical
20 complexities of operating an 800-mile pipeline
21 through this environment. That is the case here with
22 the proposed rule, on the "Waters of the U.S." We
23 believe this rule will significantly increase how
24 much of our work is regulated under the Clean Water
25 Act.

1 Many of the discharges associated with our
2 operations consist of water removed from construction
3 project sites and drainage from precipitation events
4 which do not reach waters of the U.S. The expansive
5 definition of "waters of the U.S." could really make
6 these discharges jurisdictional and subject to the
7 Clean Water Act permitting and regulatory
8 requirements. This could significantly delay our
9 ability to get critical work done, in what is a short
10 Alaska construction and maintenance season.

11 As we review the proposed rule, we've
12 identified numerous potential impacts to TAPS. These
13 include, first, unique features common in Alaska,
14 such as permafrost, wet tundra, muskegs and bogs, may
15 end up being considered jurisdictional waters, or
16 they may result in the designation of "other waters"
17 as jurisdictional. Any TAPS discharges to upland,
18 dry, and isolated areas that are hydrologically
19 connected to or even in the vicinity of those
20 geographical or water features may become subject to
21 Clean Water Act requirements.

22 Secondly, discharges to dry stream
23 channels, tundra and upland areas could now be
24 considered discharges to jurisdictional waters and
25 subject to new permitting and treatment requirements.

1 Third, manmade structures, ditches,
2 effluent channels and storage pits may themselves
3 become jurisdictional under the proposal, and if
4 these engineered structures were to be considered
5 jurisdictional waters, we may be required to manage
6 the water quality even within those structures and
7 features.

8 Fourth, these same concerns arise even with
9 naturally occurring stormwater features, such as
10 roadside ditches and other natural drainages on or
11 adjacent to TAPS property.

12 Even gravel pits could be subject to Clean
13 Water Act requirements, since manmade ponds, lagoons
14 or other water storage areas could be considered
15 jurisdictional.

16 These are just a few of the ways we believe
17 the proposed rule could impact our management of
18 TAPS. We're hopeful that the proposal will be
19 withdrawn, or dramatically changed, so that these
20 impacts are not added to our current challenges.

21 Safety and integrity of the pipeline are
22 paramount, core values here at Alyeska, and I'm proud
23 to report that we currently have the best safety
24 record we've had in our entire history. We've been
25 named as one of the World's Most Ethical Companies by

1 the Ethisphere Institute now for four years in a row.
2 Our Vessel of Opportunity Program received a 2015
3 Alaska Ocean Leadership Award for stewardship and
4 sustainability from the Alaska SeaLife Center.

5 A couple weeks ago, we received a
6 Governor's Safety Award. And, over the years, we've
7 been honored many times with both the American
8 Petroleum Institute's Distinguished Operator Award
9 and Environmental Performance Award. Our record for
10 protecting the environment has and will continue to
11 be one of the best in our industry or any industry in
12 Alaska.

13 And, Senator, I appreciate the opportunity
14 to testify here today.

15 CHAIRMAN SULLIVAN: Thanks again,
16 Mr. Hanson, and congratulations on those important
17 awards that you listed there at the end.

18 Our next witness is Kathie Wasserman,
19 who is Executive Director of the Alaska Municipal
20 League.

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K-A-T-H-I-E W-A-S-S-E-R-M-A-N

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25

MS. KATHIE WASSERMAN: Senator Sullivan,

1 thank you for the opportunity to testify on "waters
2 of the U.S."

3 My name is Kathie Wasserman. I'm Executive
4 Director of the Alaska Municipal League, a membership
5 league made up of all 164 cities and boroughs
6 throughout the state of Alaska.

7 The cities and boroughs in Alaska are
8 diverse. They vary in their types of natural
9 resources that they contain, their social and
10 political environments, their culture, their
11 economies and, to a degree, the powers that they are
12 allowed under Alaska state law. Many of the duties
13 that Alaska's municipalities have are required or
14 mandated by state law. They have varying degrees of
15 authority, with regards to roads, bridges, property
16 taxes, schools, recordkeeping, elections, hospitals,
17 economic development, land use planning, zoning and
18 air and water quality.

19 Cities and boroughs own and maintain a wide
20 variety of public safety infrastructure that would be
21 impacted by the proposed rule, including roads and
22 roadside ditches, bridges, stormwater systems,
23 maintenance projects, drinking water facilities and
24 infrastructure that was never designed to meet new
25 CWA requirements under the proposed rule.

1 Cities and boroughs are responsible for a
2 large percentage of the road maintenance, such as
3 snowplowing, debris cleanup and surface repairs.
4 Many of these small roads are in rural areas. Any
5 additional cost burdens are challenging to these
6 small governments. As Alaska's municipalities
7 realize cuts in State Revenue Sharing, the potential
8 loss of Timber Receipts, or Secure Funding for Rural
9 Schools, and the tenuous situation with PILT, which
10 is Payment in Lieu of Taxes, historically provide by
11 the U.S. Government, it now seems to reflect a lack
12 of analysis by that same federal government to
13 mandate added extra expenses, while at the same time
14 making economic development more difficult and while
15 still considering not paying Alaska's municipalities'
16 PILT payments for their property taxes that they --
17 for which they own inside each municipality.

18 I know what municipalities do to the local
19 taxpayer if they don't pay their taxes. We're not in
20 the position yet to do that to the local governments,
21 but I certainly have suggested that to my local
22 government.

23 According to a 2014 County Economic Tracker
24 report released by NACo, it found that only 65 of the
25 nation's 3,069 counties, boroughs or parishes have

1 fully recovered to pre-recession levels. Many state
2 and local projects would be significantly impacted by
3 the changes to the definition of "waters of the U.S."
4 that have been proposed.

5 Therefore, the Alaska Municipal League and
6 all 164 municipalities urge and have urged the agency
7 to withdraw the proposed rule until further analysis
8 of its potential impacts have been completed.

9 Most of Alaska's municipalities are
10 situated in low-lying areas with large bodies of
11 water near the municipality. Simply, the choice of
12 habitation by Alaska Natives, the first Alaskans, was
13 dictated, in large part, by the accessibility of salt
14 and freshwater; for either travel, drinking and the
15 foods contained therein.

16 If the U.S. Government had bothered to talk
17 to local Alaska governments and tribes, they
18 would have realized that planning and zoning
19 regulations in our respective communities are already
20 put in place to minimize impacts to those lakes,
21 streams, rivers, and springs. Municipalities
22 encourage the preservation of wildlife corridors,
23 being as so many of our people live a subsistence
24 lifestyle. We protect vistas, archeological sites,
25 national land characteristics and fish habitat.

1 The original settlers of this great state
2 survive still through subsistence. Far be it for of
3 the federal government to tell these people how to
4 take care of the land and its resources for the long
5 haul.

6 This also brings up the legal question
7 as to how this ruling would work on privately owned
8 Native corporation lands, as much of these lands lie
9 within municipal jurisdictions.

10 Municipalities are the first line of
11 defense for disasters: Police, firefighting,
12 emergency personnel are the first on the scene. In
13 the aftermath of the City of Galena flood, while FEMA
14 responded in what could be called a reasonable amount
15 of time, it was the residents and the city government
16 and the tribes that did everything possible to help
17 make sure that the community would come back to what
18 it once was and to protect themselves from what might
19 come again.

20 While many of Alaska's communities are
21 doing everything possible to protect themselves from
22 Alaska's large ever-changing rivers, with the record
23 of huge erosion problems and catastrophic floods, the
24 U.S. Government, through EPA, is adamant about
25 Alaska's communities protecting every water-filled

1 ditch.

2 We just believe, Senator Sullivan, that as
3 municipalities in the state of Alaska, are the ones
4 that will be tasked along with the State and tribes
5 in implementing these rules, that the fact that we
6 were not -- that we were not contacted in any great
7 form is a terrible, terrible thing to do to Alaska's
8 municipalities.

9 As I told you before -- and I have some
10 records to give to your staff -- we found out about a
11 meeting that was held by EPA. I have the brochure.
12 It says it was an opportunity for tribes, local
13 government and state government to give input on an
14 EPA proposed rule. I got the notice from another
15 organization late on a Friday night. The meeting was
16 on a Wednesday.

17 One of my mayors that deals with EPA rules
18 negatively all the time lives in Unalaska. It would
19 have taken her -- she would have had to leave Tuesday
20 or Monday to even get there. I called EPA in
21 Washington, D.C., and was told that oh, they didn't
22 have our phone number. I don't know what that means,
23 but . . .

24 Also, I have a copy of all the maps that
25 are on the EPA website. None of them include Alaska.

1 And when I asked the EPA gentleman in Washington,
2 D.C. a couple of months ago why they did not include
3 Alaska, I was told because esthetically, it just
4 didn't look right.

5 I probably have a little bit harder line.
6 I just think this is despicable that we have been
7 left out in the cold on this.

8 Thank you, Senator.

9 Obviously, I got off my writing.

10 CHAIRMAN SULLIVAN: No, no. That was great
11 testimony. And thank you for flying in to Anchorage
12 for this important hearing. Thank you very much.

13 KATHIE WASSERMAN: Thank you.

14 CHAIRMAN SULLIVAN: Our next witness
15 will be Lorali Simon, who is Vice President for
16 External Affairs at the Usibelli Coal Mine.

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L-O-R-A-L-I S-I-M-O-N

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21 MS. LORALI SIMON: Good morning. Thank
22 you, Senator.

23 My name is Lorali Simon. I'm Vice
24 President of External Affairs for Usibelli Coal Mine.
25 I certainly appreciate the opportunity to come before

1 you today to discuss the proposed rule regarding the
2 expansion of the definition of the "waters of the
3 United States" and its potential impacts to Alaska.

4 Usibelli is celebrating our 72nd year in
5 operation this year. We proudly supply 100 percent
6 of the in-state demand to six coal-fired power plants
7 in Alaska. We also supply coal to our export
8 customers in Chile, South Korea and Japan. Currently
9 Usibelli employs 115 people. The average wage paid
10 to Usibelli employees is more than double the average
11 wage in Alaska. Usibelli's operations directly
12 provide 25 percent of all employment for Healy
13 year-round residents. The \$12.9 million paid to our
14 Healy employees in 2013 represented nearly 60 percent
15 of all wages paid to Healy residents.

16 Usibelli is deeply concerned about the
17 proposed rule by the EPA which would significantly
18 increase the jurisdictional waters of the
19 United States under the Clean Water Act. Should this
20 proposed rule be finalized, it would likely stop all
21 development in Alaska; small, private developments,
22 as well as large resource development projects.

23 The proposed rule expands federal
24 jurisdiction over State lands, to include all
25 ephemeral and intermittent drainages, seeps, and

1 marginal wetlands. According to the EPA's website,
2 the proposed rule determines that all streams
3 regardless of size or how frequently they flow are
4 jurisdictional waters; all wetlands and open waters
5 in floodplains and riparian areas are jurisdictional
6 waters; and that there is insufficient information to
7 generalize jurisdiction of waters not in floodplains
8 or riparian areas.

9 You've already heard this today, but Alaska
10 is very unique, in that over 60 percent of our state
11 is already under federal jurisdiction, and 88 percent
12 of the jurisdictional waters are under public
13 management. We believe this proposed rule will
14 subject many more mining activities and operations to
15 regulation under the Clean Water Act than currently
16 are covered by law or regulation.

17 You have also already heard about Alaska's
18 unique features, such as our permafrost and tundra
19 that could be considered jurisdictional waters. The
20 mining industry uses sophisticated and engineered
21 structures, such as impoundments, ditches, channels,
22 ponds, and pits that could also become jurisdictional
23 waters under the proposed rule.

24 I hope you understand our concern over the
25 possibility that historically non-jurisdictional

1 onsite stormwater and surface water management
2 features could be deemed jurisdictional, and the
3 complications surrounding distinguishing ephemeral
4 tributaries from non-jurisdictional features, will
5 increase delays, costs, and permitting requirements.
6 Usibelli is troubled by the breadth of the
7 definitions in the proposed rule, which could be
8 misconstrued as encompassing previously
9 non-jurisdictional waters and treatment systems on
10 mine sites across the country.

11 As you know, the EPA and the U.S. Corps
12 currently require compensatory mitigation to promote
13 no net loss of wetlands from development projects.
14 Anyone wishing to obtain a permit to impact a wetland
15 or other aquatic resource must first avoid and
16 minimize impacts, and then compensate for unavoidable
17 impacts. Typically, for every one acre disturbed,
18 there must be 3 to 10 acres preserved.

19 If the proposed expansion of jurisdictional
20 waters becomes final, it will be nearly impossible in
21 Alaska to meet the compensatory mitigation
22 requirements, as most of the wetlands in Alaska are
23 already under public management and not available for
24 selection. The result will be an increase in price
25 for the small amount of land remaining available for

1 compensatory mitigation.

2 The local, statewide, national, and global
3 economic benefits that mining provides is
4 unquestionable. These benefits are derived from
5 employment, wages, economic activity due to purchases
6 of goods and services, and payment of taxes,
7 royalties, and fees to local, state and national
8 governments.

9 Usibelli is committed to conduct our
10 activities in a manner that recognizes the needs of
11 society and the needs for economic prosperity,
12 national security, and a healthy environment.
13 Accordingly, Usibelli is committed to integrating
14 social, environmental, and economic principles in our
15 mining operations from exploration through
16 development, operation, reclamation, closure, and
17 post-closure activities.

18 I would also like to point out that
19 Usibelli is also a recent recipient of the Governor's
20 Safety Award, and that last year we celebrated 703
21 days without a lost-time injury.

22 Thank you for the opportunity to testify
23 today, Senator. And I'm happy to answer your
24 questions.

25 CHAIRMAN SULLIVAN: Thank you, Ms. Simon.

1 And thank you for the powerful testimony. And again,
2 I think one of the issues you raise on the
3 compensatory mitigation is something that we need to
4 explore further.

5 Our next witness is Tim Troll. He's
6 Executive Director for the Bristol Bay Heritage Land
7 Trust.

8 Mr. Troll.

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T-I-M T-R-O-L-L

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13 MR. TIM TROLL: Senator Sullivan, thank you
14 very much for the opportunity to talk here today.

15 My name is Tim Troll. I am Executive
16 Director of the Bristol Bay Heritage Land Trust, an
17 organization I helped found 15 years ago while living
18 in Dillingham. The Bristol Bay Heritage Land Trust
19 is one of six land trusts in Alaska that serve
20 different geographic areas. Our service area
21 encompasses the watersheds that flow into Bristol
22 Bay.

23 Land trusts are conservation organizations
24 that work with willing landowners to preserve places
25 that are special: Working farms; wilderness parks;

1 historic sites; and not surprisingly in Alaska,
2 salmon habitat. We exist because 25 years ago the
3 Alaska legislature adopted the Uniform Conservation
4 Easement Act. A conservation easement is a statutory
5 creation that allows a property owner to sell or
6 donate development rights to a qualified
7 organization, like a land trust, while retaining
8 ownership.

9 So why would a land trust care about the
10 water? Well, when we formed our land trust in
11 Dillingham in 2000, our concern was for salmon
12 habitat in the Nushagak River Watershed. The
13 Nushagak is a giant producer of salmon in the
14 nation's greatest salmon stronghold, Bristol Bay. It
15 supports a robust subsistence culture and a
16 commercial fishery with a longevity approaching 150
17 years. The 20 year average for abundance of sockeye
18 salmon alone in the Nushagak River is 1.8 million
19 with a range of 674,000 to 3.4 million.

20 The problem we needed to address was the
21 fact that except for the Wood-Tikchik State Park most
22 of the salmon habitat in the Nushagak Watershed is
23 not conserved. The vast majority of the watershed is
24 owned by the State and is managed under an area plan
25 that does not guarantee permanent protection for

1 salmon habitat. The uplands along the lower river
2 corridor are private lands owned by the Alaska Native
3 corporations, five Alaska Native corporations, and
4 more than 300 individual Native allotments.

5 So looking into the future and taking an
6 admittedly jaundiced view of human nature we could
7 foresee a time when this fragmentation of ownership
8 and land management could lead to habitat
9 fragmentation and the loss of connectivity between
10 lakes, rivers and streams, those that salmon need
11 most to survive.

12 We decided that one way we could protect
13 the habitat and hopefully get ahead of history was to
14 document salmon streams and nominate previously
15 undocumented streams for inclusion in Alaska's
16 Anadromous Waters Catalog. Once a stream is in the
17 catalog, state law provides a higher level of
18 protection because an anadromous stream cannot be
19 disturbed without a permit from the Habitat Division
20 of ADF&G. Most of the streams in the headwaters of
21 the Nushagak are undocumented because they are remote
22 and can only be accessed by helicopter.

23 We launched our effort in the late summer
24 of 2008 with funding and other support provided by
25 various Native partners, including the Native tribes

1 of the Nushagak River. The biologists we engaged
2 sample streams using backpack electro-fishers.
3 Sampling is done in late summer when rearing salmon
4 have generally gone as far up into the headwaters as
5 they can. Fish are stunned, identified, measured,
6 occasionally photographed, and returned to the water.
7 All sampling sites are georeferenced, and each year
8 before September 30, we submit all the information we
9 gather to ADF&G. Salmon observations are added
10 to the Anadromous Waters Catalog and other fish
11 observations are added to Alaska's Freshwater Fish
12 Inventory.

13 I've been fortunate to go along on many of
14 these sampling trips. I'm not a scientist, I'm a
15 lawyer, but they invited me anyway. Over the last
16 six years, I've stood in many little tundra streams
17 barely a foot wide, burrowed down into alder-choked
18 creeks and sunk up to my waist in muddy-bottom
19 sloughs. To my astonishment, we have found fish in
20 all of these places, and often salmon. Particularly
21 surprising for me was to land near some isolated
22 pocket of water above a dry streambed and still find
23 rearing coho salmon. No surprise to our biologists
24 and no surprise to the Native folks who often joined
25 us on our surveys.

1 So we have logged hundreds of hours in
2 helicopters sampling hundreds of headwater streams in
3 Bristol Bay looking for fish. We find fish in
4 virtually every place we sample, and salmon in most.
5 We have raised and spent hundreds of thousands of
6 dollars to add hundreds of stream miles to the
7 Anadromous Waters Catalog.

8 But it doesn't take a biologist to help us
9 understand the significance of these little creeks,
10 mud holes, backwaters, side sloughs, and even
11 ephemeral and intermittent stream channels. Even a
12 Senate subcommittee, if you could visit these
13 headwaters, would have to concede the obvious: These
14 places are the perfect breeding ground and rearing
15 habitat for our salmon and a wide variety of other
16 fish. Certainly, in this region, firm protection of
17 these headwater complexes should be given. EPA's
18 Clean Water Act rulemaking affirms the obvious and
19 provides protection for these headwaters and
20 ephemeral streams.

21 If we pretend these areas are unimportant
22 and let them fall victim to abuse, then, as history
23 has shown, everything downstream could be lost: No
24 salmon; no commercial fishery; no world-class fly
25 fishing; no bears; no belugas; no Natives; no

1 economy, and no reason to protect the land.

2 Thank you, Senator.

3 CHAIRMAN SULLIVAN: Thank you, Mr. Troll.

4 Our next witness is Mr. Sam Kunaknana.

5 He's Tribal President of the Native Village of

6 Nuiqsut.

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S-A-M-U-E-L C. K-U-N-A-K-N-A-N-A

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MR. SAMUEL KUNAKNANA: Good morning, good morning. My name is Samuel C. Kunaknana, Tribal President of the Tribal Council of the Native Village of Nuiqsut, a federally recognized tribe of Alaska Native people. Before I begin I would like to thank the esteemed members of this committee for allowing me to testify on behalf of the people of my tribe.

As Tribal President, I represent the Native Colville River Delta people, a group known as Kuukpigmiut, and as their representative I want to communicate just how important clean water is in sustaining the subsistence resources of my community. For thousands of years the Inupiat people of the North Slope have subsisted on the bountiful natural resources of our region. We rely upon marine and

1 land mammals and waterfowl to maintain food security.

2 Traditional subsistence foods of our region
3 maintain the health of all our people, and with the
4 magnitude of oil and gas development on the
5 North Slope in recent times, access to these
6 resources has become more and more limited. Recently
7 the quality of our subsistence resources has now
8 begun to suffer in large part due to problems related
9 to the quality of our waters.

10 The tundra of the North Slope on which we
11 live might best be described as an aquatic
12 environment, the hydrology of which is quite complex.
13 The Inupiat people rely upon a wealth of traditional
14 knowledge passed from one generation to the next via
15 stories and word of mouth. We do not rely upon
16 reference scientific documentation to understand the
17 interconnectedness of our environment, instead
18 we have lived it for thousands of years.

19 We know that water flows across the surface
20 quite freely during the warm season and that our
21 hydrology involves not only surface waterflow but the
22 subterranean movement of the water as well. Water
23 that runs over the land in spring and summer not only
24 moves from one waterway to the next, but interflow
25 just below the surface also connects these waterways.

1 All of these water systems are connected in
2 one way or another, and they, in turn, are connected
3 to the land surface, as well. What falls to the land
4 surface through atmospheric deposition, including
5 industrial compounds, ends up in the lichen that our
6 caribou feed upon and in the waters that provide food
7 for our fish and other sea mammals.

8 When I was a young boy in school, I was
9 told of the food chain and how all of the animals and
10 fish are connected to the environment. This was
11 nothing new to me, as I learned it from my parents,
12 grandparents and ancestors. This was knowledge
13 passed from one generation to the next.

14 Many years of industrial development in my
15 homeland has now resulted in water and air quality
16 problems, and ultimately industrial aerosols are
17 deposited on the surface to be carried into our
18 hydrological systems that support our land and sea
19 mammals and waterfowl. These compounds accumulate
20 within our systems and cause health problems for us.

21 We are told today that we need to limit our
22 consumption of bird due to mercury contamination.
23 Many of our Broad white are now diseased, and when we
24 butcher our caribou, we find diseased organs. Within
25 our Village of 435 people, two children have been

1 diagnosed with Leukemia and one has already passed
2 away. What are the odds of a single child being
3 diagnosed with such a disease within a community of
4 435, let alone two?

5 We need our better rules to control the
6 quality of water in our region, whether the
7 headwaters of the streams and tributaries, or
8 wetlands that support or subsistence resources. We
9 do understand and are working to address the loss of
10 food security due to access problems to our
11 subsistence resources, as our region becomes
12 inundated with oil and gas development and perhaps
13 mining in the future. However, it would be
14 unconscionable to allow the health of the limited
15 subsistence resources we have left to continue to
16 erode due to a decline in water quality.

17 As an elected representative of the Native
18 people of Nuiqsut, I fully support this Clean Water
19 proposal, because it will protect a crucial part
20 of the food chain that will allow my people to
21 maintain food security with respect to the
22 traditional foods we have relied upon for thousands
23 of years.

24 Thank you very much for your time and for
25 this opportunity to testify on this crucial issue.

1 Thank you.

2 CHAIRMAN SULLIVAN: Thank you,
3 Mr. President, and thank you for your travel all the
4 way from Nuiqsut for this testimony. Thank you.

5 MR. SAMUEL KUNAKNANA: Quyanaqpak.

6 CHAIRMAN SULLIVAN: Our next witness is
7 Brian Litmans. He's Senior Staff Attorney for
8 Trustees for Alaska.

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11 B-R-I-A-N L-I-T-M-A-N-S

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13 MR. BRIAN LITMANS: Good morning, Chairman
14 Sullivan. My name is Brian Litmans and I am a senior
15 staff attorney with Trustees for Alaska, a nonprofit
16 environmental law firm providing legal counsel to
17 protect and sustain Alaska's natural environment.
18 Thank you for inviting me today to testify on the
19 joint-proposed rule by the U.S. Environmental
20 Protection Agency and the U.S. Army Corps of
21 Engineers defining "waters of the United States." I
22 ask that my written testimony be included in the
23 record.

24 This rule provides clarity and certainty on
25 the scope of the Clean Water Act in light of the two

1 U.S. Supreme Court decisions: Rapanos, and Solid
2 Waste Agency of Northern Cook County. Prior to these
3 two decisions, the regulating agencies took a more
4 expansive view of the definition of "waters of the
5 United States." The proposed rule narrows the
6 definition and is consistent with the Clean Water
7 Act, as interpreted by the U.S. Supreme Court.

8 The Clean Water Act sets out a national
9 goal to restore and maintain the chemical, physical
10 and biological integrity of our Nation's waters. The
11 proposed rule is rooted in sound science, supported
12 by an EPA report that reviewed more than 1,200
13 peer-reviewed scientific publications. The
14 scientific literature unequivocally demonstrates that
15 protecting upstream waters and wetlands is important
16 to protecting the integrity of downstream waters.
17 The rule implements the intent of the Act to protect
18 our Nation's waters while also complying with the
19 Court's decisions.

20 In Alaska, the vital role of wetlands
21 cannot be understated. They are sociologically,
22 ecologically and economically important to Alaska,
23 providing essential habitat for fish and wildlife.
24 Alaska's wetlands sustain some of the world's richest
25 commercial, sport and subsistence fisheries.

1 Providing such essential habitat for such a large
2 number of fish and wildlife, these wetlands are
3 paramount to the culture and economy of Alaska Native
4 and rural communities. Without wetlands, that way of
5 life would disappear.

6 This proposed rule is borne out of the
7 Rapanos decision, where the justices issued five
8 separate opinions. Chief Justice Roberts predicted
9 the troubles to come, noting that with no one test
10 confirmed by the Court, lower courts and regulated
11 entities would have to feel their way on a
12 case-by-case basis. When there is no majority
13 opinion from the Supreme Court, the lower courts must
14 parse through the variety of Supreme Court opinions
15 to determine the governing rule of law. This has
16 left the lower courts to fumble along, which in turn
17 has only created more confusion.

18 Senator Inhofe, Chairman of the Environment
19 and Public Works Committee, remarked back in 2011
20 that a rulemaking consistent with the Clean Water Act
21 and the Supreme Court decisions was critical. This
22 sentiment has also been echoed by regulated entities,
23 government agencies and environmental NGOs, all
24 clamoring for rulemaking to address this problem.

25 At this point in time, the majority of

1 circuits follow Justice Kennedy's significant nexus
2 test. This is the same test EPA and the Corps now
3 seek to implement through regulation, bringing an end
4 to the confusion and uncertainty faced by courts and
5 regulators. The rule provides the certainty and
6 regulatory efficiency that the regulated entities
7 assert is critical to both the U.S. and Alaskan
8 economy.

9 A cloud has hung over the regulating
10 agencies, the applicants, and those like Trustees for
11 Alaska seeking to ensure the purposes and intent
12 of the Clean Water Act are complied with. This rule
13 removes that cloud. The rule clarifies the process
14 to determine which streams and wetlands are protected
15 under the Act. The rule does not expand the Act's
16 protection to any new type of waters that have not
17 been considered a jurisdictional water of the
18 United States to this date.

19 Clean water and a healthy environment are
20 essential to all of us. Whether it is clean water
21 for drinking or a clean river to swim in, clean water
22 for salmon, or clean water for today and for future
23 generations, the Clean Water Act set out a goal that
24 we can all agree on. This rule supports that goal.

25 Thank you.

1 CHAIRMAN SULLIVAN: Thank you, Mr. Litmans,
2 I appreciate you laying out some of the legal
3 background of the rule, as well.

4 Our final witness is Mark Richards. He's
5 Co-Chair of Alaska Backcountry Hunters and Anglers.

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M-A-R-K R-I-C-H-A-R-D-S

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10 MR. MARK RICHARDS: Good morning, Senator
11 Sullivan. Thank you for the opportunity to testify
12 before you today, and I certainly want to commend you
13 for bringing D.C. to Alaska. We need -- we need more
14 of that.

15 My name is Mark Richards. I'm Chairman of
16 the Alaska Chapter of Backcountry Hunters and
17 Anglers. We're a national hunting and fishing
18 conservation organization dedicated to ensuring our
19 heritage of hunting and fishing traditions can
20 continue through education and hard work on behalf of
21 wild public lands and waters.

22 We are a grassroots, nonpartisan
23 organization, and part of my volunteer duties as
24 Chairman of our Alaska chapter involves attending a
25 wide array of meetings and giving testimony on

1 various issues that affect hunting and fishing and
2 conservation in Alaska.

3 One issue we recently commented on was the
4 National Park Service's rulemaking changes governing
5 hunting and trapping regulations on National Preserve
6 lands. We opposed the Service's new rulemaking
7 because we felt it was not based on any clear
8 scientific or conservation concern and that it was a
9 clear example of federal overreach.

10 The question before this Committee, and the
11 country, and specifically Alaska, is whether or not
12 this new proposed rule on "Waters of the
13 United States," clarifying what waters are protected
14 under the Clean Water Act and what waters are subject
15 to federal jurisdiction, is also federal overreach.
16 We don't believe that it is.

17 Court decisions in the last decade, as you
18 have heard earlier, have made it unclear what waters
19 are protected under the Clean Water Act and under
20 federal jurisdiction. Our Former Governor Sean
21 Parnell, along with others, was among those who
22 requested that the EPA and the Army Corps of
23 Engineers clarify these issues via the rulemaking
24 process.

25 This final rule will result in less waters

1 being under federal jurisdiction than were in place
2 for the first 30 years of the Clean Water Act.
3 During that same time period, when I was here, the
4 state of Alaska saw enormous economic growth and
5 development while our population quadrupled. We
6 built a pipeline under the regulations of the Clean
7 Water Act before the Supreme Court weighed in. Even
8 when more waters were under federal CWA jurisdiction
9 than there are now under this new rule, Alaska
10 prospered and development soured.

11 Sure, there are costs associated with
12 regulation that govern and protect our streams and
13 rivers and wetlands, costs to developers and industry
14 and the private sector and communities, but those are
15 the costs associated with clean water and healthy
16 habitat for fish and game. Those are the costs that
17 allowed me to drink out of the Sag River when my wife
18 and I worked up north during the summer; those are
19 the costs that allow me to catch a lunker Dolly
20 Varden out of the Sag, three miles downstream of
21 where the Pipeline goes underneath the Sag River.

22 And speaking of costs, there are of course
23 costs to the regulatory agencies, as well. Back in
24 2013, Senator, when you were Department of Natural
25 Resources Commissioner under Governor Parnell, the

1 administration sought to get primacy rights for the
2 State of Alaska, to take over the job of wetlands
3 regulation from the federal government under the
4 Clean Water Act. The federal laws protecting
5 wetlands would still be in place under the Clean
6 Water Act, but the State would take over wetlands
7 permitting issuance from the Army Corps of Engineers.
8 The rationale was that if the State had primacy
9 rights, they could do as good a job as the EPA and
10 Corps in regulating wetlands, but the State could
11 permit development projects at a much faster pace.

12 As you said at the time, Senator, as DNR
13 Commissioner, "It's not about cutting corners, it's
14 about making our permitting more timely, efficient
15 and certain." We support that. The problem,
16 however, then and especially now, should the
17 State of Alaska ever gain those primacy rights, is
18 that the costs of assuming regulation and permitting
19 of wetlands for the state are extremely high, and in
20 today's fiscal climate with our ongoing budget crisis
21 is, frankly, not achievable.

22 I bring up this to point out that it is
23 extremely unlikely the State of Alaska will ever gain
24 primacy rights from the federal government over
25 wetlands, but at the same time we still need to

1 clarify what bodies of water are under federal
2 jurisdiction according to the Clean Water Act.

3 That's what this new rule does. It
4 clarifies what waters are under federal jurisdiction.
5 And it is that clarification that does not sit well
6 with many here today because of fears of how it could
7 impact future development and costs to individuals
8 and businesses.

9 We understand and respect those concerns,
10 but overall, the Clean Water Act has been very much a
11 positive for our country and for our states and
12 communities, for our fish and game and for our
13 hunters and anglers. We view this clarification and
14 new rule as a positive, as well.

15 And we would like to say, Senator, we also
16 have concerns. We support this new rule, but if you
17 could, work with Senator Barrasso and others and fix
18 the concerns that we have as a state, without going
19 back to the starting block and starting over again.
20 Right now, according to the Bush administration
21 rules, things are slowed down; permitting is slowed
22 down because we don't have this definition. So we
23 want to see it fixed.

24 We understand the concerns everybody has
25 here and we're willing to work with you.

1 And just thank you for the opportunity to
2 testify and for your service to our country, really
3 appreciate it.

4 CHAIRMAN SULLIVAN: Thank you,
5 Mr. Richards. Thanks for the reminder on the primacy
6 issue. It's an important issue.

7 And I will add, that one of the things that
8 we are trying to do, as I mentioned at the outset,
9 Senator Barrasso and I had an amendment in the budget
10 process that did try to look at the clarification
11 that you mentioned, and I think that that's what a
12 lot of people are focused on.

13 Well, listen, I want to thank the witnesses
14 again.

15 What I propose to do right now, since we're
16 all on the panel here, is I'm going to start with a
17 few questions. We have a little bit of time. I'll
18 direct them at individual witnesses, but I -- but I
19 do want to add that if others want to jump in, just
20 please raise your hand. And I think that's the most
21 efficient way to do this.

22 I want to -- I do want to thank everybody
23 again. As I mentioned, we're trying to bring
24 Washington, D.C. to Alaska on a hearing of
25 importance, and I think every witness here recognizes

1 how important this issue is, not only to educate our
2 citizens but to, for the record -- and this is an
3 official Environment and Public Works Hearing in the
4 United States Senate -- is to get on the record some
5 of these Alaska-unique issues that I think most of us
6 can agree on here.

7 But even though we're trying to bring D.C.
8 to Alaska, I do recognize that so many of you
9 traveled very far distances just to be here, so I
10 want to thank the witnesses again.

11

12 F-I-E-L-D H-E-A-R-I-N-G Q-&-A S E S S I O N

13

14 CHAIRMAN SULLIVAN: So let me start out
15 with some of the questions.

16 Ms. Sweeney, I thought that your comment
17 with regard to the potential conflict, with regard to
18 ANCSA and other consultation requirements, with
19 regard to Alaska Natives was a very insightful
20 comment that you made during your testimony. Would
21 you care to expand upon that at all, and also, with
22 regard to the consultation that took place?

23 You know, the federal government does have
24 a particularly important requirement with regard to
25 consultation with all members of the state, the

1 State of Alaska, but also particularly with regard to
2 Alaska Natives.

3 President Kunaknana, if you could also talk
4 about that consultation issue, if you believe you
5 were -- had the appropriate consultation in that
6 regard.

7 I'd appreciate both of you commenting on
8 that, and anyone else.

9 MS. TARA SWEENEY: Samuel, did you want to
10 go first?

11 MR. SAMUEL KUNAKNANA: No, quyanaqpak.

12 MS. TARA SWEENEY: Thank you, Chairman
13 Sullivan. I appreciate the question.

14 The EPA, in this instance, with respect to
15 the proposed rule, did not reach out to ASRC. And as
16 we've gone through several different hearings on
17 issues affecting Alaska Natives and Alaska Native
18 corporations, the federal government certainly can do
19 a better job in reaching out to consult with Alaska
20 Native corporations. And on top of that, they're
21 required to, whether it's through the executive
22 orders that have been issued prescribing that
23 consultation.

24 One of the issues that we find is,
25 regardless of whether or not an Alaska Native

1 corporation or a tribal entity agree or disagree on
2 an issue, if there's alignment or not, it's important
3 to get that feedback from the front end. And the way
4 that the process is established now, they make their
5 decision, they draft their rule and then they go out
6 for comment.

7 And it would be nice, as we move forward in
8 this consultation era, that the federal government
9 actually sit down with all aspects of the Native
10 community, especially those that are prescribed in
11 the executive orders that prescribe the government to
12 do so. And they're certainly not following through
13 in the manner in which they could.

14 CHAIRMAN SULLIVAN: Mr. President.

15 MR. SAMUEL KUNAKNANA: (Indiscernible.)

16 CHAIRMAN SULLIVAN: I'm sorry?

17 MR. SAMUEL KUNAKNANA: I will include this
18 in writing.

19 CHAIRMAN SULLIVAN: Okay.

20 (Reporter requested clarification.)

21 CHAIRMAN SULLIVAN: Yeah. If you'd please
22 turn your mic on, so she can follow what --

23 MR. SAMUEL KUNAKNANA: I will include it in
24 writing.

25 CHAIRMAN SULLIVAN: Okay. Great. Thank

1 you.

2 Let me go to the issue of costs. I think
3 that that is one that there is very, very significant
4 differences of opinion on this issue. Several of us
5 who examined the rule think that it could have
6 enormous costs, not only in terms of money but in
7 terms of time with regard to the issuing of
8 additional permits.

9 Perhaps Mr. Rogers or Ms. Moriarty could
10 speak to that, and others who want to address that
11 issue. It's obviously a big issue with regard to the
12 State of Alaska, not only in terms of, as I
13 mentioned, the cost of doing business but the time it
14 takes to get permits, which is, in my view, a very
15 significant problem that we have in the state with
16 regard to the federal permitting, that can take
17 literally years to get projects moving.

18 Mr. Rogers.

19 MR. RICK ROGERS: Thank you, Senator.

20 It's really an important point. I think
21 we have enough experience under the status quo with
22 the Clean Water Act to be able to highlight that
23 there's a significant cost of compliance with the
24 Clean Water Act. Expanding the jurisdiction, of
25 course, would just exacerbate that problem.

1 I think you mentioned the direct cost of
2 applying for permits, but the cost of the time, while
3 difficult to quantify, is very significant.

4 Kara testified that in some cases it can
5 take two years to get a Clean Water Act permit, and
6 time equals money. That affects the delays on
7 getting the project moving forward, to get it
8 sanctioned. And frankly, it makes us less
9 competitive than other jurisdictions around the world
10 where our resources are competing in a global
11 marketplace. And the second aspect of cost is the
12 compensatory mitigation, and that's a current issue
13 that's very important to us.

14 There have been some prior agreements.
15 Back in 1994, there was a wetland initiative to
16 actually acknowledge the unique circumstances in
17 Alaska and provided far more flexibility, and we are
18 working with other stakeholders to try to make sure
19 that the Corps and the EPA acknowledge that existing
20 agreement that's still in place. But irrespective,
21 compensatory mitigation is a big cost, and of course,
22 if you expand the jurisdiction, it gets even bigger.

23 MS. KARA MORIARTY: Senator, I think, to
24 follow up on Rick's comments, you know, I did talk
25 about, you know, the current cost. What I didn't say

1 is that, you know, it does -- it can take over two --
2 up to two years to obtain a 404 permit, and the
3 average cost of each 404 permit is about \$300,000.
4 And so I don't know -- I know that Kathy from the
5 Municipal League also talked about that, you know,
6 with her municipalities, that, you know, this isn't
7 just resource development projects this could impact,
8 it's also these small communities that would need a
9 permit for their local projects, whether it be a
10 utility project or whatnot.

11 But I just would like to add: It's a bit
12 difficult, I think, to give an exact analysis,
13 because I would argue the EPA wasn't completely
14 transparent in the type of approach that they did
15 use.

16 But I want to just give one other quote,
17 that according to a professor at the University of
18 California Berkeley, David Sunding -- he's a
19 professor of agricultural and resource economics --
20 he says, quote, "The EPA's entire analysis is fraught
21 with uncertainty," unquote, and is not an accurate
22 evaluation of the actual cost of implementing the
23 rule. Furthermore, the professor stated that, quote,
24 "The errors, omissions and lack of transparency in
25 the EPA study are so severe that he renders it

1 virtually meaningless."

2 And so this isn't just Alaskans pointing
3 out that the economic analysis is flawed; others
4 have, as well.

5 CHAIRMAN SULLIVAN: Great.
6 Kathie.

7 MS. KATHIE WASSERMAN: Thank you,
8 Mr. Chairman.

9 And one thing that I would like to point
10 out is, most of Alaska's communities, the lifeblood
11 of that community is their harbor. You can kill a
12 community in many ways, but if you close down the
13 harbors, I can guarantee you most of Alaska
14 communities will not be able to thrive.

15 And right now, just to dredge is almost
16 impossible and very costly and takes a lot of time.
17 And if we now include more small waterways, with
18 perhaps no fish, and more hoops to jump through,
19 municipalities will not be able to keep their harbors
20 going. And that's how you get into most of these
21 communities.

22 Thank you.

23 UNIDENTIFIED SPEAKER: Excuse me,
24 Mr. Chairman.

25 CHAIRMAN SULLIVAN: Yeah.

1 UNIDENTIFIED SPEAKER: Your mic is hot
2 unless you push it to turn it off. So I think you
3 turned yours off there.

4 MS. KATHIE WASSERMAN: Oh.

5 UNIDENTIFIED SPEAKER: But anyway, just for
6 your -- just for your record.

7 CHAIRMAN SULLIVAN: Ms. Simon, I wanted to
8 kind of dig a little deeper on an issue that is very
9 unique in many ways to Alaska, and that's not just
10 what we're talking about with regard to costs, but
11 the compensatory mitigation issue.

12 Could you provide a little bit more detail
13 on what you were talking about in terms of our
14 inability as a state to even be able to start meeting
15 that, given the relatively small amount of
16 opportunities we have for compensatory mitigation,
17 relative to, say, other places in the Lower 48.

18 MS. LORALI SIMON: It's a really difficult
19 nut to crack, Senator. Like I said in my testimony,
20 for every one acre of disturbance, you have to
21 mitigate that with 3 to 10 acres for preservation.

22 We have had a difficult time in Healy
23 trying to identify appropriate lands or even finding
24 an appropriate land bank to partner with. So I would
25 say that in Alaska, the land bank system isn't as

1 sophisticated as it is in other areas, and certainly
2 the opportunities for lands to select is also
3 uncertain. But definitely with this proposed rule it
4 really makes it near impossible for Alaskans to
5 adhere with compensatory mitigation, because so many
6 of our wetlands are already under public management
7 and unavailable for selection. So it takes a very
8 difficult situation and makes it much worse.

9 CHAIRMAN SULLIVAN: Thank you.

10 Mr. Richards, do you have any -- as you were
11 talking -- and I appreciate, again, your testimony.
12 Do you have any suggestions on ways in which the rule
13 could be clarified, or do you think that in its
14 current form it provides the clarification that's
15 needed?

16 There's a lot of people who, in a lot of
17 states, who think that it actually doesn't do that,
18 but I appreciate your constructive comments about
19 looking at ways to try and do that.

20 You may have seen, as I mentioned, the
21 amendment we put forward that was passed as part
22 of the Senate budget process last week that tried
23 to do that. Do you have any other suggestions that
24 way?

25 MR. MARK RICHARDS: Senator, thank you.

1 The main suggestion I would have is that
2 this has become overly polarized, just like our
3 country is right now, and so . . .

4 You mentioned in your opening comments
5 about hyperbole. And well, one of the comments
6 Ms. Simon made was that this new rule would likely
7 stop all development projects, and that's not true.
8 So I think we need to -- I think we need to get on
9 the page where we can all come to a consensus, like
10 what it would do and what it wouldn't. What I'm
11 hearing, from a lot of the opposition here, is a lot
12 of coulds: "It could do this."

13 So clarification, yes, would be needed,
14 should be needed, especially for the state of Alaska.
15 But I would like to see your office work on this in a
16 bipartisan manner to, instead of kicking this back to
17 start over, to let's look at what the new rule is and
18 look at the concerns we have and look at trying to
19 work with Barrasso and others in trying to, you know,
20 come up with a fix.

21 CHAIRMAN SULLIVAN: Okay. Good suggestion.

22 I do think, though, that -- you mentioned
23 hyperbole, but even Obama administration's -- some of
24 their own agencies have resorted to --

25 MR. RICHARDS: We don't disagree with that.

1 CHAIRMAN SULLIVAN: -- concerns.

2 And let me give you one example, and then I
3 do want to just mention this to all the panelists
4 here, the issue of small businesses, the issue of
5 small communities. As Ms. Moriarty mentioned, you
6 know, an EPA 404 permit can cost on average \$300,000
7 and take two years.

8 Interestingly enough, when this rule came
9 out, the EPA and Corps certified that the proposed
10 rule will not have significant economic impacts on a
11 substantial number of small entities, small
12 communities, small businesses, which lead to the
13 chief counsel for the Small Business Administration
14 Office of Advocacy, that they determined that this
15 statement by the EPA and Corps was in error and
16 improper, and the comments that they filed, this
17 office of the SBA in the Obama administration stated
18 advocacy in small businesses are extremely concerned
19 about the rule as proposed. The rule will have a
20 direct and potentially costly impact on small
21 businesses. The limited economic analysis, which the
22 agencies submitted with the rule, provide ample
23 evidence of a potentially significant economic
24 impact.

25 Advocacy at the SBA advises the agencies to

1 withdraw the rule and conduct an SBRA panel prior to
2 promulgating any further rule on this issue.

3 So, even within the Obama administration,
4 there are concerns, significant concerns, that
5 we have not undertaken the proper analysis on how
6 this will impact small communities and small
7 businesses.

8 And I would like to just open that up for
9 any concerns. You know, most of our employers in
10 this -- in our great state are small businesses. And
11 any of the witnesses care to comment on that?

12 Rick, I know that you represent literally
13 hundreds of small businesses.

14 MR. RICK ROGERS: Yeah. Senator, that's
15 really a good point. You know, we think about our
16 big projects. We heard testimony from Alyeska and
17 from the oil and gas industry. But the Clean Water
18 Act has such a broad jurisdiction, of course it
19 affects everything from a community project to small
20 construction jobs. So clearly it's not just about
21 larger organizations, it affects every aspect.

22 And like I mentioned in my testimony,
23 Senator, the ubiquitous nature of wetlands and the
24 fact that they're so widespread in Alaska, and
25 particularly under the proposed rule, it's really

1 hard to find an activity that does not require a 404
2 permit; if you're doing any filling, any dredging, if
3 you're building a road, driveways, culverts.

4 And so I think you're correct in probing
5 that issue, because small business, both here in
6 Alaska and nationwide, is, you know, a significant
7 job creator and a significant, you know, important
8 aspect of our economy.

9 CHAIRMAN SULLIVAN: Thank you.

10 Any other comment?

11 Kathie.

12 MS. KATHIE WASSERMAN: I did a little
13 research on this, Senator, and under the SISNOSE
14 Act -- and someone obviously gave it an
15 acronym but then went no further to pay attention to
16 it -- if a community or an organization is a small
17 entity, which of all 164 municipalities, that
18 includes 160 of them, they're supposed to do a --
19 they're supposed to provide a factual basis to
20 determine the rule does not impact these small
21 entities. And under the proposed ruling that was
22 never done. I know no municipalities were ever
23 contacted as a small entity, and I have not heard of
24 any businesses that were.

25 MS. KARA MORIARTY: And, Senator, if I

1 could just add one more comment. I do represent the
2 oil and gas industry, and we might not be viewed as a
3 small business in Alaska, but we do -- are the
4 heartbeat of the economy, I would argue, with
5 one-third of all Alaska jobs can be attributed to our
6 industry. And \$300,000 here and \$500,000 there may
7 not sound like a lot, but we're -- the State's not
8 the only one suffering a financial situation at
9 50-dollar oil.

10 And mineral prices change and oil prices
11 change. It's a tough -- it's a tough environment to
12 do business. And I think the main problem with this
13 rule is that it is going to have such an impact on
14 Alaska but Alaska isn't really considered.

15 And I think when you think about specific
16 things that can be done without starting over, if
17 starting over isn't an option, we need to consider
18 how does this impact Alaska.

19 CHAIRMAN SULLIVAN: I think that's a great
20 comment.

21 One of the -- you know, there's obviously
22 very differing views here on the impact of the rule,
23 the importance of the rule, whether you support or
24 don't support the rule. I do think -- and I don't
25 want to speak for all the witnesses, though -- there

1 certainly seems to be broad consensus that this rule
2 has not done much to consider the unique
3 circumstances of Alaska, particularly given what a
4 large swath of the Clean Water Act jurisdiction we're
5 already under. And I think that that, certainly to
6 me, is one of the takeaways. I don't know if there's
7 a consensus on that throughout.

8 But let me ask another question, for
9 Mr. Litmans and Mr. Troll.

10 There seems to be, again, kind of a
11 differing view on how this could expand the
12 jurisdiction of the EPA's wetlands authority in the
13 State and throughout the country.

14 Mr. Litmans, you mentioned "didn't at all,
15 just clarified it." Even the EPA admits to an
16 expansion of about 3 percent, which 3 percent in
17 Alaska would be a pretty big expansion.

18 And I don't want to put words in your
19 mouth, Mr. Troll, but you seemed to, through your
20 testimony, also indicate that you thought it would
21 expand the jurisdiction of the Clean Water Act by
22 getting into areas that weren't previously covered.

23 Do you want to comment on that? Do you
24 think that this rule expands the jurisdiction of the
25 Clean Water Act by the EPA?

1 MR. TROLL: Well, Senator, mostly I just
2 wanted to testify to the fact of actually what I've
3 seen and is of concern, as I understand it, about
4 ephemeral streams and intermittent streams. And
5 certainly our observations, in this extensive work at
6 the headwaters of the Nushagak, and now of the
7 Kvichak, as well, it's not uncommon to find ephemeral
8 streams and pockets of water above them that do hold
9 rearing salmon and other species of fish. You know,
10 we found cohos that hold over for a year or two, just
11 waiting for the water to come back. And so we want
12 to make sure, at least from the standpoint of, you
13 know, all the downstream effects on commercial
14 fishing and subsistence fishing, that those kind of
15 areas are protected.

16 CHAIRMAN SULLIVAN: But do you think that
17 it expands the jurisdiction as presently understood
18 by the law right now?

19 MR. TROLL: I'll have to defer to
20 Mr. Litmans on that. But certainly, if they are not,
21 they should be. And there may be some question as to
22 whether it's an expansion or just a clarification
23 that these systems already do exist, or are already
24 covered by the Clean Water Act.

25 CHAIRMAN SULLIVAN: Okay. Mr. Litmans.

1 MR. LITMANS: Thank you, Senator Sullivan.

2 I stand by my testimony that the proposed
3 rule does not expand jurisdiction for the Army Corps
4 of Engineers by defining "waters of the United
5 States" as they have.

6 Again, the rule is borne out of Rapanos,
7 Bayview, SWANCC. Bayview established that adjacent
8 waters are jurisdictional. That was a decision where
9 there was no question by the Supreme Court about
10 whether or not jurisdictional waters extend beyond
11 the traditional navigable, in fact, waters of the
12 United States.

13 Justice Scalia said they did, in fact,
14 stretch beyond traditional navigable waters, in fact,
15 and would include adjacent waters because adjacent
16 waters have the ability to impact waters of the
17 United States. They have the ability to impact the
18 chemical, biological and physical integrity of our
19 nation's waters, and they're therefore rightly
20 regulated under the Clean Water Act.

21 The bigger issue with respect to
22 jurisdiction was established in Rapanos. And there
23 we have a split decision with four justices -- a
24 4-4-1 decision by the United States Supreme Court,
25 which is incredibly unusual.

1 The most important thing is that we're
2 discussing today the impacts to Alaska. Well, the
3 test for determining jurisdiction in Alaska will be
4 controlled by the Ninth Circuit, and the Ninth
5 Circuit has adopted Justice Kennedy's test, the
6 significant nexus test. That test is the same test
7 that EPA has now codified. The only difference post
8 rulemaking, should this rule be adopted, is that that
9 significant nexus test will be codified.

10 Currently, the law of the land is that, if
11 there is a significant nexus, that those waters are
12 jurisdictional. Because the test is the same for
13 purposes of determining whether or not one must get a
14 404 permit, there's no change in circumstances. If
15 there is a significant nexus, then one must get a 404
16 permit.

17 With respect to the 3 percent expansion,
18 this comes from EPA's March 2014 economic analysis of
19 proposed revisions to the definition of "waters of
20 the United States." What EPA and the Corps tried
21 to do in that report is assess what the impacts are
22 under the new test. And when you look at the 3
23 percent, it's actually a 2.7 percent increase of
24 jurisdictional waters. It was 2.7 percent based on
25 an analysis of some 290 permitted actions between

1 2009 and 2010.

2 And those -- what the Corps did is they
3 went back and they said: Under the proposed rule,
4 what would -- what would the world look like? And it
5 looks very similar if there's a 2.7 percent change.
6 And the EPA noted: Well, where does that 2.7 percent
7 change come from? It comes from largely the result
8 of clarifying current confusion and assessing -- over
9 the difficulty of assessing "other waters."

10 There is the potential -- when assessing
11 significant nexus, we are talking about hydrology, we
12 are talking about science, we are talking about
13 impacts to waters of the United States. Is there
14 significant impact to the downstream waters?
15 There is the potential that you could have scientists
16 look at this and have a differing opinion.

17 So the 2.7 percent, there's a small margin
18 of error between pre and post rule. And I would say,
19 because the significant nexus test is the law of the
20 land in the Ninth Circuit, it is what EPA adopted,
21 that there is no expansion.

22 CHAIRMAN SULLIVAN: Would you like to
23 respond, Ms. Sweeney?

24 MS. SWEENEY: Thank you, Chairman Sullivan.
25 I would like to just hit on the significant

1 nexus test. While I respect your opinion, I disagree
2 with my fellow witness here.

3 With respect to Alaska, especially on the
4 North Slope, there is a major disconnect or potential
5 overreach in the proposed rule because it provides
6 the federal government a workaround against the
7 significant nexus test if wetlands on top of
8 permafrost are characterized as riparian areas
9 adjacent to jurisdictional waters.

10 The Congressional Research Service, in
11 their report on page 3 and 4, they acknowledge that
12 the proposed rule expands federal jurisdiction
13 through the inclusion of all waters that are adjacent
14 to -- and they list the five different areas: Waters
15 susceptible to interstate commerce; all interstate
16 waters including interstate wetlands; territorial
17 seas; impoundment of the above waters, or tributary.
18 And tributaries of the above waters is a broadly
19 defined term in the proposed rule.

20 When you look at the decision in Rapanos v.
21 United States, Justice Kennedy's concurring opinion
22 concluded that wetlands were only waters of the U.S.
23 if those wetlands had a significant nexus test to
24 navigable waters. The proposed rule prescribes that
25 a significant nexus test will only be performed in

1 cases of waters categorized as "other waters."

2 If wetlands on top of permafrost are
3 categorically determined to be riparian areas, then
4 no test is needed. And according to the proposed
5 rule there is no significant analysis required, thus
6 placing those wetlands predominant to the North Slope
7 as "waters of the U.S."

8 It's important to note that the definition
9 of the "riparian area" in the proposed rule and the
10 language that Fish and Wildlife use to define
11 wetlands in Alaska are very, very similar. So
12 I would jurisdiction disagree with the notion that it
13 does not expand jurisdiction of the Clean Water Act
14 in Alaska specific to the North Slope.

15 CHAIRMAN SULLIVAN: I'd like to just make a
16 broader comment with regard to this discussion,
17 because I think it's a critically important one.

18 You know, one of the concerns I certainly
19 have as Alaska's Senator, but I think a lot of
20 Alaskans have, is what's happening with regard to
21 federal overreach that kind of goes in a little bit
22 of a rhythm that we've seen with this administration,
23 in a whole host of areas, where they try to do
24 something through the Congress, they can't get it
25 done because it's not popular, they can't get it

1 through the Congress, so they take action or direct
2 action through federal agencies to do it anyways.
3 And I think Alaskans have seen this. I've certainly
4 seen this in our state, across a whole host of areas,
5 and I think this is one that certainly looks to fit
6 that pattern.

7 So, in March of 2009, the EPA, in the new
8 Obama administration, wrote the Congress to try to
9 look at ways to maybe clarify, maybe expand the
10 jurisdiction of the Clean Water Act. A couple
11 members of Congress introduced bills to do so. Those
12 bills went nowhere.

13 In the interim, the Supreme Court
14 reprimanded the EPA for taking regulatory action that
15 was in the realm of the powers of the Congress, and
16 yet, many view this rule as doing the exact same
17 thing.

18 So let me ask, Mr. Litmans, if this is an
19 expansion of the Clean Water Act, if it's an
20 expansion, which a lot of people believe -- and
21 Ms. Sweeney, I think, did a good job of laying out
22 why, including the Congressional Research Service,
23 that this is an expansion -- isn't that, under the
24 separation of powers of the United States, in the
25 Supreme Court's ruling in Utility Air Regulator

1 Group, in which the State of Alaska played an
2 important role, isn't that the realm for Congress to
3 make the decision on whether the Clean Water Act
4 should be expanded, not the realm of an agency?
5 Which does have the role, and I admit it, to clarify
6 the law, but certainly not to write the law or expand
7 the law, which would be a violation of the separation
8 of powers.

9 MR. LITMANS: The proposed rule does not
10 expand jurisdiction.

11 CHAIRMAN SULLIVAN: No. But if it did,
12 wouldn't that be the realm of Congress and not the
13 EPA?

14 MR. LITMANS: The --

15 CHAIRMAN SULLIVAN: Just simple question,
16 simple answer.

17 MR. LITMANS: I can't give a simple answer.
18 It depends on how -- on what the agencies have done
19 with respect to defining a particular term from a
20 statute. The statute, the Clean Water Act, the
21 regulatory ability to regulate discharges and fill is
22 governed by the Congress. And so if you have a
23 Congress-based question, I don't have enough facts to
24 answer your question, sir.

25 CHAIRMAN SULLIVAN: Okay. Thank you.

1 Let me ask a final question with regard to
2 consultation. And as I mentioned, particularly with
3 regard to Alaska, do any of the witnesses believe
4 that there was extensive consultation on this issue,
5 given the groups that you represent? Whether it's
6 tribes, whether it's small communities, whether it's
7 agency or organizations that represent different
8 private sector entities, was there extensive
9 consultation with regard to this rule, particularly
10 how it applies to our unique Alaska circumstances?

11 MS. SIMON: No.

12 MS. WASSERMAN: No.

13 MS. MORIARTY: No, Senator.

14 MR. ROGERS: No. And several of us
15 commented on the connectivity rule, Senator, which
16 was of course out for public comment before they
17 initiated this rule and it was in draft format.
18 There were great concerns over that report,
19 particularly how it failed to recognize things like
20 permafrost and unique Alaska conditions, and yet, the
21 EPA just marched forward with this rulemaking and
22 kind of after the fact made amendments to that
23 connectivity report; and yet, it still is really void
24 of very thoughtful Alaskan-specific analysis.

25 CHAIRMAN SULLIVAN: Mr. President, do you

1 have any views on it?

2 MR. KUNAKNANA: (Indication in the
3 negative.)

4 CHAIRMAN SULLIVAN: Mr. Troll?

5 MR. TROLL: No.

6 CHAIRMAN SULLIVAN: Mr. Litmans?

7 MR. LITMANS: I stand by my previous
8 testimony.

9

10 C-L-O-S-I-N-G S-T-A-T-E-M-E-N-T

11

12 CHAIRMAN SULLIVAN: Okay. Well, listen, I
13 want to thank everybody again. I know we've run
14 over, a little bit of time. I really appreciate the
15 great testimony here. The differing views are
16 important views. We will certainly be taking these
17 back to Washington. But more importantly, we're
18 going to continue to try to have these kind of field
19 hearings, so we're coming to you, to your
20 communities.

21 We're going to conduct another hearing
22 on the proposed "Waters of the U.S." in Fairbanks on
23 Wednesday. And we just appreciate the time, the
24 concern, and we look forward to a continuing
25 discussion. Which for Alaska is a very important

	19.6 29:13	
\$	1971 27:14	4
\$1.7 36:8	1972 34:5	4 96:11
\$12.9 54:13	1977 43:18	4-4-1 93:24
\$133 36:6	1978 43:7	402 28:10
\$230 36:6	1991 42:24	403 28:1
\$300,000 82:3 87:6 90:6	1994 81:15	404 21:15 28:9 36:9,10 39:1,4,17 82:2,3 87:6 89:1 94:14,15
\$500,000 90:6		43 6:25 28:7
\$75,000 8:18	2	43,000 6:24
	2 28:22	43.3 28:3
-	2.1 43:19	435 65:25 66:4
-o0o- 4:4 102:12	2.7 29:1,7 94:23,24 95:5,6,17	44.5 29:14
	20 33:19 59:17	46.9 28:16
1	2000 59:11	47 29:7
1,200 68:12	2008 60:24	48 11:4 28:5 43:17 84:17
1,600 43:12	2009 95:1 98:7	
1.8 59:18	2010 95:1	5
10 17:21,24 56:18 84:21	2011 14:13 69:19	5.2 28:4
100 54:5	2013 54:14 73:24	50 28:23
101(b) 15:10 17:13	2014 18:22 49:23 94:18	50-dollar 90:9
10:00 4:2	2015 4:1 47:2	500,000 43:22
115 54:9	21 44:12	
12 37:23	222 38:22	6
12:22 102:11	25 54:12 59:2	6 4:1
130 11:7 38:11 41:15	250,000 28:24	60 54:14 55:10
13132 24:6	27th 18:21	61 38:22
15 58:17	290 94:25	63 33:17 38:9
15,000 11:5		65 7:1 49:24
150 59:16	3	674,000 59:19
160 89:18	3 11:5 41:3,14 56:18 84:21 91:16 94:17,22 96:11	
1600 29:10	3,069 49:25	7
164 48:5 50:6 89:17	3.4 59:19	703 57:20
17 43:18	3.6 41:13	72nd 54:4
170 11:7	30 61:8 73:2	
172 27:23	300 6:4 60:4	8
174 28:2	34 14:24	800-mile 43:14 44:20

83.1 28:17	actions 94:25	affected 21:16 32:14
88 30:24 55:11	activities 7:20 9:6 35:19 39:17 55:14 57:10,17	affecting 78:17
A	activity 36:2 44:16 57:5 89:1	affects 81:6 88:19,21
A.M. 4:2	actual 82:22	affirms 62:18
abbreviated 42:19	adamant 51:24	aftermath 51:13
abided 24:8,20	add 62:6 76:7,19 82:11 90:1	agencies 6:13 7:17 15:4 24:13 32:14 34:7 44:13 68:3 69:23 70:10 73:23 86:24 87:22,25 98:2 99:18
abilities 44:5	added 46:20 49:13 61:9,11	agency 12:12,14 20:7,10,21 21:2 50:6 67:20 68:2 99:4 100:7
ability 6:20 45:9 93:16,17 99:21	addition 10:23 32:9	aggressive 39:19 40:8
abolished 29:20	additional 32:10 49:5 80:8	agree 22:9,13 70:24 77:6 79:1
abundance 59:17	address 6:9 16:1 59:20 66:9 69:24 80:10	agreement 34:10 39:14 81:20
abuse 62:22	addressing 23:21	agreements 81:14
access 64:5 66:10	adequate 36:17	agricultural 82:19
accessed 60:22	adequately 11:25	agriculture 30:10
accessibility 50:13	ADF&G 60:20 61:9	ahead 60:13
account 12:25 13:1,9,12 30:6,7	adhere 85:5	aimed 7:14
accounts 7:1	adjacent 7:20 39:21 40:4,16 41:9 46:11 93:7,15 96:9,13	air 18:10 19:23,25 20:14 48:18 65:15 98:25
accumulate 65:19	adjourned 102:9	Alaska 4:1,12,18 5:23 6:16,18, 22,23 7:10,16 8:11 9:10,14 10:1, 5,9 11:2,4,12,13,17,21,22 12:5 13:2,5 14:19,22 15:21 18:1,14 19:1,7,16,19 20:1 21:7,9,14,19 22:3,7 23:2,23 24:3 25:1,11 27:12,13,22,25 28:1,8 29:11,12, 14,18,20,24 30:2,4,8 31:11,13,16 32:1,11,13,15,16,17 33:2,10,12, 17 34:2 36:12,15,18,23 37:9,18, 22,23 38:7,9,13,18,22 39:2,11 41:13 43:6,7 44:9,19 45:10,13 47:3,4,12,19 48:4,6,7,12 50:5,12, 17 52:3,25 53:3 54:3,7,11,21 55:9 56:21,22 58:19 59:1,3 60:2,3 63:14 67:8,15 68:20,22 69:3 70:11 71:5,13,16,24 72:2,11 73:4, 9 74:2,17,23 76:24 77:8,19 78:1, 2,17,19,25 80:12 81:17 83:13 84:9,25 86:14 88:24 89:6 90:3,5, 14,18 91:3,17 94:2,3 96:3 97:11, 14 99:1 100:3,10,20 101:25
accurate 82:21	administration 74:1 75:20 87:13,17 88:3 97:22 98:8	Alaska's 6:12 13:9,25 28:3 30:6, 13 31:1 36:19 38:5 48:13 49:6,15 50:9 51:20,22,25 52:7 55:17 60:15 61:11 67:17 68:24 83:10
accustomed 11:21	administration's 31:12 86:23	
achievable 74:21	administrations 19:18	
acknowledge 81:16,19 96:11	administrator 5:12 15:17 18:6 19:3 25:12	
acre 8:14 56:17 84:20	admit 99:5	
acreage 29:1 38:11	admits 91:15	
acres 11:7 27:24 28:2,16,22,23, 24 29:2,7,8,13 32:13 38:11,22 41:14 56:18 84:21	admittedly 60:6	
acronym 89:15	adopted 59:3 94:5,8 95:20	
act 6:19,23 7:6,25 9:2,4 15:8 17:12 18:10,24 19:25 27:14 28:9, 10 31:12 34:1,4,6,21,25 35:7 36:16 39:1 40:13 44:25 45:7,21 46:13 54:19 55:15 59:4 62:18 67:25 68:7,8,17 69:20 70:12,15, 23 72:14,19 73:2,7 74:4,6 75:2,10 80:22,24 81:5 88:18 89:14 91:4, 21,25 92:24 93:20 97:13 98:10,19 99:3,20	adverse 36:2,15	
Act's 70:15	adversely 31:23	
action 98:1,2,14	advises 87:25	
	Advisory 6:1 12:21	
	advocacy 41:5 87:14,18,25	
	aerosols 65:16	
	affairs 26:25 27:11 53:16,24	
	affect 31:23 36:11,18 72:1	

97:19	appears 30:24	assets 29:22
Alaska-specific 13:6 14:20 23:15	applaud 41:21	assign 21:2
Alaska-unique 77:5	applicable 27:21	assistant 5:12
Alaskan 30:10,23 33:22 43:11 70:7	applicants 70:10	association 5:24 33:3,10,12 37:19
Alaskan-specific 100:24	applications 35:21	associations 6:5
Alaskans 4:20 5:18,19 8:2 13:24 17:10 25:14 34:10 35:11 38:1 41:25 50:12 83:2 85:4 97:20 98:3	applies 100:10	assumed 40:18
alder-choked 61:17	apply 41:14	assuming 41:11 74:18
alignment 79:2	applying 81:2	assurances 40:7,13
allotments 60:4	approach 12:15 82:14	astonishingly 11:21
allowed 48:12 73:17	approaching 59:16	astonishment 61:19
allowing 63:16	approximately 29:7 36:8 38:11, 21	atmospheric 65:4
alternatives 24:17	APRIL 4:1	attempt 13:4
Alyeska 42:6,16,24 43:10 46:22 88:16	aquatic 56:15 64:11	attempted 35:13
amendment 8:22,25 76:9 85:21	aquifers 30:17	attempting 22:10
amendments 100:22	archeological 50:24	attending 71:24
American 20:24 47:7	Arctic 27:11 28:12 30:16 44:18	attention 33:24 89:15
amount 51:14 56:25 84:15	area 6:25 28:3,4,14 29:5,9 58:20 59:24 97:9	attorney 22:12 67:7,15
ample 87:22	areas 6:1 18:25 27:19,21 28:13, 16 31:24 32:11 40:3,5 41:10 45:18,23 46:14 49:4 50:10 55:5,8 58:20 62:21 85:1 91:22 92:15 96:8,14 97:3,23 98:4	attributed 33:24 90:5
anadromous 11:6 60:16,18 61:10 62:7	argue 82:13 90:4	authorities 18:13
analysis 35:20 36:4,17 49:12 50:7 82:12,20 83:3 87:21 88:5 94:18,25 97:5 100:24	arise 46:8	authority 7:18 9:5 13:14,15 15:18 18:9 20:3,7,9,20 21:24 22:1 24:19 34:25 48:15 91:12
ancestors 65:12	Army 5:13 10:6,20 67:20 72:22 74:7 93:3	authorization 20:21 22:8
Anchorage 4:1 53:11	array 71:25	authorizations 44:15
ANCSA 29:15 30:1 32:22 77:18	aspect 81:11 88:21 89:8	automatically 40:16
and/or 35:8	aspects 30:22 79:9	average 54:9,10 59:17 82:3 87:6
anglers 71:5,17 75:13	ASRC 26:25 27:12 31:14,16 32:6 78:15	avoid 56:15
animals 65:9	assert 70:7	Award 47:3,6,8,9 57:20
announcement 20:25	asserted 18:23	award-winning 7:12
announces 12:13	asserting 7:18	awards 47:17
answers 16:5 26:17	assertion 30:12	aware 33:25 41:20
antithetical 31:10	assess 94:21	
AOGA 33:11	assessing 95:8,9,10	
		<hr/> B <hr/>
		B-r-i-a-n 67:11
		back 7:17 8:4 17:1,4 22:16,17 37:15 41:20 51:17 69:19 73:23 75:19 81:15 86:16 92:11 95:3 101:17

Backcountry 71:5,16	bogs 45:14	business 21:5 80:13 87:13 89:5 90:3,12
background 71:3	born 43:7	businesses 37:22 75:8 87:4,12, 18,21 88:7,10,13 89:24
backpack 61:2	borne 10:16 69:6 93:6	butcher 65:24
backwaters 62:10	Borough 5:24 28:15,18	bypassing 7:21
bank 84:24,25	boroughs 48:5,7,19 49:1,25	
barely 61:17	bothered 50:16	
Barrasso 8:23 75:17 76:9 86:19	boundaries 28:18	<hr/> C <hr/>
barrels 43:18,20,22	bountiful 63:24	C-l-o-s-i-n-g 101:10
based 11:15 15:24 16:15,21 36:4 72:7 94:24	boy 65:8	calculates 28:15 29:13
basis 69:12 89:19	breadth 56:6	calculations 36:5
Bay 58:6,16,18,22 59:14 62:3	breed 31:10	California 82:18
Bayview 93:7	breeding 62:14	call 25:21
bears 62:25	Brian 67:7,13,14	called 14:12 19:23 24:7 26:13 51:14 52:20
begin 4:24 63:15	bridges 48:15,22	campaign 40:9
begun 64:8	briefly 19:11 20:11	canals 34:18
behalf 63:17 71:20	bright 31:13	care 25:14 51:4 59:9 77:21 88:11
believes 10:9 19:7 31:14,21	bring 20:19 74:22 76:23 77:7	caribou 65:6,24
belugas 62:25	bringing 70:3 71:13	carried 65:17
benefit 31:18 32:3	brings 51:6	carry 35:8
benefits 30:3 57:3,4	Bristol 58:6,16,18,21 59:14 62:3	cart 16:17
Berkeley 82:18	broad 30:12 37:21 39:19 65:23 88:18 91:1	case 19:20 20:4,14 44:21
big 80:11 81:21 88:16 91:17 102:3	broadening 40:1	case-by-case 69:12
bigger 81:22 93:21	broader 97:16	cases 81:4 97:1
billion 36:8 43:18	broadly 96:18	catalog 60:16,17 61:10 62:7
bills 98:11,12	brochure 52:11	catastrophic 51:23
biological 68:10 93:18	budget 74:20 76:9 85:22	catch 73:19
biologist 62:8	Budget's 12:9	categorically 97:3
biologists 61:1,23	build 8:13 44:3	categories 40:2
bipartisan 8:22,25 86:16 102:4,5	building 89:3	categorized 97:1
bird 65:22	built 73:6	causing 34:14,17
Bishop 5:25	burden 29:17	celebrated 57:20
bit 4:14 16:17 37:6 53:5 76:17 82:11 84:12 97:21 101:14	burdens 31:16 34:17 49:5	celebrating 54:4
block 75:19	Bureau 5:22	Center 47:4
Board 12:21	bureaucrat 25:16	CEO 33:9
bodies 35:13 50:10 75:1	burrowed 61:17	certainty 67:24 70:5
	Bush 75:20	certified 87:9

chain 43:3 65:9 66:20**Chairman** 4:5 13:21 14:7,21 15:7
16:14,19 17:6,23 18:5,18 19:10
21:20 22:19 23:24 25:4,7 26:1
27:9 32:20 37:2 41:19 42:4,21
47:15 53:10,14 57:25 63:3 67:2,6,
13 69:18 71:1,15,24 76:4 77:14
78:12 79:14,16,19,21,25 83:5,8,
24,25 84:7 85:9 86:21 87:1 89:9
90:19 92:16,25 95:22,24 97:15
99:11,15,25 100:25 101:4,6,12**challenged** 20:1**challenges** 43:25 44:6 46:20**challenging** 35:21 49:5**change** 90:10,11 94:14 95:5,7**changed** 46:19**channels** 45:23 46:2 55:21 62:11**chapter** 15:19 71:16,24**characteristics** 7:15 50:25**characterized** 96:8**chemical** 68:9 93:18**chief** 69:8 87:13**child** 66:2**children** 65:25**Chile** 54:8**choice** 50:11**Circuit** 94:4,5 95:20**circuits** 70:1**circumstances** 36:20 81:16
91:3 94:14 100:10**cities** 48:5,7,19 49:1**citizen** 35:21**citizens** 6:8 36:23 77:2**Citizens'** 5:25**city** 51:13,15**civil** 42:25**claim** 29:21**claims** 20:21 27:14 31:11**clamoring** 69:24**clarification** 32:10 75:5,13 76:10
79:20 85:14 86:13 92:22**clarified** 85:13 91:15**clarifies** 70:13 75:4**clarify** 18:11 72:23 75:1 98:9
99:5**clarifying** 7:16 72:13 95:8**clarity** 34:12 39:24 67:24**classification** 38:15**classified** 32:11**clean** 6:18,23 7:6,25 9:1,3 15:8
17:12,16 18:10,23 19:25 20:14
25:15 28:8,10 34:1,4,6,21 35:6
36:16 39:1 40:13 44:24 45:7,21
46:12 54:19 55:15 62:18 63:21
66:18 67:25 68:6,8 69:20 70:12,
19,20,21,22,23 72:14,19 73:2,6,
15 74:4,5 75:2,10 80:22,24 81:5
88:17 91:4,21,25 92:24 93:20
97:13 98:10,19 99:3,20**cleanest** 7:10**cleanup** 49:3**clear** 7:3 14:22 16:20 20:20 21:25
24:5 72:7,9**Click** 5:25**climate** 74:20**close** 11:8 83:12**closed** 38:25**closely** 18:2**Closer** 28:12**closure** 57:16**cloud** 70:9,13**Co-chair** 71:5**co-sponsored** 8:23**coal** 53:16,24 54:7**coal-fired** 54:6**Coalition** 41:5**Coast** 43:17**Coastal** 28:13**coastline** 6:24 11:3**codified** 94:7,9**coho** 61:23**cohos** 92:10**cold** 53:7**Colder** 44:2**colleague** 41:16**Colville** 63:19**combined** 11:4,10**commend** 71:12**comment** 15:23 42:1 77:16,20
79:6 88:11 89:10 90:1,20 91:23
97:16 100:16**commented** 11:19 12:17,19,21
72:3 100:15**commenting** 38:13 78:7**comments** 10:5,7 12:22,24 14:2,
5,20 27:16 32:19 81:24 85:18
86:4,5 87:16**commerce** 96:15**commercial** 43:3 59:16 62:24
68:25 92:13**Commission** 6:1**commissioner** 10:2 19:11,14,
17,20 22:17 25:9 73:25 74:13**commitment** 31:12**committed** 44:8 57:9,13**committee** 4:9 5:8 13:23 19:4
26:15 27:17 36:21 63:16 69:19
72:10**common** 37:25 45:13**commonly** 33:10**communicate** 63:21**communities** 21:6 37:24 50:19
51:20,25 69:4 73:14 75:12 82:8
83:10,14,21 87:5,12 88:6 100:6
101:20**community** 34:15 35:23 38:17
51:17 63:22 66:3 79:10 83:11,12
88:19 89:16**Companies** 46:25**company** 42:7,17 43:1,6**compared** 28:3**compensate** 56:16

compensatory 10:15,24 56:12,
21 57:1 58:3 81:12,21 84:11,16
85:5

competing 81:10

competitive 81:9

complete 16:9 26:16

completed 50:8

completely 82:13

complex 64:12

complexes 62:17

complexities 44:20

compliance 80:23

complications 56:3

complied 70:12

comply 44:14

complying 68:18

component 12:11

components 14:6

composed 7:1

compounds 65:5,19

concede 62:13

conceivably 29:3

concept 40:21

concern 35:17 55:24 59:11 72:8
92:3 101:24

concerned 18:16 35:11 40:10
41:23 54:16 87:18

concerns 6:8,9 7:12 13:9,12
15:2 34:16 40:10,20 46:8 75:9,16,
18,24 86:18 87:1 88:4,9 97:18
100:18 102:3,4,5

concluded 40:11 96:22 102:11

conclusion 31:14

concurring 96:21

conditions 100:20

conduct 4:15 6:7 26:16 57:9
88:1 101:21

confident 44:5

confirmed 69:10

conflict 29:25 32:22 77:17

confusion 39:16,18 69:17 70:4
95:8

congratulations 47:16

Congress 7:8,21 15:11 17:14
20:9 21:1,25 23:9,12 97:24 98:1,
8,11,15 99:2,12,22 102:4

Congress-based 99:23

congressional 18:20 19:2 20:21
22:7 30:1 41:22 96:10 98:22

connected 30:17 45:19 65:1,2,
10

connection 35:2

connections 34:19

connectivity 11:15,16,24 12:4,
10,18,19 16:10,12,15,20,24 17:3
60:9 100:15,23

connects 64:25

consensus 86:9 91:1,7

consequences 33:15

conservation 9:13 10:2 38:24
58:23 59:3,4 71:18 72:2,8

conservative 41:11

conserve 31:21

conserved 59:23

consideration 30:22 32:7

considered 10:13 40:17,23
45:15,24 46:4,14 55:19 70:17
90:14

consist 45:2

consistent 17:11 68:6 69:20

consistently 19:17

construction 45:2,10 88:20

constructive 85:18

consult 12:1 15:17 17:20 22:16
23:20 24:15 78:19

consultation 22:23,24 23:4 24:1
77:18,22,25 78:4,5,23 79:8 100:2,
4,9

Consulting 14:12

consumption 65:22

contacted 52:6 89:23

contained 11:17 50:15

contamination 65:22

context 33:17

continuation 5:16

continue 11:1 44:7 47:10 66:15
71:20 101:18

continues 33:16

continuing 101:24

contractors 5:23 43:13

contrary 34:24

contributor 15:22

control 8:7 9:5 66:5

controlled 94:4

controlling 30:21

Cook 68:2

copy 52:24

core 46:22

corners 74:13

corporate 29:22

corporation 27:12,13 39:3 51:8
79:1

corporations 21:13 30:2 32:16
37:23 60:3 78:18,20

Corps 10:6,20 11:25 14:13,17
23:14 56:11 67:20 70:2 72:22
74:7,10 81:19 87:9,15 93:3 94:20
95:2

Corps' 13:10,17

correct 16:15,22 19:7,9 41:12
89:4

corrections 12:14

correlative 31:18

correspond 28:14

corridor 60:2

corridors 50:22

cost 36:5 49:5 80:13,23 81:1,2,
11,21,25 82:3,22 87:6

costly 83:16 87:20

costs 10:16,23,24 35:24 36:13
37:5 41:1 56:5 73:11,13,15,16,19,
22,23 74:18 75:7 80:2,6 84:10

coulds 86:12

Council 37:8,18 63:13

counsel 67:16 87:13

counterparts 17:22,25

counties 49:25

country 6:5 56:10 72:11 75:11
76:2 86:3 91:13

County 49:23 68:2

couple 8:13,21 47:5 53:2 98:10

Court 7:21 19:23 20:5,6,12,24
21:22 22:2 23:22 35:4,15 68:1,7
69:10,13,14,21 72:17 73:7 93:9,
24 98:13

Court's 68:19 98:25

courts 69:10,13,16 70:4

coverage 35:7

covered 55:16 91:22 92:24

crack 84:19

craft 9:1

create 34:6

created 27:13 69:17

creates 28:6 30:7 43:24 44:2

creation 36:3 59:5

creator 89:7

creeks 61:18 62:9

crisis 74:20

critical 12:11 15:21 45:9 69:21
70:7

critically 97:17

cross 5:17 37:21

crucial 66:19,25

crude 43:15,18 44:2

culture 48:10 59:15 69:3

culverts 7:19 89:3

cumulative 39:6

current 8:1 31:15 40:4 46:20
81:12,25 85:14 95:8

customers 54:8

cuts 49:7

cutting 74:13

CWA 48:25 73:8

cycle 31:10

D

D.C. 5:7,11 6:8,9 12:20 25:14,17
52:21 53:2 71:13 76:24 77:7

dais 9:15 25:22 26:3,14,17

Dan 4:11

date 6:16 70:18

dates 17:5

David 82:18

day 8:18 43:20,23

days 57:21

deaf 12:23

deals 52:17

dealt 19:25

debate 26:8

debris 49:3

DEC 19:13,17 25:10,17

decade 72:17

decided 60:12

decision 20:5 25:2 69:7 79:5
93:8,23,24 96:20 99:3

decisions 21:2 23:22 35:15 68:1,
3,19 69:21 72:17

decline 66:16

declines 44:7

declining 43:21

dedicated 71:18

deemed 56:2

deeper 84:8

deeply 54:16

defaulting 39:25

defense 51:11

defer 92:19

define 32:4 97:10

defined 40:15 96:19

defines 27:21

defining 67:21 93:4 99:19

definition 39:9 45:5 50:3 54:2
68:4,6 75:22 94:19 97:8

definitions 40:1 56:7

degree 48:11

degrees 48:14

delay 36:12 45:8

delays 56:5 81:6

Delta 63:19

demand 54:6

demands 20:15

demonstrates 11:11 68:14

Department 9:13 10:1 21:14
73:24

depend 31:24

dependent 31:2

depends 99:18

deposited 65:17

deposition 65:4

derived 57:4

designate 27:18

designation 45:16

designations 38:25

designed 48:24

despicable 53:6

detail 84:12

determine 69:15 70:14 89:20

determined 8:15 39:4 87:14
97:3

determines 55:2

determining 24:14 39:16 94:3,
13

develop 25:3

developed 40:22

developers 73:13

development 8:7,16 10:14,25
12:1,2 14:16 15:14 25:2 28:7
29:23 31:2,4,5,9 32:3 37:8,17,25
38:2,17,21 39:1 48:17 49:14
54:21,22 56:13 57:16 59:6 64:4
65:14 66:12 73:5,10 74:11 75:7
82:7 86:7

developments 54:21

diagnosed 66:1,3

dictate 8:10

dictated 50:13

difference 94:7

differences 13:1 80:4

differing 90:22 91:11 95:16
101:15

difficult 49:14 81:3 82:12 84:18,
22 85:8

difficulty 95:9

dig 8:3 84:8

Dillingham 58:18 59:11

direct 29:25 38:23 76:18 81:1
87:20 98:1

directly 35:2 54:11

Director 9:12,25 37:8,17 47:19
48:4 58:6,16

disagree 79:1 86:25 96:1 97:12

disappear 69:5

disasters 51:11

discharge 28:11

discharges 7:23 45:1,6,17,22,24
99:21

disconnect 96:4

discover 20:22

discuss 5:4 23:15 42:15 54:1

discussing 94:2

discussion 97:16 101:25

disease 66:3

diseased 65:23,24

displacement 31:10

disproportionate 33:22 36:15
38:4,12,20

distances 77:9

Distinguished 47:8

distinguishing 56:3

disturbance 84:20

disturbed 56:17 60:19

ditch 40:21 52:1

ditches 7:19 8:3 34:18 39:22
40:20 46:1,10 48:22 55:21

diverse 48:8

Division 9:12,25 60:19

DNR 74:12

document 60:14

documentation 64:16

dollars 62:6

Dolly 73:19

donate 59:6

double 54:10

doubt 7:3

downstream 62:23 68:16 73:20
92:13 95:14

draft 11:15,24 12:7,22 16:8,9,10
17:1,3 79:5 100:17

drafted 41:23

drafting 14:10

drainage 45:3

drainages 46:10 54:25

dramatic 36:16

dramatically 34:3 46:19

dredge 10:21 28:10 83:15

dredging 89:2

drink 73:17

drinking 7:12 48:23 50:14 70:21

driveways 89:3

dry 45:18,22 61:22

ducking 7:21

due 57:5 64:8 65:22 66:10,16

durable 31:4

duties 48:12 71:23

E

earlier 72:18

ears 12:23

easement 59:4

echoed 15:5 69:22

ecologically 68:22

economic 21:3,5,8 29:23 31:4
36:2,4 38:21 48:17 49:14,23 57:3,
5,11,14 73:4 83:3 87:10,21,23
94:18

economically 68:22

economics 82:19

economies 48:11

economy 21:19 22:6,7 38:5 63:1
69:3 70:8 89:8 90:4

economy,' 20:24

ecosystems 38:10

educate 77:1

education 71:20

educational 31:7

effect 10:18 34:14 36:2 41:6

effectively 8:9 34:8

effects 36:15 92:13

efficiency 70:6

efficient 74:14 76:21

effluent 46:2

effort 40:9 60:23

efforts 5:17 7:16 44:10

elected 66:17

elections 48:16

electro-fishers 61:2

elements 31:22 32:4

eliminate 15:14

eliminated 11:22

emergency 51:12

emphasize 33:20

employee 43:10

employees 43:12 54:10,14	18:6 19:3,24 20:2,6 21:23 23:13	exceeding 20:6
employers 88:9	24:3,20 25:12,13 33:21,23 34:11, 24 36:1,17,18 39:14 40:8,25 41:2	exception 30:7
employment 31:7 54:12 57:5	51:24 52:11,14,17,20,25 53:1	exceptions 30:9 39:22
employs 54:9	54:17 56:11 68:12 70:2 72:22	excessive 20:15
Enacted 34:5	74:9 78:14 81:19 82:13,25 87:6,9, 15 91:15,25 94:7,20 95:6,20 98:7, 14 99:13 100:21	Excuse 83:23
encompasses 58:21	EPA'S 13:2,10,17 18:9,13 20:17, 20 34:23 35:12 36:5 38:3 39:13, 24 40:7,13 41:5,11 55:1 62:17 82:20 91:12 94:18	executive 24:6,7,10,21 26:24 27:10 37:7,17 47:19 48:3 58:6,15 78:21 79:11
encompassing 56:8		exempt 23:23
encourage 36:21 50:22		exemption 32:8
end 44:9 45:15 47:17 70:3 79:3	ephemeral 39:21 54:25 56:3 62:11,20 92:4,7	exemptions 32:15
endeavored 34:6	EPW 5:8	exercise 15:18 34:25
ended 19:22	equals 81:6	exist 59:2 92:23
ends 65:5	era 79:8	existing 18:11 40:2 81:19
energy 8:10	erode 66:16	expand 9:5 13:17 18:8 19:5 22:14 34:4 35:18 70:15 77:21 81:22 91:11,21 93:3 97:13 98:9 99:6,10
engaged 61:1	erosion 51:23	expanded 99:4
engineer 42:25	error 87:15 95:18	Expanding 80:24
engineered 46:4 55:20	errors 82:24	expands 29:5 39:2 40:12 54:23 91:24 92:17 96:12
Engineering 42:23	essential 38:2 68:23 69:1 70:20	expansion 18:12,17 20:19 36:16 54:2 56:19 91:16,17 92:22 94:17 95:21 98:19,20,23
Engineers 10:6,20 67:21 72:23 74:7 93:4	establish 24:14	expansions 6:15
enhancement 15:16	established 31:20 79:4 93:7,22	expansive 45:4 68:4
enjoyment 31:22	esteemed 63:16	expect 21:1
enjoys 38:19	esthetically 53:3	expenses 49:13
enormous 20:19 31:16 73:4 80:6	estimate 41:12	expensive 10:14
ensure 9:1 22:23 44:14 70:11	estimated 36:5	experience 16:3 17:17 80:21
ensuring 31:13 71:18	estimates 38:10 41:2	explain 33:14
entire 10:25 27:25 35:23 46:24 82:20	Ethical 46:25	exploration 57:15
entities 21:8 69:11,22 70:6 87:11 89:21 100:8	Ethisphere 47:1	explore 32:23 37:5 58:4
entitlement 29:15	evaluation 82:22	exponential 35:24
entity 79:1 89:17,23	events 16:7,11,25 45:3	export 54:7
environment 4:8 25:14,15,16 31:18 43:5 44:8,19,21 47:10 57:12 64:12,17 65:10 67:17 69:18 70:19 77:3 90:11	ever-changing 51:22	extend 6:19 35:7 93:10
environmental 9:13 10:1 47:9 57:14 67:16,19 69:23	ever-expanding 39:9	extensive 8:8 92:5 100:4,8
environments 48:10	everybody's 16:20	external 26:25 27:11 53:16,24
EPA 5:5,12 8:3,9,14 9:5 10:6 11:25 14:2,12,17 15:17 17:18,24	evidence 87:23	
	exacerbate 80:25	
	exact 16:7 24:24 82:12 98:16	
	examined 80:5	

extra 49:13	feed 65:6	flawed 12:3 36:3 41:7 83:3
extremely 74:19,23 87:18	feedback 79:3	flexibility 81:17
<hr/> F <hr/>		
F-i-e-l-d 77:12	feel 69:11	flood 51:13
face 8:17	fees 57:7	floodplain 41:10
faced 70:4	feet 30:16	floodplains 39:21 40:5 55:5,7
facilitate 29:22	fellow 96:2	floods 51:23
facilities 48:23	felt 35:23 72:7	flow 30:20 55:3 58:21
fact 31:23 39:7 52:5 59:21 88:24 92:2 93:11,13,14 100:22	FEMA 51:13	flows 64:19
facts 99:23	fence 40:21	fly 62:24
factual 89:19	field 6:11 38:6 101:18	flying 53:11
failed 11:25 36:17 41:7 100:19	filed 87:16	focused 9:2 76:12
fails 39:13	fill 10:21 99:21	folks 38:7 61:24
Fairbanks 6:2 101:22	filling 89:2	follow 33:15 70:1 79:22 81:24
fall 8:8 28:8 39:10 40:7 62:22	final 11:20,24 12:4 17:2 23:25 56:20 71:4 72:25 100:1	food 64:1 65:6,9 66:10,20,21
falling 12:23	finalize 13:3	foods 50:15 64:2 66:22
falls 6:22 65:3	finalized 8:1 16:23 54:20	foot 61:17
familiar 15:1	finally 36:14 40:25	Foothills 28:12
fantastic 26:5	financial 90:8	forced 8:16
Farm 5:22	find 14:18 18:3 61:22 62:3 65:24 78:24 89:1 92:7	foresee 60:7
farmer 8:4	finding 84:23	forest 37:20
farms 58:25	fines 8:17	form 8:1 31:15 52:7 85:14
faster 74:11	fire 31:8	format 100:17
fears 75:6	firefighting 51:11	formed 59:10
feature 35:1	firm 62:16 67:16	formulate 24:11
features 7:18,24 34:18 35:8 45:13,20 46:7,9 55:18 56:2,4	fiscal 74:20	fortunate 61:13
federal 6:1,13,16,17,19,23 7:17 8:8 10:12 13:15 16:3 20:10 24:13 25:16 27:20 29:20 31:19 32:9 33:20 34:7 35:6,10 38:19,23 39:2, 7,10,11,20,25 44:12 49:12 51:3 54:23 55:11 72:9,15,20 73:1,8 74:3,4,24 75:1,4 77:23 78:18 79:8 80:16 96:6,12 97:21 98:2	fish 11:6 28:1,15 29:12 38:8 50:25 61:5,10,11,19 62:3,16 65:7, 10 68:23 69:2 73:16 75:12 83:18 92:9 97:10	forward 79:7 81:7 85:21 100:21 101:24
federalism 14:12 24:7,10,12,21	fisheries 4:7 7:12 68:25	found 14:17 49:24 52:10 58:17 61:19 92:10
federally 63:14	fishery 37:20 59:16 62:24	Fourth 46:8
federally-regulated 29:6,9	fishing 62:25 71:17,19 72:1 92:14	fraction 28:19
	fit 98:5	fragmentation 60:7,9
	fix 75:17 86:20	frankly 74:21 81:8
	fixed 75:23	fraught 82:20
	flat 40:7	freely 64:20
		frequently 55:3
		freshwater 50:14 61:11

Friday 52:15

front 26:14 79:3

frozen 30:13,19

frustrate 36:24

frustration 24:2

full 42:18

fully 44:9 50:1 66:18

fumble 69:16

function 30:20

fundamental 7:15

funding 31:6 49:8 60:24

future 29:23 31:13,22 60:5 66:13
70:22 75:7

G

gain 74:17,23

Galena 51:13

game 73:16 75:12

gas 33:2,10 37:20 64:4 66:12
88:17 90:2

gather 61:9

gave 89:14

General 5:23

generalize 55:7

generally 61:4

generation 64:14 65:13

generations 70:23

gentleman 53:1

geographic 18:23 58:20

geographical 45:20

geography 30:6

georeferenced 61:7

giant 59:13

give 4:13 5:17 24:9 25:9 26:4
52:10,13 82:12,16 87:2 99:17

giving 71:25

glancing 11:16

global 57:2 81:10

goal 68:9 70:23,24

good 4:5 5:3 9:24 13:11,12 20:16
27:9 33:8 37:14 53:21 63:11
67:13 71:10 74:9 86:21 88:15
98:21

goods 57:6

govern 73:12

governed 99:22

governing 69:15 72:4

government 5:13 13:15 16:3
19:22 20:15 27:20 29:20 31:19
32:9 38:19,24 49:11,12,22 50:16
51:3,15,24 52:13 69:23 74:3,24
77:23 78:18 79:8,11 96:6

governments 5:2 16:5 49:6,20
50:17 57:8

Governor 72:20 73:25

Governor's 47:6 57:19

grandparents 65:12

granting 8:9 22:1

grassroots 71:22

grave 34:15

gravel 46:12

great 17:6 22:19 23:24 25:4,11,
17 34:15 43:9 51:1 52:6 53:10
79:25 83:5 88:10 90:19 100:18
101:15

greatest 59:14

greet 20:25

gridlock 35:18

gross 41:4

grossly 40:25 41:6

ground 62:14

group 19:24 43:3,5 63:19 99:1

groups 6:4 12:16 100:5

grow 44:7

growth 73:4

guarantee 32:15 59:25 83:13

guidance 13:7 35:4

H

H-a-l-e 9:22

H-a-n-s-o-n 42:11

H-e-a-r-i-n-g 77:12

habitat 50:25 59:2,12,22 60:1,8,
13,19 62:15 68:23 69:1 73:16

habitation 50:12

Hale 4:17 9:12,16,24,25 13:21
14:4,11 15:3 16:2,16,23 17:17,24
18:15 19:8,11 21:10 22:11,21
23:11 24:23 25:5,23,24

half 8:13 11:9

hand 76:20

handed 30:1

Hanson 42:6,8,13,22 47:16

happen 18:25

happened 8:14 13:6

happening 97:20

happy 57:23

harbor 83:11

harbors 8:6 83:13,19

hard 44:13 71:20 89:1

hardened 12:16

harder 53:5

Hartig 10:2 19:12,14,21 25:10

haul 51:5

Hawaii 11:23

headed 43:3

headquarters 17:18 18:3

headwater 62:2,17

headwaters 60:20 61:4 62:13,19
66:7 92:6

health 43:4 64:3 65:20 66:14

healthy 57:12 70:19 73:15

Healy 54:12,14,15 84:22

hear 5:22 6:8 9:9 13:24 26:9

heard 55:9,17 72:18 88:16 89:23

hearing 4:13,15 5:10,16 6:1,11 12:23 26:2 38:6 53:12 76:24 77:3 86:11 101:21 102:9	hung 70:9	102:1
hearings 5:12 6:7 78:16 101:19	hunters 71:5,16 75:13	importantly 15:24 101:17
heartbeat 90:4	hunting 71:17,19 72:1,5	impose 31:15
heat 44:1	hydrological 34:19 65:18	impossible 36:10 56:20 83:16 85:4
held 5:11 38:7 52:11	hydrologically 45:18	impoundment 96:17
helicopter 60:22	hydrology 64:12,21 95:11	impoundments 55:21
helicopters 62:2	hyperbole 8:12 86:5,23	impressive 19:15
helped 58:17	hypothetical 35:2	improper 87:16
heritage 58:6,16,18 71:19		in-state 54:6
high 10:16,23 74:19	<hr/> I <hr/>	inability 84:14
higher 10:17 60:17	ice 44:2,3	incidentally 21:14
highlight 27:15 80:22	Idaho 8:12	include 10:24 36:17 37:22 45:13 52:25 53:2 54:24 79:17,23 83:17 93:15
highly 36:3	identified 34:8 45:12 61:5	included 11:23 67:22
historic 59:1	identify 84:23	includes 89:18
historically 49:10 55:25	identity 7:15	including 15:15 43:2 48:21 60:25 65:4 96:16 98:22
history 32:1 46:24 60:13 62:22	ignoring 20:7 22:1	inclusion 60:15 96:13
hit 95:25	II 27:4	increase 18:23 35:24 41:3,12 44:23 54:18 56:5,24 94:23
hold 92:8,10	ill-conceived 36:23	increased 36:12,13
holes 62:10	illegally 34:4	increasing 13:18
home 28:12 37:15 41:17	immediately 28:8	incredibly 93:25
homeland 65:15	impact 6:20 21:5,8,12,18 22:6 33:22 38:4,13 39:6 42:16 46:17 56:14 75:7 82:7 87:20,24 88:6 89:20 90:13,18,22 93:16,17 95:14	indication 101:2
honored 34:10 47:7	impacted 5:20 6:18 48:21 50:2	indirectly 35:2
hoops 83:18	impacts 4:25 5:18 11:13 35:22 36:22 38:17 41:8,24 45:12 46:20 50:8,20 54:3 56:16,17 87:10 94:2, 21 95:13	Indiscernible 79:15
hope 55:24	imperative 32:2	individual 60:4 76:18
hopeful 46:18	implement 13:4 24:12 70:3	individuals 21:12 75:7
horse 16:17	implementing 52:5 82:22	industrial 65:5,14,16
hospitals 48:16	implements 68:17	industries 37:20 38:5
host 18:25 97:23 98:4	implications 24:13	industry 33:12 47:11 55:20 73:13 88:17 90:2,6
hot 84:1	importance 76:25 90:23	inevitably 33:15
hours 62:1	important 4:13,25 5:9 6:6,15 8:25 12:12 13:24 15:9 17:10 18:19 19:13 22:2 24:6 32:5 38:15 42:1 47:16 53:12 63:21 68:15,22 76:6 77:1,24 79:2 80:20 81:13 89:7 94:1 97:8,17 99:2 101:16,25	information 11:11 12:5,10 55:6 61:8
house 8:13		informed 44:16
HSE 43:4		infrastructure 8:10 48:20,24
huge 6:22 33:21 51:23		
human 60:6		
hundreds 62:1,2,5,6 88:13		

infrastructures 31:8	involved 14:9,15 22:4 25:1	19,23 41:3,8,13 45:6,15,17,24
Inhofe 69:18	involves 64:21 71:24	46:3,5,15 54:18 55:4,5,12,19,22
initiated 100:17	irrespective 81:20	56:2,19 70:17 93:8,10 94:12,24
initiative 42:2 81:15	Island 41:18	96:9
injury 57:21	isolated 7:20 45:18 61:21	jurisdictions 18:24 51:9 81:9
input 52:13	issuance 74:7	Justice 69:8 70:1 93:13 94:5
inside 40:21 49:17	issue 4:25 9:9 10:21 19:13 20:3	96:21
insightful 77:19	37:4 41:22 66:25 72:3 76:6 77:1	justices 69:7 93:23
instance 21:25 33:21 78:14	78:4 79:2 80:2,4,11 81:12 84:8,11	
Institute 47:1	87:4 88:2 89:5 93:21 100:4	<hr/>
Institute's 47:8	issued 5:5 16:1 22:2 69:7 78:22	K
insufficient 55:6	issues 14:20 15:5 23:15 24:4	<hr/>
intact 16:12	35:16 58:2 72:1,23 77:5 78:17,24	K-a-r-a 33:6
integrating 57:13	issuing 22:5 80:7	K-a-t-h-i-e 47:23
integrity 42:23 46:21 68:10,16		K-u-n-a-k-n-a-n-a 63:9
93:18	<hr/>	Kara 33:1,8,9 81:4,23 89:25
intend 32:14	J	Kathie 47:18,25 48:3 53:13 83:6,
intended 7:8 18:8 34:12	Japan 54:8	7 84:4 89:11,12
intent 13:2 39:15 68:17 70:11	jaundiced 60:6	Kathy 82:4
interconnectedness 64:17	jeopardized 31:3	Kennedy's 70:1 94:5 96:21
interest 12:16	jeopardizing 7:14	kicked 14:13
Interestingly 12:8 87:8	job 25:17 36:3 43:14 74:2,9 78:19	kicking 86:16
interests 21:5,6 33:23	89:7 98:21	kids 43:8,9
interfere 44:4	jobs 88:20 90:5	kill 83:11
interflow 64:24	John 8:23	kind 4:13 13:8 16:11 23:16,21
interim 98:13	join 6:2	84:8 91:10 92:14 97:21 100:22
intermittent 54:25 62:11 92:4	joined 42:24 61:24	101:18
interpretation 20:18 39:20	joint 23:21	knowledge 64:14 65:12
interpreted 68:7	joint-proposed 67:19	Korea 54:8
interstate 34:20 35:3 96:15,16	jump 76:19 83:18	Kunaknana 63:4,11,12 67:5
introduced 98:11	Juneau 10:4	78:3,11 79:15,17,23 101:2
inundated 66:12	Junior 4:11	Kuukpigmiut 63:20
Inupiat 32:5 63:23 64:13	jurisdiction 6:16,23 7:17 10:12	Kvichak 92:7
Inventory 61:12	18:17 19:6 21:16 22:15 28:9,11,	<hr/>
invested 12:15	14 30:12 34:1,5 35:6,10 38:20,23	L
invited 61:15	39:10,20 40:1 54:24 55:7,11	<hr/>
inviting 67:18	72:15,20 73:1,8 75:2,4 80:24	L-i-t-m-a-n-s 67:11
	81:22 88:18 91:4,12,21,24 92:17	L-o-r-a-l-i 53:19
	93:3,22 94:3 96:12 97:12,13	labor 37:24
	98:10 99:10	lack 49:11 82:24
	jurisdictional 7:5,9 10:13 17:8	lagoons 46:13
	18:9,13 27:19 29:16 32:12 33:18	lake 8:14
	34:21 38:16 39:4,23 40:3,16,17,	

lakes 6:24 7:4 11:5 28:22,25
50:20 60:10

land 6:21 8:5 15:16 29:15,21 31:5
38:20,25 48:17 50:25 51:4 56:25
58:6,16,18,19,23 59:7,9,10 60:8
61:21 63:1 64:1,23 65:3,18 84:24,
25 94:10 95:20

landmass 33:19

landowners 6:21 8:18 29:17
32:16 58:24

lands 6:19 7:21 28:17 29:13,18,
22 32:10,13 39:3,7,16 51:8 54:24
60:2 71:21 72:6 84:23 85:2

language 40:14 97:10

large 35:25 49:2 50:10,13 51:22
54:22 64:8 69:1 91:4

largely 36:1 95:7

larger 4:20 10:11,22 28:23,25
88:21

largest 21:15

Larry 10:2

lasted 14:13

late 52:15 60:23 61:3

launched 60:23

law 18:11 24:24 48:12,14 55:16
60:17 67:16 69:15 92:18 94:10
95:19 99:6,7

lawmaking 12:11

laws 74:4

lawsuits 35:21

lawyer 61:15

layer 30:14

laying 71:2 98:21

lead 10:10 18:16 60:8 87:12

Leadership 47:3

leading 7:11

league 47:20 48:4,5 50:5 82:5

leaked 16:8,9 17:2

learned 65:11

leave 23:13 52:19

left 53:7 66:15 69:16

legal 22:12 32:2 40:17 51:6 67:16
71:2

legality 35:16

legislation 9:1

legislature 59:3

let alone 66:4

letter 24:24

Leukemia 66:1

level 17:19 60:17

levels 50:1

lichen 65:5

lie 28:17 30:14 51:8

Lieu 49:10

life 69:5

lifeblood 83:10

lifestyle 50:24

light 67:25

limit 24:17 29:2 35:10 65:21

limited 20:15 39:22 64:6 66:14
87:21

limits 35:6

list 96:14

listed 47:17

listen 76:13 101:12

listening 14:18

literally 23:2 80:17 88:12

literature 68:14

Litmans 67:7,13,14 71:1 91:9,14
92:20,25 93:1 98:18 99:9,14,17
101:6,7

live 31:24 50:23 64:11

lived 64:18

lives 31:23 52:18

living 58:17

local 5:1 21:6 24:16 36:25 49:18,
20,21 50:2,17 52:12 57:2,7 82:9

logged 62:1

long 13:13 32:1 34:10 51:4

long-extant 20:22

long-term 32:5

longer 26:21 44:1

longevity 59:16

Lorali 53:15,21,23 84:18

loses 44:1

loss 49:8 56:13 60:9 66:9

lost 40:8 62:23

lost-time 57:21

lot 10:4 14:5 15:3,4 76:12 83:16
85:16 86:11 90:7 97:19 98:20
102:2

love 25:14

low-lying 50:10

lower 11:4 28:4 43:17,24 60:1
69:10,13,16 84:17

lunker 73:19

lying 30:16

M

M-a-r-k 71:8

M-i-c-h-e-l-l-e 9:22

M-o-r-i-a-r-t-y 33:6

made 11:16 12:14 14:5 48:5
72:18 77:20 86:6 100:22

magnitude 64:4

main 27:15 86:1 90:12

maintain 43:13 48:19 64:1,3
66:21 68:9

maintaining 9:2

maintenance 45:10 48:23 49:2

major 96:4

majority 5:7 59:23 69:12,25
102:6

make 6:6 11:20 12:6 25:3 30:11
41:19 45:5 51:17 79:4 81:18
92:12 97:15 99:3

makes 27:21 81:8 85:4,8

making 49:14 74:14

mammals 64:1 65:7,19	membership 37:21 48:4	morning 4:5 5:3 9:24 27:10 33:8 37:14 42:20 53:21 63:11,12 67:13 71:10
manage 17:15 34:8 46:5	membership-funded 37:18	mouth 64:15 91:19
managed 59:24	mention 87:3	move 79:7
management 12:9 46:17 55:13 56:1,23 60:8 85:6	mentioned 15:23 18:7 76:8,11, 23 80:13 81:1 85:20 86:4,22 87:5 88:22 91:14 100:2	moved 43:18
Manager 43:2	mercury 65:22	movement 64:22
mandate 30:1 49:13	message 9:3	moves 64:24
mandated 23:4 29:21 36:19 48:14	methodology 41:5,7	moving 35:16 43:19 80:17 81:7
manmade 46:1,13	mic 79:22 84:1	mud 62:10
manner 57:10 79:13 86:16	Michelle 4:17 9:12,24,25 14:4,11 15:3 16:2,16,23 17:17,24 18:15 19:8 21:10 22:11 23:11 24:23 25:5,24	muddy-bottom 61:18
maps 11:22,23 52:24	miles 6:24 62:6 73:20	multi-state 15:4
March 18:21 94:18 98:7	million 11:5,7 27:24 28:1,2,16,22 29:2,7,8,13 36:6 38:11,22 41:13, 15 43:20 54:13 59:18,19	multiply 29:9
marched 100:21	millions 6:24 32:13	municipal 39:3 47:19 48:4 50:5 51:9 82:5
margin 95:17	mine 53:16,24 56:10	municipalities 21:13 48:13 49:6,18 50:6,9,21 51:10 52:3,8 82:6 83:19 89:17,22
marginal 55:1	mineral 90:10	municipalities' 49:15
marine 63:25	Miners 5:23	municipality 49:17 50:11
Mark 71:4,10,15 85:25	minimize 50:20 56:16	muskegs 45:14
marketplace 81:11	mining 37:20 55:14,20 57:3,15 66:13	
match 40:14	minor 35:8	<hr/> N <hr/>
material 30:8	minority 5:8	NACO 49:24
materially 40:12	minutes 25:21 26:19,20	named 46:25
mayor 5:24	misconstrued 56:8	narrows 68:5
mayors 52:17	missing 10:25	nation's 33:18 38:10 44:11 49:25 59:14 68:10,18 93:19
meaningful 30:3 35:10	mitigate 84:21	national 12:8 18:1 24:15,16,18 50:25 57:2,7,12 68:8 71:17 72:4,5
meaningfully 17:20 23:14,18 25:1	mitigation 10:15,24 35:20 56:12, 21 57:1 58:3 81:12,21 84:11,16 85:5	nationwide 89:6
meaningless 83:1	Monday 4:1 52:20	Native 27:12,14 29:20,24 30:2,4 31:11,13 32:15,16 33:23 37:23 39:2 51:8 60:2,3,4,25 61:24 63:5, 13,15,18 66:17 69:3 78:17,20,25 79:9
means 23:16 29:17 39:10,25 52:22	money 80:6 81:6	Natives 29:11,14,19 31:16 50:12 62:25 77:19 78:2,17
meant 18:11	month 14:14	natural 8:7,17 31:21 46:10 48:8 63:24 67:17 73:24
measure 20:25	months 10:21 16:22 30:14 53:2	naturally 35:22 46:9
measured 61:5	Moriarty 33:1,8,9 37:3 80:9 81:23 87:5 89:25 100:13	
meet 39:13 44:6 48:24 56:21		
meeting 52:11,15 84:14		
meetings 71:25		
members 25:10,13 30:3 34:14 40:10 63:16 77:25 98:11		

nature 33:20 60:6 88:23		57:22 58:14 66:25 71:11 76:1
navigable 28:19 29:1,4 34:20 35:3 93:11,14 96:24	<hr/> O <hr/>	opposed 14:22 72:6
needed 10:3 59:20 85:15 86:13, 14 97:4	Obama 86:23 87:17 88:3 98:8	opposing 14:24
negative 33:14 41:24 101:3	objecting 23:2	opposite 34:14
negatively 52:18	objectives 39:14	opposition 6:3 86:11
neighboring 41:9	observations 61:9,11 92:5	option 90:17
NEPA 35:20	obtain 12:12 36:8,10 44:14 56:14 82:2	options 12:13
net 56:13	obvious 36:14 62:13,18	orally 12:20
newly 40:15	occasionally 44:17 61:6	order 4:10 8:3 24:6,7,8,11,21
nexus 40:17 70:1 94:6,9,11,15 95:11,19 96:1,7,23,25	occurred 24:25	orders 78:22 79:11
NGOS 69:23	occurring 46:9	organization 52:15 58:17 59:7 71:18,23 89:16
nice 79:7	Ocean 47:3	organizations 4:21 15:4 37:22 58:23 88:21 100:7
night 52:15	odds 19:2 66:2	organized 37:23
Ninth 94:4 95:20	offering 42:19	organs 65:24
nominate 60:14	office 12:8 86:15 87:14,17	original 51:1
non-jurisdictional 55:25 56:4,9	official 77:3	originally 19:12
non-wetlands 40:5	officials 14:9 18:6 19:3 24:16	outset 76:8
nonpartisan 71:22	oil 33:2,10 37:19 43:15,19,25 44:2 64:4 66:12 88:17 90:2,9,10	outstanding 25:8
nonprofit 67:15	omissions 82:24	overlaps 32:2
north 5:24 28:15,18,23 29:6,10 31:17 32:1 43:15 63:24 64:5,10 73:18 96:4 97:6,14	one-third 90:5	overly 86:2
Northern 68:2	ongoing 74:20	overreach 6:17 72:9,15 96:5 97:21
note 41:15 97:8	onsite 56:1	overreaching 6:12
noted 95:6	open 55:4 88:8	oversee 44:13
notice 52:14	opening 4:24 86:4	oversight 39:12 41:22
noting 69:9	operate 43:13 44:9	overview 4:14
notion 97:12	operating 44:20	owned 29:13,18 51:7 59:24 60:2
Nuiqsut 63:6,14 66:18 67:4	operation 54:5 57:16	owner 59:5
number 10:11 21:15 52:22 69:2 87:11	operational 43:25	ownership 59:8 60:7
numbers 13:18	operations 36:12 44:4 45:2 54:11 55:14 57:15	
numerous 45:12	Operator 47:8	<hr/> P <hr/>
Nushagak 59:12,13,18,22 60:21 61:1 92:6	opinion 69:13 80:4 95:16 96:1,21	P-r-o-c-e-e-d-i-n-g-s 4:3
nut 84:19	opinions 69:8,14	p.m. 102:11
	opportunities 31:7 84:16 85:2	pace 74:11
	opportunity 10:25 12:17 14:19 25:6 27:17 32:18 33:13 42:1,14 44:3 47:2,13 48:1 52:12 53:25	pages 30:25
		paid 54:9,13,15

panel 4:20,22 9:19 26:6 27:4 76:16 88:1	performed 96:25	80:20 83:9 88:15
panelists 25:21 87:3	period 73:3	pointing 83:2
panels 4:17	permafrost 11:17 23:17 30:15, 17,18,24 32:8 45:14 55:18 96:8 97:2 100:20	points 27:15
paramount 46:22 69:3	permanent 59:25	polarized 86:2
parents 65:11	permit 8:3,5 10:22 36:10 56:14 60:19 74:11 81:5 82:2,3,9 87:6 89:2 94:14,16	police 31:9 51:11
parishes 49:25	permits 10:13 21:15 28:9 36:9 39:4,17 40:24 44:15 80:8,14 81:2	policies 24:12
Park 59:21 72:4	permitted 94:25	policy 8:10 15:11 17:13
parks 58:25	permittees 10:17	political 21:3 48:10
Parnell 72:21 73:25	permitting 8:9 10:23 23:16 35:19 45:7,25 56:5 74:7,14,18 75:21 80:16	pollutants 7:24 28:11
parse 69:14	personnel 51:12	pollution 15:14 34:8
part 50:13 64:8 66:19 71:23 85:21	pesticide 8:6	ponds 7:20 46:13 55:22
participated 14:16	Petroleum 47:8	popular 97:25
partner 84:24	phone 52:22	population 30:6 31:1 73:5
partners 60:25	photographed 61:6	portion 20:23 30:8
partnership 34:7	physical 68:9 93:18	portions 24:10
passed 8:21 64:14 65:13 66:1 85:21	PILT 49:9,16	position 49:20
past 35:16	pipeline 42:7,16 43:2,14 44:20 46:21 73:6,21	positions 12:16
path 33:16	pits 46:2,12 55:22	positive 75:11,14
pattern 23:1 98:6	place 20:14 38:10 50:20 62:4 73:1 74:5 77:22 81:20	possibility 55:25
pay 49:19 89:15	places 58:24 61:20 62:14 84:17	post 94:7 95:18
paying 49:15	placing 97:6	post-closure 57:17
payment 49:10 57:6	plain 28:13 40:7,11,14	potential 11:13 29:8 36:2 45:12 49:7 50:8 54:3 77:17 95:10,15 96:4
payments 49:16	plainly 20:14	potentially 32:13 34:25 87:20,23
peak 43:19	plan 15:14 59:24	power 8:10 20:23 54:6
peer 12:12	planning 48:17 50:18	powerful 32:21 37:3 58:1
peer-reviewed 68:13	plants 54:6	powers 20:8 48:11 98:15,24 99:8
people 29:24 31:22,24 32:5 50:23 51:3 54:9 63:15,17,19,23 64:3,13 65:25 66:18,20 76:12 85:16 98:20	played 99:1	practical 44:19
percent 6:25 7:1 28:3,4,7,17 29:10,15 33:18,19 38:9,22 41:3, 14 54:5,12,14 55:10,11 91:16 94:17,23,24 95:5,6,17	plow 8:5	pre 95:18
percentage 6:22 49:2	pocket 61:22	pre-recession 50:1
perfect 62:14	pockets 92:8	precipitation 45:3
Performance 47:9	point 22:12 57:18 69:25 74:22	predicted 69:8
		predominant 97:6
		prerogatives 24:19
		prescribe 79:11
		prescribed 79:10

prescribes 96:24	product 12:10	protection 31:9 59:25 60:18 62:16,19 67:20 70:16
prescribing 78:22	production 43:19,20	proud 43:6 46:22
present 9:15 26:13 27:1	professional 33:11	proudly 54:5
presenting 9:8	professor 82:17,19,23	provide 14:19 30:3,20 32:9,18 34:12 35:10 49:10 54:12 65:6 84:12 87:22 89:19
presently 92:17	profound 33:25 36:22	provided 60:24 81:17
preservation 15:15 50:22 84:21	Program 47:2	providing 67:16 68:23 69:1
preserve 15:12 24:18 58:24 72:5	project 40:22 45:3 81:7 82:10 88:19	provision 17:12
preserved 56:18	projects 10:22 35:25 38:17 39:11 42:24 48:23 50:2 54:22 56:13 74:11 80:17 82:7,9 86:7 88:16	provisions 35:22
president 26:24 27:10 33:9 42:6, 23 53:15,24 63:5,13,18 67:3 78:3 79:14 100:25	promote 56:12	public 4:8 13:8 15:23,25 19:16 33:22 36:7 40:9,11 48:20 55:12 56:23 69:19 71:21 77:3 85:6 100:16
President/ceo 33:2	promulgated 15:25 17:8,11 21:9	publications 68:13
pretend 62:21	promulgating 88:2	published 11:14 12:3,4
pretty 91:17	proper 88:5	purchases 57:5
prevent 15:13	property 8:15,17 46:11 48:15 49:16 59:5	purpose 31:11
previous 101:7	proposal 46:3,18 66:19	purposes 70:11 94:13
previously 56:8 60:14 91:22	proposals 14:5,10	push 84:2
price 56:24	propose 14:2 76:15	pushing 7:17
prices 90:10	proposed 4:25 5:4,14 6:4,14 16:22,24 18:22 21:11 22:14 26:9 27:18,20 28:6,21 29:5 30:5,21,25 31:3,15 33:16,21 34:1,9 35:7,9, 12,17 36:4,11,18 38:3,14 39:18 42:15 44:17,22 45:11 46:17 48:21,25 50:4,7 52:14 54:1,17,20, 23 55:2,13,23 56:7,19 68:5,11 69:6 72:12 78:15 85:3 87:9,19 88:25 89:21 93:2 94:19 95:3 96:5, 12,19,24 97:4,9 99:9 101:22 102:7	put 43:16 50:20 85:21 91:18
primacy 74:1,8,17,24 76:5	proposes 31:19	
primary 15:12 17:14 35:17	prospered 73:10	Q
principles 57:14	prosperity 29:24 57:11	Q&a 32:23 37:6
prior 28:20 35:14 68:2 81:14 88:1	protect 13:16 15:12 17:14 31:21 44:10 50:24 51:18,21 60:12 63:1 66:19 67:17 68:17 73:12	Q-&a 77:12
pristine 25:16	protected 13:13 70:14 72:13,19 92:15	quadrupled 73:5
private 6:20 29:17 32:15 33:23 36:7 39:2 54:21 60:2 73:14 100:8	protecting 44:8 47:10 51:25 68:15,16 74:4	qualified 59:6
privately 29:18 51:7		quality 9:2 46:6 48:18 64:7,9 65:15 66:6,16
probing 89:4		quantify 81:3
problem 59:20 69:24 74:15 80:15,25 90:12		question 16:6 22:22 23:25 51:6 72:10 78:13 91:8 92:21 93:9 99:15,23,24 100:1
problems 38:14 51:23 64:8 65:16,20 66:10		questions 16:1 23:21 26:16 57:24 76:17 77:15
proceed 26:25		quick 4:19 22:21 26:4
proceedings 102:11		quo 80:21
process 12:2 13:8 14:12,13,15 17:9 24:2,5,8,25 70:13 72:24 76:10 79:4 85:22		quote 12:9 15:10 18:22 20:13 24:9,11 82:16,20,23
processes 8:9		
producer 59:13		

quyanapqak 67:5 78:11	recipient 57:19	Regulator 19:24 98:25
<hr/>	reclamation 57:16	regulators 44:16 70:5
R	recognize 15:11 18:2 77:8 100:19	regulatory 12:13 13:14,17 20:20 21:24 34:17 35:18 40:2 44:10 45:7 70:6 73:23 98:14 99:21
R-i-c-h-a-r-d-s 71:8	recognized 63:14	rehabilitate 8:16
R-i-c-k 37:12	recognizes 57:10 76:25	rein 8:24
R-o-d 42:11	record 10:7 13:10 14:22 16:20 18:19 19:4 24:10 26:22 37:16 46:24 47:9 51:22 67:23 77:2,4 84:6	rejecting 20:16
R-o-g-e-r-s 37:12	recordkeeping 48:16	related 64:8
raise 58:2 76:20	records 52:10	relations 40:9
raised 23:22 43:7,8 62:5	recovered 50:1	relationship 17:21
raising 43:9	reduce 15:13 34:13	relative 23:16,17 84:17
range 59:19	reducing 39:18	released 16:13 17:3 22:23 49:24
ranges 36:6	reference 11:16,17,18 64:16	relied 66:22
Rapanos 68:1 69:7 93:6,22 96:20	references 11:20	rely 63:25 64:13,15
rapidly 44:1	referred 33:11	relying 36:3
rarely 17:19 18:3	reflect 49:11	remain 7:24
rationale 74:8	reflects 30:21	remaining 56:25
RDC 37:18 40:10	refute 40:9	remains 35:17
reach 13:17 17:8 18:9 39:2,11 40:13 45:4 78:15	refutes 41:5	remarked 69:19
reaching 78:19	regard 7:13 15:7 20:12 21:23 23:9,10 24:3 26:8,9 37:4 77:17, 19,22,24 78:1,6 80:7,11,16 84:10 97:16,20 100:1,3,9	remember 16:6
read 15:8 17:13 20:11 21:11 26:21 35:9	regarded 29:4	remind 25:12
reading 40:8,11	region 17:21,24 31:4 32:1,3 62:16 63:25 64:2 66:6,11	reminder 76:5
real 28:6	regional 12:25 27:11 37:23	remote 31:1 34:18 35:8 60:21
reality 36:7	regions 31:1	remove 39:15
realize 49:7	regulate 13:19 16:4 20:23 35:13, 14 99:21	removed 45:2
realized 50:18	regulated 34:14 35:23 44:24 69:10,22 70:6 93:20	removes 70:13
realm 20:9 98:15 99:2,4,12	regulating 40:3 68:3 70:9 74:10	rendering 39:20
rearing 61:3,23 62:14 92:9	regulation 7:25 20:14 22:5 27:19 28:20 36:16 44:17 55:15,16 70:3 73:12 74:3,18 102:1	renders 82:25
reason 20:16,17 63:1	regulations 7:8 31:20 36:25 40:4 44:14 50:19 72:5 73:6	repairs 49:3
reasonable 51:14		repeatedly 34:11
rebuked 35:14		report 11:19,20,22,24 18:21 46:23 49:24 68:12 94:21 96:11 100:18,23
Receipts 49:8		reporter 79:20
received 29:19 47:2,5		represent 4:20 37:19 63:18 88:12 90:1 100:5,7
recent 57:19 64:5		representative 63:20 66:17
recently 64:6 72:3		
recess 4:19 25:20,25		

representatives 5:14
represented 54:14
representing 25:18 29:14 43:12
represents 29:2 33:19 34:9
reprimand 21:23
reprimanded 20:6 98:14
requested 72:22 79:20
require 10:13,14 39:17 56:12 89:1
required 23:4 24:22 39:5 44:15 46:5 48:13 78:21 97:5
requirement 77:24
requirements 35:20 45:8,21,25 46:13 48:25 56:5,22 77:18
research 18:21 19:2 32:7 89:13 96:10 98:22
residents 31:17 51:15 54:13,15
resorted 86:24
resource 8:7 31:2,5 37:8,17,25 38:2,17 54:22 56:15 82:7,19
resource-dependent 38:5
resources 15:16 20:15 31:25 44:6 48:9 51:4 63:22,25 64:6,7 66:8,11,15 73:25 81:10
respect 66:21 75:9 78:14 93:21 94:17 96:1,3 99:19
respective 50:19
respects 30:11
respond 95:23
responded 51:14
response 12:24
responsibilities 15:12 17:15
responsible 38:1 49:1
restart 23:14
restoration 15:15
restore 68:9
result 34:16 35:24 45:16 56:24 72:25 95:7
resulted 65:15
resume 26:1
retaining 59:7
returned 61:6
Revenue 49:7
review 12:12 45:11
reviewed 68:12
revision 34:9
revisions 94:19
Rhode 41:18
rhythm 97:22
Richards 71:4,10,15 76:5 85:10, 25 86:25
richest 68:24
Rick 37:7,14,16 41:21 80:19 88:12,14
Rick's 81:24
rightly 93:19
rights 15:13 17:15 29:20 59:6 74:1,9,17,24
riparian 27:18,21 40:5 41:10 55:5,8 96:8 97:3,9
risk 28:7 29:16
river 59:12,18 60:1 61:1 63:19 70:21 73:17,21
rivers 7:4 28:24,25 50:21 51:22 60:10 73:13
road 49:2 89:3
roads 8:6 48:15,21 49:4
roadside 7:19 46:10 48:22
Roberts 69:8
robust 59:15
Rod 42:6,13,22
Rogers 37:7,14,16 41:21 42:4 80:9,18,19 88:14 100:14
role 68:20 99:2,5
roles 43:1
rooted 68:11
roughly 28:13
row 47:1
royalties 57:7
rule 5:1,5,15,18,20 6:4,14 7:23,25 10:10,17,19 11:1,15 12:3,6,25 13:3,25 14:3,6,16,23,25 15:24,25 16:14,21,22,24 17:7 18:8,22 19:5, 25 20:1,2,3,12,13 21:4,9,11 22:10,14,22 23:7,23 25:2,3 26:8, 10 27:18,20 28:6,21 29:5,8,11,25 30:5,21,25 31:3,15 33:16 34:3,9, 12,13,16,24 35:7,9,12,17 36:4,11, 18,22,23 38:4,12,14 39:13,15,18 40:8,12,14,19 41:1,2,24 42:15 44:22,23 45:11 46:17 48:21,25 50:7 52:14 54:1,17,20,23 55:2,13, 23 56:7 67:19,24 68:5,11,17 69:6, 15 70:5,12,13,15,24 71:3 72:12, 25 73:9 75:3,14,16 78:15 79:5 80:5 82:23 85:3,12 86:6,17 87:8, 10,19,22 88:1,2,25 89:20 90:13, 22,23,24 91:1,24 93:3,6 94:8 95:3,18 96:5,12,19,24 97:5,9 98:16 99:9 100:9,15,17 102:1,7
rulemaking 7:13 8:18,24 11:12, 13 12:2,3,7,18,22 15:22 16:8,12 17:2 24:5 62:18 69:20,24 72:4,6, 23 94:8 100:21
rulemakings 18:1
rules 18:4 21:16 31:20 33:20 52:5,17 66:5 75:21
ruling 22:3 51:7 89:21 98:25
rulings 7:22
run 101:13
runoff 30:21
runs 64:23
rural 49:4,8 69:4

S

S-a-m-u-e-l 63:9
S-i-m-o-n 53:19
S-t-a-t-e-m-e-n-t 101:10
S-u-b-c-o-m-m-i-t-t-e-e 9:18 27:3
S-w-e-e-n-e-y 27:7
safety 43:4 46:21,23 47:6 48:20 57:20
Sag 73:17,20,21

salmon 59:2,11,13,14,18,22
60:1,10,14 61:3,9,20,23 62:4,15,
24 70:22 92:9

salt 50:13

Sam 63:4

sample 61:2 62:4

sampling 61:3,7,14 62:2

Samuel 63:11,12 67:5 78:9,11
79:15,17,23

sanctioned 81:8

SBA 87:17,25

SBRA 88:1

Scalia 93:13

scene 51:12

school 65:8

schools 48:16 49:9

science 12:21 68:11 95:12

scientific 64:16 68:13,14 72:8

scientist 61:14

scientists 95:15

scope 8:24 18:23 24:18 29:11
40:12 67:25

sea 65:7,18

Sealife 47:4

Sean 72:20

seas 96:17

season 45:10 64:20

seasons 10:25

seat 26:3

Seattle 17:25

secretary 5:13

section 5:17 15:8,10,23 17:13
28:9,10 36:9 37:21 39:1,17

sector 73:14 100:8

sectors 36:7

Secure 49:8

security 57:12 64:1 66:10,21

seek 19:5 70:3

seeking 70:11

seeps 54:25

select 85:2

selection 56:24 85:7

self-determination 29:23

sell 59:5

Senate 4:9 8:21 9:3 62:12 77:4
85:22

Senator 4:11 5:25 8:23 11:2
16:17 18:15 19:8 21:10 22:11
23:11 24:23 33:13 36:21 37:14
41:16,22 42:13 47:13,25 52:2
53:8,22 57:23 58:13 63:2 69:18
71:10 73:24 74:12 75:15,17 76:9
80:19 81:23 84:19 85:25 88:14,23
89:13,25 92:1 93:1 97:19 100:13,
15

senior 25:13 67:7,14

sentiment 69:22

separate 69:8

separation 20:8 98:24 99:7

September 61:8

sequence 16:7,11,25 17:4

servants 19:16

serve 33:9 34:3 35:9 58:19

served 19:17

serves 36:24

service 18:21 19:2 38:9 42:7,17
58:20 76:2 96:10 98:22

Service's 72:4,6

services 57:6

session 37:6

set 70:23

sets 68:8

Settlement 27:14 31:11

settlers 51:1

setup 26:11

severe 29:18 82:25

sewer 31:8

share 37:24

shareholders 30:4 31:17 32:4

Sharing 49:7

sheet 30:19

short 25:20 45:9

show 32:7

shown 62:23

Shutting 31:9

side 39:25 62:10

sides 9:9 26:7

significance 33:24,25 62:9

significance.' 21:3

significant 6:15 18:12 20:23
21:5,8 22:5 34:17 41:24 70:1
80:3,15,23 81:3 87:10,23 88:4
89:6,7 94:6,9,11,15 95:11,14,19,
25 96:7,23,25 97:5

significantly 10:11 11:19 22:15
36:11 44:23 45:8 50:2 54:17

similar 8:19 18:20 20:1 95:5
97:11

Simon 53:15,21,23 57:25 84:7,18
86:6 100:11

simple 99:15,16,17

simply 6:19 18:10 34:12 39:25
50:11

single 66:2

sir 99:24

SISNOSE 89:13

sit 23:14,18,19 75:5 79:9

sites 45:3 50:24 56:10 59:1 61:7

situated 50:10

situation 49:9 85:8 90:8

size 27:23,25 55:3

skepticism 21:1

Slope 5:24 27:11 28:15,18,23
29:6,10 31:17 32:1 43:15 63:24
64:5,10 96:4 97:6,14

sloughs 61:19 62:10

slowed 75:21

small 28:18 35:25 49:4,6 54:21
56:25 82:8 83:17 84:15 87:4,5,11,

12,13,18,20 88:6,10,13,19 89:5,
16,20,23 90:3 95:17 100:6

snowplowing 49:3

social 48:9 57:14

society 57:11

sociologically 68:21

sockeye 59:17

Solid 68:1

sophisticated 55:20 85:1

sought 74:1

sound 68:11 90:7

sounds 23:1

sources 34:8

soured 73:10

south 43:16 54:8

sovereign 15:20

sovereignty 36:24

speak 21:1 22:12 24:23,24 80:10
90:25

SPEAKER 83:23 84:1,5

speaking 43:10 73:22

special 58:25

species 92:9

specific 12:15 14:2 38:13 90:15
97:14

specifically 14:1,6 72:11

speculative 34:19

spend 36:7

spent 62:5

spirit 17:12

split 93:23

spoken 18:10

sport 68:25

spring 64:23

springs 50:21

staff 5:7,8 52:10 67:7,15

stage 14:20

stake 11:12

stakeholders 5:14 81:18

stand 9:14 27:1 93:2 101:7

standard 10:21

standards 24:15,17,18

standpoint 92:12

start 4:16 14:3 23:8,19 76:16
77:14 84:14 86:17

starting 75:19 90:16,17

startup 43:17

state 4:18 5:1,13,19,25 8:17 9:14
10:5,9 11:9,14 13:24 14:9 15:21
16:4 18:3 19:1,7,16,18,21 20:1
21:7,9,14,19 22:3 23:2,7,18 24:3,
11,15,19 25:1,11,18 27:23,25
32:17 34:5 36:24 38:21 39:3,8
41:17 44:12 48:6,12,14 49:7 50:1
51:1 52:3,4,13 54:24 55:10 57:7
59:21,24 60:17 73:4 74:2,6,8,10,
17,19,23 75:18 77:25 78:1 80:12,
15 84:14 86:14 88:10 91:13 98:4
99:1

state's 6:25 90:7

stated 18:7 19:4 20:12,13 38:8
39:13,15 82:23 87:17

statement 4:24 42:18 87:15

statements 34:23

states 4:9 6:3,10,20 7:2 11:3,4,
10 12:1 14:15,18,24 15:6,10,13
17:15,20 22:6,24 29:19 34:7 54:3,
19 67:21 68:5 70:18 72:13 75:11
77:4 85:17 93:5,12,17,24 94:20
95:13 96:21 98:24 102:6

states' 15:2

statewide 37:19 57:2

status 80:21

statute 20:22 99:20

statutes 23:5

statutory 13:14 59:4

steadily 43:21

step 8:25

stewardship 47:3

stood 61:16

stop 8:16 54:20 86:7

storage 46:2,14

stories 64:15

stormwater 7:19 46:9 48:22
56:1

stranger 6:12

stream 45:22 60:16,18 62:6,11

streambed 61:22

streams 11:5 39:21 50:21 55:2
60:10,14,15,20 61:2,16 62:2,20
66:7 70:14 73:12 92:4,8

stressed 6:13

stretch 93:14

strong 8:22 9:3

stronghold 59:14

structural 42:25

structures 46:1,4,6 55:21

study 11:15,16 12:4,11,18,19
15:24 16:10,12,15,21,24 17:3
29:12 82:25

stunned 61:5

subcommittee 4:7 5:22 62:12

subject 7:24 8:2 10:12 27:19
28:20 30:17 45:6,20,25 46:12
55:14 72:14

subjected 8:19

subjecting 35:19

submit 26:22 61:8

submitted 10:5,7 27:16 42:18
87:22

subsisted 63:24

subsistence 32:2 50:23 51:2
59:15 63:22 64:2,7 66:8,11,15
68:25 92:14

substantial 87:11

subterranean 64:22

success 32:6

successive 35:14

suffer 64:8

suffering 90:8

sufficient 22:23

suggested 34:11 49:21
suggesting 7:6
suggestion 86:1,21
suggestions 23:9 85:12,23
Sullivan 4:5,11 11:2 13:21 14:7,
21 15:7 16:14,18,19 17:6,23 18:5,
15,18 19:10 21:10,20 22:19 23:24
25:4,7 26:1 27:9 32:20 37:2
41:19,23 42:4,13,21 47:15,25
52:2 53:10,14 57:25 58:13 63:3
67:2,6,14 71:1,11 76:4 77:14
78:13 79:14,16,19,21,25 83:5,25
84:7 85:9 86:21 87:1 89:9 90:19
92:16,25 93:1 95:22,24 97:15
99:11,15,25 100:25 101:4,6,12
summer 60:23 61:3 64:23 73:18
Sunding 82:18
sunk 61:18
supervisors 22:17
supply 43:3 54:5,7
support 11:6 12:6 44:10 60:24
65:18 66:8,18 74:15 75:16 90:23,
24
supported 68:11
supports 59:15 70:24
supposed 10:3 14:14 89:18,19
Supreme 7:21 19:23 20:5,6,12,
24 21:22 22:2 23:22 35:4,15 68:1,
7 69:13,14,21 73:7 93:9,24 98:13,
25
surface 6:25 28:3,4 30:19 49:3
56:1 64:19,21,25 65:3,4,17
surprise 61:23,24
surprising 61:21
surprisingly 59:1
surrounding 56:3
surveys 61:25
survive 51:2 60:11
susceptible 96:15
Susitna 7:5
sustain 67:17 68:24
sustainability 47:4

sustaining 63:22
SWANCC 93:7
swath 91:4
Sweeney 26:24 27:9,10 32:21
77:16 78:9,12 95:23,24 98:21
swim 70:21
system 38:24 42:23 43:14 44:3
84:25
systems 7:20 31:8 48:22 56:9
65:1,18,20 92:23

T

T-a-r-a 27:7
T-e-s-t-i-m-o-n-y 9:18 27:3
T-i-m 58:11
T-r-o-l-l 58:11
takeaways 91:6
takes 10:20 36:9 39:19 43:25
80:14 83:16 85:7
taking 13:12 21:23 60:5 98:14
101:16
talk 7:7 19:10 23:15 50:16 58:14
78:3 81:24
talked 24:1 82:5
talking 14:18 21:21 84:10,13
85:11 95:11,12
talks 17:13
tankers 43:16
TAPS 43:13 45:12,17 46:11,18
Tara 26:24 27:9,10 78:9,12
tasked 52:4
taxes 48:16 49:10,16,19 57:6
taxpayer 49:19
technical 12:14
technology 41:9
temperate 30:15
tentacles 6:18
tentative 35:1
tenuous 49:9

term 40:15 96:19 99:19
Terminal 43:2
terms 27:13 35:22 80:6,7,12
84:13
terrible 52:7
territorial 96:16
test 40:17 69:9 70:2 94:3,5,6,9,
12,22 95:19 96:1,7,23,25 97:4
testified 81:4
testify 12:20 27:17 33:14 47:14
48:1 57:22 63:17 66:25 67:18
71:11 76:2 92:2
testifying 4:18,21 5:21 13:22
19:13
testimony 9:15 25:8,19,22
26:14,16,21,22 27:1 32:21 33:17
37:4 42:5 53:11 58:1 67:4,22
71:25 77:20 84:19 85:11 88:16,22
91:20 93:2 101:8,15 102:2,3
Texas 27:23,25
thing 40:20 52:7 83:9 94:1 98:17
things 18:5 75:21 76:7 90:16
100:19
thinks 16:3
thought 20:2 77:16 91:20
thoughtful 100:24
thousands 30:16 62:5 63:23
64:18 66:22
threatens 30:2
three-fifths 6:2
thrive 83:14
throughput 43:24 44:7
Tim 58:5,13,15
Timber 49:8
time 32:24 34:22 35:5 49:13
51:15 52:18 60:7 66:24 69:25
73:3 74:12,25 76:17 80:7,13 81:2,
6 83:16 84:22 101:14,23
timely 74:14
times 41:17 47:7 64:5
today 4:15,23 5:21 6:11 9:10
10:4 13:23 27:15 36:8 41:16

42:14 43:11 47:14 54:1 55:9
57:23 58:14 65:21 67:18 70:22
71:12 75:6 94:2

today's 74:20

told 52:9,21 53:3 65:9,21

tool 9:4

top 30:14,18 78:20 96:7 97:2

total 29:1 36:5 38:11

tough 90:11

tourism 37:20

track 13:10

Tracker 49:23

trade 6:4 33:11 37:19

traditional 28:19,25 29:4 64:2,13
66:22 93:11,14

traditionally 34:20 35:3

traditions 71:19

Trans-alaska 43:14

transformative 20:19

transformed 9:4

translates 31:6

transparency 82:24

transparent 82:14

Transportation 21:15

transporting 43:15,22

trapping 72:5

travel 50:14 67:3

traveled 5:6 77:9

travels 30:19

treated 15:21

treatment 8:20 45:25 56:9

tribal 63:5,12,13,18 79:1

tribe 63:14,17

tribes 50:17 51:16 52:4,12 60:25
100:6

tributaries 7:5 39:22 40:2,15
56:4 66:7 96:18

tributary 41:9 96:17

trips 61:14

Troll 58:5,8,13,15 63:3 91:9,19
92:1,19 101:4,5

troubled 56:6

troubles 69:9

true 31:25 86:7

trust 58:7,16,18 59:7,9,10

Trustees 67:8,15 70:10

trusts 58:19,23

Tuesday 52:19

tundra 11:18 23:17 30:19,23
45:14,23 55:18 61:16 64:10

turn 65:2 69:16 79:22 84:2

turned 84:3

type 70:16 82:14

types 48:8

typically 20:25 56:17

U

U.s 7:14

U.S. 5:1,5 6:14 8:19 10:6,10
11:15 13:3 19:6,23 20:4 29:12
33:19 38:3,8,16 42:16 44:22 45:4,
5 48:2 49:11 50:3,16 51:24 56:11
67:19,20 68:1,7 70:7 96:22 97:7
101:22 102:4

ubiquitous 39:8 88:23

ultimately 65:16

unacceptable 13:5

Unalaska 52:18

unavailable 85:7

unavoidable 56:16

uncertain 85:3

uncertainty 34:13 35:18 39:15
70:4 82:21

unclear 72:18

uncommon 92:7

unconscionable 66:14

underestimates 41:1

underneath 73:21

underscore 38:15

understand 17:10 55:24 62:9
64:16 66:9 75:9,24 92:3

Understandably 35:11

understanding 10:18

understate 36:10

understated 68:21

understatement 41:4

understating 41:6

understood 92:17

undertaken 88:5

undertaking 20:8 24:11

undocumented 60:15,21

unequivocally 68:14

unfortunate 34:9

unheralded 20:22

UNIDENTIFIED 83:23 84:1,5

uniform 24:14 59:3

unimportant 62:21

unique 26:11 30:6,22 33:25
36:19 45:13 55:10,18 81:16 84:9
91:2 100:10,20

uniqueness 13:2 18:2

United 4:9 7:2 14:24 22:6 29:19
54:3,19 67:21 68:5 70:18 72:13
77:4 93:4,12,17,24 94:20 95:13
96:21 98:24 102:6

units 38:25

University 82:17

Unlike 6:17 30:15

unquestionable 57:4

unquote 15:19 24:19 82:21

unreasonable 20:18

unrelated 9:6

unsuitable 30:11

unusual 30:10 93:25

update 26:5

upland 45:17,23

uplands 60:1	vital 37:25 68:20	54:2,18 55:4,6,7,12,19,23 56:9,20 60:16 61:10 62:7 64:9 65:6 67:21 68:4,10,15,16,18 70:16 71:21 72:12,13,14,18,25 73:8 75:4 93:4, 8,10,11,14,15,16,19 94:11,19,24 95:9,13,14 96:9,13,14,16,17,18, 22,24 97:1,7 101:22
upstream 68:15	voice 5:17	
urge 50:6	void 100:23	
urged 50:6	volumes 35:9	
Usibelli 53:16,24 54:4,9,10,16 56:6 57:9,13,19	volunteer 71:23	
Usibelli's 54:11	vote 8:22	watershed 59:12,22,23
utilities 37:24		watersheds 58:21
utility 19:23 82:10 98:25	W	waterway 64:24
V	W-a-s-s-e-r-m-a-n 47:23	waterways 7:10 64:25 83:17
Valdez 43:16 44:1	wage 54:9,11	wax 44:2,3
values 46:22	wages 54:15 57:5	ways 13:4 46:16 83:12 84:9 85:12,19 98:9
Varden 73:20	waist 61:18	wealth 64:13
variety 43:1 48:20 62:15 69:14	waiting 92:11	website 52:25 55:1
vary 48:8	wanted 8:13 26:4 84:7 92:2	Wednesday 6:2 52:16 101:23
varying 48:14	warm 64:20	weed 8:6
vast 21:2 39:7 59:23 102:6	warranted 32:8	week 85:22
version 42:19	Washington 5:7,11 6:8,9 12:20 18:7 25:13,17 52:21 53:1 76:24 101:17	weeks 8:21 47:5
Vessel 47:2	Wasserman 47:18,25 48:3 53:13 83:7 84:4 89:12 100:12	weighed 73:7
viability 30:2	Waste 68:2	well-being 38:1,2
vibrant 7:11	water 4:7 6:18,23 7:6,12,25 9:1,2, 4,12 10:1 15:8,16 17:12,16 18:24 25:15 28:9,10 30:18 34:1,4,6,17, 21 35:1,3,6 36:16 39:1 40:13 44:24 45:2,7,20,21 46:6,13,14 48:18,23 50:11 54:19 55:15 56:1 59:10 61:6,22 62:18 63:21 64:19, 22 65:1,15 66:6,16,18 67:25 68:6, 8 69:20 70:12,17,19,20,21,22,23 72:14,19 73:2,7,15 74:4,6 75:1,2, 10 80:22,24 81:5 88:17 91:4,21, 25 92:8,11,24 93:20 97:13 98:10, 19 99:3,20	West 43:17
vice 26:24 27:10 42:6,23 53:15, 23	water-filled 51:25	western 15:6
vicinity 45:19	waterflow 30:18 64:21	wet 11:9 45:14
victim 62:22	waterfowl 64:1 65:19	wetland 8:15 28:4 38:10,16 56:14 81:15
view 13:25 19:15 21:20 22:13 33:14 60:6 68:4 75:13 80:14 91:11 98:16	waters 5:1,4 6:14 7:8,13 10:10, 11 11:14 13:3,13,16,18 18:10,13 19:6 27:19 28:19 29:1,4,6,9 30:10 32:12 33:18 34:20 35:13 38:3,16 39:21 40:6,18 41:4 42:15 44:11, 22 45:4,5,15,16,24 46:5 48:1 50:3	wetlands 7:1,2 10:11 11:8,10 27:22,24 28:2,16 29:12,14,16 30:8,13,15,16,20,23 39:3,8,9 40:16 41:3,13 55:1,4 56:13,22 66:8 68:15,20,24 69:2,4 70:14 73:13 74:2,5,6,10,19,25 85:6 88:23 91:12 96:7,16,22,23 97:2,6, 11
viewed 90:2		whatnot 82:10
views 9:9 18:19,20 26:9 90:22 101:1,15,16		white 65:23
Village 63:5,13 65:25		Whitehouse 41:16
violation 99:7		wide 48:19 61:17 62:15 71:25
virtually 27:22 35:1 62:4 83:1		widespread 88:24
vision 37:25 39:24		wife 43:7 73:17
visit 62:12		wild 71:21
vistas 50:24		

wilderness 58:25 81:5 82:2 87:7

wildlife 4:8 28:1,15 29:12 38:9
50:22 68:23 69:2 97:10

wishes 21:2

wishing 56:14

withdraw 14:3 50:7 88:1

withdrawal 14:23

withdrawn 23:7 46:19

witnesses 9:8 26:2,6,7,20 76:13,
18 77:10 88:11 90:25 100:3 102:8

Wood-tikchik 59:21

word 30:23,24 64:15

words 12:9 91:18

work 13:4 18:1 25:11 43:6 44:13,
24 45:9 51:7 58:24 71:20 75:17,
25 86:15,19 92:5

workable 34:6

workaround 96:6

worked 15:3 16:8 19:21 73:18

working 58:25 66:9 81:18

Works 4:8 69:19 77:3

world 7:11 81:9 95:4

world's 46:25 68:24

world-class 7:11 62:24

worse 11:1 85:8

write 99:6

writing 42:19 53:9 79:18,24

written 18:16 21:18 22:13 26:21
27:16 39:19 67:22

wrote 98:8

Wyoming 8:23

Y

yard 8:4

year 20:5 21:22 22:3 30:14 36:8
54:4,5 57:20 59:17 61:7 92:10

year-round 54:13

years 10:22 23:3 36:9 43:1,21
47:1,6 58:17 59:2,17 61:16 63:23
64:18 65:14 66:23 73:2 80:17

young 65:8

youth 31:13

Yukon 7:4

Z

zones 30:15

zoning 48:17 50:18