Testimony of

Charlotte E. Brower, Mayor of the North Slope Borough

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

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

April 8, 2015

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

Overview of the Borough

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

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

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

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

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

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

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

Summary of the Proposed Rule's Potential Impacts on Alaska

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Impacts of the Proposed Rule on Alaska's North Slope

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

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

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

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

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

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

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

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

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

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

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

The Agencies Should Have Abandoned or Clarified their Proposed Watershed Approach

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

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

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

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

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

Conclusion

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

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

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

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

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