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arctic slope regional corporation

Senate Committee on Environment and Public Works
Subcommittee on Fisheries, Water, and Wildlife Hearing
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 6, 2015

Written Testimony
of
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Chairman Sullivan, Ranking Member Whitehouse, and distinguished members of the committee; on behalf of Arctic Slope Regional Corporation ("ASRC"), I am pleased to submit the following comments on the Environmental Protection Agency and U.S. Army Corps of Engineers (the "Agencies") proposed rule (the "Proposed Rule") defining the scope of waters protected under the Clean Water Act ("CWA").[1]

BACKGROUND

ASRC is the Alaska Native Corporation formed under the Alaska Native Claims Settlement Act of 1971 (ANCSA) for the area that encompasses the entire North Slope of Alaska. ASRC has a growing shareholder population of approximately 12,000, and represents eight villages on the North Slope: Point Hope; Point Lay; Wainwright; Atqasuk; Barrow; Nuiqsut; Kaktovik; and Anaktuvuk Pass.

ASRC is committed both to increasing the economic and shareholder development opportunities within our region, and to preserving the Iñupiat culture and traditions that strengthen both our shareholders and ASRC. Respect for the Iñupiat heritage is one of our founding principles. A portion of our revenues is invested into supporting initiatives that aim to promote healthy communities and sustainable economies.

ASRC owns approximately five million acres of land on Alaska's North Slope, conveyed to the corporation under ANCSA as a settlement of aboriginal land claims. Under the express terms of both ANCSA and the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), the unique character of these lands, founded in federal Indian law and the most significant Native claims settlement in U.S. history, must be recognized by

[1] Definition of "Waters of the United States" under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014) (hereinafter "Proposed Rule").

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the federal government in making any land management decisions. ASRC lands are located in areas that either have known resources or are highly prospective for oil, gas, coal, and minerals. ASRC remains committed to developing these resources and bringing them to market in a manner that respects Iñupiat subsistence values while ensuring proper care of the environment, habitat, and wildlife.

It is critical to ASRC and the broader Alaska Native community that the Federal government, specifically the Environmental Protection Agency, not take any action that, through the pursuit of this Proposed Rule, would have the effect of foreclosing the substantial economic opportunities associated with the potential for future responsible development of the North Slope's natural resources which can be found on Native-owned as well as State and Federal lands.

In addition, development activities compose a large portion of the region's tax base, empowering the North Slope Borough and other governmental entities to provide essential services to Alaska Natives and other residents, including housing, utilities, health care and education. Nearly all of the water, sewer, solid waste, and electrical utility services available across the North Slope are provided by the North Slope Borough. The North Slope 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. It is essential that we retain the ability to use our natural resources in a respectful manner if we are to maintain our Iñupiat culture and traditions, as well the jobs and essential services that support our communities and residents.

INTRODUCTION

As set forth in greater detail below, ASRC believes that if the Proposed Rule regarding "Definition of 'Waters of the United States' Under the Clean Water Act" is adopted, not only will it hamper ASRC's use of its lands for the benefit of Alaska Natives, but it will also constrain the development of natural resources on Alaska's North Slope.

THE IMPACT OF THE PROPOSED RULE ON ALASKA

At 172 million acres, Texas is a very big state. However, its *total* acreage is still less than the number of acres of *wetlands* in 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 occupy only 5.2 percent of the surface area." [2] Put differently, nearly half of Alaska—the largest

[2] Jonathan V. Hall, W.E. Frayer and Bill O. Willen, Status of Alaska Wetlands at 3 (U.S. Fish and Wildlife Service 1994).

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, the jurisdictional waters categories added by the Agencies to the WOTUS definition in the Proposed Rule are at least as expansive. 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]**
"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."

As noted above, under the Proposed Rule, "riparian areas" adjacent to traditionally navigable waterways are, by rule, jurisdictional waters.[6] As the Agencies make clear, once waters are jurisdictional "waters of the United States," there is no further argument or analysis:

> 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

[3] *Id.*
[4] Status of Alaska Wetlands, at 11 (emphasis added).
[5] 79 Fed. Reg. at 22,271 (emphasis added).
[6] "Waters of the United States" include "adjacent" waters, which include "neighboring" waters, which include "riparian areas."

> wetlands. Waters in these categories would be jurisdictional 'waters of the United States' by rule—no additional analysis would be required.[7]

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 permits to dredge and CWA §402 jurisdiction for discharge pollutants.[8] Even under their most aggressive rules, interpretations, policies and practices in the past, including those struck down in *SWANCC* and *Rapanos*, the Agencies have never before extended their reach to such extraordinary extents.

The risks are only somewhat reduced if the definition of "riparian area" is narrowed so that it does not include 43% of the state of Alaska. Any of the 174.7 million acres that might be excluded by a refinement of the "riparian area" definition would then be exposed to categorization as "other waters," requiring a case-by-case determination of whether they are within the WOTUS definition. The "other waters" classification included are "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]."[9] "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 the chemical, physical, or biological integrity of [jurisdictional water].[10]

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

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

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

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

"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 (among other) uses,[11] the Proposed Rule creates no exception for any material portion of the wetlands in Alaska. Yet Alaskan waters are unusual in many respects that may 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.

THE IMPACT OF THE PROPOSED RULE ON ALASKA NATIVES

Alaska is also unique because of the amount of land held by Alaska Natives, as a result of passage and implementation of the Alaska Native Claims Settlement Act of 1971. Unlike populations in the Lower 48, many Alaska Natives must utilize all of their resources to support themselves in the most remote and roadless regions in the United States, where basic necessities such as milk and fuel, cost significantly more than they do in the Lower 48. Public services taken for granted by most Americans are still not entirely available in rural Alaska. Subsistence hunting and fishing remain essential for many. Half of the calories consumed by Iñupiat on the North Slope come from our own hunting, fishing and whaling.[12]

ANCSA extinguished all aboriginal title claims in Alaska in exchange for a cash payment and the granting of Native selection rights to 44 million acres of Federal properties. Though 44 million is a large number, it is important to note that ANCSA granted Alaska Natives only a small fraction of the land we have used and lived on in Alaska for thousands of years. Despite the fact that 92% of Alaska had historically been used by Alaska Natives, ANCSA extinguished our aboriginal claims to that land, and granted us approximately 12% of the State's land area, mostly from the portion that had not already been appropriated by the State or Federal government.

[11] 79 Fed. Reg. at 22,264.
[12] Alaska Department of Fish and Game, Division of Subsistence.

The USFWS's Study of Alaska Wetlands calculates that 19.575 million acres of the lands owned by Alaska Natives are wetlands, representing 44.5% of their ANCSA land entitlement.[13] As with Alaskan waters generally, Alaska Natives are now at risk that *all* of these nearly 20 million acres will become jurisdictional wetlands because they are riparian areas, or "other waters" if they somehow significantly affect jurisdictional waters.[14] Though these wetlands are a subset of the 174 million acres of wetlands in Alaska, they deserve special consideration for two reasons. First, they are entirely privately owned, which means that the burden on private land rights is severe. Second, they are owned by Alaska Natives who received them *from the United States government* with the intention of facilitating the economic development, self-sufficiency, self-determination and future prosperity of the Alaska Native people. Yet the Agencies, themselves part of that United States government, now propose a rule that suffocates the potential of those assets.

Congress intended the land grant in ANCSA to provide for economic development for the benefit of all Alaska Natives. The House Report made this intention clear:

> When determining the amount of land to be granted to the Natives, the Committee took into consideration . . . the land needed by the Natives *as a form of capital for economic development*.[15]

Moreover, Congress' "economic development" intent expressly included mineral development. The Committee Report stated that the Regional Corporations will:

> each share equally in the mineral developments. The mineral deposits . . . [are] included as part of the total economic settlement. We feel it is very important for these mineral deposits to be available to all of the natives to further their economic future.[16]

In *City of Angoon v. Marsh*,[17] the Ninth Circuit addressed the conflict between resource development on ANCSA and ANILCA[18] lands and land use restrictions that would

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[13] Study of Alaska Wetlands, Table 1.

[14] ASRC does not dispute that some portion of these wetlands may fall under the jurisdiction of the Agencies regardless of the Proposed Rule.

[15] H.R. Rep. 92-523 at 5 (September 28, 1971); 1971 U.S.C.C.A.N. 2192, 2195 (emphasis added).

[16] *Id.*

[17] 749 F.2d 1413 (9th Cir. 1984), *later proceedings at Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986), *cert. denied*, *Angoon v. Hodel*, 484 U.S. 870 (1987).

prohibit such resource development (in that case, federal designation of a national monument including the lands at issue and a federal statutory prohibition on the sale or harvest of timber "within the monument"). Noting that the land conveyance to the Alaska Native Village Corporation of Shee Atiká, Incorporated was for the "economic and social needs of the Natives,"[19] the court stated that "it is inconceivable that Congress would have extinguished their aboriginal claims and insured their economic well being by forbidding the only real economic use of the lands so conveyed."[20] The Ninth Circuit Court of Appeals further concluded that the District Court's contrary interpretation of legislation "would defeat the very purpose of the conveyance to Shee Atiká . . . ."[21]

In *Koniag, Inc. v. Koncor Forest Resource Management Co.*,[22] the Ninth Circuit reaffirmed congressional intent for to resource development by Native Corporations. Quoting the House Report cited above, the Ninth Circuit stated:

> ANCSA's legislative history makes clear that Congress contemplated that land granted under ANCSA would be put primarily to three uses – village expansion, subsistence, and capital for economic development. *See* H.R. Rep. 92-523 at 5, 1971 U.S.C.C.A.N. at 2195. *Of these potential uses, Congress clearly expected economic development would be the most significant*:
>
> > The 40,000,000 acres is a generous grant by almost any standard. . . . The acreage occupied by the Villages and needed for normal village expansion is less than 1,000,000 acres. While some of the remaining 39,000,000 acres may be selected by the Natives because of its subsistence use, most of it will be selected for its economic potential.[23]

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[18] The Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 410hh - 410hh-5, 460mm - 460mm-4, 539-539e and 3101-3233, also 43 U.S.C. §§ 1631-1642; December 2, 1980, as amended.

[19] The Congressional findings included in ANCSA, 43 USC § 1601(b) state:

> [T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property….

[20] *Id*.

[21] *Id*. at 1418. These issues appeared again in *City of Angoon v. Hodel*. The Ninth Circuit affirmed its decision in *City of Angoon v. Marsh* that Congress would not intend to take away the economic use of property conveyed under ANCSA and ANILCA.

[22] 39 F.3d 991 (9th Cir. 1994).

[23] *Id*. (emphasis added). *See also Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 731 (9th Cir. 1978).

In short, Congress's stated purpose of granting lands to Alaska Natives (to develop their own economic well-being on our own lands) will be substantially and unfairly eroded if the Proposed Rule is allowed to go into effect in its present form.

THE IMPACT OF THE PROPOSED RULE ON ALASKA'S NORTH SLOPE

The Proposed Rule creates many problems for Alaska Natives 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 North Slope Borough. This is 83.1% of the total acreage (56.4 million acres) of those two areas.[24] In other words, more than four-fifths of the entire North Slope Borough is potentially affected by the Proposed Rule.

While 47 million acres on the North Slope are wetlands according to the USFWS, only a small fraction of these are "traditional navigable waters." The North Slope has 23,300 lakes, from a few yards to over 20 miles and seldom deeper than 10 feet.[25] There are 2,450,858.5 acres of lakes on the North Slope larger than 50 acres.[26] There are another 260,629 acres of rivers.[27] Not all of these larger lakes and rivers are "traditional navigable waters," but 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 wetlands identified by the USFWS. The possibility that the Proposed Rule will expand USFWS's jurisdiction from these 2.7 million acres of "traditional navigable waters" to *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" by *more than sixteen hundred percent* (1600%)!

These facts raise the following questions:

- Are all of the 56.4 million acres of wetlands on the North Slope jurisdictional waters because they are "traditional navigable waters" or riparian areas that are "adjacent" to "traditional navigable waters"?

[24] Status of Alaska Wetlands, at 20.
[25] "Digital Data Base of Lakes on the North Slope, Alaska," U.S. Geological Survey Water-Resources Investigations Report 86-4143 (1986).
[26] Estimated by Marie Walker, a remote sensing consultant and principal author of the USGS Water Resources Division report cited above.
[27] Estimated by the Arctic Slope Consulting Group based on Landsat image maps.

- If not, what are the clear demarcations in the Proposed Rule that relieve these lands of that regulatory burden and that will 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, are they "other waters" because they are within a "single landscape" and are or may "opportunistically" be visited by migratory birds or insects? The North Slope—although it is larger than the State of Utah—is largely a single unified, relief-free geographic area. Does that make it a "single landscape"? If not, what are the clear demarcations in the Proposed Rule that relieve these lands of that regulatory burden and that will prevent Agency officials from misconstruing the Proposed Rule?

- How is it possible to plan development for the economic betterment of the people living on the North Slope, the majority of whom are Alaska Natives and ASRC shareholders, in the face of these uncertainties?

THE IMPACT OF THE PROPOSED RULE ON ASRC

ASRC's Iñupiat shareholders are the majority population on the North Slope and live in eight remote villages, none of which is on a power grid or road system that reaches beyond the village.

ASRC owns approximately five million acres of land on the North Slope with the same pattern of wetlands that exist generally across the North Slope, as described above. ASRC selected these lands for their high potential for oil, gas, coal and mineral resources. ASRC, as a steward of the land, continuously strives to balance management of cultural resources with management of natural resources.

Economic development growth opportunities on the North Slope are limited. With expensive energy dependent largely on diesel fuel at a delivered cost of more than $7 per gallon, transportation that is limited to aircraft and seasonal barge deliveries, a harsh climate with average low temperatures of minus 20 degrees in the winter, and a small and widely dispersed labor force, the increased regulatory burdens on landowners caused by the Proposed Rule will only act as a hindrance to the economic prosperity of the region. Our economic health of our region and the viability of our communities are dependent upon the responsible development of our natural resources.

The regulatory burdens imposed on our region by the Proposed Rule will directly, immediately and adversely affect the economic well-being of literally thousands of people who uniquely rely on the land and its resource potential for their survival. Although that alone is reason enough to reject the Proposed Rule, it is important to note

that the Proposed Rule is also in direct opposition to the statutory mandate placed on ASRC by Congress through the passage of ANCSA. The Proposed Rule, as written, would essentially prohibit ASRC from developing our lands to provide benefits to our shareholders. In summary, the Proposed Rule will have disproportionate consequences for the Alaska Native people who call the North Slope home.

CONCLUSION

Our communities and shareholders appreciate our longstanding relationship with the federal government. However, in many cases, when the federal government proposes changes to established rules and regulations that it believes will help protect and conserve natural elements for the future enjoyment of *all* people, they in fact adversely affect the lives of those people who actually live in those areas, and depend on those resources. This is particularly true in the North Slope region of Alaska, where a long history of subsistence overlaps with a legal imperative to allow development within the region for the benefit of our shareholders. Both elements define who we are as Iñupiat people and are important to the long-term success of ASRC.

ASRC believes the EPA needs to consider, and acquire a better understanding of, the impacts the Proposed Rule will have on Alaska, and specifically the North Slope.

ASRC believes that the Proposed Rule, in its current form, will impose enormous burdens, not only on ASRC and our shareholders, but also on all of the residents of the North Slope—without any correlative benefit to the environment. ASRC believes that the Proposed Rule does expand the jurisdiction of the federal government, specifically the EPA and the U.S. Army Corps of Engineers. At a minimum, the federal government needs to explicitly exclude wetlands that lie atop permafrost. Further research and consideration may show that an exemption for permafrost areas is warranted. In addition, the federal government needs to provide additional clarification on the lands as to which areas within Alaska will be classified as jurisdictional waters. Regardless, because so many millions of acres of Alaska lands are potentially affected, the Agencies should specify how they intend to guarantee exemptions for private Alaska Native landowners like Alaska Native Corporations and for the State of Alaska.

Thank you for the opportunity to provide comments on this topic of significant importance.