CITIZENS' ADVISORY COMMISSION ON FEDERAL AREAS

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UNITED STATES SENATE COMMITTEE ON ENVIRONMENT & PUBLIC WORKS
SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE

Field Hearing on Proposed Rulemaking to Define Jurisdiction Under the Clean Water Act
Fairbanks, Alaska | April 8, 2015

Testimony of Sara Taylor, Executive Director of the Citizens' Advisory Commission on Federal Areas

Chairman, Subcommittee Members, thank you for allowing me to testify today, and thank you foremost for holding public hearings in Alaska on this very critical issue. For the record, my name is Sara Taylor and I am the Executive Director of the Citizens' Advisory Commission on Federal Areas (CACFA). In 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA), which fundamentally changed the way the federal government manages its lands in Alaska. In 1981, CACFA was established by the Alaska State Legislature to monitor and mitigate negative impacts to Alaskans from implementation of ANILCA and the complex mandates and highly discretionary sets of laws, regulations and policies applicable to over 225 million acres of federal land. Primarily, CACFA works with individual Alaskans in navigating these rules and policies, safeguards and preserves their rights and interests and maintains a multi-decade institutional memory of engagement with federal agencies throughout the state.

One recurring theme throughout Alaskan history is a well-meaning paternalism which stifles our opportunity for social and economic autonomy and prosperity. In one way or another, Alaska has consistently been exploited to serve a national agenda without consideration or reverence for our needs, experiences, livelihood, circumstances or expertise. Before and during our territorial days, our abundant natural resources were unsustainably managed and siphoned off to line Outside pockets. While statehood accompanied ownership, representation and sovereignty, these concepts have eroded over time as Alaskans are systematically disenfranchised by Outside interests. For areas designated under or impacted by ANILCA, promises and guarantees made at passage have been compromised and subjugated to placate Outside ideologies. In short, Alaska has advanced from being depleted into worthlessness to being idealized into powerlessness.

In many ways, the Environmental Protection Agency (EPA) and Army Corps of Engineers (ACOE) proposed rulemaking on the extent of federal jurisdiction over waters in Alaska is emblematic of this patronizing and often oblivious approach to Alaska. From territorial management to ANILCA to the proposed rule, Alaska is thoroughly accustomed to and frankly tired of being the subject of a tabletop exercise in Washington D.C. The State of Alaska has the authority, responsibility and detailed expertise to protect all waters in the state regardless of jurisdiction. The regulation of water and land use is a traditional and primary state and local power demanding both legal and intuitive deference. Yet the EPA and ACOE did not even consult with the State in developing this rulemaking which unapologetically hijacks these powers and obligations.

When the agencies say Alaskan waters require federal protection, they mean protection from us, the people whose very survival depends on clean water. Alaskans do more than depend on our water, though – we understand it. If our water needs protection, it is from administrators who do not. Approximately 63% of the nation's wetlands are in Alaska. In other words, Alaska has more wetlands than all other states combined, yet the proposed rule completely fails to acknowledge our unique geomorphological and hydrologic conditions. Even though wetland and aquatic habitats like permafrost, tundra, muskegs, spruce bogs, glaciers, ice fields and others are rare or absent outside Alaska, these conditions are common in a majority of the areas impacted by this rulemaking but are not accounted for in the rulemaking or the 2013 Draft Connectivity Report.

As just one example, wetlands on the North Slope of Alaska are epitomized by relatively flat terrain and a seasonal snowmelt that cannot penetrate the frozen soil underneath. These areas can be hundreds of miles from the nearest navigable-in-fact water, but they could be jurisdictional under the proposed rule's expanded application of "adjacent" wetlands or its reliance on a "shallow subsurface hydrological connection." Further, a majority of waters in the state are frozen for the better part of each year, only exhibiting functions described in the rulemaking for brief periods; yet, the rulemaking does not address how connectivity and capacity to impact traditional navigable waters may be limited or foreclosed by this situation, or even whether a predominantly frozen stream is considered flowing, seasonal, intermittent or ephemeral. Not only is it confusing to see how the proposed rule would apply in Alaska – to two-thirds of the wetlands at issue – it begs the question as to why application of the rule is entrusted to agencies which did not care or know enough to even consider these conditions.

To most Americans, Alaska is an idea. Seward's Folly, furs, fish and gold, a postcard, a reality show, a trophy hunt, a lifestyle, a dream vacation, or an opportunity for preservation and atonement for the industrialized and developed state of our nation. But Alaska is not an abstract concept to us. This is our home, our being, and water is the intravenous network that feeds us, both physically and spiritually. The Clean Water Act recognizes that there is no more reliable steward of clean water than the people who fish in it, swim in it and drink it. Congress mandated that

> [*f*]*ederal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources*.

33 U.S.C. § 1251(g). The Clean Water Act also explicitly stated Congress' policy to

> *recognize, preserve and protect the primary responsibilities and rights of the State to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources, and to consult with the Administrator in the exercise of* [*her*] *authority under this chapter*.

33 U.S.C § 1251(b). Pursuant to this policy, the Clean Water Act gives states clear regulatory responsibilities as well as mechanisms to assume primacy for regulating certain activities, including discharge, dredging and fill operations. *See, e.g.*, 33 U.S.C. §§ 1311, 1313, 1342, 1344, 1370. If the proposed rule is enacted, the scope for primacy assumption will be limited to the point where any attendant state program would be infeasible to maintain for so small an area. Such a scenario cannot be consistent with Congress' intent, the plain language of the Clean Water Act or basic tenets of federalism.

The proposed rule will not only serve to deprive Alaska of its traditional and sovereign powers, in spite of its superior capacity and expertise to manage and protect its waters, it will also disproportionately impact its ability to grow and prosper. Wetlands and waters cover approximately 43% of Alaska. Aquatic habitats nourish our world-class fish and wildlife populations. Water supports the responsible development of our abundant natural resources. Whether flowing or frozen, water also provides a vast statewide transportation network connecting otherwise isolated villages and providing access for traditional activities. We are not just surrounded by and infused with a lot of water potentially subject to federal jurisdiction under the proposed rule, we need and use our water in critical and unique ways which are not contemplated by the proposed rule.

Out of 283 total communities, 215 are located within two miles of a coastline or navigable waterway. Because the proposed rule expands the acreage and linear measure of waters subject to federal permitting authority under the Clean Water Act, conceivably well beyond two miles, the development and sustainability

of these communities will become hostage to either a very expensive jurisdictional question or a very expensive concession of jurisdiction. Determining jurisdiction includes expenses such as contractors, fees, studies, surveys and delays. Conceding jurisdiction can include many of the same costs, but also immediately incurs increasingly high compensatory mitigation fees. Both scenarios raise major due process concerns. Property owners, communities and sovereign states need to pay to ask the federal government if permission is needed, or pay the federal government for permission, regardless of whether permission is actually needed, just to avoid fines and penalties without efficient or cost-effective recourse.

While it would be fair to say the proposed regulations attempt to answer the jurisdictional question better than the current regulations, by making every possible nexus a significant one, this is not the case for Alaska where the nexus can be hypothetical and/or indeterminate. The proposed rule provides for attenuated jurisdiction as far away from navigable-in-fact waters as the potential for connectivity, but Alaska's distinctive hydrology is not addressed. At least under the current regulations, Alaskans have a chance at reasonably predicting and relying on a non-jurisdictional finding. Under the proposed rule, the only reliable prediction is conceding jurisdiction or abandoning the project, since even a non-jurisdictional finding would be primed for litigation.

The U.S. Constitution, the Clean Water Act and judicial precedent do not authorize or support the extent of jurisdiction claimed by the EPA and ACOE under the proposed rule, or the dire and disproportionate consequences to Alaskans and their interests from its implementation. Alaskans are no strangers to federal regulations governing essential aspects of their lives, from traditional practices to the ways they feed and warm their families to the mere exercise of their established property rights. I am not sure how much more could be demanded of us, but I do know this demand mischaracterizes the state of the law, unconstitutionally interferes with our authorities and will not enhance the protection of our waters.

If the EPA and ACOE would truly like to clarify and streamline implementation of the Clean Water Act, the Commission has some recommendations for how that could work. Starting with a draft of the existing regulations, add anything unquestionably jurisdictional and unquestionably non-jurisdictional under the Clean Water Act, as informed by United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159 (2001), and the narrowest grounds in Rapanos v. United States, 547 U.S. 715 (2006). The significant nexus test, as described in the proposed rule, is not the law established by these cases. Next, conservatively add things which might be jurisdictional under the law. Use of best available, peer-reviewed science is warranted, but only so long as it is informed by an understanding of the extent of jurisdiction available under the law.

Once these additions are developed, thoroughly review them to ensure consistency with the Commerce Clause of the U.S. Constitution. Require all remaining hydrologic features, pathways and scenarios to undergo a case-by-case determination to establish jurisdiction, recognizing that one-size-fits-all (e.g., *per se* jurisdiction) does not work for the nation's incomprehensible diversity of waters and wetlands. See if any terms require additional definitions, without making those additional definitions need additional definitions. Next, bring this revised draft of the existing regulations to the states, tribal governments and stakeholders for genuine and open consultation, regional insights and necessary edits. Lastly, propose these revisions to the public with sufficient justification and clear explanations to enable meaningful input.

Critical to this recommended approach is the idea that federal agencies start from a place of non-jurisdiction – a place of respect for the merits, common sense and practicality of local knowledge and control – and sensibly propose jurisdiction only where consistent with the law. The approach adopted for the proposed rulemaking worked from the opposite position of needing to establish jurisdiction everywhere with limited exceptions and no consultation or sincere attempt to evaluate impacts or engage stakeholders.

Thank you for this opportunity to testify.