ALASKA MINERS ASSOCIATION

121 W. Fireweed Suite 120 | Anchorage, Alaska | 99503 | 907.563.9229 | alaskaminers.org

Testimony of Deantha Crockett, Executive Director
Alaska Miners Association
April 7, 2015 Field Hearing
Senate Committee on Environment and Public Works; Subcommittee of Fisheries, Water, and Wildlife
"Impacts of the Proposed Waters of the United States Rule on State and Local Governments and Stakeholders"

Thank you for the opportunity to testify at this field hearing on the proposed rule to redefine 'Waters of the United States" under the Clean Water Act, being undertaken by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps).

AMA is a non-profit membership organization established in 1939 to represent the mining industry in Alaska. We are composed of more than 1,800 individuals and companies that come from seven geographically diverse statewide branches: Anchorage, Denali, Fairbanks, Juneau, Kenai, Ketchikan/Prince of Wales, and Nome. Our members include individual prospectors, geologists, engineers, vendors, suction dredge miners, small family mines, junior mining companies, and major mining companies. AMA works closely with the Federal and State agencies in Alaska to assure that the resources of Alaska can be developed in an economic and environmentally manner. We look for and produce gold, silver, platinum, molybdenum, lead, zinc, copper, coal, limestone, sand and gravel, crushed stone, armor rock, and other materials. These members are engaged in mineral development critical to the economies of local Alaskan communities, the State of Alaska, the United States of America, and the world.

AMA spent several months reviewing the Waters of the United States (WOTUS) proposed rule. The fact is, EPA and the Corps proposed a rule that radically redefines Waters of the U.S., under any program regulated by the Clean Water Act. This redefinition broadens the scope the Act's jurisdiction much further than what has been set in statute by Congress and recognized by the United States Supreme Court. The legality of this is questionable at best, and likely to result in intervention by the legislative and judicial branches - at least we certainly hope so. The Clean Water Act was explicitly limited to Waters of the United States as they had been historically designated – expanding jurisdiction by regulatory fiat beyond the limits of the Act as determined by the legislative and judicial branches is simply unlawful.

The proposed rule ignores decisions set out in the *Rapanos v United States* Supreme Court case, in which Justice Kennedy outlined a "significant nexus" standard. The legal proceedings that have taken place regarding the Clean Water Act are the very reason the agencies cite for the need to redefine Waters of the U.S. If that indeed is the case, then the outcomes of the cases need to be implanted into this proposed rule. Instead, tenuous but sweeping connections are made from "adjacent" water features to any navigable water, ensuring that waters clearly not intended for regulation by the Clean Water Act now qualify for jurisdictional determination. This is in direct conflict with Justice Kennedy's opinion. It would also be useful for the agencies to actually address the issue of significant nexus in a meaningful way by providing field-usable standards determining the difference between significant connections and mere connections. That EPA published this proposed rule in advance of the science being conducted to support the rule change being finalized is appalling.

The EPA and Corps argument that future "uncertainty" will be avoided, and the states and public be spared tedious case-by-case determination by widening the definition of waters of the U.S. is certainly true, but disingenuous. All certainty and discussion would be avoided by redefining every drop of surface water in the United States as "jurisdictional," but that is hardly the intent of the *Rapanos* decision.

Aside from legality issues, AMA spent considerable time in collaboration with our partners in other states to examine the impacts of this proposed rule. We found that no matter what the geographic location with a constituency reviewing the proposal, all had significant issue with the proposed rule. Yes, what affects water permitting at mining operations in Nevada is significantly different than at operations in Alaska. But, therein lies the complexity of this proposal: the Clean Water Act is explicit on governing how water is managed across the nation, and since its passage, operations have understood the requirements the Act places on that management. This proposal dramatically shifts that understanding by redefining what a "water" actually is. Nevada, clearly a dry, arid region, is seeing the possibility of regulation of man-made water bodies included in mine design. Alaska, with water being one of our most plentiful resources, is seeing the possibility of having to regulate stormwater and diversion ditches.

You have asked me here today to discuss the impacts of this proposed rule on stakeholders. Our major concern is the lack of clarity throughout the document. Definitions of numerous key terms and concepts, like waters, floodplain, wetlands, subsurface connection, etc. are ambiguous and unclear. There is no room for confusion when it comes to permitting and regulating mining projects in Alaska. We depend on, and believe the public does too, a rigorous, science-based permitting system. Without explicit definition of all technical and enforceable terms, we are left with an unpredictable and confusing proposed rule. We can only assume that we will also be left with undefined terms that will be subject to interpretation by the agencies. To be perfectly frank, we fear this provides an avenue for our federal agencies to take a large leap into overreach, and place unreasonable regulations on mining projects simply because they can.

Both agencies have hosted many public forums in which stakeholders have posed questions about the rule, and in many cases, the agencies could not provide definitions, or responded that the intent of the proposed rule is not captured in its language. The agencies must publish, communicate, and implement clear definitions of every single element within the proposed rule.

By its terms (or lack thereof), the proposed rule expands jurisdiction to waters, except decorative ponds, not previously regulated under the Clean Water Act, such as drainages, ditches, floodplain areas, industrial ponds, and more. These are not intended to be covered under the Act. Doing so will result in fundamental changes to many programs already being implemented under the Act, and we stand concerned that the agencies have not adequately considered the implications of doing so.

Also troubling to AMA is that two Federal agencies involved have not consulted with their state partners on this proposed rule. Likewise, the proposed definition has not considered, no consulted with the Alaska Native land owners in Alaska who have been granted 44 million acres of land that Congress intended to be a partial settlement of outstanding Native claims. It is our strong opinion that the new definitions will have the direct result of significantly undermining the intent of Congress for these 44 million acres be available for responsible resource development, including minerals, now owned in fee title by the Alaska Native Corporations established by the Alaska Native Claims Settlement Act. Furthermore, the rule encroaches on the traditional power of the states to regulate land and water within their borders. Coordination and consistency are crucial for any proposed rule defining waters of the U.S., and it is just as vital to ensure states' rights are not being violated. It is statutorily mandated, and affirmed by our legal system, that regulation of interior waters is a quintessential state function.

In the proposed rule, the agencies imply that states lack mechanisms and regulation to protect aquatic resources. In fact, the State of Alaska has a regulatory framework that meets or exceeds all federal water quality standards and a legal framework to support those standards.

Finally, the proposed rule structure of jurisdiction, and the associated definitions, will have negative impacts to Alaska's miners and to virtually any other economic development project. Categorizing many new water features as "waters of the U.S." and determining that all adjacent features also qualify would consequently subject nearly every parcel of land to jurisdiction under the Act. In Alaska, 175 million acres are classified as wetlands; this constitutes 45% of the land base. Alaska is the only state in the Union with extensive permafrost and Alaska's coastline and tidally influenced waters exceed that of the rest of the nation combined. Thus any regulation or rule changed addressing wetland and coastal environments will have a potentially greater effect in Alaska than anywhere else in the nation, particularly if ill conceived. The combination of these Alaska-specific issues and those that all stakeholders must manage, and Alaska's miners have an enormous burden at

stake. Obscure and poorly defined changes and significant expansion of the Clean Water Act jurisdiction could result in conflict with other Federal regulations, such as 43 C.F.R. 3809 reclamation regulations, and will undoubtedly result in significant delay and additional cost burden in permitting.

If the agencies aim to develop a meaningful, balanced, and supportable rule, they must take a more precise and methodical approach, one that is supported by science, informed by a robust understanding of the State and local laws that address water issues, and is true to Congress' intent and Supreme Court precedent. The Alaska Miners Association has recommended that the agencies table this proposed rule and engage in meaningful dialogue with the regulated community and with the states about more appropriate and clear changes to existing regulations. Only then should the agencies replace the proposed rule with one that reflects those consultations and is supported by science and case law. Doing so will ensure responsible, legally defensible rulemaking that captures the intent of Congress and the Supreme Court, and does not place unnecessary burden on Americans.

Thank you for the opportunity to comment on this important issue.