

**TESTIMONY OF  
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**BEFORE THE UNITED STATES SENATE COMMITTEE ON  
ENVIRONMENT AND PUBLIC WORKS**

**SUBCOMMITTEE  
ON FISHERIES, WILDLIFE AND WATER**

**FIELD HEARING: *IMPACTS OF THE PROPOSED WATERS OF THE UNITED STATES RULE ON STATE AND LOCAL GOVERNMENTS AND STAKEHOLDERS***

**ANCHORAGE, ALASKA**

**APRIL 6, 2015**

Good morning Chairman Sullivan and Senator Murkowski. My name is Brian Litmans and I am a Senior Staff Attorney with Trustees for Alaska, a non-profit environmental law firm providing legal counsel to protect and sustain Alaska's natural environment. Thank you for inviting me today to testify on the Joint-Proposed Rule by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers defining "waters of the United States." This rule provides clarity and certainty on the scope of the Clean Water Act in light of two U.S. Supreme Court decisions: *Rapanos* and *Solid Waste Agency of Northern Cook County*. Prior to these two decisions, the regulating agencies took a more expansive view of the definition of waters of the United States. This proposed rule narrows that definition and is consistent with the Clean Water Act, as interpreted by the U.S. Supreme Court.

The Clean Water Act, passed in 1972, sets a national goal to restore and maintain the chemical, physical and biological integrity of our Nation's waters.<sup>1</sup> The proposed rule is rooted in sound science. It is supported by an EPA report that reviewed more than 1,200 peer-reviewed scientific publications. The scientific literature unequivocally demonstrates that protecting upstream waters and wetlands is important to protecting the integrity of downstream waters. The rule implements the intent of the Act to protect our Nation's waters while also complying with the Court's decisions.

In Alaska, the vital role of wetlands cannot be understated. Alaska's wetlands are sociologically, ecologically and economically important to Alaska. They provide fundamental habitat for fish and wildlife. More than 70,000 swans, 1 million geese, 12 million ducks and 100 million shorebirds depend on Alaskan wetlands for foraging and nesting.<sup>2</sup> They serve as

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<sup>1</sup> 33 U.S.C. § 1251(a).

<sup>2</sup> National Water Summary on Wetland Resources, Alaska Wetland Resources, U.S.G.S. Water-Supply Paper 2425, 1996. Available at <https://www.fws.gov/wetlands/Data/StateWaterChapters/Alaska.pdf>; *see also* Status of Alaska Wetlands, U.S. Fish and Wildlife

important foraging habitat for mammals like moose, caribou, musk ox, beaver, muskrat, mink and land otter.<sup>3</sup> Tidal wetlands serve as rookeries and resting areas for marine mammals including seals, sea lions, and walrus.<sup>4</sup> And wetlands play a key role in supporting productive salmon fisheries.<sup>5</sup>

Alaska's wetlands sustain some of the world's richest commercial, sport and subsistence fisheries.<sup>6</sup> Almost 90 percent of wild salmon caught in the United States are caught in Alaskan waters.<sup>7</sup> The sockeye salmon fishery is the second largest – and most valuable – wild salmon fishery in North America, with 75 percent of the global catch originating in Alaskan waters.<sup>8</sup> Wetlands provide food, cover, and spawning habitat for Alaskan salmon and serve as passage ways from rearing and breeding grounds to the ocean.<sup>9</sup> Providing such essential habitat for such a large number of fish and wildlife, wetlands are paramount to the culture and economy of Alaska native and rural communities.<sup>10</sup> Without wetlands, that way of life would disappear.

Wetlands also provide important hydrologic and water-quality functions. They regulate flow, control erosion, transform and retain nutrients for the aquatic ecosystem, minimize flood impacts, and remove contaminants. Wetlands play a unique and important role in northern Alaska, where they reduce erosion by preventing the warming and thawing of permafrost.

This proposed rule is born of the unusual circumstance where the controlling Supreme Court decision had no majority opinion. In *Rapanos*, the justices issued five separate opinions. Chief Justice Roberts commented that “[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’ limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis.”<sup>11</sup>

Not surprisingly, applying the fractured *Rapanos* decision on a case-by-case basis has proven difficult at best. The Sixth Circuit commented that “[p]arsing any one of *Rapanos*'s lengthy and technical statutory exegeses is taxing, but the real difficulty comes in determining which—if any—of the three main opinions lower courts should look to for guidance.”<sup>12</sup> The Third Circuit explained that “the *Rapanos* opinions seem to present an analytical problem: the three opinions articulate three different views as to how courts should determine whether wetlands are subject to the CWA, and no opinion was joined by a majority of the Justices. So

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Service, Alaska Region, 1994, at 107. Available at <https://www.fws.gov/wetlands/Documents/Status-of-Alaska-Wetlands.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Roberts, J., concurring).

<sup>12</sup> *United States v. Cundiff*, 555 F.3d 200, 207 (6th Cir. 2009).

which test should apply?”<sup>13</sup> Perhaps the Sixth Circuit said it best: “In its short life, *Rapanos* has indeed satisfied any ‘bafflement’ requirement.”<sup>14</sup>

When there is no majority opinion from the Supreme Court, the lower courts must parse through the variety of Supreme Court opinions to determine the governing rule of law. This difficult task leads to inconsistent results and confusion as to the state of the law. At this point in time, the majority of Circuits have followed Justice Kennedy’s “significant nexus” test – *the same test the EPA and the Corps seek to implement through this rule.*

While the agencies’ guidance offered some clarity amidst the splintered *Rapanos* decision and its aftermath, there was still a cloud of uncertainty because agency guidance is not binding. Regulated entities, state and local agencies, environmental NGOs, and many others have clamored for rulemaking to address this problem.

As Senator Inhofe, Chairman of the Senate Environment and Public Works Committee, remarked back in 2011, as the then-Ranking Member of this subcommittee, “it is critical that the Agencies take the proper steps to ensure that the regulations provide an appropriate and clear definition of ‘waters of the United States’ consistent with the Clean Water Act and the Supreme Court decisions.”<sup>15</sup>

Similar sentiments were expressed in 2008 by the Alaska Miners Association, noting that the “AMA cannot overstate the importance of implementing a clearly defined, objective, and defensible wetlands determination process to forestall future lawsuits which are costly to the Federal Government as well as the mining industry . . . . We encourage [EPA and the Army Corps of Engineers] to begin the rulemaking process immediately.”<sup>16</sup>

To ensure consistency and certainty, EPA and the Corps have proposed that the test found in the current post-*Rapanos* agency guidance become binding regulation. EPA and the Corps have taken the requisite step to address the Chairman’s and the Alaska Miners Association’s request by clearly defining “waters of the United States” consistent with the Clean Water Act and the *Rapanos* decision. And, in turn, they have provided the certainty to the regulated entities that they themselves assert is critical to both the U.S. and Alaskan economy.

While critics may seek to erode the intent and purposes of the Clean Water Act, this rule will provide the regulatory certainty and a less onerous and timely review of permit applications — the precise elements sought by industry and regulated entities. This rule will benefit the private sector by increasing efficiency. The rule clarifies what waters are within the regulatory authority of the EPA and the Army Corps of Engineers and what the test is to determine whether waters are jurisdictional.

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<sup>13</sup> *United States v. Donovan*, 661 F.3d 174, 180 (3d Cir. 2011).

<sup>14</sup> *Cundiff*, 555 F.3d at 208.

<sup>15</sup> Persons and Organizations Requesting Clarification of “Waters of the United States” By Rulemaking. Available at [http://www2.epa.gov/sites/production/files/2014-03/documents/wus\\_request\\_rulemaking.pdf](http://www2.epa.gov/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf).

<sup>16</sup> *Id.*

It is time to establish regulations that will eliminate uncertainty. A cloud has hung over the regulating agencies, the applicants, and those like Trustees for Alaska seeking to ensure the purposes and intent of the Clean Water Act are complied with. This rule removes that cloud. The rule clarified the process to determine which streams and wetlands are protected under the Act. The rule does not expand the Act's protection to any new type of waters that have not been considered a jurisdictional water of the United States to this date.

Clean water and a healthy environment are essential to all of us. Whether it is clean water for drinking or a clean river to swim in, clean water for salmon, clean water for us today or for future generations, or clean water for those who maintain a subsistence way-of-life, the Clean Water Act set out a goal we can all agree on. This rule supports that goal. Thank you.