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Testimony on Proposed Waters of the U.S. rulemaking

before the

U.S. Senate Committee on Environment and Public Works
Subcommittee on Fisheries, Water and Wildlife

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Good morning. My name is Michelle Hale, and I am the Director of the Division of Water in the Alaska Department of Environmental Conservation. Larry Hartig, Commissioner of DEC, was unable to attend today and has asked me to attend in his place.

The State of Alaska has submitted comments to the U.S. EPA and the U.S. Army Corps of Engineers. I have submitted a copy of these comments for the record.

The State of Alaska believes that the Waters of the U.S. rule will lead to a significantly larger number of waters and wetlands that are “jurisdictional” and that will require permits for development, further driving up already high costs of permitting and compensatory mitigation. These high costs are borne by all permittees, from large-scale developers to individual homeowners. The costs that will be borne as a result of this rule will affect the state, individuals, industry, municipalities, and the economy of the State of Alaska.

The Army Corps of Engineers’ own permit data demonstrates that a standard individual permit for placement of fill in waters or wetlands takes almost 6 months to issue. For larger projects, this time can be much longer, years. Thus, the high costs of permits also includes delay costs as project proponents miss entire building season.

Alaska is unique

Alaska has more coastline than the lower 48 states combined. Alaska has more than three million lakes, and more 15,000 water bodies known to support anadromous fish. Estimates for wetlands in Alaska range from 130 to 170 million acres of wetlands. This is more than are found in all other states combined. Alaska’s wetlands comprise more than a third of the surface area of the state. Just about everything we do here touches wetlands.

Alaska has more at stake relative to this rulemaking than any other state. Yet, the published Waters of the U.S. rule was based upon a draft Connectivity Study that made scarce reference to Alaska. It included no reference to permafrost or tundra. While the final report did contain some reference to Alaska, astonishingly, the maps of the U.S. included in the report eliminated both Alaska and Hawaii.

The rulemaking process is flawed

EPA and the Corps have failed to adequately consult with the States in the development of the rulemaking, and the rulemaking process itself is flawed. The proposed rule was published before the Connectivity Study – the one that made scarce reference to Alaska – was even peer-reviewed or finalized.

The national Office of Management and Budget itself observes that “when an information product is a critical component of rule-making, it is important to obtain peer review *before* the agency announces its regulatory options so that any technical corrections can be made before the agency becomes invested in a specific approach or the positions of interest groups have hardened.”

Alaska has commented at every opportunity on the connectivity study and the draft rulemaking, seeking recognition of the truly unique conditions and regional differences within Alaska, yet our voices seem to have fallen on deaf ears. Not only does the rulemaking not account for Alaska’s uniqueness, it does not account for regional differences at all.

The rulemaking does not provide clarity

The intent of this rulemaking was to provide clarity in the wake of court rulings. But because the rulemaking appears to ignore Alaska’s unique conditions, it is hard to see how it provides more clarity than the existing situation, which is not good. Rather, the rule could lead to even more confusion, with the potential for litigation even higher. Just this potential for error or litigation leads project proponents to pursue 404 permits they legally don’t need.

It might be EPA’s intent to finalize the WOTUS rule and then attempt to implement it in ways that match each State’s circumstances, but this would be unacceptable. Alaska wouldn’t know how the rule would apply in our state until after it had been adopted, after EPA issued Alaska-specific guidance. In order for Alaska’s views to be considered, the guidance itself would have to go through a public rule-making process, and that process would have to be far more inclusive than the WOTUS rule-making process has been. The track record is not very good here.

EPA and the Corps have repeatedly held that the proposed rule provides clarity and does not expand the scope of WOTUS. The State of Alaska disagrees strongly on both counts.

The rulemaking unnecessarily expands EPA’s and the Corps’ regulatory reach

Alaska has long protected its water resources under state statutory and regulatory authority. There is simply no need to expand the Army Corps of Engineers’ and EPA’s regulatory reach by increasing the numbers of waters they regulate.