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November 14, 2014

Via Email, eRulemaking Portal & Certified Mail

Water Docket
U.S. Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
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Attn: Docket ID No. **EPA-HQ-OW-2011-0880**

The Citizens' Advisory Commission on Federal Areas has reviewed the Proposed Definition of "Waters of the United States" Under the Clean Water Act.[1] The Commission offers the following comments for consideration by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (ACOE) as the agencies primarily responsible for the development and potential implementation of this proposed rule.

The Commission appreciates the concerns which prompted the attempt at a refined definition of "waters of the United States" (WOTUS) under the Clean Water Act (CWA)[2] and commends the agencies for utilizing the rulemaking process as opposed to issuing internal guidance or similar. Nevertheless, the Commission would like to request the agencies withdraw the proposed rule and work together with stakeholders, including the states, to develop a legal and sensible strategy to streamline defensible jurisdictional determinations and address any perceived confusion with the current system. As is, the proposed rule mischaracterizes the state of the law and unwarrantedly interferes with state authorities and private property rights.

The Commission was created in 1981 by the Alaska Legislature following the enactment of the Alaska National Interest Lands Conservation Act (ANILCA)[3], which set aside over one hundred million acres of conservation system units in Alaska. These designations profoundly changed the way the federal government managed its lands. Guarantees were provided to respectfully integrate this newly established land management mosaic, including promises related to access, consultation and a reliable degree of autonomy and certainty for Alaskans. With ANILCA, Congress struck a balance between national conservation interests and the economic and social needs of Alaska and its citizens. This balance is a critically important one and, while unrelated to ANILCA and not unique to Alaska, the proposed rule runs contrary to its spirit.

[1] 79 FED. REG. 22,188 (Apr. 21, 2014).
[2] P.L. 92-500, 86 Stat. 898 (Oct. 18, 1972).
[3] P.L. 96-487, 94 Stat. 2371 (Dec. 2, 1980).

Interesting parallels can be drawn between ANILCA designations and jurisdiction under the CWA. Both fundamentally altered an existing relationship and suite of potential interactions between Alaskans and the federal government. But whereas ANILCA and its implementing regulations offered a balance and proscribed limitations on federal authorities, respecting Alaska's disproportionate contribution to national conservation interests, the proposed rule disregards instances where the CWA would similarly require regional distinctions and restraint.

Despite the agencies' and the preamble's protestations, the proposed rule would inarguably increase the acreage and linear measure of waterbodies subject to federal permitting authority under the CWA. A determination there will be no or negligible increases in jurisdiction is naïve, unimaginative and misleading. Under the proposed rule, the possibility of Alaska being designated as one large, interconnected watershed is not farfetched. The fact that the proposed rule overlooks the complexity of exclusively Alaskan features, such as permafrost and muskeg, underscores the validity of this as a concern.[4]

While some clarification may be needed for efficient implementation, the CWA seems very clear on one point: the people who care and know the most about the water should be in charge of its care. Those people are the ones who drink it, swim in it and fish in it. Those are the people with rights, duties and obligations to manage and protect their lands and waters. And yet those are the people most disenfranchised, most burdened and most at risk from the proposed rule's "clarification," which dismissively quashes any recognizable homage to the CWA's reverence for the merits, common sense and practicality of local knowledge and control.

Alaskans have considerable experience with federal laws, regulations and policies governing essential aspects of their lives, from traditional practices to the ways they feed and warm their families to the mere exercise of established property rights. One of the main purposes of the Commission is to identify and minimize negative impacts to Alaska and its citizens from federal actions and to assist Alaskans with negotiating these complex federal management rules. It is with this duty in mind the Commission submits its comments for consideration.

THE PROPOSED RULE'S EXPANSIVE INTERPRETATION OF JURISDICTIONAL AREAS DOES NOT COMPORT WITH STATUTORY OR CONSTITUTIONAL LAW

A defensible interpretation of a statute cannot accompany effective nullification of its words and provisions; however, this is the result of the proposed definition. For example, the rule grants no deference to Congress' inclusion of the word "navigable" in §404. Jurisdictional waters extend as far away from navigable waters as the potential for hydrologic connectivity. Not only is navigability a "central requirement" in the CWA,[5] it provides a bright line toggle for federal jurisdiction over areas lacking a connection to interstate commerce in the traditional sense.

Other provisions of the CWA also lose significance in the proposed rule. For example, there is scope for assumption of significant responsibilities by state agencies in the primacy provisions of §404. Were the proposed rule to be adopted and implemented, it is unclear whether primacy would have any practical application potential, as the waters available for assumption could

[4] Comments from the Alaska Department of Environmental Conservation expand on these and other points and are wholly incorporated here by reference.

[5] Rapanos v. United States, 126 S. Ct. 2208, 2247 (2006) (Kennedy, J., concurring).

readily shrink to a level inconsistent with, for instance, the expense, logistics and administrative burden that would necessarily attend a state permitting program. This consequence of the proposed rule is not lost on Alaska and its state regulatory agencies, who have been actively cooperating with the agencies to evaluate assumption of §404 permitting.

The CWA very attentively contemplates an oversight role for the federal government. This responsibility, for example, spares states from a race to the bottom and attendant river fires. This role does not, however, deem the EPA and ACOE the sole sufficient protectors and stewards of clean water. In fact, the CWA explicitly includes congressional intent to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and to] plan the development and use . . . of land and water resources[.]"[6] The CWA also "expressly provide[s]" for all instances where federal authority could "be construed as impairing or in any manner affecting" state authority.[7] Yet, the agencies have not cited any express provision that supports the majority of jurisdictional assumptions in the proposed rule.

While using the best available science is a thoroughly responsible means of delineating waters subject to permitting, scientific findings must be made in the context of potential jurisdiction under the law. The permitting scenario under the proposed rule, as informed by a science-based understanding of watersheds, makes every conceivable nexus a significant one. This approach goes well beyond the extent of not only the CWA, but also the federal government's authority to regulate waters under Article I, Section 8 of the United States Constitution.

THE PROPOSED RULE'S RELIANCE ON AND INTERPRETATION OF THE "SIGNIFICANT NEXUS TEST" DOES NOT COMPORT WITH LEGAL PRECEDENT

The proposed rule relies on Justice Kennedy's "significant nexus" test as the prevailing legal consensus on jurisdiction under CWA §404. However, there is no consensus on whether Justice Kennedy's concurrence in Rapanos v. United States, where his test is outlined,[8] represents a working rule. When a plurality opinion issues, the holding is generally confined to whatever position is taken by the majority of justices "on the narrowest grounds."[9] However, as Chief Justice Roberts implies in his concurrence,[10] application of the narrowest grounds doctrine is challenging with the breakdown of opinions issued in Rapanos. For instance, where federal jurisdiction is found using the Rapanos plurality's test, all nine justices could agree. Conversely, where the significant nexus test determines an area is nonjurisdictional, it is possible only one justice would agree,[11] since the dissent argued in favor of whichever test *sustained* jurisdiction.[12]

In any event, a comprehensive application of Rapanos has to be about more than polling justices, or endowing a single justice's opinion with the full force of law. While markedly split on a jurisdictional test, the justices appears to agree on some key points:

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[6] 33 U.S.C. §1251(b).
[7] 33 U.S.C. §1370.
[8] 126 S. Ct. at 2241.
[9] Marks v. United States, 430 U.S. 188, 193 (1977).
[10] Rapanos, 126 S. Ct. at 2236 (Roberts, C.J., concurring).
[11] *C.f.* 79 FED. REG. at 22,192 (arguing the four dissenting justices would affirm blanket application of the significant nexus test).
[12] Rapanos, 126 S. Ct. at 2265 and n.14 (Stevens, J., dissenting). *See also* United States v. Gerke Excavating, Inc., 464 F.3d 723, 724-25 (2006) (per curiam) (describing instances where the plurality's test, but not the significant nexus test, would be satisfied).

- **The qualifier "navigable" matters**, even though the CWA gives the federal government jurisdiction over waters that are not navigable in the traditional sense but which have a connection to waters which are.
- The CWA grants jurisdiction over wetlands which are **immediately adjacent** to traditional navigable waters with **no discernable boundary** between them.
- The current standard for tributaries (having an ordinary high water mark and leading to traditional navigable waters or other tributaries) **does not automatically grant jurisdiction** over the wetlands adjacent to them.
- **Hydrological connection is not dispositive**; quantity and regularity of flow matter.
- CWA jurisdiction exists even for water bodies that experience a dry season, **unless the wet season is speculative**.
- **Limitations on the extent of jurisdiction are necessary** to avoid serious constitutional and/or federalism difficulties.

These consensus points provide significantly more defensible guideposts than indiscriminate adoption of Justice Kennedy's Rapanos concurrence. More than that, however, the proposed rule's interpretation of its significant nexus test is inconsistent with the precedent it purports to clarify in its refined definition of WOTUS, including Rapanos but, in particular, the prior decisions in United States v. Riverside Bayview Homes, Inc.,[13] and Solid Waste Agency of Northern Cook County v. Army Corps of Engineers[14] (SWANCC) which established the test. These Court's holdings in those cases were not overruled in Rapanos, and the proposed rule's interpretation of the significant nexus test must be just as (or even more) consistent with them.

As the Rapanos plurality notes, the idea of a "significant nexus" from Riverside Bayview was based on the circumstances of that case; more specifically, a wetland immediately adjacent to a navigable waterway, with no way to discern where the water in the wetland ends and the water in the navigable waterway begins, can be considered jurisdictional. The Court's significant nexus in Riverside Bayview was the wetland's *obvious* (not remotely hydrological) connection to the navigable-in-fact waters immediately adjacent to it.[15] The Court's significant nexus in SWANCC was also informed by an *obvious* adjacency to open water.[16] Justice Kennedy dismisses a "surface" connection as a baseline requirement, but he does not preclude its singular relevance in those cases. He simply adopts a more expansive (but still limited) "significant" connection with navigable waters.

THE PROPOSED RULE'S ESTABLISHMENT OF JURISDICTION-BY-RULE TO MINIMIZE CASE-BY-CASE DETERMINATIONS IS UNSUPPORTED AND UNSUSTAINABLE

The proposed rule, particularly the concept of jurisdiction-by-rule (*per se* jurisdiction), goes well beyond the significant nexus test described in Rapanos and established in prior case law. Justice Kennedy tied his significant nexus test in Rapanos to both SWANCC and Riverside Bayview,[17] noting its flexibility to find jurisdiction beyond permanent waters with a surface connection to covered waters. This flexibility could account for specific instances where jurisdiction over a particular water body could be consistent with the intent of the CWA – specific instances he wanted the ACOE to be free to identify, as needed. Though it is never explicitly limited as such,

[13] 474 U.S. 121 (1985).
[14] 531 U.S. 159 (2001).
[15] *See* 474 U.S. at 134.
[16] *See* 531 U.S. at 168.
[17] *Id.* at 2240-41.

the only possible approach consistent with Justice Kennedy's guidance would heavily favor, if not exclusively provide for, case-by-case determinations.

Only two observations by Justice Kennedy could arguably support a *per se* jurisdiction concept:

- "When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction."[18]
- "[A]n intermittent flow can constitute a stream . . . while it is flowing. [citations omitted] It follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams."[19]

The first example merely restates the holding in Riverside Bayview and adjacency findings would thus be limited to the circumstances presented in that case (immediately adjacent with no discernable boundary). The agencies cannot simply define "adjacent" to include things outside the scope of the CWA in order to use this statement as justification for *per se* jurisdiction. The second example restates an assumption in Riverside Bayview that Congress intended to include some non-navigable waters. In Justice Kennedy's view, the ACOE could find intermittent streams jurisdictional under this assumption; since they would be streams when flowing, it could be problematic to treat them differently dependent on the presence or absence of water. And though he did not provide an explicit flow rate or temporal threshold for such a finding, the lack of such a threshold would be inconsistent with the law and his concurrence as a whole.[20]

Every other example Justice Kennedy provides of waters potentially covered by the CWA is qualified in some way to note *possibility*, not wholesale inevitability, and most contemplate some attached process of discerning whether a specific water body is jurisdictional. For example:

- "Though the plurality seems to presume that such irregular flows are too insignificant to be of concern in a statute focused on 'waters,' that **may not always** be true."
- "The question is what circumstances permit a bog, swamp, or other nonnavigable wetland to constitute a 'navigable water' under the Act—as §1344(g)(1), if nothing else, indicates is **sometimes possible**."
- "As Riverside Bayview recognizes, the Corps' adjacency standard is reasonable in **some** of its applications."
- "It seems plausible that new or loose fill . . . could travel downstream through waterways adjacent to a wetland; at the least this is a factual **possibility** that the Corps' experts can better **assess** than can the plurality."
- "**In many cases**, moreover, filling in wetlands separated from another water by a berm can mean that flood water, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways."
- "[The existing standard for tributaries] **may well** provide a reasonable measure of whether **specific** minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act."
- "Where an adequate nexus is established **for a particular wetland**, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands **in the region**."

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[18] *Id.* at 2249.
[19] *Id.* at 2243.
[20] The proposed rule's esoteric reliance on a bed, bank and Ordinary High Water Mark fails to create a meaningful distinction.

- "Yet **in most cases** regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty."
- "The possibility of legitimate Commerce Clause and federalism concerns **in some circumstances** does not require the adoption of an interpretation that departs in all cases from the Act's text and structure."
- "[M]ere adjacency to a tributary of this sort is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow towards it. **A more specific inquiry**, based on the significant nexus standard, is therefore necessary."

[citations omitted; emphasis added] The *per se* jurisdiction concept takes generic categories of water bodies where the text or intent of the CWA *may* support coverage and, instead, *automatically* grants coverage in *all* instances. Justice Kennedy's generic language, broad assumptions and apparent contemplation of further inquiry by the agencies demonstrably belies a blanket approach. Moreover, the approach dramatically shortchanges the diversity of wetlands and waters that exist nationwide, is a massive expansion of the existing regulations (regardless of the preamble's statement to the contrary) and undercuts any notions of federalism enshrined in the original legislation and subsequent case law. This is not a legal, or even palatable, exchange for the proposed rule's claim of added clarity and convenience, two things which can just as easily be provided by saying every pathway for and molecule of H_20 in the United States is under federal jurisdiction.

In establishing his significant nexus test, Justice Kennedy bolstered any expansion on precedent with support, either explicit or implicit, from the CWA and congressional intent. He also demonstrated a concern for "unreasonable applications of the statute" in requiring the ACOE to "establish a significant nexus on a case-by-case basis" unless "more specific regulations" were developed.[21] The proposed rule does not include the specificity Justice Kennedy was after – in fact, it still contains "the potential overbreadth"[22] which concerned Justice Kennedy enough to require case-by-case determinations for adjacent wetlands.

Lastly, it bears mentioning that the Rapanos Court was only considering the definition of WOTUS found in the current regulations. The discussion is thereby limited to the terms outlined there – e.g., captioning undefined terms like "tributaries" and "adjacent wetlands." Nothing in the opinion, or other precedent, supports or lends credibility to the proposed rule's new and expanded definitions of "tributaries" and "adjacent wetlands." These new definitions appear to capitalize on the Court's limited discussion of these terms to see where expansion is possible consistent with those discussions, while ignoring the context under which they were developed.

THE PROPOSED RULE'S INTERPRETATION OF THE AGENCIES' RESPECTIVE ROLES AND AUTHORITIES DOES NOT COMPORT WITH GOOD PUBLIC POLICY

Major due process concerns arise when private property owners and sovereign states need to ask the federal government if permission is needed, regardless of whether it actually is needed, just to safely avoid significant fines and penalties without efficient or cost-effective recourse. This request can include significant expenses, including contractors, fees, studies and surveys. The

[21] *Id.* at 2249.
[22] *Id.*

proposed rule creates a scenario where private property owners must obsequiously approach the federal government, engage in a lengthy and uncertain process, shell out potentially huge sums of money, where one of the possible results of the process is that the federal government had no authority to impose these requirements. At worst, this is tantamount to an unconstitutional extraction; at best, it is bad public policy.

Asserting the need for a better way to engage with federal agency authorities under the CWA should not be taken as a failure to appreciate or care about the national interest in clean water. This is about how much states, businesses and citizens would have to pay and endure to acquire and confirm rights they already possess. This burden includes not only money but also lost opportunity for everything from conservation projects to responsible business creation and expansion to critical infrastructure development and maintenance. Regardless of the proposed rule's insistence on clarity, if adopted, every project related to lands or waters in the U.S. will become hostage to a jurisdictional question.

The cost of disproving the presumed connection would fall to the applicant. Instead of case-by-case determinations establishing jurisdictional areas, which would be consistent with prevailing case law, determinations establishing non-jurisdiction will likely be the ones made case-by-case. As it stands, many project proponents in Alaska have limited construction seasons due to climate and logistics. In order to proceed with a project, many have simply conceded jurisdiction to avoid the delays and expense associated with wetlands studies and other requirements for a jurisdictional determination. Instead, applicants pay for compensatory mitigation at the outset.

The proposed rule will force more §404 applicants to pursue this option. Yet, the proposed rule fails to acknowledge or explain how indeterminate expansion of jurisdictional waters and wetlands under the proposed rule will correspondingly result in increased mitigation fees, thus undermining this readily understood cost-benefit analysis and offering no sustainable alternative.

THE AGENCIES SHOULD WITHDRAW THE PROPOSED RULE

The most defensible resolution of any perceived confusion in CWA implementation would likely be either legislative or judicial clarification. The balancing of resource protection and other interests (e.g., power generation, farming, industry, mining, infrastructure) is a truly legislative function, and it is the "province and duty of the judicial department to say what the law is."[23]

Considering the number of failed attempts at a legislative solution, and the growing split in the lower courts applying Rapanos, the Commission appreciates that the agencies have attempted to provide guidance to adjudicators and the regulated public while the issue percolates in the other branches. However, the proposed rule fails to comport with the CWA and the U.S. Constitution, inaccurately represents and applies legal precedent, overlooks the rights, duties and obligations of the states, businesses and the public, and skipped over critical technical and procedural steps. The proposed rule is not a simple fix away from these shortcomings; as such, the rulemaking should be withdrawn and given a fresh start with meaningful stakeholder engagement.

Thank you for this opportunity to comment.

[23] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

Yours faithfully,

Sara Taylor
Executive Director

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