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February 7, 2022

The Honorable Radhika Fox
Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington DC 20460

The Honorable Michael L. Connor
Assistant Secretary of the Army, Civil Works
Department of the Army
108 Army Pentagon
Washington DC 20310-0104

Submitted electronically: Docket EPA-HQ-OW-2021-0602

Re: Proposed Revised Definition of "Waters of the United States: Step One Rulemaking

Dear Ms. Fox and Mr. Connor:

The Alaska Miners Association (AMA) writes to submit comments on the Environmental Protection Agency (EPA) and Army Corps of Engineers' (Corps) proposed rule revising the definition of "waters of the United States" (WOTUS) under the Clean Water Act (CWA). 86 Fed. Reg. 69372 (Dec. 7, 2021).

AMA is a professional membership trade organization established in 1939 to represent the mining industry in Alaska. We are composed of more than 1,400 members that come from eight statewide branches: Anchorage, Denali, Fairbanks, Haines, Juneau, Kenai, Ketchikan/Prince of Wales, and Nome. Our members include individual prospectors, geologists, engineers, suction dredge miners, small family mines, junior mining companies, and major mining companies, Alaska Native Corporations, and the contracting sector that supports Alaska's mining industry.

The definition of WOTUS applies to all programs authorized under the CWA, and changes will affect all stages of all mining operations and projects nationwide. To that end, we endorse the comments of the National Mining Association and the American Exploration & Mining Association. These two organizations provided extensive technical comments on the proposed definition changes on behalf of our nationwide industry. Our comments enclosed detail the Alaska mining-specific concerns and issues:

WOTUS definition and process for application in the State of Alaska

The proposed changes to the definition of WOTUS will, without doubt, have the most significant impact to the State of Alaska and the regulated community working in the state. The EPA and Corps must evaluate the impacts from the proposed changes differently for Alaska, and not apply a broad nationwide rule to a state with such a unique water landscape. As we stated in our pre-proposal comments, the definition of "waters of the United States" is especially important to Alaskans due to the structure of the 2015 definition, subsequent jurisdiction, and its applicability to Alaska. 175 million acres of land in Alaska are classified wetlands: this constitutes 43% of the land base. Alaska's coastline and tidally influenced waters exceed that of the rest of the nation combined. In addition, Alaska is the only state with permafrost. Therefore, any

rule addressing wetland and coastal environments will very likely have a greater effect on Alaska than anywhere else in the Nation, particularly when they are as ill-conceived as the 2015 rule was.

The uniqueness of Alaska's wetlands, with less than 1% impacted and with little opportunities for flexible compensatory mitigation, was recognized in the 1994 Alaska Wetlands Initiative. The collaborated effort by EPA, Corps, U.S. Fish and Wildlife Service, and National Marine Fisheries Service convened a panel of stakeholders and solicited public input in the State of Alaska to identify and address concerns with the implementation of the Clean Water Act Section 404 program in Alaska. The Initiative should be evaluated and its provisions adopted. See the Initiative here:

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiH4Ibl7e71AhV6l0QIHcfMBLAQFnoECAUQAQ&url=https%3A%2F%2Fdec.alaska.gov%2Fmedia%2F13267%2F1994-wetlands-initiative.pdf&usg=AOvVaw338Ib80khy53wA59gxcJ3H>

When the agencies identified a stakeholder engagement process in late 2021, they identified only five geographic regions to solicit feedback from. While perhaps some of the other regions have appropriate groupings of states, the West region certainly did not. The climates, ecosystems, and water features of Idaho, California, Montana, Washington, Nevada, Oregon, Wyoming, Hawaii, and Alaska are drastically different from each other, Alaska most of all. AMA's comments to the agencies' proposal for Regional Roundtables detailed a request for an Alaska-specific session to create a proposal that works for our State. It is our hope that the agencies intend to honor this request, and convene all users of EPA and Corps programs, as well as the State of Alaska Departments of Environmental Conservation, Natural Resources, and Fish and Game in a series of sessions to shape an Alaska specific policy.

Three WOTUS changes in 10 years

For the third time in 10 years, the agencies are proposing changes the definition of WOTUS. This places another major regulatory change atop the years of uncertainty endured by the regulated community on this issue. We have attached the following comments submitted on behalf of AMA during this time:

1. November 14, 2014 Comments on Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22188 (April 21, 2014) (Docket ID No. EPA-HQ-OW-2011-0880)
2. April 15, 2019 Comments on 'Revised Definition of Waters of the United States' (Docket ID No. EPA-HQ-OW-2018-0149)
3. September 3, 2021 Pre-proposal recommendations on "Definition of Waters of the US" (Docket ID No. EPA-HQ-OW-2021-0328)

The issues outlined in these three submitted comments are no less true today than the dates they were submitted, and highlight the fact that EPA and the Corps must engage in a deliberate, thoughtful process to ensure a durable and functional rule is created and maintained through multiple years and federal Administrations.

Agencies must await *Sackett vs. EPA* decision

A valuable first step to doing so would be to pause this process and await the outcome of the *Sackett vs. EPA* case that is currently before the United States Supreme Court. The agencies must defer to the Court's decision on whether a proper test has been set to determine whether wetlands are a WOTUS under CWA. Confusion over the "significant nexus" test has for years led to delays, litigation, and uncertainty, and



clarity from the Supreme Court is critical. It is senseless for the agencies to proceed with rulemaking while this decision is being deliberated.

Thank you for your consideration of our comments, and please do not hesitate to contact me with questions.

A handwritten signature in blue ink, appearing to read "DSK", is positioned above the typed name.

Deantha Skibinski
Executive Director