ALASKA MINERS ASSOCIATION

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April 23, 2025

Stacey Jensen, U.S. Environmental Protection Agency
Milton Boyd, Department of the Army
Care of: EPA Docket Center, Water Docket
Mail Code 28221T
1200 Pennsylvania Ave, NW
Washington, DC 20460
Submitted via regulations.gov

Re: WOTUS Notice: The Final Response to SCOTUS; establishment of a public docket and request for recommendations, EPA-HQ-OW-2025-0093

Dear Ms. Jensen and Mr. Boyd:

The Alaska Miners Association (AMA) appreciates the opportunity to provide comments to the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) on the establishment of a Public Docket and request for recommendations on defining "Waters of the United States" (WOTUS) consistent with the United States Supreme Court's interpretation under the Clean Water Act.

AMA is a professional membership trade organization established in 1939 to represent the mining industry in Alaska. AMA's more than 1,400 members come from eight statewide branches: Anchorage, Denali, Fairbanks, Haines, Juneau, Kenai, Ketchikan/Prince of Wales, and Nome. Alaska's miners are individual prospectors, geologists, engineers, suction dredge miners, small family mines, junior mining companies, 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 have provided extensive technical comments on the proposed definition changes on behalf of our nationwide industry. Our comments enclosed will detail the Alaska mining-specific concerns and issues.

Alaska's lands are unique and have special characteristics unlike the rest of the U.S.

Policy regarding a definition of WOTUS will, without doubt, have the most significant impact to the State of Alaska and the regulated community working in the state. As we have stated multiple times in comment periods pursuant to WOTUS policy proposals, the definition of "waters of the United States" is especially important to Alaskans. 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 waters, wetlands, and coastal environments will very likely have a greater effect on Alaska than anywhere else in the Nation.

AMA suggests that EPA and Corps adopt a regional implementation approach for the *Sackett* standard that accounts for the unique Arctic hydrology of Alaska. Alaska's waters frequently lack the "continuous surface connection" required for adjacency for purposes of federal CWA jurisdiction, and such an approach would avoid unreasonable jurisdictional presumptions. It should be grounded in a common understanding that agencies shall refrain from applying any presumption that wetlands are jurisdictional "adjacent wetlands," absent a site-specific showing of an actual continuous surface connection to a traditional navigable water at typical conditions. If there is any doubt, the burden should be on the agencies to demonstrate a continuous surface connection in fact, not on local communities nor project proponents to prove a negative. This conforms with *Sackett* and will prevent the kind of over-inclusive assertions of jurisdiction that the Supreme Court sought to curtail.

We also encourage the agencies to defer to state and local water resource regulators for management of these isolated features. The State of Alaska, through its Department of Environmental Conservation and other bodies, is well-equipped to oversee the protection and reasonable use of Alaska's wetlands. In the wake of *Sackett*, Alaska officials have already begun evaluating which waters remain subject to CWA Section 404 and which will be managed under state law. We maintain that local and state regulators, being intimately familiar with the unique environment and realities of Alaska, are best positioned to craft permitting solutions that protect the environment without stifling community development. To that end, we encourage the EPA to consider federal funding for implementation of primacy programs for States with primacy authorization. Such state-specific flexibility is needed now more than ever to help achieve the goals of President Trump's Unleashing Executive Orders specific to Alaska, as well as Orders on energy and mineral dominance.

We therefore ask that any future rulemaking explicitly recognize Alaska's permafrost wetlands and tundra waterbodies as a special case, and exclude them from WOTUS coverage unless they plainly meet *Sackett*'s two-part jurisdictional test. This should be achieved by regulatory text, and not merely guidance, noting that in permafrost regions, wetlands are generally non-jurisdictional unless they directly abut a continuously flowing or standing jurisdictional water. Waters upstream of a discrete object must be considered non-jurisdictional. Such clarity would greatly assist Alaskans in planning projects and investments with confidence about whether federal permits are needed. It would also be faithful to the Supreme Court's directive that the CWA not be read to impinge on traditional state authority over land and water use beyond what the statute clearly covers.

With the passage of the Alaska Native Claims Settlement Act in 1971, Congress gave specific direction that we must treat Alaska's indigenous people and their lands differently, and that right must be considered when developing policy in land and water issues such as WOTUS. To that end, we would like to refer the EPA to two letters the state of Alaska wrote to ensure predictability and compliance on the permitting front here and here.

Finally, Alaska needs to be given special consideration by the agencies in light of the 1994 Alaska Wetlands Initiative. The (MOA) signed by the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) in February 1990 clarifying the "no net loss of wetlands" was not realistic or

practicable in Alaska. Since over 43% of the surface area of the state is designated as wetlands, there is little justification for implementing a mitigation program designed for the Lower-48 states in Alaska. EPA and USACE assembled a panel of stakeholders in 1994 and solicited public input in Alaska to determine how the Clean Water Act Section 404 was to be implemented in Alaska. As a result of the outreach efforts, EPA, USACE, U.S. Fish and Wildlife Service and National Marine Fisheries Service issued the attached Alaska Wetland Initiative. The Initiative was a commitment by the Federal agencies to "work more effectively with all stakeholders and the public to improve the Section 404 regulatory program in (a) manner that makes this program more fair, flexible, and effective."

Alaska is a special case in which local flexibility is needed because there are limited opportunities to create or restore wetlands because of the extent of wetlands in Alaska and other environmental conditions. Corps regulations must provide flexibility and discretion to district engineers to determine Alaska compensatory mitigation and other requirements for USACE permits.

Comments in response to the request for recommendations on defining WOTUS consistent with the United States Supreme Court's interpretation under the Clean Water Act

AMA strongly supports the agencies' reconsideration of WOTUS at this time, and appreciates the agencies' announcement that they are committed to learning from past regulatory approaches. AMA has commented on WOTUS policy proposals several times in the past decade, and we will reiterate those comments here.

Alaska's miners have seen decades of uncertainty with the jurisdictional scope of WOTUS, and were gratified to see the May 2023 decision in which the U.S. Supreme Court issued a clear majority opinion in *Sackett v. EPA,* concluding that "the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'

The agencies have asked for feedback on *the scope of "relatively permanent" waters and to what features this phrase applies. Sackett* stated that "the CWA's use of 'waters' encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" Although the current definition of WOTUS includes the phrase "relatively permanent, standing or continuously flowing bodies of water" from the *Sackett* and *Rapanos* plurality opinions, there is lack of clarity on how the term should be interpreted, and, the preamble of the 2023 WOTUS rule interprets the phrase in too broad a manner that is inconsistent with *Sackett* and *Rapanos*.

AMA offers the following recommendations:

Relatively permanent should include perennial streams and should not include intermittent or ephemeral streams, as they only contain water in direct response to precipitation or storm events, and therefore should be excluded from jurisdiction. The Court referred to the *Rapanos* plurality opinion to define relatively permanent waters as "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as

'streams, oceans, rivers, and lakes, and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.'

We urge the agencies to consider providing clear standards in the regulatory text for determining how much flow constitutes relatively permanent. To the extent that the Agencies include reference to a "typical year" in the definition of "relatively permanent," the definition of "typical year" should be based upon readily available data and should require collection of only limited site-specific data or information to ensure clarity and avoid subjective determinations. Any water feature that is dry (i.e. has no measurable surface flow) for a period of 30 days or more at any point during a typical year is intermittent. Such stream channel or water feature should not be considered "relatively permanent," should not be included in "waters," and should not be identified as WOTUS.

The scope of "continuous surface connection" should be refined to explicitly require a "continuous surface *water* connection." The Court was clear in its *Rapanos* plurality opinion and *Sackett* that to be considered jurisdictional, a water feature must be a relatively permanent body of water connected to a traditional interstate navigable water and have "a continuous surface connection to that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." For clarity and to avoid delays and subjective determinations, that assessment—whether a wetland is so connected to a traditional interstate navigable that it is difficult to distinguish the two—should be based upon visual inspection—at the water surface—and be readily ascertainable. EPA and USACE staff must confirm that a wetland or water directly abuts (touches) and has surface water connection to jurisdictional waters. The water or wetland in question must be indistinguishable from jurisdictional water to be considered under WOTUS.

Additional Recommendations

AMA urges the agencies to explore reforms to the Compensatory Mitigation structure. As we have previously stated in our comments, compensatory mitigation is a critical issue to Alaska's projects and developers who utilize compensatory mitigation as both purchasers of mitigation credits and providers of mitigation credits in the form of mitigation banks. While many industries utilize compensatory mitigation, the mining industry's compensatory mitigation challenges are unique due to the nature and locations of our impacts and the many inflexibilities of the 2008 Rule. Again, we ask that you refer to the 1994 Alaska Wetlands Initiative to understand Alaska's unique situation of not having enhancement projects that can meet nationwide Compensatory Mitigation requirements. Alaska needs flexibility in this area. Agencies must revisit and adhere to the 2018 Memorandum of Agreement (MOA) specific to Alaska signed by EPA and the Corps to provide updated flexibility. This rule allows for "Out of Kind" compensatory mitigation, or offsite mitigation. Unfortunately, it appears that the Corps has never adopted the Rule or has not created the necessary flexibility or desire to implement the approach.

Additionally, and related, there appears to be a disconnect between the Alaska Corps staff and Headquarters in DC. The local/regional Corps staff understand the opportunity and appear to want to consider "Out of Kind" compensatory mitigation. However, there appears to be reluctance out of DC to utilize it, and this needs to change. Alaska's mining industry would welcome the right opportunity for out-of-kind mitigation where communities, especially rural and indigenous communities, would benefit from improvement projects, such as a village sewage treatment facility, installation of safe drinking water facilities, repairing a landfill, etc. Alaska's villages and communities have substantial needs, and denial of out of kind mitigation proposals to meet those needs is outrageous. Regulations should be

developed to allow for mitigation that would also have a net improvement on the environment versus just locking up more of Alaska's lands through the In-Lieu Fee Mitigation approach that is primarily utilized today is a win-win-win opportunity.

Thank you for the opportunity to submit these comments.

Sincerely,

Deantha Skibinski
Executive Director