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Governor Mike Dunleavy
STATE OF ALASKA

February 7, 2022

Mr. Damaris Christensen
Oceans, Wetlands and Communities Division
Office of Water (4504–T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Ms. Stacey Jensen
Office of the Assistant Secretary of the Army
for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310

Re: State of Alaska's Comments in Response to the Revised Definition of "Waters of the United States" under the Clean Water Act ("Proposed Rule"); Docket # EPA-HQ-OW-2021-0602

Dear Mr. Christensen and Ms. Jensen,

Thank you for the opportunity to comment on the proposed definition of "Waters of the United States" ("WOTUS"), which establishes the scope of federal jurisdiction under the Clean Water Act ("CWA"). Because of its unique characteristics, Alaska stands to be disproportionately affected by the Proposed Rule, and particularly, by the vast expansion of federal jurisdiction it will inflict on states. As the Supreme Court has noted, expanded CWA jurisdiction has high costs and lengthy delays resulting from the federal government's heavy hand with Army Corps permitting. "The average applicant for an individual permit spends 788 days and $271,596 in completing the process not counting costs of mitigation. Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits. These costs cannot be avoided because the Clean Water Act imposes criminal liability as well as steep civil fines on a broad range of ordinary industrial and commercial activities."[1]

Alaska's climate and geography are incredibly hydrologically diverse. We have areas receiving less than five inches of annual precipitation, areas experiencing over 150 inches of annual precipitation, areas that are semi or permanently frozen, and areas somewhere in between. By any metric, Alaska has significantly more water than all other states: Alaska has roughly 900,000 miles of navigable rivers and streams; 22,000 square miles of lakes; nearly 27,000 miles of coastline; and more wetlands than every other state *combined.*[2] A large percentage of Alaska's lands are potential wetlands, 43 percent, compared to other states, which average less than five percent.[3] Alaska needs regulations

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[1] *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality op.) (citing Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Natural Resources J. 59, 74–76, 81 (2002)).

[2] Alaska has 63% of the Nation's total wetlands. Hall, Jonathan V, W.F. Frayer and Bill O. Wilen, *Status of Alaska Wetlands*, 1994, available at https://www.fws.gov/wetlands/documents/status-of-alaska-wetlands.pdf. Every other state clocks in well below the numbers listed above. *See* U.S. Geological Survey, *Land Area and Water Area of Each State*, accessible at https://www.usgs.gov/special-topics/water-science-school/science/how-wet-your-state-water-area-each-state (numbers based on U.S. Census Bureau, *Geography: State Area Measurements* (2010)); *see also* Bureau of Land Mgmt., *National Hydrography Dataset Information* (2014) (lake count).

[3] Hall, Jonathan V, W.F. Frayer and Bill O. Wilen, *Status of Alaska Wetlands*, 1994, at 3, available at https://www.fws.gov/wetlands/documents/status-of-alaska-wetlands.pdf.

tailored to the diversity and abundance of its waters, not a one-size-fits-all rule imposing excessive federal requirements.

Alaska cannot stand behind the Proposed Rule. First, the Proposed Rule would expand WOTUS to cover more ground than under any previous administration. Legally stretching the definition to such broad proportions also highlights the failure of Congress to adequately define WOTUS in statute. An argument could be made that the lack of an adequate statutory definition causes WOTUS to be unconstitutionally vague. As one justice has noted, "[t]he Clean Water Act is unique in both being quite vague in its reach, arguably unconstitutionally vague, and certainly harsh in the civil and criminal sanctions it puts into practice."[4] Such an expansion is legally unjustifiable and precludes any possibility of a partnership between states and the federal government.

Second, the science underpinning the Proposed Rule is insufficient to support its application to several Alaska-specific categories of waters. Third, the Proposed Rule impedes Alaska in carrying out its constitutionally imposed responsibility to manage its own natural resources[5] and impinges on Alaska's right to manage its own wetlands in contravention of § 6(m) of the Alaska Statehood Act, which recognizes Alaska's title to submerged navigable lands within its boundaries and further grants by incorporation "the right and power to manage, administer, lease, develop, and use said lands and natural resources all in accordance with applicable [s]tate law."[6] Fourth, the Proposed Rule flouts § 101(b) of the Clean Water Act, which "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of [s]tates" to manage and protect water resources.[7]

Accordingly, Alaska requests four exclusions from the WOTUS definition: (1) Alaska permafrost wetlands, (2) Alaska forested wetlands, (3) Alaska wetland mosaics, and (4) Alaska waters and lands falling under the "other waters" category. These exclusions are carefully tailored to mirror the data gaps in the science underpinning the Proposed Rule.

Rather than continuing to utterly ignore Alaska and neglect its interests (or worse, treat Alaska as subservient), the agencies must work with, and respect, Alaska. This will involve relinquishing power that was never the agencies' to begin with. This will involve accepting that states will make decisions with which the agencies may disagree. Most fundamentally, this will involve recognizing the states as co-equal sovereigns.

Rest assured my Administration will stand up for the rights of Alaska and of Alaskan property owners. This cover letter and its attachment should be considered part of our official comments for the record.

Sincerely,

Mike Dunleavy
Governor

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[4] Oral Argument Transcript, Justice Kennedy p.18, *Hawkes v. United States*, 136 U.S. 1807 (2016).
[5] *See* Alaska Constitution, Article VIII: Natural Resources.
[6] Alaska Statehood Act § 6(m); Submerged Lands Act of 1953, 43 U.S.C. § 1311(a).
[7] Clean Water Act § 102(b).

Enclosure: Alaska Department of Environmental Conservation Comments to Proposed Rule

cc: The Honorable Lisa Murkowski, United States Senate
The Honorable Dan Sullivan, United States Senate
The Honorable Don Young, Unites States House of Representatives
The Honorable Jason W. Brune, Commissioner, Department of Environmental Conservation
The Honorable Doug Vincent-Lang, Commissioner, Department of Fish and Game
The Honorable Corri A. Feige, Commissioner, Department of Natural Resources
The Honorable Ryan Anderson, Commissioner, Department of Transportation and Public Facilities
The Honorable Treg R. Taylor, Attorney General, Department of Law
Ms. Tami Fordham, Director, Environmental Protection Agency, Anchorage Operations Office
Ms. Michelle Pirzadeh, Acting Regional Administrator, Environmental Protection Agency Region 10

State of Alaska Comments
To the Proposed Rule redefining WOTUS

February 9, 2022

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Introduction

Thank you for the opportunity to comment on the proposed definition of "Waters of the United States" ("WOTUS"), which establishes the scope of federal jurisdiction under the Clean Water Act ("CWA"). Due to its unique characteristics, Alaska stands to be disproportionately affected by the new WOTUS definition proposed by EPA and the Department of the Army (the "agencies"), and particularly, by its thinly veiled expansion of federal jurisdiction.[1]

Alaska's climate and geography are incredibly hydrologically diverse. We have areas receiving less than 5 inches of annual precipitation, areas experiencing over 150 inches of annual precipitation, areas that are semi or permanently frozen, and areas somewhere in between. By any metric, Alaska has significantly more water than all other states: Alaska has roughly 900,000 miles of navigable rivers and streams; 22,000 square miles of lakes; nearly 27,000 miles of coastline; and more wetlands than every other state *combined*.[2] A large percentage of Alaska's lands are potentially wetlands—43%—as compared to other states, which average less than 5%.[3] Alaska needs regulations tailored to the diversity and abundance of its waters, not a one-size-fits-all rule imposing excessive federal requirements.

Alaska has reviewed the Proposed Rule and cannot stand behind several of the Rule's provisions. Most fundamentally, they expand federal WOTUS jurisdiction over more Alaska lands and waters than ever before. This expansion, which takes a sledgehammer to principles of cooperative federalism, is all the more alarming for its masked nature.

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[1] As several Supreme Court justices have alluded to, a WOTUS definition expanding regulatory authority under the CWA will heavily impact the State of Alaska. *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality op.) (recognizing that the "federal regulation of land use . . . under the Clean Water Act" has undergone an "immense expansion" as illustrated by its coverage extending over "half of Alaska").

[2] Alaska has 63% of the Nation's total wetlands. Hall, Jonathan V, W.F. Frayer and Bill O. Wilen, *Status of Alaska Wetlands*, 1994, available at https://www.fws.gov/wetlands/documents/status-of-alaska-wetlands.pdf. Every other state clocks in well below the numbers listed above. *See* U.S. Geological Survey, *Land Area and Water Area of Each State*, accessible at https://www.usgs.gov/special-topics/water-science-school/science/how-wet-your-state-water-area-each-state (numbers based on U.S. Census Bureau, *Geography: State Area Measurements* (2010)); *see also* Bureau of Land Mgmt., *National Hydrography Dataset Information* (2014) (lake count).

[3] Hall, Jonathan V, W.F. Frayer and Bill O. Wilen, *Status of Alaska Wetlands*, 1994, at 3, available at https://www.fws.gov/wetlands/documents/status-of-alaska-wetlands.pdf.

Tracking the gaps in the scientific data underpinning the Proposed Rule's application to Alaska, Alaska requests four exclusions: (1) Alaska permafrost wetlands; (2) Alaska forested wetlands; (3) Alaska's wetland mosaics; and (4) Alaska waters and lands falling under the "other waters" category. Each exclusion is carefully crafted to mirror these data gaps. Due to the lack of sufficient scientific support, these exclusions are necessary.

Rather than continuing to utterly ignore Alaska and neglect its interests (or worse, treat Alaska as subservient) the agencies must work with Alaska. This will involve, among other things, relinquishing power that was never the agencies' in the first place.[4] Only then can we, together, protect our Nation's waters under a scheme of cooperative federalism.

1. *Alaska objects to the Proposed Rule's extension of WOTUS to cover more land and water than under any definition before.*

The agencies claim the Proposed Rule is a "return [of] the definition of 'waters of the United States' to its longstanding and familiar definition reflected in the 1986 regulations[,]" amended only for consistency with intervening Supreme Court decisions.[5] This "return," the agencies allege, will "quickly" and "durably" protect national waters by "provid[ing] a known and familiar framework for co-regulators and stakeholders" that will be easy to implement.[6]

To this end, the Proposed Rule begins with the 1986 definitions and adds two standards from U.S. Supreme Court caselaw: the "relatively permanent standard," which comes from Justice Scalia's plurality opinion in *Rapanos v. United States*, and the "significant nexus standard," which comes from Justice Kennedy's concurring opinion in the same case.[7] The Proposed Rule also changes the 1986 definition of the phrase "other waters" to cover waters meeting either the relatively permanent or significant nexus standards, replacing the older definition of waters whose use "could affect interstate or foreign commerce."[8]

As explained below, the Proposed Rule stretches federal WOTUS power to cover more ground than that under any previous administration. First, the decision to adopt the 1986 regulations and both *Rapanos* standards ensures greater WOTUS coverage than either the 1986 regulations alone or the Kennedy test alone. Second, the agencies mis-recite both *Rapanos* standards: the "relatively permanent" standard is articulated differently in different sections of the Rule packet, creating a muddled picture of its applicability; and the "significant nexus" standard misdefines "significant" while quietly altering a key word. Third, the agencies change the 1986 definition of "other waters"

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[4] The agencies' decision to stretch the WOTUS definition to such broad proportions highlights Congress' failure to adequately define WOTUS in statute. An argument could be made that the lack of an adequate statutory definition causes WOTUS to be unconstitutionally vague. *See* Oral Argument Transcript, Justice Kennedy p.18, *Hawkes v. United States*, 136 U.S. 1807 (2016) ("The Clean Water Act is unique in both being quite vague in its reach, arguably unconstitutionally vague, and certainly harsh in the civil and criminal sanctions it puts into practice.").

[5] 86 FR 69406; "1986 regulations" as used in the Proposed Rule is synonymous with "pre-2015 regulations." 86 FR 69373.

[6] 86 FR 69375, 69385.

[7] 547 U.S. 715 (2006); 86 FR 69379–69380 (explaining that these two standards were "established in *Rapanos*").

[8] 86 FR 69418.

to create an entirely new, and unconstitutionally broad, catch-all provision. These distortions and engorgements create more WOTUS coverage than ever before.

Alaska cannot endorse such a decimation of states' rights. This expansion violates Alaska's rights to manage our own wetlands under § 6(m) of the Alaska Statehood Act, which vests title of submerged navigable lands to states and further grants by incorporation "the right and power to manage, administer, lease, develop, and use said lands and natural resources all in accordance with applicable [s]tate law."[9] This expansion impedes Alaska's ability to carry out its constitutional responsibility to carefully manage its own natural resources.[10] And this expansion defies § 101(b) of the Clean Water Act, which "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of [s]tates" in carrying out the Act.[11]

a. The agencies' decision to return to the expansive 1986 WOTUS regulatory definition and adopt both Rapanos *tests is a decision to expand federal power.*

A return to the 1986 regulations is a return to a time of heightened[12] federal WOTUS jurisdiction, when the agencies created regulations like the "Migratory Bird Rule," which extended jurisdiction to any intrastate waters "[w]hich are or would be used as habitat" by migratory birds.[13] Under the 1986 regulations, WOTUS included "traditional navigable waters, interstate waters, and territorial seas; impoundments of jurisdictional waters; intrastate waters and wetlands, the 'use, degradation, or destruction of which could affect interstate or foreign commerce;' tributaries of jurisdictional waters; and wetlands adjacent to jurisdictional waters that are not themselves jurisdictional."[14] An "[o]ther waters" provision added "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce."[15]

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[9] Alaska Statehood Act § 6(m); Submerged Lands Act of 1953, codified at 43 U.S.C. §§ 1301–1356b. The relevant provision provides in full:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof[.]

43 U.S.C. § 1311(a).

[10] Alaska Constitution, Article VIII Natural Resources.

[11] 33 U.S.C. § 1251(b).

[12] *Rapanos*, 547 U.S. at 722 (plurality op.).

[13] 51 Fed.Reg. 41217. The Migratory Bird Rule was later invalidated—in 2001. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANNC*").

[14] *United States v. Mashni*, -- F. Supp.3d --, 2021 WL 2719247, at *3 (D.S.C. July 1, 2021) (quoting 33 C.F.R. § 328.3(a)(1)–(7) (1986)); Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg 41,206 (Nov. 13, 1986). EPA promulgated identical regulations two years later. *See* Clean Water Act Section 404 Program Definitions and Permit Exemptions – Section 404 State Program Regulations, 53 Fed. Reg. 20,764 (June 6, 1988).

[15] 33 C.F.R. § 328.3(a) (1986); 40 C.F.R. § 230.3(s)(3) (1988).

Two United States Supreme Court cases subsequently limited this power. In *SWANCC v. U.S. Army Corps of Engineers*, the Supreme Court invalidated the Migratory Bird Rule, holding that "nonnavigable, isolated, intrastate waters" cannot be WOTUS.[16] In *Rapanos v. United States*, the Scalia plurality opinion and Kennedy concurrence endeavored to further limit this power.[17] While Justices Scalia and Kennedy differed in their tests—Scalia created a "relatively permanent" standard while Kennedy created a "significant nexus" standard—five justices agreed that the Corps' interpretation of its own power, in that case, was untenable.[18]

> *b. The agencies depart from this history by employing the Rapanos tests in a way that expands, not limits, their power. The agencies achieve this by adopting both Rapanos tests and by wielding them as independent sources of jurisdiction. This decision, combined with the agencies' decision to recodify the expansive 1986 rules, sets the stage for an unprecedented expansion of federal WOTUS power. If the 1986 rules extended the WOTUS definition "to the outer limits of Congress' commerce power[,]"[19] this new definition blasts right through them.[20]The reach of the "relatively permanent" standard is unclear.*

The Proposed Rule offers conflicting statements as to how the relatively permanent standard will apply. On the one hand, the preamble states that this standard will simply create "a subset of waters that will virtually always have the requisite nexus" under the significant nexus standard.[21] This view finds some degree of support in one of the definitions articulated in the Proposed Rule, which is that

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[16] *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (*SWANCC*).
[17] *Rapanos*, 547 U.S. at 734 (plurality op.) (stating that plurality opinion's "interpretation of the phrase "the waters of the United States" "confirms th[e] limitation of its scope"); *id.* at 767 (Kennedy, J., concurring) ("Absent a significant nexus, jurisdiction under the Act is lacking.").
[18] *Rapanos*, 547 U.S. at 739 (plurality op.) (concluding that "[t]he Corps' expansive interpretation of 'the waters of the United States' is thus not 'based on a permissible construction of the statute'"); *id.* at 786 (Kennedy, J., concurring) (concluding that the Corps' conclusion that "mere adjacency to a tributary" suffices to establish WOTUS "is insufficient" and elaborating that "a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow toward it. A more specific inquiry, based on the significant nexus standard, is therefore necessary."). *Rapanos* considered whether four Michigan wetlands, each located near ditches or man-made drains that eventually emptied into traditional navigable waters, constituted WOTUS. *Id.* at 729 (plurality op.). The factual record was insufficiently developed for the justices to apply their tests to these facts, so the Court remanded. *Id.*
[19] *Rapanos*, 547 U.S. at 724 (plurality op.). Implicitly acknowledging this, the agencies state that they "are proposing to replace the Commerce Clause-based standard" with this new rule. 86 FR at 69419.
[20] For over 100 years, Congress' invocation of its Commerce Clause power to protect the country's waterways used navigability as the touchstone for the exercise of this power. *See* Rivers and Harbors Act of 1899, § 13, 33 U.S.C. § 407 (prohibiting the unpermitted discharge of "refuse matter" "into any navigable water of the United States" or any tributary thereof). In the Clean Water Act, Congress similarly couched its delegation of jurisdiction to the Agencies in terms of "navigable waters." 33 U.S.C. § 1362(7) (defining "navigable waters" to mean "the waters of the United States, including the territorial seas"). While the Commerce Clause power has since been more expansively defined, the Proposed Rule violates both the traditional and modern scope of this power. *See Lopez v. United States*, 514 U.S. 549, 559 (1995) (holding that Commerce Clause power extends only over regulated activity that "substantially affects interstate commerce").
[21] 86 FR 69395.

> [u]nder the relatively permanent standard, relatively permanent tributaries and adjacent wetlands that have a continuous surface connection to such tributaries are jurisdictional[.][22]

On the other hand, the agencies elsewhere state that they "are not reaching any conclusions, categorical or otherwise, about which tributaries, adjacent wetlands (other than those adjacent to traditional navigable waters, interstate waters, or the territorial seas) or 'other waters' meet either the relatively permanent or the significant nexus standard."[23] And in the Executive Summary of the Proposed Rule, a very different definition is articulated:

> The "relatively permanent standard" means waters that are relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such waters.[24]

This definition, which was the one articulated at the WOTUS Roundtable Discussion,[25] would appear to create two categories: (1) waters that are themselves relatively permanent; and (2) waters that have a surface connection to group (1). Group (1) waters seem to contain *no* requirement of connection to a foundational water[26]—in other words, "nonnavigable, isolated, intrastate waters" would seem to qualify. Such a result would, of course, run afoul of *SWANCC*.[27]

When, at the WOTUS Roundtable Discussion, Alaska asked the agencies for clarification on this standard,[28] the agencies did not give a clear answer. Clarity is needed because, in practice, ambiguity in the WOTUS definition has become a tool for expanding federal jurisdiction.[29]

Alaska does not oppose use of the relatively permanent standard, as it is articulated in Scalia's plurality opinion, to determine WOTUS jurisdiction. But it is exceedingly difficult to provide meaningful comment on a standard that has not been clearly articulated.

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[22] 86 FR 69434. "Relatively permanent" is further defined as "waters where the waters typically (e.g., except due to drought) flow year-round or have a continuous flow at least seasonally (e.g., typically three months)." 86 FR 69434 (citing *Rapanos* Guidance at 67).
[23] 86 FR 69390.
[24] 86 FR 69373.
[25] The agencies held a "State and Local Government Roundtable Discussion on the Proposed Revised Definition of 'Waters of the United States'" from 10:00 AM to 1:00 PM EST on January 27, 2022.
[26] The Proposed Rule defines "foundational waters" as "traditional navigable waters, interstate waters, or the territorial seas." 86 FR 69373. These waters are also sometimes called "jurisdictional waters."
[27] 531 U.S. at 171 (holding that "nonnavigable, isolated, intrastate waters" cannot be covered under WOTUS).
[28] We posed the question: "How do the relatively permanent standard and the significant nexus standard interact under the Proposed Rule?"
[29] In the face of uncertainty and the costs associated with delaying a project for a formal jurisdictional determination, many regulated entities rationally select the more project-efficient route of moving forward with the permitting process despite doubtful grounds for federal jurisdiction. Particularly in a region where short construction seasons mean that a small delay can quickly turn into a much longer delay and escalate project costs, the delay involved with conducting necessary field work and debating jurisdiction with federal regulators becomes a major hurdle. Such a delay also conflicts with Congress' directive at 33 U.S.C. § 1251 to implement the CWA in a manner that avoids unnecessary delays. The regulated public should be able to easily discern what rules apply to a given activity so they can avoid preparing and submitting unnecessary permit applications.

c. The significant nexus standard, as articulated by the Proposed Rule, impermissibly expands federal power.

The Proposed Rule's "significant nexus" standard extends jurisdiction over any water having "'more than speculative or insubstantial effects on the chemical, physical, or biological integrity of' a traditional navigable water, interstate water, or the territorial seas."[30] The significant nexus standard applies to "the 'other waters,' tributary, and adjacent wetland categories[.]"[31]

As a preliminary matter, the agencies' articulation of this standard has two glaring problems. First, this definition distorts the test actually articulated by Justice Kennedy. Justice Kennedy used the connector "and" between the terms "physical" and "biological."[32] This is the difference between having to prove the requisite effect on *each* of the three types of integrity, versus having to prove an effect on only one. Swapping "and" with "or" triggers the broader of the two requirements, which, of course, results in an expansion of federal jurisdiction beyond even what Justice Kennedy intended. Alaska cannot support this.

Second, this definition misdefines "significant." As Justice Kennedy only offered a circular definition,[33] the agencies had to craft their own. Regrettably, the agencies' definition of "significant" as "more than speculative or insubstantial" does not fairly reflect the term's plain meaning. Dictionaries define "significant" as: "large enough to be noticed or have an effect,"[34] "very important,"[35] "having great effect or influence,"[36] "[s]ufficiently great or important to be worthy of attention; noteworthy; consequential, influential,"[37] and "noticeable, substantial, considerable, large."[38] The common denominator here is that to be "significant," the thing described must meet or surpass some threshold degree of importance.[39] "More than speculative" or "insubstantial" falls far short of this threshold.[40] Lowering this threshold—as the agencies have done—results, unsurprisingly, in expanded WOTUS jurisdiction. Alaska cannot support this.

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[30] 86 FR 69373, 69430.
[31] 86 FR at 69436.
[32] *Rapanos*, 547 U.S. at 780 (Kennedy, J. concurring) ("[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, **and** biological integrity of other covered waters more readily understood as 'navigable.'" (emphasis added)).
[33] Under Justice Kennedy's concurrence, a water has a "significant nexus" with a jurisdictional water if it "significantly affects" the chemical, physical, "and" biological integrity of that other water. *Id.*
[34] Significant, Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/significant?utm_campaign=sd&utm_medium=serp&utm_source=jsonld.
[35] *Id.*
[36] Significant, Cambridge Dictionary Online, available at https://dictionary.cambridge.org/us/dictionary/english/significant.
[37] Significant, Oxford English Dictionary (2d ed. 1989).
[38] *Id.*
[39] *Accord Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 157 (3d Cir. 2009) ("The word 'significant' is defined as 'important, notable.'" (quoting *Oxford English Dictionary* (2d ed.1989)).
[40] The agencies' choice to define "significant" as "more than insignificant" or "insubstantial" reflects the agencies' erroneous understanding that something that is "not significant" is therefore "insignificant." This is like saying that if water is not hot, it is cold; and concluding that, to be hot, water must simply not be cold. But water that is not "hot" is not necessarily "cold"—"lukewarm" is the left-out category in between. Ignoring that left-out category leads to the

Precisely how this standard would apply to wetlands, which of are particular importance to Alaska, is unclear.[41] The Proposed Rule extends federal jurisdiction over those wetlands that are "adjacent to" certain specified waters.[42] Invoking the 1986 regulations, the Proposed Rule defines "adjacent" as "bordering, contiguous, or neighboring."[43] The Proposed Rule then "add[s] the significant nexus standard to the . . . adjacent wetland categor[y]."[44] Left unspecified is how the definition and the standard interact: Is determining a wetland's coverage now a two-step inquiry (i.e., the wetland must first be deemed "bordering, contiguous, or neighboring," and, second, must have a significant nexus)? Or does the significant nexus standard replace the definition of "adjacent" (i.e., a wetland is "adjacent" if it has a significant nexus)? Or perhaps the standard informs only a portion of the "adjacent" definition (i.e., whether a wetland is "neighboring")?[45] As written, the significant nexus standard risks supplanting entirely the "bordering, contiguous, or neighboring" definition. If that is the intent, it should be clearly stated so it may be fully critiqued.

Alaska opposes the inclusion of this standard. Its infidelity to the Kennedy standard reflects either a lack of integrity or downright carelessness. Its definition of "significant" tips the scales toward the former. Far worse, however, is its vast expansion of the definition of WOTUS and consequent federalism violations. But worst yet? Its applicability to Alaska's wetlands is clear as mud.[46]

d. The "other waters" catch-all is an unjustified expansion of federal power.

The Proposed Rule extends jurisdiction over "the 'other waters' category from the 1986 regulations"—but "with changes informed by relevant Supreme Court precedent."[47] In 1986, the "other waters" category covered non-foundational waters whose "use, degradation, or destruction . . . could affect interstate or foreign commerce."[48] The Proposed Rule "delete[s] all of the provisions referring to "authority over activities that could 'affect interstate commerce'" and "replace[s] them with the relatively permanent and significant nexus standards[.]"[49] In other words, waters whose activities involve no use, degradation, or destruction now qualify as WOTUS if only they are

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incorrect conclusion that "hot" means "not-cold." Similarly, a connection that is not "significant" is not, for that reason, "insignificant"—there is a left-out category separating these terms that is glossed over by the Proposed Rule. The Proposed Rule's definition of "significant" as "not-insignificant" sweeps up that lukewarm category of connections which neither rise to the level of significant nor sink to the level of insignificance. This definition is, accordingly, wrong.

[41] The Proposed Rule codifies an ostensibly more restrictive "relatively permanent" standard, but fails to acknowledge that this standard, in practice, would cover only a subset of waters *also* covered under the "significant nexus" standard.

[42] 86 FR 69422. The specified waters are: (a) "traditional navigable waters, interstate waters, or the territorial sea"; (b) "relatively permanent, standing, or continuously flowing impoundments or tributaries [] that have a continuous surface connection to such waters"; and (3) "impoundments or tributaries that meet the significant nexus standard when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of foundational waters." *Id.*

[43] 86 FR 69449.

[44] 86 FR 69436, 68422.

[45] After all, what need is there to further define "contiguous"?

[46] As explained *supra* n.23, in practice, ambiguity in the WOTUS definition has become a tool for expanding federal jurisdiction.

[47] 86 FR 69418.

[48] 86 FR 69418.

[49] 86 FR 69418.

relatively permanent or have a "more than speculative or insubstantial" nexus with a foundational water.

The agencies explain this change as a shift away from the outer bounds of the commerce clause power, which the agencies acknowledge was "pushe[d]" by the 1986 "other waters" definition.[50] Alaska agrees with the agencies that the 1986 definition was too broad. But Alaska disagrees that the agencies' change *narrows* the 1986 "other waters" category. First, this change extends WOTUS jurisdiction to cover non-foundational waters that need only have more than "speculative" or "insubstantial" effects on the chemical, physical, "or" biological integrity of foundational waters. As explained above, this is an exceedingly broad standard. Second, this change applies *irrespective* of whether these waters are being used.[51] The latter is the consequence of the agencies' deletion. The agencies' myopic focus on the addition of the *Rapanos* standards obscures this important deletion.

As if to emphasize this provision's catch-all nature, the agencies state that "other waters" can include "wetlands that are located too far from other jurisdictional waters to be considered 'adjacent.'"[52] In other words: wetlands covered by the Proposed Rule are not, in fact, limited to "adjacent," i.e., "bordering, contiguous, or neighboring" wetlands, but include *any* wetland that has a "significant nexus" to a jurisdictional water. The agencies may as well have deleted the definition of "adjacent" and been done with it. This catch-all is an underhanded way of achieving the same result.

To a state like Alaska, which has great quantities of unused waters—that are also not being degraded or destroyed, because our state laws protect against that[53]—this change works to greatly expand WOTUS coverage. Following this change, non-foundational waters are covered if they merely have the requisite (low) connection, regardless of whether they are being used.[54] This will cover vastly more waters in Alaska than were the 1986 "other waters" category to remain unaltered. Perhaps the agencies simply did not have Alaska in mind when making this change. Or perhaps the agencies are intentionally flouting principles of federalism. Whatever the intent, the effect is to impinge on states' rights and to force Alaska and Alaskan property owners to bear the high costs of compliance.[55]

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[50] 86 FR 69420.
[51] 86 FR 69430.
[52] 86 FR 69393.
[53] Alaska has previously provided a sample summary of state laws and programs that protect water resources. *See* State of Alaska Recommendations on a Refined Definition of WOTUS (Sept. 3, 2021) at 3 (citing (1) State of Alaska Comments on Proposed Revision of Federal Regulations Defining WOTUS under the CWA (June 19, 2018) *and* (2) State of Alaska Letter re: Step 2 of WOTUS Rule Revision at n.3 (Nov. 28, 2017) and noting errata).
[54] This provision is especially alarming in its total about-face from the NWPR, which contained a catch-all provision stating that if a water does not fall into a jurisdictional category, it does not constitute WOTUS. 85 FR 22317, 22318. In a complete reversal of this provision, the Proposed Rule's catch-all now expressly sweep *up* waters that cannot qualify under a specific listed category.
[55] "The average applicant for an individual permit spends 788 days and $271,596 in completing the process . . . not counting costs of mitigation . . . . Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits . . . . These costs cannot be avoided because the Clean Water Act imposes criminal liability as well as steep civil fines on a broad range of ordinary industrial and commercial activities." *Rapanos*, 547 U.S. at 721 (2006) (plurality op.) (citing Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Natural Resources J. 59, 74–76, 81 (2002)).

The Proposed Rule is demonstrably not a return to the "known and familiar framework" of the 1986 regulatory definition of WOTUS, but an unjustified and costly expansion of it. This expansion is all the more serious for its masked nature.

e. Expanded federal authority will not further the CWA's objectives in Alaska.

A water that is not a WOTUS is not, for that reason, unprotected. It is simply protected by State instead of federal law. Alaska has a comprehensive, robust, and rigorous set of environmental laws that should serve as the model for the Nation.[56] The Alaska Department of Environmental Conservation has the authority to manage all waters—WOTUS and non-WOTUS.[57] Alaska water quality standards apply equally to surface water, wetlands, and groundwater waters—WOTUS and non-WOTUS.[58] The Alaska Department of Fish and Game has permitting authority over activities potentially impacting fishery resources—a unique authority for a state fish and game agency to have. This permitting authority covers all activities that occur in anadromous streams across Alaska and operates to help us ensure that projects potentially affecting these waterbodies are completed in manner that protects our fisheries. Unlike other states, Alaska has a constitutional mandate to manage our natural resources for their sustained yield. It provides that "[f]ish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses."[59] Also unlike other states, Alaska is constitutionally required to carefully balance competing interests in managing its natural resources.[60] Alaska needs the flexibility that the Clean Water Act provides for, in § 101(b), in order to carry out our constitutional mandates.[61]

Alaska is also working bilaterally with Canada to address water quality issues in our transboundary rivers from mining activity in Canada. As a result of our efforts, all our waters originating from Canada meet our rigorous water quality guidelines.

Alaska has previously used its authority to fill voids left by the CWA: Alaska regulations, for example, prohibit municipal solid waste landfills from "caus[ing] or contribut[ing] to the degradation of wetlands" and expressly requires the owner or operator of such a facility to "demonstrate the integrity of the [facility] and its ability to protect ecological resources" by evaluating many factors related to the integrity of wetlands.[62]

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[56] *See supra* n.52.
[57] *See* Alaska Statute ("A.S.") 46.03.020.
[58] 18 AAC 70.
[59] Alaska Constitution, Article VIII, § 4.
[60] Alaska Constitution, Article VIII, § 1.
[61] 33 U.S.C. § 1251(b).
[62] 18 AAC 60.315(3)(A)–(E) (factors that must be addressed include the erosion, stability, and migration potential of the soils and materials used to support the facilities; the volume and chemical nature of the waste managed in the facility; effects on fish, wildlife, and other aquatic resources and their habitat from release of the solid waste; potential effects of catastrophic release of waste to the wetland and resulting environmental impacts; and other factors "necessary to demonstrate that ecological resources in the wetland are sufficiently protected").

Greater State authority would not undermine the CWA's objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters."[63] It would simply allow a different governmental body to further this objective—States.[64] As the CWA states, States share in the responsibility of maintaining the integrity of their own waters.[65] The responsibility is on States to ensure that their own waters are clean, and to ensure they have the proper authority and infrastructure to do this. States lacking this authority should pursue it through their legislatures, not through a federal program that sets the bar for all States, including those, like Alaska, that do not need it. Emasculating all States, in service of a few, is no solution.

But this is precisely what the Proposed Rule does. Citing § 101(b), which "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of [s]tates" to manage and protect water resources,[66] the agencies unabashedly state that they believe the "better reading" of § 101(b) is that it is the states' role to provide "support" for the agencies—as the agencies *themselves* "advance the objective of the Act."[67] This could not be more backward. The federal government should be supporting the *states*—who, after all, are vested with the "primary" responsibility to manage their own water resources—as we manage our *own* waters and land as our Constitution requires us to. The agencies' explicit rewriting of § 101(b)—and the audacity to even *attempt* such a thing—is profoundly disturbing.

Alaska cares deeply about our lands and waters. Our robust and rigorous environmental laws are more than sufficient to ensure their protection. We need the flexibility § 101(b) promises in order to follow our Constitution. Alaska opposes the Proposed Rule's relegation of states to a "support" rule and its failure to create anything resembling a framework of cooperative federalism.

2. The Proposed Rule is scientifically unsupportable as to Alaska.

The agencies were directed by Executive Order to "listen to the science" in crafting this Rule.[68] The agencies claim the Proposed Rule is "supported by the best available science on the functions provided by upstream waters, including wetlands, that are important for the chemical, physical, and biological integrity of foundational waters."[69] The agencies trumpet the "wealth of scientific knowledge" supporting their conclusions and further tout the "scientific literature" that "extensively illustrates the effects [that] tributaries, wetlands adjacent to impoundments and tributaries, and 'other waters' can and do have" on the integrity of foundational waters.[70] This wealth of scientific knowledge and literature is summarized in two key documents supporting the Proposed Rule—the

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[63] 33 U.S.C. § 1251(a).
[64] 33 U.S.C. § 1251(a).
[65] The CWA states that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b).
[66] 33 U.S.C. § 1251(b).
[67] 86 FR 69400 (emphasis added).
[68] 86 FR 69382.
[69] 86 FR 69390.
[70] 86 FR 69390.

2015 Connectivity Report[71] and Sections II and IV of the Technical Support Document.[72] As the agencies explain, a rule so firmly rooted in science ensures that determinations made under that rule are "science-informed."[73] But what if the science informing a rule omits studies pertaining to a state whose concerns are distinct from every other state? It would be difficult to justify—scientifically—imposing the rule on that state.

This is precisely the situation Alaska finds itself in. Neither of the two main technical documents supporting the Proposed Rule meaningfully engage with Alaska's unique geographical and climatic characteristics. In the 2015 Connectivity Report, little of the referenced research was conducted in Alaska.[74] The body of the Report, which spans 226 pages of discussion of scientific studies and literature, mentions "Alaska" or "Alaskan" nine times; "permafrost" three times, and "wetland mosaics" zero times.[75] And at least one of these references supports the *lack* of the possibility of a significant connection.[76] The wetland types on which the 2015 Connectivity Report does focus are not representative of the wetlands found in Alaska.[77] Perhaps most offensively, the maps and illustrations in the Study do not even *depict* Alaska.[78]

The Technical Guidance Document is no more relevant to Alaska. Alaska is rarely mentioned. The mentions Alaska *does* receive include noting Alaska's exclusion from a statistic,[79] or noting that a

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[71] The agencies describe the 2015 Connectivity Report as "[a] comprehensive report prepared by EPA's Office of Research and Development" fully entitled C*onnectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. 86 FR 69390. The Proposed Rule calls this the "Science Report." 86 FR 69390. This Comment calls it the "2015 Connectivity Report."

[72] 86 FR 69382. The Technical Support Document is available at https://www.epa.gov/system/files/documents/2021-12/tsd-proposedrule_508.pdf. It states that "[t]he Preamble, the Science Report, this Technical Support Document, and the rest of the administrative record provide the basis for the definition of "waters of the United States" established in the [P]roposed [R]ule."

[73] 86 FR 69390.

[74] *See* 2015 Connectivity Rpt. at Ch. 7 [References].

[75] *See* 2015 Connectivity Rpt. Forested wetlands are discussed largely in the context of places with distinct climactic conditions, like Florida. *E.g.*, 2015 Connectivity Rpt. at ES-10 (discussing study where "sewage wastewaters were applied to forested wetlands in Florida . . .").

[76] As the 2015 Connectivity Report provides:

> Ford and Bedford (1987) note that in permafrost-dominated areas of Alaska, wetland soils tend to be frozen during snowmelt events, resulting in a significant proportion of these floodwaters running **directly** to streams, thus rendering these wetlands unimportant in streamflow regulation. Likewise, Roulet and Woo (1986) found that wetlands in the Continuous Permafrost Region of Canada **tended to be unimportant** for either long-term water storage or streamflow regulation.

2015 Connectivity Rpt. at 4-24 (emphasis added).

[77] The 2015 Connectivity Report focuses on Riparian/Floodplain Wetlands and Non-Floodplain Wetlands. 2015 Connectivity Rpt. at iii–v.

[78] 2015 Connectivity Rpt. at 2-1 ("characteristics of U.S. streams by watershed"), 2-32 (map of annual runoff), 2-46 ("percent of wetlands lost, 1780s-1980s" and "artificially drained agricultural land, 1985").

[79] Technical Support Doc. at 166 ("[A]pproximately 59% of streams across the United States (excluding Alaska) flow intermittently or ephemerally . . . .").

specific Alaskan wetland was found *not* to be a WOTUS,[80] or stating that Alaska contains too many wetlands to fit on a map.[81]

This is hardly sound science. This is *certainly* not "best available science."[82] The Proposed Rule may be scientifically supportable as to waters in the States that were studied and meaningfully considered in its supporting documents. But a rule based on this science cannot be applied with a straight face to a State whose unique features were hardly *mentioned*, never mind *studied*. To align the Rule with the *science* (as opposed to the *silence*) exclusions must be crafted to mirror the gaps in the underlying science. Only with these exclusions can the Rule fairly be considered scientifically supported.

3. Alaska requests four Alaska-specific exceptions.

Alaska believes the Proposed Rule contains several legal, logical, and scientific flaws, detailed above, and suggests that the agencies fix the legal and logical flaws in the finalized version. At this late stage, however, the scientific flaws can only be fixed with the incorporation of Alaska-specific exclusions, carefully tailored to mirror the gaps in the science underlying the Proposed Rule. Specifically, Alaska requests the exclusion of the following categories of wetlands from WOTUS coverage: (1) Alaska permafrost wetlands; (2) Alaska forested wetlands; and (3) Alaska's wetland mosaics. Alaska further requests (4) that Alaska waters be excluded from the "other waters" category.

This Section assumes that the relatively permanent standard will create only a subset of waters otherwise covered under the significant nexus standard. Accordingly, whether wetlands in Alaska are subject to federal jurisdiction will ultimately be determined by the significant nexus standard. The agencies define "significant nexus" to mean "'more than speculative or insubstantial effects on the chemical, physical, or biological integrity of' a traditional navigable water, interstate water, or the territorial seas.'"[83] The existence of such a connection turns "on the function the evaluated waters perform."[84] Relevant factors include distance, hydrologic metrics, and climatological metrics.[85]

As explained above, neither the 2015 Connectivity Report nor the Technical Support Document even attempt to specify how these factors apply to the wetlands and other waters unique to Alaska.[86] As explained below, several types of Alaska wetlands fall squarely within these data gaps. Accordingly, they must be excluded from the final rule.

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[80] Technical Support Doc. at 223 ("Other wetlands determined not meet the significant nexus standard include an emergent wetland in Alaska surrounded by development that severed any hydrologic connections between the wetland and a nearby wetland complex and lake . . . .").
[81] Technical Support Doc. at 245 ("[A]t Klatt Bog, one of the prominent patterned ground bogs in Anchorage, Alaska, the plant communities (and thus the wetland and nonwetland areas) intersperse more than can be mapped.").
[82] 86 FR 69390.
[83] 86 FR 69430.
[84] 86 FR 69430.
[85] 86 FR 69430.
[86] A good starting point might have been to include Alaska in their maps of the United States.

a. Alaska Permafrost Wetlands

Permafrost is soil that has a temperature continuously below 32 degrees Fahrenheit for two years or more.[87] Permafrost contributes to wetland formation by retarding the downward movement of soil water, and holding water in the surface of the soil, which creates an environment conducive to hydrophytic vegetation. This captured water can take on the properties of a wetland. The impact of this captured water on downstream jurisdictional waters is not fully understood because of the very short growing season characteristic of permafrost wetlands, the fact that hydric soils in these wetlands typically hover around a "biological zero" temperature, and the significant temporal lag in hydrology caused by the freeze-thaw cycle and lack of slope. Due to these climatic and geophysical limitations, any connection to foundational waters is difficult to discern.

An explicit exclusion of permafrost wetlands under the Proposed Rule is needed to reflect the lack of scientific evidence underpinning their inclusion.

b. Alaska Forested Wetlands

Forested wetlands are swampy areas that primarily receive water from precipitation, rather than runoff, streams, or groundwater infiltration.[88] Near-constant precipitation in these wetlands keeps the ground saturated with water. Hydrophytic vegetation and isolated pockets of hydric soils exist on hillsides and other slopes. Because the water in these wetlands comes from precipitation, these wetlands, at least in Alaska, exist independently of any jurisdictional waterways and regularly do not share surficial hydrologic connections to these waters. These wetlands' independent existence indicates that they should be categorically excluded from WOTUS coverage. The 2015 Connectivity Report and Technical Support Document contain insufficient science to suggest otherwise.

c. Alaska's Wetland Mosaics

Wetland mosaics consist of numerous small, discrete wetlands, separated from each other by uplands. Alaska's wetland mosaics can span hundreds of acres. The Proposed Rule would regulate wetland mosaics as a single unit on the basis that the discrete wetlands are "similarly situated."[89] But the lack of Alaska-specific science underlying the Proposed Rule means that the agencies cannot assume with *any* degree of scientific certainty that Alaska's many diverse and discrete wetlands are sufficiently connected to each other to be treated as one unit for jurisdictional determinations. Perhaps, following further study, the science will reveal that arctic wetlands, for example, are

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[87] The term permafrost, a contraction of permanently frozen ground, was proposed in 1943 by Siemon W. Muller of the U.S. Geological Survey ("USGS") to define a thickness of soil or other superficial deposit, or even of bedrock, beneath the surface of the Earth in which a temperature below freezing has existed continuously for 2 or more years. When the average annual air temperature is low enough to maintain a continuous average surface temperature below 0°C, the depth of winter freezing of the ground exceeds the depth of summer thawing, and a layer of frozen ground is developed. *See* Ray, Louis L., USGS, *Permafrost*, accessible at https://pubs.usgs.gov/gip/70039262/report.pdf.

[88] Alaska Dept. of Fish & Game, *Featured Species-Associated Wetland Habitats: Freshwater Grass Wetland, Freshwater Sedge Wetland, Bog, and Salk Marsh *Estuarine)*, accessible at https://www.adfg.alaska.gov/static/species/wildlife_action_plan/appendix5_wetland_habitats.pdf.

[89] 86 FR 69430 ("Waters, including wetlands, would be evaluated either alone, or in combination with other similarly situated waters in the region.").

separated by frozen, virtually impermeable barriers. In such a case, each wetland would be an isolated water, all its own, that cannot be WOTUS under *SWANCC*.[90]

Additionally, this provision almost certainly violates the Commerce Clause. In *United States v. Lopez*,[91] the Supreme Court ruled that upholding a federal ban on firearms near schools would require the Court to "pile inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[92] The Proposed Rule's potential to regulate Alaska's wetland mosaics as a single unit similarly piles "inference upon inference"—by inferring, first, the possibility of a connection among discrete wetlands in Alaska (based on no evidence); and further inferring (again based on no evidence) the possibility of a connection between these units and interstate commerce. This is an exercise of "general [federal] police power" that does not exist.

The Proposed Rule would place the burden of proof on *Alaska* to rebut the presumption that wetlands are *not* covered WOTUS. This is entirely unacceptable, not in the least because that presumption is based on a scientifically unsupported assumption (that wetlands in Alaska are permeable or otherwise connected to each other). The WOTUS definition should not make *any* assumptions unsupported by science, and particularly should not do so when such an assumption would, in practice, work to expand federal jurisdiction over large swaths of Alaska wetlands in clear violation of federalism principles. The Proposed Rule lacks a sufficient scientific basis for regulating wetland mosaics in Alaska as a single unit. The agencies cannot simply assume this problem away. Tracking this gap in the data, the WOTUS definition must categorically exclude Alaska's wetland mosaics.

d. Alaska exclusion from "other waters"

As applied to Alaska, the "other waters" catch-all is a vast expansion of federal power that is entirely unjustified by the Proposed Rule or its supporting documents. As previously explained,[93] the agencies provide no justification for their quiet deletion of the "use, degradation, or destruction" threshold criteria from the 1986 definition of "other waters." This deletion would heavily and disproportionately impact Alaska, which has more unused waters than any other State.

There is no indication that this provision's impact on Alaska was considered in creating this catch-all. And there is insufficient science in the supporting scientific documents (which hardly mention Alaska) to justify this deletion. To reflect this omission, the WOTUS definition must explicitly exclude Alaska from the catch-all's coverage.

e. Historical Alaska-Specific Exceptions

This is not the first time Alaska's unique circumstances have justified Alaska-specific exceptions. As one example, Alaska permafrost wetlands were excluded from the Food Security Act's definition of

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[90] 531 U.S. at 171 (holding that "nonnavigable, isolated, intrastate waters" cannot be covered under WOTUS).
[91] 514 U.S. 549, 566 (1995).
[92] *Id.* at 567.
[93] *Supra* Section (1)(d).

"wetland" by its 1986 amendments.[94] As second example, the Alaska National Interest Lands Conservation Act created "Alaska specific carve-outs to the National Park Service's authority," which had the effect of setting aside extensive land in Alaska for national parks and preserves "on terms different from those governing such areas in the rest of the country."[95] As a third example, the Crude Oil Windfall Profit Tax Act of 1980 contained a tax exemption for crude oil extracted from certain areas of Alaska.[96] In yet another example, an "Alaska graywater" exception was made to the prohibition on state regulation of graywater discharges from seafaring vessels.[97]

Such Alaska-specific exceptions make sense. As the U.S. Supreme Court and Congress recognized in the context of the crude-oil tax exemption, it was "Alaska's 'unique climatic and geographic conditions'" that justified the differential tax treatment.[98] Specifically, the Court noted that "development and production of oil in arctic and subarctic regions is hampered by severe weather conditions, remoteness, sensitive environmental and geological characteristics, and a lack of normal social and industrial infrastructure[.]"[99] These conditions increase the cost of drilling wells in Alaska to "as much as 15 times greater than that of drilling a well elsewhere in the United States."[100]

Here, too, it is Alaska's unique climatic and geographic characteristics that justify excluding certain categories of wetlands from the WOTUS definition.[101] The excluded categories encompass wetlands unique to Alaska whose connection to foundational waters is not established by the Proposed Rule's scientific underpinnings.

f. Conclusion

Application of the WOTUS definition to Alaska's permafrost wetlands, forested wetlands, and wetland mosaics are not supported by the Proposed Rule's scientific underpinnings. Similarly unsupported by science is the Proposed Rule's application of the "other waters" provision to Alaska.

Adopting Alaska-specific exclusions to mirror these data gaps will help refine an otherwise blanket rule that, in its present form, ill-fits and heavily falls on Alaska. These exclusions will also provide clarity, predictability, and a workable path forward toward cooperative federalism.[102]

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[94] 16 U.S.C. § 3801(27) ("For purposes of this Act, and any other Act, this term"—wetland—"shall not include lands in Alaska identified as having high potential for agricultural development which have a predominance of permafrost soils."); PL 99–349, 100 Stat. 710 (1986) (adding this language).
[95] *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019); *see* 94 Stat. 2371, 16 U.S.C. § 3101 *et seq.*
[96] 26 U.S.C. §§ 4986–4998 (since repealed).
[97] 33 U.S.C. § 1322(p)(9)(A)(i) and (v).
[98] *United States v. Ptasynski*, 462 U.S. 74, 78 (1983) (quoting H.R.Conf.Rep. No. 96-817, p. 103 (1980)).
[99] *Id.* (internal quotes removed).
[100] *Id.*
[101] The lack of Alaska-specific exclusions in the CWA makes sense. At the time the CWA's predecessor was enacted—1948—Alaska was not a state. *See EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 203 n.2 (1976). And at the time of the 1972 Amendments creating the CWA, Alaska was still very young, its climate and geography were not well understood, and the need for Alaska-specific exceptions was not apparent.
[102] Additionally, these exclusions avoid the outer limits of federal authority under the Commerce Clause, so would likely survive *Sackett v. EPA* in the event of an outcome unfavorable to the agencies. *See* No. 21-454 (Supreme Court granting

4. The path forward is through cooperative federalism, not compulsive federal regulation.

"The Clean Water Act anticipates a partnership between the States and the Federal Government[.]"[103] The agencies flout the CWA by treating States not as partners, but as subservient implementers.[104] The federal government's role is simply to establish a baseline of protection upon which the States may build.[105] States, and particularly Alaska, do not need the federal government to encroach on state power by expanding its own jurisdiction or establishing more stringent standards than necessary.[106]

Alaska in particular needs to be respected as a partner. Congress and the United States Supreme Court have acknowledged the need for Alaska to be free to use its resources for the economic security and social benefit of its residents.[107] This is in part because as a young state, Alaska is not heavily industrialized: Alaska's waters, wetlands, and vast natural areas remain largely undeveloped compared to those in the lower-48 states. Expansion of even basic transportation and utility networks, and industry development, remain in nascent stages in much of the state. As a result, Alaska's needs are vastly different from those of the lower-48.[108] To address these needs, Alaska must have the flexibility to manage its own water and lands.

The four Alaska-specific exclusions would further federalism principles without decreasing environmental protections. Take the example of permafrost: the federal government is not well-positioned to regulate permafrost wetlands, but Alaska is. Alaska has the authority[109] and legal infrastructure[110] to regulate permafrost wetlands. The responsibility is primarily and traditionally on Alaska to protect its own wetlands.[111] And so is the incentive: Alaska has a strong interest in

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certiorari in *Sackett v. EPA* on the following question: Whether the U.S. Court of Appeals for the 9th Circuit "set forth the proper test for determining whether wetlands are 'waters of the United States'" under the CWA.).

[103] *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

[104] As Justice Scalia noted in the *Rapanos* plurality opinion, this partnership means more than the states' assumption of primacy of federal programs under the oversight of federal agencies. *Rapanos*, 547 U.S. at 737–39 (plurality op.).

[105] "Federalism is rooted in the belief that the issues that are not national in scope of significance are most appropriately addressed by the level of the government closest to the people." Federalism Executive Order 13132 (Aug. 4, 1999).

[106] Under a cooperative federalism approach, the agencies would have to accept that some policy determinations about how to best balance competing interests and resources should be left to the States, even if federal regulators disagree with the outcome.

[107] *See, e.g.*, Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3010 *et seq.*, and *Sturgeon v. Frost*, 139 S. Ct. 1066, 1074 (2019).

[108] Alaska's Constitution, unlike that of other States, requires a careful balancing of interests in the management of natural resources. *See* Alaska Constitution, Article VIII: Natural Resources.

[109] Alaska law confers on the Department of Environmental Conservation the authority to create a wetland permitting program. AS 46.03.020(14).

[110] *See, e.g.*, 18 AAC 60.227–.228 (governing landfills located on permafrost); 18 AAC 72.265 (specifying test hole depth "in areas of known or suspected permafrost" and requiring that test holes be monitored as "necessary to protect public health, public and private water systems, and the environment"); 18 AAC 75.630(a)(2)(B) (classifying public land underlain with permafrost as "[v]ery sensitive terrestrial environment[]" which triggers treatment different than other, less sensitive, types of land).

[111] Alaska's Constitution, unlike other state constitutions, requires Alaska to maintain a careful balance of interests in the management of natural resources. *See* Alaska Constitution, Article VIII Natural Resources. Alaska's water quality regulations are generally identical to, or stricter than, federal regulations. *See* 18 AAC 83.435 ("An A[laska] P[ollutant] D[ischarge] E[limination] S[ystem] permit must include conditions to meet any applicable requirement in addition to or more stringent than promulgated effluent limitations guidelines or standards under 33 U.S.C. 1311, 1314, 1316, 1317, 1328, and 1345 . . . ."); 18 AAC 70.005–.050 (statewide water quality standards).

ensuring that Alaskans, and our environment, remain healthy.[112] Alaska takes this responsibility very seriously. It is time for the agencies to respect that.

Alaska's door remains, as it has been, open. Alaska and the agencies have worked together before, in the *Alaska Wetlands Initiative*,[113] to take an important first step toward partnership. Joining forces once more, Alaska and the agencies could agree to formally ecoregionalize[114] Alaska, and perhaps even create a new Administrative Region for Alaska. The agencies need not usurp Alaska's power to manage its own waters and lands by expanding the definition of WOTUS. Nor does doing so, and applying a one-size-fits-all approach, better protect the waters in Alaska.

Conclusion

The Proposed Rule stretches the definition of WOTUS to exceed that of any administration before it. This expansion precludes any *possibility* of a co-equal partnership between states and the federal government, in clear violation of the federalism principles enshrined in the CWA. In the course of drafting this rule, the agencies appear to have followed their now-longstanding policy of ignoring Alaska entirely: many of the Proposed Rule's provisions do not account for Alaska's specific characteristics and much of the Proposed Rule's supporting science simply omits Alaska and Alaska-related studies. The only solution is to include Alaska-specific exclusions in WOTUS, carefully crafted to mirror the omissions in the underpinning science. These will mark a desperately needed first step toward mending the relationship between Alaska and the federal government, as we work, collectively, to protect our waters.

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[112] *See Williams Alaska Petroleum, Inc. v. State of Alaska,* No. S-17772 (State of Alaska litigating against refinery following drinking water contamination resulting from refinery activities).

[113] The *Alaska Wetlands Initiative* was a part of the Clinton Administration's August 24, 1993 Wetlands Plan, under which the agencies worked with the State of Alaska to identify and address Alaska-specific issues related to the implementation of the CWA's § 404 regulatory program in Alaska. Many solutions arose from this collaboration, including developing a comprehensive mitigation strategy for oil and gas development activities on the North Slope, issuing a written statement recognizing the flexibility to consider circumstances in Alaska in implementing alternative analyses and compensatory mitigation requirements under the § 404 regulatory program, and implementing an abbreviated permit processing procedure for certain waters in Alaskan villages. *See* Environmental Protection Agency, Department of the Army, U.S. Fish and Wildlife Service, National Marine Fisheries Service, *Alaska Wetlands Initiative Summary Report* (May 13, 1994), accessible at https://archive.epa.gov/water/archive/web/pdf/alaska.pdf. Alaska seeks a return to such collaboration.

[114] A good starting place is with the study and accompanying ecoregion map created by Spencer, P. et al, *Home is where the habitat is: an ecosystem foundation for wildlife distribution and behavior*, Arctic Research of the United States (2002), accessible at https://www.nsf.gov/pubs/2003/nsf03021/nsf03021_2.pdf.