ALASKA MINERS ASSOCIATION

121 W. Fireweed Suite 120 | Anchorage, Alaska | 99503 | 907.563.9229 | alaskaminers.org

September 3, 2021

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

Stacey Jensen
Office of the Assistant Secretary of the Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310-0104

Submitted via regulations.gov

Attention: Docket ID No. EPA-HQ-OW-2021-0328

Re: Pre-Proposal Recommendations on the Definition of "Waters of the United States"

Dear Ms. Christensen and Ms. Jensen:

The Alaska Miners Association (AMA) writes to provide pre-proposal comments on the U.S. Environmental Protection Agency's (EPA) and Army Corps of Engineers' (Corps) August 4, 2021 *Federal Register* notice announcing the agencies' plans to reconsider the definition of the term "waters of the United States" (WOTUS) under the Clean Water Act (CWA) 86 Fed. Reg. 41911.

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, major mining companies, Alaska Native Corporations, and the contracting sector that supports Alaska's mining industry.

For the third time in 10 years, the agencies seek to change the definition of WOTUS, placing another major regulatory change atop the years of uncertainty endured by the regulated community. AMA strongly urges the agencies to retain the 2020 Navigable Waters Protection Rule (NWPR) in place not just to preserve certainty and clarity, but to retain the clear framework included in the Rule so that America's mining industry can continue to contribute to today's modern world.

Modern mining is critical to the United States and to Biden Administration goals

The mining industry is vital to our nation and literally is the foundation of President Biden's infrastructure and economic agenda. Our industry produces the energy, metals, and minerals that are essential to America's economic recovery and our modern standard of living. Mined products support the lifestyle of all Americans: a citizen uses an average of 40,000 pounds of newly mined materials every year. This spans from the silver used in medicine, to the gold used in components of vehicles, to the copper in our electronics, and the fertilizer used to grow our food. In addition, America's miners play a critical role in powering our nation, saving nearly $93 billion in electricity costs annually through a

diverse power grid anchored by coal. Minerals are also critical components in renewable energy sources, with nearly five tons of copper needed for a single wind turbine and 10 percent of the global silver demand used in the production of solar panels.

The mining industry also employs hundreds of thousands of Americans nationwide. Mining supports nearly 500,000 direct jobs and over 800,000 indirect jobs. More than $100 billion is generated through mining, and more than $18 billion total federal, state, and local taxes are attributable to mining jobs. In Alaska, nearly 10,000 people work in mining, with an average annual wage of $115,000. These jobs are located over 90 communities, many of which are in rural Alaska with limited other employment opportunity. Alaska mining also contributes millions to local and state governments, Alaska Native Corporations, and small businesses.

As the recent global pandemic has demonstrated, our energy, manufacturing, technology, defense, and medical supply chains are fragile. Our reliance on foreign countries and geopolitical rivals for minerals and other materials we could be sourcing here at home exposes our economy and way of life to unacceptable risks. As we attempt to recover from the economic devastation brought by the pandemic, we must adopt a long-term strategy to ensure we have the minerals needed to maintain and build our society.

The President's Build Back Better plan is dependent on the critical minerals and materials that our members mine. Home construction, power plants, wind farms, roads, bridges, ports, railways, communications grids - America's infrastructure projects begin with mining.

Importance of predictable regulatory process

However, we cannot build back better if our members cannot build at all. The U.S. has one of the longest permitting processes in the world for industrial projects, including mining. Permitting spans approximately seven to 10 years, placing the U.S. at a competitive disadvantage in attracting investment for mineral development. We compete with neighboring jurisdictions like Australia and Canada, which have similar environmental standards and practices as the U.S., where permitting takes between two and three years. These delays do not yield any environmental benefits versus the significant additional costs to project proponents.

Inefficient permitting systems already impact the domestic mining sector's ability to meet demand and can jeopardize the industry's contributions to helping this administration achieve its goal to build resilient supply chains and revitalize American manufacturing and growth.

The ability of the mining industry to contribute to America's demand cannot happen unless there are clear, consistent, and predictable regulations on which to rely, that both protect the environment and allow for development. During this time of economic recovery, it is especially critical that the regulated community has a consistent and practical rule, like the NWPR.

Agencies should retain the NWPR

The agencies have said they do not wish to have a pendulum of Rules between Administrations and wish to have a durable Rule. We believe the NWPR is that rule and should be retained and its implementation continued. It is legally sound, reflects the federal-state balance that Congress struck in the CWA, and finally provides America's industries with some clarity and regulatory certainty.

Prior to the 2015 WOTUS Rule, we submitted substantial comments on major flaws in that proposal. Those included legal issues, as the previous rules ignored Congressional intent AND Supreme Court law and was deemed illegal by numerous courts. The 2015 Rule radically redefined what constitutes a Water of the U.S., under any program regulated by the Clean Water Act. The redefinition broadened the scope of Clean Water Act jurisdiction much further than what had been set in statute by Congress and recognized by the United States Supreme Court. The Clean Water Act was explicitly limited to Waters of the United States as they had been historically designated – and we urged that expanding jurisdiction by regulatory fiat beyond the limits of the Act as determined by the legislative and judicial branches is simply unlawful.

The NWPR, however, established clear provisions that resulted in a lasting rule. Despite the August 30, 2021 ruling in the District of Arizona that vacated and remanded the NWPR, which appears to have been done without adjudicating the merits and with a questionable scope, the NWPR's legal durability over the last year has allowed our members to plan their operations and permitting processes with increased confidence and certainty. The Rule is grounded in and consistent with statute and Supreme Court precedent that determines the scope of federal jurisdiction. Specifically, in the CWA Congress struck a careful federal-state balance on how to manage the nation's waters, operating beneath a directive to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." While Congress envisioned that the federal government would play an important role in working toward that objective, it also explicitly recognized the traditional role of states in managing their own land and water resources. Congress never intended for all water in the country to be subject to federal regulation as WOTUS. Instead, Congress recognized that some waters were to be federally regulated and the remaining water features would be addressed through other federal, state, and local means. The numerous judicial decisions regarding waters of the U.S. also set a precedent that the NWPR meets.

The NWPR is also working on the ground. For the first time in well over a decade, the regulated community has a clear framework through which they can determine with certainty which features on their sites or at their facilities are federally jurisdictional and therefore require a CWA permit. To date, the agencies have not justified their hasty attempt to repeal and replace the NWPR. The NWPR is being implemented well, and the agencies should allow the rule to continue to be implemented. Rushing any reconsideration process before the agencies have a complete picture of the rule's impact will be detrimental for the regulated community, agency field staff, the states and tribes that serve as co-regulators with the agencies, and the communities that rely on a clear and predictable permitting process to advance critical projects.

Recommended principles in event NWPR is discarded

Again, we believe the NWPR is a reasonable and durable rule that has been working and implementation should continue. If the agencies nonetheless decide to move forward with what has so far been a rushed process, we offer the following specific recommendations for inclusion in a new rule:

Rule must be established and consistent with statutory and judicial policy.

Any durable and defensible WOTUS rule must recognize and give appropriate weight to Congress' policy expressed in CWA section 101(b) to preserve states' primary authority over non-navigable water resources. As described previously, Congress carefully crafted the CWA to strike a balance between the federal government's objective to protect the nation's waters, and Congress' policy to preserve the States' primacy over their land and resources. The rule must also adhere to all relevant Supreme Court

precedents. Justice Kennedy's significant nexus test is not and should not be considered the controlling test for determining federal jurisdiction. As detailed in WAC's comments, the Supreme Court has considered the constitutional bounds of the agencies' authority over WOTUS in three cases, and the agencies should not ignore any of those holdings.

A new rule must give effect to the term "navigable." Unlike the significant nexus concept, the Supreme Court's has upheld that the Agencies must give meaning to the term "navigable." The Court "read the statute as written" and held that the CWA does not allow the assertion of jurisdiction over non-navigable, isolated, intrastate ponds. Additionally, any lasting WOTUS definition cannot encompass water features solely because they cross state lines. The standalone interstate waters category has no basis in the CWA's legislative history and likewise reads the term "navigable" out of the CWA.

Finally, as discussed at length, any durable WOTUS rule must provide clarity to the regulated community and actually work on the ground. Both the pre-2015 regulatory regime and the 2015 Rule were unclear and difficult to implement on the ground. Previous rules relied on confusing case-by-case analyses and included overly broad definitions that made it difficult to implement the rule consistently. Clarity for the regulated community must be paramount in any enduring WOTUS definition.

Scope of specific jurisdictional waters
As the agencies solicited comment on the scope of specific waters, AMA provides the following recommendations:

Specific exclusions:
AMA urges that a durable Rule retain the clear exclusions that are in the NWPR. Many have been in agency practice and were included in the 2015 Rule. The exclusions most critical to AMA include:

- Ditches. AMA urges retention of the NWPR's approach to ditches, with a clear exclusion that is consistent with agency practice. The Rapanos Supreme Court opinion explained it to be nonsensical to treat statutory point discharges, such as ditches, as WOTUS as "*the separate classification of 'ditch[es], channel[s], and conduit[s] – which are terms ordinarily used to describe watercourses through which intermittent waters typically flow – shows that these are, by and large, not waters of the United States."* The mining industry depends on ditches of various sizes and must constantly maintain, modify, move, and reclaim them. Many of these are required under regulations and used to manage water within the mine site and would be excluded from the definition of WOTUS due to their function as part of a waste treatment system.

- Waste Treatment Systems. WOTUS must retain the longstanding exclusion of waste treatment systems. The exclusion has been a part of the WOTUS regulatory regime for decades, including during the pre-2015 period and both the 2015 Rule and the NWPR, and has been codified in EPA's and the Corps' regulations since 1979. It is also consistent with the agencies' prior guidance documents and practice. Waste treatment systems are essential to mining operations and function to protect water quality adjacent to and downstream of industrial operations. They treat water to ensure that discharges comply with water quality standards, or process the water for reuse on site to eliminate the need for such a discharge at all. They are sometimes the only technologically and economically feasible way to treat discharges from industrial operations. As a

result, waste treatment systems are essential in achieving the CWA's goals, and should be excluded from being classified as WOTUS.

- Other exclusions. Any durable WOTUS rule also must retain the exclusions from jurisdiction of the following: groundwater, ephemeral features and diffuse stormwater runoff, water-filled depressions incidental to mining activity, stormwater control features, and wastewater recycling structures.

Tributaries:

AMA urges retention of the NWPR's approach to tributaries. In any future rule, the agencies should retain the scope of this category to cover only those streams that contribute perennial or intermittent (as opposed to ephemeral) flows to a traditional navigable water and avoid any definition that involves case-specific significant nexus review. This approach better aligns the tributary category with the case law, specifically the *Rapanos* opinion that the CWA confers jurisdiction over only "relatively permanent bodies of water," and Justice Kennedy's concurring view that a tributary definition is too broad if it *"leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor volumes toward it."*

On the ground, the NWPR's tributary definition is a vast improvement over the 2015 Rule, under which tributaries were identified solely based on the presence of the physical indicators of a bed and banks and an ordinary high water mark. Determining jurisdiction solely based on physical indicators such as bed, banks, and ordinary high water mark is problematic because the application is often inconsistent. While the concept may work well for perennial streams and deciding where the stream edge versus a bordering wetland or floodplain is, the notion becomes troublesome when trying to decide the lateral extents of what could be very small ephemeral channels or washes. By shifting the tributary definition to focus on the better-understood concepts of ephemeral, intermittent, and perennial flow, the NWPR's approach to tributaries allows for far more clarity and predictability in identifying tributaries subject to CWA jurisdiction.

Adjacency:

AMA urges a WOTUS rule also should ensure that the adjacent category be limited to wetlands. The NWPR's approach to adjacency, which asserts jurisdiction over only those wetlands that directly abut other WOTUS or that have a direct hydrologic surface connection to other WOTUS in a typical year, has provided clarity and certainty. The pre-2015 and 2015 Rule's approaches including the significant nexus test were confusing and unworkable on the ground. AMA also recommends that the agencies continue to ensure that the presence and boundaries of wetlands are determined by satisfying all three of the definition's parameters (evidence of hydrology, hydrophytic vegetation, and hydric soils). The NWPR's approach to adjacent wetlands should be retained.

Consider uniqueness of Alaska

Finally, for any rule, we encourage you to specifically consider the uniqueness of Alaska. 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. 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.

Conclusion

Finally, AMA is a member of the nationwide mining associations National Mining Association and American Exploration and Mining Association and endorses their comments.

Thank you for your consideration and for the opportunity to comments on the proposal.

Deantha Skibinski
Executive Director