Alaska State Legislature

February 20, 2017

The Honorable Lisa Murkowski
United States Senate
522 Hart Senate Office Building
Washington, DC 20510

The Honorable Dan Sullivan
United States Senate
702 Hart Senate Office Building
Washington, DC 20510

The Honorable Don Young
United States House of Representatives
2314 Rayburn House Office Building
Washington, DC 20515

Commanding General and Chief of
Engineers Todd T. Semonite
Headquarters
U.S. Army Corps of Engineers
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Col. Michael Brooks
U.S. Army Corps of Engineers – Alaska
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Administrator Scott Pruitt
Environmental Protection Agency, 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

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OFFICE OF THE
EXECUTIVE SECRETARIAT

Re: Use of the *Wetlands Delineation Manual*, Technical Report Y-87-1, January 1987, Final Report (1987 Manual).

Dear Honorable Ladies and Gentleman:

In President Trump's spirit of de-regulation (particularly with regulations and policies that don't work), the below signatories respectfully request that the United States Army Corps of Engineers (Corps) return to correctly using the 1987 Wetland Delineation Manual (1987 Manual) in Alaska.[1] Respectfully, perhaps the Alaska delegation, via an appropriations bill, can require the Corps to only use the 1987 manual to delineate wetlands. A similar approach was taken by Congress in 1991-1993.[2]

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[1] United States Army Corps of Engineers, *Wetland Delineation Manual*, Y-87-1 (January 1987).
[2] *See* S.Rep. No. 102-344 (1992).

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The reason is simple: For too long throughout the state, the Corps has incorrectly determined that permafrost areas are "wetlands" subject to jurisdiction under the Clean Water Act (CWA).[3]

Make no mistake: The Corps is a respected agency in the federal government. Their expertise and civil projects can be seen from coast to coast. The Corps has helped create safer communities, while making valuable contributions to a national economic engine that is unparalleled in the world.[4]

However, not all Corps actions have been perfect. Wetland delineation in Alaska is a good example of an "area in need of improvement." Quite simply: despite interpretations from regional supplements (produced in violation of the Administrative Procedure Act (APA)),[5] permafrost areas are not "wetlands."

> The U.S. Army Corps of Engineers general regulatory functions were formerly financed as part of the "Operation and maintenance, general appropriation" account. The appropriation recommended provides salaries, expenses, and related costs to administer laws pertaining to regulation of navigable waters and wetlands of the United States in accordance with the River and Harbors Act of 1899, the Clean Water Act of 1977, and the Marine Protection Act of 1972.
>
> The Committee is pleased to note a significant decline in the number of complaints about wetlands delineations since the Corps of Engineers has been using the 1987 guidelines for determining Federal jurisdictional wetlands, and agrees with the Corps that these Corps guidelines should continue to be used until a subsequent delineation manual is finally adopted in accordance with the requirements for notice and public comment of the Administrative Procedure Act.
>
> The Committee notes that these guidelines were developed by the Corps over a 10-year period at a cost of $5,000,000 and were subjected to extensive field testing before being placed in service by the Corps. The Committee further notes that this level of review and analysis has not occurred with any subsequent manual.
>
> The Committee believes that most of the problems with the current 404 program occur when policy decision are made outside the normal notice and public comment process. This is understandable in light of the fact that up to 75 percent of the land regulated under this program is privately owned.
>
> The Committee is concerned about continuing complaints over the hardships being experienced under the practicable alternatives test that was adopted by the Corps in a February 7, 1990, memorandum of agreement with the Environmental Protection Agency. The practicable alternatives test as well as the traditional public interest test both must not be satisfied before a 404 permit can be obtained. The rigid test has led to the denial of permits in some cases because the applicant could not prove that there were no other alternatives available. The test is not necessarily limited by geographic area and does not even require that the applicant own or have access to the land that the Environmental Protection Agency or Corps of Engineers might think is a valid alternative. *Id.* at pages 55-56.

[3] 33 U.S.C. §1251 et seq. (1972).

[4] Historic efforts by the Corps during World War II allowed for dam construction, which created an abundance of electricity, which was harnessed in production of aircraft and ships on the West Coast. Many say, because of the underlying activities of the Corps, the War was shortened by two years or more.

[5] 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5372, 7521(2012). Noteworthy: Historically, the Corps was directed by Congress to use the 1987 Manual as the exclusive method to delineate wetlands. That was required until the Corps

Why?

Permafrost is cryogenically isolated. Soil temperatures remain cold. In addition, permafrost does not have a significant, continuing nexus to other water. As most Alaskans know, permafrost does not contribute consistent flow to traditionally defined navigable surface waters (or other jurisdictional surface waters), because, as the name suggests, permafrost is frozen material underlying the upper layers of a soil profile.

Permafrost would never qualify as a "wetland" under the 1987 Manual. Permafrost simply cannot satisfy the hydrology parameter.

Despite that history, many Alaskans are concerned with the way the Corps has interpreted specific directions from Congress. There has been no adoption of a final manual (since the 1987 Manual). The Corps has, instead, retained the 1987 Manual while using regional supplements and "informal guidance" to supersede portions that limit jurisdiction.

The result?

Shallow permafrost is delineated as wetlands. That means vast expanses of the state, amounting to millions of acres, are subject to federal regulation. Property owners face significantly greater hurdles to develop their land.[6] Expensive lawsuits have ensued.[7]

That's bad policy. Bad policy that unnecessarily hampers Alaska's good faith development of its property.

President Trump has made overtures that he is committed to de-regulation, smart-regulation, infrastructure, and energy development. Please take our request under consideration, to once again unlock the capital dollars that will add value to America's bottom line.

A small step in the right direction would be returning to the 1987 Manual.

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went through the notice-and-comment rule-making procedures of the APA to adopt a new, final wetland delineation manual. Presently, that procedure has not occurred.

[6] Please also consider enacting a statue returning the scope and jurisdiction of the Corps for purposes of the section 404 permit program to an earlier and more traditional definition of "navigable waters." That definition is: (1) all waters presently and actually being used to transport interstate or foreign commerce; (2) all waters used in the past to transport interstate or foreign commerce; (3) all waters susceptible to use to transport interstate or foreign commerce; and (4) all waters subject to the ebb and flow of the tide, to the mean high water mark. *See* 42 Fed. Reg. Vol. 42, No. 138, p. 37122, Tuesday, July 19, 1977. This also returns the jurisdiction of the Corps 404 permit program to a scope in line with the Tenth Amendment and state rights to regulate intrastate commerce. If states want to regulate development of "fill" type activities in waters not covered by the federal government, they are free to do so, under the rules they choose.

[7] *See* https://www.pacificlegal.org/releases/release-5-3-16-tin-cup-1-1509. *See Tin Cup, LLC v. United States Army Corps of Engineers*, 4:16-cv-00016-TMP.

Sincerely,

Senate President Pete Kelly

Senator John Coghill

Senator Anna MacKinnon

Senator Bert Stedman

Senator Click Bishop

Senator Cathy Giessel

cc: President Donald J. Trump
Governor William "Bill" Walker
Deantha Crockett, Alaska Miners Association

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Alaska State Legislature

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