Northwest Colorado Council of Governments

WATER QUALITY / QUANTITY COMMITTEE (QQ)

P.O. Box 2308 • Silverthorne, Colorado 80498
970-468-0295 • Fax 970-468-1208 • email: qqwater@nwccog.org

QQ Quarterly Board Meeting

Wednesday, October 15, 2014
Rio Grande Meeting Room
455 Rio Grande Pl
Aspen, CO 81611

Agenda

10:00	Welcome and Introductions
10:05	Presentation: West Slope Opposition to Aurora Change of Use Case *John Ely, Pitkin County Attorney*
11:05	2015 Legislative Session and Colorado Water Plan- *Torie & Barbara*
11:30	Waters of the United States Comment- *Torie, Barbara, Lane*
12:00	Water Quality updates (Grand Lake clarity, 303(d)(4)(c))- *Lane & Seth*
12:30	Lunch (Everyone must pick up lunch from food truck between 12:30-12:50)
1:30	Member Updates
1:45	Oil and gas preemption of local land use authority- *Barbara*
2:00	Review of 2015 Scope of Work, 2015 Contract, Policy on Disseminating information to QQ members
3:00	Adjourn

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Comments from NWCCOG/ QQ
SB 14-115 Legislative Hearing on the Colorado Water Plan: Colorado Basin
August 21, 2014

The Water Quality and Quantity Committee (QQ) comprises municipalities, counties, water and sanitation districts, and conservancy districts in the headwaters region of Colorado located in Grand, Summit, Eagle, Pitkin, Park and Gunnison counties. QQ's purpose is to facilitate and augment the efforts of member jurisdictions to protect and enhance the region's water quality while encouraging its responsible use for the good of Colorado citizens and the environment.

In the QQ region, 16 transmountain diversions (TMDs) collectively divert an average of 511,700 acre-feet of water to the East Slope (with thousands more acre-feet to be diverted through already-planned projects). Many existing TMDs were developed without appropriate mitigation. The environmental damage is still being addressed today.

On the other hand, QQ members have successfully negotiated agreements with Front Range water providers that protect and benefit West Slope water resources while honoring the needs of the water supplier—including Eagle River MOU, the negotiated agreement and 1041 permit for Windy Gap Firming Project, the CRCA, Wolford Reservoir joint operations, and proposed mitigation for Moffat expansion.

We offer the following comments on the Colorado Water Plan based on these experiences:

1. We have learned that **successful agreements for new or expanded TMDs must:**
    a) Take into account concerns where the project would be located and where water would come from.
    b) Require approval from the impacted counties, conservancy districts and conservation districts in the area from which water would be diverted.
    c) Yield multiple benefits above and beyond the narrow purposes for which the project is built (even if they are "multi-purpose")—making streams and rivers healthier to the maximum extent possible.

2. The Water Plan also will examine ways to make the permitting process for new water projects more efficient. This is important across the state, and we think that dusting off the **joint review process** as it was proposed in the 1970s is something that the Water Resource Review Committee could support. A joint review process offers three benefits:
    a) Local affected interests are at the table from the beginning, before NEPA begins, and can express local concerns as well as mitigation concepts at the earliest possible time;
    b) The NEPA process is less onerous with joint review because the reports and studies can focus on the real concerns instead of hypothetical concerns; and
    c) Agencies with regulatory authority will be discussing their concerns and can avoid imposing duplicative requirements on the applicant.

These goals can be facilitated if the regulatory entities are consulting agencies once NEPA begins.

3. Some comments on the Water Plan call for the state to consider funding or filing for water rights for a future new TMD. This is not the proper role for the State and should not be part of the Colorado Water Plan**. The State should not assume a role as a proponent of a water project until the State regulatory process has been completed and the project has been agreed to by the impacted counties, conservancy districts and conservation districts in the area from which water would be diverted.**

August 19, 2014

John W Hickenlooper, Governor
136 State Capitol
Denver, CO 80203-1792

James Eklund, Director
Colorado Water Conservation Board
1313 Sherman St., Room 718
Denver, CO 80203

Dear Governor Hickenlooper and Director Eklund,

On the Western Slope of Colorado, our water resources are not something we take for granted. We count on the Colorado River and its tributaries for our local economies, our food and our very way of life.

As you are aware, our water resources are being severely challenged. While sustained drought is taking a toll on the Colorado River, we continue to supply more than 400,000 acre feet (AF) per year to the Front Range while trying to keep up with our own needs for agriculture, industry, and our own drinking water. And recent predictions for future water levels in the Colorado River are bleak; The Department of Interior's 2012 Basin Study predicts a 9% reduction in water flows for the river in the coming decades.

But despite the drought, and predictions of long-term reductions in water levels, many Front Range interests are still hoping to take even more Western Slope water in the future.

In fact, a letter from Front Range water interests – including Denver Water, Aurora Water, Colorado Springs Utilities, the Northern Colorado Water Conservancy District, the Pueblo Board of Water Works, the Southeastern Colorado Water Conservancy District and the Twin Lakes Reservoir and Canal Co. – to the CWCB this spring stated clearly their belief that the planning process "should begin with an assurance, and not simply a hope, that a new project involving Colorado River water will be a fundamental part of the package for meeting the state's future water needs." This would be too much of the same old story. For too long, the thirst of the Front Range has been at the sacrifice of Western Slope communities.

The Western Slope in Colorado has no more water to give. We, the undersigned western Colorado residents and leaders, strongly urge you to oppose any new trans-mountain diversion that will take more water from the Western Slope of Colorado, as you develop Colorado's Water Plan.

The good news is that while we cannot just solve our state's future water needs by sending more water east, there are solutions to our long-term challenges. Through widely supported conservation, efficiency, and other measures, we already have the solutions for meeting all demands. But we need leaders from communities, businesses and governments on *both* sides of the Rocky Mountains to come together to implement these solutions.

Specifically, we urge you to develop a common-sense plan that:

- Prioritizes modernization and maximization of existing storage and delivery systems;
- Details investment in infrastructure for agricultural delivery and irrigation, on behalf of our strong agricultural economy and heritage; and
- Prioritizes municipal conservation and re-use.

In order to plan for our future, rural communities, businesses, and agricultural producers on the West Slope require reliable water resources and healthy rivers. Colorado's Water Plan is an opportunity to secure our long-term economies while promoting forward- thinking solutions that address water challenges on both sides of the Rocky Mountains.

We thank you in advance for your continued leadership on this issue.

Sincerely,

Mike Samson
Chairman, AGNC
Garfield County

Jeff Eskelson
Vice Chairman, AGNC
Rio Blanco County

AGNC State Water Plan Signers

Name	Title	Organization
John Justman	Commissioner	Mesa County
Jay Miller	Mayor Pro-Temp	City of Rifle
Richard Alluise	Mayor	Town of Silt
Bryan Fleming	Mayor Pro-Temp	Town of Silt
Aron Diaz	Trustee	Town of Silt
Keith Richel	Trustee	Town of Silt
Sonny Fernandez	Trustee	Town of Silt
Dylan Lewis	Trustee	Town of Silt
Lisa Hatch	Trustee	Town of Rangely
Larry Hatch	Owner	L&L Hatch, LLC
R. Wayne Jefferies	Owner	Jefferies Ranch
Ray Beck	Councilman	City of Craig
Dale Hancock	Owner	A&D Distributing
Ron Teck	State Senator (Retired)	
David Ludlam	Executive Director	WSCOGA
John Loschke	Trustee	Town of Parachute
Tim Olk	Trustee	Town of Parachute
Stuart McArthur	President	Parachute Chamber of Commerce
Kathy Hall	Owner	Kathy Hall & Associates
Bruce Hovde	Commissioner	Delta County
Katy Welt	Environmental Engineer	Mountain Coal
Phil Vaughn	President	PVCMI
Nita Smith	Owner	NLS Business Solutions
Randy Winkler	Mayor	City of Rifle
Roy McClung	Mayor	Town of Parachute
Jack Taylor	State Senator (Retired)	
Kelly Couey	Rancher	Couey Cattle Ranch

Name	Title	Organization
Carrie Couey	Owner/Administrator	Couey Cattle Ranch
David Merritt	Citizen	Garfield County
Laureen Gutierrez	Realtor	Mesa County
Linda Gregory	Citizen	Mesa County
Tim Pollard	Small Business Owner	
Kristi Pollard	Small Business Owner	
Tom Rugaard	Trustee	Town of Parachute

"Voice of the Western Slope since 1953"
A coalition of counties, communities, businesses & individuals

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WA-14-2
Colorado Water Planning

WHEREAS reliable, affordable water supplies are foundational to the environment, economy and quality of life in rural Colorado; and

WHEREAS Colorado benefits from a balanced economy, including robust agriculture, natural resources, outdoor industry/recreation, service, and technology sectors; and

WHEREAS the State of Colorado is developing a statewide Water Plan initiated by Governor Hickenlooper through an executive order signed May 13, 2013; and

WHEREAS in calling for the Colorado Water Plan, the Governor's Executive Order affirmed the following:

Colorado's water policy must reflect its water values. The Basin Roundtables have discussed and developed statewide and basin-specific water values and the Colorado Water Plan must incorporate the following:

- *a productive economy that supports vibrant and sustainable cities, viable and productive agriculture, and a robust skiing, recreation and tourism industry;*
- *efficient and effective water infrastructure promoting smart land use; and*
- *a strong environment that includes healthy watersheds, rivers and streams, and wildlife;* and

WHEREAS the Colorado Water Plan should draw upon CLUB 20's Colorado 64 Water Principles, including the following:

1. *All Colorado water users must share in solving Colorado's water resource problems…*
5. *The right of water rights owners to market their water rights must be protected.*
a. *Colorado must fully explore flexible, market-based approaches to water supply management, including interruptible water contracts, water banking, in-state water leasing and groundwater recharge management.*
6. *Appropriate recognition should be given to preservation of flows necessary to support recreational, hydroelectric and environmental needs concurrent with development of water for beneficial consumptive uses.*
7. *Adverse economic, environmental, and social impacts of future water projects and water transfers should be minimized; unavoidable adverse impacts must be reasonably mitigated; all communities involved should commit themselves to identifying and implementing reasonable mitigation measures as an integral part of future water projects or transfers.*
8. *Future water supply solutions must benefit both the area of origin and the area of use.*
9. *Water conservation measures that do not injure other water rights should be aggressively pursued.*
10. *There must be an ongoing, concerted effort to educate all Coloradans on the importance of water, and the need to conserve, manage, and plan for the needs of this and future generations;* and

WHEREAS water is fundamental and indispensable to vibrant economies and healthy communities, anchoring the assets that make Colorado unique and provide our competitive advantages;

WHEREAS the population of Colorado is projected by the State Demographer to double in the next 30 years, most of whom will reside along the Front Range;

WHEREAS the past four Colorado Governors, the CWCB, the Roundtables and the IBCC have made minimizing dry-up of agricultural land a statewide concern;

WHEREAS new large uses of water from the Colorado River basin, such as a new transmountain diversion to the Front Range, will affect the existing water supply of essentially all water users in Colorado and is a statewide concern;

NOW, THEREFORE, BE IT RESOLVED that CLUB 20 supports a Colorado Water Plan that:

- Blueprints the investments in water education, technology, and efficiency that allow Colorado to meet the water demands of a growing population, while minimizing the impact upon our agricultural economy and our natural resources.
- Provides an outline for meeting individual basin as well as statewide water needs.
- Details investments necessary to maintain agricultural delivery, irrigation, and reuse, that sustain this foundational industry and Colorado tradition.
- Prioritizes municipal conservation, including a statewide conservation goal and measurable outcome, and a higher goal for water providers that are using water supplies of statewide concern such as permanent dry-up of agricultural land and/or need a new trans-mountain diversion from the Colorado River basin.
- Recognizes that the health and viability of our rivers as natural and economic resources must be prioritized in water policy and management.Recognizes that determinations of whether water is physically and legally available for appropriation, and whether it can and will be put to beneficial use by an appropriator, are to be deferred to the water courts of the State of Colorado in appropriate proceedings as contemplated by our Constitution and laws.
- That prioritizes the storage of Front Range water on the Front Range.

(This resolution was jointly drafted by the CLUB 20 Tourism and Water Committee)

Adopted 9/5/2014

DISTRICT COURT, LARIMER COUNTY, STATE OF COLORADO 201 LAPORTE AVENUE, SUITE 100 FORT COLLINS, CO 80521-2761 PHONE: (970) 494-3500 **Plaintiff:** Colorado Oil and Gas Association v. **Defendant:** City of Fort Collins	DATE FILED: August 7, 2014 CASE NUMBER: 2013CV31385 FOR COURT USE Case No. 13CV31385 Courtroom: 5B

Order Granting Plaintiff's Motion for Summary Judgment on First Claim for Relief and Denying Defendant's Cross-Motion for Summary Judgment

This matter comes before the Court on Colorado Oil and Gas Association's ("COGA") Motion for Summary Judgment on its First Claim for Relief and the City of Fort Collins's ("City") Cross-Motion for Summary Judgment. The Court has reviewed the Parties' briefs, along with the supporting documentation and the applicable law, and finds and orders:

COGA challenges the City's five-year moratorium on hydraulic fracturing arguing that the Oil and Gas Conservation Act, C.R.S. §§ 34-60-101 to 118, preempts the moratorium. The Parties do not have any disagreements on the material facts of the case.

Undisputed Facts

Fort Collins is a home-rule city, as permitted by Article XX of the Colorado Constitution. City's Ex. A. The City's Charter provides that the City may appropriately plan and zone areas within the City's boundaries. *Id.* at 8–9.

Pursuant to Article X of the City's Charter, "[t]he registered electors of the city shall have the power at their option to propose ordinances or resolutions . . . [and] to adopt or reject such ordinance or resolution at the polls." *Id.* at 29.

In the municipal election of November 5, 2013, the City's voters passed a citizen-initiated ordinance that placed a five-year moratorium (referred to as the "Ordinance" or "five-year ban") on using hydraulic fracturing in oil and gas wells and storing hydraulic fracturing waste products within the City's boundaries. City's Ex. D. ¶ 6; City's Ex. E at 3.

The City adopted the Ordinance upon certification of the November 5, 2013 election results pursuant to the City's Charter. Answer ¶ 30.

The Ordinance defines hydraulic fracturing as a well-stimulation process "used to extract deposits oil, gas, and other hydrocarbons through the underground injection of large quantities of water, gels, acids, or gases; sands or other proppants; and chemical additives . . . ." City's Ex. B at 4, § 2.

The Ordinance finds that the "people of Fort Collins seek to protect themselves from the harms associated with hydraulic fracturing, including threats to public health and safety, property damage and diminished property values, poor air quality, destruction of landscape, and pollution of drinking and surface water." *Id.* The stated purpose of the Ordinance is to allow for the study of impacts of hydraulic fracturing on the citizens of the City. *Id.* at 4, § 1.[1]

By its terms, the Ordinance will expire on August 5, 2018. *See* Ex. B §§ 3, 4.

Hydraulic fracturing is used in "virtually all oil and gas wells" in Colorado. COGA's Ex. 2 (Colorado's Oil and Gas Conservation Commission: Information on Hydraulic Fracturing).

COGA claims that the Ordinance impedes its and its members' ability to "promote, develop, and produce oil and gas in Larimer County in conformity with the Oil and Gas Conservation Act." Compl. ¶ 37. Also, it claims that the Ordinance adversely affects oil and gas production because it prohibits "COGA's members and/or operators from drilling a permitted well to recover oil and gas." *Id.* ¶ 38. Finally, COGA states that the Ordinance "adversely affects and injures COGA members' present and/or future oil and gas activities within the City, including the drilling of wells within the City's territorial jurisdiction and the extension of horizontal wellbores under the City." *Id.* ¶ 44.

In May 2013, Prospect Energy, LLC (a member of COGA) signed an operator agreement with the City to allow it to use hydraulic fracturing in wells within the City's boundaries. City's Ex. C. The initial term of the operator agreement is five years, ending on May 29, 2018. *Id.* at 8, ¶ 5. Thus the Ordinance and the operator agreement are in direct conflict.

Based on these facts, the Court finds that COGA has established standing.[2]

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[1] As a result of the passage of the Ordinance, the City has engaged its staff to retain consultants to evaluate the impacts of hydraulic fracturing and the storage of hydraulic fracturing's waste products within the City. City's Ex. D ¶¶ 4–9.

[2] The City has not argued that COGA lacks standing, though the Court addresses it here. To establish standing, one of COGA's members need not apply for, and be denied, a permit to use hydraulic fracturing on an oil or gas well. "Rather, the injury-in-fact element of standing is established if the regulatory scheme 'threatens to cause injury to the plaintiff's present or imminent activities.'" *Id.* at 1017, quoting

COGA and the City each have moved for summary judgment. COGA argues that the Oil and Gas Conservation Act preempts the five-year ban. The City disagrees, arguing that COGA has not shown the five-year ban is preempted and that its power to impose moratoria allows the five-year ban to exist regardless of the Oil and Gas Conservation Act.

Applicable Law

Summary Judgment

C.R.C.P. 56(c) provides that a court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Similarly, C.R.C.P. 56(h) provides that "[i]f there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question."

On summary judgment, "[t]he nonmoving party is entitled to all favorable inferences that may be drawn from the undisputed facts, and all doubts as to whether a triable issue of fact exists must be resolved against the moving party." *AviComm, Inc. v. Colorado Pub. Utilities Comm'n*, 955 P.2d 1023, 1029 (Colo. 1998).

Presumptions

The Court must presume that government regulations are valid. *Bd. of Cnty. Comm'rs of Jefferson Cnty. v. Mountain Air Ranch*, 192 Colo. 364, 369 (1977). Accordingly, the Court must presume that both the Oil and Gas Conservation Act and the Ordinance are valid.

The Home Rule Amendment and Preemption of Municipal Ordinances

Section six of Article XX of the Colorado Constitution provides home-rule cities "the full right of self-government" on local and municipal matters. Therefore, a home-rule city's ordinance on a local matter "shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith." Colo. Const. art. XX, § 6

Consistent with Article XX, Colorado Courts have held the "exercise of zoning authority for the purpose of controlling land use within a home-rule city's municipal

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Bd. of County Comm'rs v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1053 (Colo. 1992). The Court finds that Prospect Energy's operator agreement with the City shows sufficient intention of a COGA member to use hydraulic fracturing on an oil or gas well within the City's boundaries. Imposition of the five-year ban therefore threatens to cause injury to Plaintiff's imminent activities.

border is a matter of local concern." *Voss v. Lundvall Bros., Inc*., 830 P.2d 1061, 1064 (Colo. 1992) (citing cases).

Article XX, however, does not permit a home-rule city to enact an ordinance in an area of mixed state and local concern, or in an area of statewide concern, that intrudes on state law. *Webb v. City of Black Hawk*, 2013 CO 9, ¶ 18. Rather, Colorado courts hold that a local ordinance that infringes on a matter of mixed state and local concern, or a matter of statewide concern, may be preempted in three possible ways: express preemption, implied preemption, and operational conflict. The state legislature may preempt a local ordinance by expressly indicating preemption over local laws in a statute. *Bd. of Cnty. Comm'rs, La Plata Cnty. v. Bowen/Edwards Associates, Inc*., 830 P.2d 1045, 1056 (Colo. 1992) (referred to as "*Bowen/Edwards*"). The legislature may impliedly preempt a local ordinance "if the state statute impliedly evinces a legislative intent to occupy a given field by reason of a dominant state interest." *Id.* at 1056-57. And a local ordinance may be preempted where giving the ordinance operational effect would conflict with the operation of a state statute. *Id.* at 1057.

To aid a court in determining whether a home-rule city's ordinance is preempted, the Colorado Supreme Court announced a four-part examination to determine the state's interest in the relevant matter. Court are to look at "whether there is a need for statewide uniformity of regulation; whether the municipal regulation has an extraterritorial impact; whether the subject matter is one traditionally governed by state or local government; and whether the Colorado Constitution specifically commits the particular matter to state or local regulation." *Voss*, 830 P.2d at 1067, and quoted in *Colorado Min. Ass'n v. Bd. of Cnty. Comm'rs of Summit Cnty*., 199 P.3d 718, 723 (Colo. 2009).

Although no Colorado appellate court has published an opinion analyzing preemption in regards to a moratorium, the analysis does not differ from that of a permanent ordinance. *See e.g., City of Claremont v. Kruse*, 177 Cal. App. 4th 1153, 1168, (2009) (using the well-settled "principles governing state statutory preemption" to determine whether Claremont's moratorium on marijuana dispensaries was preempted); *see also Plaza Joint Venture v. City of Atl. City,* 174 N.J. Super. 231, 237-39 (App. Div. 1980) (in determining the validity of Atlantic City's moratorium on apartment conversion, the court used New Jersey's traditional preemption analysis, including determining if "the local regulation conflicts with the state statutes"); *City of Buford v. Georgia Power Co*., 276 Ga. 590, 590 (2003) (in determining whether Buford's moratorium on construction of electric substations the court used Georgia's standard express/implied preemption analysis). A moratorium ordinance and a permanent ordinance can both be preempted.[3]

[3] A division of the Colorado Court of Appeals has examined a moratorium in the takings context, in *Williams v. City of Cent.*, 907 P.2d 701 (Colo. App. 1995). The court's analysis is inapplicable to the instant case given that *Williams* did not determine the validity of Central City's moratorium.

The Oil and Gas Conservation Act

The Oil and Gas Conservation Act ("Act") created the Oil and Gas Conservation Commission ("Commission"), which is vested with the authority to enforce provisions of the Act, and to adopt and enforce regulations pursuant to the Act. C.R.S. §§ 34-60-104, 105. The Commission has the authority to regulate throughout the state: the drilling, producing, and plugging of wells and all other operations for the production of oil or gas; the shooting and chemical treatment of wells; the spacing of wells; the operation of oil and gas wells so as to prevent and mitigate significant adverse environmental impacts. *Id.* § 34-60-106(2). The Commission also has the authority to allocate production from an oil or gas pool on an equitable basis amongst multiple land owners. *Id.* § 34-60-106(3).

Pursuant to the Act, the Commission has adopted comprehensive regulations covering drilling, developing, producing and abandoning wells (300 Series), safety (600 Series), aesthetics and noise control (800 Series), waste management (900 Series), protection of wildlife (1200 Series), among other areas. COGA's Ex. A.

The purposes of the Oil and Act Conservation Act are manifold, and include: fostering the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado; protecting and enforcing the coequal and correlative rights of owners and producers in a common source or pool of oil and gas; and planning and managing oil and gas operations in a manner that balances development with wildlife conservation in recognition of the state's obligation to protect wildlife resources and the hunting, fishing, and recreation traditions. *Id.* § 34-60-102.

Pertinent Colorado Supreme Court Cases Regarding Preemption

In 1992, the Colorado Supreme Court issued two cases deciding the validity of two local governments' restrictions on oil and gas operations: *Bowen/Edwards* and *Voss*.

In *Bowen/Edwards*, the court held that a local government may enact land-use restrictions on oil and gas operations so long as they do not impermissibly conflict with the Oil and Gas Conservation Act. 830 P.2d at 1058. The court noted that if the regulations "impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations or land restoration requirements contrary to those required by state law or regulation," those regulations could impermissibly conflict with the state interest. *Id.* at 1059–60.[4]

[4] The 2007 Amendments to the Oil and Gas Conservation Act are consistent with this holding. Codified at § 34-60-128(4), the Act states that: "Nothing in this section shall establish, alter, impair, or negate the authority of local and county governments to regulate land use related to oil and gas operations." Similar language is contained in § 34-60-127(4)(c).

In *Voss*, the Colorado Supreme Court held that the Colorado Oil and Gas Act preempted Greeley's permanent ban on the drilling of any oil and gas wells within the city's boundaries. *Voss*, 830 P.2d at 1068. The court reasoned that the Oil and Gas Conservation Act preempted the home-rule city's ban on the drilling of any oil or gas wells because the ban "substantially impedes the interest of the state in fostering" efficient and equitable oil and gas production. *Id.*

The court arrived at this conclusion by using the four-factor examination described in *Voss* (and quoted above), finding the field of oil and gas regulation to be an issue of mixed local and state interest. The court detailed: how oil and gas regulations should be uniform throughout the state because the pressure characteristics of each pool of oil and gas require wells to be drilled in a particular pattern, and not necessarily in-line with a city's or county's boundaries; that allowing a city to ban oil and gas development may increase development costs outside of the city boundaries, making development infeasible; that oil and gas development and regulation has traditionally been a matter of state control; and that the Colorado Constitution neither commits the development and regulation of oil and gas to either state or local control. *Id.* at 1067–68. Based on this analysis, the court held that Colorado's "interest in efficient oil and gas development and production throughout the state, as manifested in the Oil and Gas Conservation Act, is sufficiently dominant to override a home-rule city's imposition of a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city limits." *Id.* at 1068.

In 2009, the Colorado Supreme Court held that the Mined Land Reclamation Act ("MLRA") impliedly preempted Summit County's ban on the use of cyanide and other toxic chemicals for mineral processing because the state legislature "expressed a sufficiently dominant interest by assigning to the [Mined Land Reclamation] Board the field of the use of chemicals and other toxic and acidic reagents in mining operations for mineral processing." *Colorado Min. Ass'n*, 199 P.3d at 733. Additionally, the court held MLRA preempted the ban because "the county bans what the Board may authorize." *Id.* at 733-34.

Most recently, in *Webb v. City of Black Hawk*, the Colorado Supreme Court held that a state law requiring a "bicycle prohibition on city streets [to] be accompanied by suitable alternate bikeways" preempted Black Hawk's ban on those using bicycles on the city's streets. 2013 CO 9, ¶ 46. The court used the four-factor examination described above to determine that both the state and localities have an interest in regulating bicycles on roadways. *Id.* ¶¶ 29–42. The Court then simply stated: "The test to determine whether a conflict exists is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." *Id.* ¶ 43. Finally, the court held that because Black Hawk's ordinance "negate[d] a specific provision the General Assembly [] enacted in the interest of uniformity" on an issue of mixed state and local concern, state law preempted the city's ban. *Id.* ¶ 45.

Analysis

Express Preemption

The Act does not expressly preempt all local regulation of drilling. *See Bowen/Edwards*, 830 P.2d at 1056. However, the five-year ban on the use of hydraulic fracturing within the boundaries of the City of Fort Collins is preempted by the Colorado Oil and Gas Conservation Act for two reasons: the five-year ban substantially impedes a significant state interest and the ban prohibits what state law allows.

Implied Preemption

The Court finds that the City's Ordinance banning all hydraulic fracturing for five years is impliedly preempted by the Act.

The five-year ban on hydraulic fracturing substantially impedes the state's significant interest in fostering efficient and equitable oil and gas production for the same reasons that Greeley's ban in *Voss* substantially impeded the state's interest in oil and gas production.

The state's interest in the field of oil and gas development and production has not change materially since the Colorado Supreme Court issued *Voss;* it continues to have a significant interest therein because the Oil and Gas Conservation Act confirms it by authorizing the Commission to comprehensively regulate the production and development of oil and gas. *See* C.R.S. §§ 34-60-104 to 106. Indeed, the Act has remained largely unchanged since 1992 and the City points to no change in the Act that would materially affect the state's interest. The four-factor analysis of the state's interest in oil and gas regulation announced in *Voss* remains applicable here: the state requires uniformity in the regulation of oil and gas development; municipal regulation would have a negative extraterritorial impact; and though the Colorado Constitution does not commit the field of oil and gas development to the state or localities, the field has traditionally been an area of state control. *Voss,* 830 P.2d at 1067-68.

Next, the Court determines whether the five-year ban substantially impedes the state's interest in oil and gas development and production. Here the only differences between the ban in *Voss* and the City's five-year ban are: 1) the Ordinance bans hydraulic fracturing, rather than all oil and gas drilling, and 2) the City's ban expires after five years. Neither of these facts negates the impact on the state's interest in oil and gas production and development.

First, the City's five-year ban effectively eliminates the possibility of oil and gas development within the City. This is so because hydraulic fracturing is used in "virtually all oil and gas wells" in Colorado.[5] COGA's Ex. 2. To eliminate a technology that is used

[5] This claim was not disputed by the City.

in virtually all oil and gas wells would substantially impede the state's interest in oil and gas production.

Clearly, the Act does not prohibit any regulation by a municipality. The *Voss* court stated, " . . . [W]e do not mean to imply that [the home-rule city] is prohibited from exercising any land-use authority over those areas of the city in which oil and gas activities are occurring or are contemplated." *Voss*, 830 P.2d at 1068.

In this case however, the Ordinance does not attempt to exercise any land-use authority that is harmonious with the Act. The Act is a total ban.

Second, although the Ordinance expires after five years, the preemption analysis does not change. A city ordinance is preempted by state law regardless of how long that ordinance has legal effect. *See e.g., City of Buford ,* 276 Ga. at 590. A city can no more pass a preempted ordinance that lasts for five years than it can pass a preempted ordinance that lasts indefinitely.

Therefore, because the City's five-year ban substantially impedes the state's significant interest in oil and gas development and production, it is preempted.

Operational Conflict

If the Court did not find the Ordinance to be impliedly preempted for the reasons stated above, it would still find that the Ordinance is preempted because it conflicts with the application of the Act. *See Bowen/Edwards*, 830 P.2d at 1059.

The City's five-year ban conflicts with the Oil and Gas Conservation Act because it prohibits what the Act expressly authorizes the Commission to permit. Section 34-60-106(2)(b) gives the Commission the authority to regulate the "shooting and chemical treatment of wells," along with a host of other means to comprehensively regulate the development and production of oil and gas wells in Colorado.

The City does not and cannot dispute the fact that hydraulic fracturing is a process of chemically treating an oil or gas well. Hydraulic fracturing is a well-stimulation process that uses "the underground injection of large quantities of water, gels, acids, or gases; sands or other proppants; and *chemical additives* . . . ," to extract oil and gas. City's Ex. B at 4, § 2 (emphasis added). Because the Ordinance bans the use of hydraulic fracturing for five-years, it necessarily prohibits a technique to chemically treat wells that the Commission is expressly authorized to permit. Indeed, the Commission has promulgated elaborate rules designed so that the process of hydraulic fracturing is used in accordance with the purposes of the Act. COGA's Ex. 1.

Additionally, the five-year ban eliminates the possibility that Prospect Energy can use hydraulic fracturing within the City's boundaries during the remainder of the initial five-year term of its operator agreement with the City because the operator agreement

ends on May 29, 2018 (prior to the five-year ban's end on August 5, 2018). *See* City's Ex. C at 8, ¶ 5; City's Ex. B at 4, §§ 3, 4. This situation creates an operational conflict between what Prospect Energy contracted for, as permitted by state law, and what the five-year ban prohibits.

A local regulation that conflicts with state law on an issue of mixed local and state concern must fail. For example, a locality cannot impose "technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or . . . impose safety regulations or land restoration requirements contrary to those required by state law or regulation." *Bowen/Edwards*, 830 P.2d at 1060; *see also Colorado Min. Ass'n*, 199 P.3d at 733 (holding that Summit County could not ban the use of cyanide and other chemical reagents in mineral extraction while the MLRA allowed the Mined Lands Reclamation Board to authorize the use of those chemicals in mineral extraction).

Certainly if the City cannot pass conflicting technical conditions, safety regulations or the like, it cannot impose a total ban on hydraulic fracturing while the Act authorizes its use. The five-year ban therefore "forbids what state statute authorizes." *Webb*, 2013 CO 9, ¶ 43.

Conclusion

Based on the foregoing, the City of Fort Collins's five-year ban on the use of hydraulic fracturing and the storage of its waste products within the City's boundaries is preempted by the Oil and Gas Conservation Act.

COGA's Motion for Summary Judgment on the First Claim for Relief is Granted. Defendant's Cross-Motion for Summary Judgment is Denied.

Dated: August 7, 2014.

BY THE COURT:

Gregory M. Lammons
District Court Judge

Northwest Colorado Council of Governments

WATER QUALITY / QUANTITY COMMITTEE (QQ)

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Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
Department of the Army U.S. Army Corps of Engineers

Robert Bonnie
Undersecretary of Agriculture for Natural Resources and the Environment
U.S. Department of Agriculture

Nancy Stoner
Acting Assistant Administrator for Water
U.S. Environmental Protection Agency

RE: Docket ID No. EPA-HQ-OW-2011-0880 Docket ID No. EPA–HQ–OW– 2013–0820

Public Comment on Waters of the United States Rulemaking

Dear Ms. Darcy, Ms. Stoner and Mr. Bonnie:

These comments are submitted by Northwest Colorado Council of Governments Water Quality/ Quantity Committee (QQ) addressing the EPA and Army Corps of Engineers rulemaking regarding the Definition of "Waters of the United States" Under the Clean Water Act (79 Fed. Reg. 22263). QQ's mission is to enable its member jurisdictions to protect and enhance the headwaters of Colorado while facilitating the responsible use of water resources in Colorado. Its members are municipalities, counties, and water and sanitation districts in the headwaters of the Colorado, Gunnison, Yampa and South Platte river basins. We collectively refer to this region as the "headwaters" or headwaters region. Northwest Colorado Council of Governments is the designated Regional Water Quality Management Agency under Section 208 of the Clean Water Act.

While EPA and the Corps routinely conduct determinations of whether wetlands or other water bodies are subject to the CWA as "waters of the United States," recent cases from the Supreme Court of the United States have raised questions about Corps and EPA interpretations. EPA has reported that this uncertainty has resulted in waters not receiving water quality protection under

the CWA, additional burdens on federal agencies, and delayed timelines for permit-seekers.[1] This uncertainty often is manifested at the local government level where land use activities are regulated.

QQ comments focus on the proposed rule's consistency with the direction provided by the courts and the 208 Plan, and the degree to which the proposed rule will result in water quality protection without placing unreasonable burdens on municipalities, counties and special districts charged with protecting water quality. Subject to the comments below, QQ supports the effort reflected by this rule to clarify the definition of waters of the United States.

I. General Comments.

Water quality in the headwaters of Colorado is critically important. Tourism is the largest employment sector in the headwaters region, comprising 48% of all jobs.[2] Tourism in the region includes fishing, hunting, kayaking, rafting, wading, lake and reservoir recreation, wildlife watching, hiking, and snowmaking for ski resorts, all of which depend on clean water. While many tourists recreate in the headwaters, the economic impact of headwater tourism is felt statewide. Travelers to the headwaters region purchase most of their equipment and transportation services in the population centers on the Front Range of Colorado.[3] In addition, water from the headwaters region flows downstream to six other states and Mexico, providing water for use by more than 30 million people. Finally, local governments like those comprising QQ are charged with protecting water quality through their stormwater, wastewater and water treatment systems. Clean Water Act (CWA) protections help to ensure safe drinking water and robust economies. Simplifying and clarifying the jurisdictional scope of federal authority over water bodies is essential to this goal.

II. Comments Specific to Sections of the Proposed Rule.

a. Impoundments.

From our review, it appears that the proposed rule is intended to clarify, but not expand, federal jurisdiction over water in impoundments. If waters of the United States are impounded, they should not lose their jurisdictional status. QQ agrees with this approach because CWA

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[1] Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation, Report No. 09-N-0149 at 1- 2 (2009) <http://www.epa.gov/oig/reports/2009/20090430-09-N-0149.pdf>. This issue is discussed in more detail in Section 3.

[2] Coley/Forrest Inc., "Water and its Relationship to the Economies of the Headwaters Counties," Northwest Colorado Council of Governments, December 2011 <http://nwccog.org/docs/qq/QQStudy_Outreach%20Summary%20Jan%202012.pdf>.

[3] For example, 57% of the economic impact from fishing is experienced in the Front Range, while only 14% is experienced in the headwaters counties. Coley/Forrest Inc., "Water and its Relationship to the Economies of the Headwaters Counties."

requirements are essential to protecting water quality in reservoirs and other man-made water bodies. These water bodies are important to the headwaters economy because they host a wide variety of recreational activities. In addition, waters that flow from impoundments support recreation. More than 38,000 people rafted the Upper Colorado River in 2013 below several impoundments, spending an estimated $4.5 million dollars.[4]

b. Tributaries.

If our concerns we describe below and in the discussion of ditch exemptions are addressed, QQ thinks that the proposed definition and classification of tributaries as waters of the United States is a positive step forward. Even though tributaries in and of themselves are not "navigable waters," their hydrologic connection to waters of the United States provides the physical nexus to navigable waters contemplated by the Supreme Court. We note that non-navigable tributaries to navigable waters are subject to CWA jurisdiction under the existing rules as well.

In mountain regions of the west, almost all streams are, in fact, non-navigable because their source is snowmelt or groundwater. The benefit of clean water to local communities in the headwaters that are dependent on tributaries is substantial. These waters are the lifeblood of headwater communities, serving as drinking water supplies and receiving waters for wastewater discharges. They also support significant beneficial uses such as fisheries, boating, wading and other water-based uses all of which warrant CWA protection, especially considering that these waters flow downhill to join with other streams to create navigable waters. Tributary wetlands also serve a critical function by absorbing naturally occurring pollutants such as heavy metals. Without CWA protection, these wetlands could no longer perform this function.

The nexus between headwaters and Clean Water Act goals is aptly described in a paper published in the Journal of the American Waters Resources Association: "[H]ydrological connectivity allows for the exchange of mass, momentum, energy, and organisms longitudinally, laterally, vertically, and temporally throughout stream networks and the underlying aquifers. Therefore, hillslopes, headwater streams, and downstream waters are best described as individual elements of integrated hydrological systems."[5] Thus, CWA protection for waters at the top of the watershed whether they are tributaries or "tributary wetlands" is essential because these waters affect the biologic, chemical, and physical integrity of downstream navigable waters. There is no rational basis to exclude these waters from CWA protection because they always are functionally interconnected to the waters that they join.

QQ offers the following clarifications to this part of the proposed rule:

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[4] Colorado River Outfitters Association, "Commercial River Use in the State of Colorado, 1988-2013" <http://www.croa.org/wp-content/uploads/2014/05/2013-Commercial-Rafting-Use-Report.pdf>.

[5] Tracie-Lynn Nadeau and Mark Cable Rains, "Hydrological Connectivity Between Headwater Streams and Downstream Waters: How Science Can Inform Policy" *Journal of the American Water Resources Association* 43:1 (February 2007):128.

1. Mountain streams in the western United States often are diverted into pipes and tunnels for portions of their reach and then resurface downstream to join the main stream once again. The proposed rule correctly recognizes that such modifications do not alter the interconnectivity of a tributary to navigable waters and should not change the jurisdictional status of the tributary. However, QQ tributaries that flow through shale fields or other natural barriers should not be categorically defined as waters of the United States because those waters may have no connection to waters of the United States. Instead, QQ recommends that tributaries interrupted by natural features be evaluated under the significant nexus test.

2. The proposed definition of "tributaries" would include tributary streams whose flow is due to intercepted groundwater (as long as they have a bed, bank and ordinary high water mark). These pristine streams fed by groundwater are common in the headwaters region, where they are often important sources of drinking water. QQ supports the inclusion of headwaters springs fed from groundwater, and encourages the EPA and Corps to clarify that groundwater-fed tributaries are specifically included in this proposed definition. See also Section e.3.

3. Some waters may qualifying as a tributary under the proposed rule because they have banks, a bed, and an ordinary high water mark. However, the same drainage systems may exist wholly in uplands, drain only uplands, and contribute a minimal amount of flow only during significant rain events. Under the proposed rule, it appears that a natural drainage system with a bed, bank, and ordinary high water mark would be automatically jurisdictional even if it may exist wholly in uplands, drain only uplands, and contribute a minimal amount of flow only during significant rain events. With such waters, a significant nexus may not exist with traditionally navigable water. The rule should clarify how the agencies would treat such natural drainage systems.

4. Currently, nationwide permits (NWPs) are available for the discharge of dredge and fill material into an ephemeral stream if the activity does not impact more than 300 linear feet of the streambed and with a determination of minimal impacts from the activity. QQ members rely on the expediency the NWPs provide for small-scale projects. As written, the rule creates confusion to the status of NWPs relying on the 300 linear foot assessment because the proposed definition of "tributary" would include all streams with a bed, bank and OHWM. The proposed rule should clarify that NWP evaluations under the 404 program are not affected by the rulemaking.

4. QQ supports the continued exemption for tributary ditches and canals that are part of wastewater treatment systems. However, we propose that tributary ditches or canals that are part of stormwater management systems and water treatment systems also should be expressly excluded from the definition of tributaries in particular, and waters of the United States more generally. See comment e. 1. below under the heading "wastewater systems" for more discussion of this issue.

5. Finally, the existing CWA exemptions for agricultural activities, including agricultural ditches, are essential to the economic well-being of rural headwater areas. The

existing drainage ditch maintenance exemption under Section 404(d) is also essential for local governments. Nothing in the definition of tributary should affect these exemptions. Because the proposed definition of tributary extends jurisdiction to man-made canals, the proposed rule should emphasize that it does not alter the Section 404(d) exemptions otherwise included in the Clean Water Act. See comment e. 2 below under the heading "ditches" for more discussion of this issue.

c. Adjacent Waters and Wetlands.

QQ agrees with defining all waters that are adjacent to a jurisdictional water as categorically jurisdictional as long as the rule continues to include within the definition the characteristics of these adjacent waters**.** The list of characteristics ensures that the adjacent waters are part of "an aquatic system incorporating navigable waters" as required by the Supreme Court in *Rapanos*. As Justice Kennedy observed, wetlands should be covered if they "possess a significant nexus with navigable waters." See *Rapanos* at 787.

The amicus curiae brief to *Rapanos* filed by the Attorneys General of Michigan and New York, with 34 states and the District of Columbia as signatories said that the protection of non-navigable tributaries and wetlands is essential to protecting downstream navigable waters because non-navigable tributaries and wetlands compose the vast majority of a watershed and have the best ability to reduce pollution near the sources through natural processes. These functions provide the "measure of the significance of the connection for downstream water quality," required by Justice Kennedy in the *Rapanos* case. Because wetlands that contribute flow to a water of the United States are defined as jurisdictional tributaries under the proposed rule, wetlands adjacent to them also would be considered jurisdictional. We support this approach to adjacent wetlands because it recognizes that they serve a function, such as sediment trapping or water purification, that cannot be separated from the wetlands to which they are adjacent or the rest of the watershed.

The proposed rule does create some confusions over how the current assessments for Nationwide Permits (NWPs) for some dredge and fill activities may change with the new definition of "adjacent." Currently, NWPs are available for the dredging and filling of material if the activity does not impact more than 300 linear feet of the streambed. As discussed above in comment b. 3., NWPs are essential to local government functions. As proposed, the definition of "adjacent" waters would include riparian areas and floodplains, which creates ambiguity as to how agencies will calculate whether 300 linear feet is calculated. QQ recommends clarifying that current practice of assessing 300 feet of the *streambed,* not waters in the neighboring riparian area or floodplain, remains in place.

d. "Other Waters" with a Significant Nexus to Traditionally Navigable Waters.

1. Significant Nexus Test.

This significant nexus test seems to be based on Justice Kennedy's concurring opinion in

Rapanos[6] and existing agency guidance.[7] Although QQ is in favor of a case-specific analysis as described in the rule, we are concerned that the definition of "significant" may need further work so that waters are not inappropriately brought under jurisdiction of the CWA with too minor a connection to a traditionally navigable water. The rule would benefit from examples of what constitutes a significant nexus so that there is less uncertainty about what might fall under the definition of waters of the United States.

Within the "significant nexus" definition, the proposed rule also directs that agencies may establish a significant nexus "in combination with other similarly situated waters in the region."[8] Incorporating similarly situated waters into the significant nexus analysis allows agencies to look more broadly at regional river systems. This approach is consistent with the watershed approach taken by many in the QQ region to protect water quality and is consistent with the *Rapanos* decision.[9] It also may allow agencies an opportunity to use data generated in other jurisdictional determinations when appropriate.

2. Intermittent Streams.

Protecting these intermittent streams that are, in fact, connected to waters of the United States provides an opportunity to more fully address the non-point source impacts of future residential, commercial and industrial development in the QQ region located along mountain streams. The QQ region is projected to face additional population growth and an increased emphasis on resource extraction industries in upcoming years that could endanger water quality.[10] QQ supports the significant nexus analysis for other waters.

e. Exemptions.

Several of the five proposed exemptions need refining. We offer the following comments to help clarify these exemptions.

1. Wastewater systems.

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[6] 547 U.S. 715, 780 (2006), stating that a "significant nexus" exists "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity" of navigable waters.

[7] EPA and Army Corps of Engineers Guidance Regarding Identifications of Waters Protected by the Clean Water Act ("Guidance"), 72 Fed. Reg. 67304 (Nov. 28, 2007), available at: <http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf>.

[8] 79 Fed. Reg. 22262.

[9] 547 U.S. at 780.

[10] CDM, Colorado Basin Consumptive Needs Assessment, 4.2.1.2 (2010), available at: <http://cwcb.state.co.us/water-management/basin-roundtables/Documents/Colorado/ColoradoBasinNeedsAssessmentReport.pdf>.

In both the existing rule and proposed rule, wastewater treatment systems, including treatment ponds and lagoons are not considered "waters of the United States." This exemption is only listed for wastewater treatment, which means that water treatment systems could fall under CWA jurisdiction. Local governments and water providers own and manage treatment ponds and lagoons that are uses for drinking water treatment and stormwater management. QQ recommends including all water treatment systems, not just wastewater, under this exemption.

2. Ditches.

The proposed rule addresses the jurisdiction of ditches in two places. The proposed rule created two exemptions for ditches wholly in uplands and ditches that do not contribute flow to a traditionally navigable water. The definition of "tributary" includes all ditches not exempted. The proposed rule does not change any existing exemptions for activities on ditches in the CWA statute or other agency regulations. QQ offers several comments to clarify the treatment of ditches in the proposed rule and its relationship with existing exemptions.

a. Upland ditches and ditches not contributing flow.

QQ supports the proposed categorical exemptions for ditches located wholly in uplands and ditches that do not contribute flow to traditionally navigable waters. We believe these proposed exemptions complement and simplify existing exemptions in the Clean Water Act and are consistent with court cases.

QQ recommends that the rule explain how EPA or the Corp will determine if a ditch is "wholly" in uplands; many public infrastructure ditches are part of linked systems that may run for hundreds of miles.

QQ also recommends further clarifying how the agencies would determine how a ditch "contributes flow" to navigable waters. Many ditches may contribute very limited flow only during significant storm events or may spill occasionally while not normally contributing flow.

b. Maintenance of ditches.

The proposed rule does not change (and in fact cannot change) exemptions for activities listed in Section 404(d) of the Clean Water Act. Currently and under the proposed rule, the discharge of dredged or fill material associated with construction or maintenance of irrigation ditches or the maintenance (but not construction) of drainage ditches does not require a Section 404 permit.[11] These types of discharges are exempt as long as a case-by-case determination establishes that the discharge is not part of "any activity having as its purpose bringing an area of navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced…"[12] Local governments own and

[11] 404(f)(1)(C) of the CWA (see also 33 CFR 323.4(a)(3) and 40 CFR 232.3(c)(3)).
[12] Section 404(f)(2); s*ee also* 40 CFR 232.3(b).

operate ditches such as flood control channels, drainage conveyances, stormwater, and irrigation ditches for parks and other public facilities, and these exemptions are essential for local governments to fulfill these responsibilities.

The two proposed categorical exemptions are consistent with these existing ditch exemptions. Any activity on the proposed exempted ditches will not significantly affect navigable waters and therefore will never be part of any activity with a purpose to bring an area of navigable waters into a new use. The proposed categorical exemptions will eliminate the need for the case-by-case determination currently required under the existing ditch exemptions. The proposed exemptions for ditches are also consistent with case law, as any activities on these types of ditches will not have a significant nexus to traditionally navigable waters.

Because of the importance of these existing exemptions and the considerable concern over the proposed rule's affect on the existing exemptions, the proposed rule should be explicit that the proposed rule would not change these exemptions in any way as the proposed rule does for ranching, farming and silviculture exemptions.

c. Organization of ditch regulations.

Because how ditches are addressed under the CWA is so important to local governments, agricultural interests, and others who rely on ditches for water supply and irrigation, QQ recommends combining into one place all sections of the proposed rule pertaining to ditches. As currently proposed, jurisdictional ditches are addressed in the definition of "tributary," while ditch exemptions are intermingled with the other proposed exemptions. Presenting these in one place may serve to clarify that these sections are not in conflict and alleviate some of the anxiety about the interplay between ditches as "tributaries" and the two ditch exemptions.

3. Groundwater Collection Systems.

The proposed rule should clarify that groundwater collections systems are not exempt from Section 402 permits for several reasons. First, subterranean systems for draining reservoirs and other water bodies are common in the headwaters region; protecting downstream water quality with a Section 402 permit is essential to maintaining downstream water quality. Second, produced water from oil and gas extraction may be considered groundwater collection systems. In both of these cases, downstream water quality may be degraded if Section 402 permit jurisdiction is challenged. [13] The proposed rule should clarify that groundwater collection and drainage systems are not exempt from Section 402 requirements.

III. Conclusion.

[13] While current Colorado law would not exempt groundwater collection systems from Section 402 permitting, QQ is concerned about the argument that a specific exemption in the Clean Water Act preempts state authority over groundwater collection systems.

The protections for water quality offered in the proposed rule are critically important for the headwaters economy and environmental health. Water quality protection in the headwaters will become increasingly important as the region sees increased development and future water needs. Protecting water quality also means protecting the region's economic backbone of tourism, recreation, and agriculture. We believe this rulemaking achieves much-needed clarity and restores water quality protections that have been in place since the 1970s but were brought into question through the Supreme Court cases.

However, the proposed rule can be improved. As written, local governments could face additional expenses because of remaining uncertainties and the failure to exempt those activities that are essential to their responsibility to protect public health, safety and the environment. QQ requests your consideration of our comments. Please do not hesitate to contact me directly or Torie Jarvis at qqwater@nwccog.org for more information or questions.

Sincerely,

James Newberry
Chair of NWCCOG/ QQ and Grand County Commissioner

cc:

Senator Mark Udall
Senator Michael Bennet
Representative Jared Polis
Representative Scott Tipton
Karen Hamilton, Chief, Aquatic Resource Protection and Accountability Unit, EPA Region 8
NWCCOG/ QQ Members

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

September 16, 2014

Administrator Gina McCarthy
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Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Re: "Waters of the United States" Rulemaking
Docket No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

We are the attorneys general of seven states and the District of Columbia, and we write to voice our support of the rule proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) defining the scope of the "waters of the United States" protected under the Clean Water Act. *See* 79 Fed. Reg. 22188 (April 21, 2014).

The proposed rule is an important action to advance the statute's objective "to restore and maintain the chemical, physical and biological integrity of the Nation's Waters." 33 U.S.C. § 1251(a). The rule would establish clear categories of waters within the protection of the law by defining "waters of the United States" to include tributaries and adjacent waters (such as wetlands), along with traditional navigable waters, interstate waters, and the territorial seas. The rule is based on sound science, and takes into account the practical and ecological realties of our Nation's interconnected waters. It promotes the consistent and efficient implementation of

State water pollution programs across the country in accordance with the principles of "cooperative federalism" on which this landmark statute is based. We support the proposed rule for three reasons.

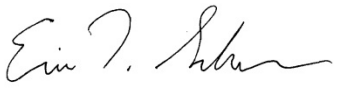
First, the proposed rule is grounded in peer-reviewed scientific studies that confirm fundamental hydrologic principles. Water flows downhill, and connected waters, singly and in the aggregate, transport physical, chemical and biological pollution that affects the function and condition of downstream waters, as demonstrated by the many studies on which EPA and the Corps rely. The health and integrity of watersheds, with their networks of tributaries and wetlands that feed downstream waters, depend upon protecting the quality of upstream headwaters and adjacent wetlands. Comprehensive coverage under the CWA of these ecologically connected waters is essential to achieve the water quality protection purpose of the act.

Second, the proposed rule advances the statute's protection of state waters downstream of other states by securing a strong federal "floor" for water pollution control, thereby maintaining the consistency and effectiveness of the downstream states' water pollution programs. The federal statute preempts many common-law remedies traditionally used to address interstate water pollution, leaving the act and its regulatory provisions as the primary mechanism for protecting downstream states from the effects of upstream pollution. Of note is the fact that all of the lower forty-eight states have waters that are downstream of the waters of other states. By protecting interstate waters, the proposed rule allows states to avoid imposing disproportionate limits on in-state sources to offset upstream discharges which might otherwise go unregulated.

Third, by clarifying the scope of "waters of the United States," the proposed rule would promote predictability and consistency in the application of the law, and in turn help clear up a confusing body of case law that has emerged. Since the Supreme Court's plurality decision in *Rapanos v. United States,* 547 U.S. 715 (2006), a complex and confusing split has developed among the federal courts regarding which waters are "waters of the United States" and therefore within the Act's jurisdiction. The federal circuits have embraced at least three distinct approaches in instances of uncertain CWA jurisdiction, with some courts adopting Justice Kennedy's significant nexus test, some adopting the plurality's test, and some tending to defer to the agencies' fact-based determinations. Many courts have actively avoided ruling on the controlling law, highlighting the need for Agency clarification. The confusion and disagreement in the courts have produced inconsistent outcomes and contribute to the ongoing uncertainty regarding the Act's

application. The proposed rule's clear categories of waters subject to the Act would alleviate much of the jurisdictional uncertainty and allow for more efficient administration of the Act. The rule's clarity would be of benefit to the states because it would ease some of the administrative burden of having to make many fact-based determinations employing uncertain tests. In this regard, in the rulemaking the agencies have requested comments as to how a final rule could ease that burden further.

For these reasons we express our support for EPA's and the Corps' proposed rules defining the scope of waters protected under the CWA, and urge its promulgation by the agencies.[1]



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District of Columbia Attorney General

Bob Ferguson
Washington State Attorney General

[1] While the undersigned attorneys general support the proposed rule, they may object to other aspects of the proposal or the agencies' rationale for it and, accordingly, reserve their rights concerning such objections.

cc: Ken Kopocis, EPA Assistant Administrator for Water
Avi S. Garbow, Esq., EPA General Counsel
Chief Counsel, Army Corps of Engineers
Water Docket

NWCCOG/WATER QUALITY AND QUANTITY COMMITTEE

SCOPE OF SERVICES 2015

I. INITIATIVES AND PROJECTS FOR THE YEAR 2015

A. COALITIONS AND EDUCATION (Implements Policies I, II, V)

(1) Facilitate "fact-based" discussions of headwater impacts associated with Front Range growth.

(2) Continue to inform Front Range policymakers and legislators about headwaters issues and transmountain diversion impacts in appropriate forums.

(3) Collaborate with other East Slope and West Slope organizations to strengthen public awareness and educate Front Range citizens about headwater issues and transmountain diversion impacts on the West Slope.

(4) Track and educate members on emerging water-related recreation issues.

(5) Develop relationship with state-wide media to promote education on QQ issues. Send letters to the editors of the local and state newspapers on water issues to refute mis-information.

(6) Organize and present information, such as the Economic Impact Study at meetings, workshops and other venues to advocate headwater perspectives throughout the State.

(7) Serve on appropriate State and local task forces or committees to promote QQ's interests.

(8) Track and coordinate efforts with other groups and organizations to ensure awareness of diverse West Slope water concerns.

(9) Increase efforts to inform certain stakeholders of unintended adverse impacts to local authority; and attempt to convey a more thorough understanding of current law.

B. BASIN ROUNDTABLES AND 1177 PROCESS (Implements Policies I, III, V)

(1) Track the outcome of any potential legislation as a result of this process that may be counter to Headwater interests.

(2) Participate in the Colorado Basin Roundtable and prepare reports to members as needed when important issues arise.

(3) Evaluate opportunities to identify and promote headwater interests through this initiative.

(4) Track IBCC process and alert members of issues that arise. Prepare draft letters and comments as needed.

(5) Participate in the formation and updating of the Colorado Water Plan; advocate for Headwaters interests; provide support and analysis to efforts of elected officials and member jurisdictions to influence water plan policy.

C. EVALUATE AND MONITOR TRANSMOUNTAIN DIVERSION PROPOSALS (Implements Policies I, II and III).

(1) Participate in environmental assessment processes.

(2) Retain and supervise necessary technical consultants.

(3) Work with member jurisdictions to cooperate on review and mitigation of impacts that go beyond the boundaries of the permitting County through intergovernmental agreements.

(4) Assist the member counties and municipalities with 1041 permitting as requested.

(5) Follow activities of Front Range Water Council.

D. STREAM MANAGEMENT AND NON-CONSUMPTIVE NEEDS (Implements Policies II, III, IV, V)

(1) Continue to work with QQ members and Front Range diverters to implement solutions to identified in–stream impacts of transmountain diversions.

(2) Provide technical assistance to Colorado River Cooperative Agreement implementation projects. Staff the Learning By Doing process.

(3) Provided the opportunity, explore and promote UPCO concept with other basins, including the "Stream Management Plan" approach.

(4) Assist member jurisdictions in efforts to support Colorado Water Conservation Board ("CWCB") Instream Flow Program and ensure state representatives understand the value of the program.

(5) Assist member jurisdictions in the creation and protection of recreational in-channel diversions. Track Recreational In-channel Diversions filings and CWCB hearings in QQ region.

(7) Assist members to determine nonconsumptive stream flow needed to protect recreation and environmental values during Colorado River Roundtable process.

(9) Represent member interests in Wild and Scenic Rivers processes.

(10) Continue to work with municipalities to implement some form of the Conserve to Enhance program that would allow for additional in-stream flows.

E. LOBBYING IN COLORADO LEGISLATIVE SESSION (Implements Policies I, II, V)

(1) Provide policy analysis on legislative bills as they affect members' authority.

(2) Participate in development of any state water planning legislation.

(3) Lobby on water-related bills that QQ has taken a position on, or based on QQ's mission and policies.

(4) Draft testimony, or assist in preparing testimony for QQ elected officials, as needed.

(5) Communicate and collaborate with other entities where interests overlap.

(6) Provide reports and action alerts to members on legislation, outlining pros, cons and QQ's position.

(7) Prepare alternatives to legislation that is counter to QQ's interests as directed by the QQ Committee.

(8) Evaluate and encourage legislation that furthers QQ interests. Possibilities include reuse, instream flows, metropolitan efficiency, special district legislation, or favorable changes in water law to promote conservation.

(9) Participate in the Colorado Water Congress and other organizations that may create and or influence legislation pertinent to QQ's issues.

F. WATER QUALITY PROTECTION (Implements Policies II, III, IV, V)

(1) File motions for party status on behalf of member jurisdictions and Participate in State Water Quality Control Commission ("WQCC") rulemakings, hearings and meetings that affect Headwaters.

(2) Participate in stakeholder meetings, Water Quality Control Division ("WCQD") workgroups, and any rulemaking hearings.

(3) Monitor WQCC and WQCD activities.

(4) Continue to participate in the Snake River Task Force to identify remediation alternatives and seek funding for projects. Work closely with the State and others to develop appropriate water quality standards for the Snake River in the next five to ten years.

(5) Finalize 208 Plan approval by the WQCC. Coordinate with NWCCOG to maintain 208 administrative responsibilities as determined by membership.

(6) For a fee that will be passed on to developers, provide 208 Plan consistency review of land development proposals and water and sanitation facility siting on behalf of member jurisdictions during the development application process.

(7) Coordinate with Water and Sanitation Districts on issues of interest.

(8) Represent members in discussions and hearings related to nutrient standards and other rulemakings and assist members in the site specific standards hearing.

(9) Provide technical staff to Grand Lake Clarity processes.

G. LOCAL, STATE AND FEDERAL REGULATIONS (Implements Policy I, III)

(1) For reduced hourly rate, provide legal and technical assistance to member's staff in revisions of their 1041 Regulations or other land use regulations. (Since the revision processes are specific to a particular member, the individual revisions will not fall within services covered by dues. Barbara, Torie and Lane will coordinate to minimize costs to members.)

(2) Neutralize objections raised by the Front Range and through the IBCC process about the 1041 process.

(3) Work with members in the QQ region on refinements to land use regulations, policies and technical approaches to protect water quality. Educate planning departments about the model water quality regulations prepared by QQ and update as necessary.

(4) Spearhead efforts to maintain County authority over oil and gas operations, including on federal lands, so that water quality and quantity are protected. Work with Department of Natural Resources to introduce County in-put into federal mitigation decision on leases.

(5) Participate in other state rulemaking proceedings as needed to protect local authority over environmental and water quality impacts of oil and gas, mining and water projects.

(6) Assist members as needed with federal legislation that approves the study of, or development of, projects leading to further potential transmountain diversions.

H. EVALUATE GROWTH IMPACTS TO WATER RESOURCES FOR MEMBERS (Implements Policies II, IV, V)

(1) Inform public entities and private sector of regional water quality and quantity impacts of their proposals and identify mitigation measures.

(2) Continue to assist ski areas through the NEPA processes, 404 permits and 401 certifications in an effort to analyze in-basin impacts.

(3) Assist QQ members with the development and implementation of water conservation measures outlined in the Colorado Water Conservation Board Water Conservation Planning Guidelines.

(4) Work with appropriate members to develop a water conservation plan based on the Conserve to Enhance model. Act as the interface with the University of Arizona Water Resources Research Center and QQ member(s) interested in developing a pilot project.

II. LEGAL SERVICES

A. Assist members to update 1041 or other land use regulations applicable to water matters at reduced hourly rate. Prepare model regulations for the region.

B. Represent members in rulemaking hearings in front of Colorado Water Quality Control Commission and other state agencies. (When rulemaking hearings are complex and exceed legal time allotted to QQ, fees for this service may be charged to the Legal Defense Fund after approval by QQ Board.)

C. Prepare briefs on behalf of members or the organization relating to legal matters of regional importance.

D. Stay abreast of evolving judicial and legislative decisions that affect member authority and responsibilities in land use, water quality and water quantity issues. Prepare reports to members of these developments.

III. QQ PROGRAM ADMINISTRATION

A. Organize and prepare for QQ meetings.

B. Oversee QQ's program finances and report to QQ Committee.

C. Meet with NWCCOG Executive Director as necessary to keep her apprised of issues that affect the NWCCOG organization.

IV. MEMBER SERVICES

A. Represent QQ Committee at meetings, rulemaking hearings, and state water policy forums.

B. Be available to QQ members to answer questions and provide technical, legislative and legal expertise on matters regarding water quality or quantity.

C. Meet with members on individual basis to update elected officials on QQ's activities. Present QQ Program overview to newly-elected officials.

E. Design QQ meetings as a forum for exchange of ideas and establishment of policy.

F. Place QQ Committee members on key committees, commissions and boards relative to water quality and quantity issues. Participate on Boards and Commissions.

G. Provide reports and white papers on regulations, Clean Water Act, water quality and quantity issues.

H. Encourage and support intergovernmental, inter-jurisdictional cooperation in water matters. Assist members to implement intergovernmental agreements.

COST: FLAT RATE FEE OF $154,900.00. As indicated in the scope of work, and as approved by the QQ Board, the Legal Defense Fund may be used to fund complex rule making hearings, amicus briefs, or other legal and technical defense costs that go beyond this scope of services.

WATER QUALITY / QUANTITY COMMITTEE (QQ)

P.O. Box 2308 ● Silverthorne, Colorado 80498
970-468-0295 ● Fax 970-468-1208 ● email: qqwater@nwccog.org

CONTRACT

Northwest Colorado Council of Governments Water Quality/Quantity Program
and
Barbara Green for Sullivan Green Seavy, Lane Wyatt & Torie Jarvis
Year of 2015

This Contract is entered into this _____, by and between the Northwest Colorado Council of Governments QQ Program (hereinafter "QQ") and Barbara Green for Sullivan Green Seavy ("SGS"), Lane Wyatt, and Torie Jarvis (hereinafter "SGS, Wyatt & Jarvis").

NOW, THEREFORE, the parties mutually agree as follows:

1. Employment of SGS, Wyatt & Jarvis. QQ hereby agrees to engage SGS, Wyatt & Jarvis and SGS, Wyatt & Jarvis hereby agrees to perform the services hereinafter set forth.

2. Scope of Services. In consideration for moneys to be received from QQ, SGS, Wyatt & Jarvis shall do, perform, and carry out in a satisfactory manner, as determined by QQ, all work elements indicated in the "Scope of Services" set forth in attached Exhibit A incorporated hereinafter by reference. The Scope of Services is contingent upon receipt of the sum listed in Appendix A.

3. Time of Performance. The services of SGS, Wyatt & Jarvis shall commence January 1, 205 and shall be undertaken in such a sequence as to assure completion of this Contract by December 31, 2015. After December 31, 2015, the contract may be extended by mutual agreement by both parties on a month to month basis.

4. Method of Payment. SGS, Wyatt & Jarvis shall submit a monthly invoice to QQ describing the activities associated with the various work elements described in Exhibit A. Upon receipt of invoice QQ shall compensate SGS, Wyatt & Jarvis for work performed.

5. Compensation. SGS, Wyatt & Jarvis shall be compensated monthly based on the proportion of the total contract amount for that billing period.

   The total amount of compensation paid by QQ to SGS, Wyatt & Jarvis shall not exceed the maximum dollar amount established in the "Scope of Services" set forth in the attached Exhibit A unless QQ and SGS, Wyatt & Jarvis require additional services not herein defined.

6. Amendment. QQ may, from time to time, require changes in the "Scope of Services" to be performed by SGS, Wyatt & Jarvis. Such changes shall be incorporated into a Letter of Agreement between SGS, Wyatt & Jarvis and QQ Chair and Vice-Chair, which shall serve as an amendment to this contract with SGS, Wyatt & Jarvis and QQ.

7. Assign-ability. SGS, Wyatt & Jarvis shall not assign any interest in this Contract and shall not transfer any interest in the same without prior consent of QQ.

8. Termination of Contract by QQ for Cause. If SGS, Wyatt & Jarvis shall fail to fulfill in a timely and proper manner its obligation under this Contract, or if SGS, Wyatt & Jarvis violates any of the terms or conditions of this Contract, QQ shall have the right to terminate this Contract by giving written notice to SGS, Wyatt & Jarvis at least forty five (45) days before the effective date of such termination. In the event of termination, all finished or unfinished documents, data, studies, or other material prepared by SGS, Wyatt & Jarvis shall, at the request of QQ, be transmitted to QQ.

9. Termination of Contract by SGS, Wyatt & Jarvis. If QQ fails to make payment as herein provided, SGS, Wyatt & Jarvis may terminate this Contract by giving written notice to QQ at least ten (10) days before the effective date of such termination, during which time QQ may cure the default by making payment. In the event QQ fails to cure, SGS, Wyatt & Jarvis shall retain all materials and documents not previously given to QQ until an agreement is satisfactorily negotiated between QQ and SGS, Wyatt & Jarvis. If SGS, Wyatt & Jarvis propose to terminate this contract for reasons other than failure to make payment they shall give at least forty-five (45) days notice.

10. Agreement Contains All Understandings. This document represents the entire integrated agreement between QQ and SGS, Wyatt & Jarvis and supersedes all prior negotiations, representations, or agreements either written or oral.

IN WITNESS WHEREOF, QQ and SGS, Wyatt & Jarvis have executed this agreement on the date written above.

Chairperson Date
NORTHWEST COLORADO COUNCIL OF GOVERNMENTS QQ COMMITTEE

Barbara Green Date

Lane Wyatt Date

Torie Jarvis Date

Water Quality/Quantity Budget

ACCOUNT NAME		2013 Actual		Actual 2014 Budget		Actual 2015 Budget
REVENUES						
County Pledges		$ 95,500.00		$ 95,500.00		$ 95,500.00
Municipal Pledges		$ 42,000.00		$ 42,150.00		$ 42,000.00
Assoc. Member Pledges		$ 3,800.00		$ 4,000.00		$ 3,800.00
Water & Sanitation Pledges		$ 11,600.00		$ 11,600.00		$ 11,600.00
Interest Income		$ 29.00				$ -
Reimbursed Expenses		$ 1,205.00		$ 2,000.00		$ 2,000.00
L&C Fellowship				$ 15,000.00		$ -
TOTAL REVENUES		$ 154,134.00		**$ 170,250.00**		**$ 154,900.00**
EXPENSES						
Contract Services						
Wyatt, Green & Koenig		**$ 154,134.00**		**$ 170,250.00**		**$ 154,900.00**
TOTAL EXPENSES		**$ 154,134.00**		**$ 170,250.00**		**$ 154,900.00**
Defense Fund Balance		**$ 98,346.93**		**$ 98,346.93**		**$ 98,346.93**