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

October 29, 2014

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 appointed by Executive Order of the governor of Colorado to prepare and implement the region's 208 Plan.

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 appreciates the efforts that have been made to clarify federal jurisdiction over waters of the United States. EPA has stated that the proposed rule is not intended to expand such jurisdiction. However, many are concerned that the proposed rule does, in fact, go beyond existing practices, especially when it comes to tributaries.

The following comments focus on the proposed rule's consistency with the direction provided by the courts, and the region's 208 Plan.

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.

If waters of the United States are impounded, they should not lose their jurisdictional status. QQ agrees with the approach in the proposed rule because CWA requirements are essential to protecting water quality in reservoirs and other man-made water bodies. These water bodies are

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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."

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 confusion 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 is 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. This is particularly important given EPA's stated intent to simplify jurisdictional scope of federal authority.

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.

It is important to understand that in the arid West, water supply via ditches is common, particularly in rural headwaters communities. Ditches historically divert water directly from tributary streams and rivers, and frequently return much needed water as return flow to the system.

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 operate ditches such as water supply, 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. Removing "ditches" from the definition of tributary also is consistent with existing exemptions under Section 404(f) of the Clean Water Act.

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.

How EPA addresses ditches 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 proposed 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.

[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).

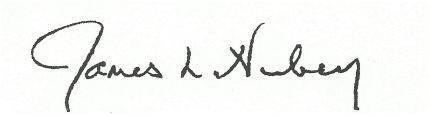
In both of these cases, downstream water quality may be degraded if Section 402 permit jurisdiction is challenged. [13] The proposed rule should clarify that groundwater collection and drainage systems are not exempt from Section 402 requirements.

III. Conclusion.

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 attempts to provide much-needed clarity water quality protection 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

[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.