

P.O. Box 2308 • Silverthorne,
Colorado 80498



970-468-0295 • Fax 970-468-1208
qqwater@nwccog.org

QQ Quarterly Board Meeting

Friday, March 1, 2019

10 AM – 3 PM

[Miller Ranch Community Room](#) (2nd Floor)

25 Mill Loft St., Edwards, CO 81632

AGENDA

- 10 AM Introductions
- 10:15 AM Discussion with new Colo. Dep't of Natural Resources Director and former Summit County Commissioner *Dan Gibbs*
- 10:45 AM Panel update on Colorado River Cooperative Agreement implementation
Jessica Brody, General Counsel, Denver Water
Tom Hogeman, Frisco Bay Marina General Manager
Karn Stiegelmeier, Commissioner, Summit County
Ed Moyer, Assistant Manager, Grand County
- 12:00 PM Lunch
- 12:45 PM Member updates
(we recommend 1-2 minutes. 2 minutes for 25 members= 50 minutes)
- 1:30 PM Update on "Waters of the US" 2019 Proposed Rule
Christopher McMichael, legal intern with Sullivan, Green, Seavy
- 2:00 PM Water Quality updates
Ashley Bembenek, Alpine Environmental Consultants LLC
- 2:30 PM Legislative positions and updates. *Torie*
- 2:45 PM Review of any other matters (other projects, media opportunities, etc.)
- 3:00 PM Adjourn

Groups sue to stop reservoir expansion

FROM SKI-HI NEWS, Grand County

<https://www.skyhinews.com/news/groups-sue-to-stop-reservoir-expansion/>

December 21, 2018

Denver Water's long-awaited Gross Reservoir expansion hit a potential snag on Wednesday when several environmental advocacy groups filed a lawsuit in federal court in hopes of stopping the project before construction can begin.

On Wednesday a collection of six environmental advocacy groups – Save the Colorado, the Environmental Group, Wildearth Guardians, Living Rivers, Waterkeeper Alliance Inc. and the Sierra Club – filed a lawsuit in Colorado's federal district court against the proposed Gross Reservoir Expansion Project, alternately called the Moffat Firming Project. Gary Wockner, director of Save the Colorado, explained the aim of the lawsuit.

"Our goal is to stop this project in its tracks," Wockner stated.

The Gross Reservoir Expansion Project is a water infrastructure construction project of Denver's municipal water supplier Denver Water. The project looks to increase the water storage capacity of Gross Reservoir, located southwest of Boulder near Pinecliffe, by an additional 77,000 acre feet; roughly tripling the reservoir's capacity. To accomplish that goal Denver Water plans to raise the height of the Gross Dam by 131 feet. If the project does become a reality the new Gross Dam will become the tallest dam in Colorado history.

The lawsuit filed by the environmental groups does not name Denver Water and instead is directed at the US Army Corps of Engineers, the Department of the Interior and the US Fish and Wildlife Service. The 57-page complaint lays out 32 separate specific claims related to alleged violations of the National Environmental Policy Act, the Clean Water Act and the Endangered Species Act.

The alleged violations claimed by the environmental groups cover a wide range of technical issues related to the formal processes by which large construction projects, such as the Gross Reservoir Expansions, are approved by federal agencies. Many of the claims made by the environmental groups revolve around allegations that the Corps of Engineers, Interior Dept. and US Fish and Wildlife failed to exercise independent judgment related to claims made by Denver Water about the project.

"Denver Water's proposal to build the largest dam in Colorado history will hurt the 40 million people in six states and two countries who depend on the Colorado River – a critical but disappearing, resource – for their water supply," said Daniel E. Estrin, general counsel and advocacy director at Waterkeeper Alliance. "Waterkeeper Alliance stands united with our many Colorado River Basin Waterkeepers who are fighting to protect their waterways and their communities from this senseless and destructive water grab."

For their part officials from Denver Water said the court filing did not surprise them.

"We expected it," Jim Lochhead, CEO of Denver Water, said. "This is a really critical project for Denver Water. In the last 15 years we have come close to running out of water a couple of time at the north end of the system."

Lochhead noted that those two incidents came in 2002 and 2013.

While Denver Water is not directly named in the lawsuit Lochhead said the organization will be entering the lawsuit to "provide our own perspective on the adequacy of the approvals."

"We are confident the federal agencies follow regulations and federal law," Lochhead said. "I think a court will uphold the findings by those agencies."

When asked whether he believed Denver Water and the environmental groups who oppose the Gross Reservoir Expansion Project could reach some form of compromise agreement Lochhead answered, saying, "I think their position is pretty clear."

In July 2017 Denver Water received its second-to-last permit approval for the Gross Reservoir Expansion Project. The project is still awaiting final approval of a hydropower license amendment application before any construction can begin on the project. Lochhead said Denver Water anticipates receiving final permit approval "really any time."

The legal process surrounding Gross Reservoir has deep significance to Grand County. The county serves as the source for much of the water Denver Water relies upon, which is transported out of the county through the Moffat Tunnel near Winter Park Resort. The county is also party to a collaborative water management group called Learning By Doing. The group looks to improve river habitat in Grand County by conducting environmental water projects and through other means.

Through Learning By Doing Denver Water would provide Grand County with funds to help cover costs related to such projects as well as releases of additional water downstream from collection points in the Denver Water diversion system to help alleviate impacts from diversions. While Denver Water has already provided some funding and additional flows the majority of the resources promised to Grand County through Learning By Doing are contingent upon completion of the Gross Reservoir Expansion.

"This project really gives us the operational flexibility to deliver on those enhancements," Lochhead said. "If this doesn't go forward we can't provide those benefits to western Colorado."

Officials from the conservation group Trout Unlimited, one of several parties in the Learning By Doing group, released a statement Wednesday opposing the lawsuit.

"The Colorado River headwaters face huge challenges, and we believe that the best hope for its future lies with collaboration among the west slope, conservation interests, and water users," officials stated. "We've already seen the value of such cooperation through projects like the Fraser Flats restoration near Tabernash. The extensive mitigation and enhancement measures negotiated to benefit the Fraser and Upper Colorado hinge on approval of the Moffat Farming Project, and so we hope to see that approval move forward."

According to Lochhead the Gross Reservoir expansion will result in additional water diversions out of Grand County only in high water years and that additional diversions would not occur in drought years.

Start a dialogue, stay on topic and be civil.

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MEMORANDUM

TO: QQ Members

**FROM: Christopher McMichael, legal intern with Sullivan, Green, Seavy,
Torie Jarvis, and Barbara Green**

DATE: February 22, 2019

SUBJECT: QQ Update on 2019 Proposed “Waters of the United States” Definition

The Environmental Protection Agency and the Department of the Army, Corps of Engineers (“EPA” or “Corps” or “the Agencies”) recently issued a pre-publication draft rule revising the Clean Water Act definition of “waters of the United States” (“2019 Proposed Rule”) after suspending the 2015 “Clean Water Rule.”

The definition of “waters of the United States” (“WOTUS”) determines which bodies of water fall under the jurisdiction of the Clean Water Act (“CWA”). For Colorado, the 2019 Proposed Rule would primarily affect activities requiring dredge and fill permits under Section 404 of the CWA, issued by the Corps. The State regulates other aspects of the CWA and has a broader definition of “waters of the state.”¹ 404 permits are needed whenever dredged and fill material is disposed of in waters of the United States. Activities that require the 404 dredge-and-fill permits include any development in wetlands and other waterbodies, headwaters diversion projects, construction of dams or other impoundments, and any other related activities affecting a jurisdictional water.

This memo will explain the background leading up to this 2019 Proposed Rule, some of the major proposed changes, and how QQ might participate in the upcoming rulemaking.

I. Background and Reasons for the 2019 Proposed Rule

¹ The Colorado Water Quality Control Commission and Water Quality Control Division regulate the water quality standards and maximum daily load programs under Section 302 of the CWA and the Section 402 National Pollutant Discharge Elimination System (NPDES) permit program.

The definition of “waters of the United States” has been the topic of legal discussions and Supreme Court cases for decades. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“*SWANCC*”), the Supreme Court found that isolated wetlands, or wetlands that were near jurisdictional waters but not adjacent or abutting those waters, were not subject to CWA jurisdiction because there was not a “significant nexus” between the isolated wetlands and the jurisdictional waters.²

Later, the Supreme Court in *Rapanos et al v. U.S. Army Corps of Engineers* (“*Rapanos*”) added to the confusion by issuing a decision without a clear majority regarding whether wetlands adjacent to tributaries fell under the CWA jurisdiction.³ Four justices determined that these adjacent wetlands were not jurisdictional because the adjacent wetlands did not have a “continuous surface connection” to a “relatively permanent, standing or continuously flowing” body of water.⁴ Justice Kennedy agreed that the wetlands in question were not jurisdictional, but with different reasoning. Relying on the decision in *SWANCC*, Justice Kennedy found no “significant nexus” between the adjacent wetlands and a jurisdictional water. According to Justice Kennedy, a significant nexus exists when the wetlands “significantly affect the chemical, physical, or biological integrity” of jurisdictional waters.⁵

In the wake of these Supreme Court decisions, the Agencies issued guidance documents to help clear up uncertainty about which waters were jurisdictional as “waters of the United States.”⁶ The guidance documents relied on the *SWANCC* decision and Justice Kennedy’s evaluation in *Rapanos*. Wetlands were jurisdictional under the CWA if they abut a tributary or are directly adjacent to a navigable water. If there is a question about whether a wetland is jurisdictional, then the Agencies will apply the “significant nexus test” outlined in the guidance. When waters fall outside the scope or do not fit into regulatory definitions, the Agencies can still assert jurisdiction over those waters if they have a “significant nexus” to a jurisdictional water.

Despite the guidance, there was still confusion and inconsistency surrounding the definition of “waters of the United States.” These guidance documents were only agency policy, not law. Furthermore, the guidance documents were confusing and difficult to use. The Agencies struggled to provide consistent results in their determinations, with different Corps offices applying the guidance differently. The Agencies also reported considerable time and expense in making jurisdictional determinations because of the additional analysis suggested by the guidance documents.

In response to requests for clarity by local governments and other regulated entities, including in the QQ region, the Agencies proposed a rule in 2015 which sought to clarify the definition of “waters of the United States” (“Clean Water Rule”). QQ provided [detailed comments](#), generally

² 531 U.S. 159 (2001).

³ 547 U.S. 715 (2006).

⁴ *Id.* at 739.

⁵ *Id.* at 780.

⁶ CWA Policy and Guidance Documents, *Section 404 Jurisdiction*, available at: <https://www.epa.gov/cwa-404/cwa-policy-and-guidance#404juris>

supportive, on this Clean Water Rule. The Clean Water Rule never went into effect in most states, including Colorado, because of pending litigation.

In 2017, the current administration formally proposed rescinding the Clean Water Rule but has not finalized the proposed repeal. In early 2018, the current administration added an effective date of the Clean Water Rule of 2020, a decision currently in litigation and not in effect as well.

In the meantime, in Colorado the Agencies are left with the same pre-2015 agency guidance to determine if certain waters fall under the CWA's jurisdiction. In order to address the ongoing confusion, the EPA and the Corps have promulgated a new definition for "water of the United States."

II. Overview of 2019 Proposed Rule

The Agencies have decided to repeal and revise the definition of "waters of the United States" because they believe the Clean Water Rule was too far-reaching, confusing as to which waters are subject to regulations, and burdensome for economic growth.⁷ By promulgating the 2019 Proposed Rule, the Agencies hope to provide clear, definitive, and consistent determinations for which waters are subject to CWA jurisdiction. The 2019 Proposed Rule was officially published in the federal register on February 14, 2019, but the Agencies released a pre-publication version for stakeholders to begin considering issues for public comment in December 2018.⁸ The comments in this memo are based on the pre-publication version of the rule.

The Clean Water Rule outlined seven categories of jurisdictional waters, whereas the 2019 Proposed Rule has only six categories of jurisdictional waters.

The six categories are:

- Traditional Navigable Waters and Territorial Seas (slight change from Clean Water Rule)
- Tributaries (same category in Clean Water Rule)
- Ditches (new category)
- Lakes and Ponds (new category)
- Impoundments (same category in Clean Water Rule)
- Wetlands (revised category)

The Agencies did not include the category of "other waters," which is part of the Clean Water Rule, in the Proposed 2019 Rule. Removing the "other waters" category would eliminate a case-by-case determination of "other waters" that might fall under CWA jurisdiction based on a "significant nexus" to other jurisdictional waters.

⁷ Environmental Protection Agency, "Proposed Revised Definition of 'Waters of the United States' Fact Sheet," (December 2018) (available at https://www.epa.gov/sites/production/files/2018-12/documents/wotus_2040-af75_nprm_frn_2018-12-11_prepublication2_1.pdf)

⁸ *Id.*

Most significant to QQ are the changes to the Agencies' definition of tributaries and wetlands. Generally, the 2019 Proposed Rule criteria for jurisdictional waters is dependent on whether bodies of water such as tributaries, wetlands, and ditches provide "perennial or intermittent" flow or whether bodies of water physically touch traditional navigable waters. The significant nexus test has been eliminated from the 2019 Proposed Rule. The changes to these categories are discussed below.

a. Traditional Navigable Waters and Territorial Seas

The first category of jurisdictional waters identified in the 2019 Proposed Rule is Traditional Navigable Waters ("TNW"), or waters that are "navigable in fact" and used in interstate or foreign commerce, and territorial seas.⁹ The "traditional navigable waters" category remains largely unchanged from the Clean Water Rule except the "interstate waters" subcategory has been eliminated. The Agencies state that all "interstate waters" are either traditionally navigable waters or meet the requirements for one of the other proposed categories of waters, and thus a separate subcategory for "interstate waters" is duplicative. The definition of TNWs is important because other categories, such as tributaries, ditches, and adjacent wetlands, are defined based on their proximity and contribution of flow to TNWs.

b. Tributaries

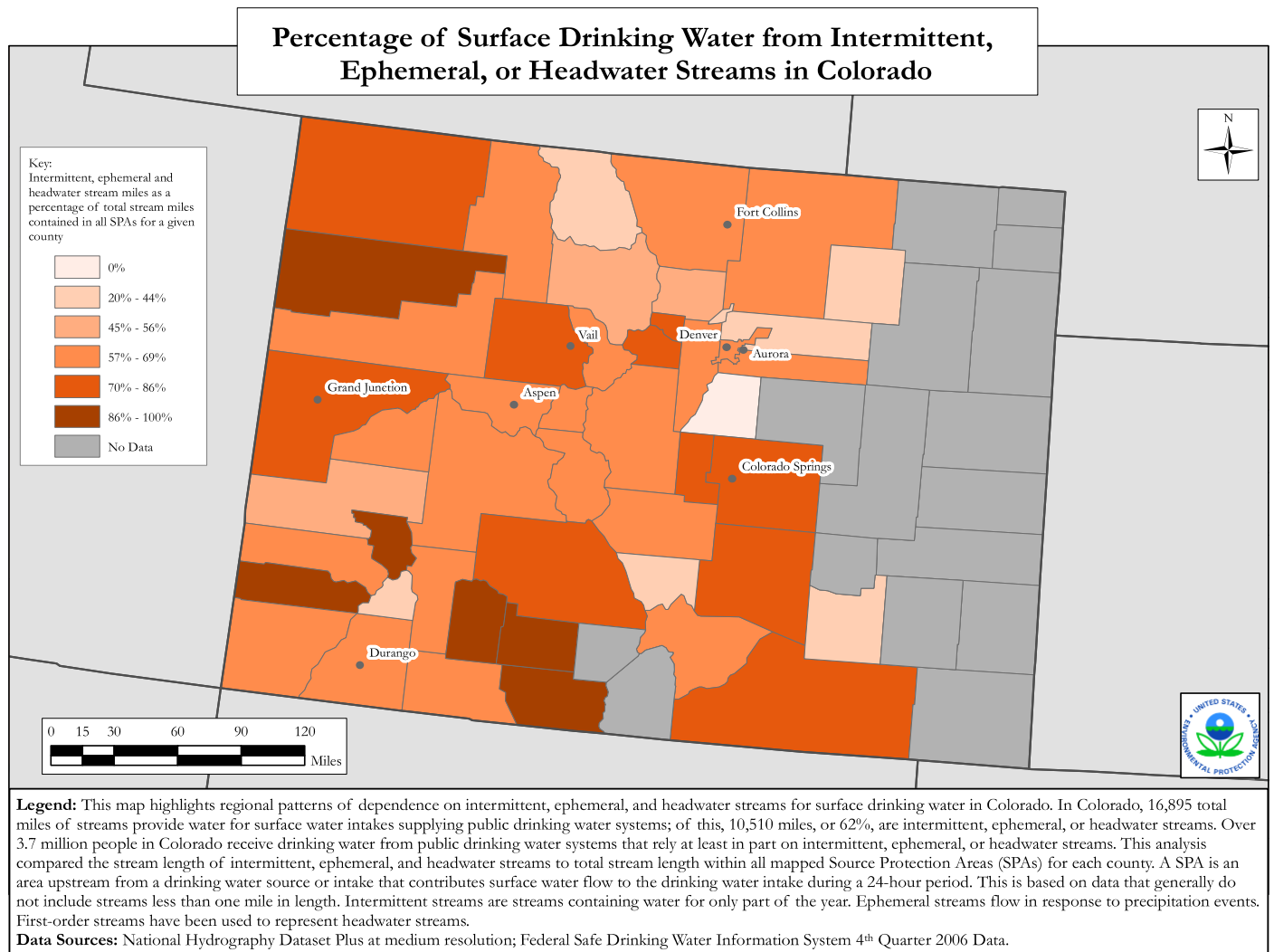
The Agencies' proposed redefinition of which tributaries fall under CWA jurisdiction is one of the most significant changes from previous definitions. The 2019 Proposed Rule defines a tributary as a "river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year."¹⁰ Prior to the 2019 Proposed Rule, tributaries were considered jurisdictional if they contributed flow to a TNW, had a bed and bank, and had an ordinary high water mark. Under the new definition, tributaries are jurisdictional only if they convey perennial or intermittent flow downstream in a typical year.

Agencies describe "perennial and intermittent flow" as surface water which flows continuously year round or that flows continuously during certain times of a typical year.¹¹ Importantly for the QQ region, rivers or streams with flows consisting of melting snowpack are generally considered "intermittent flows." Waters that flow merely in response to precipitation (rain or snowfall) or flooding events would not be considered jurisdictional. These types of waters are known as "ephemeral features" and are not considered jurisdictional under the proposed rule. This marks a departure from the Clean Water Rule and pre-2015 practice in which some ephemeral waters were considered jurisdictional based whether the waters bore a "significant nexus" to neighboring jurisdictional waters.

⁹ *Id.* at 61-62.

¹⁰ *Id.* at 72.

¹¹ *Id.* at 73-74.



With the changes outlined by the 2019 Proposed Rule, the number of the waters that are considered jurisdictional tributaries will likely decrease. The included map suggests as much as 62% of drinking water supplies in Colorado are considered intermittent or ephemeral. Furthermore, it is unclear how the agencies will distinguish between waters flowing as a result of snow or rainfall (ephemeral) and those waters that flow based on seasonal melting snowpack (intermittent). QQ should consider submitting comments on the potential exclusion of some of these ephemeral or intermittent features from CWA jurisdiction.

c. Ditches

Most ditches will not be considered jurisdictional under the 2019 Proposed Rule. For ditches to be considered jurisdictional under the 2019 Proposed Rule, they must be: 1) TNWs used in interstate or foreign commerce, 2) subject to the ebb and flow of the tide, 3) constructed in a

tributary under the new tributary definition, or 4) constructed in an adjacent wetland under the new definition of adjacent wetland.¹²

Many man-made ditches were excluded from jurisdiction under the Clean Water Rule or pre-2015 agency policy as well. However, currently, some ditches could be jurisdictional if they had a significant nexus to a jurisdictional water. Under the 2019 Proposed Rule, those ditches that might have previously qualified for jurisdiction based on the significant nexus test would be excluded unless the ditches were constructed in a jurisdictional tributary or wetland and exhibited perennial or intermittent flow to those waters.

d. Lakes and Ponds

“Lakes and Ponds” is a new category in the 2019 Proposed Rule. A lake or pond would be jurisdictional if: 1) it is a traditional navigable water, 2) it contributes perennial or intermittent flow to a jurisdictional water either directly or indirectly, or 3) if it is flooded by a jurisdictional water in a typical year.¹³ Some lakes and ponds that might have been considered jurisdictional under the significant nexus test are now subject to the “perennial and intermittent” flow requirements in order to fall under CWA jurisdiction, and some previously jurisdictional lakes and ponds may now be excluded.

e. Impoundments

The impoundments category of the 2019 Proposed Rule remains unchanged from the Clean Water Rule and from pre-2015 agency policy. Impounded jurisdictional waters of the United States are still considered jurisdictional and subject to CWA regulations.¹⁴

f. Wetlands

Which wetlands are under CWA jurisdiction has long been the most confusing and contentious aspect of the “waters of the United States” definition. The 2019 Proposed Rule defines adjacent wetlands as “wetlands that abut or have a direct hydrologic surface connection to other ‘waters of the United States’ in a typical year.”¹⁵ The Agencies favored a direct surface connection between wetlands and waters, based on Justice Scalia’s 4-person plurality opinion in *Rapanos*, instead of utilizing Justice Kennedy’s more narrow significant nexus test as the Agencies have done since 2006.

The 2019 Proposed Rule excludes wetlands that do not demonstrate “perennial or intermittent flow in a typical year” to a jurisdictional water.¹⁶ Subsurface connections between a wetland and a jurisdictional water would not be enough to invoke CWA jurisdiction under the 2019 Proposed Rule. This would eliminate some wetlands, like those separated from tributaries by berms or

¹² *Id.* at 94.

¹³ *Id.* at 105.

¹⁴ *Id.* at 70.

¹⁵ *Id.* at 114.

¹⁶ *Id.* at 115.

dikes, that have been jurisdictional previously because of the “significant nexus” to nearby jurisdictional waters.

g. Excluded Waters

The agencies have also identified some waters that are excluded from CWA jurisdiction.¹⁷ The exclusions in the 2019 Proposed Rule are substantively the same from the Clean Water Rule and Pre-2015 agency guidelines, except the Agencies explicitly exclude “ephemeral surface features” which only flow in response to precipitation.

III. Potential Impacts for the QQ Region

One of QQ’s central policies is to strengthen available tools to protect water quality and quantity. The CWA is one of the most important of these tools because of the Section 404(b)(1) guidelines that protect the aquatic environment when jurisdiction is triggered. Also, the impacts of transmountain diversion projects to the aquatic environment are regulated when CWA jurisdiction is invoked. QQ has long supported clarifying the “waters of the United States” definition as an important step towards better protecting water quality and quantity in the headwaters region.

However, as outlined below, the 2019 Proposed Rule would exclude some waters that previously received CWA protections, and may introduce additional uncertainty about which tributaries and wetlands are jurisdictional. There are several potential impacts of the 2019 Proposed Rule for QQ members:

- The 2019 Proposed Rule could affect transmountain diversion projects. Water development projects involving off-channel reservoirs, isolated wetlands, adjacent wetlands, and smaller ephemeral tributaries will likely be outside of CWA jurisdiction.
- The 2019 Proposed Rule is likely to remove some waters in the QQ region from federal jurisdiction. For example, previously, if development were to occur in a wetland area that had a significant nexus to a jurisdictional water, either through a surface or subsurface connection, then it would require a 404 permit. However, under the 2019 Proposed Rule, a wetland must either directly touch a jurisdictional water or possess perennial or intermittent flow to a TNW in order to require a 404 permit and invoke CWA protections.
As such, the proposed rule might be insufficient to address the water quality impacts of future residential, commercial and industrial development of the QQ region. The QQ region is projected to face significant pressures from additional population growth and an increased emphasis on resource extraction industries in upcoming years.
- The 2019 Proposed Rule introduces ambiguity as to which headwaters streams qualify as “tributary” because of perennial or intermittent flow. Headwaters streams

¹⁷ *Id.* at 133.

would be a tributary if they flow as the result of snowpack, defined as “layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (*e.g.*, in northern climes and mountainous regions).” However, streams with “ephemeral flow” as a direct result of precipitation, such as snowfall or rainfall, may not be considered tributaries. It will be difficult to determine whether flow is ephemeral or intermittent in parts of the headwaters region. This rule change will potentially create ambiguity and lead to additional lengthy jurisdictional determination reviews and inconsistent application by the Agencies.

- The 2019 Proposed Rule eliminates the significant nexus test, so Agencies are not required to assess connections throughout the watershed when determining CWA jurisdiction. This approach is not consistent with the watershed approach taken by many in the QQ region to protect water quality.

IV. Next Steps for the QQ Board

We recommend QQ submit comments to the Agencies on the potential water quality impacts of this proposed rule in the QQ region. The 2019 Proposed Rule was published in the Federal Register on February 14, 2019, and **comments are due April 15, 2019.**

We look forward to speaking to you about the 2019 Proposed Rule at the next quarterly meeting, and please reach out should have any questions, concerns, or comments before the March meeting.



COLORADO

Water Quality
Control Commission

Department of Public Health & Environment

NOTICE OF PUBLIC RULEMAKING HEARING BEFORE THE COLORADO WATER QUALITY CONTROL COMMISSION

SUBJECT:

For consideration of the adoption of revised water quality classifications, standards and designations for multiple segments in the Classifications and Numeric Standards for:

- Upper Colorado River Basin and North Platte River, Regulation #33 (5 CCR 1002-33) and
- Lower Colorado River Basin, Regulation #37 (5 CCR 1002-37).

Proposed revisions and proposed statement of basis and purpose language have been submitted by the following:

- Exhibit 1 - Regulation #33, Water Quality Control Division (Division);
- Exhibit 2 - Regulation #37, Division;
- Exhibit 3 - Regulation #33, City of Steamboat Springs;
- Exhibit 4 - Regulation #37, Tri-State Generation and Transmission Association, Inc. and;
- Exhibit 5 - Regulation #33, Upper Blue Sanitation District.

In these attachments, proposed new language is shown with double-underlining and proposed deletions are shown with ~~strikeouts~~. Any alternative proposals related to the subject of this hearing will also be considered. The commission will also consider in the scope of this hearing any updates regarding progress related to temporary modifications and the associated plans to resolve uncertainty, and may consider modifications to or deletion of the temporary modifications on these segments depending on the information provided. These updates will include, but are not limited to, information from Peabody Sage Creek Mining Company, Twentymile Coal, LLC, and Seneca Coal Company, regarding iron temporary modifications on Yampa River segments 13d and 13i, and selenium temporary modifications on Yampa River segments 13b, 13d, 13e, 13g, 13h, 13i, and 13j.

SCHEDULE OF IMPORTANT DATES

Proponent's prehearing statement due	03/13/2019 5 pm	Additional information below.
Party status requests due	03/27/2019 5 pm	Additional information below.
Responsive prehearing statements due	04/17/2019 5 pm	Additional information below.



Rebuttal statements due	5/15/2019 5 pm	Additional information below.
Last date for submittal of motions	5/20/2019 by noon	Additional information below.
Notify commission office if participating in prehearing conference by phone or email	5/20/2019 by noon	Send email to cdphe.wqcc@state.co.us with participant(s) name(s)
Prehearing Conference (mandatory for parties)	5/21/2019 9:30 am	Building C, 1 st floor, Room C1A Department of Public Health and Environment 4300 Cherry Creek Drive South Denver, CO 80246 +1 650-466-0971 PIN: 433 019#
Cutoff of negotiations	5/31/2019	NA
Division's consolidated proposals	6/5/2019	NA
Rulemaking Hearing	6/10/2019 10:00 am	Grand Junction City Hall Auditorium 250 North 5 th Street Grand Junction, CO 81501

TRIENNIAL REVIEW PROCESS OVERVIEW

This Rulemaking Hearing is the third and final step in a three-step process utilized in Colorado for triennial review of water quality classifications and standards. The first step is the Issues Scoping Hearing (ISH), which provides an opportunity for early identification of potential issues that may need to be addressed in the next major rulemaking. The ISH for these regulations were held in October 2017. The second step in the triennial review process is the Issues Formulation Hearing (IFH), which results in the identification of specific issues to be addressed in the next major rulemaking. The IFH for these regulations were held in November 2018. The third step is the rulemaking hearing where any revisions to the water quality classifications and standards are formally adopted by the WQCC. Information regarding triennial reviews of water quality classifications and standards in Colorado is provided on the WQCC [website](#).

HEARING SUBMITTALS:

For this hearing, the commission will receive all submittals electronically. Submittals must be provided as PDF documents, except for raw data exhibits which may be provided as Excel workbooks. Submittals may be emailed to cdphe.wqcc@state.co.us, provided via an FTP site, CD or flash drive, or otherwise conveyed to the commission office so as to be received no later than the specified date.

PARTY STATUS:



Party status requests must be in writing and must provide:

- the organization's name;
- one contact person;
- a mailing address;
- a phone number; and
- email addresses of all individuals associated with the party who wish to be notified when new submittals are available on the commission's website for review.

In accordance with section 25-8-104(2)(d), C.R.S., any person who believes that the actions proposed in this notice have the potential to cause material injury to his or her water rights is requested to so indicate, along with an explanation of the alleged harm, in their party status request.

The commission encourages informal discussions among the parties, the Division, and other interested persons prior to the hearing in an effort to reach consensus or to develop proposed resolutions of issues and/or narrow the issues potentially in dispute. The commission strongly encourages that any multi-party/division proposals for the resolution of issues (including proposed statement of basis and purpose language whenever feasible) be submitted as part of the administrative record as early as possible, but at least by the prehearing conference.

PREHEARING AND REBUTTAL STATEMENTS:

Each party must submit a prehearing statement: parties that have proposed revisions attached as exhibits to the notice must submit a proponent's prehearing statement. All other parties must submit a responsive prehearing statement. Proponents may also submit responsive prehearing statements when there are multiple proposals attached to the notice.

Each prehearing and rebuttal statement must be provided as a separate PDF document from any accompanying written testimony or exhibits.

Following the rebuttal statement due date, no other written materials will be accepted from parties except for good cause shown.

Oral testimony at the hearing should primarily summarize written material previously submitted. The hearing will emphasize commission questioning of parties and other interested persons about their written prehearing submittals. Introduction of written material at the hearing by those with party status will not be permitted unless authorized by the commission.

PREHEARING CONFERENCE:

Attendance at the prehearing conference is mandatory for all persons requesting party status. Parties needing to participate by telephone are encouraged to notify the commission office prior to the prehearing conference. Remote participants can call 1 650-466-0971 and enter the conference code 433019#. Failure to attend the prehearing conference in person or by telephone shall be cause to deny party status or deny opportunity for oral comments.

CUTOFF DATE FOR MOTIONS:

Following the cut-off date for motions, no motions will be accepted, except for good cause shown.



PUBLIC PARTICIPATION ENCOURAGED:

The commission encourages input from non-parties, either orally at the hearing or in writing prior to the hearing. Written submissions should be emailed to cdphe.wgcc@state.co.us by May 29, 2019.

SPECIFIC STATUTORY AUTHORITY:

The provisions of sections 25-8-202(1)(a) and (b); 25-8-203; 25-8-204; and 25-8-402 C.R.S., provide the specific statutory authority for consideration of the regulatory amendments proposed by this notice. Should the commission adopt the regulatory language as proposed in this notice or alternative amendments, it will also adopt, in compliance with section 24-4-103(4) C.R.S., an appropriate Statement of Basis, Specific Statutory Authority, and Purpose.

Dated this 11th day of February, 2019 at Denver, Colorado.

WATER QUALITY CONTROL COMMISSION

Trisha Oeth, Administrator



QQ Legislative update

Updated Feb. 22, 2019

BILLS EXPECTED:

____. **Expanding agricultural leasing for instream flow (ISF).** Draft included in board packet.

Likely sponsor: Rep. Dylan Roberts.

- Would expand existing agricultural leasing for ISF from 3/10 years to 5/10 years. It would allow ag leasing not just to “preserve the natural environment” but to “improve the natural environment” with specific findings from Colo. Parks and Wildlife, Colo. Water Conservation Board, and State Engineer’s Office.
- **Rationale for QQ conceptual support:** This bill expands tools to support the ISF program in the headwaters region, in line with QQ policies.
- **No position recommended** as this bill as not been introduced.

BILLS WITH RECOMMENDED POSITIONS FOR QQ CONSIDERATION:

[HB 19-1006](#). **Forest Management Fuels Reduction Projects Grant Program.** Reps.

McLachlan/Carver; Sen. Fields. From Wildlife Matters Review Committee.

- Creates a state grant program to be administered by the Colorado state forest service (forest service) to fund proactive forest management fuels reduction projects on private land in the wildland-urban interface. Eligible grant recipients would be groups of individual landowners who meet specified requirements, including residing in an area covered by a community wildfire protection plan. Grant maximum is \$200,000.
- Colorado Water Congress (CWC) supports; River District staff recommended support.
- **Rationale for recommended position:** Preventing forest fires in WUI areas may prevent water quality degradation and protect wastewater facilities from increased treatment costs from a forest fire, in line with QQ policies.
- **Recommended position: Support.**

[HB 19-1026](#). **Parks and Wildlife Violations of Law.** Reps. Catlin/McCluskie; Sens.

Coram/Donovan. Passed House Rural Affairs, waiting for House Approps.

- Following up on last year’s bill to revise CPW fees, this bill revises (and increases) penalties for permit violations. To explain the need, a DNR legislative liason explained that current penalties for not having a fishing license are lower than the cost of a fishing license. So a ticket isn’t much of a deterrent!
 - There is a small element on Aquatic Nuisance Species: explicitly allowing CPW to possess and transport ANS without being subject to the fines (a small clarification).
- CWC supports *small* ANS piece of the overall bill (Section 15). River District recommends support.
- **Recommended position: Monitor.**

HB 19-1108. Allowing nonresident electors in special district elections. Reps. Liston, Hooton; Sen. Tate. Passed House, scheduled for Senate State Affairs March 6.

- Proposes to substantially enlarge the group of eligible electors for Title 32 special districts by including nonresidents of Colorado in the voter pool if they (or their spouse) own property within special district boundaries. These out-of-state voters may only vote in special district directors elections if a special district passes a resolution allowing such. It would also allow non-residents to sit on special district boards in a non-voting capacity.
- A substantially similar bill passed the General Assembly in 2018, and was vetoed by Governor Hickenlooper.
- Eagle River Water and Sanitation District and the Special District Association oppose this bill for the following reasons:
 - The additional election requirements would be burdensome and costly for special districts, equating to an unfunded mandate.
 - It would create a special class of electors in Colorado only applicable to special districts. We believe that is not good public policy. It ignores the fact that the same argument could be made for county or other elections.
 - These potential new voters are not being disenfranchised. They are not now Colorado electors, so this is not a takeaway from any potential voter.
 - Former Governor John Hickenlooper vetoed similar legislation last year (HB18-1181), raising “constitutional issues, stating that allowing nonresidents to vote for board members but not on other ballot questions affecting a special district could violate the 14th Amendment, which guarantees equal protection under the law.” (from Coloradopolitics.com)
 - According to the Special District Ass’n, “[o]ut-of-state owners are generally part-time residents and don’t have the same level of interest in the community or interest in who’s running for special district boards. They also may not recognize the need for tax increases.” (from Coloradopolitics.com)
- Rationale for QQ recommended position: While this bill is of concern to special districts, it is not in line with any of QQ’s [policies](#).
- **Recommended position: Monitor** until considering another position at QQ meeting.

HB 19-1113. Water quality protections in permitting hardrock mining. Reps. Roberts, McLachlan. Calendared in House Rural Affairs, Mon. Feb. 4th.

- QQ supported a similar bill in 2018.
- Bill does three things that essentially codify existing practices of the Division of Reclamation, Mining, and Safety:
 - Requires an end date for water treatment in reclamation plans, eliminating perpetual water treatment for initial permitting (acknowledging that circumstances could change and require perpetual water treatment and explicitly excluding noncommercial “Good Samaritan” reclamation).
 - Eliminates self-bonding for reclamation.

- Requires bonding for water quality impacts, adding to land impacts currently in statute.
- Note: QQ also plans to continue working with bill proponents and QQ members to ensure this bill will not affect the perpetual water quality treatment required for Mount Emmons Mine outside of Crested Butte.
- **Rationale for recommended QQ position:** The bill would strengthen existing tools available to protect water quality in the QQ region, in line with QQ policies.
- **Recommended position: Support.**

HB 19-1200. Establishing a point of compliance for testing reclaimed water used for toilet flushing. Rep. Arndt.

- Bill would authorize the WQCC to develop rules establishing a point of compliance for testing reclaimed wastewater used for toilet flushing, as the point of compliance is currently where it's delivered to the premises—but human contact is already happening at this point.
- **QQ recommended position: Monitor.**

SB 19-016. Changes to distribution methods for Severance Tax Operational Fund. Sens. Donovan/Coram and Reps. Esgar/Saine/Roberts/Arndt/Catlin. Water Resource Review Committee bill. Calendared 3/4 in House Finance.

- Changes the distribution of severance tax funding for natural resource and energy grant sources (historically “tier 2,” whatever was left after core programs under Tier 1). Currently grant funding amounts are calculated based on *projected* severance tax revenues for the same year and then distributed in three lump sums. If actual amounts were lower than projections, then the third distribution would be reduced or eliminated, creating significant unpredictability. This bill would calculate funding amounts based on the previous years’ actual amounts and then issue a single, transfer of funds for the year.
- Bill also raises the maximum reserve amounts for natural resource/ energy grant programs from 15% to 100%.
- CWC Supports, River District staff recommended support.
- **Rationale for recommended position:** This funding change would increase predictability for important water quality and river health funding sources, in line with QQ policies.
- **Recommended position: Support.**

SB 19-062. Limiting agency authority to amend rules. Sen. Sonnenberg. Calendared in Senate State Affairs Jan. 28 (likely to die there).

- If a state agency has already created a rule based on its statutory authority, this bill requires an *additional* statutory grant of authority to amend the rule. A rule can be repealed without a new grant of authority.
 - An agency may only amend its rule without statutory authority if amendments are to adjust expiration dates, or if the proposed rule adjustment is because of a conflicting court case, federal law, or state law or regulation.

- **Rationale for recommended position:** QQ advocates for headwaters' regional interests before the Water Quality Control Commission (WQCC), Colorado Water Conservation Board, Colorado Oil and Gas Conservation Commission (COGCC), and other state agencies. These agencies would be hamstrung from adjusting rules in ways that QQ supports as promoting headwaters interests, in line with QQ Policies.
 - Recent rulemakings in which QQ participated that would have been affected include the WQCC updates to the 401 water quality certification regulations and the COGCC regulations involving regulation of flowlines following fatal a fatal flowline explosion in Firestone.
- **Recommended position: Oppose.**

SB 19-032. Hazardous Materials Transportation Route Study in Eisenhower. Sen. Scott/ Rep. McCluskie.

- Requires CDOT to conduct a study of the feasibility of allowing hazardous materials transport through Eisenhower Tunnel. CDOT must solicit input from representatives of specified counties, towns, communities, ski resorts, industries, organizations, emergency services providers, and state patrol (specifically including Summit County, Dillon, Silverthorne, and unincorp. Keystone, and Summit Fire & EMS)
- Also allows a public highway authority or a governmental partner in a public-private partnership to apply to Colorado State Patrol to change hazardous materials transport route designations.
- **Recommended QQ Position: Monitor.**

NWCCOG Water Quality/ Quantity Committee (QQ)
 SUMMARY OF BILLS OF INTEREST for 2019 (all positions are recommended)

February 22, 2019

Bill No.	Bill Description	Sponsors	Status	Notes	Recommended Position
<u>HB 19-1006</u>	Forest Management Fuels Reduction Projects Grant Program	Reps. McLachlan, Carver/ Sen. Fields		Wildlife Matters Review Committee	Support
<u>HB 19-1015</u>	Recreation of the Colorado Water Institute	Rep. Arndt/ Sen. Ginal	PASSED HOUSE & SENATE		Support
<u>HB 19-1026</u>	Parks and Wildlife Violations of Law	Reps. Catlin, McCluskie / Sens. Coram, Donovan	Passed House Rural Affairs, to Approps		Monitor
<u>HB 19-1050</u>	Promoting xeriscaping in HOA common areas and special districts	Rep. Titone/ Sens Priola, Winter	PASSED HOUSE AND SENATE		Support
<u>HB 19-1071</u>	Water Quality Control Division regulation clean-up	Rep. McKean/ Sen. Zenzinger	PASSED HOUSE AND SENATE	Statutory revisions committee bill	Monitor
<u>HB 19-1082</u>	Water rights holders may make necessary repairs within ditch	Reps. Catlin,Valdez/ Sen. Coram	PASSED HOUSE AND SENATE		Support
<u>HB 19-1108</u>	Allowing nonresident electors in special districts	Reps. Liston, Hooton; Sen. Tate	Passed House, to Senate State Affairs March 6		Monitor
<u>HB 19-1113</u>	Water quality protections in hardrock mining permitting	Reps. Roberts, McLachlan/ Sen. Donovan	Passed House; Senate Ag March 7	QQ supported in 2018 also	Support

NWCCOG Water Quality/ Quantity Committee (QQ)
 SUMMARY OF BILLS OF INTEREST for 2019 (all positions are recommended)

February 22, 2019

<u>HB 19-1200</u>	Establishing a point of compliance for testing reclaimed wastewater used for toilet flushing	Rep. Arndt	House Rural Affairs		Monitor
<u>HJR 19-1005</u>	Water Projects Eligibility List	Rep. Roberts/ Sen. Donovan	Passed House Rural Affairs		No position
<u>SB 19-016</u>	Changes to distribution methods for Severance Tax Operational Fund	Sens. Donovan, Coram/ Reps. Esgar, Saine, Roberts, Arndt, Catlin	Passed Senate; House Finance 3/4	Water Resources Review Committee	Support
<u>SB 19-032</u>	Hazardous Materials Transportation Routing	Sen. Scott/ Rep. McCluskie	Passed Senate; Feb. 26 in House Transpo		Monitor
<u>SB 19-037</u>	Entering federal land for wildfire mitigation	Sen Woodward	POSTPONED INDEFINITELY	May be of concern to QQ members, see Jan. 22 Leg. Update	No position
<u>SB 19-062</u>	Limiting agency authority to amend rules	Sen. Sonnenberg	POSTPONED INDEFINITELY 1/28		Oppose

First Regular Session
Seventy-second General Assembly
STATE OF COLORADO

UNEDITED
UNREVISED
REDRAFT
2.15.19
Double underlining
denotes changes from
prior draft

DRAFT

LLS NO. 19-0327.01 Jennifer Berman x3286

HOUSE BILL

HOUSE SPONSORSHIP

Roberts,

SENATE SPONSORSHIP

(None),

BILL TOPIC: "Loaned Water For Instream Flows To Improve Env't"
DEADLINES: File by: 2/11/2019

A BILL FOR AN ACT

101 CONCERNING THE COLORADO WATER CONSERVATION BOARD'S
102 AUTHORITY TO USE WATER THAT A WATER RIGHTS OWNER
103 VOLUNTARILY LOANS TO THE BOARD FOR PURPOSES OF
104 IMPROVING THE FLOW OF A STREAM REACH.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov>.)

Under current law, the Colorado water conservation board (board), subject to procedural requirements established to prevent injury to water rights or decreed conditional water rights, may use loaned water for

*Capital letters or bold & italic numbers indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.*

instream flows if the loaned water is used for preserving the natural environment of a stream reach that is subject to a decreed instream flow water right held by the board. The bill expands the number of years within a 10-year period that a loan may be exercised from 3 years to 5 years and allows a loan to be renewed for up to 2 additional 10-year periods.

The bill also expands the board's ability to used loaned water for instream flows to allow loans to:

- Improve the natural environment to a reasonable degree pursuant to a decreed instream flow water right held by the board; or
- Preserve or improve the natural environment to a reasonable degree for a stream reach for which the board does not hold a decreed instream flow water right.

In considering whether to approve one of the new types of loans authorized by the bill, the board must evaluate the proposed loan based on a biological analysis performed by the division of parks and wildlife. The board is required to promulgate rules regarding the necessary steps for proposing, reviewing, commenting on, and approving such a loan.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, 37-83-105, **amend**
3 (2)(a) introductory portion, (2)(a)(IV), and (2)(a)(V); and add (1)(b) and
4 (2)(a)(VI) _____ as follows:

5 **37-83-105. Owner may loan agricultural water right - loans**
6 **to Colorado water conservation board for instream flows.** (1) (b) A
7 WATER RIGHT OWNER MAY LOAN WATER TO THE COLORADO WATER
8 CONSERVATION BOARD FOR USE AS INSTREAM FLOW TO:

9 (I) PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE
10 DEGREE PURSUANT TO A DECREED INSTREAM FLOW WATER RIGHT HELD BY
11 THE BOARD; OR

12 (II) PURSUANT TO AN EVALUATION BY THE BOARD, BASED ON A
13 BIOLOGICAL ANALYSIS PERFORMED BY THE DIVISION OF PARKS AND
14 WILDLIFE CREATED IN SECTION 33-9-104 OF THE APPROPRIATENESS OF THE
15 LOAN; <{*Your draft changes the reference of 33-9-104 to 33-9-103.*

1 *Regardless of what section of law gives the division the type of authority*
2 *it will be exercising here, the correct reference is to section 33-9-104*
3 *because that is where the division is created. The statutory reference*
4 *refers to the statute creating the division and nothing else.*>

5 (A) TO IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE
6 DEGREE PURSUANT TO A DECREED INSTREAM FLOW WATER RIGHT HELD BY
7 THE BOARD; OR

8 (B) TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A
9 REASONABLE DEGREE FOR A STREAM REACH FOR WHICH THE BOARD DOES
10 NOT HOLD A DECREED INSTREAM FLOW WATER RIGHT. <*To add this new*
11 *language split up the way you wanted it, we had to create a new*
12 *paragraph (1)(b).*>

13 (2) (a) ~~A~~ Water right owner may loan water to the Colorado water
14 conservation board for use as BE USED FOR instream flows _____ pursuant
15 to ~~a decreed instream flow water right held by the board~~ A LOAN
16 AUTHORIZED UNDER THIS SECTION for a period not to exceed one hundred
17 twenty days, subject to the following:

18 (IV) A loan approved pursuant to this ~~paragraph (a)~~ shall
19 SUBSECTION (2)(a) MUST not be exercised for more than ~~three~~ FIVE years
20 in a ten-year period, for which only a single approval by the state engineer
21 is required. The ten-year period ~~shall begin~~ BEGINS when the state
22 engineer approves the loan. The state engineer ~~shall not~~ MAY approve a
23 loan pursuant to this ~~paragraph (a)~~ SUBSECTION (2)(a) for ~~another~~ UP TO
24 TWO ADDITIONAL ten-year ~~period~~ PERIODS; except that, if the agreement
25 has not been exercised during the term of ANY TEN-YEAR PERIOD OF the
26 agreement, an applicant may reapply one ADDITIONAL time by repeating
27 the application process pursuant to this subsection (2).

1 (V) _____ A party may file comments concerning potential injury
2 to ~~such~~ THE party's water rights or decreed conditional water rights due
3 to the operations of the loan of a ~~THE~~ water right to a decreed instream
4 ~~flow right~~ with the state engineer by January 1 of the year following each
5 year that the loan is exercised. The procedures of ~~paragraph (b) of this~~
6 ~~subsection (2)~~ SUBSECTION (2)(b) OF THIS SECTION regarding notice,
7 opportunity to comment, the state engineer's decision, and an appeal of
8 ~~such~~ THE decision shall again be followed with regard to ~~such~~ THE party's
9 comments.

10 (VI) WITH RESPECT TO A LOAN OF A WATER RIGHT TO A DECREED
11 INSTREAM FLOW WATER RIGHT TO IMPROVE THE NATURAL ENVIRONMENT
12 TO A REASONABLE DEGREE OR A LOAN OF A WATER RIGHT TO PRESERVE OR
13 IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE FOR A
14 STREAM REACH FOR WHICH THE BOARD DOES NOT HOLD A DECREED
15 INSTREAM FLOW WATER RIGHT, A PARTY MAY FILE COMMENTS
16 CONCERNING POTENTIAL INJURY TO THE PARTY'S WATER RIGHTS OR
17 DECREED CONDITIONAL WATER RIGHTS PURSUANT TO RULES
18 PROMULGATED BY THE BOARD. _____ THE BOARD SHALL PROMULGATE
19 *<{You've asked if "promulgate" or "amend" is the right term here.*
20 *Regardless whether the board is creating new rules or amending*
21 *existing rules, the correct term in statute is "promulgate".}>* RULES
22 ESTABLISHING THE PROCESSES REGARDING THE FOLLOWING NECESSARY
23 STEPS FOR PROPOSING, REVIEWING, COMMENTING ON, AND APPROVING A
24 LOAN PROPOSED PURSUANT TO THIS SUBSECTION (2)(a)(VI): _____
25 _____

26 (A) A PROPONENT'S SUBMITTAL OF A REQUEST FOR APPROVAL OF
27 THE LOAN TO THE BOARD;

1 (B) THE MANNER IN WHICH THE BOARD WILL NOTIFY INTERESTED
2 PARTIES ABOUT A PROPONENT'S OFFER;

3 (C) THE BOARD'S REVIEW OF THE PROPOSED LOAN, INCLUDING
4 A REQUIREMENT THAT THE DIVISION OF PARKS AND WILDLIFE PREPARE A
5 BIOLOGICAL ANALYSIS OF THE EXTENT TO WHICH THE PROPOSED LOAN
6 WILL PRESERVE OR IMPROVE THE ENVIRONMENT TO A REASONABLE
7 DEGREE;

8 (D) THE MANNER AND TIMING IN WHICH AN INTERESTED PARTY
9 MAY COMMENT ABOUT THE INTERESTED PARTY'S CONCERNS THAT
10 POTENTIAL INJURY WILL ARISE FROM THE PROPOSED LOAN, INCLUDING THE
11 OPPORTUNITY FOR A HEARING, IF REQUESTED;

12 (E) A DIVISION ENGINEER'S CONFIRMATION THAT THE PROPOSED
13 LOAN WILL BE ADMINISTRABLE AND WILL NOT CAUSE INJURY TO OTHER
14 DECREED WATER RIGHTS; AND

15 (F) THE BOARD'S DETERMINATION, AFTER A HEARING ON THE
16 MATTER, IF REQUESTED, WHETHER TO APPROVE THE PROPOSED LOAN.

17
18 **SECTION 2. Act subject to petition - effective date -**
19 **applicability.** (1) This act takes effect at 12:01 a.m. on the day following
20 the expiration of the ninety-day period after final adjournment of the
21 general assembly (August 2, 2019, if adjournment sine die is on May 3,
22 2019); except that, if a referendum petition is filed pursuant to section 1
23 (3) of article V of the state constitution against this act or an item, section,
24 or part of this act within such period, then the act, item, section, or part
25 will not take effect unless approved by the people at the general election
26 to be held in November 2020 and, in such case, will take effect on the
27 date of the official declaration of the vote thereon by the governor.

1 (2) This act applies to conduct occurring on or after the applicable
2 effective date of this act.