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## MEMORANDUM

**TO: QQ Members**

**FROM: Christopher McMichael, legal intern with Sullivan, Green, Seavy,  
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**DATE: February 22, 2019**

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

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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.”<sup>1</sup> 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**

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<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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.”<sup>6</sup> 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

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<sup>2</sup> 531 U.S. 159 (2001).

<sup>3</sup> 547 U.S. 715 (2006).

<sup>4</sup> *Id.* at 739.

<sup>5</sup> *Id.* at 780.

<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.

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<sup>7</sup> 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](https://www.epa.gov/sites/production/files/2018-12/documents/wotus_2040-af75_nprm_frn_2018-12-11_prepublication2_1.pdf))

<sup>8</sup> *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.<sup>9</sup> 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."<sup>10</sup> 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.

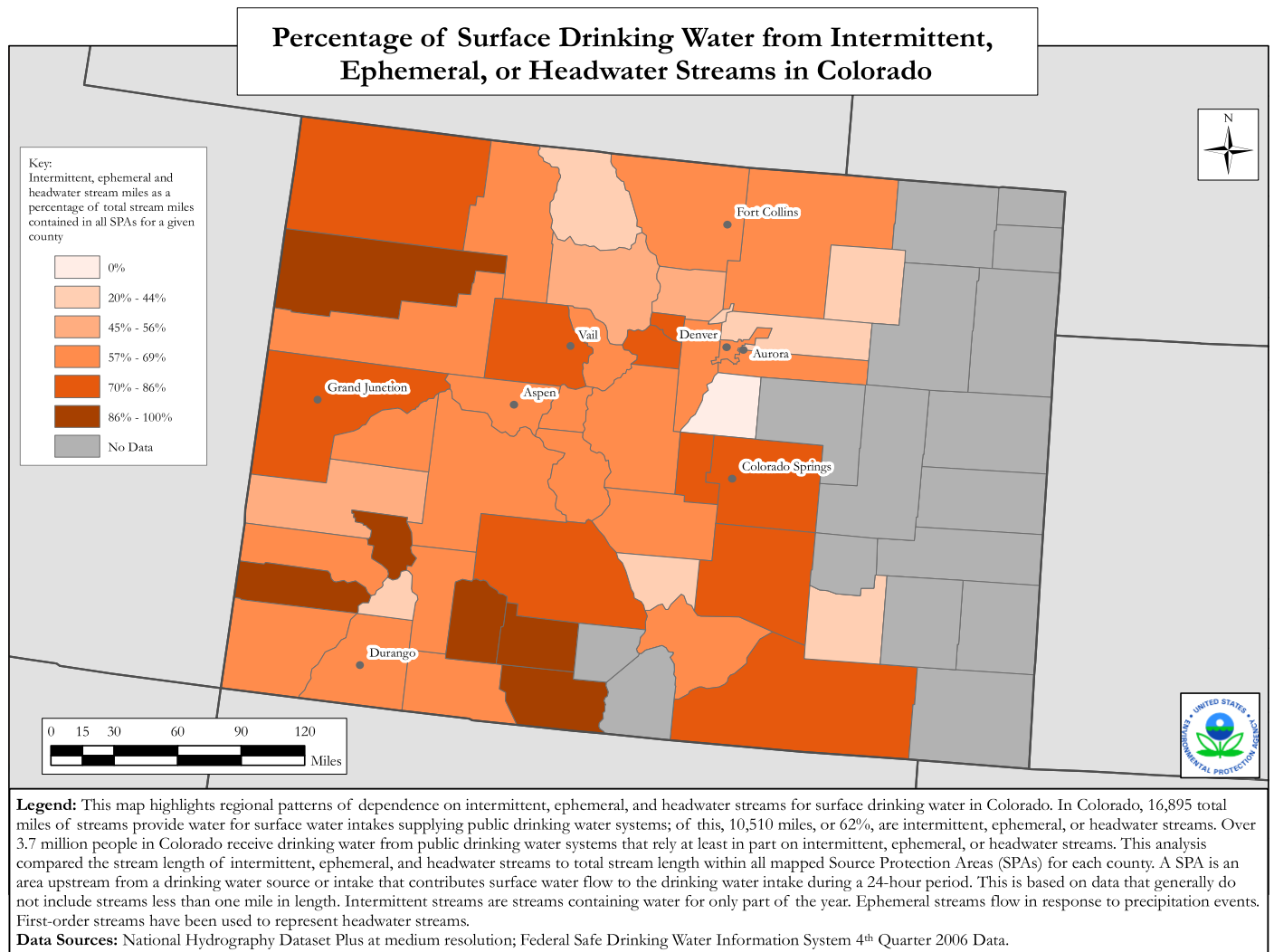
Agencies describe "perennial and intermittent flow" as surface water which flows continuously year round or that flows continuously during certain times of a typical year.<sup>11</sup> Importantly for the QQ region, rivers or streams with flows consisting of melting snowpack are generally considered "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.

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<sup>9</sup> *Id.* at 61-62.

<sup>10</sup> *Id.* at 72.

<sup>11</sup> *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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup>

*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.”<sup>15</sup> 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.<sup>16</sup> 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

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<sup>12</sup> *Id.* at 94.

<sup>13</sup> *Id.* at 105.

<sup>14</sup> *Id.* at 70.

<sup>15</sup> *Id.* at 114.

<sup>16</sup> *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.<sup>17</sup> 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

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<sup>17</sup> *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.