

P.O. Box 2308 • Silverthorne,
Colorado 80498



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

April 15, 2019

Mr. Andrew Wheeler
Administrator
U.S. Environmental Protection Agency

R.D. James
Assistant Secretary of the Army (Civil Works)
Department of the Army U.S. Army Corps of Engineers

RE: Docket ID No. EPA-HQ-OW-2018-0149

Comment on Waters of the United States Rulemaking

Dear Administrator Wheeler and Assistant Secretary James,

These comments are submitted by the Northwest Colorado Council of Governments Water Quality/ Quantity Committee (“QQ”) to address the Environmental Protection Agency’s and Army Corps’ (“the Agencies”) rulemaking regarding the definition of “Waters of the United States” under the Clean Water Act (“CWA”). QQ’s members are municipalities, counties, and water and sanitation districts in the headwaters region of the Colorado, Gunnison, and Yampa River basins (“headwaters region”). QQ’s purpose is to enhance the region’s water quality while encouraging its responsible use for the good of Colorado and the environment. The CWA provides considerable water quality protections that benefit QQ. Furthermore, the Northwest Colorado Council of Governments is the designated Regional Water Quality Management Agency under Section 208 of the CWA, appointed by Executive Order of the governor of Colorado to prepare and implement the region’s 208 plan.

QQ actively participated in the Agencies’ 2015 Clean Water Rule rulemaking and generally supported the water quality protections and clarification on CWA jurisdiction which that rule provided. The Agencies’ current rulemaking regarding the Definition of “Waters of the United States” (“2019 Proposed Rule”) does not afford waters in the QQ region the same level of protection and will add confusion as to which waters are considered jurisdictional under the

CWA. The following comments focus on how the 2019 Proposed Rule would impact waters in the QQ region and other similar regions throughout the country.

I. General Comments

Water quality is critically important to QQ because of the role water plays in the region's economy. Tourism is the largest employment sector in the headwaters region, comprising 48% of all jobs. Tourism and recreational activities impacted by water quality include fishing, hunting, kayaking, rafting, lake recreation, hiking, camping, wildlife and bird watching, skiing, and other snow sports. Travelers to the headwaters region have an economic impact throughout the entire state of Colorado because they purchase goods and services throughout the state. Agriculture and mineral resource development are other sectors of the headwaters economy that rely on clean water.¹

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. Colorado has interstate compacts with these states, a part of which requires Colorado to ensure that citizens of those states have access to clean water. Local governments like those comprising QQ are charged with protecting water quality through their stormwater, wastewater and water treatment systems. CWA protections help to ensure safe drinking water and robust economies. Maintaining CWA jurisdiction while clarifying the scope of federal authority over water bodies is essential to this goal.

The 2019 Proposed Rule is not based on the best available science, and would reduce CWA jurisdiction in the headwaters region and throughout the arid West. The end result would be a detrimental impact on water quality and the economy for millions of citizens in the United States and Mexico, and a failure to meet the goal of the CWA to restore the physical, chemical, and biological integrity of our Nation's waters.

II. Comments to Specific Sections of the Proposed Rule

a. Tributaries

Almost all streams in the mountain region of the west are non-navigable, originating from snowmelt and groundwater. These waters are the lifeblood of headwater communities, serving as the economic backbone, drinking water supplies, and receiving waters for wastewater discharges. The 2019 Proposed Rule definition of tributaries does not consider the unique characteristics of western mountain tributaries. These waters support a multitude of important beneficial uses that 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. Clean water substantially benefits local communities that are dependent on such headwaters streams and wetlands.

¹ Coley/Forrest Inc., "Water and its Relationship to the Economies of the Headwaters Counties," Northwest Colorado Council of Governments (December 2011), http://nwccog.org/wp-content/uploads/2015/03/QQStudy_Report_Jan-2012.pdf.

The nexus between headwaters and CWA goals is aptly described in a paper published in the *Journal of the American Water 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.”² Thus, CWA protection for waters at the top of the watershed, whether they are intermittent or ephemeral streams or nearby 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.

Eliminating ephemeral waters from CWA jurisdiction will remove protections for a significant number of waters in the QQ region, harming the region’s water quality and economy and endangering drinking water supplies. The Agencies have historically determined the jurisdiction of nonnavigable waters based on whether the water bore a significant nexus to other jurisdictional waters, consistent with the best available science outlined in the 2015 Connectivity Report. The 2019 Proposed Rule eliminates this significant nexus test, ignoring the best available science, in favor of determining a water’s jurisdiction based on whether a waterbody provides “perennial or intermittent flow” to a jurisdictional water. If flow is “ephemeral,” then it is not under CWA jurisdiction.

By removing protections for ephemeral streams in the 2019 Proposed Rule, the Agencies eliminate important CWA protections for drinking water supplies. One of the primary purposes of the CWA is to provide safe and clean drinking water. In the headwaters region, ephemeral and intermittent features constitute as much as 62% of drinking water sources. The headwaters region is experiencing unprecedented population growth and development. Limiting CWA jurisdiction likely will lead to increased development occurring within or near wetlands or streams, some of which may be considered ephemeral, without securing federal 404 permits or being subject to CWA regulations. Removing ephemeral streams from CWA jurisdiction will have negative impacts to existing or future water supplies and the region’s recreation-based economy.

The narrower definition of a tributary also could impact water rights holders downstream from ephemeral streams previously under CWA jurisdiction. Local governments in the headwaters region hold water rights for drinking water supplies, irrigation, environmental or recreational purpose, and other beneficial uses. If upstream ephemeral tributaries lose CWA jurisdiction, a change in the stream from unpermitted dredging or could impact downstream water rights holders. Without the 404 permit, the only recourse for downstream senior water rights holders would be an expensive and lengthy judicial proceeding. The agencies should consider how the 2019 Proposed Rule’s narrowed definition may impact water rights.

Furthermore, the determination of whether a water is intermittent and thus jurisdictional, or ephemeral and thus non-jurisdictional, will be unpredictable and extremely confusing. The Agencies state they will use a variety of methods including relying on experts and landowners to conduct field visits and collect data, flow measurements, and photographs over the span of multiple years to determine the flow of certain features. Supposedly, an important goal of this rulemaking is to increase clarity for regulated entities, a goal that QQ has supported for years.

² 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.

However, these new analyses do not accomplish clarity, instead introducing new unpredictability and expense in determining jurisdiction.

As if to illustrate the confusion, the 2019 Proposed Rule distinguishes between waters that flow as a result of snowfall or precipitation events (ephemeral features, non-jurisdictional) and waters that flow as a result of the melting of “layers of snow that accumulate over extended periods of time” (intermittent flows, jurisdictional). This distinction will result in boundary-drawing that will be extraordinarily confusing and will not reflect the changing reality of the boundary of snowmelt versus precipitation from year to year. Given the increase in drought and warmer temperatures already seen in the headwaters region, and expected to increase, distinguishing between snowpack and a snowfall event only become more difficult.

The 2019 Proposed Rule also proposes to assess flows to determine whether a stream is ephemeral or intermittent based on a “typical year.” Determining a typical year of flows is hardly straightforward, and will continue to change as the arid West, including the headwaters region, becomes hotter and drier. Will streams continue to lose jurisdiction upon reassessing flows in “typical years” given climate predictions? QQ requests additional clarification regarding how the Agencies will assess what constitutes a “typical year.”

The Agencies should reconsider the 2019 Proposed Rule wholesale to prevent loss of water quality protections and to prevent increased burdens for regulated entities attempting to determine jurisdiction. QQ recommends the 2019 Proposed Rule continue to include ephemeral streams and wetlands with important hydrological connections, but not necessarily surface connections, to jurisdictional waters. At minimum, the Agencies should elaborate on how the 2019 Proposed Rule would address the ambiguity between an intermittent and ephemeral tributary, how to understand a “typical year” of flows, and how to distinguish between snowpack and precipitation events.

b. Wetlands

QQ is also concerned about the reduced number of wetlands protected under the CWA. While the 2019 Proposed Rule would maintain adjacent and abutting wetlands as jurisdictional, the rule eliminates wetlands that do not exhibit a surface connection to a jurisdictional water from federal jurisdiction. Wetlands that do not have a surface connection, or only have a surface connection during certain times of the year or in response to precipitation, are still connected to jurisdictional waters through subsurface or watershed connections. Wetlands with a significant hydrological connection to jurisdictional waters are essential to the water quality and quantity of the headwaters region, and jurisdiction should be maintained. The 2019 Proposed Rule should include wetlands that do not exhibit a surface connection to a jurisdictional water.

III. Conclusion

Water quality protections under the CWA are critically important for the headwaters region’s water quality. Protecting water quality means protecting the region’s economic backbone of tourism, recreation, and agriculture. Water quality protection in the headwaters region will become increasingly important as the region sees increased development, additional demands on water, and decreased flows due to a warmer, drier climate. The narrowing of CWA jurisdiction in this 2019 Proposed Rule threatens the health of QQ rivers, streams, and wetlands, and the QQ region’s economy.

To sum, QQ requests the Agencies reconsider the misguided and confusing 2019 Proposed Rule. The Rule should include as jurisdictional ephemeral streams and wetlands with important hydrological connections to jurisdictional waters regardless of surface connection. The significant nexus test has afforded this type of case-by-case analysis and therefore should be reinstated. In the alternative, QQ requests clarification as to how the Agencies will determine whether a water is intermittent or ephemeral, as this could introduce significant new confusion as to which waters are jurisdictional in the headwaters region.

QQ respectfully 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,



Kathy Chandler-Henry

Chair, Northwest Colorado Council of Governments Water Quality/ Quantity Committee
Commissioner, Eagle County Board of County Commissioners

cc:

Senator Michael Bennet

Senator Cory Gardner

Representative Scott Tipton

Representative Joe Neguse

NWCCOG/ QQ Members