

Sullivan Green Seavy Jarvis LLC

To: NWCCOG and QQ Members

From: Torie Jarvis and Barbara Green

Sullivan Green Seavy Jarvis LLC, counsel to NWCCOG and QQ

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RE: Regional Water Quality Planning Under Section 208 of the Clean Water Act

Section 208 of the Clean Water Act establishes regional water quality planning as an important element of meeting the goals of the Clean Water Act. Northwest Colorado Council of Governments ("NWCCOG") is the designated Regional Water Quality Management Agency for Planning Region 12 (Eagle, Grand, Jackson, Pitkin, Routt, and Summit Counties) and authors and maintains the Regional Water Quality Management Plan or "208 Plan." NWCCOG's Water Quality/Quantity Committee ("QQ") implements the 208 Plan on behalf of NWCCOG and serves as the water policy advisory committee to NWCCOG.

This memorandum provides an overview of Section 208 planning and related federal and state laws and regulations, describes how the NWCCOG 208 Plan is implemented to protect water quality in the NWCCOG region, and offers recommendations to members of NWCCOG and QQ.

I. Legal Authority for 208 Planning

A. Federal Authority

1. Section 208 of the Clean Water Act

Congress has delegated express authority to state and local governments to engage in regional water quality planning under Section 208 of the federal Clean Water Act (CWA).¹ The purpose of Section 208 is to achieve the goals of the CWA by encouraging and facilitating "the development and implementation of areawide waste treatment management plans" or 208 Plans.² "[I]t is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State."³ Section 208 "sets up a comprehensive

¹ 33 U.S.C. § 1288.

² 33 U.S.C. § 1288(a)(1).

³ 33 U.S.C. § 1251(5).

scheme for the elimination of water pollution in all areas of the state, both urban industrial areas and agricultural and forest areas.”⁴

Section 208 requires governors to identify regional planning areas “which, as a result of urban-industrial concentrations or other factors, have substantial water quality problems.”⁵ Governors should then designate a “single representative organization. . . capable of developing effective areawide waste treatment management plans for such area.”⁶ Such organizations should then “have in operation a continuing areawide waste treatment management planning process”⁷ and a plan that shall be approved by the U.S. Environmental Protection Agency (“EPA”) Administrator.⁸ The Governor of Colorado designated NWCCOG as the representative organization to develop and implement the region's 208 Plan.

208 planning should consider regional water quality implications for both point source discharges of pollution and nonpoint sources of pollution. No Section 402 discharge permit may be issued “for any point source which is in conflict with” a 208 Plan.⁹

Diffuse “nonpoint sources” of pollution such as runoff from urban development, agriculture, or abandoned mines are not regulated through a federal or state permit system, but are instead left to state, regional, and local governments to address, including through 208 planning.¹⁰ Nonpoint source pollution is “the leading remaining cause of water quality problems,” both nationally and in the NWCCOG Region, and is difficult to regulate.¹¹ Section 208 requires a Regional Water Quality Management Plan to “identify procedures and methods (*including land use requirements*) to control to the extent feasible such sources” of nonpoint source pollution.¹²

Section 208 is an important source of authority for protecting water quality from a watershed perspective.¹³

⁴ *Natural Resources Defense Council v. Costle*, 564 F.2d 573, 576 (D.C. Cir. 1977).

⁵ 33 U.S.C. § 1288(a)(1).

⁶ 33 U.S.C. § 1288(a)(2); *see also* 40 CFR § 130.6(b).

⁷ 33 U.S.C. § 1288(b)(1)(A).

⁸ 33 U.S.C. § 1288(b)(3).

⁹ 33 U.S.C. § 1288(e).

¹⁰ *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005); *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1096-97 (9th Cir. 1998).

¹¹ EPA, *Basic Information About Nonpoint Source (NPS) Pollution*, <https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution> (accessed 10/29/2024).

¹² 33 U.S.C. § 1288(b)(2)(F-I) (emphasis added).

¹³ Barbara J. B. Green & Jon B. Alby, *Watershed Planning*, 1 U. Denv. Water L. Rev. 75 (1997).

2. Additional federal statutory requirements for regional planning (Sections 209 and 303(e) of CWA)

Other sections of the CWA authorize regional water quality planning as well.

§ 209 Basin Plans: CWA § 209 directs a national effort to develop Basin Plans not later than January 1, 1980, and 208 Plans must identify “any relationship to applicable basin plans developed under section 209 of the Act.”¹⁴ However, basin plans are largely outdated.¹⁵

§ 303(e) Continuing Planning Process: CWA § 303(e) of the CWA requires states to have a “continuing planning process” (“CPP”) separate but related to 208 planning. EPA approves state CPPs, which should include effluent limitations and schedules of compliance, total maximum daily loads of pollutants, implementation measures, and a description of the authority for “intergovernmental cooperation.”¹⁶ CPPs must incorporate “all elements of any applicable” 208 Plan.¹⁷

3. Federal regulations applicable to 208 planning

Part 130 of Title 40 of the Code of Federal Regulations include provisions that govern water quality planning. These regulations explain that Section 208 “is implemented jointly by EPA, the States, interstate agencies, and areawide, local and regional planning organizations.”¹⁸ The purpose of Water Quality Management Plans, including 208 Plans and CPPs, is to “identify priority point and nonpoint water quality problems, consider alternative solutions and recommend control measures, including the financial and institutional measures necessary for implementing recommended solutions.”¹⁹ Section 130.6(c) sets forth the required elements of water quality management plans.²⁰

B. Colorado Statutes, Regulations, and Policies for 208 Planning

1. Colorado Water Quality Control Act

The Colorado Water Quality Control Act (“CWQCA”) implements portions of the CWA in Colorado and authorizes the development of 208 Plans.²¹ 208 Plans and amendments must be either developed or reviewed by the Colorado Water Quality Control Division (“Division”

¹⁴ 40 CFR § 130.6(c)(8).

¹⁵ 33 U.S.C. § 1289; Water Quality Control Division, *Statewide Water Quality Management Plan*, Section 2.3.9 at 2-31 (June 13, 2011), accessed March 15, 2025 <https://drive.google.com/file/d/1Q3-aZWMOxdQv5ibXfPbUdY0nhSiV7mfF/view?usp=sharing>.

¹⁶ 33 U.S.C. § 1313(e)(3)(A-H).

¹⁷ 33 U.S.C. § 1313(e)(3)(B).

¹⁸ 40 CFR § 130.0(a).

¹⁹ 40 CFR § 130.6(b).

²⁰ 40 CFR § 130.6 (c)

²¹ C.R.S. § 25-8-105(1)(a).

or “WQCD”).²² Before submitting a 208 Plan to the Division for review, the CWQCA requires the designated 208 Planning Agency to hold a public hearing, provide adequate notice of such a hearing, and consider all comments submitted on the proposed plan or amendment.²³

2. WQCC Regulations

The Colorado Water Quality Control Commission (“WQCC”) requires that “any plan resulting from the Continuing Planning Process shall comply with the requirements of section 303(e)” of the CWA which in relevant part requires the EPA administrator to approve the “incorporation of all elements of any applicable areawide waste management plans under section 208.”²⁴

3. WQCC Policy 98-2

WQCC Policy 98-2, A Guide to Colorado Programs for Water Quality Management and Safe Drinking Water: A Continuing Planning Process describes the value of 208 planning, saying “this structure provided by the regional planning agencies has been fundamental to water quality actions that reflect local priorities and collaborative multi-purpose approaches.”²⁵ Then policy then goes on to lay out the elements of a 208 Plan as discussed below.

II. Elements of a 208 Plan

A. Clean Water Act

208 Plans should address “all wastes generated within the area involved.”²⁶ Related to waste treatment plants, 208 Plans should 1) identify “treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the area over a twenty-year period,” 2) establish construction priorities and a regulatory program to implement waste treatment management strategies, and 3) identify local agencies to implement such.²⁷

The Plan should identify implementation “measures necessary to carry out the plan. . . and the economic, social, and environmental impact of carrying out the plan” within specified time frames.²⁸ The Plan should address several specific types of water quality pollution, such as nonpoint sources, mine related sources, construction activity, and the disposal of

²² C.R.S. § 25-8-105(2).

²³ C.R.S. § 25-8-105(1)(b-d).

²⁴ 5 C.C.R. § 1002-23.3; 33 U.S.C. § 1312(e)(3)(B).

²⁵ WQCC Policy 98-2: A Guide to Colorado Programs for Water Quality Management and Safe Drinking Water (January 13, 2020), at 9 https://drive.google.com/file/d/18Tbk_kKdR-PeGvIwHQDbjET8jByrqU4t/view?usp=sharing WQCC Policy 98-2 at 8.

²⁶ 33 U.S.C. § 1288(b)(1)(A).

²⁷ 33 U.S.C. § 1288(b)(2)(A-D).

²⁸ 33 U.S.C. § 1288(b)(2)(E).

residual waste or other pollutants.²⁹ For these specific types of water quality pollution, the Plan should "identify procedures and methods (including land use requirements) to control to the extent feasible such sources."³⁰

B. EPA Regulations

EPA Regulations elaborate on Plan requirements by laying out nine elements required for all 208 Plans:

1. Total Maximum Daily Loads (TMDLs): Identification of both point and nonpoint sources of pollutants, pollutant reduction targets, and load reductions necessary to reduce the source(s) of the pollutant.
2. Effluent limitations: Description of water quality-based effluent limitations and schedules of compliance for the region.
3. Municipal and industrial waste treatment: An overview of municipal and industrial waste treatment dischargers, both currently operating and anticipated to be established or expanded. The Plan should also include "programs to provide necessary financial arrangements for such works; establishment of construction priorities and schedules for initiation and completion of such treatment works including an identification of open space and recreation opportunities from improved water quality."
4. Nonpoint source management and control: Discussion of agricultural and silvicultural, mine-related pollution, construction activity, urban runoff, and related activities. In each instance, the Plan should "set forth procedures and methods (including land use requirements) to control to the extent feasible such sources."
5. Management agencies: Identification of agencies responsible for carrying out the provisions of approved water quality management plans.
6. Implementation measures: Analysis of measures that will help carry out the water quality protections identified in the Plan, "including financing, the time needed to carry out the plan, and the economic, social and environmental impact of carrying out the plan."
7. Dredge or fill program: Description of programs for the control of dredge or fill material pursuant to Section 404 of the CWA.
8. Basin plan: Discussion of plans pursuant to Section 209 of the CWA, which are largely outdated.

²⁹ 33 U.S.C. § 1288(b)(2)(F-K).

³⁰ *Id.*

9. Groundwater: Description of “programs for control of groundwater pollution” within the region.³¹

C. WQCC Policy 98-2

The WQCC’s Policy 98-2 restates required elements of the 208 Plan, reorganizing the EPA nine elements into six elements substantially similar to the EPA’s:

1. “The identification of treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the area over a twenty-year period, necessary wastewater collection and urban stormwater runoff systems, necessary financial arrangements, land acquisition needs, and recreational use considerations associated with these treatment works;
2. The establishment of construction priorities for such treatment works and time schedules for the initiation and completion of all treatment works;
3. The identification of regulatory programs to manage waste treatment, including applicable pretreatment requirements and the location, modification, and construction of any facilities that may result in any discharge in an area;
4. The identification of those agencies necessary to construct, operate, and maintain all facilities required by the plan and otherwise to carry out the plan;
5. The identification of the measures those agencies deem necessary to carry out the plan, the period of time necessary to carry out the plan, and the costs of carrying out the plan within such time;
6. Processes to identify nonpoint source pollution (including from agricultural, silvicultural and unregulated mining activities), control the disposition of all residual waste generated in an area which could affect water quality and control the disposal of pollutants on land or in subsurface excavations within an area to protect ground and surface water quality.”³²

III. Implementing the 208 Plan in the NWCCOG Region

NWCCOG 208 planning focuses in large part on identifying and addressing the most pressing nonpoint source water quality and quantity issues in the NWCCOG Region: flow

³¹ 40 CFR § 130.6(c)(1-9).

³² WQCC Policy 98-2 at II.B.3.b.ii.

reductions from transmountain diversions, runoff from roadways, climate change impacts, and urban land uses.³³

1. Transmountain Diversions (“TMDs”). The NWCCOG Region is heavily impacted by TMDs that transfer an average of 500,000 acre-feet of water from the Colorado River Basin’s headwaters to the eastern side of the Continental Divide, equivalent to the storage capacity of Granby Reservoir.³⁴ The regional impacts from TMDs primarily stem from decreased water flows, which lead to increased pollutant concentrations, increased temperatures and sediment loading, and the loss of riparian and wetland values and functions. Indirect impacts from reduced flows include increased costs to treat wastewater in the NWCCOG Region, declines in fish populations, and resulting economic impacts especially to the recreation/tourism sector.³⁵
2. Runoff from Roadways: Runoff from regional roadways can cause adverse impacts to regional water quality, especially given I-70 bisects the NWCCOG Region.
3. Urban Land Uses: Runoff from developed areas can carry increased amounts of pollutants into waterways, especially from impervious surfaces covered by buildings, pavement, and compacted landscapes. The NWCCOG Region continues to grow rapidly, and interviews confirm various impacts from runoff from urban areas.
4. Climate Change: Climate change is predicted to generally worsen low flow conditions and raise air and thus water temperatures regionally.³⁶

NWCCOG serves as the Designated Planning Agency for the 208 Plan, and the counties, municipalities, and water and sanitation districts implement the 208 Plan. One of the most important parts of implementing the NWCCOG 208 Plan is identifying implementation actions for NWCCOG and implementing agencies.

Key implementation strategies in the 2025 Plan update include, for example:

- NWCCOG analyzes and provides comment to the WQCD as to whether discharge permits, antidegradation reviews, site location and design of new or expanded wastewater treatment systems, and the issuance of state revolving loan funds are

³³ NWCCOG/QQ, *Nonpoint Source Pollution Assessment for the NWCCOG Region* at 4.

³⁴ Colorado River Water Conservation District, Transmountain Diversion Policy (Revised and readopted April 2023), crwcd.wpenginepowered.com/wp-content/uploads/2023/07/202304-Transmountain-Water-Diversion.pdf.

³⁵ Coley/Forrest, Inc., *Water and Its Relationship to the Economies of the Headwaters Counties*, NWCCOG, 46 (Dec. 2011), nwccog.org/wp-content/uploads/2015/03/QOStudy_Report_Jan-2012.pdf.

³⁶ *Id* at 46.

consistent with the 208 Plan.³⁷ NWCCOG policies guide determinations of consistency with the 208 Plan. The 2025 Plan update includes nine policies found in Volume 1 of the Plan.

- NWCCOG determines whether land use development proposals to counties and municipalities in the region are consistent with the 208 Plan utilizing the nine policies in Volume 1 of the Plan.
- NWCCOG coordinates efforts to minimize nonpoint source pollution so that point source dischargers do not bear a disproportionate share of water quality protection costs. NWCCOG encourages agricultural users to implement voluntary best management practices (BMPs) to minimize adverse impacts to water quality from these activities.
- NWCCOG protects statutory authority for the designation and regulation of areas and activities of state interest under “1041 Regulations.”
- NWCCOG reviews and comments on proposed federal permits to ensure that water quality mitigation is required.
- Counties and municipalities adopt, strengthen, and enforce land use regulations that address water quality impacts of land use and development.
- Counties and municipalities protect streams, floodplains, wetlands, riparian areas, and shorelines through conservation easements, land exchanges, transfer of development rights, setbacks, or similar resource protection techniques. Techniques should consider predicted impacts of climate change and environmental justice considerations.
- During Water Quality Control Commission proceedings and federal rulemakings, NWCCOG and/or individual members advocate for the protection of classified uses, water quality standards that are fully protective of existing water quality, antidegradation provisions that take into account impacts to the region associated with the operation of projects, and the designation of high-quality waters when relevant parameters for such designation are satisfied.

As the implementation strategies demonstrate, the success of the 208 Plan hinges largely on local ability to regulate for water quality protection.

IV. County and Municipal Land Use Powers for Water Quality Planning

The 208 Plan calls for NWCCOG local governments to implement the 208 Plan in large part by adopting, strengthening, enforcing, and protecting regulatory authority to address nonpoint source water quality issues associated with development. The Colorado Land Use Enabling Act (“LUEA”) gives local governments the authority to “plan for and regulate the

³⁷ 5 C.C.R. § 1002-22.5 through 22.9; 5 C.C.R. § 1002-51.4 through 51.5.

use of land within their respective jurisdictions,” in order to balance “basic human needs of a changing population with legitimate environmental concerns.”³⁸ The Colorado General Assembly adopted the LUEA “in recognition that ‘rapid growth and uncontrolled development may destroy Colorado’s great resource of natural scenic and recreational wealth.’”³⁹ Counties and municipalities are explicitly authorized to consider water quality impacts of surface impacts of oil and gas and other energy and carbon management operations.⁴⁰

In addition to the broad powers granted by the LUEA and county and municipal planning statutes,⁴¹ counties and municipalities enact regulations based on statutory authority:

A. Areas and Activities of State Interest Act (“1041”)

Colorado House Bill 74-1041 (C.R.S. § 24-65.1-101 *et seq.*) also known as the Areas and Activities of State Interest Act or “1041,” authorizes counties and municipalities to designate and regulate a wide variety of areas and activities of state interest through a locally-enacted regulations establishing a permitting process.

Local governments may designate and regulate the adverse impact of water projects as matters of state interest in several ways. In particular, 1041 identifies “the efficient utilization of municipal and industrial water projects,” and “site selection and construction of major new domestic water and sewage treatment systems” as activities of state interest that can be designated and regulated by counties and municipalities.⁴² Areas of state interest, such as wildlife or natural hazard areas, also can be designated and development within the boundaries of those areas can be regulated by the local jurisdiction to protect water resources from environmental impacts.⁴³ If an application for a 1041 permit fails to meet even one criterion established by the local jurisdiction, “the permit shall be denied.”⁴⁴

B. Municipal Utility Powers Act

Section 31-15-707(1)(b) of the Colorado Municipal Utility Powers Act extends the regulatory reach of municipal powers outside its corporate boundaries to protect waterworks from pollution:

³⁸ C.R.S. § 29-20-102(1).

³⁹ *Droste v. Bd. of Cnty. Comm’rs of Pitkin*, 159 P.3d 601, 605 (Colo. 2007), citing *Theobald v. Bd. of Cnty. Comm’rs*, 644 P.2d 942, 947 (Colo.1982).

⁴⁰ C.R.S. § 29-20-104(h)(IV).

⁴¹ C.R.S. § 31-23-101 *et seq.*; C.R.S. § 30-28-101 *et seq.*

⁴² C.R.S. § 24-65.1-203(1)(a) and (1)(h).

⁴³ C.R.S. § 24-65.1-201(1)(a-b).

⁴⁴ C.R.S. § 24-65.1-501(3).

To construct or authorize the construction of such waterworks without their limits and, for the purpose of maintaining and protecting the same from injury and the water from pollution, their jurisdiction shall extend over the territory occupied by such works and all reservoirs, streams, trenches, pipes, and drains used in and necessary for the construction, maintenance, and operation of the same and over the stream or source from which the water is taken for five miles above the point from which it is taken and to enact all ordinances and regulations necessary to carry the power conferred in this paragraph (b) into effect.⁴⁵

Pursuant to this power, municipalities can enact ordinances that regulate land uses affecting extraterritorial water works, “reservoirs, streams, trenches, pipes, and drains,” and “five miles above the point from which [water] is taken” into the municipal system. These regulations often take a watershed approach to water quality protection.

V. Recommendations

A. Regularly Update and Defend the 208 Plan

NWCCOG and its members should regularly update the 208 Plan. NWCCOG and its members should also defend against attacks on 208 planning and local government regulatory authority to implement the 208 Plan, especially 1041 authority.

B. Adopt, Strengthen, and Enforce Local Water Quality Regulation

NWCCOG counties and municipalities should implement the 208 Plan through local regulations designed to address water quality impacts of land use and development. Regulations should:

- Apply within members’ jurisdictional boundaries and within their watersheds.
- Apply both on private and federal lands.
- Require consistency with the 208 Plan and any watershed management plans that may be locally applicable. The consistency requirement could read:

The Project will be consistent with stream management and water quality plans and policies, including but not limited to the NWCCOG Regional Water Quality Management Plan (“208 Plan”).

⁴⁵ C.R.S. § 31-15-707(1)(b).

- Include 1041 Regulations for areas and activities of state interest that may impact regional water quality, such as domestic water and wastewater treatment systems; municipal and industrial water projects; highways and interchanges and collector highways; and development in wildlife habitat areas.

NWCCOG members should use the 208 Plan Policies and Implementation Measures, the [NWCCOG Model Water Quality Protection Standards](#), and the [Water Savings Guidance and Model Standards for the Colorado Headwaters](#) in such efforts.

C. Participate in Federal and State Processes

NWCCOG should continue to analyze and provide comment to the WQCD as to whether discharge permits, antidegradation reviews, site location and design of new or expanded wastewater treatment systems, and the issuance of state revolving loan funds are consistent with the 208 Plan. The WQCD considers applicable comprehensive plans as well as the 208 Plan for these reviews, so NWCCOG members also have a role in reviewing applications to the WQCD.

NWCCOG and its member local governments should also continue to review and comment on proposed federal permits to ensure that water quality mitigation is required. The most common federal permits for projects with outsized water quality impacts are 404 Dredge and Fill Permits (and the state counterpart soon to be adopted as WQCC Regulation 87) and Federal Energy Regulatory Commission relicensing. Applicant for federal licenses or permits like these must obtain a 401 certification from the WQCD. The 208 Plan is well-positioned to inform this analysis.

NWCCOG and its members who are impacted by activities subject to the National Environmental Policy Act (“NEPA”) should participate as a cooperating agency. Under NEPA, a local agency “with special expertise with respect to any environmental issue” may become a cooperating agency, which enables the agency to participate in NEPA processes at an earlier time and assist with environmental analyses to a higher degree than through public participation in the process.⁴⁶ Cooperating agency status can help strengthen regional water quality analyses and better promote issues identified by NWCCOG and its members in federal processes.

Participation in these federal and state processes is most effective when local governments and the 208 Agency weigh in on local water quality impacts of projects or activities collectively. Members should reach out to NWCCOG to coordinate on such efforts.

⁴⁶ 40 C.F.R. 1501.8.

D. Advocate for Headwaters' Interests

At the state and federal level, NWCCOG and its members need to continue to track legislation, regulatory updates, or policies that affect members' authority to protect regional water quality. Examples include state and federal legislation; federal rulemakings implementing the CWA, NEPA, and land management agency regulations; state agency rulemakings before the WQCC or the Energy and Carbon Management Commission ("ECMC"); administrative policies and Executive Orders; federal and state permit applications; and other relevant processes such as the Water Quality Forum, the Colorado Water Conservation Board and Basin Roundtables, and other stakeholder processes.