



COLORADO
Department of Public
Health & Environment

Dedicated to protecting and improving the health and environment of the people of Colorado

November 13, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Attention: Docket ID No. EPA-HQ-OW-2011-0880

Re: Proposed Revisions to Definition of Waters of the United States
Docket ID No. EPA-HQ-OW-2011-0880

Dear EPA:

The State of Colorado offers the following comments on the Environmental Protection Agency (EPA) and Department of Defense, Department of the Army, Corps of Engineers (Corps) (jointly “the agencies”) April 21, 2014 proposed rule regarding the definition of “waters of the United States” under the Clean Water Act (CWA). Colorado cannot support the proposed rule unless and until the agencies provide the clarification and assurances requested herein.

Colorado’s primary interests in the jurisdiction and application of the CWA to waters flowing within state borders relate to water quality, water supply and administration, and continuation of agricultural activities. It is the policy of the State of Colorado to prevent injury to beneficial uses of waters, to maximize the beneficial uses of water, and to achieve the maximum practical degree of water quality. Colorado has vested interests in securing and protecting the rights to use water that originates within Colorado and provides a water supply to 19 states and Mexico. Consequently, Colorado maintains significant interests in the efficient and wise management of water resources and in preserving the State’s clear authority to administer and allocate water within its boundaries. Agriculture is a large economic driver in Colorado; given the arid nature of the state, Colorado depends heavily on irrigated agriculture. It is with these understandings that Colorado submits the following comments.

Generally:

There has been a great deal of uncertainty regarding the scope of CWA jurisdiction following the United States Supreme Court decisions in *SWANCC* and *Rapanos*. Colorado recognizes a need for clarity in the scope of CWA jurisdiction in order to understand when CWA is applicable, reduce permitting time, reduce costs, and provide project proponents certainty so they can engage in project planning appropriately and efficiently. As a headwaters state, Colorado is particularly interested in jurisdictional determinations in those headwaters.

Colorado appreciates the agencies’ statements that the proposed rule is not intended to expand what falls within CWA jurisdiction. The State remains concerned, however, that without more clarification, the definition of CWA jurisdiction to include water with a



significant nexus to navigable waters, which may include tributaries, adjacent waters and other waters as defined by the Rule, could be construed as expanding EPA and Corps obligations. Such expansion of jurisdiction could also invite added regulation over actions that have not been subjected to such regulation to date. For example, if the EPA or Corps' authority to regulate waters of the United States extends to activities in locations that have not required permits before, then so too could these agencies' obligations to conduct NEPA analyses prior to authorizing such permit under the CWA. Accordingly, Colorado recommends any revisions or edits to the proposed rule carefully acknowledge the need to clarify and not expand the existing jurisdiction of the CWA.

Agricultural Exemptions:

The agencies have stated that the proposed rule does not change or limit any of the multiple exclusions and exemptions from jurisdiction and permit requirements provided by the CWA and its regulations. Colorado supports the agencies' decision to retain intact all of the CWA agricultural exemptions. Agriculture is one of the largest economic sectors in our state; our farmers and ranchers feed the people of Colorado and beyond while conserving environmental resources. It is essential that any revisions to the provisions defining the scope of CWA jurisdiction and its exemptions not create any confusion for the agricultural sector, and that the proposed definitions do not impact the scope of the agricultural exemptions. Compliance with the CWA must be straightforward and reasonable.

Furthermore, to provide clarity to the regulated community, the exemptions in CWA sections 402, 502, and 404 should be specifically included as exemptions in the proposed rule to expressly identify what is meant by the statement in the Fed. Reg. notice (page 22193-4) that all statutory exemptions for agriculture from CWA jurisdiction will be retained.

Cumulative Impacts:

Colorado is particularly interested in protection of our high quality water resources, therefore protecting our headwaters is a priority for our state. Accordingly, Colorado supports the agencies' proposal that in determining whether "other waters" have a significant nexus to traditionally navigable waters, there will be an assessment of whether waters "alone or in combination with other similarly situated waters" have a significant nexus. Colorado agrees that it is appropriate to consider the cumulative impacts of potential activities on multiple tributaries upstream of traditionally navigable waters within a particular watershed and is supportive of this concept being included in the federal rule.

Jurisdictional Determinations for Ditches:

The agencies should provide more clarity regarding jurisdictional determinations for ditches. In particular, the proposed rule excludes ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow. Colorado believes that many of its roadside ditches would fall under this exclusion, but given the fact that the exclusion relies heavily on "uplands," Colorado suggests that the agencies provide more clarity regarding what constitutes an "upland" so that Colorado and other states can better assess the impact of the rule. We understand that the Corps utilizes a three-part test to determine uplands, based on plant life, soils, and hydrology, and suggest that the agencies consider referencing this test in the rule in order to provide clarity to which ditches will be deemed jurisdictional.

In addition, one part of the uplands exclusion for ditches requires that the ditch "drain only uplands." There is confusion regarding whether this phrase is intended to mean (1) the ditch drains only into uplands areas, or (2) the ditch must have been constructed in order to drain upland areas to allow farming or construction. If EPA's intended meaning is the former,



Colorado suggests that the agencies provide clarity by revising the language to read “drain only to uplands”.

If the agencies’ intended meaning is the latter, there is confusion regarding the outcome if a ditch had been constructed with the motivation to drain only an uplands area but over time drains other areas as well. Colorado would propose that the original motivation for the construction of the ditch should control, and therefore even if future conditions result in the ditch draining other areas as well the ditch does not become jurisdictional. The regulation should be modified to state “Ditches that are excavated wholly in uplands, and in order to drain only uplands, and have less than perennial flow.”

EPA has indicated in public meetings that an “upland” is everything upstream of navigable waters and waters that have a bed and bank and ordinary high water mark. However, “bed, bank, and ordinary high water mark” are used to define what is a tributary and therefore a water of the United States. It is confusing and circular to define an exclusion from the rule by using the term “upland,” and then define “upland” as what is not jurisdictional in the rule. When the agencies clarify the meaning of “uplands,” they should do so in a way that does not use this circular reasoning.

While Colorado believes that modifications to these provisions is necessary, any modifications to the provisions that exclude ditches from being jurisdictional waters should be done in close consultation with the states to ensure that the revisions do not diminish the agricultural exemptions in any way. Clarifying which ditches are jurisdictional and which are not would be a very important improvement to the proposed rule.

Definitions:

As exemplified by the above comments, there is some confusion related to the concept and definition of uplands. This may be the basis for some concerns that the proposed rule serves to increase CWA jurisdiction over areas that many consider to be outside the definition of waters of the US. Additionally, the terms “gullies,” “rills,” and “non-wetland swales” are proposed to be exempt by rule, but the agencies have also not provided definitions of these features. The State recommends that the proposed rule clarify what is meant by these terms and in so doing recognize the unique nature of water in the West to avoid unnecessary conflicts and/or unintended consequences.

The rule should also provide additional clarity regarding the definition of groundwater. The rule should specify that subsurface flows used to establish shallow subsurface hydrologic connections between surface waters are not jurisdictional themselves.

The agencies have proposed that some waters will be determined jurisdictional based on whether or not they have a “significant nexus” to traditionally navigable waters. It is critical that the agencies work with Colorado and all states to develop a consistent interpretation of “significant nexus” so that it is not applied inconsistently within Colorado or between different states.

Hydropower Projects:

Colorado is interested in promoting small hydro power projects. It is our interpretation that the proposed rule would not change which projects will or will not need a section 402 or 404 permit, and anticipate that the agencies agree.



Co-Regulator Consultation:

To reiterate, Colorado cannot support the proposed rule unless and until the agencies provide the clarification and assurances requested herein. Colorado encourages the agencies to continue to consult with the states as co-regulators to ensure that refinements to the rule address concerns that have been raised and to provide more clarity within the rule itself. Such consultation will also be critical in the event that additional revisions come to light as necessary after the Science Advisory Board releases its final report on connectivity. Considering the unique characteristics of hydrology, topography, and the legal frameworks in Colorado, we are particularly interested in continuing this dialogue. Through meaningful discussions, the governments can work together to ensure the rule is applied consistently and reasonably throughout the state. Colorado looks forward to a continuing dialogue on protecting our state and our nation's water resources.

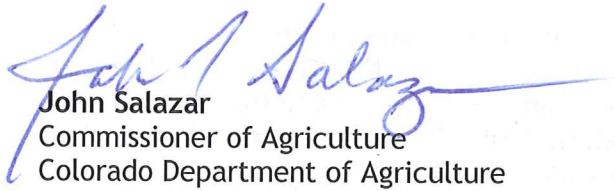
Sincerely,



Dr. Larry Wolk
Executive Director
Colorado Department of Public Health and Environment



Mike King
Executive Director
Colorado Department of Natural Resources



John Salazar
Commissioner of Agriculture
Colorado Department of Agriculture

