September 3, 2021

Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Office of the Assistant Secretary of the Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310-0104

Re: Request for Recommendations, "Waters of the United States," Docket ID No. EPA-HQ-OW-2021-0328

The State of Colorado (Colorado or State) submits the following feedback to the questions and issues identified by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) (jointly the federal agencies) in the August 4, 2021 Federal Register notice, 86 Fed. Reg. 41913, regarding the definition of Waters of the United States (WOTUS). Colorado deeply appreciates the opportunity to provide feedback early in this rulemaking process and looks forward to additional discussions with the federal agencies on these topics. As a headwaters state that, like much of the western United States, is currently suffering the consequences of long-term drought and aridification on its water resources, Colorado has expertise with the full suite of unique western water issues and can provide critical input as the federal agencies work to craft a durable, balanced, and scientifically based WOTUS definition. Colorado encourages the federal agencies to consult with our state agencies and experts throughout the rulemaking effort.

I. INTRODUCTION AND BACKGROUND

Colorado places the highest priority on protection of the State's land, air, and water, and relies on a combination of federal and state regulations to ensure that protection.

The headwaters of five major multistate river systems are within Colorado's boundaries: the Arkansas, the Colorado, the Platte, the Republican, and the Rio Grande. Many of these headwaters comprise a web of wetlands, ephemeral streams, and intermittent streams, and many are connected to traditionally navigable waters. These waters have critical importance

to the quality of water used by Colorado and 19 downstream states for drinking, agriculture, recreation, and the health of both aquatic and terrestrial ecosystems.

For Colorado's water to be most useful for drinking, agriculture, aquatic life, recreation, and other critical purposes, it must be high quality. Polluted, low quality water hurts Colorado and hurts the nation. Consider Colorado communities, such as Greeley and Fort Collins, with drinking water quality impacted by wildfire. Healthy wetlands in the headwaters help to slow the rate of fire spread, filter sediment, and protect channels that would otherwise deliver ash and heavy metal laden waters to municipal intakes. Once these headwaters are degraded and the source waters are polluted, the remedy can require considerable cost and effort. These impacts can also be seen on other critical infrastructure, such as Interstate-70, a portion of which has been repeatedly closed this summer following mudslides resulting from last year's wildfires.[1] Accordingly, protecting water quality in headwater states like Colorado has been a national priority since the passage of the Clean Water Act (CWA) in 1972. In the last forty years, Colorado and the federal government have worked together to make enormous progress in protecting water quality throughout Colorado, including in Colorado's headwaters, and this work should continue to be a national priority.

As with many western states, the large majority of Colorado's stream miles are classified by the U.S. Geological Survey (USGS) as either intermittent or ephemeral and are likely excluded from federal protections under the 2020 Navigable Waters Protection Rule (2020 NWPR). This lack of protection and regulatory clarity, as explained below, has undermined protections for Colorado's headwaters and placed new, extensive regulatory burdens on Colorado by requiring the State to act alone in this arena.

Nearly half of Colorado's acreage is dedicated to farming, ranching, and other agricultural operations that contribute tens of billions of dollars a year to the State's economy. Because the State's agricultural commodities feed Coloradans and beyond, water quantity and quality are critically important to Colorado producers. To make the most responsible and productive decisions, farmers and ranchers must have certainty about whether their lands include jurisdictional waters. Unfortunately, over the last decade, we have operated in a period of considerable uncertainty, as efforts to revisit the regime in place under the 2008 Guidance led to significant revisions in 2015 and 2020. Therefore, Colorado supports objective, clear, and recognizable limits on the extent of CWA jurisdiction and a reinforcement and clarification of the scope of existing agricultural exceptions, as discussed below. In short, we believe a recommitment to an approach along the lines of the 2008 Guidance would promise an end to the ongoing uncertainty and litigation we have witnessed over the last decade.

Stated more broadly, Colorado urges the federal agencies to develop a revised definition of WOTUS to improve regulatory certainty that:

- Is consistent with the U.S. Supreme Court's CWA jurisprudence, including *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), *Solid Waste Agency of Northern Cook County v. U.S Army Corps of Engineers*, 531 U.S. 159 (2001), and Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006);

[1] NPR, *Mudslides, Worsened By Last Year's Wildfires, Shut Down A Vital Colorado Highway* (August 3, 2021).

- Advances (and does not undermine) the objectives of the CWA: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a);
- Retains consistency and certainty with longstanding federal CWA practice, particularly the protection of water quality in Colorado;
- Is based on science, not arbitrary categories;
- Is flexible enough to acknowledge the biological and hydrological conditions of western streams and wetlands;
- Considers the cumulative impacts of tributaries on downstream navigable waters;
- Preserves the 2020 Navigable Waters Protection Rule's agricultural exemptions;
- Continues the previous WOTUS rules' consistency with Section 101(g) of the CWA and recognition of states' authority to manage water quantity; and
- Provides additional clarity regarding the application of the significant nexus test by establishing criteria or factors to be considered in any significant nexus analysis.

II. FEEDBACK ON SPECIFIC WOTUS ISSUES

Colorado's initial feedback on the issues identified in the August 4, 2021 Federal Register notice is set forth below.

A. Implementation

***Federal Agencies' Question**: The agencies seek input on co-regulator and stakeholder experiences with implementing the various regulatory regimes. In particular, the agencies would like feedback on significant nexus analyses under the pre-2015 regulatory regime and the 2015 Clean Water Rule, as well as the typical year analysis under the NWPR.*

- *Are there implementation successes and challenges in assessing specific types of sites?*
- *If there are challenges, what types of implementation assistance would be helpful?*
- *Are there ways in which these assessments could be more efficient?*
- *Are there tools that have been, or could be, developed to assist in determining jurisdiction?*

Colorado Response: Colorado supports continued federal protection of waters under a "significant nexus" test described by Justice Kennedy in *Rapanos v. United States* for wetlands and applied to all waters by the agencies in the *Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. U.S. and Carabell v. United States* (2008 Guidance). To be sure, the implementation of the 2008 Guidance suggests that there is room for improvement; in particular, there is a need for greater consistency in the application of the guidance among the various Corps districts. We request that the federal agencies adopt a new WOTUS rule based on the existing 2008 Guidance using the Kennedy significant nexus test but also providing additional clarity regarding how the significant nexus test applies. Such an approach should include objective, definable parameters supported by science like physical or biological markers of connectivity. Such sideboards on Kennedy's significant nexus test would help provide clear, science-based, and unambiguous jurisdictional determinations that make clear that the degree or gradient of connectivity is determined with quantifiable metrics that define at what point the

connectivity nexus becomes "significant." Science, including Colorado's Appendix 2 to its 2019 comments (and resubmitted as Appendix 2 to these comments), entitled *More Information Regarding the Science of Tributaries,* provides a basis to inform the identification of defined parameters that determine where along the connectivity gradient WOTUS end and state waters begin. For instance, Colorado supports a significant nexus test that requires a hydrologic connection based on scientific criteria that can be objectively, consistently, and repeatedly applied throughout the Corps' different districts in the West, particularly with regard to irrigation ditches and ephemeral features. Clarifications of Justice Kennedy's significant nexus test would provide landowners with greater confidence in managing their land and provide clarity on which actions would trigger federal oversight under the WOTUS rule.

Colorado requests that the Corps take steps to improve public transparency with regard to projects with nationwide permit coverage and its determinations of activities that qualify for exemption under Section 404(f)(1) of the CWA. Colorado requests that the Corps add these projects and determinations to the USACE Jurisdictional Determinations and Permit Decisions database and map. Colorado also requests that the USACE Jurisdictional Determinations and Permit Decisions database be made searchable by additional fields, including the regulated entity name, waterbody, industry or activity type, and scale of proposed disturbance. Finally, Colorado requests adding a field to the Corps' database that clearly identifies why a particular waterbody is or is not jurisdictional. For example, this field could read, "Ephemeral channel-significant nexus to navigable water," when the Corps has performed an approved jurisdictional determination concluding that a particular ephemeral channel is jurisdictional by virtue of its significant nexus to a navigable water. Including this information in the Corps' database would help Colorado understand the typical characteristics of jurisdictional waters in which dredge and fill activities typically take place.

B. Regional, State, and Tribal Interests

***Federal Agencies' Question**: The agencies request feedback on how or whether states and tribes have taken any actions in response to changes in the jurisdictional scope of ''waters of the United States'' under the NWPR.*

Colorado Response: Colorado works closely with the EPA to administer CWA permit programs. The Colorado Department of Public Health and the Environment (CDPHE or the Department), Water Quality Control Division (the Division), implements the CWA's National Pollutant Discharge Elimination System (NPDES) in Colorado under delegation from EPA and has developed a robust state water quality program that seeks to protect state waters through a discharge permitting program for point sources. Colorado defines its "state waters" far more broadly than "waters of the United States." Colorado state waters are "any and all surface and subsurface waters which are contained in or flow in or through this state," with minor exceptions for waters in treatment system. *See* Colorado Water Quality Control Act, § 25-8-103(19), C.R.S. Colorado law bars discharges of pollutants to state waters without a state or federal permit. *See* Colorado Water Quality Control Act, § 25-8-501, C.R.S. (requiring permits for the discharge of pollutants with limited exemptions).

Colorado does not currently have its own program to permit discharges of dredge and fill materials to state waters. Instead, Colorado has relied on the federal Section 404 program administered by the Corps to regulate dredge and fill activity and protect critical streams and wetlands.

Under the 2020 NWPR, all of Colorado's ephemeral waters and many of Colorado's intermittent streams and wetlands are excluded from federal jurisdiction. As a result, these waters are no longer eligible to receive a Section 404 permit from the Corps. Without a federal permit, the Colorado Water Quality Control Act treats discharges of fill to state waters the same as any other discharges of pollutants—these discharges cannot result in exceedances of water quality standards or compromise the classified uses of those waters. There is currently no state provision, like in Section 404 of the CWA, allowing Colorado to issue dredge and fill permits based on mitigation or replacement of the filled wetlands or waters. Because discharges of fill, by their nature, are likely to result in exceedances of state water quality standards and compromise the classified uses of these waters, Colorado cannot currently authorize these discharges under a state permit. *See, e.g.*, 5 CCR 1002-61, Reg. 61.8(1)(iii) (Colorado's Water Quality Control Division cannot issue a permit when "the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States").

The "gap" in permit coverage resulting from the 2020 NWPR is significant. The 2020 NWPR categorically excludes from the definition of "waters of the United States," among other things, ephemeral features, including ephemeral streams, swales, gullies, rills, and pools. 33 C.F.R. § 328.3(b); 40 C.F.R. § 120.2(2). Some of these features were subject to federal jurisdiction under the 2008 Guidance using the significant nexus analysis. The 2020 NWPR also includes new definitions for "adjacent wetlands" and "tributaries" that further narrow the scope of waters subject to federal jurisdiction. 33 C.F.R. § 328.3(c)(1) & (c)(12); 40 C.F.R. § 120.2(3)(i) & (3)(xii).

The USGS's National Hydrography Dataset (NHD) indicates that 24% of Colorado's streams are ephemeral and 45% are intermittent. Although the NHD provides the best available estimate of ephemeral and intermittent stream mileage statewide, it likely underestimates the true extent of these waters because the computer-based methods used to identify small stream channels over large geographic areas depend on the accuracy, scale, and assumptions inherent in the maps and models available.[2] Many of Colorado's wetlands covered under the 2008 Guidance are likely no longer subject to federal jurisdiction under the 2020 NWPR. Based on modeling developed by St. Mary's University of Minnesota and the Colorado Natural Heritage Program, Colorado estimates that between 12 and 51% of wetlands in the South Platte Headwaters watershed are no longer subject to federal jurisdiction and permitting under the 2020 NWPR.[3] This amounts to between 8,400 and 35,000 acres of wetlands in just one of Colorado's watersheds. Trout Unlimited and The Nature Conservancy have also developed estimates of the scope of Colorado's waters that lost federal protection under the 2020 NWPR. This work, which focuses on ephemeral streams and their associated wetlands, confirms that at least 25% of Colorado's streams and 22% of Colorado's wetlands have likely lost protection under the 2020 NWPR. The proportion of streams at risk increases to 75-100% in watersheds of the Eastern Plains and San Luis Valley. Similarly, 80-100% of wetlands have lost protection in watersheds in eastern Colorado and some mountainous headwaters.[4]

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[2] Heine, Reuben & Lant, Christopher & Sengupta, Raja. (2004). *Development and Comparison of Approaches for Automated Mapping of Stream Channel Networks*. Annals of the Association of American Geographers, 94(3) 477-490, at 478.

[3] St. Mary's University, *Modeling Federally Protected Waters and Wetlands*, (2019).

[4] Abby Burk, *Colorado's Wetlands and Streams Urgently Need Protections*, Audubon Rockies (Mar. 5, 2021).

Thus, the 2020 NWPR excludes a large swath of Colorado waters—approximately 24 to 69 %—from federal jurisdiction and Section 404 permitting. These impacts are likely far greater in particularly dry areas of the state. With the 2020 NWPR in effect in Colorado, project sponsors have no way to obtain legal authorization to conduct dredge and fill activities in Colorado's state waters that are no longer eligible for a federal permit. This creates regulatory uncertainty and risk for project sponsors and seriously complicates projects that may now be subject to federal oversight for only a portion of the project site.

To understand the scope of affected projects, Colorado has gathered data from the Corps to determine the average number of yearly permits issued in Colorado under Section 404 under the rules governing federal jurisdiction prior to the 2020 NWPR going into effect in Colorado. Based on information Colorado has received from the Corps, there were almost 1,000 actions performed annually by the Corps to support Section 404 or dredge and fill permit activities prior to the 2020 NWPR. These actions included issuance of approximately 720 permits and 240 jurisdictional determinations per year. Based on our analysis of the proportion of Colorado's waters that are no longer subject to federal jurisdiction under the new WOTUS definition, Colorado estimates that up to 50 percent of activities that were subject to these Corps actions in an average year are no longer eligible for a Corps permit under the 2020 NWPR.

Colorado has spent significant state resources working with stakeholders to develop a state solution to address the gap in federal protection and permitting for Colorado waters created by the 2020 NWPR. To this end, Colorado held multiple stakeholder meetings between 2020 and 2021 (summarized in the attached Dredge and Fill White Paper #2) and drafted an extensive analysis of how a potential state dredge and fill program could address the gap created by the 2020 NWPR (the attached Dredge and Fill White Paper #1). Based on that work and analysis, CDPHE proposed legislation in both the 2020 and 2021 Colorado legislative sessions to establish a state dredge and fill permitting program exclusively for the waters that lost federal protection under the 2020 NWPR. CDPHE also proposed legislation in the 2021 session to give the Department resources to protect these waters through enforcement. In the midst of uncertainty and continuing litigation around the 2020 NWPR, the Colorado General Assembly declined to institute a new state program. Consequently, there is no permitting mechanism for dredge and fill activities in these waters and Colorado has had to divert resources from other programs in order to ensure that no illegal fill activity takes place in these "gap" waters.

The State has already identified several projects for which the Corps has issued non-jurisdictional determinations for impacted ephemeral streams and wetlands or for which the project operators have indicated they will not obtain 404 permits. The State has had to divert resources from other clean water programs to identify and communicate with entities associated with these projects about the relevant state laws, and these entities have expressed significant confusion regarding the differing authority of the state and federal governments. The State anticipates continued expenditure of resources for surveillance and investigation work to identify unpermitted dredge and fill activity, including efforts to conduct inspections, document findings, and potentially take enforcement action on unpermitted dredge and fill activity. Colorado's typical oversight goal for the construction sector is around 10% of all permitted activities; in order to meet this goal for projects that are no longer subject to federal oversight, the State would need to conduct about 36 additional inspections a year, nearly a 10% increase in inspections for the construction sector. If inspections suggest further enforcement is warranted, those enforcement cases will require

additional resources.

Prior to the 2020 NWPR taking effect in Colorado, EPA typically completed between three and five enforcement cases in Colorado per year for 404 permit violations. For example, in 2017, EPA completed two enforcement cases, both of which concerned at least some waters likely to be excluded from federal jurisdiction under the 2020 NWPR. Earlier years saw greater numbers of enforcement cases, such as 2014, when EPA completed seven enforcement actions. Four of those actions covered at least some waters that are probably not jurisdictional under the 2020 NWPR.[5] Between 2011 and 2017, EPA initiated several enforcement actions against parties who discharged dredged and fill material to Sheep Creek and its adjacent wetlands without obtaining the necessary 404 permits.[6] Sheep Creek, located in Colorado's San Luis Valley, was considered a jurisdictional water under the 2008 Guidance because it was a relatively permanent tributary to Saguache Creek, a tributary to San Luis Creek that terminates in San Luis Lake, the only traditionally navigable water in this sequence.[7] However, Colorado's analysis indicates that Saguache Creek becomes a dry, ephemeral channel upstream of its confluence with San Luis Creek, and surface water rarely, if ever, flows through this portion of the channel. Under the 2020 NWPR, such "ephemeral breaks" sever jurisdiction over all upstream waters. Thus, EPA would no longer have jurisdiction to enforce against discharges into Sheep Creek.

Without federal oversight of dredge and fill activities in non-WOTUS state waters, Colorado has had to assume a substantial enforcement burden to cover oversight of up to half of dredge and fill activity previously permitted by the Corps. As noted, Colorado does not have its own permitting program for these activities. In addition, the Corps does not have an established mechanism for alerting the state when applicants conduct or plan dredge and fill activities in non-jurisdictional waters, except for the small subset of projects with an Approved Jurisdictional Determination or individual permit that identifies those non-jurisdictional impacts. This approach to enforcement will likely lead to increased demand on state resources and a degradation in state water quality because compliance and enforcement will depend on complaints and reports of illegal activity, and oversight by staff whose duties to date have not included dredge and fill enforcement.

Colorado does not currently have dedicated funding or staffing resources to undertake enforcement action against illegal fill activity in state waters. Instead, already-overburdened enforcement staff have taken on this dredge and fill work on top of their normal priorities. If this continues in the long term, it will threaten compliance and enforcement efforts across clean water programs, leading to regulatory uncertainty for developers and additional burdens on state enforcement staff.

In sum, Colorado has responded as best it can to the 2020 NWPR's withdrawal of federal protection and permitting authority and is working hard to try to protect these waters. But it lacks the statutory authority for a dredge and fill permitting program and the enforcement resources of the federal government, and Colorado is deeply concerned that it will be unable to protect these important waters in the future with its current resources.

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[5] *See* *Environmental Protection Agency, Enforcement and Compliance History Online Database*.
[6] *See* Combined Complaint & Consent Agreement, Docket No. CWA-08-2017-0009, ¶¶ 12, 14, 20, 21, 37, 39.
[7] *See id.* ¶ 10.

C. Science

***Federal Agencies' Question**: Consistent with Executive Order 13990, the agencies request identification of relevant science related to how streams, wetlands, lakes, and ponds restore and maintain the chemical, physical, and biological integrity of the nation's waters, including relevant literature that has been published since EPA's 2015 Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.*

Colorado Response: Colorado respectfully submits attachments from its 2019 comments, including Appendix 1 (with a new addendum) - *Biological Importance of Ephemeral and Intermittent Streams and Non-Adjacent Wetlands in Colorado*, and Appendix 2 - *More Information Regarding the Science of Tributaries.* These documents summarize some of the key science around the biological importance of waters excluded under the 2020 NWPR in Colorado and the complex relationship between ephemeral and larger streams in the arid West. Colorado also points the federal agencies to the following more recent, relevant scientific literature:

- Ellen Wohl, Janine Castro, Brian Cluer, Dorothy Merritts, Paul Powers, Brian Staab and Colin Thorne, *Rediscovering, Reevaluating, and Restoring Lost River-Wetland Corridors*, Frontiers in Earth Science (June 30, 2021), found at https://www.frontiersin.org/articles/10.3389/feart.2021.653623/full. This paper explores the complexities of river systems and their relationships with a much broader community of wetlands and groundwater resources than is often considered when describing the river channel influence.
- Hooley-Underwood, Z. E., Thompson, K. G., & Bestgen, K. R., *Razorback sucker spawning in an intermittent Colorado tributary*, North American Journal of Fisheries Management (April 19, 2021), found at https://doi.org/10.1002/nafm.10623. This paper documents the presence of federally endangered razorback suckers in intermittent streams. Both male and female were expressing gametes, suggesting they may have been accessing the intermittent streams to spawn. This paper is discussed more in a new addendum to Appendix 1.
- Schorr, R. A., & Mihlbachler, B. S., *Understanding habitat quality for Preble's Meadow Jumping Mouse: How survival responds to vegetation structure and composition*, Journal of Fish and Wildlife Management, *9*(2), 545-553, (Sept. 13, 2018), found at https://doi.org/10.3996/052018-JFWM-040. This paper documents the importance of riparian wetland vegetation for the survival of the federally threatened Preble's meadow jumping mouse. This paper is discussed more in a new addendum to Appendix 1.

D. Environmental justice interests

***Federal Agencies' Question**: Consistent with Executive Order 13990, the agencies request feedback on how to better engage to ensure input is received from communities with environmental justice interests. How does the jurisdictional status of waters affect communities that are overburdened with environmental pollution? How is the implementation of NWPR impacting low-income communities, and other disadvantaged communities? Can the jurisdictional status of waters be linked to environmental justice concerns, and, if so, what is the basis?*

Colorado Response: Colorado strongly supports the federal agencies working to ensure that input is received on WOTUS issues from communities with environmental justice interests. Colorado law defines communities with environmental justice interests as Disproportionately Impacted Communities. *See* § 24-4-109(2)(b)(II), C.R.S. CDPHE encourages the agencies to reach out directly to affected persons within Disproportionately Impacted Communities. Additionally, Colorado provides the following initial feedback on this issue:

First, the loss of federal protections for its waters under the 2020 NWPR and Colorado's limited enforcement resources has meant that many areas of the State, including Disproportionately Impacted Communities, are vulnerable to the degradation of their streams and wetlands from illegal dredge and fill activities. Such areas include portions of Colorado's eastern plains and the San Luis Valley. This can affect agriculture, recreational uses, and fishing in Disproportionately Impacted Communities.

Second, many of the Colorado waters that lost federal protections under the 2020 NWPR have traditionally provided high quality water for drinking and agriculture. Within Colorado, 10,510 miles of intermittent and ephemeral streams provide water for surface water intakes supplying public drinking water systems.[8] Headwater and wetland fills upstream of those intakes may degrade the quality of the water used by those systems. If the quality of these headwaters declines, public health could be jeopardized, and downstream drinking water plants will incur greater costs to treat their water. Private well users whose wells are close to surface water bodies may also find their drinking water degraded and health impacted. These cost and water quality issues are likely to hit Disproportionately Impacted Communities even harder because they have less capacity to absorb additional rate increases or compensate for a loss of high-quality drinking water by buying treated water.

Third, Colorado believes that Disproportionately Impacted Communities are themselves best positioned to provide feedback on how to effectively engage with them to receive their feedback. Every community is different and knows its own needs for communication the best. However, Colorado has assembled a list of best practices for community engagement that are outlined in its Environmental Justice Act. § 24-4-109(3), C.R.S. These include:

- Providing multiple and variable opportunities for public meetings and public hearings, including at least one session on a weekend, one on a weekday evening, and one on a weekday morning;
- Providing at least 30-days' notice before public input opportunities or the start of a public comment session;
- Using several different outreach methods, including disseminating information through trusted community partner organizations such as schools, clinics, social media, social and activity hubs, local governments, libraries, religious organizations, civic associations, community-based environmental justice organizations, and other local service providers;
- Providing multiple methods for the public to give input including in-person meetings, virtual/online meetings, online comment portals and email, and call-in meetings;
- Using a variety of locations for in-person public input on proposed state action (when consistent with public health guidelines), including holding meetings in urban centers, neighborhoods whose populations are predominantly people of color and low income, and rural areas; and

[8] EPA, *Percentage of Surface Drinking Water from Intermittent, Ephemeral, or Headwater Streams in Colorado*.

- Creating outreach materials about proposed actions in layperson's terms, translated into the most-frequently spoken languages in the communities sought to be reached. These materials should inform people of opportunities for public input, their rights, possible outcomes, and the details of upcoming public input processes.

Finally, Colorado believes that the jurisdictional status of waters can be linked to environmental justice concerns. Data from Colorado and around the country consistently show that communities of color and low-income communities—including some rural communities—are statistically more likely to be exposed to a variety of environmental health risks, environmental effects that negatively impact the lived experience of the environment, and lack of access to environmental benefits. The federal agencies can, and should, use the geospatial analysis tools at their disposal to analyze whether wetlands that lost federal protections under the 2020 NWPR are spatially concentrated in or up-watershed from Disproportionately Impacted Communities. EPA's EJScreen tool may provide one mechanism for doing so. The federal agencies can also partner with states to use state datasets, as well as state demographic definitions of Disproportionately Impacted Communities for this kind of analysis. Such spatial analyses can confirm whether trends common to other areas of concentrating impacts in Disproportionately Impacted Communities are borne out in wetlands that lost federal protections under the 2020 NWPR, and also inform how environmental justice can inform the agencies' approach to WOTUS.

E. Climate implications

***Federal Agencies' Question**: Consistent with Executive Order 13990, the agencies request feedback on how climate change affects the chemical, physical, and biological integrity of the nation's waters. How should the agencies account for the effects of a changing climate in identifying jurisdictional waters? Are there particular types of waters that are especially important in protecting the nation's waters in the face of a changing climate, and, if so, what scientific evidence supports these conclusions?*

Colorado Response: In the face of record western droughts, preserving the quality of the waters that remain to support aquatic life, agriculture, and domestic uses becomes even more important. Rollbacks of water quality protections, like the 2020 NWPR, undermine work to protect federal waters from the effects of climate change.

Specifically, wetlands can perform critical functions related to the integrity of other waters, including wildfire mitigation, flood control, and runoff storage, that will become even more important with worsening climate change. Wetlands can also be critical to preserving downstream flow duration during the summer months by filling during spring rainfall, recharging the groundwater, and slowly discharging over a long time.

F. The scope of jurisdictional tributaries

***Federal Agencies' Question**: Multiple rules, judicial decisions, and longstanding practice protected ephemeral, intermittent, and perennial streams that met applicable criteria for jurisdiction as tributaries that are ''waters of the United States." Ephemeral streams were then categorically excluded from jurisdiction in the NWPR, and some intermittent streams and even some perennial streams are no longer jurisdictional under the NWPR.*

- *The agencies seek feedback on whether certain characteristics, such as indicators of channelization; physical indicators such as indicators of ordinary*

high water mark; flow regime; flow duration; watershed size; landscape position; stream network density; or distance from a traditional navigable water, territorial sea, or interstate water should inform determinations about which tributaries could be considered jurisdictional as a class, and which decisions are best left to individual, case-specific significant nexus determinations similar to the agencies' practice from 2007 through 2015.

- *The agencies are particularly interested in feedback regarding how to identify ephemeral streams that should be jurisdictional as tributaries, as they are the dominant stream type in the arid West and in many headwater regions. The agencies are interested in understanding the impacts of their exclusion from the regulations under the Clean Water Act by the NWPR.*

Colorado Response: With regard to the impact of excluding ephemeral streams with a significant nexus to downstream waters, Colorado respectfully refers the federal agencies to the attached Appendix 1 to Colorado's 2019 comments (with a new addendum), entitled *Biological Importance of Ephemeral and Intermittent Streams and Non-Adjacent Wetlands in Colorado*. This analysis is further supported by two new studies, referenced earlier in Section C, by Schorr & Mihlbachler (2018) and Hooley-Underwood et al. (2021).

In addition, while Colorado supports including objective criteria to identify jurisdictional waters as part of a revised WOTUS definition, there is not always a bright line between ephemeral and intermittent waters in Colorado (and potentially other states in the arid West). It is common to define intermittent streams as those streams with seasonal surface flow and ephemeral streams as those streams flowing in response to short term precipitation events. But these definitions represent an artificial, discrete construction imposed on a dynamic and continuous variable (surface flow). In one year, a stream may appear ephemeral and in others may appear intermittent. Similarly, some streams may appear perennial (flowing for years at a time) but may lose surface flow during periods of drought. In the West and other arid climates, streams and stream reaches may lack surface flow, with a channel morphology indicative of ephemeral flow, but then may flow for years at a time after a large precipitation event fills perched aquifers (impermeable layers of rock or sediment which hold water above the main water table) that sustain baseflow in streams thought to be ephemeral. In fact, there are a number of mechanisms which determine flow and loss of flow in these temporary river systems, and which can be classified beyond simply "intermittent" or "ephemeral." These are described in more detail in Appendix 2 to Colorado's 2019 comments, *More Information Regarding the Science of Tributaries*. Colorado supports the use of such scientific mechanisms rather than rigid categories in determining what waters are jurisdictional.

G. The scope of jurisdictional ditches

***Federal Agencies' Question**: Historically, the agencies have recognized that ditches that reroute otherwise jurisdictional tributaries are themselves jurisdictional as tributaries. In addition, in practice, many other ditches have been considered generally not jurisdictional. The 2015 Clean Water Rule and later the NWPR, for the first time, excluded many ditches explicitly in rule language.*

The agencies solicit feedback on whether flow regime, physical features, excavation in aquatic resources versus uplands, type or use of the ditch (e.g., irrigation and drainage),

biological indicators like presence of fish, or other characteristics could provide clear and implementable distinctions between jurisdictional and non-jurisdictional ditches.

Colorado Response: Colorado supports a significant nexus test that requires a hydrologic connection based on scientific criteria that can be objectively, consistently, and repeatedly applied throughout the Corps' different districts in the West, including irrigation ditches. Clarifications of Justice Kennedy's significant nexus test would reduce, if not eliminate, the subjectivity associated with post-*Rapanos* "significant nexus" determinations and provide landowners with confidence in managing their land.

Colorado wants to emphasize that any change to the federal agencies' handling of ditches in the context of a new WOTUS definition must be done in a way that also considers the scope of the longstanding agricultural exemption for dredge and fill activities impacting irrigation ditches and how the federal agencies interpret the CWA's recapture provision.[9] Colorado opposes creating a situation where the jurisdictional scope of WOTUS and the agencies' regulatory interpretations work together to effectively discourage irrigation ditch piping projects that would otherwise improve Colorado's ditch infrastructure and conserve scarce water resources. To address our water management challenges, including persistent drought and climate change, investing in water infrastructure is essential and that includes creating, enhancing, or updating ditch piping projects.[10]

Colorado supports application of an objective significant nexus test with respect to ditches, along with a regulatory framework that would in practice exempt most construction and maintenance activities associated with irrigation ditches that are in uplands, or other areas that would revert to uplands without the presence of irrigation water and diversion structures, weirs, headgates, and other facilities that connect the irrigation ditches to jurisdictional waters.

H. The scope of adjacency

Federal Agencies' Question: *Each regulatory definition of ''waters of the United States'' has taken a different approach to determining adjacency for purposes of jurisdiction under the Act and to the jurisdiction of non-adjacent waters:*

a. Wetlands that may have been considered adjacent under some but not all definitions of ''waters of the United States'' include wetlands behind artificial berms, which were considered adjacent under the pre-2015 regulatory regime and the 2015 Clean Water Rule regardless of the presence or absence of a hydrologic surface connection, but required a surface water connection under the NWPR. The pre-2015

[9] For example, in July 2020, USACE/EPA issued a *Joint Memorandum*, replacing previous Regulatory Guidance Letter 07-02, that made a critical change to the agencies' interpretation of the agricultural exemption under CWA Section 404(f)(1)(C) and the accompanying recapture provision at Section 404(f)(2). Specifically, the 2020 Joint Memorandum states that any project that relocates or converts a jurisdictional irrigation ditch into a pipe is a change in use and a reduction in reach of WOTUS. Thus, all irrigation ditch piping and ditch relocation projects on jurisdictional ditches are now recaptured and subject to regulation under Section 404 of the CWA. A change of this nature can be a critical barrier to important irrigation ditch piping projects.

[10] Philip J. Weiser, Colorado Attorney General, *Prepared remarks: The Imperative of Investing in Water Infrastructure, Colorado Water Congress Summer Conference* (Aug. 25, 2021).

regulatory regime and the 2015 Clean Water Rule also included ''neighboring'' wetlands within the definition of ''adjacent,'' while the NWPR generally did not.

b. Adjacent lakes and ponds that were not jurisdictional as tributaries were covered under the other waters category in the pre-2015 regulations if they met certain criteria. Adjacent lakes and ponds were included with adjacent wetlands in an adjacent waters category in the 2015 Clean Water Rule. Lakes and ponds with certain surface water connections are jurisdictional under the NWPR.

c. Another category of waters includes non-adjacent, intrastate, non-navigable waters, such as certain prairie potholes, playa lakes, Carolina Bays, and more, that are not proximate (reasonably close) to jurisdictional waters or lack natural tributary connections or ditching to connect them to a tributary network. These waters are typically nonjurisdictional under the NWPR and, as a matter of practice, following Supreme Court decisions the agencies did not assert jurisdiction over them under the pre-2015 regulatory regime. These waters would have been jurisdictional under the 2015 Clean Water Rule where they met specific criteria and were found to have a significant nexus to downstream traditional navigable waters, interstate waters, or territorial seas.

The agencies are interested in identifying characteristics that could allow for clarity, implementability, and/or regionalization in defining adjacency and identifying jurisdictional waters, including whether there are appropriate distances or other factors to limit adjacency, whether there are certain situations where case-specific significant nexus determinations would more appropriately determine jurisdiction, and whether there are certain types of waters with particular features or characteristics that could provide clear and implementable distinctions between jurisdictional and non-jurisdictional waters. The agencies are also interested in recommendations for implementation approaches to address any of these types of waters.

Colorado Response: Colorado supports continued federal protection of waters under a "significant nexus" test described by Justice Kennedy in *Rapanos v. United States* for wetlands and applied to all waters by the agencies in the 2008 Guidance. However, it is critical that any new WOTUS rule clarify the application of the significant nexus test, including objective, definable parameters supported by science like physical or biological markers of such connectivity.

By creating categorical exclusions based on the lack of direct surface connection to traditional navigable waters in a "typical year," the 2020 NWPR excluded from CWA jurisdiction wetlands and other waters that have a significant nexus to such traditional navigable waters. This approach conflicts with both the fundamental purpose of the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and with the Supreme Court's controlling formulation of CWA jurisdiction.

In contrast, the Supreme Court has repeatedly applied the significant nexus test for wetlands. Consistent with *Solid Waste Agency of N. Cook Cty. v. Army Corps of Engineers,* 531 U.S. 159 (2001), and *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985), and the need to give the term "navigable" some meaning, the Corps' jurisdiction over wetlands depends on a significant nexus between those wetlands and navigable waters in the

traditional sense. The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. §1251(a), and it pursued that objective by restricting dumping and filling in "navigable waters," *id.* at §§ 1311(a), 1362(12).

Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

Many of Colorado's wetlands are connected to tributaries through subsurface connections. For instance, on North Sand Creek near Crowdry, Colorado there is a wetland complex that is largely connected to Sand Creek through the subsurface. While Colorado strongly supports the continued exclusion of any groundwater as WOTUS, Colorado also supports a rule that would include within federal jurisdiction wetlands that have a significant nexus to navigable waters even if that connection is through subsurface flows.

The 2020 NWPR appears to exclude all fens from federal jurisdiction, though a number were within federal jurisdiction under the 2008 Guidance. Fens are groundwater-fed wetlands that can take thousands of years to form and are a high priority for conservation and restoration because of their extremely sensitive nature. Numerous rare plants in Colorado only exist in fen wetland habitats. Many of the species are isolated to these few small wetland habitats and are either endemic to Colorado or are arctic relics, found nowhere else in the lower 48 states. There are different types of fen habitats including extreme rich fens, which are imperiled both globally and within the State. Examples of rare plant species found in wetland fens include: Porter feathergrass (*Ptilagrostis porteri*) (Tier 2 SGCN), Greenland primrose (*Primula egaliksensis*), pale blue-eyed grass (*Sisyrinchium pallidum*), and slender cottongrass (*Eriophorum gracile*). Fen wetlands exist on both public and private lands in Colorado, mainly in the Rocky Mountain region of central Colorado. Colorado opposes the exclusion of federal jurisdiction for any fens within federal jurisdiction under the 2008 Guidance because such fens have a significant nexus to navigable waters.

I. Exclusions from the definition

***Federal Agencies' Question**: The agencies request feedback on the implementability and clarity of exclusions present in the NWPR and identified in the 2015 Clean Water Rule or the pre-2015 regulations and the preambles to those regulations. Was the scope of these exclusions appropriate under the CWA, easy to understand, and implementable? Are the NWPR definitions of prior converted cropland and waste treatment systems appropriate under the Clean Water Act, easy to understand, and implementable? Did the exclusions have any benefits or harmful impacts? Are there regional differences with these features and/or systems that should be considered?*

Colorado Response: Colorado supports the continued exclusion of prior converted cropland and requests that the WOTUS definition fully incorporate the non-prohibited discharges of dredged or fill material set forth at 33 U.S.C. § 1344(f). Colorado also requests that the 2020 NWPR definition of "waste treatment system" at 40 C.F.R. 120.2(3)(xv) be revised and asks

that the federal agencies continue to give full force and effect to the congressional purposes of Section 101.

Agricultural Exemptions. Agriculture is one of the largest economic sectors in Colorado. This industry feeds both the people of Colorado and beyond, while conserving environmental resources. Because water quantity and quality are critical to agricultural operations, producers need a regulatory definition that provides certainty and a clear point at which WOTUS end and land begins. The requirements of CWA permitting and the significance of penalties for violating the CWA make it vital that the regulated community knows what is jurisdictional and what is not.

To that end, Colorado supports the continued exclusion of prior converted cropland from the definition of WOTUS as well as the 2020 NWPR's definition of that term to clarify that cropland would have to be abandoned and revert to wetland status for the exclusion to no longer apply. The 2020 NWPR clarified that abandonment means land that has not been used for, or in support of, agricultural purposes at least once in the last five years. Agricultural purposes are described in the preamble to include land use that makes the production of an agricultural product possible, including, but not limited to, grazing and haying. The 2020 NWPR also clarifies that cropland left idle or fallow for conservation or agricultural purposes for any period remains in agricultural use, and, therefore, maintains the prior converted cropland exclusion. The 2020 NWPR's clarifications provide some certainty to landowners that they will not lose exclusion status when implementing enhanced land stewardship practices.

Colorado also supports the 2020 NWPR's exemptions for areas of depression where irrigation water collects from the definition of WOTUS. These exemptions are critical for landowners to distinguish between state and federal wetlands and determine whether landowners require permits for activities on their land. Moreover, with a clear understanding of what is and is not jurisdictional under the CWA, producers can implement stewardship practices without the delay involved in the permitting process or the fear of legal action.

The CWA at 33 U.S.C. § 1344(f) also provides exemptions from permitting for normal farming, silviculture, and ranching activities (*e.g.*, plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices); construction or maintenance of farm or stock ponds or irrigation ditches, or maintenance of drainage ditches; and construction or maintenance of farm roads or forest roads. However, permits may be required when discharge of dredged or fill material into the navigable waters incidental to the above activities brings the water into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired, or the reach of such waters be reduced. By incorporating this exemption scheme into the 1977 amendments to the CWA, Congress made a deliberate policy choice to exempt the ordinary activities of farmers and ranchers from certain permitting requirements of the CWA. Colorado believes these agricultural exemptions should be carried forward in any revision to the definition of WOTUS.

Colorado requests that the WOTUS definition fully incorporates the non-prohibited discharges of dredged or fill material set forth at 33 U.S.C. § 1344(f) to provide more clarity and certainty for the agricultural sector. To that end, any new WOTUS rule should include additional revisions to the exemptions at 33 C.F.R. § 323.4 to provide more clarification by better defining "upland soil and water conservation practices" in Section 323.4(a)(1)(iii). Specifically, most normal farming, silviculture, and ranching activities, including upland soil and water conservation practices (*e.g.*, erosion control practices), do not require federal

permits under CWA Section 404. However, the phrase "upland soil and water conservation practices" is not specifically defined in regulation and the application of the exemption may be unclear at times. Therefore, Colorado proposes the agencies consider including this definition for "upland soil and water conservation practices" at 33 C.F.R. § 323.4(a)(1)(iii):

> Upland soil and water conservation practices means any discharge of dredged or fill material to waters of the United States incidental to soil and water conservation practices for the purpose of improving, maintaining, or restoring uplands including, but not limited to, rangeland management practices, erosion control practices, and vegetation management practices.

Including such a definition would recognize that farmers and ranchers implement these types of practices daily, thereby reducing non-point source pollution and improving water quality.

Waste Treatment Systems. Colorado also requests that the 2020 NWPR definition of "waste treatment system" at 40 C.F.R. § 120.2(3)(xv) be revised to clarify that dischargers cannot escape treatment requirements by impounding WOTUS or by discharging untreated effluent into jurisdictional wetlands.[11] This clarification would ensure consistency with other CWA regulations. *See* 40 C.F.R. § 131.10(a) ("In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States."). While the Preamble to the 2020 NWPR explained that the waste treatment system exclusion was not intended to allow for WOTUS to be used to treat effluent, this explanation did not make its way into the regulation itself. The federal agencies should take this opportunity to convey their intent that the "waste treatment system" exclusion only applies to features that are constructed off-channel, *i.e.*, not within WOTUS.

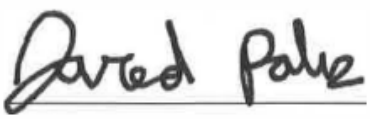
Section 101(g). Finally, while not an exemption per se, Colorado also requests that the federal agencies continue to give full force and effect to the congressional purposes of Section 101(g), ensuring that states retain authority and primary responsibility over land and water resources to carry out the overall objective of the CWA. Colorado emphasizes the importance of CWA Section 101(g), particularly to western states where water resources are often limited, and water rights carefully administered. Congress and the U.S. Supreme Court have limited the jurisdictional reach of the CWA and have recognized the primary and exclusive authority of each state to "allocate quantities of water within its jurisdiction," which decisions "shall not be superseded, abrogated, or otherwise impaired by th[e CWA]." CWA § 101(g); 33 U.S.C. § 1251(g); *see PUD No. 1 of Jefferson Cty. V. Wash. Dept. of Ecology*, 511 U.S. 700, 720–21 (1994). In addition to incorporating the language of CWA Section 101(g), the rule should clarify that neither the CWA, its implementing regulations, nor the rule itself can alter or impair any state's rights, duties, or obligations under interstate compacts or decrees of the U.S. Supreme Court equitably apportioning the flows of an interstate stream.

[11] The Colorado Water Quality Control Act, through its own definition of "state waters," does not include this same federal exclusion language. Colorado raises these concerns about the scope of federal exclusion in the spirit of broader protection of the nation's waters in states that rely on the federal definition of waters of the United States and its exclusions for program implementation.

III. CONCLUSION

Thank you for the opportunity to provide these initial comments on WOTUS. We appreciate the opportunity to engage in dialogue on this important issue and encourage the federal agencies to take advantage of Colorado's knowledge and expertise on the important water issues facing the State as you work through the rulemaking process. We look forward to continued conversations and developing a lasting, workable, legally sound, and scientifically justified WOTUS definition.

STATE OF COLORADO
Governor Jared Polis



Date: September 3, 2021

Attorney General Philip J. Weiser

Date: September 3, 2021