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U.S. Environmental Protection Agency
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Washington, DC 20460

Office of the Assistant Secretary of the Army for Civil Works
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**Re: Request for Comments on Proposed Rule Defining “Waters of the United States,”
Docket ID Nos. EPA-HQ-OW-2021-0602 and FRL-6027.4-03-OW**

The State of Colorado (Colorado or State) submits the following comments on the Environmental Protection Agency’s (EPA) and the Army Corps of Engineers’ (Corps) (collectively, federal agencies or agencies) rulemaking proposal in the December 7, 2021 Federal Register notice, 86 Fed. Reg. 69372, regarding the definition of Waters of the United States (WOTUS). Colorado greatly appreciates the opportunity to provide feedback on this proposed rule.

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 waters, Colorado is keenly aware of the importance of the federal WOTUS definition in ensuring robust water quality protections for these invaluable resources. Colorado strongly supports the agencies’ commitment to a science-based approach to defining the reach of WOTUS that reflects well established legal requirements and will provide a consistent regulatory framework. We are supportive of the agencies’ proposal to return to the more protective pre-2015 definition and to incorporate the *Rapanos v. United States* “relatively permanent” and “significant nexus” standards into the regulatory definition.

Colorado is concerned, however, that the proposed approach to the exclusions from WOTUS is a step backwards in terms of the agencies’ stated goals. Specifically, the converted cropland exclusion in the pre-2015 rule was a source of significant controversy and confusion. The 2020 Navigable Waters Protection Rule (2020 NWPR), although flawed in many ways, resolved these issues by retaining protection of water resources while giving agricultural stakeholders the regulatory clarity that they had been seeking for decades. Returning to the pre-2015 treatment of prior converted cropland, even in the interim, undermines the agencies’ stated

purposes of clarity and durability. Additionally, while Colorado supports a limited waste treatment system exclusion, the agencies' broad definition of the term in the proposed rule will likely result in more rivers and streams being impounded for treatment purposes, to the detriment of WOTUS as a whole. Colorado also believes it is important for the final rule to expressly recognize the language of Clean Water Act § 101(g) regarding the primary authority of states over water management. Finally, Colorado does not support the agencies' proposed approach, as explained in the preamble to the proposed rule, to determining the scope of jurisdictional ditches.

I. BACKGROUND

Throughout the various iterations of the WOTUS rule as proposed by the last three presidential administrations, Colorado has generally supported the pre-2015 regulatory definition of WOTUS (referred to by the federal agencies as the "1986 Rule") as interpreted by the agencies' 2008 Guidance.¹ At the same time, we have noted that the rule could be improved by including more objective parameters to define the term "significant nexus," and we specifically called for a clearer, more common-sense approach to the agricultural exemptions and explicit recognition that the scope of federal jurisdiction under the definition of WOTUS is subordinate to the authority of states to allocate water resources as stated in Section 101(g) of the Clean Water Act.

Colorado places the highest priority on protecting 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. 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.

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. Accordingly, protecting water quality in headwater states like Colorado has been a national priority since the passage of the Clean Water Act in 1972. Over the last fifty years, Colorado and the federal government have worked together to make enormous progress in protecting water quality throughout Colorado, including the State's headwaters, and this work should continue to be a national priority.

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 is 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

¹ Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (As revised, Dec. 2, 2008).

uncertainty as reflected by the significant revisions to the WOTUS rule in 2015, and again in 2020.

As with many western states, the large majority of Colorado's stream miles are classified by the U.S. Geological Survey as either intermittent or ephemeral and were likely excluded from federal protections under the 2020 NWPR. This lack of protection and regulatory clarity 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. The severe impacts of the 2020 NWPR led the State to pursue its own judicial challenge to the rule during which Colorado argued that the rule amounted to an abdication of the agencies' responsibilities under the Clean Water Act and abandonment of fifty years of improvement of our Nation's waters.

We therefore greatly appreciate the agencies' recommitment to the 1986 Rule and 2008 Guidance, along with incorporation of the Supreme Court's relatively permanent and significant nexus standards from *Rapanos v. United States*, to determine the scope of federally protected waters. We believe that using this interim approach while the agencies work with stakeholders to formulate a long-term durable WOTUS definition promises to finally put an end to the disruptive and unfortunate era of uncertainty and litigation we have witnessed over the last decade.

II. COLORADO STRONGLY SUPPORTS INCLUSION OF THE RELATIVELY PERMANENT AND SIGNIFICANT NEXUS STANDARDS IN THE DEFINITION OF WOTUS

Colorado supports the agencies' proposal to incorporate both Justice Scalia's "relatively permanent" standard and Justice Kennedy's "significant nexus" standard from *Rapanos v. United States* into the definitions for the WOTUS categories of adjacent wetlands, tributaries, and other waters. This approach is scientifically supportable, legally sound, and familiar, as it is consistent with the approach taken by the agencies under the 2008 Guidance.

Colorado applauds the agencies for returning to the bedrock principles of law that govern federal jurisdiction under the Clean Water Act. As Colorado argued in its challenge to the legally flawed 2020 NWPR, failing to include waters that satisfy the significant nexus standard in the definition of WOTUS is contrary to the language, structure and intent of the Act. In the proposed rule, the agencies properly recognize that "Since *Rapanos*, every court of appeals to have considered the question has determined that the government may exercise Clean Water Act jurisdiction over at least those waters that satisfy the significant nexus standard set forth in Justice Kennedy's concurrence." 86 Fed. Reg. at 69380. Under the 2008 Guidance, the agencies concluded that Clean Water Act jurisdiction exists if a water meets either the relatively permanent standard or the significant nexus standard. Colorado has relied on the water quality protections afforded by this federal baseline, particularly in the realm of Section 404 dredge and fill permitting, where Colorado lacks a corresponding permitting program. We support the agencies' effort to reinstate this long-standing regulatory framework.

III. COMMENTS ON THE PROPOSED DEFINITION OF "SIGNIFICANTLY AFFECT" AS USED IN THE SIGNIFICANT NEXUS STANDARD

The proposed definition of "significantly affect" lists five *physical* factors that the federal agencies will consider when making jurisdictional determinations for certain non-navigable waters. 86 Fed. Reg. 69430. Colorado supports including all five of these physical factors in

the final rule because they are highly relevant to determining the strength of the connection between a given waterbody and downstream jurisdictional waters. However, Colorado also supports adding a sixth physical factor to the definition. In addition, Colorado is concerned that the proposed definition is incomplete because it fails to incorporate measures directly related to maintaining the *chemical* and *biological* integrity of waters of the United States. In order to fill this gap, Colorado recommends including the ecological functions of upstream waters that are discussed in the preamble to the definition of “significantly affect,” as well as adding chemical and biological factors to the definition. We explain these recommendations more fully below.

A. Recommendation to Add a Sixth Physical Factor to Account for Soil Characteristics

Colorado recommends adding a sixth physical factor to the proposed definition that incorporates soil type, composition and transmissivity. These soil characteristics greatly influence the first proposed factor (“distance from a jurisdictional water”) and third proposed factor (“hydrologic factors, including subsurface flow”), since the extent to which these factors measure the strength of the hydrologic connections between one waterbody, and another depends on the capacity for the soil to transmit water downstream.

For example, waters will be significantly affected at greater distances and have more subsurface connections in soils with greater transmissivity, such as sandy soils or unconsolidated alluvium, compared to soils with lower transmissivity, such as highly compacted clays. The soil characteristics factor could be considered by looking at readily available soil maps and would not necessarily require field data. In conclusion, Colorado recommends incorporating a factor to account for the effects of soil characteristics (e.g., “soil type, composition and transmissivity”) to enhance the scientific basis for the definition of “significantly affect.”

B. Recommendation to Add Ecological Functions

All five proposed factors measure either the geography (e.g., “distance from a jurisdictional water”) or hydrology (e.g., “hydrological factors, including subsurface flow”) of a potentially jurisdictional water. 86 Fed. Reg. 69430. However, the 2008 Guidance recognized that considering physical and hydrologic factors alone was not sufficient to identify significant nexus waters. 2008 Guidance at 8. Beyond several physical factors that generally parallel the factors in the proposed rule, the 2008 Guidance lists four “ecological factors” that contribute to a complete significant nexus analysis: (1) “potential of tributaries to carry pollutants and floodwaters to traditional navigable waters”; (2) “provision of aquatic habitat that supports a traditional navigable water”; (3) “potential of wetlands to trap and filter pollutants to store flood waters”; and (4) “maintenance of water quality in traditional navigable waters.” *Id.* Without such factors, the proposed definition of “significantly affect” incorrectly assumes that physical metrics alone are sufficient to measure “the strength of the connections and associated effects that streams, wetlands, and open waters have on the chemical, physical, and biological integrity of traditional navigable waters...” 86 Fed. Reg. 69430. In fact, the federal agencies cannot fully evaluate the strength of chemical or biological connections or the magnitude of chemical or biological effects without considering such ecological information.

In the preamble to the proposed rule, the federal agencies describe several ecological “functions” of upstream waters that parallel the ecological “factors” listed in the 2008 Guidance that may influence the biological and chemical integrity of downstream waters. See 86 Fed. Reg. 69431. The preamble lists, among others, “sediment trapping and transport,” “pollutant trapping,” and “provision of habitat for aquatic species” as “functions of upstream waters.” *Id.* Waters that perform any one of these functions have a significant nexus if the function “has a more than speculative or insubstantial impact on the integrity of a traditional navigable water.” *Id.* Colorado supports adding these ecological factors/functions to the definition of “significantly affect” in the text of the rule.

C. Recommendation to Incorporate Chemical and Biological Factors

Even if the federal agencies include these functions of upstream waters in the definition of “significantly affect,” the proposed rule does not currently explain how the federal agencies would evaluate the presence and extent of these functions since, as explained above, physical factors are not sufficient to characterize the chemical and biological connections within stream systems.

Including specific chemical and biological factors, as well as ecological functions, in the definition of “significantly affect” will fill this gap in the proposed rule. Such additions to the definition of “significantly affect” would also align with the EPA’s own findings in support of the proposed rule, including:

1. “[T]ributaries provide organisms with both warm water and cold water refuges at different times of the year. . . . Tributaries also help buffer temperatures in downstream waters . . . [that are] many kilometers away.”
2. “Streams and wetlands can prevent excess deposits of sediment downstream and reduce pollutant concentrations in downstream waters. Thus, the function of trapping of excess sediment, along with export of sediment, can have a significant effect on the chemical, physical, and biological integrity of downstream waters.”
3. “Nutrient recycling, retention, and export can significantly affect downstream chemical integrity by impacting downstream water quality.”
4. “The provision of life-cycle dependent aquatic habitat for species located in downstream waters significantly affects the biological integrity of those downstream waters.”²

In light of our experience with the effects of intermittent and ephemeral tributaries on the chemical and biological integrity of downstream waters, Colorado offers the following recommendations for adding and implementing chemical and biological factors to the definition of “significantly affect.”

Chemical Factor

Colorado recommends adding a factor to the definition of “significantly affect” that explicitly accounts for the disproportionate effects that distant, low-flow streams and small wetlands can have on downstream jurisdictional waters depending on their chemical quality.

² [Technical Support Document for the Proposed “Revised Definition of ‘Waters of the United States’” Rule](#) (November 18, 2021) at 219-21.

Intermittent and ephemeral streams can carry disproportionately large loads of pollutants compared to their contribution of flow to downstream waters.³ For example, ambient concentrations of selenium in Boggs Creek, an ephemeral tributary to Pueblo Reservoir in Colorado's Arkansas River basin, can be up to 86 times the most stringent applicable standard, causing impairment of the aquatic life, water supply, and agriculture uses. In addition, uranium concentrations in Boggs Creek can be more than two times the water supply standard, resulting in impairment of the water supply use.⁴ Similar patterns exist throughout Colorado, such as in historic mining districts, where ephemeral and intermittent gulches draining former mine workings can deliver very high metal loads to downstream perennial tributaries during storm events and/or spring runoff, degrading water quality and changing macroinvertebrate distributions.⁵

In determining whether such streams "significantly affect" downstream jurisdictional waters, federal agencies must consider the extent to which high pollutant concentrations can drive downstream chemical quality despite physical factors, such as distance and magnitude and frequency of flow. Therefore, the definition of "significantly affect" should include a factor that explicitly incorporates water quality in a manner similar to the 2008 Guidance (e.g. "potential of tributaries to carry pollutants and floodwaters to traditional navigable waters"). The federal agencies could implement this factor by consulting relevant state water quality agencies, examining a state's 303(d) List of Impaired Waters and 305(b) Reports, and/or reviewing total maximum daily load reports.

Biological Factor

Finally, Colorado recommends incorporating a biological component into the definition of "significantly affect." Consideration of biological connections is consistent with the second ecological factor listed in the 2008 Guidance, that is, whether the waterbody being evaluated provides "aquatic habitat that supports a traditional navigable water." 2008 Guidance at 8.

For example, a Colorado Parks and Wildlife study found individual flannelmouth sucker, bluehead sucker, and roundtail chub spawning in the intermittent/ephemeral Roubideau Creek drainage that were originally tagged in the traditionally navigable portion of the Colorado River (Colorado River at Black Rocks).⁶ The spawning grounds in the Roubideau Creek drainage are important for maintaining populations of these native fish species in downstream jurisdictional waters.

³ See Goodrich, D. C., Kepner, W. G., Levick, L. R., Wigington, P. J., *Southwestern Intermittent and Ephemeral Stream Connectivity*, Journal of the American Water Resources Association (January 22, 2018), found at <https://onlinelibrary.wiley.com/doi/pdf/10.1111/1752-1688.12636> (describing how intermittent and ephemeral streams can export large amounts of fine sediment, nutrients, and organic matter during storm flows).

⁴ Colo. Dep't Pub. Health and Env't, [Total Maximum Daily Load Assessment: Boggs Creek - COARMA18a](#) (May 18, 2016) at 10, 16.

⁵ Roline, R., *The Effects of Heavy Metals Pollution of the Upper Arkansas River on the Distribution of Aquatic Macroinvertebrates*, Hydrobiologia (December 27, 1986), found at <https://af.booksc.eu/book/5758941/ef780d>.

⁶ Thompson, K. G., Hooley-Underwood, Z. E., *Present Distribution of Three Colorado River Basin Native Non-game Fishes* (August 2019), Colo. Parks & Wildlife Technical Publication 52, found at https://cpw.state.co.us/Documents/Research/Aquatic/pdf/Publications/2019_Present_Distribution_of_Three_Colorado_River_Basin_Native_Non-game_Fishes_and_Their_Use_of_Tributaries.pdf

An additional example involves the Arkansas darter, which primarily occupies tributary streams within the grasslands of the Arkansas River Basin. These grasslands are often characterized by isolated groundwater-fed pools of habitat that are occasionally connected to each other and the mainstem Arkansas River by intermittent or ephemeral flows during above-average seasonal flows or flood events. When these pools are connected, numerous individual darters move within the system, colonizing new habitat, and potentially supplementing local genetic diversity.⁷

These types of biological connections should be considered when determining whether waters “significantly affect” the chemical, physical, or biological integrity of traditionally navigable waters. The federal agencies should consult with state wildlife agencies and rely upon published reports and papers in evaluating biological connections. Consideration of biological connections could be incorporated into the rule by inserting an additional factor such as “whether the waterbody being evaluated provides aquatic habitat for a species migrating to a traditional navigable water.”

D. Conclusion Regarding the Definition of “Significantly Affect”

Overall, Colorado supports defining “significantly affect” in regulation and supports including all five of the factors that the federal agencies have identified in the proposed rule. However, Colorado is concerned that the proposed definition ignores the important role that soil type and composition play in determining hydrologic connectivity. Colorado is also concerned that the proposed definition risks limiting inquiries about the jurisdictional status of a given waterbody to considering its effect on the physical integrity of downstream jurisdictional waters, while failing to address chemical and biological integrity. To address these concerns, Colorado recommends:

1. Retaining all five proposed physical factors.
2. Adding a sixth *physical* factor to account for the effects of soil characteristics on hydrologic connectivity, such as “soil type, composition, and transmissivity”;
3. Including all the ecological functions of upstream waters as listed in the preamble in the final definition;
4. Adding a *chemical* factor that reflects how differences in chemical quality can drive significant effects on downstream waters, such as “potential of tributaries to carry pollutants and floodwaters to traditional navigable waters”; and
5. Adding a *biological* factor that reflects the significant effects of small tributaries on the population and habitat of aquatic life, such as “whether the waterbody being evaluated provides aquatic habitat for a species migrating to a traditional navigable water.”

⁷ Fitzpatrick, S. W., Crockett, H., Funck, W. C., *Water Availability Strongly Impacts Population Genetic Patterns of an Imperiled Great Plains Endemic Fish*, Conservation Genetics (February 12, 2014), found at <https://link.springer.com/article/10.1007%252Fs10592-014-0577-0>; Colo. Division of Wildlife, *Arkansas Darter Recovery Plan* (2001); Labbe, T. R., Fausch, K. D., *Dynamics of Intermittent Stream Habitat Regulate Persistence of a Threatened Fish at Multiple Scales*, Ecological Applications (October 27, 1999), found at [https://doi.org/10.1890/1051-0761\(2000\)010\[1774:DOISHR\]2.0.CO;2](https://doi.org/10.1890/1051-0761(2000)010[1774:DOISHR]2.0.CO;2).

Taking these steps would clarify and improve the definition of “significantly affect” by ensuring that it fully protects the physical, biological, and chemical integrity of the nation’s waters.

IV. COLORADO’S CONCERNS WITH THE AGENCIES’ PROPOSED EXCLUSIONS FROM THE DEFINITION OF WOTUS

A. Agricultural Exclusions

Agriculture is one of the largest economic sectors in Colorado. This industry feeds 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 ends, and land begins. The requirements of Clean Water Act permitting and the significance of penalties for violating the Act 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, and requests that the agencies incorporate 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 2020 NWPR 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 clarified 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. These clarifications are consistent both with the 1993 rule preamble provisions on abandonment and reversion and the change in use principle from the 2005 Corps and NRCS joint memorandum that defined agricultural use as open land planted to an agricultural crop, used for the production of food or fiber, used for haying or grazing, left idle per USDA programs, or diverted from crop production to an approved cultural practice that prevents erosion or other degradation. The 2020 NWPR’s clarifications provided some certainty to landowners that they will not lose exclusion status when modifying production practices or implementing enhanced land stewardship practices.

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

The Clean Water Act 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 Clean Water Act, Congress made a deliberate policy choice to exempt the ordinary activities of farmers and ranchers from certain permitting requirements of the Clean Water Act. Colorado believes these agricultural exemptions should be carried forward in any revised definition of WOTUS.

Colorado 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) 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 Clean Water Act 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 nonpoint source pollution and improving water quality.

B. Waste Treatment Systems

The “waste treatment system” exclusion as proposed by the agencies applies to “treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act...” While Colorado supports a limited exclusion for waste treatment systems, we believe this exclusion as written is unnecessarily broad and vague.⁸ The agencies’ description of the term allows dischargers to impound WOTUS, thus sacrificing the designated uses of those waterbodies for treatment purposes. Moreover, the exclusion allows for the unmitigated discharge of untreated effluent into jurisdictional wetlands, which serve an important function to downstream WOTUS. This approach undermines protections established through other Clean Water Act regulations. See, e.g., 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.”). Constructing an impoundment in WOTUS for treatment purposes or discharging industrial pollutants into a jurisdictional wetland should be a last resort. Colorado is concerned that the proposed open-ended regulatory language instead serves to endorse and even invite dischargers to use WOTUS as a component of their treatment systems. The exclusion as

⁸ The Colorado Water Quality Control Act, through its own definition of “state waters,” contains a waste treatment exclusion that differs from the federal exclusion. See § 25-8-103(19), C.R.S. Colorado is concerned, however, about the potential implications of the federal exclusion (and federal case law interpreting the exclusion) on our state framework.

written does not provide any incentive to construct treatment systems off-channel in situations where that alternative is practical.

We suggest, at a minimum, adding clarifying language to the phrase “designed to meet the requirements of the Clean Water Act” to reflect the explanation contained in the preamble. To that end, the text of the rule should specifically state that a discharger proposing to impound a WOTUS for waste treatment purposes would need to obtain an individual Section 404 permit for new construction in a WOTUS in order to ensure that states have the ability to apply state water quality requirements to these projects under their Section 401 authority. The text of the rule should also require that the discharger obtain a Section 402 permit for discharges from the waste treatment system into a WOTUS.

Alternatively, we suggest expressly limiting the exclusion to narrow circumstances, such as the valley fill scenario discussed in *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009), and making it clear that the waste treatment system exclusion otherwise applies only to lagoons or ponds that are constructed off-channel, *i.e.*, not within WOTUS. Recognizing that this would be a change to previous federal policy, the agencies could consider grandfathering waste treatment systems that were excluded under the previous regulation but that no longer satisfy the new off-channel criterion.

Revising the waste treatment system exclusion in one of these ways would also serve the agencies’ intent to make the WOTUS rule clearer and more understandable to the regulated community. The vague nature of waste treatment system exclusion as proposed is likely to cause more confusion and inconsistency in practice, leading to resource-intensive litigation to resolve those issues on a case-by-case basis.

C. Placement of the Exclusions in the Rule

Colorado suggests removing the excluded categories of waters from the list that defines WOTUS and instead placing them under a separate heading. Heading (a) of the proposed rule reads as follows: “Waters of the United States means...” 33 C.F.R. § 328.3(a); 40 C.F.R. § 120.2(a). The first seven categories under heading (a) describe waters that are all considered WOTUS. The exclusions contained in paragraphs (8) (waste treatment systems) and (9) (prior converted cropland), however, do not follow structurally. It would be clearer to insert a new heading (b) to cover the exclusions. Heading (b) would read: “Waters of the United States does not include:” and then insert numbers (1) and (2) to list the waste treatment system and prior converted cropland exclusions, respectively. New letters would need to be assigned to the remaining paragraphs of the rule, accordingly.

D. Section 101(g) and Interstate Compacts

Finally, while not an exclusion per se, Colorado also requests that the federal agencies continue to give full force and effect to the congressional purposes of Clean Water Act Section 101(g); 33 U.S.C. § 1251(g). Congress and the U.S. Supreme Court have placed important limitations on the jurisdictional reach of the Act and have consistently 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.” 33 U.S.C. § 1251(g); *PUD No. 1 of Jefferson Cty. V. Wash. Dept. of Ecology*, 511 U.S. 700, 720-21 (1994). These clear and recognizable limits to the extent of Clean Water Act jurisdiction should be recognized in the rule. Colorado requests the federal agencies include a clear statement recognizing that states retain authority and primary responsibility over land

and water resources to carry out the overall objectives of the Clean Water Act. Likewise, Colorado emphasizes the importance of Section 101(g), particularly to the western states where water resources are often limited, and water rights are carefully administered.

In addition to incorporating the language of Section 101(g), the agencies should further clarify that neither the Clean Water Act nor the rule itself can alter or impair any state's rights, duties, or obligations under interstate compacts or decrees of the Supreme Court of the United States equitably apportioning the flows of an interstate stream. This clarification should also incorporate language that includes waters that flow across, or form part of, boundaries of federally recognized tribes.

Lastly, the agencies asked for input on whether use of stream order is an appropriate method for determining the extent of a riverine "interstate water." Colorado seeks additional information as to how this methodology comports with the limits on the extent of Clean Water Act jurisdiction under Section 101(g) and the pre-2015 regulatory regime. The application of a stream order methodology to determine interstate waters is of particular concern to Colorado because some methodologies for determining stream order could extend the designation of interstate waters a great distance from state boundaries. The agencies should avoid using any methodology that would extend the reach of an interstate water for purposes of the WOTUS rule far beyond interstate borders.

V. COLORADO'S CONCERNS WITH THE PROPOSED APPROACH TO DETERMINING THE SCOPE OF JURISDICTIONAL DITCHES

Colorado would like 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 Act'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 the agencies' proposal as stated in the preamble, consistent with the 2008 Guidance, that "ditches created wholly in uplands and draining only uplands with ephemeral

⁹ For example, in July 2020, the Corps and 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 Clean Water Act Section 404(f)(1)(C) and the accompanying recapture provision at Section 404(f)(2). See https://www.epa.gov/sites/default/files/2020-07/documents/final_ditch_exemption_memo_july_2020_with_epa.pdf. 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. A change of this nature can be a critical barrier to important irrigation ditch piping projects.

¹⁰ Colorado Attorney General, *Prepared remarks: The Imperative of Investing in Water Infrastructure*, Colorado Water Congress Summer Conference (Aug. 25, 2021), <https://coag.gov/blog-post/prepared-remarks-the-imperative-of-investing-in-water-infrastructure-colorado-water-congress-summer-conference-aug-25-2021/>.

flow would generally not be considered WOTUS.” See 86 Fed. Reg. 69380. In the interest of clarity, Colorado encourages the agencies to consider including ditches that fit this description as a category of excluded waters in the text of the regulation. As for other ditches that do not fit this description, Colorado supports application of the relatively permanent or significant nexus test to determine whether those ditches are considered WOTUS.

Finally, the federal agencies seek input regarding whether the interpretation of “relevant reach” for ditches should consider any particular factors for situations where ditches are treated as tributaries or contain wetlands. In response, Colorado does not believe that the “relevant reach” of a ditch should pertain to an artificial drainage. If, on the other hand, a ditch is constructed within a natural drainage, the entire ditch should be considered jurisdictional (assuming that it meets the significant nexus or relatively permanent standard), thus eliminating the need for a reach determination. Importantly, however, whichever approach is used to interpret relevant reach, Colorado reiterates the need for clear permitting exemptions for construction and maintenance activities for irrigation ditches, as noted above, as well as for maintenance of drainage ditches.

VI. ECONOMIC ANALYSIS OF STATE PROGRAMS

In addition to the proposed rule itself, the agencies have requested comment on the accuracy of the assumptions regarding state regulatory programs included in the economic analysis accompanying the proposed rule (2021 Economic Analysis).¹¹ The agencies’ analysis assumes that Colorado does not regulate waters more broadly than the proposed rule requires for either the 404 program or surface waters. 2021 Economic Analysis at Table II-1, p. 50. Based on this assumption, the agencies calculate that the full benefits and costs of the proposed rule, as compared to the baseline of the 2020 NWPR, will be realized in Colorado. *Id.* at 50. Colorado agrees that the return to the status quo of the pre-2015 regulatory framework, including the 2008 Guidance, will have important benefits for the State. Colorado also wishes to highlight important state law regulatory issues the agencies should consider in their economic analysis.

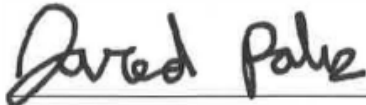
Colorado state law precludes the discharge of pollutants to state waters without a permit and defines “state waters” more broadly than any federal definition of WOTUS to date. See Colorado Water Quality Control Act, §§ 25-8-103(19) & 25-8-501, C.R.S. At the same time, state law does not specifically authorize any state-level permitting program for dredge and fill activities. As a result, Colorado, like most other states, relies on the Corps’ Section 404 permitting program to regulate dredge and fill activity and protect critical streams and wetlands. The State’s continued ability to depend on a consistent level of federal protection for these resources is another important benefit of the proposed rule.

¹¹ EPA and the Corps, *Economic Analysis for the Proposed “Revised Definition of ‘Waters of the United States’” Rule* (Nov. 17, 2021), available at https://www.epa.gov/system/files/documents/2021-11/revised-definition-of-wotus_nprm_economic-analysis.pdf.

VII. CONCLUSION

Thank you for the opportunity to provide these comments on the agencies' interim WOTUS proposal. We 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 durable, legally sound, implementable, and scientifically justified WOTUS definition in the next phase of rulemaking.

STATE OF COLORADO
Governor Jared Polis

Handwritten signature of Jared Polis in black ink, written over a horizontal line.

Date: February 7, 2022

Attorney General Philip J. Weiser

Handwritten signature of Philip J. Weiser in black ink, written over a horizontal line.

Date: February 7, 2022