COLORADO
Department of Public Health & Environment

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

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

Subject: Comments on Proposed Rule: Updated Definition of "Waters of the United States" (Docket ID No. EPA-HQ-OW-2025-0322)

The Water Quality Control Division (the division) at the Colorado Department of Public Health and Environment appreciates the opportunity to provide feedback on the proposed rule revising the definition of "Waters of the United States" (WOTUS).

Colorado is a headwaters state that relies on a combination of federal and state regulations to protect water quality for drinking, agriculture, recreation, and other uses, both within its borders and for the 19 downstream states that rely on rivers originating in Colorado. Following the U.S. Supreme Court's decision in *Sackett v. EPA*, 598 U.S. 651 (2023), which significantly narrowed federal jurisdiction, Colorado moved swiftly to fill the resulting gap in protection for our waters and wetlands.

Ephemeral and intermittent streams and wetlands are integral to watershed health, providing essential hydrological services such as groundwater recharge, flood management, and the maintenance of base flows in downstream perennial waters. These headwater systems function as critical biogeochemical reactors that cycle nutrients, trap sediments, filter pollutants, and export organic carbon that fuels downstream food webs (See chment 1). Furthermore, they support high levels of biological diversity by serving as vital breeding grounds, nesting sites, and migration corridors for wildlife, including many threatened and endangered species that rely on these unique habitats (See Attachments 1, 2, and 3). Collectively, these waters are physically, chemically, and biologically connected to downstream navigable waters, meaning their degradation can significantly impair the integrity of the entire river network (Attachment 1).

Recognizing these essential functions and the significant decrease in federal protection after *Sackett*, the Colorado General Assembly enacted House Bill 24-1379, which became law in May 2024. Under that legislative authority, the Water Quality Control Commission is in the process of promulgating Regulation No. 87 (Dredge and Fill Control Regulation) to establish a state-level dredge and fill authorization program. While Colorado has taken decisive action to protect its waters, the division has significant concerns regarding the proposed rule's economic impact on the state and our regulated community. We also have concerns about the drastic reduction in federal protection for our wetlands and streams that would result from applying the proposed "wet season" concept to water systems in arid climates and severing jurisdiction over reaches upstream of "non-relatively permanent stream reaches."

I. Economic Impacts and Administrative Burden: Shifting Costs to the State and Regulated Community

The proposed rule acknowledges that narrowing the definition of WOTUS shifts the burden of water quality protection to states and tribes. For Colorado, this burden is immediate, tangible, and costly. Colorado's experience with implementing water quality protections — both while the 2020 Navigable Waters Protection Rule was in effect and since the *Sackett* decision — provides a clear baseline for the impacts we anticipate under this proposal.

- Increased State Workload: The proposed rule shifts even more responsibility over protecting our valuable wetlands and waterways to the State. A significant number of dredge and fill activities previously subject to federal permitting under Section 404 of the Clean Water Act would no longer be eligible for an Army Corps of Engineers permit. To manage this, Colorado has expended significant legislative and administrative resources to stand up the Regulation No. 87 program, which includes procedures for individual and general permits for dredge and fill activities, including avoidance, minimization, and compensatory mitigation requirements.

- Compliance and Enforcement Costs: When federal jurisdiction recedes, the federal government's enforcement resources are also withdrawn. This division also now has responsibility for enforcing its new dredge and fill program.

- Cost to the Regulated Community: Unlike the federal program, which is largely funded by general tax revenue, Colorado's program must be funded through fees charged to regulated entities. The proposed WOTUS definition would increase the number of projects requiring state permits, thereby increasing the cumulative fee burden on Colorado businesses, infrastructure, housing developers, and public works.

II. Drastic Reduction of Wetland Protection under the "Wet Season" Concept

The division is alarmed by data presented in the agencies' Regulatory Impact Analysis (RIA) regarding the proposed definition of "continuous surface connection." The draft

rule proposes defining this term as "having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water." Table 3-1 of the RIA estimates that, using the National Wetlands Index, only 27,070 acres out of 906,581 total wetland acres in Colorado may have a surface water connection to federally jurisdictional waters "at least during the wet season." This suggests that under the proposed rule, approximately 97% of Colorado's mapped wetlands could lose federal protection.

III. Application of the "Wet Season" Concept to Colorado's Stream Systems and Severance of Jurisdiction over Reaches Upstream of "Non-Relatively Permanent Reaches"

The division objects to the proposed definition of "relatively permanent" and the reliance on the "wet season" concept to determine federal jurisdiction. The term "wet season" is not defined, but instead would rely on the use of existing agency tools to delineate the wet season based on rates of precipitation. Reliance on these tools in Colorado's arid and semi-arid climates is problematic because they do not accurately reflect the hydrology of our stream systems. Moreover, the proposal that a "non-relatively permanent reach" would sever jurisdiction over upstream reaches, as applied in Colorado and other parts of the West, is overly simplistic and ignores the scientific reality of hydrologic connectivity.

- Underestimation of Stream Networks: The U.S. Geological Survey (USGS) National Hydrography Dataset (NHD) estimates that 68% of Colorado's streams are temporary (24% ephemeral, 44% intermittent). However, scientific studies indicate that standard mapping methods may underestimate stream channel lengths in arid regions by as much as 64.6% (Attachment 4)[1]. Relying on these datasets or visual observations of surface flow to determine "relative permanence" will likely exclude vast networks of biologically critical streams.

- Severance of Jurisdiction over Reaches Upstream of "Non-Relatively Permanent Reaches": The proposed rule suggests that non-relatively permanent flowlines will sever jurisdiction for upstream tributary reaches. In Colorado, streams often flow through alluvial deposits where surface flow may disappear and reappear downstream. Allowing these natural "breaks" in flow to sever federal

[1] The USGS National Hydrography Dataset ("NHD") estimates that 44% of Colorado's streams are intermittent and 24% are ephemeral, meaning that at least 68% of Colorado's waters are temporary in nature. Some studies suggest the USGS underestimates stream channel length because they are based on 1:100,000 scale topographical maps and do not include stream segments less than one mile in length. For instance, a study by Heine et al. in 2006 found that even the higher resolution flowlines used by the USGS at a 1:24k (1 inch on the map equals 2000ft) scale, stream channel lengths are underestimated by 64.6%. See Heine, R.A., C.L. Lant, and R.R. Sengupta. 2004. *Development and comparison of approaches for automated mapping of stream channel networks*. Annals of the Association of American Geographers 94(3):477-490; Levick, L., J. Fonseca, D. Goodrich, M. Hernandez, D. Semmens, J. Stromberg, R. Leidy, M. Scianni, D. P. Guertin, M. Tluczek, and W. Kepner. 2008. *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest*. U.S. Environmental Protection Agency and USDA/ARS Southwest Watershed Research Center, EPA/600/R-08/134, ARS/233046.

jurisdiction ignores the scientific reality of hydrologic connectivity and would result in the degradation of headwaters that are essential to the chemical, physical, and biological integrity of downstream navigable waters.

The division appreciates the agencies' consideration of these comments and encourages continued consultation with states as this rule is finalized.

Sincerely,

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