

# HUERFANO COUNTY WATER CONSERVANCY DISTRICT

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Via email: [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov) and [Hanson.Andrew@epa.gov](mailto:Hanson.Andrew@epa.gov)

Re: Comments, WOTUS Notice of Intent, FR/Vol 82, No 42/ March 6, 2017

Gentlemen:

The Huerfano County Water Conservancy District appreciates the opportunity to comment pursuant to E.O. 13132 and emphatically supports the effort to revise the definition of “waters of the United States” in a manner consistent with the opinion of Justice Scalia in *Rapanos*.

Environmental justice. This District addresses water development in rural Huerfano County, one of Colorado’s poorest and driest.<sup>1</sup> The current proposed regulations (80 Fed. Reg. 37,054) will increase the permitting costs of small water projects within the county, far from traditional “navigable waters.” Executive Order 12898 (59 FR 7629, February 16, 1994), § 1-101, requires Federal agencies to avoid “disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” Huerfano County meets the “criteria for environmental justice consideration.” Because they will have a “disproportionately high and adverse” impact on social and economic conditions in communities like Huerfano County, the current proposed regulations should be revised to reflect the narrowest interpretation of Justice Scalia’s opinion in *Rapanos*.

Water quality v. quantity; very small projects. Issued under Federal statutes intended to protect water *quality*, the proposed regulations would have dramatic impacts on water *quantity*. Traditionally, water distribution decisions have been left to the States, each having developed its own system to manage water, including water rights. The

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<sup>1</sup> Located in far southern Colorado, near the New Mexico border and within the Arkansas River basin, Huerfano County has one of Colorado’s highest unemployment rate, 4.5% (Apr-17), with roughly 18.5% of residents living below the Federal poverty level (2015), and over 30% of its families on food stamps. Its minority (non-white) population is almost 40% of the total. (USBLS; USCB).

proposed regulations, however, appear to use water quality control as an excuse for a Federal incursion into the area of water quantity management and water rights – especially for small water projects located on normally dry streams. For example, largely exempt from even dam safety regulations under Colorado statute, are two types of small water impoundments:

- Livestock Water Tanks. Since 1941, small water storage structures, having a capacity of no more than 10 a.f. behind a dam of 15 feet or less in height, are allowed on “normally dry” streams for livestock watering only. While the State Engineer is to establish priorities among them on each stream, “such livestock water tanks shall be deemed to have a rebuttable presumption that there is no injury to adjudicated water rights.” C.R.S. § 35-49-105.
- Erosion Control Dams. Of the same maximum size and also on “normally dry” streams, since 1943 “erosion control dams” are incorporated into the same priority system with livestock water tanks. C.R.S. § 37-87-122.

Despite their small size and remote location, even these small structures would be subject to the current proposed regulation in spite of our State’s decision to largely ignore them. Currently, there are some 5,400 livestock water tanks and 1,750 erosion control dams within just the Arkansas River basin of Colorado. Imposition of Federal regulation on over 7,000 such these small structures would not only run counter to concepts of Federalism but would also work economic hardship on rural farmers and ranchers.

Consequently, this District respectfully requests that the current proposed regulations (80 Fed. Reg. 37,054) be revised to reflect Justice Scalia’s opinion in *Rapanos* by defining “Relatively Permanent” waters as perennial streams only and by confirming that a wetland with a “Continuous Surface Connection” is limited to one that directly touches a jurisdictional water.

Thank you for the opportunity to comment on this important issue.

Sincerely,

BOARD OF THE HUERFANO COUNTY WATER CONSERVANCY DISTRICT