



June 19, 2017

Andrew Hanson and Donna Downing
Hanson.andrew@epa.gov
CWAwotus@epa.gov
U.S. Environmental Protection Agency

Re: Revisions to Definition of Waters of the United States

Dear EPA:

Colorado is submitting these comments with respect to the Environmental Protection Agency's (EPA) request for comment on making changes to the definition of "waters of the United States."

Colorado's primary interests in the jurisdiction and application of the Clean Water Act (CWA) to waters flowing within state borders relate to water quality, water supply and administration, and continuation of agricultural activities. It is the policy of the State of Colorado to prevent injury to beneficial uses of waters, to maximize the beneficial uses of water, and to achieve the maximum practical degree of water quality. Colorado has vested interests in securing and protecting the rights to use water that originates within Colorado and provides a water supply to 19 states and Mexico. Consequently, Colorado maintains significant interests in the efficient and wise management of water resources and in preserving the State's clear authority to administer and allocate water within its boundaries. Agriculture is a large economic driver in Colorado; given the arid nature of the state, Colorado depends heavily on irrigated agriculture. In considering proposed rule language, EPA must keep in mind that states have sovereign authority to administer water within their states as well as the expertise to evaluate the implications of proposed changes to jurisdiction. It is with these understandings that Colorado submits the following comments.

Need for Clarity and Dialogue:

As Colorado noted in 2014, prior to the completion of the 2015 WOTUS rulemaking, there was a great deal of uncertainty regarding the scope of CWA jurisdiction following the United States Supreme Court decisions in *SWANCC* and *Rapanos*. Colorado supports clarifying the scope of CWA jurisdiction. Colorado urges EPA to engage in meaningful and extensive dialogue up front to ensure that a proposed definition clarifies the scope of jurisdiction rather than creating additional uncertainty. Uncertainty with respect to the scope of EPA's jurisdiction leads to uncertainty in the permitting process which slows down essential water projects in Colorado and creates an inefficient permitting system.

Given the unique characteristics of waters throughout the country and how the impact of waters can vary depending on those characteristics, it is essential that EPA take the time to engage in meaningful discussion with states as co-regulators to learn about the different ways that a revised definition will impact each state in order to develop an appropriate definition. EPA must give careful thought to a revised definition to ensure it is both protective and also has reasonable impacts nationwide.

Colorado encourages EPA to engage in significant dialogue with states and other affected entities prior to proposing any revised definition to ensure that any proposed definition protects the watersheds of our states in a reasonable manner and is an interpretation that the states are confident will withstand legal challenge. Colorado has concerns that a definition based on Scalia's opinion alone may not be consistent with the Supreme Court's direction and not able to withstand legal challenge as the majority opinion. While we understand EPA's need to revise the existing definition, Colorado believes that the most defensible definition should be consistent with Kennedy's test.

Agricultural Exemptions:

Any revised definition must retain intact all of the CWA agricultural exemptions. Agriculture is one of the largest economic sectors in our state; our farmers and ranchers feed the people of Colorado and beyond while conserving environmental resources. Best available technology has allowed us to produce more with less water, fertilizer/chemicals and energy. It is essential that any revisions to the provisions defining the scope of CWA jurisdiction and its exemptions not create any confusion for the agricultural sector, and that the proposed definitions do not impact the scope of the agricultural exemptions. Compliance with the CWA must be straightforward and reasonable, as the industry makes tremendous advancements in Best Management Practices.

Cumulative Impacts:

As a headwaters state, Colorado is particularly interested in protection of our high quality water resources. Many of our headwaters are small tributaries that run seasonally and which cumulatively can have a large impact on waters at lower elevation that are ultimately used by the public for domestic water supply, recreation, and agricultural use. Therefore, these headwaters are an economic driver for our state. Accordingly, it is a high priority for Colorado that in considering how to define "relatively permanent" and "continuous surface connection," that the definition include an assessment of whether waters alone or in combination with other similarly situated waters have a significant nexus. Colorado believes strongly that it is appropriate to consider the cumulative impacts of potential activities on multiple tributaries upstream of traditionally navigable waters within a particular watershed and can only support a federal rule that includes this concept.

Similarly, Colorado has many ephemeral waters which flow only in response to storm events, some of which may have measurable and significant impact on downstream navigable waters. Colorado expects that EPA will involve states in meaningful and substantive dialogue as it evaluates how ephemeral streams will be treated under a new proposed definition.

EPA has suggested limiting its interpretation of "relatively permanent" to perennial waters only on one end of the spectrum, or perennial waters and waters that flow for at least 3 months of the year on the other end of the spectrum. Colorado has many waters that would not fall into either of these proposed definitions, and yet those waters can have measurable and significant impact on downstream navigable waters. When addressing these issues, Colorado is urging EPA to develop criteria that clarify the protections previously afforded these waters under prior jurisdiction determinations. Because waters that may have a significant impact on downstream navigable waters will vary by state, it is important that Colorado and all states be given a seat at the table to consider the most appropriate way to establish objective criteria.

Resource Impacts

Colorado is concerned that a change in interpretation of "waters of the U.S." could compromise Colorado's ability to leverage 319 funding and other federal support for waters

that EPA no longer considers to be jurisdictional. In Colorado, there are many small tributaries in the headwaters that are impacted by legacy mining and are not within other federal cleanup programs. Colorado relies heavily on 319 monies and other federal support to conduct projects to clean up the water quality impacts from legal mining. If EPA were to restrict its funding support for those mining impacted tributaries, Colorado would suffer.

Moreover, there is broader concern that EPA or other federal agencies may tie the amount of financial and other support provided to states for water related programs to only "waters of the U.S." If federal funding or other resources provided to states for implementation of the CWA or other programs are tied to the jurisdictional waters in the state then any reduction of jurisdictional waters could result in a loss of federal resources to, or available for, state programs. EPA's financial responsibilities for protection of the environment go beyond "waters of the U.S." A reduction in CWA jurisdiction should not be used as a mechanism to reduce funding or other resources to states.

Federalism:

Colorado understands that EPA is considering a more restrictive definition of waters of the U.S. As a practical matter, if EPA limits waters under the jurisdiction of the CWA, many waters - especially the headwaters of important western streams - may be left unprotected under the CWA. States may choose to protect these waters under their own programs, but this shift away from federal protections would significantly increase the burden on the states. EPA should not unduly shift the additional and substantial burden onto the states to protect waters that have a significant impact on the larger watershed. If this burden is shifted to the states sufficient federal funding should be provided.

We appreciate the opportunity to provide this input generally. Colorado understands that developing a definition of WOTUS that recognizes the complexity and uniqueness of the hydrology, water quality, and water uses in each state will be challenging. Colorado urges EPA to work closely with all states in the development of the definition of waters of the United States. We look forward to the opportunity to have a meaningful dialogue with EPA to provide input on potential changes to the definition of waters of the United States and to explore the implications of a revised definition on Colorado and its programs.

Sincerely,

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

A handwritten signature in blue ink, appearing to read 'Larry Wolk', written in a cursive style.

Bob Randall
Executive Director
Colorado Department of Natural Resources

A handwritten signature in blue ink, appearing to read 'Bob Randall', written in a cursive style.

Don Brown
Commissioner of Agriculture
Colorado Department of Agriculture

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