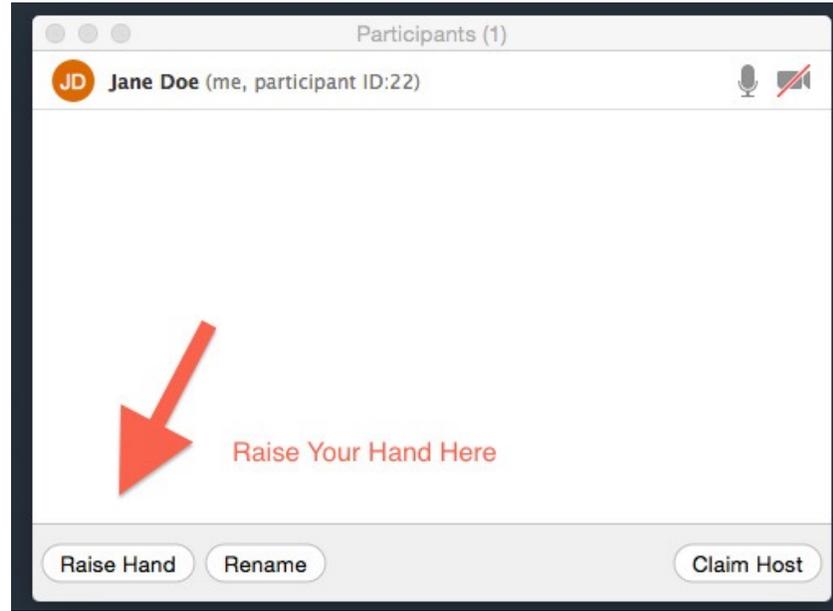
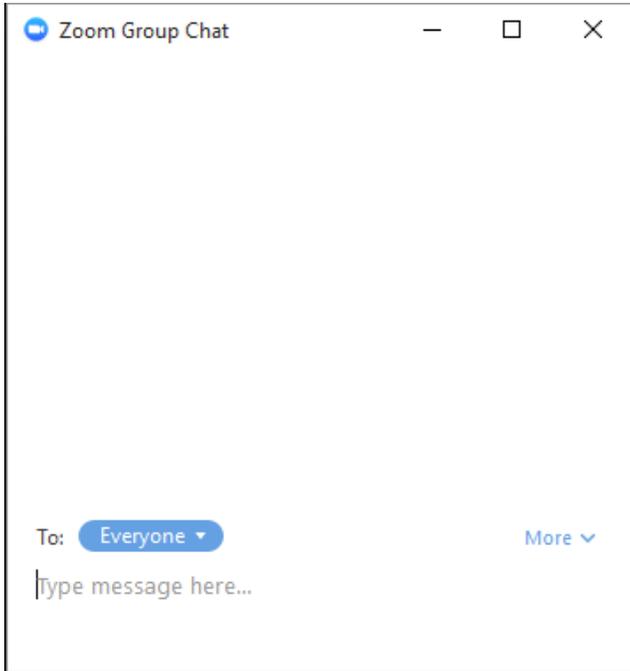




COLORADO
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Waters of the United States Webinar

Friday, July 26, 2019
Colorado Water Congress

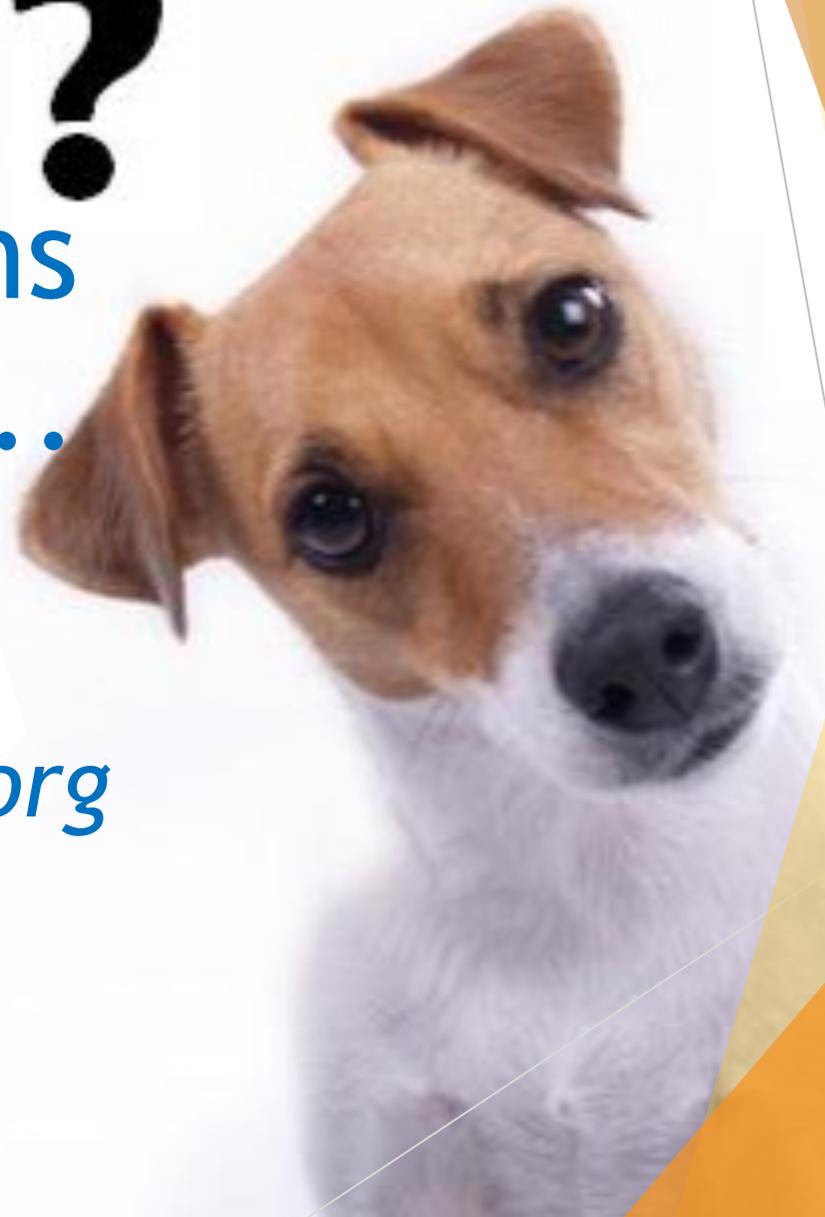


If You Have a Question:

- ▶ Zoom Chat Box
- ▶ Raise Your Hand

If You Have Questions
on How to Use Zoom..

Chane@cowatercongress.org





Gabe Racz

*Vranesh and
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Aleta Powers

ERO Resources



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*Pacific Legal
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Waters of the US

Current Status in Colorado

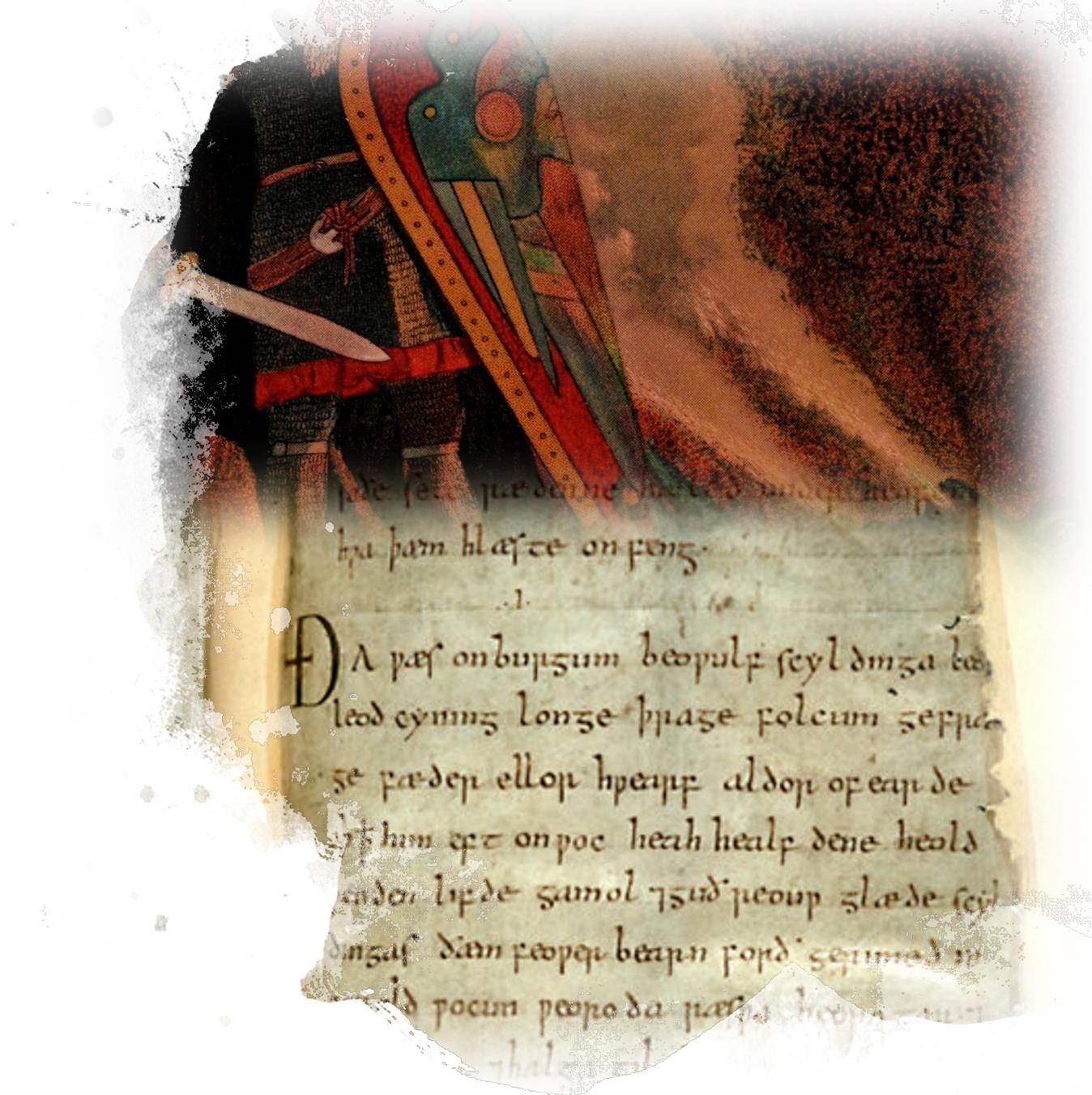
July 26, 2019

Gabe Racz, Vranesh and Raisch, LLP

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Review: The epic of the Waters of the US Rulemaking

- Jurisdiction under the Clean Water Act is limited to “waters of the United States, including the territorial seas”
 - Importance: it defines when discharge permit or 404 permit is needed
 - but WOTUS is not defined in the CWA
- EPA & Corps Rules defined
- *Rapanos* U.S. Supreme Court 2006
 - Scalia plurality: “relatively permanent” flow and “continuous surface water connection”
 - Kennedy concurrence: “significant nexus”
 - Post-*Rapanos* guidance and jurisdictional determinations
- 2015 Clean Water Rule
- (Pending) 2019 WOTUS Rule



Summary of CWC major comments on the Draft Clean Water Rule

- CWC adopted policy: “Federal jurisdiction over waters should continue to be based upon a Commerce Clause connection, and not be expanded under amendments to, or administrative interpretations of, the [Clean Water] Act.”
- Comments on the 2015 draft rule objected to:
 - Expansion of federal jurisdiction by categorizing all tributaries and adjacent waters as jurisdictional
 - Assumed impact based on impact to similarly situated waterbodies
 - Assumption that ditches are jurisdictional unless specifically exempted; exemption too narrow in the arid west because ditches are seldom “entirely in uplands”
 - Reliance on the *draft* connectivity report without regard to legal constraints
 - Remaining ambiguity in the rule

Summary of CWC major comments on the 2019 draft WOTUS Rule

- Exclusion of ephemeral features could ease permitting but could also be a concern in managing watersheds for water supply; more accurate definition of ephemeral features would help
- Quantifiable approach to definition of “intermittent” waters
- Support for exclusion of ditches but request for clarification to exclude ag and muni ditches
- Support for elimination of the significant nexus test to provide more clarity and predictability
- Create categorical exclusion for MS4s

State of Colorado comments on the Rules

- Draft Clean Water Rule comments (2014)
 - Concern about expansion of jurisdiction without clarification
 - Need to clearly incorporate agricultural exemptions
 - Supported considering significant nexus “alone or in combination”
 - Clarify jurisdiction for ditches
 - More clearly define “uplands,” and other features exempt by rule
 - Consult with co-regulators
- Draft WOTUS Rule comments (2019)
 - Objects to removal of federal jurisdiction of many Colorado waters, including “significant nexus” waters
 - Suggested a “Colorado Significant Nexus Test” to “clarify”
 - Supported clarifying agricultural exemptions
 - Argued burden on state resources by shifting the burden to protect excluded wetlands and waters: **It would also necessitate that Colorado amend its laws and build an expensive new state Section 404 program**



WOTUS Litigation

- 6th Circuit Litigation
 - 6th Circuit entered a national stay of the 2015 Rule
 - Supreme Court held that district courts have exclusive jurisdiction
 - Stay vacated as a result
- Applicability date rule – enjoined and vacated
- ND District Court
 - CO and other states, NM State Engineer challenged 2015 rule
 - Preliminary injunction entered as to the plaintiffs in front of the court (including all of CO)
 - Court decided not to extend injunction nationally
 - After 2018 elections, CO and NM withdrew as parties (treated as dismissal of their complaints)
 - **As a result, the court dissolved the injunction in CO (Tony will explain why that’s not true of NM)**
- Meanwhile, SD Texas remanded the rule and maintained injunction in TX, LA, and MS

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What's next?



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- Issuance of final WOTUS Rule – estimates by December 2019 or earlier?
- Ensuing litigation on a 2019 Rule with a new round of injunction requests?
- Final orders in District Court litigation on 2015 Clean Water Rule?
- **How many WOTUS Rules will apply in Colorado in 2019 alone, or in the next 5 years?**
- What is the practical impact of the regulatory whiplash?

Clean Water Act:
Litigation and Jurisdiction:
WOTUS Whiplash

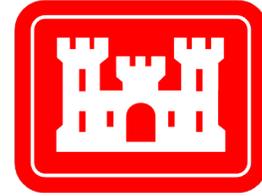


Topics

- Contrast and Compare for pre-2015, 2015, and 2019 rules
- What does it mean for projects (examples)?



CWA core questions



1. Is there a Jurisdictional Water?
 2. Is there a regulated activity (dredge/fill discharge)?
- Changing WOTUS Proposed rules/litigation continues to change the geographic extent of waters under question 1



Scope of 404 Jurisdiction: Pre-2015

- 1. Is there a jurisdictional waterway?
 - a. **No:** “Preamble waters” (note that the proposed 2015 rules provided clarification on these definitions; i.e., erosional features, artificial ponds)
 - b. **No:** Upland ditches:
 - i. Ditches that **are excavated wholly in uplands, drain only uplands, and that have less than perennial flow**
 - ii. Ditches that do not contribute flow, either directly or through another water, to a traditionally navigable water, interstate water or territorial sea
 - c. **Sometimes:** Wetlands/waters that are created by the application of irrigation water, or “leaky ditches”
 - d. **Sometimes:** Isolated wetlands/waters; subject to Significant Nexus evaluation



Scope of 404 Jurisdiction: Pre-2015

- 1. Is there a jurisdictional waterway? (continued)
 - e. **Yes:** Traditional Navigable Waters, interstate waters, territorial seas, impoundments of Waters of the U.S.
 - f. **Yes:** Perennial and intermittent wetlands/waters with surface connection
 - g. **Yes:** Tributary Ditches that return flow to another water of the U.S.
 - h. **Yes:** Ephemeral waters with bed and bank characteristics
 - i. **Yes:** Wetlands adjacent/neighboring the above



Scope of 404 Jurisdiction: 2015 Final Rule

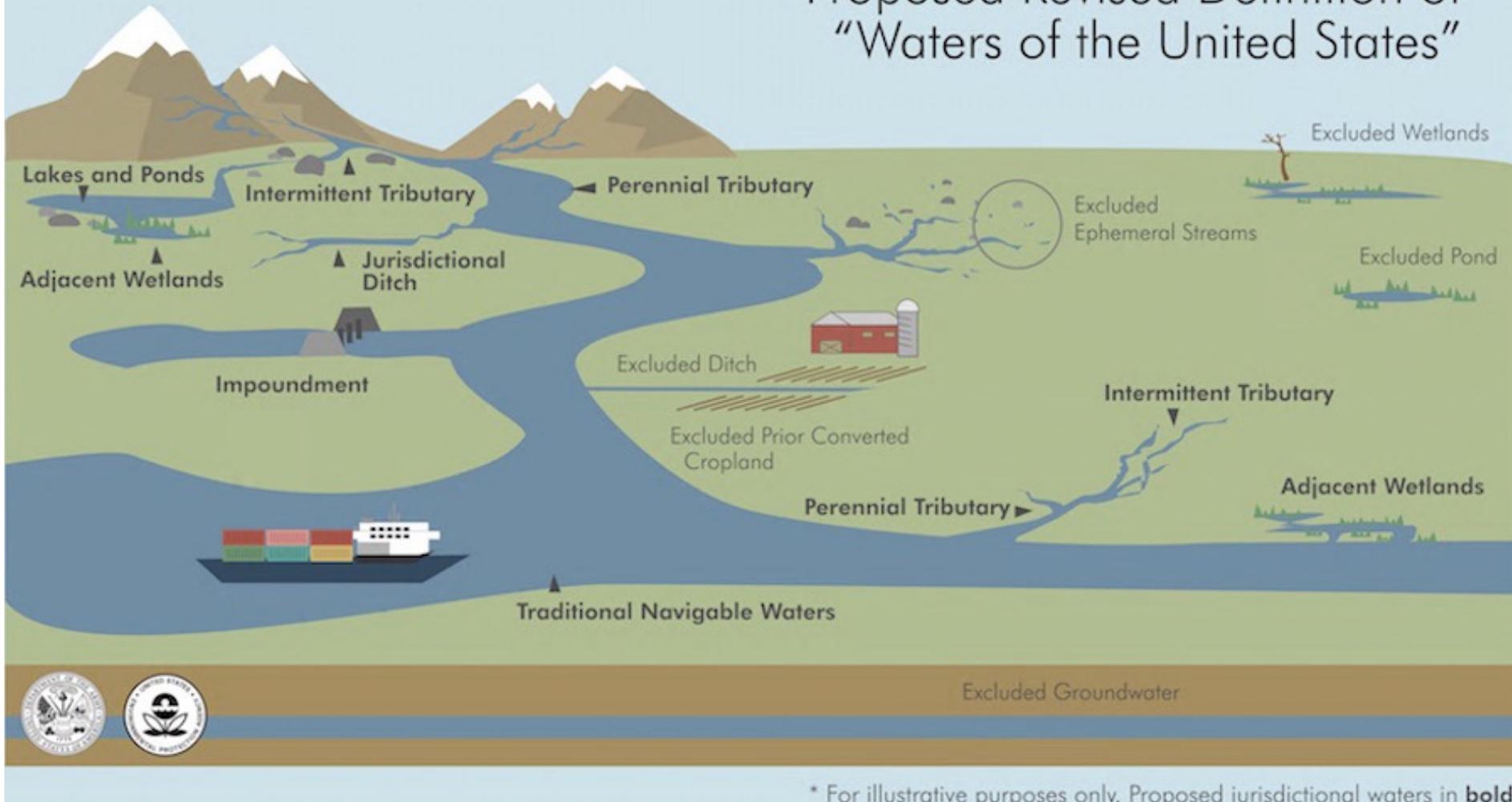
- 1. Is there a jurisdictional waterway? (2015 final rule)
 - a. **Yes:** Traditional Navigable Waters, interstate waters, territorial seas, impoundments of Waters of the U.S. (note: in Colorado, only parts of Colorado River and Navajo Reservoir are TNWs)
 - b. **Yes:** Perennial, intermittent, and ephemeral waterways, including impoundments and tributary ditches, with bed and bank
 - c. **Yes:** Adjacent waters = Wetlands within 100 feet of the OHWM of a tributary; within the 100-year floodplain and within 1500 feet of OHWM
 - d. **Maybe:** waters within 4,000 feet of OHWM subject to significant nexus evaluation
 - e. **No:** Preamble waters previously excluded; most ephemeral ditches and some intermittent ditches; ground water



Scope of 404 Jurisdiction: Proposed

- 1. Is there a jurisdictional waterway? (2019 proposed rules)
 - a. **Yes:** Traditional Navigable Waters, interstate waters, territorial seas, impoundments of Waters of the U.S. (note: in Colorado, only parts of Colorado River and Navajo Reservoir are TNWs)
 - b. **Yes:** Perennial and intermittent waterways, including impoundments, with at least intermittent connectivity
 - c. **Yes:** Tributary Ditches that return flow to another water of the U.S., as long as intermittent connectivity
 - d. **Yes:** Tributaries that are affected by natural or artificial breaks, as long as flows through the breaks/barriers are at least intermittent
 - e. **Yes:** Wetlands adjacent/abutting, having a direct hydrologic connection, to the waters listed above
 - f. **No: Everything else (ephemeral drainages, lakes or ponds, and ephemeral connections; isolated or nonabutting wetlands or features)**

Proposed Revised Definition of "Waters of the United States"



* For illustrative purposes only. Proposed jurisdictional waters in **bold**.

WOTUS whiplash

- Pre-June 2019: Colorado under Pre-2015 rules due to enjoinderment
- June 2019: Colorado removed from litigation; 2015 rules apply
- August 2019: 2015 rules rescinded? Colorado could revert to Pre-2015 rules
- December 2019: 2019 file rules expected; litigation likely. Colorado could remain under Pre-2015 rule

Approach for Smaller, Immediate projects

- Denver Regulatory Branch (Omaha District) is currently taking requests for AJDs (there was a temporary lapse in the spring)
- Colorado West Regulatory Branch (Sacramento District) general policy is not to accept AJDs though they have in some specific cases
- Southern Colorado Regulatory Branch (Albuquerque) is currently taking AJD requests
- Preliminary JD (assumes WOTUS) is still an option
- Avoid/Minimize impacts
- On potentially isolated features, evaluate 2015 vs 2019 for informed decision-making

Approach for Alternatives Analysis for Large, Future projects

Alternative	Pre-2015 Rules/ Guidelines	2015 Final Rule	2019 Proposed Rule
Original	AJD in 2005 still valid under Pre-2015 guidelines	AJD in 2005 likely still valid under 2015 guidelines (distance greater than 4,000 feet from any nearby WOTUS)	AJD in 2005 likely still valid under 2019 guidelines
Alternative 2	Isolated due to discontinuous bed and bank	Isolated due to discontinuous bed and bank (>4,000 feet from any nearby WOTUS)	No WOTUS due to less than ephemeral connection to an intermittent or perennial drainage
Alternative 3	Washington Gulch an intermittent connected stream and likely WOTUS	Washington Gulch an intermittent connected stream and likely WOTUS	Washington Gulch an intermittent connected stream and likely WOTUS
Alternative 4	Intermittent tributary likely isolated; Jefferson Channel likely WOTUS	Both intermittent tributary and Jefferson Channel likely WOTUS (gap in connectivity greater than 4,000 ft)	Intermittent tributary likely isolated; Jefferson Channel may be WOTUS depending on “ditch” interpretation
Alternative 5	AJD in 2005 still valid under Pre-2015 guidelines	May require re-evaluation under 2015 rules to determine connectivity within 4,000 feet	AJD in 2005 likely still valid under 2019 guidelines

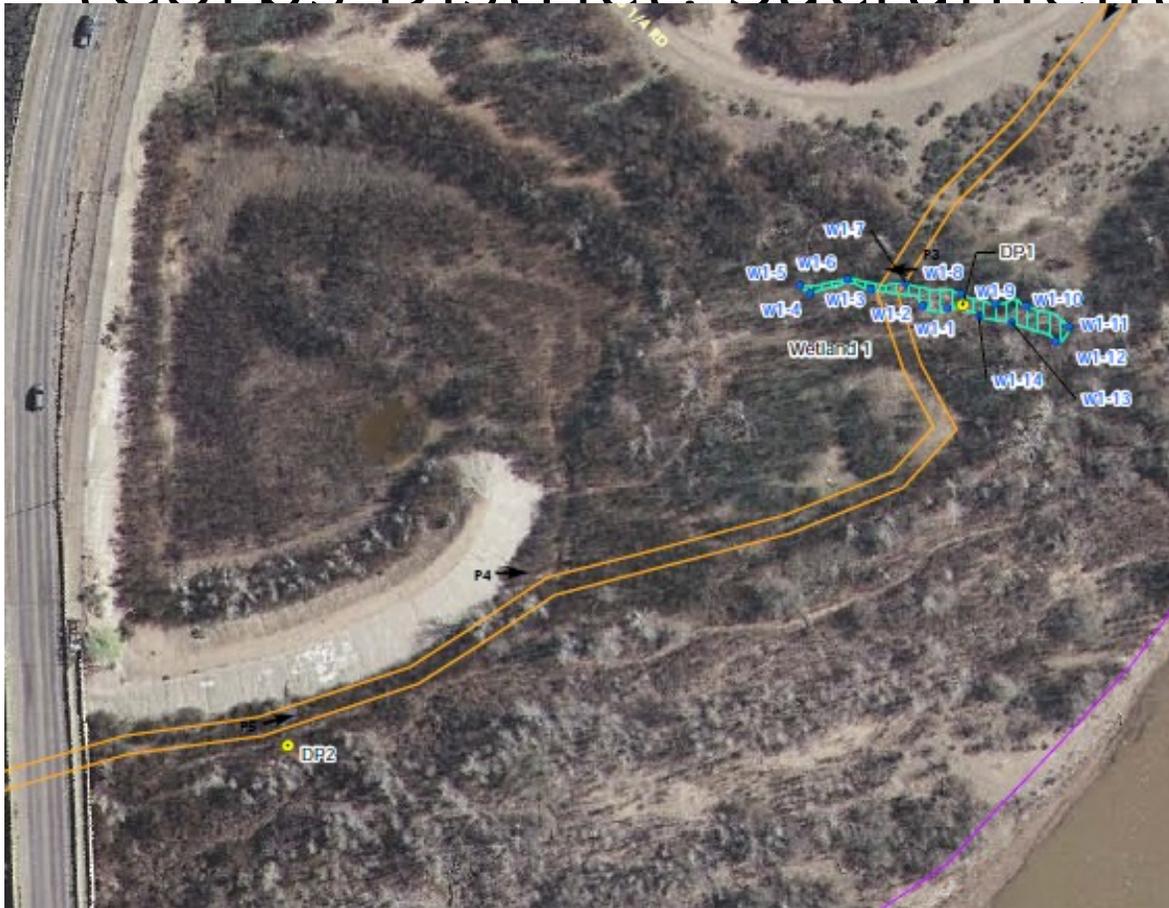
Mesa County Project: 4 Road Safety Improvements Project

(Corps District: Sacramento)



- Ephemeral washes with bed/bank; flow in response to storm events
- Required wetland delineation
- PCN prepared; NWP 14 received from Corps
- BLM lead agency
- Jurisdictional under Pre-2015 and 2015 rules
- Under 2019 guidance likely would not be jurisdictional as “less than intermittent” connection; likely would not have required wetland delineation/permitting, though perhaps some level of evaluation to prove the ephemeral nature of the drainages in the project area

Mesa County Project: Fruita Connection Riverfront Trail (Corps District: Sacramento)



- Several small wetlands above the OHWM of the Colorado River in Grand Junction (see example near Redlands Parkway Bridge)
- Determined to be jurisdictional pre-2015
- Would be jurisdictional as “floodplain wetlands” under 2015 rule
- Not “abutting” under the 2019 rule and therefore not jurisdictional

Gravel Reservoir Project (Corps District: Omaha)

- Reservoir and associated wetlands were determined to be non-jurisdictional under pre-2015 rules
- 2015 Rule likely would recapture these as jurisdictional waters due to the reservoir falling within the 100-foot buffer for “neighboring” waters
- 2019 Rule likely would find these non-jurisdictional due to lack of any surface connection to a tributary





Questions?



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Thank You!