Steve Moyer
Vice President of Government Affairs

April 15, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 2040

The Honorable R.D. James
Assistant Secretary of the Army (Civil Works)
Department of the Army
104 Army Pentagon
Washington, DC 20310–0104

Submitted electronically at *www.regulations.gov*

RE: Docket ID No. EPA-HQ-OW-2018-0149: Comments on the Revised Definition of Waters of the United States

Dear Administrator Wheeler and Assistant Secretary James:

Trout Unlimited strongly opposes the proposed *Revised Definition of ''Waters of the United States"* (2019 Proposal), which is proposed by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) (collectively, the Agencies) to replace the scientifically sound, legally justified, and publicly supported 2015 Clean Water Rule (2015 Rule).[1]

Trout Unlimited (TU) is the nation's largest coldwater fishing conservation organization. We represent 300,000 members and supporters nationwide, including 400 local chapters and 35 state councils. The 2019 Proposal, if implemented, would directly undercut the work that TU does across the nation in pursuit of our mission to conserve, protect and restore coldwater fisheries and the watersheds on which they depend.

The 2019 proposal would vastly rollback existing protections for our nation's waters. The proposal would end protections for millions of miles of streams across the country – streams that contribute to the drinking water supplies of 117 million Americans and provide essential fish and wildlife habitat that support a robust outdoor recreation economy worth $887 billion. It would also erase protections for millions of acres of wetlands, a critical part of functioning watersheds, including groundwater recharge, pollution filtration, as well as protecting communities from flooding. In eliminating these protections, the replacement rule would deregulate a host of development activities, such as pipeline construction that will, over time, degrade hunting and fishing opportunities in every state in the country.

[1] Revised Definition of "Waters of the United States", 31 FR 4153 (February 14, 2019) *(2019 Rule)*.

The proposal is scientifically and legally flawed; inconsistent with the purpose and intent of the Clean Water Act, contrary to the Administration's stated goals and fails to comport with proper procedure required by law. For these reasons, the Agencies should withdraw this proposal and develop a proposal that is at least as effective in protecting the nation's waterways as the 2015 Rule currently does in 22 states around the Nation.

TU supports the 2015 Rule

TU members, and sportsmen and women across the country, want to move forward with progress on cleaning up our nation's waters, not go backwards. Thus, the Clean Water Act needs to be strengthened, not weakened, as the Agencies 2019 Proposal would do.

The Clean Water Act, and the 2015 Rule, are vital to TU's mission, and to anglers across the nation. Whether TU is working with farmers to restore small headwater streams in West Virginia, removing acidic pollution caused by abandoned mines in Pennsylvania, or protecting the world-famous salmon-producing, 14,000-jobs-sustaining watershed of Bristol Bay, Alaska, we rely on the Clean Water Act to safeguard our water quality improvements.

TU supported the 2015 Clean Water Rule because it was scientifically sound and would help clarify application of the Clean Water Act, ensuring protections for waters while increasing certainty for regulators and regulated entities. Backed by the EPA's connectivity report, the 2015 Rule satisfied Justice Kennedy's jurisdictional standard that there must be a "significant nexus" between upstream waters and downstream navigable waterways, as EPA's Connectivity Report proved.[2]

At least 60% of rivers and stream miles in the lower 48 states are intermittent or ephemeral; i.e., they do not flow year-round. Headwaters are not only the foundation of our aquatic systems, but they are the lynchpins of fishing and hunting habitat for millions of sportsmen and women. These waters contribute to the drinking water supplies of 117 million Americans, protect communities from flooding, and provide essential fish and wildlife habitat that supports a robust outdoor recreation economy worth $887 billion annually. The 2015 Rule protected our headwaters, consistent with the goals and intent of the Clean Water Act. The 2019 proposal is a great leap backward.

The proposed 2019 Rule is inconsistent with the purpose and intent of the Clean Water Act.

The 2019 Proposal proposes a significant weakening of the Clean Water Act's 47 years of protection for our nation's waters. Contrary to messaging from proponents of the 2019 proposal, the proposal is **not** a return to the status quo, it is **not** a correction of the last Administration's attempted over-reach, and it is most certainly **not** a framework that will allow the United States to maintain the immense progress of the last decades towards attaining the Act's goal of all waters being fishable and swimmable.

[2] U.S. EPA, Connectivity of Streams and Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence (Jan. 2015) (hereinafter "Connectivity Report").

The worst element of the 2019 Proposal is that it undercuts the very heart of the Clean Water Act by arbitrarily tossing out millions of miles of streams and millions of acres of wetlands from Clean Water Act protection. The proposal completely misses the goal of the Clean Water Act, the Nation's most popular natural resource law: to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The 2015 Rule was developed in accordance with the goal and substance of the Clean Water Act, while the Agencies' 2019 Proposal is not.

The proposed 2019 Rule is inconsistent with Supreme Court precedent and is contrary to the stated goal of increasing clarity and certainty.

The Agencies' purport to seek clarity and to resolve confusion over legal interpretation of "waters of the U.S." However, if legal and practical clarity are desired, the 2019 Proposal is on the wrong track. The Agencies place an improper overreliance on Justice Scalia's decision in (Rapanos) as the basis of any proposal to replace the 2015 Rule. Instead the Agencies should return to using Justice Kennedy's "significant nexus" test and develop a proposal that is at least as effective in protecting the nation's waterways as the 2015 Rule currently does in 22 states around the Nation.[3]

Repeatedly through the preamble, the Agencies concede that they are presenting a new interpretation, almost always a new narrowing, of the 45-year body of Clean Water Act jurisprudence. This is not embedding a proposal in an existing legal construct; this is creating something new, often from whole cloth, in a way that ignores the Act's broad objectives and authorities. The Agencies' interest, as expressed in the recent Executive Order on pipelines and the Executive Order directing this rulemaking, shows that the President wants a rule that will fast track economic development, including development that may affect our nation's waters. The 2019 Proposal, therefore, is not embedded in a legal construct; it's embedded in a de-regulation agenda. Only with that understanding can anyone understand the Agencies' decision to ignore the best science available on watershed health and to refuse to quantify the impacts of their approach in proposing a rule under a statute whose first objective is to protect the chemical, physical and biological integrity of our nation's waters.

The 2019 Proposal is inconsistent with the best available science; arbitrarily drops Clean Water Act protections for many waterways, unnecessarily increasing the risk of their destruction.

The Agencies admit that the 2019 Proposal eliminates from Clean Water Act protections 18% of the nation's stream miles and 50% of the Nation's wetlands. Ephemeral streams largely comprise the 18% of stream miles, and wetlands not immediately adjacent to truly navigable waters (TNW) comprise most of the 50% of wetlands.

The American Fisheries Society's (AFS) peer reviewed report, *Headwater streams and wetlands are critical for sustaining fish, fisheries, and ecosystem services (Colvin et.al.)*, discusses the functions and

[3] Elsewhere in this docket are several comprehensive legal analyses of the failings of the agencies' approach for this proposed rule. One is from the National Wildlife Federation, a close partner representing sportsmen and women. Trout Unlimited adopts those comment in full, in addition to the brief arguments we make here.

values of headwater streams and provides a powerful summary of the immense ecological contributions that these waters provide communities and fisheries.[4] Consistent with the conclusions of the EPA's own Connectivity Study (US EPA 2015), the best available science concludes that these systems are extremely valuable.[5]

To be effective, the Clean Water Act must be able to control pollution at its source—upstream in the headwaters and wetlands that flow downstream through communities to our major lakes, rivers, and bays. The Clean Water Act—and the 2015 Clean Water Rule—were designed to ensure that our nation's small waters remain intact, and that the water flowing from them is fresh and clean. These waters are the spawning and rearing waters for trout, salmon and other wild and native fish that contribute greatly to the $50 billion recreational fishing industry in the United States. What's more, these streams send clean water downstream, where it's used to water our crops, cool our industrial generators, and provide clean, fresh drinking water for our cities and towns.

Ephemeral streams are as equally-important as perennial and intermittent streams. These are the capillaries of watersheds. They help move nutrients downstream. They can be important food sources for fish, and they have a profound effect on drinking water. If Clean Water Act protections are removed, suddenly those often-dry creek beds might become a place to put animal waste or store gas tanks. When a rain event occurs, the pollution is transported downstream.

Intermittent Streams: Changes considered, but not proposed.

There are several references to possible regulatory changes considered or discussed, but not proposed in this rulemaking, some of which would represent a drastic additional cut in federal protections on top of the vast rollbacks in protections more formally proposed.

For instance, the Agencies ask for comment on whether they ought to drop out intermittent streams from Clean Water Act protection. TU's answer is an emphatic **no**. Intermittent streams comprise nearly 60% of the nation's stream miles. As the EPA Connectivity Report and the AFS paper clearly show, Intermittent streams are critical elements of healthy watersheds. They absolutely must be protected by the Clean Water Act.

TU is strongly opposed to the Agencies even considering dropping intermittent streams from Clean Water Act protections.

Should the Agencies elect to pursue any of these conceptual revisions, they must conduct a new rulemaking process to identify proposed language and solicit feedback directly on those changes. Providing general notice that such changes are being generally considered does not provide adequate notice of specific, proposed rule changes. *See*, CSX Transp., Inc. V. Surface Transp. Bd., 584 F.3d 1076,

[4] Colvin, S.A.R., S.M.P. Sullivan, P.D. Shirey, R.W. Colvin, K.O. Winemiller, R.M. Hughes, K.D. Fausch, D.M. Infante, J.D. Olden, K.R. Bestgen, R.J. Danehy, and L.Eby. 2019. Headwater streams and wetlands are critical for sustaining fish, fisheries, and ecosystem services. Fisheries 44:73-91.

[5] See, EPA Connectivity Report.

1082 (D.C. Cir. 2009) (broad notices of proposed rulemaking insufficient to justify a final rule that lacks specific reference in the notice).

The 2019 Proposal creates increased risk to waters; increased complexity and confusion for regulators and regulated communities.

In the 2019 Proposal, the Agencies claim administrative efficiencies and eventual state takeover of regulation of these areas will suffice instead of the protections provided by the 2015 Rule. However, the 2019 Proposal provides absolutely no evidence or analysis supporting the contention that the states will step in to fill the gap. Further, new uncertainties created by the complexity of the 2019 Proposal will likely decrease, not increase, the implementation effectiveness of the Agencies.

The 2019 Proposal will reduce protections, leading to increased loss of headwater streams, many wetlands, and the functions and values they provide.

Ephemeral and intermittent streams occur in every state in the Nation. They are found in the watershed in our neighborhoods.

The National Hydrography Dataset (NHD) maps 6.5 million stream miles nationwide, 20% of which are identified as ephemeral. However, Trout Unlimited estimates that the NHD dataset misses approximately 5.5 million miles of unmapped streams nationwide and that, when these are included, ephemeral streams likely comprise closer to 57% of the nation's stream miles. Trout Unlimited has used a publicly available US Geological Survey dataset and peer reviewed scientific studies to estimate the extent of these unmapped streams in a conservative manner.

> *A key takeaway from this analysis: Real world impacts would likely be even worse because the NHD maps underestimate the number of ephemeral streams*

Applying this mapping exercise at the state level, 84% of Arizona's streams are likely ephemeral and would lose CWA protections. In Colorado, 56% are estimated as ephemeral and would lose CWA protections. In Maine, which houses 57,107 mapped stream miles but where ephemeral stream mapping has not been completed, Trout Unlimited estimates that 1.6 miles of ephemeral streams may exist for every mapped stream mile – meaning that approximately 61% of Maine stream miles could lose CWA protection.

The Agencies 2019 Proposal places all of these headwater streams and wetlands on a path leading to a much higher risk of destruction by removing them from the jurisdiction of Clean Water Act.

The TU Science Team has identified specific examples of increased risk associated with the proposed reduction of protections for headwater streams and wetlands.

The 2019 Proposal would remove Clean Water Act protections for ephemeral streams and wetlands at risk of destruction from a variety of previously, and currently under the 2015 Rule in 22 states, activities. Construction of natural gas pipelines is a good example of these activities.

Based on our experience, and using maps of streams provided by NHD, TU's Science Team analyzed the potential impacts of the major loss of jurisdictional protection caused by the 2019 Proposal would cause several different types of development activities, include gas pipelines, transmission lines, and oil and gas development.

For example, pipeline development and pollution from mines pose major challenges for trout in Pennsylvania. Trout populations are especially vulnerable because they are sensitive to warming temperatures and associated habitat degradation. Clean Water Act protections are essential to secure healthier ecosystems that benefit fish and wildlife and allow the people of Pennsylvania to recreate and our outdoor economy to thrive.

Pipeline construction involves clearing broad pathways across the landscape and trenching through hundreds of streams. New pipelines often intersect with forested headwater streams and important trout populations and habitat. During construction, erosion and sedimentation caused by earthmoving and trenching required to place the pipeline can degrade water quality and fish habitat. Storms may cause erosion controls to fail before a site can be re-vegetated, sending plumes of sediment into streams. Further, water quality in streams and wetlands can be degraded by runoff from access roads, and by contamination from gas leaks and other chemicals

In the eastern U.S., significant buildout of pipelines is occurring. Several of these pipelines in Pennsylvania, West Virginia, and Virginia threaten important brook trout habitat, especially habitat such as areas with dense stream buffers to shade the stream and protect its banks to cool the water, as well as intact tributary systems that allow fish movement.

Specifically, 80 miles of the proposed Atlantic Coast Pipeline will cross brook trout habitats in the mountains of Virginia and West Virginia. Of the 105 steam crossings in watersheds containing brook trout, 58% occur on ephemeral and intermittent streams.

Similar damage to headwater streams can be caused by transmission line development. In Maine, 53 miles of new powerline corridor, the New England Clean Energy Connect transmission line, would be constructed from the Canadian border, through prime brook trout habitat, to coastal Maine. One of TU's biggest projects in Maine, establishment of easements to protect the Cold Stream watershed, would be adversely affected.

Field Surveys have identified 181 stream crossings along this transmission line, 87 of which are in intermittent streams and 32 in ephemeral streams. Combined, over 65% of the streams to be crossed are in danger of losing protection under the 2019 Proposal.

TU members, volunteers and staff recreate in the Nation's waters and spend considerable time and funds protecting, re-connecting, and restoring them. We see the threats that these waters face on a daily basis.

TU and its members are not opposed to gas pipelines, gas development, mining, and other forms of development, but a proper balance must be maintained between these forms of development and the imperative of protecting and restoring streams and wetlands.

Clean Water Act safeguards do not prohibit industry and construction; rather, they help to ensure that development proceeds in a manner that avoids, minimizes, and mitigates impacts to water bodies.

Watersheds in which TU has made considerable investments are directly threatened by the 2019 Proposal.

An example of the combined effect of protecting and restoring navigable waters, tributaries, wetlands and "other waters" is the ***Driftless Area*** of the northern Midwest.

Roughly the size of West Virginia, the Driftless Area has over 600 coldwater limestone spring-fed creeks, several-thousand miles of mineral-rich streams, and thousands of acres of wetlands, weaving across its landscape in Wisconsin, Minnesota, and Iowa. For over a decade, Trout Unlimited has worked with farmers, and state and federal agency partners to restore watersheds and improve water quality by reducing sediment and nutrient inputs. The rivers and fisheries of the Driftless Area respond quickly to techniques that control erosion, reconnect floodplains, and improve instream habitat. More than ten million dollars have been invested in dozens of projects that resulted in 150-miles of restored streams in the area.

Our restoration gains are built on a foundation of a strong Clean Water Act. For example, Clean Water Act Section 402 (NPDES) regulates pollution loadings from point source discharges from towns and industry. Section 404 regulates projects which would dump dredged and fill material into Driftless streams from road construction and pipeline projects. These Clean Water Act safeguards do not prohibit industry and construction; rather, they help to ensure that development proceeds in a manner that avoids, minimizes, and mitigates impacts to water bodies. The substantial losses of jurisdictional protection for headwater streams and various types of wetlands in the 2019 Proposal threatens to erode the watershed health gains TU and our multitude of partners have helped to deliver to the region and others like it around the country.

These safeguards and investments pay off. For every dollar spent on stream restoration an additional $24.50 is returned to the regional economy each year thereafter. Recreational angling in the Driftless Area generates an impressive $1.1 billion in annual economic benefit to the local economy.

All of these benefits in the Driftless area and streams and wetlands around the nation are imperiled by the Agencies 2019 Proposal.

Conclusion

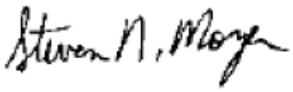
The proposed rule undermines the intent of the Clean Water Act, is unsupported by the best available science, and is legally flawed. We request that the Agencies withdraw this flawed proposal immediately

and either reaffirm the 2015 Clean Water Rule or propose and carefully consider a revised rule that is as scientifically, legally, and ecologically sound as the 2015 Clean Water Rule.

Clean water is not a political issue. It is a basic right of every American. To be effective, the Clean Water Act must be able to control pollution at its source, upstream in the headwaters and wetlands that flow downstream through communities to our major lakes, rivers, and bays.

TU's members and supporters, and American sportsmen and women across the country, will settle for nothing less than a Clean Water Act that protects the Nation's wetlands and streams.

Respectfully submitted,



Steve Moyer

Attachments:

Kurt Fesenmyer, GIS Director, Trout Unlimited. 2019. Trout Unlimited Powerpoint Presentation, "What it all means: waters of the U.S. on the ground." April 4, 2019. (2019 Trout Unlimited Mapping PowerPoint).

Trout Unlimited, Fesenmyer et.al, Mapping Waters of the U.S., Fact Sheet.

Trout Unlimited, Waters of the U.S. State Maps (12 states).

Trout Unlimited, Story Map, Waters of the U.S. Story Map.

Amicus Curiae Brief of Trout Unlimited, the American Fly Fishing Trade Association, the Izzaak Walton League of America, and the Theodore Roosevelt Conservation Partnership, in Support of Respondents in Murray Energy Corp. et al., v. U.S. Environmental Protection Agency and the United States Army Corps of Engineers (6th Cir., January 20, 2017).