

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20004

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

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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:

On behalf of the millions of our members and supporters, the undersigned hunting, fishing, conservation groups, professional societies, as well as the outdoor recreation community and businesses write in opposition to the Environmental Protection Agency's (EPA) and Army Corps of Engineers' (Corps) proposal to revise the definition of "waters of the United States." We submit the following comments regarding the proposed rulemaking.

Sportsmen Support Clean Water Act Protections for Headwater Streams and Wetlands

Sportsmen and women have long supported Clean Water Act protections for ephemeral streams and wetlands, and indeed, they still support them. In 2018, the Theodore Roosevelt Conservation Partnership conducted a poll on water issues which found:

- 92 percent of sportsmen and women want the federal government to strengthen or maintain current standards for clean water protections.
- 93 percent of hunters and anglers believe that the Clean Water Act has been a positive thing for our country.
- 83 percent of sportsmen and women support restoring Clean Water Act protections for headwaters streams and wetlands.

Hunters and anglers understand that they need clean water in order to pursue their hunting and fishing passions, and every year, over 49 million Americans head into the field to hunt or fish, and the hunting and fishing industries in the United States directly employ 1.3 million Americans. The economic benefits of hunting and fishing – which total \$200 billion a year – are especially pronounced in rural areas, where money brought in during fishing and hunting seasons can be enough to keep small businesses operational for the entire year.

During the "Step One" comment period, sportsmen and conservation organizations – as well as individual hunters and anglers – submitted comments opposing the proposed repeal of the 2015 Clean Water Rule. The 2015 Rule clarified federal jurisdiction over "waters of the United States" to conserve the roughly 60 percent of streams and 20 million acres of wetlands (and thereby the downstream waters into which they flow) at risk of being polluted or destroyed because of the jurisdictional confusion. 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.

This proposed rule represents a wholesale gutting of the Clean Water Act's 47 years of protection for our nation's waters. The 2015 Clean Water Rule only protected an additional five percent of streams from what had been protected since 2008. However, the current proposed rule would go much further than simply reversing the 2015 Clean Water Rule additions and instead remove protections required by the Clean Water Act as explained in regulation since the 1970's. These protections ensure clean water for current and future generations. For example, the agencies' proposal would no longer protect from polluting activities the large number of ephemeral streams that only flow following rain or snow nor wetlands that lack a direct hydrologic surface flow connection to a perennial or intermittent stream in a "typical" year or that are adjacent to, but do not directly abut, other jurisdictional waters. The rule would thus eliminate Clean Water Act protections for more than 18 percent of the nation's stream miles, and according to the agencies' own calculations, more than 50 percent of our remaining wetlands, including critical habitat for fish, ducks, and other migratory birds.

Ephemeral streams and wetlands are crucial to sportsmen and women's ability to pursue their outdoor passions. These streams serve as important spawning grounds as well as nursery habitat for juvenile fish, such as salmon and trout. The wetlands threatened by this roll back include both floodplain wetlands and non-floodplain wetland complexes that serve essential flood storage, water filtration, groundwater recharge, and fish and wildlife habitat functions. The prairie potholes, complexes of non-floodplain, depressional wetlands found most often in the Upper Midwest, provide important flood storage as well as important breeding habitat for pintails, mallards, and blue-winged teal as well as migration habitat for green-winged teal and snow geese. In wet years, [70% of North America's duck production](#) originates in the prairie pothole region. Wetlands will be at substantially greater risk of being drained and filled if they lose Clean Water Act protections. Streams will be at risk for increased channelization and pollution that will compound downstream. Not only would this withdrawal of protection increase risks to public health and safety, but it would also irreversibly harm hunting and angling across the country while devastating the outdoor recreation economy.

The Proposed Rule Increases Uncertainty

The proposed rule does not achieve the agencies' goal of increasing clarity, predictability, and consistency. According to the agency's own analysis, there are insufficient datasets to determine which streams are ephemeral versus intermittent and which wetlands are adjacent to navigable waters. The agencies note that the National Hydrography Dataset often mislabels ephemeral streams as intermittent streams or fails to map them at all if they are located outside of the Arid West. The National Wetlands Inventory also does not map all wetlands in the country and no national dataset exists that does. The proposed rule depends on datasets that are often unreliable or inaccessible, increasing jurisdictional uncertainty, which is exactly what the agencies stated they were trying to avoid.

Furthermore, this rule does not accomplish its stated goal of allowing landowners to determine jurisdiction at a glance, without the need for professional level analysis. The 2015 rule based determinations on scientific characteristics, such as stream beds, banks, and high water marks. The proposed rulemaking bases jurisdictional determinations for streams on their source. The average landowner is not likely to possess sufficient knowledge to understand how water moves through or within their properties to be able to determine whether it is a "water of the United States." In fact, sophisticated professional-level field evaluations and science-based tools for assessing flow regimes will

be necessary for determining jurisdiction under the constraints of this proposed rule, a time-consuming and expensive process that will be burdensome to landowners.

The Proposed Rule Is Not Based on Sound Science

The 2015 Clean Water Rule was based on sound science. During its development, the EPA reviewed more than 1,200 peer-reviewed publications and summarized the current scientific understanding about the connectivity and mechanisms by which streams and wetlands, singly or in aggregate, affect the physical, chemical, and biological integrity of downstream waters. This report underwent an external review by EPA's Science Advisory Board consisting of 27 topic experts representing independent experts in their field providing a range of expertise required to assess the scientific and technical aspects of connectivity. The Connectivity report represents the state-of-the-science on the connectivity and isolation of waters in the United States. Hunters and anglers strongly supported the report given its technical and scientific nature.

The EPA and the Corps have not provided any similarly comprehensive scientific study nor released a review that supports the proposed rulemaking. Indeed, as the Assistant EPA Administrator for Water explained, the agencies reviewed court cases, not the underlying science, and used a "legal policy construct" that is itself flawed because it fails to acknowledge the scientific basis for the Act. This approach flies in the face of the Clean Water Act's stated goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. This proposed guidance is directly counter to Congressional intent to ground the Act in scientific analysis to maintain and restore the health of the nation's waters.

The States Will Not Step In To Protect Streams and Wetlands

In their proposal, the agencies assert that states would step in to protect streams and wetlands through their own programs. This assertion is without support or merit. The Clean Water Act was enacted in 1972 in light of devastating events, including the Cuyahoga River catching on fire in 1969. Congress recognized the need for the federal government to step in to provide a federal regulatory "floor" for pollution standards, and to provide technical and financial assistance to states to help them since they had been unable to maintain streams that were fishable and swimmable.

Over the last 47 years, while 46 states have sought – and obtained – delegation of the § 402 point source pollution discharge program, only two states have delegated § 404 "dredge and fill" permit programs. It has been 17 years since the US Supreme Court issued its *SWANCC* decision and over a decade since the *Rapanos* decision, yet states have not stepped up to assume the § 404 permit program within that time. As a 2015 Montana [study](#) demonstrated, in today's world of universal budgetary constraints, it is too expensive for states to oversee a program that provides even close to the same level of protection as the federal agencies. Moreover, 36 states have "no more stringent than" federal law provisions in their state water quality statutes, or similar barriers to their providing more expansive regulation than allowed under federal law. Because of these factors, states are not likely to start regulating the dredging and filling of streams and wetlands in the absence of their Clean Water Act partnerships with the federal agencies. Even if they did, the majority would be unable to provide independent state protections comparable to the ones provided by the Clean Water Act.

The Agencies' Use a Flawed Economic Analysis

The economic analysis developed by the agencies in support of the proposed rule speculates that states will fill in the regulatory hole left by the federal government. Therefore, they contend that state action would mitigate some of the possible loss of wetlands and streams. This ignores not only the history of state involvement described above, but even more importantly, state resource constraints that are every bit as significant as those that the federal government faces.

Moreover, the agencies calculate the regulatory cost savings for themselves and the regulated community of not having to protect wetlands and small streams, but they ignore their own prior conclusion that wetlands protection would produce hundreds of millions of dollars of benefits from flood mitigation, water filtration, and other factors. In 2015, the agencies calculated that wetlands protection benefits would be at least \$313 million (and maybe over \$500 million). In the new analysis, they argue that these same wetlands benefits are 5 percent of their previous low range estimate, i.e., between \$14-16 million. For a proposed rule that would strip protection from over 50 percent of the nation's remaining wetlands, this valuation grossly underestimates the value of wetlands – and the cost of losing them.

Conclusion

Thank you for the opportunity to comment on EPA-HQ-OW-2018-0149. We oppose this attempt to revise the definition of “waters of the United States.” If the proposed definition of “waters of the United States” is adopted, the small streams and wetlands that we depend upon to sustain our fish and wildlife resources, to purify our drinking water and to reduce floods, among a multitude of other benefits, will be under tremendous risk for irreparable harm. We urge the Administration to withdraw its proposal immediately and either reaffirm the definition as put forward in the 2015 Clean Water Rule, or propose and carefully consider a revised rule that is as scientifically, legally, and ecologically sound as the 2015 Rule. America's hunters, anglers, conservationists and outdoor recreation enthusiasts will settle for nothing less than a Clean Water Act that protects our nation's wetlands and streams.

Respectfully Submitted,

National Organizations

American Fisheries Society
American Fly Fishing Trade Association
American Sportfishing Association
Angler Action Foundation
Backcountry Hunters & Anglers
California Waterfowl
Fly Fishers International
Izaak Walton League of America
National Wildlife Federation
National Wildlife Refuge Association
Quality Deer Management Association
The Billfish Foundation
Theodore Roosevelt Conservation Partnership
Trout Unlimited

State and Local Organizations

Allegheny County Chapter of the Izaak Walton League of America
Austin Chapter 10 of the Izaak Walton League of America
Beadle County Chapter of the Izaak Walton League of America
Bill Cook Chapter of the Izaak Walton League of America
Bush Lake Chapter of the Izaak Walton League of America
Calumet Region Chapter of the Izaak Walton League of America
Cass County Chapter of the Izaak Walton League of America
Central New York Chapter of the Izaak Walton League of America
Colorado Chapter of Backcountry Hunters & Anglers
Colorado Division of the Izaak Walton League of America
Cypress Chapter of the Izaak Walton League of America
Day County Chapter of the Izaak Walton League of America
Diana Chapter of the Izaak Walton League of America
Dwight Lydell Chapter of the Izaak Walton League of America
Emerson Hough Chapter of the Izaak Walton League of America
Emmet County Chapter of the Izaak Walton League of America
Florida Division of the Izaak Walton League of America
Florida Keys Chapter of the Izaak Walton League of America
Fort Wayne Chapter of the Izaak Walton League of America
Fremont Chapter of the Izaak Walton League of America
Fullerton Chapter of the Izaak Walton League of America
Garden of the Gods Chapter of the Izaak Walton League of America
Georgia Chapter of Backcountry Hunters & Anglers
Grant County Chapter of the Izaak Walton League of America
Great Lakes Committee of the Izaak Walton League of America
Harford County Chapter of the Izaak Walton League of America
Headwaters Chapter of the Izaak Walton League of America
Idaho Chapter of Backcountry Hunters & Anglers
Illinois Division of the Izaak Walton League of America
Indiana Division of the Izaak Walton League of America
Iowa Chapter of Backcountry Hunters & Anglers
Iowa Division of the Izaak Walton League of America
Kampeska Chapter of the Izaak Walton League of America
Lebanon County Chapter of the Izaak Walton League of America
Lincoln Chapter of the Izaak Walton League of America
Lois Green Sligo Chapter of the Izaak Walton League of America
Mangrove Chapter of the Izaak Walton League of America
Maryland Division of the Izaak Walton League of America
McCook Lake Chapter of the Izaak Walton League of America
Minnesota Division of the Izaak Walton League of America
Monongalia County Chapter of the Izaak Walton League of America
Montana Chapter of Backcountry Hunters & Anglers
Mountaineer Chapter of the Izaak Walton League of America
Nebraska Division of the Izaak Walton League of America
New York Division of the Izaak Walton League of America
Ohio Chapter of Backcountry Hunters & Anglers

Ohio Division of the Izaak Walton League of America
Orange Chapter of the Izaak Walton League of America
Oregon Division of the Izaak Walton League of America
Panora Conservation Chapter of the Izaak Walton League of America
Pennsylvania Chapter of Backcountry Hunters & Anglers
Pennsylvania Division of the Izaak Walton League of America
Prairie Woods Chapter of the Izaak Walton League of America
Rochester Chapter of the Izaak Walton League of America
Rockville Chapter of the Izaak Walton League of America
Silverton Chapter of the Izaak Walton League of America
South Dakota Division of the Izaak Walton League of America
Southeast Chapter of Backcountry Hunters & Anglers
Southwestern Wisconsin Chapter of the Izaak Walton League of America
Sportsman's Chapter of the Izaak Walton League of America
Suffolk-Nansemond Chapter of the Izaak Walton League of America
Tiffin-Seneca County Chapter of the Izaak Walton League of America
Virginia Division of the Izaak Walton League of America
W.J. McCabe Chapter of the Izaak Walton League of America
Wes Libbey Northern Lakes Chapter of the Izaak Walton League of America
West Central Chapter of the Izaak Walton League of America
West Virginia Division of the Izaak Walton League of America
Western Reserve Chapter of the Izaak Walton League of America
White Oak River Chapter of the Izaak Walton League of America
Wisconsin Division of the Izaak Walton League of America