

**David Nickum**  
Executive Director  
Colorado Trout Unlimited



November 28, 2017

Environmental Protection Agency  
US Army Corps of Engineers  
Re: Step 2 Rulemaking – Defining “Waters of the United States”  
[Docket ID No. EPA-HQ-OW-2017-0480](#)

Dear Colleagues:

I offer these comments on behalf of Colorado Trout Unlimited (CTU), a nonprofit coldwater conservation organization representing approximately 11,000 members in Colorado and affiliated with the nationwide organization Trout Unlimited. Our members, organized in 24 local chapters across the state, are focused on conserving, protecting and restoring coldwater fisheries and their watersheds. We engage under the Clean Water Act both as advocates for reasonable protection of coldwater resources under permits issued to others, and as permittees ourselves (or via project partners) in cases where we are doing collaborative instream habitat improvement and fish passage projects.

Headwaters matter for those of us with CTU, and that is why we urge you to retain the 2015 Clean Water Rule that provides for their protection, or to propose and carefully consider a revised rule that is based in science, legally and ecologically sound, and as effective in protecting headwater streams and wetlands as the 2015 rule. Our members recognize that protecting the rivers on which we fish and recreate, and which provide the water supplies needed for our communities and farms, starts at the source: their headwaters.

Sitting at the top of the continent, Coloradans have a special connection with headwaters –we are in many ways the headwaters of the nation, with our snowmelt-driven seasonal streams giving birth to major waterways that serve our downstream neighbors including the Platte, Arkansas, San Juan, Rio Grande and Colorado rivers. Seasonal headwater streams aren’t a distant abstraction for us, they are in our backyard. Colorado has more than 95,000 miles of streams and rivers of which only about 28,000 flow perennially. A map based on state data showing perennial vs. intermittent/ephemeral streams for Colorado is enclosed with these comments.

So our answer to your question of how the agencies should interpret key terms in Justice Scalia’s opinion, such as “relatively permanent” and “continuous surface connection” is simple: you shouldn’t. Despite the fractured decision, a majority of the Supreme Court in *Rapanos* found that streams with a significant nexus to traditionally navigable waters fall under the Clean Water Act’s protection. That – not Justice Scalia’s minority view – should be what you work to define, and that is what the 2015 Clean Water Rule attempted to clarify. The 70% of Colorado streams that are do not flow perennially nonetheless do have a significant nexus with the downstream rivers with which they ultimately connect. Allowing them to be polluted, dredged, or filled will harm the downstream waters into which they seasonally flow.

Protecting our waterways from their source is not only important to Colorado’s environment, but also to our economy. Water-based recreation is a major part of Colorado’s vibrant outdoor

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recreation and tourism economy; fishing alone contributes \$1.9 billion to Colorado's economy and supports over 16,000 jobs. These economic benefits must be fully considered in evaluating any changes to Clean Water Act jurisdiction that would adversely affect the fisheries on which those benefits depend. A 2014 Southwick Associates report ("The Economic Contributions of Outdoor Recreation in Colorado: A regional and county-level analysis") detailing the economic contributions of outdoor recreation including fishing is enclosed with these comments.

We have heard concerns voiced that the 2015 rule could interfere with traditional agricultural activities. CTU values its partnership projects with Colorado farmers and ranchers, efforts that benefit fish and farm alike. We are sympathetic to these concerns and that is why we supported elements of the 2015 rule that sought to more clearly and strongly define exemptions for traditional farming and ranching activities. We believe that thoughtfully crafted agricultural exemptions are a far better way of addressing this concern rather than removing Clean Water Act protection from 70% of our state's waterways.

Finally, in the rulemaking notice, the agencies suggest that repeal of the 2015 Rule will help provide continuity and certainty. In reality, returning to a case-by-case approach will lead to discontinuity and uncertainty. Absent clear nationwide guidance based on solid science, jurisdictional decisions will vary widely based on the approach taken by different offices. In Colorado, we could have widely differing approaches as our state is covered by three completely different Corps district offices with headquarters more than 1500 miles apart. Even an individual location can face uncertainty: Hidden Lake, a swimmable 88-acre lake in the City of Westminster used by locals for recreation including fishing, and its adjacent wetlands were once considered jurisdictional. That designation changed following the Rapanos decision, was later restored based on information provided by the City when it asked the Corps to re-assert jurisdiction, and then challenged again. This is one example of how an ill-defined standard, governed by shifting and sometimes conflicting case law, and subject to case-by-case review will in no way create regulatory certainty.

Hidden Lake is but one example; with these comments we are also enclosing a 2010 report by Dennis Buechler ("Five Case Studies on the Effects of the SWANCC and Rapanos Supreme Court Rulings on Colorado Wetlands and Streams") that outlines other case studies showing the potential implications of a reduction in Clean Water Act jurisdiction.

In order to protect locally-valued waters like Hidden Lake – and all of the rivers in Colorado and our downstream neighbors that depend upon ephemeral headwaters for their supplies clean of water – Colorado TU asks that the 2015 rule be retained, or revised only by a sound replacement that is equally effective in protecting our source waters. Headwaters matter, because we all live downstream.

Sincerely,



David Nickum