Texas Commission on Environmental Quality (TCEQ) Comments on Revised Definition of Waters of the United States; Proposed Rule

Docket ID Number: EPA-HQ-OW-2018-0149

Background

On February 14, 2019, the U. S. Environmental Protection Agency and the Department of the Army (the Agencies) published notice of proposed revisions to the rule defining the scope of waters federally regulated under the Clean Water Act (CWA). The proposed definition would establish national consistency and rebalance the relationship between the federal government and states in managing land and water resources. In addition to general public comment, the Agencies are soliciting feedback on questions regarding specific rule topics.

The proposed revisions are the second step in a two-step process to repeal and replace the final 2015 Clean Water Rule (CWR), published in the June 29, 2015 *Federal Register.* The 2015 CWR is the subject of extensive litigation, which has caused a regulatory patchwork and resulted in considerable uncertainty. The 2015 CWR is not applicable in Texas, due to an injunction issued by the U.S. District Court for the Southern District of Texas; however, it is in effect in 22 other states. To develop the proposed replacement rule, the Agencies considered the U.S. Supreme Court's plurality opinion in *Rapanos v. United States*, written by Justice Scalia. In this opinion, waters protected by the CWA are those that are "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable rivers or streams, as well as wetlands with "a continuous surface connection to such water bodies." Accordingly, the Agencies' proposal excludes features that are ephemeral (including ephemeral streams), wetlands that do not abut or have a direct hydrological surface connection to a jurisdictional water, certain ditches, and other previously-excluded features. The TCEQ offers the following comments as outlined below.

Comments on Proposed Rules

I. General Comments and Overview.

A. The TCEQ requests the Agencies do not specifically exclude drought or extreme flooding when determining a "typical year", and to provide states flexibility to incorporate local conditions. States that experience highly variable weather events need flexibility to apply regulatory terms in accordance with naturally-occurring local conditions.

As stated on page 4173 of the preamble published in the February 14, 2019 edition of the Federal Register, the Agencies specify that a "typical year would generally not include times of drought or extreme flooding." Excluding these types of events may be problematic when applied in Texas, since these phenomena occur with regularity. This could render a large amount of data unusable. For example, the percentage of time Travis County, Texas reached a certain drought threshold from January 1, 2000 to January 19, 2019 is provided below:

- D4, Exceptional: 4%
- D3, Extreme: 9%
- D2, Severe: 17%
- D1, Moderate: 24%
- D0, Abnormally Dry: 30%
- No Drought: 16%

Source: U.S. Drought Monitor, minimum 2 weeks, non-consecutive

Therefore, we recommend the Agencies defer to the states to determine the appropriate percentile used throughout the state.

B. The TCEQ requests clarity on how a non-jurisdictional water would be regulated as point sources under the CWA, as stated in the preamble of the proposal.

The preamble specifies that non-jurisdictional waters may be regulated as point sources under the CWA. These features could simultaneously be seen as a point source to be regulated federally with requirements, as well as a receiving water to be evaluated for compliance with state water quality standards in wastewater permits. These conflicting scenarios may lead to confusion and would be difficult to implement by regulatory agencies. States frequently authorize water transfers which could be misconstrued to apply in this scenario. The Agencies need to clarify that this situation would not apply to water transfers.

Specific examples from the rule preamble are as follows:

- Page 4176: "However, an ephemeral feature may constitute a point source that discharges pollutants to a "water of the United States." See *Rapanos*, 547 U.S. at 743-44 (Scalia, J., plurality). States and Tribes may also address ephemeral features as "waters of the State" or "waters of the Tribe" under their own laws to the extent they deem appropriate."

- Page 4182: "Finally, the agencies solicit comment on whether a ditch can be both a point source and a "water of the United States," or whether these two categories as established by Congress are mutually exclusive."

- Page 4194: "The agencies emphasize that ponds that are proposed to be excluded from "waters of the United States" could, in some circumstances, be point sources of pollutants subject to section 301 of the Act."

C. The TCEQ requests that the proposed rule's definition of "waste treatment system" be revised.

The definition of "waste treatment system" could cause confusion due to the inclusion of "cooling pond" within the proposed definition. Texas has many surface water impoundments or reservoirs built on perennial and intermittent streams, some of significant size, that were built primarily for cooling purposes. These may be considered cooling ponds and therefore subject to the exclusion. The TCEQ recommends the Agencies remove the term "cooling ponds" from the definition.

II. Comments and Responses to Questions Posed by the Agencies on Specific Rule Topics.

Tributaries

1. **Whether the definition of "intermittent" should contain the requirement of continuous flow for a specific duration, such as "seasonal" or "at least one month of the calendar year," instead of the phrase "during certain times of a typical year";**

   TCEQ Response: The TCEQ does not support amending the definition of "intermittent" to contain the requirement of continuous flow for a specific duration. Due to the amount of data and information that would be needed to document flow and duration, this requirement would not be efficient to implement in a state like Texas, where there are a significant number of intermittent waterbodies. Additionally, Texas already defines the terms "intermittent" and "intermittent with perennial pools" in the Texas Surface Water Quality Standards, and implements these existing state definitions in water quality management programs. Different federal and state regulatory definitions for the same or similar terms may yield conflicting interpretations when implementing Clean Water Act programs.

   The TCEQ suggests the Agencies retain the definition for "intermittent" as currently proposed, or amend the definition to specify that surface water may be pooled, as well as "flowing." An amended definition based on the proposal may reduce costs associated with gathering and analyzing data and information to determine flow status, and may not interfere with the application of our existing state definitions.

2. **Whether the tributary definition should include streams that contribute less than intermittent flow to a traditional navigable water or territorial sea in a typical year;**

   TCEQ Response: The TCEQ does not have comment on this issue.

3. **Whether less than intermittent flow, natural, or man-made breaks in a channel impact jurisdiction of upstream perennial or intermittent flow and under what conditions that may happen;**

   TCEQ Response: The TCEQ does not have comment on this issue.

4. **Whether the definition of "tributary" should be limited to perennial waters only;**

   TCEQ Response: The TCEQ does not support limiting the definition of tributary to perennial waters only. Texas has a large number of intermittent streams within its boundaries, including intermittent streams with perennial pools. These features have presumed and designated uses for aquatic life and contact recreation in the Texas Surface Water Quality Standards.

5. **Whether the definition of "tributary" as proposed should indicate that the flow originate from a particular source, such as a requirement for groundwater interface, snowpack, or lower stream orders that contribute flow;**

   TCEQ Response: The TCEQ does not support associating a particular source of flow within the definition of "tributary." Since the term "tributary" must be applied on a national level, it is important this term remain broad enough to account for site-specific conditions that occur at the local level.

6. **How effluent-dependent streams (e.g., streams that flow year-round based on wastewater treatment plant discharges) should be treated under the tributary definition;**

   TCEQ Response: The TCEQ supports treating effluent-dependent streams as currently described in the preamble of the proposal, by considering these streams within the definition of tributary without regard to source of contributed flow. The consideration of flow sources, including effluent from permitted-discharges, is best considered and applied by regulatory agencies within the context of their existing water quality management programs.

7. **Whether the seasonal continuous surface flow consideration (e.g., typically three months) from the *Rapanos* Guidance could be used as a definitional flow regime in the regulation;**

   TCEQ Response: The TCEQ generally supports the long-standing concept from *Rapanos* that a three-month duration typically describes seasonality. However, the TCEQ requests that the Agencies consider regional differences in weather patterns that may impact the duration of seasons, and the need for regulatory agencies to flexibly apply this term due to local conditions. This level of specificity in defining seasonal continuous surface flow may most appropriately be described in guidance, rather than rule, in order to afford regulatory agencies the flexibility needed to appropriately apply this term.

8. **Whether the tributary definition should include specific flow characteristics (e.g., timing, duration, frequency, or magnitude), and if so, what flow values or ranges of values (including supporting rationale) would satisfy the tributary definition and what methods, tools, or data could be used to determine such values;**

   TCEQ Response: The TCEQ does not support including a specific flow characteristic as part of the definition of tributary. Due to regional differences, any national benchmark or threshold established by the Agencies may be problematic to implement in certain regions and locales. Additionally, the TCEQ includes established flow thresholds to indicate critical low-flows as part of the Texas Surface Water Quality Standards, and when applying these standards in implementing programs. The use of flow-based benchmarks or thresholds to determine jurisdictional status may introduce unnecessary confusion into existing water quality management programs already implemented by regulatory agencies.

9. **Whether the concepts of bed and banks and ordinary high water mark should be added to the definition of tributary, and if so, how;**

   TCEQ Response: The TCEQ supports the use of physical indicators such as bed and banks, and ordinary high water mark as part of the definition of tributary. These long-standing indicators are more easily determined and less costly to measure than time-intensive surface flow measurements that may be needed to determine flow status in a typical year, in accordance with the proposal.

10. **The usefulness of incorporating into the tributary definition the following sentence: "the lateral extent of a tributary is established by its ordinary high water mark.";**

    TCEQ Response: The TCEQ supports the use of the ordinary high water mark as a physical indicator of the lateral extent for the term "tributary." Consideration of the ordinary high water mark has been included in long-standing guidance provided by the Agencies. Historical guidance provided by the Agencies considers regional differences when identifying the ordinary high water mark, particularly in the arid Southwest portions of the nation. This historical guidance is useful for regulatory agencies when implementing the term.

11. **The Corps has existing regulations at 33 CFR 328.4 regarding the limits of jurisdiction for categories of "waters of the United States." The Agencies solicit comment on including these Corps regulations in the EPA's regulations or simply cross-referencing the Corps regulations in EPA's to apply to the definition of "waters of the United States.";**

    TCEQ Response: The TCEQ supports cross-referencing the regulations at 33 CFR §328.4 that clarify the limit of jurisdiction for the territorial seas, tidal waters of the United States, and non-tidal waters of the United States. Cross-referencing these established regulations will ensure the Agencies are following the same regulations, and will provide certainty to regulatory agencies. If incorporated into the final rule, the TCEQ respectfully requests that the Agencies ensure cross-referencing the regulations will not conflict with any of the provisions as presented in the final version of the rule.

12. **Whether it is necessary to define "typical year" given the Agencies' understanding that it is a commonly understood term in field application;**

    TCEQ Response: The TCEQ suggests that the term "typical year" be defined in guidance. The TCEQ is not familiar with the term "typical year" as defined in the proposal, or as an established field application. As proposed, the jurisdictional status of tributaries, lakes and ponds, and ditches is dependent upon the conveyance of perennial or intermittent flow in a "typical year." Since jurisdictional determinations depend on flow in a "typical year", a definition for this key term should be provided by the Agencies as part of guidance.

13. **Whether they should provide additional details in the rule text about what constitutes a typical year or provide further guidance in a final preamble about appropriate tools for determining whether a year is "typical.";**

TCEQ Response: The TCEQ suggests additional guidance should be provided by the Agencies. See TCEQ response to question number 12.

14. **Alternative approaches in the rule text to convey that times of drought or extreme floods would not be a factor when determining if a river or stream meets the conditions of the definition of "tributary.";**

TCEQ Response: The TCEQ suggests the Agencies incorporate the use of physical indicators (such as bed and banks, and ordinary high water mark) as an alternative to determining flow status during a "typical year". In the preamble, the Agencies specify that a "typical year would generally not include times of drought or extreme flooding." Excluding these types of events may be problematic when applied in Texas, since these phenomena occur with regularity. In addition, most tributaries in Texas do not have gauges or any type of flow data which would make it very difficult to determine whether the stream is intermittent or ephemeral.

In lieu of considering flow status, and thus the impact of drought and flood on flow status, the TCEQ supports an alternate approach of relying upon long-standing physical indicators to determine a tributary. Although the physical indicators of a tributary may change in response to drought and flood, their overall presence is more stable and less dynamic than contributions of surface flow, and may be observed without the extensive collection of site-specific data, such as flow measurements.

15. **What implementation methods and tools that could be used to identify and distinguish perennial and intermittent flow regimes from ephemeral flow regimes as defined in this proposal;**

TCEQ Response: As stated by the Agencies on page 4200 of the preamble of the proposal, and pages 22-23 of the Resource and Programmatic Assessment; limitations in national maps such as the National Hydrography Datasets (NHD) and National Wetlands Inventory preclude their use as a reliable indicator of jurisdictional status, particularly to differentiate between intermittent and ephemeral flow. Additionally, the flow status as indicated by the NHD is typically the same as indicated on a United States Geological Survey (USGS) topographic map for a particular waterbody. These national maps are the types of resources regulatory agencies rely upon for other purposes of water quality management. Due to these limitations, and the importance of accurately determining flow status in accordance with the rule as proposed, the TCEQ anticipates that site-specific data and information will need to be collected, potentially over multiple years, in order to accurately determine flow status during a typical year. Such a costly investment in resources may be needed, due to the regulatory nature of these terms, as well as the potential for a determination of jurisdictional status to be challenged in court.

16. **The appropriate watershed scale for use in the geographic area as defined in a "typical year", and approaches to determine the geographic area.**

TCEQ Response: The TCEQ recommends that the interpretation of geographic area within the context of defining a "typical year" be determined case-by-case based on guidance, and not specifically defined in rule. An appropriate scale would be dependent upon site-specific conditions such as the length of tributary, catchment boundaries, and weather patterns. Suggestions for best practices to determine this would best be included as part of guidance, rather than in rule text.

Ditches

17. **The utility and clarity of proposing a separate category of jurisdictional ditches and how the Agencies have delineated those ditches that would be "waters of the United States" and those that would be excluded;**

TCEQ Response: The TCEQ agrees that a separate category for jurisdictional ditches is useful, and agrees with how the Agencies have delineated those ditches that would be jurisdictional and those that would be excluded.

18. **Whether the Agencies should retain the historical treatment of jurisdictional ditches within the definition of "tributary" and not in a separate category;**

TCEQ Response: See response to number 17.

19. **The proposed definition of "ditch";**

TCEQ Response: The TCEQ supports the proposed definition of "ditch."

20. **Whether the Agencies should add a temporal component to distinguish jurisdictional ditches when evaluating ditches that may have been constructed in tributaries or adjacent wetlands;**

TCEQ Response: Assuming that the Agencies request comment on whether the jurisdictional status of ditches should be evaluated based on when the ditch was constructed, the TCEQ has no comment.

21. **What tools can be used to help identify whether a ditch is constructed in upland or whether it was constructed in a tributary or adjacent wetland that meets the respective proposed definitions, and in particular what sort of showing would constitute evidence that a ditch was constructed in upland or in a jurisdictional tributary or adjacent wetland;**

TCEQ Response: The TCEQ has no comment regarding tools to distinguish the original condition of the land where ditches were constructed.

22. **Whether there are other approaches for addressing the evidentiary concerns that may arise in a permitting context for historic ditches, such as the role of historic photographs and records;**

TCEQ Response: The TCEQ could support the use of historic photographs and records as indicators of conditions prior to ditch construction, as long as the authenticity of the evidence can be verified.

23. **The exclusion of all ditches constructed in upland, regardless of flow regime, and whether that is consistent with the plurality and concurring opinions in *Rapanos*;**

TCEQ Response: See response to number 17.

24. **Whether a ditch can be both a point source and a "water of the United States," or whether these two categories as established by Congress are mutually exclusive.**

TCEQ Response: The TCEQ respectfully requests that the agencies not address this issue in the proposed rule. Additional clarity on how a non-jurisdictional water would be regulated as a point source could be provided in the rule preamble, however the TCEQ ultimately requests that the Agencies allow states to handle this matter within their respective regulatory frameworks.

Lakes and Ponds

25. **To establish a distinct jurisdictional category for lakes and ponds and whether this provides additional clarity and regulatory certainty;**

TCEQ Response: The TCEQ supports the distinct jurisdictional category for lakes and ponds.

26. **Incorporating jurisdictional lakes and ponds into another category, such as tributaries;**

TCEQ Response: The TCEQ supports the definition for lakes and ponds as an individual category, as currently proposed.

27. **Whether a specific definition of lakes and ponds should be provided in the rule language or whether any such definition is necessary;**

TCEQ Response: The TCEQ supports defining the term "lakes and ponds" in order to clarify this category.

28. **Whether more specific parameters should be included for the type of flooding that should be included for lakes and ponds when flooded by an (a)(1)-(5) water in a typical year;**

TCEQ Response: The TCEQ requests additional clarity be provided to facilitate the differentiation between: 1) flooding of lakes and ponds by a jurisdictional water and 2) extreme flooding events to be precluded from the determination of a "typical year." Clarity is needed to ensure consistent implementation of these terms by regulatory agencies.

29. **Other implementation tools available to determine the presence of a contribution of perennial or intermittent flow from the lake or pond in a typical year;**

    TCEQ Response: The TCEQ is not aware of the availability of additional implementation tools, other than those already mentioned in the preamble (such as the NHD and USGS topographic maps). Additionally, TCEQ requests the Agencies clarify the suitability of the NHD for differentiating intermittent and ephemeral lakes and ponds. Clarity is needed, since the Agencies indicate that limitations in national maps such as the NHD preclude their use as a reliable resource to distinguish ephemeral from perennial and intermittent flow regimes (see TCEQ Response to question number 15).

30. **Whether less than intermittent flow from lakes and ponds to an (a)(1) water in a typical year could be sufficient to extend jurisdiction to such lakes and ponds;**

    TCEQ Response: The TCEQ does not have comment on this issue.

Wetlands

31. **Interpretations of *Riverside Bayview*, *SWANCC*, and the *Rapanos* opinions, including specifically the proposal to provide regulatory certainty through categorical treatment of adjacent wetlands rather than on the case-by-case application of Justice Kennedy's significant nexus test;**

    TCEQ Response: The TCEQ supports the treatment of adjacent wetlands as proposed, and agrees with the points made in the rule preamble regarding consistency of the adjacent wetlands definition with the respective opinions in the Supreme Court cases.

32. **Whether including in the regulatory text that areas must satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances to qualify as wetlands would provide additional clarity;**

    TCEQ Response: The TCEQ believes that the normally expected applicability of the three wetland delineation criteria is well established in national practice, and therefore additional regulatory text is not needed.

33. **Whether there are terms or phrases within the existing wetlands definition that require clarification (e.g., "under normal circumstances"), and if so how such terms might be defined and if clarification should be provided, for example, via regulatory text or future agency guidance;**

    TCEQ Response: The TCEQ believes that the wetlands definition is well established and understood and does not need further clarification.

34. **Other potential interpretations of adjacency, such as including a distance limit to establish the boundaries between Federal and State waters, which several pre-proposal commenters recommended;**

    TCEQ Response: The TCEQ agrees with the proposed definition of "adjacent wetlands" and does not support the inclusion of distance limits within the definition.

35. **Whether the definition of "adjacent wetlands" should not include reference to dikes, barriers, and similar structures and instead those terms should be included in the definition of "upland.";**

    TCEQ Response: If the terms are deemed necessary, the TCEQ prefers that the references to dikes, barriers, and similar structures remain in the definition of "adjacent wetlands" as proposed, rather than in the definition of "upland."

36. **An alternate approach, whereby wetlands that are separated from another jurisdictional water by upland or a dike, barrier or other similar structure would not be jurisdictional even if they have a direct hydrologic surface connection in a typical year to an otherwise jurisdictional water;**

    TCEQ Response: The TCEQ supports the proposed definition of adjacent wetlands without modification.

37. **Which indicators can be used to determine whether a wetland abuts a jurisdictional water, and whether surface hydrology indicators or remote tools exist that may be helpful;**

    TCEQ Response: The TCEQ has no comment regarding wetland adjacency indicators or remote tools.

38. **Whether it is appropriate to describe a "direct hydrologic surface connection" as occurring due to inundation from an (a)(1)-(5) water or via perennial or intermittent flow between a wetland and an (a)(1)-(5) water in a typical year;**

    TCEQ Response: The TCEQ supports the description of a "direct hydrologic surface connection" in the proposed definition of adjacent wetlands based on either inundation or perennial or intermittent flow from an (a)(1)-(5) water.

39. **Whether other types of hydrologic surface connections between wetlands and jurisdictional waters could constitute a "direct hydrologic surface connection" or if and under what circumstances subsurface water connections between wetlands and jurisdictional waters could be used to determine adjacency;**

    TCEQ Response: The TCEQ has no comment on other possible hydrologic surface connections between wetlands and jurisdictional waters, but is opposed to any circumstance where a subsurface water connection alone, between a wetland and a jurisdictional water, would grant jurisdictional status to the wetland.

40. **Other tools that may be helpful in implementation of the proposed adjacent wetlands category;**

    TCEQ Response: The TCEQ has no additional suggestions for tools that may be helpful in implementation of the proposed adjacent wetlands category.

Waters and Features that are not WOTUS

41. **Whether they should enumerate additional specific exclusions for the purposes of clarity, or whether proposed paragraphs (a) and (b) are sufficiently clear as to account for all of the Agencies' intended jurisdictional and non-jurisdictional waters;**

    TCEQ Response: The TCEQ does not see a need for additional specific exclusions in proposed paragraph (b).

42. **The clarity of the groundwater exclusion in proposed paragraph (b)(2) and ask commenters to consider whether the exclusion could instead read, "groundwater, including diffuse or shallow subsurface flow and groundwater drained through subsurface drainage systems.";**

    TCEQ Response: The TCEQ believes that the language in proposed paragraph (b)(2) is sufficiently clear.

43. **Whether certain ditches excavated in upland but with perennial or intermittent flow to an (a)(1) through (5) water should be treated as a jurisdictional tributary and why, and if so, what flow regime would apply (e.g., perennial only or both perennial and intermittent);**

    TCEQ Response: Please see response to question number 17.

44. **The proposed exclusion of prior converted cropland that uses the abandonment principle to determine whether prior converted cropland would be subject to CWA jurisdiction or if the Agencies should apply the change in use analysis;**

    TCEQ Response: The TCEQ does not have comment on this issue.

45. **Procedures that may be useful in implementing the proposed exclusion for prior converted cropland (e.g., what constitutes "for, or in support of, agricultural purposes" as the term applies to the proposed prior converted cropland definition in today's proposal);**

    TCEQ Response: The TCEQ does not have comment on this issue.

46. **The kind of documentation a landowner must maintain to demonstrate that cropland has not been abandoned, or in the alternative, that the land has been used for, or in support of, agricultural purposes at least once in the immediately preceding five years;**

TCEQ Response: The TCEQ does not have comment on this issue.

47. **What evidence, other than a USDA determination, the Agencies should evaluate and rely upon to determine if cropland is eligible for the prior converted cropland exclusion;**

TCEQ Response: The TCEQ does not have comment on this issue.

48. **Whether the five-year timeframe for maintaining agricultural purposes is appropriate;**

TCEQ Response: The TCEQ does not have comment on this issue.

49. **Whether the proposed exclusion for artificially irrigated areas should include fields flooded to support the production of other wetland crop species in addition to rice and cranberries;**

TCEQ Response: The TCEQ does not have comment on this issue.

50. **Whether the proposed artificially irrigated areas exclusion should be expanded to include areas flooded to support aquaculture, such as crayfish production;**

TCEQ Response: The TCEQ does not have comment on this issue.

51. **Whether the waters and features proposed to be excluded in paragraphs (b)(7), (b)(8), (b)(9), and (b)(10) must be constructed wholly in upland, not just in upland as provided in the proposed regulatory text, in order for the exclusion to apply and how such a requirement would affect the utility of these proposed exclusions;**

TCEQ Response: The TCEQ believes that the proposed regulatory text "constructed in upland" is sufficiently clear.

52. **Whether the proposed exclusion in paragraph (b)(9) for stormwater control features should be expanded or clarified to include permitted municipal separate storm sewer systems (MS4s)... (If so, would the exclusion would apply to the entire MS4 or limited portions thereof, and how would this be implemented);**

TCEQ Response: The TCEQ believes that the proposed exclusion in paragraph (b)(9) for stormwater control features should not be expanded or clarified to include MS4s.

53. **Whether greater clarity is needed by including in the rule text that the exclusion applies to "lawfully constructed waste treatment systems".**

TCEQ Response: The TCEQ believes that greater clarity is not needed and respectfully requests that "lawfully constructed" not be inserted as a qualifier for "waste treatment systems."