

Bryan W. Shaw, Ph.D., *Chairman*  
Toby Baker, *Commissioner*  
Zak Covar, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

November 6, 2013

Office of Environmental Information Docket  
Environmental Protection Agency  
Mail Code 2822T  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OA-2013-0582

RE: Notification of a Public Meeting of the Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report, September 24, 2013, Pages 58536 – 58537, Docket ID No. EPA-HQ-OA-2013-0582

Dear Sir or Madam:

The Texas Commission on Environmental Quality (TCEQ) is providing comments on the Notification of a Public Meeting of the Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report, which was published in the September 24, 2013, Federal Register, pages 58536 – 58537, Docket ID No. EPA-HQ-OA-2013-0582. The notice provided notification of a public meeting of the Environmental Protection Agency (EPA) Science Advisory Board (SAB) and solicited comments on the report to be considered during the public meeting.

The TCEQ appreciates the opportunity to provide comments on the report. Enclosed are our comments. The stated purpose of the SAB's review was to summarize the current understanding about the connections, the factors that influence water body connections, and the mechanisms by which connected waters, singly or in aggregate, affect the function or condition of downstream waters. The report also includes a discussion of the report's concepts and their relevance to the Clean Water Act (CWA). EPA has indicated that the report will be used to provide a justification for a new rule on CWA jurisdiction. The TCEQ urges revisions to the report to solely describe the scientific literature and not apply the concepts to establishing CWA jurisdiction. The TCEQ wishes to reiterate its previously stated position that any expansion of the CWA should be accomplished through Congressional action.

Office of Environmental Information Docket  
Page 2

If you have comments or questions concerning the enclosed comments, please contact Kelly Holligan at (512) 239-2369 or by e-mail at [Kelly.Holligan@tceq.texas.gov](mailto:Kelly.Holligan@tceq.texas.gov).

Sincerely,

A handwritten signature in black ink, appearing to read 'Zak Covar', with a long, sweeping horizontal line extending to the right.

Zak Covar  
Executive Director

Enclosure

**COMMENTS BY THE TEXAS COMMISSION ON ENVIRONMENTAL  
QUALITY ON THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S  
REPORT: "CONNECTIVITY OF STREAMS AND WETLANDS TO  
DOWNSTREAM WATERS"**

**Docket ID No. EPA-HQ-OA-2013-0582**

**I. Summary of Proposed Action**

The US Environmental Protection Agency (EPA) published a draft report: *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (September, 2013 External Review Draft, EPA/600/R-11/098B)*. The EPA's Office of Research and Development (ORD) indicated that it developed the draft report to synthesize peer-reviewed scientific literature on the connectivity or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries and oceans. EPA has indicated that the draft science report will inform an upcoming joint EPA/US Army Corps of Engineers (USACE) rulemaking to clarify Clean Water Act (CWA) jurisdiction.

Simultaneously with the publication of the report, EPA indicated that it would take public comments on the report. EPA's Science Advisory Board (SAB) Panel will hold a meeting on December 16, 2013 for consideration of public comments and review of the report prior to preparation of a final version of the report.

**II. Comments**

The Texas Commission on Environmental Quality (TCEQ) provides the following comments to EPA:

1. The purposes of the report should be completely described at every instance in the report where its purpose is discussed. The Executive Summary of the report, Section 1.1, Background, indicates the purpose of the review was to summarize the current understanding about the connectivity or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans; the factors that influence the connections between water bodies; and the mechanisms by which connected waters, singly or in aggregate, affect the function or condition of downstream waters.

While the stated purpose of the review is a literature review, Section 6 of the report (page 6-2) and other portions, include a discussion of the relevance of the concepts to the CWA. The SAB should limit its discussion and conclusions to its review of the scientific literature. It is inappropriate to include a discussion of the scope of jurisdiction under CWA in report on the scientific evidence of connectivity of streams and wetlands to downstream waters.

2. The report should include a discussion of the methodology used for literature selection. The report includes a conceptual framework overview, however, there is

no discussion of the basis for the literature selected for review. It is recommended that the report be revised to include a discussion of the methodology used to select the literature reviewed.

3. The SAB should clearly state in its report that the original scientific works summarized by the report were not intended by their original authors to resolve legal issues. The report states that a broad spectrum of factors was considered in assessing the connectivity of water bodies. On pages 1-5, the authors note “water movement through the river system is the primary, but certainly not the only, mechanism providing physical connectivity within river networks.” The resulting conclusions indicate some aspect of connectivity exists for all types of water bodies. Section 1.3, Conceptual Framework Overview, states that connectivity was defined “as the degree to which components of a system are joined, or connected, by various transport mechanisms.” The overview further states “Connectivity is determined by the characteristics of both the physical landscape and biota of the specific system.... Both connectivity and isolation have important effects on downstream waters.” Pp. 3-29 of the document states isolation is the opposite of connectivity, and indicates the focus is primarily on the benefits that connectivity can have on downstream systems, but later states that isolation can have important positive effects on the condition and function of downstream waters. Examples are presented of isolated wetlands decreasing the spread of contaminants, pathogens and invasive species. This implies to imply that there is connectivity even for isolated water bodies.

EPA’s website<sup>1</sup> states the draft joint EPA/USACE rule regarding the jurisdiction of the CWA takes into consideration the current state-of-the-art peer reviewed science reflected in the draft science report. It is the position of the TCEQ that scientific research on the connectivity of the physical, chemical and biological interactions of water bodies to improve the knowledge of natural systems differs from defining connectivity for the purpose of addressing jurisdictional boundaries for implementation of the CWA. The report should be revised to identify that the purpose of the original scientific works was not to resolve CWA jurisdictional legal issues.

4. Section 6 should be revised to remove any inference that isolated, non-navigable waters are connected to larger water bodies for purposes of the CWA. In 2011 the TCEQ commented on draft guidance developed by the EPA and USACE on identifying waters protected by the CWA. In those comments the TCEQ opined that the proposed guidance would expand CWA jurisdiction. It has been stated that this report is intended to provide justification for expansion of the CWA. **The TCEQ reiterates its previously stated position that any expansion of the Clean Water Act should be accomplished through a Congressional act. To do otherwise ignores the Congressional policy under CWA Section 101(b) to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . .”**

---

<sup>1</sup>(<http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345#Download>)

Current and future actions by the EPA and USACE should adhere to prior U.S. Supreme Court decisions.

In the Solid Waste Agency of Northern Cook County (*SWANCC*) decision, the court concluded “isolated, non-navigable, intrastate waters” from waters of the U.S. did not fall under CWA jurisdiction. The discussion of the connectivity and the CWA in Section 6 of the report appears to be in direct conflict with the *SWANCC* decision. The section should be revised to remove inferences that isolated, non-navigable waters are connected to larger water bodies for purposes of the CWA.

5. The portions of the report discussing groundwater should be revised to recognize that groundwater is not “water of the United States.” Groundwater interactions are specifically considered in the evaluation of connections between water bodies. In the Executive Summary, Section 1.1, Background, the report states, “Specific types of connections considered in this review include...hydrologic and biogeochemical interactions occurring in surface and groundwater flows, including hyporheic zones and alluvial aquifers.” Groundwater is not subject to the CWA. The states are solely responsible for regulating groundwater. Likewise, administrative and judicial interpretations of the CWA have consistently treated groundwater separately from “waters of the United States.” Since the EPA/USACE have stated that the information in the report will be considered in the joint rulemaking, it is requested that the report be revised to acknowledge that groundwater is not subject to regulation under the CWA.