TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 14, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460
Attention: Docket ID No. EPA-HQ-OW-2011-0880

Re: *Federal Register*, Vol. 79, No. 76, Pages 22218-22274, April 21, 2014; EPA and USACE's Definition of "Waters of the United States" Under the Clean Water Act

Dear Sirs or Madames:

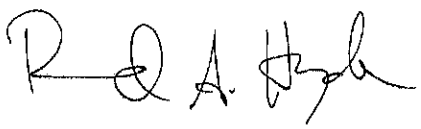
The Texas Commission on Environmental Quality (TCEQ) appreciates the opportunity to comment on the United States Environmental Protection Agency's (EPA) and United States Army Corps of Engineers (USACE) proposed definition of "Waters of the United States" under the Clean Water Act (CWA), *Federal Register*, Vol. 79, No. 76, Pages 22218-22274, April 21, 2014. The TCEQ agrees with the Texas Attorney General's comments submitted August 11, 2014, on how the proposed rulemaking exceeds the EPA/USACE authority under the Constitution. Additionally, the imposition of major national policy by administrative rule is inappropriate. EPA and the USACE should seek revisions to the CWA through legislation rather than continuing with this rulemaking.

However, should EPA continue to pursue rulemaking, the TCEQ has a number of concerns with this proposal that are outlined in the attached comments. The following concerns are highlighted, as they are most significant:

- Section 101(g) of the CWA expressly protects state-issued water rights. The proposed rule should reference Section 101(g) and clearly state that the rule will not infringe upon the states' primary authority to allocate water and administer water rights within their borders.
- There are significant items for which the EPA and the USACE are continuing to seek input through the proposed rule. The development of the "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" was intended to provide a scientific basis for the development of the rule. To date, this report has not been finalized. Therefore, the TCEQ requests that the EPA/USACE suspend the rulemaking and continue to work with stakeholders or republish the proposed rule for a second round of comments.
- Non-navigable tributaries should meet a jurisdictional test for relatively permanent, standing, or continuous flow and continuous connectivity for federal jurisdiction to be applied (following Justice Scalia's opinion in *Rapanos*).

If you have questions concerning the enclosed comments, please contact L'Oreal Stepney, P.E., Deputy Director of the Office of Water at (512) 239-1321, or by e-mail at loreal.stepney@tceq.texas.gov.

Sincerely,



Richard A. Hyde, P.E., Executive Director
Texas Commission on Environmental Quality

Attachment

COMMENTS BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON THE DEFINITION OF "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT

Docket ID No. EPA-WQ-OW-2011-0880

I. Summary of Proposed Action

On April 21, 2014, United States Environmental Protection Agency's (EPA) and United States Army Corps of Engineers (USACE) proposed a revised definition of "Waters of the United States" under the Clean Water Act (CWA), *Federal Register*, Vol. 79, No. 76, Pages 22218-22274.

II. Comments – Rule Versus Statute

1. The only appropriate avenue for EPA and the USACE to seek revisions to the CWA is through legislation. EPA/USACE should abandon this rulemaking.
   - The TCEQ agrees with the Texas Attorney General's comments submitted August 11, 2014 on how the proposed rulemaking exceeds the federal EPA/USACE authority under the Constitution. There is regulatory concern about how to identify jurisdictional waters under the federal CWA. The imposition of major national policy by administrative rule is inappropriate, and Congressional legislation is required to implement a lasting resolution to the ongoing issues. In addition, legislation, rather than rulemaking, is more appropriate in instances, such as this, when the EPA/USACE's asserted regulatory authority approaches, or even exceeds, the outer boundaries of the federal government's constitutional authority under the Commerce Clause.
   - The TCEQ believes the proposed rule expands EPA's and the USACE's jurisdiction under the CWA. Any such expansion should be accomplished through a Congressional act. The proposed rule ignores the Congress's policy under CWA Section 101(b) to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." By expanding EPA's and the USACE's jurisdiction over waters of the U.S., the states are being denied their right to best determine how to prevent, reduce, and eliminate pollution in their local waters that currently fall solely under each state's jurisdiction.

III. Comments – Proposed Rule

Should EPA/USACE not abandon this rulemaking and seek revisions through appropriate legislation, the TCEQ offers the following comments on the rulemaking effort.

1. Water Rights
   The proposed rule should reference CWA Section 101(g) and clearly state that the rule will not infringe upon the states' primary authority to allocate water and administer water rights within their borders. Section 101(g) of the CWA expressly protects state-issued water rights. The act provides that "the authority of each State

to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this [Act]." The TCEQ seeks assurance that the proposed rule will not infringe upon this authority.

2. General

The TCEQ requests that the EPA/USACE suspend the rulemaking and continue to work with stakeholders while seeking input on the proposed approach for the rule and finalizing the draft report "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (Connectivity Report). In the alternative, the TCEQ requests that the EPA/USACE republish the proposed rule for a second round of comments if any changes are made pursuant to the subjects on which the EPA/USACE specifically solicited comments or the final Connectivity Report.

The preamble to the proposed rule indicates that the intended purpose of the rulemaking is to provide clarity to regulated entities. However, based on the discussion in numerous areas of the preamble, it appears that the proposal of the rule is premature. There are significant items for which the EPA/USACE are continuing to seek input. In the preamble, the areas for which the EPA/USACE are explicitly seeking comments include the following:

- What waters should be determined to be non-jurisdictional? P. 22189
- What other emerging technologies or approaches would save resources and improve efficiency for regulators and the regulated community in determining which waters are jurisdictional? P. 22195
- What subcategories of "other waters" have a significant nexus and should be considered jurisdictional by rule, rather than by a case-specific analysis, and which ones, if any, should be determined non-jurisdictional by rule? P. 22198
- How can the lateral and upstream extent of tributaries be defined? P. 22203
- Should wetlands that connect tributary segments be considered tributaries or adjacent waters? Pp. 22203 , 22206
- How can the agencies improve the definition of "tributary" to provide increased clarity and greater regulatory certainty? P. 22204
- What other reasonable options exist to provide clarity for jurisdiction over adjacent wetlands and waters with confined surface or shallow subsurface connections? P. 22208
- Should there be greater specificity on how the agencies will determine whether a water is located in a floodplain? P. 22209

- Can the term "neighboring" have a more precise definition with respect to the meaning of a) shallow subsurface hydrologic connection; b) confined surface hydrologic connection; c) floodplain; and d) riparian area? P. 22209
- Should a significant-nexus case-specific analysis be applied to isolated other waters as proposed? P. 22211
- Does science support other approaches to be used for providing greater certainty in determining the jurisdictional status of other waters? P. 22212
- In what ways can the agencies improve how their jurisdiction over other waters will be determined? Pp. 22214-15
- Are there other approaches that would be more appropriate for determining how other waters are similarly situated and have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas? Pp. 22189, 22215-17
- How can gullies and swales best be distinguished from ephemeral tributaries? P. 22219
- In upland ditches, should the threshold flow regime be less than intermittent, or less than perennial as proposed? Pp. 22203, 22219

The extent of the requests for input indicates that the EPA/USACE continue to question the appropriate approach for clarifying the definition of "waters of the United States."

In addition, the EPA/USACE have stated the rule will not be finalized until the draft Connectivity Report has been finalized. The development of the report was intended to provide a scientific basis for the development of the rule. On September 30, 2014, the Science Advisory Board (SAB) documented their activities in reviewing the Connectivity Report in a letter to EPA. On October 17, 2014 the SAB provided EPA with the final review of the Connectivity Report. To date, the Connectivity Report has not been finalized.

The input provided on the questions posed by the EPA/USACE regarding the framework for defining "waters of the United States" as well as changes to the Connectivity Report have the potential to significantly change the proposed rule. Because of these potential impacts, the TCEQ believes it would have been more prudent for the EPA/USACE to seek such input and consult the final version of the report before proposing their rulemaking. Failure to do so will result in EPA/USACE adopting a rule for which there is not adequate public participation.

3. Continuous Surface Connection versus Significant Nexus

Non-navigable tributaries should meet a jurisdictional test for relatively permanent, standing, or continuous flow and continuous surface connectivity for federal

jurisdiction to be applied. The TCEQ asserts that the blanket application of the EPA's/USACE's jurisdiction over all tributaries is improper. Under the U.S. Supreme Court's plurality opinion in *Rapanos v. United States* written by Justice Scalia, if a non-navigable tributary does not have a "relatively permanent, standing, or continuous" flow and a "continuous surface connection" to a navigable water body, there is no federal jurisdiction over the tributary. The TCEQ requests that EPA/USACE implement this concept in any interpretation of "waters of the United States."

The TCEQ's position is that EPA/USACE should follow Justice Scalia's opinion in *Rapanos*, which represented the opinion of four justices, rather than Justice Kennedy's concurring opinion setting out a "significant nexus" test, for both legal and policy reasons. From a legal standpoint, the TCEQ agrees with the Texas Attorney General's comments submitted on August 11, 2014 explaining why Justice Scalia's plurality opinion should be followed rather than Justice Kennedy's concurring opinion based on *Marks v. U.S.* establishing which opinion represents the holding of the Court when there is not a majority. From a policy standpoint, the plurality opinion sets out a narrower, more objective standard to apply thus creating greater certainty for the states and other stakeholders while also allowing for the protection of water quality.

By contrast, the concurring opinion sets out a broader; more subjective standard which conflicts with the primary role of the states by allowing the EPA/USACE broad discretion, and will create greater uncertainty for the regulated community. However, even Justice Kennedy, in his concurring opinion, expressed skepticism with the breadth of USACE's then-existing standard for tributaries, which was similar to the proposed rule definition, because it "seems to leave wide room for regulation of drains, ditches and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Rapanos v. United States*, 547 U.S. 759, 781. Nonetheless, in the proposed rule, EPA/USACE purporting to follow Justice Kennedy's concurring opinion, propose that all tributaries are jurisdictional by rule.

States should be allowed to exercise the primary responsibility set forth by the CWA by applying state-determined, flexible, site-specific strategies that will achieve long-term water quality objectives. This rulemaking is another example of overreach by the EPA/USACE. The *Solid Waste Agency of Northern Cook County v. USACE (SWANCC)* and *Rapanos* Supreme Court decisions limited the extent to which EPA's and the USACE's jurisdiction extends beyond navigable-in-fact waters. Current and future regulatory actions by EPA/USACE should follow the decisions made by the Court.

In *SWANCC*, the Court concluded that the presence of migratory birds was not sufficient to provide the USACE with jurisdiction over an isolated, non-navigable, intrastate water under the CWA. The TCEQ believes that EPA has not demonstrated

a need for these water bodies to be under federal jurisdiction, nor have EPA and the USACE demonstrated how the proposed rule is consistent with *SWANCC*.

The CWA defines the term "navigable waters" as "the waters of the United States, including the territorial seas." In *Rapanos*, Justice Scalia stated that waters of the United States must be "relatively permanent, standing or continuously flowing bodies of water." In addition, he stated there must be a "continuous surface connection" between wetlands and waters of the United States to trigger EPA/USACE jurisdiction over the wetlands.

4. The TCEQ believes the connection between water bodies must be natural and not the result of pumping the water from one water body to another. In *Rapanos*, Justice Scalia noted that if a non-navigable tributary does not have a "relatively permanent, standing, or continuous" flow and a "continuous surface connection" to a navigable water body, there is no federal jurisdiction over the tributary. The Scalia test, rather than the Kennedy test, would best preserve the Congress's express policy to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources" in Section 101(b) of the CWA, especially if the test is applied to all non-navigable waters, by providing states with the ability to regulate water quality within its boundaries. Therefore, the TCEQ believes the Scalia test should be used by EPA and the USACE to clarify the definition of waters of the United States and that the connection between water bodies must be natural and not the result of pumping the water from one water body to another. As discussed earlier, the most objective and certain path forward is to follow the test set by Justice Scalia's plurality opinion rather than the "significant nexus" test set by Justice Kennedy's concurring opinion. Therefore, TCEQ requests that the EPA/USACE follow the Scalia test in defining waters of the United States, require that the connection between water bodies be natural and not the result of pumping the water from one water body to another, and apply it not only to wetlands but also to other non-navigable waterbodies.

5. Expansion of Waters Addressed by the Definition of "Waters of the United States"
The proposed rule should not broaden jurisdiction under the CWA. The EPA/USACE have stated that the proposed rule does not broaden their jurisdiction under the CWA. However, the proposed rule includes in the definition of "waters of the United States" waters which previously would have required a case-by-case determination of jurisdiction based on certain criteria. In the proposal, there is no enumeration of criteria establishing a basis for federal jurisdiction. Accordingly, it is unclear how this cannot be considered a broadening of EPA's and the USACE's jurisdiction under the CWA. The following are two examples:

   - In the current rule, 33 CFR §328.3(a)(6) identifies the territorial seas as waters of the United States. 33 CFR §328.3(a)(5) identifies tributaries of waters identified in paragraphs (a)(1) through (4) as waters of the United States. In the proposed rule, 33 CFR §328.3(a)(3) identifies the territorial seas as waters of the United

States, and 33 CFR §328.3(a)(5) identifies tributaries of waters identified in paragraphs (a)(1) through (4) as waters of the United States. Under the proposed rule, a tributary of territorial seas is by rule a water of the United States; whereas, previously, the tributary was not explicitly by definition a water of the United States.

- 33 CFR §328.3(a)(6) in the proposed rule identifies "all waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (a)(5)" as waters of the United States. In the current rule, the corresponding language at 33 CFR §328.3(a)(7) only identifies "wetlands adjacent to waters . . . identified in paragraphs (a)(1) through (a)(6)" as waters of the United States. In other words, the proposed rule expands the scope of the definition of "waters of the United States" from just adjacent wetlands to all adjacent waters.

6. Defining boundaries and limits for explicit categories of waters of the U. S. [33 CFR §328.3(a)(1)-(5)]
   The TCEQ requests that wetlands not be defined as part of a tributary system. The proposed rule states that wetlands, lakes, and ponds which contribute flow to (a)(1)-(3) waters will be considered tributaries [33 CFR §328.3(c)(5)]. However, in the preamble, EPA requests comments on whether wetlands should be considered adjacent waters rather than tributaries or potentially addressed through other considerations of connectivity (pages 22203 and 22208). EPA and the Corps should address wetlands as either adjacent waters or other waters depending on the case-specific facts.

Adjacent waters [33 CFR §328(a)(6), (c)(1)-(4)]

7. The TCEQ requests that EPA/USACE consider only the presence of surface hydrologic connections to determine adjacency. The term "neighboring" and the associated definitions of "riparian" and "floodplain" should be stricken from the proposed rule.

   The proposed rule presumes that waters adjacent to waters of the United States are also waters of the United States [33 CFR §328.3(a)(6)]. However, this presumption even conflicts with Justice Kennedy's concurring opinion in *Rapanos*. Justice Kennedy disagreed with USACE's position that all wetland's adjacent to tributaries are waters of the U.S. because he was concerned about the breadth of USACE's then-existing standard for tributaries, which was similar to the proposed rule definition. *Rapanos v. United States*, 547 U.S. 759, 780-781 (Kennedy, J, concurring in the judgment). Extending this presumption to all adjacent waters is even less supportable. An additional concern is the proposed definition of "adjacent." One determinant of adjacency is "neighboring," which includes "waters located within the riparian area or floodplain . . . and waters with a shallow subsurface hydrologic

connection or confined surface hydrologic connection to" a jurisdictional water [33 CFR §328.3(c)(2)].

- The TCEQ has two objections to using a subsurface connection as a criterion for adjacency. The first objection is that the determination of the existence and extent of a shallow subsurface hydrologic connection can be difficult. The second objection is that groundwater is not within the scope of the CWA. Conceivably, any groundwater connection, even those between surface waters that are distant from each other, might be construed as establishing adjacency, though presumably this is not the intent of this provision in the rule.

- TCEQ is concerned with allowing a hydrologic connection to be a demonstration of the term "neighboring" [33 CFR §328.3(c)(2)]. A hydrologic connection (particularly a subsurface connection) has no geographic limit on how far away a connected water body might be, and the basic tenet of adjacency for determining federal jurisdiction becomes so attenuated as to be without meaning.

- The definitions for "riparian area" and "floodplain" lack specific boundaries and do not result in greater clarity or regulatory certainty. The definition of "riparian area" indicates that these areas are transitional, and, as a result, any determination of which waters will be considered to be within a riparian area will be subjective. A "floodplain" is defined as an area inundated during periods of moderate to high flows, which means the extent of a floodplain will depend on the severity of the inundation.

Addressing "other" waters

8. The proposed rule should not allow for aggregation of similarly situated other waters – each water body should be subject to its own jurisdictional test. TCEQ is concerned with the provision that provides that other waters are jurisdictional if there is a significant nexus to (a)(1)-(3) waters of the United States, either alone or in combination with other similarly situated waters [33 CFR §328.3(a)(7)]. This provision leads to uncertainty as to the types of water bodies that might ultimately be defined as jurisdictional, and the definition proposed for "significant nexus" in 33 CFR §328.3(c)(7) does little to reduce this uncertainty. In addition, the aggregation of similarly situated other waters greatly increases the potential to capture waters that Congress never intended to be regulated under the CWA. The EPA/USACE acknowledge the uncertainty raised by the provision by soliciting comments on a variety of alternative approaches for addressing other waters (pages 22214-22217).

   The ambiguity involved in trying to determine what are other waters is highlighted in the definition of "significant nexus," which states that for a nexus to be significant, the effect on a jurisdictional water must be "more than speculative or insubstantial"

[33 CFR §328.3(c)(7)]. The definition of "significant nexus" remains too vague to effectively implement.

Non-jurisdictional categories of waters

9. Additional categories should be added to provide more examples of waters that will never be identified as jurisdictional waters. In 33 CRF §328.3(b), various categories of water bodies are listed as non-jurisdictional. This new section is potentially helpful, but additional categories should be added to help address the uncertainty that is currently associated with the proposed provision for "other waters" in 33 CFR §328.3(a)(7).

10. Intermittent ditches constructed entirely in uplands are considered non-jurisdictional in the proposed rule [33 CFR §328.3(b)(3)]. An intermittent ditch should be non-jurisdictional unless it is constructed directly in or on a water of the United States.