

Texas Commission on Environmental Quality (TCEQ) Comments on Definition of “Waters of the United States” - Recodification of Pre-Existing Rules; Proposed Rule

Docket ID Number EPA-HQ-OW-2017-0203

Background

On July 27, 2017, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) proposed rules to repeal the “Clean Water Rule: Definition of ‘Waters of the United States’” which was published in the *Federal Register* on June 29, 2015 and to re-codify the regulatory text which existed prior to the 2015 rule. This is the first step in a two-step process being undertaken by the EPA and USACE to review and revise the definition of “waters of the United States” consistent with the Executive Order signed February 28, 2017.

The TCEQ offers the following comments.

Comments on Proposed Standards

I. General Comments and Overview.

A. The Texas Commission on Environmental Quality (TCEQ) supports the repeal of the 2015 Definition of “Waters of the United States”, referred to as the Clean Water Rule, and recodification in regulation of the pre-2015 regulations.

The TCEQ provided comments on the Clean Water Rule during the rulemaking process. It has been the TCEQ’s position that the Clean Water Rule exceeded the federal EPA/USACE authority. Recognizing that the numerous challenges which have been filed on the Clean Water Rule have resulted in a nation-wide stay of the Clean Water Rule it is appropriate for EPA and USACE to repeal the rule and recodify the pre-2015 regulations as an interim measure.

II. Consistency with the President’s Executive Order signed on February 28, 2017 “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”

A. The TCEQ requests the EPA and USACE ensure consistency with the President’s Executive Order signed on February 28, 2017 “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”

The July 27, 2017 *Federal Register* notice indicated that the agencies were publishing the proposed rule as the first step of a two-step process to review and revise the definition of “waters of the United States” consistent with the February 28, 2017 Executive Order. The TCEQ strongly urges the EPA and USACE to follow Clean Water Act (CWA) Section 101(b) which directs the agencies to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.”

It is requested that the EPA and USACE provide adequate opportunities for the States to engage in the review and revision of the definition of “waters of the United States.”

New rules should only be proposed after the States have been provided ample opportunity to have substantive input into rule language.

B. The TCEQ strongly requests the EPA and USACE interpret the term “navigable waters” consistent with the Opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

The President’s Executive Order directs the Administrator of the EPA and Assistant Secretary of the USACE to consider interpreting the term “navigable waters”, in a manner consistent with the opinion of Justice Scalia. Texas would like to see the agencies utilize the U.S. Supreme Court’s plurality opinion in *Rapanos v. United States* written by Justice Scalia. In *Rapanos*, the four Justices supporting the opinion written by Justice Scalia said the waters protected by the CWA are those that are “relatively permanent, standing or continuously flowing bodies of water” connected to traditional rivers or streams that can carry navigation, as well as wetlands with “a continuous surface connection to such water bodies.”

III. Step Two for the Review and Revision of the Definition of “Waters of the United States.”

A. The EPA and USACE indicate that the agencies intend to develop a revised definition of “waters of the United States”. The TCEQ looks forward to providing input into this second step of the two-step process.

While the July 27, 2017 *Federal Register* notice indicated the agencies were not soliciting comment on the scope of the definition, the TCEQ provides the following comments for consideration as the agencies proceed with revising the definition:

1. Consultation with the States will be essential in developing the rule. EPA and the USACE are urged to coordinate with the states during the next step. It is requested the States be provided with information on the anticipated schedule for development of the revised definition and that the agencies not rush the rule development.
2. The immense geographic variability throughout the United States greatly impacts the characteristics of surface water bodies. The EPA and USACE should ensure that the development of a revised definition provides sufficient flexibility to address this variability and site-specific characteristics and ensure the States’ authorities are not superseded.
3. 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. To ensure certainty, the rule proposal should clearly identify those waters specifically excluded from the definition.
4. In developing the revised definition, aggregation of similarly situated waters should not be considered. Each water body should be subject to its own jurisdictional test. The aggregation of similarly situated waters greatly

increases the potential to capture waters that Congress never intended to be regulated under the CWA.