

June 19, 2017

The California Department of Transportation (Department) welcomes the opportunity to comment on the Clean Water Rule and any future proposed rule to rescind or revise the rule.

The Department supports efforts to increase clarity, reduce regulatory uncertainty, and minimize applicant and regulatory staff time.

In response to the questions posed:

1. How would you like to see the concepts of “relatively permanent” and “continuous surface connection” defined and implemented? How would you like to see the agencies interpret “consistent with” Scalia? Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule?

Justice Scalia's opinion suggests a substantial change to current regulation, limiting the scope of waters under Corps jurisdiction. The opinion also is clear about those waters that would be under Corps jurisdiction (exceptions noted below). Such a level of clarity about scope and firmness of limits on that scope, would be a substantial benefit and address some of our current challenges.

The opinion addresses a couple issues that are common problems for us. It clearly states that ephemeral streams, man-made ditches, and dry arroyos in the middle of the desert are not under Corps jurisdiction. These are features that have commonly been considered jurisdictional in California, the jurisdictionality of which can push the boundaries of plausibility. The opinion also states clearly that "neighboring" and other wetlands that do not have a physical surface connection, are not under Corps jurisdiction. We support clear determinations of non-jurisdiction in cases where jurisdiction would be beyond reason. Making clear determinations such as these help.

2. What opportunities and challenges exist for our state or locality with taking a Scalia approach?

The Department has encountered several challenges, such as vagueness and delays related to significant nexus test, confusion regarding roadside ditches, varying individual interpretations among regulatory staff, regulatory creep, regulatory uncertainty. Justice Scalia's opinion gives a firm limit to the Corps' jurisdiction, and consideration of it could add clarity. The Department recognizes opportunities to make clear definitions of waters and limits to jurisdiction. The Department also recognizes opportunities to mitigate regulatory challenges.

Roadside ditches. Many roadside ditches are remote from substantial flows, but may still be considered jurisdictional if they have a tie with even the most minor ephemeral drainage or the most minor wetland feature. In some cases, long runs of roadside ditch may be considered jurisdictional even though they are substantively roadside ditches with only very minor ephemeral contributions from minor ephemeral drainages.

Significant nexus test vagueness and delays. Significant nexus test sets a too-vague threshold for determining jurisdiction. We find it difficult to come up with a clear reasoning to argue a lack of significant nexus. Corps staff has held a standard of significant nexus that we find too broad, but we

have limited capacity to contradict because of substantial flexibility of the threshold. Also, the additional timeline involved in Corps staff addressing significant nexus tests, in addition to EPA review of significant nexus determinations, is substantial.

Individual interpretations. Much of waters boundaries, jurisdiction determinations, and mitigation requirements are left to substantial interpretation by Corps staff. Particularly with changes in staff assigned to Caltrans projects, these interpretations can change, causing difficulties in forecasting project needs or delaying projects while addressing changing requirements.

Regulatory uncertainty. Resulting from many sources, including vagueness of waters definitions and already-mentioned variable staff interpretations and significant nexus test, vagueness and variation in application of CWA is a constant challenge.

Regulatory creep. We continue to see incremental growth in claims of regulatory authority from Corps staff, even to extent of regulating upland areas adjacent to waters. We need clarity regarding the outward limits of Corps jurisdiction and regulatory authority.

Mitigation availability and policy. Within one district in California, the San Francisco Corps District, we find a paucity of mitigation opportunities. Projects are often delayed due to lack of available mitigation opportunities. Factors include relatively in-tact, healthy wetlands that make on-site mitigation often not tenable, small coastal watersheds that make bundled mitigation applicable only to small areas and "economy of scale" not feasible, policy that makes bundling of mitigation difficult, and policy that does not allow for use of In-Lieu Fee.

The opinion leaves at least two items to interpretation: meaning of surface connection, and meaning of relatively permanent water. Regarding surface connection: many California wetlands (as determined by current Corps wetland definition) abut a stream or other potential water, but may have surface flow during only a short period. Differentiating whether wetlands would need a surface connection of year-round surface flow, or simply be connected by contiguous wetland characteristics (e.g., hydric soil), would be important. Many California wetlands may abut a stream without maintaining year-round surface water flow, so the difference would affect many California wetlands. Regarding relatively permanent water: the opinion indicate relative permanence would mean year-round flow except in extreme circumstances such as drought, whereas current Corps definition would indicate relative permanence could be achieved by flow through 3 or 4 months of the year in an average year. This difference would affect many streams in California. These items would need clarity.

Regardless whether the Corps updates their waters definition and jurisdiction following Justice Scalia's opinion, we support revising waters definition and limits of jurisdiction in such a manner that are at least as clear and insulated from incremental growth, as those in Justice Scalia's opinion. We support efforts to increase clarity, reduce regulatory uncertainty, and minimize applicant and regulatory staff time.

Thank you,
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