

JOHN BEL EDWARDS
GOVERNOR



CHUCK CARR BROWN, Ph.D.
SECRETARY

State of Louisiana
DEPARTMENT OF ENVIRONMENTAL QUALITY
OFFICE OF THE SECRETARY

June 19, 2017

U.S. Army Corps of Engineers, Department of the Army, Department of Defense

Environmental Protection Agency

Via email to: CWAwotus@epa.gov and Stacey.m.jensen@usace.army.mil

RE: Input on forthcoming proposal to revise the definition of waters of the United States (Clean Water Rule: Definition of "Waters of the United States; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015))

The Louisiana Department of Environmental Quality (LDEQ) has reviewed the May 8, 2017 request to Governor Edwards for input and wisdom on a forthcoming proposal to revise the definition of waters of the United States (Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015)). The LDEQ recognizes the desire to engage in a discussion with the states at this early stage, and wishes to provide broad input, with more specific comments reserved until such time as more information is available regarding this rulemaking process. The LDEQ requests consideration of the attached suggestions.

The LDEQ is committed to protection and restoration of the State's water bodies through implementation of CWA and related programs and through partnerships with state and federal agencies, and appreciates the opportunity to submit input at this early stage.

If you have any questions concerning this submittal, please contact me at (225) 219-3950 or via email at Chuck.Brown@la.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Chuck Carr Brown".

Chuck Carr Brown, Ph.D.
Secretary

For discussion purposes, LDEQ notes the following remarks on the forthcoming proposal to revise the definition of waters of the United States.

I. Concepts of “relatively permanent” and “continuous surface connection”

Justice Scalia’s opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) emphasized clarity and including federal jurisdiction to “relatively permanent” waters and wetlands with “a continuous surface connection” to them. While the LDEQ recognizes the underlying spirit of Justice Scalia’s opinion, it should be noted that this was a plurality (non-majority) opinion and thus not a mandate. Furthermore, the Scalia opinion did not provide clear guidance as to how these terms were to be defined, highlighting the importance of input on these concepts.

With the limited information presented, the LDEQ would like to provide broad input as to what could constitute the definition of these terms in the hydrological and environmental context for the state of Louisiana until such time as a more formal proposed rule crystalizes at the federal level. LDEQ suggests that EPA maintain flexibility in defining “relatively permanent” to account for regional and state-specific hydrological and other environmental characteristics that may result in differences in the application of “relatively permanent” in regions and states across the nation. For instance, what may be defined as “relatively permanent” in the southern state of Louisiana may be drastically different due to prevailing climatological and hydrological conditions in other regions and states. Regarding wetlands with a “continuous surface connection,” LDEQ suggests that EPA consider among other things the potential impact of man-made infrastructure (such as levees) on determining that connection for wetlands. LDEQ looks forward to the continuing dialogue with EPA, and will provide more specific input with regard to these proposed definitions and their applicability and appropriateness within the state of Louisiana as more information becomes available.

II. Changes to the scope of state programs regarding CWA jurisdiction

LDEQ appreciates EPA asking if the agency anticipates any changes to scope of state programs regarding CWA jurisdiction. However at this time with the limited information presented, LDEQ is unable to adequately and fully respond as to whether any changes to the scope of state programs regarding CWA jurisdiction may result. LDEQ may have more substantive feedback on possible changes to scope of CWA programs once the agency is able to review a proposed rule.

III. Programs other than CWA 303, 311, 401, 402, and 404 that are specific to Louisiana that could be affected

As LDEQ commented in 2014 on the proposed rule Definition of Waters of the United States under the Clean Water Act (Docket EPA-HQ-OW-2011-0880), EPA should give consideration to the proposed rule’s impact to voluntary programs for implementation of best management practices (BMPs) and conservation practices (CPs) such as through the state Department of Agriculture and Forestry and the federal U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS). Voluntary implementation of these BMPs/CPs results in observable water quality improvements which does influence CWA programs, and any regulatory changes that may negatively impact voluntary participation may be detrimental to water quality protection and restoration programs in Louisiana and across the nation.