TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 14, 2017

CWAwotus@epa.gov
Hanson.Andrew@epa.gov

Andrew Hanson
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1306A
Washington, D.C. 20460

Dear Mr. Hanson:

Texas appreciates the opportunity to provide preliminary input on revising the Clean Water Rule. We recognize the difficulty inherent in defining and implementing the scope of "waters of the United States" and request that the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) continue to engage with stakeholders and States to develop rule language. Any proposed rule language should follow Congress' policy under Clean Water Act (CWA) Section 101(b) to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." New rules should only be proposed after the States have been provided ample opportunity to have substantive input into rule language.

Below are responses to the questions asked in the PowerPoint presentation attached to the letter to Governor Abbott dated May 8, 2017.

1. **How would you like to see the concepts of "relatively permanent" and "continuous surface connection" defined and implemented?**

   Relatively Permanent: There should not be a "one-size-fits-all" description for "relatively permanent" due to the immense variability of conditions throughout the United States.

   Continuous Surface Connection: There must be a "continuous surface connection" between wetlands and waters of the United States to trigger EPA/USACE jurisdiction over the wetlands. The connection between water bodies must be natural and not the result of pumping the water from one water body to another. As discussed in Scalia's opinion, only wetlands "that 'adjoin[ed]' waters of the United States [are] a part of those waters." In addition, in his plurality opinion, Scalia stated that only:

> "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' ... thus lack the necessary connection to covered waters that we described as a "significant nexus" in SWANCC. Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: first, that the adjacent channel contains a 'water of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

How would you like to see the agencies interpret "consistent with" 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 Act 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."

Texas asserts that the blanket application of EPA's/USACE's jurisdiction over all tributaries is improper and that site-specific characteristics should be considered. As Scalia wrote in his opinion,

> "The definition refers to water as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical f atures.' All of these terms connote continuously present, fixed bod es of water, as opposed to ordinarily dry channels through which w ter occasionally or intermittently flows. Even the least substantial of the definition's terms, namely 'streams,' connotes a continuous flow of water in a permanent channel—especially when used in company with other terms such as 'rivers,' 'lakes,' and 'oceans.' None of these terms encompasses transitory puddles or ephemeral flows of water. The restriction of "the waters of the United States" to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term. In applying the definition to 'ephemeral streams,' 'wet meadows,' storm sewers and culverts, 'directional sheet flow during storm events,' drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody. The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction."

The term "neighboring" should be stricken from the rule. T e presumption that adjacent waters within a specified distance of waters of the United States are by default waters of the United States conflicts with both Scalia's and Kennedy's opinions in *Rapanos*. Kennedy disagreed with USACE's position that all wetlands adjacent to tributaries are waters of the U.S. because he was concerned about the

breadth of USACE's then-existing standard for tributari s, 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."

Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule? The rule should not allow for aggregation of similarly situated other waters - each water body should be subject to its own jurisdictional test. The aggregation of similarly situated other waters greatly increases the potential to capture waters that Congress never intended to be regulated under the CWA.

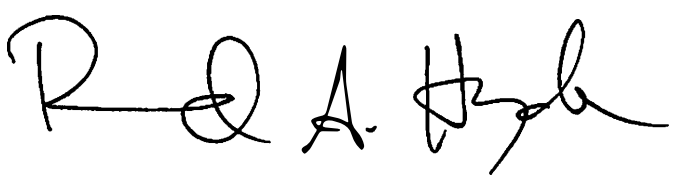
2. **What opportunities and challenges exist for your state or locality with taking a Scalia approach?** From a policy standpoint, the plurality opinion sets out a narrower, more objective standard to apply thus creating greater certainty for the states and other stakeholders while also allowing for the protection of water quality.

3. **Do you anticipate any changes to the scope of your state or local programs (e.g., regulations, statutes, or emergency response scope) regarding CWA jurisdiction? In addition, how would a Scalia approach potentially affect the implementation of state programs under the CWA (e.g., 303, 311, 401, 402, and 404)? If so, what types of actions do you anticipate would be needed?** Texas does not anticipate any changes to the scope of our state or local programs under the Scalia approach.

4. **The agencies' economic analysis for step 2 intends to review programs under CWA 303, 311, 401, 402, and 404. Are there any other programs specific to your region, state, or locality that could be affected but would not be captured in such an economic analysis?** Texas is not aware of any other tate programs that may be affected.

Thank you for the opportunity to provide feedback as EPA develops a new rule and new definition of "waters of the United States." Please contact Caroline Sweeney, Deputy Director, Office of Legal Services, at 512-239-0665 or Caroline.Sweeney@tceq.texas.gov if you have further questions.

Sincerely,



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