Texas Department of Transportation

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Andrew Hanson
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Dear Mr. Hanson:

In accordance with the Presidential Executive Order dated February 28, 2017, the U.S. Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) are reviewing the rule defining "waters of the U.S." under the Clean Water Act. As part of the review, the two federal agencies are asking for input from states on re-writing the rule and re-defining waters of the U.S. As an agency that develops over 2,000 transportation projects a year across the broad geography of our State, TxDOT has extensive and first-hand experience on this subject through regularly engaging with Corps staff on waters of the U.S. jurisdictional issues and permitting matters. The subject of the reach of federal jurisdiction is also relevant because of the real cost to the State, in time and money, involved in identifying waters of the U.S. and applying for a Section 404 Clean Water Act permit from the Corps. With this experience in mind, TxDOT is providing these comments on the waters of the U.S. rule.

Background

The Corps and EPA finalized a rule (2015 Rule), effective August 2015, redefining and expanding the definition of "waters of the United States" under the Clean Water Act. The final rule did little to meet its stated intent to provide clarity and certainty. Instead, it created confusion and gave the federal agencies even more broad discretion in determining the reach of their jurisdiction under the Clean Water Act. The February 2017 Executive Order directed the EPA and the Corps to review and rescind or revise the 2015 Rule. Specific direction was given in the Executive Order so that...

> ...the Administrator and the Assistant Secretary shall consider interpreting the term "navigable waters," as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

The Justice Scalia interpretation has a more limiting effect on the reach of the Clean Water Act and would limit jurisdiction to "relatively permanent, standing or continuously flowing bodies of water."

The 2015 Rule used a "significant nexus" test whereby jurisdiction should apply if a hydrologic connection could be demonstrated. This standard would include as waters of the U.S. intermittent or ephemeral channels and some disconnected wetlands. It should be noted that, even with the 2015 Rule stayed by the Sixth Circuit, the significant nexus test is still the standard being used today.

Underlying Issue

At issue is not just the fundamental question of federal reach, it is ultimately the cost for compliance. As referenced by Justice Scalia in the *Rapanos* opinion:

> The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes.

TxDOT's experience is similar for individual permits, one to two years, and somewhat less for nationwide permits, two to four months. Either way, the time is often critical because the Section 404 permitting is, due to the need for detailed engineering information, often one of the last tasks prior to construction and is usually on the critical path of the project schedule. The cost to the State is not just in dollars spent on the permitting process, it is also the other costs that can be attributed to delaying delivery of transportation infrastructure improvements. A study developed by the Texas Transportation Institute (TTI) indicated that the cost of roadway project delay on personnel and commercial travel and the cost to the general economy could range from $96,000 a month for a small project to $447,000 a month for a large project (TTI Technical Report 0-6581-TI-3, 2011).

TxDOT Objections to the 2015 Rule

The final rule (Clean Water Rule: Definition of "Waters of the United States") was published in the *Federal Register* June 29, 2015. The rule revised 33 CFR 328.3(a) to identify eight different paths for a water to meet the definition of "waters of the United States." TxDOT objects to two of these pathways, in part, and two others, in full. They are:

> *§ 328.3(a)(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;*

TxDOT disagrees with this provision, in part, because it relies on a definition of "tributary" that uses a high water mark to demonstrate jurisdiction. Simply using a high water mark as an indicator can result in a water of the U.S. being exceptionally small (e.g., conceivably as little as one foot wide) or exceedingly removed (in some cases, 100+ miles) from the nearest navigable water. Regulating waters of this size or with this remoteness would seem to do little for water quality in downstream navigable waters. This subsection of the rule as written is not consistent with Justice Scalia's opinion in *Rapanos* that ephemeral waters should not be included in waters of the U.S., nor does it consider Justice Kennedy's suggestion that distance from navigable-in-fact waters and volume of flow should be considered in determining waters of the U.S.

> *§ 328.3(a)(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;*

TxDOT disagrees with this provision, in part, because it relies on a definition of "adjacent" that does not require a hydrologic connection. It also allows adjacency to include a feature that is above the headwaters of a stream. A hydrologic connection should be a requirement, and jurisdiction should not extend far into, or above, the headwaters of a stream. The rule as written is not consistent with Justice Scalia's opinion in *Rapanos* that adjacent waters should have a surface connection to bodies that are waters of the U.S.

> *§ 328.3(a)(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus...*

TxDOT disagrees with this provision, in full, because it pre-determines a nexus for types of isolated wetlands based on a limited analysis and includes ambiguous geographic boundaries. Isolated wetlands are just that, isolated, and by definition do not have a permanent hydrologic connection to the tributary system and therefore should not be considered a water of the U.S. Additionally, there is within this sub-section a wetland type specific to Texas that would greatly expand the federal reach across a broad portion of the State. This provision is not consistent with Justice Scalia's opinion in *Rapanos* that adjacent waters should have a surface connection to bodies that are waters of the U.S.

> *§ 328.3(a)(8) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark...*

TxDOT disagrees with this provision, in full, because it could incorporate waters with no permanent hydrologic connection and uses an arbitrary distance as a threshold. Additionally, it is not consistent with Justice Scalia's opinion in *Rapanos* that adjacent waters have a surface connection to bodies that are waters of the U.S., nor does it consider Justice Kennedy's suggestion that a connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters.

Recommendation

In soliciting comments on the waters of the U.S. rule, the Corps and EPA state they will consider interpreting the term "navigable waters," as defined in the CWA in a manner consistent with the opinion of Justice Scalia in *Rapanos*. In our own review of the legal discussion in *Rapanos*, it is helpful to look at Justice Scalia's opinion along with that of Justice Kennedy who had a separate concurring opinion that uses the "significant nexus" test.

In short, the significant nexus standard is met if a water feature, either alone or in combination with similarly situated waters in the region, significantly affects the chemical, physical, and biological integrity of traditional navigable waters, interstate waters or the territorial seas. The overarching problem of the significant nexus test is that it has been applied in a way that provides no upstream boundary. It is not apparent that Justice Kennedy has such an interpretation, but the significant nexus test does not prevent it. The significant nexus test as applied in the 2015 Rule does not help in defining the upper limits of waters of the U.S. anywhere short of where raindrops touch the ground. In short, the significant nexus standard has been applied in a way to simply confirm that upstream waters are connected to downstream waters. It would have been more helpful had the Corps and EPA in their rulemaking spent more time defining the elusive "significant" and less time describing the obvious "nexus."

It is likely that the agencies, in the 2015 Rule, overextended Justice Kennedy's intent in applying the significant nexus test. Justice Kennedy made apparent his concerns for a broad reach in several references in his concurring opinion in *Rapanos*. We've identified five references from the Kennedy opinion that indicate a limitation on the federal reach of Section 404 Clean Water Act jurisdiction. These are described below (with page references from the Kennedy opinion).

1. When commenting on the context of a wetland relative to navigable waters, Justice Kennedy states, "The required nexus must be assessed in terms of the statute's goals and purposes." (p. 22)
2. Further down in the same paragraph referenced above and still commenting on the context of a wetland relative to navigable waters, Justice Kennedy states, "When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."" (p. 23)
3. When Justice Kennedy notes the Corps' use of the high-water mark as the determining jurisdictional factor for a tributary he comments that 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 towards it..." (p. 25)
4. Commenting on the Court of Appeals decision in *Rapanos* and their use of a hydrologic connection to satisfy the significant nexus test, Justice Kennedy notes, "Absent some measure of the significance of the connection for downstream water quality, this standard was too uncertain. Under the analysis described earlier, supra, at 22–23, 25, mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." (p.28)
5. Commenting on the Court of Appeals decision in *Carabell* and their use of a hydrologic connection to satisfy the significant nexus test, Justice Kennedy notes, "As explained earlier, mere adjacency to a tributary of this sort is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow towards it." (p.30)

These citations from the Justice Kennedy opinion begin to form the boundaries of the upper limits of his interpretation of waters of the U.S. Each of the references could be further interpreted to be framed as such:

1. The definition of waters of the U.S. must be limited to those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas (i.e., some waters have little or no bearing on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas).
2. If a nexus is speculative or insubstantial, the water should not be considered a water of the U.S.
3. Distance from navigable-in-fact waters is a factor to be considered in determining waters of the U.S., as is the carrying capacity of the waterway.
4. A hydrologic connection, alone, is not enough in determining significant nexus. The significance of the connection should be considered. A connection may be too insubstantial to meet the significant nexus requirement.
5. Adjacency to a tributary, alone, is not enough in determining significant nexus. Additionally, distance from navigable-in-fact waters is a factor to be considered in determining waters of the U.S., as is the volume of flow in the waterway.

It is notable that Justice Kennedy implies more than once that distance from navigable-in-fact waters should be considered in determining waters of the U.S., as should the volume of flow in the waterway.

With these takeaways from the Justice Kennedy opinion, we can add the basic principles of the Justice Scalia opinion. They are:

> Waters of the U.S. "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."
>
> Only "those 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."

Using both opinions as a foundation, we are proposing a revision of the regulatory language that would:

- Interpret the term "navigable waters," as defined in the CWA in a manner consistent with the opinion of Justice Scalia in *Rapanos*.
- Incorporate key parts of the Justice Kennedy's opinion that would have the effect of strengthening the legal basis of a revised rule.
- Remove the problematic significant nexus analysis from the permit application process.
- Draw a more distinct line for jurisdictional determinations.
- Allow for similarly situated wetlands, otherwise not regulated by the rule, to come under jurisdiction only after case-by-case scientific analysis and separate rulemaking.

The following changes to 33 CFR 328.3(a) based on the language in the 2015 Rule are recommended (note: other minor and corresponding changes would also be necessary but are not included here).

> Add as excluded waters under §328.3(b) that a tributary that is ephemeral is not a water of the U.S. Ephemeral tributary should be defined in §328.3(c) as a water course that has no flow between precipitation events as a regular and normal occurrence. This change would reduce the upstream boundaries and prevent dry washes in arid areas from being waters of the U.S. It is also consistent with Justice Scalia's opinion that ephemeral waters should not be included in waters of the U.S. and it considers Justice Kennedy's suggestion that distance from navigable-in-fact waters and volume of flow should be considered in determining waters of the U.S.
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> Revise the definition of "adjacent" at §328.3(c)(1) to require an observable surface water connection and one that is more than speculative or insubstantial. This change is consistent with Justice Scalia's opinion that adjacent waters should have a surface connection to bodies that are waters of the U.S.
>
> Delete the definition of "neighboring" at §328.3(c)(2). This change removes the ability to broadly interpret "adjacent" to include non-contiguous waters. This change is consistent with Justice Scalia's opinion that adjacent waters should have a surface connection to waters that are waters of the U.S. and takes into consideration Justice Kennedy's suggestion that a connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters.

Delete §328.3(a)(7) and replace with a provision that requires separate case-by-case rulemaking for other similarly situated waters not covered under (a)(1) through (6) of this section to be considered waters of the U.S. The procedure for review should give deference to the scientific evidence provided by the state(s) in which the similarly situated waters occur for determining whether the similarly situated waters under review contribute significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. This change allows for other waters to come under jurisdiction but only after case-by-case analysis, rulemaking, and support from the state in which the waters occur.

Delete the definition of "significant nexus" at §328.3(c)(5). This definition is not needed because it allows for broad reach in its application and would be inconsistent with the other changes recommended here.

Delete §328.3(a)(8). This additional pathway for determining waters of the U.S. is not needed because it allows for broad reach in its application and uses arbitrary thresholds as boundaries. Additionally, it is not consistent with Justice Scalia's opinion that adjacent waters should have a surface connection to waters that are waters of the U.S. and it is not consistent with the other changes recommended here.

These revisions to the 2015 Rule correspond to the comments in the "Objections" section above and would address the concerns noted. In our opinion, these revisions would reduce the extent of waters of the U.S. from that proposed in the 2015 Rule, be consistent with the opinions of justices Kennedy and Scalia in *Rapanos*, and would result in a more easily interpreted rule.

TxDOT is gathering on-the-ground examples of how the changes recommended above would affect specific locations around the State. We would gladly provide this, or other information, if needed.

Sincerely,

James M. Bass
Executive Director

Cc: Texas Transportation Commission
Jerry Strickland, Office of Texas Governor Greg Abbott
Carlos Swonke, Director, Environmental Division
Jerry Haddican, Director, Government Affairs Division