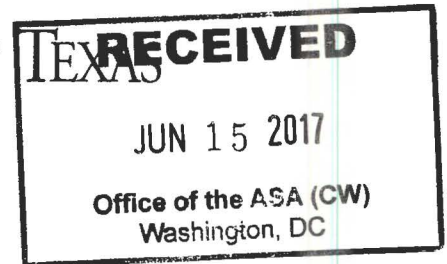




RAILROAD COMMISSION OF TEXAS



June 6, 2017

Scott Pruitt, Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 2822T
Washington, DC 20460

Douglass W. Lamont, P.E.
Senior Official Performing the Duties
of the Assistant Secretary of the Army
108 Army Pentagon
Washington, D.C. 20310

Re: Clean Water Rule: Definition of "Waters of the United States"
Under the Clean Water Act

Dear Administrator Pruitt and Acting Secretary Lamont:

We have received a copy of your letter dated May 8, 2017, to Texas Governor Gregg Abbott requesting our input on the proposal to revise the definition of waters of the United State (Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015)). We appreciate your request for our input.

The Railroad Commission of Texas (Commission) has effectively regulated the oil and natural gas industry in the State of Texas since 1919. The Commission's primary statutory responsibilities in the regulation of Texas oil, gas and geothermal resources, as well as lignite mining, are to conserve the State's natural resources; prevent the waste of natural resources; protect the correlative rights of mineral interest owners; protect the environment from pollution associated with oil, gas, geothermal, and surface mining activities; and ensure safety. The Commission works closely with the Texas Commission on Environmental Quality. Both agencies have jurisdiction over prevention of pollution of surface water in the State.

Below are our responses to the questions included in the PowerPoint presentation attached to your letter dated May 8, 2017, to Governor Abbott:

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 in *Rapanos v. United States*, 547 U.S. 715 (2006) found that Clean Water Act jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters. As determined by Justice Scalia, the term "relatively permanent" should not include dry channels "through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." The term should include

only those waters that flow year-round or continuous seasonally. As such, the term should be determined based on site-specific characteristics.

With respect to the term "continuous surface connection," Justice Scalia stated that such a connection would make it "difficult to determine where the 'water' ends and the 'wetland' begins." In other words, there should be no clear distinction between the 'waters' and the wetlands."

In keeping with Justice Scalia's opinion, any rule adopted by the Agencies should not include the concept of aggregation of similarly situated "other waters." Congress did not envision federal Clean Water Act jurisdiction over any land feature that could possibly hold water.

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

Defining the scope of the Clean Water Act in a manner consistent with Justice Scalia's opinion in *Rapanos* would greatly clarify the scope and requirements of the Federal regulations. Such an approach would create greater certainty for the States and reduce the frustration and uncertainty of the public by eliminating the ambiguity regarding the reach of the Clean Water Act. It would protect private property rights and encourage economic development. And, it would ensure that the regulatory burden is proportionate to reasonable water protection benefits.

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?

We do not, at this time, anticipate any changes to the scope of our programs regarding Clean Water Act jurisdiction.

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?

An economic analysis of Clean Water Act programs under Section 303 (Impaired Waters and Total Maximum Daily Loads); Section 311 (oil spill); Section 401 (State water quality certification); 401 (State water quality certification); Section 402 (NPDES program); and Section 404 (discharge of dredged and fill material) should capture all the Clean Water Act programs under the Commission's jurisdiction.

The Commission appreciates the opportunity to comment on this important issue.

Sincerely,



Christi Craddick, Chairman



Ryan Sitton, Commissioner



Wayne Christian, Commissioner