

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Toby Baker, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 3, 2021

U.S. Environmental Protection Agency
EPA Docket Center
Docket ID No. EPA-HQ-OW-2021-0328
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Subject: *Federal Register*, vol. 86, No. 147, Pages 41911 - 41914, August 4, 2021, Department of the Army and U.S. Environmental Protection Agency; *Notice of Public Meetings Regarding "Waters of the United States"; Establishment of a Public Docket; Request for Recommendations.*

Dear Sir or Madame:

The Texas Commission on Environmental Quality (TCEQ) appreciates the opportunity to provide recommendations on upcoming rulemakings by the Department of the Army and U.S. Environmental Protection Agency (the Agencies) to re-define "waters of the United States," or WOTUS. The Agencies' request for recommendations was published on August 4, 2021 in the *Federal Register*, vol. 86, No. 147, Pages 41911-41914. TCEQ requests opportunities for co-regulator coordination in recognition of states' unique role to protect water quality, in accordance with Section 101(b) of the federal Clean Water Act (CWA). Flexibility to accommodate regional differences and local conditions must be appropriately considered to determine jurisdictional status of surface waters. TCEQ requests the upcoming rulemaking provide durable regulatory certainty, which is needed by states to appropriately implement and administer CWA programs. Finally, TCEQ requests the Agencies acknowledge the contributions to water quality objectives that cooling reservoirs provide in arid regions of the nation, including Texas; and provide options for considering portions of these waters as jurisdictional, or other flexibilities.

If you have questions concerning the enclosed comments, please contact Earl Lott, Deputy Director of the Office of Water at (512) 239-2047, or by e-mail at earl.lott@tceq.texas.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Toby Baker".

Toby Baker
Executive Director

Attachment

**Texas Commission on Environmental Quality (TCEQ) Recommendations on
Notice of Public Meetings Regarding “Waters of the United States”; Establishment of
a Public Docket; Request for Recommendations**

***Federal Register* Vol. 86, No. 147 41911-41914**

Background

In the August 4, 2021 edition of the *Federal Register*, the Department of the Army and U.S. Environmental Protection Agency (the Agencies) published notice of public meetings regarding “waters of the United States” or WOTUS; establishment of a public docket; and request for recommendations. Written recommendations will be accepted by September 3, 2021. The Agencies announced their intent to revise WOTUS on June 9, 2021 by a two-step rulemaking process: 1) a foundational rule to restore longstanding protections in place prior to the Clean Water Rule (finalized on June 29, 2015), amended to be consistent with relevant Supreme Court decisions; and 2) a second rulemaking process to build upon the foundational rule. Recommendations are being solicited by the Agencies to assist and inform the upcoming rulemaking processes.

The definition of WOTUS establishes the geographic scope of federal jurisdiction under the Clean Water Act (CWA), potentially impacting federal water quality management programs, including those administered by states. The definition of WOTUS and associated rulemaking efforts by the Agencies have been the subject of extensive litigation, which has resulted in considerable uncertainty and confusion. If completed, the proposed rulemaking efforts would replace the final Navigable Waters Protection Rule (NWPR), recently published in the April 21, 2020 edition of the *Federal Register*. In accordance with Executive Order 13990, the Agencies have reviewed the NWPR and have decided to initiate the two new rulemakings. The Agencies are currently seeking recommendations to assist and inform the upcoming rulemaking processes, particularly on the topics of:

- Implementation
- Regional, state and tribal interests
- Science
- Environmental justice interests
- Climate implications
- Scope of jurisdictional tributaries and ditches, and adjacency
- Exclusions from the definition

TCEQ offers the following recommendations as outlined below.

TCEQ Recommendations

Notice of Public Meetings Regarding “Wates of the United States”; Establishment of a Public Docket; Request for Recommendations

Recommendations Regarding “Waters of the United States”

I. Recommendations concerning regional, state and tribal interests.

A. TCEQ requests opportunities for co-regulator coordination. In accordance with Section 101(b) of the federal CWA, states have a unique role in protecting water quality. Ample co-regulator coordination in the spirit of cooperative federalism is critically needed, in order to develop a durable definition of WOTUS. TCEQ requests upcoming opportunities for federalism and tribal consultations; as well as the regional roundtables referenced in the August 4, 2021 *Federal Register* notice, be planned and announced with sufficient advance notice to state co-regulators.

B. Flexibility to accommodate regional differences and local conditions must be appropriately considered. States that experience highly variable weather events and environmental conditions need flexibility incorporated into the determination of jurisdictional status. For example, states such as Texas may experience drought and flooding events with regularity. Due to regional differences, any national benchmark or threshold established by the Agencies may be problematic to implement in certain regions and locales. Various physical indicators that integrate long-term changes in environmental conditions (such as the ordinary high water mark) may most appropriately capture long-term environmental changes and account for regional differences.

C. Durable certainty is needed for states to implement and administer CWA programs in a clear and transparent manner. Extensive litigation and continuous rulemakings have contributed to the uncertainty and confusion of the WOTUS definition. States have dedicated time and resources toward maintaining situational awareness of the status of jurisdiction in a particular state or region, a difficult task due to the patchwork of litigation and rulemakings initiated from 2015-2021. Effective water quality management is predicated upon clear and transparent processes, including engagement of stakeholders and affected parties. The extensive litigation and continuous rulemakings are contrary to these ideals. The overall goal of the proposed rulemaking processes must be to ensure the resulting rulemaking is durable and provides the certainty needed to implement the CWA for many years to come.

II. Recommendations concerning exclusions from the definition.

A. TCEQ requests the Agencies provide options for considering portions of cooling reservoirs as jurisdictional, or other flexibilities, rather than entirely as a waste treatment system. In arid portions of the nation, including Texas, cooling reservoirs or ponds may contribute to water quality objectives. For example, Texas has many surface water impoundments or reservoirs built on perennial and intermittent streams, some of significant size, that were constructed primarily for cooling purposes. According to the NWPR, these waters are considered waste treatment systems and therefore subject to exclusion of jurisdictional status. TCEQ requests the Agencies acknowledge the significant contributions of these waters and provide options for considering portions of reservoirs as jurisdictional, or other flexibilities, rather than entirely as a waste treatment system.