Waters of the United States/Clean Water Act: Texas Department of Transportation Comments on U.S. EPA Proposed Rule

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The Texas Department of Transportation ("TDOT") submitted December 16, 2025, comments to the United States Environmental Protection Agency and United States Army Corps of Engineers (collectively, "Corps") on the proposed rule to revise the definition of "Waters of the United States" ("WOTUS"). See Docket ID No.: EPA-HQ-OW2025-0322.

TDOT states that its comments reflect its experience as:

… the lead Federal Action Agency for environmental review, consultation, and other actions required by applicable Federal environmental laws for Federally funded highway projects in Texas and as a non-federal applicant for state-funded projects.

TDOT also states by way of introduction that determining whether and to what extent a proposed transportation project will impact WOTUS is a critical component of its environmental review process. Further, it states that uncertainty regarding the identification and boundaries of such waters can delay project implementation.

Support is expressed for the Corps' effort to what it describes as "provide greater regulatory certainty by clarifying the definition of "'WOTUS.'" TDOT does however suggest revisions to the proposed rule, which include:

- Clarify that dry land ditches are not "tributaries" and can never be jurisdictional waters (stating that simplifying the revised exclusion for ditches to apply to all ditches constructed or excavated entirely on dry land, regardless of what areas they drain and whether they carry a relatively permanent flow of water, will improve the clarity and usefulness of this exclusion to WOTUS).
- Clarify the definitions of "continuous surface connection"4 and "relatively permanent" (noting that there are aspects of the two proposed definitions that may be open to varying interpretation and they need refinements to ensure the definitions are consistent and unambiguous).
- Continuous surface connection (recommends that the Corps specify in the regulation itself how regulated entities should determine the presence of water "at least during the wet season" for a specific area to avoid future disputes regarding the meaning of this phrase).
- Relatively permanent (suggests that the phrase is vague and open to interpretation and should be better defined in the regulations).

A copy of the TDOT comments can be found here.