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December 16, 2025

The Honorable Lee Zeldin, Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1101A
Washington, DC 20460

RE: Updated Definition of "Waters of the United States," Docket ID No.: EPA-HQ-OW-2025-0322

Dear Administrator Zeldin:

The Texas Department of Transportation (TxDOT) appreciates the opportunity to provide input on the above-referenced proposed rulemaking. Our comments reflect TxDOT's 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 Texas¹ and as a non-federal applicant for state-funded projects.

Determining whether and to what extent a proposed transportation project will impact "waters of the United States" is a critical component of our environmental review process, and uncertainty regarding the identification and boundaries of such waters can delay project implementation. Therefore, TxDOT supports the efforts of the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) to provide greater regulatory certainty by clarifying the definition of "waters of the United States." However, there are aspects of the proposed changes that may be problematic in that they are open to varying interpretations, and TxDOT requests revisions for clarity as discussed below.

Clarify that dry land ditches are not "tributaries" and can never be jurisdictional waters

TxDOT particularly appreciates the proposed revised exclusion for ditches, including roadside ditches.² Simplifying this exclusion 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 important exclusion to the definition of "waters of the United States."

However, TxDOT is concerned that in the future, the proposed new definition of "tributary"³, specifically its second sentence, could be interpreted to classify a dry land ditch as a jurisdictional "tributary" if it conveys relatively permanent flow. Therefore, TxDOT suggests that EPA and USACE explicitly state in the regulatory language that the drainage area and flow regime of a dry land ditch does not affect its jurisdictional status, and that such ditches cannot be considered jurisdictional "tributaries" even if they convey relatively permanent flow.

¹ See Memorandum of Understanding between the Federal Highway Administration (FHWA) and TxDOT dated July 17, 2025.

² Proposed 40 CFR 120.02(b)(3) and 33 CFR 328.3(b)(3).

³ Proposed 40 CFR 120.02(c)(10) and 33 CFR 328.3(c)(10).

Clarify the definitions of “continuous surface connection”⁴ and “relatively permanent”⁵

TxDOT also appreciates the proposed new definitions of “continuous surface connection”⁶ and “relatively permanent.”⁷ These new definitions further improve the clarity of existing regulations, however, there are aspects of these proposed new definitions that may be open to varying interpretations., TxDOT is requesting refinements to ensure these definitions are consistent and unambiguous.

“Continuous surface connection”⁸

The proposed new definition of “continuous surface connection” refers to water being present “at least during the wet season,” which is not further defined and therefore open to interpretation. EPA and USACE explain in the rulemaking preamble that they intend to use Water-Budget Interactive Modeling Program metrics as the primary source for identifying “the wet season,”⁹ but this still leaves many questions unanswered. For example, who defines “the wet season” for a particular area? If the determination is based on historic precipitation cycles, what threshold will be used to distinguish between wet and dry seasons? Does water need to be present during the *entirety* of “the wet season,” or only a portion of it? TxDOT recommends that EPA and USACE 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.

The proposed new definition of “continuous surface connection” also requires surface water to be “abutting (*i.e.*, touching)” a jurisdictional water. Again, this phrase is susceptible to multiple interpretations. For example, “touching” from what distance, and through what medium? How is “touching” defined when the borders of the feature and the associated jurisdictional feature change over the course of a season, year, or multi-year (but less than five-year-long) drought? This phrase would similarly benefit from further specificity in the regulations themselves to avoid future disputes about its meaning.

“Relatively permanent”¹⁰

Like the proposed new definition of “continuous surface connection,” the proposed new definition of “relatively permanent” also refers to water being present “at least during the wet season.” As explained above, this phrase is vague and open to interpretation and should be better defined in the regulation itself.

⁴ Proposed 40 CFR 120.02(c)(3) and 33 CFR 328.3(c)(3).

⁵ Proposed 40 CFR 120.02(c)(8) and 33 CFR 328.3(c)(8).

⁶ Proposed 40 CFR 120.02(c)(3) and 33 CFR 328.3(c)(3).

⁷ Proposed 40 CFR 120.02(c)(8) and 33 CFR 328.3(c)(8).

⁸ Proposed 40 CFR 120.02(c)(3) and 33 CFR 328.3(c)(3).

⁹ 90 Federal Register 52519, left-hand column (November 20, 2025).

¹⁰ Proposed 40 CFR 120.02(c)(8) and 33 CFR 328.3(c)(8).

Again, thank you for the opportunity to provide the above comments. If you have any questions, please feel free to contact me at (512) 305-9515, or your staff may reach out to Doug Booher, Environmental Affairs Division Director, at (512) 466-7435 or Doug.Booher@txdot.gov.

Sincerely,



Marc D. Williams
Executive Director

cc: Carl L. Johnson, P.E., Chief Engineer
Brian R. Barth, P.E., Deputy Executive Director for Program Delivery
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