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Paul R. LePage
GOVERNOR

May 31, 2017

Donna Downing, Office of Water
Environmental Protection Agency
1200 Pennsylvania Avenue, NW.,
Washington, D.C. 20460

Re: Proposed Revisions to the Clean Water Rule: Definition of the "Waters of the United States"

Dear Ms. Downing:

Thank you for the opportunity to actively participate in the development of revisions to the U.S. Environmental Protection Agency's (EPA's) Clean Water Rule: Definition of "Waters of the United States" (80 Fed. Reg. 37,504). The State of Maine strongly supports increasing opportunities to meaningfully participate in the federal regulatory development process, and better ensure that federal rules are consistent with both the EPA's mission, and the cooperative federalism process.

The waters of the state of Maine form the foundation of Maine's identity and its rich environmental and natural resources heritage. When people think of Maine, they think of our water from our mountain streams to our rocky coast. Maine's economy is inexorably linked to the continued high quality of all waters of the state, including those waters regulated by the Clean Water Act (CWA).

The 2015 Clean Water Rule established a new definition for "waters of the United States" in an effort to provide clarification and predictability to the procedures used to identify those waters covered by the CWA. Unfortunately, these regulations expanded the EPA's and the U.S. Army Corps of Engineers' (Agencies') authority far beyond the jurisdictional limits established under the



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Commerce Clause of the U.S. Constitution¹, imposing additional costs and creating greater uncertainty for the regulated community.

Maine supports EPA's two-step process to first reinstate the former regulatory definition of "waters of the United States", and then redefine federal CWA jurisdiction in accordance with the plurality opinion written by Justice Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006). In their opinion, Justice Scalia and the plurality concluded that the phrase "the waters of the United States":

"includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams," "oceans, rivers, [and] lakes," Websters New International Dictionary 2882 (2nd ed.) and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."

Redefining "waters of the United States" in accordance with this opinion will help exempt drainage ditches, swales or other parcels of land that are only intermittently inundated with water from federal regulation, and help restore the principles of federalism to our environmental programs.

Defining Relatively Permanent Waters

How should the concept of a relatively permanent body of water be defined,² given that both the plurality opinion and dissent upheld CWA jurisdiction over non-navigable tributaries of traditional navigable waters that are "relatively permanent" (i.e., waters that typically flow year-round, or waters that have a continuous flow at least seasonally)?

Maine believes that the definition of "river stream or brook" in Maine's Natural Resources Protection Act can provide useful guidance on this issue. Under Maine law³, a river, stream or

¹ Pursuant to the 10th Amendment of the U.S. Constitution, federal jurisdiction under the CWA is limited to powers delegated to the United States by the Constitution (in this instance, by the Commerce Clause in Article 1, Section 8), and all remaining powers are reserved to the states.

² The Department's comments relate to non-navigable tributaries of traditional navigable waters, as the Agencies' jurisdiction over traditional navigable waters as defined in 33 C.F.R. § 328.3(a)(1) and 40 C.F.R. § 230.3(s)(1) is not in question.

³ 38 M.R.S. §§ 480-B(9)

brook is a channel between defined banks that is created by the action of surface water and has 2 or more relevant characteristics, most notably:

A. It is depicted as a solid or broken blue line on the most recent edition of the U.S. Geologic Survey 7.5 minute series topographic map or, if that is not available, a 15-minute series topographic map; and

B. It contains or is known to contain flowing water continuously for a period of at least 6 months of the year in most years.

Maine suggests that the use of these criteria, namely the depiction on a USGS topographic map and the presence of continuously flowing water for a period of at least 6 months of the year, will provide the predictability sought by both stakeholders and the states. Clear and concise criteria that substantially reduce interpretation or agency discretion will go far towards providing regulatory certainty and ultimately result in better environmental outcomes.

Defining "Wetlands with a Continuous Surface Connection"

Both the plurality opinion and the dissent in *Rapanos* agreed that wetlands having a continuous surface connection to a relatively permanent, non-navigable tributary (of a "traditional" navigable water) are "waters of the United States." Conversely, wetlands that are separated from a non-navigable tributary by uplands, a berm or other physical feature are not, and do not fall within the Agencies' jurisdiction. As noted by Justice Scalia:

"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 the two, are "adjacent" to such waters and covered by the Act."

Maine believes that only those wetlands directly touching a jurisdictional water body should be subject to the CWA. In plain terms, a "continuous surface connection" means that there is a direct surface hydrologic connection between the wetland and an adjacent jurisdictional water body. Groundwater and intermittent streams should not be regulated under the CWA, nor should wetlands that lack a continuous and direct surface water connection. Only those wetlands that

actually touch a jurisdictional water body (i.e., a navigable or non-navigable tributary of a navigable water body) can legitimately satisfy the requirement for a continuous surface connection⁴. Together, our suggested approach for both “relatively permanent waters” and “continuous surface connection” provides more consistency for the entire spectrum of jurisdictional waters.

Impacts in Maine

The proposed changes will not negatively affect Maine’s precious water resources, but will help to simplify the administration of our delegated and state water programs. Maine has delegated authority to administer many sections of the CWA, including Sections 303, 401 and 402, which rely upon the definition of “waters of the United States.” In addition to the delegated administration of the CWA, Maine regulates activities that impact waters of the state, which include surface and subsurface waters (38 M.R.S. § 361-A(7)), and administers several other laws that regulate the land and waters of the state⁵, including the Natural Resources Protection Act (38 M.R.S. § 480-A et seq.), the Stormwater Management Law (38 M.R.S. § 420-D), Site Location of Development Law (38 M.R.S. § 481 et seq.) and Shoreland Zoning laws (38 M.R.S. § 435 et seq.). The proposed revisions to the CWA represent an important step in reducing federal regulatory overreach, and will allow Maine and other states to more effectively implement both their delegated and non-delegated water quality programs.

Thank you for the opportunity to comment on this important initiative, and Maine looks forward to working with you on this and other efforts to reduce regulatory overreach.

Sincerely,



Paul R. LePage

Governor

⁴ A very broad approach to defining the term “continuous surface connection” could very well result in an isolated wetland and the jurisdictional waters being subject to the CWA, while the “continuous surface connection” itself is not. This makes no sense.

⁵ Waters of the state regulated by the State of Maine include surface and subsurface waters (38 M.R.S. § 361-A(7)).