



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



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November 14, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T, 1200 Pennsylvania Ave. NW.
Washington, DC 20460.
Attention: Docket ID No. EPA-HQ-OW-2011-0880

To Waters of the United States Regulation Comment Reviewers:

I am submitting these comments on behalf of the Maine Department of Environmental Protection (“DEP”) regarding the proposed regulation defining “Waters of the United States” (“WOTUS”) proposed by the U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps”) (collectively, “the Agencies”). As described in these comments, the proposed regulations expand the Agencies’ jurisdiction beyond the jurisdictional limits allowed under the Commerce Clause of the U.S. Constitution. The proposed regulations also create uncertainty for regulated entities, and may result in inconsistent regulation between DEP and the Corps. DEP is requesting that the Agencies revise the proposed rule to return the scope of the Agencies’ jurisdiction to federal jurisdiction consistent with the Agencies’ 2008 guidance documents, as well as revise provisions of the regulations which may cause regulatory uncertainty. Given the nature of the necessary changes to the regulatory proposal, DEP further requests that the Agencies seek additional public comment after the revisions have been made.

Maine DEP plays the lead role in the regulation of impacts to water quality in Maine, through delegated authority under the Clean Water Act and through regulatory powers reserved to the state.

Protection of the waters of the state of Maine is essential to Maine’s identity and its rich environmental and natural resource heritage. Much of Maine’s economy directly depends upon the continued high quality of all waters of the state, including those waters regulated by the

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Clean Water Act (“CWA”). EPA has delegated to Maine the authority to administer many sections of the CWA, including those which rely upon the definition of WOTUS: Sections 303, 401 and 402. In addition to administration of the CWA, DEP administers several other laws which regulate the land and water use of the state, including by not limited to the Natural Resources Protection Act (38 M.R.S.A §480-A et seq.), stormwater management law (38 M.R.S.A §420-D), Site Location of Development laws (38 M.R.S.A §481 et seq.), and shoreland zoning laws (38 M.R.S.A §435 et seq.).

Given Maine’s rich environmental heritage as well as Maine’s dependence on the high standard of environmental quality to ensure a prosperous economy, DEP regulates activities which impact waters of the state. Waters of the state regulated by the State of Maine include surface and subsurface waters. (38 M.R.S.A. §361-A(7)) Although the *Rapanos*¹ opinions sought to clarify what is and is not considered jurisdictional under the CWA, neither the plurality opinion written by Justice Scalia nor the concurrence written by Justice Kennedy overturned the premise described in *SWANCC*² that the states have the traditional and primary power of land and water use (see *SWANCC* at 174). Pursuant to the 10th Amendment of the U.S. Constitution, the Agencies’ jurisdiction under the CWA is limited to the powers delegated to the United States by the Constitution (in this instance, by the Commerce Clause in Article I, Section 8), and all remaining powers are reserved to the States.

The estimated 3% increase of jurisdiction nationwide and 17% increase in jurisdiction regulating “other waters” exceeds the jurisdiction afforded to the Agencies by the U.S. Constitution.

Despite the fact that the Supreme Court made the determination that the Corps exceeded its jurisdiction in the *Rapanos* cases, the Agencies proceeded to develop a regulation that expanded their jurisdiction by an estimated 3% nationwide, and an estimated 17% expansion of jurisdiction for waters categorized as “other waters.” The Agencies’ *Economic Analysis of Proposed Revised*

¹ *Rapanos v. United States*, 547 U.S. 715 (2006).

² *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

*Definition of Waters of the United States*³ (“*Economic Analysis*”) predicts an expansion of jurisdiction over what was considered jurisdictional under the 2008 guidance. The result of the expanded interpretation of WOTUS is an encroachment of federal jurisdiction into state jurisdictional waters by approximately 3%. *Economic Analysis* at 34. This 3% expansion of jurisdiction encroaches upon Maine’s traditional and primary authority over land and water use.

It should be noted that the *Economic Analysis* was conducted over the course of a two-year time period which may not be indicative of normal construction activity due to the economic climate during the time period. If increased construction were to have taken place during the two-year time period, the estimates of expanded jurisdiction may have been greater than what was presented by the Agencies. Furthermore, the estimates which were provided in the *Economic Analysis* represented a nationwide increase. More rural, water-rich states, such as Maine, are likely to be disproportionately impacted by the proposed regulation and expansion of jurisdiction.

Waters that are not navigable, and that have traditionally been regulated solely by the State of Maine, such as a “shallow subsurface hydrologic connection” to a jurisdictional water, are considered WOTUS under the proposed regulation. Significantly, the *Economic Analysis* states that 0% of “other waters” evaluated using the 2008 guidance were determined to be jurisdictional, compared to 17% of “other waters” under the proposed rule. *Economic Analysis* at 34. The Agencies’ *Economic Analysis* indicates that this expansion is a result of the redefinition of the “adjacency” test. This expansion in jurisdictional reach interferes with the regulation of a state resource by the state. Further, use of shallow subsurface connections to determine adjacency essentially federalizes regulation of groundwater, which no reasonable person could interpret as navigable water. Use of a shallow subsurface connection as the only connection to a traditional navigable water (“TNW”) would be to “read the significance of the term ‘navigable’ out of the statute altogether.” (see *SWANCC* at 171-172)

³ March 2014, US Environmental Protection Agency and US Army Corps of Engineers.

There is insufficient specificity in the definition, which will lead to regulatory uncertainty.

A fundamental principle of regulation is the need for clear understandable direction which can be followed and understood. This objective was made more difficult by the Agencies' apparent attempts to use two separate approaches to determine jurisdiction that the two opinions in the *Rapanos* case presented. What seems to have resulted from this approach is a lack of clear direction regarding how connected a water can be to a navigable water in order to be considered a WOTUS.

As drafted, the proposal presents insufficient specificity that is necessary to define the resource to be regulated. For example, terms and phrases in the definition of "significant nexus" such as "other similarly situated waters in the region," "it must be more than speculative or insubstantial," "perform similar functions," "are located sufficiently close together or sufficiently close to a 'water of the United States,'" and "evaluated in a single landscape unit" all lack the specificity necessary to establish regulatory certainty. This also increases the likelihood of regulatory inconsistency. These terms appear to provide for an expansion of jurisdiction of waters regulated as WOTUS.

The Agencies should also provide clarity regarding which ditches are not considered jurisdictional and that conveyances that are part of an MS4 system are not "waters of the United States."

Per se jurisdictional determinations eliminate the requirement that there be a physical or scientific connection or nexus to traditional navigable waters.

One of the results of the proposed definition is the elimination of the requirement that a nexus be established when determining whether "other waters" are jurisdictional. Under the 2008 guidance, waters were jurisdictional if they were "traditionally navigable waters," wetlands adjacent to TNWs, or other waters that had an established nexus to TNWs. This test ensured that there was a direct and scientific connection between TNWs and water subject to federal regulation. This assurance of a scientific connection has been eliminated in the proposed rule.

Under the proposed rule, ephemeral or intermittent streams would be *per se* jurisdictional, even without a determination that there is a connection to TNWs. Under the proposed rule, waters which may lack relative permanence but are “adjacent” to TNWs would be *per se* jurisdictional, without a determination that they have a physical or scientific connection to jurisdictional waters. DEP requests that case-specific determinations be conducted to ensure a physical and scientific basis for each jurisdictional determination.

The Agencies should provide the opportunity for public participation on the revised regulatory proposal.

After the U.S. Supreme Court struck down the Agencies’ overreach of jurisdiction in the SWANCC decision, the Agencies developed guidance in 2008 to determine the extent to which waters are classified as “Waters of the United States” and therefore can be regulated under the Clean Water Act. This guidance more appropriately reflected: (1) the nexus of “other waters” to TNWs and (2) the need for site-specific determinations regarding the significance of a nexus of “other waters” to TNW. This guidance did not undergo notice and opportunity for public participation pursuant to the Administrative Procedure Act (“APA”) (5 U.S.C. Subchapter II). To the extent that Maine has the delegated authority to administer many of the provisions of the CWA, Maine supports efforts of EPA to ensure that the definition of WOTUS has been developed pursuant to the APA. Guidance which has not gone through the APA is not judicially enforceable under Maine law. (5 M.R.S.A. §8002(9)). Maine requests that the proposal be revised and re-posted for public comment.

DEP requests that the Agencies revise the proposed rule and resubmit the revisions for additional public comment.

In an effort to undergo rulemaking in response to the *Rapanos* decision, the Agencies developed a regulation that exceeds their jurisdiction. DEP requests that the agencies revise the proposed definition, including jurisdictional consideration of “other waters” and adjacency and terminology that may cause regulatory uncertainty due to the lack of specificity in the terms.

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DEP further request that the Agencies provide an additional comment period for the revised definition.

Thank you for your consideration of these comments. If you have questions related to these comments, I can be reached at (207) 287-7830 or at heather.parent@maine.gov.

Sincerely,



Heather L. Parent

Deputy Commissioner,

Maine Department of Environmental Protection