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## MEMORANDUM

DATE: April 6, 2007  
TO: Board Member  
FROM: Henry Jennings  
SUBJECT: Proposed Surface Waters Definitions for the Purposes of Creating Buffer Zones

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At the March 16, 2007 meeting, Board members continued the review of preliminary language for establishing a 25-foot buffer around surface waters. During that meeting, two issues arose that required further development:

1. The question of which wetlands might be affected resulted in a request by the Board for a lay person's description of which surface waters would be covered by the current working definition; and
2. We discussed the fact that the developing definition of surface waters did not currently include marine waters and how that could be addressed.

### 1. Lay Person's Summary of the Affected Surface Waters

Following the February 16, 2007 Board meeting, the definition, as suggested by staff from the DEP, consisted of the following:

***“For the purposes of this subsection, ‘surface water’ means a wetland mapped by the United States Fish and Wildlife Service under the National Wetlands Inventory project; a GPA water as defined in section 465-A; or a river, stream or brook as defined in section 480-B.”***

According to Jeff Dennis of the DEP, this definition would include all lakes and ponds except man-made ponds less than 30 acres in size, both permanent and intermittent natural streams, and the most significant wetlands. It would not include small, isolated wetlands; man-made channels, ditches, swales, other man-made conveyances and most man-made ponds; or natural channels and swales that are not frequently wet enough to meet the stream definition in 480-B (see below).

The definition of river, stream or brook contained in 38 M.R.S.A. § 480-B is as follows:

***River, stream or brook.*** “River, stream or brook,” means a channel between defined banks. A channel is created by the action of surface water and has 2 or more of the following characteristics:

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

*B. It contains or is known to contain flowing water continuously for a period of at least 3 months of the year in most years.*

*C. The channel bed is primarily composed of mineral material such as sand and gravel, parent material or bedrock that has been deposited or scoured by water.*

*D. The channel contains aquatic animals such as fish, aquatic insects or mollusks in the water or, if no surface water is present, within the stream bed.*

*E. The channel contains aquatic vegetation and is essentially devoid of upland vegetation.*

*“River, stream or brook” does not mean a ditch or other drainage way constructed, or constructed and maintained, solely for the purpose of draining storm water or a grassy swale.*

What isn't completely clear under DEP's proposed language is what types of freshwater wetlands would be included under this definition, and what wouldn't. The US Fish and Wildlife Service's main focus in mapping the wetlands is to identify waterfowl habitat. Consequently, forested and meadow wetlands aren't likely to be mapped under this project. Their maps are online and viewable at <http://wetlandsfws.er.usgs.gov/wtlnds/launch.html>. Discussions are ongoing with DEP about the scope of the US Fish and Wildlife Service's mapping project and possible alternatives for defining the more commonly thought of wetlands that are inundated year round and support emergent wetland plants. Wetlands mapped by towns through the shoreland zoning requirements may be another option.

## 2. Marine Waters

Prior to the March meeting, I contacted DEP about possible statutory language for defining marine waters. DEP staff suggested we might consider adding the definition of coastal wetlands contained in 38 M.R.S.A. § 480-B to our current working definition of surface waters:

***Coastal wetlands.*** *“Coastal wetland” means all tidal and subtidal lands; all areas with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat or other contiguous lowland that is subject to tidal action during the highest tide level for the year in which an activity is proposed as identified in tide tables published by the National Ocean Service. Coastal wetlands may include portions of coastal sand dunes.*

If you decided to add the coastal wetlands definition by reference, the new working definition would read:

***“For the purposes of this subsection, “surface water” means a wetland mapped by the United States Fish and Wildlife Service under the National Wetlands Inventory project; a GPA water as***

***defined in section 465-A, a river, stream or brook as defined in section 480-B, or a coastal wetland as defined in section 480-B.”***

However, the definition of Coastal wetland may be a bit broad for our purposes, especially the clause reading, “all areas with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat.” One option might be to use part of the “Coastal wetlands”, definition by adding text to the working definition instead of using the statutory reference.

If you elect to adopt only part of the “Coastal wetlands” definition (excluding the vegetation tolerant to salt water), you might end up with something like this:

***“For the purposes of this subsection, ‘surface water’ means a wetland mapped by the United States Fish and Wildlife Service under the National Wetlands Inventory project; all tidal and subtidal land, which may include portions of coastal sand dunes, and any swamp, marsh, bog, beach, flat or other contiguous lowland that is subject to tidal action during the highest tide level for the year as identified in tide tables published by the National Ocean Service, a GPA water as defined in section 465-A; or a river, stream or brook as defined in section 480-B.”***

This would essentially add all land that is subject to tidal action during some portion of the year to the list of affected surface waters.

I hope to have better information for defining wetlands available by the time we discuss this subject again.