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To: U.S. Environmental Protection Agency
From: Ecological Restoration Business Association
Filed to Docket No.: EPA-HQ-OW-2021-0602
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Re: Revised Definition of “Waters of the United States” (Rule I)

The Ecological Restoration Business Association (“ERBA”) appreciates the opportunity to provide comments to the U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps”) (collectively, the “Agencies”) in response to the docket EPA-HQ-OW-2021-0602 “Waters of the United States” (“WOTUS”) proposed rule (“Rule I”) and request for recommendations. Representing wetland and stream mitigation providers across the country, ERBA advocates for a durable definition of WOTUS based on science that allows for transparent, predictable implementation.¹ As both regulated entities and entities in the business of delivering regulatory compliance, finding durability remains ERBA’s chief concern for this WOTUS rule-making process.

ERBA supports the proposed Rule I’s return to the familiar regulatory regime of the *Rapanos*-era guidance and 1986 regulations, including a significant nexus analysis. However, to ensure the next WOTUS definition is implementable across the country and clarifies long-disputed terms, ERBA recommends that the Agencies consider incorporation of additional criteria and categories to provide greater certainty and predictability for jurisdictional determinations (“JDs”). For recommendations on such specific criteria and categories, we defer to organizations with a science and wetland conservation mission.²

I. Durability for the Growing Ecological Restoration Industry.

ERBA members are in the business of conservation and ecological restoration investments. For investments at scale, ERBA members rely on clear and predictable implementation of the environmental laws and policies that underpin environmental markets. When interpretation and implementation of WOTUS is unsettled, mitigation providers struggle to predict the needs of regulators and permittees. This regulatory uncertainty dis-incentivizes investment in wetland and stream restoration and subsequently places growth in the broader ecological restoration industry—an estimated \$25 billion in annual economic output and 225,000 jobs—at risk.³ To put this economic impact in perspective,

¹ See ERBA’s April 2019 Comment Letter on WOTUS Step Two and ERBA’s September 2021 Preproposal Comment Letter, [both available here](#).

² For example, the National Association of Wetland Managers (NAWM) or Society of Wetland Scientists.

³ BenDor T, Lester TW, Livengood A, Davis A, and Yonavjak L. (2015) Estimating the Size and Impact of the Ecological Restoration Economy. PLoS ONE 10(6): e0128339. <https://doi.org/10.1371/journal.pone.0128339>.

consider that the ecological restoration industry is now documented as providing more jobs than the well-known iron and steel, logging, and coal mining sectors.⁴

Efficient permitting for infrastructure is also hindered: when investment retracts from third party mitigation solutions, fewer high quality offsets options are available to permittees and regulators, which slows responsible permitting of infrastructure projects, increases regulator staff time evaluating individual mitigation proposals, and has negative consequences for the environment. Because most mitigation projects require years of planning and capital expenditure upfront, continuous regulatory uncertainty and protracted rule-making only exacerbate these issues. Some ERBA members have delayed development of future restoration projects due to WOTUS' ongoing uncertainty.

Considering the history of WOTUS iterations and litigation, the legal defensibility of the forthcoming WOTUS rule is critical to achieving durability. The Agencies outline how Rule I's return to the *Rapanos*-era significant nexus and relatively permanent standards, a pivot from the Clean Water Rule's (CWR) and Navigable Waters Protection Rule's (NWPR) reliance on bright line categories of waters, aligns Rule I with the Supreme Court's recent interpretation on the permitting scope of the Clean Water Act (CWA) and articulation of a multi-factor test designed for factual case-by-case analyses.⁵ ERBA supports Rule I's prominent use of the significant nexus test for this legal defensibility reason and because the test represents a return to a familiar analysis with a decades-long record of implementation that offers predictability to the Agencies, permittees, and mitigation providers.

However, to be durable, Rule I must also provide stakeholders predictability, which depends on how implementable and operational the Rule is across the country. As long-standing field practitioners, we have seen the consequences of subjective decision-making standards that lack transparency and consequently fuel concerns over the purpose and intent of the underlying regulatory program. Based on our decades of field experience, we recommend that the next WOTUS Rule shift from dominant reliance on the case-specific "significantly affects" standard to clearly define additional criteria and categories of jurisdictional waters informed by current science, prior implementation records, and the chemical, physical, and biological goals of the CWA for our nation's waters.

Where peer-reviewed science and field observation documents a significant effect that "other" waters have on the integrity of foundational waters⁶, either individually or in combination, the Agencies should consider establishing categories for those waters as *per se* jurisdictional. The Agencies should also consider development of categories and criteria based on the historical understanding of key terms and activities. One key term recently impactful on ERBA member businesses is interpretation of the Prior

⁴ *Id*; Not to mention the economic value of the ecosystem services wetland restoration firms deliver; a recent study found that wetlands offer a region \$4.2B in sediment, pollutant, and safe drinking water benefits. See Tariq Aziz, Philippe Van Cappellen. Economic valuation of suspended sediment and phosphorus filtration services by four different wetland types: A preliminary assessment for southern Ontario, Canada. *Hydrological Processes*, 2021; 35 (12) DOI: 10.1002/hyp.14442.

⁵ *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020).

⁶ We use the term "foundational waters" in this comment letter as the Agencies' define that term in the public notice (see p.69373), as "traditional navigable waters, interstate waters, or the territorial seas."

Converted Cropland (PCC) exclusion. The PCC exclusion is a consistent focal point in WOTUS deliberations, which makes it especially important to now find resolution and clarity on the defined exclusion to achieve a durable WOTUS. ERBA recommends that Rule I include a definition for the PCC exclusion in alignment with historical practice and the USDA's certification interpretation for ease of application and consistency across federal agencies.

We recognize that inclusion of additional categories and criteria in the final version of Rule I may raise concerns with "logical outgrowth" challenges. Under the Agencies' current rule-making structure, the public notice for Rule II likely offers the best opportunity to successfully incorporate these recommended categories and criteria. Thus, we urge the Agencies to expeditiously promulgate Rule II.

II. Rule I Implementation Recommendations.

➤ *Training Resources/Guidance Manuals*

ERBA recommends additional, comprehensive required training for Regulatory project managers to implement Rule I and Rule II. The perpetual pendulum swing in WOTUS jurisdiction is impacting regulators' knowledge of, and confidence in, implementing WOTUS. Across Corps' Districts and WOTUS iterations, ERBA members have seen regulators vary in their adherence to and particular interpretations of WOTUS, with some regulators falling back to prior WOTUS interpretations of certain features or hesitating to issue determinations due to uncertainty around a different forthcoming rule.

Rule I's return to familiar *Rapanos*-era interpretations will help, but additional field resources are needed from the national level, and importantly at the regional level. Nationally, the 2008 *Rapanos* Joint Memorandum has been a reliable resource for stakeholders across the country and should be updated and re-issued by the Agencies following finalization of the next WOTUS rule. Because geographies vary so widely across the U.S., the regional level is often most appropriate for determining certain criteria and common categories of jurisdictional versus non-jurisdictional features. A library of resources and a well-planned training initiative in the Districts should accompany Rule I to equip regulators with the tools they need to confidently and consistently conduct JDs. As a part of the training initiative, ERBA recommends that the Division and/or District levels develop an implementation checklist or decision flowchart to guide steps in the JD analysis process, including how to factor in field observations. The checklist should incorporate the permissible criteria to inform a case-specific "significantly affects" multi-factor analysis in that region.

ERBA recommends making all of these guidance resources and training materials available to permittees and mitigation providers so that the regulated community can better understand and anticipate agency requirements, and plan in advance to address permitting needs.

➤ *Standardized JD Issuance, Requirements, and Appeals Relief*

ERBA recommends that the Agencies develop and adhere to guidance for standardized processing of JDs. ERBA members experience the consequences of regulators' variances in requirements for and processing of JDs across the 38 Corps Districts. JDs impact ERBA member operations in multiple ways: i)

during the mitigation bank approval process, ii) prompting credit or other mitigation compliance sales as a result of a permittee's unavoidable impacts to waters determined jurisdictional, and iii) consequently, informing ERBA members' investment in future mitigation sites and anticipation of the regulated communities' permitting needs.

Despite the 2008 Mitigation Rule (33 CFR 332) clearly not requiring an Approved JD ("AJD")⁷, some Districts require that a mitigation banker obtain an approved AJD before moving forward with their mitigation project review process. The AJD process is much longer than the Preliminary JD ("PJD") process that most Districts typically accept as sufficient. Whether an AJD or PJD is required often comes down to individual project managers within Districts and their personal regulatory interpretation and prior familiarity and expertise in conducting JDs, rather than an objective policy directive.

For all types of JD requests, ERBA members and their permittee clients suffer from unpredictable timelines and a lack of clear communication from regulators on the status of their pending JD requests. Once a request is submitted, applicants may go months without hearing updates or scheduling site visits. In many instances, the JD process alone has taken three years or more before a final JD decision is issued, which causes uncertainty for a project applicant and delays advancement to their next stage of project review. We recognize that many of these delays are a product of staffing challenges and a lack of resources invested in staff recruitment, training, and retention to match regulatory programs' labor needs with expanding program demands. However, Corps HQs could still provide support to Districts to improve JD efficiencies through national guidance on a consistent process and corresponding project management.

To this end, ERBA recommends that the Agencies' prioritize JD processing improvements for greater consistency, predictability, and transparency in this next rollout of Rule I. ERBA urges the Agencies to develop a clear regulatory framework with timelines and notice requirements for responding to different categories of JD requests (i.e. PJDs vs AJDs). Compliance with timelines should be tracked per District for transparency and accountability in administration. If a District repeatedly fails to respond to an applicant's request or notice deadline, then the applicant should have a specified path to move forward or otherwise appeal to a higher level of leadership. Importantly, we recommend standardizing the process for conducting and completing JDs across Districts to offer applicants assurance on a uniform, predictable approach that facilitates project timelines and investment in restoration projects.

➤ *Address Feasibility Concerns in the Next WOTUS Rule*

Lastly, we recognize that some implementation challenges stem from underfunding of the Corps' Regulatory Program to sufficiently staff and train regulators. The Regulatory Program budget was largely flat-lined over the past decade, despite exponential growth in the number of mitigation projects submitted for review and ongoing oversight, in addition to increased permitting demands for

⁷ See Compensatory Mitigation for Losses of Aquatic Resources; Final Rule. 73 Fed. Reg. 70, p. 19618 (April 10, 2008). While we note that some Districts have recently stopped requiring AJDs, other Districts continue with the incorrect policy. Guidance from the HQ level would be beneficial to ensure a uniform requirement and process across Districts.

infrastructure and development projects. The subsequent reductions in staffing and training protract permitting and approval timelines, which negatively impacts the economy and the environment. Without a targeted funding increase for the Regulatory Program, the Corps will continue to fall short in meeting their own stated timelines and success criteria, and will be ill-equipped to support forthcoming infrastructure investments.⁸

Considering these chronic funding challenges and regulators' limited time, ERBA recommends that the Agencies keep the following considerations front of mind for implementation of Rule I: feasibility, available databases and tools, project management requirements and standards, and analyses based on objective aquatic features. Standardizing and streamlining how project managers perform JDs will also ensure regulators are organized and efficiently using their time to reach a timely JD decision.

➤ *Support for Specific Delineation Tools, Databases, and Memos*

Identification of publicly accessible data and tools informing regulator's determinations make JD outcomes more predictable for ERBA members and their clients, and expedite the JD analysis process for regulators. ERBA supports the use of the many long-standing tools identified in the supplemental material "Technical Support Document," especially remote sensing, USGS and topographical maps, aerial photography, gage data, satellite imagery, watershed studies, hydrologic modeling tools, scientific literature, effective aerial and satellite imagery LIDAR, the Antecedent Precipitation Tool (APT) and stream duration models (SDAMS).⁹ We emphasize the value of remote and drone technology as an efficient tool to maximize regulators' limited time and more quickly conduct analyses. To ensure Districts are equipped to consistently take advantage of this technology, ERBA recommends that Corps HQ invest recent appropriations and supplemental funding towards needed remote technology upgrades and training across all Districts.

A specific tool's utility may vary depending on the geographic region. Regional manuals should document which technical tools may carry more relevance and weight than others to guide local regulators' jurisdictional analyses. For transparency to the public, ERBA recommends that Corps' Divisions (or Districts) maintain a database or index of permissible tools that regulators may use to inform JDs. The database(s) could be organized by water feature and/or region, and should be updated via a public notice alert on a periodic basis as developments become available.

Accompanying a database of tools, ERBA recommends that Corps HQ and Districts improve public access to JD decisions and connected permit actions. While this information is technically available through Freedom of Information Act requests, mitigation providers could better monitor mitigation demand trends and proactively invest in permittees' anticipated mitigation credit needs if an updated database of JD records was proactively maintained and easily accessible at the District level. When supplies of

⁸ See ERBA's FY 2022 Energy and Water Appropriations Request [available here](#).

⁹ See Technical Support Document for the Proposed Revised Definition of Waters of the United States, Rule. November 18, 2021, available at <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0081>; and NAWM's comments on Rule I for specific details on certain tools' benefits and concerns.

mitigation credits are readily available to meet mitigation demand, the permitting timeline and corresponding regulator workload is streamlined for the benefit of both infrastructure and agency staff.

Conclusion

ERBA appreciates the opportunity to work with EPA and the Corps throughout this rule-making process. ERBA urges the Agencies to continue to include robust stakeholder participation in a transparent rule-making process to ensure the final result is a durable policy that establishes predictability, transparency, and certainty for permittees, mitigation providers, and regulators alike. An implementable and stable WOTUS policy will offer the regulatory certainty needed for private sector investment in mitigation options, and in turn reduce regulatory confusion and delays in permitting timelines for permittees and mitigation providers.

Thank you for your consideration of ERBA's comments. Please do not hesitate to reach out to Sara Johnson, Executive Director, at sjohnson@ecologicalrestoration.org with any questions or requests for further information. ERBA stands ready to serve as an industry resource to the Agencies on the mitigation provider perspective.

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