



Ecological Restoration Business Association

Growth Through Resilient Environmental Solutions

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ERBA Applauds Corps Guidance on Watershed Approach and Mitigation Post-Sackett

Last Friday, on World Water Day, Assistant Secretary for the Army Michael Connor issued guidance (“Post-Sackett Memo” [available here](#)) affirming the position of the 2008 Compensatory Mitigation Rule (“Rule”) that restoration of non-jurisdictional waters and wetlands at compensatory mitigation sites may offset impacts to jurisdictional waters, and in fact such restoration may have increased value for impacted waters under the Rule’s watershed approach.

The Ecological Restoration Business Association (“ERBA”) applauds the leadership of the ASA’s office in issuing this guidance, which supports mitigation providers’ delivery of existing and future mitigation credits that represent uplift for a full suite of ecological functions and services, not just those considered jurisdictional at the current moment. As we now approach almost a decade of swings in WOTUS interpretations, affirmation that mitigation credits for “non-jurisdictional” features will retain their ecological and permitting value under the 404 program helps to steady the impact of jurisdictional whiplash and rightfully acknowledges the contribution of mitigation projects to watershed restoration and the goals of the Clean Water Act (“CWA”).

The Post-Sackett Memo follows a formal request by ERBA to Corps leadership last September 2023, [available here](#), to issue a District-level directive on the Rule’s Preamble and watershed approach provisions that support application of “non-jurisdictional” credits to jurisdictional impacts. Notably, the Memo states:

- “Jurisdictional status is not determinative for whether aquatic resources can serve as compensatory mitigation.”
- “Non-jurisdictional aquatic resources may be even more valuable as compensatory mitigation after the Sackett decision as they are currently without federal protection.”
- “Including non-jurisdictional aquatic resources as compensatory mitigation, in particular for *existing and future* mitigation banks and in-lieu fee projects, ensures these resources continue to provide critical function to the watershed. [emphasis added]”

Besides the compensatory mitigation specific provisions, the Post-Sackett Memo authorizes the Corps to fully utilize Civil Works and Regulatory programs and resources to “protect, restore, and enhance our Nation’s waters and wetlands that are now more vulnerable.” This includes: consistent reporting on approved jurisdictional determinations and technical assistance resources so stakeholders can develop strategies to fill the gap of federal protections; incentivizing restoration of vulnerable features like ephemeral streams under the Civil Works’ aquatic ecosystem restoration program; and, implementing nature-based solutions in Civil Works planning and projects. Collectively, these actions and the support for mitigation investments will help the Nation “fill the gap” created by the Sackett decision’s rollback in federal protections.

ERBA will continue to stay closely engaged with the Corps and peer federal and state agencies on the Sackett response, including providing feedback to the ASA’s office on implementation of the Post-Sackett Memo at the District-level and advocating for policies that support multipurpose banking. As always, our industry stands ready to invest in ecosystem restoration for both efficient permitting compliance and achievement of the CWA’s goals.