



Ecological Restoration Business Association

Growth Through Resilient Environmental Solutions

www.ecologicalrestoration.org

To: U.S. Environmental Protection Agency, Department of the Army, Corps of Engineers

From: Ecological Restoration Business Association

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Date: April 23, 2025

Re: Waters of the United States Notice: The Final Response to SCOTUS

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-2025-0093 “Waters of the United States (WOTUS) Notice: The Final Response to SCOTUS” request for recommendations (the Proposal). ERBA represents businesses sponsoring efficient wetland and stream mitigation projects across the country, and businesses need certainty. Accordingly, ERBA advocates for a durable definition of WOTUS that allows for transparent, predictable implementation, which supports sustained investment in mitigation options. As both regulated entities and entities in the business of delivering regulatory compliance, finding durability and expediting high quality mitigation to market are ERBA’s chief concerns for all WOTUS rulemaking and other administrative action efforts.

Importantly, as a part of WOTUS implementation, ERBA recommends that the Agencies maximize permittees’ mitigation options as allowed under the 2008 Compensatory Mitigation Rule (2008 Rule), which states that mitigation credits for restoration of non-jurisdictional features may offset jurisdictional impacts. To ensure the next WOTUS definition is implementable across the country and clarifies long-disputed terms, ERBA recommends that the Agencies consider issuing guidance and investing in technology and e-permitting platforms to provide certainty and predictability on jurisdictional determinations (JDs). For recommendations on key terms that inform the WOTUS, we defer to peer organizations of practitioners with permitting and field expertise.¹

I. Durability for Economic Growth.

➤ *Flexibility in Mitigation Options.*

The Agencies should preserve Corps guidance issued in March 2024 that underscores the 2008 Rule’s direction that “jurisdictional status is not determinative for whether aquatic resources can serve as compensatory mitigation for the unavoidable impacts to waters of the United States authorized by Corps permits.”² This March guidance and the 2008 Rule provision protect the utility of existing and future mitigation investments from regulatory volatility and ensure that permittees have the most options available for their mitigation compliance. The more mitigation options available in the marketplace, the lower the cost of compliance for permittees. Whether incorporated as amended, reissued, or separate guidance on WOTUS implementation, ERBA strongly recommends that the Agencies encourage flexibility in mitigation compliance under the watershed approach of the 2008 Rule.

¹ For example, please see comments from the National Association of Wetland Managers (NAWM).

² Assistant Secretary of the Army. *Memorandum for Commanding General, U.S. Corps of Engineers*. March 22, 2024. See Section 4(b) citing to 73 FR 19594.

Relatedly, to ensure future mitigation options are expediently brought to market and available for permittees, the Agencies should embrace the pragmatic program management concepts in the Corps' recent memos on fast tracking mitigation approval decisions.³ These memos and their commonsense approaches for greater discipline and efficiencies in agency review processes were initiated during President Trump's first term and are more pertinent than ever considering the several Executive Actions on permit streamlining. Bringing more mitigation credits to market faster in accordance with these memos will make compliance easier and less expensive for permittees. We encourage national implementation of the memos' concepts alongside the rollout of any WOTUS changes.

➤ *Business Considerations.*

ERBA members are in the business of mitigation 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 disincentivizes 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.⁴ To put this economic impact in perspective, consider that the ecological restoration industry is now documented as providing as many, and in some instances more, private sector jobs as the well-known natural resources and construction sectors that we service.⁵

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 energy and 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 rulemaking only exacerbate these issues. Some ERBA members have delayed development of future mitigation options due to WOTUS' ongoing uncertainty.

➤ *Suggestions to Inform a Durable WOTUS.*

Considering the history of WOTUS iterations and litigation, ease of implementation and the legal defensibility of the forthcoming WOTUS rule is critical to achieving durability. ERBA is not in a position to comment on the specifics of what water features should be subject to federal jurisdiction. Our advocacy efforts are chiefly focused on i) speeding up the delivery of mitigation options to market for permittees and ii) timeliness and predictability on mitigation requirements in final permit decisions. While keeping these primary goals in mind, ERBA offers a few suggestions based on our observations over decades of Clean Water Act permitting.

³ Connor, Michael L. "Memorandum for Commanding General, U.S. Army Corps of Engineers Re: Improving U.S. Army Corps of Engineers Timeline Compliance with the 2008 Compensatory Mitigation Rule." September 16, 2024; Moyer, Jennifer A. "Memorandum for Division Regulatory Program Managers and District Regulatory Chiefs Re: Principles of Delivery for Mitigation Bank Decisions." September 19, 2024.

⁴ 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>.

⁵ *Id*; And also consider the economic value of the ecosystem services that ecological restoration firms deliver; see L.M. Brander, R. de Groot, J.P. Schägner, V. Guisado-Goñi, V. van 't Hoff, S. Solomonides, A. McVittie, F. Eppink, M. Sposato, L. Do, A. Ghermandi, M. Sinclair, R. Thomas, *Economic values for ecosystem services: A global synthesis and way forward*, Ecosystem Services, Volume 66, 2024, 101606, ISSN 2212-0416, <https://doi.org/10.1016/j.ecoser.2024.101606>.

To be durable, the next WOTUS rule must 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 experience, we recommend that the next WOTUS Rule clearly define additional criteria and categories for jurisdictional waters that are informed by physical field indicators, readily available science and mapping, and rely less on the case-specific assessments.

The Agencies' March 12, 2025 joint memorandum on "continuous surface connection" (the CSC Guidance) supersedes the varying case-specific policy memoranda in an attempt to provide clarity on discrete features and "continuous surface connection." However, the CSC Guidance states that certain "line drawing" situations are difficult and the Agencies "will work to resolve these scenarios on a case-by-case basis and provide further clarity when appropriate to guide future implementation." This case-by-case approach leaves the regulated public still guessing on what features may be jurisdictional or not depending on geography and the latest record of JDs. To offer a more predictable framework for assessing jurisdiction, we recommend consideration of the practical points made by Justice Kavanaugh in his primary concurrence to the *Sackett* decision.⁶

As the majority decided in *Sackett*, Justice Kavanaugh disagreed with the case-by-case approach to determining jurisdiction, which was characteristic of the former "significant nexus" test. But he went on to supplement the majority's adjacency test (i.e., adjacent is strictly adjoining) with adjacency also encompassing situations when a wetland is separated from a covered water only by a man-made feature, natural river berm, beach dune, or the like. Essentially, the subject wetland would be adjoining the covered water *but for* the man-made feature or natural sediment barrier that would not be present *but for* a surface connection (potentially with temporary interruptions) between the subject wetland and covered water, such as a berm or dune. Justice Kavanaugh's supplemental test offers an approach to defining "continuous surface connection" that allows for an easy field assessment of jurisdiction based on physical indicators. His sound approach also aligns with accepted understandings of wetland adjacency that are familiar to regulated entities and those providing expedient compliance solutions, like ERBA members. Justice Kavanaugh justifies his supplemental test, in part, through highlighting the pragmatic considerations on infrastructure flooding, water storage, and downstream pollution. These are just a few of the issues that the public, including regulated entities, have come to expect the Clean Water Act to address and account for in the WOTUS definition.

ERBA members have also been watching Corps' Districts respond to varying District Court interpretations on the role of "indistinguishability" in the "continuous surface connection" test. Rather than confusing the test for continuous surface connection, for ease of implementation, we recommend that the next WOTUS rule clarify that indistinguishability informs the continuous surface connection assessment and is not a separate threshold test that must be met. We refer to the more specific comments from the National Association of Wetland Managers (NAWM) on this topic.

Again, for ease of implementation, the Agencies should consider where there is opportunity to use bright line tests and/or commonly accepted definitions or maps to establish categories for waters and aquatic features that are *per se* jurisdictional or non-jurisdictional. The Prior Converted Cropland (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

⁶ *Sackett v. Environmental Protection Agency*, 598 U.S. 651, 715 (2023), (Kavanaugh, J., concurring).

that the next WOTUS rule 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.

II. WOTUS Implementation Recommendations.

➤ *Training Resources/Guidance Manuals*

ERBA recommends additional, comprehensive required training for Regulatory project managers to implement the next WOTUS rule. 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 particular interpretations of WOTUS or hesitate to issue determinations due to uncertainty around a different forthcoming rule.

Clarity on the key definitions of "continuous surface connection" and "relatively permanent" will help, but additional field resources are needed at the national and regional levels. 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 the rule 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 assessments of "continuous surface connection" for finding a wetland adjacent and jurisdictional, and the "relatively permanent" status of a water body.

ERBA recommends making all relevant 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 because 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.

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 several 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. Some of these delays are symptomatic of understaffed Districts. Nevertheless, even with a reduced workforce, efficiencies could be realized by standardizing the JD process through national guidance, timelines, checklists, corresponding project management, and greater use of technology.

To this end, ERBA recommends that the Agencies' prioritize JD processing improvements for greater consistency, predictability, and transparency in the next WOTUS rule rollout. 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. Additionally, 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.

Relatedly, we recommend that the Agencies increase transparency in AJD decisions by posting final AJDs and any relevant maps to Corps Districts' websites to inform the public and future Corps decisions.⁷ Increased transparency should also help states better understand where they may want to pick up permitting, and what resources are needed to empower state programs, an issue repeatedly raised by the Environmental Council of the States.⁸

➤ *Address Feasibility Concerns in the Next WOTUS Rule*

We recognize that some implementation challenges stem from staffing and training limitations within the Corps' Regulatory Program. The Regulatory Program's investments in training and technology were 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 infrastructure and development projects. These reductions and years of falling behind in technology now protract permitting and approval timelines, which negatively impacts the economy and the environment.

To efficiently administer the program with a reduced workforce, we recommend assessing whether any funds recently saved can be reallocated to support maintaining permit staffing levels and, equally importantly, investments in technology for e-permitting and corresponding training so that regulators are working smarter and saving time on historically burdensome and inefficient paperwork. We echo comments from our peer organization, the Environmental Policy Innovation Center, on this topic and encourage the Agencies to build on the successful dashboard and program management tools quickly implemented by the Virginia Department of Environmental Quality on roughly a one-year time frame.⁹

Again, considering the Agencies' program obligations and regulators' limited time, ERBA recommends that the Agencies keep the following considerations front of mind for implementation of WOTUS: 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*

⁷ This recommendation is another aspect of the March 2024 guidance that should be preserved. See Section 4(a) of the Assistant Secretary of the Army. *Memorandum for Commanding General, U.S. Corps of Engineers*. March 22, 2024.

⁸ See ECOS' May 23, 2023 statement available here: <https://www.ecos.org/documents/press-release-on-sackett-v-epa-and-importance-of-state-wetland-stewardship/>.

⁹ See the dashboard at: [myDEQ Portal](https://mydeqportal.com/).

Publicizing the same data and tools that inform regulators' determinations makes JD outcomes more predictable for ERBA members and their clients, and expedites the JD analysis process for regulators. As mitigation experts, ERBA members have seen the pros and cons of many long-standing JD tools, including 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 assessment models (SDAMS). 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 available funding in needed remote technology upgrades and training across all Districts.

ERBA members have also seen the challenges that result when guidance manuals are overly complicated to implement, such as when manuals rely on evaluation of multiple factors or field tests. Specifically, the Corps' Engineer Research and Development Center has created multiple "Streamflow Duration Assessment Method" (SDAM) manuals and associated assessments for various regions of the county (e.g., see Mazor et al. 2021 and James et al. 2023). While informative and scientifically rigorous, these manuals and assessments are technically complex and require specialized knowledge of complicated stream concepts including fluvial geomorphology or benthic macroinvertebrate communities; they do not allow the regulated public to easily assess whether certain waters may be found "relatively permanent" and ultimately jurisdictional. If SDAMs continue to serve as a resource, they should be accompanied with available public training and user guides to help landowners, mitigation sponsors, and other stakeholders easily understand how they will be applied in their geography.

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 (FOIA) 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. To protect sensitivities around property rights, AJD data could be aggregated to the HUC 8 level, versus the parcel level. When supplies of 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 rulemaking process. ERBA urges the Agencies to include experienced stakeholder participation in a transparent rulemaking process to ensure the 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.