Ecological Restoration Business Association

Growth Through Resilient Environmental Solutions

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To: U.S. Environmental Protection Agency, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army
From: Ecological Restoration Business Association
Filed to Docket No.: EPA-HQ-OW-2025-0322
Date: January 5, 2026

Re: Updated Definition of "Waters of the United States"

The Ecological Restoration Business Association (ERBA) appreciates the opportunity to provide comments to the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (Army) (collectively, the Agencies) in response to the docket EPA-HQ-OW-2025-0322 Updated Definition of "Waters of the United States" (the Proposed Rule). 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 the Waters of the United States (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 related regulatory efforts.

Importantly, as a part of WOTUS implementation, ERBA recommends that the Agencies continue to allow mitigation bank credits for non-jurisdictional features to offset jurisdictional impacts, which is explicitly addressed in the 2008 Compensatory Mitigation Rule (2008 Rule) and maximizes the mitigation credit options available to permittees for faster permitting.

ERBA also recommends several revisions to the Proposed Rule to facilitate transparent and predictable implementation on the ground. Definitions under the Proposed Rule reflect a significant change in the historic 50-year scope of the Clean Water Act's (CWA) protection, well-established practices regarding the delineation of wetlands, and rely on implementation methods that will result in unpredictable case-by-case determinations. The loss of longstanding federal protection for certain waters may create public safety concerns for downstream and coastal communities, which many states and localities are ill-equipped to proactively address through their own regulations and resources. **We recommend a more moderate approach to the WOTUS definition that adheres to the *Sackett* decision, *Rapanos* plurality, and lessons learned on WOTUS implementation challenges. Regarding a few key terms of WOTUS, we recommend a few refinements based on our decades of practitioner field experience, particularly on the concepts of seasonality and surface water monitoring requirements.** We also refer to our peer organizations representing states and practitioners with additional permitting and field expertise.[1]

[1] For example, please see comments from the Environmental Council of the States (ECOS) and National Association of Wetland Managers (NAWM).

I. Mitigation Policy to Drive Economic Growth.

- *All aquatic resources remain eligible to serve as compensatory mitigation.*

The Agencies should preserve the U.S. Army Corps of Engineers (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 WOTUS authorized by Corps permits."[2] This March guidance and the 2008 Rule provision help protect the utility of existing and future mitigation investments from regulatory volatility and ensure that permittees have mitigation credits available to accelerate permit issuance. The more mitigation credit options available in the marketplace, the lower the cost of compliance for permittees seeking authorization under a myriad of federal regulatory requirements. Whether incorporated as amended, reissued, or separate guidance on WOTUS implementation, ERBA strongly recommends that the Agencies encourage and the Corps implement flexibility in matching mitigation credits for now non-jurisdictional aquatic features with jurisdictional impacts, as allowed under the watershed approach of the 2008 Rule.

With this next WOTUS definition, the Agencies note that state programs may be established to fill the gap from a change in federal jurisdiction. If new state programs are established, existing mitigation banks and new mitigation banks undergoing the Interagency Review Ream (IRT) process may need to have credits approved under new state-level authorities. This can be accommodated under the existing IRT structure established in the 2008 Rule and there is established precedent for states with robust permitting programs being active in IRT decision-making, at times serving as co-chairs of the IRT. As the regulatory landscape changes, we ask that the Agencies work effectively with their state partners on the IRT and with bank sponsors to ensure existing credits and new bank credits are approved for application as compensatory mitigation under new programs developed by states and tribes in response to WOTUS shifts at the federal level. Expediting approval and ensuring federal agency support for existing federally approved banks under state or tribal programs will also help ensure credits are readily available under these new programs to meet permittee demand and avoid bottlenecks.

Relatedly, to ensure future federal mitigation credits 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.

- *Adherence to the Mitigation Hierarchy*

ERBA members are an important partner in the CWA Section 404 permitting process, identifying and implementing restoration projects in advance of impacts. This value is recognized in the mitigation

[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.

[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.

hierarchy established in the 2008 Rule at 33 CFR § 332.3(b), which established a preference for advance mitigation provided first via bank credits, followed by in-lieu fee credits and then permittee-responsible mitigation. The 2008 Rule recognizes that bank credits are preferable for permittees, the Agencies, and the resource because bank credits represent an already approved mitigation plan with real estate and financial assurances in place, achievement of site-specific performance milestones, and larger more ecologically valuable parcels, all of which reduce risk and uncertainty. ERBA members remain committed to providing these high quality mitigation bank credit options to expedite permit issuance, and request that in issuing permits the Corps continue to emphasize the importance of adherence to the mitigation hierarchy.

The past decade of persistent uncertainty surrounding the definition of WOTUS can deter investment in mitigation banks, and some ERBA members have delayed development of future mitigation options due to the constant regulatory swings. When investment retracts from third party mitigation solutions, fewer high quality mitigation 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 jobs and infrastructure growth. Because most mitigation projects require years of planning and capital expenditure upfront, continuous regulatory uncertainty, and protracted rulemaking only exacerbate these issues. The lost or delayed investment in mitigation banks also creates a lag for efficient permitting – the Corps permit data finds that permitting is 50% faster when credits are readily available for permittees.[4] The Agencies and the Corps can help offset uncertainty and incentivize investment in mitigation banks through adherence to the mitigation hierarchy.

- *Economic Considerations for the Regulatory Impact Analysis.*

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 dis-incentivizes investment in wetland and stream restoration and subsequently places economic growth in the broader ecological restoration industry—an estimated $25 billion in annual output and 221,000 jobs—at risk.[5] To put this economic impact in perspective, consider that the ecological restoration industry is now documented as providing as many (and in several instances more) private sector jobs than the well-known natural resources extraction and construction sectors that we service.[6] Our industry also encompasses a range of small businesses that support project delivery such as local nurseries, consultants, and equipment operators.

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[4] U.S. Army Institute for Water Resources. *The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources.* (October 2015) 2015-R-03, available at: https://www.epa.gov/sites/default/files/2015-11/documents/mitrule_report_october_2015.pdf.

[5] 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.

[6] *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..

ERBA recommends that the Agencies' EO 12866 Regulatory Impact Analysis (RIA) more fully account for the social cost of the Proposed Rule, including potential impacts to the mitigation and restoration industry that may result from a new definition of WOTUS. The market for compensatory mitigation banking in response to the CWA Section 404 permitting program is arguably the leading and most successful environmental market in the country due to a robust regulatory driver and predictable standards.[7] This unique market leverages private capital and an entrepreneurial private sector solution to efficiently answer regulatory challenges for client permittees. Overlooking or undervaluing the market activity of such a robust market in the RIA would be a major omission from a comprehensive and defensible RIA. We note that there are several studies on the industry's economic footprint, with numerous mitigation and restoration providers being small businesses. We recommend that the RIA consider the following statistics:

- Restoration supports as many as 33 jobs per $1 million invested with an economic output multiplier of between 1.6–2.6 (multiplier for total economic output from investments), and an employment multiplier of between 1.5 and 3.8 (the number of jobs created for every restoration job). Both multipliers are comparable to the ranges of several other industries, including traditional energy sectors, which support approximately 5.2 jobs per $1 million invested.[8]
- A 2014 study found that the broader ecological restoration industry supported direct employment of 126,000 individuals, with indirect and induced employment of 95,000 additional individuals (totaling 221,000 jobs).[9] The study also found direct economic impacts of $9.5 billion, and total impacts of $24.9 billion (USD2015), or $12.9 billion and $34.05 billion, respectively, in today's dollars when adjusted for inflation.[10]
- A follow up study, published in 2023 and based on data collected from 2019, focused specifically on the mitigation industry subset of ecological restoration, which represents the industry segment completing compensatory mitigation work, and found this sub industry alone supports $3.5 billion in direct economic output and employs ~21,000 individuals, with total output (direct, indirect, and induced) of over $9.6 billion and support for over 53,000 jobs.[11] The studies demonstrate employment grew in the mitigation industry by 24.7 % and economic output by 32.6 % between 2014 and 2019, with labor income increasing at a compound annual growth rate (CAGR) of 5.25 percent.
- A closer review of the data collected in 2014 and 2021 revealed that over 90% of business respondents were from firms with less than 500 employees, 42% of the respondent businesses had under $1M in total revenue, and 68% of respondent businesses had less than $1M in revenue derived from ecological restoration services specifically.[12] Review of the 2021 data and report published in 2023 found that the industry has a median firm size of 13 employees with 71% of the firms employing fewer than 100 persons, about 22% of the industry firms have

[7] *See* Fig. 1 "Legal Drivers" on p. 8 of BenDor (2023).

[8] BenDor T, Lester TW, Livengood A, Davis A, 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; Garrett-Peltier H, Pollin R. Job Creation per $1 Million Investment, *The jobs are in the trees*, Grist (2010); Price Waterhouse Coopers, *The Economic Impacts of the Oil and Natural Gas Industry on the U.S. Economy in 2009: Employment, Labor Income and Value Added* (2009), www.api.org/policy-and-issues/policy-items/jobs/economic-impacts-of-oil-natural-gas-industry-on-us-economy-2011; Associates Southwick, *The Conservation Economy in America: Direct Investments and Economic Contributions* (February 18, 2013), National Fish and Wildlife Foundation.

[9] BenDor T, Lester TW, Livengood A, Davis A, 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.

[10] *Id*.

[11] BenDor T, Kwon J, Lester TW (2023) Assessing the size and growth of the US wetland and stream compensatory mitigation industry. PLoS ONE 18(9): e0285139. https://doi.org/10.1371/journal.pone.0285139.

[12] Data shared by Professor Todd BenDor in a December 9, 2025 meeting with ERBA.

annual revenues less than $500,000, and 56% have annual revenues less than $5 million. These statistics qualify many businesses in the industry as "small businesses" under 13 CFR 121 and thus necessitate a small business review in accordance with the Small Business Regulatory Enforcement and Fairness Act.

- The Agencies state that they convened a small business listening session that focused on the perspectives of permittee small businesses, i.e. those that are applying for permits under the current CWA Section 404 program. To fulfill its statutory obligations, the Agencies should also contact the ecological restoration industry that services applicants to assess the likely economic impact of this rulemaking on these entities, as well as contact other small business sectors that rely on clean water for recreation, sportsmen, and industrial uses.

The RIA should be redone to fully evaluate the social costs of the Proposed Rule, including impacts to the restoration industry resulting from a change in CWA Section 404 permitting activity and a change in authorized impacts requiring mitigation. Again, the restoration industry is an important partner in providing mitigation solutions to enable efficient and responsible economic development. While the Agencies have noted that there may be some forgone benefits from avoidance, minimization, and mitigation that is no longer required under Section 404 following this jurisdictional change, to evaluate the full social costs of the Proposed Rule, the impacts to the restoration industry must be considered, alongside deregulatory cost savings for permittees. Given the potential scope of jurisdictional change contemplated in the Proposed Rule, it is reasonable to expect the regulation will have broader economy-wide impacts—evaluating only compliance costs will fail to capture the full social cost of the regulation. As noted in EPA's 2024 *Guidelines for Preparing Economic Analyses – Third Edition,* "Social cost represents the total burden that a regulation will impose on society, defined as the sum of all opportunity costs incurred as a result of the regulation…Likewise, social cost is distinct from but includes the cost of compliance borne by the regulated entity."[13] In addition to the impacts to the restoration industry, the social cost should also evaluate how the loss of Clean Water Act protections will contribute to increased flooding and pollution risks, and associated costs to communities and other industries (e.g. sportsmen and conservation recreation activities).

While the Agencies assert that the Proposed Rule would not contain an unfunded mandate as defined by the Unfunded Mandates Reform Act (UMRA), we question if that is consistent with the Agencies' assertion that states and tribes may enact new laws or regulations in response to a change in Federal jurisdiction. As expressed by peers like ECOS, many states are also under resourced and ill-equipped to quickly adopt their own dredge and fill regulations to fulfill the goals of the CWA. We suggest that the RIA more thoroughly evaluate and quantify cost estimates that account for the indirect and implicit costs on state and local governments, as required by UMRA. The mitigation community is prepared to work with state or tribal governments to develop high quality compensatory mitigation programs for any new state or tribal regulatory programs that may be established following changes in federal jurisdiction. However, we recognize that these state and local level agencies often have limited resources, which can constrain their ability to develop and execute these programs. Additional quantification from the Agencies on the resources required to develop and operate a robust regulatory program can help inform state budgeting and program design. The Agencies should also consider resources, financial and otherwise, that could be made available for interested states and tribes reacting to the Final Rule to continue to protect the nation's natural flood control and downstream pollutant filtration systems.

[13] U.S. EPA. 2024. Guidelines for Preparing Economic Analyses (3rd edition). Report number EPA-240-R-24-001. Washington, DC.

- *Practitioner and Permittee Considerations.*

ERBA recommends that the RIA also factor in the impact of implementation challenges and associated delays on permittees, states, and tribes in the Final Rule's RIA. As discussed above, the uncertainty of the rulemaking could slow investment in mitigation credits, contributing to a credit supply bottleneck and permitting delays, which have financial implications for permittees. The combination of a departure from the longstanding use of physical indicators to determine jurisdiction in the Corps' Wetland Delineation Manual plus the introduction of new terms and concepts present undeniable challenges for the agencies, permittees, and practitioners servicing permittees to understand how the Proposed Rule will be implemented in the field, all of which will contribute to delays.

Permittees will also struggle from delays and increased costs trying to now fund and/or navigate potentially 50 different approaches to aquatic resource protections versus a single primary federal program. For example, recent research identified that at least 24 states are currently dependent on the federal CWA program and do not have state permitting schemes regulating dredge and fill activities in the state's waters.[14] For these states and even those that have some semblance of an existing program, each state approaches their particular permitting scheme and processes differently, which places permittees in the challenging position of navigating a myriad of state permitting processes as their projects cross state lines.

The loss of a federal jurisdictional nexus has far-reaching implications for widely relied-upon federal permitting frameworks. In the absence of CWA jurisdiction, many landowners will be forced to pursue individual Section 10 permits under the Endangered Species Act (ESA), a process that lacks established agency timelines, rather than the more efficient and well-established Section 7 consultation. Currently, many Corps Districts expediently authorize minor impacts through a reliance on general permits and streamlined permitting procedures supported by programmatic consultations under the ESA, Magnuson-Stevens Act, and other federal laws. These programmatic consultations accelerate the permitting process for project developers and facilitate the development of mitigation options that offset impacts to aquatic resources and species. Eliminating access to programmatic consultations shifts the regulatory burden entirely onto individual landowners, forcing them to navigate complex, duplicative consultation processes, thereby increasing costs, prolonging timelines, and undermining regulatory certainty for permittees and Agencies alike.

II. Definition Suggestions to Inform a Durable and Implementable 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. 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 the following recommendations based on our decades of experience as practitioners helping permittees navigate CWA permitting.

Relatively Permanent Waters & Continuous Surface Connection – "wet season"

ERBA recognizes the importance of incorporating the seasonality concept into the Final Rule when defining Relatively Permanent Waters, and how a "continuous surface connection" is established. ERBA

[14] Kihslinger, R., McElfish, J.M., Jr., Luedke, H., and Ray, G. (2023). Strategies for States/Tribes for Protection of non-WOTUS waters: A Taxonomy. © 2023 Environmental Law Institute, Washington, D.C.

disagrees with the Proposed Rule's consideration of an alternative approach that would only define perennial (i.e. by definition strictly permanent) waters as jurisdictional under the CWA. Such an alternative would effectively ignore and write out the *Sackett* majority's and Justice Scalia's *Rapanos* opinion that "relatively permanent" waters, "seasonal rivers," and waters with "temporary interruptions in surface connection" are to be afforded protections under the CWA (*emphasis added*). As the Agencies themselves even discuss in a portion of the Proposed Rule:

> Requiring permanent indistinguishability based on permanent surface water in both the paragraphs (a)(1) through (3) and (a)(5) water and the adjacent wetland would read the modifier ''relatively'' out of the interpretation of ''relatively permanent"… and render the vast majority of wetlands nonjurisdictional, which the agencies propose is not the best reading of the CWA under Sackett. It would also ignore the Rapanos plurality's statement that ''relatively permanent'' includes ''seasonal'' waters, such as those that do not flow during dry months."[15]

Accepting that seasonality is essential and required by the U.S. Supreme Court in the forthcoming Rule, the question then is the best approach for the Rule and subsequent implementation guidance to codify seasonality. A stated goal of the Proposed Rule is ease of implementation, but as currently described implementing "wet season" will still require the average landowner to hire consultants and wait through potentially several seasonal changes to definitively define "wet season" to inform Approved Jurisdictional Determinations (JDs). Additionally, due to the variability between and nature of the 38 Corps Districts, the Proposed Rule runs the risk of 38 different interpretations and protocols for wet season, which will create more confusion and uncertainty in implementation.

ERBA strongly recommends simplifying the Proposed Rule's consideration of a fixed national definition for "wet season" by stating that the term will be defined in updates to the Corps' Regional Supplements to the 1987 Wetland Delineation Manual and the National Ordinary High Water Mark (OHWM) Field Delineation Manual for Rivers and Streams (Jan 2025) (the Regional Supplements). These Regional Supplements are the actual documents that typically inform Corps delineations. Their routine update process can address implementation challenges, formally involve knowledgeable stakeholder input, and include appropriate regionalization of "wet season" requirements. Relying on the Regional Supplements offers the regulated public and agencies use of a proven process rather than a mix of various tools that may be inconsistently weighed and applied nationally. Regional flexibility would also support integration with existing or future State aquatic resource protection programs, consistent with the intent of this rulemaking.

Considering that aquatic resources and precipitation are dynamic systems with regional and temporal variation, ERBA recommends that the Regional Supplements incorporate some workable flexibility into their region specific "wet season" definitions. When regionally defining "wet season," the Agencies will necessarily rely on past data that inherently lags behind current wet season conditions. A permissible deviation range will help account for this data flaw and expected fluctuations (e.g. the occasional "dry spell") over time. Further, when determining the permissible deviation range, the Agencies should also look at the region's precipitation and flow over a period of several versus a single year. For instance, a feature may be jurisdictional if it experiences flow during a wet season across an average number of years (e.g. 5 years), regardless of the flow that may be greater or less than the defined time range in one year.

[15] *Updated Definition of "Waters of the United States,"* 90 Fed. Reg. 52498, 52528 (November 20, 2025) (to be codified at 33 CFR Part 328).

We also recommend that the Final Rule avoid extensive discussion or prescriptive direction on the exact tools that will be used to inform "wet season," like the Web-Based Water-Budget Interactive Modeling Program (WebWIMP). Instead, the Final Rule should simply state that the Regional Supplements will provide direction on the appropriate tools and efforts should be made to use tools based on recent, vetted, and publicly available data. For example, "Streamflow Duration Assessment Method" (SDAM) manuals are now published in almost every Corps District, were typically developed in the past five years or less, and are a tool designed to adapt and account for seasonal variation (the issue at hand with "wet season"). Contrast these types of tools with the WebWIMP dataset, which has not been updated since 2009.[16] In addition to being over 15 years old, the WebWIMP dataset was not created with a seasonality or CWA jurisdictional application end use objective.

Continuous Surface Connection and "Adjacent" versus "Abutting" Wetlands

As expressed in ERBA's April 2025 comments, we remain concerned that interpreting adjacent wetlands as abutting flies directly in the face of the plain language and understanding of the term "adjacent" as deliberately used by Congress in the statutory text of the CWA. This presents a major litigation vulnerability and threatens the durability of the *Sackett* majority opinion and forthcoming Rule on which is it based. To offer a more predictable framework for assessing jurisdiction, we urge the Agencies to consider the reasonable arguments by Justice Kavanaugh in his *Sackett* primary concurrence.[17]

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.

There also is precedence for courts and the Agencies to weigh the practical points of Justice Kavanaugh's concurrence. A concurrence signals to lower courts, litigating parties, and future Supreme Courts how the law might develop. Justice Jackson's famous concurrence in *Youngstown Sheet & Tube v. Sawyer* (1952) was not the majority opinion, yet it became the dominant framework for analyzing executive power. Justice O'Connor's concurrence in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* (1995)—another case involving the interpretation of environmental statutory language—has similarly shaped how courts apply the ESA's "harm" definition. And Justice Kennedy's concurrence in *Rapanos* controlled wetlands law for seventeen years, despite being joined by no other justice.

[16] University of Delaware. 2009. "WebWIMP: The Web-Based, Water-Budget, Interactive, Modeling Program." http://cyclops.deos.udel.edu/wimp/public_html/index.html.

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

Here, Justice Kavanaugh's *Sackett* concurrence carries particular weight because it identifies what four sitting justices believe is an oversight and inconsistency in the majority's statutory interpretation. Kavanaugh provides a textual foundation—the plain meaning of "adjacent"—that a future Court or defending Agencies could invoke. And it comes from a noted conservative Justice writing alongside the Court's liberal Justices, suggesting this is not a mere ideological divide but a genuine dispute about what the statute says. The Kavanaugh concurrence is significant and based on the same textual arguments of the majority opinion—it will likely be cited in future litigation and thus deserves due consideration now by the Agencies to ensure durability and defensibility in the next WOTUS rulemaking.

Continuous Surface Connection – New Wetland Surface Water Requirement

ERBA members have several concerns about the implementation and durability of the Agencies' newly created requirement that the scope of a jurisdictional wetland will be determined by the extent of persistent surface water presence in the wet season. Relying on surface water as the determinative factor is problematic because persistent surface water presence is difficult to determine (e.g. often requires at least a year of monitoring well data), costly, and ultimately is not required by the *Sackett* majority's direction on "continuous surface connection." The practical implementation challenges of a new surface water presence requirement undermine *Sackett*'s direction to issue an implementable bright line test on jurisdiction that is accessible and timely for the average landowner. Determining on a case-by-case basis where the line is for a particular wetland's surface water presence will cause costly delays for permittees, landowners, and the agencies, likely resulting in inconsistent approved JD outcomes, who may then simply resort to seeking a preliminary JD to avoid the uncertainty, again at odds with the goals of *Sackett*.

In the *Sackett* majority's attempt to establish a bright-line test via "continuous surface connection" between wetlands and relatively permanent waters, the Court did not also elaborate on additional criteria or physical markers that would result in determining portions or pockets of a wetland as jurisdictional based on a complex and consultant dependent delineation process. Wetlands often experience phases of surface water inundation depending on several factors, with inundation potentially occurring in sync with the wet season or outside of it during non-consecutive months. Wet-season surface water presence cannot be reliably assessed during a standard wetland delineation, but requires multiple site visits to prove jurisdiction, which would impose unreasonable burdens on landowners, agencies, and permittees. Further, the Proposed Rule's reliance on the National Wetlands Inventory (NWI) modifiers is inappropriate because many wetlands remain unmapped or inaccurately characterized on the NWI.

As an alternative and at a minimum, we recommend that the Final Rule default to relying on the widely accepted and familiar physical indicators of jurisdiction (i.e., hydrophytic vegetation and hydric soils, etc.) as acceptable surrogates for surface water presence to offer all parties an implementable approach aligned with *Sackett*. If viewed as essential by the Agencies (e.g. to address permafrost wetland concerns), the surface water presence factor could still be an option as well for determining the extent of a wetland but a longer process that would be opted into at the at the discretion of the permittee/landowner applicant. As another alternative, the Agencies could consider following the path of the Navigable Waters Protection Rule (NWPR) that defined adjacent wetlands to include those abutting or those wetlands that are inundated by flooding (an event causing a continuous surface connection) from a jurisdictional water in a typical year.

The newly introduced surface water presence requirement is a significant deviation from prior practice and not a practicable standard for implementation. It will create additional cost, risk, and uncertainty for

landowners, which is in direct opposition to the Court's objective in *Sackett*, and is not justified by the majority's opinion in *Sackett*. Again, we urge the Agencies to eliminate this new layer of delineation complexity and instead default to use of familiar physical indicators as surrogates for surface water presence to avoid a protracted review that may or may not splice wetlands into jurisdictional and non-jurisdictional sections.

Ditches

Rather than treating "ditches" as their own category, we recommend simply addressing ditches through the definition of tributaries and the longstanding ditch exemptions (e.g. CWA 404(f) drainage ditch maintenance exclusion). For many areas of the country, trying to determine whether a subject ditch is a "constructed or excavated channel" will require episodic review of historic aerial photographs and be time consuming and difficult to implement. The Proposed Rule acknowledges that lakes and ponds may function as a part of tributary networks and this same logic should apply to channels or ditches that have taken on the functions of an otherwise jurisdictional stream or other tributaries. As noted by other commentors during the April 2025 comment period, ditches in non-jurisdictional waters and ditches with no more than ephemeral flow will already be excluded by other provisions of the Proposed Rule. Industry and use-specific ditch features will also remain exempted from CWA jurisdiction under the existing ditch exemptions for agricultural uses and maintenance.

Building on the recommendation to eliminate the "ditches" category, ERBA also recommends that the Agencies consider returning to the NWPR approach. Under the NWPR, jurisdiction was preserved when a tributary conveys flow to a downstream water through a channelized non-jurisdictional feature, subterranean river, culvert, dam, tunnel, or similar artificial structure. Severing jurisdiction in these scenarios, as in the Proposed Rule, is inconsistent with the CWA's intent, undermines public safety, and is inconsistent with the Proposed Rule's logic on other tributary conveyances and features.

Prior Converted Cropland

ERBA does not agree with the proposed definition of Prior Converted Cropland (PCC). Within "Section a. *Basis for the Proposed Definition*," the Agencies state a goal of consistency between the CWA and the Food Securities Act (FSA) when PCC land is involved. However, the Proposed Rule's definition is not consistent with past PCC determinations. The Proposed Rule includes land in support of agricultural uses, which includes, but is not limited to, grazing, haying, wildlife conservation, soil conservation, etc. which would be considered PCC. Historically, under the FSA the U.S. Department of Agriculture (USDA) PCC determinations were for commodity crops only (corn, cotton, grains, etc.) and did not extend to broader agricultural uses as outlined in the Proposed Rule's new definition. Cessation of typical commodity cropping activities for over five years could allow such a degraded wetland to reestablish some of its natural and original conditions. The broad interpretation of 'agricultural purposes' in the Proposed Rule includes many activities that would qualify to maintain the PCC exclusion and not be considered as abandonment. But many of these activities (e.g. grazing, haying, wildlife management) are not as intensive as typical commodity cropping. Allowing these activities to maintain PCC status for 'any period or duration of time' could result in impacts to wetlands that are not as altered as was intended by the Agencies' addition of a PCC exclusion in the 1993 definition of waters of the United States.[18]

ERBA recommends and supports the Agencies' alternative approach that only the USDA can make a PCC determination. This would maintain and achieve consistency, per the Proposed Rule's discussion, because the USDA has decades of experience making PCC determinations as authorized by the FSA. It

[18] *See* 58 Fed. Reg. 45008.

would also allow for efficiency given the experience the USDA has, which the EPA and Corps have historically relied on.

III. Other WOTUS Implementation Recommendations.

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

ERBA recommends and supports national standardization of JDs across the 38 Corps Districts, while emphasizing that such standardization must also be implemented at the regional level and applied consistently among individual reviewers to ensure predictable and equitable outcomes. 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. Even under a reduced workforce environment, efficiencies could be realized by standardizing the JD process through national and/or regional guidance, timelines, checklists, corresponding project management, and greater use of technology.

To this end, ERBA recommends that the Corps prioritize JD processing improvements for greater consistency, predictability, and transparency when implementing the Final Rule. ERBA urges the Corps to develop a clear regulatory framework with timelines and notice requirements for responding to different categories of JD requests (i.e. PJDs vs AJDs). This could be accomplished through an update to Regulatory Guidance Letter 16-01 or supplemental guidance memo to the field on RGL 16-01. Compliance with timelines should be tracked per District for transparency and accountability in administration. We understand that a Corps' Mission Success Criteria relates to JD processing timelines, however unless this performance metric is published per District it will not have the intended accountability and oversight benefits. If a District repeatedly fails to respond to an applicant's request or notice deadline, then the JD timeline guidance memo should outline that the applicant can formally elevate the issue via an appeals process under 33 CFR 331 or through a meeting with the District Commander via the District's Regulatory Chief. 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 Army and Corps increase transparency in AJD decisions by requiring all Districts to post final AJDs and any relevant maps to Corps Districts' websites to inform the public and future Corps decisions.[19] Increased transparency should also help states better understand where they

[19] 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. We note that some Districts, namely the Sacramento District, are already following this best practice (see: https://www.spk.usace.army.mil/Missions/Regulatory/Jurisdiction/). _

may want to pick up permitting, and what resources are needed to empower state programs, an issue repeatedly raised by ECOS.[20]

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

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, gauge data, satellite imagery, watershed studies, hydrologic modeling tools, scientific literature, effective aerial and satellite imagery LIDAR, the APT and 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. Especially when tools rely on evaluation of multiple factors or field tests, 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. As recommended earlier, the Regional Supplements should document which technical tools may carry more relevance and weight than others to guide local regulators' jurisdictional analyses, especially on the "wet season" term. 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.

- *Address Feasibility and Technology Concerns in the Next WOTUS Rule*

The Regulatory Program's advancements in training and technology have slowed 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. As also recommended by our peer organization, the Environmental Policy Innovation Center (EPIC), we encourage the Agencies to

[20] *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/.

build on the successful dashboard and program management tools quickly implemented by the Virginia Department of Environmental Quality (DEQ) on roughly a one-year time frame.[21]

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 principals and standards, and analyses based on objective metrics to determine the presence of wetlands or other aquatic resources. 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.

Conclusion

ERBA appreciates the opportunity to work with EPA and the Army 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.

[21] *See* the dashboard at: myDEQ Portal.