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VIA ELECTRONIC SUBMISSION

Docket ID No. EPA-HQ-OW-2025-0093

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue NW

Washington, DC 20460

Re: Comments on the Regulatory Impact Analysis for the Proposed Updated Definition of "Waters of the United States" (WOTUS)

To the U.S. Environmental Protection Agency and Department of the Army:

We at the National Environmental Banking Association (NEBA) respectfully submit the following key positions related to the rules, definitions, and regulations on Waters of the United States (WOTUS):

- NEBA is an association of wetland and species mitigation bankers, private landowners and numerous support companies who are committed to providing high quality mitigation banks and projects to assist the private sector in addressing their regulatory needs and requirements related to the Clean Water Act and Endangered Species Act, along with other regulatory mandates requiring mitigation. Further, NEBA counts among its members 52 Government Members as local, state, and federal regulators including from the EPA, USACE, and USFWS. NEBA supports private sector solutions to addressing wetland and species and water quality needs that provide cost-effective and efficient methods for private sector development to proceed in a timely manner with a minimal amount of regulatory burdens, while harnessing the efficiency of the private sector to supply their needed mitigation.
- NEBA supports regulatory consistency and certainty in application of rules and regulations related to Waters of the U.S. (WOTUS).
- NEBA supports all efforts to streamline and reduce the burdens on private and public permittees under WOTUS and believes the best method to address this issue is to provide consistent and transparent guidelines for determining jurisdictional wetlands and waters of the US.

Headquarters

1250 Connecticut Ave NW Suite

700, Washington, DC, 20036

tel: 202-930-2365

www.environmentalbanking.org

info@environmentalbanking.org

We submit these comments on behalf of the wetland mitigation banking industry regarding the "Regulatory Impact Analysis (RIA) for the Proposed



Updated Definition of Waters of the United States Rule" (November 2025). As stakeholders deeply invested in the ecological integrity of the nation's aquatic resources and the economic viability of environmental markets, we appreciate the Agencies' effort to provide regulatory certainty following the Supreme Court's decision in *Sackett v. EPA*. However, the current Proposed Rule threatens to destabilize the environmental restoration economy by relying on undefined terms and assuming implementation capabilities that do not exist in the majority of the country. Specifically, the undefined "Wet Season" standard and the widespread lack of validated stream assessment protocols create immediate barriers to compliance and investment. To ensure the financial viability of the mitigation banking industry and the long-term protection of the nation's waters, we urge the Agencies to address the following critical shortcomings.

I. The "Wet Season" Standard is Undefined, Circular, and Unenforceable

The Proposed Rule relies heavily on the concept of a "wet season" to determine jurisdiction for tributaries and adjacent wetlands. The phrase "at least during the wet season" appears 41 times in the RIA as the benchmark for "relatively permanent" flow and "continuous surface connection". Despite its centrality, the definition provided in the RIA is fundamentally flawed.

A. Circular Reasoning

Section 1.3.3 of the RIA attempts to clarify this standard by stating: "The agencies propose to implement 'having surface water at least during the wet season' to mean that surface water persists throughout the wet season". This is a textbook example of circular reasoning. The Agencies are defining a regulatory term by simply restating the term itself. This tautology provides no guidance to the regulated community. It attempts to define the *duration* of flow (persisting throughout) without defining the *period* of flow (the wet season itself). Telling a regulator that water must exist "during the wet season" creates no enforceable standard if the "wet season" remains an abstract concept defined only by the presence of water.

B. Lack of Quantitative Metrics

Beyond being circular, the standard lacks any quantitative or qualitative parameters. Is the "wet season" defined by specific calendar months? A precipitation threshold? A groundwater table elevation? Without these objective metrics, the standard is scientifically ambiguous and legally vulnerable.

C. Operational Paralysis

Mitigation bankers and regulators cannot determine jurisdiction or value credits if the foundational metric for "permanence" is a circular definition. This ambiguity directly contradicts the Agencies' stated goal of providing regulatory certainty and will inevitably lead to inconsistent, ad-hoc application across USACE districts, paralyzing the permitting process.



II. Implementation Crisis: 29 States Lack Necessary Stream Protocols

The RIA assumes that the Proposed Rule will reduce regulatory burdens. However, a review of the Regulatory In-Lieu Fee and Bank Information System (RIBITS) reveals a critical infrastructure gap that the RIA fails to account for.

A. The 29-State Gap

Effective implementation of the new stream standards—specifically determining "relative permanence" and calculating appropriate mitigation—requires established, scientifically validated infrastructure. We define this infrastructure as possessing three criteria: (1) a specific stream assessment tool, (2) a stream banking protocol, and (3) currently active stream banks with issued stream credits.

A search of RIBITS demonstrates that **29 states currently lack these sufficient stream assessment and mitigation protocols.**

- Only 21 states (or portions thereof) possess the existing methods necessary to determine whether a stream is jurisdictional under the new rigorous standards.
- In the remaining 29 states, regulators lack the technical tools to implement the Proposed Rule's stream requirements.

B. Economic and Permitting Consequences

This deficit creates a massive hidden cost. In these 29 states, the Agencies cannot simply "flip a switch" to the new definition.

- **Permitting Bottlenecks:** Without validated assessment tools, jurisdictional determinations will devolve into subjective, ad-hoc judgments, increasing litigation risk and permit processing times.
- **Market Failure:** The mitigation banking industry cannot invest in stream credits in these regions without a predictable banking protocol. The lack of infrastructure stifles the market incentives necessary for private investment in stream restoration, threatening the "no net loss" goal.

III. The Urban Heat Island (UHI) Effect and Jurisdictional Breaks

We strongly reiterate that the RIA must account for the economic and hydrological impacts of Urban Heat Islands (UHI).

- **Severing Jurisdiction:** The Proposed Rule states that non-relatively permanent features sever upstream jurisdiction. In urban watersheds, UHI-induced microclimates can dry out tributaries, converting them from "relatively permanent" to ephemeral. This anthropogenic effect creates jurisdictional breaks that significantly reduce federal protection beyond the baseline.
- **Mitigation Banking Resilience:** Large-scale mitigation banks act as "cooling islands" that regulate microclimates and sustain flow, offering



superior resilience compared to small, on-site permittee-responsible mitigation (PRM) projects which are highly susceptible to UHI failure.

IV. **Proposed Rule Threatens 2008 Mitigation Rule Mandates**

The 2008 Mitigation Rule (33 CFR 332) was promulgated to improve efficiency and predictability in the mitigation process. A core component of this regulation is the establishment of specific processing timelines, such as the 225-day timeline for the review and approval of mitigation banking instruments. The Proposed WOTUS Rule, however, introduces systemic inefficiencies that will make adherence to these mandated timelines virtually impossible for regulators.

- **Administrative Bottlenecks:** The new rule requires regulators to perform complex, case-by-case analyses to define "relatively permanent" waters and "wet seasons" in the absence of standardized protocols (as noted in Section II). This significant increase in analytical burden per permit will inevitably divert agency resources, creating backlogs that delay the review of new mitigation bank instruments and credit releases, directly violating the efficiency mandates of the 2008 Rule.
- **The Necessity of the Hierarchy:** To salvage any possibility of meeting the 2008 Rule's timelines, the Agencies must strictly enforce the mitigation hierarchy, which prioritizes **Mitigation Banking** over other forms of compensation. Mitigation banks provide pre-approved credits that eliminate the need for time-consuming, project-specific mitigation plan reviews during the permit application process. Prioritizing banks is the only administratively feasible way to process permits efficiently under the complex new jurisdictional regime.

V. **Recommendations**

We respectfully request that the Agencies:

1. **Define "Wet Season":** Provide a clear, scientifically robust quantitative definition of "Wet Season" to allow for consistent jurisdictional determinations and eliminate the circular reasoning currently present in the RIA.
2. **Address the Stream Protocol Gap:** Acknowledge the lack of stream assessment infrastructure in 29 states. Provide a transition period and dedicated funding to develop validated protocols in these regions before the new definition takes full effect to prevent a moratorium on stream permitting.
3. **Quantify UHI Mitigation:** Explicitly recognize and quantify Urban Heat Island mitigation as a distinct ecosystem service provided by large-scale mitigation banks in the RIA.
4. **Reaffirm Banking Preference:** Explicitly state that for all remaining jurisdictional impacts, mitigation banking is the required standard for compensation. This is necessary not only for ecological stability but to ensure regulators can meet the federally mandated processing timelines established in the 2008 Mitigation Rule.



We urge USACE and EPA to reconsider the proposed definitions and preserve a regulatory framework that supports both environmental protection and a stable, financially viable mitigation banking industry.

Best regards,

A handwritten signature in black ink, reading 'Jeffrey R. Oyen'. The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Jeff Oyen,
Board Chairman
National Environmental Banking Association