



December 15, 2025

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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. 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**

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We write to express significant concerns regarding the implementation of the Proposed Rule changes to the definitions of “waters of the United States” in U.S. Army Corps of Engineers (USACE) districts that currently lack established, scientifically validated protocols for stream analysis and mitigation. Specifically, we question the Regulatory Impact Analysis (RIA) assumptions regarding administrative efficiency and "reduced burden" when applied to districts which lack a formal Standard Operating Procedure (SOP) for stream mitigation and/or stream assessment methods.

To be jurisdictional as proposed, wetlands must now satisfy a two-part test: (1) having surface water at least during the **wet season**, and (2) abutting (touching) a **jurisdictional water**. A jurisdictional water is defined for the first time in regulation as "standing or continuously flowing bodies of water that are standing or continuously flowing year-round or at least during the wet season". Consequently, a “continuously flowing body of water”, more commonly known as a stream, becomes a key component of the WOTUS definition. The proposed rule mandates that ephemeral (non-relatively permanent) features will now sever jurisdiction for upstream relatively permanent waters. Therefore, by definition Districts will have to identify which portions of a stream are perennial, intermittent, or ephemeral.

A search of the Regulatory In-Lieu Fee and Bank Information System (RIBITS) demonstrates that there exists a large portion of the United States that currently lack established, scientifically validated protocols for stream analysis and mitigation based on the following criteria— (1) a specific stream assessment tool, (2) a stream banking protocol, and (3) currently active stream banks with issued stream credits.

Below is the list of USACE Districts and States that meet the criteria:

1. **Established Stream Assessment Tool:** A functional assessment method (not just a ratio).
2. **Stream Banking Protocol:** A framework for establishing banks.
3. **Active Stream Markets:** Existing banks currently issuing "Stream Credits" (not just wetland credits used for streams).



## USACE Districts with Functioning Stream Protocols & Active Stream Banks

<u>USACE District</u>	<u>Primary Stream Assessment Protocol</u>	<u>Market Status</u>
<b>Charleston (SAC)</b>	SC Stream Quantification Tool (SCSQT) / Charleston Method	<b>Active</b>
<b>Fort Worth (SWF)</b>	Fort Worth Stream Method / TXRAM	<b>Active</b>
<b>Galveston (SWG)</b>	Level 1 Stream Condition Assessment / TXRAM	<b>Active</b>
<b>Huntington (LRH)</b>	WV Stream & Wetland Valuation Metric (SWVM) / Ohio HHEI/QHEI	<b>Active</b>
<b>Kansas City (NWK)</b>	Missouri Stream Mitigation Method	<b>Active</b>
<b>Little Rock (SWL)</b>	Little Rock Stream Method	<b>Active</b>
<b>Louisville (LRL)</b>	KY SQT / S. Indiana Stream Method (Ephemeral)	<b>Active</b>
<b>Memphis (MVM)</b>	<i>Uses Little Rock or Vicksburg Methods (Context Dependent)</i>	<b>Active</b> (Limited)
<b>Mobile (SAM)</b>	Mobile District Stream SOP	<b>Active</b>
<b>Nashville (ORN)</b>	Tennessee Stream Quantification Tool (TNSQT)	<b>Active</b>
<b>Norfolk (NAO)</b>	Unified Stream Methodology (USM)	<b>Active</b>
<b>Omaha (NWO)</b>	Nebraska Stream Condition Assessment Procedure (NeSCAP)	<b>Active</b> (NE only)



<b>Pittsburgh (LRP)</b>	PA Function-Based Protocol / WV SWVM	<b>Active</b>
<b>Rock Island (MVR)</b>	Illinois Stream Mitigation Method / Iowa Stream Method	<b>Active</b>
<b>Savannah (SAS)</b>	Savannah SOP / Georgia SQT	<b>Active</b>
<b>St. Louis (MVS)</b>	Missouri Stream Mitigation Method / Illinois Stream Method	<b>Active</b>
<b>Tulsa (SWT)</b>	Oklahoma Stream Mitigation Method	<b>Active</b>
<b>Vicksburg (MVK)</b>	<b>Charleston Method</b> (Used for Bank Credits)	<b>Active</b>
<b>Wilmington (SAW)</b>	NC Stream Assessment Method (NCSAM) / NCSQT	<b>Active</b>

**States with Functioning Stream Protocols & Active Stream Banks**

The following states contain at least one USACE District where private mitigation banks actively sell discrete "Stream Credits" determined by a functional assessment tool.

<u>State</u>	<u>Applicable USACE Districts</u>	<u>Stream Protocol Used</u>
<b>Alabama</b>	Mobile, Nashville	Mobile Stream SOP
<b>Arkansas</b>	Little Rock, Vicksburg, Memphis	Little Rock Method / Charleston Method (in MVK)
<b>Georgia</b>	Savannah, Mobile	GA SQT / Savannah SOP
<b>Illinois</b>	Rock Island, St. Louis, Chicago	IL Stream Mitigation Method
<b>Indiana</b>	Louisville, Chicago, Detroit	KY SQT (in LRL) / IN Stream Method (Limited)



<b>Iowa</b>	Rock Island	Iowa Stream Mitigation Method
<b>Kansas</b>	Kansas City, Tulsa	Kansas Stream Mitigation Method
<b>Kentucky</b>	Louisville, Nashville, Memphis, Huntington	KY SQT / Eastern KY Stream Method
<b>Louisiana*</b>	<b>Vicksburg (MVK) Only</b>	<b>Charleston Method</b>
<b>Mississippi</b>	Mobile, Vicksburg, Memphis	Mobile Stream SOP / Charleston Method (in MVK)
<b>Missouri</b>	Kansas City, St. Louis, Little Rock	Missouri Stream Mitigation Method
<b>Nebraska</b>	Omaha	NeSCAP
<b>North Carolina</b>	Wilmington	NCSAM / NCSQT
<b>Ohio</b>	Huntington, Pittsburgh, Buffalo	HHEI / QHEI / SWVM
<b>Oklahoma</b>	Tulsa	Oklahoma Stream Mitigation Method
<b>Pennsylvania</b>	Pittsburgh, Baltimore, Philadelphia	PA Function-Based Protocol
<b>South Carolina</b>	Charleston	SC SQT
<b>Tennessee</b>	Nashville, Memphis	TN SQT
<b>Texas</b>	Fort Worth, Galveston, Tulsa	TXRAM / Fort Worth Method
<b>Virginia</b>	Norfolk	Unified Stream Methodology (USM)
<b>West Virginia</b>	Huntington, Pittsburgh	WV SWVM



This list includes all or portions of 21 states that may have an existing stream assessment method sufficient to determine whether a stream is jurisdictional or not. Conversely, this also establishes that there are 29 states that currently do not have sufficient stream assessment and stream mitigation protocols in place to meet the proposed WOTUS rule requirements.

### **I. The RIA Fails to Account for Implementation Delays in Districts Without Stream Protocols**

The RIA suggests that the Proposed Rule will reduce regulatory burdens by narrowing the scope of jurisdiction. However, this conclusion assumes a uniform ability across USACE districts to efficiently distinguish between jurisdictional and non-jurisdictional waters using established tools.

- **Lack of Stream Assessment Tools in many states and Districts:** By example, there is no established stream mitigation SOP or stream mitigation establishment protocol currently in effect for the U.S. Army Corps of Engineers New Orleans District (MVN). Unlike the Mobile or Charleston Districts, which have robust, publicly available stream mitigation SOPs, the New Orleans District (NOD) has historically focused its regulatory tools on wetlands (e.g., the Louisiana Wetland Rapid Assessment Method or LRAM). The **Louisiana Wetlands Rapid Assessment Method (LRAM)** is used exclusively for assessing **wetlands** (e.g., bottomland hardwoods, cypress-tupelo swamps, pine savannahs, coastal marshes). It contains no modules, worksheets, or metrics designed to measure stream function, bed/bank characteristics, or flow regimes. It cannot be used to generate credits or debits for stream impacts. The NOD does not have a finalized, standalone functional assessment protocol for streams.
- **Increased Reliance on Ad-Hoc Judgment:** Without a codified stream assessment protocol, the new "relatively permanent" standard will force NOD project managers to rely heavily on case-by-case "best professional judgment" to determine both jurisdiction and mitigation requirements. This will inevitably lead to inconsistent determinations, increased permit processing times, and litigation risk—costs that are not quantified in the RIA.

### **II. The "Ephemeral Break" Standard Will Create Bottlenecks in the Absence of Data**

The Proposed Rule's provision that "non-relatively permanent flow" features (e.g., ephemeral streams) sever upstream jurisdiction introduces a complex new analytical requirement.



- **Data Gaps:** The RIA acknowledges that "NHD streamflow classifications are largely missing from Eastern States". In districts like NOD, where low-gradient, modified, and agricultural channels are common, distinguishing between a "relatively permanent" tributary and an excluded "ephemeral" feature is technically difficult without a specific regional protocol.
- **Operational paralysis:** In the absence of a stream SOP that defines "relative permanence" through measurable indicators (e.g., bed and bank characteristics, biological indicators) specific to the Gulf Coastal Plain, the NOD will face a bottleneck of jurisdictional determinations that simply cannot be processed efficiently.

### III. Recommendation

We request that the final RIA and Rule:

1. **Acknowledge the disparity** in implementation readiness across USACE districts.
2. **Quantify the increased administrative cost** for districts like NOD that must now develop new stream protocols from scratch to implement the "relatively permanent" and "continuous surface connection" standards.
3. **Provide a transition period or dedicated funding** for these districts to establish valid stream assessment protocols before the new definition takes full effect, preventing a moratorium on permitting for stream impacts in Louisiana and other states with similar issues.
4. **Establish regulatory consistency and certainty** regarding Waters of the U.S. (WOTUS) rules and regulations by utilizing this current rule-making opportunity to draft and implement a nation-wide stream assessment tool, a nation-wide stream mitigation banking template which will provide for the establishment of stream mitigation banking opportunities in every USACE District and State.

Best regards,

A handwritten signature in black ink, appearing to read 'Jeffrey R. Oyen', with a long, sweeping horizontal line extending to the right.

Jeff Oyen,  
Board Chairman  
National Environmental Banking Association