



December 1, 2023

VIA EMAIL

Matt Wilson
U.S. Army Corps of Engineers
Attn: CECW-CO-R
441 G Street NW
Washington, DC 20314-1000

usace.ohwm@usace.army.mil

Re: Interim Draft of the *National Ordinary High Water Mark Field Delineation Manual for Rivers and Streams*, ERDC/CRREL TR-22-26

Dear Mr. Wilson:

The Waters Advocacy Coalition (“WAC” or “Coalition”) offers the following comments on the Interim Draft of the *National Ordinary High Water Mark Field Delineation Manual for Rivers and Streams* (“Draft Manual”). WAC represents a large cross-section of America’s construction, transportation, real estate, mining, manufacturing, forestry, agriculture, energy, wildlife conservation, and public health and safety sectors—all of which are vital to a thriving economy and provide much-needed jobs. WAC members’ activities, projects, and operations are often subject to Clean Water Act (“CWA”) regulation.

I. EPA and the Corps Must Go Through Rulemaking to Change the Scope of CWA Jurisdiction

According to EPA’s and the Corps’ Joint Notice of Availability, the Draft Manual “does not imply or represent a change to the [regulatory] definition of ‘ordinary high water mark’ (OHWM) or ‘Waters of the U.S.’” and instead focuses on providing technical guidance “to support OHWM identification and delineation in a consistent, robust, repeatable, and defensible way.”¹ Moreover, in denying some WAC members’ request for an extension of the comment period on the Draft Manual, the Corps further asserted that “[i]dentification of OHWM is a separate and distinct concept from determining which aquatic resources are or are not subject to regulatory jurisdiction.”² By making these assertions, the Corps fails to acknowledge that the Agencies, in fact, rely on the presence of OHWM indicators and a defined channel as the determining factors for differentiating non-jurisdictional erosional features from potentially jurisdictional tributaries. For instance, in the preamble to the current rule defining “waters of the

¹ See <https://usace.contentdm.oclc.org/utills/getfile/collection/p16021coll15/id/756>.

² Letter from Thomas P. Smith, Chief, Operations and Regulatory Division, to Emily Coyner, Nat’l Stone, Sand, and Gravel Ass’n (Oct. 20, 2023).

United States” (“WOTUS”), the Agencies explained that “a water would be a stream, *not an excluded erosional feature, if the water has a defined channel and an indicator of an ordinary high water mark* such as a natural line impressed on the bank.”³ The Response to Comments document for that rule similarly states that excluded “erosional features like gullies and rills . . . lack an OHWM” and that “swales do not have an OHWM.”⁴

The foregoing statements from the 2023 WOTUS Rule and supporting materials illustrate how the scope of one of the regulatory exclusions applies only to features that lack *any* indicators of an OHWM. Despite the Corps’ characterizations of the Draft Manual, the OHWM *is* critical to understanding what constitutes WOTUS under the current regulations. Accordingly, any changes in the Corps’ approach to identifying OHWMs would directly impact what water features are or are not subject to regulatory jurisdiction. So long as the Agencies will continue to use OHWM indicators to limit the scope of the swales and erosional features exclusion, any efforts to redefine OHWM must be made through rulemaking.

II. At a Minimum, the Agencies Must Reaffirm That the OHWM Has No Relevance to the Relatively Permanent Standard

Given that the Agencies will continue to use the OHWM to identify what constitutes a “tributary” under the current definition of WOTUS, they must clarify that the presence of an OHWM has no bearing on whether the “tributary” in question meets the relatively permanent standard. The Agencies appear to recognize this in the preamble to the 2023 WOTUS Rule: “The agencies will utilize the Corps’ well-established definition of an ordinary high water mark (OHWM) to assist in identifying tributaries for purposes of this rule. . . To be a jurisdictional tributary under this provision of the rule, the tributary must [still] meet [] the relatively permanent standard[.]”⁵ Following the Supreme Court’s decision in *Sackett v. EPA*,⁶ there is no question that the presence of an OHWM is irrelevant to determining whether a tributary meets the relatively permanent standard. The Agencies should make that clear in any forthcoming guidance on OHWM identification and delineation.

In *Sackett*, a majority of the Supreme Court “conclude[d] that the *Rapanos* plurality was correct: the CWA’s use of ‘waters’ encompasses ‘only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”⁷ Because *Sackett* endorsed the *Rapanos* plurality’s analysis, the plurality’s rejection of the Corps’ interpretation that ephemeral streams and drainage ditches were jurisdictional “tributaries” if they had a perceptible OHWM,

³ 88 Fed. Reg. 3,004, 3,132 (Jan. 18, 2023).

⁴ See Revised Definition of “Waters of the United States – Response to Comments Document, Sec. 15 – Exclusions and Exemptions, at 57.

⁵ 88 Fed. Reg. at 3,080.

⁶ 598 U.S. 651 (2023).

⁷ *Id.* at 671 (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (plurality)).

must be given considerable weight.⁸ Before *Rapanos*, “the Corps [had] interpreted its own regulations to include ‘ephemeral streams’ and ‘drainage ditches’ as ‘tributaries’ that are part of the ‘waters of the United States.’”⁹ “This interpretation [had] extended ‘the waters of the United States’ to virtually any land feature over which rainwater or drainage passes and leaves a visible mark.”¹⁰ The plurality squarely rejected the Corps’ prior interpretation and instead held that “‘the waters of the United States’ include only relatively permanent, standing or flowing bodies of water . . . as found in streams, oceans, rivers, lakes, and bodies of water forming geographic features.”¹¹ The plurality underscored that “[a]ll of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows.”¹² The plurality criticized the Corps for “stretch[ing] the term ‘waters of the United States’ beyond parody” by relying on the presence of a channel and an OHWM to assert jurisdiction over features such as ephemeral streams and drainage ditches.¹³

In light of *Sackett* and its endorsement of the *Rapanos* plurality’s analysis, there is no basis for the Agencies to rely on the OHWM to determine that a “tributary” constitutes a relatively permanent, standing, or continuously flowing body of water.

III. Conclusion

WAC appreciates the opportunity to submit these comments on the Draft Manual. If you have any questions, please feel free to contact Courtney Briggs (WAC Chair) at courtneyb@fb.org or at (202) 406-3667, or David Y. Chung (Counsel for the Coalition), at dchung@crowell.com or at (202) 624-2587.

Sincerely,

American Exploration & Mining Association
American Farm Bureau Federation
American Fuel & Petrochemical Manufacturers
American Gas Association
American Road and Transportation Builders Association
American Society of Golf Course Architects
American Soybean Association
Associated Builders and Contractors
Associated General Contractors of America
Essential Minerals Association
Golf Course Superintendents Association of America
ICSC

⁸ *Rapanos*, 547 U.S. at 725 & 731-34.

⁹ *Id.* at 725.

¹⁰ *Id.*

¹¹ *Id.* at 732-33.

¹² *Id.* at 733.

¹³ *Id.* at 734.

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