



December 1, 2023

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RE: Comments on EPA/USACE’s 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 American Petroleum Institute (“API”), the Associated General Contractors of America (“AGC”), and the Fertilizer Institute (“TFI”) (collectively, “the Associations”) respect the U.S. Army Corps of Engineers’ (“USACE”) and U.S. Environmental Protection Agency’s (“EPA”) (collectively, “the Agencies”) commitment to effective stakeholder engagement concerning the Interim Draft of the National Ordinary High Water Mark Field Delineation Manual for Rivers and Streams (“Draft OHWM Manual” or “manual”) as noticed on December 1, 2022 with comments due on December 1, 2023.<sup>1</sup> We appreciate the opportunity to provide comments and share the benefit of our members’ insights from their extensive experience in this field.

**Fundamentally, we believe that RGL 05-05, a longstanding USACE guidance on OHWM identification, is a robust reliable document that should remain in effect as the governing**

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<sup>1</sup> See USACE and EPA’s Notice of Availability of the Interim Draft of the National Ordinary High Water Mark Field Delineation Manual for Rivers and Streams, Dec. 1, 2022 (“Joint Notice”). Available at: <https://usace.contentdm.oclc.org/utills/getfile/collection/p16021coll15/id/756>. We note that both Agencies jointly announced the Notice; however, per a memorandum of agreement between the USACE and the EPA, the USACE determines, on a case-by-case basis, the extent of geographic jurisdiction for the purpose of administering its CWA Section 404 regulatory program. RGL 05-05 at footnote 1. We will reference “Agencies” and “USACE” as appropriate.

**OHWB guidance.**<sup>2</sup> In the Joint Notice, the Agencies also agree that the Draft OHWM Manual is not intended to “imply or represent a change to the definition of ‘ordinary high water mark’ (OHWM) or ‘Waters of the U.S.’ nor does it change existing guidance related to the OHWM (e.g., Regulatory Guidance Letter No. 05-05).”<sup>3</sup> The Agencies seem to be saying that this will be the case while the document is an interim manual.<sup>4</sup> However, for the longer term, the Agencies do not provide any reasoned basis or stated need for RGL 05-05 being replaced by this extensive 386-page Draft OHWM Manual. Introducing myriad complexities into the current long-established RGL 05-05 framework will certainly not “support OHWM identification and delineation in a consistent, robust, repeatable, and defensible way” as the Agencies intend.<sup>5</sup>

**We understand the extensive academic work that has been undertaken on this subject; therefore, we recommend that the manual be updated based on comments, and that the manual be made available as a reference document whilst allowing RGL 05-05 to remain as the presiding national OHWM identification guidance.**

In addition, the regulatory scope of this first-of-its-kind Draft OHWM Manual is unclear. Notably, this Draft OHWM Manual was issued prior to the *Sackett v. EPA* decision, and does not reflect current legal and regulatory parameters for determining jurisdictional federal waters under the Clean Water Act (“CWA”).<sup>6</sup> **To avoid any unintended expansions of jurisdictional waters especially concerning flow, and given the Supreme Court’s clear-eyed focus on a jurisdictional standard that provides clear reliable benchmarks for landowners, we recommend that the Draft OHWM Manual be carefully reviewed, revised, and modified to adhere to the tenets laid out in the *Sackett* decision. We also request that any efforts relating to the scope of jurisdictional waters should be conducted through a notice and comment rulemaking.**

Conceptually, we support the broad objectives and principles of this Draft OHWM Manual but we believe that RGL 05-05 is the appropriate mechanism for setting national OHWM delineation guidelines.<sup>7</sup> **Moreover, given the Draft OHWM Manual’s broad reach to include a new non-specific list of physical indicators as well as an open-ended list of landscape-scale considerations in interpreting OHWM indicators, we question whether standardized national regulatory certainty based on this complex manual can even be achieved. We are**

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<sup>2</sup> Ordinary High Water Mark Identification, USACE Regulatory Guidance Letter (RGL) No. 05-05 (Dec. 7, 2005) (“RGL 05-05”).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1.

<sup>6</sup> See *Sackett v. EPA*, 598 U.S. 651 (2023) (“*Sackett*”) (see discussion below).

<sup>7</sup> *Id.*

especially concerned because it is our experience that these types of inconsistencies are almost always accompanied by increased errors in outcomes, potential delays in permitting, added costs, new consulting fees that the regulated community will face in outsized consultants' fees as well as additional strains on the USACE's resources.

The Agencies also solicit comments on specific topics such as physical indicators that are particularly useful for identifying OHWM, regional differences in the applicability of specific field indicators, implementation of the weight-of-evidence ("WoE") approach, problem situations and possible approaches for addressing them, additional remote sensing data or techniques, usefulness of supporting examples to clarify and inform identification of indicators and lines of evidence in the field, and usefulness, usability, and clarity of the OHWM Data Sheet and its accompanying instructions and field procedures. Based on our members' considerable experiences with permitting issues relating to the CWA and Sections 9 and 10 of the Rivers and Harbors Act of 1899 ("RHA of 1899"), we also provide specific comments in these areas for your consideration.

## **I. The Associations and Their Interests**

The Associations and their interests are summarized as follows:

API is a national trade association representing over 600-member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers. API's members have a substantial interest in the scope of asserted federal jurisdiction under the CWA. As you know, API and its members have been constructive participants in the EPA and the USACE's development of CWA regulations (including rules relating to the "waters of the U.S." and nationwide permits) which affect the oil and natural gas industry.

AGC is the Nation's largest and most diverse trade association in the construction industry. The association represents more than 27,000 members through a network of chapters in all 50 states, the District of Columbia, and Puerto Rico. Our commercial construction firms are engaged in building, heavy, civil, industrial, utility, and other construction for both public and private property owners and developers. Collectively, AGC member firms build much if not most of the nation's public and private infrastructure. Construction is a vital partner in improving the resilience of our communities and infrastructure, modernizing our public and private spaces to increase efficiency, and building safe and healthy communities. Construction activities on land and water often require a jurisdictional determination before proceeding.

TFI represents the Nation's fertilizer industry, including producers, importers, retailers, wholesalers, and companies that are engaged in all aspects of the fertilizer supply chain. Fertilizer is a key ingredient in feeding a growing global population, expected to surpass 9.5 billion people

by 2050. Half of all food grown around the world today is made possible through the use of fertilizer. The U.S. fertilizer industry is one of the world's largest, as it is the fourth largest producer of nitrogen-based fertilizers and the second largest producer of phosphate fertilizer. Over the past three years, the U.S. fertilizer industry invested an average of \$2.4 billion annually in capital infrastructure projects. These investments helped to create jobs, increase worker and community safety, and conserve energy, land, water, and air resources. As such, the fertilizer industry is subject to regulation under various sections of the CWA, including Sections 311, 401, 402, and 404.

## II. General Comments

- A. Under some circumstances, the OHWM definition can be informative in determining a jurisdictional water and while the Agencies provide assurances that the manual is not intended to imply or represent a change to the definition of OHWM or “waters of the U.S.,” the expansive scope of the manual does not appear to be aligned with narrow parameters that drive the legal test under *Sackett* for determining “waters of the U.S.”**

We applaud the Agencies' acknowledgement that the Draft OHWM Manual is not intended to “imply or represent a change to the definition of ‘ordinary high water mark’ (OHWM) or ‘Waters of the U.S.’ nor does it change existing guidance related to the OHWM (e.g., Regulatory Guidance Letter No. 05-05); nevertheless, our members would like to share a number of concerns.”<sup>8</sup>

In the recently issued *Sackett* opinion, the Supreme Court expressed its displeasure with the “unfortunate footnote” to the CWA story that the “outer boundaries of the Act’s geographical reach have been uncertain from the start.”<sup>9</sup> And noting this persistent problem, the Court stated that: “Today, we return to the problem and attempt to identify with greater clarity what the Act means by ‘the waters of the United States.’”<sup>10</sup> This is the overarching theme of the *Sackett* ruling with the Court rejecting the significant nexus test and concluding “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 (internal citations omitted).’”<sup>11</sup> The Court

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<sup>8</sup> RGL 05-05 at 1.

<sup>9</sup> *Sackett* at 658.

<sup>10</sup> *Id.* at 659.

<sup>11</sup> *Id.* at 671 (quoting *Rapanos* at 547 U. S., at 739). The plurality opinion in *Rapanos* also emphasized that 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.” *Rapanos* at 733. Explaining further, the plurality opinion noted that: “None of these terms encompasses transitory puddles or ephemeral flows of water.” *Id.* As related to adjacent wetlands, *Sackett* also held that the CWA extends

was also mindful of overly broad requirements that would put “a staggering array of landowners at risk of criminal prosecution for such mundane activities as moving dirt.”<sup>12</sup>

As such, we request that the OHWM requirements be refined to reflect the principles of *Sackett* and for the USACE to look for ways to significantly simplify as well as clarify the process for identifying and delineating jurisdictional waters overall. At a minimum, any such efforts must be made through a notice and comment rulemaking.

**B. The Draft OHWM Manual appears to be an academic technical report; however, for regulatory purposes, it is overly expansive and does not provide any answers to the regulatory community in meeting the relatively permanent standard under the 2023 Revised WOTUS Rule as amended<sup>13</sup> or in states where the revised rule is enjoined and the Agencies’ interpretations of “waters of the U.S.” is consistent with the pre-2015 regulatory regime and the *Sackett* decision.<sup>14</sup>**

As discussed above, for the regulated community, there appears to be a disconnect between this Draft OHWM Manual and how it will align and be consistent with the *Sackett* decision as well as the two prevailing regulatory regimes for determining jurisdictional waters.

As background, the Agencies state the OHWM defines the boundaries of aquatic features for a variety of federal, state, and local regulatory purposes.<sup>15</sup> The Draft OHWM Manual itself includes wide-ranging examples of aquatic features including evidence of OHWM in dry channels in the Southwest and Northwest Prairies region.<sup>16</sup> We are concerned that the Draft OHWM Manual goes too far by extending to ephemeral, non-jurisdictional waters via the nomenclature used in the manual relating to low, moderate, and high flows and applying exponentially more complicated analytical methods.

Under *Sackett* which endorsed the *Rapanos* plurality opinion, the CWA use of “waters” encompasses only those relatively permanent, standing, or continuously flowing bodies of water

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to only wetlands that are “as a practical matter indistinguishable from waters of the United States.” *Sackett* at 654.

<sup>12</sup> *Sackett* at 653.

<sup>13</sup> 88 *Fed. Reg.* at 3,004 (Jan. 18, 2023) (“2023 Revised WOTUS Rule”); 88 *Fed. Reg.* 61,964 (Sept. 8, 2023) (“2023 Conforming Rule”).

<sup>14</sup> See <https://www.epa.gov/wotus/pre-2015-regulatory-regime>

<sup>15</sup> Joint Notice.

<sup>16</sup> Draft OHWM Manual at 58. Figure 33.

‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”<sup>17</sup>

OHWM has a limited role in the wake of *Sackett*. First, with this *Sackett* ruling, the role of OHWM becomes limited because for one, OHWM can no longer be used to establish the basis for the significant effect on the physical integrity of the downstream waters. Previously, as explained in the 2023 Revised WOTUS Rule and as applicable pre-*Sackett*, physical indicators of OHWM as well as a wide array of indicators could be used to establish a significant nexus to downstream waters.<sup>18</sup>

Second, in the preamble to the 2023 Revised WOTUS Rule, the Agencies were also clear that not all features with OHWM are categorically considered a tributary.<sup>19</sup> Some commenters specifically stated that “this rule should include categorical protections for all tributaries (*e.g.*, features with an OHWM), rather than requiring case-by-case analysis” but the Agencies did not make that change and instead stated that the rule defines tributaries as ones that meet either the relatively permanent standard or the significant nexus standard on a case-specific basis.<sup>20</sup> Thus, with one

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<sup>17</sup> *Sackett* at 653. With the significant nexus removed, the relatively permanent standard includes tributaries of core waters or tributaries of impoundments that are relatively permanent, standing, or continuously flowing bodies of water; other intrastate lakes/ponds that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to core waters or tributaries that meet the relatively permanent standard; or wetlands with continuous surface connection to core waters or impoundments/tributaries that meet the relatively permanent standard and with a continuous surface connection to those waters. 2023 Conforming Rule.

<sup>18</sup> 88 *Fed. Reg.* at 3,130. The 2023 Revised WOTUS Rule includes exclusions which should also be implemented consistently (*e.g.*, ephemeral features, ditches etc.). The Navigable Waters Protection Rule categorically excluded ephemeral streams and while the 2023 Revised WOTUS Rule did not, the preamble to the 2023 Revised WOTUS Rule also noted 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.” 2023 Revised WOTUS Rule at 3,132. This document also similarly stated that excluded “erosional features like gullies and rills are typically more deeply incised than streams and lack an OHWM” and that “swales do not have an OHWM and typically lack a more define channel that a stream exhibits.” *Id.* at 3,084.

The 2023 Revised WOTUS Rule includes no definitions of flow or a tributary but the Draft OHWM Manual includes a definition of ephemeral river as well as references to studies relating to ephemeral flows. Draft OHWM Manual at 315, 343, and 346. The manual discusses “ephemeral streams, in which larger, infrequent discharges pull the average flow toward the upper end of the range of measure flow magnitudes” and that “[i]dentifying evidence of these high flows is key to conducting a field identification of the OHWM.” Draft OHWM Manual at 6. Again, this may be scientifically relevant but this statement needs to be reconciled with regulatory requirements. The Agencies had clarified that the final rule expressly excludes “[s]wales and erosional features (*e.g.*, gullies, small washes) characterized by low volume, infrequent, or short duration flow.” 2023 Revised WOTUS Rule at 3,084.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 3,081.

standard remaining, to be considered a jurisdictional tributary under the 2023 Revised WOTUS Rule, the tributary must meet the relatively permanent standard.<sup>21</sup>

Given this dichotomy between OHWM and the relatively permanent standard analysis as well as the pre-2015 regulatory regime, we recommend that the Agencies carefully review, revise, and modify the Draft OHWM Manual for consistency and clarity. At a minimum, the legal parameters should be noted and assurances provided that jurisdictional waters will not increase (laterally or linearly) based on erroneous applications of OHWM to non-jurisdictional ephemeral and other waters or those subject to exclusions.

In essence, the Agencies need to clearly explain the limited scope of OHWM as well as the role of relatively permanent standard within its purview. To provide clarity, the Draft OHWM Manual should be limited to longstanding physical indicators for determining OHWM and all remaining overreaching aspects should be removed and separately considered under the relatively permanent standard, as applicable.

**C. Without clear limits and increased use of complex procedures, using the Draft OHWM Manual and accompanying OHWM Data Sheet and field procedures promises to be onerous – and holds the potential to sweep in more aquatic features and longer stream segments as jurisdictional. As a practical matter, this is likely to add a significant workload to the USACE as well as increased costs for USACE and the regulatory community.**

We have carefully reviewed the 386-page manual that is replacing the longstanding four-page succinct RGL 05-05 as well as the accompanying OHWM Data Sheet and field procedures including the new WoE methodology. Our members appreciate the many manuals and regulatory guidance letters developed by the USACE which help the regulated community as well as those administering the USACE’s regulatory program; however, this manual appears to be a significant departure from that purpose. As a practical matter, we find it would be very difficult to implement without use of consultants and/or increased training and understanding.

Given that the “CWA is a potent weapon” and that “[i]t imposes what have been described as ‘crushing’ consequences ‘even for inadvertent violations,’” landowners and the regulated community will be forced to hire professional consultants who have undergone training in identifying and delineating OHWM per the manual.<sup>22</sup> Based on our knowledge, private firms are already providing a 36-hour training course on the new OHWM protocols. The USACE also estimates 30 minutes on average to fill out the OHWM Data Sheet per response and based on our experience and understanding of the requirements, we would submit that it is a gross

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<sup>21</sup> 2023 Conforming Rule.

<sup>22</sup> *Sackett* at 660 citing *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 602 (2016).

underestimation.<sup>23</sup> In reviewing the OHWM Data Sheet, the amount of effort to 1) assess a site; 2) fill out the OHWM Data Sheet per the detailed instructions; and 3) use the Draft OHWM Manual for guidance would substantially exceed the time estimated by the USACE.

This is particularly true because given the parameters of the manual, additional OHWM Data Sheets may be required for multiple sites within a single project. According to our members, producing a photo log, conducting an internal assessment of the site, and using additional resources as indicated on the OHWM Data Sheet would likely be at a minimum, closer to double the estimated average time per OHWM Data Sheet for simpler sites and significantly more for complex sites. In addition, the information requested in the OHWM Data Sheet contemplates multi-disciplinary approaches in highly specialized fields such as fluvial geomorphology, hydrology, biology, and wetland science requiring a team of experts to complete the forms.

As discussed below, the manual specifies four new categories of physical indicators as well as additional listed regional and landscape considerations. Given the liberal approach being taken by the USACE to be overly inclusive, this will certainly sweep in more aquatic features and additional stream segments without consideration to the regulatory requirements.

We already note evidence of this expansion with examples of OHWM within wide-ranging aquatic features the USACE provides in the Draft OHWM Manual. For example, several dry channels are included to illustrate OHWM delineations in complex settings requiring careful observations of all sorts of physical indicators.<sup>24</sup> And with myriad scientific studies (and notwithstanding regulatory constraints), there will be uncertainty and lack of consistent application in the indicators noted that will contribute to delays in the permitting processes. For instance, the presence of lichen are noted as evidence of vegetation indicators in locating in OHWM such as a scour line demonstrated by lichen in a dry stream but then the manual also notes that “lichen often occur above the OHWM, but as previously discussed, there may be zonation in lichen and some species that occur below the OHWM.”<sup>25</sup> Given these conflicting statements, different consultants and staff with varying experiences would likely arrive at different conclusions.

Overall, we also have concerns that implementing new processes across the field offices as well as increased numbers of completed OHWM Data Sheets for review will likely increase the USACE’s workload as well and potentially impact overall permitting processes.

In sum, we believe that the costs of adopting this manual are likely to outweigh any benefits. In fact, nebulous goals are noted such as more “timely, consistent, and predictable identification and delineation of the OHWM across the Nation,” but this is not substantiated with supporting data or

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<sup>23</sup> USACE’s Information Collection Request (“ICR”), 88 *Fed. Reg.* 74,984 (Nov. 1, 2023). Note: The Association will be submitting a separate comment letter in response to this ICR with comments due January 2, 2024.

<sup>24</sup> *For e.g.*, Draft OHWM Manual at 53, 58, and 80, Figures 29, 33, and 51.

<sup>25</sup> *Id.* at 105-106.



any established need to remedy an existing problem.<sup>26</sup> We suggest that the USACE reassess the Draft OHWM Manual and look to simplify the process and revert to the current long-established practice of determining OHWM that the USACE and the regulated community are familiar with.<sup>27</sup> Beyond the technical guidance, we also request that any efforts that relate to the regulatory scope of jurisdictional waters be conducted through a notice and comment rulemaking.

### III. Specific Comments

- A. As a baseline, RGL 05-05 should be the governing national guidance on OHWM identification and per this guidance, physical indicators should be considered to the extent they are deemed “reasonably reliable” when making an OHWM determination. As noted in RGL 05-05, where the physical characteristics are inconclusive, misleading, unreliable, or otherwise not evident, the USACE may turn to other “appropriate means” that are based on reliable methods consistent with the USACE’s regulatory practice established under RGL 05-05.<sup>28</sup>**

The OHWM defines the lateral limits of CWA jurisdiction in non-tidal waters, provided that the limits of jurisdiction are not extended by adjacent wetlands.<sup>29</sup> As the Agencies explained in the 2023 Revised WOTUS Rule, the term “OHWM” has remained unchanged since 1977 but as evident by the Supreme Court cases and various waters of the U.S. rulemakings, the scope of jurisdictional waters has expanded and contracted over time, and OHWM has been applied within the context of these changes.<sup>30</sup>

The regulatory definition of OHWM under 33 C.F.R. Section 328.3(c)(4) is “that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.”<sup>31</sup> Compared to this, 33 C.F.R. Section 329.11(a) relating to navigable waters is slightly different stating that federal regulatory jurisdiction extends “laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark,” and 33 C.F. R. Section 329.11(a)(1) defines OHWM on non-tidal waters as “the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving;

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<sup>26</sup> Joint Notice.

<sup>27</sup> *Id.*

<sup>28</sup> RGL 05-05 at 1.

<sup>29</sup> *Id.* at 1.

<sup>30</sup> 41 *Fed. Reg.* 37,144 (July 19, 1977) (cited in 89 *Fed. Reg.* 3110 (Jan. 18, 2023)).

<sup>31</sup> 33 C.F.R. Section 328.3(c)(4) (2023 Revised WOTUS Rule) (previously 33 C.F.R Section 328.3(e)).

changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.”<sup>32</sup>

Both definitions include a list of physical indicators and other appropriate means that consider the characteristics of the surrounding areas. This allows for case-by-case consideration but it is narrowly tailored to what would be considered “appropriate” within the characteristics of the surrounding areas. It is not an invitation to unreasonably expand the definition and take the kitchen sink approach as appears to be the case with the Draft OHWM Manual.

In 2005, the USACE also issued RGL 05-05 on OHWM identification and includes a list of “physical characteristics [that] should be considered when making an OHWM determination, to the extent that they can be identified and are deemed reasonably reliable.”<sup>33</sup> And RGL 05-05 notes, [w]here the list of physical characteristics are inconclusive, misleading, unreliable, or otherwise not evident, districts may determine the OHWM by using other appropriate means provided that those other means are “reliable.”<sup>34</sup> And in these situations, the districts have an extra burden to document in writing the physical characteristics used to establish OHWM for regulatory purposes. **This RGL 05-05 process provides accountability and consistency to the regulatory process and should remain in place.**

**B. The Draft OHWM Manual appears to expand into a full stream assessment rather than simply considering the physical indicators for delineating OHWM which is problematic, introduces increased complexities and variabilities into the process, and is a material change in the USACE’s practice under RGL 05-05.**

As recently as January 2023, the Agencies noted that, “[t]he regulations at 33 CFR 328.3(e) and 329.11(a)(1) [Definitions of OHWM] list the factors to be applied” and that “RGL 05-05 further explains these regulations.”<sup>35</sup> Yet, as discussed above, the Draft OHWM Manual expands the list of physical indicators to other areas. As noted in the 2023 Revised WOTUS Rule, “[d]elineation of an OHWM in tributaries relies on the identification and interpretation of physical features, including topographic breaks in slope, changes in vegetation characteristics (*e.g.*, destruction of terrestrial vegetation and change in plant community), and changes in sediment characteristics (*e.g.*, sediment sorting and deposition). Field indicators, remote sensing, and mapping information can also help identify an OHWM.”<sup>36</sup>

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<sup>32</sup> 33 C.F.R. Section 329.11.

<sup>33</sup> RGL 05-05 at 3.

<sup>34</sup> *Id.*

<sup>35</sup> 88 *Fed. Reg.* at 3,083.

<sup>36</sup> *Id.*

The Agencies note that the USACE continues to improve its regulatory practices through ongoing research and development of regional and national OHWM delineation procedures; however, the Agencies also emphasize that they will apply the regulations, RGL 05-05, and applicable OHWM delineation manuals “[c]onsistent with longstanding practice.”<sup>37</sup> Further, the Agencies will take additional steps to ensure that “the OHWM identification factors are applied consistently nationwide.”<sup>38</sup>

However, to create an all-in-one approach to determining OHWM when the landscape of the nation is so vast from a desert tundra landscape to tropical biome is infeasible for this type of work. The Agencies need to recognize these limitations and first and foremost, continue to rely on its longstanding case-by-case practice of delineating OHWM under RGL 05-05 and take steps to provide for a clearer and more streamlined internal OHWM assessment process.

Also, the Draft OHWM Manual strays into additional indicators connected to stream assessments beyond longstanding practice of OHWM-related physical indicators under the applicable regulations and RGL 05-05. Based on our members’ experience, the OHWM-related physical indicators and assessments have been at times in-the-field reviews while one member based in Alaska depicts OHWM on plates (drawings) based on available aerial imagery and/or topographic maps as well as the civil engineering and drafting expertise of the drafting team.

The OHWM Data Sheet requirements appear to remove this longstanding case-by-case flexible approach by adding a site overview from remote and online resources, and anticipating the use of additional highly sophisticated resources and technologies such as LIDAR, GIS mapping and so forth. Not everyone has access to such resources especially where previously, in-field assessment would have sufficed. All this introduces added time and burdens on the regulated community as well as agency staff that are not taken into account fully.

In addition, per the Agencies, after the OHWM indicators are used to assist in identifying a tributary, the next question is whether a tributary meets the relatively permanent standard.<sup>39</sup> Thus, as the Agencies state: “A water must not only be a tributary but must also meet either the relatively permanent standard or the significant nexus standard.”<sup>40</sup> That is, the relatively permanent standard encompasses “surface waters that have flowing or standing water year-round or continuously during certain times of the year,” and which “do not include surface waters with flowing or

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 3,083-3084.

<sup>40</sup> *Id.* at 3,081. Note, the significant nexus standard was eliminated by *Sackett* and as reflected in the 2023 Conforming Rule.

standing waters for only a short duration in direction response to precipitation.<sup>41</sup> As such, concepts of stream assessments including duration and timing of flow as well as sources of flow are all under this relatively permanent standard analysis. OHWM is only mentioned in the context of LIDAR-indicated tributaries and “to reasonably conclude the presence of an OHWM and shed light on the flow characteristics.”<sup>42</sup>

We also find that the Draft OHWM Manual applies varying definitions of OHWM to include similarities and differences between bankfull, dominant, and effective discharges but it is important to note that these terms especially as relating to bankfull do not have consensus in the scientific community and are subject to varying interpretations.<sup>43</sup> The Draft OHWM Manual states that “[b]ankfull channel is the scientific concept most associated with the regulatory definition of the OHWM[;]” however, the Draft OHWM Manual also notes that: “Many scientific studies explore concepts connected to bankfull, but this has sometimes led to conflicting and inconsistent definitions.”<sup>44</sup> Thus while “all the scientific research behind bankfull can be useful in understanding and characterizing the OHWM” in an academic setting, it is important to frame OHWM delineation in the context of regulatory requirements.<sup>45</sup>

As the Agencies note, “[u]ltimately, multiple indicators, data points, and sources of information may be used to determine whether a water, including a tributary, is relatively permanent.”<sup>46</sup> Thus, the role of OHWM is limited in consideration of whether a tributary is relatively permanent and all attempts to tie OHWM indicators to stream assessments and flow-related factors should be removed from the Draft OHWM Manual. **Ultimately, OHWM should be tied to the longstanding physical indicators such as the presence and characteristics of a reliable OHWM with a channel defined by a bed and bank.**

**C. The qualitative weight-of-evidence (WoE) approach to assemble, evaluate, and integrate different lines of evidence is a new requirement that will likely lead to inconsistent assessments of OHWM across the Nation if adopted.**

The Draft OHWM Manual outlines a WoE methodology to organize and evaluate observation at stream sites and requiring each line of evidence to be weighed before the body of evidence is then

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<sup>41</sup> *Id.* at 3,084. As stated, this includes tributaries under 2020 NWPR as well as those considered relatively permanent under the Rapanos Guidance. *Id.*

<sup>42</sup> *Id.* at 3,087.

<sup>43</sup> Draft OHWM Manual at 12.

<sup>44</sup> *Id.* at 12.

<sup>45</sup> *Id.* at 14.

<sup>46</sup> 88 *Fed. Reg.* at 3,088.

weighed to decide on the location of the OHWM.<sup>47</sup> Descriptions of weights are provided; however, the process of weighing the relevance, strength, and reliability of each line of evidence and then combining weights to support a final delineation is complex and subject to the whims of the evaluator. As the manual explains, “[t]he WoE approach, particularly with someone knowledgeable about local vegetation, can be applied to identify the OHWM.”<sup>48</sup> Thus, with the WoE approach subject to individual knowledge, the USACE’s goal to have consistent and objective determinations that are repeatable may be difficult to attain. Simply put, the WoE approach would vary by experience and regional expertise. A consultant with many years of experience in a particular region would likely give different weights to evidence that is presented in one region versus someone who is new to the field and/or with expertise in a different region.

The WoE methodology also moves away from RGL 05-05 baseline standard for indicators to be “reasonably reliable” and problematically, gives “strength,” “relevance” and “reliability” equal consideration.<sup>49</sup> This requires further training, and specifying each indicator to be weighed by each of the three standards, adds further complexity leaving more room for inconsistent and inefficient OHWM practices.

We again submit that the best approach is to leave the processes under RGL 05-05 in place as the baseline standard.

**D. Compared to the current practice, the OHWM Data Sheet and its accompanying instructions are extensively-detailed and complex. Proper implementation will require additional training even for professional consultants as well as engaging experts in multi-disciplinary fields; therefore, it will add additional burdens for landowners and the regulated community.**

Classified under four categories, the OHWM Data Sheet lists numerous boxes for physical indicators and requires checking off boxes next to indicators used to identify the location of the OHWM. This catch-all list is a departure from longstanding practice where RGL 05-05 stated that “districts should give priority to evaluating the physical characteristics of the area that are determined to be reliable indicators of the OHWM.”<sup>50</sup> Again, RGL 05-05 notes that “[p]hysical evidence to be evaluated include those items listed in the definitions at 33 C.F.R. Sections 328.3(e) and 329.11(a)(1).”<sup>51</sup> Furthermore, as a next tier evaluation, RGL 05-05 notes that because “many types of water bodies occur with varying considerations, including topography, channel

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<sup>47</sup> Draft OHWM Manual at 20-21.

<sup>48</sup> *Id.*

<sup>49</sup> *See e.g.*, OHWM Field Identification Data Sheet Instructions and Field Procedures, Step 3b.

<sup>50</sup> RGL 05-05 at 2.

<sup>51</sup> *Id.*

morphology and flow dynamics,” districts may consider other physical characteristics indicative of the OHWM.”<sup>52</sup>

The lack of a tiered OHWM assessment that considers varying complexities as contemplated in RGL 05-05 means that any response will require consideration of all these variables and weighing the evidence. As the manual notes, “[i]n simple cases in which the location of the OHWM is readily apparent, the process is much faster” but “the process of applying the WoE technique remains the same.”<sup>53</sup> Applying the WoE methodology in simple cases seem to be an entirely unnecessary and inefficient step.

Notwithstanding our comments above, the OHWM Data Sheet should include a Tier 1 box for simple cases that have reliable physical indicators listed in the definitions and then only direct users to a Tier 2 or other more advanced tiers where “other appropriate means” need to be activated or per RGL 05-05, there is a need for other reliable methods “[w]here the physical characteristics are inconclusive, misleading, unreliable, or otherwise not evident.”<sup>54</sup>

Overall, we request the USACE to consider further refining this OHWM Data Sheet and making it easier to use while keeping in mind the concepts laid out in RGL 05-05. Note that any OHWM Data Sheet that is required would be added to the permit applicable package and unnecessarily add regulatory burdens.

Given current practices, we do not believe that a one catch-all OHWM Data Sheet is necessary for all assessments. A large percentage of OHWM assessments can be processed quickly and efficiently and should not require consideration of all the complex elements under the OHWM Data Sheet. A simple acknowledgement in the permit application package that the OHWM was identified in accordance with the guidance provided in RGL 05-05 or the OHWM Data Sheet should suffice. We believe that only in certain special circumstances, the OHWM Data Sheet may be appropriate and could be utilized on a case-by-case basis.

Lastly, if an OHWM Data Sheet is mandated for all projects, we also request clarification of what would be considered an accurate and complete OHWM Data Sheet that is sufficient to meet the USACE’s requirements. As currently written, there is enormous room for inconsistent application in the staff acceptance and review of the OHWM Data Sheet and those concepts need to be further considered within the USACE’s internal processing.

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<sup>52</sup> *Id.*

<sup>53</sup> Draft OHWM Manual at 155-156.

<sup>54</sup> RGL 05-05 at 3.

**E. As a practical and administrative matter, we encourage the Agencies to improve transparency in this process by making available public comments for review online.**

We appreciate efforts taken to date to engage stakeholders in this Draft OHWM Manual; however, comments that will help inform and shape this manual are not available for public review. At this time, comments are to be submitted via an email address provided in the Joint Notice.

As such, we request improving transparency and facilitating easier public access to available documents by opening a docket through regulations.gov. This will provide a central depository as well as a familiar process for the public to review federal documents and submit comments as well as view comments that are submitted.

**F. In the event that the USACE proceed with finalizing the manual and OHWM Data Sheet, both documents should be accompanied with clear language that underscore its purpose as technical scientific-based non-mandatory documents and not regulatory enforceable documents for setting policy or regulatory action on jurisdictional waters.**

Like the RGL 05-05, the OHWM Draft Manual and the OHWM Data Sheet can be helpful resources to the USACE staff as well as the regulated community; however, if the intent is to mandate the regulated community to use these resources, we have concerns.

As such, similar to the caveats the Agencies note relating to the regulatory definitions and RGL 05-05 in the Joint Notice, **the Draft OHWM Manual should also explicitly state that it shall remain an optional technical reference document and that it will be not used as a basis for enforcement or regulatory compliance.**

The USACE should be clear that they will not require the use of the Draft OHWM Manual or associated OHWM Data Sheet/field procedures and that the regulated community can have the option to demonstrate compliance with the legal and regulatory definitions of OHWM or “waters of the U.S.” and RGL 05-05 under current case-by-case practices for determining OHWM.

This is particularly important given that RGL 05-05 requires districts to have complete and accurate documentation that substantiates the USACE decision for an approved jurisdictional determination; but does not restrict the types of acceptable documentation. For example, RGL 05-05 states that documentation can include “data sheets, site visit memoranda, maps, sketches, and, in some cases, surveys and photographs documenting the OHWM.”<sup>55</sup> This practice should be allowed to continue and not be displaced by any unnecessary OHWM Data Sheet submittal

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<sup>55</sup> RGL 05-05 at 4.

requirements. The need for flexibility and case-by-case processes are important for OHWM identification.

**G. Within the academic-driven scope of the Draft OHWM Manual, we support a collaborative approach to understanding the complexities of OHWM, which vary considerably throughout the Nation; however, from a regulatory point of view and CWA Section 101(b), the purpose should properly reflect the role of states under cooperative federalism.**

The Joint Notice states that the OHWM defines the boundaries of aquatic features for a variety of federal, state, and local regulatory purposes.<sup>56</sup> The manual's purpose seems to be more expansive to include state and local jurisdictions while the Agencies also emphasize the need for a national standard. We request that the regulatory scope of this manual be clearly defined through a rulemaking process. Under cooperative federalism, states also play a key role in protecting the Nation's waters and to this end, we support engaging states and tribal governments in this effort.

#### IV. Conclusion

We appreciate the Agencies' request for comments from wide-ranging stakeholders on its proposal to develop a first-of-its-kind National OHWM Manual and associated tools for identifying and delineating OHWM; however, we have serious concerns with such an endeavor which appears to be unmoored to the current legal and regulatory landscape as well as being unnecessary given the well-established practices for OHWM identification under RGL 05-05. The Draft OHWM Manual appears to extend the reach of jurisdictional waters with its consideration of expansive factors not considered before, resulting in increased regulatory burdens and uncertainty in the permitting process. Our members require regulatory certainty for planning their operations and assessing needs for permits far in the future.

For reasons outlined in our comments above, we request keeping RGL 05-05 as the governing national guidance on OHWM identification, and we ask that the USACE conduct a reassessment of this Draft OHWM Manual, field procedures, and OHWM Data Sheet given legal and regulatory parameters and consider releasing a revised manual as a reference document for practitioners.

We look forward to continued engagement as stakeholders with you in this effort, and hope you will not hesitate to reach out with any questions or concerns regarding these comments.

Thank you again for the opportunity to provide feedback.

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<sup>56</sup> Joint Notice.



Respectfully submitted,



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