January 2, 2024

Department of Defense
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for Privacy, Civil Liberties, and Transparency
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Submitted electronically via Federal eRulemaking Portal: http://www.regulations.gov

RE: Comments on Proposed Collection; Comment Request by U.S. Army Corps of Engineers Department of the Army, Defense of Defense, Docket Id. No. USA-2023-HQ-0016

Dear Mr. Wilson:

The American Petroleum Institute ("API"), the Associated General Contractors of America ("AGC"), and the Fertilizer Institute ("TFI") (collectively, "the Associations") submit the following comments in response to the U.S. Army Corps of Engineers' ("USACE") request for comments in response to the proposed public information collection notice as noticed on November 1, 2023, with comments due on January 2, 2024.[1] We appreciate the opportunity to provide comments on this ICR and share the benefit of our members' insights from their extensive experience in this field. Overall, we support information collection requests that aid the permitting process while providing regulatory certainty; however, in this case, we believe that the USACE has critically underestimated both the time and cost burdens imposed by these forms. We therefore recommend substantial tailoring of these forms before they are deployed, as well as a specific review to ensure that the forms do not inadvertently expand the federal Clean Water Act ("CWA") authority by failing to adhere to the tenets laid out by the Supreme Court in the *Sackett v. EPA* ("*Sackett*") decision.[2]

[1] *See* 88 *Fed. Reg.* 74,984 (Nov. 1, 2023) ("ICR").

[2] *Sackett v. EPA*, 598 U.S. 651 (2023) (*See* discussion below).

The ICR seeks comments on the following forms:

- Request for Jurisdictional Determination Form ("JD Request Form"),
- Preliminary Jurisdictional Determination Form ("PJD Form"),
- Interim Draft Rapid Ordinary High Water Mark Field Identification Data Sheet ("OHWM Data Sheet"), and
- Automated Wetland Data Sheets (0-9) ("ADS").[3]

The ICR also includes the following four Approved Jurisdictional Determination ("AJD") forms with the USACE noting that they are included in the collection for historical purposes but are no longer in use:

- "'[P]re-2015 regime (a.k.a. 'Rapanos')' AJD Form,"
- "[P]re-2015/Rapanos 'dry land' AJD Form,"
- "2020 NWPR [Navigable Waters Protection Rule] AJD Form," and
- "January 2023 Rule AJD Form" (collectively, referred to as "AJD Forms").[4]

Specifically, the ICR invites comments on whether the proposed forms are necessary for "the proper performance of the functions of the agency, including whether the information shall have practical utility," assessing "the accuracy of the agency's estimate of the burden of the proposed information collection," "ways to enhance the quality, utility, and clarity of the information to be collected;" and "ways to minimize the burden of the information collection on respondents."[5]

We are pleased to provide comments on these forms. Also, on December 2, 2023, the Associations submitted comments in response to the Interim Draft of the National Ordinary High Water Mark Field Delineation Manual for Rivers and Streams ("Draft OHWM Manual" or "manual") and the associated OHWM Data Sheet, and we incorporate by reference these applicable comments.[6]

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[3] ICR at 74,984.

[4] *Id.* As noted, these forms are "not currently in use" and "they are included in this collection for historical purposes. *Id.* at 74,984. Based on this representation, our understanding is that these four forms are not included for substantive comments but as historical information. However, we are unclear as to why quantified data is provided for the four AJD Forms, and that the total for "Annual Burden Hours," "Number of Respondents," and "Annual responses" includes data from the use of all the forms including the ones not currently in use. *Id.* at 74,985. *See* comments below.

[5] *Id.* at 74,984.

[6] *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/utils/getfile/collection/p16021coll15/id/756. Comments submitted by API, AGC, and TFI in response to this Joint Notice via email, December 2 2023 ("Associations' Comments"). Available at:

Fundamentally, we appreciate and support the USACE's continued efforts in having a process in place for the issuance of PJDs that are advisory in nature as well as formal AJDs which can be relied on for five years for permitting and development purposes. Both types of jurisdictional determinations, and especially AJDs, are particularly useful in providing regulatory certainty as to the scope of the USACE's jurisdiction over certain aquatic features. A formal determination by the USACE aids the regulated community with planning and developing projects. With accurate understanding of jurisdictional aquatic features on a site as reflected in an official AJD, the regulated community can rely on this information for permitting processes as well as can make decisions to avoid and minimize permanent and temporary impacts on jurisdictional waters where possible.

To that end, we appreciate the USACE developing useful tools for determining jurisdictional waters that can be utilized to help improve the efficiency and accuracy of data collection as well as to provide reliability, clarity, and consistency in these processes. Overall, we are supportive of information collection requests that support and expedite the permitting process, provide regulatory certainty, and lessen burdens for both the USACE staff and the regulatory community.

As to this specific ICR, we have concerns that the burdens to respondents are unclear and potentially incorrectly estimate burdens especially given that the listed forms are not required each time a new filling or maintenance is planned but may be utilized if appropriate, that the estimates do not account for the time and funds expended in mobilizing experts for this process, that the total burden numbers inaccurately include estimates from forms that are currently not in use by the USACE's admission, that additional supporting technical information that is customarily required by staff as part of these jurisdictional determinations requests should be also considered as part of information collection, and that additional burdens these forms will impose on users are not fully assessed.

We also submitted detailed comments that listed our serious concerns with the Draft OHWM Manual and the related OHWM Data Sheet. In this ICR, the USACE again highlights its position that the Draft OHWM Manual will improve consistency in the identification and delineation process, provide consistent indicators of definitions and OHWM indicators, and that the OHWM Data Sheet facilitates documentation for the OHWM.[7] We disagree and submit that the USACE already has well-established indicators in place through its regulations and RGL 05-05 Guidance.[8]

https://www.agc.org/sites/default/files/Files/Energy%20%26%20Environment%20(public)/OHWM%20final%20filed%2012%201%2023.pdf

[7] ICR at 74,985. *See* Associations' Comments.

[8] Ordinary High Water Mark Identification, USACE Regulatory Guidance Letter (RGL) No. 05-05 (Dec. 7, 2005) ("RGL 05-05").

We do not find that the Agencies have provided any reasoned basis or stated need for RGL 05-05 to be replaced by the extensive 386-page Draft OHWM Manual. As we note in our comments as submitted, 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.[9] The Agencies need to recognize these limitations and first and foremost, continue to depend on its longstanding case-by-case practice of delineating OHWM under RGL 05-05, and then following recommended revisions, make available the OHWM Data Sheet on an optional case-specific basis.

Finally, any forms pertaining to delineating jurisdictional waters should reflect current legal and regulatory parameters for determining jurisdictional federal waters under the CWA.[10] **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 USACE staff, landowners, and the regulated community, we recommend that the forms be carefully reviewed, revised, and modified to adhere to the tenets laid out in the *Sackett v. EPA* ("Sackett") decision.[11]**

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 provide general and 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 Environmental Protection Agency ("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.

[9] Associations' Comments. Joint Notice at 1.

[10] *Sackett*.

[11] *Id.*

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. This ICR and corresponding information collection instruments should be aligned with the narrow parameters that drive the legal test under *Sackett* for determining "waters of the U.S."

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."[12] And noting this persistent problem, the Court stated: "Today, we return to the problem and attempt to identify with greater clarity what the Act means by 'the waters of the United States.'"[13] 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

[12] *Sackett* at 658.

[13] *Id.* at 659.

ordinary parlance as 'streams, oceans, rivers, and lakes (internal citations omitted).'"[14] The Court 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."[15]

With the significant nexus standard removed under *Sackett*, the relatively permanent standard is the central standard under the 2023 Conforming Rule for determining whether a water is jurisdictional.[16] This test 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.[17] That is, as noted in the Agencies' 2023 Revised WOTUS Rule, "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 standing waters for only a short duration in direction response to precipitation."[18] Certain features such as swales and erosional features are expressly excluded based on longstanding practices.[19]

As such, we request that any information collection forms relating to jurisdictional determinations be refined to reflect the principles of *Sackett* for the pre-2015 regulatory regime, as well as the 2023 rules (as applicable) for the 2023 regulatory regime. We also ask that the USACE 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 relating to jurisdictional waters must be made through a notice and comment rulemaking.

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[14] *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 to only wetlands that are "'as a practical matter indistinguishable from waters of the United States,' such that it is 'difficult to determine where the 'water' ends and the 'water' begins." *Sackett* at 678-679 (citing *Rapanos* at 742).

[15] *Sackett* at 653.

[16] *Id.* at 654. The Agencies note that they will apply *Sackett* to both the 2023 Conforming Rule as well as to the pre-2015 regime as applicable. 88 *Fed. Reg.* 61,964 (Sept. 8, 2023) ("2023 Conforming Rule").

[17] 2023 Conforming Rule.

[18] 88 *Fed. Reg.* 3004, 3,084 (Jan. 18, 2023) ("2023 Revised WOTUS Rule"). As stated, this includes tributaries under 2020 NWPR as well as those considered relatively permanent under the *Rapanos* Guidance. *Id.*

[19] *Id.* at 3,115.

B. Based on our careful review of the Draft OHWM Manual, we do not agree with the assertions in the preamble that the manual and the associated OHWM Data Sheet will help improve consistency in the identification and delineation of the OHWM; and primarily we believe that RGL 05-05 should remaining the presiding OHWM guidance with any final OHWM Data Sheet to be made available for use on case-by-case optional basis.

The preamble to this ICR asserts without justification that the Draft OHWM Manual provides and describes indicators and a methodology that will help improve consistency in the identification and delineation of the OHWM through consistent definitions of the indicators, a new step-by-step process for identifying the OHWM using a weight-of-evidence ("WoE") approach and by facilitating an OHWM Data Sheet for logging information at the site.[20] Our comments in response to the Draft OHWM Manual provide detailed comments on each of these arguments which we incorporate by reference.[21] We also discuss each of these elements below.

C. As a practical and administrative matter, we encourage the Agencies to improve transparency in this process by making all the forms subject to the ICR available in one place for public comments for review online.

We appreciate efforts taken to date to engage stakeholders; however, all the forms under this ICR and OMB Control No. 0710-0024 are not readily available in one location to facilitate review. Certain forms are available if searched individually under USACE publications as related to Engineering Forms; while the AJD Forms under this specific ICR and OMB Control Number are not available easily. The ICR states that the associated collection instruments can be requested by sending a request to a mailing address or contacting by phone; however, no online alternative is provided. This is startling given that the very reason for soliciting comments is the collected instruments which are not easily available.

We request improving transparency and facilitating easier public access to available documents by including the collection instruments into the existing regulations.gov website for this docket number. 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.

[20] ICR at 74,985.

[21] Associations' Comments.

III. Specific Comments

A. Further clarification and corrections are needed to reflect and itemize burdens associated with the following: JD Request Forms, PJD Forms, four AJD Forms that are not in current use, and the Memoranda for Record ("MFR").

The USACE explains that it "intends to implement the 2023 Conforming Rule and the pre-2015 regime consistent with *Sackett"* using the JD Request Form and the PJD Form.[22] The USACE also notes that it is electing to use the MFR instead of a JD 'form' to document the basis for jurisdictional determinations under these two regimes.[23] The USACE also includes four other forms that are not "currently in use" and explains that they are included in this collection "for historical purposes."[24]

First, while the AJD Forms are purportedly only provided for historical purposes, the burden data for the four AJD Forms as related to "Annual Burden Hours," "Number of Respondents," and "Annual Responses" appears to be added with the other forms' data to compile the total annual burden hours, total number of respondents, and total number of annual responses.[25] We welcome any clarification from the USACE on these four AJD Forms because if the four AJD Forms are no longer in use as appears to be the case, that data should be removed from the total burden numbers.

Second, we recommend that separate quantified data and estimates including burdens should be provided for information that is collected from respondents to form the basis for the USACE's issuance of the MFR. This is especially important because no information collection request is made specific to the MFR even though similar to the AJD Forms which are included, comparable information will continue to be collected from respondents to document the USACE's basis for jurisdictional determinations under the two prevailing regimes.

As such, there is a burden associated with the completion of an MFR similar to the AJD Forms which should be assessed and reflected in the estimated data. The estimates for jurisdictional determinations should be specific to the post-*Sackett* requirements reflecting the removal of the significant nexus test under *Sackett,* the *Rapanos* plurality opinion as it applies currently*,* and the use of the relatively permanent standard under the 2023 Conforming Rule where applicable. The estimates also should clearly reflect all the analysis and information collection required of

[22] ICR at 74,984.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 74,985. For example, total annual burden hours are listed as 73,853 hours. These are compiled by adding up all the forms' individual data estimates for annual burden hours (2,815 hours - JD Request Form, 1,670 hours - 3 AJD Forms, 61 hours – dry land AJD Form, 625 hours – PJD Form, OHWM Data Sheet – 19,990 hours, ADS – 48,692 Hours). *Id.* Note: It would be helpful for the USACE to define the term "burden" and explain the types of burdens that are included here (e.g. staff time).

respondents in preparation and completion of a MFR. In essence, the purpose of the MFR is not simply to "document the basis of jurisdictional determination" but it requires an understanding of the review area, listing of features including by size, a rationale for each aquatic resource supporting that the feature meets the relevant category of the waters of the US as well as a similar assessment of non-jurisdictional features, and data sources.[26] Reflecting on our members' experiences, the supporting data and sources at this level of information are typically asked of the respondents and should be accurately reflected in the estimation of burdens.

It is also unclear how the USACE calculated these response estimates because an ADS that requires data collection from in-field observations to fill out the form is estimated to take an average of thirty minutes per response while a JD Request Form that includes basic information (but does not include all the additional information that is routinely asked of respondents) is listed as ten minutes per response on average, and a PJD Form with information requiring a list of all aquatic features and supporting data is listed as twenty-five minutes per response on average.[27] There are no burden estimates provided for the MFR completion; however, the USACE's estimate for the three AJD forms per response is 150 minutes. Again, that estimate does not take into account the level of complexity required for documenting JD determinations.

Filling out the basic JD Request Form may take ten minutes on average but it does not take into account all the data collection components that need to be collected by the respondent in response to the USACE for the completion of a PJD or an AJD. The average burden per response for a PJD Form is noted as 25 minutes per average and again, the burden of work can be similar to an AJD and include data collection conducted through desk review or field work. All of this can require mobilizing experts for data collection for the preliminary supporting information that forms the basis of a PJD or an AJD. The PJD in fact can require a similar level of work as an AJD including preparation and submittals of wetland delineation reports, data sheets, and maps, plans, or plats.

We appreciate the USACE's dedication to preparing jurisdictional determinations and our comments simply reflect the need for more accurate estimates of burdens and assessments that are undertaken for documenting OHWM, delineating wetlands, and/or delineating jurisdictional waters.

B. Only relevant information that is pertinent under the USACE's statutory and regulatory authority should be required and information outside the scope should be removed.

[26] ICR at 74,984. *See* example of a MFR issued October 2, 2023 ("MFR Example"). Available at: https://www.mvs.usace.army.mil/Portals/54/docs/regulatory/JDs/2023-477 AJD.pdf?ver=MtVJwgkjRsZuRUcygCfHrw==

[27] ICR at 74,985.

Our review of the forms under the information collection request indicates that certain information is not necessary, has no practical utility, and adds to the reporting burden for the respondents. We request a review of all the forms and all optional information not subject to specific regulatory requirements should be excluded.

For example, the JD Request form includes nine reasons for making the request and asks the respondent to check as many as possible. All of these require the respondent to attest to their intentions which are not regulatory required. The form requires the respondent at this early stage to respond to a range of potential outcomes such as: whether the respondent plans to a) construct/develop a project designed to avoid all aquatic features, b) to take initial steps toward future permitting process, c) to take steps toward permitting, d) if required by another jurisdiction, e) to contest jurisdiction, or f) if the site is entirely over dry land. All of these are overly obtrusive and also as a practical matter, difficult to assess at the beginning of the process. The intentions for requesting jurisdictional determinations are entirely irrelevant and have no practical utility. For one, the reasons for the request will not affect the final PJD or AJD determination. The USACE's function as noted in a MFR is "stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel."[28]

At a minimum, we request that Question 5 in the JD Request Form be removed and similar reviews be performed on all the forms.

C. OHWM Data Sheet is burdensome, unnecessary, and should only be used on an optional case-by-case basis.

We provide the following specific comments on the OHWM Data Sheet in addition to our prior submitted comments.

1. The 30-minutes average burden per response is underestimated and is not an accurate reflection based on our understanding of the requirements.

The USACE estimates 30 minutes on average to fill out the OHWM Data Sheet per response and based on our understanding of the requirements, we would submit that it is a gross underestimation. 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,

[28] *See* MFR Example.

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 of 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.[29] 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 is 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."[30] 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. We understand that the OHWM Data Sheets may be useful to USACE staff in completing their review as well as for respondents in certain cases and as such, should be made available for use upon specific requests but not as a mandatory requirement for every OHWM assessment.

2. The qualitative weight of evidence approach to assemble, evaluate, and integrate different lines of evidence is a new requirement that will add increased burdens on information collection.

The Draft OHWM Manual outlines a WoE methodology to organize and evaluate observation at stream sites and requires each line of evidence to be weighed before the body of evidence is then weighed to decide on the location of the OHWM.[31] Descriptions of weights are provided;

[29] *For e.g.,* Draft OHWM Manual at 53, 58, and 80, Figures 29, 33, and 51.

[30] *Id.* at 105-106.

[31] *Id.* at 20-21.

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."[32] 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 new to the field and/or with expertise in a different region.

The OHWM Data Sheet also adds two more factors to the existing robust "reliable" factor under RGL 05-05 which is a departure from longstanding practice and will lead to increased time and inconsistent outcomes.[33] The RGL 05-05 on OHWM identification 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."[34] 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."[35] And in these situations, the districts have an extra burden to document in writing the physical characteristics used to establish OHWM for regulatory purposes.[36]

Yet, the WoE methodology moves away from RGL 05-05 baseline standard for indicators to be "reasonably reliable" and problematically, gives "strength," "relevance" and "reliability" equal consideration.[37] 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. This RGL 05-05 process provides accountability and consistency to the regulatory process and should remain in place.

3. **The expanded list of physical indicators for delineating OHWM is problematic, introduces increased complexities and variabilities into the process, and is a material change in the USACE's practice under RGL 05-05.**

The regulatory definitions of OHWM as well as those provided in RGL 05-05 are adequate for specifying appropriate physical indicators; and yet, an increasingly over-worked OHWM Data

[32] *Id.*

[33] RGL 05-05.

[34] *Id.* at 3.

[35] *Id.*

[36] *Id.*

[37] *See e.g.,* OHWM Field Identification Data Sheet Instructions and Field Procedures, Step 3b.

Sheet is introduced for use in all situations, ranging from the simple to the complex. Disregarding the current longstanding case-by-case flexible approach, the USACE adds four separate categories called "geomorphic," "vegetation," "sedimentary" and "ancillary" indicators.[38] And each of these lines of evidence would need to be listed and weighed using the WoE approach.

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.[39]

The regulatory framework has been clear and no such drastic revision to existing policy is necessary. 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."[40] 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; 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."[41]

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 and the expanded list in the OHWM Data Sheet.

Based on our members' experience, the OHWM-related physical indicators and assessments have been at times in-the-field reviews while one member depicts OHWM on plates (drawings) based

[38] OHWM Data Sheet.

[39] RGL 05-05 at 1.

[40] 33 C.F.R. Section 328.3(c)(4) (2023 Revised WOTUS Rule) (previously 33 C.F.R Section 328.3(e).

[41] 33 C.F.R. Section 329.11.

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 on the agency staff that are not considered fully.

The role of OHWM is limited under current regimes with the prevailing question being whether a tributary is relatively permanent, and as such, 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. The current OHWM Data Sheet should be revised and simplified.

4. **There is a lack of tiered OHWM assessment with the OHWM Data Sheet which appears to be required for all projects ranging from simple to complex and this unnecessary burden can be reasonably minimized by making the data sheet optional and/or adding a tiered approach per RGL 05-05.**

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 in every scenario. 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."[42] However, the USACE should recognize that applying the complex WoE methodology in simple cases seems to be an entirely unnecessary and inefficient step.

Given current practices, we do not believe that a one catch-all OHWM Data Sheet is necessary for all assessments although it may be useful to facilitate USACE staff review in certain cases. 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 acknowledgment 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.

[42] Draft OHWM Manual at 155-156.

In the alternative, the OHWM Data Sheet could also 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."[43]

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.

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 as well as within this ICR.

D. Estimated burdens are underestimated for the Automated Wetland Sheets.

The USACE also includes ten wetland data sheets that represent 10 regional sub-forms. The ADS were introduced in 2022 and include PDFs as well as automated forms provided in Microsoft Excel. The USACE believes that this will automate the data analysis using information input by the respondent and reduce the time and effort required to complete these processes. To that extent, the average burden per response on the affected public is provided as thirty minutes. No further rationale is provided for this estimate.

We appreciate efforts by USACE to further streamline information collection efforts by incorporating certain information into the automated forms themselves; however, these are highly detailed forms requiring the expertise of multiple experts with regional-specific knowledge of vegetation, soil, and hydrology. Based on our members' experience, thirty minutes to fill out the form on average severely disregards all the steps and resources that are needed to be activated to fill out the form accurately. These steps can include mobilizing a team internally, hiring consultants, desk review using a variety of tools, accompanying team and consultants to sites which can sometimes include a day or two of travel time depending on the location, assessing the site which can vary depending on complexity of elements, delineating the boundary of jurisdictional features, assessing site for factors such as hydrology, soil and vegetation, and compiling the report per the requirements of the form.

[43] RGL 05-05 at 3.

All these steps even for the simplest sites can take four to five days with costs undertaken by the respondent for the hiring of experts and all associated expenses such as travel. We ask the USACE to reconsider its assessment of average burdens on the respondents for filling out the ADS.

IV. Conclusion

We appreciate the Agencies' request for comments regarding the ICR and applicable forms relating to the jurisdictional determination process. Our members require regulatory certainty for planning their operations and assessing needs for permits far in the future, and efficient processing of jurisdictional determination requests is an important aspect in aiding those efforts.

For reasons outlined in our comments above, we ask you to reconsider and revise the estimated burdens for the proposed forms and to look for ways to remove unnecessary components, minimize burdens, and enhance the quality, utility, and clarity of the information that is to be collected.

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.

Respectfully submitted,

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