

September 19, 2023

The Honorable Michael S. Regan
Administrator
Office of Administrator
Mail Code 1101A
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable Michael L. Connor
Assistant Secretary of the Army for Civil Works
U.S. Army Corps of Engineers
108 Army Pentagon
Washington, DC 20310

Dear Administrator Regan and Assistant Secretary Connor:

On behalf of the National Association of Home Builders (NAHB) and its more than 140,000 members, I write to thank you for your August 22, 2023, response to my June 28, 2023, letter addressing the pause on approved jurisdictional determinations (AJDs) and permitting under the Clean Water Act (CWA) Section 404 program and ask for additional clarification. While we appreciate the agencies' issuance of a conforming rule to address the Supreme Court's ruling in *Sackett v. EPA* and hosting public webinars to explain the rule's implementation, a number of uncertainties remain.

The Corps' website states "Now that the conforming rule has become effective, the nationwide pause on issuance of certain approved jurisdictional determinations (AJDs) is now lifted in entirety. Effective immediately, USACE districts have resumed issuance of all AJDs nationwide under the applicable regulatory regime." That has not been our members' experience. Since the effective date of the rule, NAHB has asked environmental consultants from across the country about the status of their pending AJD requests. Several stated that in lieu of processing the AJDs, many Corps field staff told them they are waiting for further guidance on how to interpret and implement the conforming rule and the pre-2015 rule plus *Sackett*.

As we understand it, there currently are only a few decisions the Corps field staff are comfortable making – preliminary jurisdictional determinations, delineation concurrence letters, no permit required letters, and AJDs for dry land and categorically excluded waters. Each of these actions have been characterized by the Corps field staff as temporary workarounds that have been used in response to the nationwide AJD freeze following the Court's *Sackett* ruling. Unfortunately, none of these options apply to most of the activities conducted by landowners, homebuilders, industries, states, or local governments who request AJDs before seeking required CWA 404 permits. Further, none of these options consider the questions regarding what constitutes "relatively permanent" or "continuous surface connections". As a result, AJDs for these types of projects remain, and will likely continue to remain, in the "pending" pile. This is unacceptable.

When the *Sackett* decision was announced, the agencies immediately paused the processing of certain approvals, yet assured the public that this would only be for a short time until a new rule was issued. Now there is a new conforming rule, yet the lapse remains in place because the Corps field staff are unwilling or unable to proceed absent additional direction from Headquarters. Given the recognition that training would be necessary to promote clarity and consistency, the solution seems quite clear: the agencies need to provide additional guidance to not only their field staff, but also the public.

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The preamble of the conforming rule states that the agencies have a wide range of available approaches for providing administrative guidance to address other issues that may arise outside of this limited rule “including AJDs and permits, guidance, use of the final rule’s severability provision, notice and comment rulemaking, and agency forms and training materials.” With that in mind, NAHB poses the following implementation questions that we believe must be answered for our members to fully understand the scope of federal CWA jurisdiction and have clear expectations of when they will need a CWA 404 permit:

- How and when do the agencies intend to educate and empower their field staff across all Corps Districts to make consistent and defensible decisions that are consistent with the *Sackett* ruling, including in those states that are subject to the preliminary injunction?
- How and when will that same information that is used to educate the field staff be shared with the public?
- How will the agencies direct their field staff to interpret the term “relatively permanent” and what supporting data will be required to demonstrate that a feature meets this definition?
- How will the agencies direct their field staff to interpret the term “continuous surface connection” and what supporting data will be required to demonstrate that a feature meets this definition?
- How and when will the interpretive guidance regarding “relatively permanent” and “continuous surface connection” be shared with the public?

I appreciate your prompt attention to this critically important matter for the U.S. home building industry. Should you have any questions, please do not hesitate to contact Ms. Susan Asmus, Senior Vice President, Regulatory Affairs, at (202) 266-8538 or sasmus@nahb.org. NAHB looks forward to working collaboratively with you to implement a workable definition of WOTUS and protect our nation’s waterways.

Best regards,



Alicia G. Huey, 2023 Chairman of the Board
National Association of Home Builders of
the United States

cc: Ms. Radhika Fox, Assistant Administrator, Office of Water, U.S. EPA
Mr. Jaime A. Pinkham, Principal Deputy Assistant Secretary of the Army for Civil Works, U.S. Army Corps of Engineers