

June 28, 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 of the United States (NAHB) and its more than 140,000 members, I write to urge you to quickly propose and finalize a revised regulation and immediately provide the Corps districts with regulatory guidance that clarifies the limits of federal jurisdictional under the Clean Water Act (CWA) consistent with the U.S. Supreme Court's holdings in *Sackett v. Environmental Protection Agency*. Since the *Sackett* decision was announced on May 25, 2023, the Corps has stopped processing requests for approved jurisdictional determinations (AJDs) while the districts await guidance from Corps' Headquarters on how to proceed. Halting AJDs leads to permitting delays and places another barrier on the nation's home builders' ability to provide safe, decent, and affordable housing.

Over a month has passed since the Court's opinion. With no post-*Sackett* interpretive guidance, home builders and developers face three untenable options. First, they may attempt to determine whether their activities require a CWA §404 wetlands permit and risk subsequent CWA enforcement action if they interpret *Sackett* differently than the federal regulators. Second, property owners may accept a preliminary jurisdictional determination (PJD), allowing federal regulators to assume that the wetlands or water features on or near the property are jurisdictional. In this scenario, only after our members relinquish the right to have the Corps make an official determination of jurisdiction of aquatic resources for any CWA jurisdictional features on their property will the Corps district offices agree to process requested CWA §404 permits. And third, they can do nothing and wait until the agencies figure how to address *Sackett*. These options are extremely frustrating and costly to the U.S. homebuilding industry, and none is appropriate or acceptable.

Last week, Assistant Secretary Connor testified before the House Committee on Transportation and Infrastructure's Subcommittee on Water Resources and Environment and stated that the agencies do not intend to lift the nationwide suspension on AJDs or provide the districts with interim *Sackett* regulatory guidance until a final rule is enforced. On June 27, 2023, the agencies announced they intend to file amendments to the 2023 "Revised Definition of 'Waters of the United States' Rule" (2023 Rule) and issue a final rule by September 1, 2023.<sup>1</sup> Land acquisition, permit processing, and home building cannot be paused until September 1; we desperately need interim guidance from the agencies *now*.

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<sup>1</sup> <https://www.epa.gov/wotus/amendments-2023-rule>

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A healthy housing market is critical to a strong and vibrant U.S. economy and is contingent upon EPA and the Corps moving forward quickly and affirmatively to clarify the scope of federal CWA jurisdiction and restart the Section 404 approval processes. *Sackett* established clear, bright lines concerning which aquatic features are not jurisdictional under the CWA. In short, the agencies cannot rely on the “significant nexus test,” cannot regulate wetlands that do not directly touch (i.e., appear indistinguishable from) a water of the United States, and cannot claim as jurisdictional any waters of the United States that are not relatively permanent bodies of water connected to traditional interstate navigable waters. While the agencies continue to apply two different WOTUS regulatory definitions, with less than half the states following the 2023 Rule and a majority adhering to the “pre-2015 regulatory regime”, regardless of which regulatory definition of WOTUS is being followed, *Sackett* has invalidated key aspects.

NAHB supports the agencies’ plan to promulgate a new WOTUS regulatory definition consistent with *Sackett*. Nevertheless, there is an immediate need for interim regulatory guidance that will allow the Corps to lift the nationwide suspension of issuing AJDs and provide affected landowners, including homebuilders, certainty over whether their lands may be subject to CWA jurisdiction.

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 Mr. Michael Mittelholzer, Assistant Vice President, Environmental Policy, at (202) 266-8660 or [mmittelholzer@nahb.org](mailto:mmittelholzer@nahb.org). NAHB looks forward to working collaboratively with you as the agencies craft a durable and workable regulatory definition of WOTUS that is consistent with the recent *Sackett* opinion.

Best regards,



Alicia G. Huey  
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