Testimony of Vince Messerly

On Behalf of the

National Association of Home Builders

Before the

Transportation and Infrastructure Committee

Subcommittee on Water Resources and Environment

Hearing on

"Waters of the United States Implementation Post-*Sackett* Decision:

Experiences and Perspectives."

September 11, 2024

Introduction

Chairman Rouzer, Ranking Member Napolitano, and members of the Subcommittee, I appreciate the opportunity to appear before you today on behalf of the National Association of Home Builders ("NAHB"). My name is Vince Messerly, and I am the president of the Streams and Wetlands Foundation, a non-profit wetlands mitigation bank based in Ohio. I also serve as Vice Chairman of NAHB's Environmental Issues Committee.

NAHB's membership includes more than 140,000 member firms, involved in the home building, remodeling, multifamily construction, land development, property management, subcontracting and light commercial construction industries. NAHB members construct approximately 80% of all new housing in the United States each year.

As a mitigation banker, I have the opportunity to collaborate hand-in-glove with home builders and developers to accomplish two bedrock goals: creating housing opportunities and safeguarding the environment. Our team develops and monitors wetland bank projects to ensure high quality aquatic resources are restored and receive long-term protection. Builders undergoing the Clean Water Act (CWA) 404 permitting process purchase wetland bank credits to offset their construction activity on wetlands. This dynamic has supported over 1,500 permit applicants, facilitating an estimated $3 billion in economic development and infrastructure projects, while also protecting, enhancing, or restoring more than 4,000 acres of wetlands, riparian corridors, and upland buffers.

Because of this experience, I have a unique understanding of the CWA regulatory process and how the inefficiencies impact home building in the real world. The Sackett Supreme Court decision crystallized the intent of the CWA and corrected the goalposts. On September 8th, 2023, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (hereafter "the Agencies") released their revised definition of the Clean Water Act term "waters of the United States" ("WOTUS") to comply with *Sackett*. As the one-year mark has passed, NAHB regrets to share with the Subcommittee that the revised rule's implementation has been a letdown. The Agencies failed on two fronts—WOTUS is not being implemented according to the Supreme Court's holdings, and the understanding of the regulatory process continues to be as clear as mud.

The residential construction industry, and others in the regulated community, continue to experience prolonged and opaque permitting processes, which makes it more difficult for home builders to provide homes or apartments at a price point attainable for most households. Consequently, builders and developers operating under an unpredictable regulatory environment will make home building inefficient and costly, ultimately exacerbating our nation's housing crisis."

Housing Attainability:

Before examining *Sackett* and the Agencies' WOTUS implementation, it is crucial to contextualize the immense housing challenges Americans are experiencing. Predictability and certainty in the CWA 404 permitting regime are crucial because housing production is linked to successful permitting. Our nation is facing a fever-pitched housing attainability crisis. The root cause of this crisis is straightforward—there is a dearth of supply in the single-family and multifamily markets, both for-rent and for-sale. NAHB's

economists estimate that there is over a 1.5-million-unit housing shortage in the U.S.[1] Unfortunately, this has forced a majority of Americans to remain on the sidelines, unable to access the American Dream of homeownership and the ability to build economic success.

According to NAHB's "Priced Out Estimates" study for 2024, **77% of households are unable to afford the median price of a new home which sits at $495,750.**[2] Lowering costs is pivotal because prospective homebuyers are highly elastic to price changes. The study further demonstrates that for every $1,000 increase in the median price of a new home, an additional 106,031 households would be priced out of the market. Indeed, constrained inventory is fueling the housing affordability crisis.

Permitting delays and regulatory uncertainty needlessly increases housing costs by reducing housing supply. As someone who has navigated the CWA 404 wetland permitting process, regulators do not need to deny a permit to halt a housing project, simply delaying the process, or worse failing to provide clear regulatory guidance is more than enough to cause a developer or builder to abandon a project – no matter how desperately needed housing might be in a community.

The challenges surrounding WOTUS permitting become stark when you consider the time and cost to obtain a CWA section 404 permit. A 2002 study found that it takes an average of 788 days and, adjusted for inflation, $471,836 to obtain an individual permit and 313 days and $50,233 for a "streamlined" nationwide permit. Over $1.7 billion is spent annually by the private and public sectors obtaining wetlands permits.[3] Importantly, these ranges do not consider the cost of mitigation, which can be exorbitant. When considering these implications—from housing attainability to CWA section 404 permitting—it is clear why we need to have proper implementation of the WOTUS rule, which is why *Sackett* sought to address long-running concerns over federal overreach.

The Sackett Decision

In May 2023, the United States Supreme Court decided the case *Sackett v. Env't Prot. Agency.*[4] The Sacketts own a 0.63-acre vacant lot in a residential subdivision near Priest Lake, Idaho. To the north, the lot is bounded by a county road, and on the other side of the road there is a drainage ditch. To the south, the lot is bounded by another road and a row of houses sit south of that road; those houses have frontage on Priest Lake.

The government asserted jurisdiction over a wetland area on the Sacketts' lot pursuant to the Clean Water Act. The question in the *Sackett* case was whether that wetland area was a "water of the United States" and therefore jurisdictional. All nine justices agreed that the government had improperly asserted jurisdiction over the wetland, and five justices established a test for determining when the government may assert Clean Water Act jurisdiction over wetlands.

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[1] Single-Family Starts will Rise in 2024 but Supply-Side Challenges Persist, https://www.nahb.org/news-and-economics/press-releases/2024/02/single-family-starts-will-rise-in-2024.
[2] Na Zhao, Nearly 77% of U.S. Households Cannot Afford a Median-Priced New Home, https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2024/special-study-households-cannot-afford-a-median-priced-new-home-april-2024.pdf?rev=cb6f4f7d507341cb9ece97b90b6709c3.
[3] Sunding, D., & Zilberman, D. (2002). The economics of environmental regulation by licensing: An assessment of recent changes to the wetland permitting process. https://digitalrepository.unm.edu/nrj/vol42/iss1/5/
[4] *Sackett v. Env't Prot. Agency*, 598 U.S. 651 (2023).

The Court began its opinion by explaining that the Clean Water Act can have "crushing" consequences on property owners, even those that inadvertently contravene its requirements.[5] (The EPA threatened Michael and Chantell Sackett with fines of $40,000 per day because they unknowingly backfilled their property). The Court then provided a history of its previous CWA cases. In *United States v. Riverside Bayview Homes, Inc*.[6], the Court allowed the Corps of Engineers to assert jurisdiction over wetlands that actually abutted a navigable water.[7] Then in *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*[8] *(SWANCC),* the Court held that isolated ponds not adjacent to open waters did not fall under the jurisdiction of the CWA. Furthermore, the *Sackett* Court explained that after the SWANCC decision "[t]he agencies never defined exactly what they regarded as the 'full extent of their authority.' They instead encouraged local field agents to make decisions on a case-by-case basis. What emerged was a system of 'vague' rules that depended on 'locally developed practices.'"[9]

Finally, the *Sackett* Court addressed *Rapanos v. United States.*[10] In *Rapanos*, no opinion garnered five votes. In describing the *Rapanos* plurality opinion, the *Sackett* Court wrote that the CWA:

> May fairly be read to include only those 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 'wetland' begins." 547 U.S., at 742, 755, 126 S.Ct. 2208 (emphasis deleted). That occurs when wetlands have 'a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands.'"[11]

Additionally, in *Rapanos*, a concurring opinion determined that "jurisdiction under the CWA requires a 'significant nexus' between wetlands and navigable waters and that such a nexus exists where 'the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity' of those waters."[12]

As the *Sackett* Court explained, even after three Supreme Court opinions addressing the jurisdiction of the CWA many property owners were in a "precarious position because it is often difficult to determine whether a particular piece of property contains waters of the United States."[13]

After analyzing the wording of the CWA and these three previous cases, the Court ruled that the Sacketts' wetlands were not jurisdictional. The Court rejected the "significant nexus" test and clarified that for the government to assert jurisdiction over a wetland that wetland must be adjacent to a "water of the United States." And to be adjacent, wetlands must be "indistinguishably part of a body of water that itself constitutes "waters" under the CWA."[14] Moreover, "[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby."[15] Thus, the Court held that:

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[5] *Sackett*, 598 U.S. at 660.
[6] *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985).
[7] *Sackett*, 598 U.S. at 665.
[8] *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001).
[9] *Sackett*, 598 U.S. at 665-66.
[10] *Rapanos v. United States*, 547 U.S. 715 (2006).
[11] *Sackett*, 598 U.S. at 678 (quoting *Rapanos)*.
[12] *Id.* At 667 (quoting J. Kennedy's concurring opinion in *Rapanos*).
[13] *Id.* at 669 (internal quotations omitted).
[14] *Sackett*, 598 U.S. at 676.
[15] *Id.* at 20

> The CWA extends to only those wetlands that are "as a practical matter indistinguishable from waters of the United States." *Rapanos,* 547 U. S., at 755 (plurality opinion) (emphasis deleted). This requires the party asserting jurisdiction over adjacent wetlands to establish "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." Id., at 742."[16]

Sackett Aftermath

Following the *Sackett* decision, the Agencies immediately instituted a nationwide freeze in processing any requested jurisdictional determination (JD), or issuance of CWA 404 wetlands permits based upon already issued AJDs until the Agencies could amend (i.e., fix) their Revised Definition of Waters of the United States[17] rule to comply with the *Sackett* ruling. The resulting three-month suspension of the CWA 404 permitting program halted home building and infrastructure projects around the country. Assistant Secretary of the Army Civil Works Mr. Michael Connor announced over 4,000 projects seeking approved jurisdictional determinations (AJDs) were backlogged before this Subcommittee on December 5th, 2023.[18]

NAHB members reported that the Agencies' staff encouraged project proponents, who were seeking AJDs, to instead agree to accept preliminary jurisdictional determinations (PJDs) to avoid delays in Corps field staff processing AJDs, which compounded ongoing confusion over the *Sackett* ruling. It is crucial to highlight—when a property owner accepts a PJD, they are agreeing to not have the Agencies make a CWA jurisdictional determination, and instead presume all aquatic features (i.e., wetlands, streams, drainage ditch, pond, etc.) are jurisdictional and therefore require a permit. As a result, landowners were coaxed into surrendering to the PJD route, which is more likely to trigger additional permitting requirements, including being forced to pay for compensatory mitigation.

Nearly three months after *Sackett*, the Agencies released regulatory text amendments amendment to the WOTUS rule on August 13, 2023[19], and purported to have complied with the *Sackett* opinion. Surprisingly, the actual changes to the regulatory text of the WOTUS definition were quite limited. To highlight the major change—the Agencies removed references to the "significant nexus" test under three of the rule's five jurisdictional categories—tributaries, adjacent wetlands, and Intrastate lakes and ponds.[20] For each of those three jurisdictional categories where the "significant nexus" test was removed, what now remains is an equally confusing and vague standard. This new test requires federal regulation if the water feature in

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[16] *Sackett*, 598 U.S. at 678-79.
[17] Revised Definition of ''Waters of the United States,'' 88 Fed. Reg. 3004 (Jan. 18, 2023).
[18] Water Resources Development Acts: Status of Past Provisions and Future Needs: House Water Resources and Environment Subcommittee of the Transportation and Infrastructure Committee, 118th Cong. (2023). https://transportation.house.gov/calendar/eventsingle.aspx?EventID=406974
[19] Amendments to 40 CFR 120.2 and 33 CFR 328.3, https://www.epa.gov/system/files/documents/2023-08/Regulatory%20Text%20Changes%20to%20the%20Definition%20of%20Waters%20of%20the%20United%20States%20at%2033%20CFR%20328.3%20and%2040%20CFR%20120.2.pdf.
[20] *Id. at 3*

question is “relatively permanent,” or has “continuous surface connection” between itself and a downstream jurisdictional feature—both of which were left undefined.

On September 8, 2023, the Agencies issued their Revised Definition of ‘‘Waters of the United States’’; Conforming (hereafter “the Conforming Rule”).[21] Frustratingly, the Agencies again refused to define “continuous surface connection” or “relatively permanent” despite the *Sackett* Court’s repeated admonishment for expansive interpretations of regulatory authority to regulate non-navigable isolated wetlands as “adjacent wetlands.” In a deeply disturbing choice, the public and regulated industries were intentionally prohibited from commenting on the rule or the flaws with the existing preamble. The Conforming Rule was finalized using the APA “good cause” exemption[22] because the Agencies determined public comment was unnecessary. As a matter of government transparency and public participation, this is highly problematic.

Because the Agencies used the “good cause” exemption, they continued to rely on the preamble from their January 2023 rulemaking. For example, they asserted within the preamble the concept of “relatively permanent” when determining whether a feature meets the “tributary” jurisdictional category, which stretches beyond the Supreme Court’s understanding of the concept (i.e., free flowing rivers, streams, creeks, etc.). This means the Agencies can claim evidence of a “relatively permanent tributary” by simply being “able to trace evidence of a flow path downstream”.[23]

This evidence includes ephemeral flows[24], which is flowing water from a ”concentrated period of back-to-back precipitation events.”[25] Furthermore, the Agencies claim “a tributary may flow through another stream that flows infrequently, and only in direct response to precipitation, and the presence of that stream is sufficient to demonstrate that the tributary flow to a paragraph (a)(1) water."[26] Perhaps one of most egregious assertions within the preamble concerns the concept of ”continuous surface connection” in the context of jurisdictional tributaries is that ”[t]ributaries are not required to have a surface flowpath all the way down to the paragraph (a)(1) water and the flowpath may include subsurface flow."[27]

The *Sackett* decision made clear the Agencies only have authority under the CWA to take jurisdiction over “relatively permanent” waterbodies and wetlands that are indistinguishable from those waters. The Conforming Rule intentionally failed to provide any regulatory definition of what constitutes a “relatively permanent” waterbody and ignores the concept of “indistinguishability.” Unlike the WOTUS regulatory definition finalized under Navigable Waters Protection Rule[28], the Conforming Rule neglects to exclude from federal jurisdiction all “ephemeral features,” which only possess water following a rainfall event, but instead claims within the preamble that ephemeral features could have “relevantly permanent” flow.

[21] 88 Fed. Reg. 61964 (Sept. 8 2023).
[22] Congressional Research Service: The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action (2019). https://crsreports.congress.gov/product/pdf/R/R44356.
[23] 88 Fed. Reg. 3079 (January 18, 2023).
[24] *Id*. at 3084.
[25] *Id*. at 3086, 3087.
[26] *Id*. at 3084.
[27] *Id*. at 3084.
[28] 85 Fed. Reg. 22250 (April 21, 2020).

The Conforming Rule rendered more confusion and uncertainty in the residential construction industry. The Agencies refused to provide a clear regulatory definition of either "relatively permanent" waterbodies, or "continuous surface connection", and avoided collaboration with the public on implementation guidance. In response, NAHB submitted a Freedom of Information Act ("FOIA") on October 11th, 2023, request seeking information concerning how the Agencies were interpreting and enforcing the final Conforming Rule in the field. Specifically, the NAHB FOIA request sought:

- Copies of administrative guidance documents,
- training materials provided to Corps district offices,
- Implementation guidance from the Agencies headquarters staff to Corps district offices, and
- Questions from all Corps district offices to Agencies headquarters staff concerning implementation of the Conforming Rule.

Despite FOIA's statutory deadline that requires a response within 30 days, over six months passed before NAHB received a formal response. The Agencies' FOIA response included 1,500 pages—over half of which was redacted citing a FOIA exemption for internal deliberative documents. Among the unredacted documents were multiple copies of the same public webinars and factsheets. This unsatisfactory response forced NAHB to submit a FOIA administrative appeal to the Agencies concerning the heavily redacted documents and liberal use of the "Exemption 5". [29] Specifically, NAHB is challenging the Agencies' assertion that documents related to the implementation or enforcement of a final rule can still be considered deliberative and internal.

Finally, in June 2024, the Agencies updated[30] the coordination memorandum which was first released in September, 2023.[31] Together those memos string together a process by which the Corps and EPA would coordinate jurisdictional determinations. They do not provide any clarity to the regulated community concerning when a feature is or is not a "water of the United States." Instead, the memos established an internal elevation process between Corps districts, EPA Regional Offices, and the Agencies headquarters staff to review before finalizing any approved jurisdictional determinations (AJDs) for either adjacent wetlands or intrastate lakes and ponds. Not surprisingly, several of the pending AJDs subject to internal elevation and review by Agencies headquarters staff concern interpreting and applying the undefined concepts of "relevantly permanent" and "continuous surface connection" when making jurisdictional determinations for non-navigable adjacent wetlands, ephemeral tributaries, and isolated ponds.

[29] Department of Justice: FOIA Guide, 2004 Edition: Exemption 5. https://www.justice.gov/archives/oip/foia-guide-2004-edition-exemption-5.

[30] Michael L. Connor, Assistant Secretary of the Army; Bruno Pigott, Acting Assistant Administrator U.S. Environmental Protection Agency, EXTENSION OF JOINT COORDINATION MEMORANDA TO THE FIELD BETWEEN THE U.S. DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY (June 25, 2024).

[31] Michael L. Connor, Assistant Secretary of the Army; Radhika Fox, Assistant Administrator U.S. Environmental Protection Agency, JOINT COORDINATION MEMORANDUM TO THE FIELD BETWEEN THE U.S. DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS (CORPS) AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA) (Sept. 27, 2023).

Examples of the Agencies Overreach After *Sackett*

It is unfortunate that the Agencies have returned to the playbook that they used after the SWANCC decision. They are encouraging "local field agents to make decisions on a case-by-case basis." And, to no surprise, what has emerged is "a system of 'vague' rules."[32] The Agencies are asserting federal jurisdiction over isolated wetlands by relying upon man-made non-jurisdictional features like roadside drainage ditches, pipes, culverts, and swales. The Agencies claim these theoretical connections are enough to claim jurisdiction over isolated wetlands, even when it is clear where the jurisdictional water ends, and the wetland begins.[33]

For example, in Corpus Christi, Texas, the Agencies have asserted jurisdiction over a wetland that is connected to a jurisdictional water only by a non-jurisdictional 115-foot-long ephemeral drainage ditch.[34] Moreover, the ditch runs through two culverts before reaching the jurisdictional waterbody. The Agencies provide that wetlands can be considered adjacent "when a channel, ditch, swale, pipe, or culvert (regardless of whether such feature would itself be jurisdictional) serves as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water."[35] In this matter, the Agencies asserted jurisdiction because "[t]he 115-foot length of the physical connection via the ditch and the culverts is relatively short."[36]

Yet, in *Sackett* the Court held that the CWA extends to "only" those wetlands that are "as a practical matter indistinguishable from waters of the United States."[37] Furthermore, it stated that a wetland cannot be considered part of water of the United States "even if they are located nearby."[38] In the above example, the wetland in question is clearly distinguishable from the water of the United States—there is no evidence that it is difficult to determine where the waterbody ends and the wetland begins. Additionally, the Agencies asserted jurisdiction because the distance between the wetland and waterbody is "relatively short"—in other words "nearby." A clear contravention of *Sackett*.

Similarly, in Camden-Wyoming, Delaware, the Agencies asserted jurisdiction over two wetlands—Wetland #6 and Wetland #8.[39] Wetland #6 is 70 feet away from a jurisdictional waterbody and connected to it by a non-jurisdictional 70-foot pipe. Wetland #8 is 350 feet away from a jurisdictional waterbody and connected to it by a non-jurisdictional 350-foot swale.[40]

Again, the Agencies misread *Sackett*. They implausibly assert that "Under *Sackett*, the word 'indistinguishable' is not a separate element of adjacency, nor is it alone determinative of whether adjacent wetlands are "waters of the United States"; rather, the term (among others the Supreme Court uses) informs the application of the "continuous surface connection"

[32] *Sackett*, 598 U.S. at 665-66.
[33] *Sackett*, 598 U.S. at 678-79.
[34] Russel Kaiser, U.S. Environmental Protection Agency; Milton Boyd, U.S. Department of the Army, MEMORANDUM ON SWG-2023-00284 (June 25, 2024).
[35] *Id*. at 2.
[36] *Id*. at 4.
[37] Sackett, 598 U.S. at 678. (emphasis added).
[38] *Id*. at 676.
[39] Russel Kaiser, U.S. Environmental Protection Agency; Milton Boyd, U.S. Department of the Army, MEMORANDUM ON NAP-2023-01223 (June 25, 2024).
[40] *Id*. at page 3.

requirement."[41] However, the Court stated, "In sum, we hold that the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'"[42] This is not an offhand comment or a minor point, but the "holding" of the *Sackett* decision. And it provides that the CWA extends "only" to those wetlands that are "indistinguishable" from jurisdictional waters. With respect to Wetland #6 there is a wetland, then a pipe and then a jurisdictional water. Clearly, the Agencies could distinguish between the wetland and the jurisdictional water because there is a 70-foot pipe between them. Similarly, with respect to Wetland #8 the Agencies could distinguish where the wetland ended, and the jurisdictional water began—because there is a 350-foot swale between them. Finally, with respect to both wetlands the Agencies claim the distances to the jurisdictional waters are "relatively short." But as the *Sackett* Court stated, even wetlands that are "nearby" cannot be considered part of the jurisdictional water.[43]

Lastly in Snow, Ohio, the Agencies have asserted jurisdiction over a wetland that is connected to a jurisdictional waterbody through a 95-foot non-jurisdictional stream and then 100 feet of a second wetland that abuts the jurisdictional waterbody.[44] As with the other examples above, the Agencies pay no mind to *Sackett*'s holding that to assert jurisdiction over a wetland, the Agencies must prove that it is indistinguishably part of the jurisdictional water body. In this example, the Agencies could distinguish the wetland in question, a non-jurisdictional stream, a second wetland, and the jurisdictional waterbody.[45] In violation of *Sackett*, the Agencies declare that 195 feet is a "relatively short" distance.[46]

While these are only four examples, it is evident that the Agencies are not faithfully implementing the Court's directives. If home builders and the residential construction industry cannot understand the regulatory framework under which to operate, how can we expect to achieve housing production to address our national affordability crisis? Safeguarding the environment and building homes do not have to be mutually exclusive.

Conclusion

Thank you, Chairman Rouzer and Ranking Member Napolitano, for convening this important hearing and allowing NAHB to share our views on how the Agencies' WOTUS implementation post-*Sackett* is impacting our industry's ability to increase the production of quality, affordable housing. NAHB stands ready to work with you and members of the Subcommittee to achieve thoughtful, effective policies to address these concerns and expand the availability of attainable, affordable housing for all Americans.

NAHB commends Chairman Rouzer and this Subcommittee for spearheading H.R. 7023, the *Creating Confidence in Clean Water Permitting Act.* This was a welcome step in improving the process. As we continue to move forward, NAHB urges Congress to consider the following improvements to the CWA Section 404 permitting**:**

[41] *Id*. at 2.
[42] *Sackett*, 598 U.S. at 678.
[43] *Sackett*, 598 U.S. at 676.
[44] Stacey Jensen, U.S. Environmental Protection Agency; Milton Boyd, U.S. Department of the Army, MEMORANDUM ON LRB-2023-00451 (Sept. 3, 2024).
[45] *Id.* at 4.
[46] Stacey Jensen, U.S. Environmental Protection Agency; Milton Boyd, U.S. Department of the Army, Memorandum ON LRB-2023-00451 (September 3, 2024).

- If the Agencies continue to refuse to provide regulatory definitions for either "relatively permanent" water (RPW) or "continuous surface connection" (CSC), Congress must step in and either define these terms, or conversely identify features that cannot, by statute, be considered either a RPW or CSC such as:

    - Ephemeral features that only flow in direct response to a rainfall event cannot be an RPW.
    - Man-made features (i.e., pipes, ditches, culverts, etc.) used to connect otherwise isolated wetlands to jurisdictional features.
    - Groundwater, including shallow subsurface flow.

- Obtaining AJDs is an essential step during CWA 404 permitting process. Congress must ensure that the Agencies prioritize responding to AJD requests. As stated in this written testimony, the regulated community is being maneuvered toward the PJD route. This is concerning because property owners are surrendering their land to federal regulation in an effort to receive quicker permitting. PJDs are also non-binding which means that they are not appealable nor subject to judicial review. Homebuilders must accept their permit as is or refuse the permit and abandon their project—costing upwards of hundreds of thousands of dollars in sunk development costs.

- The past three presidential administrations have turned project proponents into regulatory ping pong victims. With each administration crafting their own WOTUS rule, home builders who may have held AJDs from a prior administration, have had their validity denied not because of changes in the environmental conditions found on their property, but rather due to court rulings or changes in administration's priorities. NAHB recommends that regulatory changes to the definition of WOTUS should not invalidate an AJD during its lifespan. Further, we recommend that AJDs be durable for 10 years, as envisioned in the *Creating Confidence in Clean Water Permitting Act*.

I appreciate the opportunity to discuss these critical issues.