

Testimony of Frank Murphy

Chairman of the Environmental Issues Committee of the National Association of Home Builders

Before the

United States House of Representatives

Small Business Committee

Hearing on “Small Business Perspectives on the Impacts of the Biden Administration’s

Waters of the United States (WOTUS) Rule”

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Chairman Williams, Ranking Member Velázquez, and members of the committee, on behalf of more than 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to testify. My name is Frank Murphy, and I am the Chief Operating Officer at Wynne/Jackson, a small real estate development firm in Dallas, Texas, with eight employees and averages under \$5 million in annual revenue. I have been in the real estate industry for nearly forty years, and I serve as the Chairman of NAHB’s Environmental Issues Committee.

In my experience, I have participated in development, asset and property management, consulting, leasing, and brokerage activities for over \$2.0 billion in real estate projects. Projects have consisted of approximately 17,000 acres of residential and master-planned developments, 12,000 residential lots, 10,000 apartment and condominium units, 4.5 million square feet of office and retail developments, 10 hotels, and numerous mini-storage facilities, marinas, and golf courses. I currently operate the development, special districts, and project consulting areas for the company in addition to my role as Chief Operating Officer.

NAHB’s membership includes over 140,000 firms involved in all aspects of residential construction, including home building, remodeling, multifamily construction, land development, property management, subcontracting and light commercial construction industries. Our industry is primarily dominated by small businesses, with our average builder member employing 11 employees. Since the Association’s inception in 1942, NAHB’s primary goal has been to ensure that housing is a national priority and that all Americans have access to safe, decent and affordable housing, whether they buy or rent a home. Over 80% of new residential housing units in 2023 will be built by NAHB members. Additionally, over 98% of NAHB members meet the U.S. Small Business Administration’s definition of “small entity.”

NAHB fully endorses the public comment submitted by the U.S. Small Business Administration, Office of Advocacy (Advocacy) on the proposed definition of waters of the United States (WOTUS) by the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps; collectively, the

agencies) that was submitted to the Federal Register on February 7, 2022.¹ The Revised Definition of WOTUS (2023 rule) was printed in the Federal Register on January 18, 2023.²

My small business is dedicated to developing, building, and preserving affordable housing options for all citizens. I have a unique understanding of how the federal government's regulatory process impacts businesses in the real world. Additional regulations and their attendant administrative reviews and permitting processes make it more difficult for me to provide homes or apartments at a price point attainable for working families. More importantly, living under a regulatory regime that relies on the significant nexus test and determinations from unelected federal bureaucrats will make home building inefficient, costly and will ultimately exacerbate our nation's housing affordability crisis.

Reducing Burdens on Small Business:

The Regulatory Flexibility Act (RFA) requires federal agencies to consider the effects of its actions on small entities, including small businesses, small non-profit enterprises, and small local governments.³ When an agency issues a rulemaking proposal, the RFA requires the agency to prepare and make available for public comment an initial regulatory flexibility analysis (IRFA), which will "describe the impact of the proposed rule on small entities."⁴ The RFA states that an IRFA shall address the reasons an agency is considering the action; the objectives and legal basis of the rule; the type and number of small entities to which the rule will apply; the projected reporting, record keeping, and other compliance requirements of the rule; and all federal rules that may duplicate, overlap, or conflict with the rule. The agency must also provide a description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and minimize any significant economic impact of the proposed rule on small entities.⁵

Section 605 of the RFA allows an agency, in lieu of preparing an IRFA, to certify that a rule is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification, the agency must publish such a certification in the Federal Register at the time of the publication of the notice of proposed rulemaking along with a statement providing the factual basis for the certification.⁶ EPA has indicated that the 2023 rule will not have a significant impact on a small number of small entities. Advocacy outlined why the agencies improperly certified the rule and acknowledged that the rule would impose costs directly on small entities. Those costs will be significant for a substantial number of them.⁷

Under the 1996 amendments to the RFA, known as the Small Businesses Regulatory Enforcement Fairness Act (SBREFA)⁸, each covered agency (i.e., EPA) must prepare an IRFA. It must first notify the

¹ U.S. Small Business Administration, Office of Advocacy: (2022), [Comments from the U.S. Small Business Administration, Office of Advocacy on the EPA and Army's proposed rule defining waters of the United States](https://cdn.advocacy.sba.gov/wp-content/uploads/2022/02/08152154/Comment-Letter-Proposed-WOTUS-Definition-2022.pdf?utm_medium=email_source=govdelivery). Retrieved on March 6, 2023, from https://cdn.advocacy.sba.gov/wp-content/uploads/2022/02/08152154/Comment-Letter-Proposed-WOTUS-Definition-2022.pdf?utm_medium=email_source=govdelivery.

² 88 Fed. Reg. 3004 (January 18, 2023).

³ 5 U.S.C. §§601-612.

⁴ 5 U.S.C. §603(a).

⁵ 5 U.S.C. §603(c).

⁶ 5 U.S.C. §605.

⁷ *Id.*

⁸ 5 U.S.C. §609.

Chief Counsel for Advocacy and provide them with information on the potential impacts of the proposed regulation on small entities and the type of small entities that may be affected. Advocacy must then identify individual representatives of affected small entities to obtain advice and recommendations about the potential impacts of the proposed rule. The agency must convene a review panel made up of the agency, Advocacy, and the Office of Management and Budget to review the materials the agency has prepared, collect advice and recommendations of the small entity representatives; and issue a report on the comments of the small entity representatives and the findings of the panel. Following this process, the agency shall modify the proposed rule, the IRFA, or the decision on whether an IRFA is required.⁹

Economic Outlook for the Home Building Industry:

Housing is an excellent example of an industry that would benefit from more intelligent and sensible regulation. According to a study completed by the NAHB, government regulations from federal, state and local governments account for up to 25% of the price of a new single-family home and over 40% of multifamily development. Nearly two-thirds of this impact is due to regulations that affect the developer with the rest due to regulations that are imposed on the builder during construction.¹⁰ The regulatory requirements we face as builders do not just come from the federal government. A key component of effective regulation is ensuring that federal, state, and local agencies cooperate and coordinate to streamline permitting requirements and respect the constitutional roles of each level of government. Notably, more sensible regulation will translate into job growth in the home building industry.

The U.S. home building industry is in a recession; few industries have struggled more than home building. The costs of housing for homeowners and renters are increasing due to inflation being at a 40-year high, a broken supply chain, and building costs that are up 19% compared to last year.¹¹ Residential mortgage rates have more than doubled since the beginning of 2022, and the difference between a 3% and 6% mortgage equates to an increase in a family's monthly mortgage payment of more than \$700 for the cost of a typical home. Adding increased regulatory pressure on top of these challenges makes it impossible to provide homes at an attainable price.

2022 was the first year single-family starts declined in 11 years, falling an estimated 12% to 999,000 units. NAHB projects that single-family production will fall to 744,000 units this year before rebounding to its normal pace in 2024.¹² According to a report from Redfin, around 63,000 home-purchase agreements in the U.S. fell through in July 2022, which equates to 16.1% of all homes that went under contract.¹³ NAHB economists recognize that we will need to exceed 1.1 million starts annually to reduce

⁹ 5 U.S.C. §§609(b) (1) through (6).

¹⁰ National Association of Home Builders, (2021), [Government Regulation in the Price of a New Home: 2021](https://www.nahb.org/-/media/NAHB/news-and-economics-plus/special-studies/2021-special-study-government-regulation-in-the-price-of-a-new-home-may-2021.pdf). Retrieved on March 6, 2023, from <https://www.nahb.org/-/media/NAHB/news-and-economics-plus/special-studies/2021-special-study-government-regulation-in-the-price-of-a-new-home-may-2021.pdf>.

¹¹ National Association of Home Builders, (2022), [Building Materials Prices Up More than 19% Year over Year](https://www.nahb.org/blog/2022/05/building-materials-up-more-than-19-percent-year-over-year). Retrieved on March 6, 2023, from <https://www.nahb.org/blog/2022/05/building-materials-up-more-than-19-percent-year-over-year>.

¹² National Association of Home Builders, (2023), [A Housing Downturn in 2023 Followed by a Recovery in 2024](https://www.nahb.org/news-and-economics/press-releases/2023/01/housing-downturn-in-2023-followed-by-recovery-in-2024). Retrieved on March 6, 2023, from <https://www.nahb.org/news-and-economics/press-releases/2023/01/housing-downturn-in-2023-followed-by-recovery-in-2024>.

¹³ Pan, Jing (August 18, 2022), [Homebuyers Are Increasingly Backing Out of Deals: How to Keep Your Sale on Track](https://moneywise.com/investing/real-estate/homebuyers-are-backing-out-of). Retrieved March 6, 2023, from <https://moneywise.com/investing/real-estate/homebuyers-are-backing-out-of>.

a deficit due to the underbuilding in the prior decade. If the home building industry operated normally, there would be millions more jobs in home building and related trades. Smart regulation can help unleash that growth.

Our impact on the economy is more than just jobs. Buyers of new homes and investors in rental properties add to the local tax base through business, income and real estate taxes; new residents buy goods and services in the community. NAHB estimates the economic impacts of building 100 typical single-family homes include \$28 million in wage and business profits, \$11.1 million in federal, state and local taxes, and 297 jobs. In the multifamily sector, the impacts of building 100 typical rental apartments include \$10.8 million in wages and business profits, \$4.2 million in federal, state and local taxes and 113 jobs.¹⁴

Even moderate cost increases can have significant negative market impacts. This is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low to moderate-income home buyers. Such buyers are more susceptible to being priced out of the market. As the price of the home increases, those on the verge of qualifying for a new home will no longer be able to afford this purchase. As of 2022, an analysis done by NAHB illustrates that a \$1,000 price increase will result in 117,932 households are priced out of the market for a median-priced new home.¹⁵ In the final quarter of 2022, a record high 87% of home buyers reported being able to afford fewer than 50 percent of the homes for sale in their markets.¹⁶

Any effort to advance our nation's housing recovery is smart economic policy. To reach these goals, however, we need policies that streamline and enhance existing efforts and remove regulatory hurdles, not ones that add layers of regulatory red tape and provide minimal benefits, like the 2023 WOTUS rule.

Costs of Regulations Falls Disproportionally on Small Business:

There are several recent economic studies on the cost of regulations on firms including studies conducted by the U.S. Chamber of Commerce Foundation¹⁷ and the National Association of Manufacturers (NAM)¹⁸ that show the disproportionate impact on small businesses and free enterprise in America. The NAM study found that U.S. federal government regulations cost an estimated \$2.028

deals?utm_source=syn_oath_mon&utm_medium=Z&utm_campaign=14843&utm_content=oath_mon_14843_home+purchase+agreements+fell+through.

¹⁴ National Association of Home Builders, (2015), [The Economic Impact of Home Building in a Typical Local Area Income, Jobs, and Taxes Generated](https://www.nahb.org/-/media/nahb/news-and-economics/docs/housing-economics/economic-impact/economic-impact-local-area-2015.pdf). Retrieved on March 6, 2023, from <https://www.nahb.org/-/media/nahb/news-and-economics/docs/housing-economics/economic-impact/economic-impact-local-area-2015.pdf>.

¹⁵ National Association of Home Builders, (2022), [Households Priced-Out by Higher House Prices and Interest Rates](https://www.nahb.org/news-and-economics/housing-economics/housing-economic-impact/household-priced-out-by-higher-house-prices-and-interest-rates). Retrieved on March 6, 2023, from <https://www.nahb.org/news-and-economics/housing-economics/housing-economic-impact/household-priced-out-by-higher-house-prices-and-interest-rates>.

¹⁶ National Association of Home Builders, (2023), [Housing Affordability Goes South](https://eyeonhousing.org/2023/01/housing-affordability-goes-south/). Retrieved on March 6, 2023, from <https://eyeonhousing.org/2023/01/housing-affordability-goes-south/>.

¹⁷ [U.S. Chamber of Commerce Foundation, \(2016\) Understanding Small Business in America](https://www.uschamberfoundation.org/smallbizregs/). Retrieved on March 6, 2023, from <https://www.uschamberfoundation.org/smallbizregs/>.

¹⁸ National Association of Manufacturers, (2014), [The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business](https://www.nam.org/wp-content/uploads/2019/05/Federal-Full-Study.pdf). Retrieved on March 6, 2023, from <https://www.nam.org/wp-content/uploads/2019/05/Federal-Full-Study.pdf>.

trillion in 2012, equal to 12 percent of GDP.¹⁹ Furthermore, the studies reflect that small businesses incur regulatory costs that are more than three times the cost borne by the average U.S. company.²⁰ In the past twenty-two years, federal agencies have published more than 88,000 final rules, of which 15,458 have been identified by federal agencies as having a negative impact on small businesses.²¹ Businesses have to comply with federal regulations, as well as more stringent state and local regulations. Complying with a complex regulatory system has a major cost burden for small businesses, affecting the economy directly.

A federal permit under CWA section 404 triggers requirements under the CWA and other federal laws, such as the Endangered Species Act (ESA), the National Historic Preservation Act (NHPA), and floodplain management requirements under the National Flood Insurance Program (NFIP). For example, under the ESA's section 7 consultations regulations activities occurring within areas designated as critical habitat under ESA and requiring a federal wetlands permit must undergo a section 7 consultation process where the U.S. Fish and Wildlife Service (FWS) must consult with the Corps before issuing the requested CWA 404 wetlands permit to determine the project's potential impacts upon designated critical habitat.²² While identical land development activities occurring within areas designated by FWS as critical habitats, without requiring a CWA section 404 permit, are not subject to the ESA section 7 requirements. Compliance with federal historical preservation requirements under Section 106 of the NHPA requires that each federal agency identify and assess the effects its actions may have on historic properties. Additionally, home builders must comply with CWA section 402 stormwater discharge requirements, which include maintaining a 50-foot buffer around all WOTUS features.²³ Should the agencies deem more isolated and ephemeral features as jurisdictional, home builders will lose developable land and building lots. As a small business, there is a myriad of requirements that slow down the development of projects. The agencies did not include these additional permitting requirements in their economic review of the 2023 rule. They failed to consider that bureaucratic delays cost small businesses money as they must float their finances while the Corps makes its jurisdictional determination and goes through the permitting process.

Small home builders often do not have environmental regulatory compliance staff and must hire outside consultants for help when complying with the CWA. These fees, which may cost tens of thousands of dollars, are passed down to home buyers and renters. The agencies are forcing small businesses to pay these fees to hire consultants since the 2023 rule relies on the overly complicated and convoluted significant nexus test.

The 2023 rule will directly impact small businesses and home builders. In the economic analysis the agencies provided in the docket, it was estimated that CWA section 404 permit costs would increase from \$108.6 million to \$275.9 million for projects based in 26 states in transitioning from the Navigable Waters Protection Rule (NWPR) to the 2023 rule.²⁴

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² 50 C.F.R. §402.03.

²³ U.S. Environmental Protection Agency, (2022), [EPA's National Pollution Discharge Elimination System \(NPDES\) 2022 Construction General Permit \(CGP\), Appendix F – Buffer Requirements](https://www.epa.gov/system/files/documents/2022-01/2022-cgp-final-appendix-f-buffer-reqs.pdf). Retrieved on March 6, 2023, from <https://www.epa.gov/system/files/documents/2022-01/2022-cgp-final-appendix-f-buffer-reqs.pdf>.

²⁴ U.S. Environmental Protection Agency, (2021), [EPA's Economic Analysis for the Proposed, Revised Definition of waters of the United States rule](https://www.epa.gov/system/files/documents/2022-01/2022-cgp-final-appendix-f-buffer-reqs.pdf). Retrieved March 6, 2023, from <https://www.epa.gov/system/files/documents/2022-01/2022-cgp-final-appendix-f-buffer-reqs.pdf>.

Most small businesses engaged in residential land development evaluate the potential viability of proposed land development or residential construction projects using an Internal Rate of Return (IRR) basis. NAHB members also typically rely upon a combination of debt and equity to finance their land acquisition and land development. Using a typical financing structure of 60% debt and 40% equity, and assuming optimistically current debt rate of 6% (low side) and equity rates being in the 25% IRR range, then the aggregate cost of financing is approximately 14.4% (6.0 debt rate x 60% + 25.0 equity rate x 40%). This means that every year of delay results in an increased cost of development of approximately 14.4%. Small businesses cannot sustain significant regulatory delays as it would result in the final price of the finished lots to the homebuilder and subsequent homebuyer being too expensive to be marketable.

As a small business owner, the most effective way to halt my business is not to deny a project or permit application outright – it is to get caught up in bureaucratic red tape during the jurisdictional determination (JD) or subsequent CWA section 404 permitting process without resolution. Many of NAHB's members are waiting longer than a year for their JDs to be considered. Home building is most often financed using loans. During the highest inflationary period our country has seen in over 40 years, we are being asked to float our finances while we wait for a decision under the significant nexus test. These delays cost real money and directly impact our small businesses and the cost of housing.

2023 WOTUS Rule:

For years, landowners and regulators alike have been frustrated with the continued uncertainty over the scope of federal jurisdiction over WOTUS. NAHB members initially hoped the agencies would create a durable and flexible rule to improve the CWA's implementation. Home builders support removing redundancy, clarifying jurisdictional authority, and having the agencies facilitate compliance while protecting and improving the aquatic environment. Unfortunately, the 2023 rule fails to provide the clarity and certainty the home building industry seeks. This rule increases federal regulatory power over private property and increases litigation, permit requirements, and lengthy delays for any business trying to comply. Equally important, these changes will not significantly improve water quality because much of the rule improperly encompasses water features already regulated at the state level.

Let me discuss some of the problematic features in detail:

Potential Impacts on the Home Building Industry:

Home building is a complex and highly regulated industry. As costs, regulatory burdens, and delays increase, the small businesses that make up much of the industry must adapt. This can include paying higher prices for land or purchasing smaller parcels, redrawing development or house plans, and completing mitigation or resource enhancement projects. All these adaptations must be financed by the builder and ultimately arrive in the market as a combination of higher prices for the consumers and lower output for the industry. As output declines and jobs are lost, other sectors that buy from or sell to the home building industry also contract and lose jobs. Builders and developers, already crippled by the economic downturn, cannot depend upon the future home buying public to absorb the many costs associated with overregulation.

Because compliance costs for regulations are often incurred before home sales, builders and developers must essentially finance these additional carrying costs until the property is sold. Because of the

increased price, it may require a land developer to reduce the number of buildable lots thereby increasing the cost of the remaining building lots. For home builders, the longer it takes for the home to be sold results in either decreased profits for the builder and increased costs for the prospective homebuyer. Carrying these additional costs only adds more risk to an already risky business yet is one of the difficult realities that land developers and home builders face. The 2023 rule only adds to the headwinds that our industry faces.

The picture becomes starker 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 \$271,596 to obtain an individual permit and 313 days and \$28,915 for a “streamlined” nationwide permit. Over \$1.7 billion is spent annually by the private and public sectors obtaining wetlands permits.²⁵ Importantly, these ranges do not consider the cost of mitigation, which can be exorbitant. When considering these excesses, it becomes clear that we need to find a necessary balance between protecting our nation’s water resources and allowing citizens to build and develop on their private land.

The 2023 Rule Inappropriately Expands Federal Jurisdiction, Especially Compared to the Navigable Waters Protection Rule:

In the agencies’ press release announcing the rule, they assert it “establishes a clear and reasonable definition of WOTUS and reduces the uncertainty from constantly changing regulatory definitions that have harmed communities and our nations waters.”²⁶ The agencies also claim the 2023 rule is consistent with the agencies’ prior practices interpreting the WOTUS definition under a so-called pre-2015 WOTUS definition.²⁷ Both claims by the agencies are simply inaccurate as the rule significantly differs from the agencies’ prior practices under the 2008 Rapanos Guidance when interpreting the concept of “relatively permanent” flow and applying the “significant nexus” test.

The 2023 rule establishes a two-tiered approach to asserting federal jurisdiction by analyzing certain categories of water features under either the relatively permanent standard or the significant nexus standard. By implementing this two-tiered approach to determine a waterbody’s jurisdictional status, the agencies are giving themselves two bites at the apple to regulate impoundments, adjacent wetlands, non-navigable intrastate waters, ephemeral streams, and human-made drainage ditches.

The agencies intentionally continue using overly broad and undefined terms so they have the maximum discretion to interpret them as they see fit in the field, including stepping in where they may think a state has not gone far enough. The regulatory text lacks a clear definition of “significantly affect.” Furthermore, key regulatory terms within the 2023 rule remain completely undefined including terms such as what constitutes a “tributary,” “relatively permanent” flow, “neighboring,” and “similarly situated waters in the region,” giving federal regulators in the field full and unfettered discretion to interpret and re-interpret these important and yet undefined terms in a manner that enables the

²⁵ Sunding, D. and Zilberman, D., (2002), [The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process](https://www.epa.gov/system/files/documents/2022-01/2022-cgp-final-appendix-f-buffer-reqs.pdf). Retrieved on March 6, 2023, from <https://www.epa.gov/system/files/documents/2022-01/2022-cgp-final-appendix-f-buffer-reqs.pdf>.

²⁶ U.S. Environmental Protection Agency Press Office, (December 30, 2022), [EPA and Army Finalize Rule Establishing Definition of WOTUS and Restoring Fundamental Water Protections](https://www.epa.gov/newsreleases/epa-and-army-finalize-rule-establishing-definition-wotus-and-restoring-fundamental). Retrieved on March 6, 2023, from <https://www.epa.gov/newsreleases/epa-and-army-finalize-rule-establishing-definition-wotus-and-restoring-fundamental>.

²⁷ 88 Fed. Reg. §3005 (January 18, 2023).

broadest of federal jurisdiction over otherwise non-navigable, isolated, and ephemeral waterbodies and landscape features.

Instead of providing clear regulatory definitions, the agencies rely upon an array of confusing and often conflicting statements buried within the 2023 rule's preamble of 140 pages of regulatory text as well as an additional 250 pages of varying interpretations of these undefined terms contained within the agencies' Technical Support Document for the 2023 rule.²⁸ The Corps has acknowledged it will rely on the conflicting preamble to implement the rule. Small businesses desperately need clear regulatory definitions for regulatory concepts contained within the 2023 rule, as well as equally clear regulatory exclusions for when these regulatory concepts do not apply.

Rule Expands the Concept of “Relatively Permanent”:

The agencies inaccurately claim the 2023 rule's interpretation of the undefined term “relatively permanent” flow is consistent with the agencies' pre-2015 practice. The importance of the concept of “relatively permanent” under the 2023 rule is difficult to overstate since the agencies will automatically assert federal jurisdiction over all tributaries, streams, or drainage ditches that meet the 2023 rule's concept of “relatively permanent” flow, along with all wetlands “adjacent” to relatively permanent tributaries as well as all other waterbody features (including interstate lakes, ponds, streams, and wetlands) that maintain a “continuous surface water connection” to a “relatively permanent” tributary.^{29, 30} Under the 2023 rule, the agencies claim they will determine whether a waterbody or landscape feature meets the “relatively permanent” concept on a case-by-case basis.

Notably, the prior WOTUS definition established under the NWPR included a categorical exclusion from CWA jurisdiction over all ephemeral features, along with a regulatory definition of the term ephemeral that included all features that contained water only in response to a rainfall event.³¹ The NWPR's categorical exclusions for all ephemeral features were consistent with the agencies' approach under the Rapanos Guidance, which explained the agencies' interpretation of the concept that relatively permanent waters “do not include ephemeral tributaries which flow only in response to precipitation [events].”³² However, in finalizing the 2023 rule, the agencies have revoked both interpretations of the concept for “relatively permanent” under the Rapanos Guidance as well as the categorical exclusion for all ephemeral features under the NWPR.

Under the 2023 rule, instead of providing small businesses with clear definitions for what constitutes “relatively permanent,” “intermittent,” or “ephemeral” flow when assessing the jurisdictional status of a tributary or ditch, it offers no clear definitions of what might constitute a “relatively permanent” versus “ephemeral” flow. Instead, under the 2023 rule, the agencies offer in the preamble conflicting guidance.

²⁸ U.S. Environmental Protection Agency, (December 7, 2021), [Technical Support Document for the Proposed, Revised Definition of Waters of the United States Rule](https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0081). Retrieved March 6, 2023, from <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0081>.

²⁹ 33 C.F.R. §328.3(a)(3)(i).

³⁰ 33 C.F.R. §328.3(a)(4)(ii).

³¹ 33 C.F.R. §328.3(c)(3).

³² U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, (December 2, 2008), [Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States](https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf). Retrieved March 6, 2023, from https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

For example, under the Rapanos Guidance, ephemeral tributaries which contain water and provide flow only during short durations and in response to rainfall events were not considered jurisdictional “relatively permanent” tributaries.³³ However, under the 2023 rule’s preamble, the agencies contradict that notion by claiming instances where non-relatively permanent and ephemeral tributaries contain flow from back-to-back rainfall events and could be considered jurisdictional as relatively permanent tributaries.³⁴ For any small business trying to comply with the CWA, the last thing these firms need is a rule that rescinds a prior regulation’s definitions, reserves agency regulatory guidance, and offers confusing and conflicting interpretations of undefined concepts within an all-encompassing regulatory preamble. Such an approach by the agencies ensures confusion and uncertainty for small businesses seeking to comply with the law.

Rule’s Reliance on the Significant Nexus Test:

Through the significant nexus test, federal regulators using a case-by-case approach must determine the jurisdictional status of numerous types of waterbodies or landscape features based on several vague functions and factors. Ultimately, the significant nexus process culminates with a federal regulator making a jurisdictional determination that a waterbody or landscape feature, either alone or in combination with similarly situated features in the region, has a material influence upon the chemical, physical, or biological integrity of a traditional navigable water (TNW). Under the 2023 rule, the significant nexus test will be applied to three out of the five jurisdictional categories, e.g., tributaries, adjacent wetlands, and intrastate waters. These categories include isolated lakes, ponds, streams, human-made drainage ditches and isolated wetlands.

In her testimony submitted before the Subcommittee on Water Resources and Environment of the House Committee on Transportation and Infrastructure, during the Subcommittee’s hearing titled “Stakeholder Perspectives on the Impacts of the Biden Administration’s Waters of the United States Rule,” Ms. Susan Parker Bodine, Esq. highlighted how the agencies could interpret the scope of a significant nexus test even broader under the 2023 rule than under previous WOTUS definitions, particularly when assessing potential biological connections between otherwise non-navigable, isolated, intrastate waters covered under the final rule’s (a)(5) intrastate lakes, ponds, streams, and wetlands category.³⁵ As Ms. Bodine explains in her testimony, while the agencies repeatedly acknowledge in the rule’s preamble that following the U.S. Supreme Court’s SWANCC ruling, the agencies can no longer assert federal jurisdiction over isolated waters simply by asserting those features serve as habitat for migratory birds. However, her testimony outlines how the agencies will instead rely upon speculative theories of possible biological connections contained within the agencies’ Technical Support Document to nevertheless assert jurisdiction over an isolated water. One example from the agencies’ Technical Support Document that Ms. Bodine highlights is the agencies could find a biological connection exists between a migratory bird and an isolated water if a bird flies from an isolated water to a navigable water and leaves bird droppings containing seeds of aquatic plants.³⁶ Under another example, the agencies state they can claim jurisdiction during a significant nexus test using the requisite biological connection that exists when amphibians, reptiles, invertebrates, or mammals migrate from an otherwise

³³ *Id.*

³⁴ 88 Fed. Reg. §3086 (January 18, 2023).

³⁵ [Stakeholder Perspective on the Impacts of the Biden Administration’s WOTUS Rule: Hearing before Subcommittee on Water Resources and Environment of the House Committee on Transportation and Infrastructure, 118th Cong. \(2023\) \(testimony of Susan Parker Bodine\)](#)

³⁶ *Id.*

isolated pond or wetland to a tributary of a navigable water and leave scat or larva of aquatic insects.³⁷ Therefore, Ms. Bodine’s testimony demonstrates that although the agencies will not base federal jurisdiction over isolated features due to the use of migratory birds as habitat, she explains how the agencies repeated assertions are disingenuous because the agencies will instead assert jurisdiction based upon the *dispersal of insects, seeds, or even scat by a bird into a jurisdictional feature* to assert jurisdiction over the isolated feature.³⁸ The examples Ms. Bodine includes in her testimony demonstrate how difficult this rule will be for small businesses to comply.

In the rule’s preamble, the agencies outline that they will provide useful tools to the public with step-by-step information needed for the agencies to make informed and consistent determinations of federal jurisdiction. That information should be part of the regulations, and the public should have had the opportunity to comment. Furthermore, the rule goes into effect on March 20, 2023, and the public has yet to weigh in on any of these guidance documents.

One such regulatory guidance the agencies recently released is entitled, “Joint Coordination Memorandum to the Field Between the U.S. Department of the Army, U.S. Army of Engineers and the U.S. Environmental Protection Agency.”³⁹ This joint Corps/EPA regulatory guidance document creates a required interagency review process for all draft approved jurisdictional determinations (AJDs) utilizing the significant nexus test under the 2023 rule. Under this guidance document, the Corps’ districts must wait a minimum of five days to allow staff within the EPA’s Regional Office to review and request additional information from the Corps’ District concerning the draft JD. Under the guidance document, if the staff within the EPA Regional Office has any comment or questions about the Corps district’s draft JD, an additional 14-day waiting period is triggered to allow EPA Regional Office staff time to review, comment, or even hold a meeting with Corps district staff to discuss its findings under the draft JD. If agreement cannot be reached on a draft JD between Corps district staff and staff within the EPA Regional Office, or if the draft JD concerns a “significantly affects” determination for any feature covered under the 2023 rule’s intrastate water jurisdictional category, then a headquarters review by the agencies is triggered. Any headquarters review of a draft JD triggers an additional 14-day delay but can be extended beyond 14 days provided staff from both agencies agree (in writing) to an unspecified longer timeframe to complete their review of the draft JD.

Importantly, nowhere within this joint regulatory guidance must the federal agencies either notify or seek the consent of the landowner seeking the JD from the Corps district. Nor under the joint guidance does a failure on the part of the agencies to adhere to the guidance’s deadlines result in the issuance of the requested draft JD. Ultimately, this joint guidance illustrates the unnecessary complexity and bureaucratic delays that have become the hallmarks of the significant nexus test.

The Supreme Court heard oral arguments in *Sackett v. EPA* on Monday, October 3, 2022. The question presented in *Sackett* is “Should *Rapanos* be revisited to adopt the plurality’s test for wetlands jurisdiction under the Clean Water Act?” If the Court answers this question affirmatively, it will reject that the significant nexus test is the proper test for determining CWA jurisdiction. While the public waits

³⁷ *Id.*

³⁸ *Id.*

³⁹ U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, (2022), [Joint Coordination Memorandum to the Field Between the Army and EPA](https://www.epa.gov/system/files/documents/2022-12/Waters%20of%20the%20United%20States_Coordination%20Memorandum.pdf). Retrieved March 6, 2023, from https://www.epa.gov/system/files/documents/2022-12/Waters%20of%20the%20United%20States_Coordination%20Memorandum.pdf.

for the Court's decision, the agencies rushed to finalize this rule. It is especially shortsighted and a waste of federal resources, given that the Supreme Court's upcoming ruling under *Sackett v. EPA* is squarely focused on the legality of the significant nexus test.

Aggregation of Waterbodies to Claim More Land:

The agencies' two-tiered approach of relying on the relatively permanent standard and the significant nexus standard gives them two opportunities to claim jurisdiction under the impoundments, tributaries, wetlands, and intrastate water categories under the 2023 rule. While implementing the significant nexus test, the agencies acknowledge that "stream and wetland connectivity to downstream waters ... is best understood and assessed when considered cumulatively."⁴⁰ Furthermore, the agencies explain that "in the region" means the catchment of the tributary. The agencies state that "the catchment of the tributary of interest may contain not just the tributary of interest, but also lower order tributaries that are aggregated together with any adjacent wetlands as part of a significant nexus analysis."⁴¹ The agencies outline that for practical administrative purposes, the 2023 rule does not require evaluating all similarly situated waters when concluding that certain waters have a significant nexus with a TNW.⁴²

Based on the preamble, the significant nexus test will require the evaluation of property outside the boundaries of the tract being considered for development. Usually, builders and developers have no control over these adjacent properties. If the neighboring landowner does not grant access or significantly delays access to consultants or agencies to evaluate features on their land, this poses a major risk to small businesses. Home builders and small businesses will struggle to understand the limitations of the 2023 rule when they acquire property when the agencies place such a heavy reliance on the aggregation of waters in the region.

Preliminary Jurisdictional Determinations:

After the issuance and implementation of the Clean Water Rule in 2015, many home builders across the country felt helpless while waiting for the agencies to process their jurisdictional determinations. Instead, many within the industry turned to preliminary jurisdictional determinations (PJDs) to advance the permitting process.

As the Philadelphia District of the Corps explains it, "a landowner, permit applicant or other affected party may elect to use a preliminary JD to voluntarily waive or set aside questions regarding CWA jurisdiction over a particular site, usually in the interest of allowing the landowner to move ahead expeditiously to obtain a Corps' permit authorization where the party determines that it is in his or her best interest to do so."⁴³ Importantly, PJDs cannot be appealed.

When a small business files for a PJD, it essentially gives up its legal right under the CWA to have the federal agencies tell them whether a jurisdictional wetland or waterbody feature is on its property. NAHB members need this information from the agencies before commencing land development or home building activities requiring federal wetlands permits before dredge and fill activities can occur

⁴⁰ 88 Fed. Reg. §3127 (January 18, 2023).

⁴¹ *Id.*

⁴² 88 Fed. Reg. §3128 (January 18, 2023).

⁴³ U.S. Army Corps of Engineers, [Army Corps Jurisdictional Determination Overview](https://www.nap.usace.army.mil/Missions/Regulatory/Jurisdictional-Determinations/). Retrieved March 6, 2023, from <https://www.nap.usace.army.mil/Missions/Regulatory/Jurisdictional-Determinations/>.

with jurisdictional features. This is especially true for features jurisdictional under the significant nexus test, such as isolated wetlands, ephemeral streams, and drainage ditches.

NAHB members have consistently reported experiencing significant delays awaiting requested AJDs even under prior iterations of the WOTUS regulatory definition (i.e., pre-2015 regulatory regime), particularly when the landscape feature awaiting a jurisdictional determination by the Corps required the completion of a significant nexus test such as non-adjacent, isolated wetland or ephemeral streams, and roadside drainage ditches. Since these features required the agencies to complete a significant nexus test before asserting CWA jurisdiction, NAHB members initially hesitated to proceed to the CWA section 404 permitting process until they knew those features were jurisdictional.

However, NAHB members and Corps' districts reported experiencing considerable backlogs, over a year or longer, awaiting requested JDs, particularly for landscape features requiring a significant nexus test. For many NAHB members and their homebuying clients, waiting for an AJD was delaying the land development and homebuying process, resulting in many NAHB members simply giving up and instead filing for a PJD so their planned projects could advance to the permitting process. A landowner, permit applicant, or other "affected party" may elect to use a PJD to voluntarily waive or set aside questions regarding CWA jurisdiction over a particular site, usually in the interest of allowing the landowner or other "affected party" to move ahead expeditiously to obtain a Corps' permit authorization where the party determines that is in his or her best interest to do so.⁴⁴ The Corps explains in Regulatory Guidance Letter 16-01, that a PJD will treat all aquatic resources that would be affected in any way by the permitted activity on the parcel as jurisdictional.⁴⁵

The Corps' Operation and Maintenance Business Information Link, Regulatory Module (ORM2) shows a dramatic increase in the number of PJDs issued by the Corps when the agency implemented a WOTUS definition that relied upon a significant nexus approach. By comparison, the Corps' ORM2 showed an extraordinary decline in the number of requested PJDs when implementing the NWPR. The precipitous decline in requested PJDs was because the NWPR did not rely on the significant nexus test and categorically excluded all ephemeral features. NAHB is concerned that the 2023 rule's reliance on the significant nexus test will increase the delays our members will experience. Under the 2023 rule, we are likely to see the return of over 75% of projects requesting PJDs; in comparison, under the NWPR, the number of requested PJDs decreased to 34% of projects.⁴⁶ Many of our members will be stuck in permit backlogs and JD reviews so they will opt for a PJD instead. Through this, many small businesses and home builders recognize that they are giving authority to the federal government to regulate the water that it does not have the authority to regulate – but to speed along the process, our members often accept this.

Agencies' Refusal to Honor AJDs under the NWPR Causes Substantial Disruption to Small Businesses:

NAHB members obtain AJDs from the Corps primarily for two reasons - first to discern whether a feature found on a property slated for residential development is a CWA jurisdictional feature and the second reason is to document the agencies' determination that no CWA jurisdictional features are found on a property. Importantly, as the U.S. Supreme Court affirmed under *Army Corps of Engineers v. Hawkes*

⁴⁴ *Id.*

⁴⁵ Jackson, Donald, (October 31, 2016). [U.S. Army Corps of Engineers Regulatory Guidance Letter 16-01](https://www.nap.usace.army.mil/Missions/Regulatory/Jurisdictional-Determinations/). Retrieved March 6, 2023, from <https://www.nap.usace.army.mil/Missions/Regulatory/Jurisdictional-Determinations/>.

⁴⁶ *Id.*

Co., AJDs are final agency actions judicially reviewable under the Administrative Procedures Act.⁴⁷ An AJD is the only document that notes the presence or absence of CWA jurisdictional features on a particular property. Furthermore, the agencies' policy on AJDs clearly states that jurisdictional determinations are final agency actions that landowners can rely upon them for a period of time no less than five years.⁴⁸ NAHB members rely upon these determinations when appraising properties and securing financing for planned residential land development and construction activities.

Therefore, NAHB members were shocked in January 2022 when the Corps abruptly announced via a statement on the agency's website that it would no longer honor AJDs issued under the NWPR. The agencies pointed to a federal district court's vacatur ruling of the NWPR as their rationale for not honoring AJDs under that rule.⁴⁹ The Corps' announcement caught landowners completely by surprise because it did not attempt to notify individuals with AJDs issued under the NWPR. Instead, the Corps would require landowners seeking a CWA section 404 permit to request and wait for a new jurisdictional determination from the Corps. However, the Corps' announcement that the agency would not issue CWA section 404 permits based upon AJDs issued under the NWPR, leaves developers and builders with AJDs finding no jurisdictional features under the NWPR uncertain whether they face the prospect of a CWA enforcement action by the Corps if they proceeded with land clearing, grading, or construction activities. Ultimately, the agencies' refusal to honor AJDs issued under the NWPR leaves developers, builders, and other private landowners with a high degree of uncertainty and the prospect of additional costs and regulatory delays as they await new jurisdictional determinations by the Corps.

Intrastate Waters:

The rule also provides a catchall "intrastate waters" category for areas that may not fit neatly into a specific water category but for which the agencies, on a case-by-case basis, have retained complete discretion to find a significant nexus. Importantly, this includes the ability to make blanket jurisdictional determinations by considering all similarly situated waters in the region to determine if they, individually or taken together, have a significant nexus to a TNW. The ability to aggregate waters, even within a catchment area, further illustrates that there is no limit to federal jurisdiction under this rule.

The preamble of the rule contradicts the regulatory text. The preamble states "in implementing the significant nexus standard, the agencies generally intend to analyze waters under paragraph (a)(5) individually to determine if they significantly affect the chemical, physical, or biological integrity of a paragraph (a)(1) water."⁵⁰ However, the regulatory text clearly states that (a)(5) waters, "that are either alone or in combination with similarly situated waters in the region" are jurisdictional.⁵¹

As a small business, it is unclear how the agencies will perform a significant nexus test when the preamble and regulatory text contradict each other. This unpredictability will make it difficult for small businesses to comply and grow. The agencies suggest that the rule and preamble provide clarity; however, they only produce more questions. Unfortunately, small businesses and builders will need to

⁴⁷ *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 597 (2016).

⁴⁸ *Supra.* note 45 U.S. Army, Regulatory Guilder Letter 16-01, *Jurisdictional Determinations* (Oct. 2016), 33 C.F.R § 331 (Appendix C).

⁴⁹ *Pascua Yaqui Tribe v. U.S. Env'tl. Protection Agency*, 557 F.Supp.3d 949 (D. Ariz. 2021).

⁵⁰ 88 Fed. Reg. §3102 (January 18, 2023).

⁵¹ 88 Fed. Reg. §3142 (January 18, 2023).

rely on the agencies for answers or be required to pay tens of thousands of dollars to consultants to help us comply with the CWA.

Under CWA Section 101(b), Congress explicitly recognizes the primary responsibilities and rights of states in helping to prevent, reduce and eliminate pollution in our waterbodies. Intrastate waterbodies that do not impact interstate commerce or have a continuous connection to TNWs should not be federally regulated. These waterbodies should be expressly excluded in any definition of WOTUS moving forward.

Conclusion:

The 2023 rule does not add new protections for our nation's water resources but rather, inappropriately shifts the jurisdictional authority of many drier-end features and non-navigable isolated wetlands, streams, and drainage ditches to the federal government. As a small business serving the affordable housing market, I am concerned about additional government regulations and the continued uncertainty this rule ensures. Builders cannot continue to provide affordable housing to those in need while weighed down by additional regulatory burdens and requirements like the 2023 rule.

In addition, the rule allows the agencies to illegally take the easy way out by sweeping everything under federal authority. If the agencies want to develop a meaningful and balanced rule, they must take a more methodical and sensible approach. I have significant concerns with the 2023 rule, and I encourage Congress to swiftly pass H.J. Res 27, providing for congressional disapproval of the Revised Definition of the waters of the United States. Lastly, I urge Congress to require the agencies to delay the implementation of the 2023 rule until the Supreme Court issues a ruling under *Sackett v. EPA*.

I appreciate the opportunity to discuss these important issues.