Testimony of Carl Harris

On Behalf of the

National Association of Home Builders

Before the

Senate Environment and Public Works Committee

Hearing on

“Improving the Federal Environmental Review and Permitting Processes”

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Introduction

Chairman Capito, Ranking Member Whitehouse, and members of the Committee, I am pleased to appear before you today on behalf of the National Association of Home Builders (NAHB) to share our views on how federal permitting inefficiencies are acting as a barrier to the production of quality, affordable housing. My name is Carl Harris, I am a small-volume home builder from Wichita, Kansas, and I serve as the Chairman of NAHB's Board of Directors.

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

As home builders, our work is deeply connected to the environment. Our members strive to create flourishing communities—we cannot achieve this goal without safeguarding the environment—where we abide by federal, state, and local environmental regulations. While these laws serve a crucial purpose, their implementation can severely undermine projects and add exorbitant costs to the final price of a home.

The residential construction industry, and others in the regulated community, continue to experience prolonged and opaque permitting processes, coupled with significantly higher mortgage interest rates 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.

Regulatory Costs' Influence on Housing Attainability

Before examining the permitting hurdles our members face, it is essential to first illustrate the immense housing challenges across our country. Americans are facing a visceral housing attainability crisis. The root cause of this crisis is transparent—there is a profound undersupply of single-family and multifamily units, both for-rent and for-sale. NAHB's economists conservatively 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 its financial advantages.

To showcase this, 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 sensitive 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 are priced out of the market.

[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.

Given how elastic homebuyers are to marginal price changes, let's zoom out and look at the big picture of regulatory cost. According to a 2021 NAHB study, regulatory costs at the federal, state, and local levels account for **24% of the final price of a new single-family home built for sale**.

Regulatory reforms that chip away at this block help reduce the overall cost of construction which will help increase housing supply. With more housing supply, home prices are pushed lower, and more prospective homebuyers can get off the sidelines and into the market. Unfortunately, our members often struggle with predictability and certainty under federal permitting regimes, namely, the Clean Water Act ("CWA") and the Endangered Species Act ("ESA"), which are critical because housing production is linked to successful permitting.

Almost all land developers have been forced to step away from a parcel of land due to the uncertainty in getting the necessary permits to move forward with a different project. On this issue, the CWA is well-known among the regulated community because it is unclear which parts of the land parcel are considered a "waters of the United States" ("WOTUS") and therefore requires a federal wetland permit under the CWA. To discover this answer, it can take over a year for the landowner to receive a response from the government.

To build more attainable housing nationwide, we must be able to develop the parcels near municipal centers that have been avoided due to regulatory uncertainty. When considering these implications, it's clear why we need to make the unwieldy permitting process more straightforward for home builders.

The CWA 404 Nationwide Permit: Streamlining Gone Awry

Nearly 60,000 Nationwide Permits ("NWP") are issued annually. Developers and builders pull some of the highest numbers and report major issues with this once "streamlined" permitting pathway. To better understand this tool, let's begin at its inception and revisit what Congress intended when it enacted the NWP (CWA 404(e)), and how Congress' activities fit in with the context of the Corps' regulatory program during the 1977 CWA amendments which created the NWPs.

The first NWP program was adopted in 1977 as a mechanism to offset the court ordered expansion of the Section 404 permit program in response to *NRDC v. Callaway*[3]. This ruling broadened jurisdiction from traditionally navigable waters to "all waters of the United States." Recognizing that the Corps did not have the resources to regulate activities in *all* these waters, it crafted a permit through rulemaking that would authorize certain limited Section 404 discharges into WOTUS features.

Soon after the Corps regulations were adopted, the NWP program was soundly endorsed by Congress in the 1977 CWA Amendments to provide administrative efficiency in regulating activities causing minimal

[3] *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

adverse environmental effects. The Report on S. 1592, the Senate's version of the 1977 Amendments declared, **"The amendment also provides for the use of general permits as a mechanism for eliminating the delays and administrative burdens associated with this program."**[4]

Later, during debates on the conference report, Representative Ray Roberts, specifically acknowledged the Corps' recently promulgated NWPs in his discussion of the general permit authority granted in conference: "On July 19, 1977, the Corps of Engineers promulgated revised regulations implementing Section 404. These regulations were designed to simplify and clarify the program. Among others, these regulations permitted, on a nationwide basis, the discharge of dredged or fill material into nontidal rivers and streams above the headwaters and lakes that are less than 10 acres in surface area, provided that certain specified management practices are followed."

In that same tenner, Senator Ed Muskie, in a colloquy with Senator Sam Nunn noted, "the bill does… grant the authority for nationwide permits as contemplated in the Corps regulations."[5] The legislative history demonstrates Congress' endorsement of the program in effect at the time, as both chambers overwhelmingly approved the CWA Amendments, including giving the Corps the authority to issue general permits on a state, regional, or nationwide basis.

The NWP of 1977 did not require advanced notice to the Corps and had very few restrictions. In 1978, President Carter issued Executive Order 12044 which directed the regulatory agencies to review their regulations to simplify and make them less burdensome. This directive led to the adoption of changes to the regulations in 1982, which eliminated the non-applicability of the NWP 26 to natural lakes larger than 10 acres. The National Wildlife Federation immediately filed a lawsuit against the Secretary of the Army to nullify the amended regulation. *National Wildlife Federation v. Marsh*[6] was settled through a consent agreement that required the Corps to promulgate new regulations. The revisions placed significant restrictions on the NWP to ensure minimal environmental effects, to limit discharges under NWP 26 to a maximum of 10 acres, and to involve all resource agencies in the decision-making process.

The regulatory and legislative history that has shaped the Corps' general permit authority and program contains **two important points**:

- First, the general permit program was a necessary response to the expansion of the wetlands jurisdiction resulting from *NRDC v. Calloway*.
- Second, and more importantly, Congress ratified the general permit program as a function to provide regulatory relief for activities resulting in minimal environmental effects, and eliminate the administrative burdens and delays associated with the individual permit process.

With this underscored, it's important to recall that Congress approved the earlier versions of NWPs 12 (utility lines), 14 (minor road crossing), and 26 (discharges into isolated or headwaters wetlands and waters of less than 10 acres). Further, Congress agreed that these types of general permits were envisioned for Section 404(e); it was also expected the Corps to develop additional general permits, if necessary, to ensure a streamlined permit process.

[4] S. Comm. on Env't and Pub. Works, S. Rep. No. 95-370, to accompany S. 1952, at 75 (July 28, 1977).
[5] 1977 CWA Legislative History, at 1053-54 (Aug. 4, 1977).
[6] *National Wildlife Federation v. Marsh*, 568 F. Supp. 985 (D.D.C. 1983).

Congress' endorsement for a streamlined process under CWA 404(e) should serve as a guidepost as the overall efficiency of the program today is reexamined. NAHB has shared several examples of how the program has added procedural requirements, reduced the allowable acreage thresholds, and imposed expensive mandatory mitigation requirements for even minimal impacts to any jurisdictional feature regardless of ecological function.

Regrettably, the CWA 404 NWP no longer resembles the original intent of a streamlined, efficient permitting program to authorize those routine activities with only a minimal environmental impact. It is critical for Congress to revisit its intent when establishing the CWA 404 NWP and compare it to the permitting program as it exists today. NAHB is hopeful that Congress will restore the program's efficiency and utility for the homebuilding industry.

Current CWA 404 Permitting Challenges

Earthmoving is a fundamental part of the home building process, often requiring CWA Section 404 permits due to the historically broad jurisdiction asserted by the Corps and the EPA (hereafter "the Agencies") over what constitutes a WOTUS. However, the Corps has consistently found that most homebuilding activities qualifying for a CWA 404 permit have minimal adverse environmental impacts and thus fall under one or more NWPs. Given this importance, developers and homebuilders must navigate and interpret how the Agencies define and enforce WOTUS regulations in the field and throughout the CWA 404 permitting process.

Following the Supreme Court's *Sackett*[7] ruling, the Agencies had an opportunity to break the familiar cycle of disregarding the Court's repeated attempts to articulate clear limits on the scope of federal jurisdiction under the CWA 404 permitting program. In *Sackett*, the Court made clear that the *Rapanos*[8] plurality opinion, articulated by Justice Scalia, sets forth the correct test for what is a WOTUS under the CWA:

- Waters of the United States encompassing only (i) "relatively permanent" bodies of water connect to traditional interstate navigable waters; and (ii) wetlands that have a "continuous surface connection" with relatively permanent waters, "so that they are 'indistinguishable' from those waters". For a wetland to be CWA jurisdictional, it must be "difficult to determine where the 'water' ends, and the 'wetland' begins."

Unfortunately, nearly two years have passed since *Sackett*, and the Agencies continue to ignore the Court's clear endorsement of the *Rapanos* plurality test. The Agencies instead chose to issue a revised WOTUS regulatory definition that intentionally avoided defining key terms like "continuous surface connection" or "relatively permanent" flow. These two terms are fundamental terms to allowing the Agencies to assert CWA jurisdiction over otherwise isolated wetlands and intermittent or ephemeral roadside ditches.

[7] *Sackett v. Environmental Protection Agency*, 598 U.S. ___ (2023).
[8] *Rapanos v. United States*, 547 U.S. 715 (2006).

As Ms. Susan Parker Bodine explained in her testimony before this Committee, the Agencies' revised WOTUS rule not only fails to comply with the Supreme Court's directives but also expands jurisdiction in ways that directly contradict the Court's key holdings under the *Sackett* opinion.[9] To highlight one area—the Supreme Court ruled that an "adjacent wetland" must be connected (i.e., indistinguishable) to another CWA jurisdictional features through a "continuous surface connection," resulting in difficulty discerning where jurisdictional features ends and the wetland begins.

However, the Agencies' preamble asserts that a wetland can be clearly distinguishable from a WOTUS and still be regulated—only a physical connection is required between a wetland and a WOTUS. That connection does not need to be WOTUS itself, it can be a non-jurisdictional feature like a man-made ditch, or even a grass swale. Also, the preamble contradicts the evidence of "relatively permanent" flow does not need to be connected to naturally occurring bodies of water like streams, creeks, rivers, lakes, etc.

Instead, a water feature can be a jurisdictional tributary if the federal regulator can trace evidence of a flow path downstream. That flow path does not need to be a WOTUS, it can be ephemeral flow, or even only possesses flow in response to "a concentrated period of back-to-fact precipitation events" e.g., following a thunderstorm deluge.[10] Based on this expansive interpretation of CWA jurisdiction contained within the final rule's preamble, it is clear the Trump Administration must repeal the final rule's preamble when it addressed the deficiencies of the revised WOTUS rule.

Over the year and a half since the Sackett ruling, the Agencies have steadfastly refused to provide any regulatory guidance explaining how the agencies intend apply the key findings from the Sackett ruling in the field. Instead, the Agencies announced an internal coordination process by which the Agencies would review certain requested jurisdictional determinations involving two jurisdictional categories under the revised WOTUS rule; adjacent wetlands and interstate lakes and ponds.[11] During an oversight hearing before the House of Representatives Transportation and Infrastructure Committee's Subcommittee on Water Resources and Environment, NAHB member Vince Messerly a wetlands mitigation banker from Ohio provided some examples from these "Field Memos."[12]

Mr. Messerly's testimony explained how these "Field Memos", rather than providing clarity to regulatory community, has instead shown how they Agencies intend to take expansive interpretations of "relatively permanent" and "continuous surface connection" concepts the directly contradict the Supreme Court's holdings under the Sackett ruling, including:

- Even "if a wetland is divided by a road," the wetlands on either side of the road are jurisdictional so long as "a culvert [] maintain[s] a hydrologic connection" between the two and *either* wetland

[9] Hearing on Supreme Court's Ruling in *Sackett v. U.S. Environmental Protection Agency:* Hearing before the Senate Committee on Environment and Public Works, 117th Cong. (2023).
[10] 88 Fed. Reg. 3887-88 (January 18, 2023).
[11] Michael L. Conner, 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 AMY, U.S. ARMY CORPS OF ENGINEERS (CORPS) AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)(Sept. 27, 2023).
[12] Waters of the United States Implementation Post-Sackett Decision: Hearing before the U.S. House of Representatives Transportation and Infrastructure Committee Subcommittee on Water Resources and Environment, 118th Cong. (2024)

has a continuous surface connection to a relatively permanent water. The agencies further claim they can "consider if a subsurface hydrologic is maintained" between the two wetlands as part of assessing whether they can assert jurisdiction over both. (Field Memo LRB-2021-01386)

- A "pipe directly connecting [a wetland and a relatively permanent tributary] under a road serves as a physical connection that meets the continuous surface connection requirement for the wetland." (Field Memo NAP-2023-01223)

- A wetland "exhibits a continuous surface connection" to a relatively permanent impoundment of a jurisdictional water via "an ephemeral drainage swale" that "conveys water from the surrounding uplands and [the wetland] at a low frequency and low volume" such as after a "rain event." (Field Memo NAP-2023-01223)

- "Depending on the factual context, including length of the connection and physical indicators of flow, more than one feature such as a non-relatively permanent ditch, other non-relatively permanent channel, or culvert can serve as part of a continuous surface connection where together they provide an unimpaired, continuous physical connection to a jurisdictional water." (Field Memo POH-2023-00187)

These "Field Memos" have made an already difficult CWA 404 permitting process even worse, NAHB members report that obtaining a NWP can take almost a year or longer, while the Corps claims obtaining NWP takes on average four months. NAHB has urged this Administration to rescind these memorandums, initiate a new WOTUS rulemaking that is consistent with Sackett and removes problematic interpretations of "relatively permanent" and "continuous surface connection."

Obtaining Jurisdictional Determinations

Before issuing a CWA section 404 permit, the Corps must comply with two sets of regulations—the EPA's 404(b)(1) Guidelines (the Guidelines) and the Corps' own regulations. The Guidelines are regulations outlining measures to i) avoid, ii) minimize and iii) compensate for impacts to aquatic areas.[13] The regulations provide that the first way a landowner can avoid an impact to an aquatic resource is to not discharge fill material into a WOTUS. If a landowner has an alternative to adding fill to a WOTUS, the landowner must utilize that alternative. Therefore, under the EPA's regulations, it is imperative that a landowner that plans to develop property knows what areas of their property are (and are not) a WOTUS. To determine these areas, landowner must conduct a jurisdictional determination ("JD")

Unfortunately, the CWA is silent on this procedure. JDs are discretionary and a products of the Corps' regulations and regulatory guidance.[14] An approved jurisdictional determination ("AJD") is the only type of jurisdictional determination where you can receive a "definitive, official determination that there are,

[13] 40 C.F.R § 230.10.

[14] *See* 33 C.F.R. § 320.1(a)(6) (implementing regulations authorize district engineers "to issue formal determinations of the applicability of the [CWA] to . . . tracts of land"); *see also* Corps Regulatory Guidance Letter 16-01: Jurisdictional Determinations 2 (Oct. 2016) ("RGL 16-01").

or that there are not, jurisdictional aquatic resources on a parcel."[15] During the *Sackett* oral argument, the attorney representing the Administration told the court that the government "make[s] available free of charge jurisdictional determinations as to any property."[16]

This is somewhat misleading. It's true the Corps doesn't charge landowners seeking AJDs. However, the Corps itself doesn't prepare the necessary documentation, nor conduct site specific property investigations necessary to prepare a wetland delineation report. These are services paid for and performed by qualified wetlands scientists, environmental engineers, biologists, environmental consultants, and attorneys—all hired by the landowner.

After the *Sackett* decision, numerous Corps district stated they would not conduct AJDs unless accompanied by a permit, and the Corps made clear that no one "has a right to a JD."[17] In other words, landowners don't have the right to know if the CWA regulates their property; and to make matters worse, the Corps puts AJDs as a low priority on their workload stack. Due to this reality, NAHB's members report that it can take **more than a year to receive an AJD** in some areas of the country.

Delays AJDs can also impact state regulatory programs. For instance, Virginia was forced to react to the Corps' AJD delay, becuase it was an obstacle to landowners complying with the Commonwealth of Virginia State wetlands permitting program. Commonwealth officials did not want tie permittees while the Agencies tried to determine how to respond to the *Sackett* decision. Therefore, Virginia agreed to attempt to process state jurisdictional determinations within 30 days, if submitted by a Virginia-certified professional wetland delineator. [18]

Rather than languish while waiting for an AJD, landowners can also seek a "preliminary jurisdictional determination ("PJD") in order to expeditiously obtain a permit authorization."[19] Unlike an AJD, the more expeditious PJD comes with **several caveats**:

- *First*, it is neither "legally binding,"[20] nor final and appealable.[21]
- *Second*, it may be issued "even where initial indications are that the aquatic resources on a parcel may not be jurisdictional."[22] (In other words, the government will assert control over aquatic areas whether the CWA provides it with authority or not).
- *Finally*, for purposes of mitigation requirements and computation of impacts, a "permit decision made on the basis of a PJD will treat all aquatic resources that would be affected in any way by the permitted activity on the parcel as jurisdictional."[23]

While the PJD process is an optional, fast tracking for certainty has more drawbacks. First, accepting a PJD might subject a landowner to unnecessary costs for mitigating impacts to non-jurisdictional features

[15] *See* RGL 16-01 at 2; *see also* 33 C.F.R. § 331.2.
[16] Transcript of Oral Argument at 86, *Sackett v. Env't Prot. Agency*, 598 U.S. ___ (2023).
[17] RGL 16-01 at 2.
[18] Memorandum from Mike Rolband to Stakeholders of Virginia (June 29, 2023) (*Recent Supreme Court Decision Sackett v. Environmental Protection Agency (EPA) - Effect in Virginia and How to Move Forward Without Economic Dislocation*).
[19] RGL 16-01 at 3.
[20] *Id.*
[21] *See* 33 C.F.R. § 331.2.
[22] RGL 16-01 at 3.
[23] *Id*.

on the basis of a document that is not legally binding or appealable. Second, because PJDs treat all aquatic features as jurisdictional, the landowner may not be able to utilize an applicable NWP because the project would be seen to exceed the NWP's acreage limit—even if all the aquatic features are not actually jurisdictional.

By offering PJDs, the Corps effectively positions itself to expand its regulatory authority over non-jurisdictional aquatic resources by consent of the landowner— all because obtaining AJDs takes too long. Such an expansion likely exceeds the Corps' statutory authority because it allows the agency to assert jurisdiction *by presumption,* without making any demonstration to support that jurisdiction.

Complying with Endangered Species Act During the NWP Process

NAHB's members, and other industries, undergo the ESA's Section 7 Consultation process to obtain the necessary "incidental take" authorizations for activities that have a federal nexus (e.g., requiring a federal permit, or receiving federal funds), and potentially impact either an endangered species or a species' designated critical habitat. Under the Corps' general condition #18, activities that "may effect" a federally protected species (e.g., threatened or endangered) or a species designated critical habitat are prohibited, unless a Section 7 Consultation has been completed addressing those potential impacts.[24]

ESA Section 7(a)(2) requires federal agencies to ensure "any authorized, funded, or carried out by such agency. . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction of adverse modification of [critical] habitat of such species.[25] This means, federal agencies cannot proceed with a proposed activity if doing so would either," jeopardize *the existence of a species"* or "*destroy or adversely modify*" a species' critical habitat.

However, over the years the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), and even the federal courts have become increasingly aggressive in utilizing the ESA's authorities under the Section 7 to control—or even restrict—land use activities requiring any type of federal authorization in areas with listed species or designated critical habitat. At the same time the federal courts have issued several rulings finding the implementation of important federal programs such as the National Flood Insurance Program (NFIP), or even EPA's decision to delegate the administration of the CWA 404 federal wetlands permitting program to the State of Florida under CWA 404(g), violated the ESA's Section 7 Consultation requirements.[26],[27]

EPA's action revoking the State of Florida's assumption of the CWA 404 permitting program had immediate and significant impacts upon NAHB members. According to the State of Florida's Department of Environmental Protection (FDEP) over 1,700 projects, including a significant number of residential land development and homebuilding projects were undergoing FDEP's CWA 404 permitting process when the Court revoked Florida's assumption of the CWA 404 permitting program. The Corps

[24] U.S. Army Corps of Engineers, Nationwide Permit General Condition 18 Endangered Species.
[25] 16 U.S.C. 1536(a)(2)
[26] *Florida Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008).
[27] *Ctr. for Biological Diversity v. Regan*, 734 F. Supp. 3d 1 (D.D.C.), judgment entered, 729 F. Supp. 3d 37 (D.D.C. 2024).

Jacksonville District announced on their website residential developers and homebuilders who had been awaiting FDEP CWA 404 permits must restart the CWA 404 permitting process again with Corps.[28]

To avoid violating the ESA's "j*eopardy*" and "*adverse modification*" standards when issuing CWA 404 permits (individual and the NWP), the Corps must comply with the ESA's Section 7 Interagency Consultation Regulations.[29] Between 2008 and 2015, the FWS reported completing nearly 90,000 Section 7 Consultations (formal, informal, and programmatic). The Corps' CWA 404 wetlands permit was the most common federal permit triggering the ESA's Section 7 Consultation and land development activities seeking a NWP were the most frequent activity triggering the ESA's Section 7 Consultation requirements.[30] According to the Corps' permitting database (ORM2), between 2017 and 2020, the Corps District conducted 8,700 Section 7 Consultations (formal, informal, and programmatic) each year for activities seeking NWPs.[31]

The Corps general condition #18 requires all non-federal permittees to submit pre-construction notification (PCN) to the Corps (district engineer) if any ESA listed species or designated critical habitat might be affected or is in the vicinity of proposed activity seeking a permit. During this 45 day PCN period, the Corps will confer with the FWS or NMFS on whether the proposed activities "may effect" a listed species or designated critical habitat this triggering the ESA's Section 7 Consultation requirements.

Importantly, the 45-day delay under the PCN does not include the timeframe necessary to complete an ESA Section 7 Consultation. While the ESA's regulations were amended in 2019 to establish a 60-day deadline to complete an informal consultation.[32] Formal consultation has no deadlines for completion, and only a recommended timeframe of 150 days (five months).[33] However, in practice NAHB members report formal consultations taking **a year and half or longer to complete.** It's key to point out, general condition 18 prohibits permittees from beginning any work until their notified that the Corps has completed the (informal or formal) Section 7 Consultation process.

Let me provide an example on how the ESA's Section 7 Consultation process works during a typical residential land development project. Assume a residential developer applies for a NWP 29 (residential development) to fill a portion of wetland or another CWA 404 jurisdictional feature when grading a parcel of land necessary to build streets, utility lines crossing, and other required infrastructure. The immediate impacts caused by the land grading activities as well as the construction of streets, utility lines, etc., would constitute "direct effects" of the Corps CWA 404 permit. The future impacts caused by subsequent home construction upon the building lots created are "reasonably certain to occur" (such as excavation of building's foundations, or stormwater runoff during the active phrase of land development) would constitute "indirect effects" of the CWA 404 permit. In this action, the "action area" associated with the Corps' permit would not only include the parcel of land seeking the CWA 404 permit, but also any areas upstream or downstream, that maybe reasonably certain to impacted in the future,

[28] U.S. Army Corps of Engineers Jacksonville District (2025) Retrieved February 17, 2025, from https://www.saj.usace.army.mil/Missions/Regulatory/
[29] 50 C.F.R. 402.02-402.16
[30] Malcom, Jacob & Li, Ya-Wei, (2015) Data contradict common perceptions about a controversial provision of the Endangered Species Act. Proceedings of National Academy of Sciences (PNAS) Washington, D.C.
[31] U.S. Army Corps of Engineers (2021) Biological Assessment for the Proposed Issuance and Reissuance of the 2021 Nationwide Permits. Corps' Regulatory Community of Practice. Washington D.C. Page 14.
[32] 50 C.F.R. 402.13(c)(2)
[33] 50 C.F.R. 402.14(e)

because of activity seeking the CWA 404 permit. What's important in this example is the scope of the ESA Section 7 Consultation is much larger than (i.e., the entire project) as compared to the specific areas within the Corps jurisdiction. This broad scope of the Section 7 Consultation analysis effectively "federalizes" the entire project seeking the CWA 404 permit impacting all subsequent aspects of the land development or homebuilding activities on the site.

There are numerous examples of how the Consultation process (informal, formal, and programmatic) impacts residential land development and homebuilding activities seeking CWA 404 permits. Typical, requirements imposed on residential developers and homebuilders during the ESA Section 7 Consultation process include:

- Time of year restrictions on land clearing or construction activities to avoid potentially disturbing an endangered or threatened species or modifying presumed habitat,
- Restrictions on the percentage of available land for development e.g., restricting development to 30% or less of area,
- Restrictions on impervious surface (e.g., paved areas or covered roofed structures) to reduce future stormwater runoff,
- Restrictions on outdoor activities, exterior lighting, access to outdoor recreation areas, pesticide use, or even restrictions on pet ownership, and
- Recently adopted regulatory changes allow FWS or NMFS to impose mandatory habitat compensatory mitigation requirements.

These examples of "conservation measures" are imposed as terms and conditions in an "incidental take statement" (ITS) and represents necessary actions deemed "reasonable and prudent measures" (RPMs) in the view of FWS or NMFS to minimize "take", "jeopardy", or "adverse modification" of areas designated as "critical habitat". In the context of the CWA 404 permitting process, these RPMs are necessary to avoid "jeopardy" or "adverse modification" and are included by the Corps as binding conditions of the CWA permit. If a developer or homebuilder objects to these conditions or is unable to comply—they risk not only forfeiting their needed CWA 404 permit, but also risk third-party lawsuits, as well as civil and criminal penalties. As a result, the developer or homebuilder either accepts these conditions and passes costs onto the future homebuyer or abandons the project.

The Compensatory Mitigation Process: More Credits, More Cost Savings

Home builders are required to purchase compensatory mitigation to offset the impacts of authorized discharges of dredged or fill material that results in unavoidable impacts to federally regulated water bodies. For example, the Corps' general conditions for the (2021) NWP require compensatory mitigation whenever an authorized activity impacts more than 300 feet of streambeds or 0.1 acre of a wetlands.[34] In 2008, the Agencies issued a final rule, titled "Compensatory Mitigation for Losses of Aquatic Resources,"[35] which describes four acceptable methods for conducting required wetlands mitigation (i.e., restoration, enhancement, establishment, and preservation), and a three-tiered hierarchy for the performance of required mitigation (in order of preference):

1. Approved wetlands mitigation banks,

[34] U.S. Army Corps of Engineers (Corps) 2021 Nationwide Permits General Conditions #23. Mitigation.
[35] 33 C.F.R. §332 & 40 C.F.R. §230(j).

2. In Leu Fee (ILF) programs, and
3. Permittee-responsible compensatory mitigation.

Developing land for the creation of residential lots, and the home construction process all require a substantial amount of earth-moving activities, which prompt builders and developers to obtain CWA 404(a) wetlands permits (individual and NWP). Although the CWA 404(b)(1) guidelines require developers and builders seeking CWA 404 permits to demonstrate they have taken all feasible steps to avoid and then minimize impacts to WOTUS features, some impacts are unavoidable which can trigger compensatory wetland mitigation requirements.

In 2017, builders and developers were the second largest users of compensatory mitigation in the United States right after the transportation infrastructure sector.[36] Furthermore, the Corps reported that between 2014 and 2018, approximately 40 percent of the individual and NWPs triggered compensatory mitigation. During this same four-year span, the Corps reported projects triggering compensatory mitigation fulfilled their mitigation obligations by utilizing credits from approved mitigation **banks 55% percent of time, followed by 30% for permittee-responsible mitigation, and 16% reported paying for in-leu fee (ILF) mitigation.[37]**

At face value, the Corps' data on the percentages of wetlands compensatory mitigation being performed is seemingly positive. A significant amount of compensatory mitigation performed by CWA 404 permittees are fulfilled by purchasing credits from approved wetlands mitigation banks. Furthermore, when developers and builders have more than one option to purchase these credits, mitigation banks must compete against each other and offer price competitive mitigation options to developers, home builders, as well as prospective homebuyers all of whom benefit from the new affordable housing units produced.

However, after nearly 20 years, NAHB's members operating under the Corps' Mitigation Rule, as well as wetlands mitigation bankers all see opportunities for needed improvement. While some developers and builders report having access to mitigation credits, many do not. The lack of available credits, or even cost-effective mitigation options presents a significant barrier for NAHB members seeking to deliver affordable housing units.

To illustrate this problem, below is a sample of states represented on this Committee. NAHB has compared projected housing starts over just the next two years, compared to approved mitigation banks with greater than 1 acre of reported credits available according to the Corps RIBITS database as of February 17, 2025. The results show the following:

- Arizona is projected to build 78,800 single-family homes and has no approved mitigation banks.
- Delaware is projected to build 9,500 single-family homes and has no approved mitigation banks.
- California is projected to build 129,200 single family homes and has 21 mitigation banks.
- Maryland is projected to build 27,000 single family homes and has 3 mitigation banks.

[36] Ecosystem Marketplace (2017) State of Biodiversity Mitigation in 2017: Market and Compensation for Global Infrastructure Development. Washington, DC.
[37] U.S. Army Corps of Engineers (Corps) Operations and Maintenance Business Information Link (OMBIL), Washington D.C.

- Oregon is projected to build 23,600 single family homes and has 9 mitigation banks.

These findings raise several concerns even within those states with approved mitigation banks, NAHB members frequently are unable to purchase available credits because mitigation banks are limited to selling credits for impacts occurring only within the watershed where the bank is located. The Corps' final mitigation rule also requires mitigation ratios of at least 1:1, **typically the Corps requires 2:1 mitigation ratio or higher.**[38]

The scenario is not much better for NAHB members seeking to use ILF programs when credits from approved banks are unavailable. Most states do not have approved ILF programs, and for those that do, NAHB members report rapid increases in the rates charged resulting in unsustainable fees that far outpace inflation or even the market value of the residential projects. For example, between 2009-2018 in twelve northern Kentucky counties around the greater Cincinnati area, an ILF for impacts to wetlands increased 65% ($30,000 to $49,500 per credit), while ILF for impacts to streambeds increased 126% from ($170 to $385 per foot), as compared to an overall 17% inflation over that same period.

Unfortunately, certain aspects of the current Mitigation Rule—whether due to administrative burdens or inefficient implementation—have hindered federal regulators, mitigation providers, and permittees from accessing the most cost-effective and efficient compensatory mitigation options. NAHB recognizes several key steps that the Corps, other federal and state agencies, and mitigation bankers must take to enhance this critical tool.

One way to improve availability of wetlands mitigation credits is to reform the Interagency Review Team (IRT) process under the Corps' (2008) Mitigation Rule.[39] Under the Corps' rule, members of the IRT consists of federal agencies (Corps, EPA, & FWS), state and local agencies, tribal representatives, along with the public, are all afforded time to review and comment on a mitigation bank's or ILF's prospectus, proposed mitigation bank's service area, and the schedule release of approved mitigation credits.

While the Corps' 2008 Mitigation Rule includes a timeframe of 225 days for the Corps along with fellow IRT members to complete its review of a pending mitigation bank's or ILF's programs prospectus, actual approval times often exceed this limit. According to the Corps' own permitting data analyzed by wetlands mitigation bankers the average time it took the Corps along with fellow members of the IRT to review and approve a proposed mitigation bank **was 495 days or 1.5 times longer than the Mitigation Rule's timeline**.[40] The same study also found approval of new ILF programs, despite being far fewer in number than proposed mitigation banks, also took well over year (467 days).[41] Importantly, during both the Trump and Biden administrations the Corps proposed reforming the IRT approval process for new mitigation banks.

[38] 73 Fed. Reg. 19,613 (April 10, 2008)
[39] 33 C.F.R. 332.8
[40] Martin, Steve and Madsen, Becca, (2023) "The Time it Takes for Restoration an Analysis of Mitigation Banking Instruments Timeline." Environmental Policy Innovation Center and Ecological Restoration Business Association, Washington D.C. Page 29.
[41] Ibid. Page 39

NAHB urges Congress to integrate the Corps' regulatory guidance allowing the full release of mitigation credits once a bank's financial assurances requirements are met.[42] Currently, mitigation banks receive permission from the IRT to release credits for sale at three different intervals (initial credit release, interim credit release, and final credit release). However, the Corps' own guidance explains how the interim credit release could potentially include all available credits once the mitigation bank sponsor can demonstrate proof of sufficient financial assurances. Allowing banks to release more credits earlier in the process helps developers and builders whose activities are located within a bank's approved service area, and also helps capitalize the bank's sponsors to ensure they can demonstrate sufficient financial resources to support the bank's current and future operations.

NAHB also urges Congress to promote the use of so called "out-of-kind mitigation" when compensatory mitigation credits or ILF program are unavailable. Currently, the Corps' 2008 Mitigation Rule out-of-kind mitigation is the least preferable option under the mitigation hierarchy.[43] However, identifying scenarios where out-of-kind mitigation could be feasible would help developers, homebuilders, states, and local governments implement required mitigation in a cost-effective and efficient way.

Municipalities are increasingly undertaking stream and wetlands restoration projects on a regional scale to comply with CWA Section 402 National Pollutant Discharge Elimination System (NPDES) municipal sanity sewer systems (MS4) permits and EPA-mandated enforcement consent decrees aimed at addressing issues with combined sanitary sewer systems. These ongoing projects provide many of the same water quality, ecological, and watershed benefits as wetlands and stream mitigation efforts conducted by private bank sponsors or ILF programs.

Because these municipal projects are typically included in capital budgets, they come with detailed cost estimates and projected completion schedules. Additionally, since they are often conducted on publicly owned land, easements, or rights-of-way, their overall costs can be significantly lower than those of private wetlands banks or ILF programs, which must account for land acquisition or securing access to private property for restoration or mitigation work.

Finally, since these projects are generally funded through sewer ratepayer fees or tax revenues, allowing CWA 404 permittees to contribute to their funding could create economies of scale—lowering per-unit costs for both permittees and municipalities while enhancing overall watershed improvements.

Conclusion

Thank you, Chairman Capito and Ranking Member Whitehouse, for convening this important hearing and allowing NAHB to share our views on how permitting challenges are impacting our industry's ability to increase the production of quality, affordable housing. NAHB stands ready to work with you and members of the Committee to achieve thoughtful, effective policies to address these concerns and expand the availability of attainable, affordable housing for all Americans.

[42] U.S. Army Corps of Engineers (2019) Mitigation Bank Credit Release Schedules and Equivalency in Mitigation Bank and In-Lieu Fee Program Service Areas. (RGL-19-01). Washington D.C..
[43] 33 C.F.R. 333.2(b)(2)