

**Testimony of Douglas Davis, Jr.
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Before the Senate Environment and Public Works Committee

“Stakeholder Reactions: The Navigable Waters Protection Rule under the Clean Water Act”

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Chairman Barrasso, Ranking Member Carper, members of the Committee, on behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to testify today. My name is Douglas Davis, Jr. and I am the President and Chief Executive Officer of the Fletcher Davis Company. The Fletcher Davis Company is a family owned development, building, and management company based in St. Augustine, Florida. Starting in 1961, founding brothers, Paul and Jerome Fletcher, began developing conservation based master-planned communities throughout the Southeastern United States. Since then ingenuity and insights have helped to steadily grow our business, relationships and reputation.

The word “green” or “sustainable” may be relatively recent terminology within the residential construction industry but our company has been creating sustainable communities for over fifty years. I am proud of the fact that our business has prioritized environmental protection by using new and innovative design methods. However, this goal becomes more elusive when the federal government attempts to increase regulatory red tape and relies on a failed permitting regime that makes it extremely difficult for any business to provide housing at a price point that middle-class American families can afford.

I commend the Committee’s desire to highlight the stakeholder experience with Clean Water Act (CWA) compliance, and I appreciate the opportunity to share my perspective. Recognizing and supporting the need for a clean environment and the benefits that it brings to our nation’s communities, home builders and land developers have a vested interest in preserving and protecting our nation’s water resources. Since its inception in 1972, the CWA has helped to make significant strides in improving the quality of our water resources and improving the quality of our lives.

Under the CWA, home builders must often obtain and comply with section 402 storm water and 404 wetland permits to complete their projects. We understand we have a responsibility to protect our water resources, especially in Florida where many residents are attracted to the state by our beaches, lakes, and rivers. But what is missing in these compliance efforts is a regulatory scheme and permitting process that is consistent, predictable, timely, and focused on protecting true aquatic resources.

The home building community knows all too well the frustration of a broken permitting process. Over the years, the federal government has expanded the scope of their regulatory authority and have frequently changed the requirements needed to obtain a federal wetland permit. These changes have made the permitting process virtually impossible to navigate and have caused many land use projects to come to a grinding halt, putting more people on unemployment. It is impossible for home builders and developers to support the needs of our community under an ever-changing regulatory system. With property rights being jeopardized by federal regulatory overreach, it is increasingly difficult to attract new companies into our industry. Unfortunately, our company has fallen victim to this broken system.

The regulatory requirements we face as builders do not just come from the federal government. At the local level, jurisdictions may charge permit, hook-up, and impact fees, and establish development and construction standards that either directly or indirectly increase costs to builders and developers. A key component of effective regulation is ensuring that local, state and federal agencies are cooperating with the goal of streamlining permitting requirements in order to remove duplication. The federal government must also respect the regulatory responsibilities of state and local governments.

Impacts of onerous permitting requirements

The CWA grants the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) statutory jurisdiction over the “waters of the United States” (WOTUS) but does not define that phrase. The definition is of critical importance to builders and developers because conducting certain activities within these designated areas, such as land clearing, grading, and earth moving, can trigger CWA permitting and mitigation requirements.

In 2015, the Obama Administration attempted to draw a bright line by adding new terms, definitions, and interpretations of federal authority over private property that are more subjective and provided the agencies with greater discretionary latitude to expand their regulatory authority. The rule fell well short of providing the clarity and certainty sought by the regulated community. It increased federal regulatory power over private property and lead to increased litigation, more permit requirements, and lengthy delays for any business trying to comply. It was so convoluted that even professional wetland consultants with decades of experience struggled to determine what is jurisdictional. Additionally, various district courts have ruled that the rule was illegal and have ordered the rule be remanded back to the agencies.

Under the 2015 rule, builders and developers were ill-equipped to make their own determinations and had to hire outside environmental consultants and wetland delineators to conduct jurisdictional determinations to determine whether CWA permits were necessary. This takes time and money. Delays often lead to greater risks and higher costs, which many developers would rather avoid given tight budgets and timeframes. Onerous permitting requirements could delay or eventually kill a real estate deal.

As a builder and developer who lives in and around the communities I build, I go to great lengths to minimize our environmental footprint. Our projects are carefully designed to protect the environment, honor native culture and heritage, and promote local economies. After we acquire a piece of land, we work with our environmental consultants to determine a building plan that has the smallest environmental impact. We create maps that identify the environmentally sensitive areas and lay them on top of each other in order to easily locate the most buildable parcels of land. Often this means changing development plans or deviating from more profitable construction layouts. The environmental community frequently applauds our efforts and methods.

Although we go to great lengths to minimize our environmental impact, our projects have been derailed because the federal government's jurisdiction has gone too far and the permitting process has been convoluted and complicated. The most frustrating aspect of CWA permitting is the fact that the requirements are always changing. Simply put, even with the best environmental planning and making every effort to comply, we often are forced to give up and walk away.

These pitfalls are perfectly illustrated by one of our projects that was delayed for 10 years as we sought to obtain the necessary 404 permit. Every step of the process offered arduous obstacles, as the rules changed and new requirements were added along the way. These years were spent responding to the Corps constant requests for additional information, studies, and data. When we responded with the requested information and data, we were often met with follow-up requests to reformat the information in a painstakingly specific way. The numerous requests appeared to be nothing other than an intentional stalling mechanism, as we swiftly complied with every request only to be faced with another. We had to hire additional environmental consultants to conduct more wetland delineations and functional assessments. In addition, the Corps staff assigned to our project continually changed over the years, and we struggled to keep them appropriately educated on our project. Over the years we have had dozens of field visits from Corps and EPA staff in order to survey and assess the land. We complied every step of the way, but this is not how the system should function.

Another example is a project where we were hung up in the permitting process and forced to negotiate a programmatic agreement with the Corps that would allow us to break ground only on specific areas of land. It took eleven years to reach this agreement because the Corps were unable to provide a definitive answer to our requests. Under the agreement, we were strictly forbidden from touching specific areas and were left with a fragmented development plan that we were unable to meaningfully execute. Nonetheless, the system is clearly broken if it takes more than a decade to resolve these issues.

These anecdotes demonstrate how we have been left at the mercy of the federal agencies because there is little recourse for landowners in this position. Federal agencies have the ability to hold up a project for any reason and nothing can be done to expedite the process. While the Corps has never officially vetoed any of our permit requests, their delays and stalling techniques have effectively accomplished that. In many cases it would be more beneficial for the agencies to deny my permit because in that instance, I would have an opportunity to challenge that decision. Failing to approve or deny a permit creates a regulatory and legal limbo with few options.

I want to offer one more example of the unintended consequences that stringent federal regulations have on protecting our environment. For example, in the event that mitigation is not an option, builders will pay into a mitigation bank. The goal of a mitigation bank is to protect the environment by preserving, enhancing, or re-creating wetlands.

In an effort to contribute to the preservation of the natural resources in our community, my company set up a mitigation bank to help collect these offsets. We were met with many layers of red tape, and it took us over ten years to navigate the interagency review process in order to get our bank approved. To be clear, the federal government held up the creation of wetlands for 10 years.

We were motivated to set up this bank because we were trying to do something positive for our business, our community and our environment. Once again, we were met with difficulties due to an inefficient federal approval process. It is frustrating to be met with so many regulatory hurdles, and it disincentives businesses from taking proactive steps to protect the environment.

Navigable Waters Protection Rule

Clarification of CWA jurisdiction and creating a streamlined permitting system have been top environmental priorities of the Trump Administration. On January 23, 2020 the Trump Administration finalized the Navigable Waters Protection Rule (NWPR). The NWPR presents a unifying theory for extending federal jurisdiction to only those waters and wetlands that “maintain a sufficient surface water connection to traditional navigable waters of the territorial seas.” It intends to clearly distinguish federal waters, based on commonly agreed upon standards for CWA jurisdiction that are supported by statutory text and Supreme Court decisions, from state waters that may be broader than those covered by the federal WOTUS definition. The NWPR respects the cooperative federalism outlined in the CWA, by allowing state and local governments to maintain jurisdiction over many of their waters.

The NWPR provides many benefits to builders and developers. For example, it exempts ephemeral features that form only in response to rainfall, eliminates ambiguous tests to determine jurisdiction, and removes many isolated features from federal jurisdiction. As a result, builders and developers should require fewer federal wetland permits and have greater ability to determine their permitting needs for themselves. In general, compared to prior rules, the NWPR subjects less area to federal oversight, eliminates ambiguous tests and provides landowners with greater certainty, and focuses on conditions that are more easily observable, making it easier to implement in the field.

The examples that I previously provided show the challenges that the NWPR can solve for the regulated community. The NWPR provides a bright line for jurisdiction and no longer allows for a troublesome “gray area.” The distinction of what is jurisdictional is clear enough to allow landowners to determine for themselves what features would require a federal permit. This rule provides fewer opportunities for the goal posts to be moved and the rules to be changed. The

NWPR provides straightforward regulatory requirements, clear jurisdictional lines, and makes CWA compliance easier for any business trying to comply.

One of the biggest misconceptions surrounding the NWPR is that waters that no longer fall under federal jurisdiction will go unprotected. This is untrue. State and local governments play an important role in protecting waters because they have a better understanding of the landscape and the needs of their community. The 2015 rule attempted to eliminate the role of state and local governments, which goes against the cooperative federalism construct that Congress intended.

State and local governments have the authority to regulate waters and there are a number of environmental requirements that builders and developers in Florida must comply with. For instance, when creating a development, I must consult with the Florida Department of Environmental Protection, comply with the various state wetland laws and regulations and obtain stormwater permits to manage any runoff. The greatest difference between federal permitting and state permitting is that we have generally found state agencies to operate under reasonable deadlines and with a greater degree of accountability.

Implementation of NWPR

NAHB members recognize that the work needed to realize the full potential of the NWPR is far from over. Proper implementation of this rule is extremely important because failure to do so could actually be harmful to our businesses and the overall economy. Efforts to ensure consistency between EPA and the Corps and their respective regional and district offices are of paramount concern to the regulated community. We are also interested in how field staff will be trained and how they will operate on the ground to interpret and apply the NWPR's provisions. We realize that new technology and emerging data may be available to assist with determining jurisdiction in certain cases, but special care will be needed by those on the ground to ensure that such methods are deployed in a way that does not jeopardize effective implementation of the rule.

We really appreciate the initial steps that the agencies have already taken to implement the NWPR. They recently proposed three different memorandums designed to help facilitate implementation. We encourage the agencies to finalize these memorandums and other relevant directives, guidance documents, and manuals as quickly as possible.

We all share your goal that the NWPR be implemented swiftly and consistently across the country. One way to facilitate this goal is for the agencies to host a series of workshops where the public and key stakeholders can share their diverse experiences and perspectives and discuss potential alternatives to any implementation challenges. Such workshops have been successfully held in locales across the country to assist with the rollout of other regulations.

Cost of permitting on home builders

Home building is one of the most regulated industries. As costs, regulatory burdens, and delays increase, the small businesses that make up a majority of the industry must adapt. This can include paying higher prices for land or purchasing smaller parcels, redrawing development or house plans, and/or completing mitigation. All of 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 construction 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 multitude of costs associated with overregulation.

Because compliance costs for regulations are often incurred prior to home sales, builders and developers have to essentially finance these additional carrying costs until the property is sold. Because of the increased price, it may take longer for the home to be sold. Carrying these additional costs only adds more risk to an already risky business, yet is one of the difficult realities that home builders face every day.

The picture becomes more stark when you consider the time and cost to obtain a CWA section 404 permit. A 2002 study found that it takes an average of 788 days and \$271,596 to obtain an individual permit and 313 days and \$28,915 for a “streamlined” NWP. Over \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.¹ Importantly, these ranges do not take into account 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 their land.

Housing Affordability and COVID-19 recovery

Home builders are especially sensitive to the cost of regulations because we have no choice but to pass these costs on to the home buyer, which directly impacts housing affordability. According to a nationwide survey conducted for NAHB in August 2019, four out of five American households believe the nation is suffering a housing affordability crisis and at least 75 percent report this is a problem at the state and local level as well. Other NAHB research shows that housing affordability in the single-family market is near a 10-year low. Only 59.6 percent of new and existing homes sold between the beginning of April and end of June were affordable to families earning the U.S. median income of \$72,900, and if the median U.S. new home price goes up by \$1,000, more than 158,857 households would be priced out of the housing market nationwide.

As a result, owning or renting a suitable home is increasingly out of financial reach for many households. In fact, almost a third of the nation’s households are cost burdened and pay more than 30 percent of their income for housing. At the same time, net new households are being

¹ David Sunding and David Zilberman, “The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process,” 2002

formed faster than new single-family and multifamily homes are coming on line, so there is both a surge in need and not nearly enough supply.

Making things worse, NAHB estimates that nearly 25 percent of the final cost of a single-family home and more than 30 percent of the cost of a multifamily home is due to government regulations at all levels of government. This is further exacerbating the supply/demand curve and making the housing market even more challenging.

Clearly, the nation is experiencing a regulatory and housing affordability crisis. President Trump recognized this earlier this year when he issued an Executive Order establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing where he directed federal agencies and others to address, reduce and remove the multitude of overly burdensome regulatory barriers that artificially raise the cost of housing development and contribute to the lack of housing supply.

Additionally, the COVID-19 pandemic has greatly affected almost every facet of our lives. Elevated unemployment numbers have dominated headlines, state and local governments are struggling to remain solvent and the U.S. economy is in economic distress. Many parts of the U.S. economy are likely to experience long-lasting economic suffering, with job losses and business failures. However, housing has been a bright spot for the U.S. economy. Housing has experienced the strongest rebound among the individual sectors of the economy. Construction has remained an essential service in most states, despite “stay-at-home” orders and consumer confidence remains strong. Single-family permits are now up 8 percent year to date. As a result of the gains for housing demand and a slowing in the rate of improvement for the overall economy, the housing share of GDP rose to a 13-year high. This calculation further demonstrates the strength and perseverance of the housing industry, despite the overall economy’s sluggish recovery.

Except for the Great Recession, housing has led our nation out of virtually all economic downturns over the last several decades. However, unnecessary regulatory red tape will hamper the residential construction industry’s ability to contribute to an economic recovery. The ramifications for job growth are significant. Building 1,000 average single-family homes creates 2,900 full-time jobs and generates \$110.96 million in taxes and fees for all levels of government to support police, firefighters and schools. Similarly, building 1,000 average rental apartments generates 1,250 jobs and \$55.91 million in taxes and revenue for local, state and federal government.

Despite these real challenges, many continue to suggest that additional regulatory requirements are necessary. Housing will be unable to help lead the economic recovery unless we repeal onerous regulations and promote sensible replacements. The NWPR is a perfect example of the regulatory actions we need to get our economy moving again. Our goal is to create more affordable housing options for all Americans while also protecting the communities we call home.

NAHB commends the Trump Administration for rolling back the 2015 Obama rule and putting forward a replacement that respects Congressional intent, follows Supreme Court precedent and

provides clarity and predictability to the permitting process. The NWPR achieves the goal of improving compliance while protecting our aquatic environment. This will go a long way towards helping housing lead the way in our economic recovery from COVID-19 and will help many families in their pursuit of the American dream.