

Resolution No. 2

Date: 2/29/2024

City: Las Vegas, NV

NAHB Resolution

Title: Wetlands
Sponsor: Environmental Issues Committee
Submitted by: Vince Messerly

WHEREAS, the Clean Water Act (CWA) grants the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) statutory jurisdiction over “navigable waters,” which are defined as “the waters of the United States;”

WHEREAS, the CWA only requires a permit for a “discharge” from a “point source” to “navigable water,” and a “discharge” occurs only where there is an addition of pollutants;

WHEREAS, in their policies, litigation and field practices, EPA and the Corps have expanded the scope of the terms “navigable waters” and “discharge” to overstep their authority and regulate upland ditches and storm drains, land clearing and soil removal;

WHEREAS, under the Sackett ruling, the U.S. Supreme Court held all CWA jurisdictional features (waterbodies and wetlands) must have a relatively permanent surface connection to another jurisdictional feature, while all CWA jurisdictional adjacent wetlands must be connected (i.e., touching) and thereby indistinguishable from either a traditional navigable water (TNW) or another jurisdictional feature;

WHEREAS, the Corps and EPA have failed to define key regulatory terms such as “navigable water,” “tributary,” “relatively permanent,” “continuous surface connection,” and “discharge” in a manner that is consistent with court opinions and Congress’ intent;

WHEREAS, the EPA and Corps are relying on a case-by-case analysis performed by Corps district staff to determine the jurisdictional status of a water body;

WHEREAS, the EPA and Corps are interpreting the undefined concept of continuous surface connection to mean that a wetland either physically abuts or touches jurisdictional water or relatively permanent water or is connected by a discrete, non-jurisdictional feature such as a human-made ditch, swale, pipe, culvert or ephemeral feature;

WHEREAS, the agencies’ failure to define these terms has resulted in inconsistent jurisdictional decisions among Corps districts and has expanded the scope of their CWA authority;

WHEREAS, the Corps is making jurisdictional determinations of wetlands beyond the parameters of the soils, vegetation and hydrologic conditions on which they should be based;

WHEREAS, the lack of timely approved jurisdictional determinations (AJDs) by the Corps is forcing home builders, developers, and environmental consultants to file preliminary jurisdictional determinations (PJDs) instead of approved jurisdictional determinations to advance to permitting;

WHEREAS, private landowners seeking PJDs must first relinquish their right to obtain an AJD from the Corps identifying those features, if any, on their property that are “waters of the United States,” and thus requiring a federal wetlands permit; importantly, under the PJD process, the Corps and EPA impermissibly claim CWA authority to subsequently issue federal wetland permits to private landowners for impacts to non-jurisdictional features on their property;

WHEREAS, CWA Section 101(b) recognizes it is the role of states, and not EPA nor the Corps, to determine what to regulate under state laws, such as CWA non-jurisdictional isolated wetlands, intermittent, and ephemeral waterbodies. States have several options to protect these features through regulatory and non-regulatory programs (e.g., utilizing CWA’s non-point source program, expanding existing stormwater management requirements, or expanding or creating state wetland programs);

WHEREAS, in light of regulatory uncertainties at the federal level, state and local governments are hastily adopting ill-conceived wetland and water protection policies with a negative impact on residential construction activities;

WHEREAS, the Corps’ Section 404 permit process is complex, lengthy and costly, and it can be open-ended, leading to unnecessary and costly delays in the development process;

WHEREAS, over the years, the Corps has ignored congressional intent to create a streamlined nationwide permit (NWP) program and has arbitrarily added onerous terms and conditions to the permits that have limited their usefulness and can make them almost as costly and drawn-out as individual permits;

WHEREAS, the Corps’ 2008 Compensatory Mitigation Rule’s mitigation hierarchy favors mitigation banks, and the cost to participate in an in-lieu fee program dramatically fluctuates. The 2008 Mitigation Rule has made the approval of mitigation banks more complex, more costly and slower; and

WHEREAS, the Corps’ implementation of Section 404 has run into coordination and consultation problems with other laws and regulations, including the National Historic Preservation Act and the Endangered Species Act,

NOW, THEREFORE, BE IT RESOLVED that the National Association of Home Builders (NAHB) urge the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (or “the Agencies”):

1. To adopt regulations, guidance and policies asserting that “navigability” is a guiding factor to determine the geographic reach of the Clean Water Act (CWA), consistent with congressional intent.
2. To adopt regulations, guidance and policies asserting CWA authority only over activities that “discharge” or “add” materials to jurisdictional waters.
3. Provide the public with an opportunity to comment on a set of clear regulations, regulatory guidance, and policies that can be uniformly applied across all

Corps districts, including clarifying the meaning of the terms “relatively permanent,” “continuous surface connection,” and “adjacent” wetland to determine the extent of CWA jurisdiction.

BE IT FURTHER RESOLVED that NAHB urge EPA and the Corps to include the following in their regulatory requirements for Sec. 404 of the Clean Water Act on a regional and national basis:

1. Provide to Congress an annual report summarizing, by Division and District, the number of approved general permits, approved Individual Permits, issued approved jurisdictional determinations (AJDs) and preliminary jurisdictional determinations (PJDs), backlogged permits (general and individual) and backlogged AJDs and PJDs, as well as average times to issue AJDs, PJDs, individual and general permits.
2. Revise current procedures to provide a streamlined, cost-effective, timely, and efficient process for obtaining jurisdictional determinations - AJDs and PJDs, general permits, such as nationwide, regional, and programmatic, and individual permits for residential and commercial development and construction activities.
3. In accordance with *Sackett*, respond to all requests (e.g., standalone and those associated with a requested permit) for AJDs in a timely manner (e.g., within 60 days), recognize the Corps’ determinations (i.e., jurisdictional and non-jurisdictional) contained within AJDs are final agency actions upon which CWA permits can be issued for five years unless, (A) an applicant requests a new AJD, or (B) conditions on the ground change.
4. Issue a completeness determination within a reasonable and uniformly applied time period (targeted to be 60 days) of submitting all permit applications. If a permit application is incomplete, the Corps will provide the applicant with a detailed list of the items needed to complete the application. The Corps must issue a completeness determination within a reasonable and uniformly applied time period (targeted to be 60 days) of the applicant supplying the additional information. If a completeness determination is not issued within the described time period, it will be determined that the application is complete.
5. Approve or deny with prejudice all applications within a reasonable and uniformly applied time period (targeted to be 60 days) of the completeness determination. The expiration of the aforementioned time period without a decision on a complete application will result in the affirmative approval of the permit.
6. Allow permit applicants to waive the above time requirements or grant a one-time 60-day extension.
7. Provide a publicly viewable tracking status for project applicants to track where their permit or AJD is in line to obtain real-time status updates.
8. Provide expedited approval of mitigation banks, in-lieu fee programs and project-sponsor mitigation projects.

BE IT FURTHER RESOLVED that NAHB urge Congress:

1. To support legislative efforts maintaining the statutory intent of the CWA is that “navigability” be the guiding factor in jurisdictional decisions.
2. To support legislative efforts clarifying continuous surface connection means continuous surface hydrological connection.

3. To support legislative efforts maintaining that the statutory intent of the CWA is to grant jurisdiction over only those activities that result in additions of pollutants into “waters of the U.S.”

4. To support legislative efforts to require the Agencies to revert to the use of the 1987 Corps Wetland Delineation Manual and to ensure that any changes to the manual go through the rulemaking process before being adopted.

BE IT FURTHER RESOLVED that NAHB urge state and local governments, which may be considering whether to adopt additional wetlands protection policies or permitting programs, do so only after identifying those categories of wetlands or waterbodies not already regulated under the CWA and take into account their effect on the state’s economy and the development industry;

BE IT FURTHER RESOLVED that NAHB urge the Corps and EPA to adopt reasonable compensatory mitigation banking programs that will be applied consistently and provide other options, such as in-lieu fee programs as a viable compensatory mitigation option, streamline the mitigation bank approval process, and update (Regulatory In lieu fee and Bank Information Tracking System) RIBITS in real-time; and

BE IT FURTHER RESOLVED that NAHB urge the Corps and EPA to ensure that relevant programs triggered by Sec. 404, such as the National Historic Preservation Act and the Endangered Species Act, are streamlined and have a straightforward procedure and enforceable timeline for coordination and consultation with federal, state and local officials.

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| Leadership Council Action: | Approved |
| Resolutions Committee Action: | Recommends Approval |
| Land Development Committee Action: | Recommends Approval |
| State and Local Government Affairs Committee Action: | Recommends Approval |
| Legal Action Committee Action: | Recommends Approval |
| Environmental Issues Committee Action: | Recommends Approval |
| Federal Government Affairs Committee Action: | Recommends Approval |

If approved, this resolution will supersede current policy 2007.6 No. 4 Wetlands.