**Testimony of Alicia Huey**

**Chairman of the Board National Association of Home Builders**

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Chairman Rouzer, Ranking Member Napolitano, and members of the subcommittee, 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 Alicia Huey and I am the president of AGH Homes, Inc., a custom home building company I founded in 2000. I have been a developer for over 30 years near Birmingham, Alabama and was just sworn in as NAHB's Chairman of the Board.

NAHB members are involved in the 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.

NAHB members are strong stewards of the environment; we recognize the need for clean and sustainable communities that benefit our residents and potential home buyers. NAHB members are vested in preserving and protecting our nation's land and water resources. Since its inception in 1972, the Clean Water Act (CWA) has helped to make significant strides in improving the quality of our water resources and our lives. As environmental stewards, the nation's home builders build neighborhoods and help create thriving communities while maintaining, protecting, and enhancing our natural resources, including our lakes, rivers, ponds, and streams. Creating lots and building homes involves substantial amount of earth-moving activities.

Because the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (hereafter "the agencies") have historically asserted broad federal jurisdiction over "waters of the US" (hereafter "WOTUS") under the CWA, NAHB members must often obtain CWA permits to address stormwater, and wetlands impacts to complete their land development and home building projects. What is most important to these compliance efforts is a CWA regulatory definition of WOTUS that is consistently applied, predictable, timely, and focused on protecting actual aquatic resources. Or as our friends at the

American Farm Bureau Federation describe, the agencies' goal when crafting a regulatory definition of WOTUS should be clean water and clear rules. Having a clearly understandable WOTUS regulatory definition empowers landowners to know when their activities require CWA permits and when the activities do not require CWA permits. Unfortunately, establishing a clear regulatory definition of WOTUS is becoming increasingly elusive.

In addition to federal mandates under the CWA, most builders and developers must also comply with a myriad of state and local environmental requirements designed to protect water quality and natural resources and promote conservation. For example, half of the states protect waterbodies and wetlands more broadly than required under the CWA, and twenty-three states have explicit regulatory authority to issue permits for dredge and fill activities in wetlands.[1] Further, many local governments have adopted wetlands protection ordinances and regulations that offer additional protections.[2] Beyond complying with these federal, state, and local mandates, NAHB members regularly make property purchase decisions and design, site, and develop their projects to avoid impacting and preserving sensitive areas and seek to showcase natural resources as important project amenities. For most of the last two decades, builders and developers have faced constantly changing regulatory definitions of WOTUS, making our decisions, including project financing, land acquisitions, project design, land development, and homebuilding activities exceedingly difficult.

My 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 make it more difficult for me to provide homes or apartments at a price point that is attainable for working families. More importantly, living under a regulatory regime that relies on the significant nexus test and determinations from an unelected federal bureaucrat will make homebuilding inefficient and costly.

Housing is a great 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.[3] 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 construction industry.

The U.S. homebuilding industry is already in a recession; few industries have struggled more recently than homebuilding. The costs of housing for homeowners and renters is increasing due to inflation being

[1] Environmental Law Institute, State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act (May 2013).
[2] Kusler, J., Common Questions Local Government Wetland Protection Programs, Prepared by Association of State Wetlands Managers and International Institute for Wetlands Science and Public Policy (June 26, 2006), at 2.
[3] Survey conducted by Paul Emrath, National Association of Home Builders, "How Government Regulation Affects the Price of a New Home," 2011

at a 40-year high, a broken supply chain, and building costs that are up 19% compared to last year.[4] 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 that 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.[5] 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.[6] NAHB economists recognize that we will need to exceed 1.1 million starts annually to reduce 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, and new residents buy goods and services in the community. NAHB estimates the economic impacts of building 100 typical single-family homes to 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.[7]

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.

**"Waters of the United States" Final Rule:**

On January 18, 2023, the Environmental Protection Agency and U.S. Army Corps of Engineers issued a final rule redefining the scope of waters protected under the CWA. 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 final rule fails to provide the clarity and certainty the construction

[4] 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

[5] 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

[6] 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-deals?utm_source=syn_oath_mon&utm_medium=Z&utm_campaign=14843&utm_content=oath_mon_14843_home+purchase+agreements+fell+through

[7] 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

industry seeks. This rule will increase federal regulatory power over private property and lead to increased 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.

**Final Rule Inappropriately Expands Federal Jurisdiction, Especially Compared to the Navigable Waters Protection Rule.**

In the agencies' press release announcing the final 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."[8] This claim is simply inaccurate as the final rule establishes a two-tiered approach to asserting federal jurisdiction by analyzing certain water features under the relatively permanent standard or the significant nexus standard. By implementing this two-tiered approach to determine this water's jurisdictional status, the agencies are giving themselves "two bites at the apple" to regulate impoundments, adjacent wetlands, non-navigable intrastate waters, and ephemeral streams drainage ditches.

The agencies intentionally created overly broad terms so they have the authority 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 final rule remain completely undefined including terms such as what constitutes a "tributary," "neighboring," and the aforementioned, "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 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 forthcoming regulatory guidance documents to explain how the regulatory text will be further interpreted and implemented across all Army Corps Districts. Importantly, none of these regulatory guidance documents have been subject to public notice and comment and can be revised or rescinded at any time. For any small business trying to comply with the law, the last thing needed is a set of new, vague and convoluted definitions that provide another layer of uncertainty.

Let me discuss some of the problematic features in detail:

**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 and completely undefined 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 (another undefined term), has a material influence upon the chemical, physical, or biological integrity of a traditional navigable water (TNW). Under the recently finalized WOTUS rule, the "significantly affects" test will be applied to three out of

[8] https://www.epa.gov/newsreleases/epa-and-army-finalize-rule-establishing-definition-wotus-and-restoring-fundamental

the five jurisdictional categories, e.g., tributaries, adjacent wetlands, and intrastate waters. These categories include features such as isolated lakes, ponds, streams, human-made drainage ditches or even a wetland.

In the rule's preamble, the agencies outline that they will be providing 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 have just recently released is entitled, "Joint Coordination Memorandum to the Field Between the U.S. Department of the Army, U.S. Army of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA)."[9] This joint Corps/EPA regulatory guidance document creates a required internal interagency review process for all draft approved jurisdictional determinations (e.g., including those where the agency determined a feature was non-jurisdictional) under the final rule's significantly affects standard. Under this guidance document, the Corps districts must wait for a minimum period 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 jurisdictional determination (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 "significant affect" determination for any feature covered under the final 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 the 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 who is 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."

By comparison, the WOTUS definition under the Navigable Waters Protection Rule (hereafter "NWPR"), which the recently finalized WOTUS rule rescinds, based federal jurisdiction on observable landscape conditions. That rule empowered landowners to determine whether their activities might impact a waterbody or landscape feature that is jurisdictional under the CWA. The NWPR's definition of WOTUS did this by requiring CWA jurisdictional features to maintain surface water connections during a "typical year" to TNWs and territorial seas, and tributaries of those features.

By linking CWA jurisdiction to observable surface conditions, the NWPR addressed many of NAHB's concerns. For example, the original 1986 regulations and this final rule define the extent of "adjacent wetlands" to encompass ambiguous terms such as "neighboring" features. By comparison, the NWPR clearly defined "adjacent wetlands" and eliminated vague and undefined regulatory concepts such as

[9] https://www.epa.gov/system/files/documents/2022-12/Waters%20of%20the%20United%20States_Coordination%20Memorandum.pdf

"neighboring" and "similarly situated," which rendered the "significant nexus" test irrelevant, and categorically exempted from CWA jurisdiction all "ephemeral" features that form only in response to rainfall events as well as all ditches that failed to meet the NWPR's definition of "tributary." Compared to the agencies' recently finalized WOTUS rule, the WOTUS regulatory definition under the NWPR provided many improvements including:

- *Eliminated "Significantly affects" test:* By avoiding the onerous significant nexus test the NWPR linked federal CWA jurisdiction to those waterbodies and landscape features that maintained a surface water connection to another traditional navigable water.
- *Encompassed far fewer adjacent wetlands:* Since the NWPR only asserted federal CWA jurisdiction over wetlands that directly abut (i.e., touch) or maintain a surface water connection to other jurisdictional water during a typical year (a defined term under the NWPR) and avoided overly expansive and confusing terms like "neighboring" and "similarly situated" found under today's final WOTUS rule.
- *Excluded all ephemeral features:* The NWPR included both a regulatory definition of ephemeral features and an explicit CWA categorical jurisdictional exclusion for all such ephemeral features., By contrast, the recently finalized WOTUS rule not only rescinds the NWPR's ephemeral definition and exclusion but purposefully fails to distinguish under the final rule's ditches exclusion when ephemeral flow equates to a CWA jurisdictional *relatively permanent flow*.
- *Narrowed federal jurisdiction over tributaries:* Since the NWPR required tributaries to maintain perennial or at least intermittent flow, the NWPR did not depend on subsequent field surveys such as observations of "bed and banks and ordinary high-water mark" (OHWM) that in arid and semi-arid areas of the country have proven to be difficult to discern from erosional features left on the landscape following instances of ephemeral flow. In comparison under the recently finalized WOTUS definition, determining the presence of a tributary return to a subjective field survey approach of locating a "bed and bank" and OHWM.
- *Excluded more ditches:* Under the NWPR all ditches were excluded unless they met the conditions of either a TNW or a tributary. By comparison under the recently finalized WOTUS rule, all ditches are included unless they meet narrow exemptions.
- *Excluded basing jurisdiction on "interstate waters":* Under the NWPR, the agencies recognized that the federal government is limited to regulating "interstate commerce" and that just because a wetland or waterbody crosses a state line, it does not provide the federal government with jurisdiction over that feature.

Compared to the WOTUS regulatory definition under the NWPR, today's WOTUS rule subjects more areas to federal CWA jurisdiction and returns to ambiguous regulatory terms and requires landowners to await the results of overly complex and bureaucratic delays inherent under the "significant nexus test" before knowing the CWA jurisdictional status of many non-navigable, isolated, and ephemeral features. Instead of relying upon observable features as under the NWPR that had made making jurisdictional determinations in the field much easier.

**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 have retained complete discretion to find a significant nexus on a case-by-case basis. Significantly, this also includes the ability to make blanket jurisdictional

determinations by considering all similarly situated waters in the region to determine if they, taken together, have a significant nexus to a TNW. The ability to aggregate waters, even within a catchment area, further illustrates the notion that there is no limit to federal jurisdiction under this rule.
These definitions will leave home builders in a constant state of confusion. This unpredictability will make it difficult for my business to comply and grow. The agencies suggest that the rule provides clarity; however, all it does is produce more questions. Unfortunately, builders will need to 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 federal commerce or other jurisdictional waters should not be federally regulated. In fact, these waterbodies should be expressly excluded in any definition of WOTUS moving forward.

**Final Rule is Inconsistent with Supreme Court Precedent:**

The CWA was designed to strike a careful balance between federal and state authorities. This has proven to be a difficult task, and to some extent, the efforts of the courts to provide clarity have only added to the uncertainty. The courts have been clear on one issue, which is that there is a limit to the federal jurisdiction of waters. In fact, the Supreme Court has twice affirmed that the U.S. Constitution and CWA place limits on federal authority over intrastate waters. To view the rule through this legal framework, it is necessary to look at the key cases:

***Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC):***

In 2001, for the first time, the Supreme Court limited the federal government's jurisdictional authority under the CWA through the *SWANCC* decision. The case questioned whether the CWA conferred the Corps of Engineers with authority over isolated, seasonal ponds at an abandoned sand and gravel pit in suburban Chicago because they were susceptible to being used by migratory birds. The agency tried to explain that those isolated features impacted interstate commerce and therefore were navigable waters. The Court rejected the Corps' assertion of jurisdiction because the agency's authority does not extend to isolated, abandoned sand and gravel pits with seasonal ponds, which provide migratory bird habitats.[10] In other words, the Corps could not assert jurisdiction over a feature without a connection to navigation.

***Rapanos v. United States and Carabell v. U.S. Army Corps of Engineering:***

Both the *Rapanos*[11] and *Carabell*[12] cases followed the same fact pattern: wetlands miles away from TNWs that drained through multiple ditches, culverts, and creeks, eventually draining into a TNW. The question of this court case was over the jurisdictional theory that waters are jurisdictional if they have a "hydrological connection" to a TNW. *Rapanos* provided a significant clarification that CWA jurisdiction does not reach non-navigable features merely because they may be hydrologically connected to downstream navigable waters. In short, the "any hydrologic connection" theory was rejected.

[10] Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)
[11] Rapanos v. United States, 126 S.Ct 2208 (2006)
[12] Carabell v. United States, 126 S.Ct. 1295 (2006)

However, two theories emerged from the majority's opinion in *Rapanos*. The first, written by Justice Scalia, claimed that CWA coverage extended to "…only those relatively ***permanent, standing, or continuously flowing*** [emphasis added] bodies of water 'forming geographic features that are described in ordinary parlance as 'stream[s,] … oceans, rivers, [and] lakes.'"[13] The plurality also developed a jurisdictional rule for wetlands in particular: "[O]nly those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and 'wetlands,' are 'adjacent to' such waters and covered by the Act."[14] The second test was authored by Justice Kennedy, who concurred with the judgment but wrote separately for himself. He elevated the concept of "significant nexus," by explaining that "[W]etlands possess the requisite nexus, and thus comes within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[15] "Consistent with *SWANCC* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends on a significant nexus between the wetlands in question and navigable waters in the traditional sense."[16]

The most significant clarification that *Rapanos* provided was that the five Justices agreed that CWA jurisdiction does not reach non-navigable features merely because they are hydrologically connected to downstream navigable water. However, many have maligned *Rapanos* because the Justices failed to reach a majority opinion that announced the "correct" test for CWA jurisdiction. In many cases, the existence of two tests only adds more confusion and disagreement regarding the scope of the CWA. While the agencies face a difficult task in resolving this conflict, the proposed rule is obviously inconsistent with these Supreme Court decisions and will expand the scope of waters that can be regulated by the agencies. The rule would extend coverage to many features that are remote and/or carry only minor volumes of water, and contrary to the Supreme Court's findings, its provisions provide no meaningful limit to federal jurisdiction. This broad overreach is unacceptable.

***Sackett v. Environmental Protection Agency***

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 would reject that the significant nexus test is the proper test for determining CWA jurisdiction.
While the public waits 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.

**<u>The Proposed Rule Ignores Federal/State Balance</u>**

While many aspects of the CWA are vague, Congress explicitly intended to create a partnership between federal agencies and state governments to protect our nation's water resources. Congress states in section 101 of the CWA that "[f]ederal agencies shall cooperate with state and local agencies to develop

[13] Rapanos 126 S.Ct. at 2225
[14] Id. at 2226
[15] Id. at 2226
[16] Id. at 2249

comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." Under this notion, there is a point where federal authority ends and state authority begins.

The rule published by the agencies, however, blatantly ignores this history of partnership and fails to recognize that there are limits to federal authority. If this rule is implemented as written, the federal government will severely cripple the state's role in protecting our nation's water resources, which would be a huge mistake and unconstitutional. Litigation is a likely result, and while it makes its way through the court system, regulators and businesses will be left in a lurch.

In addition, because the change in jurisdictional authority applies not only to section 404 of the CWA but also to all programs, the states will be required to conduct more monitoring and develop water quality standards for these newly jurisdictional waters in addition to those that are already covered. States will also be required to develop total maximum daily loads if these waters do not meet their water quality goals. Because many of these newly designated waters are on the drier side of the spectrum and/or will be conveyances designed to move water from one place to another, I am particularly concerned with the impacts this rule will have on section 402 stormwater permitting requirements and how the states and localities may pass on the myriad of new, onerous, and costly requirements to landowners.
For many years, States have adequately regulated their own waters and wetlands. States take their responsibilities to protect their natural resources seriously and do not need the federal government to meddle in their affairs and unnecessarily assert jurisdiction. In fact, every state has the authority to exceed federal law so long as there is a compelling reason. If you looked around the country, you would find that many states are protecting their natural resources more aggressively than when the CWA was enacted – a testament to their desire and willingness to do so.

In these times of austere budgets and competing priorities, the agencies should heed the CWA's directive and allow the states to maintain their prerogatives to regulate the lands and waters within their boundaries as they see fit.

**Potential Impacts on Construction:**

Home building is a complex and highly regulated industry. 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 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 construction industry also contract and lose jobs. Builders and developers, already crippled by the economic downturn, cannot depend upon the future homebuying 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 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. This final rule only adds to the headwinds that our industry faces.

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 2021, an analysis done by NAHB illustrates the number of households priced out of the market for a median-priced new home due to a $1,000 price increase. Nationally, this price difference means that when a median new home price increases from $345,000 to $346,000, 153,967 households can no longer afford that home.[17]

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.[18] 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.

***Increased Number of Federal Permits:***

Construction projects rely on efficient, timely, consistent permitting procedures and review processes under CWA programs. Builders and developers are generally ill-equipped to make their own jurisdictional determinations and must hire outside consultants to secure necessary permits and approval. This takes time and money. Delays often lead to higher costs, which lead to greater risks. Onerous permitting liabilities could delay or eventually kill a real estate deal. If the rule is implemented as written, the ability to sell, build, expand, or retrofit structures or properties will suffer notable setbacks, including added costs and delays in development and investment.

Specifically, for the "intrastate waters" category, builders will be at the mercy of the agencies. Builders will have to request a jurisdictional determination from the agencies to ensure they are not disturbing land near an aggregated water. Consequently, an increase in the number of jurisdictional determinations requests, across all industries, will result in greater permitting delays as the agencies are flooded with paperwork.

***Increased Federal Consultations:***

Many federal statutes tie their approval/consultation requirements to those of the CWA – meaning that if one needs to obtain a CWA permit, he/she must also obtain others (examples include the Endangered Species Act, National Historic Preservation Act, and National Environmental Policy Act). If more areas are considered jurisdictional, more CWA permits will be required, triggering these additional statutory reviews. Because project proponents do not have a seat at the table during these additional reviews and the consulting agencies are not bound by a specific time limit, builders and developers are immediately

[17]NAHB Priced-Out Estimates for 2021, https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-nahb-priced-out-estimates-for-2021-february-2021.pdf

[18] David Sunding and David Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," 2002

placed at a disadvantage. Lengthened permitting times will include an increased number of meetings, formal and informal hearings, and appeals. These federal consultations are just another layer of red tape that the federal government has placed on small businesses, and it is doubtful that the agencies will be equipped to handle this inflow.

***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 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."[19] PJDs cannot be appealed.

Essentially, our members gave up their right to defend themselves just to move the process along. NAHB fears this will happen again with the implementation of this final rule. Many of our members will be stuck in permit backlogs AJD reviews so they will opt for a PJD instead. Through this, many home builders recognize that we 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.

**The WOTUS Rule's Exclusions Are Too Limited and Fails to Recognize Longstanding Categorical Exemptions:**

NAHB is concerned that the agencies' failure to recognize longstanding categorical exclusions from federal jurisdiction under the WOTUS final rule will result in federal overreach and unnecessary regulatory confusion on the part of regulators and landowners. Under the final rule, the agencies have not recodified nearly a dozen features that were categorically excluded from CWA jurisdiction under prior iterations of the WOTUS regulatory definition. Instead, the agencies claim that they intend to implement exclusions under the final rule in a manner consistent with prior agency practices, where certain features were not specifically excluded by the rule, but the agencies would "generally" not assert jurisdiction over those features. NAHB believes that any clearly worded WOTUS regulatory definition must also have clearly worded jurisdictional exclusions rather than relying upon general statements by the agencies on how they have typically interpreted prior categorical exclusions. The agencies must instead ensure the final WOTUS rule is implemented in a consistent and clear manner by specifying within the final rule a list of features that are categorically excluded from jurisdiction by rule and can be relied upon by landowners and regulators alike. NAHB had urged agencies during the public comment process to include the following categorical exclusions for stormwater management facilities and treatment ponds, green infrastructure, and municipal separate storm sewer systems (MS4) infrastructure.

[19] https://www.nap.usace.army.mil/Missions/Regulatory/Jurisdictional-Determinations/

***Stormwater Management Facilities including Stormwater Treatment Ponds are not WOTUS features:***

NAHB members typically must secure NPDES stormwater permits before discharging stormwater to a WOTUS or a municipal separate storm sewer system (MS4). A required element of all NPDES stormwater permits for active construction sites is the Storm Water Pollution Prevention Plan (SWPPP), which identifies specific sediment and erosion control measures necessary to protect water quality. Historically, the preferred method for treating stormwater under an SWPPP has been using on-site retention or dentition ponds, infiltration trenches, or other conveyance systems. These man-made ponds and trenches are designed to slow concentrated stormwater runoff and trap sediment to protect receiving streams, lakes, and other downstream waterbodies (i.e., WOTUS features). Without an explicit exclusion, however, stormwater treatment ponds could be deemed a WOTUS because of the final WOTUS rule's overly broad jurisdictional categories including "tributary," "adjacent wetlands, "or "intrastate waters."

While the final WOTUS rule's categorical exclusion for "water treatment systems" should cover stormwater management facilities and stormwater treatment ponds, absent a specific categorical exclusion, NAHB remains concerned home builders could be punished. Specifically, without such categorical exclusions for stormwater treatment ponds, home builders face the prospect of being required to secure CWA Section 402 NPDES permits coverage to address construction-related stormwater discharges leaving their active construction sites and a federal wetlands permit (CWA Section 404 dredge or fill permit) for their own discharges into their own stormwater treatment ponds. This admittingly would be a perverse outcome and inconsistent with the common-sense interpretation of the agencies' "waste treatment systems" exclusion. Nevertheless, without an explicit categorical exclusion for stormwater treatment ponds, developers and home builders risk having to obtain CWA 404 permits for routine maintenance activities of these facilities.

***Green Infrastructure Features are not WOTUS features:***

EPA has defined green infrastructure as a means of "protecting and restoring natural landscape features and using natural systems (or systems engineered to mimic natural processes) to manage rainwater as a resource," and the agencies tout its many benefits, including increased climate resiliency, reduced urban island effects, lowering a buildings' energy demands, and sustainable communities.[20] The agencies "support(s) expanded use of green infrastructure to protect and restore waters while creating more environmentally and economically sustainable communities" and see green infrastructure as part of its "strategic agenda to protect waters." Despite the agencies' unequivocal support for green infrastructure, there is no indication under the final WOTUS rule that green infrastructure features such as rain gardens, stormwater infiltration cells, and other low-impact development techniques to manage the stormwater runoff will be covered under the final WOTUS rule's waste treatment system exclusions. This is troubling to NAHB's membership since localities often encourage or require developers and builders to install green infrastructure on new projects. By not explicitly excluding green infrastructure features from CWA jurisdiction, the agencies have created a powerful disincentive to developers, builders, and local governments from installing such features moving forward. If green infrastructure features such as rain gardens, bioswales, and other stormwater management devices are not categorically excluded from the WOTUS regulatory definition, then landowners and local governments

[20] www.epa.gov/green-infrastructure/what-green-infrastructure

alike face the prospect of having to obtain costly and time-consuming CWA §404 permits to perform routine maintenance of these same features. A clear disincentive to NAHB members who otherwise would consider installing green infrastructure devices into new residential developments.

***Municipal Separate Storm Sewer Systems (MS4) Are Not WOTUS Features:***

Municipal Separate Storm Sewer Systems (MS4s) systems are owned and operated by state and local governments and vary in size; however, their function is universal—to transport or convey a city's stormwater through pipes, drains, gutters and open ditches.[21] Many MS4 systems are regulated as point sources and therefore are required to obtain §402 National Pollutant Discharge Elimination System permits and develop stormwater management programs. Because exposed ditches and intermittent streams are often part of MS4 systems, I am concerned that the proposed may regulate MS4s (or their components) as WOTUS. This would be problematic because these features are already regulated as a point source. Further, there are miles of roadside ditches that are simply there to carry stormwater from the roadways for public safety and for which it makes little sense to consider it as federally regulable water.

***Impacts of Declaring Roadside Ditches Jurisdictional:***

The dilemma caused by the CWA jurisdictional status of the common ditch is so important to the residential construction industry because ditches are so ubiquitous that they crisis-cross the American landscape nearly everywhere. The Federal Highways Administration estimates there are more than 3.9 million miles of roadways within the United States, and federal regulations generally require those roads to be drained by ditches.[22,23] Therefore, having the agencies declare even a fraction of the millions of miles of roadside drainage ditches jurisdictional has major regulatory and permitting ramifications for residential developers and builders. Particularly since NAHB members typically must install culverts, roads, and even driveways across ditches to access their residential developments or even an individual homebuilding lot.

Historically, the Corps did not assert jurisdiction over roadside drainage and irrigation ditches constructed in upland areas. In addition, Congress established a statutory exemption from CWA §404 permitting requirements for the construction or maintenance of irrigation or drainage ditches under CWA Section 404(f)(1)(C). The problem for NAHB's membership is that the Corps districts have applied the statutory exclusion from CWA 404 permitting requirements inconsistently across the country resulting in regulatory confusion and litigation.

Under the NWPR the agencies created an exclusion for irrigation and drainage ditches provided those ditches were not constructed within a wetland, relocated an existing tributary, nor satisfied the NWPR's definition of a tributary.[24] Because of the NWPR's ditch exclusion and the exclusion of all ephemeral features, the jurisdictional status of ditches narrowed under the NWPR. Furthermore, because the

[21] 40 C.F.R. § 122.26(b)(8).
[22] U.S. Department of Transportation, Federal Highways Administration, Highway Statistics 2021 §4 Highway Infrastructure, Public road length by ownership and Federal-aid highways *at https://www.fhwa.dot.gov/policyinformation/statistics/2021/*
[23] 30 C.F.R. § 816.151(d).
[24] 40 C.F.R. § 328.3(b)(5)

NWPR did not use the "significant nexus test," any isolated wetlands located near non-jurisdictional ditches could not subsequently be deemed jurisdictional by the agencies using a case-by-case approach. By comparison, the current WOTUS regulatory definition eliminated the NWPR's ditch exclusion. In addition, under the final rule, roadside drainage ditches (including ditches with only ephemeral flow) can be considered jurisdictional using the significant nexus test under either the tributary or interstate water jurisdictional categories. Finally, because the final rule returns to using the "significant nexus test" this means any isolated wetlands located nearby a jurisdictional ditch can also be deemed jurisdictional.

**Conclusion:**

The final 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 agencies. As a builder 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 these that provide little environmental benefit.

In addition, the rule allows the agencies to illegally "take the easy way out" by sweeping everything under federal authority. If the agencies are interested in developing a meaningful and balanced rule, they must take a more methodical and sensible approach. I have significant concerns with the final rule, and I would encourage Congress to direct the agencies to implement a durable and practical definition of WOTUS.

I appreciate the opportunity to discuss these important issues.