

Holland & Knight

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May 1, 2024

Via Electronic Mail: michael.l.connor.civ@mail.mil

Michael L. Connor, Assistant Secretary
Army for Civil Works
108 Army Pentagon
Washington, DC 20310

Re: Administrative Appeal/Notice of Intent to Sue Regarding FOIA Request FP-24-001229

Dear Mr. Connor:

Holland & Knight represents the National Association of Home Builders (“NAHB”). The purpose of this letter is to provide notice of our intent to file suit related to the Corps of Engineers’ failure to make a timely determination and ongoing unlawful withholding of records related to the regulatory definition of “waters of the United States” (“WOTUS”) under the Clean Water Act in violation of the Freedom of Information Act, 5 U.S.C. § 552, as amended (“FOIA”), or alternatively, the Administrative Procedure Act, 5 U.S.C. §§ 701–06 (“APA”).

On September 8, 2023, the Corps and the U.S. Environmental Protection Agency (“EPA”) published a final rule in the Federal Register¹ revising the regulatory definition of “waters of the United States” (“WOTUS”) under the Clean Water Act to conform to the U.S. Supreme Court’s decision in *Sackett v. EPA*.² In the final rule’s preamble, the agencies claimed that while the rule was “immediately effective,” the agencies may provide additional administrative guidance documents, memorandums, and training materials for either the public or Corps district staff on how they intend to implement the conforming WOTUS regulatory definition.³

On October 11, 2023, NAHB filed a FOIA request seeking various documents concerning the implementation of the September 8 WOTUS regulatory definition (the “FOIA Request”). Specifically, the FOIA Request sought the following documents pertaining to implementation of the WOTUS rule: administrative guidance documents, memoranda, training materials (including

¹ 88 Fed. Reg., 61,964 – 61,969 (Friday, September 8, 2023).

² *Sackett v. EPA*, 598 U.S. ___, 143 S. Ct. 1322 (2023).

³ 88 Fed. Reg., at 61,966 (Friday, September 8, 2023).

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draft versions of the previously listed documents), Mr. Walker's September 28, 2023, email on JD coordination, USACE implementation guidance of the pre-2015 Regulatory Regime post-Sacket, USACE implementation guidance on the 2023 rule (a.k.a., USACE HQ jurisdiction SharePoint files), and correspondence between USACE HQ and the district offices concerning the above-mentioned documents.

In an email dated October 20, 2023, the Corps Office of the Chief Counsel acknowledged receipt of the FOIA Request as properly filed on October 11, 2023. According to the email, the FOIA Request was "forwarded to the Humphries Engineer Center Support Activity office for processing." The Office of Chief counsel recommended contacting that office for any further questions.

On November 9, 2023, NAHB sent an email to the Humphries Engineer Center Support Activity office inquiring as to the status of the FOIA Request and noting that the 20 day response time under FOIA had run. In an email from Raye Thornton, dated November 9, 2023, the Corps stated that USACE Humphreys Engineer Center Support Activity ("HECSA") is the proper FOIA office designated to answer the request. According to Ms. Thorton, on October 17, 2023, HECSA assigned tracking number FP-24-001229 to the FOIA Request and noted a suspense date of November 15, 2023. HECSA further stated the following:

We are actively working on your request, but will require additional time to search for, collect, and review the documents. Many of the documents will require consultation and coordination with other USACE offices and with the Department of the Army and other federal agencies before a final response may be made. We understand this is a topic of interest and will complete your request as quickly as possible. Because I am still collecting documents and because of the required coordination with other offices and agencies, it will likely be December 8, 2023, before a final response can be issued.

Despite these representations, no documents were provided by December 8, 2023. Consequently, on December 11, 2023, NAHB requested an update on the status of the response. In an email dated December 13, 2023, Ms. Thorton stated that HECSA has "gathered the responsive documents" and was in the process of reviewing them. "Because EPA, DOJ, Army, and Department of Defense all have equities in the responsive documents, I am required to coordinate with them before release decisions can be made. As you might imagine, this process takes quite some time to accomplish." HECSA asked that NAHB seek an update on January 3, 2024.

NAHB sought an update on January 4, 2024. Receiving no response, NAHB again reached out on January 12, 2024 and January 30, 2024. On January 30, 2024 Ms. Thorton indicated that she had "reviewed 1,099 pages of documents (37 pages were a consultation from EPA)" but that "[m]any documents will need to be reviewed by EPA and/or the Office of the Assistant Secretary

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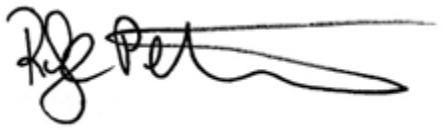
of the Army for Civil Works because the EPA and ASA/CW collaborated on most of the training materials. Additionally, USACE is still in litigation on this issue, so I may also have to loop DOJ into this process.” Ms. Thorton offered to send the “releasable, strictly USACE documents for review” while waiting on the EPA “if the attorneys agree.”

On January 31, 2024 NAHB replied to the Corps and asked for the response in its entirety. Months passed. On March 13, 2024, NAHB again asked for a status update. In response, Ms. Thorton indicated that the consultation packages were “sent to the Department of the Army and to EPA so they can review their equities.” The agencies “made some verbal comments, but they have not given me their official determinations.”

As of this date, no documents have been provided. An agency must determine whether to disclose responsive records and notify the requester of its determination within 20 working days of receiving a FOIA request. 5 U.S.C. § 552(a)(6)(A). The agency must also make the responsive records “promptly” available, unless it can establish that certain unusual circumstances are present and/or that it may lawfully withhold records, or portions thereof, from disclosure. *Id.* § 552(a)(6). Additionally, within 20 working days, the agency must inform the requester that it has a right to appeal the agency’s determination. *Id.* § 552(a)(6)(A)(i)(III)(aa). A person who files a lawsuit and substantially prevails may be awarded reasonable attorney fees and litigation costs reasonably incurred. *Id.* § 552(a)(4)(E).

Prompt access to the records responsive to the FOIA Request is necessary to effectuate FOIA’s purpose of meaningful government transparency. The Corps has identified the relevant documents but has withheld them under the guise of further review. The constructive denial of this request in order to undertake further review by the agencies is inconsistent with the limited reasons to justify a deadline extension. *Id.* § 552(a)(6)(B)(i). Therefore, unless a final determination is made within 10 days NAHB will file suit seeking declaratory relief establishing that the Corps has violated FOIA. NAHB will also seek injunctive relief directing the Corps to make a final determination regarding the FOIA Request and to immediately produce any agency records improperly withheld from NAHB.

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read "Rafe Petersen", is written over a horizontal line. The signature is contained within a rectangular box.

Rafe Petersen

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Cc: Crystle Poge
U.S. Army FIOA Office
Via Email: Crystle.C.Poge@usace.army.mil

Raye L. Thornton
U.S. Army Corps of Engineers
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