

Strike Two Against the NAHB: They Lose Another Standing Battle

December 19, 2011 by [Seth Jaffe](#)

Last week, [I noted](#) that the [D.C. Court of Appeals had found](#) that the National Association of Home Builders did not have standing to challenge a determination by EPA and the Army Corps of Engineers that two reaches of the Santa Cruz River are traditional navigable waters. On Friday, in [National Association of Home Builders v. United States Army Corps of Engineers](#), the NAHB lost yet another standing battle.

This time, the NAHB was challenging the Corps' nationwide permit, NWP-46, allowing discharges of dredge and fill material into certain upland ditches. The District Court had found that the NAHB did have standing, but ruled against NAHB on the merits. The Court of Appeals didn't even let them get that far, once more barring the courthouse doors.

Aside from the NAHB's bad luck in losing in the court of appeals twice in one week, what's news here?

The news is that, once again, the Court has provided useful guidance regarding what regulated entities – or their trade groups – must allege to establish standing in these types of cases. The NAHB had asserted that NWP-46 imposes costs on its members because it is ambiguous and leaves members uncertain when they are in fact subject to CWA jurisdiction for filling ditches. Unfortunately for the NAHB, the Court concluded that the Corps has been asserting jurisdiction over upland ditches for years. Moreover, the Court pointed to an acknowledgement by the NAHB VP for Legal Affairs that the Corps had “consistently suggested that at least some upland ditches were subject to CWA jurisdiction.”

In short, the Court concluded that the NAHB's injury was not traceable to the permit, but was instead traceable to the Corps' underlying assertion of jurisdiction, **which was not asserted for the first time in NWP-46**. Indeed, as the Court noted, because the Corps had previously asserted jurisdiction over upland ditches, NWP-46 **benefited** NAHB members, by providing them a way to comply with the CWA that is less costly than the individual permit process.

As the two NAHB decisions make clear, a trade group asserting standing on behalf of its members – or those members suing on their own behalf – must address the traceability and redressability prongs of the standing requirement with particularity, and must establish both that the specific regulatory action being challenged is the direct cause of their injury and that vacating the agency action will redress that injury.

I'm sure that the third time will be a charm for the NAHB.



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