

## Sauce For the Goose? Home Builders Lose a Standing Battle

December 11, 2011 by [Seth Jaffe](#)

Developers have cheered in recent years as the Supreme Court has tightened its standing rules. In a decision issued on Friday in [National Association of Home Builders v. EPA](#), the Court of Appeals for the District of Columbia may have [hoist the developers on their own petard](#).

After EPA and the Army Corps of Engineers issued a determination that two reaches of the Santa Cruz River constitute “traditional navigable waters” under the Clean Water Act, the National Association of Home Builders sued. The complaint appears to have attached declarations referring to individuals who own property along tributaries of the two reaches, and who asserted that they are have applied for permits under the CWA. None of this was enough for the Court, which made four important points:

- The NAHB itself did not have organizational standing. The Court made clear that an organization does not have standing unless it has credibly asserted that the challenged action “‘perceptibly impaired’ a non-abstract interest.”
- NAHB’s effort to assert representational standing for its members generally failed, because it contained no assertions linking this site-specific TNW determination to any broader impacts that would affect developers away from the Santa Cruz River.
- NAHB’s effort to assert standing on behalf of owners in the vicinity of the Santa Cruz River failed because none of the declarations filed with the complaint alleged any harm specifically tied to the issuance of the TNW determination.
- NAHB did not have “procedural standing” to challenge the agencies’ failure to provide notice and an opportunity to comment before issuing the TNW determination. Quoting from the Supreme Court decision in [Summers v. Earth Island Institute](#), the Appeals Court stated that “deprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing.” As the Court further noted, allegations of procedural violations may be relevant in assessing the redressability issue, but they cannot loosen the requirement that plaintiffs demonstrate that they have suffered a substantive injury traceable to the procedural violation.

The NABH decision appears plainly correct in light of Supreme Court standing jurisprudence. Moreover, it does not substantially narrow access to the courts. In fact, I think it provides a useful roadmap regarding the types of declarations that will be required to establish standing for developers. What it does make clear is that the courts are not simply discouraging environmental plaintiffs in their standing jurisprudence. Instead, the

courts are discouraging each side equally – or at least requiring the same demonstrations from developers as well as environmentalists.

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