

September 21, 2017

Ms. Donna Downing
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Re: Definition of “Waters of the United States” – Recodification of Pre-existing Rules (82 FR 34899); EPA-HQ-OW-2017-0203; submitted via regulations.gov

Dear Ms. Downing:

The National Stone, Sand and Gravel Association (NSSGA) fully supports the decision by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (the Agencies) to withdraw the 2015 Waters of the United States Rule (80 FR 37054), which would have radically expanded jurisdiction under the Clean Water Act (CWA) to include areas suspected of only tenuous connections to navigable waters. The rule would have led to confusion and inconsistency in the field, and put businesses and individuals at risk of fines for disturbing dry land, with no demonstrated improvement to the environment. Opponents of the rule included industry, environmental groups and 32 states, whose legal challenges resulted in stays by the U.S. Court of Appeals, 6th Circuit and the federal district court in North Dakota due to “substantial likelihood of success on the merits.” Rather than wait for the long and costly legal process to ultimately determine the 2015 rule was unlawful, NSSGA appreciates the efforts by the Agencies to bring clarity and certainty for aggregate operators, regulators and the general public by protecting navigable waters as intended by the CWA. While the Agencies’ decision to return to the “pre- rule” status quo once the 2015 rule is rescinded is not an ideal long-term solution, this action at least restores the guidance that aggregate operators are familiar with while the Agencies work to develop a rule that provides clarity and certainty.

The withdrawal notice cites two major reasons for the withdrawal: the lack of state consultation/deference required under Section 101 (b) of the CWA during the rulemaking process and the uncertainty that could arise if the nationwide stay of the rule were to be lifted. NSSGA concurs with both of these, and the following includes additional rationale for the withdrawal of the 2015 rule.

CWA Jurisdiction is Vital to the Aggregates Industry and Infrastructure

NSSGA is the leading advocate for the aggregates industry which employs more than 100,000 highly-skilled men and women. Our industry generates \$27 billion in annual sales and supports \$122 billion in national sales in affiliated industries. For every job created in the aggregates industry, an additional 4.87 jobs are supported throughout the economy. Our members are responsible for the essential raw materials found in every home, road, runway and public works project from schools to hospitals. Additionally, environmental applications such as erosion control, wastewater, sewage, and air pollution control, and drinking water purification systems also use these materials. Aggregate companies take rock from the ground, then crush and sort it. When aggregate producers are finished using the stone, sand, or gravel in the area, they return the land to other productive uses such as residential communities, parks, nature preserves, and drinking water reservoirs.

The determination of CWA jurisdiction is critical to this industry. Aggregates mining must occur where the material is naturally located. CWA permits are required for mining in and near waters and their adjacent wetlands. However, aggregate mining also occurs in areas that are not truly aquatic, such as ephemeral and isolated areas that do not have a discernible surface hydrologic connection to traditionally navigable waters, such as vernal pools and swales in the arid western U.S. The scope and reach of CWA jurisdiction has a direct impact on the costs of planning, financing, constructing, and operating an aggregates facility. These, in turn, impact the costs of infrastructure projects which are largely borne by the taxpayer.

The 2015 Rule is Unlawful and Withdrawal is the Correct First Step

The Agencies' withdrawal of the 2015 rule is a critical first step. The 2015 rule was challenged by industry, 32 states, and environmental groups, and a rare national stay was issued shortly after the rule went into effect. The timing of the final rule and connectivity report, which was used to scientifically justify the rule, showed EPA considered the rule foregone conclusion and ignored the input of stakeholders, including the main regulator, the Corps. At the time, EPA portrayed the rulemaking process as highly inclusive, but subsequent congressional reports and testimony show that they finalized an unlawful rule and tainted the rulemaking process. EPA is correct to withdraw this deeply flawed rule and start over.

While the Supreme Court in *Rapanos v United States* (126 S. Ct. 2208, 20-06) called on the Agencies to develop a rule, neither Justice Scalia's plurality opinion nor Justice Kennedy's concurrence contemplated that the Agencies would propose a rule so sweeping that vast areas of the American landscape, including areas that are dry most of the year, would become regulated waters. Indeed, Justice Scalia's plurality opinion limiting the term "navigable waters"

to flowing "bodies of water" was completely ignored, and instead a rule was issued that improperly treated Justice Kennedy's concurrence as the governing holding of the Court.

Instead, an incomplete connectivity analysis, released before peer review comments were even addressed, was relied upon. The study purportedly synthesized scientific studies on aquatic connectivity as the controlling document interpreting what Justice Kennedy meant in holding that the CWA does not reach waters with only "remote and insubstantial" effects on "navigable waters." The reliance on the connectivity study transformed the scientific study into controlling the legal justification for the 2015 rule, rather than starting with the limits set forth in *Rapanos* and interpreting scientific evidence to define the difference between "any" nexus and "significant nexus." This approach was contrary to Justice's Kennedy's admonition that the Agencies may identify only certain categories of tributaries and their adjacent wetlands that are "significant enough" to "perform important functions" for navigable waters. In effect, the rule removed "significant" from "significant nexus."

In 2015, the U.S. Court of Appeals, 6th Circuit, noted that the rule was inconsistent with Supreme Court decisions, the rulemaking process was "suspect" because major changes to the rule such as the broad expansion of "adjacent" waters to be up to 1500' were not subjected to public review and comment, and that EPA illegally lobbied to promote the rule. The North Dakota district court stated that "[t]he Rule allows EPA regulation of waters that do not bear any effect on the "chemical, physical and biological integrity" of any "navigable-in-fact water" and the rule was "likely arbitrary and capricious." The courts for these reasons granted a rare stay, with the expectation that the litigants would be ultimately successful in overturning the rule.

In addition to the courts finding the rule so problematic as to warrant a nationwide halt, Congressional hearings and reports catalog the many problems with both the rule and the rulemaking process. In particular, the House Committee on Oversight and Government Reform report, dated October 27, 2016, which includes extensive email records and government personnel testimony, concludes: "The process that led to the rule's signing, however, was rife with legal shortcuts, predetermined conclusions, and politically-driven timelines." Before the Senate (Committee on Environment and Public Works (EPW) hearing, April 26, 2017), Misha Tseytlin, Wisconsin Solicitor General, testified: "EPA built the WOTUS Rule around five distance-based components, but those components have no support in the administrative record...The illegality of the WOTUS Rule is not mere happenstance; rather, it is the direct result of EPA's unprecedented decision to shut the public out of the rulemaking process, in plain violation of the APA's notice-and-comment requirement." The rushed nature of the review of the

comments and the date of the final rule show that not all comments were reviewed or even considered.

The withdrawal notice notes that the 2015 rule did not include adequate deference and consultation with the states. This point is confirmed by Mr. Tseytlin in the hearing: "...the WOTUS Rule is a deeply intrusive assault upon traditional state authority... This Rule was adopted without meaningfully consulting the States about their own water protective programs." NSSGA appreciates the Agencies' efforts to seek state input in accordance with part 101 (b) of the CWA and urges that the state comments submitted as part of the federalism consultation be carefully considered.

According to the EPW testimony of General Peabody of the Army Corps of Engineers, retired: "It was the unanimous conclusion of Corps staff, which I fully supported, that the rule as written was fatally flawed," and "by using Corps data without the involvement of Corps personnel, EPA misapplied Corps data to draw unsupportable conclusions." Gen. Peabody's internal memos from the spring of 2015 show the primary regulator of the CWA permits program urging EPA to not promulgate a deeply flawed rule, but these were ignored.

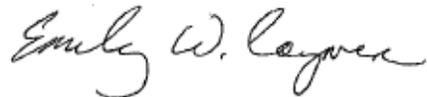
NSSGA Supports the Federalism Rationale in the Rescission Proposal

The previous rulemaking failed to adequately consult with state governments and a rule was issued that extends CWA jurisdiction beyond any reasonable limits envisioned by Congress and intrudes into the traditional authority of the states in managing their land and water resources. The proposed rule noted this failure as inconsistent with section 101 (b) of the CWA that recognizes the "primary responsibilities" of the states regarding managing their land and water resources. The Agencies' decision to engage in a fresh federalism consultation, including determining the extent to which states or tribes may protect waters not subject to CWA jurisdiction, is a welcome step to more clearly delineate the limits of the CWA. The 2015 rule overlaps and conflicts with many state laws and policies that protect their aquatic resources creating confusion and undermining the cooperative federalism goals of the CWA. As this federalism consultation moves forward, we urge the Agencies to give great deference to state programs that have proven to be effective stewards of their resources. NSSGA hopes that the ongoing federalism consultation will help to better define "relatively permanent" waters consistent with sound scientific principles and actual practice in the field.

Conclusion: The 2015 Rule Should be Withdrawn

The 2015 rule was not based in science or law, and the process was tainted, closing out important stakeholders: the public, the states and even the primary regulator, the Army Corps of Engineers. For these reasons, NSSGA strongly supports the decision to withdraw the 2015 rule and to develop a new rule to provide certainty to regulators, operators and the general public while protecting navigable waters and the rights of the states and landowners. Thank you for your consideration of these comments. We can be reached at (703) 526-1064 or at ecoyner@nssga.org.

Sincerely,

A handwritten signature in cursive script that reads "Emily W. Coyner".

Director, Environmental Policy