

August 13, 2018

Re: Definition of “Waters of the United States” – Recodification of Preexisting Rule; Supplemental Notice of Proposed Rulemaking; EPA-HQ-OW-2017-0203; submitted via regulations.gov

The National Stone, Sand & 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 both delay and withdraw the 2015 Waters of the United States (WOTUS) Rule 80 FR 37054 (2015 rule), which 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. These comments are provided as requested by the agencies and focus in particular on the negative impacts of the 2015 rule to the aggregates industry. NSSGA has submitted comments previously on this topic, both alone and with the Waters Advocacy Coalition (WAC) and incorporates these by reference.

NSSGA is the leading advocate for the aggregates industry. Our members are responsible for the essential stone, sand and gravel used to build road and public works project as well as erosion control, wastewater and drinking water purification systems. Aggregates companies take natural materials from the ground, then size them to produce materials for construction projects. When aggregates producers are finished producing the stone, sand, or gravel at an operation, they return the land to other productive uses such as drinking water reservoirs and preserves.

The determination of Clean Water Act (CWA) jurisdiction is critical to this industry. 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.

NSSGA agrees with the agencies that allowing the 2015 WOTUS Rule to go into effect, even for a short time, would cause confusion amongst the regulated community and regulators because it fails to provide regulatory certainty. As the notice states,

“To date, all three of the courts that substantively have considered the 2015 rule...have found that petitioners seeking to overthrow the rule are likely to succeed on the merits...” and

that petitioners' comments demonstrate the "widespread disagreement and confusion over the meaning of the 2015 rule and the extent of jurisdiction it entails."

NSSGA appreciates the examples where the 1986 WOTUS Rule and subsequent guidance would have ruled that isolated waters or wetlands are non-jurisdictional, but the 2015 WOTUS Rule would have caused them to become jurisdictional. The issue of ephemeral streams would have had a much greater impact on the aggregates industry. Aggregates operations typically cover a large area, for both economic and safety reasons. The enormous increase in federal jurisdiction represented by the rule's inclusion of dry stream beds would have imposed enormous costs on aggregates operations. NSSGA members estimated an additional cost of mitigation at \$1,000,000 per new site or expansion, due primarily to the inclusion of ephemeral waters in the 2015 rule. In some cases, the increased cost of mitigation would exceed the value of the property, leading to companies walking away from potential development sites, or even abandoning existing aggregates operations where planned expansion opportunities would have been threatened by additional and excessive costly stream and wetlands mitigation.

For example, in Virginia the Department of Environmental Quality (DEQ) permits wetlands, small stream segments and isolated waters that the Corps doesn't regulate. In fact, one member noted that Corps personnel would frequently tell them not to put ephemeral streams or ditches on property maps so as not to confuse reviewers.

Furthermore, the 2015 WOTUS Rule would have put many landowners and operators at risk of civil and criminal violations, as ephemeral streams have very rarely been considered federally regulated "waters." The majority of the public would not know that disturbing these features required consultation with and permits from the Corps, as well as mitigation costs.

NSSGA strongly supports the agencies' actions to delay the 2015 rule while the agencies work to withdraw and replace the rule to provide certainty to regulators, operators and the general public, while protecting navigable waters and the rights of the states and landowners. This would mean a Rule that clearly excludes ephemeral and isolated waters, and purpose-built structures like pits, quarries and water treatment systems. Thank you for your consideration of these comments. I can be reached at (703) 526-1064 or at ecoyner@nssga.org.

Sincerely,



Director, Environmental Policy