

NATIONAL STONE, SAND & GRAVEL ASSOCIATION



Natural building blocks for quality of life

Statement of the
National Stone, Sand & Gravel Association

Hearing On

“Meeting the Needs of Small Businesses and Family Farmers in
Regulating our Nation’s Waters”

Submitted to the
House Committee on Small Business
U.S. House of Representatives

July 22, 2009

Madam Chairman and Members of the Committee:

On behalf of the National Stone, Sand & Gravel Association (NSSGA), we offer this testimony for the hearing on, “Meeting the Needs of Small Businesses and Family Farmers in Regulating our Nation’s Waters.” NSSGA and its member companies go to great lengths to ensure proper stewardship of the land in our aggregate operations and we are proud of our record. However, NSSGA is concerned that legislation pending in Congress that goes under the misnomer of the Clean Water Restoration Act would have a negative impact on our member’s operations.

NSSGA’s interpretation of the Clean Water Restoration Act (S. 787), as passed by the Senate Environment & Public Works Committee, is that it would expand the jurisdiction of the Clean Water Act (CWA) so broadly that multiple permits would be required to continue aggregate operations, adding another layer of regulation on an already highly regulated industry. Further, the broad definition of ‘Waters of the U.S.’ will result in unnecessary over-regulation that will negatively impact our customers. NSSGA also is concerned that the legislation abrogates the federal – state partnership that is central to the successes of the CWA. For these reasons NSSGA opposes the legislation and believes it will ultimately result in higher construction material costs while failing to achieve the enumerated goals of the legislation.

NSSGA and our member companies have been involved in numerous court cases regarding CWA jurisdictional issues. We laud the goals of the CWA and support the regulators in implementing this complex law. Our members, however, believe the current CWA Section 404 program should be restructured to focus on the value and function of wetlands. They are opposed to expanding the jurisdiction of the CWA due to the unintended consequences which could have a negative impact on, and limit access to, essential aggregate deposits.

According to the U.S. Geological Survey, NSSGA is the largest mining association by product volume in the world and represents the crushed stone, sand and gravel-or construction aggregate-industries. Our member companies produce more than 90 percent of the crushed stone and 70 percent of the sand and gravel consumed annually in the United States. There are more than 10,000 construction aggregate operations nationwide. Almost every congressional district is home to a crushed stone, sand or gravel operation. Proximity to market is critical due to high transportation costs, so 70 percent of our nation’s counties include an aggregates operation. Of particular relevance to this hearing, 70 percent of NSSGA members are considered small businesses.

Clean Water Restoration Act (S. 787)

NSSGA does not believe the Clean Water Restoration Act as passed by the Senate Environment and Public Works Committee simply “restores the original intent of Congress.” We believe it greatly expands the original intent of Congress by redefining jurisdiction of the CWA to the point that activities on dry land would be subject to the law. By removing the term “navigable” from the CWA, and redefining ‘waters of the U.S.’ as *all intrastate and interstate waters* the jurisdictional reach of the law becomes virtually endless.

Because the legislation is designed to define federal jurisdiction as broadly as possible and only includes two exemptions, NSSGA is concerned that areas that simply should not be regulated will end up being regulated. NSSGA believes the courts will interpret Section 4 as not limiting jurisdiction in any way, reasoning that if Congress wanted to exclude specific features they would have included them alongside the exemptions for prior converted cropland and waste treatment systems. The result of this unlimited jurisdiction will be the regulation of mud puddles, ditches, gullies, and other land features by the federal government and any alteration will require an expensive and time-consuming permitting process. Regrettably, the legislation does not differentiate between a spring mud puddle in the middle of an aggregate operation and an actual wetland that provides benefits to wildlife, flood protection, or water filtration.

Overregulation is simply bothersome if there are no additional costs associated with complying with the regulation, however in the case of section 404 permits the costs are quite substantial. In fact, a study of the CWA Section 404 permitting process found that obtaining a nationwide general permit from the Corps of Engineers took on average 313 days at a cost of \$28,915. Moreover, obtaining an individual permit from the Corps took on average 788 days at a cost of \$271,000. See David Sunding and David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetlands Permitting Process*, 42 Nat. Resources J. 59 (Winter 2002). NSSGA believe that these costs will create a cost-prohibitive disincentive for small businesses to seek these permits in order to continue to operate – thus reducing economic activity at a time when Congress is working hard to restore economic growth.

Additionally, by including “and all interstate and intrastate waters, including lakes, rivers, streams (including intermittent streams), mudflats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds, all tributaries of any of the above waters, and all impoundments of the forgoing” in the new definition of “waters of the United States,” the legislation is abrogating the state-federal partnership that exists under the current law. The legislation would assert federal jurisdiction over all waters traditionally left to state regulation. In our opinion this dramatic expansion of the law far exceeds original Congressional intent, and edges on being unconstitutional.

It is important to note that the many past successes of the CWA are a direct result of the partnership between the federal government and the states. Voiding this partnership may have drastic unintended consequences as water and land use decisions would shift from local and state authority closest to the people who elected them, to the far removed federal government. Citizens and businesses seeking permits would be forced to deal with the federal government instead of their local city or county personnel. Local officials understand the issues and reasons for or against a project and importantly are accountable to the public for those decisions. By subjecting local water and land-use decisions to the delays, and potentially less responsive federal bureaucracy, the unintended consequence of the legislation may be further alienation of the citizenry as to the impact on them and their community, and a blatant disregard of their opinions.

Additionally, NSSGA is concerned that the legislation will negatively impact our members by granting CWA jurisdiction over man-made ponds in upland-areas at aggregate operations used in

conjunction with the normal course of business. These ponds are used in a variety of ways, including: sediment and erosion control, recycling of storm water for washing aggregate to meet the specifications of customers (notably state Departments of Transportation); dust suppression; and for vehicle wheel washes to eliminate tracking of aggregate material onto the public right-of-way. These ponds may take on, over the course of time, various characteristics of hydric soils or hydric vegetation, even though they are created in upland areas and have no hydrological connection to any flowing traditionally jurisdictional stream. Forcing these operations to obtain CWA permits for incidentally-created or man-made upland ponds will not achieve the goal of protecting the natural wetlands resources of the United States. Unfortunately, the legislation does not even give the regulators the authority to exempt such ponds.

After an aggregate operation's production ends, operators begin the process of reclamation. Again, operators' ability to conduct normal reclamation of their mine site could be severely limited under the broad jurisdiction of the CWA as proposed by the legislation. During this reclamation period operators return the land to a useable form to benefit the local community. Some of the uses of reclaimed quarries include: nature preserves, wildlife habitat, recreation areas, golf courses, housing subdivisions, water reservoirs, industrial parks, shopping centers, or any other use approved by the local zoning board. Any man-made water body created incidentally to aggregate production or reclamation would fall under the broad CWA jurisdiction of S. 787. Even if a quarry pond is slightly altered or even expanded, NSSGA believes this legislation would require a permit and possibly mitigation.

NSSGA worries that the proposed legislation could affect siting of future aggregate operations. Currently it takes a considerable investment of time and money to locate a suitable deposit for aggregate production, determine if the aggregate is of sufficient quantity and quality for development, and make it through the local, state and federal permitting process. For example, in California, a recent study warned that the state does not have sufficient aggregate reserves available to meet the needs of the communities unless additional deposits are located, permitted and developed within the next 15 years. (see Aggregate Availability in California, Department of Conservation, California Geological Survey, S. Kohler, 2006) . However, it takes on average 12 years to site and permit a new aggregate operation within the state of California. Florida is experiencing similar difficulties in siting or expanding aggregate operations. Legislation like S. 787 could delay the permitting process further as all potentially jurisdictional areas must be identified, thus delaying an already over-taxed permitting process of the federal government, as well as having unintended consequences on the aggregate operator's ability to conduct business. These kinds of delays for providing construction materials essential to the built environment will add expense to consumers and to stretched local and state budgets.

As introduced the Clean Water Restoration Act greatly expands federal jurisdiction far beyond the original intent of Congress in passage of the CWA and will severely impact aggregate businesses, as well as the communities served who need to maintain, repair and replace buildings, roads, airports and water-sewage treatment facilities (94 percent of asphalt is aggregate, 80 percent of concrete is aggregate).

NSSGA urges Congress to reassess this legislation and in the meantime seek input from the regulated community to identify and protect waters and wetlands that truly are important to