



Natural building blocks for quality of life

August 8, 2006

The Honorable James M. Inhofe
Chairman, Committee on Environment
and Public Works
Room 410
Senate Dirksen Office Building
Washington, D.C. 20510

ATTENTION: Michele Nellenbach

Dear Mr. Chairman:

The National Stone, Sand & Gravel Association (NSSGA) is pleased to submit these comments with respect to the Committee's hearing on federal wetlands jurisdiction following the Supreme Court's decision in *Rapanos v. United States* and *Carabell v. US Army Corps of Engineers*, Nos. 04-1034 and 04-1384 (U.S. June 19, 2006) (hereinafter *Rapanos*).

Based near the nation's capital, NSSGA is the world's largest mining association by product volume. Its member companies represent more than 90 percent of the crushed stone and 70 percent of the sand and gravel produced annually in the U.S. and approximately 117,000 working men and women in the aggregates industry. During 2005, a total of about 3.2 billion tons of crushed stone, sand and gravel, valued at \$17.4 billion, were produced and sold in the United States.

Background

In the *Rapanos* decision, the Court vacated the judgments of the U.S. Court of Appeals for the 6th Circuit that had upheld federal jurisdiction over wetlands connected to traditional navigable waters by a series of drainage ditches and non-navigable creeks, and wetlands separated from a drainage ditch by a berm. ("Traditional" navigable waters are those actually navigable waters that are used or could be used in interstate commerce.) The Court remanded the cases to the lower court for further proceedings, but under different legal theories. Four justices (Justices Scalia, Thomas, Alito and Chief Justice Roberts) ruled that the Clean Water Act authorizes federal jurisdiction only over "relatively permanent bodies of water . . . connected to traditional interstate navigable waters," as well as wetlands that have a continuous surface connection with the waters such that it is "difficult to determine where the 'water' ends and the 'wetland' begins." Justice Kennedy, however, while voting to overturn the lower court, urged a remand to determine whether the specific wetlands at issue have a "significant nexus with navigable waters." The remaining four justices (Justices Stevens, Souter, Ginsburg and Breyer) voted to preserve the expansive authority asserted by the U.S. Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") over wetlands and waters even remotely connected to traditional navigable waters.

Need for Congressional Action

The Court's split decision highlights the need for Congress to exercise its responsibility to decide and set forth clearly the jurisdictional limits of the section 404 federal wetlands permitting program. Proceeding on a case-by-case basis is unacceptable to NSSGA members and the rest of the regulated community that often engage in activities that may encounter wetlands and other "waters of the United States."

The members of the NSSGA support legislation that takes a common sense approach to establishing readily identifiable limits to federal wetlands jurisdiction. Such an approach should include the following elements:

1. The right of each state to regulate wetlands and other waters within the state's jurisdiction should be preserved.
2. Exclusion from federal jurisdiction of isolated waters and wetlands, including those connected to traditional navigable waters by pipes, culverts, man-made ditches, and ephemeral areas.
3. Clarification of the jurisdiction of only section 404 of the CWA, which regulates the discharge of dredged and fill material.
4. Vest the Corps, not EPA, with exclusive administrative authority for determining the jurisdiction of the section 404 program, within the bounds set by Congress.

Most of these elements are reflected in the Court's plurality opinion in *Rapanos*. In addition, they are contained in legislation pending in the House of Representatives, H.R. 2658, the Federal Wetlands Jurisdiction Act, sponsored by Reps. Richard Baker (R-LA) and Marion Berry (D-AR).

It is the responsibility of Congress to decide and state clearly the jurisdictional limits of the federal wetlands regulatory program. Enactment of legislation along the lines described above will fulfill Congress' responsibility. The NSSGA urges the Committee to lead the Senate to adopt such legislation.

Require Agency Rulemaking

In the event that clarifying legislation cannot be achieved in a timely fashion, an interim step may be to direct the Corps to promulgate rulemaking. In deciding the *Rapanos* case, four of the justices mentioned explicitly the need for a clarifying rule.

Chief Justice Roberts noted, with regard to lack of rulemaking issued after the Supreme Court's 2001 *SWANCC* decision:

"[Rulemaking] would have [given them] plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.... The proposed rulemaking went nowhere. Rather than refining its views of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless views of the scope of its power. The upshot today is another defeat for the agency."

With respect to such a directive, the NSSGA again urges Congress to focus solely on the section 404 regulatory program by directing (a) that any rule be limited to clarifying the jurisdiction of the dredge and fill program only; and (b) that the Corps have sole responsibility for promulgating the rule.

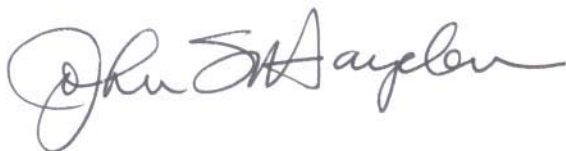
In addition, the NSSGA urges the Committee and the Congress to set boundaries for the Corps to follow in issuing a rule. NSSGA suggests the Corps be instructed by Congress to issue a rule as follows:

1. "Isolated" waters and wetlands are no longer subject to federal jurisdiction.
2. Given that isolated waters are no longer legally subject to CWA regulation, the Corps should be instructed to define clearly the terms "adjacent" and "tributary," which are the key words used to define "isolated" waters.
3. Congress should direct the Corps to eliminate "neighboring" from the definition of "adjacent." Current regulations define "adjacent" as "bordering, contiguous, or neighboring." Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands." But the term "neighboring" is vague and no longer appropriate in light of *Rapanos*.
4. Congress should direct the Corps to define "tributary" to eliminate most man-made ditches and drains, in conformity with the Court's decision in *Rapanos*.

Mr. Chairman, the NSSGA believes the suggestions outlined above are a moderate, measured response to the questions of federal jurisdiction over wetlands that remain after the *Rapanos* decision.

The NSSGA appreciates the opportunity to submit comments and the Committee's attention to this important issue.

Sincerely,

A handwritten signature in cursive script, appearing to read "John S. Hayden". The signature is written in dark ink and is positioned below the word "Sincerely,".

John S. Hayden, PG, REM
Vice President, Environmental Services