



Natural building blocks for quality of life

November 16, 2006

Mr. David B. Olson
U.S. Army Corps of Engineers
CECW-OR/MVD
441 G Street, NW
Washington, DC 20314-1000

Dear Mr. Olson,

The National Stone, Sand and Gravel Association (NSSGA) submit the following comments on the Corps' September 26, 2006 (Vol. 71, No. 186) proposal to reissue and modify nationwide permits (NWP's).

NSSGA, based near the nation's capital, 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 alone, a total of about 3.2 billion metric tons of crushed stone, sand and gravel, valued at \$17.4 billion, were produced and sold in the United States. The vast majority of these materials are utilized in public infrastructure projects. NSSGA's members also regularly undertake land reclamation activities that include wetland restoration, creation and enhancement, as well as flood storage enhancement.

NSSGA supports many of the improvements suggested for the NWP program in the proposed rules as outlined below and requests further changes as it relates to the aggregates industry. NSSGA's fundamental issue with the NWP program remains that NWP 44 for mining activities is fatally flawed and is an inherently useless permit for the aggregates industry.

BACKGROUND

Due to how aggregate is deposited by nature, sand and gravel are often located in areas that are considered jurisdictional under the Clean Water Act (e.g. near adjacent and other wetlands and in streambeds). NSSGA's members excavate aggregate materials often creating large depressions that may fill with surface water or ground water. These areas often become inundated well before reclamation is complete. Consequently, NSSGA's members frequently find themselves involved in the Clean Water Act section 404 permitting process. At times they find themselves involved in counterproductive jurisdictional disputes with the Corps over waters and wetlands created in uplands, which are by law and regulation supposed to remain non-jurisdictional until all mining and reclamation activities have ceased and they are "abandoned."

NSSGA has consistently participated with the Corps on revisions to the NWP program. The Association participated actively in the process intended by the Corps to develop activity-specific replacement permits for NWP 26. Since the Corps first proposed phasing out NWP 26 and replacing it with activity-specific NWPs, NSSGA's members have requested on several occasions an activity-specific NWP for the aggregates industry. See, e.g. Comments of NSSGA (06/12/97). **While the first draft by the Corps appropriately set forth a separate NWP for aggregate mining activities**, in the July 1, 1998 proposal the Corps made a determination to combine all mining activities into one proposed NWP "E." Commenting on this proposal, NSSGA noted that differences among mining types (e.g. hard rock v. aggregate) are sufficient to justify an aggregates-specific NWP and that it would not make sense to lump together all mining types, since they are not similar activities with similar environmental effects. See Comments of NSSGA (08/26/98). Unfortunately, however, the Corps determined to combine all mining activities into one permit, NWP 44. Despite comments that NWP 44 would be "of little use to the [aggregates] mining industry," and that the regulated community would have "little incentive to design their projects to meet the terms and conditions of NWP 44," 65 Fed. Reg. at 12,859 (AR PRT1-052/3), the Corps reduced the maximum acreage limit for replacement permits drastically to 1/2 acre, despite recognition that it will force many projects with minimal effects into the individual permit process. See 65 Fed. Reg. at 12,825.

In effect, the Corps has created a NWP that has restrictive conditions that go so far as to render the NWP of virtually no use to the aggregates industry. We know of only a few instances where a member company actually used NWP 44 and that was for very minor stream diversions. Indeed, most companies have been forced into the individual permit process for all Section 404 activities – even in cases where affected wetlands are of lesser value, and constitute a miniscule percentage of project acreage. The resulting delays in the individual permit process has resulted in increased costs of aggregates and ultimately increased costs to end-users. Unfortunately, the Corps' response appears to be that it has unlimited authority under section 404(e) to promulgate whatever conditions it wants. This is not the program that Congress intended.

FURTHER IMPROVEMENTS NEEDED FOR NWP 44

NWP 44

While the new proposal does not make any major important changes to NWP 44 for Mining Activities that will enable its use in a significantly broader context, it does make supportable and substantive changes with regards to some of the General Conditions that apply to all NWPs, especially regarding protection of the 100-Year Floodplain. While we support these positive changes, NSSGA specifically questions and challenges the calculated utility of NWP 44 as evidenced in the Decision Document that supports NWP 44. The Decision Document states "...this NWP will be used approximately 413 times per year on a national basis..." Based on NSSGA's survey of our membership regarding their use of NWP 44, the aggregates industry makes up less than 10 percent of this predicted use. In fact, using results of a Freedom of Information Act inquiry, the Corps' own data show that only 9 of the 38 districts have authorized NWP 44 with only 26 approvals being given for aggregates mining.

Regarding the Floodplain General Condition, the Corps rightly acknowledges in accordance with the position we originally communicated, that “One of the environmental benefits of the NWP program is that it provides incentives for project proponents to avoid and minimize impacts to waters of the United States to qualify for an expedited NWP authorization instead of applying for individual permits, which generally require greater costs and time to obtain. Prohibiting the use of NWPs 39, 40, 42, 43, and 44 removes the incentive to reduce impacts to qualify for general permit authorization. If required to obtain individual permits, project proponents may propose larger activities with greater impacts to waters of the United States within the 100-year floodplains.” NSSGA concurs with this statement. Further, this relationship exists with regards to acreage caps as well. Due to the restrictive acreage cap, combined with the majority of Corps districts revoking the use of NWP 44, the industry has been forced to turn to the time-consuming and costly individual permitting process in order to guarantee certainty as to the future of their business by obtaining permits for impacts larger than ½ acre on mine sites that are consistently larger than 100 acres, at the very least. By losing the option of a NWP, the industry has no incentive to design their projects so that those activities meet the terms and conditions of a NWP.

In the Corps Decision Document for NWP 44, the Corps states, “If this NWP is not available, substantial additional resources would be required for the Corps to evaluate these minor activities through the individual permit process...” The Corps also states, “The no action (or no NWP) alternative would not achieve one the goals of the Corps NWP program, which is to reduce the regulatory burden on applicants for activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively.” NWP 44 is of virtually no use to the aggregates industry with the current ½ acre cap.

SUGGESTED ALTERNATIVE IMPROVEMENTS FOR NWP 44

NSSGA offers the following options to the Corps to improve the usefulness of NWP 44:

1. NSSGA supports a separate NWP for aggregates mining, **as originally conceived by the Corps**, with a sliding acreage cap based on project size or acreage up to 5 acres of affected “waters of the United States.” This can be accomplished in one of several ways listed below:

Retain ½ acre cap, but make it relate to single and complete project size as follows:

- (a) 100 Acres -- One half acre;
- (b) 200 Acres -- One acre;
- (c) 300 Acres -- Two acres;
- (d) 400 Acres -- Two & One half acres;
- (e) 500 Acres -- Three acres; and
- (f) 600 Acres -- Three & One half acres.

Large project size enables NWP use that constitutes minimal adverse effects on individual and cumulative basis better than rigid half-acre caps unrelated to project size.

2. Establish a 3 to 5 acre limit for NWP 44 where state mining and reclamation laws applicable to aggregates mining are in place. The Corps in issuing NWP 21 for surface coal mining, in

which acreage is not capped, has accepted this concept, where state or federal governments oversee reclamation. The same principle could apply to aggregates mining.

3. Seek a waiver by the District Engineer to either increase or decrease the ½ acre cap through the use of regional conditions if they determine no more than minimal adverse effects will occur in a particular watershed on an individual or cumulative basis. An example of this is found in the Corps proposal to remove certain restrictions on fills within the 100-year floodplain, whereas the Corps states, “Where there are regional concerns regarding development activities in 100-year floodplains involving discharges of dredged or fill material into waters of the United States, division engineers can regionally condition certain NWP’s to restrict or prohibit use of those NWP’s to authorize activities in those floodplains.”

JURISDICTIONAL ISSUES

NSSGA is equally concerned with the Corps failure to formally exclude formerly mined aggregate pits and ponds from the definition of "waters of the United States," in cases where mining or reclamation activities are still ongoing. The 1986 Preamble to the Corps regulations indicated that the agencies do not generally regard as jurisdictional water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States. 51 Fed. Reg. 41206, 41217 (1986) (citing 33 C.F.R. § 328.3(a)). In 1994 and 1996, NSSGA twice noted that the failure of the 1986 preamble to include a definition of "abandoned" created substantial difficulties for aggregate companies. While proposing language that would resolve this issue when reissuing the NWP’s in 2000, the Corps did not see that promise through other than again recognizing it in the preamble. See 65 Fed Reg. at 12818, 12860-61 (March 9, 2000). The result is that from time to time Corps districts continue to assert jurisdiction over isolated and upland pits and ponds where mining and reclamation activities are still on-going – at times even adversely affecting beneficial wetlands mitigation and restoration projects. Thus, we reiterate again the need to clarify this fundamental issue in the Corps regulations, especially in light of the 2001 Supreme Court decision in SWANCC and the 2006 decision in Rapanos.

EPHEMERAL STREAMS

In response to jurisdictional uncertainty stemming from the Rapanos Supreme Court Decision, the Corps is proposing to provide greater protection to ephemeral streams. For those NWP’s that have a 300 linear foot limit for the loss of streambed, the Corps is proposing to apply that linear foot limit to perennial, intermittent and ephemeral streams. For proposed activities resulting in a loss of more than 300 linear feet of intermittent and/or ephemeral stream bed, the district engineer can waive the linear foot limit, if he determines that the proposed activity will result in minimal individual and cumulative adverse effects on the aquatic environment. In justifying expanded jurisdiction the Corps notes difficulties in judging the start and finish of intermittent versus ephemeral streams, administrative simplicity, and greater perceived environmental protection as benefits. However, NSSGA finds this attempt to expand jurisdiction not warranted in light of the decision in Rapanos and SWANCC and the lack of formal guidance from the agencies based on these court decisions. Likewise the Corps proposes a related modification of its definition for “loss of waters of the United States” to include filling or excavating of ephemeral stream beds when determining whether proposed activities exceed the threshold limits of the NWP’s. These arguments run counter to the

Corps' own proposal to expand coverage under NWP's to authorize discharge of fill material into ditches and canals under NWP "B."

NSSGA's SUPPORT FOR CORPS' PROPOSED CHANGES

NSSGA also supports certain proposed improvements made by the Corps in the NWP program generally and NWP 44, specifically:

1. NSSGA supports the Corps' removing complexity and variability now deemed unnecessary regarding certain types of mining activities and certain types of waters. (These comments apply to the current NWP 44, recognizing that a separate NWP for aggregate mining is the preferred option.) In a positive change, the newly proposed NWP 44 "...removes terms requiring measures to prevent increases in stream gradient and water velocities, and minimizing turbidity as the prevention or reduction of such impacts is more appropriately addressed through the NWP conditions, as well as site-specific review and any case-specific special conditions added to NWP authorization by district engineers..." NSSGA supports these changes since it is redundant by virtue of the requirements already included in the General Conditions.
2. NSSGA supports the Corps' proposal that removes, as unnecessary, references in NWP 44 to the Water Quality and Management of Water Flow General Conditions since these general conditions apply to all NWP's.
3. NSSGA supports the Corps' proposal to make the Management of Water Flows General Condition more practical by not mandating maintenance of the pre-construction course, condition, capacity and location of opens waters, but only to the "maximum extent practicable." Further, we ask the Corps to make it clear that the activity may alter the pre-construction course, condition, capacity and location of open waters if it benefits the aquatic environment.
4. NSSGA supports the Corps' removal of the requirement for a Water Quality Management Plan (GC 21), and instead allows the District Engineer the discretion to determine, if necessary, additional measures to be taken to protect water quality.
5. Regarding fills within the 100-year floodplain, NSSGA supports the Corps' proposal to modify this General Condition and to remove the prohibition against the use of NWP's 39, 40, 42, 43 and 44 to authorize discharges of dredged or fill material in waters of the United States resulting in permanent above-grade fills within mapped 100-year floodplains located below headwaters or within mapped floodways above headwaters. NSSGA supports the Corps proposal to simply require permit applicants to comply with applicable state or local floodplain management requirements that have been approved by the Federal Emergency Management Agency (FEMA), rather than dictate additional stringent floodplain restrictions that appear redundant to those of FEMA.
6. NSSGA supports language in the Decision Document for NWP 44 that certain mining activities, and in particular sand and gravel mining, "...will increase the holding capacity of

the 100-year floodplains and may reduce downstream flood peaks, if materials are excavated from the substrate and moved off-site. Aggregate mining activities in streams may increase the capacity of those streams, thereby decreasing flooding.... Such increases in flood-holding capacity may benefit local communities by reducing flood hazards.”

7. NSSGA supports the newly proposed “NWP B” Discharges into Ditches and Canals. This newly proposed NWP authorizes discharges of dredged and fill material into certain types of ditches and canals that are determined to be waters of the United States. It would allow a landowner to return his or her land to its prior condition, where those ditches and canals: 1) are constructed in uplands; 2) receive water from another water of the United States; and 3) divert water to another water of the United States. These ditches and canals are generally deemed to be lacking in significant aquatic resource function and therefore a more generous one-acre cap is specified for this new NWP. It would also require a PCN if the dredged or fill material will be discharged into more than 500 linear feet of ditch or canal.

SEPARATE NWP FOR AGGREGATES MINING

As we noted in our comments above, the Corps originally released a draft of replacement NWPs that included a separate NWP for aggregates mining. For the sake of perceived administrative efficiency, the Corps dropped this separate NWP and combined all mining other than coal into one NWP. Usage results show that this perceived “efficiency” is overwhelmed by the lack of utility for the aggregates industry. A separate NWP for aggregates mining with the possibility of a greater range of acreage limits for large parcel projects is necessary for an NWP for aggregates mining to be of serious utility. Such a larger project size with still very small allowable impacts is more protective of cumulative impacts than smaller acreage caps on smaller parcel size projects.

NSSGA is pleased to offer these comments on the Corps’ proposed changes to the NWP program generally and NWP 44, specifically. Please contact me at 703/526-1065 if you need further information or clarification.

Sincerely,



John S. Hayden, PG, REM

Vice President, Environmental Services