

Statement of

The National Stone, Sand & Gravel Association

To the  
Senate Environment and Public Works Committee

On the  
“The Clean Water Act following the recent Supreme Court  
decisions in *Solid Waste Agency of Northern Cook County* and  
*Rapanos-Carabell.*”

December 13, 2007

Madam Chairman and Members of the Committee:

On behalf of the National Stone, Sand & Gravel Association (NSSGA), we are pleased to offer this testimony on the Clean Water Act (CWA) following the recent Supreme Court decisions in *Solid Waste Agency of Northern Cook County* and *Rapanos-Carabell*. NSSGA and its member companies have been involved in numerous court cases regarding jurisdictional issues surrounding the CWA. We recognize the goals of the CWA and support the regulators in implementing this complex law. Our members, however, believe the current CWA Section 404 program is inadequate in protecting wetlands and we 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 aggregate-industries. Our member companies produce more than 92 percent of the crushed stone and 72 percent of the sand and gravel consumed annually in the United States. More than three billion tons of aggregates (or 2.95 billion metric tons) were produced in 2006 at a value of approximately \$21 billion, contributing nearly \$40 billion to the GDP of the United States. Without these important commodities, the nation's infrastructure could not be built or maintained, and the commerce and quality of life would be severely reduced. The aggregates industry workforce is made up of about 118,000 men and women. Every \$1 million in aggregate sales creates 19.5 jobs, and every dollar of industry output returns \$1.58 to the economy. With over 11,000 operations nationwide, most Congressional Districts are home to multiple operations.

The members of the NSSGA recognize that the Earth's resources, upon which all life depends, are finite, and that wise environmental stewardship is necessary today to preserve the potential for a quality life for future generations. Accordingly, the Association adopted Environmental Guiding Principles which are attached in Appendix 1. The members of NSSGA also identify the concept of sustainability as a business approach that integrates environmental, social and economic aspects to ensure the long-term supply of aggregate materials to society. This month, NSSGA's Board of Directors adopted the sustainability principles which are attached in Appendix 2. As a highly regulated industry, NSSGA is proud that our members go above and beyond what the law and regulations require, wherever possible.

In addition NSSGA encourages its members to adopt and implement an Environmental Management System (EMS) program to meet its environmental requirements and improve its overall performance. An EMS is a continual cycle of planning, implementing, reviewing and improving the actions that an organization takes to meet its environmental goals. NSSGA developed its own EMS template for the aggregates industry that provides a logical step-by-step system for assigning responsibility, evaluating practices, procedures, and processes, and allocation of resources based on the Plan, Do, Act, Check management system approach. We would like to highlight the fact that in a letter dated May 28, 2002, the Environmental Protection Agency commended NSSGA for "developing EMS guidelines that will assist its members in meeting the criteria for the National Environmental Performance Track Program."

## **Post Rapanos Regulatory Environment**

NSSGA believes the regulatory process is a precept fundamental to implementation of the nation's laws. The basic purpose of rulemaking is to afford stakeholders the due process required by law to provide a reasoned forum that allows all interested parties to comment on proposed rulemakings to ensure regulators have the most complete set of data and testimony so that informed decisions can be made. NSSGA has concerns about certain aspects of the wetlands guidance pursuant to the Supreme Court's decision in Rapanos. We plan to submit comments at the appropriate time on the implementation of the guidance industry.

Although NSSGA member companies are proud of their work in preserving the environment and ensuring a high quality of life for future generations, NSSGA strongly believes that the Section 404 program should do a better job of protecting important wetlands based on the value and function of those wetlands. The Section 404 program is often used to stop growth of any kind and has further been used to assert regulatory jurisdiction over incidental wetlands created in upland areas at aggregate mining properties before all mining and reclamation is completed.

## **Current Legislative Proposals**

To date, only one bill has been introduced in the 110<sup>th</sup> Congress that deals with CWA jurisdiction and it is titled the "Clean Water Restoration Act" (S. 1870). NSSGA believes the bill would impose another layer of regulation on an already highly regulated industry at both the Federal and state level. Additionally, NSSGA is concerned that certain terms used in the bill are sufficiently vague that their interpretation could have severe unintended consequences on the future of our business.

NSSGA does not believe S. 1870 simply "restores the original intent of Congress" which was to "restore the chemical, physical and biological integrity of the nation's waters." NSSGA certainly believes and supports the restoration of the nation's waterways and wetlands. However, the "savings clause" in the bill does not directly address many of the waters that are found at aggregate operations, farming ponds, or other isolated, non-navigable, intrastate, upland water bodies created incidentally to any earth-moving activity.

By removing the term "navigable" from the CWA, the reach of the agencies now becomes one of theoretical hydrological interpretation rather than one of direct observation of a water conveyance system between a wetland/water of the U.S. and a flowing stream. In other words, the agencies will now have the ability to look at subsurface groundwater connections as opposed to physical above ground water conveyances or conduits. This IS an expansion from the CWA jurisdiction of the past at least for water bodies or wetlands that are removed from any adjacent or abutting flowing streams.

The legislation would create a one-size fits all approach to federal regulations by essentially declaring that all wet areas, infrequently wet areas, and any activities that may affect those wet areas are subject to federal jurisdiction under the CWA. Specifically, the approach taken in Section 4 of S. 1870 defines "Waters of the United States" with an inclusive list of types of water and does not list a single exclusion. NSSGA believes the courts will interpret Section 4 as not limiting jurisdiction in any way, thus extending CWA authority over any wet area or infrequently wet area and to any activity that may affect those areas. 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.

For example, the legislation would allow 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: washing aggregate to meet the specifications of customers (notably state Departments of Transportation); for dust suppression to control fugitive dust; 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 these incidentally created, man-made, isolated upland ponds is tantamount to bad public policy based on and poorly conceived science.

This legislation does not give the regulators the authority to exempt such ponds. To be more specific, the savings clause inserted into the legislation would, in our opinion, actually limit the regulators ability to make such common-sense determinations.

Another hurdle faced by aggregate operations with regard to S. 1870, is the vague phrase “activities affecting these waters” included in Section 4. These four simple words can be interpreted to mean different things by reasonable people because “activities” is not defined. NSSGA believes this will be a focus of additional unnecessary, expensive and time-consuming litigation.

This phrase also has the potential unintended consequence of giving the Federal government a veto over land-use planning power simply because any activity that is near wet areas or infrequent wet areas would need a CWA permit. For those citizen or environmental groups that oppose virtually all public works projects, this phrase would provide another means to oppose a project that has been approved at the local level. The unintended consequence of this language could virtually federalize local land use planning.

After an area has been mined, operators begin the process of reclamation and could again find themselves under the broad jurisdiction of the CWA proposed by S. 1870. 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, 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 mining or reclamation would meet the broad CWA jurisdiction of S. 1870. Even if the pond is altered or expanded, this legislation would require a permit and possibly mitigation.

NSSGA also is concerned about the possibility of siting future aggregate operations. Currently it takes a considerable investment of time and money to locate a suitable deposit for mining, 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. 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. 1870 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.

Unfortunately, the savings clause that purportedly limits the impact on the mining sector actually creates more confusion. Section 6 is constructed in a manner that creates two major problems. First, only discharges of storm water would be exempted at aggregate operations, however other potential areas of CWA jurisdiction would stand. This will cause enormous confusion for those on the ground. Second, it is likely the courts will view the list of exemptions as limiting due to the simple fact that Congress inserted the list in the bill in the first place. If a specific activity is not listed then it could be reasonably assumed that Congress meant it to be within the jurisdiction of the CWA.

A worse case scenario would be the inability to site and permit new aggregate operations in areas with high growth rates. Considering that 40 percent of aggregate produced is used in road and transportation projects and another 20 percent in public works projects (schools, airports, water and sewer systems, etc.), the unintended consequence of this action would be to drive up the price for construction aggregate, as these basic raw materials needed to sustain the economic growth of an area must be imported from greater distances. This increased cost for new construction will be borne by the taxpayer.

Ultimately, this legislation that is said to provide the regulated community with more certainty will actually require additional permits, longer delays and higher costs for construction projects.

As introduced the Clean Water Restoration Act greatly expands the jurisdiction of the CWA and will have a number of severe impacts on the aggregates community. NSSGA urges Congress to reconsider this legislation and seek input from the regulated community on those areas where we can work together to protect waters and wetlands that truly are important to ecosystems and watersheds and those that provide valuable flood control and water purification.

NSSGA believes the Section 404 program can be improved by:

- Classifying wetlands based on value and function. Wetlands should be classified into three categories on a national, state or regional basis with "strict sequencing" in the high value wetlands; "public interest" (balancing) test in medium value wetlands; and automatic permit with mitigation requirements in lowest value wetlands.
- Developing incentive programs for private landowners to conserve wetlands on their property. Tax credits and other benefits encourage landowners to leave privately owned wetlands in their natural state and to manage such lands accordingly.

NSSGA is proud of the work our members do to protect the environment. By working together, wetlands that are truly valuable can be protected for the benefit of the environment, our nation's waters, and future generations while at the same time our members can continue to provide essential aggregate materials that sustain the quality of life enjoyed by all Americans.

## **Appendix 1**

The NSSGA Board of Directors amended these Environmental Guiding Principles on February 11, 2001. The Environmental Guiding Principles were originally adopted January 20, 1991.

### **The National Stone, Sand and Gravel Association (NSSGA)**

- Encourages its members to meet all established environmental regulatory requirements, and where possible to do better than the law and regulations require.
- Believes that environmental laws and regulations should be based on sound scientific, engineering and medical research and on established scientific, engineering and medical principles. To this end, NSSGA will work with lawmakers and regulators and make available the expertise of its member, staff and research facilities to help in shaping the nation's environmental policies.
- Encourages its members to adopt and implement an Environmental Management System (EMS) program to meet its environmental requirements and improve its overall performance. An EMS is a continual cycle of planning, implementing, reviewing and improving the actions that an organization takes to meet its environmental goals.
- Encourages its members to strive for excellence in environmental affairs and to provide leadership by example by demonstrating environmental stewardship in all aspects of their operations.
- Encourages its members to contribute to environmental enhancement by implementing programs such as landscaping and wildlife habitat development.
- Encourages its members to work with community leaders and citizens groups in developing plans for appropriate uses of the land in the community interest, once mining operations have been completed.
- Encourages its members to participate in communicating to the public the importance to society of an environmentally-responsible aggregate industry, and in educating the youth of our country in the wisdom of responsible environmental stewardship in a business setting.
- Believes that wise environmental stewardship is good business, and good for business.

## Appendix 2

### **National Stone, Sand & Gravel Association's Guiding Principles for Sustainable Aggregates Operations**

The members of the National Stone, Sand and Gravel Association (NSSGA) identifies sustainability as a business approach that integrates environmental, social and economic aspects to ensure the long-term supply of aggregate materials to society. NSSGA recognizes that sustainable practices are necessary today to preserve the potential for a quality life for future generations.

#### **Overarching Practices**

- NSSGA members sustain the communities in which we operate by providing raw materials as natural building blocks for quality of life.
- We are conscious of the need to provide economic, social and environmental value for future generations, and the communities in which we operate.
- We demonstrate a strong and unwavering commitment to safety, health and the environment at our operations.
- We work with appropriate government bodies to establish effective, responsible and balanced laws and other requirements based on sound science.
- We encourage life cycle re-use of products during manufacturing and post consumer use.
- We maintain adequate aggregate resources in locations that minimize the life cycle impacts of the resource's extraction, delivery and use.
- We encourage proper land use development and planning within communities to ensure long-term aggregate resource availability.
- We adhere to the highest ethical business practices and transparency in all aspects of our operations.
- We recognize that profitability is essential to a sustainable industry and its continued ability to contribute to communities.

During the Mining Life Cycle of an aggregate operation, our members are encouraged to:

#### **Planning Phase**

- Develop a site-specific plan for post mining land use and/or reclamation that engages stakeholders in planning for future needs and interests.
- Plan for the prevention and/or minimization of environmental impacts.
- Adopt and implement an Environmental Management System program to properly manage potential environmental risks and requirements, and improve overall environmental performance.

#### **Operational and Closure Phase**

- Pursue new technologies and practices to improve the operational, safety, health and environmental efficiency of our operations.
- Invest in the personal and professional development of employees to ensure a strong workforce into the future.
- Ensure that employees are treated in a respectful and positive manner, and provide them with competitive compensation programs consistent with performance and industry practice.
- Identify, control and/or eliminate risks associated with occupational injuries and illnesses.
- Encourage employees and contractors to interact responsibly within the community in which we operate and serve.
- Work in partnerships to promote beneficial post-mining land use, including industrial, commercial, and residential and community development, agricultural production, and wildlife conservation, habitat creation and restoration.