



Natural building blocks for quality of life

January 27, 2005

U.S. Army Corps of Engineers
Attn: CECW–MVD (David B. Olson)
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' November 30, 2004 proposal to change the Nationwide Permit ("NWP") regulations. See 69 Fed. Reg. 69563. 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 120,000 working men and women in the aggregates industry. During 2003 alone, a total of about 2.66 billion metric tons of crushed stone, sand and gravel, valued at \$14.4 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.

The latest proposed changes to the NWP program create certain procedural difficulties. While the following presents our concerns with the Corps proposal, 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 industry. Those concerns led to the filing of a suit by NSSGA that is now pending in federal court. As will be discussed in more detail below, NSSGA's strong concerns remain. Thus, in addition to the following comments, we urge the Corps to address our basic concerns as the Corps considers the reauthorization of the NWPs.

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 and create large depressions that may fill with surface water or ground water as well as rainwater. 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." As you are aware, NSSGA (and its predecessors National Stone Association and National Aggregate Association) has consistently provided comments to the Corps on revisions to the NWP program. While NSSGA felt that NWP 26 was adequate in helping to further the Administration's goal of no net loss of wetlands consistent with Congressional intent under section 404(e), the Association nevertheless 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 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 regulated community. We know of only a few instances where a member company actually used NWP 44 and that was for very minor and miniscule 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.

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 NWPs 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.

SPECIFIC COMMENTS ON THE PROPOSAL

The original importance of the NWPs to the section 404 permitting program and to the regulated community who rely upon them cannot be overstated. Congress implemented the NWP provisions in order to streamline the permitting process for projects with minimal or no adverse environmental effects. Since that time, and prior to the March 2000 replacement permits, both the Corps and the regulated community alike have depended on NWPs as an efficient means to permit projects with minimal adverse effects.

1) Verification Letters

The Corps proposes to change the period under which a verification letter is valid. Currently, the Corps issues verification letters that authorize impacts under the NWPs that are valid for a period of not longer than two years. See 33 C.F.R. § 330.6(a)(3)(ii). The Corps is proposing to change the date of expiration for verification letters to the expiration date of the NWP. In many ways, this is a practical approach, since NWPs are valid for 5 years and the current NWPs are valid until March 19, 2007.

However, action must be taken to allow the Corps to establish project completion dates beyond the expiration of the NWP. This is essential for regulatory certainty and to accommodate the normal lag time between project planning and implementation. Indeed, resources are often committed in reliance on the issuance of permits such as authorization under the NWPs despite the fact that still other steps must be taken for full approval of the project. We believe therefore that projects that receive verification after March 19, 2005 (i.e. within 2 years of expiration of the NWPs) be afforded the two year period for completion. This is also consistent with General Condition 27, which allows the Corps to grant project proponents additional time to complete projects authorized under the NWPs. The additional two-year period in such circumstances is reasonable and better allows for planning.

2)PCN Review

The Corps is proposing to amend the NWP regulations to increase the preconstruction notification (PCN) review period from 30 days to 45 days by amending 33 C.F.R. § 330.1. The purported reason for this change is to assure that the Corps regulations, 33 C.F.R. § 330.1(e), are consistent with General Condition 13 and "current practice." The fact that the 45-day PCN has been "current practice" for almost 10 years based on the Corps' issuance and modification of NWPs is evidence that these actions are indistinguishable from other federal rulemakings and are subject to the federal rulemaking process. We are in full agreement that the NWP program has dramatically increased in "complexity." Indeed, as noted in other comments, the program that exists now is surely not what Congress envisioned. The further the Corps pushes out decisionmaking on the NWPs, the more the NWP program begins to resemble the Individual Permit program. Thus, it is ironic that the Corps is proposing to fix a problem that is of its own creation by further punishing the regulated community with delays in permit processing time.

As is the case with many of the recent changes to the NWP program, increasing the PCN review period to 45 days does not comply with the goal for an expedited permit process. If the average time for processing remains under 30 days, as is evidenced by the Corps own internal research, then common sense dictates that the Corps keep the PCN review time to 30 days. More importantly, the proposed regulation should make it clear that Condition 13 still applies requiring the Corps to determine if the PCN is complete within 30 days of the date of receipt, so unnecessary and costly delays are avoided

CONCLUSION

We have articulated our broader concerns about the NWP program in response to this proposed rule because NSSGA firmly believes that NWP 44 is useless. Given the importance of the 404 program to our members, NSSGA plans to again play a large role in the upcoming NWP reauthorization process. Towards these ends, we are willing to meet with Corps staff at any time to discuss NWP 44 and our specific concerns. We believe that such pre-proposal meetings (which the Corps has granted in the past) are an efficient means of focusing on the most important issues in the upcoming process.

Sincerely,



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