



NATIONAL STONE, SAND  
& GRAVEL ASSOCIATION

July 7, 2023

The Honorable Michael L. Connor  
Assistant Secretary of the Army for Civil Works  
U.S. Army Corps of Engineers  
108 Army Pentagon

The Honorable Michael S. Regan  
Administrator  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW

Re: Post-Sackett Pause on AJDs and materials needed for IJIA implementation

Dear Assistant Secretary Connor and Administrator Regan:

The National Stone, Sand & Gravel Association (NSSGA) strongly urges the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (the agencies) to immediately issue a public, post-Sackett memo on approved jurisdictional determinations (AJDs) for areas that are clearly excluded from jurisdiction under the *Sackett v EPA* (Sackett) opinion. While we agree that an updated rule is needed for more complex aspects of the Supreme Court of the U.S. (SCOTUS) opinion, interim directives are urgently needed to issue AJDs for features that were clearly excluded under Sackett, namely isolated waters, ephemeral waters, intermittent waters that lack relatively permanent flow and wetlands not connected to tributaries or navigable waters.

It has been over a month since the release of Sackett, and our members cannot wait another two months or more while they are seeking to supply construction materials to infrastructure projects. The dynamic nature of our industry means that time is of the essence, and delays hinder our ability to contribute to the administration's infrastructure goals by providing the high-quality materials needed for nearly every project. Over the past two years our industry has been operating under one rule nullified, then the pre-2015, then another rule in place for a short time then nullified in half of the country. The current AJD ban only adds to existing confusion and obstacles our industry faces as we work to fulfill the administration's infrastructure goals by providing high quality materials needed for nearly every project.

NSSGA represents the stone, sand, and gravel (known as aggregates) needed for infrastructure and environmental improvements such as the purification of water and flood control from over 9,000 operations across the U.S. The industry employs over 100,000 people in high-paying jobs to source 2.6 billion tons of aggregates each year that are used to sustain our modern way of life and build our nation's communities and infrastructure. Regulatory compliance delays and costs impact the availability of materials needed for infrastructure. NSSGA helped deliver the Infrastructure Investment



and Jobs Act (IIJA) and strongly supports every federal effort to improve infrastructure, promote energy development and build more resilient communities. The lack of transparency and consideration from the agencies impairs timely permits which our members require to supply vital materials needed to advance our shared infrastructure goals.

At a time when the SCOTUS has made it abundantly clear that many features are now non-jurisdictional and admonished the agencies for lack of clarity with prior rules, we find it concerning that the Corps has halted the only tool that allows the regulated community to have certainty regarding their jurisdictional status. This is especially troubling for our members who risk severe penalties for violation of the CWA. After an unprecedented move of disallowing previously issued JDs under the 2020 WOTUS rule and requiring an additional analysis under the pre-2015 rule and/or the 2022 Rule, some of our members are having to now navigate the post-Sackett landscape blindly. Simplifying the process with a short interim directive or memo that identifies features not subject to jurisdiction and eligible for AJDs as well as preliminary JDs (PJDs), will provide needed certainty.

As per the Corps website: “The only USACE process for determining that an aquatic resource is NOT jurisdictional is an AJD.” During the busiest season for most industries including ours, the Corps has removed the only avenue for landowners to be certain that their features are not subject to the CWA.

Instead, our members face a frustrating array of unacceptable choices that are not within the legal framework under Sackett. They are forced to accept a preliminary jurisdictional determination (PJD), which would make many now non-jurisdictional features jurisdictional, requiring costly and time-consuming mitigation and other requirements, or determine that features are non-jurisdictional and face greater risks, or wait even longer, exacerbating the confusion we have experienced in recent years. SCOTUS unanimously noted the need for clarity, and this delay in any type of direction from the agencies is in direct opposition to this.

Adding to the frustration is the complete lack of transparency. Since Sackett, our members have received inconsistent and conflicting information from the Corps. This seems to stem from an apparent hold on all AJDs from headquarters. It was not until the June 22 hearing before the Senate Committee on Environmental & Public Works where Assistant Secretary Conner publicly acknowledged the headquarters decision placed this hold on AJDs pending rulemaking. This lack of communication and uncertainty is exactly what SCOTUS admonished the agencies for.

Direction from the Corps to immediately issue AJDs for clearly excluded waters is needed to fulfill the infrastructure goals of this administration. Doing so will help avoid supply chain issues, keeping material prices low and reducing inflation, which is essential for the general economic health of the country. Issuing a clear directive that outlines what waters are excluded and ensuring both AJDs and PJDs are issued per Sackett would demonstrate to the regulated community that we can collaborate collectively to achieve the best outcomes. This would provide a limited degree of certainty rather than the nebulous void of uncertainty caused by the lack of communication, saving valuable time and resources for stakeholders and the Corp staff. By holding up this process, a huge backlog is being created so it's likely our members will have to face even more delays once the new rule is released.



The June 21 bicameral letter from Transportation and Infrastructure Committee Chairman Sam Graves (R-MO), Senate Environment and Public Works Committee Ranking Member Shelley Moore Capito (R-WV), Water Resources and Environment Subcommittee Chairman David Rouzer (R-NC), and Senate Fisheries, Wildlife, and Water Subcommittee Ranking Member Cynthia Lummis (R-WY) notes: “In implementing the Court’s decision, the Agencies must adhere to the majority opinion and not slow-walk compliance with the decision. The Agencies wasted valuable time and resources by prioritizing the promulgation of a rule over the first two years of the Biden Administration; that is now clearly unlawful. Notably, this Administration ignored our repeated admonitions that the Agencies should wait until the Supreme Court acted to proceed, and our warnings that the rule being drafted would not be “durable.” Now the EPA and the Corps must work to bring application of WOTUS quickly and effectively in line with *Sackett II*.”

Summer is a critical time for our industry to accomplish the infrastructure goals of the nation, particularly in the northern part of the US. We cannot wait additional months on end for a rule. We urge the agencies to issue a clear public directive of what waters are clearly not jurisdictional, and begin issuing AJDs as well as clearly excluding non-jurisdictional areas from PJDs, so that we can all get back to work.

Thank you for your consideration of these comments. I can be reached at (703) 526-1064 or at [ecoyner@nssga.org](mailto:ecoyner@nssga.org).

Sincerely,



Emily W. Coyner, P.G.  
Senior Director, Environmental Policy

