



NATIONAL STONE, SAND  
& GRAVEL ASSOCIATION

December 1, 2023

Mr. Matt Wilson  
U.S. Army Corps of Engineers  
Attn: CECW-CO-R  
441 G Street NW  
Washington, DC 20314-1000  
[usace.ohwm@usace.army.mil](mailto:usace.ohwm@usace.army.mil)

Re: Comments on Army Corps of Engineers Draft National Ordinary High Water Mark Manual (OWHM)

Dear Mr. Wilson:

The National Stone, Sand & Gravel Association (NSSGA) appreciates the opportunity to comment on the U.S. Army Corps of Engineers (Corps) Draft National Ordinary High-Water Mark (OHWM) Manual (manual). NSSGA applauds this extensive compilation of science but is concerned about the lack of clarity about when it should and should not be used. We are especially concerned that it could expand the jurisdictional reach, in conflict with the Supreme Court's unanimous Sackett ruling and could limit the use of Nationwide Permits (NWP). We also recommend that the Corps rescind RGL 05-05 that relies on the finding of an OHWM to define the lateral limits of CWA jurisdiction.

NSSGA is the leading advocate for the aggregates industry, which produces the stone, sand and gravel (known as aggregates) needed for infrastructure and environmental improvements such as the purification of air and water. Our members take the natural materials from the ground, and size them to go into roads and important public works projects such as water delivery systems, flood control, wastewater treatment and air purification systems. Regulatory compliance costs and processing delays can impact operational costs, particularly for small businesses. These, in turn, impact the costs of infrastructure projects, which are largely borne by the taxpayer. NSSGA members work diligently to comply with regulations,



and often go beyond what is required to improve their communities and the environment, such as creating wildlife habitats, wetlands for banking, parks, and other public areas. NSSGA members rely on permits to operate. When NSSGA members must spend more to comply with cumbersome regulations and red tape, it impacts the resources our members have available to perform these voluntary and environmentally beneficial projects. NSSGA requested an extension given that since the manual was released two rules have been promulgated and there was a three-month delay during the normally busy summer months in many permitting activities post-Sackett. Now that significant nexus is no longer a legal method to determine jurisdiction, the definition of relatively permanent flow is even more crucial. However, EPA and the Corps have declined to offer a new definition of this, and ordinary high-water mark will be an even more important factor. It is unclear how flow fits in to the post-Sackett WOTUS rule, as well as the half of the country where the January WOTUS rule has been stayed and the 2008 regulatory system (minus significant nexus and isolated wetlands) is still in effect. These comments, therefore, represent a very limited experience post-Sackett use of this manual, as well as ongoing confusion over jurisdiction.

#### The Corps Needs to Specify When the OWHM Manual is Needed

The lack of context of when this manual should and should not be used is problematic. The Corps needs to specify when this manual is required or merely helpful to use. As it stands, it has no limits to when it is needed or not, so the implication is that the manual will need to be consulted for every feature. This will add significant time and effort to workload and cost of determinations for both stakeholders and Corps staff. The manual is good science but is overly complicated and does not provide clarification to jurisdiction and regulation.

#### The Corps Needs to Rescind or Revise RGL 05-05

Regulatory Guidance Letter (RGL) 05-05 as it currently stands is no longer valid after Sackett. The statement in RGL-05-05 that “the OHWM defines the lateral limits of federal jurisdiction for non-tidal waters of the U.S. in the absence of adjacent wetlands” should be removed in light of Sackett. That statement repeats the provision in RGL 05-05 issued well before the recent Supreme Court opinion in Sackett greatly limiting the scope of CWA jurisdiction. Under this language the Corps may assert jurisdiction based solely on the OHWM determination without making the legally required finding of whether a relatively permanent flow exists as required under Sackett. The unclear parameters are especially problematic because there is no regulatory definition of ephemeral streams. In fact, according to the preamble of the January 2023 rule, the Corps and EPA still consider ephemeral flows to be tributaries provided that one is able to trace evidence of a flow path downstream despite the rule’s statement that a



“relatively permanent water” does not include ephemeral flows (88 Fed. Reg. 3039, 3079). This directly conflicts with the Sackett ruling because the mere evidence of a flow path could sweep in ephemeral flows that are excluded under Sackett. In the absence of an ephemeral flow definition, the Corps should use a form like the [NC Stream ID Form 4.11](#) which is widely used in the eastern US and accepted by many Corps offices (some other states have similar forms), and provides a quantitative score of whether a stream is ephemeral, intermittent, or perennial. This form can assist in determining whether the stream meets the Sackett test of a relatively permanent flow.

#### Without Limits to Its Use, The Manual Will Sweep In Far More Features Than Current Practice

With the presumption that this manual is always required, the effect will be to limit the use of NFPs by increasing the size of features and require more individual permits. This will significantly increase the cost and time required for permitting by operators, as well as processing permits for the Corps. This kind of expansion should include rulemaking with all of the required cost analysis impacts, rather than just a technical manual. Again, a section on “Use of the Manual” would be very helpful so that regulators and stakeholders have a clear idea of how and when to use it.

#### The Relationship of the Manual to the 2023 WOTUS Rules is Unclear

While the multi-industry request for an extension by NSSGA and other associations was denied, the unclear and changing regulatory landscape over the course of this manual’s review period has made a full evaluation of its applicability and use in the field impossible to gauge. First, there was an expansive new rule in January 2023, which was subsequently found to be unlawful in over half the states in the US. In May, the Supreme Court unanimously ended the use of significant nexus and limited the extent of jurisdiction with Sackett. Instead of quickly implementing this decision, the Corps put a pause on approved jurisdictional determinations (AJDs) and other Corps actions for three months. This action, along with the prior decision to invalidate AJDs under the Navigable Water Protection Rule (NWPR), left projects at a standstill. This made the evaluation of the use of this manual in determinations impossible. The confusion continues with a minimal conforming rule and no guidance about the extent of jurisdiction.

#### Summary

While NSSGA appreciates the opportunity to review the manual, the changing and unclear regulatory landscape make the seemingly generous one-year review period inadequate.




Based upon this limited ability to use this document in the field, NSSGA recommends that:

- The Corps needs to specify when the Manual is required.
- RGL 05-05 needs to be revised or rescinded.

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,

A handwritten signature in cursive script that reads "Emily W. Coyner".

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

