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NATIONAL STONE, SAND & GRAVEL ASSOCIATION

April 23, 2025

Re: WOTUS Notice: Request for Recommendations; EPA-HQ-OW-2025-0093; submitted via regulations.gov

The National Stone, Sand & Gravel Association (NSSGA) is pleased to provide comments to the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (the agencies) on the Waters of the United States (WOTUS) Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations. NSSGA is a member of the Waters Advocacy Coalition and incorporates their comments by reference. NSSGA supports the agencies in working towards a durable rule based on the unanimous *Sackett* opinion by the Supreme Court of the US (SCOTUS). Premature rulemaking during the previous administration, as SCOTUS was considering the case, and the subsequent updated rule failed to provide the clarity and certainty needed by officials of the agencies and other government entities, the regulated community, and the public. NSSGA agrees with the initial decisions to remove the expansive and confusing coordination memos and to make isolated wetlands non-jurisdictional as comporting with the *Sackett* opinion.

NSSGA recommends that the current rule be revised to add clarity and exemptions, as well as defining key terms. These include:

- Exemption of ephemeral waters
- Clarifying and broadening the definitions and exemptions for:
    - Water treatment systems,
    - Ditches,
    - Groundwater, and
    - Pits used for aggregate production and other construction purposes.

Adding clarity to what is NOT a WOTUS would save time and money for the regulated community, the agencies and other government agencies and allow more focus on truly aquatic systems meant to be regulated under *Sackett*.

NSSGA is the leading advocate for the aggregates industry. Our members are responsible for the essential stone, sand and gravel used in road and public works projects, as well as erosion control, wastewater treatment, sewage, air pollution control, and drinking water purification systems. Aggregate companies take naturally occurring rock from the ground, then crush and sort it. When aggregate producers finish using the stone, sand, or gravel in the area, they return the land to other productive uses such as drinking water reservoirs and nature preserves. The determination of Clean Water Act (CWA) jurisdiction is critical to this industry, and NSSGA has provided input and comments on every major WOTUS action undertaken by the agencies. Aggregate operations cover large areas and are often located near bodies of water. The scope and reach of CWA jurisdiction have a direct impact on the costs of planning, financing, constructing, and operating an aggregates facility. An overly expansive WOTUS definition, causing high costs and delays in opening aggregates operations, can have the paradoxical effect of harming water quality by halting or delaying important projects like those for water treatment and erosion control. Furthermore, the lack of clarity combined with the punitive CWA penalties under WOTUS causes delays and costs due to uncertainty and inconsistent application across the U.S.

NSSGA Supports the End of Jurisdiction Over Isolated Wetlands Via Non-Jurisdictional Features

The *Sackett* opinion clearly ended the use of significant nexus, and thus, isolated wetlands cannot be jurisdictional via non jurisdictional features. SCOTUS held: "The CWA's use of "waters" in §1362(7) refers only to "geographic[al] features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes'" and to adjacent wetlands that are "indistinguishable" from those bodies of water due to a continuous surface connection." The use of marginal non jurisdictional features like ditches, swales, pipes or culverts to create a questionable connection by the former administration violates *Sackett*.

NSSGA Supports the Recission of the Coordination Memos

While NSSGA appreciates the use of examples to help the regulated public better understand jurisdiction, the "coordination memos" were not helpful. The lack of illustrations was a major flaw, and most of the examples themselves appeared to be an attempt to create connections beyond what is allowable under *Sackett*. In at least one case, the example mirrored the conditions in *Sackett*, and yet the site was considered jurisdictional!

NSSGA Recommends Revision of the Current Rule for Efficiency and Clarity

NSSGA recommends revising the current rule, which was last revised in September of 2023. This rule can be greatly improved by removing the existing preamble (composed entirely prior to the *Sackett* opinion) and replacing it with the inclusion of concepts and findings from *Sackett*

and subsequent court decisions. Additionally, improving definitions and exemptions, detailed in the following sections, will enhance clarity.

NSSGA Supports a Revision of the Current Rule Pre-amble to Comport with *Sackett*

The current rule's preamble was written entirely prior to the release of the *Sackett* opinion and relies upon an overly broad interpretation of jurisdictional waters. Since this opinion, our members have seen the Corps use the concepts in this preamble to exert jurisdiction over features without flow and not indistinguishable from navigable waters, a clear over-reach. A preamble citing *Sackett* and how it has been used for this rulemaking would be an improvement.

Ephemeral Waters Should Be Clearly Exempted

Ephemeral waters, by their nature, are not relatively permanent and therefore should be fully and clearly exempted under an updated rule. The mere presence of a feature, such as an OHWM, should not make a normally dry feature jurisdictional. Calling these features a "tributary" (as the Corps has been known to do) is not a legal workaround. At a minimum, ephemeral waters should be exempted. This does not mean that features that have more flow should meet the relatively permanent definition, merely that in no circumstance should an ephemeral feature ever be considered a WOTUS. A clear exemption in the rule, along with explanatory preamble language, will help NSSGA members and others in obtaining Corps concurrence in a timely manner.

OHWM Alone Cannot Create Jurisdiction

NSSGA is aware of several instances, post *Sackett*, where the Corps has used the OHWM as proof of relatively permanent flow. This is not an accurate measure of relatively permanent flow. NSSGA specifically provided comments on the draft and the 2025 National Ordinary High Water Mark Field Delineation Manual for Rivers and Streams: Final Version (ERDC-CRREL TR-25).

The Executive Summary confirms that the mere existence of an OHWM does not make a feature jurisdictional on page xxv:

> "The identification of the OHWM alone is insufficient to determine jurisdiction under the Clean Water Act, and this manual does not affect the other regulations, guidance documents, or case law that must be consulted to determine if a given stream or river with an OHWM is a jurisdictional water of the US."

Relatively permanent means relatively permanent. OHWM has no place in determining jurisdiction. Any tools used by the Corps that are based on science, including the OHWM Manual, should not be used to expand the limits set by law.

Ditches Exemption Needs to Be Expanded

Ditches, unless they meet a specific, narrow definition of tributary, should be exempted. Only ditches that are channelized portions of streams with constant flow can be considered jurisdictional. Ditches are needed for drainage of roads, farm fields, residential areas, and many other purposes for flood prevention and safety. These features are purpose built and do not meet the definition of waters of the U.S. It is hard to conceive of any ditch that never indirectly contributes flow to another water. For many aggregates operators, human-made features like ditches have been inappropriately considered jurisdictional and subject to rigorous and lengthy study and costly mitigation. This has resulted in making large swaths of aggregates off limits and causing local shortages. A member of the industry in the Western U.S. notes:

> *"Gravel is typically located on the floor of a river valley. The flat plains within a river valley are typically irrigated fields and pasture and have been for more than one hundred years. The vegetation types, presence of water, and even the soil characteristics of these areas differ greatly from areas that have not been developed by agriculture. The impacts of farming create small wetland-like features. The features are often not contiguous and only have sufficient water due to irrigation. Rather than delineations of areas in acres, we see areas that are best measured in square feet. In fact, we have often witnessed the Corps office determine that the banks of man-made irrigation canals and settling ponds are jurisdictional wetlands."*

The Pits Exemption Must Include Idle Areas

Excavations for the purposes of supplying aggregates should be extended to allow periods of non-active use. Aggregates operations often create open depressions that serve as sediment catch basins and areas that direct drainage from the surrounding site so as not to fill the active mining area with water. Indeed, the excavation of dry land areas creates most sand pit lakes. As excavation commences, water fills the pit, due, in large part, to the high-water table where many companies operate. During normal operations, these pits are generally pumped free of water. However, should operations pause or stop for a period due to seasonal or infrastructure project needs, these may fill with water. Not only should the exclusion be in the text of the rule, but the exclusion should also be clear that sites undergoing active reclamation under state law have not been "abandoned." An NSSGA member that operates in multiple states provided an example of a multi-year effort to permit a property with existing pits. These pits were not

initially considered WOTUS, but during consultation, the Corps shifted positions and then considered them WOTUS, causing delays and uncertainty. For many companies, reclamation under state law continues well past cessation of active mining operations, and the mine site is not considered abandoned under state reclamation programs. The current definition should have the time constraint removed as follows:

> *Waterfilled 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~~*

Waste Treatment Exemption Needs to Be Defined and Include Settling Ponds

The long-standing waste treatment exemption needs to be retained to protect the integrity of the nation's waters. NSSGA suggests that this exemption be supplemented either in the exemption or a definition. NSSGA members utilize settling ponds for removing fines before discharge or reuse. At times, Corps staff have incorrectly considered these passive yet purpose-built structures to be WOTUS and caused unnecessary burdens and costs. Additionally, conveyances that lead to and from waste treatment ponds must also be included. The suggested definition follows:

> *Waste treatment system. The term waste treatment system includes all components, including: treatment ponds (such as lagoons, settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).*

Many members have faced the absurd situation of having their water treatment systems, particularly settling ponds, subjected to stringent requirements as if they were WOTUS. In testimony delivered to the House Small Business Committee Hearing "American Infrastructure & the Small Business Perspective" on April 28, 2018, NSSGA member Bill Schmitz of Gernatt Asphalt Company testified about Corps personnel misidentifying a treatment system as a WOTUS. Mr. Schmitz described a 12-year ordeal when the Corps incorrectly identified settling basins as wetlands, resulting in hundreds of thousands of dollars on consultant and lawyer fees, and equipment.

Groundwater Should Be Exempt

Groundwater should be exempted from the rule, which is consistent with the CWA. Groundwater flow is generally more complicated than that of surface water, which cannot be gauged by visual observation. Groundwater can only be evaluated by disruptive and expensive

subsurface investigation and interpretation. Even then, it may be hard to discern when shallow subsurface flow is truly excluded groundwater. There are ample regulations at the federal, state, and local levels to protect groundwater which are the appropriate avenues for groundwater regulation. The CWA was never intended to govern groundwater. Therefore, any shallow subsurface flow should clearly be considered exempt groundwater under the CWA.

AJD Backlog Needs to Be Cleared and Processing Incentivized

Because of changing definitions, confusion, and high penalties of the CWA, approved jurisdictional determinations (AJDs) are more vital than ever. It is our understanding that past language funding the Corps included the term permits, and that AJDs were incorrectly de-prioritized by the Corps. This is counterproductive. AJDs are much more efficient than full permitting for both the Corps and the regulated community. Given the wide range of features no longer jurisdictional post-*Sackett*, AJDs should be re-prioritized. NSSGA members have been waiting months and longer on AJDs for features that should be clearly exempt from jurisdiction. The Corps should work to clear this backlog and make AJD approval a high priority.

Prior Corps Decisions Need to Be Grandfathered

The agencies must clearly reinstate the long-standing position that any changes to the WOTUS definition do not apply retroactively. Under the 2023 rule, the agencies took the remarkable position that AJDs issued under prior rules could not be relied upon, causing uncertainty. The agencies should clarify that AJDs are valid for five years.

In Addition to Updating WOTUS, the Mitigation Rule Also Needs to Be Updated

The current mitigation regulatory structure is problematic across the U.S. In the 17 years since finalizing "Compensatory Mitigation for Losses of Aquatic Resources" (mitigation rule), the science and understanding of what works (and what does not) has advanced exponentially. There is a great track record of success by the mitigation banking industry, as well as landowners doing their own mitigation, so streamlining the process makes sense for both stakeholders and government resources to provide the most effective mitigation for environmental improvement. NSSGA supports rule changes that would expedite the approval of compensatory mitigation banks and onsite mitigation. Making compensatory mitigation requirements more clearly defined and readily available can only serve to improve the quality of our waters and prevent unnecessary and costly delays on vital projects.

Summary

NSSGA supports the Trump administration’s efforts to create a rule that protects the waters of the U.S. and provides clarity for the public, regulators, and businesses, which aligns with *Sackett*. We support clear and robust exclusions to save all parties time and effort, including

ephemeral waters, groundwater, water treatment systems (including settling ponds), ditches, and pits.

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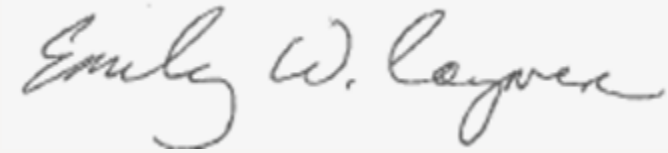
Sincerely,



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