NSSGA®

NATIONAL STONE, SAND & GRAVEL ASSOCIATION

September 11, 2024

The Honorable David Rouzer
Chairman
Subcommittee on Water Resources and Environment
Committee on Transportation and Infrastructure
U.S House of Representatives
Washington, D.C. 20515

The Honorable Grace Napolitano
Ranking Member
Subcommittee on Water Resources and Environment
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Rouzer and Ranking Member Napolitano,

On behalf of the 500 members of the National Stone, Sand & Gravel Association (NSSGA), I write to express our gratitude for the much-needed oversight hearing titled *Waters of the United States (WOTUS) Implementation Post-Sackett Decision: Experiences and Perspectives* on September 11, 2024. Your attention to this matter is crucial and greatly appreciated.

NSSGA represents the aggregates and industrial sand industry, and the companies that manufacture equipment and provide services. Our industry, with 9,000 facilities and well over 100,000 employees in high-paying jobs, plays a vital role in sustaining our lifestyle and constructing the nation's infrastructure and communities. The 2.5 billion tons of aggregates we produce annually are fundamental components required for building communities, roads, airports, transit, rail, ports, clean water and energy networks. Aggregates are a local product because rocks are heavy, and excess transportation adds to the cost of the material. If operations are not allowed to expand or open near where they are needed, the materials end up costing more.

The stone, sand and gravel industry urgently needs clarity and certainty regarding Clean Water Act (CWA) permitting. NSSGA's members frequently pull CWA permits when developing new quarries or determining if, when, or how to expand their existing quarry, and the lack of clear guidelines is a significant challenge. In May 2023, the Supreme Court issued a clear ruling to limit federal jurisdiction under the CWA in *Sackett v. EPA.*

Sackett ruled on the jurisdiction of adjacent wetlands, providing a two-part test to make that determination, and ruled that the significant nexus test was inconsistent with the CWA and the original 2023 WOTUS rule. The agencies are now relying on two new tests from *Sackett* to determine jurisdiction. They are relying on a new and untested 'relatively permanent water' (RPW) test for tributaries and doing everything they can to claim jurisdiction of adjacent wetlands through the 'continuous surface connection' (CSC) test. These new and unknown tests harm landowners and industry and put practitioners in a precarious position because the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) determine jurisdiction case-by-case. The Justices made it clear that an adjacent wetland is only jurisdictional when *indistinguishable* from an otherwise jurisdictional WOTUS feature.

While the EPA and USACE have provided some webinars and recently began providing field Memorandum for Records (MFR) on certain jurisdictional determinations that are, again, on a case-by-case basis, there has been no publicly available guidance or efforts to define the ambiguous terms of RPW or CSC by the agencies. This puts many landowners, industry, and practitioners in a risky position because it is often difficult to determine whether a particular feature is WOTUS, and as such, could lead to incidental impacts coupled with civil penalties and possibly criminal prosecution. The agencies are defining CSC as ***any*** physical connection, even if that connection itself is not jurisdictional. The agencies state that back-to-back rainfall could satisfy the RPW test to make a drainage ditch, an otherwise dry feature, jurisdictional. This violates the clear language of an "indistinguishable" connection in the unanimous *Sackett* opinion and was not promulgated via rulemaking, which violates the Administrative Procedure Act. The only option for our members is to request an approved jurisdictional determination (AJD) and wait for the agencies to tell them what is considered federal jurisdiction. These delays cost the industry real money and increase overall infrastructure project costs.

The environmental consultants NSSGA members use to provide insight into filing permits have shared that they do not know what to expect until the agencies finally review their requests and issue an AJD. These consultants have shared examples of where they have found a feature to be ephemeral and, therefore, non-jurisdictional, but the EPA and USACE will interpret the data differently to claim that feature as an RPW. NSSGA encourages the agencies and Congress to sit down with industry to best determine how federal staff is making these decisions and to walk through how it is compliant with the Supreme Court's decisions.

NSSGA applauds this committee for holding a hearing to explore how the federal agencies are disregarding a unanimous Supreme Court opinion. Essentially, the agencies have created a new significant nexus test in all but name and brought many development and infrastructure projects to a halt. With the expiration of the Infrastructure Investment and Jobs Act (IIJA) funding on the horizon, federal agencies should utilize their existing authorities to help the industry ramp up production to utilize best the investments made by Congress, and that should include expediting AJDs and permits under the CWA.

Sincerely,

Michele Stanley
Executive Vice President & Chief Advocacy Officer