

STATEMENT OF

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ON BEHALF OF

THE NATIONAL STONE, SAND, & GRAVEL
ASSOCIATION

BEFORE THE HOUSE
COMMITTEE ON SMALL BUSINESS

HEARING ON

WILL EPA'S 'WATERS OF THE UNITED STATES' RULE DROWN
SMALL BUSINESSES?

WASHINGTON, D.C.

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Chairman Graves and members of the Committee, thank you for inviting me to testify on behalf of the National Stone, Sand & Gravel Association (NSSGA) at this hearing: “Will EPA’s ‘Waters of the United States Rule’ Drown Small Businesses?”

My name is Alan Parks and I am Vice President of Memphis Stone and Gravel Company, of Memphis, Tennessee, where I have worked for almost 15 years on permitting and environmental compliance. Additionally, I direct the company’s exploration drilling activity, long range mining, and reclamation work. I am a registered professional geologist in the State of Tennessee and have degree in mining engineering. My prior occupation was working as a geologist for the Tennessee Department of Environment and Conservation.

NSSGA is the world’s largest mining association by product volume. NSSGA member companies represent more than 90% of the crushed stone and 70% of the sand and gravel consumed annually in the U.S., and there are more than 10,000 aggregates operations in the U.S. Of particular relevance to this hearing, 70% of NSSGA members are considered small businesses, and many are located in rural areas.

Memphis Stone and Gravel Company was started in 1910 and remains a family-owned business. We have eight active mining facilities in Tennessee and Mississippi. Memphis Stone and Gravel Company has a long history of providing aggregates for the betterment of the nation. To assist with the war effort in 1942, Memphis Stone and Gravel Company was the prime contractor for Halls Air Force Base and Murfreesboro artillery ranges. We have won national and local awards for conservation, community service, and safety.

Like all aggregates operations, Memphis Stone and Gravel Company is regulated by numerous entities including the city, county, and state governments, and federal agencies including the EPA, the Mine Safety and Health Administration, and the U.S. Army Corps of Engineers. Before we begin operations we must obtain permits to construct and operate our facilities. After we start operations, our facilities are routinely monitored to ensure we are operating in a safe and environmentally responsible manner. A safe and healthy environment in which to work is good business, and in the best interest of the employees. We work hard to make sure this happens.

Aggregates are the chief ingredient in asphalt pavement and concrete, and are used in nearly all residential, commercial, and industrial building construction and in most public works projects, including roads, highways, bridges, dams, and airports. Aggregates are used for many environmental purposes including: treating drinking water and in sewage treatment plants, for erosion control and in cleaning air emissions from power plants. While Americans take for granted this essential natural material, they are imperative for construction. Unlike other businesses, we cannot simply choose where we operate. We are limited to where natural forces have deposited the materials we mine. There are also competing land uses that can affect the feasibility of any project.

Through its economic, social and environmental contributions, aggregates production helps to create sustainable communities and is essential to the quality of life Americans enjoy. Aggregates are a high-volume, low-cost product. Due to high product transportation costs,

proximity to market is critical; thus 70% of our nation's counties are home to an aggregates operation. Generally, once aggregates are transported outside a 25-mile limit, the cost of the material can increase 30% to 100%, in addition to creating environmental and transportation concerns. Because so much of our material is used in public projects, any cost increases are ultimately borne by the taxpayer.

As the industry that provides the basic material for everything from the roads on which we drive to purifying the water we drink, NSSGA members are deeply concerned that EPA's proposed rule will stifle our industry at a time when we are just now recovering from the economic downturn. The aggregates industry removes materials from the ground, then crushes and processes them. Hazardous chemicals are not used or discharged during removal or processing of aggregates. When aggregates producers are finished using the stone, sand or gravel in an area, they pay to return the land to other productive uses, such as residential and business communities, farm land, parks, or nature preserves.

Over the past eight years, the aggregates industry has experienced the most severe recession in its history. This expansion of jurisdiction will have a severe impact on industry by increasing the costs and delays of the regulatory process, causing further harm to an industry that has seen production drop by 39% since 2006. While stone, sand and gravel resources may seem to be ubiquitous, construction materials must meet strict technical guidelines to make durable roads and other public works projects. Because many aggregate deposits were created by water, they are often located near water. The availability of future sources of high quality aggregates is

a significant problem in many areas of the country and permitting issues has made the problem worse.

NSSGA members pride themselves on meeting or exceeding compliance with all pertinent environmental laws and regulations, and emphasize sustainable practices. Memphis Stone and Gravel Company pays very close attention to our resources, particularly water. Careful design of our plants ensures we maximize the recycling of precipitation and reuse of all of our water supplies. Additionally, we operate most of our facilities as a no-discharge system, keeping all process water on-site and requiring no hazardous chemicals in our production process.

EPA claims this rule change is needed because so many waters are unprotected, but that is not true: states and local governments have rules that effectively manage these resources. For example, states and many municipalities regulate any potential negative impacts to storm water run-off and require detailed storm water pollution prevention plans. These plans are required for every project, both during construction and operations. States and local governments are best-suited to make land use decisions and balance economic and environmental benefits, which is what Congress intended. While EPA states groundwater is excluded from this rule, the rule also says that “shallow subsurface connections” are included. Does this mean the water that fills our pits is jurisdictional? It would be a rare event to NOT encounter shallow, unconfined or perched groundwater in sand and gravel deposits that we typically mine. Will a separate permit be required for reclaiming the pit and returning it to another, beneficial use? These are just some of

the many questions this rule poses, but does not answer. And, that in many ways underscores the problem with the proposed rule, the uncertainty of the scope of jurisdiction.

EPA contends the purpose of the proposed rule is to eliminate the time and resources allocated to make site-specific review of determinations. Before breaking ground, we always evaluate whether we are affecting jurisdictional water, which requires consultation with the Corps and sometimes hiring a consultant. Yet EPA doesn't provide any set criteria on what a "significant nexus" is, so the inclusion "other waters" will require additional time for determinations to be made. The delay caused by multiple consultations, surveys, reports, and individual watershed permits processed will add significant new costs during the permitting process, which could lead to abandoning projects once considered viable.

The aggregates industry requires large land areas to process and remove the extensive quantities of material needed for public works projects. Memphis Stone and Gravel Company can use up to 25 acres a year per site. This proposed rule could effectively place many areas "off limits" due to cost of new permits and/or the mitigation required to off-set losses to now regulated streams.

Having a clear jurisdictional determination for each site is critical to the aggregates industry. These decisions impact the planning, financing, constructing and operating aggregates facilities. Because the Clean Water Act 404 "dredge and fill" permitting process and the corresponding states' 401 Certification process is so long and costly for a small company like Memphis Stone and Gravel Company, we attempt to avoid jurisdictional areas. Now, under the

proposed revisions, many previously non-jurisdictional areas like floodplains, wet weather conveyances, upland headwaters, ephemeral streams or any riparian area could be considered jurisdictional. It will make nearly any area we try to access regulated and in need of additional permits.

Even obtaining a jurisdictional determination can be a significant undertaking for a small company like ours. As a small company we attempt to do many of the jurisdictional determinations and other permitting in-house. However, Memphis Stone and Gravel Company will from time to time seek a consultant to help us obtain the required information for submission, because of time constraints. While jurisdictional determinations are good for five years, as an industry we make business decisions to buy or lease properties to extract aggregates for very long terms, 15 to 30 years is not uncommon for Memphis Stone and Gravel Company. The companies in our industry are very concerned that past understandings of what would be jurisdictional will now be subject to review. A change in what is considered jurisdictional can have significant impacts on our material reserves, which will affect the life of our facilities and delay the start-up of new sites. Ultimately this change will disrupt the supply of aggregates to our biggest customers, government agencies; thus affecting highway programs, airports, and municipal projects.

There is much inefficiency in the current regulatory system; however, adding vague terms and undefined concepts to an already complicated program is not the way to fix the problem. In some cases this rule could have a negative effect on the environment and safety. Ditches without maintenance can degrade and lead to increased erosion and sediment problems.

EPA should undertake a full evaluation of the effects this rule will have on small businesses via a Small Business Advocacy Review (SBRFA) Panel. The proposed rule will put small businesses at risk of fines of up to \$37,500 per day if a permit is required and not obtained, which could wipe out a small business that does not realize a permit is needed for work far from “navigable” water. We agree wholeheartedly with Chairman Graves that EPA is required to comply with the Regulatory Flexibility Act and get input from affected small businesses before proposing a rule. EPA claims this rule is based on sound science, but the Science Advisory Board, the group of independent scientists reviewing it, are still not near completion; in fact they have raised serious questions EPA has not answered.

EPA’s economic analysis of this rule does not accurately show what businesses like ours will end up paying if this rule is finalized. It is not even close. One NSSGA member calculated that to do the additional mitigation of a stream required under this rule would be more than \$100,000; this is just for one site in our industry. This is more than EPA has estimated the stream mitigation costs are for entire states in its economic analysis. For our business, time is money. Any new requirements lead to a long learning curve for both the regulators and the regulated. Just getting a jurisdictional determination can take months - permits can take years; how much longer will it take to break ground with so many vague and undefined terms in this rule?

The proposed rule has no clear line on what is “in” and what is “out,” making it very difficult for our industry and other businesses to plan new projects and make hiring decisions. If

it is determined development of a site will take too long or cost too much in permitting or mitigation, we won't move forward. That means a whole host of economic activity in a community will not occur--all of this in the name of protecting a ditch or farm pond.

Taken further, a significant cut in aggregates production could lead to a shortage of construction aggregate, raising the costs of concrete and hot mix asphalt products for state and federal road building and repair, and commercial and residential construction. NSSGA estimates that material prices could escalate from 80% up to 180%. As material costs increase, supply becomes limited, which will further reduce growth and employment opportunities in our industry. Increases in costs of our materials for public works would be borne by taxpayers, and delay road repairs and other crucial projects. Given that infrastructure investment is essential to economic recovery and growth, any change in the way land use is regulated places additional burden on the aggregates industry that is unwarranted and would adversely impact aggregates supply and vitally important American jobs.

NSSGA appreciates this opportunity to speak on the devastating effects of a broad expansion of Clean Water Act jurisdiction on the aggregates industry. Thank you, Mr. Chairman, and I will be happy to respond to any questions.

Attachments: NSSGA Clean Water Act Expansion

EPA'S EXPANSION OF CLEAN WATER ACT JURISDICTION WILL HARM THE AGGREGATES INDUSTRY

EPA's proposed rule will greatly increase the scope of what is considered "waters of the U.S.," including generally dry areas. This goes far beyond sensible limits established by Congress and the U.S. Supreme Court, and usurps congressional authority by effectively removing "navigable" from the Clean Water Act. Furthermore it will impose significant costs that far exceed the environmental benefits. We ask that Congress deny EPA the ability to broaden its jurisdictional determination beyond the 2008 Guidance.

Changes in Scope:

- Determination of jurisdiction is critical to the aggregates industry, impacting the costs of planning, financing, constructing and operating aggregates facilities.
- This expansion of CWA jurisdiction will have a severe impact on industry by increasing the costs and delays of the regulatory process, causing further harm to an industry that has seen production drop by 39% since 2006.
- EPA insists this broad expansion of powers is merely a change in "definition," and does not require full regulatory evaluation, such as the effects on small businesses.
- Many marginal aquatic areas that only have a remote and insubstantial impact to traditionally navigable waters will now be under federal jurisdiction, which imposes costs that far exceed any benefit to the aquatic ecosystem.

Overwhelming Burden to Business:

- EPA's economic analysis and adherence to proper rulemaking procedure are fatally flawed and should be completely redone.
- This draft rule will complicate and slow an already ponderous permitting process.
- It will put businesses at risk of fines of up to \$37,500 per day if a permit is required and not obtained.
- Costs for mitigation under this new rule could run **\$100,000 and up PER SITE**, while EPA's flawed economic analysis finds costs PER STATE of far less than that.

The rule will make it even more difficult for aggregates operators to ensure a timely supply of aggregates for public works projects essential to economic recovery, and will increase costs with no discernable environmental benefit.

WATERS OF THE U.S.?

