

NSSGA[®]

NATIONAL STONE, SAND
& GRAVEL ASSOCIATION

**STATEMENT OF
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**ON BEHALF OF
THE NATIONAL STONE, SAND, & GRAVEL
ASSOCIATION**

**BEFORE THE HOUSE
COMMITTEE ON TRANSPORTATION & INFRASTRUCTURE
WATER RESOURCES & ENVIRONMENT SUBCOMMITTEE**

**HEARING ON
STAKEHOLDER PERSPECTIVES ON THE IMPACTS OF
THE BIDEN ADMINISTRATION'S WOTUS RULE**

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Aggregates are Vital to Infrastructure and the Environment

Chairman Rouzer, Ranking Member Napolitano and members of the Subcommittee, thank you for inviting me to testify on behalf of the National Stone, Sand & Gravel Association (NSSGA) at this hearing.

The National Stone, Sand & Gravel Association is the voice of our nation's aggregates industry, which operates over 9,000 operations and employs over 100,000 people in high-paying jobs to source 2.6 billion tons of aggregates each year that are critical to the supply chain and used to sustain our modern way of life and build our nation's communities and infrastructure.

My name is Mark Williams, and I am the Environmental Manager at Luck Companies, the nation's largest family-owned and operated aggregates company, which has 21 active aggregate operations throughout the southeast from Virginia to Georgia. I have a BS in Biology and have been working in the environmental field for over 35 years. I am a Virginia Certified Professional Wetland Delineator and have been active in laboratory testing, field monitoring and permitting, as well as performing wetland delineations. I have worked at Luck Companies for 17 years and am responsible for permit compliance, environmental training and community engagement. I am the former chair of the NSSGA Environmental Committee and the 2019 recipient of the NSSGA Environmental Leader Award.

Luck Companies was started 100 years ago and remains a family-owned and operated business. We have aggregates operations in Virginia, North Carolina, South Carolina and Georgia. Luck Companies has a long history of providing aggregates for the betterment of the nation, including the DC metro area roads and bridges, the Dulles airport, homes and schools, as well as providing materials used for stream restoration and erosion control. Perhaps you've seen our quarry adjacent to the Manassas Battlefield Park or you've ridden a bike on the W&OD trail that bridges across our quarry in Leesburg. Flying into Atlanta, we operate the quarry that is directly adjacent to the southern runway. We have won national and local awards for conservation, community service and safety. Luck Companies has a Memorandum of Understanding with Loudoun County that we will mine the resource efficiently and completely, and then the quarries will be transferred at no cost to the county to be used for the storage of as much as 29 billion gallons of drinking water for the citizens of Loudoun County, enhancing the growing community's water supply.

Luck Companies supports a number of nonprofit organizations and activities in the communities we operate in and near. For example, we participate in events with the Alliance for the Chesapeake Bay and the James River Association to help improve the water quality of and appreciation for these national treasures. We are Model Level members of the RiverStars program of the Elizabeth River Project. We fund school and trail projects with the Nature Generation, a non-profit that develops programs for Loudoun County Schools. These partnerships have led to such notable collaborative projects as the installation of sturgeon breeding reefs in the James River; creation of a wetlands park in Norfolk Virginia; and the installation of many walking trails in Loudoun and Spotsylvania Counties in Virginia. Another project that we're particularly proud of is the work that was done in collaboration with Virginia Commonwealth University's Rice Rivers Center to study and enhance the life cycle of the endangered Atlantic Sturgeon. Luck Companies donated over 5,000 cubic yards of randomly sized aggregates to be placed in two locations in the James River near Richmond, Virginia. Each location was about the size of a football field and researchers continue to study the fish that are spawning and feeding in this area. Although dozens of sturgeon are captured and tagged each year, the spawning grounds of these



enormous fish have not been identified. Hatchlings and juvenile fry have been captured and released, but there have been no eggs found in the river. Luck Companies personnel have been involved in the production of the stone, the delivery to the river locations, the placement and the study of the reef. Aggregate materials are also a major component of the installation of many structures that are necessary for environmental protection. Riprap is used for the protection against erosion from running water, and for the creation of living shorelines in the Chesapeake Bay and its major tributaries. Even larger stone is used for shoreline protection when smaller measures can be washed away by frequent hurricane forces. This armor stone is also used to protect piers, railroad trestles, bridges such as the Chesapeake Bay Bridge Tunnel, and the bases of new windmills that are being installed 27 miles offshore of the Virginia coast.

Like all aggregates operations, Luck Companies is regulated by numerous entities including local and state governments and federal agencies such as 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. Finally, when an operation is no longer productive or needed, we prepare a reclamation plan that will allow the former quarry operation to benefit the community in any number of meaningful ways. We are committed to optimizing our operations with the community in mind to ensure that we are good neighbors.

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. A disruption in the aggregates supply chain can slow or stop these important projects and break crucial links in moving other goods across the U.S. Aggregates are used for many environmental purposes, including treating drinking water and in sewage treatment plants; for erosion control and stream restoration; and in cleaning air emissions from power plants. Biofiltration is a recent innovation where aggregates and organic materials are blended to create a mixture that removes substantial quantities of nitrogen and phosphorus from stormwater runoff, which is a significant benefit to water quality. While Americans take these essential natural materials for granted, 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 use. 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, most congressional districts are home to an aggregates operation. Generally, if aggregates are transported outside a 25-mile limit, the cost of the material can increase substantially, in addition to creating higher air-borne emissions. 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 rushed and unnecessary new WOTUS rule will further complicate an already lengthy and burdensome process. The aggregates industry removes naturally occurring materials from the ground, then crushes and sorts them by size. Hazardous chemicals are not used, produced or discharged during removal or during the



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 development, nature preserves or water supply features.

NSSGA members pride themselves on meeting or exceeding compliance with all pertinent environmental laws and regulations and emphasize sustainable practices. Luck Companies pays very close attention to our resources, particularly water. Careful design of our plants ensures that we maximize the recycling of precipitation and the reuse of all of our water supplies. Our associates live and play near our operations, and environmental stewardship is a key issue for all of us.

The New WOTUS Rule is Confusing & Unnecessary

We have been given multiple statements about the proposed rule by EPA. First, it was a simple withdrawal of the 2020 Navigable Waters Protection Act and a return to the pre-2015 regulatory framework. Now it is intended to be a “durable” rule, while at the same time the Supreme Court is considering an important case that could limit or eliminate the Significant Nexus Test, which this new rule is based on. EPA had no reason to rush this rule before the court decision. This is already the fifth rule change that the regulated community and regulators have experienced in the last 10 years, and the court decision could well require a sixth change. This adds to the time for all parties to understand a new rule that may only exist for a few months, which is an unnecessary drain on corporate and government resources.

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, and the pre-2015 regulatory structure is currently in place. Additionally, states and many municipalities regulate any potential negative impacts to stormwater run-off and require detailed stormwater pollution prevention plans. These plans are required for every project, both during construction and operations. For example, I have a certification from the Commonwealth of Virginia to assess wetlands and water issues that are unique to the state. This is what the Congress intended with the Clean Water Act (CWA): states and local governments are best suited to regulate unique local environments and make land-use decisions that balance economic and environmental benefits. The 2020 rule provided the clarity that regulated companies like mine need to know - what is federally jurisdictional and what is not.

This new rule poses more questions than it answers. For example, the rule includes exemptions for ditches, pits for fill and storage features used for water treatment. Looking closer, however, the conditions that these exemptions must fulfill are nearly impossible to meet in most cases, rendering them useless. For example, the rule says that ditches are exempt, unless they convey water from one wetland area to another that meets the jurisdictional definition. In my mind, the only purpose of a ditch is to convey water from someplace where you don't want it, so doesn't this make every ditch jurisdictional? Luck Companies wants to do things the right way, but this unclear rule makes it nearly impossible to know what the right way is. Clarity is key because operators are at risk of large fines and even jail time under the Clean Water Act.

Before breaking ground, operators must always evaluate whether we are affecting jurisdictional water, which requires consultation with the Corps and often involves hiring a consultant. The delay caused by multiple rules and consultations, surveys, reports and individual wetland permits processed will add



significant new costs during the permitting process which would lead to the abandonment of projects that were once considered viable. The aggregates industry requires large land areas to process and remove the extensive quantities of material needed for public works projects. This rule could effectively place many areas “off limits” due to the cost of new permits and/or the mitigation required to offset losses to now regulated “waters,” which may be mere depressions in the land, ditches or other features remote from navigable waters, worsening supply chain problems.

Having a clear jurisdictional determination for each site is critical to the aggregates industry. These decisions impact the planning, financing, constructing and operation of aggregates facilities. The CWA 404 “dredge and fill” permitting process and the corresponding states’ 401 Certification process is long and costly. Now, we must add a new set of unclear terms that may sweep in waters previously unregulated.

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; planning 15 to 30 years in advance is not uncommon in our industry. The companies in our industry are very concerned that past understandings of what would be jurisdictional will now be subject to additional 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 startup of new sites. Ultimately, this change will disrupt the supply of aggregates to our biggest customers, which are government agencies; thus, affecting highway programs, airports and municipal projects.

There is already 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 flooding or erosion and sediment issues.

The mitigation for such impacts is also costly, difficult or even impossible to obtain. An expansion of the jurisdictional definition leads to the need for additional mitigation of those impacts. This has already led to a strain on the available mitigation resources for projects that are necessary for existing, approved transportation contracts. Approval of potential new mitigation banks is now estimated at five to nine years, and approval of permits depends on the availability of mitigation credits. Luck Companies has experienced delays that are directly tied to the lack of available credits. The approval of new credits is inevitably delayed, in part due to the outdated 2008 rule. Unlike WOTUS, this rule is in need of an update because mitigation science has expanded greatly since 2008, and an update that allows for banks that are constructing projects that are known to be beneficial should be approved more quickly. Instead of ensuring that this program was running as efficiently as possible before increasing the jurisdiction of WOTUS (and therefore the need for more mitigation banks and projects), this administration has made it more difficult for any projects to proceed, even those that benefit communities and the environment.

EPA flouted the Regulatory Flexibility Act and Disregarded Costs

EPA should have undertaken a full evaluation of the effects that 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 large daily fines 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. EPA bypassed the



requirements to comply with the Regulatory Flexibility Act and failed to get input from affected small businesses before proposing a rule (see the U.S. Small Business Administration comments on the proposed rule, February 2, 2022).

EPA's economic analysis of this rule does not accurately show what businesses like ours will end up paying, if this rule is finalized. Whenever jurisdiction is expanded, as this rule clearly does, additional features will be determined to be federally jurisdictional, and if impacted, will require replacement, typically at an increased ration, known as mitigation. Additional mitigation required under this rule can cost a new individual aggregates operation or expansion an additional million dollars or more in mitigation, and cause delays. For our business, time is a valuable asset. Any new requirements lead to a long learning curve for both the regulators and the regulated. Just getting a jurisdictional determination can take months and permits can take years; how much longer will it take to break ground with so many vague and undefined terms in this new 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 that development of a site will take too long or cost too much in permitting or mitigation, we won't move forward. This means that a whole host of economic activities in a community will not occur, all in the name of protecting a ditch or a farm pond.

Another NSSGA member has described the impacts of fluctuating CWA jurisdictional rules (including the new Rule which may only be in effect for a short time, followed quickly by another based on the possible outcome of *Sackett v EPA*):

Our business is very capital-intensive and typically viable only if in operation for many decades. Aggregate companies invest in land for future operations based on the quality of the reserves and the proximity to areas of expected population growth. Therefore, changes in the regulations during the permitting process greatly influence the ability to obtain the necessary permits. Finalizing a new WOTUS rule prior to the Supreme Court's decision on the *Sackett* case will create unnecessary hardships for our industry and further delays our ability to supply the much-needed aggregates for our Country's infrastructure. For just one of our properties, we have been trying to get a permit for over six years, and this new rule will just add to the delay, probably by years if this Rule is allowed to go into effect. The Corps of Engineers issued the original Jurisdictional Determination (JD) in late 2016. The cost of evaluating the site and the JD approval was approximately \$330,000 and took over two years to complete. Various other environmental studies were being performed and finalized as well during this time period. The updated JD was obtained under the 2020 WOTUS Rule in 2021 at a cost of \$30,000. This revised JD process took approximately nine months before a decision was issued. An additional study was also conducted to evaluate the quality and type of each wetland on the site to re-evaluate this site in light of the Army Corps of Engineers policy of not accepting decisions made under the 2020 rule. This additional effort costs approximately \$180,000. Total cost to date is \$540,000 in the Section 404 permit process alone. With the uncertainty surrounding this new rule and a possible SCOTUS decision that could require yet another rule, we could be looking at tens of thousands of dollars of additional cost and further delay to account for additional study and permitting. Mitigation costs of this site will be in the millions, but we cannot proceed given



the uncertainties of the regulatory framework. Any new proposals or changes in the Section 404 requirements will slow down the permitting process and require additional costs and delays.

Taken further, a significant reduction in aggregates production could lead to a shortage of construction aggregate, causing supply chain issues and raising the costs of concrete and hot mix asphalt products for state and federal road building and repair and commercial and residential construction. As material costs increase, supply becomes limited, which will further inflate prices and 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.

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

