

BEFORE THE UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
WASHINGTON, D. C.

IN THE MATTER OF
APPLICATIONS OF
NATIONAL SAND AND GRAVEL
ASSOCIATION AND SUNDRY OTHER PARTIES

For the exemption of the dredging and
excavating of sand and gravel from
surface or open cuts from the maximum
hours provisions of the Fair Labor
Standards Act of 1938 as an industry
of a seasonal nature, pursuant to
Section 7(b)(3) of the Act and Part
526 of Regulations issued thereunder

FINDINGS AND DETERMINATION
OF THE
PRESIDING OFFICER
January 8, 1940

The National Sand and Gravel Association and sundry other parties having filed a petition with the Administrator for the exemption of the dredging and excavating of sand and gravel from surface or open-cuts, and necessary milling activity incident thereto, from the maximum hours provisions of the Fair Labor Standards Act of 1938 as an industry of a seasonal nature pursuant to Section 7(b)(3) of the Act and Part 526 of the Regulations issued thereunder, the Administrator gave notice of a public combined hearing on several surface or open-cut mining industries to be held at the Raleigh Hotel, 12th Street and Pennsylvania Avenue, N. W., Washington, D. C., to commence at 10 o'clock a.m., June 19, 1939, before the undersigned as Presiding Officer.

Pursuant to notice the undersigned convened the hearing and an opportunity was afforded to all who appeared to present testimony and to question witnesses through the Presiding Officer. Appearances were entered for and against the application and by agreement supplementary data were filed subsequent to the hearing.

The dredging and excavating of sand (but not industrial sand)^{1/} and gravel from surface or open-cuts were defined in the notice of hearing to mean the extraction of such sand and gravel from pit, bank or marine deposits by hand or power methods including the necessary milling activities incident thereto but not embracing any underground operations.

The present findings relate solely to sand and gravel and not to any of the other industries included within the general scope of the hearing.

The National Sand and Gravel Association, appeared in support of the application on behalf of all commercial sand and gravel producers in the United States. Its own membership produces 65 per cent of the total. Much of the evidence presented by the Association was obtained from questionnaires circulated to all commercial sand and gravel companies.

The American Federation of Labor appeared in opposition to the application.

Sand and gravel is excavated from banks or pits by the use of power shovels, drag lines, power scrapers and slack-line cable-way excavators. Marine deposits are usually excavated by means of pump dredges, ladder dredges or dipper dredges. The products are then put through a plant which sizes, washes, and grades them. After treatment, they may be shipped or stock piled.

^{1/} "Industrial sand" on which testimony was taken at the hearing but which is not considered in this Determination includes glass, moulding, grinding and polishing, fire, furnace and engine sand.

It seems to be a general practice to ship from the stock pile both during the production season and during the season when production is suspended. Shipments from the stock pile during the season in which no operations are carried on are not considered part of production by the applicants.

Sand and gravel are among the more important forms of aggregates which find use in the construction industries.

Since construction specifications normally call for washed sand and gravel, there is virtually no commercial market for unwashed sand and gravel. In fact, the applicants consider water one of the materials necessary for the production of the commercial product.

The treatment plants, invariably unheated and frequently open, are situated either adjacent to the excavation or located a mile or so away. In the latter case, the material is transported from the site of excavation to the plant by barge, truck, train or conveyor. Wherever located, the treatment plant is always operated as an integral part of the excavating operation.

Sand and gravel operations are conducted throughout the entire United States. Because the products are of low value per unit of volume and weight, long hauls from the treatment plant to the point of use are impractical. The average land haul was said to be 45 to 50 miles, and the average water haul approximately 30 miles. Thus sand and gravel plants are competitive only within rather narrow territorial limits.

In addition to a very large number of very small sand and gravel operations with an unknown volume of employment and production, there were in 1935 almost 1800 commercial operations listed by the 1935 Census, with products valued at \$54,000,000 and employment during the peak months of 10,000 wage earners. There were also a considerable number of non-commercial operations, i.e., for the most part, operations conducted by various governmental agencies for the production of sand and gravel for use on their own projects, and not for sale.

Sand and gravel operations in the United States take place during a season ranging from approximately four months to twelve months. During this period, of course, at least some of the operations are interrupted by inclement weather in addition to such interruptions as may be caused by breakdown of machinery, etc.

It is clear from data submitted by the applicants that in those areas of the United States that have comparatively cold winters, (in general the more northerly areas), sand and gravel plants shut down and cease operations for an extended period. More specifically, in those areas in which the average temperature during the months of December, January and February is 25 degrees Fahrenheit or less, over 90 percent of all sand and gravel production takes place within a six months period, and all but a negligible amount is produced within seven months. Thus sand and gravel operations are substantially shut down for six months and completely shut down for about five months. This shutdown is primarily caused by (1) the impracticability of excavating frozen sand and gravel; and (2) the impracticability of washing sand and gravel after excavation, in freezing weather. In a practical sense, the materials excavated, handled and processed by the industry are unavailable in the form in which they are normally excavated, handled and processed, i.e., as unfrozen sand and gravel. It may be noted that there is a concurrent falling off in demand because of construction specifications, but this does not appear to be a determining factor. The length of the operating season varies directly though not precisely with normal winter temperatures, but complete winter shutdown of all plants does not occur beyond the 20 degree-25 degree average December-February temperature zone. Thus in a general way, under the effect of similar climatic factors, there is a northern branch of the sand and gravel industry that conforms to the requirements set forth in Section 526.3 of the Regulations. The southern branch, on the other hand, does not conform to these requirements. Many of its plants do not shut down at all and there is no normal shutdown of any extended period. Such cessation as may exist is caused rather by a falling off in demand than by the effect of climatic factors on the availability of materials.

The line between the northern and southern branches, as defined above, cannot be drawn for practical purposes with mathematical exactitude. It is impractical, for example, to define the northern branch as including all plants that lie in the isothermic belt below 25 degrees on Figure 5 of the Atlas of American Agriculture prepared by the United States Department of Agriculture because this map is not generally available and also because it does not readily lend itself to this type of reference use. Furthermore plants immediately outside this belt frequently are subject to approximately the same climatic factors as plants immediately within it. Therefore, to give practical effect to the statutory exemption, I find it necessary and desirable to include within the northern branch of the industry all plants in all counties within the belt or touched by the 25 degree isotherm. A list of such counties will be found in Appendix A. The available information in the record indicates that the northern branch of the industry as thus defined will include all plants that shut down substantially for about six months or more, and completely for about five months or more, because freezing weather makes unfrozen sand and gravel unavailable during the shut-down period. However, since the evidence in the record does not entirely preclude the possibility that some plants or groups of plants outside the above-defined geographical area do in fact operate in the same manner and for the same reasons as the typical plant in the northern branch described in the preceding paragraph, I find that a supplementary determination should be made for such plants or groups of plants, if any, upon a proper showing of facts.

DETERMINATION

On the whole record I find and determine that:

1. There is a branch of the sand and gravel industry (as defined herein) wherein the plants normally shut down for about six months each year, except for an insubstantial amount of production that may be produced shortly before or shortly after the main production season. This branch is located in the colder and, in general, more northerly parts of the United States; and

2. There is a southern branch of the industry wherein the plants do not shut down at all or do not normally shut down for a substantial period each year; and

3. The plants in the northern branch cease operation annually at a regularly recurring season of the year, except for sales, maintenance, and similar work, because the materials used by the industry are not available for excavation, handling and processing in the form in which they must be excavated, handled, and processed, i.e., as unfrozen sand and gravel, because of climatic factors; and

4. The northern branch of the sand and gravel industry is an industry of a seasonal nature within the meaning of Section 7(b)(3) of the Act and Part 526 of Regulations issued thereunder; and

5. The southern branch of the sand and gravel industry is not an industry of a seasonal nature within the meaning of the Act and the Regulations; and

6. For the purpose of this Determination the sand and gravel industry shall mean the excavation of sand and gravel, but not industrial sand, from open cuts, including necessary milling operations incident thereto; and

7. For the purpose of this Determination the northern branch of the sand and gravel industry shall include all plants located in counties that lie within the isothermic belt below 25 degrees Fahrenheit or are touched by the 25 degree isotherm on Figure 5 of the American Atlas of Agriculture issued by the United States Department of Agriculture. The said counties are listed in Appendix A attached hereto and incorporated herewith by reference.

8. This determination shall be without prejudice to a supplementary determination enlarging the scope of the Northern branch by the inclusion therein of such plants or groups of plants, if any, as operate in the same manner and for the same reasons as the plants in the Northern branch described in paragraphs 1 and 3 above.

WHEREAS, said Findings and Determination were duly filed with the Administrator on January 8, 1940, and are now on file in Room 5144, Department of Labor Building, Washington, D. C., and available for examination by all interested parties:

Signed at Washington, D. C., this 8th day of January, 1940.

Harold Stein

Harold Stein
Presiding Officer

(1/3/40)

(3037)

APPENDIX A

A. All counties in the States of:

Iowa	South Dakota
Maine	Utah
Minnesota	Vermont
Montana	Wisconsin, and
New Hampshire	Wyoming
North Dakota	

B. All the counties in the State of Colorado except the counties of:

Adams	Lincoln
Arapahoe	Logan
Baca	Morgan
Bent	Otero
Cheyenne	Phillips
Crowley	Prowers
Denver	Pueblo
Douglas	Sodgwick
Elbert	Washington
Kiowa	Weld, and
Kit Carson	Yuma

All the counties in the State of Connecticut except the counties of:

Middlesex	Tolland, and
New London	Windham

All the counties in the State of Idaho except the counties of:

Ada	Lincoln
Benewah	Minidoka
Canyon	Nez Perce
Gooding	Owyhee
Jerome	Payette, and
Latah	Twin Falls
Lewis	

All the counties in the State of Michigan except the counties of:

Berrian and	Monroe
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All the counties in the State of Nebraska except the counties of:

Adams	Harlan
Banner	Hayes
Buffalo	Fitchcock
Chase	Jefferson
Cheyenne	Kearney
Clay	Kimball
Dawson	Nuckolls
Deuel	Pawnee
Dundy	Perkins
Franklin	Phelps
Frontier	Redwillow
Furnas	Richardson
Gosper	Thayer, and
Hall	Webster

All the counties in the State of New York except the counties of:

Genesee	Seneca
Monroe	Suffolk
Massau	Tayne
Niagara	Westchester, and
Orleans	all the counties of the City of New York

C. The following counties in the following states:

State of Illinois:

Boone	Lee
Bureau	McHenry
Carroll	Marshall
Cook	Percer
DeKalb	Ogle
DuPage	Peoria
Henderson	Putnam
Henry	Rock Island
Jo Daviess	Stark
Kane	Stephenson
Kendall	Warren
Knox	Whiteside
Lake	Will, and
La Salle	Winnebago

State of Indiana:

Allen	Marshall
DeKalb	Noble
Elkhart	Saint Joseph
Kosciusko	Steuben, and
Lagrange	Whitley

State of Massachusetts:

Berkshire	Hampshire
Franklin	Middlesex, and
Hampden	Worcester

State of Missouri:

Atchison	Putnam
Centry	Schuyler
Harrison	Scotland
Holt	Sullivan, and
Mercer	Worth
Nodaway	

State of Nevada:

Elko
Eureka, and
White Pine

State of New Mexico:

Colfax	Sante Fe, and
Nora	Taos
Rio Arriba	

State of Ohio:

Williams

State of Oregon:

Baker	Lane
Clackamas	Linn
Deschutes	Marion
Grant	Umatilla
Hood River	Union, and
Jefferson	Wasco

State of Pennsylvania:

Bradford	Susquehanna
Erie	Tioga
Lackawanna	Warren
McKean	Wayne, and
Pike	Wyoming
Potter	

State of Washington:

Chelan

Ferry

King

Kittitas

Lewis

Okanogan

Pend Oreille

Pierce

Skagit

Skamania

Snohomish

Spokane

Stevens

Whatcom, and

Yakima