FEDERAL REGULATION OF WATERS: IMPACTS OF ADMINISTRATION OVERREACH ON LOCAL ECONOMIES AND JOB CREATION

(113–66)

FIELD HEARING

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

APRIL 28, 2014 (Altoona, Pennsylvania)

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April 25, 2014

SUMMARY OF SUBJECT MATTER

TO: Members, Committee on Transportation and Infrastructure
FROM: Staff, Committee on Transportation and Infrastructure
RE: Field Hearing on "Federal Regulation of Waters: Impacts of Administration Overreach on Local Economies and Job Creation"

PURPOSE

On Monday, April 28, 2014, at 9:00 a.m., at the Blair County Convention Center in Altoona, Pennsylvania, the Committee on Transportation and Infrastructure will meet to receive testimony on the potential impacts of a United States Environmental Protection Agency (EPA) and United States Army Corps of Engineers (Corps) proposed joint rulemaking to change the scope of federal jurisdiction under the Clean Water Act, and on the effects of tightened Corps of Engineers permitting requirements for stream crossings of natural gas collector lines constructed in Pennsylvania.

PROPOSED RULE TO REDEFINE "WATERS OF THE UNITED STATES"

Background

Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (commonly known as the "Clean Water Act" or the "CWA") to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The CWA claims federal jurisdiction over the Nation's "navigable waters," which are defined in the Act as "the waters of the United States, including the territorial seas" (CWA § 502(7)). The CWA instituted a system requiring individual permits for discharges of pollutants to navigable waters.

EPA has the basic responsibility for implementing the CWA, and is responsible for implementing the National Pollutant Discharge Elimination System (NPDES) permitting

program under section 402 of the CWA. Under the NPDES program, it is unlawful for a facility to discharge pollutants into "navigable waters," unless the discharge is authorized by and in compliance with an NPDES permit issued by EPA (or by a state, under a comparable approved state program).

EPA shares responsibility with the Corps for implementing the dredge and fill (wetlands) permitting program under section 404 of the CWA. Under the wetlands permitting program, it is unlawful for a facility to discharge dredge or fill materials into "navigable waters," unless the discharge is authorized by and in compliance with a dredge or fill (section 404) permit issued by the Corps.

The CWA does not contemplate a single, federally-led water quality program. Rather, Congress intended the states and EPA to implement the CWA as a federal-state partnership where the states and EPA act as co-regulators. The CWA established a system where states can receive EPA approval to implement water quality programs under state law, in lieu of federal implementation. Currently, 46 states have authorized programs, including Pennsylvania.

Federal Jurisdiction Under The CWA

Since enactment of the CWA in 1972, EPA and the Corps (the "Agencies") have promulgated several sets of regulations interpreting the Agencies' jurisdiction over "navigable waters." The first of these regulations was promulgated by the Corps in 1972 and generally limited CWA Section 404 jurisdiction to only traditional navigable waters.

The Agencies later promulgated further sets of regulations, including in 1974, 1975, 1977, 1986, and 1993, which broadened the scope of their asserted federal jurisdiction over "navigable waters." In the 1986 publication of regulations, the Agencies for the first time asserted jurisdiction over non-navigable, isolated, intrastate waters that are or may be used as habitat for migratory birds.

Federal jurisdiction under the CWA over "traditional" navigable waters has not been in question. However, controversies quickly arose shortly after enactment of the CWA in 1972 over whether there is federal jurisdiction over upstream headwaters, isolated waterbodies, intermittent and ephemeral streams, manmade ditches, swales, ponds, and other non-navigable waters, and more generally over where the outer limits of federal jurisdiction lie under the CWA.

Some interests have sought to preserve a balance of power and long-term cooperative relationship between the federal government and the states, and have argued for a limited scope of federal jurisdiction over waterbodies, allowing states to assert jurisdiction over waters where the federal interest in those waters is limited or nonexistent.

Other interests have argued for an expansive (and some, an unlimited) scope of federal jurisdiction over waterbodies, to include most any wet areas. This approach would undermine the federal-state partnership that Congress originally envisioned for implementing the CWA.

Supreme Court Cases on CWA Jurisdiction

There has been a substantial amount of litigation in the federal courts on the scope of CWA jurisdiction over the past 40 years, including three United States Supreme Court cases.

In the most recent two cases, *Solid Waste Association of Northern Cook County v. United States Corps of Engineers*, 531 U.S. 159 (Jan. 9, 2001) (also known as "*SWANCC*"), and the combined cases of *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*, 547 U.S. 715 (June 19, 2006) (collectively referred to as "*Rapanos*"), the Supreme Court articulated limits to federal jurisdiction under the CWA regarding the scope of what are considered "waters of the United States," and told the Agencies that they had gone too far in asserting their authority. The *SWANCC* decision rejected the Agencies' authority to regulate isolated waters based upon the potential presence of migratory birds. The *Rapanos* decision affirmed that CWA jurisdiction does not extend to all areas with a mere "hydrological connection" to navigable waters, although the Court was unable to agree on the proper test for determining the extent to which federal jurisdiction applies to wetlands, resulting in a split decision. This split decision left the Agencies with nonuniform guidelines from the Court as to how to interpret the CWA's jurisdictional scope in the future.

Legislative Initiatives to Expand Federal Jurisdiction Under the CWA

Legislation was introduced in the House of Representatives and the Senate in the 110th and 111th Congresses that was aimed at overruling the *SWANCC* and *Rapanos* cases and redefining the scope of CWA jurisdiction. (See, *e.g.*, *Clean Water Restoration Act* (H.R. 2421, 110th Congress); *America's Commitment to Clean Water Act* (H.R. 5088, 111th Congress); *Clean Water Restoration Act* (S. 787, 111th Congress).)

These bills faced overwhelming bipartisan opposition in Congress and were rejected in both the 110th and 111th Congresses because of concerns that they would expand federal jurisdiction to allow EPA and the Corps to exercise unlimited regulatory authority over all interstate and intrastate waters and wet areas.

The Agencies' Proposed Revised CWA Jurisdiction Rule

Between 2010 and 2013, the Agencies drafted and attempted to finalize new guidance to describe their latest views of federal regulatory jurisdiction under the CWA. Those efforts were met with strong bipartisan opposition, and the Administration ultimately halted its efforts to finalize the guidance.

Most recently, the Administration directed the Agencies to develop a rule to redefine the scope of the CWA's jurisdiction. On March 25, 2014, the Agencies publicly announced a proposed rule entitled *Definition of 'Waters of the United States' Under the Clean Water Act*. This rule ostensibly aims to "clarify" which waterbodies are subject to federal jurisdiction under the CWA.

The proposed rule replaces the definition of "navigable waters" and redefines "waters of the United States" in the regulations for all CWA programs. The proposed rule redefines "waters of the United States" as:

1. All waters currently, in the past, or that may be susceptible to use in interstate or foreign commerce, including tidal waters;
2. All interstate waters, including interstate wetlands;
3. The territorial seas;
4. All impoundments of waters identified in 1-3 above;
5. All tributaries of waters identified in 1-4 above;
6. All waters, including wetlands, adjacent to waters identified in 1-5 of this section; and
7. On a case-specific basis, other waters, including wetlands, which alone or in combination with other similarly situated waters in the region, have a significant nexus to a water identified in paragraphs 1-3.

Many stakeholders have expressed serious concerns with the proposed rule, including that the definitional changes contained in the proposed rule would significantly expand federal control of water and land resources across the Nation, triggering substantial additional permitting and regulatory requirements. Specifically:

Issue	Agencies' Position	Stakeholders' Concerns
Broader in Scope.	*The Agencies assert that the scope of CWA jurisdiction is narrower under the proposed rule than that under the existing regulations, and that the proposed rule does not assert jurisdiction over any new types of waters.*	The proposed rule provides essentially no limit to CWA federal jurisdiction. It establishes broader definitions of existing regulatory categories, such as tributaries, and regulates new areas that are not jurisdictional under current regulations, such as adjacent non-wetlands, riparian areas, floodplains, and other waters.
Inconsistent With Supreme Court Precedent.	*The Agencies state that the proposed rule is consistent with Supreme Court decisions and is therefore narrower than the existing regulations.*	The Supreme Court has made clear that there is a limit to federal jurisdiction under the CWA, specifically rejecting the notion than any hydrological connection is a sufficient basis to trump state jurisdiction.
Fails to Provide Reasonable Clarity.	*The Agencies state that the proposed rule will provide clarity for the regulated public and the Agencies.*	The proposed rule leaves many key concepts unclear, undefined, or subject to Agency discretion.
Adversely Affects Jobs and Economic Growth.	*The Agencies state that the proposed rule will benefit businesses by increasing efficiency in determining coverage of the CWA.*	The proposed rule will subject more activities to CWA permitting requirements, NEPA analyses, mitigation requirements, and citizen suits challenging the applications of new terms and provisions. The impact will be felt by the entire regulated community and average Americans, including landowners and small businesses least able to absorb the costs. The potential adverse effect on economic activity and job creation in many sectors of the economy has been largely dismissed by the Agencies.
Flawed Rulemaking Process Prejudges the Science, Undermining the Credibility of the Rule and the Process to Develop It.	*The Agencies state that the rule is based on EPA's draft scientific study on the connectivity of waters and is therefore supported by the latest peer-reviewed science.*	Instead of initiating the rulemaking process by soliciting input from, and developing consensus with, the general public, scientific communities, and federal and state resource agencies to determine the appropriate scope of CWA jurisdiction and the range of issues to be covered by the rule, the Agencies simply have proceeded with a rulemaking that is based on the draft guidance, thereby codifying their misinterpretations of legal standards articulated by the Supreme Court.

		In addition, EPA's Science Advisory Board panel is still in the process of peer-reviewing the draft connectivity report and, at its December 2013 meeting, the panel identified significant deficiencies with the report. It does not appear the Agencies intend to give the public an opportunity to review the final connectivity report as part of the rulemaking.

PERMITTING STREAM CROSSINGS IN PENNSYLVANIA FOR GAS GATHERING LINES

Background

As part of the process of developing a natural gas gathering system to transport natural gas extracted from wells in the Marcellus Shale region to natural gas transmission systems and, ultimately, to the market, natural gas gathering lines need to be laid across land and across certain streams and wetlands along the lines' path. This can result in the temporary discharge of dredged or fill material into these waterbodies. Because of these temporary impacts to waterbodies, these activities require a federal permit from the Corps pursuant to Section 404 of the CWA if those waterbodies are subject to jurisdiction under the CWA.

Historically, the Corps has recognized that impacts from these types of linear facilities crossing waterbodies are minimal and temporary. For a linear project like a pipeline, each individual crossing of a separate waterbody, or each individual crossing of a single waterbody at separate and distinct locations, is reviewed and authorized as a separate activity. Generally, these small crossings have only temporary impacts when analyzed separately. Temporary impacts are those that exist only for the duration of the project construction and the immediate period of restoration that follows construction. Conversely, permanent impacts are those impacts that are anticipated to exist in perpetuity after project implementation.

In many parts of the country, pipeline projects are authorized by a Nationwide Permit (NWP) issued by the Corps, specifically, NWP-12. As long as specified general conditions associated with the NWP are satisfied, NWP-12 is available for construction, maintenance, repair, or removal of utility lines, provided that the activity does not result in the loss of greater than one-half acre of jurisdictional waters. The impact threshold of one-half acre of waters applies independently to each single and complete project, as discussed above.

To utilize NWP-12, a project sponsor generally must provide preconstruction notification to the Corps. The project sponsor then may begin construction upon notification by the Corps that the activity may proceed or if 45 days have passed since the Corps received a complete preconstruction notice.

NWP-12 does not apply in Pennsylvania, as it has been suspended in favor of a state programmatic general permit covering linear facilities known as "PASPGP-4." The Pennsylvania

Department of Environmental Protection administers the PASPGP-4 program, with review in certain instances by the Corps.

Authorization Pursuant to PASPGP-4

PASPGP-4 generally is available to linear projects that impact 1.0 acre or less of waters, including jurisdictional wetlands. PASPGP-4 categorizes such projects into three categories for purposes of review:

Category I: Projects below certain temporary and/or permanent impact thresholds that do not affect federal endangered species. Qualifying projects would be authorized without notice to the Corps.

Category II: Projects below certain temporary and/or permanent impact thresholds (generally the same as under Category I) that do not affect federal endangered species but that do not qualify for Category I for certain reasons. Qualifying projects could be authorized after opportunity for review and comment by the Corps.

Category III: Projects that do not qualify for Category I or Category II, *e.g.*, because an impact threshold is exceeded or federal endangered species may be affected. Category III activities receive a project-specific review by the Corps. Qualifying projects may be authorized only after case-by-case opportunity for review and comment by all appropriate federal and state resource agencies and a determination by the Corps that the activity would have no more than minimal adverse environmental impacts.

PASPGP-4 uses the existing regulatory definition of single and complete project to determine the applicability of PASPGP-4. However, PASPGP-4 expands the definition of single and complete project for purposes of categorizing projects for review, and requires consideration of the cumulative impact of the aggregate of all the stream crossings in the overall project. Further, PASPGP-4 requires consideration of the temporary, as well as the permanent, impacts associated with the project for purposes of categorization, even though most of the impacts of these facilities are minimal and only temporary.

The practice of aggregating the cumulative impacts of an overall project has led to most natural gas gathering line projects qualifying only for Category III review. This result is inconsistent with the original rationale for the Corps having established and followed the single and complete project definition: "The purpose of separating out linear projects within the text of the definition for single and complete project was to effectively implement the NWP program by reducing the effort expended in regulating activities with minimal impacts." (See 56 Fed. Reg. 59110 (Nov. 22, 1991).)

The notion of using cumulative impacts of an overall project to screen activities for purposes of review pursuant to a state programmatic general permit is not supported by the Corps regulations and is inconsistent with longstanding practice in Pennsylvania and nationally.

The process of Category III review required by PASPGP-4 for most gas gathering line projects adds approximately 120 to 180 days or more to the review time for each project, after approval from Pennsylvania has been granted.

The extensive and redundant review required by PASPGP-4 stands in stark contrast to the streamlined approach of NWP-12, where construction simply may proceed in most cases if express authorization is not provided by the Corps within 45 days of submission of complete preconstruction notification.

Importantly, the Corps in other states is not aggregating impacts of any overall project for purposes of determining applicability of NWP-12 or the requirement for preconstruction notification. In fact, the Corps' latest reissuance of the Nationwide Permits provides a separate definition of the term single and complete *linear* project, which reinforces the rule that various individual crossings of a linear project should not be aggregated or treated together as an overall project.

WITNESSES

Mr. Ken Murin
Chief
Division of Wetlands, Encroachment and Training
Bureau of Waterways, Engineering and Wetlands
Pennsylvania Department of Environmental Protection

Mr. David Spigelmyer
President
Marcellus Shale Coalition

Ms. Tonya Winkler, AICP
Midstream Permitting and Compliance Manager
Rice Energy, LP

Mr. Warren Peter
President
Warren Peter Construction
On Behalf of the Indiana-Armstrong Builders Association,
Pennsylvania Builders Association, and
National Association of Home Builders

Mr. Thomas R. Nagle, Jr.
President
Cambria County Farm Bureau
On Behalf of the Pennsylvania Farm Bureau

Ms. Jacqueline Fidler
Manager
Environmental Resources
CONSOL Energy

FEDERAL REGULATION OF WATERS: IMPACTS OF ADMINISTRATION OVERREACH ON LOCAL ECONOMIES AND JOB CREATION

MONDAY, APRIL 28, 2014

HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
WASHINGTON, DC.

The committee met, pursuant to call, at 9 a.m., at the Blair County Convention Center, One Convention Center Drive, Altoona, PA 16602, Hon. Bill Shuster (Chairman of the committee) presiding.

Mr. SHUSTER. The committee will come to order. I first want to take the opportunity to thank everybody for coming out here today. I am pleased to welcome our panel of distinguished witnesses today. First of all, Ken Murin, environmental program manager for the Division of Wetlands, Encroachment and Training of the Bureau of Waterways, Engineering and Wetlands from the Pennsylvania Department of Environmental Protection. That is a long title, Mr. Murin. Thank you for being here. Mr. David Spigelmyer, the president of the Marcellus Shale Coalition; Tonya Winkler, AICP, midstream permitting and compliance manager for Rice Energy. Thank you for coming today. Warren Peter, the president of Warren Peter Construction. Thomas Nagle, president of the Cambria County Farm Bureau and a local cattle farmer, and Jacqueline Fidler, manager of environmental resources for CONSOL Energy. Thank you all for being here today. Today we are going to explore the impact and executive actions that the administration is taking to regulate the waters and restrict the development of important energy resources in Pennsylvania and elsewhere in the country.

Last week the President published a proposed rule that would dramatically extend the reach of the Federal Government when it comes to regulating ponds, ditches, and other wet areas. This is an example of the disturbing pattern of the imperial Presidency that seeks to circumvent Congress. Unilaterally broadening the scope of the Clean Water Act and the Federal Government's reach into our everyday lives will have adverse effects on the economy and jobs, increase the likelihood of costly litigation, and restrict the rights that landowners and local governments enjoy regarding decision-making on their own land.

This Federal jurisdiction—was the subject of failed legislation in the 110th and 111th Congress, and I would like to point out that both those Congresses were controlled by the Democrats in the House and Senate at the time. Strong bipartisan opposition prevented those Bills from moving forward. Even in Congress now the

Obama administration is trying to achieve the power of expansion through a rulemaking. This proposed rule supposedly aims to clarify which water bodies are subject to Federal jurisdiction under the Clean Water Act. Twice the Supreme Court has told the agencies that there are limits to the Federal jurisdiction under the Clean Water Act and they have gone too far in asserting authority. So twice the Congress told the Democrats and twice the Supreme Court had said to the administration, the EPA, you don't have this jurisdiction.

It is a responsibility of Congress, not the administration, to define the scope of jurisdiction under the Clean Water Act. Similarly, the administration is taking steps to restrict the development of important energy resources in Pennsylvania. The administration is utilizing the Wetlands permitting process under the Clean Water Act to throw obstacles in the way of developing and transporting to market the gathering lines of natural gas produced in the Marcellus Shale region. Since 2011 when the Army Corps of Engineers issued Pennsylvania State a pragmatic general permit forum, the inferred concerns from industry and the DEP regarding several key changes have increased the permitting review time for natural gas gathering lines, delaying the delivery of gas from the well to the marketplace and delaying royalty payments to property owners and revenues to the State.

I have met with and worked with industry, DEP, and the Corps over the last 3 years to attempt to address these concerns. While I am told the timeline has improved somewhat, the underlying changes that caused these problems in the first place have not been addressed. Regulations to the Nation's water must be done in a manner that responsibly protects the environment without unnecessary and costly expense to the Federal Government. We can continue to protect our waters without unreasonable and burdensome regulations on our businesses, farmers, and families.

I look forward to hearing from all our witnesses today, about their experience and thoughts on both the issues, and thoughts on improvements on the next general permit issues in 2015.

I now yield to Mr. Gibbs, who is the chairman of the Subcommittee on Water Resources and Environment, for an opening statement.

Mr. GIBBS. Thank you, Mr. Chairman, and I want to thank the witnesses for being here. I look forward to the testimony today.

I would also like to thank Chairman Shuster for holding this very important and timely hearing—in Altoona. I appreciate your leadership on these important issues.

On March 25 the EPA and the Army Corps of Engineers released a proposal that according to the agencies would clarify the scope of the Federal jurisdiction within the Clean Water Act. In reviewing the proposal I have serious concerns about implementations of water previously regulated by States rather than the Federal Government. When the Clean Water Act was first passed by Congress it was done so under the constitutional authority of the—clause defining jurisdiction as—waters. The proposal would effectively remove—resulting in the erosion of State authority and granting Federal jurisdiction to waters never intended for inclusion of the Clean

Water Act, including ditches, manmade ponds, flood plains, and unseasonably wet areas.

However, the agencies have continued to claim that no waters would be covered in the rulemaking—no new waters in the rulemaking. When I questioned Army Corps and agriculture officials in the hearings last month about this issue, I found that rather than clarifying the issue, they made it muddier. Additionally, we are here today to learn about the cost regulations permitting pipeline projects that appear to exist only in Pennsylvania.

I am particularly concerned about this new time-consuming process that my own district in Ohio is located above a large portion of—formation. Ohio can expect to see development of natural gas lines—pipelines similar to here in Pennsylvania.

Once again, I would like to thank the chairman for holding this important hearing and I look forward to hearing from the witnesses.

Mr. SHUSTER. I thank the gentleman, and everybody—Mr. Gibbs from Ohio, as he said there, I want to introduce the other Members who made the trip here today. To my far left is Congressman Scott Perry from York County—York County, Adams and the center part—central Pennsylvania; Congressman Jeff Denham from California—the Central Valley in California; and Congressman Tom Rice from South Carolina, Myrtle Beach, the third most popular vacation spot in America.

Mr. RICE. You mean you didn't come here for business?

Mr. SHUSTER. I told him he needed to show some love to Pennsylvania because quite a few of our folks travel to Myrtle Beach for vacation.

Mr. RICE. It——

Mr. SHUSTER. And—Pennsylvania money, too. We appreciate you making the trip up here——

Mr. RICE [continuing]. Come back early and all.

Mr. SHUSTER. I thank each of the Members for being here and the staff for traveling up, and again, I appreciate the witnesses making the trip here today. I ask unanimous consent that the full statements be included in the record of all the witnesses. Since we have written testimony we ask that you keep your testimony to 5 minutes. I am pretty quick with the gavel, but I won't be too quick today. It is important, so I want to make sure you are heard, and any Members that don't get a chance to ask questions, we will keep the record open for 5 days following this to pass on to you that opportunity.

I will ask unanimous consent that written testimony submitted on behalf of the National Association of Realtors be included in this hearing—on this record.

Without objection, so ordered.

[The information follows:]

NATIONAL ASSOCIATION of REALTORS®

Steve Brown, ABR, CIPS, CRS, GREEN
2014 President

Dale A. Stinton
Chief Executive Officer

GOVERNMENT AFFAIRS DIVISION
Jerry Giovaniello, Senior Vice President
Gary Weaver, Vice President
Joe Ventrone, Vice President
Scott Reiter, Vice President
Jamie Gregory, Deputy Chief Lobbyist

April 25, 2014

The Honorable Bill Shuster
2209 Rayburn HOB
Washington, D.C. 20515

Dear Representative Shuster,

On March 25, 2014, the Environmental Protection Agency and Army Corps of Engineers proposed to "clarify" which waters of the United States are subject to regulation under the Clean Water Act. The National Association of REALTORS® strongly opposes the proposal as a thinly veiled attempt to expand the federal government's reach to almost any property with a wet area in the country.

While asserting their proposal is "narrower" than the existing regulations, these agencies unapologetically add new categories and catch-all definitions to those regulations, including:

- "ALL Tributaries" that contribute to a jurisdictional "by rule" water. Current regulations are limited to some tributaries, but this proposal includes an entirely new definition of the term "tributary" that is so broad and sweeping that few waters can be excluded.
- "ALL adjacent waters" – current regulations extend only to adjacent wetlands but this proposal inserts all other adjacent waters into the regulations.
- "Other Waters" – if "all tributaries" and "all adjacent waters" isn't broad enough, under the proposal regulators can assert jurisdiction over any other water that it deems has a "significant nexus" based on their case-by-case review using their own evidence.

The Supreme Court has made clear that there is a limit to federal jurisdiction under the CWA. But this proposed rule will extend coverage to many waters that are remote and/or carry only minor volumes, and its provisions provide no meaningful limit to federal jurisdiction. While it's true the proposal will exclude some waters, like swimming pools and farm waste ponds, these were never at issue. And the exclusion of some waters doesn't justify the inclusion of others.

The regulators will claim that all the new definitions and catch-alls will provide brighter lines for what's "in/out" and on net benefit property owners. What they are really saying is the draft rule would save bureaucrats time in denying more permit applications to property owners who are seeking to improve *their very own property*. In reality, the proposed rule will subject more activities to CWA permitting requirements, NEPA analyses, mitigation requirements, and citizen suits challenging

the applications of new terms and provisions. The potential adverse impacts on economic activity have been largely dismissed by the agencies and are not reflected in EPA's flawed economic analysis for the proposed rule.

Thank you for holding this critical oversight hearing into a potential regulatory over-reach into properties with a wet area. We look forward to working with you to restore the original limits of the Clean Water Act and narrow the scope to the navigable waters of the U.S. as Congress really intended.

Sincerely,

Steve Brown
2014 President, National Association of REALTORS®

Mr. SHUSTER. And with that, I will start with Mr. Murin.

TESTIMONY OF KENNETH MURIN, ENVIRONMENTAL PROGRAM MANAGER, DIVISION OF WETLANDS, ENCROACHMENT AND TRAINING, BUREAU OF WATERWAYS, ENGINEERING AND WETLANDS, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION; DAVID SPIGELMYER, PRESIDENT, MARCELLUS SHALE COALITION; TONYA WINKLER, AICP, MIDSTREAM PERMITTING AND COMPLIANCE MANAGER, RICE ENERGY, INC.; WARREN PETER, FOUNDER AND PRESIDENT, WARREN PETER CONSTRUCTION, ON BEHALF OF THE INDIANA-ARMSTRONG BUILDERS ASSOCIATION, PENNSYLVANIA BUILDERS ASSOCIATION, AND NATIONAL ASSOCIATION OF HOME BUILDERS; THOMAS R. NAGLE, JR., PRESIDENT, CAMBRIA COUNTY FARM BUREAU, ON BEHALF OF THE PENNSYLVANIA FARM BUREAU; AND JACQUELINE FIDLER, MANAGER, ENVIRONMENTAL RESOURCES, CONSOL ENERGY, INC.

Mr. MURIN. Thank you, Chairman Shuster. Thanks again for inviting the Department of Environmental Protection here this morning to provide testimony before the Committee on Transportation and Infrastructure on Pennsylvania's program for issuing permits for projects under a consolidated permitting process, and more specifically, for oil and gas pipeline projects.

Before providing details on the process, I would like to address another recent Federal matter that may be impacting Pennsylvania permitting activities. Last week the Environmental Protection Agency, EPA, and the United States Army Corps of Engineers, or the Corps as I'll refer to, published a proposed rule regarding the definition of waters of the United States. This definition is to be used in determining the jurisdiction of the Clean Water Act with respect to the requirements for permits under section 404 as well as other Federal Clean Water Act programs.

As the publication of the rule is recent and the rule is lengthy, the Department has not yet completed its review of the proposal. However, as Pennsylvania is home to over 86,000 miles of streams and rivers, and 404,000 acres of fresh water wetlands, DEP feels that this proposed rule may be particularly relevant to Pennsylvania and fully anticipates providing formal comments to EPA.

Prior to finalization of the waters in the United States rule, DEP recommends the EPA and the Corps of Engineers reach out to Pennsylvania to discuss the comments provided by the Department. Once completed, DEP can provide these comments to the committee members and make them available to the public as well. Due to our ongoing review and our planned stakeholder outreach I will not be providing testimony on that proposed rule today.

The Commonwealth of Pennsylvania is a water-rich State and the protection of these abundant water resources is vital to the health and the vitality of the Pennsylvania citizens' environment and economy. Pennsylvania has a vast energy portfolio, ranking second in the Nation, in natural gas production and fourth in the Nation in coal production. Pennsylvania is the only producer in the Nation of high-heat anthracite coal. The role of the Department of Environmental Protection is to ensure environmentally responsible

development of the Commonwealth's vast energy resources, which includes protection of the equally abundant fresh water resources.

In Pennsylvania, the Dam Safety Encroachments Act and the accompanying regulations found at 25 PA Code, chapter 105, require permits for stream and wetland encroachments complimentary to those required under section 404 of the Federal Clean Water Act. Under Federal regulations the Corps has the flexibility to develop general permits on a statewide, regional or national basis. The Department has worked with the Corps to develop a joint permitting process that consolidates the State and Federal permitting process making it more efficient and less time-consuming without sacrificing environmental protection.

In 1995 the Department and the Corps negotiated a statewide general permit, State Programmatic General Permit, or SPGP–1, for projects in Pennsylvania that impacted one acre or less of waters of the United States, including wetlands. Projects with greater impact cannot be authorized under this permit and were required to obtain the individual section 404 permit directly from the Corps. The Corps first issued its Pennsylvania State Programmatic General Permit on March 1, 1995. This general permit is renewed every 5 years, with the most recent renewal or the fourth generation, also known as SPGP–4, having been issued on July 1, 2011.

During the review process that led to the most recent renewal of SPGP–4, the Corps' interpretation and application of several terms, concepts and definitions used in the permit, as they relate it to pipeline projects, were modified. Specifically, these changes were intended to provide clarification of the process of permitting pipeline projects. Prior to the issuance of SPGP–4 in July 2011 the Department, in cooperation with the Pennsylvania representatives to Congress, attempted to negotiate some changes to the Corps' clarifications; ultimately, however, the Corps did not make the changes recommended by the Department and the Pennsylvania congressional representatives. This is noteworthy as DEP will begin the process of negotiating the next permit renewal with the Corps next year, which is 2015, in order to have the SPGP–5 in place by July 1, 2016.

Under SPGP–4 the Corps defined three broad categories of impacts. Category 1 and 2 activities normally do not trigger any additional review by the Corps and authorize when a department provides State law approval. Category 3 activities, however, are reviewed by the Corps as well as the State, and some examples of projects that require the Corps' review include projects with impacts that threaten endangered species, impact more than one acre of wetland, impact more than 250 linear feet of stream. Recent data provided by the Corps indicates that approximately 13 percent of the projects authorized from 2011 to 2013 require concurrent review by DEP and the Corps. Of these projects, approximately 32 percent were pipeline projects.

To provide a perspective in context on the joint permitting program, between July 1, 2011, and June 30, 2013, DEP reviewed approximately 9,500 authorizations under PA SPGP–4. It is important to point out that this statewide general permit covers more than just pipelines. It covers many activities associated with land

development in general, such as culverts, small bridges, docks, temporary stream crossings and intake and outfall structures.

During the period of July 1, 2006, through June 30, 2011, over 90 percent of the Corps' authorizations were issued in less than 60 days from the date of receipt of a complete application. From there the review delays, they were typically associated with deficient application submissions.

SPGP–4 has been a critical tool used in consolidating the Federal section 404 and State chapter 105 permitting processes in Pennsylvania, although it was tailored to allow for one-stop authorization of the projects under both section 404 of the Federal Clean Water Act and the State chapter 105 regulations. PA SPGP–4 is a Corps permit and the Corps controls the extent to which a Corps review is necessary.

Mr. SHUSTER. If you can just sum up——

Mr. MURIN. OK. How much time do I have?

Mr. SHUSTER. About another 30 seconds.

Mr. MURIN. OK. All right.

The consolidated State and Federal permitting processes under SPGP have been effective, allows environmental responsible development of the Commonwealth's vast energy resources. As we look to the upcoming renewal of the State Programmatic General Permit in 2016 the Department is optimistic that working together with the Corps we will be able to reevaluate the requirements of Nationwide Permit 12 and the State Programmatic General Permit with regard to the use of certain critical terms/definitions that bring in greater consistency and efficiency into the implementation of these important Clean Water Act requirements.

Thank you for your interest regarding this issue and opportunity for the Department to provide this testimony.

Mr. SHUSTER. Thank you, and your testimony is—we have it full in the record here and we are going to get into some questions and we will talk to you about some of those issues.

Mr. MURIN. OK. Thank you.

Mr. SHUSTER. And with that, Mr. Spigelmyer.

Mr. SPIGELMYER. Good morning, Chairman Shuster, distinguished members of the House Committee on Transportation and Infrastructure. My name is Dave Spigelmyer. I am the president of the Pittsburgh-based Marcellus Shale Coalition, a trade association representing some 300-some producer pipeline and supply chain members. Our members represent the largest and most active companies producing, gathering and transporting more than 95 percent of the natural gas now being produced here in the region in the Commonwealth of Pennsylvania. You have a copy of my formal testimony which I will summarize this morning in my comments.

Increased development of natural gas here in the region has made game-changing contributions to our economy, our energy security, and due to the increased use of natural gas, EPA has reported that we have significantly reduced carbon dioxide emissions in the region, bettering our environment. We have done so well reducing energy costs for nearly every citizen in the United States. In 2008 prices of natural gas at the well had hit $13.71 per Mcf, or thousand cubic feet. After a nearly record-cold winter here in the Northeast this year our well had prices and delivered utility prices

are less than half of what they were just 6 years ago. In 2008 our vertical drilling conventional industry produced 25 percent of the natural gas we consume here in the Commonwealth. Today, unconventional horizontal development accounts for more than 14.3 billion cubic feet of production per day, equaling 5.2 trillion cubic feet annually or more than 20 percent of America's natural gas demand being developed right here in our backyard.

These contributions are huge in terms of change in our national energy picture, and putting men and women to work right here in the Commonwealth of Pennsylvania. According to the Department of Labor and Industry here in Pennsylvania more than 241,000 people in Pennsylvania are now employed either directly or indirectly by our industry. One great aspect of this work is that we can employ men and women right here at home trade in a hard hat in Pennsylvania—trade in a helmet and military uniform abroad for a hard hat here in the Commonwealth. And with nearly every consumer product, all steel, glass, plastics, chemicals, fertilizers and powdered metals that we touch today being manufactured through the use of natural gas, we believe that abundant, affordable and reliable supplies of natural gas are poised to open up huge new manufacturing opportunities here in Pennsylvania and likely all over this Nation.

However, a critical in—shale development, including the Marcellus and Utica Plains, is the requirement to gather and transport natural gas to consumers. Predictable and consistent authorization in the permitting process for pipelines is critical if the benefits of shale development are to continue in our region. Today, hundreds of completed wells await a pipeline connection to transport that gas to consumers here in Pennsylvania and throughout the region. Wells that are unable to be tied into a pipeline slows the delivery of that product to market, and slows the royalty revenues that would flow to mineral owners across the State.

The primary reason for the delay is that approving pipeline projects rests in the review process now embraced by the Baltimore District of the U.S. Army Corps of Engineers. Federal jurisdiction applies to these projects in the location where pipelines cross the waters of the United States, pursuant to section 404 of the Clean Water Act. In Pennsylvania, authorization of these projects typically has been provided under the State Programmatic General Permit, issued pursuant with the Clean Water Act, section 404(e).

The Pennsylvania State Programmatic General Permit #4 was reissued effective July 1, 2011, by the Baltimore District of the U.S. Army Corps of Engineers. As a result of this change by the Baltimore District, the requirements for a review embodied in the State Programmatic General Permit have created an inefficient process that is now duplicative of the State's review. Today, the process being followed by the Baltimore District of the U.S. Army Corps requires nearly all pipeline projects, both large and small, to undergo individual review by the Corps, reviewing the total impacts of a project, and not just the individual water crossing being authorized.

The approach for project authorization for these type of projects reflected in the State Programmatic General Permit is inconsistent with the goal—of the Corps' own goal, inconsistent with its regula-

tion, and represents a marked departure from the longstanding approach of evaluating each water crossing individually, which leads to substantial permitting delays.

Combining the total impacts of an overall project for preauthorization review of each individual water crossing is also inconsistent with the Corps' definition of a single and complete project, and is inconsistent with the rationale expressed by the Corps when it adopted this review process. No other district in the Army Corps where our members operate approaches the permitting function for gathering lines and midstream pipelines in the manner now in place in Pennsylvania.

In all other areas of the country where gathering lines are being built, the Corps adheres to its regulatory definition of single and complete, and evaluates each crossing of water individually. The adherence by other Army Corps districts to the regulatory definition of a single and complete project is in accord with the Corps' own rules, and allows for efficient and effective review of those projects. Furthermore, the review by the Baltimore District of the Army Corps, under the State Programmatic General Permit, does not alter the manner in which these projects are designed or constructed.

Their review of these projects is unnecessary, it is duplicative, and it does not provide meaningful environmental benefit, yet the Army Corps process imposes substantial administrative burden, adds additional costs, and significant delays that could be eliminated. The delays being experienced in Pennsylvania erode our competitive standing as a location to invest capital, and can impact the job growth that has revitalized communities all across this Commonwealth.

I appreciate the opportunity to appear before you today, and thank you for allowing me to testify. I welcome your questions.

Mr. SHUSTER. Thank you very much. And with that, Ms. Winkler, you may proceed.

Ms. WINKLER. Good morning, gentlemen. I am Tonya Winkler. I am the midstream permitting and compliance manager for Rice Energy, Inc. Rice Energy is engaged—it is not on. There we go. I will borrow this one. Start over.

Good morning, gentlemen. I am Tonya Winkler, midstream permitting and compliance manager for Rice Energy, Inc. Rice Energy is engaged in exploration and production of natural gas wells, and gathering and transportation of natural gas from our wells to our sales points, as well as installation and operation of water transfer lines for the use in production of our natural gas wells in Pennsylvania and Ohio.

Rice Energy currently owns and operates approximately 40 miles of natural gas gathering lines, with a proposed 110 miles to construct in the next year. Additionally, we currently operate 33 miles of water transfer lines, with a proposed 73 miles to construct in the next year. An integral part of that successful development of both the Marcellus and the Utica Plains is the construction of that midstream infrastructure. Consistent and timely authorization of these pipelines, as we propose them, and other midstream projects is vital to ensure that these constructions proceed as planned, on schedule, and within our budgets.

Rice Energy currently has millions of cubic feet of natural gas waiting to flow to market, estimated $56 million this year alone in lost revenue, just due to orphaned wells. Uncertain permitting review times and delays resulting in that lost revenue not only for Rice Energy, but loss of royalties for our landowners, loss of jobs, both for our midstream construction, as well as our oil and gas—or our drilling operations, loss of tax base for local, State, and Federal Government agencies as well.

The delays that Rice Energy has experienced throughout the review process is not just isolated issues. For example, our midstream and completions team work together and collaborate methods to utilize water transfer lines for various stages of our operations, but the untimely authorization process has led to stalled progress more often than not. The company now has 18 wells in inventory, with no pipeline installed to transport the water necessary for production, or to produce this gas and get it to market in Pennsylvania. These unanticipated delays in completions have resulted in the loss of millions of dollars over an operating year, in addition to the $56 million stated above.

As recent—as a recent of—I apologize. As a result of these unpredictable delays, Rice Energy has now started to focus our operations elsewhere, where permit review times are a little more predictable, such as in Ohio, that is—Nationwide Permit 12 review process. As an example of what we—our permitting reviews in Pennsylvania, we presently have 85 percent of our midstream projects that are under DEP review also going under Corps review for the total impacts of the overall project, rather than the limited impact of an individual cross that is being authorized.

This does lead to regular, substantial delays in authorization of our projects, and is hindering the ability of Rice Energy to develop and construct our infrastructure necessary to collect, gather, and transport this gas into market. Using recent data, Rice Energy estimates it takes an average of 80 days for projects that have only minimal and temporary impacts to waters of the United States to receive approval. Based upon our experience, it now takes at least 1½ or more years to get even the most basic midstream infrastructure pipeline project into sales.

Rice Energy is wholly committed to working with the local, county, State, and Federal Government officials and regulators to facilitate our safe, responsible installation of natural gas gathering lines and water transfer lines, both in Pennsylvania, and in Ohio. However, the delays and increased costs in connecting these producing wells into market will continue, and does influence Rice Energy's strategy for future development. The loss of development relates not only to our wells already completed and produced, but also for future wells yet to be drilled.

I thank you for the opportunity that you gave me today to speak to you, and I look forward to answering any of your questions. Thank you.

Mr. SHUSTER. Thank you very much. Mr. Peter, proceed. It is working.

Mr. PETER. Thank you, Chairman Shuster, and thank you, members of the committee, for allowing me to testify here today. Again, my name is Warren Peter. I am founder and president of Warren

Peter Construction. I am located in Indiana, Pennsylvania. I am also here on behalf of the Builders Associations, national and Pennsylvania, and our local association.

Home builders have been advocates for Clean Water Act since its inception. We have a responsibility to protect the environment, and it is a responsibility I know well, for, under the Clean Water Act, I must obtain permits for building projects. When it comes to Federal regulatory requirements, what I desire, as a small business owner, is a permitting scheme that is consistent, timely, and focused on protecting true aquatic resources.

Landowners have been frustrated with the continued uncertainty over the scope of the Clean Water Act over the waters of the United States. There is a need for additional clarity, and the administration recently proposed a rule intended to do just that. Unfortunately, the proposed rule falls short. There is no certainty under this proposal, just an expansion of the Federal authority. These changes will not even improve water quality, as the rule improperly encompasses waters that are already regulated at the State level.

The rule would establish broader definitions of existing regulatory categories, such as tributaries, and regulates new areas that are not currently federally regulated, such as adjacent non-wetlands, riparian areas, flood plains, and other waters. And these changes are far-reaching, affected all Clean Water Act programs, but provide no additional protection, for most of these areas already comfortably rest under State and local authority.

I am also concerned that the terms are overly broad, giving the agencies broad authority to interpret them. I need to know the rules. I can't play a guessing game of "is it jurisdictional?" We don't need a set of new, vague, and convoluted definitions. Under the Clean Water Act, Congress intended to create a partnership between the Federal agencies and State governments to protect our Nation's water resources.

There is a point where Federal authority ends and State authority begins, and the Supreme Court has twice affirmed that the Clean Water Act places limits on Federal authority over waters, and the States do regulate the waters under their jurisdiction. In Pennsylvania, wetlands have been regulated under State law since 1980. Since that time, Pennsylvania has set an annual gain of wetland acreage. Pennsylvania takes its responsibility to protect its natural resources seriously. I also believe that Pennsylvania's story is not unique. If you look around the country, you will find many other States are protecting their natural resources more aggressively since the passage of the Clean Water Act in 1972.

The proposed rule will have significant impacts on my business. Construction projects rely on efficient, timely, and consistent permitting procedures and review processes under Clean Water Act programs. An onerous permitting process could delay projects, which leads to greater risks and higher costs. Also, more Federal permitting actions will trigger additional statutory reviews by outside agencies under laws including the Endangered Species Act, the National Historic Preservation Act, and National Environmental Policy Act. It is doubtful the agencies will be equipped to handle this inflow of additional permitting requests.

I am uncertain of what environmental benefits are gained by this paperwork, but I am certain of the massive delays in permitting that will result. The cost of obtaining a Clean Water Act permit ranges from $28,915 to $271,956. Permitting delays will only increase these costs and prevent me from expanding my business and hiring more employees.

The agencies have not considered the unintended consequences of this rule. Under this proposed rule, low-impact development stormwater controls could be federally jurisdictional. Many builders voluntarily select LID controls, such as rain gardens and swales, for the general benefit of their communities. This rule would discourage these voluntary projects if they required Federal permits.

This proposed rule does not add new protections for our Nation's water resources. It just shifts the regulatory authority from the State to the Federal Government. The proposed rule is inconsistent with previous Supreme Court Decisions and expands the scope of waters to be federally regulated beyond what Congress envisioned. Any final rule should be consistent with Supreme Court Decisions, provide understandable definitions, and preserve the partnership between all levels of government. All are sorely lacking here.

And, again, thank you for the opportunity to testify today. I look forward to any questions.

Mr. SHUSTER. Thank you very much. And with that, Mr. Nagle, proceed.

Mr. NAGLE. Good morning, Chairman Shuster, and members of the committee. I am a cattle and grain farmer in Cameron County, Pennsylvania. Clean water is important to all of us, but the hearing is not about the water quality. Rather, it is about Federal agencies attempting to gain regulatory control over the land use, and using the claim clean water.

Federal Clean Act—Water Act was signed into law before I was even born, but some have been saying—trying to claim power that the 1972 law never intended it to give. Farmers are straightforward people who believe the words mean something. Those of us in agriculture believe that the authors of the Clean Water Act include the term navigable for a reason, and, you know, as the Supreme Court case—have said that the Federal Government can only regulate navigable waters.

However, recent proposals released by EPA and the Army Corps gives conflicting messages. It also seems it is trying to gain control over additional water bodies and lands that they touch. Just because homeowners' lawns, or farm fields, or a school playground collects water after rain does not mean that they should be regulated under waters of the United States, but from the—what I understand, the regulatory proposal would do exactly that.

EPA has stated that farmers are exempt from the proposed rule, and nothing will change, yet they also state that the rule will extend Federal regulations to most seasonal and rain—seasonal rain depending streams. This is confusing. It is my understanding that there are no protection in this proposal for common farming activities, and exemptions are available only for farmers continuing since—farming practices since 1977. Since I was born in 1979, does this mean the exemptions do not apply to me?

What if ultimate effect of the rule prevents farmers from passing their operations to their children, or prevents young people like myself from becoming farmers? By expanding the regulation to rain dependent streams, EPA could regulate new areas, like dry land. What if the expansion leads to new regulations, or eliminates common accepted farm practices? What would it require for the permit to control—for permits to control pests or mowed grass across a ditch? There is not guarantee that such permits would be issued, or even evidence that stopping these activities would have any real effect on water quality.

States like Pennsylvania already have significant laws, and regulations, and programs in practice—in place to protect water considered unregulated, including intermittent streams. My written testimony identifies many of them. What's more, our State DEP official can show that water quality improvements for many of the State-driven and State-administered programs, and what if expanded Federal regulation harms the State's ability to continue to improve upon successful initiatives? I am seriously concerned about the proposal, and its 370-page document, and full compliance. I—and if I misunderstand the regulation, I could be fined $37,500 per day. That is a pretty scary thought for a producer like myself.

Over the next 90 days farmers like myself will be hard at work in the fields, and at least the agency should extend the comment period to 180 days to allow farmers to fully access how the rule will impact our business, so we can provide proper feedback. It would even be better if Congress took action in—it would even be better that if Congress took action—in 1972, Congress proposed to limit EPA authority to navigable waters, and in 2010 Congress rejected the legislation proposal that would do—that EPA now is attempting to do.

I hope that Congress will help the—help farmers convince the agencies to ditch the rule. And thank you for the opportunity to testify today, and I will answer any questions. Thank you.

Mr. SHUSTER. Thank you very much. Ms. Fidler, proceed.

Ms. FIDLER. Thank you. On behalf of CONSOL Energy—thank you. On behalf of CONSOL Energy, a leading diversified energy company headquartered in the Appalachian Basin, and CNX Gas Company, a subsidiary of CONSOL Energy, we would like to thank you for the opportunity to address the committee on the proposed rule changing the definition of waters of the United States as it applies to the Clean Water Act.

The proposed rulemaking expands upon the definition of jurisdictional waters, and would include waters not traditionally covered under the Clean Water Act. The EPA has indicated that the intent to of the proposed rule is to streamline the decisionmaking process with regards to which waters are jurisdictional waters by increasing clarity as to the definition of waters of the U.S.

CONSOL Energy feels that proposed change is unwarranted due to current Federal regulation and robust State programs that are already in place to protect waters of the U.S. The proposed change will absolutely lead to increased permitting review and processing time due to the uncertainty of jurisdictionality, which will be an undue burden on industry. The expansion of jurisdictional waters would have substantial impact across the energy industry, and all

industries, by requiring permits for impacts to otherwise isolated waters, therefore triggering additional Federal requirements with little to no environmental benefit.

In September 2013, EPA published their draft "Connectivity of Streams and Wetlands to Downstream Waters" report. The report was used as a building block for expanding the Clean Water Act's regulatory jurisdiction, however, this was done prior to the Science Advisory Board review of the report. Such expansion of jurisdiction should not be based on a report that does not address the fundamental question of significance of any hydrological connection. The Science Advisory Board has published a similar conclusion in their draft review of EPA's draft connectivity report.

In addition to the rivers, streams, and wetlands traditionally recognized as waters of the U.S., the proposed rule includes a third category, known as riparian areas. The isolated resources in riparian areas do not pose a significant or direct impact to waters of the U.S.

The connectivity report also does not fully account for the Army Corps of Engineers' "1987 Wetland Delineation Manual," which requires three field tests for determining the existence of a wetland. The author's selective literature choices led to an error in the required wetland determination analysis, illustrating that the report was not ready to be finalized when the EPA drafted the proposed rule.

At CONSOL Energy, we pride ourselves on being excellent stewards of the environment. Compliance with all regulations intended to improve and protect the environment in the areas where we operate is one of our top core values. CONSOL Energy's environmental standards go above and beyond regulatory requirements. In working toward these values, our environmental strategy relies on avoidance of jurisdictional waters, as currently defined. The proposed rule change would significantly limit our ability to avoid newly regulated jurisdictional waters. The additional planning, retraining, permitting, and mitigation associated with this limitation significantly impacts our project lead times and costs.

To demonstrate these impacts on a coal project, we have prepared two exhibits. This first one shows stream resources in an impact area as the rule is today. This is a large project that is just in the planning and design phase. We haven't had a JD completed on it yet. This project as is right now, we are impacting 82,000 linear feet of streams. Now, if the rule were to be approved, this is how the impact area is increased. And this is actually a liberal determination, and we are only assuming a 100-foot buffer zone.

However, if the rule was interpreted in the most conservative way, this entire area could be considered wetland area, and our impact would be large. Overall, it is an increase of 10 percent stream resources, 15 percent wetland resources, and an additional 581 acres of this riparian area. It is a significant—it has a significant effect on our cost, and we are estimating, to mitigate this area, it would add over $10 million just to this project.

In closing, CONSOL Energy would like to re-emphasize that we do not support the proposed rule changing the definition of the waters of the U.S. These changes would lead to considerable permitting delays, additional mitigation cost, and a loss in our ability to

consistently avoid and minimize, while extending waters of the U.S. coverage into areas that have no significant hydrologic connection to jurisdictional waters. Thank you.

Mr. SHUSTER. Well, thank you all. Thank you, Ms. Fidler. Just let me start with you, Ms. Fidler. You mentioned this project here. You are confident under the current rule, on the way you had it laid out in the first slide, that you can protect those streams and the quality of water there with what you are doing?

Ms. FIDLER. We will impact those streams, and we are—we plan on impacting those streams. It is budgeted, it is planned for. We will be mitigating in the same watershed as our impact. However, when you look at the project, if the proposed rule were to be applied, we would still probably complete the project, however, it would have to get some really hard—we would have to take a really hard look on whether or not we would be able to mitigate——

Mr. SHUSTER. Right.

Ms. FIDLER [continuing]. Our impact.

Mr. SHUSTER. Right. Thank you.

Ms. FIDLER. Um-hum.

Mr. SHUSTER. And I think it has been pointed out here by a number of you that—especially Mr. Nagle, that this proposed rule, there is great uncertainty. You are not sure how it is going to be—once it is—if it is implemented, how it will be rolled out there by the agency. And so I think good for us to—for me to start with the question. Mr. Murin pointed out that when you did the first Pennsylvania State Programmatic General Permit, you said that you put your comments in to the Corps, and they didn't pay attention to them. Is that correct? That is what your statement said?

Mr. MURIN. Generally, yes. As part of the SPGP process, both the Corps and the Department conduct a negotiation. As I mentioned, it is an Army Corps permit, but we did have some concerns about some of the interpretations——

Mr. SHUSTER. Sure.

Mr. MURIN [continuing]. That were being——

Mr. SHUSTER. Yeah, but, going back before that, is that typical of the Corps of Engineers, or when you are dealing with the Federal agency, that they disregard many of your suggestions?

Mr. MURIN. I wouldn't say it is typical. I mean, it is a negotiated process.

Mr. SHUSTER. Sure.

Mr. MURIN. So each time—especially with SPGP, as I mentioned, that we are in the fourth iteration of it now, and so each time there are some discussions, and some of our suggestions are taken, recommendations, sometimes they are not.

Mr. SHUSTER. Right. And Mr. Peter and Mr. Nagle, what has your experience been in the past? Not looking forward to this new rule, because, again, we don't know, you know, what kind of impact it is going to have. What has your experience been dealing with these different agencies at the Federal level? Has it been one that it is ever increasing the burden on you, and—with getting minimal results?

Mr. PETER. That is correct. It is always a timely manner, you know, and it just delays projects extensively on the time factor,

which always increases costs. You know, there is not speedy correspondence and so on, so it is very timely.

Mr. NAGLE. I have had no personal experience with any—prior to this ruling coming, because with me—part of becoming a farmer, I have not had to experience anything with the EPA, so that is why the uncertainty where we go—here.

Mr. SHUSTER. And in your daily activities out there on the farm, there are times when, what you mentioned about playgrounds and your farm, that water will lay somewhere, maybe depending on your farming techniques? Is that a big concern of yours?

Mr. NAGLE. That is a large concern of mine, because, you know, if you have a rainfall that produces, you know, 2 inches of rain in 20 minutes, anyone's ground, or especially our fields, are going to have some streams, you know, intermittent rain streams. And we work with—pretty closely with NRCS now to have compliance, as far as conservation plants, nutrient management plants, to ensure water safety. You know, we have our field conservation strip, a 90-foot strip to prevent erosion, so we are pretty much taking all the precautions now. And, with further regulations, things could be more difficult for us.

Mr. SHUSTER. Right. And things like, at a construction site, or on a farm, if you get a wet day, and you get ruts from your equipment that you don't tend to, that can potentially have an unintended consequence of having water lay in it. So things as simple as that can have an impact. Is that correct?

Mr. NAGLE. Yes.

Mr. PETER. Yeah, I would think so. I mean, something as small as a very minor tributary that only has water in it when you have an excessive amount of rain, if they look at that, you know, I mean—and with our topography, especially here in Pennsylvania, I mean, we are all hills and valleys, and, you know, we get a heavy rain that comes down, it is going to run somewhere. You know, it is just a rain shower, but those, you know, if they look at those as being protected waterways, just a little stream that only happens whenever it rains, or like you are saying, a low area, or something in a playground that lays water, that could be just detrimental to the construction industry, and I am sure to the overall economy.

Mr. SHUSTER. Right. It has been my concern that, you know, in Washington, DC, we do a one size fits all for everything, and that somebody tells these bureaucrats in Washington that, you know, the Pennsylvanians don't love their land. I look here, everybody here is drinking—everybody here drank, I think, Pennsylvania water this morning, and we all care about water quality.

And for the Federal Government to—it is not just in the environment. It is everything we do that happens in Washington, that they feel as though we don't love our children enough to educate them, we don't love our environment enough to protect it. So, again, I have grave concerns that this is going to happen, if it does happen, that we will see a never-ending rampup of regulations. And, again, a site like this, it is going to cost $10 million, potentially more.

Ms. Winkler, your experience has been with the stream crossings, it increases the cost of your doing business?

Ms. WINKLER. It does significantly increase our costs, not only in additional permitting, but in the delays, which has been mentioned

before, which increases total project costs overall. Not just in construction, but in just delay in getting gas in to market.

Mr. SHUSTER. Right. Thank you. And with that, I will yield to Mr. Gibbs for some questions. We will probably have two rounds of questions.

Mr. GIBBS. Thank you, Mr. Chairman. Mr. Murin, I am, you know, earlier this month, a few weeks ago, Secretary Darcy, the Secretary of Army Corps-Civil Works for my subcommittee, and—we talked about this proposed rule. And, you know, I kind of tend to almost interpret, maybe the general public might too, that by them putting out this proposed rule, they are implying that States aren't doing their job.

And I would first like you to comment on that, but, I am concerned, you know, Mr. Peter made some good comments about, you know, consistency, timely—delay—possibly delay permit—further. You know, as Chairman Shuster said, one-size-fits-all policy on Washington. Can you just kind of expand on what your thinking is? Is there really a need for the U.S. EPA and the Army Corps to expand their scope of jurisdiction, you know, how that applies to, you know, the job you are doing here in Pennsylvania as a State regulator?

Mr. MURIN. OK. Yeah, I—at this point in time, as I mentioned in the testimony, is that we haven't had a chance review the proposed rule yet, so, as far—it might be a little premature to anticipate what maybe the Corps or EPA is proposing. But at least currently, under the current rule, we see it as working pretty effectively, for the most part. Certainly, as I testified, that there are some anomalies as it deals with—especially the pipeline projects, and how certain definitions are interpreted, what the procedures are.

But from Pennsylvania's standpoint, we are looking for that efficiency. We want to have a consistent viewpoint. Anything that the State can certainly handle at the local—at the State level, or at the local level, that is something that we would like to promote. Certainly there are some differences. There will probably always be some differences because of the different legal authorities. But, from a State perspective, seems like things were—are working, for most part, pretty well.

Mr. GIBBS. Does—to build on that a little bit more, I have heard some, I think, testimony today about the Baltimore District of the Army Corps, and it talks about the individual stream crossings, the pipelines. Is Baltimore District doing something different here in Pennsylvania than the rest of the districts around the country are doing, you know, in regards to the permitting process?

Mr. MURIN. Overall in Pennsylvania, not just the Baltimore District—there are three Corps districts in Pennsylvania, Pittsburgh, Baltimore, and Philadelphia. And the Baltimore Corps District is the lead district, so it helps coordinate activities statewide. It is different from the standpoint that we do have the SPGP process. Some other States do rely upon the Nationwide Permit, the Nationwide Permit 12, as I mentioned, and some other folks that had testified as well. So, from that standpoint, there are some differences. I believe there are about 20 States around the country that have a SPGP process, rather than relying upon the Nationwide Permit.

Mr. GIBBS. All right. OK. Thank you. Mr. Nagle, a couple weeks ago, in Ag Committee, we had Secretary Vilsack before the committee, and I asked the Secretary if normal farming operations would be exempt under the rule, and he said absolutely. But then he had 52, I think it was, specific exemptions especially for dealing with the NRCS, the Natural Resources Conservation Services, farmers. Do you have any thoughts about why they would have to have a list of exempted rules if they think the rule—all farming opportunities are exempt?

Mr. NAGLE. Yeah, I don't know why they would have all farming exempt. I don't know why they would have a list of exemptions that would have to do with our current thing with NRCS, technically involved with crop insurance, and things like that. We have to be in compliance with NRCS. So I would think, as a whole, generally, most farmers are already in compliance, so it kind of alarms me that they are asking for additional exemptions, if they are exempt. So that is kind of the problem that we—and I have, is the cloudiness of it.

Mr. GIBBS. Yeah, I am really concerned about it too, because they make the statement that normal farming practices are exempt, but then they produce this list of specifics, and I don't really know the necessity of that. And I also would be concerned, you know, just—I believe that this administration thinks that they already have jurisdiction of all waters of the United States, and then—State sovereignty issues are really concerning to me. I am going to yield back to the chairman, but we will do another round. Thank you.

Mr. SHUSTER. Thank you, Mr. Gibbs. Like you say, we will have a second round. Now yield to Mr. Denham, chairman of the Subcommittee on Railroads, Pipelines, and Hazardous Materials, and he also happens to be a farmer from California, so he knows these issues that we have been talking about here today very, very well. So, with that, I yield to Mr. Denham.

Mr. DENHAM. Thank you, Chairman Shuster. Ms. Fidler, looking at your map over here, what type of boats go on these different waterways here? Do you have any vessels that go on those?

Ms. FIDLER. None that I am aware of.

Mr. DENHAM. No?

Ms. FIDLER. No.

Mr. DENHAM. No boats? So——

Ms. FIDLER. These are very small——

Mr. DENHAM. You——

Ms. FIDLER. It is a very small stream.

Mr. DENHAM. Could you even put a canoe, and maybe—put a paddle in the water, and——

Ms. FIDLER. Not even after a large rain event.

Mr. DENHAM. So not navigable by any means?

Ms. FIDLER. Not in my opinion.

Mr. DENHAM. Do they ebb and flow with the tide? Does the tide create any movement in these?

Ms. FIDLER. No, sir.

Mr. DENHAM. How about interstate or foreign commerce? Do you have any vessels that go through those that create commerce in the local area?

Ms. FIDLER. We do not.

Mr. DENHAM. Thank you. Now, obviously I asked those questions, because that is why the Clean Water Act was set up, from a national perspective. Mr. Murin, in California we have a State Water Board, and that State Water Board, has a great deal of regulatory authority over our farms, our water that comes off of our farms, certainly all of our different waterways. Do you have something similar here in Pennsylvania?

Mr. MURIN. Not that I am aware of, no.

Mr. DENHAM. So do you have any regulations over your local and State water usage?

Mr. MURIN. Yes, yes, we do, and the Department of Environmental Protection has the laws and regulations that we implement.

Mr. DENHAM. And do you feel the need to have greater regulation, from a Federal perspective, or is Pennsylvania getting the job done currently?

Mr. MURIN. I believe that we are getting the job done currently, based upon the implementation of our laws and regulations.

Mr. DENHAM. So moving the standard from navigable waters, which obviously these are not navigable waters, to jurisdictional waters, waters of the United States, how is that going to adversely affected your regulatory authority?

Mr. MURIN. I don't know if I can answer that right now. As I said, we haven't fully—or fully reviewed the proposed rule. I think, from Pennsylvania's perspective, based upon the definitions that we have, for what we regulate under our Acts and our regulation, that we pretty much have all those waters already covered.

Mr. DENHAM. To what size? What size of water are you regulating?

Mr. MURIN. It is—it doesn't regulate as far as size. I mean, all wetlands are regulated in Pennsylvania. Under the Clean Streams Law, we do have regulation over all waters that are defined in the Clean Streams Law. Streams, creeks, rivulets, dammed water, ponds, it goes on. Under the chapter 105 regulations, as far as streams, it is pretty much everything that has a defined bed and bank, to keep it simple.

Mr. DENHAM. A bed and bank, meaning?

Mr. MURIN. A bed of a stream with an established bank. There is a difference in elevation between where the stream flows and the bank.

Mr. DENHAM. But a pond as well? You would have regulatory authority over a pond?

Mr. MURIN. We do have some regulatory authority over that, certainly in the Clean Streams Law, and then from the Dam Safety Encroachments Act and chapter 105; it would depend on certain factors.

Mr. DENHAM. And this new jurisdictional—what I would consider an overreach would not only regulate everything that you have described, but even go further to mud hole, puddle? I mean, this becomes a land use policy, as well as just water use, would you agree?

Mr. MURIN. If it is—if the—if it is as you described, it would expand it from that perspective.

Mr. DENHAM. Thank you. Mr. Chairman, my time has about expired. I will yield back.

Mr. SHUSTER. Thank you. And, with that, go to Mr. Perry for questions.

Mr. PERRY. Thanks, Mr. Chairman. Mr. Murin, I am trying to figure out, and it seems that you would be the best person on this panel, maybe, to enlighten us as to what tangible clean water benefits, what water quality benefits, will be realized if this rule is enacted?

Mr. MURIN. Again, I am not sure the specifics of what is proposed, but based upon what is existing, certainly the tangible benefits are protecting wetlands——

Mr. PERRY. I know what is existing. I am——

Mr. MURIN. Yeah.

Mr. PERRY [continuing]. Talking about what is proposed.

Mr. MURIN. Yeah. And I can't——

Mr. PERRY. OK. All right.

Mr. MURIN. I am sorry, at this time I can't——

Mr. PERRY. All right. So would—based on what we think is proposed, if Mr. Nagle drove his tractor through a field, and there was, you know, there had been a rain maybe a week before, and there is a portion of it that is a little lower, but he is trying to get his crops in or out, maybe he gets a little close to it and leaves a ditch. Maybe he has to pull his tractor out with another tractor because he gets it mired into the axle, and—so on and so forth, leaves a ditch, can't repair the ditch for some time because it is muddy. Ditch fills up with rain, with water. Is that now, under the current—or under the proposed rule under the jurisdiction?

Mr. MURIN. Again, I don't know. As far as—if there is no change to what is defined as far as a wetland, the wetland area would have to have the soils, the hydrology, and the plant community——

Mr. PERRY. It says ephemeral bodies of water.

Mr. MURIN. Yeah.

Mr. PERRY. Is that—would that be considered ephemeral?

Mr. MURIN. No.

Mr. PERRY. It is transient, it is not permanent, but there is water in it. What would the length of it have to be for it to be ephemeral?

Mr. MURIN. I think there would have to be connectivity to other——

Mr. PERRY. So if it was a low-lying area——

Mr. MURIN. Yeah.

Mr. PERRY [continuing]. That is generally dry, but occasionally wet, there is a ditch in it with water in it now, could the connection be made?

Mr. MURIN. I guess it could.

Mr. PERRY. OK.

Mr. MURIN. Yeah.

Mr. PERRY. Yeah. Point taken. So I have got a swing set in my backyard for my kids, and where they swing, you know, their feet grind out the dirt. There is much that—I try to put it back in and plant it, and so on and so forth, water in it. You are saying no, but it is up to—is it—would it be up to interpretation?

Mr. MURIN. Yeah, I think that is——

Mr. PERRY. Yeah, that is a problem.

Mr. MURIN [continuing]. When it comes down to——

Mr. PERRY. That is a problem for me.

Mr. MURIN. As far as the Department is concerned, those were—would not be areas that we would——

Mr. PERRY. As far as your Department is concerned right now.

Mr. MURIN. Right.

Mr. PERRY. However, you have been in a position on many occasions to enact things and enforce things foisted upon us by the Federal Government, even at your displeasure or disagreement. I would cite the Chesapeake Bay strategy, to a certain extent, to some of that. But I don't want——

[Inaudible.]

Mr. PERRY. Let me move on. I want to ask Mr. Spigelmyer a question. I have got a narrative here out of the Los Angeles Times, 4/26, so this is just a couple days ago, regarding energy prices going up for good. And it says, "The Federal Government appears to have underestimated the impact as well. An Environmental Protection Agency analysis in 2011 had asserted that new regulations would cause few coal plant retirements. The forecast on coal plants turned out wrong almost immediately, as utilities decided it wasn't economical to upgrade their plants, and scheduled them for decommission."

In vain—in light of that, in light of increasing prices, and in light of, you know, and other statistics in the same article, "Current regulations going into effect next year will result in 60 gigawatts of electricity out of the grid, which is tantamount to 60 nuclear reactors." Based on that, when people say, you know, the regulations aren't mattering all that much, you gas drillers, you oil people, you can go somewhere else. Taxes—you, you know, or no, you can't go—the gas is here. If you want the gas and the oil, you have got to get it here. You folks in the energy industry, any other options?

Mr. SPIGELMYER. First of all, yeah, Congressman, let me come back to the point that you made about electric power choice, and costs there. In 2007, 2008, the Public Utility Commission and the Commonwealth were actively talking to consumers across the—about the rate caps coming off, and power rates going up dramatically. At the same time, we were producing, you know, ample supplies of natural gas, and growing that supply rapidly through horizontal unconventional development.

Prices dropped fairly rapidly. Power choice was made. Many of the generators in the Commonwealth, and this region, moved to natural gas, saving consumers billions from where we were going to be with rate caps coming off. Certainly added uncertainty with regulatory—with a regulatory environment. Added costs across the power generation sector will have an impact on price, no doubt about that.

Mr. PERRY. Mr. Chairman, with your indulgence, just want to draw the thread. What I am trying to show and illustrate is that Mr. Murin, who is from the DEP, and this is his expertise, although he has, you know, he is not representing the Federal Government, the EPA, in this regard, but he is going to be the—they are going to be the agency that has to enforce a lot of this stuff in the State, and any other State, their—tantamount agencies would do the same thing, could quantify very little value in this regulation.

And the other side of the equation, whether you are in the farming industry, or whether—energy industry, additional regulation is going to cause significant tangible problems, especially in the energy industry, where there is a lack of power, especially during peak times, or unexpected things, like the polar vortex, or exceptionally hot periods of time, where everybody is running their air conditioning, that we are going to have blackouts, brownouts, not to mention—notwithstanding the increase—the great increase—46 percent is what the article says the increases in prices will be. So nearly 50-more percent based on nothing else more than these regulations. And I yield back.

Mr. SHUSTER. Thank the gentleman. Appreciate you making those points. With that, Mr. Rice is recognized.

Mr. RICE. Thank you, Mr. Chairman. Well, at this panel here we have got represented food, energy, and construction, and regulation. Food, energy, and construction. We are talking about a process here that will lengthen the time for permitting, make it more difficult, and run up the costs, right? I don't know what we are concerned about. We are just talking about food and energy, for God's sake. Maybe we are overreacting here. Everybody in this room wants to protect the environment. This is one more example of Federal overreach. And my whole focus in Congress is on American competitiveness and jobs, and certainly food cost directly affects that, and certainly energy cost directly affects that.

I believe the current administration thinks we need to be off fossil fuels altogether. I think that is their ultimate goal, and they want to run up the cost of fossil fuels to the point that alternative energy makes sense, because that is the only way it makes sense in the current environment. Hey, in the long run, I hope we are off fossil fuels eventually. I hope we are on alternative fuels. But we are not ready yet, are we? We don't have the technology for it. So we have got to keep using what we have got.

And, in my opinion, we should do everything we can to make that available, within reason. We need to protect the environment. But if we are going to be spending money on fossil fuels, we need to be doing it using our resources, I believe, and keeping our wealth here, instead of sending it overseas.

I think that the cost of fuel is a fundamental factor in American competitiveness because, on the one hand, we create jobs right here using our own fuel, and we also keep our wealth here, which—and we create a tax base here, and we can use the taxes to build our own infrastructure, and all those things factor in competitiveness. But also, by putting these additional regulations on, by dragging our feet, not necessarily going out and stopping energy exploration, not necessarily going and putting up roadblocks to prevent it, but just not helping, by the Federal Government not helping with it, that we hold costs up.

The war on coal, I have seen projections cost the average consumer $40 a month on their utility bill. When the President took office, fuel at the pump was $1.80 a gallon. Now it is $3.50 a gallon. Even though those monies don't go to the Federal Government, there is still taxes. You still have to have the stuff. That is money out of consumers' pockets. That consumer spending is two-thirds of the American economy.

And should we wonder why we have 2.8 percent growth 6 years after the Great Recession, should we wonder why we have 6.7 percent unemployment—who here believes that 6.7 percent is an accurate reflection of our unemployment in this Nation? I don't either. So—no, I think that this is one more example of the administration maybe not putting up direct obstacles to energy exploration, but it is a way they could help, a way they are dragging their feet. Keystone pipeline, absolute case in point.

There is a paragraph, Mr.—is Nagle or Nagle?

Mr. NAGLE. Nagle.

Mr. RICE. Nagle? In your written testimony that I thought was great. It says, "It is extremely difficult for me and my fellow farmers to trust the intentions of Federal officials in development of this proposed rulemaking, given the history of continuous effort of certain Federal agencies to expand their power and authority. These Federal agencies have tried to claim authority under the Clean Water Act of virtually any land area over which a bird flies. Federal agencies have openly tried to lobby Congress to remove the word navigable from the Clean Water Act. These types of actions make me, and other farmers, very doubtful that Federal officials will apply this new volume of regulations in a way that is fair or reasonable to us, or considerate of our needs and daily challenges."

Well, I don't understand your concern. For goodness sake, you don't trust the Federal Government? Yeah. Who was it? Was—I think it was you, Mrs. Winkler. Were you saying that in—looking at a stream crossing, that the Army Corps now looks at the gas flowing through the pipeline, and its effect when it is ultimately used? Was that you, or was that you, Mr.—one of you was talking about that.

Ms. WINKLER. Go ahead. I think it was you.

Mr. RICE. Yeah.

Mr. SPIGELMYER. Actually, it wasn't necessarily the gas flowing through the pipeline, but taking a look at overall impact, rather than the authorized use that we are trying to permit.

Mr. RICE. So there—I know on the Keystone pipeline they are looking at the ultimate burning of the fuel, in terms of whether or not they are going to approve that pipeline. Are they doing that here as well?

Mr. SPIGELMYER. Go ahead.

Ms. WINKLER. In my experience, I haven't noticed that so much as—really it has been the State of Pennsylvania to discuss about how we—a topic many of us have touched upon already. I think the State is doing a good job looking at each individual impact of every single stream, be it ephemeral, intermittent, or perennial. In my personal experience as a consultant, and working at Rice, I have yet to encounter a single permit in which the Army Corps comes in an requests anything different than what the State is already requesting us to do for protection.

And so, in terms of the material flowing, I haven't noticed that they are really looking at that. But in terms of each and every individual crossing, the State is already looking at that. The Army Corps isn't adding anything but additional time.

Mr. RICE. My time.

Mr. SHUSTER. Thank you. We could talk a little bit more about that, and I have been making the case that for the past 50 years or so the DEP in Pennsylvania has done just that, and the Corps just lays that layer over. I think it is Washington bureaucracy. Looking at the Marcellus Shale clay sand, there is 50 years of gas there. That means there is work for us, so that is why they put that layer in there. And we have been trying, in Congress, to push back on that. Unfortunately, we don't have a Senate that is willing to work with us to do that.

Can you talk about your experience, Pennsylvania versus Ohio, when it comes to permitting? Ms. Fidler, you can——

Ms. WINKLER. I think this will work better, thank you. Certainly. Rice is actually fairly new to our operations in Ohio. We just started within the past year. But what we have noticed is our ability to get into the construction phase our pipeline projects is incredibly fast. And from the time that we are ready to—we are—we start permitting to the time we are in construction, we are looking at 45 to 60 days, versus my experience in Pennsylvania for a similar type of project, a short gathering line, maybe just a couple miles, in Pennsylvania I am probably looking, on an average, of about 100 to 120 days.

So, again, when you are looking at a cost of doing business——

Mr. SHUSTER. Time is money.

Ms. WINKLER [continuing]. The exact same—similar type of project, Ohio is much faster under the Nationwide Permit 12 process. And, again, it is the exact same—similar type of controls. Rice Energy has actually gone above and beyond what Ohio currently requires, and we follow the Pennsylvania DEP rules for all our erosion control and sediment controls for our pipeline projects in Pennsylvania. But in just—we don't have that double layer of regulation. We aren't going through the DEP and the Army Corps. We are just going through one agency.

Mr. SHUSTER. And the topography, the geology over in——

Ms. WINKLER. Where——

Mr. SHUSTER [continuing]. Ohio, is it similar to Pennsylvania?

Ms. WINKLER. Where we are operating in Ohio, it is similar to Pennsylvania. We are in southeast Ohio, so the same type of rolling hill and terrain. Same type of concerns with, you know, sediment potentially running downhill. It is just—it is a difference of not having to get through as much regulation. But, again, you are getting the same type of controls, same result in the protection.

Mr. SHUSTER. Ms. Fidler, did you have the same experience?

Ms. FIDLER. Yeah, I think we have had the same experience as Ms. Winkler has with rights, and—on both the coal and gas side of our operations. You know, looking from State to State, and our coal operations in West Virginia even, it seems the permitting process is more organized, more consistent, and more clear. It seems a lot easier. And so, when you are evaluating a project, Pennsylvania kind of might land in second or third place.

Mr. SHUSTER. Right. Mr. Spigelmyer?

Mr. SPIGELMYER. Yeah. Mr. Chairman, due to the activities of both you and your office, as well as, you know the House Committee on Transportation and Infrastructure, we have seen some improvement in delay times at Army Corps. But, that said, it is

still redundant, it is duplicative, and it is time consuming to go through that process with little to no environmental benefit——

Mr. SHUSTER. Right.

Mr. SPIGELMYER [continuing]. Being achieved. And, as you mentioned a moment ago, time is money, and delay is money.

Mr. SHUSTER. Right. And, you know, that is the case we have been making—Mr. Spigelmyer has been making with your coalition. And whenever we bring in people from industry to sit across the table from the Corps of Engineers, the natural inclination is, because of the fear of the Federal Government, is the industry isn't punching hard enough, making their case forceful enough, and so we have got to continue to do that.

And again, you know, I understand, when you see what the IRS has done to groups out there, and the fear they have, again, coming up against a Government agency, the thought is, are they going to delay my permit a couple more days, or a couple more weeks, and cost me even more money? But we have got to make the case. And I guess Mr. Spigelmyer, you are the heavy hand of the industry, to come in and punch back. You have been doing a great job of that. But we have got to continue to make this case, because when we see this new regulation potentially coming out on the waters of the U.S.—I appreciate the fact that, Mr. Murin, you haven't fully looked at this. It looks like CONSOL is really aggressively looking at it. That is because it is going to cost you lots of money, so you are looking at it aggressively, but this is the first hearing we have had on it.

The rule only came out formally about a week ago, I guess, so Mr. Gibbs, I believe, has announced a hearing on May 8th on his Subcommittee on Water Resources and Environment, so I would encourage the State of Pennsylvania, DEP, to really come forward with your views on this. And we will, of course, be urging States across the country and industry that are going to be impacted by it. I know that the farmers and the construction industry have been looking at it, so again, we want to make sure that we get your views, because you are going to be the folks that live with this, if it is.

We are fighting it. We are going to continue to fight it. But, you know, it is problematic, and it is—we think it is tough now with the stream crossings, I think this will probably—Mr. Murin, would you say that if this—although you haven't looked at it in depth yet, but—if a reg comes out affecting the waters of the U.S., do you think that would affect stream crossing permitting in Pennsylvania? Add——

Mr. MURIN. It certainly could. I mean, certainly it is the Department's perspective, again, to work with the Corps and the EPA to identify how we can best coordinate those activities, but—and we put in some policies and procedures ourselves to help ensure that that is done at the State level. But certainly the unknown is what would be done at the Federal.

Mr. SHUSTER. Right. And, Mr. Perry, you mentioned that—is it the Los Angeles Times article that said a 46-percent increase?

Mr. PERRY. Forty-six.

Mr. SHUSTER. And what was the timeframe that they said——

Mr. PERRY. They said, I think, 15 years——

Mr. SHUSTER. Fifteen years?

Mr. PERRY [continuing]. Depends on what State you are in.

Mr. SHUSTER. And I think that is something we haven't seen here. I just had a coal-fired facility in my district close down, one next door in Congressman Murphy's district, to two coal-fired plants. I think the estimates are, like, 390-some coal-fired plants will shut down in the coming years.

And the American people haven't realized the impact of energy costs going up as Mr. Perry quoted there. So that is a scary thought, to see that our energy costs are going to go up that much in the next decade or so because of these regulations.

With that, I will yield to Mr. Denham for any questions that he has. OK. Any—Mr. Gibbs?

Mr. GIBBS. Thank you, Mr. Chairman. I want to comment, I am glad Ohio is competitive. Welcome to Ohio. Come over to Ohio. I know we have got a lot of rigs from Pennsylvania there in Ohio right now, and you are very much welcome there.

Mr. Spigelmyer, you know, on your permitting delays, when did the Marcellus kind of take off? What—how long has it been now?

Mr. SPIGELMYER. The first Marcellus horizontal well was drilled in 2004, but real rampup in development began around 2008, late 2007.

Mr. GIBBS. How—what—roughly what percentage of current wells are shut in because they can't get the connecting——

Mr. SPIGELMYER. It is probably less than 10 percent, but close to 10 percent, and that is a pretty significant number when you think about the fact we have drilled about 7,000 wells in the Commonwealth to date, that have changed the outlook for natural gas supply not only for this Commonwealth. We have moved from a quarter of the natural gas that we consumed in the Commonwealth to being a net exporter, producing 20 percent of America's natural gas demand from this region now. That is a pretty incredible feat in a short period of time. But when you start talking about 10 percent of your wells being shut in because of lack of pipeline infrastructure, or the delays associated with being able to build that infrastructure, it has significant impact on those——

Mr. GIBBS. Yeah, there is no doubt. I know in Ohio, in Utica, we have—it is more wet gas——

Mr. SPIGELMYER. Right.

Mr. GIBBS [continuing]. And we are building 11 separation facilities——

Mr. SPIGELMYER. You bet.

Mr. GIBBS [continuing]. Currently, and we have to connect them all up, and the gathering pipes—the pipelines to—break out the ethylene, and all the other wet gases, and dry gas, and it was a little different.

Mr. SPIGELMYER. Yeah. We have an interesting situation in Pennsylvania, where we have a little bit of both. We have probably a world-class dry gas play in the northeastern part of the Commonwealth. Some would call it Gucci gas. It is pipeline capable gas almost right out of the well. And we have wells in northern Pennsylvania that may be the best in the world. Southwestern Pennsylvania is under-pressured. It does yield heavy hydrocarbons, ethane, pentane, butane, isobutene, propane.

All those liquid streams are there, and our operators are active, and need to do that same exact work that you are talking about in the eastern area of Ohio, building compression, building cryogenic facilities, pipelines, and gathering facilities. And we are very hopeful that soon we will also have cracking technology available to open up new opportunities of manufacturing.

Mr. GIBBS. I will just open this up to the entire panel, but I am really concerned in the proposed nearly 400-page rule, which kind of blows me away. I know Secretary Darcy, in my committee a couple weeks ago, made the comment about case-by-case basis. And if you read through that rule, seems like there is a lot of discretion by the Feds to define what a tributary might be. You know, I think we had some discussion already. It could be a road ditch, obviously.

But does anybody want to—I really want to hear case by case, if you talk about inconsistency, and a lack of certainty, and—I think we see a little bit here with the Baltimore Corps District, versus maybe the Huntington District, when—talk about pipeline permitting. Anybody want to expound on that case-by-case scenario that they are talking?

Ms. WINKLER. OK. Well, I know, just from my experience, Rice is somewhat unique in that our operations in Pennsylvania, and our operations in Ohio, are all in the Pittsburgh Corps District. So to see the difference between a permit submitted in Pennsylvania, and a permit submitted in the—in Ohio, in the comments that you—the process is just amazing, even though it is going to the same Corps.

Now, in terms of individual projects, and—I know right now in Pennsylvania, if it is a roadside ditch, we are already calling it a stream. It is an ephemeral stream. We do that. At least in the southwest region, we are required to do that. That—I think—really, all we are asking for, as an industry, we just want some consistency. You know, I don't necessarily agree with having to call a roadside ditch a stream——

Mr. GIBBS. Yeah, I was just going to say, I would be careful with that, but——

Ms. WINKLER. Yeah. But what we are asking for—and I know Rice doesn't either, but we just need—all we are asking for is just some consistency. If it is a roadside ditch, it is a roadside ditch. You know, it is not carrying—it is not navigable. You can't put anything on it. It is not carrying any large amount of water any one time. And so——

Mr. GIBBS. I just wanted to ask a quick question——

Ms. WINKLER. Um-hum.

Mr. GIBBS [continuing]. Of Ms. Fidler. You talk about the Science Advisory Committee hasn't reported yet. I brought that up with Secretary Darcy, and I got kind of a gray answer. You stated in your comments that the report hasn't been put out yet, is that correct, and that it is—or it is under review, and—but they put the proposed rule out there anyways?

Ms. FIDLER. That is right. The EPA's draft report was put out before the Science Advisory Board had an opportunity to review it. And right now, on their Web site, the Science Advisory Board's review is in a draft form—draft form.

Mr. GIBBS. OK. Thank you. Thank you, Mr. Chairman.

Mr. SHUSTER. Mr. Perry?

Mr. PERRY. Thanks, Mr. Chairman. I am going to start out with Ms. Winkler. I understand that no other district of the Army Corps approaches the permitting function for gathering lines, water transfer lines, and other linear facilities in the manner, and with the requirements now in place in Pennsylvania. If you are, if you are able to explain, why the difference with the Corps, how it treats Pennsylvania, and everybody else?

Ms. WINKLER. Well, I think that is in regards to the PA SPGP–4 with the aggregation of all of our impacts. If you are in Ohio, each stream of—each stream crossing is considered its own individual project.

Mr. PERRY. Same work in Ohio, same work in Pennsylvania.

Ms. WINKLER. Same work——

Mr. PERRY. Why is it treated differently?

Ms. WINKLER. I cannot answer that question for—but I——

Mr. PERRY. OK. Mr. Murin, can you answer——

Ms. WINKLER [continuing]. They do.

Mr. PERRY [continuing]. Answer that question?

Mr. MURIN. I would answer it the same way, that it is in the way that the interpretation is of some of the terms.

Mr. PERRY. So the point I want to make is that the Federal Government, whether it is the EPA, or the Corps of Engineers, or anybody, has the ability to interpret, based on what they view, and it can be completely different for one citizen or another based on that interpretation, and nothing else. Is that—am I right or wrong, based on what you know about the Corps' decision in Pennsylvania, versus the neighboring State of Ohio, or any other of the 49 States?

Mr. MURIN. My understanding is that the Corps can make those regional determinations.

Mr. PERRY. Right. OK. So—and herein lies, you know, the problem with giving the blanket authority to the Federal Government, whether it is the EPA or the Corps of Engineers. Mr. Peter, you build houses, right?

Mr. PETER. Correct.

Mr. PERRY. So, based on your testimony, and I agree, based on what I have read, regarding the proposed rule, the term shallow, or shallow subsurface connection, leaves the door completely open, and unbounded jurisdiction by the Department, or blanket jurisdiction for determination. So you build houses, right?

Mr. PETER. Um-hum.

Mr. PERRY. You buy a piece of ground, you are doing a spec home. Maybe you are doing some townhomes, some low-cost housing so people can get in the first time. You are working with the local zoning commission, the local planning commission. You get your stuff in order, and you start building, and it is based on a price point for somebody to get in. Maybe a first time homeowner like I was at one point, $100,000, $150,000, something like that.

And all of a sudden this subsurface connection, below the surface, is made between the ditch your pettibone made putting up the roof and the stream a quarter mile away. What does that do to your price point? What does that do to your business?

Mr. PETER. Well, I could see, you know, definitely affecting the cost significantly because of it is happening to, you know, if they

take it into consideration as, you know, as a waterway, I mean, to protect that, and——

Mr. PERRY. How will you know about the subsurface connection? How do you know?

Mr. PETER. You don't. I mean, and that is——

Mr. PERRY. How do they know?

Mr. PETER. Yeah. I don't know what the—I don't know how anybody would know what is there.

Mr. PERRY. Well, how can you plan for that when you are doing your cost estimate about how much you are going to sell that home for to a new time home buyer—first time home buyer?

Mr. PETER. It would be very difficult to plan for. You know, the only thing that you could do——

Mr. PERRY. Wouldn't it be just a guess, like, a hope, that I could build it before EPA came in and made the connection?

Mr. PETER. Right. It is—correct. It is either that, or, as I am indicating—some of which is—but sometimes you have to look at things and anticipate the worst. And, of course, then that increases the cost. And, you know, if that is—comes to that point, when you are looking at something like that, you may have to build a factor in there if you experience—and, you know, a money factor included into your project, which—and then, as I say, then, you know, we try to keep housing affordable, and that is our goal, all of us. So, if you have to do that, you know, and then maybe it wouldn't be used, but maybe it would be. But everybody is going to have to build something in there in case something like that happens.

Mr. PERRY. OK. Thank you. Mr. Nagle, you know, I think a lot of people don't understand the cost of farming when you have got a head for a combine costing $100,000, and that doesn't include the machine itself, and you need multiple heads, you need a corn head, you need a weed head. How does this potentially affect—you are—I don't know how anybody young gets into farming. You have got to pay a mortgage based on crops or animals, and mortgage on land. And I don't know what it goes for around here, but where I live, it is pretty darn expensive.

Like, nobody gets into farming. Everybody sells their farm for development because they can't afford to, even though they may love it. Explain to us how this proposed rule is going to affect new people, young people, whether they inherit the farm, or whether they want to buy the farm. How is it—how do you see it affecting them?

Mr. NAGLE. Probably some of the biggest factors affecting is the $37,500 per day fine if you are found on a rule that you weren't in compliance that you don't know if you are or you are not in compliance. I know myself, and probably most farmers, we wouldn't stay in business too long if we were out of compliance for 10 or 20 days. I mean, we don't have any—that much capital.

And then as far as the land that we farm, we have—setbacks on, you know, if an intermittent stream comes through once a year, they say you have to set back, you know, 100 feet on each side, multiplied by—if I am farming 750 acres, and pretty hilly in parts of Pennsylvania, so I am just guessing off the top—30 or 40 different ditches, that is a lot of acres that are tillable and not on crop production. And, you know, we are on a—definitely a market-based relation. We have to, you know, our bushels per acre. So that would

be—definitely affect the amount of acres that we would be actually farming.

Mr. PERRY. Let me ask you this. Do you—the acreage you currently farm, do you know all the subsurface connections right now? Do you know them?

Mr. NAGLE. No. No, I do not.

Mr. PERRY. Do you know how to figure that out?

Mr. NAGLE. No, I don't.

Mr. PERRY. Who is going to determine that?

Mr. NAGLE. I am not sure who determines that.

Mr. PERRY. Mr. Chairman, thank you. I yield.

Mr. SHUSTER. Thank you. Mr. Rice?

Mr. RICE. I have to come back to you, Mr. Nagel. You say you don't trust the Federal Government to fairly and efficiently administer these rules to farmers, and I think that equally applies to these energy companies and contractors here. It would be absurd to think that if you mishandled a ditch adjacent to one of your fields that the Federal Government might shut that field down until the dispute was resolved, and charge you $37,500 a day.

But it is also absurd to realize that it takes 10 years to get approval to build a highway, and it takes 15 years to get approval to dig out a port that has been dug out five times before. It is also absurd to think that it takes 5 years, and counting, to get the Keystone pipeline approved. So, no, I think your mistrust is well placed.

I believe that Federal regulation is a noose around the neck of the American economy. I think if we can compete fairly globally, then nobody can beat us, but we are strangling our own selves. We have a noose of regulation around our own necks, and we are strangling our own selves. I think you should keep your mistrust. I think that George Washington, and Thomas Jefferson, and John Adams, and Ben Franklin, they didn't trust the Federal Government either, and they are the ones who wrote the Constitution. So I am with you in that camp.

I think we need to do whatever we can to avoid this rule being promulgated, number one, and we need to look at Federal regulation in general, and see what we can't—can do to streamline and make it much more efficient, because it has grown completely out of hand, and this is just one area. I mean, throughout the entire Federal Government, this is a big, big problem. I have never dealt much with transportation and infrastructure issues before I was in Congress, and I have only been in Congress 15 months, but before that I was a tax lawyer for 25 years, and believe me, I understand the impact of Federal regulation on business. Thank you very much.

Mr. SHUSTER. Thank you for being here. I just have one request for Mr. Spigelmyer. The Rice Energy situation is—again, if you can talk to someone of your membership, and if they can get their Pennsylvania experience, versus—I know you have got people that operate all over the country. And, again, I understand, and that is the question to Ms. Winkler about Pennsylvania and Ohio. They are just on the other side of the river from each other. So if you can get us examples—we will even blot out the names, because, as Mr. Rice points out, and I think everybody here, you don't trust the

Federal Government. You are afraid they are going to do something to harm you financially if you spout off too loud.

Mr. SPIGELMYER. Mr. Chairman, I mean, I think there will be plenty of examples to provide you. Like you, and Congressman Perry, you represent districts in Pennsylvania. Without predictability, without certainty, capital flows elsewhere. I don't think it was intentional, but Congressman Gibbs made it real clear, it is easy to do business right now in Ohio. That is a competitive disadvantage for our Commonwealth. It is harder for us to attract jobs. It is harder for us to attract capital. It is harder for us to grow the play if we are a less predictable, a less certain environment to invest. And, you know, again, appreciate the help that you have provided, and attention you provided to this issue. We will continue to work closely and get the answers for you.

Mr. SHUSTER. Again, I guess the last question I will ask you, Mr. Spigelmyer. It is my view that, you know, one of the diplomatic tools that we have available today, especially as we are faced with folks in the Middle East who don't like us—energy, and with Russia. And I believe that if the President were to get FERC to sign some of these permits to start to build liquefied natural gas plants at our ports around this country, we would stop Putin—we would stop the Russians in their tracks. Do you think that is reasonable?

Mr. SPIGELMYER. Yeah. It is certainly a global competitive play for America. Certainly it has changed, the—shale gas development generally across this country. This isn't a Marcellus or a Utica play. This is—shale plays all across the U.S. have changed the outlook for energy, and it is a global strength for us. It has put people to jobs. It has brought men and women home from foreign land that, you know, had a helmet on to wear a hard hat today produce natural gas, to produce oil.

You know, when I was young, we were 57 percent dependent on oil. As early as 2005, 2006, today, we are 42 percent dependent on oil—on foreign oil because of the fact we are producing more and more of it here at home. We need to continue to do that.

Mr. SHUSTER. Well, again, thank you. And, again, I would encourage everybody, especially the State of Pennsylvania, before Mr. Gibbs holds his next hearing—it is important that the States, and the different associations, whether it is the Farm Bureau, or the home builders, or the energy companies, really making sure you are looking deeply at this rulemaking on the U.S. waters, because I think that all of us up here share your concerns, and I think they are valid. So we want to make sure that we hear from you. Not only that Congress hears, but to make sure your members of your associations are out there talking to the communities out there, what it is going to do to the cost of food, the cost of housing, the cost of energy. It is going to come out of the consumer's pocket.

So again, I think all of us want to protect the environment, but we need to do it in a way that is science-based, not some knee jerk reaction to protecting the environment, because it is going to cost us all in the end, jobs, it is going to cost us money, and we are not going to get an environment that is necessarily cleaner, or more protected. So, again, I thank everybody for taking the time, thank the folks in the audience who took the time to come out today, and

thank the Members traveling from the various States, appreciate it. Mister——

Mr. DENHAM. From Myrtle Beach.

Mr. SHUSTER. Mr. Denham, do you want to make a commercial for California? Again, I really appreciate the Members coming out and spending the time here today, and this is the way that Congress gets the facts. And, as we move forward, we are going to be pushing back hard on this new regulation that they are looking at. So, again, thank you all very much. And, with that, do I have to say anything? Hold on a second, I have got to do housekeeping here. I ask unanimous consent the record of today's hearing remain open until such time as our witnesses have provided answers to any questions that may be submitting in writing, and unanimous consent that the record remain open for 15 days for additional comments and information submitted by a Member or witnesses to be included in today's record. Without objection, so ordered, and with that, the committee stands adjourned.

[Whereupon, at 10:36 a.m., the committee was adjourned.]

CLEAN WATER ACT SECTION 404 REVIEW OF PIPELINE PROJECTS

Kenneth Murin
Environmental Program Manager
for Wetlands and Encroachments
Department of Environmental Protection
Commonwealth of Pennsylvania
April 28, 2014

Thank you Chairman Shuster for inviting the Department of Environmental Protection to provide testimony before the Transportation and Infrastructure Committee on Pennsylvania's program for issuing permits for projects under a consolidated permitting process, and, more specifically, for oil and gas pipeline projects.

Before providing details on this process, I'd like to address another recent federal matter that may impact permitting in Pennsylvania. Last week, the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) published a proposed rule regarding the definition of Waters of the United States. This definition is to be used in determining the jurisdiction of the Clean Water Act with respect to the requirement for permits under Section 404, as well as other federal Clean Water Act programs. As the publication of the rule is recent and the rule is lengthy, the Department has not yet completed its review of the proposal. However, as Pennsylvania is home to over 86,000 miles of streams and rivers and 404,000 acres of freshwater wetlands, DEP feels that this proposed rule may be particularly relevant to Pennsylvania and fully anticipates providing formal comments to EPA. Prior to finalization of the Waters of the United States rule, DEP recommends that EPA or the U.S. Army Corps of Engineers Corps reach out to Pennsylvania to discuss the comments provided by the Department. Once completed DEP can provide those comments to Committee members and will make them available to the public as well. Due to our ongoing review, and our planned stakeholder outreach, I will not be providing testimony on that proposed rule today.

The commonwealth of Pennsylvania is a water-rich state and protection of these abundant water resources is vital to the health and vitality of Pennsylvania's citizens, environment and economy.

Pennsylvania has a vast energy portfolio, ranking second in the nation in natural gas production and fourth in the nation in coal production. Pennsylvania is the only producer in the nation of high-heat anthracite coal. The role of the Department of Environmental Protection is to ensure the environmentally responsible development of the commonwealth's vast energy resources which includes protection of the equally abundant freshwater sources.

In Pennsylvania, the Dam Safety and Encroachments Act, and the accompanying regulations found at 25 Pa. Code Chapter 105, require permits for stream and wetland encroachments complimentary to those required under Section 404 of the federal Clean Water Act. Under federal regulations, the Corps has the flexibility to develop "general permits" on a statewide, regional or nationwide basis. The Department worked with the Corps to develop a joint permitting process that consolidated the state and federal permitting process, making it more efficient and less time consuming without sacrificing environmental protection. In 1995, the Department and the Corps negotiated a statewide general permit, State Programmatic General Permit (SPGP-1), for projects in Pennsylvania that impacted one acre or less of waters of the United States, including wetlands. Projects with greater impact could not be authorized under this general permit and were required to obtain an individual Section 404 permit directly from the Corps.

The Corps first issued its Pennsylvania State Programmatic General Permit on March 1, 1995. This general permit is renewed every five years with the most recent renewal, the fourth generation also known as SPGP-4, having been issued on July 1, 2011. During the review process that led to the most recent renewal of SPGP-4, the Corps' interpretation and application of several terms, concepts and definitions used in the permit, as they related to pipeline projects, were modified. Specifically, these changes were intended to provide clarification of the process for permitting pipeline projects. Prior to the issuance of SPGP-4 in July 2011, the Department, in cooperation with Pennsylvania's representatives to Congress attempted to negotiate some changes to the Corps clarifications. Ultimately however, the

Corps did not make all of the changes recommended by DEP and Pennsylvania's Congressional representatives. This is noteworthy, as DEP will begin the process of negotiating the next permit renewal with the Corps next year (2015), in order to haveSPGP-5 in place by July 1, 2016.

Under SPGP-4, the Corps defined three broad categories of impacts. Category I and II activities normally do not trigger any additional review by the Corps and are authorized when the Department provides state law approval. Category III activities, however, are reviewed by the Corps as well as the state. Examples of projects that require Corps review include projects with: impacts to threatened and endangered species, impacts of more than an acre of wetland, and impacts of more than 250 linear feet of stream. Recent data provided by the Corps indicates that approximately 13% of the projects authorized from 2011 – 2013 required concurrent review by DEP and the Corps. Of these projects, approximately 32% were pipeline projects.

To provide perspective and context on this joint permitting program, between July 1, 2011 and June 30, 2013 DEP reviewed approximately 9,500 authorizations under PASPGP-4. It is important to point out that this statewide general permit covers more than just pipelines - it covers many activities associated with land development in general such as: culverts, small bridges, docks, temporary stream crossings, and intake and outfall structures.

During the period July 1, 2006 through June 30, 2011, over 90 percent of the Corps authorizations were issued in less than 60 days from the date of receipt of a complete application. When there were review delays, they were typically associated with deficient application submissions.

SPGP-4 has been a critical tool used in consolidating Federal Section 404 and State Chapter 105 permitting processes in Pennsylvania. Although it was tailored to allow for "one-stop" authorization of projects under both Section 404 of the Federal Clean Water Act and the state Chapter 105 regulations, PASPGP-4 is a Corp permit and the Corps controls the extent to which a Corps review is necessary.

By signing Executive Order 2012-11, Gov. Tom Corbett charged the Department of Environmental Protection with developing and implementing a policy that results in more timely permitting decisions, provides clear expectations for applicants to improve the quality of permit applications, establishes performance measures for DEP's permit review staff, and implements electronic permitting tools to enhance internal operations. In November 2012, at the direction of Governor Corbett, DEP implemented the Permit Review Process and Permit Decision Guarantee Policy. Part of the implementation of this new policy was an effort to educate consultants and applicants on the expectations of the Department to ensure receipt of complete and technically adequate applications. Since November 2012, DEP has recognized an overall improvement of the quality of applications. DEP has observed that when the Corps receives a complete and quality permit application, review times are generally consistent with the national average of between 45 to 60 days.

Given the increase in permit workload particularly related to the expanding natural gas industry in Pennsylvania, the Department worked closely with the Corps and our Congressional representatives to ensure that the State and Federal permit processes are protective, but efficient. As early as 2012, there were discussions regarding the preferred permit for natural gas pipeline construction in the commonwealth, which included either the Corps Nationwide General Permit for utility line activities, referred to as Nationwide Permit-12 or the SPGP-4. The Department closely analyzed the issue and concluded a move away from use of the SPGP-4 at that time was not warranted because when compared to states where the Nationwide permit-12 was in use, the review timeframes for pipelines in Pennsylvania under SPGP-4 were comparable.

The consolidated state and federal permitting process under the State Programmatic General Permit has been effective. It allows for the environmentally responsible development of the commonwealth's vast energy resources. As we look to the upcoming renewal of the State Programmatic General Permit in 2016, the Department is optimistic that working together with the

Corps we will be able to re-evaluate the requirements of Nationwide Permit 12 and the State Programmatic General Permit with regard to the use of certain critical terms and definitions to bring greater consistency and efficiency into the implementation of these important Clean Water Act requirements.

Thank you for your interest regarding this issue and the opportunity for the Department to provide this testimony.

Testimony on behalf of the Marcellus Shale Coalition

House Committee on Transportation and Infrastructure Hearing

April 28, 2014

I'm Dave Spigelmyer, President of the Marcellus Shale Coalition. The Marcellus Shale Coalition is a regional trade association with national membership. The MSC was formed in 2008 and is currently comprised of approximately 300 producing and supply chain members who are fully committed to working with local, county, state and federal government officials and regulators to facilitate the development of the natural gas resources in the Marcellus, Utica and related geological formations. Our members represent many of the largest and most active companies in natural gas production, transmission, and gathering in the country, as well as the suppliers and contractors who service the industry.

Increased development and use of natural gas offers tremendous environmental and economic benefits to Pennsylvania and the nation. The activities associated with developing shale gas resources have provided a tremendous boost to our region, and affordable energy prices are helping to fuel increased, wide-ranging economic activity across the nation. A critical feature of the successful development of Marcellus Shale play is the construction of infrastructure necessary to gather the natural gas from the wellhead and transport it to consumers. Consistent and timely authorization of gathering pipelines and other midstream projects is essential to ensure that these construction projects proceed on schedule as planned. In the absence of predictable and timely authorization process, wells that are completed and ready to produce are stranded without a pipeline connection to transport the produced gas to market.

As present, there are hundreds of natural gas wells that have been drilled in Pennsylvania but are waiting on pipelines to be built to gather and transport the gas. These wells are not producing gas and, hence, are not generating any downstream economic benefits or royalties for landowners. Thousands of workers also are not being employed in construction activities and orders for new pipe are being delayed.

The primary cause for these delays is recent changes that were made to the way in which natural gas pipeline projects are reviewed and approved by the U.S. Army Corps in Pennsylvania. Federal jurisdiction over the construction of these projects applies in locations where the pipelines cross waters of the United States, pursuant to Section 404 of the Clean Water Act. In Pennsylvania, authorization for these projects typically is provided by a State Programmatic General Permit, issued pursuant to Clean Water Act § 404(e) – specifically, Pennsylvania State Programmatic General Permit.

The Pennsylvania State Programmatic General Permit No. 4 (PASPGP-4) was reissued effective July 1, 2011, by the Baltimore District of the Army Corps. As a result of the unilateral change adopted by the Baltimore District, the requirements for review embodied in Pennsylvania State Programmatic General Permit have created an inefficient process that is duplicative of state review and that does not provide any corresponding environmental benefit.

Prior to the changes embodied in Pennsylvania State Programmatic General Permit, the majority of these types of projects would have been authorized pursuant to the state's effective permitting program without individualized review by the Army Corps. This efficient permitting process provided close coordination with the Commonwealth of Pennsylvania, without unnecessary, duplicative effort,

and protected the waters of United States above and beyond the jurisdiction of the Army Corps. Now, the process being followed by the Army Corps requires virtually all pipeline projects (both small and large) to undergo individualized review by the Corps and provides that the Corps consider as part of pre-authorization review the total impacts of the "overall project," rather than just the limited impact of the individual water crossing being authorized. This has led to substantial delays in authorization of projects and is hampering the ability of pipeline companies to develop and construct the infrastructure necessary to gather and transport natural gas from wells that are ready to produce. Our members estimate that the total pipeline permitting process now takes more than 145 days for projects that have only minimal, temporary impacts to waters of the United States. The total development process, including construction, can now take more than 16 months for even the most straight-forward project.

The approach to project authorization for these types of projects that is reflected in Pennsylvania State Programmatic General Permit is inconsistent with the goal of the Army Corps' general permit program, and with its regulations, and represents a marked departure from the Army Corps' longstanding approach of evaluating each individual crossing of a water of the United States separately. The goal of the general permit program is to provide an efficient process to authorize any activity in a category of activities, where the Corps has determined that the activities in the category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment. Natural gas pipeline projects have only limited, temporary impacts to waters of the United States, with no net loss of such waters, and are ideally suited to the efficient review processes that are intended for the general permit program. Combining the total impacts of an "overall project" for

pre-authorization review of each individual water crossing, however, is fundamentally inconsistent with the goal of the general permit program of providing for efficient review and authorization of projects of a similar nature with minimal impact.

Combining the total impacts of an "overall project" for pre-authorization review of each individual water crossing also is inconsistent with the Corps' definition of a "single and complete project" and the rationale expressed by the Corps when it adopted that definition more than 20 years ago. As explained by the Corps at the time, and followed consistently (until now) since:

"The purpose of separating out 'linear projects' [like pipelines] within the text of the definition for 'single and complete project' was to effectively implement the NWP [nationwide permit] program by reducing the effort expended in regulating activities with minimal impacts."[1]

The individualized and duplicative review that now exists in Pennsylvania, which focuses on the total impacts of an "overall project" rather than the limited impact of each individual crossing being authorized, is not consistent with the purpose articulated by the Corps more than 20 years ago in establishing the definition of a "single and complete project," and it does not meet the goal of the general permit program.

No other District of the Army Corps where our members operate approaches the permitting function for gathering lines and other midstream projects in the manner now in place in Pennsylvania. In all other areas of the country where gathering pipelines and other midstream projects are being built, the Corps adheres to its

[1] 56 Fed. Reg. 59110, 59114 (Nov. 22, 1991).

regulatory definition of a "single and complete project" and evaluates each individual crossing of a water of the United States separately. No expanded definition of "project" is used to increase the scope of review by including multiple water crossings over a broad geographic area. This adherence by other districts to the regulatory definition of "single and complete project" is in accord with the Corps' rules and allows for efficient review and permitting of projects that have minimal and limited impact to water resources.

Each of the natural gas gathering or other midstream projects that cross a water of the United States in Pennsylvania is subject to regulatory review by Pennsylvania Department of Environmental Protection, and is authorized by a state general permit or an individual permit issued by the Department. The activities authorized involve only minimal and temporary impacts to water resources, and those impacts are fully addressed and mitigated by the conditions of the state's general or individual permit. The review by the Army Corps pursuant to the revised Pennsylvania State Programmatic General Permit does not alter the manner by which these projects are designed or constructed. The Army Corps review for these types of projects is unnecessary and duplicative and does not provide any meaningful environmental benefit. Yet, the Army Corps process imposes substantial administrative burden and associated costs – all of which are unnecessary and should be eliminated.

The delays and related cost increases created by this duplicative review process threaten to jeopardize the enormous economic boom to Pennsylvania associated with the development of the Marcellus Shale in a number of ways. The delays have adverse economic impacts to those who produce steel pipe, those who install new pipelines, and those who make use of efficient natural gas at lower cost to

expand downstream economic activity. The delays also impact the level of tax revenue paid to Pennsylvania and the United States.

By way of example only, a typical natural gas gathering pipeline construction project involving 5 miles of pipe would employ over 100 workers and 20 or more inspectors. There are hundreds of pipeline currently under agency review. Conservatively estimated, this means that more than 2,000 workers and 400 inspectors could now be working but are not.

Production orders for pipe also are impacted by these delays. The pipe used in these projects is predominantly made in the United States. The delays in permitting and constructing these pipelines, therefore, are affecting U.S. manufacturers and workers, as well as the pipeliners who build the lines, consumers who use efficient natural gas, and landowners who expect to receive royalties from gas production.

The delays and increased costs of connecting producing wells to market also can significantly influence a company's strategy for where to focus further development. Unpredictable and unnecessary regulatory burdens can lead companies to employ capital elsewhere and, for some, to stop development in an area altogether. The loss of economic activity, accordingly, relates not only to the wells already completed and ready to produce, but also to wells that could be being drilled if the conditions for development were more favorable.

As the President recognized by Executive Order, development of our domestic natural gas resources is vital to this country. Efficient and timely authorization of gathering pipeline and other midstream projects is essential to ensure that the country fully realizes the substantial benefits that the development of our shale resources presents. For these reasons, we ask for the support of this Caucus in

seeking to end the unnecessary and duplicative review process created by the recently modified Programmatic General Permit and, thereby, to eliminate the timing delays, administrative burden and other costs created by the Army Corps' approach to authorizing gathering pipelines and other midstream projects in Pennsylvania.

Testimony on behalf of Rice Energy, Inc.
House Committee on Transportation and Infrastructure Hearing
April 28, 2014

I'm Tonya Winkler, AICP, Midstream Permitting and Compliance Manager for Rice Energy, Inc. (Rice Energy). Rice Energy engages in the exploration and production of natural gas wells and gathering and transportation of natural gas as well as installation and operation of water transfer lines for the use in production of natural gas wells in Pennsylvania and Ohio.

Rice Energy commenced leasing land in 2008 and drilled its first well in 2010 in Pennsylvania. Since 2008, the company has grown significantly to a total of approximately 160 employees and currently operates 6 drilling rigs in Pennsylvania and Ohio. Rice Energy also owns and operates approximately 40 miles of natural gas gathering lines with a proposed 110 miles to construct over the next year. Additionally, Rice Energy currently operates approximately 33 miles of water transfer lines with a proposed 73 miles to construct over the next year.

As stated in the Marcellus Shale Coalitions testimony, increased development and use of natural gas offers tremendous environmental and economic benefits to Pennsylvania and the nation. An integral part of the successful development of Marcellus Shale play is the construction of midstream infrastructure necessary to gather the natural gas from the wellhead and transport it to consumers. Consistent and timely authorization of gathering pipelines and other midstream projects is essential to ensure that these construction projects proceed on schedule as planned.

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Rice Energy has millions of cubic feet of gas that could be flowing to market on a daily basis if the pipeline infrastructure was in place. Uncertain permitting review timeframes and delays result in loss of revenue for Rice Energy, loss of royalties for land owners, loss of jobs, and loss tax base for local, state, and federal governmental agencies.

The delays Rice Energy has experienced throughout the review process of its midstream projects are not isolated issues. For example, Rice Energy midstream and completions teams have made collaborative efforts to utilize water transfer lines for various stages of operations, but the untimely authorization process has stalled progress. The Company now has 18 wells in inventory with no pipeline installed to transport the water necessary for production and the produced gas to market in Pennsylvania. These unanticipated delays in completions result in a loss of millions of dollars over an operating year. As a result of these unpredictable delays, Rice Energy is starting to focus operations in Ohio, where permit review time is much more predictable.

Rice Energy believes changes that were made to the way in which natural gas pipeline projects are reviewed and approved by the U.S. Army Corps in Pennsylvania is the primary reason for delay in stream and wetland crossing permits. Federal jurisdiction over the construction of these projects applies in locations where the pipelines cross waters of the United States, pursuant to Section 404 of the Clean Water Act. In Pennsylvania, authorization for these projects typically is provided by a State Programmatic General Permit, issued pursuant to Clean Water Act § 404(e) – specifically, Pennsylvania State Programmatic General

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Permit.

The Pennsylvania State Programmatic General Permit No. 4 (PASPGP-4) was reissued effective July 1, 2011, by the Baltimore District of the Army Corps. As a result of the unilateral change adopted by the Baltimore District, the requirements for review embodied in Pennsylvania State Programmatic General Permit have created an inefficient process that is duplicative of state review and that does not provide any corresponding environmental benefit.

Presently, 85 percent of Rice Energy's midstream projects under review by the Pennsylvania Department of Environmental Protection are also undergoing review by the Corps to review the total impacts of the "overall project," rather than the limited impact of the individual water crossing being authorized. This regularly leads to substantial delays in authorization of projects and is hindering the ability of Rice Energy to develop and construct the infrastructure necessary to complete, gather and transport natural gas from wells. Using recent data, Rice Energy estimates it takes an average of 80 days for projects that have only minimal, temporary impacts to waters of the United States to receive approval. Based on Rice Energy's recent experiences, midstream infrastructure development, including construction, can now take more than one and one-half years for even the most basic midstream project.

No other District of the Army Corps where Rice Energy operates approaches the permitting function for gathering lines and water transfer lines in the manner now in place in Pennsylvania. In all other areas of the country where gathering

pipelines and other midstream projects are being built, the Corps adheres to its regulatory definition of a "single and complete project" and evaluates each individual crossing of a water of the United States separately. No expanded definition of "project" is used to increase the scope of review by including multiple water crossings over a broad geographic area. This adherence by other districts to the regulatory definition of "single and complete project" is in accord with the Corps' rules and allows for efficient review and permitting of projects that have minimal and limited impact to water resources.

Each of the natural gas gathering or other midstream projects that cross a water of the United States in Pennsylvania is subject to regulatory review by Pennsylvania Department of Environmental Protection, and is authorized by a state general permit or an individual permit issued by the Department. The activities authorized involve only minimal and temporary impacts to water resources, and those impacts are fully addressed and mitigated by the conditions of the state's general or individual permit. The review by the Army Corps pursuant to the revised Pennsylvania State Programmatic General Permit does not alter the manner by which Rice Energy designs and constructs midstream projects. The Army Corps' review for these types of projects is unnecessary and duplicative and does not provide any meaningful environmental benefit. Seemingly, the process only imposes substantial administrative burden and associated costs.

Rice Energy is wholly committed to working with local, county, state and federal government officials and regulators to facilitate the safe and responsible installation of natural gas gathering lines and water transfer lines in Pennsylvania

and Ohio. However, the delays and increased costs of connecting producing wells to market will continue to influence's Rice Energy's strategy for further development. Unpredictable and unnecessary regulatory burdens may result in the Company focusing on development elsewhere. The loss of development relates not only to the wells already completed and ready to produce, but also to wells that could be drilled if conditions for development were more favorable.

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Testimony of Warren Peter,
Founder,
Warren Peter Construction

Before the Transportation and Infrastructure Committee

Hearing on "Federal Regulation of Waters:
Impacts of Administration Overreach on Local Economies and Job Creation"

April 28, 2014

Chairman Shuster and distinguished members of the Committee, thank you for the opportunity to testify this morning.

My name is Warren Peter, and I am the founder and president of Warren Peter Construction located in Indiana, Pennsylvania. Warren Peter Construction is a full service residential remodeling, design, and build company. We have been serving customers in the greater Indiana, PA area since 1981 when I founded the company. I am a proud small business owner and now have seven full time employees. We focus primarily on custom home building.

My goal is to provide and expand opportunities for all consumers to have safe, decent and affordable housing and for my business to thrive. The Great Recession and its lingering impacts significantly reduced the production of housing over the past several years. Due to these declines, the industry is operating well below historic norms. In order to meet the housing needs of a growing population and replacement requirements of older housing stock, the industry needs to build about 1.4 million new single-family homes each year and more than 1.7 million total housing units. By comparison, in 2013, home builders constructed only 618,000 single family homes and 307,000 multifamily units.

While the recovery from the Great Recession has been slow, home building is beginning to experience growth. In fact, since the last quarter of 2011, advances in home building have been responsible for 13% of total economic expansion. And this growth creates jobs. According to the National Association of Home Builders (NAHB), 305 full-time equivalent (FTE) jobs, and $8.9 million in tax revenue are generated by the construction of 100 single family homes. Similarly, 100 new multifamily units results in 116 FTE jobs and $3.3 million in tax revenue. Further, the building and improvement of the housing stock of a local area provides a tax base for state and local governments. The taxes attributable to housing are substantial. According to Census data and NAHB calculations, property taxes attributable to housing totaled approximately $300 billion in 2012.

The rise and fall of housing activity has been the dominant economic factor of the last decade. Housing typically leads the economy out of recession, although in the period after the Great Recession, housing has not played that role. There are many reasons why the recovery has been slower than past history would suggest, including regulatory burdens, increased construction costs and the lack of available financing. I am pleased that the Committee is addressing this important issue and I appreciate the opportunity to give my perspective.

Home builders have been advocates of the Clean Water Act (CWA) since its inception and have a vested interest in preserving and protecting our nation's water resources. The CWA has helped our nation make significant strides in improving the quality of our water resources and improving the quality of life. As we build neighborhoods and help create thriving communities, we have a responsibility to protect the environment. Under the CWA, I must often obtain and comply with section 402 and 404 permits for building projects. As a small business navigating federal bureaucracies, what is most important to my compliance efforts is a permitting scheme that is consistent, predictable, timely, and focused on protecting true aquatic resources. The regulatory requirements we face as builders do not just come from the federal government. A key component to effective regulation is ensuring that local, state and federal agencies are cooperating, where possible, to streamline permitting requirements and respecting the appropriate responsibilities of each level of government.

I have an intimate understanding of how the federal government's regulatory process impacts small businesses in the real-world. Many of these regulations have made it significantly more difficult to do business and have hampered job creation. Housing serves as a great example of an industry that would benefit from smarter and more sensible regulation. According to a study completed by the NAHB, government regulations account for 25% of the price of single-family home. Nearly two-thirds of this impact is due to regulations that affect the developer of the lot, with the rest due to regulations that fall on the builder during construction.[1]

"Waters of the United States" Proposed Rule:

On April 21, 2014, the Environmental Protection Agency and U.S. Army Corps of Engineers ("the agencies") proposed a rule redefining the scope of waters protected under the CWA. For years, landowners and regulators alike have been frustrated with the continued uncertainty over the scope of federal jurisdiction over "Waters of the United States." By improving the CWA's implementation, removing redundancy, and further clarifying jurisdictional authority, it can do an even better job at facilitating compliance and protecting the aquatic environment.

[1] Survey conducted by Paul Emrath, National Association of Home Builders, "How Government Regulation Affects the Price of a New Home," 2011

Unfortunately, the proposed rule falls well short of providing the clarity and certainty the construction industry seeks. This rule will increase federal regulatory power over private property and will lead to increased litigation, permit requirements, and lengthy delays for any business trying to comply. These changes will not improve water quality, as much of the rule improperly encompasses water features that are already regulated at the state level.

The Proposed Rule Unnecessarily and Inappropriately Expands Federal Jurisdiction

The agencies assert that the scope of CWA jurisdiction is narrower under the proposed rule than under current practices and that it does not assert jurisdiction over any new types of waters. This is simply not accurate. In reality, the proposed rule establishes broader definitions of existing regulatory categories, such as tributaries, and regulates new areas that are not jurisdictional under current regulations, such as adjacent non-wetlands, riparian areas, floodplains, and other waters.

In addition, this change in jurisdictional authority does not only apply to section 404 of the CWA, but to all of its other programs. For home building activities, I am also concerned with the impacts this rule will have on section 402 storm water permitting requirements, the various mandates associated with effluent limitations, and water quality standards.

The proposed changes provide no additional protections for these newly jurisdictional areas as many already comfortably rest under state and/or local authority. I believe the agencies intentionally created overly broad terms so they have the authority to interpret them as they see fit. For any small business trying to comply with the law, the last thing it needs is a set of new, vague and convoluted definitions that only provide another layer of uncertainty. Let me discuss some of the problematic features in detail:

New Definition of Tributary:

The agencies have sought to expand their reach by adding, for the first time, a broad definition of "tributary." They define a tributary as a "[w]ater body physically characterized by a bed and bank and ordinary high water mark which contributes flow directly or through other water bodies to Traditional Navigable Waters (TNW)." They also state that a water body does not lose its tributary status if there are man-made breaks, as long as a bed and bank can be identified up or down stream. This new definition will include substantial additions, such as a first time inclusion of ditches, conveyances and other water features that may flow, if at all, only after a heavy rainfall. Unless proper mapping is provided by the agencies it may be impossible for a home builder to independently identify a tributary.

New Definition of Adjacent:

The concept of regulating "adjacent waters" is completely new. In the past, the notion of "adjacent" only applied to wetlands, yet through this rule, "adjacency" will now extend to water bodies. While widening this concept to include waters, the agencies also try to clarify what is

"adjacency" by redefining essential terms. The current definition of "adjacency" is "bordering, contiguous, or neighboring." However, much of the confusion rests within the meaning of "neighboring." The rule vaguely defines "neighboring" as "waters located within the riparian area or floodplain or waters with a surface or shallow subsurface connection."

The rule leaves the door completely open on the meaning of riparian and floodplain. It gives no indication as to what type of floodplain a water must be located in to be deemed jurisdictional and places no parameters on flood frequency. Intentionally leaving these terms loosely defined gives the agencies relatively unbounded jurisdiction and leaves land owners perplexed as to whether their land may be regulated.

"Other Waters:"

The rule also provides a catchall "other waters" category for areas that may not fit neatly into a specific water category but for which the agencies have retained complete discretion to find a significant nexus on a case-by-case basis. Significantly, this also includes the ability to make blanket jurisdictional determinations by considering all similarly situated waters located within the same region or watershed to determine if they, taken together, have a significant nexus to a TNW. The ability to aggregate waters further illustrates the notion that there is no limit to federal jurisdiction under this rule.

These definitions will leave home builders in a constant state of confusion. This unpredictability will make it difficult for my business to comply and grow. The agencies suggest that the rule provides clarity however; all it does is produce more questions. Unfortunately, we have to rely on the agencies for answers.

Rulemaking the Proposed Rule is Inconsistent with Supreme Court precedent:

The CWA was designed to strike a careful balance between federal and state authority. This has proven to be a difficult task, and to some extent, the efforts of the courts to provide clarity have only added to the uncertainty. The courts have been clear on one issue, which is that there is a limit to federal jurisdiction of waters. In fact, the Supreme Court has twice affirmed that both the U.S. Constitution and CWA place limits on federal authority over intrastate waters. While many were optimistic that this rule would finally translate the Court's directives to a workable framework, the proposed rule instead is a marked departure from past Supreme Court decisions and raises significant constitutional questions. In order to view the rule through this legal framework, it is necessary to look at the key cases:

Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC): In 2001, for the first time, the Supreme Court limited the federal government's jurisdictional authority under the CWA through the *SWANCC* decision. The case questioned whether the CWA conferred the Corps of Engineers with authority over isolated, seasonal ponds at an abandoned sand and gravel pit in suburban Chicago because they were susceptible to be use by

migratory birds. The Court rejected the Corps's assertion of jurisdiction because the agency's interpretation gave no effect to the word navigable in the term "navigable waters." In other words, the Corps could not assert jurisdiction over the area in question simply because a migratory bird might land there.

Rapanos v. United States and Carabell v. U.S. Army Corps of Engineering: Both *Rapanos*[2] and *Carabell*[3] cases followed the same fact-pattern: wetlands miles away from TNWs that drained through multiple ditches, culverts, and creeks, that eventually drain into a TNW. The question of this court case was over the jurisdictional theory that waters are jurisdictional as long as they have a "hydrological connection" to a TNW. *Rapanos* provided a significant clarification that CWA jurisdiction does not reach non-navigable features merely because they may be hydrologically connected to downstream navigable waters. In short, the "any hydrologic connection" theory was rejected— just as the migratory bird rule was disapproved in *SWANCC*.

However, two theories emerged from the majority's opinion in *Rapanos*. The first, written by Justice Scalia, claimed that CWA coverage extended to "...only those relatively **permanent, standing, or continuously flowing** [emphasis added] bodies of water 'forming geographic features' that are described in ordinary parlance as 'stream[s,] ... oceans, rivers, [and] lakes.'"[4] The plurality also developed a jurisdictional rule for wetlands in particular: "[O]nly those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and 'wetlands,' are 'adjacent to' such waters and covered by the Act."[5]

The second test was authored by Justice Kennedy, who concurred in the judgment, but wrote separately for himself. He elevated the concept of "significant nexus," first used by the Court in *SWANCC*, to be the appropriate test for jurisdiction: "[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[6] "Consistent with *SWANCC* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends on a significant nexus between the wetlands in question and navigable waters in the traditional sense." [7]

The most significant clarification that *Rapanos* provided was that the five Justices agreed CWA jurisdiction does *not* reach non-navigable features merely because they are hydrologically connected to downstream navigable water. However, many have maligned *Rapanos* because the

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[2] Rapanos v. United States, 126 S.Ct 2208 (2006)
[3] Carabell v. United States, 126 S.Ct. 1295 (2006)
[4] Rapanos 126 S.Ct. at 2225
[5] *Id.* at 2226
[6] *Id.* at 2248
[7] *Id.* at 2249

Justices failed to reach a majority opinion that announced the "correct" test for CWA jurisdiction. In many cases, the existence of two tests only adds more confusion and disagreement regarding the scope of the CWA.

While the agencies face a difficult task in resolving this conflict, the proposed rule is obviously inconsistent with these Supreme Court decisions and will significantly expand the scope of waters to be regulated by the agencies. The rule would extend coverage to many features that are remote and/or carry only minor volumes of water, and contrary to the Supreme Court's findings its provisions provide no meaningful limit to federal jurisdiction. The rule ignores the tests that were developed in *Rapanos* and reverts back to regulating any hydrologic connection. More specifically, the rule disregards Justice Kennedy's "Significant Nexus" test by making all connections regulable. Such a broad overreach is unacceptable.

The Proposed Rule Ignores Federal/State Balance

While many aspects of the CWA are vague, it is clear that Congress intended to create a partnership between the federal agencies and state governments, to protect our nation's water resources. Congress states in section 101 of the CWA that "[f]ederal agencies shall co-operate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resource." Under this notion, there is a point where federal authority ends and state authority begins.

The rule proposed by the agencies blatantly ignores this history of partnership and fails to recognize that there are limits on federal authority. If this rule is finalized, the federal government will severely cripple the state's role in protecting our nation's water resources, which would be a huge mistake as well as unconstitutional. Litigation is a likely result, and while it makes its way through the court system, regulators and businesses will be left in a lurch.

While some may believe that protections were weakened after the *SWANCC* and *Rapanos* decision, in Pennsylvania, wetlands have been regulated under state law since 1980. Since that time, Pennsylvania has seen a net annual gain of wetland acreage. This illustrates that Pennsylvania takes its responsibility to protect its natural resources seriously and does not need the federal government to regulate every minor pond or ditch. In fact, Pennsylvania has the authority to exceed federal law, so long as there is a compelling reason. I also believe that Pennsylvania's story is not unique—if you looked around the country you would find that the states are protecting their natural resources more aggressively than when the CWA was enacted in 1972.

Potential Impacts on Construction:

Home building is a complex and highly regulated industry. Costs for certain regulatory actions are borne by these small businesses in the form of land, planning, and carrying costs, which ultimately arrive in the market as a combination of higher prices and lower output for the industry. As output declines and jobs are lost, other sectors that buy from or sell to the construction industry also contract and lose jobs. Builders and developers, already crippled by the economic downturn, cannot depend upon the future home-buying public to absorb costs for regulations.

Because compliance costs for regulations are often incurred prior to home sales, builders and developers have to pay these additional carrying costs. Carrying these additional costs only adds more risk to an already risky business. This is one of the difficult realities that home builders face every day. This rule only adds to the headwinds that our industry faces.

Even moderate cost increases can have significant negative market impacts. This is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low to moderate income home buyers. Such buyers are more susceptible to being priced out of the market. As the price of the home increases, those who are on the verge of qualifying for a new home will no longer be able to afford this purchase. An analysis done by NAHB illustrates the number of households priced out of the market for a median priced new home due to a $1,000 price increase. Nationally, this price difference means that when a median new home price increases from $225,000 to $226,000, 232,447 households can no longer afford that home. We need to find a necessary balance between protecting our nation's water resources and allowing citizens to build and develop their land.

The costs of obtaining Corps section 404 permits are significant: averaging 788 days and $271,596 for an individual permit; 313 days and $28,915 for a nationwide permit. Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.[8] These ranges do not take into account the cost of mitigation, which can be exorbitant. On average, it takes 15 months between the time a developer applies for zoning/subdivision approval and the time they obtain preliminary approval to start site work.[9]

Increased Number of Federal Permits:

Construction projects rely on efficient, timely, and consistent permitting procedures and review processes under CWA programs. Developers are generally ill-equipped to make their own jurisdictional determinations and must hire outside consultants to secure necessary permits and approvals under CWA programs. Delays often lead to greater risks and higher costs, which

[8] David Sunding and David Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," 2002

[9] Survey conducted by Paul Emrath, National Association of Home Builders, "How Government Regulation Affects the Price of a New Home", 2011

many developers would rather avoid given tight budgets and time frames. If environmental liabilities, such as an onerous permitting process, exceed the purchase price of a real estate transaction, those liabilities could delay or eventually kill a deal-making process. If the rule is finalized in its current form, the ability to sell, build, expand, or retrofit real estate projects will suffer notable setbacks, including added cost and delays for development and investment.

Specifically for the "other waters" category, builders will be at the mercy of the agencies. Builders will have to request a jurisdictional determination from the agencies to ensure they are not disturbing land near an aggregated water. Consequently, an increase in the number of jurisdictional determinations requests, across all industries, will result in greater permitting delays as the agencies are flooded with paperwork.

Increased Federal Consultations:

Many federal statues tie their approval/consultation requirements to those of the CWA i.e. if one has to obtain a CWA permit, he/she must also obtain others. If more areas are considered jurisdictional, more CWA permits will be required. More federal permitting actions will trigger additional statutory reviews – by agencies other than the permitting agency – under laws including the Endangered Species Act, National Historic Preservation Act, and National Environmental Policy Act. Project proponents do not have a seat at the table during these additional reviews, nor are consulting agencies bound by a specific time limit. Lengthened permitting times will include an increased number of meetings, formal and informal hearings, and appeals. These federal consultations are just another layer of red tape that the federal government has placed on small businesses and it is doubtful the agencies will be equipped to handle this inflow.

Unintended Consequences and Regulations Beyond Wetlands:

Discourages use of Low Impact Development:

Often times, localities will require or encourage builders and developers to use Low Impact Development (LID) or green infrastructure when managing stormwater runoff on their properties. These relatively new practices use or mimic natural processes to infiltrate or reuse stormwater runoff on the building site where it is generated. This is a highly encouraged practice that keeps rainwater out of the sewer system and reduces the amount of untreated runoff discharged into surface waters.

While the uses of LID methods are beneficial to communities throughout the country, there is no single source of federal funding dedicated to the design and implementation of LID solutions. Many builders voluntarily implement the use of LID Best Management Practices (BMPs) for the general benefit of their communities. Examples of LID BMPs are bioretention areas such as

raingardens, swales, retention ponds and infiltration basins. Under this proposed rule, these BMPs could fall under the jurisdiction of the CWA. Over time, these areas could begin to function similarly to wetlands and be regulated. Engineers will have to reevaluate which BMPs will ultimately fall under CWA jurisdiction and builders will be less inclined to participate in these voluntary activities.

Impacts on Municipal Separate Storm Sewer Systems:

In addition, there are serious concerns on the impact this proposed rule will have on Municipal Separate Storm Sewer Systems (MS4s). MS4 systems are owned and operated by state and local governments and vary in size; however, their function is universal—to transport or convey a cities' stormwater through pipes, drains, gutters and open ditches. Many MS4 systems are regulated as point sources and therefore are required to obtain a 402 National Pollutant Discharge Elimination System permit and develop a stormwater management program because exposed ditches and intermittent streams are often part of a MS4 system. I am concerned that the proposed rule does not prevent MS4s from being regulable as a "Water of United States." These features are already regulated as a point source. For this reason, I believe that the agencies should consider including an exemption for urban and suburban storm sewer systems, as they should not be jurisdictional under the CWA.

Conclusion:

This rule does not add new protections for our nation's water resources but rather, it considers which level of government has the jurisdictional authority to oversee those protections. The intent of the CWA and Supreme Court precedents say that there is a limit to federal authority and the responsibility of protecting our nation's water is shared across all levels of government. The rule fails to recognize this balance.

I have significant concerns with the proposed rule and I would encourage the agencies to rethink it. I believe the rule should be consistent with Supreme Court decisions, provide understandable definitions and preserve the partnership between local, state and federal governments. The housing industry cannot successfully face the forthcoming challenges while weighed down by additional regulatory burdens and requirements that provide little benefit.

I appreciate the opportunity to discuss these important issues.

Pennsylvania Farm Bureau

Testimony before

Committee on Transportation and Infrastructure

U.S. House of Representatives

Federal Regulation of Waters: Impacts of Administration Overreach on Local Communities and Job Creation

April 28, 2014
Altoona, PA

offered by
Thomas R. Nagle, Jr.
President, Cambria County Farm Bureau

Good morning, Chairman Shuster, Ranking Member Rahall, and members of the Committee. I am Tommy Nagle, a first generation farmer from Cambria County, Pennsylvania where I grow 775 acres of grain and manage a herd of 225 Angus cattle. Thank you for the invitation to testify.

Clean water is important to us all. The health and vitality of my growing family is something I care deeply about, and their continued access to safe water is important to my wife, Tracy, and me. But your hearing today is not about the quality of our water, rather it's about federal agencies attempting to assert their dominion and regulatory control over land use under the guise of clean water.

The federal Clean Water Act was signed into law before I was even born. But some people—both inside and outside government—have been trying to claim power that the 1972 law never intended to give.

Farmers are straightforward people who believe that words mean something. Those of us in agriculture believe that the authors of the Clean Water Act included the term "navigable" in its description of the waters subject to federal regulation for a reason. In fact, the word "navigable" appears in the law more than 80 times. And, as you know, recent Supreme Court cases have reaffirmed that the federal government is limited to regulating only "navigable" waters.

I understand the federal government's stated purpose for the proposed rulemaking is to clarify the confusion that our Supreme Court and federal courts are supposed to have created through their interpretation of the Clean Water Act. What EPA and the Army Corps of Engineers have done in an effort to clarify this to me and other land managers is to create 370 pages of regulations and regulatory guidance principles that we must fully understand to ensure I am in compliance with federal law. If I miss or misunderstand any one regulation among the massive quantity of regulations that EPA and the Corps are proposing, I am vulnerable to the harsh fines and other enforcement measures available to EPA and the Corps – up to $37,500 for each day a federal official believes I have missed or misinterpreted a regulation.

Those who have read and analyzed this proposed rulemaking tell me that the 370-page document contains numerous descriptions of land areas with little or no water that EPA and the Corps will consider to be part of "waters of the U.S." This document also provides EPA and the Corps the opportunity to determine, on their own without Congressional oversight, additional land areas – again, with little or no water – as "waters of the U.S." But there is apparently next to nothing in these 370 pages where EPA and the Corps try to place limitations in their own authority or clearly identify where they can't regulate. It should be clear enough to everyone that our courts have ruled "waters of the U.S." do not include wet areas whose connection to navigable streams is insignificant.

It seems to me that any serious attempt to clear up confusion in interpretation should make an equal and comprehensive effort to identify what federal agencies have no power to regulate. But that portion is apparently missing in the 370 pages of proposed regulation.

I understand the proposed rulemaking can be read and interpreted to allow federal officials to declare small portions of homeowners' lawns, farm fields, or playground areas "federally regulated" under the Clean Water Act if any standing water could result from a rainfall. I don't believe that federal agencies should have authority to declare a land area as part

of "waters of the U.S.," just because it may have an occasional and temporary period of standing or flowing water from a rainfall. And my belief seems to be supported by our courts in decisions they have made. But the proposed rulemaking doesn't appear to attempt to identify when temporarily wet land areas are not included as part of "waters of the U.S."

EPA has stated that farmers are exempt from the proposed rule and that nothing will change. Yet, they also state that the rule will extend federal regulation to "most seasonal and rain-dependent streams." This so-called "clarification" of existing regulation is confusing.

It is my understanding that there are no protections in the proposed rule for common farming activities, and exemptions from the rule are available only to farmers who have been farming continuously since 1977. Since I was born in 1979, does this mean that the exemptions do not apply to my family farm?

What if the ultimate effect of this rule prevents farmers from passing their operations on to their children, or prevents young people, like myself, who want to be farmers from entering the profession?

By expanding the scope of federal regulation to "rain-dependent streams," EPA will bring new areas to regulation – even dry land. What if this expansion then leads to new regulation or prohibition of commonly-accepted farm practices – such as causing a need for a permit to control pests, to mow grass across a ditch, or to install a fence? There is no guarantee that such permits would be issued, or any evidence that disallowing these activities would have any measureable positive effect on water quality.

Farmers are normally trusting of others, and believe that others will try in good faith to treat them fairly, reasonably and with some level of empathy. But we're not blindly trusting, especially when another's past conduct proves otherwise.

It is extremely difficult for me and my fellow farmers to trust the intentions of federal officials in development of this proposed rulemaking given the history of continuous effort of certain federal agencies to expand their power and authority. These federal agencies have tried to claim authority under the Clean Water Act for virtually any land area over which a bird flies. Federal officials have tried to regulate as a "point source" farm areas just outside of a poultry house where exhaust fans may blow some chicken feathers. And federal agencies have openly tried to lobby Congress to remove the word "navigable" from the federal Clean Water Act. These types of actions make me and other farmers very doubtful that federal officials will apply this new volume of regulations in a way that is fair or reasonable to us, or considerate of our needs and daily challenges.

Many of the federal officials who invented these ideas for invoking federal regulation are likely in the same or similar positions for their agencies today. Frankly, giving these officials 370 more pages of regulations to work with on the issue of federal regulation scares me. Tracy's and my effort to viably operate our family farm is very time consuming and financially challenging. We don't have the resources to legally fight the army of lawyers, biologists, hydrologists and other technical analysts that EPA and the Corps have readily available to support the enforcement whims of a federal official.

I'm equally scared of the additional legal ammunition that this 370-page volume of regulations will give to "citizen action groups" in the quest to advance their ideologies and

political agendas. Too many of these groups are extremely opposed to any type of agriculture other than the type captured in Norman Rockwell paintings. Norman Rockwell's agriculture doesn't work in today's changing and challenging agricultural economy. Many of these organizations are well funded, with their own army of lawyers, biologists, hydrologists and technical analysts dedicated to advancing their cause. The citizen suit provisions of the Clean Water Act will allow these groups equal opportunity to pursue extreme legal claims through interpretation of the new volume of regulations. Tracy and I, and other farm families, don't have the financial or emotional resources to combat the assault on farms that these groups would pursue under the new regulations, if they become final.

A common misconception is that unless the federal government regulates a body of water, it is not regulated at all. The truth, however, is that state governments regulate small and local streams. And Pennsylvania's Department of Environmental Protection (DEP) is currently busy inspecting farms and other activities along our 58,000 miles of rivers and streams.

States, like Pennsylvania, already have significant laws, regulations and programs in place to protect the very bodies of water that are being characterized as unregulated.

Pennsylvania's Clean Streams Law, Chapter 102 Erosion & Sediment Control and Post-Construction Stormwater Management regulations, Nutrient and Odor Management Act, Concentrated Animal Feeding Operation (CAFO) Program, Mandated State Standards for Storage and Land Application of Manure, Dirt and Gravel Road Program, and Flood Plain Management Act are just a few parts of the strong framework that Pennsylvania has created to protect its waterways, including intermittent streams.

What's more, our DEP officials can actually show water quality improvements from these state-driven and state-administered programs. What if expanded federal regulation harms individual states' ability to continue and improve upon successful water quality initiatives?

I am seriously concerned about the complex and confusing nature of this regulatory proposal. It is a 370-page document that is laden with regulatory explanations that few like me will be able to easily understand. And over the next 90 days, I will be in my fields and with my cattle doing what farmers need to do when the weather is warm and the sun is shining. In the very least, the agencies should extend the comment period to 180 days to allow farmers like me the time we need to fully assess how this will impact our businesses, so that we can provide quality feedback.

Farmers do care about applying common sense and good judgment and stewardship in managing their farms. The overwhelming majority of farmers – husbands, wives and children – live on the very same farms that they operate. We try hard to incorporate the highest level of conservation measures in our farming practices as we feasibly can.

But farmers also need a regulatory system that gives us a high level of confidence that we can engage our fields and pastures in farm production without becoming vulnerable to federal regulation at some point in the future. What these proposed regulations seem to do is just the opposite – make virtually every portion of farmland or pastureland where water flows from a rain or may hold a portion of water from a rain vulnerable to federal regulation.

Farm families cannot reasonably function under a regulatory system that provides the potential for federal officials to designate and regulate any portion of a farm as a "water of the

U.S.," as I understand the proposed regulations will do. Virtually every farm field and pasture has the potential for water flow or standing water from ordinary rainfall. In absence of regulations that clearly describe when and where EPA and the Corps may not regulate, the proposed regulations make critical farm business planning and debt financing vulnerable to drastic change under claim of federal authority. The uncertainty and unpredictability of these regulations will add to the stress that farm families already experience just in trying to make their farms operate profitably.

Farmers, and all other individuals potentially affected, deserve regulations that clearly and practically state what and where the limitations of federal authority are and provide clear understanding on land areas that are out of bounds for federal officials to regulate. Farmers and landowners deserve much better than what EPA and the Corps have proposed.

A more meaningful and effective action, however, would be for members of Congress to prevent EPA from doing your job – drafting, debating and passing legislation that authorizes power to regulatory agencies. The legislators who authored the Clean Water Act in 1972 carefully considered what the extent of EPA's regulatory authority should be, and they purposely limited that authority to "navigable" waters. You, and your colleagues, flatly rejected a legislative proposal in 2010 that would do exactly what EPA is now attempting to do. I would hope that Congress will help farmers convince these regulatory agencies to "Ditch the Rule."

Thank you again for the opportunity to testify today, and I would be happy to respond to your questions.

Changing the Definition of "Waters of the US (WoUS)"

Subcommittee Members:

On behalf of CONSOL Energy, Inc., a leading diversified energy company headquartered in the Appalachian Basin, and CNX Gas Company LLC, a subsidiary of CONSOL Energy, we would like to thank you for the opportunity to address the subcommittee on the proposed rule changing to the definition of waters of the United States as it applies to the Clean Water Act.

The proposed rulemaking expands upon the definition of "jurisdictional waters" and would include waters not traditionally covered under the Clean Water Act. The Environmental Protection Agency (EPA) has indicated that the intent of the proposed rule is to streamline the decision making process in regards to which waters are "jurisdictional waters" by increasing clarity as to the definition of waters of the US.

CONSOL Energy feels the proposed change is unwarranted due to current federal regulation and robust state programs that are already in place to protect waters of the US. CONSOL Energy also believes that the proposed changes will absolutely lead to increased permitting review and processing time by regulators due to the uncertainty of jurisdictionality, which will be an undue burden on industry. The expansion of jurisdictional waters would have substantial impact across the energy industry and indeed all industries by requiring permits for impacts to otherwise isolated waters, thereby triggering additional federal requirements for little to no environmental benefit.

In September 2013, EPA published their *Draft Connectivity of Streams and Wetlands to Downstream Waters* report. The report was used as a building block for expanding the Clean Water Act's regulatory jurisdiction; however this was done prior to the Science Advisory Board's review of the report. Such expansion of jurisdiction should not be based on a report that does not address the fundamental question of significance of any hydrologic connection. The Science Advisory Board has come out with much the same conclusion in their *Draft Review of the Draft Connectivity of Streams and Wetlands to Downstream Waters.*

In addition to the traditionally recognized rivers, streams and wetlands, the proposed rule includes a third category known as "riparian areas". The proposed rule's definition of riparian areas could include land surrounding the recognized traditional areas (transition areas between terrestrial and aquatic ecosystems), geographically isolated wetlands, flood plains, and even other areas connected through the subsurface. *The Connectivity of Streams and Wetlands to Downstream Waters* report also does not fully take into account the Corps' 1987 wetland delineation manual requirements of requiring three field tests for determining the existence of a wetland. Selective choices in literature by the author led to error in the analysis with respect to the required determination of wetlands and illustrates that this report was not ready to be finalized when EPA drafted the proposed rule.

CONSOL Energy prides itself on being good environmental citizens and has set "compliance" as one of our top core values. This includes all regulations intended to improve the environment for the people living in the areas we operate. CONSOL Energy actually makes it a point to go above and beyond compliance as shown by our partnership with the Center for Sustainable Shale Development. In working toward these values we rely on avoidance of jurisdictional waters (as currently defined) as a way to be both compliant with Clean Water Act requirements and be good environmentally conscience corporate citizens. The proposed rule changes would significantly limit our ability to avoid newly regulated jurisdictional waters. By limiting our ability to avoid newly regulated jurisdictional waters, EPA would be directly affecting our project lead times and costs by requiring additional planning, training to meet additional permitting requirements, and now requiring mitigation for isolated resources and "riparian areas" that do not pose a significant or direct impact to the waters of the US.

Currently, CONSOL Energy has a project site located in central WV where the proposed rule would have a significant impact on our schedule, planning, and cost if it were to be implemented under the new proposed ruling. With the increased jurisdiction of the resources on the property, CONSOL Energy would be forced to abandon this site due to the associated increased costs with permitting delays and increased mitigation costs that we typically are able to avoid or minimize. (Refer to both figures showing resources w/current jurisdiction shown vs. jurisdiction after the Rule)

In closing, CONSOL Energy would like to reiterate that we are not in support of the proposed rule changing the definition of waters of the US and expanding jurisdictional waters that are covered by the Clean Water Act. These changes would lead to considerable permitting delays, additional mitigation cost, and a loss in our ability to consistently avoid and minimize currently regulated jurisdictional waters, while extending waters of the US coverage into areas that have no significant hydrologic connection to jurisdictional waters.

Thank you for your time and consideration.

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