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

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offered by
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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.