Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

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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

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