Testimony of Kevin Kelly

Chairman of the Board

National Association of Home Builders

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Hearing on "Potential Impacts of Proposed Changes to the Clean Water Act Jurisdiction Rule"

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Chairman Gibbs, Ranking Member Bishop, members of the subcommittee, on behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to testify today. My name is Kevin Kelly and I am the president of Leon Weiner and Associates, a building company based in Wilmington, Delaware, and NAHB's 2014 Chairman of the Board.

NAHB members are involved in the home building, remodeling, multifamily construction, land development, property management, subcontracting and light commercial construction industries. Our industry is largely dominated by small businesses, with our average builder member employing 11 employees. Since the Association's inception in 1942, NAHB's primary goal has been to ensure that housing is a national priority and that all Americans have access to safe, decent and affordable housing, whether they choose to buy or rent a home.

Recognizing the need for a clean environment and the benefits that it brings to communities, residents, and potential home buyers, NAHB members have a vested interest in preserving and protecting our nation's land and water resources. Since its inception in 1972, the Clean Water Act (CWA) has helped to make significant strides in improving the quality of our water resources and improving the quality of our lives. As environmental stewards, the nation's home builders build neighborhoods and help create thriving communities while maintaining, protecting, and enhancing our natural resources, including our lakes, rivers, ponds, and streams. Under the CWA, home builders must often obtain and comply with section 402 storm water and 404 wetlands permits to complete their projects. What is most important to these compliance efforts is a regulatory scheme that is consistent, predictable, timely, and focused on protecting true aquatic resources. Unfortunately, such a permitting program is becoming more and more elusive.

My business is dedicated to the development, preservation, and management of affordable housing for all citizens. I have a unique understanding of how the federal government's regulatory process impacts businesses in the real-world. Additional regulations make it more difficult for me to provide homes or apartments at a price point that is affordable to working families.

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 can account for up to 25% of the price of a 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 are imposed on the builder during construction.[1] The regulatory requirements we face as builders do not just come from the federal government. A key component of effective regulation is ensuring that local, state and federal agencies are cooperating, where possible, to streamline permitting requirements and respect the appropriate responsibilities of each level of government. Importantly, more sensible regulation will translate into job growth in the construction industry.

The growth potential in the home building industry is particularly important because few industries have struggled more during the Great Recession than home building. The decline in home construction was historic and unprecedented. Single-family housing production peaked in early 2006 at an annual rate of 1.8 million homes, but construction fell to 353,000 homes per year in early 2009, an 80% decline in activity. In contrast, a normal year driven by underlying demographics should see 1.4 million single-family homes produced. Clearly, if home building were operating at a normal level, there would be millions of more jobs in home building and related trades. Smart regulation can help unleash that growth.

Our impact on the economy is more than just jobs. Buyers of new homes and investors in rental properties add to the local tax base through business, income and real estate taxes, and new residents buy goods and services in the community. NAHB estimates the first-year economic impacts of building 100 typical single family homes to include $28 million in wage and business profits, $11.1 million in federal, state and local taxes, and 297 jobs. In the multifamily sector, the impacts of building 100 typical rental apartments include $10.8 million in wages and business profits, $4.2 million in federal, state and local taxes and 113 jobs.

As an industry, we have finally turned the corner and are contributing to, rather than subtracting from, Gross Domestic Product growth and an improving labor market. Thus, any effort to advance our nation's housing recovery is smart economic policy. To reach these goals, however, we need policies that streamline and enhance existing efforts and remove regulatory hurdles, not ones that add layers of regulatory red tape and provide minimal benefits.

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

"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, the agencies are hoping they can do an even better job at facilitating compliance while protecting and improving the aquatic environment.

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. Equally important, these changes will not significantly improve water quality because 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 claim 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 and water features that are located in riparian areas or floodplains.

The agencies intentionally created overly broad terms so they have the authority to interpret them as they see fit in the field, including stepping in where they may think a state has not gone far enough. For example, the proposal suggests that "neighboring" could include any wet feature within a "floodplain." As I am sure you are aware, floodplains can extend for miles from traditional navigable waters, yet the agencies can now claim that those features, miles away, can be considered neighboring. This is a far cry from what Congress intended to be covered by the CWA. 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.

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

[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

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 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 expand the scope of waters that can 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, however, blatantly ignores this history of partnership and fails to recognize that there are limits to federal authority. If this rule is finalized as proposed, 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

[6] *Id.* at 2248
[7] *Id.* at 2249

result, and while it makes its way through the court system, regulators and businesses will be left in a lurch.

In addition, because the proposed change in jurisdictional authority does not only apply to section 404 of the CWA, but to all of its programs, the states will be required to conduct more monitoring and develop water quality standards for these newly-jurisdictional waters in addition to those that are already covered. States will also be required to develop total maximum daily loads if these waters do not meet their water quality goals. Because many of these newly-designated waters are on the drier side of the spectrum and/or will be conveyances designed to move water from one place to another, I am particularly concerned with the impacts this rule will have on section 402 storm water permitting requirements and how the states and localities may pass on the myriad of new, onerous and costly requirements to landowners.

States have adequately regulated their own waters and wetlands for years. States takes their responsibilities to protect their natural resources seriously and do not need the federal government to meddle in their affairs and unnecessarily assert jurisdiction. In fact, every state has the authority to exceed federal law so long as there is a compelling reason. If you looked around the country, you would find that many states are protecting their natural resources more aggressively than when the CWA was enacted – a testament to their desire and willingness to do so.

In these times of austere budgets and competing priorities, the agencies should heed the CWA's directive and allow the states to maintain their prerogatives to regulate the lands and waters within their boundaries as they see fit.

Potential Impacts on Construction:

Home building is a complex and highly regulated industry. As costs, regulatory burdens, and delays increase, the small businesses that make up a majority of the industry must adapt. This can include paying higher prices for land or purchasing smaller parcels, redrawing development or house plans, and/or completing mitigation or resource enhancement projects. All of these adaptations must be financed by the builder and ultimately arrive in the market as a combination of higher prices for the consumers 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 the multitude of costs associated with overregulation.

Because compliance costs for regulations are often incurred prior to home sales, builders and developers have to essentially finance these additional carrying costs until the property is sold. Because of the increased price, it may take longer for the home to be sold. Carrying these additional costs only adds more risk to an already risky business, yet is one of the difficult

realities that home builders face every day. This proposed 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.

The picture becomes more stark when you consider the time and cost to obtain a CWA section 404 permit. A 2002 study found that it takes an average of 788 days and $271,596 to obtain an individual permit and 313 days and $28,915 for a "streamlined" nationwide permit. Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.[8] Importantly, these ranges do not take into account the cost of mitigation, which can be exorbitant. When considering these excesses, it becomes clear that we need to find a necessary balance between protecting our nation's water resources and allowing citizens to build and develop their land.

Increased Number of Federal Permits:

Construction projects rely on efficient, timely, and consistent permitting procedures and review processes under CWA programs. Builders and developers are generally ill-equipped to make their own jurisdictional determinations and must hire outside consultants to secure necessary permits and approval. This takes time and money. Delays often lead to higher costs, which lead to greater risks. Onerous permitting liabilities could delay or eventually kill a real estate deal. If the rule is finalized in its current form, the ability to sell, build, expand, or retrofit structures or properties 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.

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

Increased Federal Consultations:

Many federal statues tie their approval/consultation requirements to those of the CWA – meaning that if one has to obtain a CWA permit, he/she must also obtain others (examples include the Endangered Species Act, National Historic Preservation Act, and National Environmental Policy Act). If more areas are considered jurisdictional, more CWA permits will be required, triggering these additional statutory reviews. Because project proponents do not have a seat at the table during these additional reviews and the consulting agencies are not bound by a specific time limit, builders and developers are immediately placed at a disadvantage. 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:

Discourages use of Low Impact Development:

Oftentimes, 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 use of LID methods can be 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 install LID Best Management Practices (BMPs) for the general benefit of their communities. Examples include bioretention areas such as raingardens, swales, retention ponds and infiltration basins. Over time, these areas could begin to function similarly to wetlands and under the proposed rule, be deemed jurisdictional. If so, builders and developers will be less inclined to install these highly-efficient and effective systems. Further, such an end result is in direct conflict with the current efforts by EPA to promote the use of green infrastructure.

Impacts on Municipal Separate Storm Sewer Systems:

Municipal Separate Storm Sewer Systems (MS4s) 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 402 National Pollutant Discharge

Elimination System permits and develop stormwater management programs. Because exposed ditches and intermittent streams are often part of MS4 systems, I am concerned that the proposed may regulate MS4s (or their components) as "Waters of United States." This would be problematic because these features are already regulated as a point source. Further, there are miles of roadside ditches that are simply there to carry storm water from the roadways for public safety and for which it makes little sense to consider as a federally regulable water.

Scientific Study and Economic Analysis:

EPA Administrator, Gina McCarthy, recently defended the importance of science in guiding the agency's decision making. NAHB strongly agrees that sound science must underpin any regulatory action, which is why it so surprising that the agencies have yet to complete the report that was intended to serve as the scientific basis for the rulemaking. The agencies have submitted a draft scientific study, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" ("draft connectivity study") to the EPA Science Advisory Board (SAB) for peer review. Final recommendations from the SAB panel are expected in the coming weeks, yet the agencies moved forward with the proposed rule before the review was completed. It remains unclear why the agencies are urgently moving this rulemaking forward prior to the release of the SAB's findings – particularly when there is no statutory (or other) deadline compelling them to do so.

Likewise, NAHB remains concerned that the draft Economic Analysis for the rule was hastily completed, as it fails to fully consider the costs and impacts the proposed rule will have on the full suite of CWA programs and underestimates the extent and impact of those waters that will now be deemed jurisdictional.

In sum, we take issue with the agencies' reckless disregard for the science and poorly considered economic analysis. The agencies violated the spirit of the Administrative Procedure Act and have made a mockery of the SAB process by proposing a rule without the foundational science firmly in place or a comprehensive analysis of the likely costs and benefits.

Conclusion:

The proposed rule does not add new protections for our nation's water resources but rather, inappropriately shifts the jurisdictional authority of many drier-end waters to the federal agencies. As a builder serving the affordable housing market, I am concerned about additional government regulations and the continued uncertainty this rule ensures. I cannot continue to provide affordable housing to those in need while weighed down by additional regulatory burdens and requirements like these that provide little benefit.

In addition, the rule allows the agencies to illegally "take the easy way out" by sweeping everything under federal authority. If the agencies are interested in developing a meaningful and balanced rule, they must take a more methodical and sensible approach. I have significant concerns with the proposed rule and I would encourage the agencies to rethink it.

I appreciate the opportunity to discuss these important issues.