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

[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.

<u>Unintended Consequences and Regulations Beyond Wetlands:</u>

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.