

**Submitted Testimony of the American Public Gas Association to the
House Small Business Committee Hearing, “Environmental
Protection Agency (EPA) and the U.S. Army Corps of Engineers
(Corps) proposed rule defining the scope of waters protected under
the Clean Water Act”**

A Consumer Perspective

On behalf of the American Public Gas Association (APGA), we appreciate this opportunity to submit testimony on the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) proposed rule defining the scope of waters protected under the Clean Water Act (CWA) (Docket ID No. EPA-HQ-OW-2011-0880)

APGA is the national association for publicly owned natural gas distribution systems. There are approximately 1,000 public gas systems in 37 states, and over 700 of these systems are APGA members. Publicly-owned gas systems are not-for-profit, retail distribution entities owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies that own and operate natural gas distribution facilities in their communities. Public gas systems’ primary focus is on providing safe, reliable, and affordable service to their customers.

At the most basic level, APGA represents the views of American natural gas consumers. Our members serve homeowners and small businesses, which rely on affordable natural gas to heat their homes, cook their meals, power their restaurants, schools and hospitals, and service businesses of all types.

On March 25, 2014, the EPA and Corps (hereafter collectively, the Agencies) published a Notice of Proposed Rulemaking (NPR) to clarify the scope of CWA regulation over America's streams and wetlands. APGA acknowledges that the CWA is fairly characterized as "watershed" legislation that is responsible for addressing successfully pollution in the waters of the United States,¹ and applauds the Agencies for their work in that area. Our concern is that this proposed rule, while arguably well-intentioned, has been inadequately studied and, by appearing to broaden the Agencies' reach under the CWA, will increase, rather than diminish, regulatory uncertainty, to the detriment of APGA's members' operations. Of course, at the end of the day, if the NPR is adopted as a final rule, its validity will be determined by the judicial system, unless Congress intervenes to make clear that it did not intend for the scope of CWA to reach to the limits to which the Agencies now want to take it.

APGA's stake in this debate is that the effort of the Agencies to extend their CWA jurisdiction, if implemented, would raise safety concerns as related to the ongoing operation and maintenance of natural gas distribution systems and inflict an unnecessary and unwarranted financial burden on APGA's members and their customers.² In other words, the extension of federal jurisdiction to matters heretofore considered to be within the parameters of the States frequently has unintended consequences, and this is no exception. In addition, the downsides of enhanced jurisdictional reach are greatly heightened, if not accompanied by, sufficient increased funding to ensure timely action by the Agencies as it relates to CWA matters over which they exercise jurisdiction.

¹ *Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers*, 531 U.S. 169, 175 (2001)(dissent)("SWANCC").

² The time and cost burden of the federal permitting process was noted in *Rapanos*, 547 U.S. at 721.

Prejudges the Science

There are certain aspects of the NOPR that APGA finds very troubling from the standpoint of fundamental administrative law principles. The need to broaden the scope under the proposed rule is based on EPA's draft scientific study on the connectivity of waters "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.*" The EPA's Science Advisory Board panel is still in the process of peer-reviewing the draft connectivity report. At its December 2013 meeting, the panel identified significant deficiencies with the report. In addition, the Agencies base their analysis of "significant nexus" – a key phrase in the judicial history of the reach of CWA jurisdiction³ - on a yet-to-be finished literature review which fails to examine what connections are "significant." The final report will be released during the comment period, which will not allow the affected parties adequate time to review and comment. Moreover, it does not appear that the Agencies intend to give the public an opportunity to review the final connectivity report as part of the WOTUS rulemaking.

There are numerous places throughout the preamble to the proposed rule wherein the Agencies have asked the public to provide specific information regarding the proposed rule's scientific justifications. The purpose of the Science Advisory Board (SAB) review of the draft connectivity study was to evaluate the "evolving scientific literature on connectivity of waters," and the public deserves the opportunity to comment on the conclusions of that review process.

Expanding the Scope

The EPA and the Corps both assert that the scope of CWA jurisdiction is narrower under the proposed rule than under existing regulations, and that the proposed rule does not extend jurisdiction over any new types of waters. However, under the manner in which the proposed

³ *E.g., SWANCC*, 531 U.S. at 167-68.

rule is constructed, there is essentially no limit to CWA federal jurisdiction. 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. The Congressional Research Service found that the proposed rule expands the agencies' authority by proposing new definitions such as "tributary" and new categories of waters such as "adjacent waters." Authority will be expanded over many new isolated waters through its "significant nexus" definition, which relies on a yet-to-be-completed "Connectivity of Streams and Wetlands to Downstream Waters" report that fails to address the "significance" of such connections.

Impacts on APGA Members

Due to the expansiveness of the proposed rule, the potential impact on public gas systems would be significant. The proposed rule increases the number of water features that would be subjected to federal permitting standards. These water features have been traditionally regulated at the local level. This system of shared responsibility, consistent with basic principles of federalism,⁴ has resulted in effective environmental protection without imposing unnecessary federal controls (or expending federal dollars) where they are not needed. APGA believes that the Agencies should focus on maintaining a proper balance between Federal and State oversight of non-navigable waters wholly within State boundaries that do not affect interstate commerce.

In 2013 the Chambersburg municipal gas system in Chambersburg, PA had to cross the Conococheague Creek with a gas main. To minimize impact to the creek, it directionally bored six feet under the stream bed. Notwithstanding taking such steps to avoid any impact to the

⁴ The CWA recognizes the "primary responsibilities and rights of States to prevent, reduce and eliminate pollution,..." *Rapanos* at 722-23.

creek, Chambersburg was required to complete a CWA Section 404 stream crossing permit, which took seven months to obtain (and could have taken much longer). What this illustrates is that permitting on CWA waters is slow now, and if the Agencies are successful in extending their jurisdictional reach, acquiring such permits will be even slower and more widespread in the future. This will be especially so, if as appears to be the case, the Agencies are not seeking any, much less adequate, additional funding to support their widened authority. Bottom line, this will make operating safe and efficient natural gas distribution systems more difficult and more expensive, without any offsetting benefit.

With the potential increase in the number of geographical features that would have to undergo a review and likely additional permitting, APGA's members are concerned with the impact the increased workload would have on the Agencies with respect to both the quickness of the review process and the quality of the review. Due to the nature of our business, timely review and issuance of permits are not only critical to maintain safety, but are also critical for maintaining a reliable and resilient system.

APGA's members spend a significant amount of time and resources replacing and servicing their systems, such as updating cast iron gas mains and older steel gas mains and services. This work is for the safety of their residents, as well as to satisfy Federal and State regulations whose goal is public safety. They regularly cross ditches and dry creek beds and properties in flood plains and/or properties that may drain into storm water ditches. Delaying pipe replacements for months or years would negatively impact the safety of natural gas system consumers, with any offsetting benefits to the environment being either negligible or non-existent.

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 reality, APGA believes, is that the proposed rule will subject far more activities to both federal and state CWA permitting requirements, NEPA analyses, mitigation requirements, and citizen lawsuits challenging the applications of new terms and provisions. The impact will be felt by our members and our member's customers, especially small businesses that are likely to be 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 and certainly is not reflected in EPA's flawed economic analysis for the proposed rule.[CITES] Neither do the Agencies adequately address the effect on state and federal resources for permitting, oversight, and enforcement.

The Economic Analysis suggests that the proposed rule will increase overall jurisdiction under the CWA by only 2.7 percent federalism.⁵ But the EPA arrives at this percentage using a flawed methodology that only accounts for the Section 404 program, relies on figures extrapolated from statistics from 2009-2010, and fails to consider waters and features that were not historically subjected to the CWA permitting process. Relying on these outdated data, the Agencies systematically and substantially underestimate the impact of the proposed rule's new definition.

Conclusion

APGA has the utmost respect for the CWA and the Agencies' actions thereunder to clean our nation's waters. We are expressing our reservations about the NOPR because of our concerns

⁵ EPA and the Corps of Engineers prepared economic analysis "Economic Analysis of Proposed Revised Definition of Waters of the United States."

regarding regulatory uncertainty and the adverse impacts of such uncertainty as it relates to the hundreds of communities in this country that will be adversely impacted by expanding the scope of the CWA beyond what we believe Congress intended or the courts have sanctioned. Neither agency has outlined a clear path to implementing this rule so as to prevent unnecessary permit backlog on an already overtaxed review staff. The unintended consequences of such expanded jurisdiction will make operating a safe and efficient local natural gas distribution system less likely and more expensive, to the detriment of the millions of consumers served by such systems. For these reasons, we urge Congress to look very carefully at the NOPR that is the subject of this hearing. .

APGA appreciates the opportunity to submit testimony before the House Committee on Small Business on this critical natural gas and public interest issue. We stand ready to work with the Committee on these and all other natural gas issues.