



Statement of the American Farm Bureau Federation

To: House Committee on Small Business

**Regarding: Meeting the Needs of Small Businesses and Family Farmers in
Regulating our Nation's Waters**

July 22, 2009

**Presented by: Charlie Kruse, President Missouri Farm Bureau
On Behalf of American Farm Bureau**

Madame Chairwoman and members of the Committee, my name is Charlie Kruse. I am a fourth generation farmer from Dexter, Missouri where I raise corn. I am the president of the Missouri Farm Bureau, and I am pleased to offer this testimony on behalf of the American Farm Bureau Federation and farmers and ranchers nationwide. Farm Bureau is the nation's largest general farm organization, representing producers in every part of agriculture. We appreciate the invitation to comment on the regulatory implications and associated costs to small business of deleting the term "navigable" from the Clean Water Act (CWA).

The compliance costs associated with an expanded CWA regulatory program can be summarized in the following manner: Broader scope will result in an increase in permit requests, litigation will lead to delays, higher compliance cost, lost productivity and financial burdens for small businesses.

A recent study published in the Natural Resource Journal found that it takes two years to prepare and obtain an individual 404 permit and one year to prepare and obtain a nationwide general permit.¹ It should be of no surprise that if it takes that much time the average costs are going to be significantly higher. According to the study, "*individual CWA permit application costs over \$271,596 to prepare (ignoring the cost of mitigation, design changes, cost of carrying capital and other cost), while the cost of preparing the typical nationwide general permit application averages \$28,915.*" Costs and delays of these magnitudes can cripple small businesses.

As bold and astonishing as these numbers are, they ignore other important costs. The following are three real life examples of regulatory burdens farmers and ranchers have or will likely face if the Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) are allowed to regulate all water.

Example #1 relates to a farmer living in the western U.S. who made the decision to obtain a 404 permit in order to transition his pastureland to grape production in 2004. The first question is "why would a producer need a permit to farm his land?" That is a good question and the only answer is – the agencies have not promulgated regulations to implement the law – they have only issued guidance, and under this scheme agency personnel have the capacity, if they wish, to narrow the statutory 404 (f)(1) rendering the exemptions meaningless.

The second question is "Why is this farmer growing grapes in a swamp?" The answer is – he is not. As a result of the change, the Corps and EPA now regulate isolated, intrastate, non-navigable depressions. These areas are no more than puddles that pool water on the surface for approximately 7 days a year during the growing season and can not be identified by the untrained eye.

So what did it cost for this small farm (40 acres) to obtain a 404 permit to grow grapes on land that has in the past been covered by the statutory exemption?

- 2-year wait

¹ The economics of Environmental Regulation by David Sunding, David Silberman, 2002 Natural Resource Journal. (Attached)

- Consulting fees - \$6,000
- Permit fee - \$1,500
- Mapping fee - \$1,500
- Wetlands Mitigation fee - \$35,000/acreX 10 acres = \$135,000
- Total cost - \$144,000

Let me make two important points about this:

#1 This example is not an “isolated” case. Farmers and ranchers in the West generally wait 2 to 4 years to obtain a permit, with costs ranging anywhere from \$80,000 to well over \$1 million.

#2 This money was spent by a small businessman and resulted in absolutely no environmental benefit.

If the word “navigable” is removed from the CWA, and if the Corps and EPA are allowed to use an overly-broad interpretation of the term “waters of the U.S.,” many more farmers and ranchers will be caught in exactly this kind of costly regulatory quagmire, with virtually no perceivable environmental benefit. Water will not be cleaner, more drinkable, or more fishable – which are the statutory goals of the law. Environmental activists, however, will be given an opportunity to control land use by litigating against property owners.

Example #2 highlights the costs associated with mitigation for a small farmer in the upper Midwest. This example involving the U.S. Army Corps of Engineers surfaced about the same time the Supreme Court was hearing the Rapanos case. In this case, the farmer initiated a project to improve existing drainage on 11.8 of his 130 acres. Before he conducted any work, he contacted USDA’s Natural Resources Conservation Service (NRCS) and the State of Minnesota to get approval and was told that they did not consider his land to be a wetland. Afterward, the Corps wrote him a strong letter informing him that it had reviewed his information and did consider his proposal an attempt to fill 11.8 acres of jurisdictional wetlands. The Corps said he would need a section 404 permit and would have to restore or create wetlands at a ratio of 1.5 acres of compensatory mitigation to one acre of wetland adversely impacted. The Corps instructed him that he would need approximately 17.7 acres of restored and/or created wetland, which the Corps stated would cost about \$77,000 – (this is more than the property was worth).

Additionally, the Corps sent him a copy of a Public Notice inviting a public interest review of the intended use - of his land. The Corps also claimed jurisdiction over his property was based on a hydrologic connection of his field to “navigable” water. The closest navigable water is more than 160 miles as the crow flies from this tract of land. The tenuous hydrologic connection that exists between the land and the Corps “tributary” is generated by runoff that only “*occasionally*” exits this property through a ditch that his center pivot irrigation system crosses when it makes a circle. The land is not navigable water; it’s nowhere near navigable water. If this farmer’s land can be regulated as navigable waters, just about any land can. His situation is not unique. There are other farmers who face the same problem but who do not feel they can criticize the Corps or other federal agencies without inviting more regulatory burdens on their farms. Unfortunately, he abandoned his improvement project and will continue to farm his 11.8 acres as his family has for

decades. If he had been allowed to complete his project he could have increased his farm's income by about \$1,500 per year.

During his exchange with the Corps, he questioned why his project would not fall under Clean Water Act section 404(f) exemptions. He, like many other farmers and ranchers, thought the law allowed farms, ranches and forestry operations to continue "normal" farming, silviculture and ranching activities. When he raised this to the Corps attention they were happy to point out that the 404 f(1) exemptions were generally "recaptured" by paragraph (2) of Section 404 (f) and his project, in its judgment, was not covered by the exemption. The bottom line is that the farmer, because of the tremendous costs, was prevented from improving the productivity of his lands. Further, his actions were initiated only after NRCS indicated the land was not a wetland. The Corps' different interpretation led the landowner from a wetland to a regulatory wasteland.

Example #3 highlights the number and acres of private ponds that could be impacted if the Corps and EPA are given the authority to regulate all water in Missouri. Aware that USDA agencies in Missouri have digitized aerial maps used in administering farm and conservation programs, we inquired about the number of private ponds and lakes in our state. Across 114 counties, we have nearly 315,000 ponds and lakes on private land. Ninety counties have more than 1,000 private ponds. Sixteen counties have more than 5,000 ponds on private lands. The three members of the Missouri congressional delegation serving on this committee collectively have more than 169,000 private ponds and lakes in their districts. Keep in mind that the Farm Service Agency's figures do not take into account other water features that could fall under federal regulation.

The regulatory reach of the federal Water Pollution Control Act, almost since the law's inception, has engendered many heated conflicts related to the federal/state relationship, the question of "navigability" and perhaps most critically the use of private property. The regulatory reach of the CWA, in particular, has kept courtrooms busy as the issue has made its way from the federal district and circuit courts to the United States Supreme Court on several occasions. Anyone who has ever had to deal with the Corps and EPA can relate horror stories about the burdensome cost, regulatory creep, narrowing exemptions and ever-broadening interpretations of what constitutes water or a wetland.

The scope of federally regulated waters is extremely important to farmers and ranchers because determinations of areas subject to or excluded from federal CWA regulation directly impact the value of agricultural land. Agricultural operations, even with the "Section 404 (f)(1) normal farming exemptions," have fallen into costly regulatory quagmires that farmers never imagined could exist. For example, in several western states the use of herbicides, which are registered and fully regulated by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), now require a National Pollutant Discharge Elimination System (NPDES) permit. Depending on the outcome of other litigation, all farmers and ranchers may soon have to bear the cost of NPDES permit compliance. It is important to note that this legal and regulatory exercise comes with little or no real gain in water quality in rivers and streams. In fact, it significantly drains resources from the bottom line of many farmers and ranchers. If the regulatory reach of the CWA is expanded, litigation and costs of compliance both for regulators and the regulated community will increase.

Farmers and ranchers are practical small business owners. We recognize and understand that words matter. It is clear to us that Congress intended to use the term “navigable waters” when it passed the CWA in 1972 – or it would not be there. It is our view, and that of many legal experts, that deleting this term from the 1972 act would fundamentally expand, not simply restore, the scope of areas that would be subject to federal regulation. The purpose of the deletion, as we understand it, is to sever any connection of federal jurisdiction over U.S. waters from “navigable waters” and the Commerce Clause under the Constitution. Whether some intended to do that in 1972 may be open to debate; whether Congress did so is not. The history of the act amply demonstrates that the term “navigable waters” was and is at the root of the federal government’s regulatory jurisdiction and should remain a part of the statute.

Expanding the scope of the CWA would sweep many agricultural and forestry activities under CWA regulation simply because such activities are conducted near some isolated ditch, swale, wash, erosion feature or ephemeral stream that would be deemed a “water of the United States.” This would represent the most sweeping change to the law since its enactment in 1972.

Some have stated it is their intent to take CWA regulation back to a time before the Supreme Court was asked to review the actions of the federal agencies, and “*not to extend the reach, not to go beyond that purpose*” – to restore the status quo ante. Farmers and ranchers appreciate this perspective and the invitation to testify to bring some practical experience to the important goal of protecting water quality. I hope these comments will help inform members’ views of exactly what the *status quo ante* really was. Some might incorrectly infer there was a time when no controversy existed or that the law and regulations were black-and-white. That is manifestly not the case. Farmers and ranchers well understand the significant problems in interpretation of the CWA and we have first-hand knowledge of the ever-changing interpretation of federally regulated waters espoused by the Corps and EPA. We are also all too familiar with the uncertain, idiosyncratic and vague definitions of jurisdictional wetlands that helped to fuel the issues that have been before this committee for years.

During the 1980s and 1990s, the Corps and EPA had at least three delineation manuals, countless guidance documents and lists of subjective and ambiguous wetland indicators and criteria. The only parts and pieces of this broad scheme that did not evolve or were not victims of regulatory creep were those few regulations that had the benefit of full public review and comment through the rulemaking process. Whether or not the Corps or EPA had the goal of creating moving targets within their programs and policies that were, and still are, jurisdictionally vague, that was clearly the effect. The lack of definitive rulemaking has been problematic for the program, landowners and the courts. It has resulted in unclear, inconsistent and confusing jurisdictional concepts that have frustrated anyone who has had the misfortune to deal with it.

Fortunately, under current law and regulations, farmers and ranchers by and large do not have to seek 404 permits. But if the law’s jurisdictional reach is expanded, it is entirely possible that every ditch and swale on agricultural property would become a “water of the United States”, including more than 314,000 ponds in Missouri alone, based on the notion that ‘ephemeral’ features would be declared waters of the U.S. An ‘ephemeral’ feature by definition only contains water for brief periods after a precipitation event. Even though someone’s property, or a piece of their property, was dry most of the time and only held water shortly after a rain, the government

would be empowered to assert jurisdiction. And even if it did not, any activist with a lawyer would have the ability to sue to make the government assert jurisdiction. In the end, it may well be that a court, and not Congress, will decide not only the geographic scope of the CWA but to what extent the Corps and EPA can regulate the hydrologic cycle. We hope Congress will avoid that outcome.

The history of the CWA since its enactment in 1972 is replete with instances when the Corps and EPA construed binding legislative language in a manner that effectively narrowed the normal farming exemption. The current farming exemptions have been eroded over time and have not protected farming as originally envisioned. For example, regulators misconstrue what constitutes plowing and what is an ongoing farming operation. The Corps once tried to exclude temporary rice levies as not meeting the normal farming exemption. Even now, the Corps and EPA have narrowed what they consider normal farming practices in an attempt to limit crop rotational practices.

Currently, a number of Corps districts contend farmers need permits to switch the use of their land between pasture grazing and row croplands. Too often, non-farmer regulators decide for themselves what is a normal farming practice, and the result is more regulation and more costly compliance for farmers and ranchers.

Prior Converted Cropland - In addition, there appears to be considerable confusion over the regulatory treatment of prior converted cropland (PCC). We are concerned deleting the term “navigable” opens the door for EPA and the Corps to tie the hands of farmers and ranchers and directly impact the use and value of more than 55 million acres of agricultural land - a value conservatively estimated to be \$110 billion. Changing this important regulatory exemption will devastate and devalue the assets of landowners currently making plans to use their property, sell development rights or give conservation easements.

The EPA and Corps issued regulations in 1993 that formally codified the long-standing policy of not treating PCC as a “water of the United States” and specifically recognized that PCC areas could be used for either agricultural or non-agricultural uses. We are concerned that the financial well-being of farmers and ranchers could be dramatically impacted if changes to the CWA, fail to incorporate the understanding of PCC that informed the agencies’ decision to exclude PCC from the definition of ‘waters of the United States.’ By definition -

PC cropland has been significantly modified so that it no longer exhibits its natural hydrology or vegetation. Due to this manipulation, PC cropland no longer performs the functions or has values that the area did in its natural condition. PC cropland has therefore been significantly degraded through human activity and, for this reason...[and] in light of the degraded nature of these areas, *we do not believe that they should be treated as wetlands for the purposes of the CWA.*” (emphasis added) 1993 Regulation and Preamble.

The absolute exclusion of prior converted farmland from federal regulation involves two aspects of particular importance to our nation’s farmers. First, the regulation in question has been a part of the *Code of Federal Regulation* for over 14 years and it explicitly exempts prior converted farmland from the definition of “waters of the United States.” Second, once a farmer’s land is

designated as prior converted cropland and outside the jurisdiction of the CWA that designation does not change regardless of use. This is one of the very few things that the Corps and EPA have in “black and white.” The final regulation notified agricultural producers and the public of the regulatory requirements and clarified which areas would not be regulated as “waters of the United States.”

In addition to farmers and ranchers, it clarified to the entire economy, financial institutions specifically, that the market value of the land – on which financial decisions were based – would not change due to restrictions in land use from federal regulation. With approximately 55 million acres of PCC, there are significant financial risks to thousands of farmers and hundreds of banks nationwide if Congress rolls back this Clinton era regulation. Such an abrupt policy shift would immediately generate significant financial uncertainty at a time when banking and credit risk are already problematic.

Acknowledging the regulatory creep of this program, the Clinton Administration further justified this important action by stating –

except for a brief period of time after the adoption of the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989 Manual), the Section 404 program has generally not considered such farmed areas as meeting the regulatory definition of wetlands under the CWA. The Corps ceased using the 1989 Manual in August, 1991 at the direction of Congress (Energy and Water Development Appropriations Act of 1992, Publ L. 102-580) and began using its earlier 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual) for wetlands delineations.

It is important not to minimize or denigrate the nature of farmland as an asset. Land is generally the largest and most valuable asset that a farmer has and is our equivalent of a 401(k). It serves as the critical source of collateral by which farmers are able to secure loans and other debt financing vital to operating their farm businesses. It also serves as the major source for farm families as they plan for retirement. The value of land is directly based on how it can be used. Land whose potential for future use is severely restricted through regulation is worth little, striking at the very core of economic needs that farm families must sustain to keep their farms viable. The Corps and EPA took this into consideration during the rulemaking:

In response to commentators who oppose the use of PC croplands for non-agricultural uses, the agencies note that today’s rule centers only on whether an area is subject to the geographic scope of CWA jurisdiction. This determination of CWA jurisdiction is made regardless of the types or impacts of the activities in those areas (emphasis added).

The owners of the more than 55 million acres of prior converted farmland, of whom I am one, are deeply troubled if Congress does not fully understand, even today, 16 years after it became effective, the proper regulatory treatment of PCC. Any change to this long-standing regulation would signal an abrupt and controversial departure from existing treatment under the law. In fact, many farmers fear this is exactly the goal of the environmental groups that are pressing to delete the term “navigable.” It is why most people feel the goal of the legislation is not, as some state, to

“restore” the act but to further broaden its regulatory reach into areas where it has never been valid.

The regulatory reach of the CWA has been one of the most contentious and controversial aspects of the law. Any change in this policy will generate tremendous financial uncertainty and rekindle long-standing controversy and opposition from the agricultural community.

Deleting the term “navigable” would not eliminate the uncertainty regarding the CWA, it would merely replace one set of questions regarding the CWA with a new set of questions. By proposing to regulate “all intrastate waters,” the regulatory focus shifts the central question from being “What water is federal?” to “What is a water?” If the statutory structure is changed, EPA, the Corps, and the general public will have to consider and determine where regulation begins. But unlike the current version of the CWA, they will not have decades of case law, regulations, and guidance to consult for reference. Instead, EPA, the Corps, and the general public will have to determine how far the CWA reaches absent any specific guidance or precedence. EPA and the Corps will be required to promulgate regulations defining “waters of the United States” under the new statute. It will be no easy task. At what point does rainfall running across the landscape become a “water”? At what point does a puddle become a wetland? Would groundwater be a water of the United States? Ditches? Gutters? These are just a few of the questions that carry heavy regulatory cost and would have to be resolved if “navigable” is deleted from the CWA.

Contrary to the contention that deleting the word “navigable” will resolve uncertainty, the change will create more uncertainty and usher in years of litigation over the scope of the CWA. In particular, EPA and the Corps would be subject to lawsuits if they did not regulate “all” intrastate waters. The new definition being debated would leave the agencies very little room or discretion to limit their jurisdiction. Courts could interpret the word “all” to mean “all” and therefore compel the agencies to regulate every “intrastate water”—no matter how small, how infrequent, or how local in nature.

Such a change would exacerbate the already difficult and costly task of conducting business.

Prior to the Supreme Court’s ruling in *Solid Waste Agency of Northern Cook County (SWANCC)*, federal agencies attempted to assert jurisdiction over any water body that would potentially be used by migratory birds flying between or among states. The Supreme Court stated that this “bird rule” went too far and had no relation to the CWA. The Supreme Court, in *SWANCC*, recognized and relied on the CWA’s use of “navigable” in the context of the act’s description of federal jurisdiction to conclude that the scope of areas where federal agencies may regulate is limited. Legislation that asserts jurisdiction to what was in existence prior to *SWANCC* does not “restore” federal authority; it would explicitly authorize such jurisdiction for the first time. Moreover, it would authorize federal control as broad or broader than the “bird rule” struck down by the U.S. Supreme Court.

We appreciate your interest in this issue and the opportunity to submit this testimony.

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