

Statement by the

**NATIONAL CATTLEMEN'S BEEF ASSOCIATION,
PUBLIC LANDS COUNCIL and
ARIZONA CATTLE GROWERS' ASSOCIATION**

With regard to

The Clean Water Restoration Act

Submitted to the

United States House of Representatives - Committee on Small Business

The Honorable Nydia M. Velázquez, Chairwoman

The Honorable Sam Graves, Ranking Member

By

Jim Chilton
Box 423, 17691 W. Chilton Ranch Road,
Arivaca, Arizona 85601

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Testimony before the Committee on Small Business, U.S. House of Representatives
James K. Chilton, Jr.
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I am testifying on behalf of the Arizona Cattle Growers' Association, the Public Lands Council, the National Cattlemen's Beef Association and my family.

My name is Jim Chilton and I am a 5th generation Arizona rancher. My address is Box 423, 17691 W. Chilton Ranch Road, Arivaca, Arizona 85601. Arivaca is approximately 55 miles southwest of Tucson, Arizona in native mesquite and oak grassland grazed for over 300 years since the explorer priest Fr. Kino brought cattle ranching to the area. The north end of our 50,000-acre ranch is adjacent to the town of Arivaca and continues south to the international border with Mexico. The ranch includes private property, state school trust land leased for grazing since statehood, three federal grazing permits within the Coronado National Forest and a private land farm. I am very proud of my wife Sue Chilton, my two sons, my partner who is my brother, my father and mother and my ancestors and their contribution to the culture, economy, and strength of the State of Arizona.

We have been in the cattle business in Arizona for over 120 years preserving our western ranching customs, culture and heritage dating back to our pioneering ancestors who settled in Arizona Territory in the 1800's. Our multi-generational responsibility has given us a long-term view of the necessity to be excellent stewards of the grasslands and water resources we respectfully manage in Arizona.

National Cattlemen's Beef Association, Public Lands Council and Arizona Cattle Growers' Association Object to Immeasurable Expansion of the 1972 Clean Water Act

Arizona Cattle Growers' Association

The Arizona Cattle Growers' Association (ACGA) is the only professional organization solely dedicated to representing, educating, communicating and providing service to Arizona's beef producing families. ACGA represents over 950 members that raise over 970, 000 head of cattle on private, federal, and state trust land. Each year the Arizona cattlemen provide over 400 million pounds of beef and generate 3.2 billion dollars for Arizona's economy.

Public Lands Council

The Public Lands Council (PLC) has represented livestock ranchers who use public lands since 1968, preserving the natural resources and unique heritage of the West. Public land ranchers own nearly 120 million acres of the most productive private land and manage vast areas of public land, accounting for critical wildlife habitat and the nation's natural resources. PLC works to maintain a stable business environment in which livestock producers can conserve the West and feed the nation and world.

National Cattlemen's Beef Association

The National Cattlemen's Beef Association (NCBA) has represented America's cattle producers since 1898, preserving the heritage and strength of the industry through education and public policy. As the largest association of cattle producers, NCBA works to create new markets and

increase demand for beef. Efforts are made possible through membership contributions. To join, contact NCBA at 1-866-BEEF-USA or membership@beef.org.

The Proposed Clean Water Restoration Act (CWRA) gives the Army Corps of Engineers (“Corps”) and the Environmental Protection Agency (“EPA”) control over all watersheds in the nation. Since all land in the nation is within a watershed it means that the Corps and EPA would have land use control over farmers’ and ranchers’ property and other businesses not currently under the jurisdiction of the 1972 Clean Water Act. Water for grazing, farming, cattle and wildlife is absolutely essential to life, to economic production, and to the conservation of our ranching heritage. Consequently, bureaucrats would control the lives and land use of farmers’ and ranchers’ private land and grazing permits on State, Indian and Federal lands and therefore control peoples’ lives.

Not only does the expansion of the Clean Water Act threaten farmers and ranchers across the nation, but it affects small businesses, small communities, forestry, mining, manufacturing and all productive uses on private, State School Trust, Native American, and federally-managed lands. In fact, the proposed expansion of Federal jurisdiction would include hundreds of millions of isolated, intrastate pools, stock water ponds, springs, small lakes, depressions filled with water on an intermittent basis, drainage and irrigation ditches, irrigated areas that would otherwise be dry, sloughs, and damp places located on farms and ranches that have NO nexus with any navigable waters.

CWRA expands the current Corps and EPA jurisdiction to all waters within the United States and importantly to “activities affecting these waters.” What life activity does NOT affect at least your own water in some way? Therefore, the proposed Act is essentially a limitless national land and water use control effort that will regulate every activity in a wet area in the nation without requirement that it be connected in any way to a navigable water. Bureaucrats driven by private agendas will be empowered to impose their views and appealing their decisions will be costly and usually prohibitive in time, money, and national productivity. Bureaucrats will control citizens rather than citizens controlling government. Unfortunately, activists employed by federal agencies are already aware that they can freely interpret federal regulations to favor their personal philosophy. This *de facto* license results in a form of tyranny that supplants the rule of law. Every State will essentially have a federal land and water use Czar operating with dozens of powerful bureaucrats who control the very water we need to survive.

We believe the Clean Water Restoration Act is a “nice-sounding” name which masks an economically and culturally devastating power grab. It flagrantly violates both the spirit and the words of the U.S. Constitution. In fact, the Bill would effectively devalue private property without just compensation. Even worse, it will make law abiding citizens feel victimized and robbed without realistic remedy because appeal of arbitrary and vindictive rulings will be beyond the means of most citizens.

The Cost in Time and Money to Obtain a Permit

It makes no sense to require a family rancher or farmer to get a permit from the EPA or Corps before they can utilize their property or continue to water their cattle and farm their land. This is especially true given the fact that the federal government is already struggling to handle a backlog of 15,000 to 20,000 existing permit requests. As the United States Supreme Court has recognized, “The average applicant for an individual Clean Water Act permit spends 788 days and \$271,596 in complying with the current process and the average applicant for a nationwide permit currently spends 313 days and \$28,915 - not counting the substantial costs of mitigation or design changes.” Rapanos, 447 U.S. at 719 (plurality opinion). The culturally unique ranchers of the United States own and manage approximately 666.4 million acres of the 1.938 billion acres of the contiguous U.S. land mass. They rely on considerably more land than any other segment of agriculture and any other industry. In addition to raising livestock, they and American farmers grow hay, feed grains, food grains, fiber, fruits and vegetables. Passing this Act will be another serious wound to American family agricultural productivity.

The proposed language change, removing the word “navigable” from the present Constitutional limitation upon control of the “Waters of the United States,” would also constitute a direct attack on the heritage of the western pioneer ranching culture and ranching in every part of the United States. Congress must be aware that just deleting one small word is such a clever weapon of mass destruction. I’m sure the proponents of that change hoped it would escape unnoticed: so minor, so camouflaged in a nice-sounding name. But we do take notice and are entirely aware of the potential of that weapon to increase costs and delay production. Those delays and those costs may drive more farmers and ranchers over the financial edge and further arm those activists who seek to destroy the ranching and farming culture.

Personal Experience with Obtaining a 404 Permit from the Corps

Prior to the Supreme Court’s Rapanos decision, our family ranch had to apply for a 404 permit to construct a road across a wash that is dry almost 100% of the time. The regulatory approval process, which necessitated hiring attorneys and environmental consultants, cost about \$40,000. All we wanted to do was cross a dry wash on our legal right of way so that we could have legal access to 240 acres of our private property. The process took over a year. We then abandoned another project that would have required culverts in two other dry washes on an existing ranch road after concluding from our prior experience that seeking a 404 Corps permit was too expensive in time and money. Keep in mind that this is private property I am talking about in an area in which dry washes are often no more than a few hundred feet apart. It is impossible to traverse your own land without crossing a low place in our hilly terrain. Furthermore, no water on our ranch drains into a navigable river since it all disappears into the desert sand.

The requirement to obtain a 404 permit (prior to the U.S. Supreme Court Rapanos decision) in a dry desert grassland seemed totally irrational. It was the grotesque expansion of regulatory jurisdiction and bureaucracy beyond rational comprehension. Specifically, our attorney and environmental consultants informed us that our request for two culverts in two dry washes (that only have water briefly two or three times a year for less than 12 hours) would trigger the need

for a 404 permit based on the fact that both washes had sand in the bottom greater than one foot and that the cumulative impact would be slightly more than 1/10th of an acre in a 100-acre pasture. Therefore, the dry washes (each with sand about two feet from one side of the dry wash to the other side) activated what our consultants believed to be Navigable Stream provisions of the 1972 Clean Water Act. It is laughable or enough to provoke anger, to think of these desert washes as “navigable” waters of the United States.

I asked, how can these two dry washes impact in any way a navigable stream since the nearest navigable stream is the Colorado River about 275 miles away? The two small dry washes unite with another small dry wash that joins another dry wash that is a tributary to the last connected dry wash that disappears in the desert approximately 40 miles from where I wanted to install two culverts. The Brawley never reaches even a dry river bed. In a rare big storm the wash has water for less than a day before it spreads out in the desert and all of its water evaporates or sinks into the sand.

Observations on the Difficulty of Obtaining a 404 Permit

In addition to my own frustrating and costly experience with obtaining permits on my private land, I have reviewed the onerous, expensive and time consuming process home builders have to navigate to obtain a 404 permit from the Corps. The Corps rules and regulations are nearly impossible to understand by an ordinary citizen or small business entrepreneur. As a consequence, due to the complex bureaucratic legalese, homebuilders need to hire specialist attorneys and/or environmental consultants to plot a course through the complicated paper work. It is simply not acceptable to require family ranchers, farmers and other small businesses to hire expensive legal and environmental experts to conform to the requirements of a dramatically expanded Clean Water Act. Furthermore, few small private businesses can hold out on needed improvements for years while the wheels of agency compliance slowly review and then turn out the required documents.

The average private citizen has no timely recourse against the well-placed activists inside the Federal agencies. Regulators have real power over the lives of citizens. Most officers of the United States do their best to be objective, to fulfill their duties and not to be arbitrary or capricious. However, I have personally experienced assaults from environmental activists within federal agencies. It is nearly impossible for a citizen to fight a powerful bureaucrat who has a private anti-agriculture or anti-land use agenda. The more complex and far reaching the law is with complicated, rules, regulations and policies, the greater the opportunity for abusive bureaucratic behavior.

Hypothetically, a federal officer might not like a rancher, farmer or other business person and/or personally object to the nature of the business. A rogue Corps officer may dilly, dally and delay forever. Worse, a Corps employee may arbitrarily demand environmental mitigation in exchange for a permit. Since mitigation is often in the form of money or land, who gets the money or who gets the land? Is it fair or equitable for a small business person to be required to finance environmental organizations in exchange for a permit? Clearly, the power to deny

permits can provide nearly unchecked independence to a federal officer who chooses to exercise a form of tyranny over fellow citizens.

Should Congress Expand Burdensome Regulation During a Recession?

We ask, how, during a severe recession when the economy is struggling to recover, Congress can justify adding an enormous burden to American agricultural production by adopting the CWRA in the absence of tangible benefit? What will be the cost of the Act to the American economy? What will be the impact of an additional attack on the American ranching culture? How can the family rancher, farmer and small businessman survive this extra regulatory cost in time and money? How will the additional regulatory burden impact food prices, the consumer and the standard of living for Americans? How will this nation be able to meet the growing demand for locally-produced food that doesn't require transportation from distant regions and other continents? How will American livestock producers compete with other livestock producing countries? How much more of our food will have to come from imports? What will the impact be on exports of our products and the U.S. balance of payments? How many bureaucrats will need to be hired and what will it cost to pile these additional regulatory burdens on American citizens? Isn't it both wise and fair to have answers to these important questions prior to putting more chains and shackles on American livestock producers?

Enacting a new Standard for Federal Jurisdiction will Increase Litigation

It will take years to litigate the constitutionality of CWRA. Furthermore, 40 years of settled law will be trashed. Vast amounts of time and money will be diverted from production to a brand new legal treasure trove of litigation while citizens wait years to determine what the courts will conclude about what they can or can not do on their own land.

Importantly, the shift of both land use control and water regulation and water rights to the federal government from the States is a long-term change in the nature of the United States government. The legal and policy issues raised by this systemic departure from our nation's founding principles affect the basic concept of Federalism and settled law. Why would a State want to transfer its jurisdiction over local water and land use and cede *de facto* local zoning authority to the Federal Government? Citizens of small towns in rural agricultural areas far from navigable waterways will no longer be free to shape their future through their local land use. Their choices will be effectively subject to the veto of an unelected federal permitting officer.

All small businesses, farmers and ranchers will face the possibility of citizen suits by radical activists whose obstructionist philosophies will be financed by productive taxpayers under the Equal Access to Justice law. Those who make their living from the cottage industry of filing suits against the government will be delighted with the proposed changes to the Clean Water Act. These changes constitute an effective transfer of public money to activists who oppose American production. How can small businesses, farmers and ranchers defend themselves when a radical activist group cleverly files suit against the Federal Government's issuance of a permit while actually targeting the small business, the farmer or rancher?

It is difficult and costly even to gain intervenor status. The activists submit arguments to the court advocating denial of your right to even make your case. I have spent hundreds of thousands of dollars from my retirement savings intervening in lawsuits filed by radical activist environmental groups against the Forest Service in which I was actually the target. They tried time and again to eliminate grazing on my federal grazing allotments by requesting injunctions or denial of historic permit renewals. I am not alone. Other western ranchers have either had to fight this costly battle or sell out their heritage and cease production.

The remedy the activists usually request is an injunction against grazing or other productive activity essential to the livelihood and economic health of the individual and the community during the years it takes to resolve the suit. The activists chalk up a home run from the start by imposing costs and delays. These costs and delays are paid for directly by the producer and the taxpayers and later by the American consumer.

Producers usually have to try to intervene to help the Federal Government defend itself because the government interest may not be exactly the same as the producer's interest. Often someone in Washington DC charged with handling the case may decide not to defend the agency and the urban lawyers defending the government may not clearly understand the implication of serious issues affecting agriculture. The government has a record of advancing its own political agenda, settling these lawsuits, giving the activists what they want, and then using taxpayer dollars to pay the activists for their obstructionism under the Equal Access to Justice Act. This is already the situation. How much more will the proposed virtually limitless expansion of the jurisdiction of the Corps and EPA cost farmers, ranchers and other individuals and business to defend themselves over time?

Respect for Private Property

The proposed expansion of regulatory jurisdiction is a covert attack on private property rights fundamental to this nation. Private property is the bedrock of American productivity and the best hope for conservation of natural values. The right to hold and use private property is the most powerful tool for motivating human ingenuity to improve landscapes. Free people, vested with the security of private property and the rule of moral law, have natural incentives to enhance the value of land that belongs to them. An improving natural world order occurs because of freedom, not in the absence of freedom. And as George Washington said, "private property and freedom are inseparable."

Conclusion

Current law gives federal bureaucrats the authority to regulate wetlands associated with "navigable waters." If any non-navigable water needs to be protected by federal law, the specific water that needs protection should be identified and a rational solution should be found for the specific problem.

Farmers and ranchers believe that our nation's water is precious. The cost and scarcity of water inherently lead us to use it conservatively and scientifically for productive purposes. Livestock producers agree that we need to continue to protect the quality of our Nation's surface and ground water, but no expansion of federal jurisdiction is necessary to accomplish this goal. Federal agencies have ample authority under existing law to protect water quality. It is essential that the partnership between the federal and state levels of government be maintained so that States can continue to have the essential flexibility to do their own land and water use planning. Chairman Oberstar's attempt at usurping authority over these issues by vastly expanding federal jurisdiction must be halted by responsible congressional action.