Testimony

Jack Field

Owner, Lazy JF Cattle Co.

with regards to

Will EPA's 'Waters of the United States' Rule Drown Small Businesses?

submitted to the

United States House of Representatives

Committee on Small Business

Representative Sam Graves, Chairman

submitted by

Mr. Jack Field

Washington Cattlemen's Association

National Cattlemen's Beef Association

May 29th, 2014

Washington, DC

Good afternoon, my name is Jack Field. I am a cattle rancher from Yakima, Washington and the Executive Vice President of the Washington Cattlemen's Association. WCA is an affiliate of the National Cattlemen's Beef Association of which I am also a member. Thank you to the Chairman and Ranking Member for allowing me to testify today on the impacts of the Environmental Protection Agency and the U.S. Army Corps of Engineers' proposed expanded definition of "waters of the United States." I will also provide my concerns with the USDA-Natural Resources Conservation Service (NRCS) interpretive rule that was promulgated alongside this proposal.

First and foremost, the cattle industry prides itself on being good stewards of our country's natural resources. We maintain open spaces, healthy rangelands, provide wildlife habitat and provide the country with those juicy ribeyes we all love to throw on the grill on summer days like today. But to provide all these important functions, cattlemen must be able to operate without excessive federal burdens, like the one we are discussing today. I don't think the negative impacts of this definition can be overstated. As a producer and the head of a state association, I can tell you that after reading the proposed rule it has the potential to impact every aspect of my operation and others like it by dictating land use activities in Washington state from 2,687 miles away. I would also feel confident in saying that I believe it will actually have a detrimental impact on water quality.

After reading the proposal I can say that one thing is clear, the proposed definition is not clear. If the agencies' goal was actually to provide clarity than they have missed the mark completely, making the status quo worse, not better. The proposal would include ditches as Water of the U.S. if a regulator can distinguish a bed, bank, and ordinary high water mark. The proposal also would make everything within a floodplain and a riparian area a federal water by considering them "adjacent waters." The result could be to eliminate the use of my summer pasture, which is located wholly in a floodplain. I will show you what I think it could mean for my ranch and other small businesses like it.

In total I own and manage 55 cow/calf pairs and 10 replacements, or 120 total head of cattle, which is the average number of head for a cattle rancher in the U.S. There are some bigger and some smaller, but I'm about your average size, which means the average cattle producer in the U.S. falls well under what the law considers a "small business." We clearly manage the landscape and must utilize it to raise our animals. My cattle drink from tanks which I pump from a stream so I can protect potential bull trout habitat, they also water from irrigation ditches, ponds, creeks, seeps and puddles that they find. Therefore it is important to me and my operation to have clean water. Protecting the quality of the water I need for my cows does not require the federal government's oversight. Myself, for profitability and moral reasons, and the state of Washington do a pretty darn good job.

You can see in the first attached picture I have a small stream running through my pasture that my cattle utilize for drinking water. It is my judgment, based on the language of the proposal

that this could easily qualify as a water of the U.S., opening me and my ranch up to significant liability. Not only could I be required to get a 404 permit for grazing my cows in the pasture, but by making it a federal water there are now considerations under the National Environmental Policy Act, or NEPA, and the Endangered Species Act due to the federal decision-making in granting or denying a permit. There is also the citizen suit provision under Sec. 505 of the Clean Water Act that would keep me up at night. For the price of a postage stamp someone who disagrees with eating red meat could throw me into court where I will have to spend time and money proving that I am not violating the Clean Water Act. I don't think this is what anyone had in mind when Congress passed the Clean Water Act.

Instead of improving water quality, it is my belief, the belief of the Washington Cattlemen's Association, and the belief of the National Cattlemen's Beef Association that this proposal will decrease the quality of our water because it would discourage ranchers like myself from implementing conservation practices that are designed to protect water quality. As an example, I recently completed a project that you can see in the second attached picture that creates a riparian pasture so I can manage the grazing that occurs within the riparian area. The fence has allowed me to better manage my forage and to protect water quality. I voluntarily installed the fence, not because I had to, but because I thought it would be good for the environment. If this proposal and the NRCS-EPA-Corps Interpretive Rule were in force when I started this project I would not have completed it due to the significant legal liability they have created.

The Washington Cattlemen's Association and the National Cattlemen's Beef Association believe some presumptions have been created by the NRCS interpretive rule. First, that cattle grazing is a discharge activity subjecting me to legal liability if it occurs in a water of the U.S. I have never heard of the federal government declaring cattle to be either a point source or to create a fill activity under the Clean Water Act, but that's exactly what they've done. Second, if I implement a conservation practice that is not on the prescriptive list of 56 NRCS practices, or not done to the NRCS standard, it could now fall outside the statutory exemption for normal farming and ranching. The result is that if I do not follow the exact specifications for NRCS' prescribed grazing standard on my operation, I am no longer exempted from the 404 dredge and fill program. While this might not have been the agencies' intent, it was the result. The fence that I put up in the attached picture was done with cost-shared dollars from the local conservation district. It was not required to meet the more strenuous NRCS standard for fencing and I would not have engaged in the project had it been a requirement. You can see in this picture that the posts are spaced farther apart than NRCS specs require, and do not have the required number of wires. Both those requirements add costs. The entire project cost approximately $1,400. Had I been required to install a fence meeting the NRCS standard and specifications it would have cost me an additional $300, for a quarter mile fence. While that may not seem like a lot, if you expand that over hundreds of acres it can really add up to a lot of money. And for a small business like mine, $300 does matter. Future conservation projects will not be implemented if

this interpretive rule and proposed definition are allowed to move forward. I could not afford to risk being in violation of the Clean Water Act with fines of $37,500 per day and possible criminal sanctions to put in a project. I also would not go through the hassle and high cost of getting a 404 permit to complete this small project. I want to do my part for the environment, but I can't if it would jeopardize my entire operation. This is why the National Cattlemen's Beef Association and the Washington Cattlemen's Association are asking the agencies to withdraw the Interpretive Rule.

This didn't have to be the result; all the agencies had to do was engage stakeholders early on in the process, incorporate our suggestions and we would be much farther along in crafting a rule that actually would clarify the scope of Clean Water Act jurisdiction. We are particularly concerned with the lack of outreach with the small business community, contrary to the Regulatory Flexibility Act. Being the owner of a small business myself in the cattle industry and knowing the detrimental impact this regulation will have on my operation, it is appalling the agencies could assert that this regulation will not have a "significant economic impact on a substantial number of small entities." It is clear to me that the rule's primary impact will be on small landowners across the country. The agencies should have conducted a robust and thorough analysis of the impact, but it is clear from the certification that they have not completed this important step in developing the regulation.

There was also zero outreach to the agriculture community before the rule was proposed and before the interpretive rule went into effect. Despite what the EPA is saying, they did not have a meaningful dialogue with the small business community as a whole. Even when cattle producers asked the head of the office of water at our February meeting in Nashville about the proposal, all we were told was to "wait and see what the proposal says." Well we were forced to wait instead of having input and this is what we got, a proposal that doesn't work for small businesses, doesn't work for cattle ranchers, and doesn't work for the environment.

Picture #1

Picture #2