

Testimony on behalf of the

**National Cattlemen's Beef Association**

With regard to

**The Clean Water Restoration Act**

Submitted to the

United States Senate – Committee on Environment and Public Works

The Honorable Barbara Boxer, Chairwoman  
The Honorable James Inhofe, Ranking Member

Submitted by

Randall Smith  
Cattle Producer, Glen, Montana  
Montana Stock Grower's Association  
National Cattlemen's Beef Association

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Chairwoman Boxer, Ranking Member Inhofe, members of the Committee, my name is Randy Smith, and I am a cattle rancher from Glen, Montana. I appreciate this opportunity to provide testimony to the Senate Committee on Environment and Public Works regarding the jurisdiction of the Clean Water Act. I am here on behalf of the National Cattlemen’s Beef Association (NCBA) and the Montana Stockgrowers Association (MSGA). NCBA is the national trade association representing U.S. cattle producers with more than 31,000 individual members and 64 state affiliate, breed, and industry organization members. All together, NCBA represents more than 230,000 cattle breeders, producers, and feeders. NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry’s policy positions and economic interests. MSGA is a non-profit organization representing nearly 2,500 members across the state of Montana. MSGA strives to serve, protect, and enhance the economic, political, environmental, and cultural interests of cattle producers, the largest sector of Montana’s number one industry – agriculture. Our members are proud of their tradition as stewards and conservators of America’s land, air, and water. They work hard every day to protect these precious resources.

My comments today will address Senator Feingold’s effort to redefine the jurisdiction of the Clean Water Act in his so-called “Clean Water Restoration Act.” NCBA and MSGA do not agree with Senator Feingold that S. 1870 “restores” Congressional intent regarding the extent of federal jurisdiction over our waters when the Clean Water Act was enacted in 1972. Instead, the bill ignores Congressional intent and greatly expands federal jurisdiction far beyond anything Congress imagined at the time of enactment.

U.S. cattlemen own and manage considerably more land than any other segment of agriculture or any other industry for that matter. Cattlemen graze cattle on approximately 666.4 million acres of the 1.938 billion acres of the contiguous U.S. land mass. In addition, the acreage used to grow hay, feed grains, and food grains adds millions more acres of land under cattlemen’s stewardship and private ownership.

Any change in the definition of “waters of the United States,” therefore, directly affects many cattlemen because they own much of the land where wet areas are located. Deleting the word “navigable” from the definition of waters of the United States would have a profound and negative effect on America’s beef cattle business. NCBA and MSGA believe S. 1870 is unconstitutional, unnecessary and unjustifiable. We strongly oppose its passage and urge the Committee to reject this effort.

## **I. Overview of the Federal Clean Water Act**

Congress enacted the Clean Water Act (CWA), to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. 101(a). Section 301(a) of the CWA prohibits the “discharge of any pollutant by any person” except in compliance with the Act. 33 U.S.C. 301(a). The term “discharge of a pollutant” is defined to mean “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. 502(12)(A). The CWA defines the term “navigable waters” as “waters of the United States, including the territorial seas.” 33 U.S.C. 502(7).

The Clean Water Act has been tremendously successful. It is arguably the most successful environmental law on the books. Millions of miles of rivers, lakes, streams, wetlands, estuaries, ponds, and other waters are cleaner and functioning appropriately thanks to the CWA. The Environmental Protection Agency's (EPA) most recent Water Quality Report to Congress indicates that approximately 59 percent of the waters assessed were fully meeting their designated uses. NCBA and MSGA support building on this success story with agriculture water quality programs that achieve and protect state designated uses, without being unreasonably burdensome on America's farmers and ranchers.

## **II. Congressional Intent**

Since 1870, it has been well settled law that Congress' authority to regulate waterways is limited to regulating waters that could carry foreign or interstate commerce under the Commerce Clause of the U.S. Constitution. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). Thus, until recently, only waters that were navigable in fact, had been historically navigable, or were susceptible to navigation with reasonable improvement fell under federal jurisdiction, thereby excluding many wetlands. 39 Fed. Reg. 6113 (1974). It was not until 1968 that environmental and navigational factors began to be considered when determining federal jurisdiction. 33 CFR §209.120 (superseded by 72 Fed. Reg. 37, 133 (1977)).

With passage of the Clean Water Act in 1972, Congress acknowledged Constitutional limits and granted the federal government broad, but not unlimited, jurisdiction over our Nation's waters. There can be no clearer indication of Congressional intent with regard to the limits of federal jurisdiction than the fact that Congress used the term "navigable" repeatedly when establishing those limits and drafting and passing the CWA in 1972. If the term "navigable" meant nothing, the term would not have been used throughout the law. It is clear that Congress did not intend the CWA to regulate all waters of the United States. Rather, the stated goal of the CWA is to eliminate the discharge of pollutants into the Nation's "navigable" waters. Thus, Congress deliberately kept in place the constitutionally mandated system under which the states have "virtually plenary" authority to regulate intrastate, non-navigable waters. *California Oregon Power Co. v. Beaver Portland Cement Co.* U.S. (1935).

In fact, when the CWA was passed in 1972, Congress clearly recognized a partnership between the federal and state levels of government when it comes to protecting our waters. This recognition is set forth in Section 101(b) as follows:

"It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources..."

CWA 101(b). It is this provision and the use of the word "navigable" throughout the CWA to describe federal jurisdiction that recognizes an essential dividing line between federal and state jurisdiction.

Nevertheless, Senator Feingold has attempted to explain his introduction of S. 1870 by claiming that Congressional intent has been ignored in recent Supreme Court cases that have challenged the extent of federal jurisdiction under the CWA. It is Senator Feingold's stated desire to undo these decisions which he believes go too far in restricting the reach of federal jurisdiction, and to "restore" the original intent of Congress when it passed the Clean Water Act. Specifically, Senator Feingold has said he believes U.S. Supreme Court decisions in *SWANCC* and *Rapanos* (holdings briefly explained and cited below) have so restricted federal jurisdiction that Congressional intent regarding such jurisdiction must be reaffirmed. NCBA and MSGA believe Senator Feingold and the other cosponsors of S. 1870 are mistaken. The *SWANCC* and *Rapanos* decisions did not contravene Congressional intent; rather the U.S. Supreme Court reasonably interpreted the law using the U.S. Constitution, the legislative history, and language of the CWA statute itself.

An individual unfamiliar with U.S. water regulation might interpret Senator Feingold's justifications to mean that states have skirted their responsibilities or are incapable of protecting their waters. Nothing could be further from the truth! States have very strict programs in place to protect their waters. To remove the word "navigable" from the CWA would take state authority away and give it to the federal government, violate the U.S. Constitution, contravene expressed Congressional intent, and subject cattle producers to unprecedented and unwarranted federal regulatory intrusion into their private business operations. Such a vast expansion of federal control must not be allowed. The federal-state partnership embodied in the CWA must be preserved.

### **III. Cattle Producers and the Clean Water Act**

Two core provisions of the CWA which directly affect cattle producers are: 33 U.S.C. 404, the program which authorizes the issuance of permits for the discharge of dredged or fill material to waters of the U.S., and 33 U.S.C. 402, the National Pollutant Discharge Elimination System (NPDES) program which authorizes the issuance of permits to discharge pollutants from point sources to waters of the U.S. Each of these provisions is discussed below.

#### **A. The Section 404 Program**

The Army Corps of Engineers and the EPA share responsibility for implementing and enforcing Section 404 of the CWA which authorizes the issuance of permits for the discharge of dredged or fill material into waters of the U.S. Therefore, the definition of "waters of the United States" is critical to determining the reach of this program. Until 1983, the Corps regulations limited section 404 coverage to truly navigable waters. When the Corps expanded its jurisdiction by regulation to include "wetlands adjacent to navigable waters and their tributaries," the expansion was challenged by Riverside Bayview Homes. *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121, 129 (1985). On December 4, 1985, the U.S. Supreme Court determined that Congress intended "to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term" and determined that adjacent wetlands that are "inseparably bound up with the 'waters of the United States'" fall under federal jurisdiction. *Id.* at 133.

In 2001, the Supreme Court considered whether “isolated waters” or ponds that are not traditionally navigable or interstate, nor tributaries thereof, nor adjacent to any of these waters fall under federal jurisdiction if migratory birds land on them from time to time. The Court held that the use of isolated non-navigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal CWA jurisdiction. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 166-174 (2001) (SWANCC).

In 2006, the Court again considered the meaning of the term “waters of the United States” in *Rapanos v. United States*, 126 S. Ct. 2208 (2006). The case involved whether federal CWA jurisdiction extends to pollutant discharges into wetlands adjacent to non-navigable tributaries of traditional navigable waters. *Id.* at 2219. In a plurality opinion, four Justices agreed that waters of the United States covers “relatively permanent, standing or continuously flowing bodies of water” that are connected to traditional navigable waters, as well as wetlands with a continuous surface connection to such water bodies. *Id.* at 2225-2227. Justice Kennedy, concurring, determined that jurisdiction should include wetlands that “possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made,” and “wetlands adjacent to navigable-in-fact waters.” *Id.* at 2248.

It is not unreasonable, nor surprising, that the U.S. Supreme Court has extended CWA jurisdiction to some non-navigable waters, as discussed in the SWANCC and *Rapanos* decisions. In addition to expanding the reach of federal jurisdiction beyond truly navigable waters, the cases also provide a reasoned and thoughtful view of the limits of federal jurisdiction. Without such limits, federal jurisdiction would be boundless and would place an undue and unacceptable burden on the private property of cattle producers and others.

It is this kind of boundless jurisdiction that Senator Feingold’s legislation would allow. There must be hundreds of millions of isolated, intrastate pools, ponds, and depressions filled with water on an intermittent basis, drainage and irrigation ditches, artificially irrigated areas, stock ponds, mud puddles, sloughs, and damp spots located on farm and ranch lands that are nowhere near any navigable waters, and provide very little if any environmental value. Surely, Senator Feingold understands and agrees that not all waters are the same in terms of their environmental function and value. To think that Senator Feingold intends to force farmers and ranchers to get section 404 permits whenever a cow or a plow affect one of these environmentally-insignificant waters is nothing less than shocking. Such an expansion of federal jurisdiction boggles the mind, is unwarranted, irrational, is not in the national interest, and would be disastrous for U.S. agriculture.

S. 1870 would result in the imposition of huge financial burdens on farmers and ranchers, would take away private property rights to the productive use of their land, and would do little to better our environment. It is one thing to regulate navigable waters and wetlands that have a “significant nexus” to those waters, because they have true environmental value. It is another thing to regulate every wet area simply because it is wet, regardless of the fact that these areas provide very little if any environmental value.

NCBA and MSGA support a reasonable program for conserving and enhancing waters that have true environmental value. We believe such waters are currently being protected by state and federal governments. Any clarification of jurisdiction should take place within our regulatory processes, but not in Congress. The EPA and the Army Corps of Engineers are very capable of doing this work. There is no need for this legislation.

## **B. The NPDES Permit Program and Cattle Operations**

### **1. Overview**

As noted above, the NPDES permit program regulates and authorizes discharges from “point sources” to waters of the U.S. Section 502(14) of the CWA specifically includes “concentrated animal feeding operations” (CAFOs) in the definition of the term “point source.” The term “does not include agricultural storm water discharges and return flows from irrigated agriculture.” The EPA has defined the term CAFO to be a “lot or facility” where animals “have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period and crops, vegetation, forage growth, or post harvest residues are not sustained in the normal growing season over any portion of the lot or facility,” 40 CFR 122.23, and confine more than a threshold number of animals detailed in 40 CFR 122.23(b)(4). The threshold number for beef cattle is 1000 head. Smaller size feedlots can be determined to be CAFOs in certain defined situations.

Some of NCBA’s and MSGA’s members own CAFOs and are regulated under the federal NPDES permit program. Our members support efforts to and work hard every day to ensure that CAFOs are environmentally sound operations. We are, however, concerned that some members of this Committee and others may be misled by activists who are opposed to the existence of CAFOs and want to create the perception that they are problematic for human health and the environment. Indeed, some activists are working hard to do away with CAFOs. We urge the Committee to carefully evaluate the facts and scientific evidence rather than opinion, perception, and hype created by activists with anti-CAFO agendas.

The fact is, CAFOs are subject to a vast array of federal, state and local environmental laws and authority to deal with every conceivable environmental problem presented by them. The Clean Air Act, the Clean Water Act, FIFRA, soil conservation, dust and odor control, and nuisance laws apply broadly throughout the country to provide environmental protection from every aspect of animal agriculture operations. For example, the EPA has recently promulgated extensive new regulations to control discharges from CAFOs under the NPDES program. Indeed, there has been a significant shift over the past several years in federal efforts to regulate and prohibit production area discharges from CAFOs except in the most extreme circumstances. In addition, CAFOs must utilize and comply with strict nutrient management plans when land applying manure to agricultural fields to ensure that manure is applied at agronomic rates. Any violation of these requirements can result in substantial penalties and, in certain situations, imprisonment. NCBA and MSGA urge the Committee to consider these new regulatory requirements that ensure protection of our waters and give them time to work prior to issuing unjustified criticisms. Zero discharge from the production area means just that – zero discharge.

Once this program is given time to work, it can no longer be claimed that CAFOs are a concern with regard to water quality.

## **2. NPDES Permit Program**

The EPA or states with authorized NPDES permitting programs may issue general or individual NPDES permits allowing the discharge of pollutants to surface waters of the United States as long as certain conditions are met. The Clean Water Act includes both technology-driven limits and water-quality-based limits on pollution. The technology-driven limits in the form of effluent limitations aim to prevent pollution by requiring the installation and implementation of various forms of technology designed to reduce discharges. These limitations are dictated by the more general “effluent limitations guidelines” (ELGs) which are separately promulgated by the EPA. An effluent limitation is “any restriction established . . . on the quantities, rates and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into . . . water.” Water quality based regulations apply once a given body of water’s pollution level exceeds the level that a state deems acceptable for the body of water’s intended use or function. These regulations may ratchet up the pollution control required of individual polluters. Permits also include extensive reporting and recordkeeping requirements to help ensure compliance with effluent limitations.

In February 2003, the EPA updated and issued a final rule governing regulation of CAFOs under the NPDES permit program. After its release, a number of environmental and agricultural organizations separately appealed several aspects of the rule. The appeals were consolidated and heard by the Second Circuit Court of Appeals on December 13, 2004, and a final decision was issued on February 28, 2005. The decision overturned several aspects of the 2003 rules, upheld several other challenged provisions, and remanded other issues for further consideration by the EPA. In June 2006, the EPA released its proposed rule to address the 2<sup>nd</sup> Circuit decision; a final rule is expected to be released in July or August 2008. All newly regulated CAFOs are required to submit to the permitting authority an NPDES permit application and nutrient management plan by February 27, 2009.

The provisions that were either not litigated or were upheld in the final rule of 2003, taken together with the proposed rule issued in June 2006 provide for a comprehensive approach to regulating CAFOs under the Clean Water Act, and ensure that no production area discharges will occur except in the most extreme circumstances. The regulations impose a zero-discharge limitation on the production area of a CAFO by prohibiting the discharge of pollutants into waters of the United States, except in the event of discharges that might occur during the worst 24-hour storm in a 25-year period. For many producers, this requirement means spending hundreds of thousands of dollars to build basins around portions of their feedyards to catch any runoff.

In addition, the CAFO rule establishes non-numerical effluent limitations in the form of best management practices (BMPs) for the land application and production areas of CAFOs. BMPs are measures or methods that have been determined to be the most effective, practical means of preventing or reducing pollution from nonpoint sources. BMPs for the production area include daily and weekly inspections, maintenance of depth markers in lagoons to determine design

capacity, and on-site recordkeeping. A BMP for the land application area requires that CAFOs develop and implement a nutrient management plan (NMP) that sets application rates designed to minimize phosphorus and nitrogen transport to surface waters in compliance with applicable technical standards, ensures adequate storage of manure and process wastewater, and prevents direct contact of animals with waters of the United States. These NMPs must be made available to permitting authorities and the public for review, comment, and hearing prior to issuance of a permit. After approval by the permitting authority, portions of the NMP must be included as enforceable terms and conditions of the producer's NPDES permit.

Sanctions for violation of a CAFO's NPDES permit include severe civil and criminal penalties for each day of violation. The basic monetary penalties range up to \$32,500 per day. Stiffer penalties of as much as \$50,000 per day, three years' imprisonment, or both, are authorized for criminal (negligent or knowing) violations of the Act. A fine of as much as \$250,000, 15 years in prison, or both, is authorized for 'knowing endangerment', i.e. violations that knowingly place another person in imminent danger of death or serious bodily injury. Injunctive relief is also available. These penalties and sanctions are an effective deterrent to violations of the Clean Water Act.

Currently, CWA enforcement of the NPDES permit program is appropriately shared by the EPA and states, with states having primary responsibility. However, EPA has oversight of state enforcement and can bring a direct action whenever it believes a state has failed to take appropriate action or where states request EPA involvement. In addition, private citizens may bring suit against persons who violate the Clean Water Act or against the EPA or equivalent state official for failure to carry out the requirements of the Act.

#### **IV. Conservation and Clean Water**

In addition to the array of regulatory programs described above, many cattle producers also voluntarily implement conservation practices in an effort to be as environmentally friendly as possible in their operations. Just one example is the popularity among producers of USDA's Farm Bill conservation programs. These programs provide resources to assist producers in their private land conservation goals as they work to improve their land, air, water, and natural resources. In FY2006, the Natural Resources Conservation Service (NRCS) spent over \$1 billion through the Environmental Quality Incentives Program (EQIP) providing farmers and ranchers with technical and financial assistance on conservation practices and projects. From 2002 to 2006, NRCS dispersed over \$2.7 billion for projects to improve water quality—the majority of those funds were in EQIP projects. In the same time period, they spent almost \$1.2 billion conserving and improving wetlands, mainly through the Wetlands Reserve Program.

My family ranch, Smith Six Bar S Ranch, was a regional recipient of the Environmental Stewardship Award in 1992, given by NCBA and sponsored by Dow AgroSciences and USDA's NRCS. For years, we have realized the importance of resource conservation and worked to implement practices and projects to enhance wildlife habitat and water quality and quantity on our property. Farmers and ranchers are excellent stewards of their land, natural resources, and water—their livelihoods depend on it. They should be enabled and encouraged, through

programs like these, to continue to produce our nation's food and fiber in an environmentally sound and sustainable way.

## **V. Property Rights Implications**

Approximately 70 percent of the land in the lower 48 states is privately owned. A substantial portion of this land is used for the production of food which is arguably the most important use for this land. The production of food in our country cannot be taken for granted. In fact, farmers and ranchers in other countries are increasingly able to produce comparable food at lower cost to the American market. Additionally, society also looks to this private land and associated waters for many other services, including wildlife habitat, clean water, and open space, most notably. American producers face an ever tightening web of regulation which economically marginalizes an increasing number of operations. While many, if not all, of the environmental regulations are well-intended, it must also be recognized that limiting and ultimately choking the ability of farming and ranching operations to earn a living will come at a considerable cost to the entire nation.

The challenge for society in using private lands is to strike a sensible balance between the demands of food production and conservation of natural resources. Unfortunately, the United States through both Republican and Democratic administrations failed to strike a reasonable balance between protecting wet areas and respecting people who make their living on the land. Not only has no balance been struck, but in fact regulation has been allowed to proceed unlawfully and directly at odds with teachings from the leading Supreme Court cases on the issue. Fortunately, the Supreme Court provided a roadmap for resolving the situation in its recent decision in Rapanos v. United States, 126 S.Ct. 2208 (2006).

## **VI. Big Hole Watershed Committee Work**

I serve as the Chairman of the Big Hole Watershed Committee, headquartered in Butte, Montana. The mission of the Big Hole Watershed Committee is to seek understanding of the Big Hole River and agreement among individuals and groups with diverse viewpoints on water use and management in the watershed. We are a non-profit organization that makes decisions through consensus. Our twenty-two member Governing Board represents diverse interests including ranching, utilities, local government, conservation organizations, outfitters/guides, and sportsmen. State and federal agencies participate on the Committee as technical advisors; among them are the Montana Department of Fish, Wildlife, and Parks; the Montana Department of Natural Resources and Conservation; the U.S. Fish and Wildlife Service; USDA's Natural Resources Conservation Service; the U.S. Forest Service; and the Bureau of Land Management.

Attached, please find as Appendix 1 more detailed information about the Big Hole Watershed Committee and the work we are doing, in particular with drought mitigation and Arctic grayling recovery. All of these organizations and individuals have come together on a voluntary basis to work toward a clean and plentiful water supply for all. If anything, we need more incentives to work together to achieve regional goals of cleaner, more plentiful water, not legislation that will bring wholesale change to the framework in which we are all working. State and local partners have been critical to the success of our Committee—this legislation would take away their seat at the table, and put all authority over our nation's water with the federal government.

## **VII. Conclusion**

NCBA and MSGA agree that we need to continue to protect the quality of our Nation's surface and ground waters, but no expansion of federal jurisdiction is necessary to accomplish this goal. Federal agencies already 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. Senator Feingold's attempt at usurping authority over these issues and vastly expanding federal jurisdiction must not be allowed.