Testimony

on behalf of the

National Cattlemen's Beef Association
&
Public Lands Council

with regards to

"The Appropriate Role of the States and Federal Government in Regulating Groundwater"

submitted to the

United States Senate
Committee on Environment and Public Works
John Barrasso, Chairman

submitted by

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Good morning, my name is Joe Guild. I am a rancher from Washoe County, Nevada, where I live with my wife, Catherine. I co-operate a cow-calf ranch for a family trust located on private and US Forest Service land in Douglas County, Nevada and Alpine County, California, in addition to running a small herd of my own cattle. Additionally, I'm a member of the management team for a large cattle, sheep, and dairy alfalfa ranch in Eastern Nevada that operates on private and public lands. I'm a past president of the Nevada Cattlemen's Association, member of the Public Lands Council, and current Treasurer of the National Cattlemen's Beef Association. Today, I represent nearly 25,000 of America's cattle producers who will be detrimentally impacted by federal regulation of groundwater under the Clean Water Act. Thank you, Chairman Barrasso and Ranking Member Carper, for allowing me to speak on this critical issue today.

One of the most complex environmental issues facing our country in recent history has been the Environmental Protection Agency's (EPA) attempted definition of Waters of the United States, known simply as WOTUS. NCBA has worked hard, and continues working to ensure that the definition of WOTUS is not expanded to include water that Congress never intended to regulate. However, if the EPA finds authority to regulate discharges to surface water via groundwater, any progress made on this front will be lost. The regulation of groundwater has the potential to impact even more cattle operations than the damaging 2015 WOTUS definition.

The Carson River runs through a portion of the range on the smaller ranch that I manage. The water is used to irrigate hay fields and mountain and valley pastures. A tributary runs through one of the valleys on the mountain range. To prevent degradation of the streambed, we move the cattle away from the stream as often as possible. I don't have an NPDES permit for this operation because, quite frankly, I don't need one. My cattle are not point sources, and thus do not meet the Clean Water Act's discharge standard. Through USDA-NRCS, I've implemented voluntary conservation practices on my operations, including the strategic placement of wells and underground pipelines to move water throughout the operation. Such voluntary practices increase efficiency and maintain natural resource quality, both on my operation and downstream. However, the expansion of the Clean Water Act to regulate discharges into groundwater would change all of this. Not only would such an expansion directly contradict the intent of the law, but take authority from those who can best manage groundwater quality.

Currently, a range of thought exists when it comes to the appropriate regulation of groundwater at the federal and state level. Among those who believe federal groundwater regulation to be necessary, two schools of thought exist. The conduit theory argues that groundwater is a point source, while the direct hydrologic connection theory claims that groundwater is a conveyance. Under the plain language of the Clean Water Act, groundwater is neither. Groundwater is sufficiently managed through state programs and the Safe Drinking Water Act. Regulation under the Clean Water Act would only lead to unnecessary, duplicative permitting and enforcement, usurping current state authority.

States are uniquely positioned to manage and prevent the discharge of pollutants into groundwater.

The Clean Water Act begins by stating that it is the "policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act." This important statement indicates the key role that states play in protecting the quality of our nation's water. Unfortunately, the EPA's direct hydrologic connection theory completely obliterates this federal-state partnership through a *de facto* declaration that all waters are federal.

When Congress enacted the Clean Water Act in 1972, then amended the Act in 1987, one theme remained constant; the Clean Water Act is intended to regulate discharges to jurisdictional surface waters from point sources. The Act specifically defines a point source as a discernable, confined, and discrete conveyance that discharges pollutants to a jurisdictional surface water. By limiting Clean Water Act jurisdiction to point sources, Congress ensured that responsibility would remain with the states to regulate groundwater quality. This wasn't an accident – Congress understood that groundwater regulation could not be a one-size-fits all approach.

Only states have the flexibility to regulate groundwater discharges in a way that is most beneficial to the environment. The state of Nevada has a robust environmental regulatory regime, much of which is dedicated to maintaining groundwater quality. In western states like Nevada, water quality is directly tied into a question of water quantity. Questions of water quantity are

often tied directly to questions of water quality, and states cannot effectively manage water rights if they have no control over the regulation of groundwater quality.

In Nevada, we have a number of different subsurface water systems that are unique to our region. Certainly, underground flow of glacial water, which is a unique piece in Nevada's water quality regulatory framework, should not be regulated in Mississippi, New Jersey, or Florida. One of the things I love most about our country is its geographic and topographic variety – every state provides a new adventure. But those new adventures present new challenges to overcome, and states are the only parties that can address soil and water quality in a holistic manner to ensure that our agricultural operations stay in business for many generations to come.

Groundwater is not a point source, and regulating it as such blurs the line between point and non-point source standards that are key to the integrity of the Clean Water Act.

The theory that groundwater may be regulated as a point source defeats the Act's bifurcated approach by blurring the line between sources and non-point sources. Bringing non-point sources into the realm of Clean Water Act regulation will exponentially expand EPA's permitting and enforcement authority, while providing little environmental benefit.

To determine if federally regulating groundwater as a point source under the Clean Water Act really provides a significant benefit, Congress and the EPA must consider what environmental benefit will be gained, and if that benefit outweighs a significant increase in operation costs. In the cattle industry, Concentrated Animal Feeding Operations (CAFOs) are defined as point sources under the Clean Water Act, and are therefore required to have an NPDES permit if there is a discharge from their operation into a jurisdictional surface water. Under the NPDES permit, CAFOs are required to implement manure management practices that prevent their operation from discharging. A CAFO does not receive an NPDES permit until it meets set requirements for nutrient management.

So who will this additional permitting requirement effect in the cattle industry? Me, the pasture-based cow-calf rancher, and the other ranchers like me across the country. We work hard to maintain the soil and water quality on our operations through the implementation of voluntary USDA-NRCS programs. Due to the unpredictable, diffuse flow of groundwater that varies depending on the hydrological and geological features in each region, it is difficult to calculate

what amount of nutrients could be coming from my ranching operation and flowing through groundwater to distant or adjacent surface water. That all said, it would be devastating to the farming community for the government to require farmers and ranchers to get NPDES permits for groundwater flow.

To put it in perspective, the number of cattle that graze today on pasture in the United States is less than the number of buffalo that grazed America's prairies prior to westward expansion. Waste from non-point, pasture-based agriculture is simply not a regulatable source of surface water pollutant. By regulating groundwater, the EPA accomplishes nothing other than a significant expansion of Clean Water Act authority to manage operations that, frankly, do not need to be federally managed. Presently, discharges to groundwater are managed at the state level, and should remain so.

Groundwater is not a conveyance as defined by the Clean Water Act.

While it is clear that groundwater should not be regulated as a point source, additional confusion remains as to whether groundwater can be classified as a "conveyance" under the Clean Water Act. While the Act provides no definition for conveyance, the general definitions section of the Act clarifies that conveyances must be "discernable, confined, and discrete." All prior case law in this area finds that a point source may be separated from a jurisdictional surface water, and that point source can still be subject to permitting and enforcement if a conveyance exists which connects it to the surface water. However, in all cases, the conveyances considered met the qualifications provided by the Clean Water Act. In fact, these conveyances were specifically engineered to convey pollutants from one point to another. Naturally flowing and diffuse groundwater is nothing like conveyances that were designed, built, and maintained with the sole purpose of moving effluent from one point to another.

Interpretation of the Clean Water Act to regulate groundwater as a conveyance presents a significant risk to any diversified producer. Earlier, I mentioned that I assist in managing a large operation to produce alfalfa for beef cattle, dairy cattle, and sheep. On this operation, we fertilize crops and consult with experts to ensure that nutrients are no over applied. But scientific data tells us that, even with the best precision application practices – even when we do everything possible to ensure that the application of nutrients to a crop is exact, there will always be some amount of nutrient that pass the root zone. If we do our job right, that amount will be filtered out

by soil in the groundwater system, and has little to no environmental or public health impact. However, under the direct hydrologic connection, because a risk exists of discharging to surface water, even though that risk is minimal, operations will be required to get an NPDES permit.

If Congress allows the expanded interpretation of "conveyance" to include groundwater, all sectors of the cattle industry will face additional federal regulation and scrutiny, with little to no environmental benefit. Without an incentive, farmers and ranchers will stop working voluntarily with state and federal conservation programs to protect water quality. As producers sell off their cattle out of frustration with further regulation, the industry will face further consolidation because smaller producers are unable to comply with overly burdensome permitting requirements.

Thank you for taking the time to hear my concerns, and for listening to livestock producers around the country. The key to environmental sustainability is working together with states and stakeholders, not fighting us. Thank you for your time, and I look forward to answering your questions.