Statement on behalf of the

NATIONAL CATTLEMEN'S BEEF ASSOCIATION

&

PUBLIC LANDS COUNCIL

On

The Future of WOTUS: Examining the Role of the States

Submitted to the

Subcommittee on Environment

The Honorable Andy Biggs, Chairman

House Committee on Science, Space, and Technology

The Honorable Lamar Smith, Chairman

By

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National Cattlemen's Beef Association

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James K. Chilton, Jr.
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My name is Jim Chilton and I am a 5th generation rancher from Arivaca, Arizona. Arivaca is approximately 55 miles southwest of Tucson, Arizona. 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 trust lands and three federal grazing permits within the Coronado National Forest. I am very proud of my wife Sue Chilton, my two sons, my partner (my brother) and ancestors. The entire family is blessed to be able to live preserving our western ranching customs, culture, and heritage dating back to pioneering ancestors who entered Arizona Territory in the late 1800's. We have been in the cattle business in Arizona for about 127 years and have a long-term view of the necessity to be excellent stewards of the grasslands we respectfully manage.

2015 Waters of the United States Rule

We are thankful and appreciative that the Waters of the United States Rule, 80 Fed. Reg. 37,054 (June 29, 2015) has been proposed to be withdrawn. Our experience convinces us that it was an unjustifiable over-reach by the Environmental Protection Agency (EPA) and the Corps of Engineers (Corps). It represented to us a federal agency power grab not supportable by either the Clean Water Act or the US Constitution's grant of authority to the federal government over genuinely navigable waters.

The 2015 Rule, in my opinion, unlawfully burdened my ranching operation since I could not determine whether I would be in compliance or out of compliance on any necessary ranch improvement involving any of the typical Southern Arizona dry washes on my ranch, due to the vagueness of the Rule. The possibility that features like small dry washes on Chilton Ranch could be treated as waters of the United States (WOTUS) created uncertainty about whether and how Chilton Ranch could use its private land and what regulatory requirements would apply to particular uses.

United States Supreme Court Rapanos Decision

A new rule must be drafted by the Environmental Protection Agency and the Corps of Engineers that follows the meaning and spirit of the Supreme Court Rapanos Decision (Rapanos, 447 U.S. at 719 (plurality opinion) and clearly adheres to what the public and an agricultural producer can see is really a navigable waterway.

My Neighbors and I have No Navigable Streams Nor any Nexus to a Navigable Stream

As is the case for most ranches in the Western United States, a requirement to obtain a Corps Section 404 permit or other permits for routine work in a desert grassland is totally irrational. There are no navigable streams for an estimated 265 miles from my ranch. More specifically, the following are examples of my experience with the expensive, time consuming and burdensome Section 404 permitting process as it was formerly applied. These experiences underpin my hope that a future rule will adhere to the U.S. Constitution and Rapanos Decision.

Abandoned 404 Project

During the late 1990s, prior to the Rapanos Decision, I had to retain environmental consultants and an attorney in an effort to comply with requirements imposed to obtain a permit to put a small dirt road across a dry wash. That wash only carries water briefly during occasional summer rainstorms. My environmental consultants believed, at that point in time, building a small dirt ranch road across the wash was subject to the the 1972 Clean Water Act regulations. It is laughable or enough to provoke anger, to think of this desert wash as a "navigable" water of the United States. No one could float anything—not even a leaf—from my land to the nearest navigable river because the supposed connections do not connect and are almost always dry and are never, ever navigable.

The dry wash in question connects with the Brawley dry wash about ten miles west of my proposed road crossing. The Brawley Wash ends and any ephemeral water it ever carries spreads out into the desert approximately 70 miles north from the wash where I needed a ranch road. The Brawley Wash is not connected to the next feature: the dry Santa Cruz River. The dry Santa Cruz River bed virtually vanishes as it spreads out like fingers in the desert 68 miles detached from the usually dry Gila River. The intermittent and ephemeral Gila River bed extends through sandy, dry terrain until it reaches the Colorado River, another hundred or so miles across the desert from the city of Gila Bend. The Colorado River is, of course, the first truly year-round navigable river; it is located approximately 265 miles from the spot where I wanted to cross that desert wash with a road. See Figure 1 on the following page which illustrates the vast, and hydrologically disconnected, expanse of space between the Santa Cruz basin near Chilton Ranch and the Colorado River. It is an unsupportable assertion of authority for the EPA and Corps to claim that the entire Santa Cruz basin, liberally covered with dry washes that are ephemeral at best, has a navigable or even seasonal nexus with the Colorado River.

My desire to obtain a Corps 404 permit to cross a desert wash with a small ranch road, on the well-documented right-of-way I owned, became so time-consuming (over three years) and expensive that I abandoned the project altogether. The $40,000 I had spent was entirely the result of the vague and expansive requirements of EPA and the Corps of Engineers; not a penny went to a constructive or productive agricultural need; it was all for a permit writing expert, consultants, an environmental assessment and engineering report, a survey, and attorney fees.

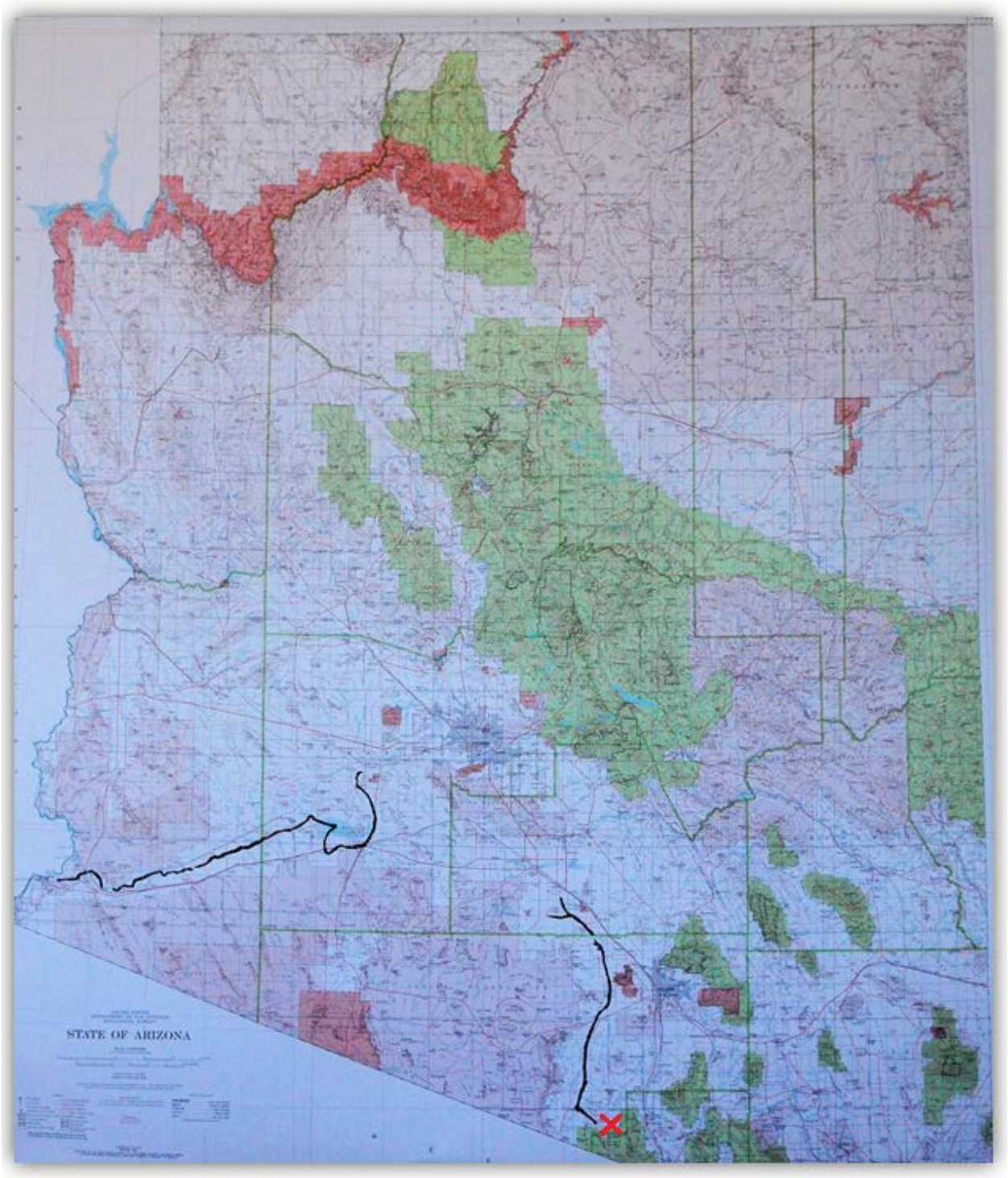

Figure 1. The Chilton Ranch is located at the red “X”. The dark line leading north of the ranch represents the Santa Cruz basin. The dark line on the left represents the Gila River basin. Note: the dark lines represent river beds, not flowing water. As you can see, these river beds do not connect and therefore no nexus exists between my ranch and the navigable Colorado River, which constitutes the western border of Arizona along the left side of the map.

Another ranch improvement abandoned

A second personal experience emphasizes the point that, when a bureaucracy writes rules, it is always tempted to expand its authority. This time I wanted to improve a small dirt road on my private land by placing a culvert in a dry wash which had twelve inches wide of sand in the bottom. I needed this improvement so the dip would be more easily crossed by ranch trucks. This little road and the dry wash are located more than 270 miles from the navigable Colorado River. My environmental consultant again told me that, at that point in time, this dry wash would be considered a Water of the United States and therefore a 404 permit would be required to improve this road. Based on my expensive and time-consuming experience with the other dry wash, I did not pursue the permit and did not improve the road.

Later, the Supreme Court Rapanos decision was issued. With a careful reading of the Rapanos decision, I concluded that there was clearly not a significant nexus between my culvert project and the navigable Colorado River. Therefore, I installed the culvert in the dry wash and significantly improved my road. Please see Figure 2, below, depicting the actual bridge with culvert Chilton Ranch LLC constructed after the Supreme Court Rapanos decision.

Unfortunately, two years ago, the EPA and the Corps promulgated the 2015 WOTUS Rule which would have made it again highly questionable whether I could improve a ranch road to cross any dry wash, of which there are probably hundreds on my ranch, without a 404 Permit.

Figure 2. The dry wash and constructed bridge and culvert at Chilton Ranch.

Corps 404 Permitting Costs

Language in the Supreme Court Rapanos Decision described costs typically incurred due to the former interpretation:

> ..."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).

Clearly, the Court found that the Clean Water Act permitting process was unjustifiably expensive in both time and money. Farmers and ranchers are concerned now about future rule development that could return us to the situation we, as well as small businesses, small communities, forestry, mining, manufacturing and all productive land uses, faced prior to the Rapanos decision.

Tyranny of the Bureaucracy

In my view, the 2015 WOTUS Rule empowered bureaucrats to impose their personal views without concern for being called to account for their actions. Any future rule should be designed to restrict such behavior by removing any subjectivity from interpreting what is a federal water. We need a reasonable interpretation shared by citizens on what constitutes a navigable river and what is a genuine nexus to navigable water.

Unfortunately, when a vague and expansive rule is adopted, it opens the door for activists to freely interpret federal regulations to advance their personal philosophy. This *de facto* license results in a form of tyranny that supplants the rule of law and undermines public respect for government. From our own experience and that of other western ranchers, every past EPA and Corps expansion of jurisdiction has eventually resulted in enabling agenda-driven individuals within the bureaucracies to drive federal policy toward their wildland vision. I have personally had to conduct decades-long battles to redress unjustified bureaucratic attacks and to defend the right to produce food and to protect our multi-generation ranching heritage.

Respect for Private Property

As George Washington said, "private property and freedom are inseparable."

As a Supervisor on our Pima County Natural Resource Conservation District Board, I recognize that our District Cooperators, small ranchers, and farmers rely on their property rights and the right to produce without federal imposition of undue burdens. Consequently, the question of potential rule development that could again inappropriately label dry washes on our land as navigable waters directly concerns us and our Resource Conservation Cooperators. We advocate that future rule development on WOTUS properly construe the limits of the federal government and the role of the agents enforcing that rule.

Conclusion

It is clear the 2015 Rule would have allowed the EPA and the Corps of Engineers to trump states' rights to manage intrastate waterways and even dry washes and river beds. Any future rule should recognize the authority of state and local governments to make local land and water use decisions. It is, for example, our position that intra-state rivers, such as the Santa Cruz in southern Arizona, should be regulated by the State, not the Federal Government. **We request that Congress take action to ensure that any new EPA and Corps rule minimize adverse impact on farmers, ranchers, businesses, and individuals, and that it must be designed to reduce the potential for abuse through expansive interpretation, and to recognize the reality that a navigable water is exactly that: a waterway with sufficient water to be an avenue of shipping commerce.** It is simply unacceptable to require family ranchers, farmers, and other small businesses to hire expensive legal and environmental experts to navigate compliance with a federal rule that is both over-expansive and ambiguous. Any future rule must clearly delineate agricultural exclusions; small agricultural producers cannot wait on ranch and farm improvements for years while the wheels of bureaucracy slowly turn out the required permits.

In our area, a significant nexus with the Colorado River does not exist in the Santa Cruz Dry River Basin since the Santa Cruz spreads out and disappears in the Santa Cruz Flats south of Eloy, Arizona approximately 68 miles distant from the dry Gila River. Southern Arizona does not have a "significant nexus with a navigable water."

Future EPA and Corps rules must be simple, straight-forward, and easily interpreted. Likewise, future rules must not infringe on private property rights or States' rights. The following are the recommendations of the National Cattlemen's Beef Association and Public Lands Council:

1. Producers living in states with an approved section 402 permitting program need **a clear rule that defines WOTUS based on objectively identifiable characteristics** to reasonably administer the program within their borders. Such a definition will go a long way towards avoiding litigation and other costs that divert scarce resources from protecting state and federal waters.

2. The EPA should conduct a thorough review of congressional intent and judicial interpretations, including Justice Scalia's opinion in the *Rapanos* case, and **develop an independent interpretation of the various Clean Water Act terms, including "waters of the United States," rather than relying strictly on one judge's view**.

3. The term **"navigable waters" must be given importance and effect**. We recognize that Congress intended to regulate at least *some* waters that are not navigable in the traditional sense. This is clear from prior U.S. Supreme Court decisions in *Riverside Bayview, SWANCC,* and *Rapanos*. However, federal jurisdiction cannot extend to isolated or intrastate waters that are not navigable. Nor does it extend to any ordinarily dry features, such as ephemeral streams. Justice Kennedy concurred with notion in the *Rapanos* case, criticizing the Agencies for leaving "wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes

toward it," and for asserting jurisdiction over wetlands "little more related to navigable-in-fact waters" than the isolated ponds at issue in *SWANCC*.

4. In defining those non-navigable water bodies or wetlands that are "waters of the U.S.", **EPA should focus on water features that have an actual surface connection to traditional navigable waters and that are identifiable based on clear, objective characteristics**, to provide clarity and certainty to regulators and the producers. Mere adjacency to a tributary is insufficient to create jurisdiction.

5. A water feature that is "relatively permanent" must contain water persistently and frequently. At a minimum, they must continuously carry water on a seasonal basis (such as throughout the spring and summer season). **Features that are usually dry and only carry water when it rains are not "relatively permanent" waters**.

6. **Wetlands should only be "waters of the U.S." when they are adjacent to traditional navigable waters and their tributaries**, meaning they directly touch or share a common border with those waters. The presence of a hydrologic connection to navigable-in-fact waters is not enough to support federal jurisdiction.

7. Administrative clarity and regulatory certainty are key goals of this rulemaking. Because the Clean Water Act is a strict liability statute that includes an absolute prohibition on unauthorized discharges into WOTUS, **the new definition must provide clear lines to put regulated entities on notice and meet administrative due process requirements**.

8. An appropriately narrow and clear WOTUS definition will go a long way to fix the issues that many agricultural producers face when attempting to comply with the Clean Water Act. That being said, **the EPA and Army Corps should carefully consider the need to retain the long-standing agricultural exclusions from WOTUS and should consider the need for additional exclusions**, depending on the scope of the revised WOTUS definition.

JAMES K. CHILTON, JR.

11-29-17

Jim Chilton, a fifth generation Arizona rancher, was born in 1939 and raised on farms and ranches. In 1979, Mr. Chilton, together with his father and brother formed a partnership, Chilton Ranch & Cattle Company, a cow-calf ranching company. In 1987, Mr. Chilton and his wife Sue and two sons purchased a 50,000-acre ranch south of Arivaca, Arizona that expanded the family operation.

Mr. Chilton was honored as Rancher of the Year in 2002 by the Arizona Cattle Growers' Association and three years later received a similar award from the Arizona Farm Bureau. In 2005, he received the True Grit Award from the Arizona Cattle Growers' Association and the Individual of the Year Award from the Arizona/New Mexico Coalition of Counties. In 1991, the Chiltons were awarded the Pima County Natural Resource Conservation District Award of Merit for Outstanding Accomplishments in Resource Conservation. In 2005, his wife and he received The Arizona Farm Bureau Environmental Stewardship Award.

Mr. Chilton has been a principal in municipal financial advisory firms since 1970. Prior to forming his own municipal investment banking firms, Mr. Chilton was Senior Vice President and Manager of the Shearson/American Express Public Finance Division for the western United States.

A graduate of Arizona State University, he received a Bachelor of Science, a Master of Science in Economics, and a Master of Arts in Political Science. Mr. Chilton also served U.S. Senator Carl Hayden of Arizona for three years as a Special Assistant.

He and his wife Sue have been married for over 54 years, raised two sons and are enjoying five grandchildren.