Testimony

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with regards to

"A Review of the Interpretive Rule Regarding the Applicability of Clean Water act Agricultural Exemptions"

submitted to the

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Representative Glenn Thompson, Chairman

submitted by

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Good morning, my name is Andy Fabin. I raise cattle and row crops in Indiana, Pennsylvania. I am testifying before you today as a member of the National Cattlemen's Beef Association and the Pennsylvania Cattlemen's Association. 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' interpretive rule on the Normal Farming and Ranching exemption under Sec. 404 of the Clean Water Act.

I am extremely concerned about the devastating impacts this interpretive rule could have on conservation practices being implemented on the ground, especially if you couple that with increased liability from the expansion of the "waters of the U.S." definition that is also currently taking place. As a farmer my willingness to implement voluntary conservation practices has been greatly diminished, despite my desire to improve and protect the waters on my farm. I'm not alone in my thinking, which means that if this Interpretive Rule remains in place, farmers and ranchers across the country will slow their adoption of conservation practices. Because of this negative consequence NCBA is requesting the agencies withdraw the Interpretive Rule and begin a dialogue with farmers and ranchers in order to provide actual clarity that will encourage instead of discourage conservation implementation.

On my operation we run 60 cows and have 3500 acres of corn, soybeans, wheat, and rye. Also, we operate a soybean extrusion plant in which we process in excess of 1.3 million bushels of beans into high protein soymeal and soy oil. I have ephemeral streams running through my pastures and fields, as well as ponds and ditches. It appears to me that many of these features would become federal waters, with most not falling into any of the vague and unclear exclusions that EPA and the Corps have included in the proposed definition. If they ARE 'waters of the U.S.' I will need a 404 or 402 permit to conduct many activities near those waters, that is unless those activities are exempted. EPA, the Corps and now even the Natural Resource Conservation Service would have me believe that despite the expanded definition all the activities that take place on my farm are exempted. This is, at a minimum, a negligent mischaracterization, and more likely, an intentionally deceptive tactic being used to pacify the agricultural community. Not all agricultural activities are exempted under the Clean Water Act, and this proposal would expand the number of farming activities that will need permits, requiring many farmers like myself to seek 402 NPDES permits or 404 Dredge and Fill permits.

Specifically, the Interpretive Rule put out on the same day as the proposed definition has narrowed the scope of the Normal Farming and Ranching Exemption under Sec. 404 of the Clean Water Act. While the agencies claim that the Interpretive Rule has expanded the exemption to include a new set of 56 NRCS practices, I'm confused as to why those 56 were not considered "normal farming" practices in the first place. Is it NRCS' position that I have been violating the Clean Water Act since I have not asked for a 404 permit to implement any of my conservation practices thus far. It can be assumed that if those 56 practices are only now exempted through the Interpretive Rule, then they were not before, making all conservation practices that touched water a violation of the Clean Water Act. I don't believe this was the

intent of Congress. Since the 1930s, Congress has encouraged conservation activities, making them an integral, or "normal," part of all farming operations long before passage of the Clean Water Act.

Additionally, I am confused about the agencies' intent. If the Corps and EPA intended to clarify that the exemption covers conservation activities, why didn't they just say just? They should have said "conservation practices and activities, because they are designed and implemented to protect the environment, are exempted as 'normal farming and ranching' activities." Perhaps the agencies knew they were narrowing the exemption to these 56 NRCS practices in an effort to make those practices mandatory for farmers and ranchers. I believe they have made these voluntary standards mandatory because if you tell a farmer that he has to either comply with an NRCS standard or face the permitting requirements or violations of the Clean Water Act and its fines of $37,500 per day, he hasn't been given any real choice at all. He or she must implement an NRCS standard. The only real choice is whether to do it the NRCS way or not at all. I'm afraid that most farmers and ranchers will pick the latter. If that happens, what have we accomplished? Conservation practices will decrease and overall water quality will decrease.

NRCS was created to help farmers on a voluntary basis. Many producers like myself have a great relationship with our local NRCS agent. The Interpretive Rule states that when conducting one of the 56 chosen conservation practices, "[t]he activities must also be implemented in conformance with NRCS technical standards," despite whether it is a cost-shared practice or voluntary. There is no way to get around that this requirement makes NRCS a Clean Water Act Compliance agency if this Interpretive Rule is left in place. You can imagine how many farmers and ranchers are going to allow NRCS field agents on their property knowing they are now an extended arm of the EPA and the Corps for Clean Water Act Enforcement. Making NRCS a Clean Water Act compliance agency is not the way to work with farmers and ranchers. And hiding mandatory compliance with NRCS standards through the guise of an exemption is deplorable.

Not only do other NRCS practices now fall outside the scope of the "normal farming" exemption such as nutrient management and terracing, so do any voluntary practices that do not meet NRCS specifications. I have participated in many NRCS cost-shared conservation practices, but I do not have an NRCS certified grazing plan for my cattle. EPA and the Corps, along with NRCS chose these 56 practices because they have the potential to discharge if they are done in a water. Prescribed Grazing is one of those 56 standards. This makes grazing a discharge activity, and for any farmer or rancher with cattle, unless you have an approved grazing plan your cattle that walk through a wetland on your pasture are now a violation of the Clean Water Act. I can't give you a better example of a "normal farming and ranching" activity than grazing cattle on a pasture, but, apparently now that exemption doesn't consider grazing "normal," and I will need a Sec. 404 permit to graze my cattle because inevitably in Pennsylvania, they will wonder through a wetland or ephemeral stream, which is now a "water

of the U.S." We believe that grazing cattle was already a "normal ranching" activity, and EPA and the Corps' Interpretive Rule has not given farmers and ranchers anything they didn't have before, but in fact, has taken that exemption away from many of us.

Now that the Interpretive Rule is in effect, and my conservation practices are being scrutinized by the Corps and NRCS, my willingness to work with them has been significantly diminished. I'm worried local NRCS personnel are going to have to spend their entire time checking compliance of voluntary conservation activities instead of assisting farmers and ranchers in continuing to improve the waters around their properties. The model of voluntary conservation that has been the pinnacle of farmers and ranchers protection of our natural resources is going to be upended.

Not only should the EPA and the Corps withdraw their overreaching definition of "waters of the U.S.," but they should also immediately withdraw the Interpretive Rule because ultimately the only affect it will have is to decrease beneficial conservation activities. Thank you and I would happy to answer any questions members of the subcommittee may have.