



April 16, 2015

The Honorable Ron Johnson
Chairman
Senate Committee on Homeland
Security and Governmental Affairs
340 Senate Dirksen Office Building
Washington, DC 20510

The Honorable Thomas R. Carper
Ranking Member
Senate Committee on Homeland
Security and Governmental Affairs
340 Senate Dirksen Office Building
Washington, DC 20510

The Honorable James Lankford
Chairman
Subcommittee on Regulatory Affairs
and Federal Management
B40C Dirksen Senate Office Building
Washington, DC 20510

The Honorable Heidi Heitkamp
Ranking Member
Subcommittee on Regulatory Affairs
and Federal Management
502 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Johnson, Chairman Lankford, and Senators Carper and Heitkamp:

Thank you for your letter on March 18 in connection with your review of the impact of Federal regulations. American Farm Bureau Federation (AFBF) applauds your bipartisan effort. In particular, we commend your desire to understand the “real-world effects” of Federal regulations. Such a review is timely and, in our judgment, will permit policymakers to gain a greater appreciation for the very real effects Federal regulations have on farmers and ranchers, how farmers and ranchers respond to the demands of regulations and how those regulations affect agricultural producers in their efforts to produce food, fiber and fuel.

By way of assistance to your effort, I am including as an attachment with this letter a copy of material AFBF supplied to the House Committee on Government Reform and Oversight in 2011; at that time, the House Committee was engaged in a similar effort to your own and we were pleased to participate in that process as well. Federal regulations have an undeniable, long-lasting impact on farmers and ranchers and we support efforts to bring greater sense, flexibility and balance to develop a more rational approach to the Federal rulemaking process.

In our view, the Committee could not have chosen a more appropriate time to initiate such a review. Farmers and ranchers today are faced with an increasing array of regulatory demands and requirements that appear to be unprecedented in scope. We note that your letter asks us to “identify concerns with the regulatory process” as well as providing “a description of how specific rules affect” farmers and ranchers, as well as “rules that...merit attention by the Committee, along with a description of how the rules affect” our members. You also invite scrutiny of “older regulations that may warrant modification or even revocation.” We are pleased to respond to this inquiry, and stand ready to elaborate on any of the topics raised in this response with staff of the Committees. It appears that the request falls largely into two areas: process-related matters and substantive requirements of regulatory rules. We have attempted to organize our response along those lines.

Clearly this is a topic that could generate a response that could run to thousands of words. While we have attempted to cover a range of regulations that create real costs and substantive burdens to our members, the examples we cite should in no way be considered an exhaustive list. Federal regulations – as well as the state and local regulations that often flow from them – permeate virtually every phase of agricultural production. It would probably be the work of a lifetime to annotate all of the implications of Federal rules.

AFBF policy speaks to specific issues related to the regulatory process, as well as to specific regulations. As a general observation, our members believe that Federal regulations should respect property rights; be based on sound scientific data; be flexible enough to recognize varying local conditions; be transparent; and include an estimate of the costs and benefits associated with public and private sector compliance prior to being promulgated.

Concerns with the Regulatory Process

Recent proposals have underscored how critical it is to reform and improve the rulemaking process. Above all, it is paramount that agencies

- be transparent in their proceedings;
- rely upon science that can be replicated and that is peer-reviewed;
- not assume authority not granted by Congress;
- provide ample opportunity for public and stakeholder input;
- not abuse the regulatory process; and
- adhere to judicial rulings that put clear limits on an agency's authority.

We cite below several instances where we believe Federal agencies have either abused the regulatory process or ignored Congressional intent in imposing regulatory obligations on farmers and ranchers. This list is illustrative, not exhaustive.

A. Water rights¹

The U.S. Forest Service is engaged in an ongoing effort to encroach upon long-standing state water rights and expand its authority over water rights that – by tradition, law and court rulings – come under state authority. Beginning with an effort that was declared illegal and invalidated by a U.S. District Court – the USFS has sought to revise portions of the USFS Handbook, by which it would require permittees to surrender to the Federal government lawfully acquired state water rights in order to maintain access to Federal special use permits. While this effort has so far been targeted primarily at ski resorts, it has also been used to compromise the rights of cattlemen who graze on public lands in the West. Perhaps of most concern is that the agency has attempted to do this through directives and modifications to its handbook – not through the formal notice-and-comment procedure, which would provide affected stakeholders the opportunity to review, evaluate and comment on any changes that

¹ Legislation addressing this issue passed the House of Representatives in the 113th Congress but was not taken up by the Senate. We understand this legislation will soon be reintroduced by Rep. Tipton in the House and by Senator Barrasso in the Senate.

could affect their rights.

B. Agricultural exemptions under the Clean Water Act

Last year, the EPA and the Army Corps of Engineers promulgated – effective immediately – an ‘interpretive rule’ whereby the agencies sought to limit rights of farmers and ranchers that were granted by Congress for normal agricultural activities. This “interpretive rule” (which, in the eyes of many legal experts, was in fact a regulatory rule that should have been subject to notice and comment) was so controversial that it was repealed by Congress last December.

C. Wetland delineations

Wetlands occur frequently on farmland and ranchland. Traditionally, wetlands have been determined by the presence of three criteria: hydrology (inundation or near-surface water for a set amount of time); hydric soils; and hydric vegetation. While disputes over the Army Corps of Engineers wetland manual are literally decades old, we have witnessed occasions in which Federal bureaucrats have sought, on their own, to modify the wetland characteristics, going from the traditional three-criteria evaluation to two or even one. Such a regulatory step has the effect of immediately imposing upon the landowner more restrictive requirements; potentially implicating Federal programs such as Sodbuster or Swampbuster; and potentially undermining the value of the land.

D. National Environmental Policy Act (NEPA)

As more than 40 years of experience with implementing NEPA have demonstrated, overly broad NEPA reviews can add significant and unreasonable costs and lengthy delays to projects and can, in turn, challenge the viability of projects that grow the economy, promote favorable environmental outcomes and further energy development at home. It is imperative that government programs impacting economic development in the U.S. – including NEPA - are implemented in a manner that supports and does not hinder growth.

The Council on Environmental Quality (CEQ) proposed Revised Draft Guidance for Federal Departments and Agencies Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews in December 2014. In group comments filed², concerns were raised that the guidance goes beyond the scope of NEPA and would impose additional burdens on permitting agencies and significant delays on project applicants.

E. Endangered Species Act (ESA)

The Endangered Species Act (ESA) is one of the most far-reaching environmental statutes ever passed. It has been interpreted to put the interests of species above those of people, and through its prohibitions against “taking” of species it can restrict a wide range of human activity in areas where species exist or may possibly exist. The ESA can be potentially devastating for a landowner – and the extent of the problem can be large when it is noted that 70% of all listed species occur on private lands.

² Please see attached NEPA comments

One of the most recent procedural problems occurred with the listing of the Northern Long-eared Bat. In publishing its species-specific 4(d) rule, the Fish and Wildlife Service has potentially called into question the legal activities of many farmers and ranchers. In its proposal last year, the agency was quite clear in noting that the bat's problems stem almost entirely from the prevalence of white-nose syndrome. But the FWS also mentioned pesticides as affecting the bat; yet when the Service published its 4(d) rule and exempted certain forestry and other activities, it made no mention whatsoever that normal, lawful pesticide applications would be covered by the provisions of the 4(d) rule. We are greatly concerned that the process the agency followed may subject farmers to potential legal liability – even when the activities in which they engage fully conform with the law.

A. Waters of the United States

The EPA and the Army Corps of Engineers are now engaged in a sweeping regulatory proposal that would redefine what constitutes a “water of the United States” (WOTUS), bringing with any such designation legal obligations and legal exposure to citizen lawsuits. While we deal with the substance of the proposed rule below, it is worth noting that the agency has received nearly 1 million comments on the proposal; of those, an estimated 20,000 or more of the filed comments were viewed as substantive – and of those substantive comments, over half opposed to the agencies’ proposal. Yet the agency appears to be little concerned with those substantive concerns and has just sent its final proposal to OMB for final inter-agency review. This is all the more bewildering because the Office of Advocacy with the Small Business Administration (SBA) filed formal comments with the agencies stating that “Advocacy believes that EPA and the Corps have improperly certified the proposed rule under the Regulatory Flexibility Act (RFA) because it would have direct, significant effects on small businesses. Advocacy recommends that the agencies withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking.”³ We find it astonishing that the agencies intend to move forward on a rule that has raised bipartisan concerns in Congress and among other Federal agencies, and which has met with opposition from over half the states. Perhaps more than any other proposal, this entire proceeding amply demonstrates how agencies can ignore stakeholder input and even simple fairness when they have set their sights on expanding their regulatory reach.

In our judgment, a thorough Congressional oversight review of EPA’s conduct of this rulemaking is amply justified. We believe that, in many important respects, the agency has failed in its duty to conduct an impartial, fair rulemaking.

Substantive Regulatory Concerns

A. H-2A Regulations

The H-2A program permits agricultural producers who are unable to obtain domestic workers

³ See the Office of Advocacy’s letter at <https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act>.

the opportunity, under certain conditions, to obtain visas for foreign workers to come and perform work in the U.S. for a limited period of time. The genesis of the program dates to the 1950s, but its current statutory authorization stems from the Immigration Reform and Control Act of 1986. The statutory language is brief; the Department of Labor, however, has done everything in its power to make the program unusable by growers (see the attachment to the House Government Reform and Oversight Committee for one example). The program is inefficient, expensive, time-consuming and a hindrance to growers. DOL's abuse of its authority to administer the H-2A program alone would merit an investigation by your Committee.

B. EPA's Waters of the U.S. proposal

We discussed above procedural problems that have infected the EPA/Army Corps of Engineers proposal. Yet the substantive problems of the rule are even greater. Attached is a copy of an economic analysis of the WOTUS proposal prepared by David Sunding, Ph.D. It provides a detailed description of the impact this regulation will have on the regulated community.

C. EPA's proposal on ozone

EPA's proposal to tighten the National Ambient Air Quality Standards (NAAQS) for ozone has the potential to cause real and significant costs to farmers and ranchers and rural America while providing uncertain and unverified benefits. In comments filed both individually⁴ and with a broader industry group⁵, AFBF identified significant concerns about the impact lower ozone standards will have on agriculture, rural communities, and the overall economy. Despite over three decades of cleaner air, EPA is now proposing a new stringent standard that would bring vast swaths of the country into nonattainment. These new stringent standards have the potential for damaging economic consequences across the entire economy and would place serious restrictions on farmers, increasing input costs for items like electricity, fuel, fertilizer and equipment. Further, as ozone standards are ratcheted down closer to levels that exist naturally, more farmers will be forced to abide by restrictions on equipment use and land management, making it harder to stay in business. EPA's own estimates show that a new ozone rule could cost tens of billions of dollars per year and has the potential to be the most costly regulation in our nation's history.

D. EPA's proposal on greenhouse gases

EPA's Clean Power Plan and regulations for new power plants create important questions about the reliability and affordability of electricity across the country. Farming and ranching are energy-intensive businesses. Farmers and ranchers depend on reliable, affordable sources of energy to run their daily operations, including using tractors and operating dairy barns, poultry houses and irrigation pumps. For many farmers that compete in a global economy, energy represents a major input cost that can ultimately determine viability and prosperity. In

⁴ Attach AFBF Comments

⁵ Attach group Ozone Comments

comments⁶ filed regarding EPA's GHG regulations, we raised serious concerns about the billions of dollars in cost on the U.S. economy that these regulations would impose while failing to meaningfully reduce CO₂ emissions on a global scale.

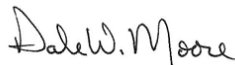
E. ESA

The Office of Management and Budget is currently reviewing two proposed regulations by the Fish and Wildlife Service governing the process for designating critical habitat under the ESA and the definition of "adverse modification" as applied in ESA, Section 7 consultations. The proposed rules depart from the limited scope and purpose intended by Congress by 1) allowing the agency to designate critical habitat based on speculative conditions, including designation of areas that do not have physical and biological features needed by the species; 2) allowing for broader designation of unoccupied areas as critical habitat; and (3) providing unfettered discretion to establish the scale of critical habitat—extending to landscape or watershed-based designations that do not look to whether all areas within the designation actually meet the criteria for designation as critical habitat. If finalized, these regulatory changes would grossly expand the scope of the ESA and provide the Service greater reach in critical habitat land designations that could have a significant negative impact on farmers' and ranchers' ability to maintain active farm and ranch operations on both private and Federal lands.

We would also urge the Committee to incorporate in its review consideration of legislative proposals that could address some of the above concerns. Such a review should include consideration of H.R. 185, the *Regulatory Accountability Act*; this legislation passed the House of Representatives on January 13 and is now pending before your Committee.

In closing, we commend the Committee for its work in this important area. We stand ready to work with you on substantive and procedural remedies that will alleviate the regulatory burden for farmers and ranchers.

Sincerely,



Dale Moore
Executive Director
Public Policy

⁶ Attach AFBF ESPS EGU Comments