Statement of the American Farm Bureau Federation

TO THE UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

The Impact of Federal Environmental Regulations and Policies on American Farming and Ranching Communities

February 7, 2018

Presented By:

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Chairman Barrasso, Ranking Member Carper, and Members of the Committee, my name is Zippy Duvall and I am the President of the American Farm Bureau Federation. I am pleased to be here today to offer testimony on several issues of importance to farmers and ranchers across the country.

On behalf of the nearly 6 million Farm Bureau member families across the United States, I commend you for your leadership in providing oversight of federal environmental regulations and policies and appreciate the Committee's 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.

Since I was first elected as president of the American Farm Bureau Federation two years ago, I have visited with farmers and ranchers in all 50 states to hear firsthand "what keeps them up at night" and what their national Voice of Agriculture, Farm Bureau, can do to help them be more productive and profitable—to sustain their farms for the next generation and sustain our nation's food supply. Two concerns have come up on almost every farm I have visited: 1) the lack of an adequate, legal supply of farm workers, and 2) the burden of complying with a web of often overlapping and conflicting federal regulations.

I have met farmers and ranchers who are not sure if they should encourage their children to remain on the farm, because they are not sure the farm will sustain another generation if these problems continue to get worse. I would remind the members of the Committee that the average age of the American farmer is 58. A generation of farmers and ranchers will be hanging up their hats within the next few years. Who will take their place and work to keep food on our tables? I maintain hope that the next generation of farmers and ranchers will step up to the challenge. Technological innovations and long-term growth in food demand make this an exciting time to be involved in agriculture. Many young people are excited to carry on a tradition of farming and ranching that has been in their family for decades if not centuries. My own son, Zeb, is taking on more and more of the daily tasks of running our family farm in Greshamville, Georgia, the same as I took over from my dad many years ago. But as committed as these young people are to the farming and ranching life, they cannot continue if the regulatory burden continues to grow. Already, farm income is reduced about 50 percent compared to five years ago, but I assure you that regulatory costs have not gone down. These facts would give pause to even the most dedicated young farmer or rancher.

So I commend you for holding today's hearing. The Committee could not have chosen a more appropriate time to review the impact of regulations on agriculture.

Farmers and ranchers today are faced with an increasing array of regulatory demands and requirements that appear to be unprecedented in scope.

This topic 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 – and the state and local regulations that often flow from them – permeate virtually every phase of agricultural production. It probably would be the work of a lifetime to compile all of the implications of Federal rules.

AFBF policy speaks to both the regulatory process and 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.

CERCLA / EPCRA

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted to provide for cleanup of the worst industrial chemical and toxic waste dumps and spills, such as oil spills and chemical tank explosions. CERCLA has two primary purposes: to give the federal government tools necessary for prompt response to problems resulting from hazardous waste disposal into water and soil, and to hold polluters financially responsible for cleanup. The Emergency Planning and Community Right-to-Know Act (EPCRA) requires parties that emit hazardous chemicals to submit reports to their local emergency planning offices, thus allowing local communities to better plan for chemical emergencies.

In 2008, the EPA finalized a rule to exempt all agricultural operations from CERCLA reporting and small operations from EPCRA reporting requirements, recognizing that low-level continuous emissions of ammonia and hydrogen sulfide from livestock are not “releases” that Congress intended to regulate. When the rule was challenged in 2009, the Obama administration spent eight years defending this Bush-era regulation. In defending the lawsuit, the Obama EPA argued that CERCLA and EPCRA language does not explicitly exempt farms because Congress never believed that the continuous emissions of agricultural operations would fall into the realm of regulation. However, in April 2017, the D.C. Circuit Court of Appeals issued a decision vacating EPA’s 2008 exemption, concluding that the exemption violated the statutes.

Not only does this court decision have the potential to require nearly 200,000 farms and ranches to report their low-level emissions, but will also likely put our nation’s environmental and public health at risk. Currently, Hazardous Substance release reports are taken by the National Response Center (NRC), run by the Coast Guard. This department has averaged 28,351 reports per year over the last eight years. When farms from across the nation must suddenly report their low-level emissions, these reports from over 200,000 agricultural operations will inundate the

NRC. This increase of over four times the average annual amount, in the weeks after the court's decision goes into effect, could prevent the Coast Guard from responding to actual hazardous waste emergencies, entirely defeating the primary purposes of CERCLA.

Importantly, emergency responders do not see value in the reporting from farms, and the influx of agricultural reports will hurt emergency response coordination. The National Association of SARA Title III Program Officials, which represents state and local emergency response commissions, notes the continuous reports "are of no value to [Local Emergency Planning Committees] and first responders" and that the reports "are generally ignored because they do not relate to any particular event." In addition, the Coast Guard and EPA have stated that these emission reports will serve no useful purpose in terms of the crisis and emergency response function of CERCLA and EPCRA. The massive volume of reports will impede the efforts of the Coast Guard, EPA, and state and local emergency responders. CERCLA and EPCRA were intended to focus on significant events like spills or explosions, not routine emissions from farms and ranches.

Following the D.C. Circuit Court of Appeals decision, the EPA's options are limited. EPA has provided reporting guidance to farmers and ranchers, but there is no scientific consensus on how to measure air emissions on individual farms, requiring many farmers to spend resources on consultants. These requirements not only require reporting by larger farms, but also small pastured cow-calf farms, ranchers grazing on federal lands and horse farms.

The court recently granted a stay for three months, providing additional time for the agency to further develop administrative guidance and streamlined reporting forms, but buying time does not change the ultimate outcome: thousands of farms and ranches across the nation will be forced to report their daily emissions to the EPA or face liability of up to nearly $54,000 per day.

Now, it is up to Congress to ensure that the EPA is not required to implement this overly burdensome court decision and open up hundreds of thousands of farms and ranches to activist lawsuits while potentially creating a database of sensitive private farmer information. The whole point of activists' dogged effort to require reporting is to create a federal database that makes it easier to harass farmers and ranchers.

Farmers and ranchers are looking to Congress to act swiftly to protect their privacy and their businesses from the financial strain and burden of these unnecessary reporting requirements on ordinary activities on their land.

Regulatory Reform

All Americans have a vested interest in a regulatory process that is open, transparent, grounded on facts and respectful of our system of federalism, and a process that faithfully reflects and implements the will of Congress and adheres to the separation of powers in the Constitution. Particularly in the field of environmental law, all affected stakeholders – businessmen and

women, farmers, environmentalists, agribusinesses small and large, university researchers, scientists, economists, taxpayers, lawmakers and state and Federal regulators – benefit from a process that is fair, generates support and respect from diverse viewpoints, and achieves policymakers' goals.

Most people would be surprised if they knew the extent to which farms and ranches of all sizes and types are affected by Federal laws and the regulations based on those laws. Rural agribusinesses, which provide much-needed economic activity and jobs in rural America, also are challenged on the regulatory front.

While farm bill programs such as crop insurance and conservation programs are most readily recognizable as affecting agriculture, producers confront numerous other regulatory challenges. A list that is by no means exhaustive includes lending and credit requirements, interpretations of the tax code, health care provisions, energy policy, labor and immigration laws, and environmental statutes ranging from air and water quality concerns to designations of critical habitat and other land uses. For farmers and ranchers, regulations don't just impact their livelihood. Unlike nearly any other economic enterprise, a farm is not simply a business; it's often a family's home.

When a government regulation affects the ability of a farmer to use his or her land, that regulatory impact "hits home" – not just figuratively but literally. That happens because the farm often *is* home and may have been passed down in the family for generations. If the regulatory demand is unreasonable or inscrutable, it can be frustrating. If it takes away an important crop protection tool for speculative or even arguable reasons, it can harm productivity or yield. If it costs the farmer money, he or she will face an abiding truth – farmers, far more often than not, are price takers, not price makers: with little ability to pass costs on to consumers, farmers often are forced to absorb increased regulatory costs. And when, under the rubric of "environmental compliance," the regulation actually conflicts with sound environmental methods the farmer is already practicing, regulations can be met with resistance and ultimately a lack of respect for the process itself.

We believe a fair, transparent, open and updated regulatory process will benefit not just farmers and ranchers: it will reinvigorate public respect for the important and critical role regulations must and do play while benefiting taxpayers, the environment, small businesses and people in all walks of life.

The regulatory process today is the product of decisions made over decades, often done without any effort to integrate those decisions into a coherent system. Such a system should assure stakeholders a fair outcome, further congressional intent, safeguard our environment, take into account modern social media, respect the role of the states, and reinforce public confidence in the integrity of the system. That is not the case today. Regulatory agencies, with judicial

approval, increasingly exercise legislative functions – and they are encroaching on judicial functions as well, creating an imbalance that needs correction.

Attached to today's testimony are two documents that outline in greater detail specific examples of regulatory burdens to American farmers and ranchers, and recommendations on how Congress and the Administration can improve the regulatory framework and strengthen the existing system to protect our environment and agricultural landscape, and to reinvigorate the American economy.[1] [2]

I would also like to encourage members of the Committee to lend their support to S. 951, the Regulatory Accountability Act, a bipartisan bill introduced by Senators Rob Portman of Ohio and Heidi Heitkamp of North Dakota. When this issue was before the Homeland Security and Government Affairs Committee last year, I met with both Senator Portman and Senator Heitkamp. Senator Portman adopted a number of changes brought forward by Senator Heitkamp, and Farm Bureau was pleased that the Committee approved this legislation last May.

Unfortunately, since then the bill has been awaiting broader bipartisan support. AFBF believes strongly that everyone – farmers, regulators, environmentalists, academics, scientists, consumers and the public in general – has a vested interest in a fair, transparent, open and accountable system. We believe S. 951 makes important improvements to the existing regulatory scheme and we hope members of the Committee will work with Senators Portman and Heitkamp to move this bill to the Senate floor.

Duplicative Regulatory Burdens

For nearly three decades, the application of pesticides to water was regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), not the Clean Water Act (CWA). A series of lawsuits, however, yielded a trio of 9th Circuit Court of Appeals decisions holding that pesticide applications also needed CWA National Pollutant Discharge Elimination System (NPDES) permits. To clear up the confusion, EPA promulgated a final regulation to clearly exempt certain applications of aquatic pesticides from the CWA's NPDES program. EPA's final rule was challenged and overturned in *National Cotton Council v. EPA*. This decision exposed farmers, ranchers, pesticide applicators and states to CWA liability by subjecting them to the CWA's NPDES permitting program.

The general permits are now in place for over 360,000 new permittees brought within the purview of EPA's NPDES program. This program carries significant regulatory and administrative burdens for states and the regulated community beyond merely developing and then issuing permits. It goes without saying that a meaningful environmental regulatory program is more than a paper exercise. It is not just a permit. EPA and states must provide technical and

[1] Regulatory Improvement and Reform: A priority for American Agriculture
[2] AFBF Letter to U.S. Environmental Protection Agency, May 15, 2017

compliance assistance, monitoring and, as needed, enforcement. These new permittees do not bring with them additional federal or state funding.

There are three fundamental questions each member should ask. First, are FIFRA and CWA regulations duplicative? Second, in light of FIFRA's rigorous scientific process for labeling and permitting the sale of pesticides, are duplicative permits the appropriate way to manage pesticide applications in or near water? And third, is this costly duplication necessary or does it provide any additional environmental benefit ? Your answer to all three questions should be NO. Never, in more than 40 years of FIFRA or the CWA, has the federal government required a permit to apply pesticides for control of pests such as mosquitoes, forest canopy insects, algae, or invasive aquatic weeds and animals, such as Zebra mussels, when pesticides are properly applied "to, over or near" waters of the U.S.

Lastly, state water quality agencies repeatedly have testified that these permits provide no additional environmental benefits, that they simply duplicate other regulations and impose an unwarranted resource burden on their budgets.

Waters of the United States (WOTUS)

The 2015 WOTUS rule is a disaster and is even broader than EPA's expansive proposed rule. There is no doubt that the final rule creates even more risk and uncertainty for farmers, ranchers and others who depend on their ability to work the land.

For example, the definition of "tributary" was broadened significantly to include landscape features that may not even be visible to the human eye, or that existed historically but are no longer present. The 2015 rule even gave the federal agencies the power to conclusively identify WOTUS remotely using "desktop tools." There are many other significant problems including outright ambiguity and confusion with the exclusions.

While we acknowledge that the 2015 rule provides a list of exclusions, many of the exclusions are extremely narrow, or are so vague that they lend themselves to narrow agency interpretation. As an example – both puddles and dry land are excluded from the definition of WOTUS.

Puddles

One of the most fundamental problems with the 2015 rule is that it simply does not define the term "water." In an attempt to mock concerns over the ambiguity of the definition of puddle "the final rule adds an exclusion for puddles. A puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event." Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37054, 37099 (Jun. 29, 2015). It may be comforting to some to know that bureaucrats will not be regulating small pools of water on pavement. But for farmers and ranchers, such a narrow exclusion is clear evidence of just how expansive the

2015 rule really is. Farm fields are not made of pavement, they are made of soil, and in many low areas that soil stays wet long enough to look like a puddle in the middle of a field. We learned after the rule was final that the Corps was concerned about the lack of definition for "water" and how difficult it would be to distinguish between non-wetland areas and puddles.(USACE Implementation Challenges Pre-Rule Documents, CWA "Waters of the U.S." Implementation Concerns, HQUSACE April 24)

Dry Land

The agencies declined to provide a definition of "dry land" in the regulation because they:

"determined that there was no agreed upon definition given geographic and regional variability." (Final Rule at 173)

However, the preamble claims that the term is "well understood based on the more than 30 years of practice and implementation" and further states that "dry land" "refers to areas of the geographic landscape that are not water features such as streams, rivers, wetlands, lakes, ponds, *and the like*." (Final Rule at 173)

Based on the broad and confusing preamble explanation of what are "waters," there will be an equal amount of confusion over the definition of "puddle" and "dry land."

Farm Bureau is looking forward to working with EPA to either revise or repeal the 2015 rule and replace it with a common sense definition that protects clean water but provides clear understandable rules.

The Endangered Species Act

The Endangered Species Act (ESA) provides a set of protections for species that have been listed as endangered or threatened and is administered by the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). Originally enacted in 1973, Congress envisioned a law that would protect species believed to be on the brink of extinction. When the law was enacted, there were 109 species listed for protection. Today, there are 1,661 domestic species on the list, with 29 species considered as "candidates" for listing. Unfortunately, the ESA has failed at recovering and delisting species since its inception. Less than 2 percent of all listed species have been removed from ESA protection since 1973, and many of those are due to extinction or "data error."

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 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.

The ESA is a litigation-driven model that rewards those who use the courtroom at the expense of those who practice positive conservation efforts. Sue-and-settle tactics employed by some environmental groups have required the government to make listing decisions on hundreds of new species. These plaintiffs have been rewarded for their efforts by taxpayer-funded reimbursements for their legal bills.

While the ESA has had devastating impacts on many segments of our society, its impacts fall more unfairly on farmers and ranchers. One reason for this is that farmers and ranchers own most of the land where plant and animal species are found. Most farmland and ranchland is open, unpaved and relatively undeveloped, so that it provides actual or potential habitat for listed plants and animals. Often farm or ranch practices enhance habitat, thereby attracting endangered or threatened species.

Unlike in other industries, farmers' and ranchers' land is the principal asset they use in their business. ESA regulatory restrictions are especially harsh for farmers and ranchers because they prevent them from making productive use of their primary business asset. Also unlike in most other industries, farm and ranch families typically live on the land that they work. Regulations imposed by the ESA adversely impact farm and ranch quality of life.

Despite the fact that the ESA was enacted to promote the public good, farmers and ranchers bear the brunt of providing food and habitat for listed species through restrictions imposed by the ESA. Society expects that listed species be saved and their habitats protected, but the costs for doing this fall to the landowner upon whose property a species is found.

The scope and reach of the ESA are far more expansive today and cover situations not contemplated when the law was enacted. Both statutory and regulatory improvements would help to serve the people most affected by implementation of the law's provisions. The ESA should provide a carrot instead of the regulatory stick it currently wields.

For example, the Obama Administration promulgated two 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. These regulatory changes grossly expanded the scope of the ESA and provide the Service greater reach in critical habitat land designations that can have a significant negative impact on farmers' and ranchers' ability to maintain active farm and ranch operations on both private and Federal lands.

Privacy & Use of Unmanned Aircraft Systems

Farm Bureau supports the use of unmanned aircraft systems (UAS) as another tool for farmers and ranchers to use in managing their crops and livestock and making important business decisions. A farmer faces daily challenges that can affect the farmer's yield, environmental conditions on the farmer's property and, ultimately, the economic viability of the farm. Farmers rely on accurate data to make these decisions, and the use of UAS adds a valuable and accurate tool for the farmer in making optimal decisions to maximize productivity.

America's farmers and ranchers embrace technology that allows their farming businesses to be more efficient, economical and environmentally friendly. American agriculture continues to evolve. Farmers and ranchers use precision-agriculture techniques to determine the amount of fertilizer they need to purchase and apply to the field, the amount of water needed to sustain the crop, and the amount and type of herbicides or pesticides they may need to apply. These are only a few examples of the business decisions a farmer makes on a daily basis to achieve optimal yield, lower environmental impact and maximize profits.

UAS provides detailed scouting information on weed emergence, insect infestations and potential nutrient shortages. This valuable information allows the farmer to catch threats before they develop into significant and catastrophic problems.

The imagery from UAS also allows the farmer to spot-treat sections of fields as opposed to watering or spraying the entire field. Images from UAS allow the farmer to identify the specific location where a specific treatment – be it fertilizer, water, pesticides or herbicides – is necessary. By spot-treating threats to the crop, the farmer not only lowers the cost of treatment but also has the potential of lowering the environmental impact by minimizing application.

While Farm Bureau supports this new technology and the potential opportunities it offers for farmers and ranchers, Farm Bureau is also concerned about the data collected from UAS and the privacy and security of that data.

Even if an individual operator follows all the applicable rules, regulations, and best management practices in his or her farming operation, there is still concern that regulatory agencies or one of the numerous environmental organizations that unnecessarily target agriculture might gain access to individual farm data through subpoenas. While a farmer's pesticide or biotech seed usage may be a necessary, appropriate and accepted practice, it also may be politically unpopular with certain groups.

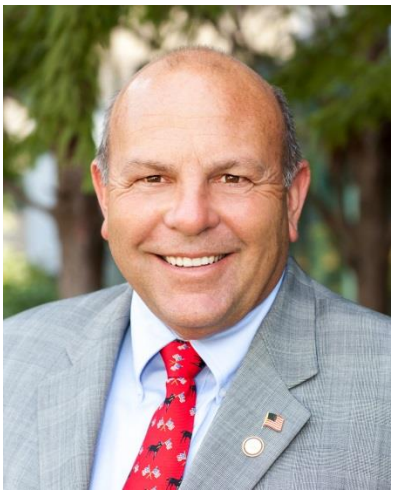
The biggest fear that farmers face in data collection is government accessing their data and using it against them for regulatory action.

Questions abound within the agricultural community about “who owns and controls the data.” If a farmer contracts with a company authorized to fly UAS, does the farmer own all the data from that UAS or is it shared by both the contractor and the farmer? In the case of a farm on rented ground, does the tenant or the landlord own the data?

Farm Bureau supports the use of UAS and believes it will be an important addition to farmers’ management toolbox, but it is critical that the data remain under the ownership and control of the farmer and is not available to government agencies or others without permission.

Conclusion

We at the American Farm Bureau Federation appreciate the Committee’s willingness to listen to our concerns. The need for continued oversight and reform of the nation’s environmental regulatory framework cannot be overstated. Farmers, ranchers, and small businesses rely on regulatory certainty and the constitutional protection of private property rights to make sound business decisions. We look forward to continuing to work with you and the Senate Environment and Public Works Committee in pursuing solutions to these important challenges.



Bio – President Zippy Duvall

President of the American Farm Bureau Federation since January 2016, Zippy Duvall is a third-generation farmer from Georgia. In addition to a 400-head beef cow herd for which he grows his own hay, Duvall and his wife, Bonnie, also grow more than 750,000 broilers per year.

Prior to being elected AFBF president, Duvall served for nine years as president of the Georgia Farm Bureau. Duvall's long leadership history in his home state includes service on the Georgia Farm Bureau Young Farmers Committee and Georgia Farm Bureau board of directors.

He was also recognized with several state appointments, including then-Georgia Gov. Sonny Perdue's Agricultural Advisory Committee and the Georgia Development Authority. His many state honors include Georgia Dairy Family of the Year.

As GFB president, Duvall's service on the AFBF board of directors included roles on the Trade Advisory Committee, including several international trade missions, and on the Finance Committee.

In 2017, Duvall was honored by National 4-H Council as a founding luminary, an exclusive group of accomplished and influential 4-H alumni.

Duvall and his wife, Bonnie, have been married for more than 38 years, raised four children and now enjoy spending time with their five grandchildren. They attend New Hope Baptist Church in Greshamville, Georgia, where he serves as a deacon.

ADDENDUM

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April 16, 2015

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The Honorable Thomas R. Carper
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The Honorable James Lankford
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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 rights[1]

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 filed[2], 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 individually[4] and with a broader industry group[5], 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

comments[6] 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 CO_2 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 W. Moore

Dale Moore
Executive Director
Public Policy

[6] Attach AFBF ESPS EGU Comments

Regulatory Improvement and Reform:
A priority for American Agriculture

RECOMMENDATION:

The undersigned agricultural organizations recommend that the new Administration and Congress make reform of the regulatory development process a top priority. The Administration should pledge to work with Congress in a bipartisan, bi-cameral fashion to craft a package of reforms that can be signed into law by the summer of 2018. The President should designate the Director of OMB and the Attorney General as the principal Administration officials charged with interfacing with Congress.

The bipartisan leadership of Congress should establish a working group to join with the Administration in crafting a bipartisan package of reforms that update, improve, strengthen and reform the existing regulatory process.

Agribusiness Council of Indiana Agricultural Retailers Association Agri-Mark, Inc.
American Farm Bureau Federation AmericanHort American Seed Trade Association
American Soybean Association American Sugar Alliance
American Sugar Cane League American Sugarbeet Growers Association
California Association of Winegrape Growers
California Specialty Crops Council CropLife America
Dairy Producers of New Mexico Dairy Producers of Utah Delta Council
Exotic Wildlife Association Federal Forest Resource Coalition The Fertilizer Institute
Idaho Dairymen's Association Michigan Agri-business Association Michigan Bean Shippers
Milk Producers Council Missouri Dairy Association National Agricultural Aviation Association
National Alliance of Forest Owners National Aquaculture Association
National Association of State Departments of Agriculture
National Association of Wheat Growers National Corn Growers Association
National Cotton Council National Council of Agricultural Employers
National Council of Farmer Cooperatives
National Grain and Feed Association National Milk Producers Federation
National Pork Producers Council National Potato Council National Sorghum Producers
Northeast Dairy Farmers Cooperatives Ohio AgriBusiness Association
Oregon Dairy Farmers Association
Society of American Florists South East Dairy Farmers Association
Southwest Council of Agribusiness St. Albans Cooperative Creamery, Inc.
United Fresh Produce Association U.S. Apple Association
USA Rice U.S. Cattlemen's Association
U.S. Rice Producers Association Upstate Niagara Cooperative, Inc
Western Peanut Growers Association Western United Dairymen

I. Overview

All Americans have a vested interest in a regulatory process that is open, transparent, grounded on facts, respectful of our system of Federalism, that faithfully reflects and implements the will of Congress and adheres to the separation of powers in the Constitution. Particularly in the field of environmental law, all affected stakeholders – businessmen and women, farmers, environmentalists, agribusinesses small and large, university researchers, scientists, economists, taxpayers, lawmakers and state and Federal regulators – benefit from a process that is fair, generates support and respect from diverse viewpoints, and achieves policymakers' goals.

Farmers and ranchers across the country are uniquely affected by Federal laws and the regulations based on those laws; rural agribusinesses also are challenged on the regulatory front. While farm bill programs such as crop insurance and conservation programs are most readily recognizable as affecting agriculture, producers confront numerous other regulatory challenges. A list that is by no means exclusive includes lending and credit requirements; interpretations of the tax code; health care provisions; energy policy; labor and immigration laws; environmental statutes ranging from air and water quality concerns to designations of critical habitat and other land uses. For farmers and ranchers, regulations don't just impact their livelihood. Unlike nearly any other economic enterprise, a farm is not simply a business: it's often a family's home. When a government regulation affects the ability of a farmer to use his or her land, that regulatory impact 'hits home' – not just figuratively but literally. That happens because the farm often *is* home and may have been passed down in the family for generations. If the regulatory demand is unreasonable or inscrutable, it can be frustrating. If it takes away an important crop protection tool for speculative or even arguable reasons, it can harm productivity or yield. If it costs the farmer money, he or she will face an abiding truth – farmers, far more often than not, are price takers, not price makers: with little ability to pass costs on to consumers, farmers are often forced to absorb increased regulatory costs. And when, under the rubric of 'environmental compliance,' the regulation actually conflicts with sound environmental methods the farmer is already practicing, the result can be met with resistance and ultimately a lack of respect for the process itself. We believe a fair, transparent, open and updated regulatory process will benefit not just farmers and ranchers: it will reinvigorate public respect for the important and critical role regulations must and do play while benefiting taxpayers, environmentalists, small businessmen and women and people in all walks of life.

II. The Current Situation

The regulatory process today is the product of decisions made over decades, often done without any effort to integrate those decisions into a coherent system. Such a system should

assure stakeholders a fair outcome, further congressional intent, safeguard our environment, take into account modern social media, respect the role of the states, and reinforce public confidence in the integrity of the system. That is not the case today. Regulatory agencies, with judicial approval, increasingly exercise legislative functions – and they are encroaching on judicial functions as well, creating an imbalance that needs correction. Consider that:

- The primary statutory authority governing the rulemaking process, the *Administrative Procedure Act* (APA), is over 70 years old and was enacted before many Federal regulatory agencies were even in existence. Although the law is little changed from what it was seven decades ago, statutes and programs that utilize the APA process have proliferated: the Clean Air Act; Superfund; the Energy Independence and Security Act of 2007; Highway bills; the Consumer Product Safety Act; the Clean Water Act; Swampbuster and Sodbuster; the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA); the Endangered Species Act (ESA); the Food Quality Protection Act; the Food Safety Modernization Act, and many, many more. Consider:

  - EPA, under the new Clean Power Plan, is literally restructuring the nation's energy sector – and along with it much of our economy – through an APA rulemaking. The agency has done this even though Congress in 2009 failed to enact legislation to approve such profound changes. Thus, one agency has embarked on a sweeping program using a framework established nearly three-quarters of a century ago that was simply not designed to manage such profound policy changes. (This initiative of the agency, in fact, would likely not have occurred but for a 5-4 decision by the Supreme Court in 2007.)

- In the 1970's, Congress increasingly authorized the use of citizen lawsuits, particularly in environmental statutes. Nearly concurrently (i.e., *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973)), the Supreme Court broadened the ability of parties to sue in Federal court. Those two steps significantly increased the number and range of policy decisions decided by the courts. Given the relatively few cases that are ultimately decided by the Supreme Court, many policies now are decided by a handful of judges on appellate courts or even single judges in federal district courts. Consider:

  - Perhaps the most litigated provision in the Clean Water Act is how to determine the scope of the term 'waters of the US.' Over the past 44 years, that single provision has been the subject of numerous lawsuits and ever-changing regulations and guidance documents (as well changes to the Army Corps of Engineers' wetlands manuals) – even though Congress itself has not altered the language it wrote in 1972. Indeed, in response to the U.S. Supreme Court decision in *Rapanos* (2006), environmental activists advocated for legislation to overturn the court's ruling and broaden the scope of the Clean Water Act; legislation was introduced in both the Senate and House to accomplish that goal. Those bills, however, met resistance from Democrats and Republicans alike and no proposal was even scheduled for debate on the floor of

either the House or Senate. Nevertheless, EPA proposed and finalized the new "WOTUS" rule that effectively ignored Congress and expanded Federal jurisdiction even though Congress had not done so. Within the last year, bipartisan majorities in both the House of Representatives and the Senate voted to reject EPA's interpretation of the law. Once again, however, the courts, not the people's elected representatives, will decide the outcome.

- Coupled with the expansion of litigation, the U.S. Supreme Court has expanded agencies' powers by entrenching the principle that when interpreting what laws and regulations mean, judges must give deference to agencies:

  - In *Chevron U.S.A. v. Natural Resources Defense Council* (1984), the Supreme Court required federal judges to defer to an agency's reasonable interpretation of a statute – even if the regulation differs from what the judge believes to be the best interpretation. This principle applies if the statute in question is within the agency's jurisdiction to administer; the statute is ambiguous on the point in question; and the agency's construction is reasonable.

  - In *Auer v. Robins* (1997), the Court again expanded agencies' authority. In that case, the Court held that it would give deference not only to an agency's interpretation of a statute but to an agency's interpretation of its own regulations as well.

  At another layer of regulation, agencies may often use handbooks and field manuals in guiding decisions that affect landowners; yet these guidance documents are not subject to public notice-and-comment, and they can even vary from region to region and often change on a whim. Yet, courts are increasingly deferring to those guidance documents and even to individual agency employee interpretations of those guidance documents. Given the breadth of deference afforded to agencies, they have a strong incentive to issue ambiguous rules and then ask courts for deference when the rules are challenged in court. Our nation's judges no longer play the role assigned them by the Constitution – to decide what the law actually means.

- With the expansion of citizen lawsuits, disbursements of public funds from the Judgment Fund have taken on increased significance. Additionally, in 1980 Congress enacted the *Equal Access to Justice Act*. The statute has the laudable goal of seeking to assure that no stakeholder is foreclosed from access to the court system; but its implementation has been unequal, even arguably unfair (see example below). Moreover, particularly for western states, there are increasing complaints that the EAJA has been used to pursue an activist agenda through the courts when such policies fail to win approval on Capitol Hill. This has often occurred in disputes over logging on public lands.

- Over the last several decades, economic and scientific models have played an increasingly important role in how regulatory agencies decide policy questions. Use of models *per se* is not wrong; they can be valuable tools. But models should not be relied upon exclusively, nor should model results be a substitute for hard facts and data when

the two conflict . President Obama noted the critical role science plays at the start of his Administration when he issued his Memorandum for the Heads of Executive Departments and Agencies on March 3, 2009. That memorandum, enunciating many aspects of the importance science plays in the rulemaking process, has generated bipartisan support. But some question how faithful agencies are to the policy; and in any event, if agencies depart from these science guidelines in rulemaking, aggrieved parties have little recourse and none in the courts.

- Some statutes, like the Clean Air Act, significantly limit whether or how agencies can consider costs when reaching policy decisions; other statutes, such as the Clean Water Act and FIFRA, allow either some weighing of costs-and-benefits or grant greater flexibility to agencies in making determinations. Yet even the Clean Air Act requires the agency to take into account the impact its regulations will have on jobs. Other statutes, like the Regulatory Flexibility Act and the Small Business Regulatory Fairness Act, are designed to assist small businesses in the regulatory process yet agencies too often find ways to circumvent their requirements. For example, the 'social cost of carbon' template is being used to 'quantify' certain economic benefits; there may be cases where such an approach is useful. But rulemakings with significant, extensive economic implications should rely if at all possible on quantifiable, real world data whenever it is available. Rulemakings should not devolve into a game of manipulated statistics or theoretic qualifications to justify preferred policy outcomes.

- Internal agency guidance is being developed to make fundamental changes in how regulations are implemented even when explicit authority from Congress is absent. In November 2015, the President issued a memorandum to EPA, the Department of Interior and other select agencies that it shall be their policy "to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources caused by land- or water-disturbing activities…" The agriculture community is attempting to learn how such a sweeping directive may affect the issuance of permits under the Clean Water Act, grazing permits under the Taylor Act, injurious wildlife listings under the Lacey Act and other programs where any activity requires Federal assent or permission. This memorandum raises fundamental legal, even constitutional, questions; foremost among them is to what extent, if any, agencies in the Executive Branch have the authority to direct, limit or even prohibit conduct in the absence of Congress granting them such authority.

III. The Current System Poses Challenges for Agriculture

Regulations have a direct impact on America's farms and ranches. But agricultural producers are affected uniquely: for the overwhelming majority, as stated earlier, their businesses are their homes. Thus, when a new or revised Federal regulation takes effect, more than likely it will affect how a grower can manage his or her land – what crops to grow, or where or how to grow them; how to manage them before or after harvest; how to house, feed or care for the livestock under their care; and – most significantly – how to make sure

that farming and ranching operations are sustainable and productive for their children, the extended family, and future generations. When the Constitution was ratified over two centuries ago, more than 90 percent of Americans lived on family farms. Today, fewer than 2 percent of Americans live on the farm. But American agriculture today – as it was 240 years ago – remains, at heart, a family enterprise.

Farmers and ranchers across the country have shared stories about the impact regulations have on their lives and businesses. Additionally, agricultural facilities like grain elevators and commodity processing facilities have been subjected to unreasonable, costly and lengthy battles over Federal rules. One of the realities of life in rural America is the 'mission creep' that increasingly brings farmers, ranchers and related agricultural businesses face-to-face with Federal regulators. Consider the following real-life examples:

(a) A West Virginia farmer was told by EPA that dust and feathers blown to the ground from her chicken growing operation constituted a violation of the Clean Water Act. It required tens of thousands of dollars for her to defend her farm in court (as well as intervention in the suit by the American Farm Bureau Federation). The court sided with her and rejected EPA's allegations and the agency's interpretation of the Clean Water Act. EPA subsequently ignored the decision and publicly stated its intent to go after more farmers for the same activity.

(b) A Washington state grower was told by the Department of Homeland Security that the farmer had to dismiss certain workers because the workers supplied improper documentation under the Immigration Act. Subsequently, the Department of Labor told the same farmer he had to *hire* the same workers because it was required by Federal law.

(c) A California farmer faces an enforcement action from the Army Corps of Engineers for violating the Clean Water Act. The agency alleges that the farmer created "mini mountain ranges" by plowing 4-7 inches deep in a wetland – even though Clean Water Act regulations explicitly state that plowing in a wetland is permitted.

(d) Idaho ranchers were forced to go to court to fight the Bureau of Land Management in an effort to protect their state water rights from takings by the federal government. The BLM had threatened the ranchers to sign over their water rights to the government or face a drawn out (and costly) legal battle. The ranchers won on every point of the lawsuit all the way to the Idaho Supreme Court, but only after incurring considerable expenses during the litigation. In the end, the court ruled that it did not have authority under EAJA to require the federal government to pay attorney fees – even though a court in another state reached the opposite conclusion. The rancher now faces litigation expenses of over $1 million because one court has ruled he cannot recover costs that other courts have said are reimbursable."

(e) Ranchers grazing livestock on public lands in Utah and other states are required to have Federal grazing permits for their activities. Frequently, they have separately acquired

water rights they hold that have been adjudicated under state law. Federal law and Supreme Court precedents reaffirm those rights. Yet Federal officials, without any authority from Congress and without public notice, have attempted to require those ranchers to share or hand over their private water rights to the Federal government as a condition of their permit.

(f) The US Department of Labor proposed an agricultural child labor regulation in 2012. The department subsequently withdrew the proposal after it was found that the Department's characterization of the family farm exemption in the proposal differed from its own statements in its Field Manual.

(g) Many specialty crops benefit from chlorpyrifos as an insecticide. EPA has proposed revoking tolerances for the product (effectively eliminating its use in agriculture). In doing so, EPA is relying in part on an epidemiological study. Although the agency has requested raw data from the study those requests have been rejected by the researchers. Yet EPA continues to employ the study despite the fact that the agency's own Science Advisory Panel has expressed concern with how EPA is using the study.

(h) EPA has published a controversial draft ecological assessment of atrazine. Atrazine has been used for decades and currently is employed on over 44 million acres of corn; millions of more acres in sorghum and sugar cane also use the product. Despite its widespread use and decades of data demonstrating its safety and efficacy, EPA appears to be relying on methodological errors and disputed scientific studies in this draft assessment in order to eliminate use of the chemical.

(i) The U.S. Fish and Wildlife Service recently added native salamanders under an interim rule as 'injurious wildlife' to prevent the importation or interstate movement of a foreign animal disease. The Lacey Act does not authorize animal disease regulation, Congress did not intend native species listings and a recent court ruling has found the Act does not authorize the Service to regulate interstate trade (*U.S. Association of Reptile Keepers, Inc. v. Sally Jewell et al., Memorandum of Opinion, May 12, 2016*)

(j) The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) revised its hazard communication standard and classified whole grain (i.e. corn, soybean and wheat) as a "chemical hazard," basing this on the view that when the grain is processed, it produces dust which can be combustible under certain conditions. As a result, commercial grain facilities now are classified as "chemical manufacturing facilities." OSHA made this change unilaterally in the final rule, without proposing it in the proposed rule.

IV. Regulatory Missteps

Reform of the rulemaking process is critically needed. Listed below are examples of how the system has failed to deliver for stakeholders.

(a) Waters of the US (WOTUS) rule

Perhaps no regulatory proceeding in recent memory more graphically underscores where the system is failing:

(1) EPA violated the prohibition on lobbying

The Government Accountability Office (GAO) found that EPA violated the Anti-Deficiency Act by essentially generating comments in support of its own proposal.

(2) Use/misuse of science

EPA and the Army Corps of Engineers undertook a compilation of scientific research on the subject of connectivity of waters as a means of validating the agency's proposal to expand Federal jurisdiction. The agency, however, unveiled its regulatory proposal *before* the study was even complete and available for comment; in fact, before the 'study' itself was final, EPA was defending its rule, attempting to garner public support for it and then finalized the rule itself before finalizing the 'study.' Not surprisingly, the study appeared to ratify the agency's pre-existing view that nearly all waters are somehow connected and therefore almost all "waters" – including "waters" that are actually dry land – should be regulated under the Clean Water Act. EPA has based its legal and scientific underpinning of this rule based on a misreading of the concurring opinion of a single Supreme Court Justice in *Rapanos*: that the agency could only regulate waters that had a 'significant nexus' to navigable waters. The agency took the view that virtually any connection was significant.

(3) Use/misuse of economics

EPA publicly stated and re-stated claims that were almost contradictory. In some forums, the agency claimed its proposed regulation had a negligible impact on its jurisdiction, extending it only by 3% or 4%. Such a claim allowed the agency to elide its obligations under the Regulatory Flexibility Act. Yet in other forums, the agency made the assertion that its 'clean water' rule would extend protection to 60% of the nation's flowing streams and millions of acres of wetland.

(4) Subversion of the APA notice-and-comment procedure

The APA required the agency to receive, evaluate and respond to comments received during the comment period on the proposed rule. Yet the agency manifestly used the comment period not only to defend its rule – it also used the period to attack and reject comments made by those who had criticized the rule and to generate comments in support of its own point of view. The agency went on to

claim that it received over a million favorable comments (some being nothing more than signatures on petitions generated on the agency's behalf through social media efforts undertaken by the agency and paid for by U.S. taxpayers).

(5) Lack of State-Federal consultation

The Clean Water Act (§1251) states that "It is the policy of the Congress to recognize, preserve, and protect the primarily responsibility and rights of States to prevent, reduce, and eliminate pollution…" Yet dozens of states have sued the agency over its proposal, demonstrating that the agency is not following congressional intent to work with states in implementing the law.

(6) Refusal to respect the intent of Congress

Both houses of Congress, by bipartisan votes contemporaneous with EPA's proposal, voted for legislation overturning the agency's regulation. Yet the agency has refused to acknowledge that its judgment is secondary to the Congress.

(b) U.S. Forest Service Groundwater Directive (federal taking of private property water rights)

A U.S. Court rejected an effort by the U.S. Forest Service (USFS) to coerce Federal permit holders to relinquish or share water rights permit holders had lawfully gained through state adjudication proceedings; the USFS was attempting to do this by conditioning permits on the transfer or sharing of such rights. Many western ranchers also hold water rights and have been pressured by the Bureau of Land Management (BLM) to concede their rightful ownership. Similarly, BLM appears to be increasingly moving away from the multiple-use concept authorized by Congress; rather, the agency is injecting its own preferred policy approaches to the management of public lands, often for the single use of environmental and species protections.

(c) EPA draft ecological assessment of atrazine

Atrazine is an important herbicide for corn farmers and others; it is used today on more than half of all corn acres and has a long history of use and study (by some estimates, nearly 7,000 studies). Yet EPA has published a draft ecological assessment of atrazine that, if left unchallenged, could eliminate its use by farmers. In its assessment, the agency has adopted an approach that has raised significant scientific questions and apparently disregarded the advice of multiple SAPs over the years.

(d) Worker Protection Standards rule

EPA in the last year has finalized changes to its worker protection standards (WPS) rule.

The new regulation imposes new recordkeeping, training and other requirements on farmers that will cost millions of dollars. EPA claimed that the rule was justified because it would confer safety benefits to workers – even though in numerous instances in the proposal it admitted it could not quantify or justify its assertion of increased benefits.

(e) The traditional definition of wetlands uses three criteria – hydrology, vegetation and the presence of hydric soils. Yet Federal regulators increasingly try to reduce or eliminate one or more of the criteria as a means of expanding Federal regulations; those policy choices are made largely without the benefit of APA procedures.

(f) Planning Rule for National Forest Management

In 2012, the USDA Forest Service adopted new planning rules that radically restructured the purposes of the National Forest System. These planning rules advance 'ecological integrity' over congressionally authorized outputs, such as timber, water, forage, and recreation. The forest industry, ranchers, and recreation groups filed suit, arguing that the rules represented a fundamental departure from legislative mandates but courts dismissed the suit on the grounds that there was no concrete injury from a rule that simply guides planning. Yet the exact outcomes alleged by the plaintiffs are coming to pass: reduced timber outputs, less grazing, and more complex rules that promise to stymie needed forest management projects.

V. A Bipartisan Approach

Given this set of facts – an administrative statute that is 70 years old; an explosion of Federal laws and requirements; greater Federal demands on state governments with fewer resources to accomplish them; an increase in the amount and scope of litigation; expanded ability of parties to sue; the development and use of computer models to simulate or sometimes substitute for real-world conditions; the broadening scope of environmental statutes to affect and sometimes override economic considerations and property rights; the judicial principle that courts must defer to agencies rather than interpret the law themselves – it is no surprise that the impacts of regulations on agriculture have increased. Coupled with this set of facts is another critical component: the increasing difficulty of Congress in finding agreement on bipartisan solutions. In truth, over the past few decades we have seen executive/regulatory and judicial activities increase to the point that those branches are deciding policy questions at the expense of Congress – where the Constitution explicitly vested policy decisions. At the heart of regulatory reform should be a bipartisan effort to rectify this imbalance.

In recent years, Congress has sought to address shortcomings in the existing system, considering legislative proposals to make improvements in the *Administrative Procedure Act*. Unfortunately, to date such efforts have failed to gain sufficient bipartisan support. We do believe, however, that there are common principles on which both parties agree.

The striking feature on regulatory reform that gives us cause for optimism is that, for years, even decades, we have seen both Democratic and Republican presidents enunciate a set of principles that are strikingly similar. While clearly there are different emphases and priorities, we believe Republican and Democratic Presidents alike have reiterated the desirability and need for an honest, transparent, open and credible regulatory process. Note the statements below taken from Executive Orders and other presidential documents, some nearly four decades old, that speak to these questions:

Regulations … shall not impose unnecessary burdens on the economy, on individuals, on public or private organizations, or on State and local governments. …Regulations shall be developed through a process which ensures that … the need for and purposes of the regulations are clearly established; meaningful alternatives are considered and analyzed before the regulations is issued; and compliance costs, paperwork and other burdens on the public are minimized.

President Jimmy Carter, Executive Order 12044 (March 23, 1978)

Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society; regulatory objectives shall be chosen to maximize the net benefits to society; among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen.

President Ronald Reagan, Executive Order 12291 (February 17, 1981)

Federal regulatory agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. … In choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity) unless a statute requires another regulatory approach.

President Bill Clinton, Executive Order 12866 (September 30, 1993)

National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance.

President Bill Clinton, Executive Order 13132 (August 4, 1999)

> *The public must be able to trust the science and scientific process informing public policy decisions. Political officials should not suppress or alter scientific or technological findings and conclusions. If scientific and technological information is developed and used by the Federal Government it should ordinarily be made available to the public. To the extent permitted by law, there should be transparency in the preparation, identification and use of scientific and technological information policymaking*
>
> President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies (March 3, 2009)

> *Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. … This order…reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993. As stated in that Executive Order and to the extent permitted by law, each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and cost are difficult to quantify; (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations …*
>
> President Barack Obama, Executive Order 13563 (January 18, 2011)

In the 2016 presidential election campaign, Donald Trump has spoken to the need to address over-regulation. In response to questions from the American Farm Bureau Federation, Mr. Trump said:

> *As President, I will work with Congress to reform our regulatory system. … We will increase transparency and accountability in the regulatory process. Rational cost-benefit tests will be used to ensure that any regulation is justified before it is adopted. Unjustified regulations that are bad for American farmers and consumers will be changed or repealed.*

Similarly, in response to the same question, Hillary Clinton's campaign responded:

> *As president, she will always engage a wide range of stakeholders, including farmers and ranchers, to hear their concerns and ideas for how we can ensure our agriculture sector remains vibrant. If there are implementation challenges with a particular regulation, Hillary will work with all stakeholders to address them."*

VI. Proposals to Consider

Members of America's farm and ranch community call on the new Administration and Congress to initiate a process that will draw upon the best of ideas from a broad range of stakeholders. Republicans and Democrats should invite comments from the broadest range of perspectives. As stated earlier, we firmly believe that *all* affected parties have a fundamental interest in a process that commands respect; that is transparent; that reflects congressional intent; and that seeks to fairly and evenly balance the interests of all affected parties. We do not believe the system that exists today exhibits those characteristics.

Listed below are some provisions that in our view deserve consideration. There are undoubtedly others; they should all be up for discussion, consideration and debate. We pledge our readiness to work with the new Administration and all members, on both sides of the aisle, in an effort to strengthen the existing system to protect our environment, the agricultural landscape, and to reinvigorate the American economy.

1. Review *Chevon* and *Auer* deference policies. Congress should consider:
    a. To what extent deference should apply
    b. What is the appropriate way to acknowledge agency expertise
    c. Whether the existing system fairly treats the regulated community
    d. How best to re-establish equilibrium among Congress, agencies and the courts

2. Review agency use of science. Congress should consider:
    a. How to assure the President's memorandum on science is implemented
    b. How the Information Quality Act is implemented
    c. How agencies can assure transparency in the science they use

3. Review agency use of economic data. Congress should consider
    a. How agencies utilize economic data and economic models
    b. How agencies implement executive orders on least-cost alternatives
    c. How well agencies implement SBRFA

4. Review agency transparency in rulemaking. Congress should consider
    a. How well the APA promotes transparency
    b. What further steps can promote agency openness
    c. How well the APA respects Federalism and the role of the states

5. Review Federal-state cooperation. Congress should review
    a. How well agencies implement the Clinton EO on federalism
    b. How well agencies respect state authority
    c. Whether agencies are unduly burdening state governments with regulatory costs

6. Review the *Administrative Procedure Act*. Congress should
    a. Undertake a comprehensive review of the APA
    b. Mandate a minimum 60-day comment period for major rules

   c. Establish special procedures for rules that have significant impact on the economy or certain sectors
   d. Examine ways to promote advance notice to states and regulated parties about upcoming regulatory initiatives
   e. Explore ways to assure the APA reflects Presidential Executive Orders on rulemaking
   f. Explore the appropriateness of cost-benefit considerations in rulemaking

7. Re-affirm the public's right to know. Congress should
   a. Mandate greater transparency of disbursements from the Judgment Fund
   b. Assure the *Equal Access to Justice Act* is fairly and impartially implemented
   c. Assure that settlement decrees that affect the regulated community are disclosed in advance

8. Review the impact of judicially-driven policy and regulation. Congress should
   a. Review the issue of standing and how it impacts regulations
   b. Review the scope of matters subject to judicial review
   c. Review need for narrowing scope of judicial interpretation

9. Review Congress' role in rulemaking. Congress should
   a. Examine the need or appropriateness for congressional approval of major rules
   b. Examine the need for greater congressional oversight of agency rulemaking