

ACCELERATING AGRICULTURE: HOW FEDERAL
REGULATIONS IMPACT AMERICA'S SMALL
FARMERS

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ENERGY, AND TRADE
OF THE
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Questions for the Record:

None.

Answers for the Record:

None.

Additional Material for the Record:

None.

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THURSDAY, JUNE 21, 2018

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
SUBCOMMITTEE ON AGRICULTURE, ENERGY, AND TRADE
Washington, DC.

The Subcommittee met, pursuant to call, at 10:32 a.m., in Room 2360, Rayburn House Office Building. Hon. Rod Blum [chairman of the Subcommittee] presiding.

Present: Representatives Blum, Chabot, King, Leutkemeyer, Comer, Marshall, and Schneider.

Chairman BLUM. Good morning. I call this hearing to order. Thank you for joining us for today's Subcommittee on Agriculture, Energy and Trade hearing. Welcome.

Today, the Subcommittee will examine how federal regulations affect America's small farmers. Family and small farms play a vital role in the American economy. More than 90 percent of farms in the United States are considered small, and most small farms are family owned and operated. These farmers account for 90 percent of America's farm production. Small farms also operate half of the farmland in the United States.

My home state of Iowa has the third highest number of farms in the country, and Iowa is ranked number one in export value for pork, number one for corn, foods, and other grains. I just had to get that in there. So farming is especially important in Iowa and in my district.

The agriculture industry also plays an important role in providing jobs. In 2016, direct on-farm employment accounted for over 2 million jobs, or 1.4 percent of total employment in the United States. I consistently hear from farmers in my district in Iowa about the challenges they face, including federal regulations. The House Small Business Committee has held many hearings on the top of regulations and this continues to be a problem for small businesses across the country. Our small farmers are no exception.

The current regulatory environment in the agriculture industry disproportionately burdens small farmers. With many regulations taking a "one-size-fits-all" approach and many federal agencies having the authority to regulate agriculture, small farmers are forced to comply with expensive, confusing, and time-consuming regulations, which in turn negatively impacts the American economy.

Today, we will hear from farmers and experts who are experiencing the impact of regulations out in the field—no pun intended. They will provide real examples of what it is like for a small farmer to navigate the confusing regulatory landscape. I look forward to discussing this important topic and what Congress can do to help provide some regulatory relief to our nation's farmers.

I now yield to the Ranking Member of the Subcommittee on Agriculture, Energy and Trade, Mr. Schneider, for his opening statement.

Mr. SCHNEIDER. Thank you, Mr. Chairman. And again, I am glad we are able to have this hearing, and I thank the witnesses for joining us today to share their perspectives and insights on this issue.

Since the founding of this Nation, farms and farmers have always played a significant role in the United States' economy. They provide the country and the world with enough food to eat, fuel jobs for workers up and down the supply chain, and keep American agriculture at the forefront of innovation.

Many of these farmers are small businesses who continue to work hard to support themselves and their customers in an increasingly global market. It is our role in Congress to help support farmers so that they can continue their work growing our food and our economy and make our farming communities strong. Today, we will examine how Federal regulations impact America's small farms.

Regulations serve an important purpose in helping to keep us safe. Agriculture regulations help to improve water quality, protect animal welfare, and consumer welfare through food safety and labeling regulations. Without these safeguards, small farms and producers could be hurt by illicit business practices, left in the dark when combatting nationwide challenge like avian influenza and struggling without Federal assistance on issues ranging from organic standards to conservation practices.

Despite these important aspects of regulations, it is also important to recognize that regulation can also place a burden on small businesses, especially those in the agriculture industry. Farmers and ranchers are faced with a flurry of requirements through a variety of regulations from the Endangered Species Act and the Food Safety Modernization Act, to the Federal Land Policy Management Act to name just a few. Compounding much of the complexity is the overlap of agency jurisdiction in a variety of farming practices. The end result is often burdensome on farmers who just want to manage their farms.

It is critical that agencies are considering the economic impact of the regulations on small farms. At the same time, Congress needs to know what steps are needed to help agencies achieve this goal. Adequate communication and transparency are critical to an effective system of regulation. An open line of communication can ensure that regulations are written effectively, minimizing unnecessary burdens for small business. And that is what I hope to achieve in today's hearing.

Congress plays an important role in ensuring that the American public is protected while simultaneously ensuring that regulations are not too burdensome on farmers. It is therefore irresponsible for

the government to haphazardly create change or get rid of a regulation without thoroughly looking at and understanding the impact of the long-term consequences.

I look forward to the insights this pane will provide on this topic, and again, I want to thank the witnesses and I yield back.

Chairman BLUM. Thank you, Mr. Schneider.

If Committee members have an opening statement prepared, I ask that it be submitted for the record.

I will take a minute to explain the timing lights for you. You will each have 5 minutes to deliver your testimony. The light starts out as green. When you have one minute remaining, the light will turn to yellow. That does not mean you speed up like with the traffic lights. And finally, at the end of your 5 minutes—well, maybe you should speed up—it will turn red. And I ask, please, that you adhere to that time limit.

I would now like to formally introduce our witnesses.

I am pleased to introduce our first witness, Mr. Craig Martins, who is a constituent of mine from the district and the great state of Iowa. Mr. Martins is the Operations Manager of Three Rivers FS in Dyersville, Iowa, a locally-owned agriculture cooperative serving producers in Northeast Iowa. His responsibility includes developing and leading the sales, operations, and service teams within the cooperative. Mr. Martins is testifying on behalf of the National Council of Farmer Cooperatives and GROWMARK, Inc., an agriculture cooperative based in Illinois. Thank you for joining us today, Mr. Martins, and welcome.

I am also pleased to introduce our second witness, who is also a constituent from my district in Iowa, Mr. John Weber is the owner of Valley Lane Farms, a grain and livestock operation in East Central Iowa. He has been in pork production for 44 years and has lifelong experience in grain and livestock farming. Mr. Weber served as the President for the National Pork Producers Council (NPPC) from March 2016 to March 2017, and will be testifying on behalf of NPPC today. Thank you for joining us today, Mr. Weber, and welcome as well.

And I now yield to the gentleman from Kansas, Dr. Marshall, to introduce our third witness.

Mr. MARSHALL. Well, Mr. Chairman, thank you so much. And we will see if we cannot kind of balance out this witnesses' testimony up here.

I am very proud to introduce Mr. Glenn Brunkow. As you know, Glenn is from the largest agriculture producing district in the country, and Glenn, much like myself, is a fifth generation farmer. They grow corn, soybeans, wheat, hay, and raise cattle and sheep, so he brings a great diversity to talk about some of the regulations we have going on here. Probably most importantly, he is from the top agriculture university in the country, having a bachelor's degree and a master's degree from the home of the ever-fighting mighty Kansas State Wildcats. So without further ado, Glenn, we welcome you and look forward to your testimony. I should add, Glenn is here representing the American Farm Bureau Federation as well, something near and dear to my heart back home as to all of us. Thank you.

Chairman BLUM. Thank you, Dr. Marshall.

I now yield to our Ranking Member, Mr. Schneider, for the introduction of our final witness.

Mr. SCHNEIDER. Thank you.

It is my pleasure to introduce Professor Laurie Ristino, the director of the Center for Agriculture and Food Systems and associate professor of law at Vermont Law School. She is a legal and policy expert on food security, the Farm Bill conservation title, ecosystem services, and private land conservation. She was previously an attorney at USDA and served during the President George H. W. Bush administration and President Barack Obama administration. Professor Ristino has a BA from the University of Michigan, a JD from the University of Iowa, and an MPA from George Mason University. Welcome, Professor Ristino.

Chairman BLUM. Thank you, Mr. Schneider.

I think you are outranked here and outweighed, Dr. Marshall. University of Iowa. Good stuff.

Welcome to our witnesses today to you all.

I now recognize Mr. Martins for 5 minutes.

STATEMENTS OF CRAIG MARTINS, OPERATIONS MANAGER, THREE RIVERS FS; JOHN WEBER OWNER VALLEY LANE FARMS INC.; GLENN BRUNKOW CO-OWNER BRUSH CREEK CATTLE COMPANY; LAURIE RISTINO ASSOCIATE PROFESSOR OF LAW DIRECTOR, CENTER FOR AGRICULTURE AND FOOD SYSTEMS VERMONT LAW SCHOOL

STATEMENT OF CRAIG MARTINS

Mr. MARTINS. Chairman Blum, Ranking Member Schneider, and members of the Subcommittee. On behalf of National Council of Farmer Cooperatives and GROWMARK, Inc., I appreciate the opportunity to testify this morning.

I applaud this Subcommittee for taking a closer look at how regulations affect small business owners. Expensive and confusing regulations are detrimental to all the business owners, including farmers and their co-ops. This morning, I would like to highlight two regulatory efforts that will have a direct impact on my co-op.

The first is OSHA crane and derrick construction rule and its impact on propane suppliers. Propane is an important part of on-farm energy use. Propane sales, service, and delivery are a critical part of many co-op business strategies. Over 35 NCFC members provide propane services, including GROWMARK and its co-op owners. However, the crane rule is making it harder and more expensive for co-ops to do so. It imposes certification requirements on crane operators, which include propane technicians, operating on what OSHA defines as a construction site or performing a construction activity.

There are several problems with this rule. First, the regulations are burdensome and cause duplication since propane companies are highly regulated already.

Second, they treat telescoping and knuckle boom cranes, which can fit in the back of a pickup truck even, the same as huge tower cranes you see looming over construction sites here in Washington, as an example can be seen in this picture. This is the type of crane

that we use out in the field to set tanks. It is not a 40-story crane. It is just a truck with a crane and a guy.

Third, is how OSHA defines both construction sites and construction activity. This is something that can serve as Exhibit A on the absurdity of governmental regulations. According to OSHA, a construction site is considered any property where construction activity is taking place, whether or not any of those activities are associated or even located near the delivery location for a propane tank. For example, a propane technician might need to be certified if he were dropping off a tank on the ground at a house where a second floor bathroom is being remodeled, or at a farm where a barn is being painted.

Even more problematic is how OSHA defines a construction activity. A technician would not need certification if the tank was simply left on the ground without connecting it to the piping; however, if the propane tank is placed on the ground and the crane is put away and the technician connects it, that could be considered construction activity.

One concern is that the rule sets two standards for the same activity using the same machinery based on arbitrary factors. This inconsistency is causing a high level of confusion among the industry.

In addition, the certification cost would be nearly \$3,800 per employee, a total of close to \$114,000 for our co-op every 5 years. Across the industry, the burden would be close to \$151 million over the same time period.

We are asking the House members to cosponsor the Common Sense Certification Reform Act, which provides relief for propane field technicians from certifications when appropriate. The NCFC also calls on Congress to instruct OSHA to delay the November 10, 2018 compliance deadline.

I would also like to touch briefly on the Department of Homeland Security's Chemical Facility Antiterrorism Standards Rule. Three Rivers, as many other co-ops, supply anhydrous ammonia fertilizer to their farmer members. It is also regulated under the DHS's Chemical Facility Antiterrorism Standards. Our industry takes its responsibility to prevent anhydrous ammonia from falling into the wrong hands seriously.

Unfortunately, many of the regulations enacted by DHS has led to confusion among the agricultural community on how to comply. In my written testimony, I have provided detailed descriptions of the difficulties that we have in working with the DHS. The end result has been that the DHS's advice has been vague and without explanation as to steps necessary to reach compliance.

DHS should follow their own regulations to provide clarity as to how cooperatives can become compliant without excessive costs. Further, they should provide better tools and resources to facilities so they can achieve compliance with the standard. DHS should also examine how it can partner with state Departments of Agriculture so that small cooperatives have resources that are easily accessible to help comply with the rules.

Before I conclude, I would also like to note that my written testimony also contains details of several important regulatory reform provisions contained in the House Farm Bill.

Thank you again for the opportunity to testify today, and I look forward to your questions.

Chairman BLUM. Thank you, Mr. Martins.

Mr. Weber, you are now recognized for 5 minutes.

STATEMENT OF JOHN WEBER

Mr. WEBER. Good morning, Chairman Blum, Ranking Member Schneider, and members of the Subcommittee. My name is John Weber. I am a pork producer from Dysart, Iowa, and past president of the National Pork Producers Council, which represents the interests of America's 60,000 pork producers and on whose behalf I am testifying.

As has been previously stated, regulations add to the cost of doing business, and right now, the pork industry certainly does not need more costs. Many of the rules we have seen coming out of Washington have had harmful, unintended consequences, including stifling innovation and impeding the inherent motivation of farmers and small business people to get better and more efficient at what they do. One example of a regulation that would have devastated the pork industry was the 2010 rule from USDA's Grain Inspection Packers and Stockyards Administration. It would have dictated the terms of private contracts between the sellers and buyers of livestock, restricted marketing arrangements, required reams of paperwork, and made certain industry practices per se violations of the Packers and Stockyards Act, throwing simple contract disputes into Federal court.

According to an Informa Economics study, this rule would have cost approximately \$4 per pig, or about \$420 million to our industry. In my relatively small family operation, that would amount to over \$56,000 in lost revenue or added costs.

Worst of all, the regulation, which also would have raised consumer prices, was a solution in search of a problem. The rule had no input from farmers, and as a result, was a gross bureaucratic overreach that did an end run around Congress and the courts. No economic analysis was done.

Another troublesome Federal regulation that could have had a significant negative impact on agriculture was Waters of the United States rule. It broadened the definition of navigable waters to include grass waterways, upstream waters, and intermittent streams, which are used on many farms for drainable or irrigation. It also covered lands adjacent to such waters. The rule gave expanded jurisdiction to EPA and the Army Corps of Engineers to regulate all kinds of farming activities because under the Clean Water Act there is an absolute prohibition on discharging anything, including pesticides, fertilizer, and even seeds into waters of the United States without a Federal permit.

Bureaucrats wrote a regulation again without input from the regulated community that would have subjected farmers to criminal penalties and civil fines of up to \$38,500 per day for planting crops without a discharge permit. And they gave private citizens and activist groups the power to enforce this rule. Furthermore, this would have been an additional layer of regulation.

One of the biggest fears that I and other farmers had with this was implementing conservation practices. We already are required

to deal with NRCS, the Army Corps, and our state DNRs. Would the WOTUS rule have been another hurdle to get desperately needed conservation practices in place?

I do want to make it clear that farmers like myself are not opposed to regulations. Believe it or not, there are some good ones, and NPPC has even encouraged that some be issued. They are in our written testimony. But rules, whether Federal or state, should be based on sound science and analysis, be practical to implement, and cost-effective, and address actual problems that need solutions. And those who will be regulated must be involved in developing the rules.

Additionally, before implemented, regulations should be subject to cost-benefit analysis and rules whose costs far outweigh their benefits should be scrapped.

Congress can take steps to ease the regulatory burden. First of all, by reforming the Administrative Procedures Act, which has not been updated in a significant way in 70 years. Secondly, by changing congressional oversight to require approval for major regulations, those costing \$100 million or more. And third, by increasing transparency in rulemaking by allowing more public participation in developing regulations.

This Congress and the Trump administration have done a good job of starting to rein in red tape but more needs to be done. These are incredibly trying times for America's pork producers, and for that matter, all of agriculture. With record production built on optimism for global demand and a marketplace that is now in disarray, the last thing we need is more burdensome regulations.

Thank you for allowing me to testify today. I would be happy to answer any of your questions.

Chairman BLUM. Thank you, Mr. Weber.

Mr. Brunkow, you are now recognized for 5 minutes.

STATEMENT OF GLENN BRUNKOW

Mr. BRUNKOW. Chairman Blum, Ranking Member Schneider, and members of the Subcommittee, my name is Glenn Brunkow. I am co-owner of Brush Creek Cattle Company in Wamego, Kansas, a fifth generation farmer and rancher with my father, wife, and kids.

I thank you for this opportunity to provide testimony on Federal regulations affecting America's small farmers and ranchers. I do so on behalf of the American Farm Bureau Federation.

Right now, as you know, every penny counts in agriculture. Farm income is at its lowest level in more than a decade. When the business cycle works against you, it makes it even tougher to shoulder the costs of regulation, especially when those regulations are duplicative, unnecessary, or just plain misguided.

One good example is in Kansas. The Flint Hills region where I live is home to the largest undisturbed tall grass prairie ecosystem in the world. Generations ago, bison roamed this vast expanse and both lightning strikes and Native American tribes set fire to the prairie each year. Those fires rejuvenated tall grass prairie plants and kept at bay common species found just east of the ecosystem's herbaceous plants, deciduous and carnivorous trees, without prescribed fires, the ecosystem would rapidly change. But prescribed

burns in the Flint Hills have caused national ambient air quality standard monitoring system stations to record an exceedance of either ozone or PM2.5 on more than one day. Agriculture producers have worked with the state of Kansas in creating a smoke management plan and groups like Kansas Farm Bureau and Kansas Livestock Association encourage farmers and ranchers to look at www.ksfire.org prior to striking a match to see what their smoke will affect downwind.

But even with the 2010 Smoke Management Plan, it is becoming more difficult every year to find windows of opportunity to successfully burn large areas of grasslands for fear of knocking an air monitoring station out of compliance.

KFB and other groups have actively lobbied Kansas's congressional delegation and the Environmental Protection Agency to create a regulatory mechanism to continue to allow for an annual prescribed wildlands to burn and not count toward nonattainment exceedances at monitoring stations.

We are hopeful this can be addressed once and for all so all land owners will have the certainty of knowing that they can use this tool that Mother Nature and Native Americans have known for centuries was the only way to maintain the natural ecosystem and keep invasive species and trees from taking the Flint Hills.

Another important regulatory concern is how the Federal government implements the swampbuster provisions of the Farm Bill. Swampbuster enacted in 1985 was designed to prevent conversion of wetlands, but the understanding was that the lands created before the enactment would be exempt. Unfortunately, the USDA sits as both judge and jury and farmers can face repercussions when they undertake basic, every day farming activities, such as removing or cleaning up fence rows, squaring off or modifying a field footprint, and improving or repairing drainage. Cleaning out drainage ditches or removing trees in or adjacent to farm fields.

It should not be that way. USDA should follow the intent of Congress and recognize prior converted farmlands once it has been converted remains in that status. Farmers should not have to fight the Federal government repeatedly to assert their rights. Instead, USDA should recognize and accept mandatory minimal effect exemption. And just as importantly, the appeals process is heavily weighted in favor of the government and against farmers and should be reformed.

The 2015 WOTUS rule is probably the most challenging. The rule broadened the definition of a tributary to include landscape features that may not be visible by the human eye. Make no mistake, the features occur in abundance in our farm fields. There is no question the 2015 WOTUS rule would have an enormous impact on producers. It is true the rule contains exclusions but these are narrow and vague and up to agency interpretation. It seems impossible that we would be engaging in discussions about what is a puddle or dry land.

We applaud the proposed releasing of the advanced notice of proposed rulemaking which is intended to speed up and ensure transparency in how rules are proposed.

This concludes my statement, and I ask that my written statement be included in record in full. I am pleased to share these re-

marks with the members of the Subcommittee and happy to answer any questions.

Chairman BLUM. Thank you, Mr. Brunkow.

Ms. Ristino, I believe I have that correct, you are now recognized for 5 minutes.

STATEMENT OF LAURIE RISTINO

Ms. RISTINO. Thank you, Mr. Chairman.

Mr. Chairman, Ranking Member Schneider, and members of the Subcommittee, I appreciate the opportunity to testify today before the Committee on how regulations to ensure human health and safety can go hand in hand with supporting the growth of small farming and food production operations.

In my testimony today I will make the following key points: Regulation of the agriculture sector is essential to safeguard public safety and health. At the same time, in some cases, regulations may be better tailored to small farmers and food producers by taking into account their different production methods and associated risk in a way that ensures health and safety while allowing for local innovation.

Producer financial and technical assistance, as well as public research dollars that assess production methods and associated risks are needed to help level the playing field for small and mid-size producers. Based on these points, I will conclude that the question is not whether to regulate but how to do so in a way that protects the public while fostering innovation at different scales of agricultural and food production.

To that end, I offer several practical suggestions for how government can improve regulatory design and outcomes for small farmers and food producers. A key area where agriculture is regulated is food safety. Indeed, the Federal government's police power has long been used in the area of food safety to protect the health and welfare of our citizens, often preempting state and local laws in creating a "one size fits all" regulatory regime. Although the American food supply is among the safest in the world, the Food and Drug Administration estimates over 48 million cases of food-borne illness a year. A 2015 study by the Ohio State University estimates the annual cost of food-borne illness at approximately \$55 billion.

A recent example showing the scale of modern food-borne illness outbreaks given the concentration consolidation of our food system is the recent E.coli outbreak caused by the contaminated romaine lettuce. One hundred ninety seven people in 35 states were sickened. The contaminated lettuce was eventually traced to Yuma, Arizona, a major growing region of leafy greens in the United States.

The Food Safety Modernization Act (FSMA), which was passed in 2011, is the first major overhaul of our food safety regulatory system since 1938. FSMA is designed to address the type of food-borne illness exemplified by the romaine lettuce outbreak. In particular, FSMA attempts to prevent food-borne illness in the first place by requiring farms and processing facilities to improve recordkeeping and sanitary practices associated with producing, handling, and distributing fresh fruits and vegetables. This new regulatory frame-

work has the effect of allocating much of the cost of food safety to the beginning of the food supply chain.

While Federal regulatory regimes create national uniform standards benefitting public health and safety, they can have unintended consequences, as you have all noted, for small farmers and food producers making market entry challenging or too costly. The public's growing interest in local healthy food and related support of farmers, farmers markets, and community-supported agriculture is a bright spot in America's agricultural economy.

To support the continued growth of small farms and improve the health of rural economies, it is important to assess the impact of regulations in terms of how they support or hinder small food and farm businesses and then tailor policy where health safeguards may be assured to this growing sector.

For example, under the Tester-Hagan Amendment to FSMA, small farming operations serving only local markets were exempted from FSMA's requirements out of a concern regarding regulatory burden and based upon the argument that small producers do not make large numbers of people sick.

However, there has been debate and an apparent lack of data regarding the actual magnitude of food-borne illness risk associated with small farm produced food. One survey of farmers and farmers market managers showed that many good food safety practices were in place but there was room for improvement in production handling and transportation practices. The Tester-Hagan Amendment reflects a larger debate in which local food advocates and producers question the need for across-the-board application of Federal health and safety regulations.

Fortunately, there are a number of strategies that policymakers can employ to better align critical Federal regulatory regimes to ensure health and safety with supporting the growth and innovation of small farmers and emerging food economies. One is outreach in developing legislation and implementing regulations. Outreach to small farmers and food producers and subject matter experts is critical to understand the policy needs of these groups and regulatory risks.

The second is publicly funded food science research. Agribusiness and large food producers have the resources to pay for research to support the product lines small and midsize producers do not.

Three is financial and technical assistance. Compliance with regulatory regimes is not surprising, as also has been noted, more burdensome for small producers who have less resources to leverage. Consequently, both financial assistance to help pay for the cost of compliance as well as technical assistance.

And I yield. Thank you, and I am happy to answer any questions.

Chairman BLUM. Thank you, Ms. Ristino. You mentioned in your testimony government regulatory regimes. That is interesting. I agree with that, the regime part, especially.

Now we will be asking you questions, and I will recognize myself first for 5 minutes.

As I have been in politics for the last 5 years and traveling Northeast Iowa, when I talk to farmers I kind of recognized an interesting phenomena. And that was when they dealt with the Iowa

DNR, they did not have issues with our DNR. And they said, in fact, they coach us to compliance. And I wrote that down 5 years ago, coached to compliance. So they worked. The DNR in Iowa works with farmers and producers to achieve the desired results. However, when the EPA was involved, the federal agency, not so much so. They show up with a subpoena or the threat of a subpoena at the end of a bayonet. And I heard it time and time and time again. And that bothers me how a state organization—I do not know the way it is in Kansas, maybe you can tell us about that, Mr. Brunkow—but coach to compliance, work together versus it is our way or the high way. And I would just like to hear from especially the three gentlemen that are in business, what your experience has been with your state regulatory agency versus the EPA and federal regulatory agencies, and have you observed this or have you encountered this?

Whoever wants to go first, fine.

Mr. WEBER. Mr. Chairman, I would respond a little bit to that. I think your assessment is absolutely correct, especially with the DNR. I have had the opportunity to work with the DNR multiple times and I have always had the impression that they were there to help or to help me do a better job. You know, there are rules to follow and we have to follow those rules. We understand them. We go to training with DNR. But they are probably a little closer to the farm level than maybe EPA is. But I would sense the same thing in the countryside that you did.

I think it is an issue that is extremely important. I could cite the Iowa Nutrient Reduction Strategy as another one of those programs that tends to educate and encourage farmers as to what they can do. It puts out a little incentive. Let us improve water quality. It is not mandatory but here are some things that we offer and here is what you can do. And it has made huge headways. It has stimulated a lot of interest in water quality in the state of Iowa.

Chairman BLUM. And it is not mandatory?

Mr. WEBER. It is not mandatory. I call it an incentive program. All of these programs such as that, I do not want them to become dependency programs, but certainly, I think there is a time when incentivization is needed to accomplish a goal, maybe better than regulation or mandatory regulation. So another observation I would make in the countryside.

I will yield with that.

Chairman BLUM. Mr. Brunkow? Kansas?

Mr. BRUNKOW. I absolutely agree. In Kansas, it works the same way. The state agencies are there to help us, to coach us through it, to help us find funding, to help correct any issues we might have. The smoke management issue that I talked about in Flint Hills is a perfect example of that. You know, the air quality standards in Kansas City, Omaha, Wichita run really close anyway, and when we burn in the spring it just pushes them over the edge. We have to burn in the Flint Hills, otherwise, we get taken over by invasive species. Fire is the only effective management tool to keep them healthy. We have to burn when the winds are right. To be safe, to ensure the safety of surrounding structures, to en-

sure the safety of roadways, we have to burn when the winds are right.

The Kansas Department of Agriculture, Kansas State University, Kansas Farm Bureau, the Kansas Livestock Association all work together to come up with a smoke management plan, a website that we can go to and model where our smoke is going to go that day, and we are working really hard. We understand and we are really aware of the issues caused by our smoke. But we also understand there is a very limited window of when we can burn and burn effectively.

We have all seen the wildfires out west, even in Kansas. We are trying to reduce our fuel load on those acres also in addition to maintaining the health of the prairies. We are trying to lower the fuel loads and lessen any catastrophic fires along with that.

Chairman BLUM. Have you had interaction with the EPA or federal agencies, and how is it different?

Mr. BRUNKOW. I have not. My neighbors have. And yes, you are right. The EPA is there at the end of a bayonet, whereas, our local state agencies show up and they are there to help us through and help find a solution.

Chairman BLUM. Mr. Martins, anything in that area?

Mr. MARTINS. Absolutely. We are in contact with the IDALS daily, if not weekly. When we are doing site remodels or we are looking towards the future, we actually call them and ask them what is coming down the line, and they will help us be pre-compliant so that when we are building something new, we actually build it so that legislation that could be coming down the road, we have already put it in place. And I feel that if the EPA or the DHS would work with those guys and get them involved, they would be easy to get in contact with to come out and help us be compliant because we want to be compliant. We do not want to be out of compliance because a fine really hurts our company.

I brought a couple of examples. For an anhydrous facility, the Iowa group sends us a checklist. Here is what it takes to be compliant. So as you are planning or you are getting prepared, you just check off the boxes, talk to the inspectors. They will come out and look at it and say, yep, you are compliant. The DHS, there is a lot of ambiguity with what is giving. You know, some of it is classified, some of it is sensitive, obviously, in the algorithm that makes you compliant or out of compliance. But really, just give us a checklist of what we need to do to be compliant and we will do it.

Chairman BLUM. Thank you. My time is expired.

I now recognize Mr. Schneider, the Ranking Member, for 5 minutes.

Mr. SCHNEIDER. Thank you. Again, thanks to the witnesses for joining us today.

I am trying to think through the framework. You know, I think about regulations. I sense or focus on three compatible goals but one is working to ensure and preserve the prosperity of our farm sector, including and specific to our small farms, our family farms. At the same time, we want to ensure the safety and security of our food supply. And thirdly, it is the health protection and sustainability of our environment. And collectively, that is what we are

trying to achieve, ideally collaboratively. Like you said, coach to compliance I think makes sense.

All of you kind of touched on this idea of unintended consequences or sometimes not seeking to do the right thing perhaps but not understanding the implications for small farms. And I would like to focus on that.

Ms. Ristino, I want to give you a chance because in your remarks you talked about strategies—outreach, funding research, providing financial and technical assistance. You did not get to your fourth one, which was improving regulatory design, which I think touches on what we were talking about. What do we have to do to improve regulatory design? And I will open it up to everyone but I will start with you, Ms. Ristino.

Ms. RISTINO. Thank you for that because I was not able to get that last point. It is actually something we do a lot at the law school and we try to teach lawyers this because we do not always do a good job with that in law school, is to really make legal regulations and requirements and law, actually, more accessible to the people who have to comply or to the people who are protected by those laws. And so I think there are, especially with the emergence of, you know, digital websites and apps and things like that, there is a way that we can take really complicated information, and to my other colleagues here at the table, make that more accessible to farmers. Like, for example, we actually have a farmland access toolkit we put together, which is more accessible. And it is actually designed so that farmers who want to get on land can easily access that. We are also creating a free leasing application because a lot of farmers do not have easy access to land or they do not have the ability to get a lease without spending a lot of money on a lawyer. So there are many different ways that I think both regulators and folks in Congress and state legislatures can make information more accessible by designing it to be that way.

Mr. SCHNEIDER. And let me turn to you, Mr. Brunkow. In your testimony you talked about, and maybe you can explain it, how can agencies, regulators engage better with our farmers and ranchers when they are drafting regulations or writing the rules and laws that are going to affect what you all are doing?

Mr. BRUNKOW. I think just to talk to us to find out what will work in the country. We want to do the right thing. We breathe the same air. We work with the same soil. My family has been there for well over 100 years, 130, 140 years. We want to make sure that that is there, too. We eat the same foods. So we want to work with you. We just need to make sure that those regulations are not burdensome. We need to make sure that they are regulations that we can comply with easily and just help us to make those regulations something that does not crush us in terms of what we have to do to comply with them.

Mr. SCHNEIDER. Mr. Weber, do you have thoughts?

Mr. WEBER. Well, I have some thoughts. You know, I think our Federal agencies need to work through the states because I think a lot of small business and farmers feel more comfortable. Just with Chairman Blum's comments, they feel more comfortable working with a state agency and more local people. And I think if they work through the DNR or they work through even local FSA offices

and so on and so forth, or extension work, farmers are much more receptive to that type of help than receiving a rule that is printed in the Federal Register and how are we going to comply with this? And not having had the chance to have some input into that rule.

Mr. SCHNEIDER. And let me bring it back because the focus is on the small farms. What can we do to help the small farms? You have got your large corporate operations and they have resources and facilities, experts with very narrow focus, but the small farm, small farmer is responsible for everything. How do we help make sure they have the resources to do what they need to do?

Mr. WEBER. I think in certain cases that can be a real challenge. Because there are larger organizations that do. They have funding to provide legal staff to do paperwork, things like that that small farmers may not. That is a tough one.

Mr. SCHNEIDER. My red light is on. I am out of time. But Mr. Martins, if you have something you want to add? Or I will yield back otherwise.

Mr. MARTINS. I think just include the states because we are interacting with them every day, all day. You know, we can call them and they will come up within a couple days if it works out for them. But I do not have a problem dealing directly with the Federal people, but bring the state along so that they can be a resource for us, too.

Mr. SCHNEIDER. Thank you. And I will close with this, Mr. Brunkow, you touched it and we all nodded our head. We all breathe the same air. We eat the same food. I think we are all in this together. So thank you, and I yield back.

Chairman BLUM. Thank you, Mr. Schneider.

And I will recognize my esteemed colleague from the great state of Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I thank the witnesses for your testimony. I know that there are three Hawkeyes and a Wildcat down here. Or how we missed the Fourth District, but I will not bring that up. I would just win the argument if I did. And I appreciate everybody bragging about the production that we do in each of these sections that feed the world. I mean, it is something for everybody to take great pride in. And to go back, I think it is at 140 years, Mr. Brunkow, and that tells me family operation that is tied together, and I hope it can go on for a long, long time. That is the American dream being lived out, and that is true across the board here in some ways one way or another.

I would like to first turn though to Ms. Ristino. And I want to ask just kind of a basic question. We are talking about regulation here. Where does the authority come from for the Executive branch to regulate our farmland in this country?

Ms. RISTINO. The laws that Congress passes.

Mr. KING. So I want to make this point, and I will just ask you if you agree with me that Congress has delegated the regulative authority to the Executive branch of government who writes rules and regulations promulgated, published under the Administrative Procedures Act that have the force and effect of law; fair enough?

Ms. RISTINO. Well, I mean, a bit of that authority is in the constitution, but yeah, because it implements the laws. But I think

there is a complication with the APA. But yes, I generally agree with what you said.

Mr. KING. In that there would not be any regulatory authority for the Executive branch if Congress did not authorize them to have the authority to do so?

Ms. RISTINO. Through the APA. It is kind of like a mini legislative process.

Mr. KING. Yeah. And so where I am going is that Congress has delegated this responsibility to the Executive branch of government, I think in part, knowing politics like I do, because they did not want to face the minutia of burden that comes down on that. They had people who were appointed in the branches that they had created, in the Executive branch that they had created that were experts in the field. And so therefore, in order to delegate that responsibility and get it away from Congress, they have created the Administrative Procedures Act and a number of other acts that established this regulation. I want to ask you a question. I just assert that. And if you would shake your head I would listen to rebuttal.

So I put that down because I think Congress has ducked its responsibility and I listened to Mr. Weber call for some changes in the APA, and reform was the language they used, Mr. Weber, and I think you also advocated for what we refer to here as the REINS Act, which is any regulation that has more than \$100 million in impact to our economy is required under that act, which has not passed the Senate yet but it does sit on Mitch McConnell's desk right now, that it has to come back to Congress for an affirmative vote before it has the force and effect of law. I certainly support that, but I wanted to expand a little more on that because if we get a REINS Act out of the Senate, I am really confident the president will sign that as quick as he can get his pen to the paper. But it does not address the regulations that exist up to this point. It grandfathers them all in. So do you have any suggestions on what to do with that, Mr. Weber?

I put you on the spot here.

Mr. WEBER. Yeah, you are putting me on the spot, other than I would, you know, if there could be some type of, I do not know, of review at least or go back a certain amount of time, you know, to look at the cost of these regulations. And we had a discussion in our office this morning about the number of \$100 million. And we came to the conclusion that any time you impact an industry to that extent, I do not care whether it is a large industry or a small industry, I think there needs to be a second set of eyes that would look at that regulation and hear input from your constituents on how it may or may not impact. So that was a number we put in there.

Mr. KING. It was also the number that was written into the REINS Act.

Mr. WEBER. Yes. Yes.

Mr. KING. So it conforms to that.

I just serve back a suggestion, and that is that of all the existing regulations and the new regulations, whether they are \$100 million more or less, without an amount to it, and I propose that the agencies serve up a minimum of 10 percent of their regulations each year to Congress to be reexamined and that they would sunset if

Congress does not affirm them with an affirmative vote. And that way we would scour through all the existing regulations. We would reset them over a period of a decade and then any new regulations, eliminate that \$100 million and just allow for any new regulations have to come back before Congress. I think we would pass most of them in a block, and those that were brought to our attention, like WOTUS, we would examine that and it would be the voice of the people rather than the agency.

I see you nodding your head, Mr. Brunkow, so I would like to hear what you would say to back up that statement. Leading the witness, I confess.

Mr. BRUNKOW. Well, certainly, any time that we would have advance notice in review of regulations I think would be really good. Too often we do not know about, do not see those regulations until it is almost too late.

One thing that did alarm us about WOTUS was the EPA's campaign on social media to promote the rule, the WOTUS rule. There were several posts on Facebook, on Twitter, leading people to support their proposed rule changes. So, that really concerns me when I have a government agency trying to lead.

Mr. KING. In conclusion, as my time has run out, I would just say that that that I have described also sits on Mitch McConnell's desk, and the press did not hardly catch it. So if you all want to go back and take a look at that, I think we can have a continuing conversation on how to get this government right and hold Congress accountable so that you are not burdened by overregulation.

Thank you, and Mr. Chairman, I yield back.

Chairman BLUM. Thank you, Mr. King.

Welcome to Chairman Chabot, who is the Chairman of our entire Small Business Committee. Thanks for being here today.

And now I would like to recognize Dr. Marshall for 5 minutes.

Mr. MARSHALL. Thank you so much, Chairman.

Glenn, most of our brothers and sisters, they moved off the farm, and you came back to the farm. What is your passion? Why do you do it? What do you love about farming? Why do you wake up in the morning?

Mr. BRUNKOW. Well, there is just something about living on the land, knowing that I am there working the land that my grandfather, my great grandfather, my great great grandfather worked, working with my father every day, and I am very passionate about the crops I produce, the livestock that I produce. We are really tied to that land, and I want to make sure that I maintain it, I grow it, I develop it, and I have something there for my kids to come back to.

Mr. MARSHALL. Yeah, I think that is something that I am not sure all the city dwellers realize is that most farmers are cash poor. And we think about what are you leaving to your children? Is there anybody more motivated than you to make sure that your children have rich soil? And you guys are blessed with much richer soil than I have in my part of the state. What is your vision for your children and your grandchildren with that land that you are using?

Mr. BRUNKOW. Well, certainly, I want them to come back to it, and I want to maintain it the way it is. We talked about the Flint

Hills being the last area of tall grass prairie, the biggest area left. I certainly want to maintain that. We do want to do what is right and we want to make sure that we maintain our environment, that we produce safe food, but our margins are razor thin and we want to make sure that we have the ability to maintain our businesses for the long term.

Mr. MARSHALL. And certainly, these regulations, every regulation adds up to your input cost. Maybe we will talk about WOTUS here for a second, the swampbuster.

Do you guys have terraces on your farm?

Mr. BRUNKOW. Oh, yeah.

Mr. MARSHALL. I remember as a young kid growing up and my grandfathers building these terraces. And then I woke up as a congressman and now they want to regulate the runoff from the water. Can you just maybe explain, I think people have this vision of what a wetland is, what we are regulating. And talk about a field with a terrace that your grandfathers made. Maybe it was your great grandfather. You are a little younger than me. Those terraces and the runoff and a little bit about soil erosion, and just kind of run with water conservation and soil conservation.

Mr. BRUNKOW. Sure. The terraces and waterway systems that we have in our fields are meant to slow down the water running across those fields, slow down and maybe in some cases eliminate erosion. And we want to make sure that we maintain that topsoil on the field. They catch the water. The terraces are berms that are across the field. They catch the water and they direct them into a waterway that is grassed, grows grass and filters the water and slows it down before it hits the—

Mr. MARSHALL. And then when WOTUS comes along what happens to some of that runoff?

Mr. BRUNKOW. It is all classified as Waters of the United States, and therefore, regulated by the EPA.

Mr. MARSHALL. So my point is, our grandfathers making great conservation practices and now I am being penalized for the great work that they did.

Mr. BRUNKOW. Exactly.

Mr. MARSHALL. And again, I am out hunting a lot in these big pivots of cornfield and I look down in the corners and I will say, why are we not farming that? And they will say it is a wetland. I mean, when I envision a wetland when I am sitting here reading about them in college, I was envisioning this 6 inches of water, a foot of water year-round, thousands of ducks on it and flamingos or something. What are wetlands to you guys? Just describe some of the wetlands that you have to work around?

Mr. BRUNKOW. Some of them are no more than in the spring when it is rainy, places that collect water. And you know, it is very temporary in most cases.

Mr. WEBER. Basically, the function of a wetland is to slow water flow down, and it serves some other purposes as well. But again, we are seeing a few more of them in the state of Iowa, some actually trying to be established, especially with large tile drain areas, to run them through a wetland before the water does reach a stream. Usually, a grassland and to me it is a method that is really

being explored and getting a lot of press as far as being a new water quality.

Mr. MARSHALL. So with or without WOTUS, you, as a producer that owns the land, I assume are trying to work with those situations and try to figure out what is best to prevent the water erosion and things?

Mr. WEBER. Absolutely. I have to keep referring to Iowa's Nutrient Reduction Strategy. I think it was just a great program that was developed at the right time. My son is a sales rep and has about 75 to 80 customers, local farmers that come in, and it is amazing how that has blossomed in our area, the use of cover crops, simple things that farmers can afford to do and work into their programs. The interest in conserving and building soil—

Mr. MARSHALL. We are in.

Mr. WEBER. It is. It is what farmers live for. It is what I live for. I want to leave my soil better than when I got it for my next generation. And do not see near as much abuse of farmland as I did maybe 20 or 30 years ago, and I am more than impressed with a bunch of the young farmers in our area that really want to adapt these practices, whether it is for an economic reason for a conservation reason. They are aware of the pollution in the Gulf and they are aware of what is going on. And so to me you are seeing a lot being done in the country, especially in Iowa. And I really credit the program for getting the ball rolling. And I think we are going to accomplish what we set out to accomplish.

Mr. MARSHALL. Thank you for all what you do. I yield back.

Chairman BLUM. Thank you, Dr. Marshall.

I now recognize the gentleman from Kentucky, Mr. Comer, for 5 minutes.

Mr. COMER. Thank you, Mr. Chairman. It is always good to see fellow farmers in Washington on the Hill testifying.

My first question is for Mr. Weber. We have a fair amount of pork production in Kentucky, the majority of which is in my congressional district. Can you give us a quick example of some of the Federal permits you are required to have to operate a hog barn?

Mr. WEBER. Well, basically, from the state of Iowa's standpoint, I certainly can. We are required to go through a master matrix program in the state of Iowa. DNR is involved with that. They have basically final approval of that. It goes through our county board of supervisors. It is a points-based system on siting new facilities. Not easy to do. It is not easy to do. It is not easy anymore to find a location that will gather you enough points in the master matrix to build any sizeable type operation. There is still room for some 2,400 head finishing sites and so on, but when you start going to 4,800 or larger sites, it is extremely difficult to get siting. And there is a lot of objection to a lot of those that are done. But the master matrix, what we use in Iowa, again, I think a very good program. We want buildings to be built in the right place, that they are not offensive to neighbors, and so on and so forth. I think it is working very well, but it is coming under more and more scrutiny every day.

Mr. COMER. How long does it take the average farmer if they wanted to get all the permits necessary to begin construction on the infrastructure?

Mr. WEBER. I would say you better plan on 2 years. A minimum of 2 years' time.

Mr. COMER. And that is the same problem we are having in Kentucky. It is very unfortunate. Very few business plans would succeed in any industry if it took 2 years to get approval from the permitting process. So that is an issue that obviously we need to try to work on. I think the president, with his focus on reducing the regulatory burden on small businesses, I think he is aware of this. I know Secretary Perdue is. It is something that as a member of the Ag Committee, it is certainly important to me, and we are going to keep trying to streamline the regulatory process to get the Federal government out of the way for the private sector and allow a quick decision. It does not take 2 years to decide whether or not that permit is going to be approved.

My question for the farmers on the panel, how would the revitalization and the possible expansion of the H2A program benefit the Ag sector in my home state of Kentucky where we have poultry, we have tobacco, soybeans, corn. These are the top commodities in Kentucky. Can you all touch on that?

Mr. WEBER. Agriculture is in desperate need of a workforce. The pork sector and the poultry sector are together on this. The H2A program, H2AC program would allow these people to come into our country for at least 10 months to a year's time. We need that. We desperately need that.

We have got plants, we have new packing plants in the state of Iowa that are not going to second shift because they cannot get enough help. They cannot get enough labor. We have got plants under construction that I know the owners of that lay awake at night worrying about getting the help to man these plants when they are up and running. And so I think it is a huge issue for agriculture. It is absolutely a huge issue and we need some reform to allow these people to come to our country that are willing to work and have a set of criteria to, whether they go back or renew their visa or whatever it is, we desperately need that in agriculture.

Mr. BRUNKOW. And I absolutely agree with Mr. Weber. We have to have those workers. They are very necessary for us to produce the food and fiber we all need. We need some sort of a common sense streamlined approach to that. I know many of our plants, just like Mr. Weber said, are struggling to find workers, worry about the documentation of the workers they do have. And so we need to find a way to help out the people that are willing to work and help us.

Mr. COMER. One last question. Could you touch real quickly on the impact the ELD is having with livestock transportation? I represent, my district goes all the way to Eastern Kentucky, and it takes a long time to haul those cattle from Eastern Kentucky or even the Carolinas and Virginia all the way out to the Midwest, to the feed lots. We have worked hard to get the exemption for livestock haulers. My time has run out but real briefly touch on that impact of that regulation.

Mr. BRUNKOW. There is another regulation that needs some common sense applied to it. As livestock haulers, you have got to get the livestock from point A to point B in a timely manner. It

may take a little bit longer than those regulations require. And just the burden of the electronic logbooks are burdensome.

Mr. WEBER. Another classic example of exactly why we are here. We needed to hear from the livestock sector before rules were printed and implemented, and I think that is going to happen. I think we are going to have the opportunity to have input in that, but certainly, hauling perishable goods is different than hauling a lot of other material. And we want to be safe. We want to have good equipment. But it is a different world out there when you are hauling livestock. Fourteen hours in a day, a total of 14 may or may not be enough to get the job done.

Mr. COMER. Thank you all very much. I yield back, Mr. Chairman.

Chairman BLUM. Thank you, Mr. Comer. I noticed you omitted Kentucky bourbon as one of the products of your state. Is that on purpose?

Mr. COMER. No. No. I am proud of the bourbon, especially Maker's Mark which is in my district.

Chairman BLUM. Thank you for those excellent questions.

I would now like to recognize the gentleman from Ohio, Chairman Chabot, who is also, as I said previously, Chairman of our full Small Business Committee.

Mr. Chairman, you are recognized for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chairman.

And even though I am the Chairman of the Full Committee, I am actually on other Committees as well, and I was in Judiciary for the past hour or so. So that is why I did not make it earlier. And I apologize. And some of the questions that I may ask may have already been asked or you may have referred to them in your testimony. If so, I apologize. But it never hurts to let it sink in twice or sometimes multiple times. Or at least I find that to be the case.

So my first question I would like to ask you about is we hear a lot that one of the groups that is most significantly adversely impacted by the estate tax is farmers. And small businesses also in general can be impacted, and of course, by definition, most farmers are small businesses. But have you seen, do you know stories about, is that true or is that just a myth? Sometimes you will hear from folks who are not concerned about that. They will say, oh, that is really not true. But I think it is, and I have heard from others. Would anyone like to comment on that about the impact of the estate tax on farmers?

Mr. BRUNKOW. Oh, it is absolutely true. One my family worries about constantly. As I said, one of our farms we homesteaded in the 1860s. That has been passed down through the generations. And as we pass that through it gains value every time. We may be cash poor but our net worth looks pretty good. But when it comes to, you know, one of the things I worry about is paying the taxes, that burden, when the income just does not add up. We have no intention of ever selling any of the property we have. That property is part of us. That property, it is as much a part of me as anything and I cannot imagine selling it. But the burden that the estate tax would bring if it was passed directly on down to me might

force some of that. I certainly do not have the cash on hand, and I do not really want to refinance to pay for the estate tax.

Mr. CHABOT. Yeah. And as you know, I mean, we have a long time in this country bemoaned the fact of the fewer and fewer family farms being out there and what an important part of the American being, the American story family farms are.

Have you heard, is it true that sometimes literally the family farm does have to be sold and does not go down to the next generation because it has to be sold literally to pay the taxes? Anybody?

Mr. WEBER. I think that scenario could easily exist. I personally have not heard of that happening. I think about this a lot at my age. But I guess I might have a little different view. The estate tax does not bother me if the exemption keeps up with inflation or is above, you know, where it is now, in our area that probably is okay. If we eliminate the estate tax, we need to keep a stepped up basis for our errors. Those would be comments I would make on it. We cannot give them both up because that is absolutely not going to work. If you have multiple children in your family and they may want to sell some property, they cannot be hit with the tax. So, stepped up basis is critically important to us. The estate tax, it could and can be a big hit if people have not planned for it. And certainly, increasing the exemption, the lifetime exemption was, I think, the right move because it was well overdue for where inflation was and the price of land.

Mr. CHABOT. And as you have mentioned the exemption, it was in the Tax Cuts and Jobs Act that was passed last December that the president signed into law, did double the exemption.

Mr. WEBER. Yes.

Mr. CHABOT. And so I assume you would agree that is certainly a step in the right direction?

Mr. WEBER. Yes.

Mr. CHABOT. Okay.

Mr. WEBER. Correct.

Mr. CHABOT. Many of us did want to and still want to eliminate it all together. We think it is unfair that when an individual or family who has already paid taxes on it once, that it is not right to pay taxes again on it another time based upon death. We think that is unfair, but we do think this, and I notice by nodding, both, at least you gentlemen agree that that was the proper move.

Thank you very much, Mr. Chairman. I yield back.

Chairman BLUM. Thank you, Chairman Chabot.

We are now going to start our second round of questions. And I would like to recognize Mr. Schneider, the Ranking Member for, well, as long as he wants to take.

Mr. SCHNEIDER. I will be quick, but actually, Mr. Brunkow, I want to talk to you. Just dig a little bit more about the Flint Hills because you touched on it. And it is a unique ecosystem, not just in Kansas and Oklahoma but in the entire country, distinct. And you talked about the need to have the annual burn, controlled burn.

What are the invasive species you worry about, and what would be the impact of those species coming in?

Mr. BRUNKOW. Well, it starts out as shrubs, whether that be bock brush, dogwood, those kind of things. Builds up to cedar trees,

eastern redcedar tree, and eventually, larger trees. It just progresses. The pretty ecosystem is not a stable ecosystem and it wants to progress into a forest if left alone. Without the fire, it will progress. And there is plenty of examples of that just around my hometown where development has not allowed for burning and brush has not been controlled. And you can see the shrubs turn into small trees. Small trees burn into large trees. And eventually, you have a forest area with a lot of underbrush, with a lot of fuel, and there again, I talked about—

Mr. SCHNEIDER. The second issue; right?

Mr. BRUNKOW.—the wildfire danger, which is a very real danger. But also, you lose that ecosystem.

Mr. SCHNEIDER. I want to take it to the logical conclusion. What is the impact to our industry of the prairie moving to a progression towards forest rather than prairie?

Mr. BRUNKOW. We lose a lot of grazing lands that we use for our cattle right now. As that progresses, as the brush takes over, as the invasive species take over, the grazing capacity, the carrying capacity of those lands is greatly diminished, if not completely lost.

Mr. SCHNEIDER. Right. And I know the answer but I am going to ask it anyway. There is a reason that this is cattle land and not like Kentucky, Illinois where I am from, Iowa, we are not growing corn because of the terrain and the ecosystem.

Mr. BRUNKOW. The terrain and the rocks.

Mr. SCHNEIDER. Right. So it is not that you replace one for the other; it is cattle thrive in this ecosystem. I am going to say this wrong. Farmers will struggle harder because you cannot till the soil. So the need to maintain the ecosystem as a prairie is important.

Mr. BRUNKOW. Exactly.

Mr. SCHNEIDER. I am asking leading questions but that is where this is unique. When we set rules across the country, we have to be able to have the—and we talked earlier about Mr. Martins working with the states, understanding of each ecosystem is different.

I want to turn to you on that, Ms. Ristino, because you come at this from both having been in the Federal government, but also studying it and trying to understand it. How do we do better at this? And you touched on this a little bit with your strategies, but I am going to give you the last couple of minutes of my time. What are the takeaways we should, as policymakers, focus on to say we have to do a better job of creating that balance to ensure the prosperity of our farms, protect our environment, and the security and safety of our food supply?

Ms. RISTINO. Well, it sounds simple but we have to work together. I mean, because clearly we have real environmental challenges, especially with climate change. And then loss of soils, clean water, and we want to be food secure moving forward. We want to encourage farming. We are losing farmers. Farmers are getting older and going to retire. Much of the land will be turning over to hopefully new farmers. And so estate planning and working together to make sure that we have that next generation and that we protect those resources is really important. But I think it takes a lot of hard work. And my colleagues here at the table talked

about the fact that working with the state has been easier than NRCS, who used to be a client of mine, but I know that NRCS tries to be highly collaborative and works with organizations like Ducks Unlimited or Pheasants Forever and works with the states and works with, say, the Iowa Soybean Association. Those highly collaborative relationships with farmers on the ground and with the institutions that those farmers are familiar with are incredibly important but it does take a lot of work and we have a lot of challenges. But there are places like Iowa, excuse me, that has made some real strides with nutrient management. There are also places in Wisconsin that have been successful as well working together on watersheds. But it takes a lot of collaboration and the real will to voluntarily, collaboratively come together to make those changes.

Mr. SCHNEIDER. Thank you. I appreciate that.

And I will use my last couple of seconds to emphasize two other points.

Immigration reform, as you touched on, Mr. Weber, we need to make sure that we have that work supply and I think there are ways we can find to work across the aisle to do that.

But we are also losing people. Your family is unique. Not unique, but it is distinct. Too many people are leaving the Heartland, if you will, but creating opportunities, whether it is education. We have veterans coming back, and whatever we can do, especially to help veterans, maybe go to farming for first generation would be a wonderful thing.

So with that, I yield back.

Chairman BLUM. Thank you, Mr. Schneider.

Brad mentioned the word "balance," and that leads me right into my question. I tend to think of it as right-of-way lines and, you know, businesses, I am a small business person, we can handle regulations as long as they fit within the right-of-way lines. Are you with me? So they are reasonable, you have time to adapt to them so they do not bankrupt your business, you do not have to hire a bevy, with all due respect, a bevy of lawyers to comply. So I would like to hear from the three gentlemen that are in business, are we inside or outside the right-of-way lines? And I would like to hear from Iowa and Kansas's standpoint. Are your states inside or outside? And then the federal government, are we inside or outside the right-of-way lines? And if we are outside, is it because the rules are too complex? Is it because it takes too much time to comply with them? Is it because it is too much out-of-pocket expense? And so I would just like to hear your thoughts. Inside or outside the right-of-way lines? Federal government versus state?

Mr. MARTINS. I would say the state is inside the lines. They make sense. And they come and talk to us and they help us get ready. The Federal government sometimes falls outside of the lines because they are trying to make one compliance rule fit everything and they need to get more input to make it adjustable. You know, you still have to have rules and you still have to have compliance, but not everything is going to fit into one highway I guess I would say.

Chairman BLUM. Mr. Weber?

Mr. WEBER. And I think there have been times. I think the two I highlighted in my presentation were two that I would say got out-

side the line. Big regulations affecting the entire country, and there just was not enough input. I am talking about the WOTUS rule and I am talking about the GIPSA rule. And so to me those were two that to me got outside the line. There are a lot of regulations, Federal regulations that have come down to us that I think are very workable and livable that we live with every day. It has got to be the challenge. It is about this transparency I talked about. I think if we can be more transparent, I think we can stay in the lanes that you are talking about.

The industry you are trying to regulate needs to be involved in some way, shape, or form, or at least have a chance to have input into developing the regulation to achieve the goal you are after, whatever agency it is, whether it is EPA or whoever it might be, OSHA, whatever it might be. I think they need to talk to these people, make it more of an education, more of an incentive type process than just say we are going to write it and you are going to live by it. And that does not sit well in the country.

Chairman BLUM. Mr. Brunkow?

Mr. BRUNKOW. I would absolutely agree. Our state has been within those right-of-ways for the most part. Federally, we veer out of them, sometimes fairly severely, in the case of WOTUS, and there needs to be more transparency. There needs to be more input from those affected by the regulations. And as I said, we want to work with them. We want to work with and ensure that we are doing the right thing, but there is a limit. And you asked if they were burdensome, if they were expensive. Yes. The answer is yes. They can be.

Chairman BLUM. I thought it might be.

Mr. BRUNKOW. We want to make sure that they are common sense, that they work for us, and that we can live within that.

Chairman BLUM. And then, Ms. Ristino, one of the parts of your presentation today, testimony, was outreach. And what I hear here is I am hearing the states are within the right-of-way lines. Federal government can get outside of the right-of-way lines. So is this an outreach program? Is it a problem or is it a problem with not getting enough input when they are making these rules and regulations? Or both?

Ms. RISTINO. Well, I think when you are at the Federal government and you are governing essentially the entire country, you cannot have or you do not have naturally that close connection except through your representatives to Congress because it is so large. But I do think there are ways that we can innovate that are better than notice and comment because there are only certain groups and certain people that have enough access or wealth or time to really feel that they can access that kind of method of providing input. I think we saw that with the FSMA rollout that notice and comment was not enough and the FDA did listening sessions and went around. And I know the USDA also does listening sessions especially during a Farm Bill cycle. I think that, but also, there are going to be other ways, too, that we can have better communication and outreach and more productive conversations regarding how we can work together to actually make changes on the ground that do not harm producers but also make real measurable improvements to the environmental outcomes on working lands in America.

Chairman BLUM. Thank you. And that was votes, so the timing worked out beautifully here.

I would just like to make some closing remarks briefly. I would like to thank our witnesses for being here today. I thought your testimony was excellent. It was a great conversation. We appreciate your testimony very much.

It is clear that we have more work to do to ensure that our nation's small farmers, who play a vital role in our economy, are not being hurt by federal regulations. A "one-size-fits-all" approach to federal regulations is not the right approach for small farmers.

As chairman of the Subcommittee on Agriculture, Energy and Trade, I look forward to working with my colleagues to find solutions that will lighten some of these regulatory burdens that have been discussed today, not only for our farmers but for all small businesses across our great nation.

I now ask unanimous consent that members have 5 legislative days to submit statements and supporting materials for the record.

Without objection, so ordered.

And if there is no further business to come before the Committee, we are adjourned. And I would just like to adjourn with the final words, I think it was Mr. Brunkow said, we are all in this together, basically. So more communication would be a great thing.

And that concludes our hearing. Thank you very much.

[Whereupon, at 11:48 a.m., the Subcommittee was adjourned.]

APPENDIX



Statement of Mr. Craig Martins

**Operations Manager
Three Rivers FS
Dyersville, Iowa**

Testifying on Behalf of the National Council of Farmer Cooperatives
and GROWMARK, Inc.

**Testimony before the Subcommittee on
Agriculture, Energy, and Trade**

**House Small Business Committee
U.S. House of Representatives**

Accelerating Agriculture: How Federal Regulations Impact America's Small Farmers

June 21, 2018

*Craig Martins Testimony, NCFC & GROWMARK
House Small Business Committee
Subcommittee on Agriculture, Energy, and Trade
June 21, 2018*

Chairman Blum, Ranking Member Schneider, and members of the Subcommittee, on behalf of the National Council of Farmer Cooperatives (NCFC) and GROWMARK, Inc., I sincerely appreciate the opportunity to submit testimony for the record as part of the Subcommittee's hearing to discuss how federal regulations impact America's small businesses.

I am Craig Martins, Operations Manager for Three Rivers FS, headquartered in Dyersville, IA. My responsibilities include developing and leading the sales, operations and service teams within Three Rivers FS. Service to our farmer members, safety, compliance and efficiency are important areas of focus in the operation of an agriculture cooperative and an individual's farm. Since 1929, NCFC has been the voice of America's farmer-owned cooperatives. With nearly 3,000 farmer cooperatives across the United States, the majority of our nation's more than 2 million farmers and ranchers belong to one or more farmer co-op. NCFC members also include 21 state and regional councils of cooperatives. These farmer cooperatives allow individual farmers the ability to own and lead organizations that are essential for the vitality of the agriculture sector and rural communities.

NCFC's members span the country, supply nearly every agricultural input imaginable, provide credit and related financial services, and market a wide range of commodities and value-added products. Earnings from these activities are returned to the co-op's farmer members on a patronage basis, helping to improve their income from the marketplace. These earnings are then recycled through rural communities as farmers and ranchers purchase goods and services from local businesses, thereby sustaining rural America.

One of NCFC's members, GROWMARK, is an agricultural cooperative based in Bloomington, Illinois. GROWMARK provides agronomy, energy, facility planning, and logistics products and services, as well as grain marketing and risk management services in more than 40 states and Alberta, and Ontario, Canada. The GROWMARK System supports over 250,000 customers, providing services that span the supply chain from providing the ideal seed varieties for planting, caring for plants during the growing season, collecting and storing grain after harvest, to selling the product at the best market price and shipping it across North America.

NCFC and GROWMARK value member ownership and control in the production and distribution chain; the economic viability of farmers and the businesses they own; stewardship of natural resources; and vibrant rural communities. American farmers are dependent upon the integrity of their soil and other natural resources for their livelihoods. For generations, farmers have worked tirelessly to protect and improve the land. They also understand that satisfying the demands of a growing world population must not come at the expense of ecological health, human safety or economic viability. For decades, farmers have adhered to a principle of continuous improvement.

Three Rivers FS is a locally-owned agricultural cooperative serving producers in Northeast Iowa. Formed in 1930, Three Rivers FS is a leader in meeting producer needs in production agriculture and agronomy marketing. Our vision is to be the trusted advisor for our patrons and our mission

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is to develop relationships and deliver solutions that drive sustainable performance for our patrons and our cooperative. Three Rivers FS is a proud member of GROWMARK.

I thank this Subcommittee for supporting public policies that continue to protect and strengthen the ability of farmers and ranchers to join together in cooperative efforts to maintain and promote the economic well-being of farmers, ensure access to competitive markets, and help capitalize on market opportunities.

I also applaud this Subcommittee for taking a closer look at how federal regulations affect small businesses. Arduous, expensive, and confusing regulations can be completely detrimental to small business owners, including farmers. I commend this subcommittee for addressing this important issue and considering options to relieve hardworking farmers across America from excessive regulations. It is imperative that federal policies promote an economically healthy and competitive U.S. agriculture sector, and this can only be accomplished if farmers are able to operate without the oppressive weight of undue regulation.

Our common, ultimate goal is to enhance and strengthen the productive capacity of our farms. In today's testimony, I wish to highlight legislative and regulatory efforts that will have a direct impact on agricultural businesses; and particularly, emphasize specific regulations that are excessively burdensome upon farmers and the co-ops they own. Together, we can create a future where farmers are free from unnecessary, burdensome regulation while maintaining public safety and American farmers' passion for protecting and improving the land and communities in which they live.

OSHA Crane & Derricks in Construction Rule

Propane is an integral part of the agricultural energy portfolio, for its domestic availability, high-energy density, clean-burning qualities, and price-point.¹ Propane is the world's third most common fuel, and it is used in residential properties, industrial vehicles, and frequently in the agricultural industry, where it powers engines, heats buildings, and is used to dry and process crops.² Propane sale, service, and delivery are a critical part of many farmer cooperative business structures.

Over 35 NCFC members provide propane services to its members, including GROWMARK and its co-op owners. However, a recent OSHA regulation is making it harder and more expensive for cooperatives to employ propane technicians and provide these services to its customers. The *Crane and Derricks in Construction Rule* imposes certification requirements on crane operators which include propane technicians. OSHA stated in its final rule published on August 9, 2010, that any individual operating a crane on a construction site, or performing a construction activity, is required to have a third-party certification. The rule clarifies the employer's duty to ensure competency of the crane operators through training, certification, and evaluation.

¹ https://www.afdc.energy.gov/fuels/propane_basics.html

² <https://www.propane.com/about-propane/>

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This burdensome and duplicative regulation unfairly includes general industry, specifically propane, under construction standards. As these entities are already highly regulated by our own industry safety standards, and the operation of telescoping and knuckle boom trucks is vastly different from tower cranes and other large-scale cranes used in construction, we believe propane companies are incorrectly included in this rule.

According to OSHA, a construction site is considered any property where construction activity is taking place. More specifically, a construction activity includes any work for construction, alteration, or repair, which includes painting and decorating at a residential or commercial location.³ Propane industries have faced particular challenges with this rule, which is resulting in compact, mobile equipment to be regulated as heavily as tower cranes used on large scale construction sites. The cranes used to unload propane tanks at cooperatives, farms, business, etc., are typically small enough to sit on the back of a pickup truck; and are only used in loading and unloading items from relatively low heights.

According to the rule, the delivery or retrieval of a propane tank to the ground without positioning the tank onto or within any structure, or in a particular direction, does not constitute a construction activity. However, the intentional positioning or orientation of a propane tank onto an excavation, concrete pad, tank legs, or any support is considered to be preparation for installation, therefore the activity is deemed as construction and requires certification. Further, any use of a crane to move a propane tank onto a construction site falls under the scope of the rule, as any activity done on a construction site is automatically deemed construction.

The crane operator certification may be obtained from an accredited, third-party testing organization that meets OSHA requirements or through an audited employer program that meets OSHA's certification requirements.⁴

Farmer cooperatives would be impacted by this rule's certification requirement when delivering and connecting propane tanks with truck cranes, which are regulated under this rule. According to letters of clarification from OSHA, the delivery of propane tanks to any active construction site is a construction activity that requires the certification. Using a truck-crane to position a propane tank in any way, other than to the ground, also constitutes a construction activity that requires the certification. If the tank is placed onto any sort of structure or surface where it will be connected or installed, the crane usage is subject to regulation. Numerous letters of clarification have been directed to OSHA regarding what constitutes a construction activity and a construction site. There are still many questions left unanswered.

The propane industry and consumers are primarily concerned with the inconsistent regulation of the same activity. The rule is designed to regulate the crane usage itself, and therefore should not be dependent upon the location of the crane, how the tank is set down onto the ground or another

³ 29 C.F.R. 1910.12(b); 29 C.F.R. 1926.32(g).

⁴ Technically, there are four (4) options for certification. Not mentioned are: obtain a state or local license to operate cranes within a state or local jurisdiction with acceptable requirements; or a qualification issued by the U.S. military. These certification options are impractical/not applicable to propane industry.

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surface, or if it will be subsequently installed in the future. The rule seemingly sets two standards for the same activity using the same machinery, based upon arbitrary factors. This inconsistency and lack of clarity signify the high level of confusion among the industry, demonstrating the necessity of an extension of the compliance date.

Third-party certification costs for the training course, certification, wages, and incidentals are approximately \$3,790 per individual certification requiring renewal every five years. This would be a huge cost on the propane industry. The propane industry estimates it will cost approximately \$151 million every five years to comply with this rule. Affordable and reliable energy is a necessary component of functioning businesses, agriculture, and family households. The significant costs of this certification process will bear down on distributors of propane, including farmer cooperatives, which already have a struggling farm economy impacting their bottom line. Additionally, families and farmers that rely on propane will be impacted by this additional cost in the supply chain. The farmers feeding, clothing, and fueling our world are managing rising input costs and stagnant or declining commodity markets, and an increased propane bill is an avoidable concern.

The compliance date for employers to ensure that propane field technicians are certified is set for November 10, 2018. However, OSHA is still reviewing public comments on adding a permanent requirement for employers to qualify employees through required training, certification/licensing, and evaluation, on whether to remove an existing provision that requires different levels of certification based on rated lifting capacity of equipment, and establishing minimum requirements for determining operator competency.

The propane industry is one that is highly regulated under general industry standards and prioritizes having a culture of safety. NCFC and GROWMARK support robust industry standards to promote agricultural safety and health. However, OSHA's inclusion of propane deliveries under its *Crane and Derricks in Construction Rule* is unreasonable, duplicative, and costly to co-ops that sell and deliver propane. The propane industry self-imposes training, education, safety, and examination requirements of industry employees. The training and safety requirements of this program are more detailed than the crane rule, and tailored to the unique safe handling of propane containers.

NCFC and GROWMARK call on OSHA to correct the scope of its *Cranes and Derricks in Construction* final rule and appropriately remove propane dealers from covered entities subject to the rule. NCFC calls on members of Congress to co-sponsor H.R. 5988, the *Common Sense Certification Reform Act*, which provides relief for propane field technicians from third-party certification in cases in which such operators are only delivering or retrieving propane containers. NCFC also calls on Congress to instruct OSHA to delay the November 10, 2018 compliance deadline while the agency reviews the potential impact of the regulation and appropriately define the scope of the regulation.

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DHS Chemical Facility Anti-Terrorism Standards Rule (CFATS)

Anhydrous ammonia (NH₃) is used across the agriculture industry in a number of ways, including to control mold growth in high moisture grains and to add nonprotein nitrogen to corn silage. Most commonly, NH₃ is used as a nitrogen fertilizer for field crops. NH₃ is cost effective, efficient, and easy to use, resulting in its popularity as a nitrogen fertilizer among farmers across the United States.⁵

NH₃ provides many benefits to farmers. However, due to its chemical makeup, it must be handled with extreme care. In order to be properly used and stored, NH₃ must be compressed from a gas into a liquid and is kept in specially designed pressure sealed tanks. Farmers use toolbars pulled by tractors to inject the NH₃ directly from these sealed tanks, known as nurse tanks, into the ground. As the NH₃ is injected directly into the soil, pressure is released, and quickly converts to a gas. The gas immediately combines with soil moisture, causing the soil to retain desirable chemical properties, which are ideal for crop growth.⁶

Farmer cooperatives across the country, including many of NCFC's members, store and supply NH₃ to support their members' needs. It is essential for cooperatives to have the ability to provide fertilizers, such as NH₃, to their farmer-members so each farmer can achieve the highest yields possible. NCFC, member co-ops, and individual farmers recognize the need for readily accessible NH₃; however, the Department of Homeland Security's (DHS) regulation of NH₃ through the Chemical Facility Anti-Terrorism Standards (CFATS) rule, has led to confusion among the agricultural community on how to comply.

While NH₃ clearly has a number of practical benefits, it can be dangerous if not handled properly. Recognizing the hazard that NH₃ poses, DHS has placed it upon its list of Chemicals of Interest (COI) which are regulated under CFATS. In November 2007, DHS finalized Appendix A to CFATS, which made a special note that NH₃ was to be included within the list of COI's. Each COI is associated with a specific screening threshold quantity (STQ), and if a facility possesses a chemical above the STQ, the facility must submit a Chemical Security Assessment Tool Top Screen (Top Screen).⁷ The Top Screen can be submitted online and is done to determine if the facility is considered to be high-risk and covered under CFATS. DHS subsequently assigns the facility to a particular tiered level – "1" being the highest risk and "4" the lowest. All covered facilities are then required to submit a Security Vulnerability Assessment (SVA) and either a Site Security Plan (SSP) or Alternative Security Program (ASP) to DHS for approval.⁸

Through this approval process, DHS considers a number of critical assets that measure the facility's policies, procedures, and security plans. These factors are run through an online

⁵ <https://www.extension.umn.edu/agriculture/nutrient-management/nitrogen/using-anhydrous-ammonia-safely-on-the-farm/>

⁶ <https://www.extension.umn.edu/agriculture/nutrient-management/nitrogen/using-anhydrous-ammonia-safely-on-the-farm/>

⁷ 6 CFR Part 27; Appendix to Chemical Facility Anti-Terrorism Standards – Final Rule

⁸ <https://www.dhs.gov/chemical-facility-anti-terrorism-standards>

program, which completes an algorithm, essentially running a risk assessment on the facility's safety and emergency or protective measures. In order to complete the SVA, SSP, or ASP, an individual must undergo Chemical-terrorism Vulnerability Information (CVI) training and be certified. This greatly limits the individuals that can contribute to the discussion regarding the assessments and plans, as only certified individuals can make contact with DHS or others DHS considers to be "in the know".

After DHS assesses the facility, if it is determined that they are not compliant with the standards, DHS is mandated to provide a clear explanation as to why the facility failed, and what needs to be done in order to meet tolerances. However, cooperatives have faced great confusion attempting to reach compliance with DHS. For example, at Three Rivers FS, the concerns from DHS could only be remedied through impractical and costly changes to fencing or the addition of security cameras. The costs of the fencing would be upwards of \$120,000 and would also be impractical for escape access in case of emergency, merely shifting the safety threat. Further, the installation of security cameras is unnecessary because NH₃ is only stored at the facility during four months of the year.

DHS's advice to Three Rivers FS has been ambiguous without explanation as to how it would be safer or an improvement to the SSP. While DHS claims it is committed to continually working with the cooperative until it is compliant, approximately \$5,000 has already been spent in personnel time. Prolonging the process will only be a continued and growing expense. Per the rule, DHS is obligated to provide a "clear explanation of deficiencies."⁹ DHS should be obligated to provide more clarity as to how facilities can become compliant in a cost-effective way.

Further, DHS should work with state departments serving agricultural communities so that cooperatives have resources that are easily accessible to comply with the rules. Three Rivers FS cooperative has continually tried to include the Iowa Department of Agriculture and Land Stewardship into this process, however due to DHS's strict policy with the CVI certification, they are unable to join the conversation. DHS requires that only those with CVI certification and deemed to be "in the know" may have any knowledge of a facility's SVA, SSP, or ASP. This policy is detrimental to small cooperatives who rely on local resources for tools to become compliant with federal regulations, particularly when the requirements are unclear. At the very least, DHS needs to educate state officials so that they can serve their constituents, and so cooperatives can easily access local resources to help them become compliant.

DHS should provide clarity as to how cooperatives can become compliant without excessive costs. Further, they should provide better tools and resources to facilities so that they can achieve compliance with CFATS without confusion and wasted resources. Clarification on how to meet the standards of the SVA, SSP, and ASP would improve the ability of cooperatives and other chemical facilities to meet DHS's standards; saving money and time for both the facility and DHS.

⁹ 6 CFR 27.245 Review and approval of security site plans

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It is vital for cooperatives to be able to comply with these regulations, as failure to do so would result in civil penalties or facility shut down.

House Farm Bill Regulatory Reform Provisions

NCFC and GROWMARK support regulatory reform and want to work with Congress to achieve this result. We were pleased to see a number of reforms included within the House Committee on Agriculture's farm bill. A summary of those provisions is listed below, followed by more detail on several provisions I wish to specifically highlight.

- *FIFRA Reform* – Streamlining the complicated and contradicting regulatory procedures in the ESA and Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to create an efficient and effective process that ensures protection of species as well as American agriculture, public health and safety.
- *Pesticide Registration Enhancement Act (PRIA)* – Reauthorization of PRIA is essential to maintaining public safety, while simultaneously allowing agricultural growers and producers to utilize the best crop protection tools modern technology has to offer.
- *National Pollutant Discharge Elimination System (NPDES) Permit Reform* – Explanation of the NPDES permitting process will remove duplicative and unnecessary procedures for pesticides that have already been approved under FIFRA.
- *Agricultural Retail Facility Definition* – Clarification of the definition of a “retail facility” is necessary for growers and producers after the Occupational Safety and Health Administration (OSHA) inappropriately removed agricultural retailers from the regulatory exemption.

FIFRA Reform

NCFC and GROWMARK support the well-established, rigorous, and science-based pesticide registration review process established under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Unlike other federal environmental statutes, FIFRA requires EPA to engage in a risk-benefit analysis in its regulation of pesticides. A thorough and holistic approach that relies on sound science and robust data ensures that risk conclusions are as closely tied to real-world conditions as practicably possible. However, this sensible process is constantly at odds with the Endangered Species Act's (ESA) cumbersome regulatory additions, which is administered by the Fish and Wildlife Service and the National Marine Fisheries Service (the Services). These conflicting procedures result in massive amounts of wasted time, money, and resources. The ongoing conflict between the EPA and the Services about how best to protect threatened and endangered species when regulating pesticides only hurts growers and provides no additional protections for these species.

Before a new pesticide registration is granted or an amendment is made to an existing pesticide registration, EPA is required under FIFRA to ensure that the proposed use does not cause “any unreasonable adverse effects on the environment, (including fish, wildlife and “non-target”

plants), taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.”

ESA provides for an additional level of scrutiny by requiring federal agencies, such as EPA, to consult with the Services on “agency actions” (such as a pesticide registration) that could impact threatened or endangered species or their critical habitats. As part of the consultation process, the Services are required to issue a “biological opinion” (BiOp) which includes recommendations of measures or restrictions to “agency actions” that would alleviate any concern regarding the impact an action might have on a listed species.

The EPA and the Services have dramatically different views on approaches to assessing and managing potential risks to fish, wildlife and plant species from use of pesticides. These agencies disagree on fundamental legal and science policy matters related to their respective obligations under the ESA and FIFRA. The overly precautionary regulation favored by the Services threatens public health, agricultural productivity, global competitiveness, and will place a burden on our economy with no commensurate benefit to threatened and endangered species.

When ESA consultation is delayed, pesticide consumers and users bear the risk that a court will impose buffer zones or other use restrictions that have significant economic impacts and that significantly impair food and fiber production. The delays trigger court rulings and settlements that have imposed unnecessary, non-science-based mitigations and loss of crop protection products or uses, often decreasing acres of crop land available for production.

Activist initiated ESA/FIFRA debate and litigation have been ongoing for almost 15 years and there is no end in sight. In 2013, a panel of the National Academy of Sciences (NAS) published a report providing guidance on the specific issues at the center of the conflicting procedures. The agencies have been attempting to address these recommendations and have created “Interim Approaches” for ESA risk assessment. The agencies have tested this approach on three different insecticides that are known to be safe, however have already been subject to EPA review. Per the Interim Approach protocol, the EPA released draft biological evaluations (BEs) for these three insecticides. The BEs are well over 12,000 pages and are extremely inconsistent with other meaningful studies.

Despite the government’s implementation of the Interim Approaches and its work on the first three draft BEs, there have been multiple new ESA lawsuits challenging new product registrations, leading to additional regulatory uncertainty. These lawsuits have a chilling effect on the introduction of new, more modern pesticide products. Further, ESA litigation has diverted the severely restricted resources of both EPA and the Services away from conservation efforts that would be more beneficial to the protection and recovery of threatened and endangered species and critical habitat.

There is strong evidence that FIFRA/ESA consultations are not working effectively or efficiently. Three nationwide consultations began in 2013 and are not yet complete. Economic analysts have determined that the Services would require up to a 25-fold budget increases to

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meet demand for timely completion of Office of Pesticide Programs (OPP)'s current schedule for pesticide registration and registration review.

An improved ESA consultation process is needed to make the best use of limited government resources, and to increase transparency and public trust in the risk assessment processes. Creative thinking and new approaches are needed to allow growers and other pesticide users to continue to have access to the tools they need to protect families, crops, homes and wildlife from pests and diseases.

Again, NCFC and GROWMARK were pleased to see needed, common-sense reforms included in the farm bill passed by the House Agriculture Committee. The provisions aim to put the necessary authority in the hands of the EPA, which has the scientific and technical expertise to assess the risks of pesticide products. Reform efforts would:

- Amend FIFRA to incorporate the ESA's protection standard for threatened and endangered species and their critical habitat into FIFRA's pesticide registration standard.
- Let the relevant agencies focus on what they do best – Empower OPP to make a jeopardy determination based on the ESA standard codified in FIFRA using its pesticide assessment expertise and incorporating the Services species-specific expertise to help inform the timely and efficient jeopardy determination. FIFRA deadlines would be retained to encourage interagency cooperation.

We believe that the Farm Bill is the best opportunity to address this issue. Your assistance and action is critical.

Pesticide Registration Improvement Act (PRIA)

Congress must move quickly to reauthorize the pesticide industry's highly successful fee-for-service program, commonly referred to as the Pesticide Registration Improvement Act (PRIA). The act was scheduled to expire on September 30, 2017, but was granted a short-term extension of current law in the FY'18 omnibus appropriations bill. Despite passage in the House by voice vote in 2017, objections unrelated to the bill have thwarted long-term enactment. PRIA is supported by a diverse and unique coalition, including the NGO community, as this necessary and important program funds, in part, EPA's pesticide registration and review programs.

Reauthorization of PRIA is vital to allow agricultural producers and growers to have access to the safest and most efficient crop protection tools, without compromising public safety. The pesticide industry will contribute over \$40 million in registration and maintenance fees which will supplement federal appropriations. Therefore, more resources will be available for streamlining a more effective and efficient pesticide evaluation process. Further, this will help fund worker protection training activities at the EPA.

NCFC and GROWMARK were pleased to also see this measure included in the farm bill passed by the House Agriculture Committee.

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FIFRA & Clean Water Act (CWA)

The registration and re-registration of pesticide products under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) is founded on robust science, ensuring that products in the marketplace can be used while offering the desired protections for human health and the environment. The FIFRA label is the law: users who do not follow the label are in violation of federal law.

The National Pollutant Discharge Elimination Permit (NPDES) is in fact a permit to discharge. In the case of pesticides, this a permit to discharge a substance that is already evaluated by EPA for impacts to water quality. No other permitted discharge is regulated twice by EPA, and this regulation is clearly duplicative and burdensome. Congressional action to clarify the language regarding the NPDES permitting is essential to reducing overbearing regulatory measures. These changes should explain that a second permit for discharge of a substance already approved under FIFRA is unnecessary and excessive.

EPA's own analysis demonstrates that the NPDES permits program for pesticides is the single greatest expansion of the program in its history, covering over five and half million pesticides applications per year by at least 365,000 applicators. Those stakeholders directly affected include state agencies, city and county municipalities, mosquito control districts, water districts, pesticide applicators, farmers, ranchers, forest managers, scientists and many others.

EPA's pesticide permit aims to cover applications of pesticides registered for aquatic use and applied to water or forest canopies into or over flowing or seasonal waters, and conveyances to those waters. It was the numerous activist lawsuits against both agricultural and non-ag users of aquatic and terrestrial pesticides that led to Congress seeking to clarify the intention of Clean Water Act. The very same groups who oppose a legislative solution make no secret of their intention to continue their citizen suits until all pesticide applications are permitted. In fact, activist just recently filed notice of intent to sue a local agricultural district in Hawaii. This establishes an uncertain liability for farmers and ranchers, as well as users applying pesticides to public utility rights of way, private homes and businesses.

NCFC and GROWMARK applaud inclusion in the House farm bill clarifying this issue and aiming to end a duplicative regulatory burden.

Although the issues I raise today are vastly different, they are all critically important and impactful to the future of small agricultural businesses and are worthy of your attention. Especially at a time when farmers across the country face burdensome regulations inhibiting growth and production, we must identify ways for our agriculture sector to prosper.

Thank you again for the opportunity to testify today, and I look forward to your questions.

Craig N. Martins

163 Franklin Rd.
Luana, Ia 52156

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Mobile: 847-922-1908

Objective:

Sales and operational professional with comprehensive experience in all phases of strategic business management and distribution channel development desiring to continue leadership career in agriculture.

Accomplishments:

- Led the creation and modernization of departments, reorganized workflows and established motivated teams.
- Implemented a global dealer network risk assessment used to develop a sales, service and distribution strategy to bench-mark current dealer network position and plan for future distribution channels.
- Built the infrastructure within manufacturing, customer service and technical support to ensure a successful North American launch of the MIOne robotic milking system and other strategic product launches.
- Merged acquired businesses, developed easy to manage business models, implemented a culture of accountability and successfully managed to conclusion numerous projects.
- Effectively managed multi-million dollar budgets, implemented new ERP systems, and completed system conversions.
- Directed operational performance improvements each year and decreased operational costs while continually striving to improve customer satisfaction.
- Led multi-product line manufacturing locations, site consolidations and manufacturing line renovations during both rapid expansion and during business decline.
- Effectively communicates within all levels of a multicultural, global, matrix drive organization.
- Developed logistic concept to raise order fulfillment from 40% to a maintained 80% + level of fulfillment.
- Developed and implemented metrics for inventory management, order fulfillment and operational management of company owned dealerships.
- Achieved 25% of annual GEA North American equipment sales and new parlor installations in assigned sales territory.

Work History & Experience:

Three Rivers FS	Dyersville, IA	September 2015 to Current
<i>Operations Manager</i>		
<ul style="list-style-type: none"> ▪ Responsible for developing and leading the modernization of sales, operations and service teams within the Three Rivers FS system. ▪ Initial focus is to evaluate the personnel and operational processes to bring the sales and distribution locations back to profitability within the agronomy, energy, feed and service business units. ▪ Concentrated on rebuilding the customer base trust and gaining market share within assigned sales territory. 		
GEA Farm Technologies	Bönen, Germany & Naperville, IL	May 1997 to September 2015
<i>Director – Global Business Development</i>		June 2013 to December 2015
<ul style="list-style-type: none"> ▪ Responsible for building global department to capitalize new business opportunities in both mature and emerging markets and to create a strong connection with our key accounts. ▪ Led the initiatives to streamline the GEA Farm Technologies large project design, sales and installation in coordination of other business segments of GEA. ▪ Converged global dealer development departments and lead in the creation of a common strategy to assess the current status of dealership network and to drive the direction of the future dealership footprint globally. ▪ Concentrated sales efforts in emerging markets of Eastern Europe, South America and the Pacific Rim to penetrate markets through customer direct or dealer driven sales. ▪ Directed the global sales release of the Dairy ProQ robotic rotary product line. 		

Craig N. Martins

Vice President – North American Operations

December 2010 to June 2013

2

- Responsible for 260 employees with 12 direct reports within the manufacturing, purchasing, customer service, technical support, training, IT & logistics for the NA subsidiary.
- Managed operations for 11 locations in NA Subsidiary with a sales turnover of approximately \$235 million.
- Focused on growing GEA FT Inc. market share, improve operations efficiencies, continue consolidation of acquired businesses and develop new distribution channels locally and globally.
- Responsible for the creation & maintenance of GEA FT Inc. capital expenditure budgets and to coordinate globally.
- Developed a format to include sales in weekly discussions to quickly address changing market requirements.

Vice President of Supply Chain – North America

August 2009 to December 2010

- Responsible for a department consisting of 240 employees with 8 direct reports leading the manufacturing, purchasing, customer service, IT & logistics departments in the NA subsidiary.
- Led teams to develop and organize internal information to configure and release online ordering systems.
- Focused on integrating separate locations under one management structure and operational metrics program.
- Managed the procurement, maintenance and resale of 200+ vehicles in the North American Fleet.

Director of Product Management – Americas

June 2008 to August 2009

- Responsible for 8 employees managing the capital equipment, hygiene, supplies and service product lines.
- Led the initiative to consolidate product lines and implement product life-cycle management process.
- Focused on building brand loyalty and awareness through industry relationships and business contacts, and building dealership value and loyalty through quality products and support.

Customer Accounts Manager – North America

February 2007 to June 2008

- Responsible for team of 14 employees comprising the customer service, project management, international order management and project quotations teams.
- Focused on consolidation of the separate US and Canadian customer service groups and providing the training and procedures to improve our customer satisfaction.

Supplier Relations and Procurement Manager

January 2001 to February 2007

- Focused on the purchasing and negotiation of contracts for the equipment and supplies product lines in NA.
- Consolidated suppliers and contracts both locally and globally within the GEA Farm Technologies organization.

Territory Sales Manager

October 2000 to December 2001

- Developed and implemented sales, marketing, on-site technical support and training strategies towards target markets in the Western US with a focus on Nevada, California and Arizona.
- Led the consolidation of the Westfalia and Surge Western US dealerships through the company acquisition.

Technical & Installation Support Specialist

May 1997 to October 2000

- Focused on the release and technical support of the Autorotor milking parlor line product offering.

Fairchild Feed & Supply**Winthrop, IA****August 1994 to May 1997***Agronomy and Animal Nutrition Sales*

- Focused on crop planning, annual soil testing, sales and application of agronomy related products.
- Worked to obtain and manage customer animal nutrition accounts using the Carl S. Akey line of nutritional products.

Education:

Iowa State University, Ames, Iowa, May 1994

Bachelor of Science – Dairy Science, Minor - Agronomy

Harper College, Palatine, Illinois, April 1998

AutoCAD Basic and Intermediate Design



**Written Testimony of the
National Pork Producers Council**

**On
The Effects of Regulations on
Small Businesses**

**Before the
House Committee on Small Business
Subcommittee on Agriculture, Energy,
and Trade**

June 21, 2018

NPPC Oral Testimony of John Weber on Effects of Regulations on Small Businesses, House Committee on
Small Business Subcommittee on Agriculture, Energy, and Trade
June 21, 2018

Introduction

The National Pork Producers Council (NPPC) is an association of 42 state pork producer organizations that serves as the global voice for the U.S. pork industry. NPPC represents the interests of America's 60,000 pork producers, the vast majority of whom would be classified as small businesses.

The U.S. pork industry represents a significant value-added activity in the agricultural economy and the overall U.S. economy. In 2017, pork producers marketed about 120.5 million hogs, and those animals provided total cash receipts of more than \$20 billion. Overall, an estimated \$23 billion of personal income and \$39 billion of gross national product are supported by the U.S. pork industry.

Exports of pork add significantly to the bottom line of each pork producer. U.S. exports of pork and pork products in 2017 totaled 5.4 billion pounds – a record – valued at nearly \$6.5 billion. That represented almost 27 percent of U.S. production, and those exports added more than \$53 to the value of each hog marketed. (The average price received for a market hog in 2017 was \$147.) Exports support approximately 110,000 jobs in the U.S. pork and allied industries.

Iowa State University economists Daniel Otto, Lee Schulz and Mark Imerman estimate that the U.S. pork industry is directly responsible for the creation of more than 37,000 full-time equivalent pork producing jobs and generates about 128,000 jobs in the rest of agriculture. It is responsible for approximately 102,000 jobs in the manufacturing sector, mostly in the packing industry, and 65,000 jobs in professional services such as veterinarians, real estate agents and bankers. All told, the U.S. pork industry supports more than half a million mostly rural jobs in the United States.

U.S. pork producers today provide 25 billion pounds of safe, wholesome and nutritious meat protein to consumers worldwide.

Cost of Federal Regulations

Federal regulations cost the American economy more than \$2 trillion annually in direct costs, lost productivity and higher prices, according to a 2014 study conducted by Lafayette College economists Mark and Nicole Crain for the National Association of Manufacturers. That's a cost to employers of about \$10,000 per employee per year, and for small businesses, the cost per worker is nearly \$18,000 annually. [<http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>]

From 2009 through 2016, more than 21,000 new rules were imposed on business and agriculture at a cost of about \$110 billion, according to data from the Government Accountability Office.

America's farmers and ranchers, currently facing a decline in incomes, a growing labor shortage, market volatility caused by trade disputes and the vagaries of Mother Nature, can only be disheartened by also having to contend with the red tape and unfunded mandates spewing forth from bureaucrats in Washington.

(Chinese and Mexican tariffs on U.S. pork are causing significant harm to hog farmers. Iowa State University economists estimate losses for 2018 at more than \$2 billion, all attributable to the retaliatory duties on U.S. pork exports. See the attachment.)

Indeed, regulations consistently are cited by farmers as the No. 1 burden on their productivity; they must expend additional resources to hire professionals to ensure compliance, or must spend their own valuable time deciphering the regulatory maze, which carries its own opportunity costs. [<http://www.nsba.biz/wp-content/uploads/2017/01/Regulatory-Survey-2017.pdf>]

In addition to added costs and lost time, the ever-changing regulatory landscape creates uncertainty for farmers, hindering innovation while making it difficult to formulate investment plans or estimate next year's returns. (The Trump administration has made a tremendous effort to address the regulatory burden. The Office of Management and Budget's December 2017 "Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions"

showed that 635 regulations had been withdrawn, 244 were made inactive and 700 were delayed.)

Over the past 10 years, however, the U.S. pork industry – and many other sectors of American agriculture – have had to deal with significant federal regulations related to the buying and selling of livestock, labeling meat, trucking, air emissions, clean water, antibiotics use and organic livestock production.

Farmers aren't opposed to regulations, as such, but rules – whether federal, state or local – should be based on sound science and/or analyses, be practical to implement and cost effective and address actual problems that need solutions. Additionally, before being promulgated, regulations should be subject to cost-benefit analyses, and rules whose costs far outweigh their benefits should be scrapped.

Major Rules Affecting Pork Producers

The Bad

1. GIPSA Rule

Pork producers have had to struggle with several major regulations since 2010. Perhaps the biggest and potentially most costly was the so-called GIPSA Rule, a regulation written by the U.S. Department of Agriculture's Grain Inspection, Packers and Stockyards Administration.

Issued almost eight years ago to the day, the GIPSA Rule would have dictated the terms of private contracts between the sellers and buyers of livestock and poultry, restricted marketing arrangements, required reams of paperwork and made certain industry practices *per se* violations of the Packers and Stockyards Act (PSA).

An economic analysis conducted in 2010 and updated in 2016 by Informa Economics found that today the regulation would cost the U.S. pork industry more than \$420 million annually, or more than \$4 per hog.

Livestock industry analysts said the rule would have stifled industry innovation, forced simple contract disputes into federal court and compelled meat packers to own animals rather than contract with farmers to raise them to avoid any PSA legal exposure.

With fewer contracts available, livestock farmers likely would have been forced to rely on the “cash” market, where prices tend to be lower and risks greater. Many farmers would have been hard-pressed to survive in that market, and others may not have been able to get from bankers – who are very risk averse – the capital needed to operate. As producers went out of business, concentration and vertical integration in meat processing would have increased.

But it wasn’t just the potential costs, complexities and consequences of the regulation that perplexed pork producers and other food-animal farmers. It was how the rule was written that was most disturbing.

GIPSA lacked authority or exceeded it in writing certain provisions of the regulation, it failed to support the need for the rule with evidence of problems in the pork industry, and it didn’t consider its own studies showing that restricting contracts could harm the livestock industry.

The provision of the rule that declared no showing of injury to competition would be necessary to establish a violation of the PSA, for example, was in direct contradiction to the rulings from eight of the 13 circuits of the U.S. Court of Appeals. It also was something Congress considered and rejected during its debate on the 2008 Farm Bill, the vehicle that directed USDA to write regulations related to the PSA.

The regulation also was offered with no meaningful analysis of its impact on the livestock industry, and no economic analysis was done.

Despite the significant flaws in the GIPSA Rule and 16,000 comments in opposition to it just from pork producers, it took more than seven years to kill it. (The Trump administration in mid-October 2017 announced it would withdraw the last proposed remnants of the 2010 regulation. But it’s not dead yet. Congress should fix the problem once and for all.)

In the rule-making process, there often seems to be a disconnect between the federal bureaucracy and the “regulated community.”

2. WOTUS Rule

The Obama-era Waters of the United States (WOTUS) Rule is illustrative. The regulation, proposed in April 2014 and effective in late August 2015, sought to clarify the authority under the Clean Water Act (CWA) of the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers over various waters.

Their jurisdiction – based on several U.S. Supreme Court decisions – had included “navigable” waters and waters with a significant hydrologic connection to navigable waters.

But the WOTUS Rule broadened that to include, among other water bodies, grass waterways, upstream waters and intermittent and ephemeral streams (also known as ditches) such as the kind farmers use for drainage and irrigation. It also covered lands adjacent to such waters.

That expanded jurisdiction would have had a significant negative impact on many agricultural practices. That’s because under the CWA there is an absolute prohibition on discharging any “pollutant,” which would include manure, chemical pesticide, fertilizer and even a seed of corn, into a WOTUS without a federal permit.

Bureaucrats wrote a regulation that would have subjected farmers to criminal penalties and civil fines of up to \$38,500 a day for planting crops without a CWA discharge permit. What’s more, they gave private citizens and activist groups the power to enforce the rule!

(The WOTUS Rule is tied up in several courts cases. It is enjoined in 24 states, while its status is unclear in the other 26. Meanwhile, the administration is in the process of rescinding the regulation and proposing a new rule to protect the nation’s waterways, with input from stakeholders, including farmers.)

3. Organic Livestock Rule

While it was not a “major” regulation for pork producers, the Organic Livestock and Poultry Practices Rule is another good example of a flawed rule-making process and of an unnecessary, unscientific mandate from Washington.

Issued by the Obama administration at the very end of its term, the regulation would have added animal welfare standards to the nation’s organic food production law. That 1990 USDA statute limits consideration of livestock as organic to feeding and medication practices.

The proposed regulation would have dictated how organic producers raised and cared for livestock and poultry, including during transport and slaughter. It would have specified, without scientific justification, which common practices were allowed and prohibited in organic livestock and poultry production. The rule also would have established unreasonable indoor and outdoor space requirements for animals. In short, the regulation would have eliminated producers’ discretion to make sound decisions about animal care.

NPPC wrote to USDA in its comments in opposition to the regulation that the rule’s welfare standards were not based on science and were outside the scope of the 1990 organic food production law. The new standards would have presented serious challenges to livestock producers and added complexity to the organic certification process, creating significant barriers to existing and new organic producers. (In its own analysis of the regulation, USDA said 90 percent of the existing organic egg farmers wouldn’t have met the new standards.) The organization also noted that the standards seemed to be based on public perception – or USDA’s understanding of that perception – of “good animal welfare” and did not reflect a consensus by experts in animal welfare and handling.

“The inclusion of animal welfare requirements into the organic food production law is no different than requiring that all farmers wear bib overalls or paint their barns red in deference to public sentiment,” wrote NPPC.

Some of the standards could have jeopardized animal and public health. The provision on outdoor access, for example, was in conflict with pork industry best management practices to prevent swine diseases that pose threats to animal and human health.

4. Hours of Service Rule

Another regulation on which the regulators seemed to take a one-size-fits-all approach is the Department of Transportation (DOT) Hours of Service Rule for commercial truckers, engaged in interstate commerce.

The rule limits such truckers to 11 hours of driving time and 14 consecutive hours of on-duty time in any 24-hour period. Once drivers reach that limit, they must pull over, go “off duty” and wait 10 hours before driving again.

But drivers transporting livestock and poultry can’t just pull over and leave their animals unattended to suffer or die in the 100-degree heat of Iowa, or the minus-20 degree cold of Minnesota.

NPPC has been working closely with DOT to add flexibility to the Hours of Service Rule and is supporting legislation sponsored by Sens. Hoeven and Bennet that would set up a DOT working group, which would include farmers and the truckers who haul livestock, to develop a regulation that protects highway safety while allowing livestock haulers to transport animals in a safe and humane way.

Of course, not all regulation is bad.

The Good

1. New Swine Slaughter Inspection System Rule

NPPC is urging USDA, for example, to finalize a regulation that would give packing plants greater responsibility for hog carcass inspections, while the agency’s Food Safety and Inspection

Service (FSIS) employees would ensure the effectiveness of those activities and focus on other food-safety verification tasks.

The New Swine Slaughter Inspection System (NSIS) Rule is an expansion of and improvement on the current HACCP-based Inspection Models Project (HIMP) pilot program currently in five pork establishments. HIMP has helped enhance food safety and humane animal handling and allowed for better utilization of FSIS and industry resources.

2. Alternative Proteins

NPPC also is asking USDA to regulate so-called laboratory proteins: plant- and chemical-based products that are manufactured in scientific laboratories and labeled and marketed as “meat.”

Manufacturers of plant-based products are trying to blur the distinction between their products and conventionally produced meat and poultry. Packages often have pictures of animals on them, or use words such as “beefy” in large type (much larger than any indication that the product is plant-based). Companies making the products are trying to occupy the best of both worlds, making broad claims about sustainability and taking issue with animal agriculture’s production practices while trying to mimic meat on grocery shelves.

Proponents of chemical-based products, which right now are not commercially viable, often refer to them as “clean meat,” which obviously is meant to disparage traditionally produced meat products and cause even further confusion for investors and consumers. For farmers, this is neither acceptable, nor true.

3. Agricultural Visas

The pork industry also is supporting federal legislation and its accompanying regulations to establish a non-seasonal agricultural guest worker visa to address a severe farm labor shortage. (The unemployment rate in the top pork-producing Congressional Districts averages 2.8 percent; the national average is about 3.8 percent.)

Additionally, NPPC is urging the Department of Labor to eliminate some of the red tape for hiring foreign-born workers under existing visa programs, including the non-immigrant NAFTA Professional, or TN visa. The program allows citizens of Canada and Mexico, as NAFTA professionals, to work in the United States in prearranged business activities for U.S. or foreign employers.

What Can Congress Do About Federal Red Tape?

NPPC supports reducing the regulatory burden on U.S. pork producers and American agriculture by increasing accountability and transparency in the federal regulatory process, broadening the scope of required economic analyses, requiring agencies to work with key stakeholders throughout the rulemaking process and strengthening congressional oversight.

Congress can take a number of steps to ease the federal (and state) regulatory burden:

- **Accountability:** The Administrative Procedures Act (APA), which governs how federal agencies may promulgate regulations, has not been updated in a significant way in 70 years.

NPPC supports legislation, such as the “Regulatory Accountability Act,” that would require agencies to consider cost-effective alternatives, use the best reasonably available science and periodically review whether existing regulations are meeting their original objectives. Additionally, NPPC supports legislation prohibiting federal agencies from using funds to advocate for comments on a proposed regulation.

- **Transparency:** Increasingly, key stakeholders are shut out of the regulatory process and often are given only 30 or 60 days to comment on regulations that an agency has spent years developing.

NPPC supports legislation, such as the “Regulatory Accountability Act,” that would increase public participation in developing regulations.

- Congressional Oversight: Currently, Congress only may disapprove a regulation by passing a resolution pursuant to the Congressional Review Act (CRA).

NPPC supports legislation, such as the “Regulations from the Executive in Need of Scrutiny (REINS) Act,” that would require congressional approval for all new major regulations – those with an economic impact of \$100 million or more – allowing for the people’s voice to be heard and restoring balance between the executive and legislative branches.

Role of Congress on State Regulations

While they aren’t federal rules, Congress still can have a role in some state regulations.

Two cases on point are the California and Massachusetts laws dictating certain food-animal production practices and – more importantly – banning the sale in the state of out-of-state products that don’t meet their respective state dictates.

The California Legislature in 2010 banned the sale in the state of out-of-state eggs from hens housed in so-called battery cages. The law was adopted as an adjunct to a voter-approved 2008 ballot initiative that banned the hen housing as well as sow gestation stalls and crates for veal calves. California lawmakers wanted to protect the economic interests of their state egg producers by making out-of-state producers comply with the housing ban – just like in-state producers – if they wanted to sell product in California. (The state’s voters this November will decide whether to extend the out-of-state sales prohibition to pork and veal.)

In 2016, Massachusetts voters approved Question 3, which banned sow gestation stalls, battery cages and veal crates *and* the sale in the state of pork, eggs and veal produced anywhere in the country from animals kept in the prohibited housing.

That means pork from pigs born to sows housed in gestation stalls on farms in Iowa, for example, will be prohibited from being sold in Massachusetts, beginning Jan. 1, 2022.

Consumers in California already have seen higher prices for eggs.

A January 2016 study conducted by Cornell University economist Harry Kaiser found that California's ban on battery cages and on selling eggs from out-of-state hens housed in such cages resulted in a 49-cent per dozen increase in egg prices. Based on average per capita egg consumption in the United States of 21½ dozen a year, California consumers are spending almost \$14 per person more on eggs or \$70 per year for a household of five because of the ban. While that price increase may not be severe for an average California household, the same can't be said for the poorest households in the state, Kaiser pointed out.

Using the same economic model, Kaiser estimated that Massachusetts' ban would cost the state's consumers \$249 million in higher food prices – \$95 million in higher egg prices and \$154 million in higher pork prices – in just the first year after implementation.

Farmers outside of those states also have been or will be negatively affected by the sales bans. Pork producers in the Midwest who want to continue selling pork in Massachusetts would see an increase in transaction costs. Hog finisher, for example, would need to ensure that weaned pigs are from sows not housed in gestation stalls.

If more states are allowed to regulate agricultural activities outside their borders, such mandates – rather than the free market – could force farmers around the country to abandon their scientifically accepted production practices. That, too, would come with a significant cost to farmers and consumers.

Brian Buhr, professor in applied economics at the University of Minnesota, in a May 2010 study estimated a cost to the pork industry of between almost \$1.9 billion and more than \$3.2 billion to transition to group housing from sow gestation stalls, which currently are used by more than 80 percent of pork producers.

Those conversion costs would raise the price of pork, which in turn would start a cycle of consumers demanding less pork followed by higher prices. Buhr estimated a cost to consumers

of \$5 billion. Undoubtedly, some pork producers would go out of business, thus further reducing the production (supply) of pork and prompting another rise in consumer prices.

(Animal-rights groups not only know this, they count on it to have “market” forces do their dirty work of significantly reducing meat consumption.)

While the states have every right to regulate business and agriculture within their respective borders, they cannot dictate to entities outside of them, and they cannot restrain interstate trade.

Prohibitions on the sale of out-of-state pork from pigs born to sows housed in gestation stalls clearly is a restraint of interstate commerce and, therefore, a violation of the U.S. Constitution’s Article I., Section 8, Clause 3 – the Commerce Clause.

The Constitution grants Congress plenary power over interstate commerce, with the Commerce Clause operating as a check on the legislative powers of the states to regulate the economy.

NPPC supports legislation to help reign in states’ restraint of interstate commerce – even if unintended – and prevent a patchwork of state laws and regulations affecting the scientifically accepted production practices of livestock farmers.

Conclusion

One of NPPC’s missions for hog farmers is to ensure that federal regulations are reasonable. As previously stated, that means they should be based on sound science and/or analyses – including cost-benefit analyses – be practical to implement and cost effective and address actual problems that need solutions. (As economist Milton Friedman said: “One of the great mistakes is to judge policies and programs by their intentions rather than their results.”)

This Congress and the Trump administration have done a good job of starting to reign in the federal Leviathan, with the White House rescinding several burdensome rules and directing

agencies to eliminate two existing regulations for each new one proposed and with Congress providing more oversight of the regulators.

But more needs to be done.

Certainly, there must be rules, but eliminating expensive, confusing and time-consuming federal regulations and making sure the necessary ones aren't too burdensome will go a long way to ensuring that small business people and farmers – America's economic engine – can continue to be the world's best at what they do.



Statement of the American Farm Bureau Federation

**TO THE UNITED STATES HOUSE
COMMITTEE ON SMALL BUSINESS
SUBCOMMITTEE ON AGRICULTURE, ENERGY AND TRADE**

**Accelerating Agriculture: How Federal Regulations Impact America's Small
Farmers"**

June 21, 2018

Presented By:

**Glenn Brunkow
Co-owner, Brush Creek Cattle Company**

Chairman Blum, Ranking Member Schneider, and members of the Subcommittee, my name is Glenn Brunkow. I am co-owner of Brush Creek Cattle Company in Wamego, KS. Our farm is located in Northeast Kansas, an area known as the Flint Hills. I am a fifth-generation farmer/rancher with my father, wife and kids. The land we farm today is the piece of ground my family homesteaded in the 1860s, where we grow corn and soybeans and raise cattle and sheep.

I am grateful for the opportunity to provide testimony to the subcommittee on federal regulations and their impact on America's small farmers. I am especially pleased to present the perspective of the American Farm Bureau Federation, which is the nation's largest general farm organization. One of the strategic priorities set by the American Farm Bureau Board is regulatory reform. That includes not only specific rules such as the 'waters of the U.S.' (WOTUS) rule, but also the rulemaking process itself. It is critical for policymakers to gain an 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.

Right now, as you may be aware, every penny counts in agriculture. Farm income is at the lowest level in more than a decade and, since 2013, has fallen by more than 50 percent or \$64 billion. In many cases, the prices that farmers receive for their crops or livestock continue to be as much as 50 percent lower than a few short years ago. In tough economic times like this, farmers feel the impact of regulations even more because money dedicated to compliance – especially when it is of doubtful value – is money that cannot be reinvested in the farm or put in the bank to cushion against hard times. So today's hearing is timely and welcome. The subcommittee could not have chosen a more appropriate topic.

As an overview, I think it is important to underscore an overlooked fact: farmers and ranchers today are highly regulated and face an increasing array of regulatory demands and requirements that appear to be unprecedented in scope. Because of the impact of regulations, Farm Bureau has been deeply engaged in a wide range of regulatory reform efforts. I would like to provide an overview of these to the subcommittee. To start, I would like to give you some specific regulatory compliance issues that are at the top of our agenda; we are hoping to gain some relief from some of these provisions in the farm bill. Others relate to ongoing topics that we are working to correct.

Kansas

In my home state of Kansas, the Flint Hills region is home to the world's largest undisturbed tall grass prairie ecosystem in the world, a unique area that spans roughly 50 miles east to west and runs from just south of the Nebraska border through more than 14 Kansas counties and into three counties in Oklahoma. Long before western settlement and the invention of barbed wire, bison

roamed this vast expanse and both lightning strikes and Native American tribes set fire to the prairie each year. These annual fires rejuvenated the tallgrass prairie plants and kept at bay common species found just to the east of this ecosystem – herbaceous shrubs, deciduous and conifer trees. Today, 99 percent of the Flint Hills region is privately owned grasslands used to graze cattle, horses and other livestock. Landowners and tenants routinely organize and partner together to utilize prescribed and managed fire in order to maintain prairie grasses and forbs and keep invasive shrubs and trees at a minimum, and reduce the fuel load and associated risk of wildfire. In less than ten years, without regular fire, land in the Flint Hills can be overrun with Eastern Red Cedar trees and other non-productive plant species. It is most common to experience prescribed wildlands fires in the early spring months of March, April and May. In order to get an effective fire a gentle breeze is a must; and, when dealing with topography and real estate improvements in many areas the wind has to be blowing in certain directions in order to burn specific pastures. However, depending on the direction of the wind, it has been known to carry haze, ozone and PM2.5 associated with burning to urban communities such as Kansas City, Wichita, Omaha, and Oklahoma City. In fact, within the past decade prescribed fire in the Flint Hills has caused National Ambient Air Quality Standards (NAAQS) monitoring stations to record an exceedance of either ozone or PM2.5 on more than one day. In an attempt to be a good partner with the regulated communities in larger metropolitan regions as well as public health officials, the State of Kansas and agricultural producers created a Smoke Management Plan in 2010

(http://www.ksfire.org/docs/about/Flint_Hills_SMP_v10FINAL.pdfhttp://www.ksfire.org/docs/about/Flint_Hills_SMP_v10FINAL.pdf). Since then groups like Kansas Farm Bureau (KFB) and Kansas Livestock Association (KLA) have encouraged ranchers and prescribed fire councils to look at www.ksfire.org prior to striking a match to see what impact their burning will have downwind.

However, even with the 2010 Smoke Management Plan, it is becoming more difficult every year to find windows of opportunity throughout the year to successfully burn large acres of grasslands for fear of knocking an air monitoring station out of compliance with the ever-tightening air quality requirements. KFB and other groups have actively lobbied Kansas' congressional delegation and the Environmental Protection Agency (EPA) to create a regulatory mechanism to continue to allow for annual prescribed wildlands fire to not count toward non-attainment exceedances at monitoring stations. We are hopeful this can be addressed once and for all so that landowners will have certainty knowing they can use a tool that Mother Nature and Native Americans knew for centuries was the only way to maintain the natural ecosystem and keep invasive shrubs and trees from taking over the Flint Hills region. Without the use of prescribed fire, invasive trees such as the Eastern Red Cedar will overtake the landscape and eventually an accidental fire will create a situation like we have seen in the intermountain west and areas of the southern High Plains where out of control infernos cause loss of life and property.

Swampbuster

Swampbuster today is a regulatory program in which USDA sits as judge and jury. Many of today's compliance problems arise when farmers undertake basic everyday farming activities such as removing or cleaning up fence rows, squaring off or modifying a field footprint, improving or repairing drainage, cleaning out drainage ditches, or removing trees in or adjacent to farm fields.

To provide the subcommittee background, in 1985 Congress included in the farm bill a provision that was intended to discourage the conversion of wetlands to non-wetland areas. The provision, dubbed Swampbuster, provided that any farmer who produced an agricultural commodity on a converted wetland would be ineligible for farm program benefits in that crop year. The idea was to freeze conversions at the point in time that the legislation became law (December 23, 1985). In other words, if the land (wetland) had been converted to agricultural use prior to the magical date of December 23, 1985, the land was deemed by Congress to be Prior Converted Cropland (PCC for short).

In 1990, Congress set out three criteria to determine what constitutes a wetland and provided that when any one of the three wetland criteria is absent, the land is "nonwetland" and any action on such land is exempt from the ineligibility provisions of the statute. That language remains in effect today. In 1996, in the last substantive farm bill change to Swampbuster to date, Congress strengthened the PCC provision by deeming that farmland converted prior to 1985 could never lose converted status.

Unfortunately, although Congress clearly wanted to ensure that PCC, once converted, would remain in that status, farmers are having to fight the federal government repeatedly to assert their rights. That means getting USDA to recognize and accept the mandatory Minimal Effect Exemption. It also means getting the word out to young farmers and ranchers, who may not realize their land is PCC, or that they have rights. And perhaps most importantly, it is trying to fix an appeals process that is heavily weighted in favor of the government and against farmers.

Waters of the United States (WOTUS)

Probably no single regulation of the federal government affecting farmers has gotten more attention than the 2015 WOTUS rule. That is true for a simple reason: if allowed to go into effect, this regulation would create tremendous difficulties for farmers and ranchers. There is no doubt that the final rule poses tremendous risks 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 definitions 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 commonsense definition that protects clean water but provides clear, understandable rules. As AFBF President Zippy Duvall says, a farmer should be able to walk out into his field and, without having to hire lawyers and engineers, point to one area and say it’s WOTUS and point to another area and say it is not WOTUS. That clarity does not exist today.

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 issued 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 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.

The House of Representatives has taken a strong stand on this issue, voting several times to correct this over-regulation, and we thank the members of the subcommittee for their support. A provision to remedy this problem is included in the House farm bill that is awaiting final passage. We hope that legislation will clear the final hurdle soon and we hope all House members will work to protect this provision when the measure is sent to conference with the Senate.

H-2A reforms

As many of you know, the shortage of workers to assist in agricultural production is reaching crisis proportions. Part of that problem is due to problems with the nation's immigration law, and that is exacerbated by the current H-2A program. The H-2A program is bureaucratic, expensive, and time-consuming for farmers and ranchers. To make it worse, farmers are never guaranteed that they will actually get their workers on their date of need – and some sectors of agriculture, such as dairy, are ineligible to participate at all because the program is restricted to temporary and seasonal work.

The Administration recently announced that they would be proposing reforms to the H-2A program, and that is a welcome development. Anything we can do to clear away the regulatory underbrush will help farmers.

But in a broader context, we need a new, revitalized program—one that is open to all of agriculture and does not impose unnecessary recruitment costs on growers. We need a program that protects workers but does not stifle agricultural production through above-market wages, bureaucratic delays and suffocating requirements.

That means Congress needs to pass legislation to update and reform agriculture's guest worker program. The AG Act, which was reported from the House Judiciary Committee last year, contains many positive elements that align with AFBF policy. AFBF has not endorsed the legislation because there remain important matters that we want to see addressed. However, the legislation provides a solid foundation on which to build and we will continue to work with members on both sides of the aisle to make the legislation even stronger in meeting producers' needs.

EPA Review of Costs and Benefits

I would like to bring to the subcommittee's attention an important initiative EPA has just announced that merits your support.

One June 13, EPA published in the Federal Register an Advanced Notice of Proposed Rulemaking in which the agency announced it was seeking to promote greater transparency in how it determines costs and benefits in rulemakings. This is a very welcome initiative. As the agency itself noted:

In this advance notice of proposed rulemaking (ANPRM), EPA is soliciting comment on whether and how EPA should promulgate regulations that provide a consistent and transparent interpretation relating to the consideration of weighing costs and benefits in making regulatory decisions in a manner consistent with applicable authorizing statutes. EPA is also soliciting comment on whether and how these regulations, if promulgated,

could also prescribe specific analytic approaches to quantifying the costs and benefits of EPA regulations.

AFBF commends the agency for this ANPR. We have had significant concerns in the past as to how the agency evaluates costs and benefits. To cite just one example, in the agency's update of the worker protection standards rule, the agency – more than a dozen times – claimed that it could not quantify benefits but at the same time asserted that the benefits outweighed the costs of newly imposed regulatory requirements. These types of unsubstantiated assertions do not help to build trust, support and cooperation with the regulated community. And perhaps more importantly, it actually engenders a certain degree of disrespect for the process. When rulemaking is transparent, open, based on sound science and economics, it gives the regulated community the assurance that they are being treated fairly.

This leads to my next point.

Regulatory Process Reforms

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 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 communication methods such as 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.

I have attached to my testimony a white paper on regulatory reform that was signed by over fifty agricultural organizations. It outlines in great 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

Last year, the House of Representatives passed H.R. 5, which incorporated a number of reforms that Farm Bureau supports. One in particular was debated on the House floor and received bipartisan support. That amendment, offered by Rep. Peterson of Minnesota, would prohibit any federal agency from using social media to “stack the deck” in favor of its own proposal during a rulemaking.

You would think we don’t need a prohibition like that, but that is exactly what EPA did in its WOTUS rulemaking. In fact, the Government Accountability Office found that the agency violated the law in undertaking a Thunderclap campaign to generate comments in support of its proposal. The counterpart to H.R. 5, S. 951, was approved over a year ago by the Senate Committee on Homeland Security and Governmental Affairs. It has unfortunately not been scheduled for debate in the Senate. We regret that, because we think the legislation is worthy of strong support on both sides of the aisle.

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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. 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 another 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 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.

Although 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 on 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 FWS 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. First, it allows 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. Second, it allows for broader designation of unoccupied areas as critical habitat. Finally, it provides 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 provided 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.

Conclusion

Farm Bureau and I appreciate the subcommittee's willingness to listen to farmers' and ranchers' 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 all the members of the committee in pursuing solutions to these important challenges.

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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

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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

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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

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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

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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

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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

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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.

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(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

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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 primary 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.

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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.

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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)

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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."

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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 *Chevron* 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

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- 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

TESTIMONY

Laurie Ristino

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Vermont Law School
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Before the
Committee on Small Business
U.S. House of Representatives

Hearing on
Accelerating Agriculture: How Federal Regulations Impact Small Farmers

June 21, 2018

Mr. Chairman, ranking member Velázquez, and members of the committee, I appreciate the opportunity to testify today before the committee on how regulations to ensure human health and safety can go hand-in-hand with supporting the growth of small farming and food production operations.

I direct the Center for Agriculture and Food Systems at Vermont Law School and am a member scholar at the Center for Progressive Reform. Previously, I served as a senior counsel at the USDA for twenty years. In my current role leading a center for sustainable agriculture, I have had the opportunity to work with and help support small farms and food production in New England and across the country. In fact, one of my key goals as director has been to support small and mid-sized sustainable farming and food production by creating law and policy tools to help those producers thrive.

In my testimony today, I will make the following key points:

1. Regulation of the agriculture sector is essential to safeguard public safety and health.
2. At the same time, in some cases, regulations may be better tailored to small farmers and food producers by taking into account their different production methods and associated risks in a way that ensures health and safety while allowing for local innovation.
3. Producer financial and technical assistance as well as public research dollars that assess production methods and associated risks are needed to help level the playing field for small and mid-sized producers.

Based on these three points, I will conclude that the question is not whether to regulate, but how to do so in a way that protects the public while fostering innovation at different scales of

agricultural and food production. To that end, I offer several practical suggestions for how government can improve regulatory design and outcomes for small farmers and food producers.

Regulations are Essential for Protecting the Public and Creating New Markets

A key area where agriculture is regulated is food safety. Indeed, the federal government's police power has long been used in the area of food safety to protect the health and welfare of our citizens, often preempting state and local laws and creating a one-size fits all regulatory regime.

Although the American food supply is among the safest in the world, the Food and Drug Administration (FDA) estimates there are over 48 million cases of food borne illness a year.¹ Disease causing organisms are found in raw meats, uncooked vegetables, fecal contaminated water, and unpasteurized dairy products.² Those at greatest risk for food borne illness include the elderly, caregivers, pregnant women and cancer patients.³ A 2015 study by the Ohio State University estimates the annual cost of food borne illness at approximately \$55.5 billion.⁴

A recent example showing the scale of modern food borne illness outbreaks given the concentration and consolidated of our food system is the recent E. coli outbreak caused by contaminated romaine lettuce. One hundred and ninety-seven people in 35 states were sickened. The contaminated lettuce was eventually traced to Yuma, Arizona, a major growing region of leafy greens in the United States.⁵

The Food Safety Modernization Act⁶ or FSMA, which was passed in 2011, is the first major overhaul of our food safety regulatory system since 1938. FSMA is designed to address the type of food borne illness exemplified by the romaine lettuce outbreak. In particular, FSMA attempts to prevent food borne illness in the first place by requiring farms and processing facilities to improve record keeping and sanitary practices associated with producing, handling and distributing fresh fruits and vegetables. This new regulatory framework has the effect of allocating much of the cost of food safety to the beginning of the food supply chain.

It is important to note that regulatory regimes can also help develop new markets and increase profit margins for business. This is what has happened with the passage of the Organic Foods Production Act of 1990 and the subsequent establishment of the national organic standards. Compliance with USDA certified organic standards means that producers can affix the USDA certified organic label to their agricultural products and that consumers can trust that those products were produced consistent with federal standards. Importantly, consumers are willing to pay more for organic products like produce⁷. Since the adoption of the organic standards in the

¹ <https://www.fda.gov/food/foodborneillnesscontaminants/foodborneillnessesneedtoknow/default.htm>

² <https://www.fda.gov/food/foodborneillnesscontaminants/foodborneillnessesneedtoknow/default.htm>

³ <https://www.fda.gov/Food/FoodborneIllnessContaminants/PeopleAtRisk/default.htm>

⁴ <http://fortune.com/food-contamination/>

⁵ <https://www.fda.gov/Food/RecallsOutbreaksEmergencies/Outbreaks/ucm604254.htm>

⁶ 21 USC 301 et seq.

⁷ <https://www.ers.usda.gov/amber-waves/2009/march/consumers-willing-to-pay-a-premium-for-organic-produce/>

early 2000s, organics have grown dramatically. In 2017 alone, the organic food market grew 6.7% while the food market as a whole only grew 1.1%.⁸

Supporting Small Farms and Food Producers while Protecting Health and Safety

While federal regulatory regimes create national, uniform standards benefitting public health and safety, they can have unintended consequences for small farmers and food producers, making market entry challenging or too costly. The public's growing interest in local, healthy food and related support of farmers, farmers markets and Community Supported Agriculture is a bright spot in America's agricultural economy. To support the continued growth of small farms and improve the health of rural economies, it is important to assess the impact of regulations in terms of how they support or hinder small food and farm businesses and then tailor policy, where health safeguards may be assured, to this growing sector.

For example, under the Tester-Hagan amendment to FSMA, small farming operations serving only local markets were exempted from FSMA's requirements out of concern regarding the regulatory burden and based upon the argument that small producers do not make large numbers of people sick. However, there has been debate, and an apparent lack of data, regarding the actual magnitude of food borne illness risk associated with small farm produced food.⁹ One survey of farmers and farmers market managers showed many good food safety practices, but room for improvement in production, handling and transportation practices.¹⁰

The Tester-Hagan amendment reflects a larger debate in which local food advocates and producers have questioned the need for across-the-board application of federal health and safety regulations. For example, raw milk food advocates and producers disagree with the FDA's safety concerns regarding disease causing microbes in unpasteurized milk¹¹, and the agency's related requirement that milk is pasteurized when intended for interstate commerce. Lack of USDA inspected slaughterhouses in some areas, also required for interstate commerce under federal law, can be a market impediment for small livestock producers. In response, some producers have advocated custom slaughter or mobile slaughter facilities. Yet, these laws were put into place during the last century to address very serious safety issues in our food supply.

Beyond health and safety regulations, there are on-going debates about the National Organic Program, concerns about the evolution of those standards, and certification costs. A subset of small producers are foregoing certification because of the cost, negative perceptions of federal certification, and bureaucratic requirements of certification, among other reasons.¹²

⁸ <https://www.ota.com/resources/market-analysis>

⁹ <http://www.foodsafetynews.com/2011/11/powerful-coalition-gains-exemption-for-small-farmers/#.WyU1AadKhPY>

¹⁰ <https://www.foodsafetymagazine.com/magazine-archive1/junejuly-2014/food-safety-and-farmers-markets/>

¹¹ <https://www.fda.gov/Food/ResourcesForYou/Consumers/ucm079516.htm>

¹² <https://www.purdue.edu/newsroom/releases/2018/Q2/farmers-drop-organic-labels-over-certification-process,-access-to-markets,-study-says.html>

Policy Strategies to Support Small Farms and Safe Food Production

Fortunately, there are a number of strategies that policymakers can employ to help better align critical federal regulatory regimes to ensure health and safety with supporting the growth and innovation of small farmers and emerging food economies.

1. **Outreach.** In developing legislation and implementing regulations, outreach to small farmers and food producers and subject matter experts is critical to understand the policy needs of these groups and regulatory risks. As was seen with the FSMA roll-out, traditional avenues, such as notice and comment, may not be sufficient to engage these stakeholders in the policymaking process. Effective engagement of stakeholders is the cornerstone of informed policy approaches, which, in turn, have a greater chance of success.
2. **Publicly Funded Food Science Research.** Agri-business and large food producers have the resources to pay for research to support their product lines. Small and mid-sized producers do not. Accordingly, small farmers and producers who need scientific support for the safety of their production processes must largely rely on existing research, to the extent it is available. Accordingly, public research into the safety and efficacy of food and agricultural production methods is critical to help grow sustainable and diversified food markets and ensure public safety.
3. **Financial and Technical Assistance.** Compliance with regulatory regimes is, not surprisingly, more burdensome for smaller producers who have less resources to leverage. Consequently, both financial assistance to help pay for the cost of compliance as well as technical assistance to help with the mechanics of compliance is key. One prime example where such assistance has been needed is FSMA compliance, which, as I discussed earlier, requires a new set of requirements and related costs for agricultural producers in order to prevent food borne illness.
4. **Improved Regulatory Design.** One of the fundamental hurdles for producers posed by regulation is simply access to information. Making information regarding when compliance is triggered and how to comply more accessible and easier to understand reduces the burden of compliance. Further, policymakers can streamline regulatory compliance by creating and adequately funding public resources that connect the dots among different categories of regulatory compliance for different stakeholders. For example, the dynamic potential of digital technology and user friendly applications could be better harnessed by government in designing its online resources in order to reduce compliance barriers.

Thank you, I would be pleased to answer any questions you have.

