

January 22, 2016

The Honorable Michael Conaway
Chair
House Agriculture Committee
1301 Longworth House Office Building
Washington, D.C. 20515

The Honorable Collin Peterson
Ranking Minority Member
House Agriculture Committee
1301 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Conaway and Ranking Member Peterson:

As the second session of the 114th Congress begins its work, we commend you for scheduling an oversight hearing on policies implemented by the Environmental Protection Agency (EPA) that affect U.S. agriculture. The undersigned organizations represent the overwhelming majority of farmers, ranchers and livestock producers in America. Our members are on the front lines in dealing with mandates emanating from EPA. We applaud your readiness to evaluate EPA policies and regulations and their impact on producers, and we look forward to working with you to identify potential remedies to over-regulation by the agency. In addition, we request that this letter be included in the hearing record.

While we, in many instances, have expressed significant concerns with EPA's actions, the agency has demonstrated that, when it wishes, it can take a thoughtful approach that merits support. For instance, last summer the agency published for comment a white paper, "Risk Management Approach to Identifying Options for Protecting the Monarch Butterfly." In that paper, EPA identified two elements of its approach: (1) seeking input from a diverse group of stakeholders; and (2) identifying activities that will balance weed management needs across varied landscapes with conservation of the milkweed plant. That type of balanced approach – seeking broad input from the regulated community and acknowledging upfront that weed management needs would need to be given consideration – is one that merits support.¹ We also wish to commend the agency for the collaborative approach it has adopted in supporting development of state managed pollinator protection plans, an EPA initiative we discuss at greater length below.

Unfortunately, such a balanced approach is too often absent from the agency's policy-making on a myriad of issues. Some of those issues are set out below, but first, we would like to draw the committee's attention to an over-arching concern about the agency's general conduct.

EPA Process

This June will mark the 70th Anniversary of enactment of the Administrative Procedure Act. That statute, designed to protect the rights of the public in Federal rulemaking proceedings, is now seven decades old and was enacted long before many Federal agencies – including EPA – were in existence. It should be updated. We were pleased when the House voted just over a year

¹ We should note that this document, issued to solicit public comment, was merely a proposal. We have not seen the agency's final policy and do not know if EPA will pursue this approach.

ago to pass H.R. 185, the Regulatory Accountability Act, legislation that would make the APA more transparent, provide the regulated community a greater voice in the process, and hold agencies more accountable for major rulemaking and the guidance they issue. We recognize that you both voted in favor of this measure, and we thank you for your leadership on this important legislation.

EPA approach to rulemaking is often, unfortunately, a textbook case of why H.R. 185 and other reforms are necessary. Among policies pursued by the agency where process infringements have particularly affected agriculture, we would note:

- In its ‘waters of the US’ (WOTUS) rulemaking, EPA managed a grassroots campaign designed to promote its own interpretation of the law. The GAO recently issued an opinion to the U.S. Senate stating unequivocally that EPA violated the law. This followed a judgment by the Small Business Administration Office of Advocacy that the EPA had violated its obligations under SBREFA.
- In its broad rulemaking to implement Federally imposed TMDL limits within the Chesapeake Bay watershed, EPA relied on modeling that not only mischaracterized agriculture nutrient run-off, but which vastly overstated agriculture’s impact in the watershed.
- As part of its recent proposal to revoke tolerances for chlorpyrifos, EPA appears to be relying on epidemiological studies that have not been made available – either to the public or even to EPA. While apparently a violation of the EPA’s own standards, such reliance may also be a violation of the Data Quality Act.
- Approximately one year ago, EPA published for comment and reaction a paper from the Biological and Economic Analysis Division which concluded that neonicotinoid seed treatments “provide negligible overall benefits to soybean production in most situations” and that “in most cases there is no difference in soybean yield when soybean seed was treated with neonicotinoids versus not receiving any insect control treatment.” In reality, the EPA paper was little more than an extended literature search that was geographically limited and not at all representative of the benefits of seed treatment. Yet it was widely regarded as an agency determination about the benefits of seed treatment. Further, USDA was not consulted and issued a strong response that contradicted EPA’s conclusions.
- In revising its Worker Protection Standards (WPS) rule, EPA proceeded in several ways that have raised legitimate concerns within the agricultural community:
 - By law, the agency is required to submit to Congress revisions to its FIFRA regulations. The rule promulgated in November, however, differed in at least one substantial aspect from the rule submitted to Congress earlier in the spring.
 - In its WPS rulemaking, the agency relied on old, outdated incidents and reports to justify increased obligations on employers. In a large number of instances, the agency admitted that it could not quantify or calculate benefits from the new provisions yet went on in the rule to claim that benefits would outweigh costs.
 - In the final rule, EPA inserted the Application Exclusion Zone (AEZ), which prohibits entry up to 100 feet surrounding application equipment. The AEZ was not included in the proposed rulemaking as a regulatory revision or an alternative EPA was considering. As a result, EPA effectively precluded state regulatory partners, the regulated community, and all interested stakeholders the opportunity

to provide comment on this significant revision. The process in which EPA adopted this provision in the final rule is equally as concerning as the enforcement and compliance challenges the AEZ presents, which could include preventing pest control applications within 100 feet of a growers property line.

- EPA currently has open for comment a proposal revising its regulation governing certification of pesticide applicators. The comment period on these proposed rule changes (40 CFR Part 171) closes on January 22, 2016. State regulatory agencies, the regulated community, and other agricultural stakeholders have significant concerns with both the process and substance of this proposed rulemaking.

If the Agency promulgates a final rule, without fundamentally and comprehensively changing substantial portions of its proposal, the end result will require the vast majority of state lead agencies to terminate administration of their certification programs, turning this responsibility and these costs back to EPA. Such an outcome would mean decreased training and education of the regulated community, and increased risks to human health and the environment. In short, the proposed rule incentivizes both the state regulatory agencies and the regulated community to respond to implementation and compliance requirements in a manner that is in direct conflict with the Agency's stated objectives for publishing this proposed rulemaking.

In addition to inducing state agencies and the regulated community to take actions contrary to the proposal's stated rationale and objectives, concerns include, but are not limited to: EPA's FIFRA requirements under the Regulatory Flexibility Act², Unfunded Mandates Reform Act³, Executive Orders 13132⁴ & 13563⁵; EPA's Economic Analysis; findings from the Small Business Advocacy Review Panel; EPA's stated Rationale and Objectives; and specific provisions in the proposed rule⁶.

This proposed rulemaking⁷ was included in the Agency's retrospective review plan; however, EPA did not address accompanying requirements under Executive Order 13563⁸. For example, the Agency did not include specific plans or identify specific measures needed to effectively evaluate the stated objectives of the proposed rule as required under the retrospective review for ex post evaluation.

The ex post retrospective review is essential to gauge whether the proposed rule was "designed and written in ways that facilitate evaluation of their consequences and thus promote retrospective analyses and measurement of 'actual results.'"⁹ As required under

² 5 U.S.C. § 601, *et. seq.*

³ 2 U.S.C. § 1501

⁴ Executive Order No. 13132, *Federalism*, 64 FR 43255 (1999)

⁵ Executive Order No. 13563, *Improving Regulation and Regulatory Review*, 76 FR 3821 (2011)

⁶ 80 FR 51356

⁷ 80 FR 51368

⁸ EO No. 13563, *Improving Regulation and Regulatory Review*, 76 FR 3821 (2011)

⁹ United States. Office of Management and Budget. Office of Information and Regulatory Affairs. *MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: Retrospective Analysis of Existing Significant Regulations*. By Cass Sunstein. April 25, 2011.

the Agency's own retrospective review, EPA should identify, articulate, and publish the specific criteria EPA will use to analyze and measure the success of the proposed rule before taking any further action with this rulemaking.

We recommend that the committee closely review the agency's conduct in its rulemaking because the process followed can often affect, if not dictate, an outcome. Below, we outline a number of specific issues that affect agriculture that merit close scrutiny by the committee.

1. Waters of the United States (WOTUS) rule

The final WOTUS rule is even broader than the proposed rule—and creates even more risk and uncertainty for farmers, ranchers and others who depend on their ability to work the land. The definition of “tributary” has been broadened to include landscape features that may not even be visible to the human eye, or that existed historically but are no longer present—and that can be conclusively identified by remote bureaucrats using “desktop tools.” The jurisdictional status of ditches now also hinges on whether they are found, again by remote agency staff, to be “excavated in” such an invisible or non-existent “tributary”—or to be a “relocated tributary” (a ditch that historically diverted the flow of a tributary). The definitions of “neighboring” (as used within “adjacent”) and “significant nexus” remain overly broad and so vague that they are open to wildly varying agency interpretations. The rule provides a list of exclusions, which has been revised and superficially expanded from the one in the proposed rule. Many of the exclusions, however, are extremely narrow, or so vague that they lend themselves to narrow agency interpretation. Overall, the exclusions are insufficient to outweigh our grave concerns with the expansive jurisdiction and tremendous uncertainty that will result from the rule.

2. Worker Protection Standards (WPS) rule

As noted earlier, EPA relied upon outdated reports and studies in justifying its expansion of the WPS rule. Most significantly, however, the agency has created a ‘designated representative’ provision that has virtually no relation to worker safety. It would allow virtually anyone claiming to have a valid signature of an employee of the farm to approach a farmer and demand farm-specific information on pesticide use. There are no restrictions placed on the ‘designated representative’ as to what they can do with the information – and there is no requirement that the representative even share the information with the worker in question. It is easy to see how this provision could be abused by anti-pesticide activists to damage farmers’ reputations and disrupt agricultural operations.

3. National Pollutant Discharge Elimination System (NPDES) permit for pesticide applications

In 2009, the 6th Circuit Court of Appeals invalidated a long-standing EPA policy which affirmed that pesticide applications lawfully applied under FIFRA do not require an

NPDES permit. EPA failed to defend its own regulation by seeking either an *en banc* ruling or requesting U.S. Supreme Court review. An overwhelming bipartisan majority in the House has voted to rectify this defective court ruling, yet EPA has taken no action to halt duplicate regulation of farming operations.

4. Chesapeake Bay TMDL

EPA has asserted it has the authority to decide how the burdens of achieving state water quality goals will be shared among activities such as farming, construction, forestry, municipalities and others—plus the power to impose federal deadlines for on-the-ground restrictions, regardless of cost or social and economic harm. EPA’s interpretation of the CWA dramatically alters the carefully crafted balance of federal versus state and local power established by Congress under the CWA. Congress specifically reserved to the States the “primary” authority for deciding how to achieve water quality goals—and made State and local authorities exclusively responsible for decisions on land use and development. EPA now has what amounts to super-zoning authority over local economic development and land-use decisions. If the decision stands, EPA will have unprecedented power to impose unfunded demands on state and local governments and economies to achieve its water quality goals (which may, in fact, be unachievable). This power will extend not only across the Bay watershed, but across any watershed nationwide where waters are identified as falling short of Clean Water Act goals.

5. Water Quality Standards

In August of 2015, EPA finalized new Water Quality Standards regulations, which not only burden states by setting rigid parameters on their adoption of new or revised Water Quality Standards but which will impact landowners, particularly farmers and ranchers. In a nutshell, the regulations effectively require a state to adopt fishable/swimmable standards for every ditch and/or feature that meets EPA new expanded definition of tributary unless a state can prove, through a costly and burdensome use attainability analysis, that those standards are unattainable. EPA has made its intentions very clear: the preamble to the final rule indicates that EPA “expects” that it will be “rare” for a state to be able to demonstrate that a WOTUS cannot attain the fishable/swimmable use or a sub-category of fishable/swimmable. As has been pointed out in the context of the WOTUS rulemaking, the new tributary definition only requires indicators of a bed, bank, and ordinary high water mark – no actual water is necessary nor do those features need to be present in the field. The combined effect of the new WOTUS rule and the new Water Quality Standards rules is likely to be staggering. States will not have the resources to conduct use attainability analyses for their waters and thus, they are likely to designate fishable/swimmable uses for newly jurisdictional “tributaries” such as common agricultural ditches without ever confirming attainability. As a result, states and landowners are likely to chase unattainable goals and standards for the foreseeable future. Considering that millions of miles of “so-called” tributaries are likely to become jurisdictional under the new WOTUS rule, farmers and ranchers will be tied up in litigation and bureaucratic red tape for years.

6. Pesticide/FIFRA/Pollinator issues

Over the last year, the agriculture community has become even more concerned about trends within EPA that may make it increasingly difficult for farmers to obtain crop protection tools that are vital for farming operations. The 9th Circuit recently invalidated the registration of sulfoxaflo^r; EPA has indicated that it will not defend its own decision to register sulfoxaflo^r. EPA recently abruptly withdrew its approval of the Enlist/Duo herbicide on corn and soybeans and has delayed the approval review of that same chemistry for cotton. In addition, EPA has similarly delayed approval of new, environmentally safer dicamba formulations for use as an herbicide on cotton varieties containing already approved dicamba tolerance traits. In both cases, existing formulations of these herbicides can be readily used in all 50 states by growers, commercial applicators and homeowners alike, but are not labelled for use on the new, traited crop varieties created to provide desperately needed new tools to combat herbicide resistant weeds. In November, EPA proposed to revoke all tolerances for chlorpyrifos – and despite its reliance on questionable epidemiology studies that are not publicly available and overwhelming requests from the stakeholder community, it refused to extend the comment deadline past January 5. At the same time, EPA is under increasing political pressure to use agenda-driven science to limit use and pesticide availability under the guise of protecting pollinators – despite the fact that the NAS report from 2013 found that there are numerous factors – foremost among them the varroa mite – that are affecting honey bees. The agriculture community is increasingly anxious at the potential loss of important crop protection tools.

The 2007 National Academy of Sciences (NAS) report, *Status of Pollinators in North America*, and the 2013 USDA-EPA joint report, *National Stakeholders Conference on Honey Bee Health*, identified the numerous and complex factors associated with bee health, including: parasites and diseases, lack of genetic diversity, need for improved forage and nutrition, need for increased collaboration and information sharing, and a need for additional research on the potential impacts certain pesticides may have on honey bee health.

We note the complexity in evaluating and addressing the multitude of factors impacting honey bees, and we appreciate EPA's on-going efforts to promote and protect pollinator health. However, we have significant concerns that the Agency's process for developing proposed label language that is neither FIFRA compliant nor based on a sound, science-based risk assessment approach. We request EPA work with the agricultural community to further clarify, define, and improve the proposed label language before taking any further Agency action.

States have individually and collectively been actively engaged in identifying the various challenges surrounding bee health, and more importantly, developing partnerships on the state level to bring forward solutions so beekeepers, growers, applicators, and other agricultural stakeholders are able to continue to produce our nation's food, fiber, and fuel in a collaborative and productive manner. These partnerships are commonly referred to as State & Tribal Pollinator Protection Plans (MP3s), and they are a proven formula in a

number of states.

We commend EPA's support and partnership in identifying MP3s as a successful, non-regulatory vehicle to achieve risk mitigation and enhanced collaboration across the agricultural stakeholder community, and we note the *National Strategy to Promote the Health of Honey Bees and Other Pollinators*¹⁰ recognizes the MP3 as a model for success. We recommend EPA continue to support and replicate this state-driven approach to ensure informed and workable solutions are developed and implemented through public-private partnerships at the state level to achieve sound policy initiatives, ensure our growers have access to appropriate crop protection tools, and to protect and promote pollinator health.

7. Spill Prevention and Countermeasure (SPCC) rule for farms

Storage of oils, including fats, are captured by these regulations and the proposed revisions (expected in 2016) will broaden the regulation to more agricultural operations. These regulations impose secondary containment requirements, burdensome paperwork requirements, and penalties associated with failure to comply. In addition, the WOTUS Rule is a global regulatory change which will be imposed on the SPCC program, resulting in more operations falling under the SPCC regulation than ever were before.

8. Clean Air Issues

Ozone Standards – Stringent new ozone standards have the potential for damaging economic consequences across the entire economy and would place serious restrictions on farmers, increasing input costs for things like electricity, fuel, fertilizer and equipment. Further, as ozone standards are ratcheted down closer to levels that exist naturally, more farmers will be forced to abide by restrictions on equipment use and land management, making it harder to stay in business.

Clean Power Plan - The impacts of the Clean Power Plan on energy affordability and reliability cause significant concerns for farmers and ranchers. In addition to these concerns, farmers are troubled that the regulation does not distinguish between emissions generated from fossil fuels and biogenic sources such as agricultural biomass and feedstocks. Moreover, in an unprecedented expansion of EPA's regulatory reach, the Clean Power Plan rules will in effect regulate production practices on the farm owing to an undefined requirement in the Clean Power Plan that farmers must use "sustainable" farming practices on land in order for energy feedstocks to potentially qualify as "carbon neutral" when they are later converted to energy and generate GHG emissions.

National Ambient Air Quality Standards (NAAQS) for fine particulate matter (PM_{2.5}) – This proposed rule will regulate ammonia as a precursor to regulated PM_{2.5} criteria pollutant. This regulation will result in agricultural operations being regulated as

¹⁰ White House. (2015). National Strategy to Promote the Health of Honey Bees and Other Pollinators. Retrieved from: <https://www.whitehouse.gov/sites/default/files/microsites/ostp/Pollinator%20Health%20Strategy%202015.pdf>

stationary sources of pollution due to ammonia emissions regardless of whether those emissions actually have an effect on PM2.5 concentrations.

9. EPA's National Enforcement Initiatives (NEIs)

One of EPA's current enforcement initiatives for the fiscal years 2014-2016 expands enforcement action against our nation's animal agriculture operations. EPA is currently undergoing a process to modify the NEIs and this presents an opportunity that we support - returning this priority to the standard enforcement program - which is prudent considering the current NEI has not produced demonstrable water quality benefits.

10. EPA's NPDES Electronic Reporting Rule

This rule (finalized September 25, 2015) will result in EPA collecting farm information from states that goes beyond the scope of the federal program. Taking into account EPA's accidental release of farm information to environmental activist groups in 2013, the lack of data security measures to prevent EPA from collecting non-NPDES farm information is very concerning to our nation's farmers and ranchers.

These specific items are not exhaustive but do represent some of the most pressing issues farmers and ranchers currently face from EPA regulations. We commend the Committee for undertaking this oversight hearing, and we stand ready to work with you on common sense reforms that reflect Congressional intent without infringing on the legitimate rights of the agricultural community.

Sincerely,

American Farm Bureau Federation
American Soybean Association
Dairy Farmers of America
Milk Producers Council
National All-Jersey
National Association of State Departments of Agriculture
National Association of Wheat Growers
National Cattlemen's Beef Association
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Peach Council
National Potato Council
National Sorghum Producers
National Turkey Federation
United Fresh Produce Association

U.S. Cattlemen's Association
U.S. Poultry & Egg Association
U.S. Sweet Potato Council
Western Growers Association
Agri-Mark Cooperative, Inc.
Dairy Producers of New Mexico
Dairy Producers of Utah
Exotic Wildlife Association
Idaho Dairymen's Association
Kansas Livestock Association
Missouri Dairy Association
Northeast Dairy Farmers Cooperatives
Oregon Dairy Farmers Association
South East Dairy Farmers Association
St. Albans Cooperative Creamery
Southwest Council of Agribusiness
Texas Association of Dairywomen
Texas Cattle Feeders Association
Upstate Niagara Cooperative, Inc.
Washington State Dairy Federation
Western Peanut Growers Association
Western United Dairywomen