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Submitted via Federal eRulemaking Portal

May 15, 2017

U.S. Environmental Protection Agency
Office of Regulatory Policy and Management
1200 Pennsylvania Ave. NW.
Mail Code 1803A
Washington, D.C. 20460-0001

Re: **Docket ID No. EPA-HQ-OA-2017-0190 (*Evaluation of Existing Regulations)***

The National Association of State Departments of Agriculture (NASDA) appreciates the opportunity to provide the following general comments on improving the regulatory process and the following specific comments on the U.S. Environmental Protection Agency's (EPA) evaluation of existing regulations in accordance with Executive Order (EO) 13777, Enforcing the Regulatory Reform Agenda.

I. About NASDA

NASDA represents the Commissioners, Secretaries, and Directors of the state departments of agriculture in all fifty states and four U.S. territories. State departments of agriculture are responsible for a wide range of programs including food safety, combating the spread of disease, and fostering the economic vitality of our rural communities. Conservation and environmental protection are also among our chief responsibilities. In forty-three states and Puerto Rico, the state department of agriculture is the lead state agency responsible for the regulation of pesticide use under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

II. General Comments to Improve the Regulatory Process & Accountability

EPA regulations and requirements have significant impacts on many of our members' agencies. As regulatory partners, NASDA members are charged with delivering and enforcing various regulatory programs on behalf of our federal partners. Cooperative Federalism is critical to enhancing our federal-state partnerships in order that we may deliver a predictable, transparent, and science-based regulatory framework to protect human health and the environment while allowing the agricultural community to prosper.

In order to succeed in delivering an effective regulatory framework, NASDA urges EPA to ensure a well-resourced and fully staffed Office of Pesticide Programs.. NASDA stands ready to help our federal partners develop a regulatory framework that provides the necessary protections and minimizes the economic impact and undue regulatory burdens on agricultural producers.

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As the Administration seeks to improve the process, oversight and delivery of sound regulatory actions, NASDA offers six recommendations to enhance the rulemaking process:

1. Institutionalize enhanced Federalism Consultations;
2. Improve economic analyses that more realistically account for economic costs to states;
3. Enhance public participation and greater transparency of the regulatory process;
4. Provide increased flexibility in state regulatory programs;
5. Renew focus on utilization of best available science; and
6. Improve stakeholder outreach, especially to rural communities.

1. Enhanced Federalism Consultations

Because federal regulatory actions often impact multiple agencies at the state level, federalism consultations must be broad-based and include representatives from associations representing all relevant state agencies. Federalism consultations should commence early in the regulatory process and remain on-going. These consultations should allow significant opportunities for robust participation. Throughout the process of developing and implementing regulatory actions, it is important to emphasize that state regulatory agencies are not simply stakeholders, but are instead partners with federal agencies. States can—and should—be used more as resources for federal agencies. Often states have a wealth of data, experience, and expertise that would help federal agencies better implement regulatory programs.

Unfortunately, the federalism consultations conducted by agencies in the past were often perfunctory and did not allow regulator-to-regulator dialogue on issues of mutual interest. Additionally, on those occasions when consultation did occur, it was often limited to only a handful of associations representing state and local governments and did not necessarily include the representatives from state agency associations most impacted by the proposed regulation. Though some federal agencies did include other state and local representatives in their consultation processes, renewed focus on ensuring federalism consultations include the appropriate parties will be very beneficial to developing and implementing a science-based and statutorily compliant regulatory process.

2. Improved economic analyses that more realistically account for economic costs to states

State regulatory agencies, including state departments of agriculture, are responsible for implementing and enforcing significant elements of federal regulatory activities. In recent years federal regulatory actions have required state regulatory agencies to assume an increasing amount of new responsibilities. However, states across the country face significant budgetary pressures and additional state resources to fund these responsibilities are often simply not available. In many cases, years of federal funding stagnation have resulted in an increasing number of unfunded mandates being imposed on states.

In addition, states are often not only charged with carrying out federal regulatory changes, they must also comply with those new regulations just as industry or members of the regulated community. This often entails significant costs that are not adequately captured in economic impact analyses. We note there are often disproportionate demands (legal, accounting, training, etc.) on smaller state

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governmental agencies that make implementing and/or complying with new federal regulations especially challenging.

Finally, federal agencies should engage state regulatory agencies and stakeholders to carefully evaluate proposed regulations to better determine whether the required resources are available and whether expected outcomes merit those expenditures. NASDA strongly urges EPA to adopt a cost/benefit policy whereby any cost imposed must be balanced by significant, quantifiable benefits for each individual component of a new regulation.

3. Enhanced public participation and greater transparency of the regulatory process

In recent years, increased attention has been devoted to new policy initiatives and de facto regulatory requirements that are implemented without the traditional notice and comment rulemaking process and outside of OMB's oversight and review through various means, such as: consent decrees ("sue and settle"), warning letters, policy memorandums, or guidance documents ("regulation by letter"). These informal agency actions often times create policy and compliance changes outside of the Administrative Procedures Act (APA) or a Regulatory Impact Analysis (RIA) and deprive OMB, state agencies, and interested stakeholders the opportunity to participate in the rulemaking process. To this end, NASDA requests:

- All federal agencies submit all non-formal actions (consent decrees, warning letters, policy memorandums and guidance documents) to OMB;
- OMB exercise its authority to review these notices for benefit-cost analysis.
- Any action having an economic impact over $100 million, and where appropriate, be returned to the agency with guidance to comply with the APA or RIA;
- OMB require all agency notices to cite specific statutory authority and include a nonbinding disclaimer notice;
- OMB require all significant guidance documents or notices undergo a preliminary federalism consultation and subsequent notice and comment period; and
- OMB-OIRA review all proposed consent decrees an agency intends to sign before they are executed in an effort to mitigate policy initiatives through consent decrees or "sue and settle" practices.

Many of the negative impacts from these initiatives and notices can be further mitigated by OMB's earlier engagement and oversight of agency actions. Therefore, we recommend OMB require all agencies to submit such notices to OMB for compilation on OMB's website, which will enhance transparency and oversight. NASDA recommends OMB request the Government Accountability Office (GAO) to assist in compiling and tracking these non-formal rulemaking notices.

4. Flexibility in state regulatory programs

States need flexibility to implement and enforce certain federal regulations, which cannot account for all of the nuances and variations in demographics, operations, and local customs. NASDA encourages federal agencies to look for ways to engage state regulatory partners in creating programs to provide

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these kinds of flexibility—especially in situations where the alternative may be an undue regulatory burden on the regulated community. We emphasize that even under these flexible approaches, states do still incur costs. Every effort must be taken to ensure these do not result in unfunded mandates on the states.

5. Renewed focus on utilization of best available science

Regulations must be based on the best available, sound, validated, and peer-reviewed science and rely on science-based risk assessments. Moreover, where the science is not fully formed or understood regulatory agencies should work to ensure policymakers do not misuse or inappropriately apply science that is not validated or otherwise related.

6. Improved stakeholder outreach, especially to rural communities

Expanded stakeholder outreach to farmers, ranchers, and rural communities will ensure proposed rulemakings and other agency actions will benefit from the diversity of those rural voices, perspectives, and opinions. Broadband infrastructure in rural communities is still developing, and many rural constituents do not have timely or comprehensive access to online tools or resources. As a result, rural stakeholders are often precluded from participating or commenting on agency actions through the federal register. NASDA encourages agencies to enhance educational and outreach efforts to rural communities and provide teleconference access for oral comments, which can be submitted in the docket and become part of the official record.

III. Specific Modifications and Revisions

NASDA submits the following specific recommendations on modifying, replacing and/or eliminating regulatory requirements (or specific provisions within those regulations) that currently inhibit job growth, impose burdensome costs that exceed environmental benefits, are unnecessary and ineffective, or are not substantiated by available data or are inconsistent with the data guidelines implementing the Information Quality Act.

As state regulatory agencies, NASDA is not requesting any actions that may impair, rescind, weaken or conflict with EPA's or state agency efforts to protect human health and the environmental, and the following specific recommendations identify regulatory obligations that can be modified or repealed without compromising current statutory obligations or regulatory benefits and protections currently in place.

A. 'Waters of the US' (WOTUS) Rule (80 Fed. Reg. 37054, June 29, 2015; 40 CFR 230.3)

On February 28, 2017 President Trump signed Executive Order 13778 directing EPA to review the WOTUS rule. NASDA strongly support EPA's two-step process of rescinding the 2015 rule and issuing a new, revised rule. Throughout this process, it is critical the agency continue to engage state and local governments in a robust manner. Any new rule should respect state authority, clearly recognize the

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limits of federal jurisdiction, respect private property rights, and minimize economic impact. We encourage the agency to develop its implementation plan before finalizing a new rule to ensure consistent application. Further, NASDA encourages the agency to clarify and protect normal farming exemptions and prior converted cropland in any new rule.

Recommendation: EPA should continue to consult with states and local governments throughout the two-step process of rescinding the 2015 rule and develop and issue a new revised rule. In addition EPA should create a new economic analysis as a part of this process.

B. Total Maximum Daily Loads (TMDLs) (40 CFR Part 130)

EPA's administration of the 303(d) program and implementation of total maximum daily loads has created a regulatory mechanism that removes authority from state regulators and local land use planners. This blurred authority between the Federal and state governments prevents states from devising and adapting their own plans to most effectively and efficiently achieve water quality standards. This EPA overreach has raised the cost of achieving water quality goals and inhibited adaptive management. Water quality goals must be achievable and take into account naturally occurring pollutants and local watershed characteristics.

Recommendation: EPA should revise its TMDL regulations to provide clarity and certainty to the regulated community and state and local governments by assuring that:

(a) States, not EPA, have the authority to set pollutant "allocations" for waters within their borders and incorporate the allocations into state implementation plans. This provides states and localities with the flexibility they need to change allocations when needed.
(b) EPA's TMDL authority is limited to approving or setting the *total* maximum load for a particular pollutant, as required by the statutory term "*total* maximum daily load."

C. Worker Protection Standards (WPS) rule (40 CFR 170)

EPA promulgated the worker protection standard (WPS) for agricultural workers in November 2015. Among other requirements, the new rule increased the frequency for mandatory training, added recordkeeping requirements and introduced new concepts, including the "application exclusion zone" and "designated representative." Most of the new WPS requirements became effective in January 2017. Due to the lack of availability and timely delivery of the necessary educational materials, enforcement guidance, training resources, and other tools necessary to effectively implement the rule and help the regulated community with compliance assistance activities, NASDA joined the American Farm Bureau Federation in a joint petition in December 2016 seeking regulatory relief to these challenges. EPA denied NASDA's request for relief at that time, but because the implementation challenges remain, NASDA submitted a supplemental request for relief in February 21, 2017. NASDA greatly appreciates EPA granting relief to this urgent request and suspending implementation of the WPS rule changes that went into effect in 2015 until EPA has finalized and delivered adequate enforcement guidance, educational

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materials, and training resources to the states with the adequate advanced time necessary to effectively implement the rule changes and assist the regulated community with compliance activities.

NASDA requests EPA initiate actions to revote the problematic changes that went into effect in 2015. Specifically, NASDA requests EPA revoke the "Designated Representative" (40 CFR § 170.311(b)(9) and related provisions) and the "Application Exclusion Zone" (40 CFR §170.405(a)(1); §170.405(a)(2); §170.505(b); and related provisions). These two specific provisions effectively make the WPS rule changes promulgated in 2015 unworkable for state agencies in its entirety. NASDA welcomes the opportunity to work with EPA to find the least burdensome path forward to maximize worker protection while mitigating undue regulatory burdens on the states and the regulated community.

Designated Representative: In the WPS rule promulgated November 2, 2015, EPA included a provision that permits anyone claiming to be a 'designated representative' (DR) to gain access to a farmer's proprietary records relating to pesticide use.[1] This provision provides farmers with no protection from fraudulent or counterfeit claims; does not assure that records released by the farmer will actually be shared with workers; and imposes no constraints on what DR's may do with documentation once it is obtained. EPA has never cited any data or facts that demonstrate that such a provision would improve worker safety. Thus, the regulation imposes an unnecessary regulatory burden and cost, while exposing farmers to legal liability, with no discernible benefit.

Recommendation: EPA should repeal 40 CFR § 170.311(b)(9) and related provisions.

Application Exclusion Zone: In the final WPS, EPA inserted a final articulation of the Application Exclusion Zone (AEZ) that unduly burdens state agencies and the regulated community.[2] As finalized, the AEZ goes beyond the Agency's stated intent to create a one-hundred foot buffer surrounding the application equipment that, according to the regulations now in place, extends beyond the agricultural establishment, arguably jeopardizing a grower's ability to manage all his or her land and prohibiting appropriate pest mitigation activities if there is any kind of structure, permanent or otherwise, inhabited or vacant within one hundred feet of the agricultural establishment. Furthermore, any individual, structure, or a passing vehicle within one hundred feet of the property can effectively cease the grower's application activity. After the final rule was promulgated, EPA's Office of General Counsel (OGC) was working to issue interpretive guidance clarifying the Agency's intent under the final regulation; however, Agency guidance does not carry the weight and authority of a codified federal regulation and does not provide the necessary clarity to assist state regulatory agencies or the grower community with compliance and enforcement activities. In short, both EPA and the state regulatory agencies are still uncertain on how to enforce or deliver compliance assistance on the AEZ.

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[1] The specific requirement is at 40 CFR 170.311(b)(9).

[2] WPS provision at 170.405(a)(1) establishes the applicable AEZ distances, and WPS provision 170.405(a)(2) establishes a requirement for the agricultural employer not to allow any worker or other person in the AEZ within the boundaries of the establishment until the application is complete. Provision at 170.505(b) establishes a requirement for the handler to suspend the application if any worker or other person is anywhere in the AEZ. Thus, the AEZ goes beyond the boundaries of the establishment in question and applies to any area on or off the establishment within the AEZ while the application is ongoing.

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Recommendation: EPA should revoke the AEZ, which goes beyond EPA's original intent and creates an unworkable and unenforceable provision that does not provide any additional regulatory protections beyond those already required under law.

D. Certification of Pesticide Applicators (40 CFR 171)

NASDA greatly appreciates the significant improvements EPA made to the *Pesticides: Certification of Pesticides Applicators* final rule *(published on January 4, 2017)*, and NASDA further appreciates the twelve month extension EPA provided to states on the effective date of this rule to help states and the regulated community have the educational assistance and resources necessary to deliver an effective implementation. NASDA appreciates the on-going collaboration with EPA's Office of Pesticide Programs on this rule.

During this twelve month extension, NASDA requests EPA revise and amend the new mandatory minimum age standard for commercial RUP applicators at 18 years (§171.103(a)(1); 171.105(g); and related provisions), which will unnecessarily complicate some states' ability to facilitate a successful implementation. Prior to this rulemaking, individuals under the age of 18 were able to apply RUPs if they met certification and training requirements promulgated within their respective state. The age requirement would require numerous states to undertake the lengthy and costly process of amending state statutes through the state legislature and/or undertake a state regulatory public comment and rule change. The age requirement, like many other aspects of pesticide applicator certification and training standards should be a determination made by individual states and not a federally mandated requirement that will force states to amend their statutory authorities. We request that the Agency amend this narrow portion of the final rule, and NASDA stands ready to assist EPA in addressing this specific revision.

Recommendation: EPA should work with states to revisit and revise the mandatory minimum age provision to provide states greater regulatory flexibility in implementing the final rule changes.

IV. Conclusion

The successful development and delivery of a transparent, predictable, consistent and science-based regulatory process and framework requires robust and meaningful consultation with state agencies. NASDA recommends EPA ensure its state regulatory partners have adequate time, assistance, and resources necessary to assist in the development, delivery, and implementation of new rules and new standards.

As noted above, many regulations do not result in increased net environmental benefits, and in some cases may even divert resources from environmental and public health protection efforts. NASDA welcomes the opportunity to discuss these recommendations further with EPA, and NASDA greatly appreciates EPA undertaking this effort to identify and alleviate unnecessary and costly regulatory burdens on the agriculture community and its state regulatory partners.

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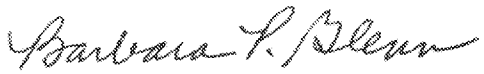
Thank you for your consideration of this request. Please contact Dudley Hoskins (Dudley@nasda.org) or Britt Aasmundstad (Britt@nasda.org) if you have any questions or would like any additional information at this time.

Sincerely,



Barbara P. Glenn, Ph.D.
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