Statement of Leonard Felix

National Agricultural Aviation Association

Before the

House Committee on Small Business
Subcommittee on Agriculture, Energy and Trade

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Adrift in New Regulatory Burdens and Uncertainty: A Review of Proposed and Potential Regulations on Family Farmers

Chairman Tipton and Subcommittee Members:

My name is Leonard Felix, President of Olathe Spray Service, Inc., headquartered in Olathe, Colorado. For 43 seasons I've been providing pest control services to the citizens, businesses and government of Colorado. I've been asked to testify today on behalf of the National Agricultural Aviation Association on the impacts of EPA's newly-issued pesticide National Pollutant Discharge Elimination System (NPDES) general permit on the aerial application of pesticides. I am glad to provide such comments, and while I'm not a policy expert, I have a first-hand understanding of the burdens this permit will impose on my business, my clients, and others who are similarly situated.

My business is not unlike the 1,600 small-businesses in 46 states that make up the aerial application industry in the United States. Besides me at my business, I have two sons who are also pilots, one mechanic and my daughter-in-law is engaged in bookkeeping. Altogether, there are nine full time employees and six to 10 seasonal workers. The average size of an aerial application business in the U.S. is 2.2 aircraft, and five employees which consist of two pilots—one of which is the owner/operator, a mixer-loader of crop protection products and an office assistant. Despite my business' small size, like most aerial applicators we represent a large and

diverse group of clients. We treat farmland, forest and rangeland pests for private and government clients. We also help treat weeds that threaten water flow in the irrigation canals and diversions of the Uncompahgre Valley Water Users Association in Colorado.

This irrigation association has been serving more than 175,000 acres of Colorado farmland since construction by the Bureau of Reclamation in 1906. Water is collected from the Rocky Mountains near the Continental Divide, down the Gunnison River and then through a 6-mile tunnel into the South Canal, the Uncompahgre River, and through diversions and canals to the rich farmland below. There farmers raise irrigated vegetables, forage, grain crops, orchards, grapes, berries and other specialty crops – and all depend on a steady supply of this essential water. The herbicides we apply keep the water flowing by controlling the reed canarygrass, orchardgrass and other noxious weeds that, left untreated, would choke the many canals and lateral ditches.

Besides these critical irrigation canal treatments, we spray about 60,000 acres of clients' cropland each year for control of weeds, insects and diseases. Plus, we help control mosquitoes for the Grand Valley Pest Control District, Orchard City and Cedaredge Townships, and Gunnison County; we also treat private forests for control of Spruce Budworm and other insects that are destroying forests across the West.

As you can see, we're pretty busy much of the year. It's not uncommon for aerial applicator businesses to have more than 100 clients, we service over 500 yearly. When conditions change quickly or pest emergencies occur, those clients often call at 10 pm or later asking for treatment ASAP. The growing season isn't too long in Colorado, and we have to put in long days. Depending on harvest crews, night applications are often required to protect them and keep up with our customers' and their crops' needs. This pace requires constant attention to the maintenance of our aircraft, frequent calibration of our spray equipment, and safety checks all around. We work to be experts on pesticide FIFRA label requirements and state laws for their use. And when we return from a day's work, it all starts over again after we do the recordkeeping for clients, the state, the FAA, and FIFRA.

Now that I've set the stage, let's add to this scenario an entirely new set of obligations – that of satisfying the new pesticide NPDES permit recently implemented by EPA and states. More than 40 year ago, Congress established FIFRA as the comprehensive pesticide law, and repeatedly passed up opportunities to regulate pesticides under the Clean Water Act. In fact, EPA promulgated a rule in 2006 making it absolutely clear that pesticides applied to waters of the U.S. according to FIFRA are exempt from NPDES permits. Then in 2009, the 6th Circuit Court of Appeals revoked EPA's rule and overturned 40+ years of Congressional intent, requiring hundreds of thousands of pesticide users to also comply with CWA permits.

EPA's pesticide NPDES general permit was implemented October 31 in six states (AK, ID, MA, NH, NM, and OK), but also set the bar for similar permits in Colorado and 43 other states that are authorized to implement their own permits. Colorado's Department of Public Health & Environment (DPHE) administers the Colorado permit on private property; EPA administers their Pesticide General Permit on Federal and Tribal lands. So it will require our compliance with both since we work for all of them. This will be difficult due to the differences in the two permit requirements.

Pesticide NPDES permits are now here – staring us in the face and in the pocketbook. Getting up to speed on them will be a huge challenge. To reduce legal liability, EPA has announced a 120-day phase in period before enforcement begins, and states are generally following suit. But soon, there will be enforcement penalties for a multitude of potential paperwork and performance violations, and activists will be able to challenge operators under the Clean Water Act's citizen suit provisions. The documents permittees file are posted immediately on EPA's website, so activists will be fully armed for legal action whenever they see an opening. Even if you are totally innocent, the costs of defending yourself against a citizen suit can put you out of business, and trigger a cascade of pest control problems down the list of your clients. And it is all unnecessary because FIFRA requires EPA to ensure a pesticide undergo rigorous testing for water safety before it is allowed to be registered for use.

I would also like to describe how the permit's requirements directly affect my work and that of other aerial applicators. Because applicators are generally working as for-hire contractors

for public and private decision-making clients and don't have direct knowledge in advance or authority to control the pest control efforts, EPA has spared applicators a large part of the planning and reporting burdens that government agencies and other large entities must meet. However, there are still unnecessary burdens and problems remaining in the permit to challenge even an experienced crew like mine. And many states are going above and beyond EPA's requirements for water permits.

As part of the permit, there are extensive requirements for documenting maintenance and calibration of our equipment, assessing weather conditions, minimizing spray drift and other off-track movement, site monitoring, and avoiding creeks, ditches and other water bodies that are or could be jurisdictional. Completing these activities is already part and parcel to safety and professionalism in our business, but the permit requires extra documentation of these activities and more with timely records.

For example, failure to properly update these records can be a violation of the permit and result in penalties of up to $37,500 per day and potential citizen suits – *simply over paperwork* that may not have been completed on time because we've been working long hours in the middle of the busy season or a declared pest emergency. Such NPDES records don't add anything to the environmental protections that our professionalism and the FIFRA label builds into every registered pesticide product. They just add costs, time consuming burdens, and open the door for activists to sue using our own information submitted in all the reports and records we're required to keep.

So while my sons and I are working to properly apply the pesticide products for our clients, dodge power lines and other obstacles, and keep track of the wind and weather, we now must also worry about taking notes for completing the NPDES permit records later that evening. Long, hard days and risks are part of being pilots, but the burdens and risks of the NPDES permit are something we don't need or want. Our work requires concentration to ensure safety. We need to be well-rested and focused when we start our day. Unnecessary NPDES PGP paperwork is going to add to an already tedious amount of work to our routines.

At the end of the day, the NPDES permit requires aerial applicators to record:

- Each treatment area spray made during the day, including location and size in acres or linear feet of the treatment area;
- The identification of any treated waters, either by name or by location;
- The pesticide use pattern and target pests treated for;
- Documentation of weather condition assessment completed in the treatment area prior to and during application;
- Name of each pesticide product used including the EPA registration number;
- Quantity of each pesticide product applied to each treatment area;
- Other pesticide application details; and
- Whether or not visual monitoring was conducted during pesticide application and/or post application, and if not, why not, and whether any unusual or unexpected effects identified to non-target organisms.

But it gets worse: Applicators may also be considered by EPA to be Decision-makers if they participate in the planning of the pest control process. If that happens, it opens a whole host of additional requirements and exposes applicators and their clients to Joint and Several Liability for any permit violation that may ultimately occur. Applicators who are also a Decision-maker must also:

- Submit a Notice of Intent (NOI) to be covered and wait for coverage while the NOI is considered. This NOI includes the applicator's legal certification that his/her actions, the pesticides applied, and the timing/methods used will not adversely affect endangered and threatened species, or federally-listed critical habitat.
- Develop and maintain an up-to-date, extremely detailed Pesticide Discharge Management Plan that documents all aspects of the pest control plan and activities conducted under that plan;
- Evaluate various pest management options in a manner similar to Integrated Pest Management (IPM), establish action thresholds, and select pesticide use only when other non-chemical methods are dismissed;
- Monitor activities of applicators and revise pest management measures to implement corrective actions for spills, leaks, or otherwise less than optimal applications;

- Conduct surveillance to observe any possible adverse incidents, especially to any endangered or threatened species present;
- Document all aspects of the above with detailed records;
- Provide timely reports of any changes in methods, corrective actions taken, or adverse incidents observed, and annual reports summarizing all activities.

The bottom line is: do all these requirements improve the environment? No! To repeat, it is all unnecessary because FIFRA requires EPA to ensure a pesticide undergo rigorous testing for water safety before it is allowed to be registered for use. Agriculture doesn't need the added burden, states don't want the added expense, and even EPA and a majority in Congress have voiced their opposition to the permits.

There is a solution to this nonsense: enact H.R. 872. Mr. Chairman, I am aware the House has passed this legislation in a bipartisan fashion, and that there are 65 or more Senators willing to support this legislation if it is brought up for a vote in the Senate. We can only hope there is one more vote soon, that of the Senate Majority Leader.

I appreciate the opportunity to represent my company, the Uncompahgre Valley, and the National Agricultural Aviation Association with this testimony. Thank you.

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