Statement of the American Farm Bureau Federation

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

REGARDING: ADRIFT IN NEW REGULATORY BURDENS AND UNCERTAINTY: A REVIEW OF PROPOSED AND POTENTIAL REGULATIONS ON FAMILY FARMERS

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Thank you, Chairman Tipton and Ranking Member Critz. I appreciate the opportunity to appear before you today and to provide comments on behalf of the small businesses that comprise the farm and rural family members of Farm Bureau. My name is Carl Shaffer, and I have the privilege of serving on the Board of Directors of the American Farm Bureau Federation and as President of the Pennsylvania Farm Bureau. Farm Bureau represents farms of all sizes, but most farmers today are small family businesses which produce virtually all agricultural commodities grown and sold in our great nation and abroad. I am pleased to offer this testimony on behalf of the Pennsylvania Farm Bureau, as well as the American Farm Bureau Federation and its more than 6.2 million member families.

I own and operate a farm in Columbia County, Pennsylvania where I raise green beans for processing, corn and wheat. As a small businessman, I struggle to keep up with all of the laws and regulations that control how a person operates their business. Of all the departments and regulatory agencies in our federal government, the one that takes the most amount of my time and costs me the most amount of money in productivity is the Environmental Protection Agency (EPA). Per Congress' mandate, farms have always been touched by EPA regulation. However, in the last three years, we have seen an increase in regulations both in their scope and cost, as well as in their lack of transparency. For many, there is a strong perception that EPA begins with a presumption that farming activities are harmful for the environment. We have asked for opportunities to provide meaningful input to the policy development process in order to ensure that regulations for farming businesses are workable both for the businesses and the environment. Thus far, there is apparently little success. The only input we are assured of is during the public comment period, which is required for all federal rulemakings, and at that point, EPA has already made its decisions and is simply going through the legal process to finalize an agenda.

Let me began by saying that many farmers are convinced that EPA's goal is to control how farmers farm. In just the last three years, EPA has set in motion a significant number of new regulations that will significantly change the face of agriculture. The changes I see coming are intended to bring far more mandatory pressures on row crop agriculture and to extend and deepen the reach of mandatory regulation to all of livestock agriculture. I will limit my testimony today to five of the EPA regulatory efforts that threaten the continued operations of family farmers and ranchers. Please understand that this list does not cover the tidal wave of regulatory issues about to crash down on agriculture, but the five issues addressed in the balance of my testimony will be acutely felt by small business entities. They are EPA's:

1. Burdensome, and we believe unlawful, micromanagement of watershed total maximum daily load (TMDL) and implementation plan for the entire Chesapeake Bay Watershed;
2. Proposed rulemaking expanding the scope of the waters federally regulated under the Clean Water Act (CWA);
3. Duplicative and costly Clean Water Act permits for normal pesticide applications;
4. National Ambient Air Quality Standards (NAAQS) for coarse particulate matter, or dust; and
5. Unjustified attempt to collect data from both regulated and unregulated livestock operations under Section 308 of the Clean Water Act.

In contrast to EPA's heavy-handed approach of issuing crushing regulatory burdens, agriculture and the U.S. Department of Agriculture (USDA) have worked together over the last few decades to make enormous strides in agriculture's environmental performance by adopting a range of conservation

practices and environmental measures. We are proud of our accomplishments and believe that our overall environmental footprint is smaller today than 50 years ago. Unlike USDA, EPA is literally piling regulation on top of regulation, and guidance on top of guidance to the point of erecting barriers to economic growth. An excellent example of EPAs' over-reach is the Chesapeake Bay TMDL.

Chesapeake Bay TMDL

The land I farm is in the Chesapeake Bay Watershed upstream from the tidal portions of the Bay and within sight of the Susquehanna River. Right now, the Pennsylvania Department of Environmental Protection (DEP) and Department of Agriculture are scrambling to develop and submit for approval the second iteration of EPA's mandated state implementation plan, the Phase II Watershed Implementation Plan (WIP) for the Chesapeake Bay Watershed. Pennsylvania Farm Bureau has been involved in the WIP process since it first began almost two years ago, and sits on the WIP Management Team, a group of industry, governmental and environmental groups working with DEP officials to provide advice and insight on objectives and actions the commonwealth should pursue to reduce pollution in the Chesapeake Bay Watershed in a manner that is environmentally effective and economically feasible. Unfortunately, EPA does not believe that economic considerations of any kind should be taken into account in developing WIPs, and it has refused to conduct a Use Attainability Analysis. EPA's sole perspective is that it will not approve a WIP unless the submitting state provides "reasonable assurance" that EPA's mandated allocations will be met on EPA's own deadline. Any regulation that is intended to control how I farm my land, without consideration of costs make my work that much more difficult. And imposing regulations, regardless of whether the voluntary approaches Pennsylvania farmers have been using for decades actually work, is a blow to agriculture and small business in our region.

Like other states in the Watershed, our state DEP has been working with more than 150 partners and existing state law to reduce pollution in the Bay, and thus far, we are making steady progress. For decades, farmers in cooperation with DEP have been implementing on-the-ground conservation measures to reduce pollution and preserve our waterways. It is not quick enough for EPA, however, because EPA's TMDL has micromanaged and dictated environmental performance to all states in the Chesapeake Bay Watershed. The EPA TMDL has eliminated the congressionally mandated state-driven implementation process by dictating to states how they will meet the TMDL, what load allocations must be met even at the local and individual source level, and threatened and imposed federal backstops if EPA believed the WIPs failed to provide "reasonable assurance" that the EPA caps will be met on its timeline.

Despite EPA's public statements that the WIP development was a state-driven process, EPA's actions demonstrate that it was an EPA-driven process. For example, DEP and other Bay states were required to submit a draft WIP for approval in an extremely tight deadline with constant technical and modeling delays and errors that resulted in an incredible amount of wasted resources. EPA rejected each and every WIP and informed each state what it would need to do to get a "passing" grade and earn EPA's approval, even for non-point sources that should be completely within a state's authority to regulate. Yet, when our DEP asked EPA for more guidance on whether certain practices would meet EPA expectations and load reduction targets, EPA often provided little information. DEP drafted a WIP without having enough information to know whether its policy decisions would ultimately meet EPA's mandate and improve the environment. On Nov. 8, 2010, Pennsylvania's DEP and Department of Agriculture, under the previous administration of then-Governor Ed Rendell, wrote to EPA stating:

> In general, Pennsylvania is concerned that EPA's approach to the Draft Chesapeake Bay TMDL is neither practical, equitable, nor cost-effective and could reverse progress in meeting our water quality goals.

Now, as DEP is trying to develop the Phase II WIP on a similarly hurried timeframe, it looks as if the process is going to repeat itself. Pennsylvania's DEP is reaching out to the 43 state counties in the Bay Watershed seeking information on workable solutions to reduce nutrient and sediment runoff at the local level – an objective that EPA officially required for the Phase II WIPs. The timeline that Pennsylvania is expected to meet, along with the other Bay states, is quite unreasonably ambitious. The Draft Phase II WIP must be submitted to EPA by Dec. 15, 2011 and the final plan is due by March 30, 2012.

One of the fundamental problems Pennsylvania and other Bay states are facing is that the assumptions that went into the Chesapeake Bay Model are fundamentally wrong. Models are tools that, if done properly, can sometimes be used when actual data is not available. But in the Bay, despite years of efforts, the "model world" lacks a connection to reality, particularly in relation to activities and conditions on the farm. In the short time that I have, I want to focus on the lack of scientific realities specific to Pennsylvania agriculture.

- The Chesapeake Bay TMDL: The TMDL limits the amount of nutrients that regulated Pennsylvania agricultural operations in the Susquehanna River Watershed can deliver to the Bay at 761,488.58 pounds of nitrogen, 18,589.44 pounds of phosphorus, and 2,688,715.58 pounds of sediment. These numbers apply to farms in Pennsylvania, even though the Susquehanna River itself is meeting Pennsylvania water quality standards for nutrients. In other words, even though farmers in Pennsylvania meet state water quality standards, because the Bay is still impaired, we must further reduce nutrient loads.

- Nutrient management plans: EPA assumes that only 47.2 percent of Pennsylvania farms have already adopted nutrient management practices. In its TMDL, EPA requires 85 percent of farms to adopt "enhanced nutrient management practices." However, the 47.2 percent baseline is wrong because all Pennsylvania agriculture operations that generate manure are already subject to nutrient management requirements. The problem is that the Bay Model does not recognize non-cost-shared nutrient management practices, so the model grossly misrepresents the on-the-ground reality of nutrient management on Pennsylvania farms. Pennsylvania's draft WIP pointed out this flaw:

  > A significant number of agricultural and other best management practices that have been implemented in Pennsylvania have not been "tracked" and entered into the Chesapeake Bay Model. A significant level of interest in this deficiency was expressed by Pennsylvania's Agricultural Watershed Implementation Plan workgroup. Pennsylvania pilot project efforts in Lancaster and Bradford counties, as well as preliminary evaluation of data from NASS [National Agricultural Statistics Service] indicates that as much as 84 percent of some implemented BMPs [best management practices] have not been entered into the Bay Model, resulting in potentially significant nutrient and sediment reductions not being accounted for in the reductions attributable to Pennsylvania.

- Manure transport out of the Watershed: EPA's Model assumes that only 57,659 tons of manure are transported from Pennsylvania to locations outside of the Chesapeake Bay Watershed. However, Pennsylvania told EPA in Sept. 2010 that all Chesapeake drainage county conservation districts in Pennsylvania report the export of manure from the county, and 227,527 tons left the Chesapeake Bay Watershed.

- Presumption of "lost" manure: EPA's flawed model assumes that at least 15 percent of all manure at an animal feeding operation production area is simply "lost" and ends up in the waterways. Even though EPA was told that this assumption had no factual support, EPA made no changes.

EPA did not correct these gross discrepancies between its Model and reality and finalized the Chesapeake Bay TMDL in Dec. 2010, knowing full well that it had not properly accounted for agricultural BMPs and was misrepresenting manure management in Pennsylvania and other jurisdictions. Instead, EPA promised to make some changes to land use and nutrient management assumptions in the Chesapeake Bay Model in 2011, in time for the revised model to be used for the Phase II WIPs. However, in the new models (Phase 5.3.2), EPA only changed the number of acres of impervious surface and some nutrient management assumptions. It did not address the lack of credit for non-cost-shared BMPs. It did not address the fact that a single piece of land can utilize multiple BMPs. It did not correctly apply the recommendations of the Agricultural Work Group regarding nutrient management. Nor did it address the 15 percent manure loss assumption that is built into the Model. The Model is still grossly flawed and should not be used as a basis for regulation.

As a result, EPA made its Model worse, not better. EPA again rushed to meet the arbitrary deadline it established for state submission of Phase II WIPs and is again requiring states to take actions to meet load allocations based upon a flawed model that does not reflect reality.

In addition to the flawed assumptions used to develop the Model, the Model's general limitations are coming to light as localities attempting to meet "reasonable assurance" at the local level in Phase II WIPs are facing abnormal and absurd results. For example, when Virginia tried to use EPA's Model to determine how much Charles City County needed to reduce sediment, it found that, while the old Model told them that Charles City County needed to *reduce* sediment by 48 percent, the new Model says that Charles City County could *increase* sediment by 406 percent. Obviously, every state and community or small business in the Bay that has been assigned an allocation and a responsibility under EPA's TMDL is concerned. EPA's refusal to take the time to improve its models, or to reduce its reliance on models, is undermining what little confidence agriculture had in the effort. Worse, EPA's federal TMDL could cause people to spend scarce resources on conservation measures that are directed to the wrong sources or the wrong areas.

Finally, in a meeting with EPA on Sept. 16, 2011, the Watershed jurisdictions unequivocally informed EPA that the Model was unacceptable. As noted by the State of Virginia in a Sept. 28, 2011 letter to EPA summarizing that meeting: "the current Watershed Model is undermining the credibility of our collective efforts." In the Sept. 16, 2011 meeting, concerns were raised by Pennsylvania, Maryland and Virginia. For example, Pennsylvania pointed out that EPA's Model continues to assume inaccurate manure application rates. According to Pennsylvania:

> Within EPA's Model about 50 percent of crop land and 90 percent of all row crops receive manure. USDA's National Agricultural Statistics reports that 24 percent of total harvested cropland receives manure.

Faced with backlash, in a letter dated Oct. 5, 2011, EPA finally admitted that its models could not support allocations below the scale of a major river basin. However, EPA is still demanding Phase II WIPs from states that include a narrative of how the states are to meet those river basin-wide allocations. Also, EPA's letter says nothing about the validity of the thousands of binding load allocations that are already in the Final TMDL. EPA is admitting its Model is unsound, but it has not released the sources listed in the TMDL from federally binding mandates. Finally, in a question-and-answer document issued on Oct. 17, 2011, EPA repeated its threats to take retaliatory action against states if they do not meet EPA's ever-changing expectations. Thus, EPA's mandates continue, even as EPA testifies before Congress that the TMDL is not even a "regulation."

In further followup, on Oct. 17, 2011, EPA also released a plan for responding to the modeling concerns raised by the states. Unfortunately, each concern that involved a change to the Model was pushed back to 2017. The only fix EPA is willing to make before 2017 is the recognition of additional BMPs. In response to concerns about wildly varying loadings resulting from the new Model, EPA suggests that states focus their communication on implementation goals rather than pounds per acre reductions. That advice is difficult to follow when the TMDL specifies specific pounds of reductions for over 488 individual sources and communities with large storm sewer systems, as well as aggregate (by river basin) pounds of reduction to be met by all the animal feeding operations, all the row crop agriculture, all septic systems and smaller municipal storm sewer systems in each river basin. If EPA had merely accepted its limited authority under the Clean Water Act and left implementation up to the states, states and localities could have devised their own plans on how to meet the overall reductions.

Despite this valid criticism, EPA continues with its unlawful and unachievable plan. A news article reporting the previously referenced inconsistencies in Virginia quoted an EPA official dismissing the concerns of local and state governments on modeling data saying, "Use common sense. Let's get on with it." Another EPA official is quoted as saying, "None of this stuff should impede the planning for what everyone knows is needed to be done." Unfortunately, common sense tells us as farmers that ever-shrinking public dollars and hard earned private capital must be applied in a manner to achieve actual and proven water quality improvements, not compliance with a model based on assumptions that puts out inconsistent prescriptions for water health. "Common sense" would be to leave the implementation of a TMDL to the states, where Congress intended.

What does all this mean for the small business, especially the farmer? Billions of dollars can be potentially spent to chase paper compliance with a model that uses faulty assumptions rather than valid and readily available data, and a computer model that shows inconsistencies, as displayed in the Charles City County instance. As taxpayers and citizens, we expect a certain level of confidence in federal regulatory directives, especially ones we believe are illegal in the first place. Before EPA can require states to provide "reasonable assurance" that implementation will lead to achieving EPA's flawed targets, the public must have a minimum level of confidence that regulatory mandates and the billions of dollars spent by taxpayers will achieve the promised results. If the billions are spent, the practices are implemented, and reality proves the modeling projections are wrong, then what? Will family farmers,

other small businesses and communities be expected to spend even more monies and resources to pursue other practices and programs directed through a modified model?

As farmers, business-owners and economic engines of the nation's economy, Farm Bureau members are worried that the private investments they are making to improve water quality, based on the flawed Model, will be for naught and will not be credited to them as individuals or to the agricultural industry.

Finally, one of the reasons Congress entrusted TMDL implementation only to the states is that meeting pollutant reduction goals costs money. EPA has established this TMDL and binding regulatory allocations and timelines *regardless of cost*. Clean Water Act and EPA regulations specifically allow states to consider economic consequences and to modify water quality goals when necessary to avoid substantial economic and social disruption. EPA asserts that the TMDL will restore jobs and help the Chesapeake Bay economy, but it has not provided any data to support these claims. The Chesapeake Bay states, however, estimate that implementation will cost billions of dollars (*e.g.*, $7 billion for Virginia, $3 billion to $6 billion for New York). Farm Bureau believes the TMDL threatens the economic health of businesses, individuals and communities throughout the Chesapeake Bay Watershed without improving the Bay any more than the voluntary state-based efforts in place before the federal takeover.

Waters of the U.S.

On May 2, 2011, the EPA and the U.S. Army Corps of Engineers (the Corps) (collectively, the Agencies) published in the *Federal Register* a "Draft Guidance Regarding Identification of Waters Protected by the Clean Water Act" (Draft Guidance) on the issue of Clean Water Act jurisdiction. As you know, in 2001 and 2007, the U.S. Supreme Court issued two opinions that held that EPA does not have unlimited jurisdiction over water in the Clean Water Act. Despite concerted efforts by environmental activists to get Congress to overturn those court decisions, legislation to do so never even came to a vote in a House committee, and similar legislation died in the Senate after passing the committee on a party-line vote. Now, however, EPA apparently wants to proceed on its own, without any change in the law, and undermine two U.S. Supreme Court decisions that affirmed congressional intent in the law.

The Draft Guidance and its supporting economic analysis fail to explain, consider or analyze all of the implications of the Agencies' regulatory over-reach on other important Clean Water Act programs. The Draft Guidance applied broad jurisdiction principles, such as aggregation of all waters in a watershed and the regulation of agricultural, irrigation and roadside ditches to the entire Clean Water Act. We believe that the Draft Guidance also misconstrues the Supreme Court cases, is inconsistent with the Agencies' regulations and, as the Agencies themselves state, significantly expands federal jurisdiction.

First and foremost, because the Draft Guidance (or any ensuing rule) amends the Agencies' existing regulations by describing new conditions under which the Agencies may assert jurisdiction, it must be undertaken in compliance with the Administrative Procedure Act (APA) and all other mandatory statutory and regulatory requirements, including the Small Business Regulatory Enforcement Fairness Act (SBREFA) and the Regulatory Flexibility Act (RFA).

As an initial step down the path of complying with its statutory and regulatory requirements, EPA held an invitation-only "Waters of the U.S. Small Entities Outreach Meeting" on Oct.12, 2011. At the meeting, EPA outlined the contents of the Draft Guidance issued in May 2011. During the meeting, several of the small business entities questioned EPA's plans to use the Draft Guidance as a basis for a proposed rule. The members specifically asked EPA not to finalize the "overly legalistic" Draft Guidance and, instead, to develop regulatory alternatives that would establish clear and understandable limits on jurisdiction.

Farm Bureau expressed its concerns that EPA must comply with the RFA and SBREFA. EPA began the Oct.12 small business meeting by explaining that it was "not legally required" to comply with the RFA and SBREFA, but that it would nonetheless be conducting a process that would be "indistinguishable" from these laws' requirements. We believe that EPA is wrong on both counts. As explained, the Draft Guidance, if implemented either as "guidance" or as a rule, would have significant impacts on small business interests, and EPA should not be allowed to claim otherwise. Moreover, the process that EPA is currently conducting cannot be legitimately described as indistinguishable from the RFA and SBREFA and, as such, will lead to incomplete and flawed data for the basis of a proposed rule.

The small business representatives expressed the belief that a proposed rulemaking expanding the scope of waters regulated under the Clean Water Act would have direct and significant impacts on small business interests. Contrary to what EPA stated in the Oct. 12 meeting, Farm Bureau believes that compliance with the RFA is not optional. An agency promulgating a rule that has "significant" impact on "small entities" must undertake a number of mandatory steps to ensure that the agency adopts the least burdensome alternative for small business. This assessment of alternatives is at the heart of the RFA and SBREFA. If EPA is moving forward with a rule defining and, as stated, "expanding" the scope of Clean Water Act jurisdiction, then EPA must comply with the RFA and SBREFA requirements. EPA tries to wordsmith its way around the RFA by claiming that any proposed rule revising the definition of "the waters of the United States" would merely have "indirect" effects on small entities, and, thus, it need not comply. But there can be no question that EPA's expansion of the scope of "waters of the United States" subject to Clean Water Act regulation has direct effects not only on regulated entities, but also on the entire nation.

As EPA knows, the scope of Clean Water Act jurisdiction has implications that permeate all sections and programs under the Clean Water Act – Section 303 water quality standards, Section 311 oil spill prevention control and countermeasures, Section 401 water quality certifications, the Section 402 point source permit program (including the just issued pesticide permits and soon-to-be-issued post-construction storm water regulations), and the Section 404 dredge and fill permit program. These programs regulate all sorts of diverse activities across the nation. Now, EPA is expanding the CWA program geographically to cover more areas across the landscape, including ditches, dry washes and desert drainages. As a result, EPA's so-called "definitional changes" that broaden the scope of CWA jurisdiction have direct impacts on anyone whose business relies in some part on the use of land. When public or private property is deemed "waters of the United States" by EPA and the Corps, there are numerous and costly impacts that flow from that determination, from the value of land to restrictions on land use. All of these are felt acutely by small business entities.

In Florida, for example, it is estimated that 40 percent of the value of farm land is directly attributable to future development.[1] Thus, when CWA jurisdiction creates permitting requirements associated with the use of the farm land, the value of the farmland decreases significantly. For farmers and ranchers their land is typically their principal asset, and frequently provides collateral for loans and other capital purchases needed to operate their farm or ranch. EPA's determination that CWA jurisdiction exists over ditches and other features may affect farmers' ability to obtain loans. Farmers have direct experience where banks have called loans or demanded more collateral to secure loans when it turned out that the mortgaged property was subject to CWA regulation.

There is also no question that an assertion of CWA jurisdiction significantly limits the activities farmers, ranchers and landowners can undertake on their land. For example, although normal farming activities are supposed to be exempt from CWA permitting requirements, the Agencies often require permits for changing from one type of farming to another or moving dirt into ditches to allow movement of farm equipment from one field to the next. They have also required a permit for cranberry growers to expand their cranberry bogs, ranchers to convert land to orchards, farmers to build a pond on their property, and dairy farmers to expand forage acres to support their dairy herd.

Realistically, a determination that land contains "waters of the United States" subject to CWA jurisdiction often will cause a project to be modified or even abandoned. Obtaining a Section 404 permit typically takes at least a year, costs hundreds of thousands of dollars and requires the support of expert technical consultants (and often lawyers).[2] For those that have the means to apply for a CWA permit, the regulations also impose certain avoidance, minimization and mitigation requirements.[3] Avoidance requirements, which involve leaving some portion of an area proposed for development in an undisturbed condition, result in a net loss of developable land unless other land is made available for development. The cost of avoidance (*i.e.*, development foregone) averages about $400,000 per acre in Southern California and can be well over $1 million per acre in some cities.[4] In extreme cases, the avoidance requirement can render an entire project infeasible or force the applicant to move the project to another site. In the mining context, for example, if the mineral resource is located in a jurisdictional area, the avoidance requirement may mean that the resource can never be extracted.

Mitigation requirements obligate permittees to undertake costly compensatory actions (*e.g.*, restoration of degraded wetlands or creation of man-made wetlands). To meet the compensatory mitigation requirements, permittees can purchase credits from a mitigation bank. Mitigation bank prices for seasonal wetlands are over $200,000 per acre in the Sacramento region.[5] In a number of Corps districts, there are already limited credits available for third party mitigation, and an increase in jurisdiction will

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[1] Plaintiga, A.J., Lubowski, R.N., and R.N, Stavins, *The Effects of Potential Land Development on Agricultural Land Prices*, 52 Journal of Urban Economics 561, 581 (2002).

[2] *See* David Sunding & David Zilberman, *The Economics of Environmental Regulations by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74 (2002) (study concluding that the average applicant spent $271,596 ($337,577 in 2011 dollar values) to prepare an individual section 404 permit application and $27,915 ($35,954 in 2011 dollar values) to prepare a nationwide permit application).

[3] In addition, applying for a permit under section 404 of the CWA triggers mandatory consultation with multiple state and federal agencies under, for example, the National Environmental Policy Act, the Endangered Species Act, the National Historic Preservation Act and the CWA. These consultations are often lengthy and burdensome and can, for example, take longer than the time it takes to build a house.

[4] David Sunding, *Review of EPA's Preliminary Economic Analysis of Guidance Clarifying the Scope of CWA Jurisdiction* (July 26, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514.

[5] *Id.*

lead to great uncertainty about, and possible exhaustion of, available mitigation credits. In such situations, this will certainly drive up mitigation costs and cause increased delays.

Furthermore, once a CWA permit is finally obtained, permittees now face the risk that their permit could be retroactively vetoed by EPA despite compliance with the permit's terms and conditions. The threat of an EPA retroactive veto makes it more difficult for individuals to rely on essential CWA permits when making investment, hiring or development decisions, and proponents must now account for the possibility of losing essential discharge authorization after work on the project has been initiated.[6]

If a landowner proceeds with work in an area designated "waters of the United States" subject to CWA jurisdiction, the Agencies can seek, and the court can impose, civil and even criminal penalties for violating the CWA. Michael and Chantell Sackett, for example, faced fines of up to $37,500 per day for unknowingly beginning construction of their family home on land that EPA claims contains jurisdictional wetlands.[7] Similarly, EPA assessed a $120,000 penalty for an Illinois farm that deposited 3,000 cubic yards of material into two acres of forested wetlands without obtaining a required permit. One rancher in California was required to convey a 300-acre parcel for conservation to settle claims that he plowed 33 acres of vernal pools and swales on his land to prepare it for planting.

In addition to CWA penalties, an assertion that land contains "waters of the United States" subject to CWA jurisdiction exposes project proponents to third-party litigation authorized by the citizen-suit provision of the CWA.

Clean Water Act Section 402 and Pesticide Applications

As this Committee is likely already aware, despite agriculture's efforts, the Supreme Court declined to hear a petition to review the Sixth Circuit's decision in *National Cotton Council v. EPA*, the ruling which invalidated EPA's interpretation that pesticide use in accordance with label restrictions is not a discharge of "pollutant" under the CWA. As a result of the *National Cotton Council v. EPA* decision, the discharge of pesticide from a "point source" to "waters of the United States" is requiring permit coverage, as of Oct. 31, 2011. "Point source" and "waters of the United States" are legal terms of art and a frequent topic of litigation, and the full scope of permit requirements for particular pesticide uses remains unclear after the *National Cotton Council v. EPA* decision.

A significant number of farms and small businesses will be impacted by the federal requirement under which the EPA and delegated states must issue CWA National Pollutant Discharge Elimination System (NPDES) general permits for certain pesticide applications.

EPA recently finalized its Pesticide General Permit (PGP), which will establish a model framework for regulating pesticide discharges under the NPDES program. EPA's PGP will apply in six states (Alaska, Idaho, Mass., N.H., N.M. and Okla.). Pennsylvania and 43 other states have been granted primacy to administer NPDES permitting. Pennsylvania's DEP published its draft rule last Dec., which largely mirrored EPA's draft rule, but thus far, DEP has not finalized the rule.

[6] David Sunding, *Economic Incentive Effects of EPA's After-the-Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal* (May 30, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514.
[7] *Sackett v. Envtl. Prot. Agency*, 622 F.3d 1139, 1141 (9th Cir. 2010), *cert. granted*, No. 10-1062 (Jun. 28, 2011).

EPA estimates that this new requirement will affect approximately 365,000 pesticide applicators nationwide that perform 5.6 million pesticide applications annually. It will cost $50 million and require over one million hours per year to implement.

The permit's complex compliance requirements will impose tremendous new burdens on thousands of small businesses, communities, counties, and state and federal agencies legally responsible for pest control, and potentially expose them to legal jeopardy through citizen suits over paperwork violations. Ultimately, the permit could jeopardize jobs, the economy and human health protections across America as regulators and permittees grapple to implement and comply with these permits.

The proposed PGP offers permit coverage for only specific types of pesticide use that EPA believes will result in "unavoidable discharges": (1) aquatic weed and algae control; (2) mosquito and other flying insect pest control; (3) aquatic nuisance animal control; and (4) forest canopy pest control.

Any other regulated pesticide discharges would require coverage under an individual permit. The PGP is stringent, imposing numerous recordkeeping, reporting, and use restrictions on covered pesticide use. Permit requirements can be enforced by EPA or interested citizens through lawsuits in federal court with substantial potential penalties.

The proposed PGP does not offer coverage for agricultural applications (other than weed control in ditches). To date, EPA has not explicitly stated that agricultural pesticide application will require NPDES permit coverage if pesticide falls into waters of the U.S. during application. EPA has stated in the PGP proposal, however, that *any* pesticide use will require an NPDES permit "if those activities will result in point source discharges to waters of the U.S." EPA sought public comment on whether additional pesticide uses should be covered under the PGP and whether the proposed permit conditions were appropriate.

Farm Bureau filed comments with EPA explaining that the CWA does not authorize NPDES permit requirements for agricultural pesticide use and most would run off as agricultural storm water. We further explained that agricultural pesticide use is not subject to NPDES permitting because Congress specifically intended that state and local water quality programs – *not* NPDES permitting – would address any incidental water quality effects of agricultural activities such as pesticide use. Agricultural pesticide discharges are therefore beyond the scope of EPA's NPDES permitting authority.

Moreover, the act of applying for, and obtaining, an NPDES permit will cost farmers dearly, in both the literal and figurative sense. Literally, it will cost growers to hire a consultant to complete the necessary mountain of legal paperwork to apply for the permit. Figuratively, as a permit holder, farmers can be sued. Even if a farmer does not get the permit, a private citizen can sue the state (or federal) government for not requiring that farmer to have a permit. Or, they can sue the farmer for an allegedly unlawful discharge. If, through the course of the legal proceedings, it is determined that a farmer was required to have an NPDES permit, the maximum penalty is $37,500 per day.

Therein lays our main concern: EPA ignored the comments it received from the agriculture community and published a rule that offers no guidance on whether EPA believes farmers are required to have this permit for the traditional, land application of pesticides. Farm Bureau does not believe farmers should need a permit, but EPA's regulatory language is purposefully ambiguous. Now farmers face a daunting choice: to apply for a permit or not?

As referenced earlier, EPA's permits will require paper compliance with little actual improvements to our water. In fact, current programs in Pennsylvania, which are replicated across the nation, do improve water quality and do provide enforcement mechanisms for illegal use and application of pesticides. Under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Pennsylvania Pesticide Control Act, our state requires that any farmer or business must have a Pesticide Applicator's license or certification to purchase restricted use pesticides, let alone apply them. In order to obtain this license, an individual must first study for and pass an exam covering application safety, reading of labels and regulatory requirements. In order to keep a license current, holders must complete a specified number of continuing education requirements every three years. Pennsylvania's process that I just described does improve water quality. Conversely, EPA's process of permit requirements and the ambiguity of the published regulation do nothing but increase costs on farms and businesses and create legal uncertainty for the engines of our economy.

Members of the Committee also need to view this issue in the context of how the agency wants to expand its jurisdiction by "clarifying" what are waters of the U.S. According to EPA, waters of the U.S. include land – ditches, erosion features and low-lying land features that may be dry most of the year but are occasionally wet. Even when these features are dry, they would remain waters of the U.S. according to EPA. So now, under certain circumstances, a farmer who is applying pesticides to dry land could need a Clean Water Act permit. This goes well beyond anything Congress intended in the law and is an example of an agency that needs to be reined in.

I would like to thank the House of Representatives for doing its part to prevent this regulatory pickle farmers now face. Unfortunately, the Senate failed to approve language that EPA helped write which would clarify, in statute, that farmers are not subject these rules. We are hopeful that the Senate will take appropriate action, but we will also say its action cannot come quickly enough.

Dust

Coarse particulate matter ($PM_{10-2.5}$) (including dust) consists of particles between 2.5 and 10 micrometers. $PM_{10-2.5}$is primarily found in rural areas, where it is a part of normal rural life. Most of the $PM_{10-2.5}$ in rural areas consists of crustal and organic materials, which are naturally occurring. Dust can be disturbed by such normal activities as driving on unpaved rural roads, working farm fields with tractors, or moving livestock and is also generated by naturally occurring conditions, such as blowing winds and arid conditions.

Unlike the scientific evidence for $PM_{2.5}$, EPA readily admits that there are considerable uncertainties in the scientific knowledge of possible health impacts of these materials. EPA can only "suggest" that coarse PM causes short-term adverse health effects and admits that any link to long term health impacts is "inconclusive."

$PM_{10-2.5}$ has been subject to EPA regulation for several years, through the promulgation of NAAQS. EPA is in the process of its periodic five-year review of the NAAQS for particulate matter and farm dust. Farm Bureau applauds the recent decision of the administrator to propose that the current standard for coarse PM be retained with no change, a decision that will help to prevent many other rural areas around the country from falling into non-attainment status for dust. It will not, however, help those farmers in Arizona, California, New Mexico and other parts of the West and Southwest whose operations are already regulated because they cannot meet current dust standards.

While the administrator's recent announcement that EPA will not propose revisions to the current standard is welcome news, it does not provide the certainty that farmers and ranchers in rural areas need to keep from having their operations regulated due to naturally occurring dust. A recent petition filed by the WildEarth Guardians illustrates the point.

The group claims that data shows that certain areas are currently in violation of the dust standards, and EPA "must designate" these areas as being in non-attainment. States and local authorities are required to develop and implement plans to reduce dust in these areas. Failure to bring such areas back into compliance can result in loss of federal highway funds, among other consequences.

EPA has repeatedly said that the purpose of the ambient air quality standards is to protect public health, primarily in population centers. Yet, of the 15 areas that WildEarth Guardians claims "must be" declared in violation, nine are in areas where the population is less than 20,000 people. The petition demands EPA clamp down on dust from such areas as Pagosa Springs (pop. 1,591), Alamosa (pop. 9,000), Lamar (pop. 8,659) and Parachute (pop. 1,006), all in Colorado. Several other rural areas in New Mexico, Montana and Wyoming are also included in the petition.

Only legislation such as H.R. 1633, the *Farm Dust Regulation Prevention Act of 2011*, can provide the certainty that farmers, ranchers and residents of rural areas need to ensure that their normal activities that are essential parts of their operations are not unduly regulated by a standard for which there are no proven benefits for human health.

Section 308 CAFO Reporting Rule

On Oct. 21, 2011, EPA published an Information Collection Request (ICR) and a proposed NPDES Concentrated Animal Feeding Operation (CAFO) Reporting Rule in the *Federal Register* (76 *Fed. Reg.* 65431). Among the information EPA is proposing to require CAFOs to submit under Section 308 is the location of the production area, either by street address or by latitude and longitude. Section 308(b) requires that information obtained by EPA under that section "shall be made available to the public." This is a huge concern for farmers and ranchers because unlike most factories, most farmers and their families live on their farms and ranches. Therefore, this type of information, if made public by EPA, could have significant security and privacy issues associated with it.

In addition to the facility location information, EPA is proposing to require CAFOs to report contact information, NPDES permit information, information on the type and number of animals at a CAFO, and information on acres available for land application of manure. EPA has not demonstrated that collecting such information from all CAFOs is necessary or of practical utility. In particular, EPA has not demonstrated any necessity for obtaining information from CAFOs that do not discharge.

Under Section 308 of the CWA, EPA has the authority to collect information from point sources whenever required to carry out an objective of the CWA, including the development and enforcement of effluent limitations. However, the CAFO effluent limitations have already been established, and this blanket information request appears to be driven solely by a desire to have a national inventory of production agriculture in order to further EPA's goal of micromanaging and issuing regulations telling farms how to operate.

It is not surprising that EPA has made no effort to support the proposition that collecting information from entities that do not discharge is necessary to carry out the CWA. Courts have repeatedly held that EPA has no CWA permit authority over non-dischargers.[8] Thus, there is no credible argument that obtaining information from non-dischargers is necessary for EPA to carry out its functions under the CWA.

EPA's proposed CAFO Reporting Rule will subject thousands of farmers across the United States to the risk of $37,500 a day penalties for failing to meet an obligation which they know nothing about. When all of the unnecessary costs are added to the security and privacy concerns and the lack of demonstrated necessity, one must conclude that EPA is on a fishing expedition that will be at the expense of farmers and ranchers.

Conclusion

The overwhelming number of proposed regulations on the nation's food system is unprecedented and promises profound effects on both the structure and competitiveness of all agriculture. The trend of the past three years has been toward greater EPA regulatory control over agriculture. It should surprise no one that regulatory compliance drives the need for significant investment. EPA proposals are overwhelming to farmers and ranchers and are creating a cascade of costly requirements that are likely to drive individual farmers to the tipping point. In addition to driving up the cost of producing food, fiber and fuel, these proposals highlight EPA's goal of controlling land use and water supplies. In many cases, the regulations bring with them citizen suit enforcement and judicial review of individual farming practices.

Mr. Chairman and Ranking Member, I commend you for convening this hearing and for all your hard work on behalf of agriculture across the country. I will be pleased to respond to questions.

[8] *National Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011) ("[T]here must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority."); *Service Oil, Inc. v. Environmental Protection Agency*, 590 F.3d 545, 550 (8th Cir. 2009) (holding that EPA had no authority to impose a penalty for a violation of Section 308 before the facility discharges any pollutants).