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May 24, 2002

Mr. John Morrall
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB, Room 10235
725 17" St., NW
Washington, D.C. 20503

RE: Comments on Draft Report on Costs and Benefits of Federal Regulations

Dear Mr. Morrall:

The American Farm Bureau Federation (AFBF) is the largest general farm organization in the United States, representing the interests of over 5.1 million member families in all 50 states and Puerto Rico. We are pleased to offer our comments on the Draft Report on Costs and Benefits of Regulations submitted by the Office of Management and Budget.

Over the past few decades, federal regulations have placed increasing economic and paperwork burdens on American farmers and ranchers. Agricultural producers are generally impacted by many federal agencies in the course of conducting their farm or ranch activities. Not only do producers have to comply with rules and regulations of agencies within the Department of Agriculture for the production of their crops, but they also have to comply with environmental regulations under the Clean Water Act, Clean Air Act, Endangered Species Act, the Food Quality Protection Act, the Food Drug and Cosmetic Act, as well as state and local regulations.

Most farmers and ranchers are small businessmen. As indicated in the draft report, the average regulatory cost per employee for businesses with less than 20 employees is $7,000, while the average cost for larger firms with over 500 employees is about $4,500. Most farms and ranches fall into the category of 20 or fewer employees.

But cost is not the only factor. Coming under the jurisdiction of so many agricultural and environmental regulatory agencies as they do, farmers and ranchers must comply with the requirements of each. Paperwork requirements alone are enormous. Farmers and ranchers often spend so much time complying with these programs that they have difficulty finding time to farm or ranch.

Reducing the costs and the burdens of federal regulations is very important to farmers and ranchers. Regulatory reform is a priority issue of the American Farm Bureau Federation. In addition to providing comments on specific regulations and the use/abuse of regulatory guidance,

we also accept OMB's invitation to provide comments on other aspects of the regulatory process that would benefit from reform.

I. AFBF PRINCIPLES ON APPROPRIATE REGULATION

AFBF believes that appropriate regulatory philosophy should be based on certain fundamental principles. These include:

- **The right to own and use private property.** Because individuals have personal responsibilities and rewards for private property ownership, they are highly motivated to care for their property. Private ownership fosters good stewardship of the land while at the same time making beneficial use of it.

- **Market-based incentives.** Markets transfer property rights. That is the beautiful simplicity of a free-market economy. It inherently transfers property right ownership when transactions take place.

- **Outcome-based performance standards.** This is the most efficient kind of evaluation. Most of our commodities are based on an established standard for an end product. Efficient labels and branded products rely on explicit and inherent standards. Branded product standards are based on reputation (private property responsibility of the company). The alternative, a prescribed practice, is only an estimate, guess or a proxy for an intended outcome. The further down the production system that rules are imposed the more difficult it is to achieve the objective. The further rules move from an outcome-based standard, the less efficient and less effective they become.

- **Sound science and peer review.** This is an efficiency issue. Without solid facts supporting its enactment, there is little chance that a regulation will ever achieve its intended objective. Many regulations that are written cannot work, because there is no factual, science underlying the rules.

- **Measurable benefits.** This is common sense. Why impose any kind of change through a regulation unless there are measurable benefits? It is possible to place an economic value on any benefit whether it is based on a marketable commodity, natural resource, recreational benefit or even political gain. Regulations based on the right to own private property, market-based incentives, outcome-based standards and sound science are the easiest **and** most efficient criteria from which to develop measurable benefits. This also allows policy makers and the public to prioritize the best use of public funds to the area of greatest benefit.

- **Flexible and adaptable to existing state rules.** State policy makers work to make their state economies and natural resources as robust that they can. Imposing a rigid, generic federal rule on a state that is already addressing resource-specific issues within a state, removes the responsibility from the individual state. This is the same kind of dynamic that exists with

private property. **A** state government allowed to have the responsibility to care for their resources is motivated more if they have ownership of the outcome. In addition, the states can direct resources at the state level much more effectively than those resources can be directed from Washington, D.C.

- **Congressional oversight.** Individual administrative departments have not been very accountable for spending and program duplication. There needs to be comprehensive oversight of departmental initiatives. When any one issue, such as invasive species, can identify over a dozen conflicting authorities within the federal administration, there is an accountability problem.

- **Education and Technical Assistance.** Information on new technologies must be easily accessible and available.

11. SPECIFIC COMMENTS ON THE COST-BENEFIT ASPECTS OF THE REPORT

1) The Organization for Economic Cooperation and Development Reference Checklist for Regulatory Decision-making

Box I on page 81 presents a checklist that embodies regulatory principles adopted by the Organization for Economic Cooperation and Development (OECD). It provides an excellent reference list for agencies to use in processing regulations. We believe that federal regulatory programs could benefit if a checklist of this sort, together with the two additional suggestions below, were incorporated into them. The nine checkpoints listed are:

- Is the problem correctly defined?
- Is government action justified?
- Is regulation the best form of government action?
- Is there a legal basis for regulation?
- What is the appropriate level (or levels) of government for this action?
- Do the benefits of regulation justify the costs?
- Is the distribution of effects across society transparent?
- Is the regulation clear, consistent, comprehensible and accessible to others?
- Have all interested parties had the opportunity to present their views?

Items not included in the above list include:

- What programs and regulations are already in place? *Current regulations often assume that noa-compliance indicates a problem. As with the case of livestock facility regulation, EPA has already identified 42,000 state-permitted livestock. facilities but are concerned that there are only 2,000federally permitted livestockfacilities. **A** discussion of the lack offederal compliance implies no over-sight, when it boils down instead to statutory semantics.*
- Have the associated risks been identified and used to prioritize the regulatory goals?

A water quality rule that focuses on a single nutrient such as phosphorus may actually create other risks as pennittees scramble to limit phosphorus to regulated amounts. Rules that protect the migratory waterfowl, may actually increase the levels of phosphorus in water.

2) Cost Benefit Methodologies.

Cost/benefit methodologies appear to vary significantly among agencies. Reading through the major rules listed in Table 7 it becomes clear that agencies measure costs and benefits in their own way.

- There is no apparent standard method to analyzing costs and benefits.
- Annualized values vary significantly.
- Discount rates vary. No explanation is given for this factor.
- Some agencies put a dollar value for human life, while others do not. It is not appropriate to list any kind of environmental or human health benefit without quantifying it economically. Will insurance rates drop when human health is enhanced? Will consumers pay more to see a vista enhanced by a rule?

The analyses listed in Table 7 are highly variable. Some list only the costs. Some list only the benefits. Some list both costs and benefits. Some list no costs or benefits (see Table 8, page 77-78).

There are specialized areas of economics that deal specifically with benefit/cost analysis' and assigning a monetary value to social benefits (human health, esthetics, recreation, etc.) There is no reason for not conducting a thorough benefit/cost analysis. USDA has an Office within the Office of Chief Economist -- the Office of Risk Assessment and Cost Benefit Analysis --that focuses on methodologies for benefit/cost analysis and risk assessment (http://www.usda.gov/agency/oce/oracba/index.htm).

111. COMMENTS ON SPECIFIC REGULATIONS OR PROGRAMS

The two major areas where comments are requested are: (1) specific suggestions for new rulemaking or for elimination of outdated and unnecessary rules, and ***(2)*** suggestions on problematic use of agency guidance in lieu of rulemaking. The report also specifically asks for comment on specific regulations, guidance or paperwork requirements that impose especially large burdens on small business, unfunded mandate issues, or suggestions or comments on any analytical issues that need refinement or development.

1. SPECIFIC SUGGESTIONS FOR EXPANDING PROGRAMS BY ENACTING NEW REGULATIONS.

a. *Endangered Species Act*--- 43 USC 1631 et seq.

[1] A useable, straight-forward text on project analysis is, Economic Analysis of Agricultural Projects, J. Price Gittenger. Economic Development Series in Economic Development. John Hopkins University Press 1982.

Regulating Agencies: US Fish & Wildlife Service, National Marine Fisheries Service

Problem: More than 75 percent of all endangered and threatened species listed under the federal Endangered Species Act inhabit private property. For more than 34% of all listed species, private property is their only habitat. If the Act is to succeed, the cooperation of private landowners is critical.

The law is not working, precisely because the cooperation of private landowners has not been solicited. Instead, federal agencies have administered the law through coercive regulation of private landowners. As a result, the law has not achieved its purpose of recovering species. In addition, critical aspects of the administration of the law have been invalidated by courts. New rulemaking is needed to update and clarify these requirements.

Proposed Solution: We suggest that both Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) enact rules that would streamline the administration of the law to make it more landowner-friendly. Rules that provide more landowner involvement in the ESA process would improve the administration of the law by reducing conflicts between agencies and landowners that have plagued the law since its enactment. Involving landowners early in the process and providing incentives rather than heavy-handed regulation will increase the willingness of landowners to manage species on their lands instead of the opposite result. Command-and-control tactics that have marked administration of the ESA from the beginning make landowners wary of the presence of listed species on their property because of the increased restrictions on the use of their property that result.

Rulemaking would include:

- *Require independent scientific peer review for most ESA decisioizs.* Recent actions involving false planting of Canada lynx samples and a preliminary report of the National Academy of Sciences (NAS) overruling a decision to deny water to Klamath, Oregon, farmers last year severely affect the credibility of agency science. Peer review requirements would help restore that credibility, as well as ensure that agency actions are based on sound science.

- *Provide that landowners applying for a federal permit or license or receiving technical assistance or funding from a federal agency be given the opportunity to participate and have their input considered in consultations required by section 7 of the ESA.* Currently, decisions on the fate of permit applications by private entities are made by FWS or NMFS and an applicable federal "action" agency. The private entity, who is the one party directly affected by the decision, is left out of the process. The Endangered Species Act does not prohibit private participation, and private participation would improve the administration of the law.

- *Require that affected landowners, local communities and the general public be given an opportunity to provide comments and have their comments considered on all draft recovery plans and draft biological opinions under the ESA.* The same logic as that above applies here. Landowners and the people who live and work in local communities have

to live with the presence of listed species. Recovery, if it is to occur at all, will take place in the communities or on private lands. Involving those people in the recovery planning process will improve the administration of the Act.

- *Develop a consistent framework for the FWS and NMFS for implementation* of *the Endangered Species Act, especially in areas where their jurisdictions overlap.* FWS has jurisdiction over terrestrial species and fresh-water fish. NMFS has ESA jurisdiction over marine mammals and marine fish. Species like salmon migrate from fresh-water to the ocean ad then come back to spawn. NMFS has ESA jurisdiction, including the fresh-water part of the salmon's journey. FWS and NMFS policies in these overlap areas are often inconsistent and even conflicting.

- *Require notification to persons holding federal permits or licenses who are affected by a citizen suit under the Endangered Species Act.* Suits filed only against government agencies often are not discovered by the landowners who are really affected by the suit until a settlement has been made that adversely impacts them. Often agencies and plaintiffs settle cases out from landowners.

- *Provide a thorough economic analysis of all proposed critical habitat designations, with opportunity for affected parties to participate and have their input considered from the early, stages of the analysis.* **A** recent decision of the 10th Circuit Court of Appeals, New Mexico Cattlemen's Association v. Norton invalidated the process by which the FWS conducts economic analyses under the critical habitat designation portion of the ESA. Currently, FWS has no framework for conducting these analyses. Rulemaking would provide that framework.

- *Foster incentives through regulations to implement the Landowner Incentive Program and the Private Grant Program.* The FY 2002 Budget for the Department of Interior announced two new programs within the Department of Interior. The Landowner Incentive Program is to provide funding for state endangered species incentive programs. The Private Grant Program is to provide grants on a competitive basis to individual entities for endangered species conservation projects. Money has been appropriated. But there is no framework for either of these programs. Rulemaking would provide such **a** framework.

b. National *Landscape Conservation System* --
Regulatory Agency: Bureau of Land Management (BLM)
Authority: Antiquities Act (16 USC 431 et seq.)
Description of Problem: The designation of 15 new national monuments in the final days of the previous administration caused significant controversy in the Western states where they were created. The designations also created considerable uncertainty in people within the monument areas and the surrounding communities with respect to what a designation meant for the continued use and enjoyment of their private property. The Department of Interior has recently announced that it will begin the process of developing management plans for these monuments, yet there is no framework for developing such plans.

Proposed Solution: The Antiquities Act provides that declarations creating monuments cannot include private property (although there will still be inholdings surrounded by the monument boundaries), nor can a declaration impact valid existing rights. A regulatory framework for this program is essential to ensure compliance with the Antiquities Act, to provide consistent application throughout the system, and to provide area residents and communities with some expectations as to how management of monuments will be achieved. We suggest that such regulations specify:

- Private property will not be included in the monument or regulated by a management plan.
- All existing rights, such as water rights, grazing rights and access rights, will be respected and unaffected by the management plan.
- A process for significant public input into development of management plans.
- A process for revision or amendment of management plans.
- **A** statement whether BLM will seek to purchase privately owned property or interests in privately owned property in the administration of the monuments.

c. Cooperative Conservation Initiative.

This is a major initiative of the Interior Department for the 2003 fiscal year. If approved by the Congress, implementing regulations should be ready so that the benefits of the program can be maximized for the 2003 fiscal year.

d. *Clean Water Act Regulatory Amendments*

In Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, (SWANCC) the U.S. Supreme Court limited the reach of Clean Water Act jurisdiction over "navigable waters." In so doing, it restricted the definition that had been given by the Army Corps of Engineers.

The Supreme Court based its ruling on the statutory term "navigable waters." The Court held that there must be a clear and compelling connection between traditional navigability and the wetlands or waters to be regulated by federal agencies. The decision emphasized that "navigable waters" define the limits of the Clean Water Act jurisdiction and that –

> "The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."

The Court held that the agencies' expansive definition of the term "waters of the United States" was so broad that the word "navigable" was effectively eliminated from the statutory term, "navigable waters."

Farm Bureau believes the SWANCC opinion clearly expresses the view that the reach of the Clean Water Act is not as expansive as the Corps and EPA assert. It is Farm Bureau's position that the federal government needs to recognize the significance of this decision

and limit federal jurisdiction to wetlands that have a "significant nexus" to navigable waterways.

This ruling is extremely important to farmers and ranchers. Farm Bureau is concerned with legal briefs that have been filed recently by the Department of Justice that seek to narrow the interpretation of SWANCC and seek to preclude the need for rulemalung or any new direction in administrative policy.

We believe the questions of CWA jurisdiction, the regulatory definition of "adjacent" and "waters of the United States" are policy and regulatory matters, which should be resolved through a rulemaking.

e. Mandatory price reporting was enacted into law more than *2* years ago. Part of that law required USDA to start a library of swine production contracts that producers could access for comparison purposes. To date, nothing has been done to begin implementation of this library.

f. The government (FBI) has developed a list of terrorist organizations. Extremely few domestic organizations are on that list despite their well-known support for terrorist activities. The focus, to this point, has been on foreign organizations. More emphasis needs to be placed upon domestic organizations, which support terrorist activities, as they have ready access too much of the resources within the U.S. and therefore pose the greater threat to national security. Since agriculture is extremely vulnerable to this type of activity it is especially important to have such organizations listed in which the FBI will be ready to take an active role in investigations.

2. SPECIFIC REGULATIONS THAT ARE NOT BEING IMPLEMENTED AS INTENDED.

a. *Food Quality Protection Act*
Environmental Protection Act regulations implementing the Food Quality Protection Act are not being implemented as they are supposed to. **A** full discussion of the problems with administration of FQPA are described below.

b. *Mad Cow* ***Disease*** *Regulations*
Both the Food and Drug Administration and the Food Safety and Inspection Service are proposing rules related to control of BSE (commonly referred to as 'mad cow disease'). Some of the ideas now being presented are rules put into place in other countries, which have BSE. The U.S. does not have BSE. Far different requirements are needed to keep a certain disease out of the country as compared to trying to eradicate a disease already found in a country. Agencies involved need to use scientific basis in recommending rules designed for one purpose and used for another purpose. The structure of the particular industries involved in each country also needs to be taken into consideration. What may work in one country may have an entirely different effect in another country due to the differences in size of the industry in each country and the structure of that industry in each country.

c. *Endangered Species Act De-Listing Regulations*
The Endangered Species Act provides that listed species are to be removed from the list when they have recovered. Recovery is normally determined by recovery goals established by recovery teams through recovery plans. Grizzly bears in the Yellowstone Park area, gray wolves in the Great Lakes region (Minnesota, Michigan and Wisconsin) and bald eagles -- three very highly visible species -- have clearly and admittedly met all of the recovery goals set forth in their respective recovery plans, yet de-listing has not moved forward. We request that a "prompt" letter be issued to the Fish & Wildlife Service to begin de-listing these species at once.

d. Total Maximum Daily Load (TMDL) Proposed Rule Should Incorporate the Following Points

A TMDL is the total maximum load of a given pollutant that will allow a water segment to attain water quality standards. In short, the assimilative capacity of an impaired waterbody. Once EPA approved a TMDL that information should be used by the state in their Continuing Planning Process, (CPP) established under Section 303(e), for implementation of state assigned WLAs and LAs. The CPP allows for an integrated watershed approach that brings together and integrates the distinctive approaches contained within the Clean Water Act (CWA) for point and nonpotnt sources. Specifically, point sources would be subject to water quality based effluent limitations that could be incorporated into NPDES permits, over which EPA would exercise discretionary review and veto authority. Nonpoint sources would be subject to state-developed best management practices, over which EPA would exercise the power of review and grant funds. The integrated watershed approach, conducted under the umbrella of the CPP, allows states and local watersheds to:

a. Monitor and assess their needs;
b. Plan their economic development, implement water quality management measures and even institute trading policies;
c. Achieve the goals and objectives of the watershed in a manner consistent with the goals of the CWA; and
d. Diffuse and minimize the potential for adverse litigation that will frustrate a cooperative and locally led watershed approach.

EPA's TMDL Approval Authority - EPA is responsible for the scientific validity of each proposed TMDL. EPA should determine whether the total load identified by the State reasonably reflects an amount of pollutant loading that will eliminate impairment by the pollutant at issue. EPA will determine whether or not to approve the TMDL solely on the basis of this scientific analysis.

State Authority -To balance economic, social, and environmental interest of the state. WI-As and LAs must be established by the state and serve as the basis for future action implementing the approved TMDL through the NPDES program or other programs pursuant to the State's continuing planning process ("CPP"). WLAs and LAs **are not** the TMDL and **are not** "elements" of a TMDL subject to EPA approval.

e. Conceizti-ated Animal Feeding Operations

Farm Bureau is concerned with the debilitating impact the proposed regulations will have on America's livestock operations. Complying with new NPDES regulations will be costly to many producers and will have a major effect on the future of many individual farms. States throughout the country have instituted their own non-NPDES permitting schemes that address Animal Feeding Operations. The existence and success of these programs indicates that increased federal regulation of Animal Feeding Operations will result in increased coordination costs for federal and state governments and unnecessary heightened regulatory burdens for producers. Farm Bureau urges EPA to:

a. Maintain the 1,000 animal unit permit threshold;
b. Maintain the 25-year, 24-hour storm exemption;
c. Not include land-application m the NPDES permit; and
d. Not include the concept of Co-permitting.

C. REGULATIONS THATE ARE OUTDATED OR UNNECESSARY AND NEED TO BE REMOVED

1. The Bureau of Land Management (BLM)
43 CFR 4130.2(g)
This regulation provides that people who hold permits to graze livestock may take "conservation use" on the allotment. This means that a permit can be obtained and not used for livestock grazing for the term of the permit.
Reason for Removal: The provision allowing for "conservation use" was invalidated by the Tenth Circuit Court of Appeals in Public Lands Council, et al. v. Babbitt, 167 F.3d 1287 (1999).

IV. ABUSES OF REGULATORY GUIDANCE

Agencies seem to be going around the system by simply offering guidance rather than a rule. This eliminates public input into the process but still often as the same affect as a rule. Agencies should be severely limited in offering "guidance". If changes need to be made than rule modification, or a new rule, whichever is needed, along with required protocol should be done.

1. WETLANDS

The Army Corps of Engineers executes a large part of its regulatory program through regulatory guidance instead of issuing regulations. The Environmental Protection Agency (EPA) also executes substantial parts of its wetlands program through program guidance instead of through the regulatory process. This has caused problems for farmers and ranchers.

Farmers and ranchers, like many other small businesses, have been significantly impacted by an overly intrusive federal wetlands regulatory program. Many farmers have unwittingly found

themselves ensnared in a regulatory trap that unnecessarily delays and frustrates all attempts at good faith compliance and is prohibitively expensive to challenge over a protracted period of time. In farming or ranching, the agricultural value of the land rarely justifies the cost of challenging regulatory burdens, which can run into hundreds of thousands of dollars and take years to clarify. Win or lose, the viability of the farming or ranching operation is placed in jeopardy. Wetlands regulations have the net effect of reducing the value of productive assets by restricting current economic uses and limiting future use opportunities.

From the perspective of farmers and ranchers, most of the problem stems from an excessively broad federal definition that encompasses land exhibiting few, if any, true wetlands characteristics. Regulation of these "dry wetlands" has caused property values to fall and tax burdens to shift dramatically, limiting the ability of farmers to obtain critical financing for their operations. Dry wetlands designations have also precluded farmers and ranchers from physically expanding many types of farming operations, causing inefficiency and reduced competitiveness.

Despite a clear statement of intent from Congress in Section 404(f) that normal and routine farming and ranching practices are not subject to individual permit requirements, the opposite is often the case. Regulators have expanded their control and power over private land as well as normal and routine farming practices. These frequent attempts to circumvent and narrow the intent of Congress under Sec. 404(f) actions are not benign and can result in costly legal disputes. Often, landowners are offered an "opportunity for settlement" that usually includes a severe financial penalty and forfeiture of some land as mitigation for the so-called violation. In short, the issue comes down to vague law and unintelligible guidance that have eroded credibility of the 404 program among law-abiding landowners.

Wetland Identity Crisis - There has been a long-standing debate over how a wetland should be defined, but in the beginning, wetlands were wet. The Corps of Engineers proposed and ultimately adopted a final regulation on April 3, 1974, that stated: "Wetlands are those land and water areas subject to *regular inundation* by tidal, riverine, or lacustrine flowage. Generally included are inland and coastal shallows, marshes, mudflats, estuaries, swamps, and similar areas in coastal and inland navigable waters." In 1974, wetness equaled regular inundation. Inundation equaled water covering the surface. We emphasize this point for two very important reasons. First, Congress and the Courts has specifically and repeatedly rejected applying the Clean Water Act's permitting programs to ground water. And secondly and almost inexplicability, the Corps and EPA have shown little restraint in dropping below the surface of the ground to find "navigable waters" in order to establish federal jurisdiction.

Because of this lack of fidelity to surface water, landowners have been harassed, frustrated and literally beaten by strict enforcement schemes into submission by federal wetland determinations. Determinations bind private individuals through a complex and confusing plethora of regulatory guidance documents. Guidance is used as regulation but it has never been subjected to Administrative Procedure Act requirements. Guidance documents that should be enacted as regulations because they dictate the scope of the wetlands program include: 1) the 1987 Delineation Manual; 2) Hydric Soils List, the Hydric Plant List; 3) Mitigation MCA and sequencing (the policy of avoidance, minimization and compensatory mitigation); 4) guidance on "normal circumstances;" 5) guidance on plowing; 6) guidance on the exemption for farm and

ranch roads; 7) guidance on drainage ditch maintenance; and 8) guidance on the construction and maintenance of farm and stock ponds. All of these "guidance" documents are used to make federal wetland regulatory determinations and all never result in a final agency action. This regulatory quagmire is so murky that in order for a landowner to challenge the reach of federal jurisdiction, he or she must first commit a CWA violation.

This complicated and complex scheme has resulted in a confusing array of definitions, prohibitions, and policies applicable to all wetlands and all activities in wetlands.

Clearly, the *Corps* and EPA have abused regulatory guidance and used it to expanded federal regulatory jurisdiction. As a starting point OBM should require the *Corps* and EPA to initiate rulemaking on the following issues -

1. The 1987 Delineation Manual
2. Definitional criteria of a jurisdictional wetland
   - Hydrology Duration
   - Hydrology Location
   - Hydric Soils
   - Hydrophytic Vegetation
3. Definition of "navigable water"
4. Definition of "water of the United States"
5. Definition Of "adjacency"
6. Definition of a "tributary" to "navigable waters"
7. Definition of regulated activities within a jurisdictional wetland
8. Mitigation requirements

2. EPA PESTICIDE PROGRAM

The EPA also conducts a substantial portion of its pesticide regulatory program through Pesticide Registration (PR) Notices. Important decisions relating to pesticide cancellations, pesticide restrictions and procedures are being implemented through PR Notices. These PR Notices have the force and effect of regulation, but they bypass public notice and comment procedures required by the Administrative Procedures Act (APA)..

While public comment might be permitted under these PR Notices, it is often not the same as public comment under the APA. Furthermore, these PR Notices do not permit the same level of public scrutiny as proposed regulations. Nor do they fully allow for public scrutiny into the science behind pesticide decisions, as would be permitted under the APA. Finally, the use of PR Notices does not allow the same level of administrative or judicial scrutiny as proposed regulations. Using PR Notices provides no judicially reviewable standard, such as is provided by the "arbitrary, capricious, abuse of discretion" standard in the APA.

Farmers and ranchers, who use the registered products to produce food and fiber for the country, are caught in the middle between EPA and pesticide registrants. Registrants who decide to discontinue a product because EPA has used unscrutinized and flawed data and procedures affect

farmers and ranchers who use that product and who may not have a viable alternative to correct the problem for which the product was used.

The appropriate remedy is for EPA to convert its PR Notice procedures into regulatory rulemaking subject to the public scrutiny requirements of the APA. If any aspect of the PR Notice procedure is to be retained, it should be narrowly circumscribed to exclude areas that should be addressed through rulemaking.

3. FOOD QUALITY PROTECTION ACT

The same problems inherent in the EPA pesticide program are present in the manner which EPA is administering the Food Quality Protection Act (FQPA). In fact, implementation of the EPA pesticide policies and the FQPA go hand in hand, as one complements the other to some degree.

Important EPA scientific policies, such as the cumulative risk policy (now in draft stage), pesticide tolerance data requirements, including scientifically unsupportable safety factors—have been or are being promulgated by the agency as guidance documents and not as regulations. Since these policies drive the standards by which EPA is to review product registrations, they are more appropriate as rules or regulations than "guidance."

An additional problem with EPA's use of "policy" in this respect is that the policies are never final. The EPA says that such policies are continually evolving, and these policies change as EPA sees fit. If there is any public input allowed, it is usually after-the-fact. It is like shooting at a moving target. In the meantime, pesticide registrations that might be necessary for our members which are lost or restricted as a result of those "evolving" policies are permanent. A large number of pesticide registrations have already been reviewed and determinations made based on such ad hoc policy guidance.

The mechanism used by EPA in implementing the FQPA allows the agency to change the regulatory rules in midstream without public scrutiny. Furthermore, the use of policy guidance in these situations does not provide public scrutiny of the complex science that is used in setting such policies or making re-registration decisions. The science used in pesticide decisions is highly complex, and federal agencies do not always interpret it properly. If the scientific basis for a "policy" is found to be wanting and subsequently changed by EPA, it is too late to re-review any pesticide decisions made under the erroneous regime.

The APA provides judicially reviewable standards by which to judge an agency's result. The APA does not allow for continual revision of a rule in midstream without public input or without a compelling reason for doing so. But any such midstream change would be reviewable in court, whereas there are no standards to govern midstream policy changes. APA does not allow moving targets.

The appropriate remedy is to require that EPA's FQPA policies and decisions be subject to the APA through rule-making procedures, and not using "policies" that are always changing from one decision to another. The administration of the FQPA and the pesticide laws is too important to Farm Bureau members and to farmers and ranchers across the country to be subject only to

agency whim. Farmers and ranchers, and the general public, need the certainty and the public scrutiny protections that only the APA can provide.

V. **OTHER REGULATORY ISSUES TO ADDRESS**

1. *Agency Regulatory Impact Statements:* **A** standard needs to be put into place that defines what goes into the calculation of costs of implementation of any particular regulation. Currently, there does not seem to be any uniform method for cost determination, with the result that there is no meaningful comparison of cost-benefit across agencies. Some items that need to be included in these costs include such items as:

- Direct agency enforcement costs
- Costs of implementation of regulation by those regulated. This needs to include costs to retrofit any existing equipment or operation.
- Impacts such increased costs will have on the competitiveness on sector affected.
- As part of the rule-making process public comment should be taken on agency cost estimates.

2. *Takings Executive Order (EO 12630).* This Executive Order requires federal agencies to asses the regulatory takings impact of proposed regulations on the regulated community. Regulations, especially those that restrict land uses such as regulations enacted under the Endangered Species Act, the Clean Water Act and Clean Air Act, can have profound implications for farmers and ranchers if they are unable to make accepted use of their property because of the regulation at issue. By restricting land uses for public purposes, such as species enhancement or clean water concerns, agencies often run afoul of the Fifth Amendment prohibition against regulatory taking without just compensation. Agencies are supposed to prepare "takings implication analyses" where this issue is addressed. Agencies routinely provide only a cursory and incomplete review of takings impacts with the result that proposed regulations seldom, if ever determine a possible "taking." Greater attention by OMB needs to be given to compliance with this Executive Order.

3. *There should be a peer review requirement for all scientific regulations.* Regulations regarding health, safety and environmental issues involve scientific data. Often, these regulations are complex and involve cutting-edge scientific application. These regulations affect the lives and livelihoods of many people, and need to be based on the best science possible. In many cases regulations have been enacted and regulatory decisions made and then the scientific basis for the regulation or decision has been found to be in error. The scientific basis for regulations should be determined before regulations are enacted, not after decisions affecting people's lives and livelihoods have been made. A process of "peer review" of scientific regulations before they are proposed or before they become final would reduce the likelihood of regulations that are not scientifically correct. Agencies should be required to put such a peer review process in place to inform their proposed rulemaking and ensure that the rules are scientifically correct. This process should include well-respected scientists in that field or scientific journals well known to represent mainstream science.

Public comments should be allowed on "scientific" information presented on any rule. Any additional costs associated with the peer review process would be more than offset by the savings from having scientifically accurate regulations.

4. *Privacy safeguards* OMB reviews agency requests for collection of information from private individuals or entities. Once collected, there is no assurance that personal and private information contained in the submission will not be released to another agency or to the general public. It is more and more difficult to maintain confidentiality of personal data in this age of computers. AFBF has encountered cases where the names, addresses and other personal identifying information of farmers and ranchers has bee given by federal agencies to activist groups seeking to eliminate their operations. The activist groups use this information to target campaigns of harassment against these producers. We think it is the role of OMB enact or ensure that there are confidentiality safeguards when agencies seek to collect information that might include personal identifying information. In many cases, this information is protected from disclosure from the Freedom of Information Act (FOIA) by the Privacy Act, but agencies have not heretofore respected these protections. Furthermore, agencies requesting information often ask for more information than they need for the particular program, leaving the additional information subject to FOIA disclosure. Internal agency requirements to build in privacy safeguards for personal identification information would greatly help to protect private citizens from harassment or unrelated agency interference resulting from their compliance with agency collection requests. Privacy guidelines similar to the Information Quality Guidelines issued by OMB earlier this year could achieve these results.

5. *E-Government* The government is moving quickly to using the internet as its way of conducting business. The Administrative Procedures Act provides basic rules relating to the publication of proposed regulations and the opportunity of the public to provide comments before a proposal becomes final. Agencies asking for public comment now often publish on the internet Agencies often announce the availability of substantive proposals in Federal Register notices, but do not include the proposal in the notice. Instead, it provides an internet link to the proposal. There are several APA problems with this procedure, at this time.
   (a) There are many parts of rural America that are not hooked up to the internet. This deprives them of a meaningful opportunity to comment on agency proposals.
   (b) Often, the links provided by the agency do not yet have the proposal posted. The links provided by the agency in the Federal Register notices are often not direct !inks, and it is difficult to find the proposal subject to comment.

6. *Farms as a small business* Most farms in the U.S. do in fact fall into the category of being a "small business." When agencies develop rules affecting most farms they need to be required to abide by the rules in place in regards to small business. Definitions of "small businesses" need to be updated to reflect changing economic conditions.

7. *Federal Agencies Should Respect and Recognize Parallel State Regulations* In some cases, federal agencies regulate areas where there is parallel state regulation of greater or equal scope. In many of these cases, the state regulation is not recognized as the federal agency preempts it. Such cases include meat inspection regulations, where federal regulators do not

recognize valid state programs unless there is a federal inspector at the plant. Another cases is regulation under the Endangered'Species Act, where federal agencies pre-empt state regulations and often ignore valid state programs. Such situations create needless inefficiencies and duplication of efforts.

8. *Overlapping Federal Jurisdictions* 'Stovepipe' programs at either state or federal levels waste regulatory resources. Whether the independent, 'stovepipe' effect takes place at the state or the federal level, it confounds the opportunities for an effective rule when it occurs.

Specific examples include

- *Water Quality.* There is no benefit from having many agencies at either the state level or federal level involved in regulation of something like water quality. On the federal level, EPA, Army Corps of Engineers, USDA, Commerce, and Department of Interior to name a few, have separate, non-intersecting water quality regulations. Yet USDA, Commerce and the Department of Interior all have research or stocking facilities that add nutrients to water to enhance the growth of aquatic life.

- *Animal Health.* Department of Interior has historically had the most resources for understanding the aquatic animal diseases (a form of water-borne pathogens). Commerce has significant aquatic biologist and pathologist resources. The aquaculture industries have been encouraging USDA to take over the regulation/certification of aquatic animal health for more than 20 years. Currently USDA is promulgating rules to develop a national aquatic animal health plan. USDA can not create an effective program without leveraging the existing resources from Interior and Commerce. Now EPA is considering regulating water-borne pathogens in a context that does not recognize decades of expertise from Interior, Commerce or USDA. There is no coordination of efforts.

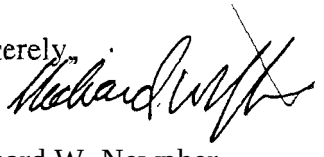
- *Invasive species.* The National Invasive Species Council has identified some 20 federal authorities and agencies regulating 'invasive species.'While this regulatory morass is currently under discussion, little real coordination has yet to hit the ground in program implementation. Everyone agrees that "invasive species," which cause $137 billion damage annually, is a significant problem. The lack of effective agency coordination, however, severely hampers government response to this problem. The lack of coordination results in overlapping, duplicative and wasteful spending on the problem, with diminishing results as more agencies act independently of one another.

- *Aquaculture.* We import millions of pounds of Atlantic salmon from Norway **and** Chile, because our salmon farmers cannot compete with the regulations and permits in this country. Atlantic salmon is an 'endangered species,' an 'injurious wildlife' and EPA is attempting to regulate Atlantic salmon that is not in an indigenous area as a 'pollutant.' Like invasive species, the aquaculture industry is subject to overlapping jurisdiction from several agencies. Federal aquaculture programs are discussed in the Joint Subcommittee on Aquaculture, but they are ultimately not coordinated at the regulatory level. Not only is funding wasted and little achieved, but producers are often confronted with inconsistent or conflicting requirements.

We do not believe that it is the role of OMB to determine which federal agency should take the lead in addressing these issues. That determination is left to either Congress or the President, as head of the Executive Branch. OMB may have a role in executing any decisions that are made at these levels. We do believe it is the role of OMB to identify and recognize areas of significant overlap and raise such issues with the Executive Branch. An examination of these issues should lead to some decisions being made to appoint a lead agency for particular issues that will reduce regulatory overlap and inefficiency. Federal stovepiping and overlapping jurisdiction is a significant problem that diminishes program productivity, wastes taxpayer dollars, and confounds and frustrates those who are regulated. While this problem may not be able to be resolved in the context of this report, it is serious enough to warrant the attention of the highest levels of the Executive Branch.

We appreciate the opportunity to offer our comments on this important topic. We hope they are helpful. We look forward to working with OMB to implement the suggestions that we have made.

Sincerely,



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