



March 6, 2015

The Honorable Shaun Donovan
Director, Office of Management and Budget
725 17th Street N.W.
Washington, D.C. 20503

The Honorable Howard Shelanski
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street N.W.
Washington, D.C. 20503

Dear Director Donovan and Administrator Shelanski:

On behalf of the National Association of State Departments of Agriculture (NASDA), thank you for hosting representatives from state and local governments on February 6 to discuss the Administration's efforts around improving regulatory processes and improving retrospective regulatory review. NASDA was very appreciative for the opportunity to participate in those discussions and we look forward to continuing to work with you and your team on this important undertaking.

NASDA represents the Commissioners, Secretaries, and Directors of the state departments of agriculture in all fifty states and four territories. As state regulators of significant aspects of our nation's agricultural industry, NASDA members are actively involved in ensuring the safety of an abundant food supply; protection of animal, plant, and environmental health; and promoting the vitality of rural communities.

As the Administration continues to engage in this retrospective regulatory review and looks for other ways to minimize the impact of regulations on both local governments and the regulated community, NASDA offers a number of suggestions the administration should consider:

- Enhanced Federalism Consultations;
- Improved economic analyses that more realistically account for economic costs to states;
- Enhanced public participation and greater transparency of the regulatory process;
- Flexibility in state regulatory programs;
- Renewed focus on utilization of best available science; and
- Improved stakeholder outreach, especially to rural communities.

Enhanced Federalism Consultations

Because federal regulatory actions often impact multiple agencies at the state level, federalism consultations must be broad-based and include representatives from associations representing all

relevant state agencies. Federalism consultations should occur early in the regulatory process and allow significant opportunities for robust participation. Throughout this process, it is important to emphasize that state regulatory agencies are not simply stakeholders, but are instead partners with federal agencies in the implementation of a host of programs. States can—and should—be used more as resources for federal agencies. Often states have a wealth of data, experience, and expertise that would help federal agencies better implement regulatory programs.

Unfortunately, the federalism consultations conducted by agencies are often perfunctory and do not allow regulator-to-regulator dialogue on issues of mutual interest. Additionally, on those occasions when consultation does occur, it is often limited to only a handful of associations representing state and local governments and does not necessarily include the representatives from associations representing the state agencies that will be most impacted by the proposed regulation. Though some federal agencies include other state and local representatives in their consultation processes, additional focus on ensuring federalism consultations include the appropriate parties would be very beneficial.

Regulatory actions that would benefit from improved consultations:

- ***Proposed EPA and Army Corps of Engineers Rule to Define “Waters of the United States” Under the Clean Water Act (Docket ID No. EPA-HQ-OW-2011-0880)¹ and the so-called ‘Interpretive Rule’ for Agricultural Conservation Practices (EPA-HQ-OW-2013-0820)²***

NASDA was disappointed at the lack of consultation conducted by Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) prior to the release of those agencies’ proposed rule to define “Waters of the United States” Under the Clean Water Act (WOTUS). This proposal will have tremendous impacts on state agencies, yet the agencies failed to consult with state agencies during the development of the proposal. While we appreciate the outreach the agencies have engaged in following the release of the proposal, many of the flaws with the rule that have been identified during the post-release outreach could have been brought to light earlier, resulting in an improved proposal. Notably, a robust, pre-release consultation process with state agencies would have identified many of the fatal flaws associated with the agencies’ “Interpretive Rule,” which was roundly criticized by conservation organizations, agricultural organizations, and state agencies—and which the agencies were directed to withdraw by Congress in the FY2015 appropriations bill.

NASDA urges OMB to require that federal agencies have robust federalism consultations early in the regulatory process, and include participation of a wide range of state regulatory agencies, including state departments of agriculture.

¹ National Association of State Departments of Agriculture. (2014, November 14). NASDA’s Comments Regarding Proposed Regulatory Changes to the Definition of “Waters of the United States” Under the Clean Water Act. <http://www.nasda.org/Policy/9617/10937/30804.aspx>

² National Association of State Departments of Agriculture. (2014, July 7). NASDA’s Comments Regarding Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A). <http://www.nasda.org/Policy/9617/10937/28232.aspx>

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

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

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

Finally, federal agencies should engage state regulatory agencies and stakeholders to carefully evaluate proposed regulations to better determine whether the required resources are available and whether expected outcomes merit those expenditures.

Regulatory actions that would benefit from improved economic analyses that more realistically account for economic costs to states:

- ***Proposed EPA and Army Corps of Engineers Rule to Define “Waters of the United States” Under the Clean Water Act (Docket ID No. EPA-HQ-OW-2011-0880)***³

NASDA has serious concerns with the economic analysis conducted by EPA and the Corps in conjunction with this rulemaking. Specifically, the economic analysis utilized a flawed approach in determining the number of impacted waters that dramatically underestimated the number of waterbodies that would become jurisdictional under the rule. In addition, the analysis relied on economic data from 2009 to 2010, a period of depressed economic activity, to estimate the impacts of the proposed rule. The analysis also estimated the cost impacts to other programs such as those under Section 303 and 402 of the Clean Water Act would be “cost-neutral or minimal;” however, the agencies did not provide any analysis to support this. Finally, the estimates of the benefits were based on outdated and irrelevant data and improbable assumptions.

- ***Agricultural Worker Protection Standard Revisions (Docket ID No. EPA-HQ-OPP-2011-0184)***⁴

EPA claimed the proposed Worker Protection Standard (WPS) rule did not contain a federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal

³ National Association of State Departments of Agriculture. (2014, November 14). NASDA’s Comments Regarding Proposed Regulatory Changes to the Definition of “Waters of the United States” Under the Clean Water Act. <http://www.nasda.org/Policy/9617/10937/30804.aspx>

⁴ National Association of State Departments of Agriculture. (2014, August 15). NASDA’s Comments on EPA’s Proposed Agricultural Worker Protection Standard Revisions. <http://www.nasda.org/Policy/9617/10937/28968.aspx>

governments, in the aggregate, or the private sector in any one year. The Agency estimated the costs of the proposed rule are between \$65 million and \$75 million per year. EPA then stated the proposed rule is not subject to the Unfunded Mandates Reform Act (UMRA) because it contains no regulatory requirements that may significantly or uniquely affect small governments; however, EPA did not provide any substantive data in the preamble or proposed rule supporting its finding the proposed changes do not meet the UMRA threshold.

NASDA contends the proposed WPS rule will, in fact, significantly and uniquely affect small governments and the state lead agency (SLA) charged with enforcing the proposed rule changes. For example, the proposed rule will require additional training, staff time, and resources for SLAs to familiarize themselves with the new regulations, assist in educating the regulated community in their states, and facilitate train-the-trainer programs. These costs will be significant, especially during the first several years of implementation.

NASDA strongly urges that federal agencies should engage state regulatory agencies and stakeholders to evaluate proposed regulations, availability of required resources, and whether expected outcomes merit those expenditures..

Enhanced public participation and greater transparency of the regulatory process

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

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

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

NASDA urges OMB to exercise its authority to improve public participation and increase transparency of the regulatory process.

Flexibility in state regulatory programs

States need flexibility to implement and enforce certain federal regulations, which cannot account for all of the nuances and variations in demographics, operations, and local customs. **NASDA encourages federal agencies to look for ways to engage state regulatory partners in creating programs to provide these kinds of flexibility**—especially in situations where the alternative may be an undue regulatory burden on the regulated community. We emphasize that **even under these flexible approaches, states do still incur costs**. Every effort must be taken to ensure these do not result in unfunded mandates on the states.

Federal programs that would benefit from flexible, state-led approaches:

- ***Pollinator Health and Activities Associated with the Federal Pollinator Health Task Force⁵***

Pollinator health continues to be a key priority for the Administration, as is evidenced by the formation by the President of the Pollinator Health Task Force, co-chaired by the EPA and the U.S. Department of Agriculture (USDA). All involved recognize the scope and complexity in attempting to address the various factors effecting bee health. We do not believe a comprehensive, prescriptive national plan or federal regulation will successfully address all of these variables across the diverse and robust agricultural community in all fifty states and four territories. However, a state-by-state approach utilizing the state departments of agriculture as the vehicle to unify, discuss, and develop best management plans will result in a productive and synergetic relationship between beekeepers, growers, applicators, and other agricultural stakeholders.

NASDA members, individually and collectively, have been actively engaged in identifying the various challenges surrounding bee health, and more importantly, developing partnerships on the state level to bring forward solutions so beekeepers, growers, applicators, and other agricultural stakeholders are able to continue to produce our nation's food, fiber, and fuel in a collaborative and productive manner. State departments of agriculture are developing state Managed Pollinator Protection Plans (MPPP). An MPPP is a set of recommendations and practices developed through a public-private partnership process and adopted by both growers

⁵ National Association of State Departments of Agriculture. (2014, November 24). NASDA's Comments on EPA's Pollinator Health Task Force. <http://www.nasda.org/Policy/9617/10937/30917.aspx>

and bee keepers to communicate and coordinate operations and processes to enhance the protection of managed pollinators. The purpose of a state MPPP is to establish a systematic and comprehensive method for beekeeper and agricultural producer cooperation and communication that allows both parties to operate successfully. This state driven model is already a proven formula in a five states (California, Colorado, Florida, Mississippi, and North Dakota), and EPA has recognized and is actively supporting the state MPPP model as a means to bring a national solution on a state-by-state approach.

NASDA encourages OMB to have federal agencies engage state regulatory partners in creating programs that may provide local and state flexibility.

Renewed focus on utilization of best available science

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

Regulatory actions that would benefit from renewed focus on the best available science:

- ***Proposed Food and Drug Administration (FDA) rules implementing the Food Safety Modernization Act (FSMA) – Proposed Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption (FDA-2011-N-0921-0973)***⁶

FSMA requires FDA to establish science-based standards related to food safety. NASDA is concerned with FDA's use of a recreational water standard in its Produce Safety rule for water used for growing activities. This EPA water quality standard was established as a guideline for states to consider in setting state requirements for water (e.g., standards regarding potential effects of ingesting water while swimming). However, the current recreational water quality standards are unrelated to water use for food safety purposes and are therefore inappropriate to be considered "best available science."

There is some discussion that FDA is considering other standards or means to regulate water used on produce; the suggestions, as we have heard them, will not meet the "best-available-science" standard either. Instead, FDA should set an interim standard or some other means for producers to adhere to the high, but reasonable, expectation that the standards relate to public health and are not just a means to be able to enforce a number which is just as likely irrelevant as it might be accurate. It is as equally imperative that regulatory agencies meet the high standards required of them as it is for the regulated community to adhere to science-based requirements, once established.

⁶ National Association of State Departments of Agriculture. (2014, December 15). NASDA's Comments on FDA's Proposed Supplemental Rule on Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption. <http://www.nasda.org/Policy/9617/10937/31371.aspx>

NASDA urges OMB to assure that agencies consistently and appropriately apply best available science to the regulatory system.

Improved stakeholder outreach, especially to rural communities

Expanded stakeholder outreach to farmers, ranchers, and rural communities will ensure proposed rulemakings and other agency actions will benefit from the diversity of those rural voices, perspectives, and opinions. Broadband infrastructure in rural communities is still developing, and many rural constituents do not have timely or comprehensive access to online tools or resources. As a result, rural stakeholders are often precluded from participating or commenting on agency actions through the federal register.

NASDA encourages agencies to enhance educational and outreach efforts to rural communities and provide teleconference access for oral comments, which can be submitted in the docket and become part of the official record.

We have appreciated recent efforts by USDA's Animal and Plant Health Inspection Service (APHIS) and the U.S. Food & Drug Administration to host conference calls and other opportunities for stakeholders in rural America to participate in the regulatory process and provide officials with comments on various agency proposals.

Thank you for the opportunity to provide these comments and to participate in the state and local government roundtable discussion. We look forward to continued dialogue with you and others in the administration. Please contact Nathan Bowen, Director of Public Policy, at (202) 296-9680 or Nathan@nasda.org if you have any questions or would like any additional information.

Sincerely,



Barbara P. Glenn, Ph.D.
Chief Executive Officer
NASDA