Testimony of
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On behalf of the National Association of State Departments of Agriculture

As submitted to the
House Committee on Agriculture, Subcommittee on Biotechnology, Horticulture, and Research Public Hearing to Focus on the Farm Economy: Factors Impacting Cost of Production

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Introduction

Chairman Davis, Ranking Member DelBene, and distinguished members of the Subcommittee on Biotechnology, Horticulture, and Research: good morning and thank you for the invitation to testify on the important subject of the farm economy and factors impacting the cost of production. I appreciate the opportunity to share a state agency perspective on this important topic.

My name is Jeff Witte, and I proudly serve as New Mexico's Secretary of Agriculture and as a member of the Board of Directors for the National Association of State Departments of Agriculture (NASDA). NASDA represents the commissioners, secretaries, and directors of the state departments of agriculture in all fifty states and four territories. State departments of agriculture are responsible for a wide range of programs including food safety, combating the introduction and spread of plant and animal diseases, and fostering the economic vitality of our rural communities. Environmental protection and conservation are also among our chief responsibilities.

In forty-three states and Puerto Rico, the state department of agriculture is the lead state agency responsible for the regulation of pesticide use under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[1].

In New Mexico, my department is responsible for a wide range of regulatory and licensing programs including: apiary registration; commercial feed registration; dairy permitting; egg dealer licenses & registration; fertilizer & soil conditioner registration; nursery licenses; pesticides; weighmaster licenses; and weights & measures licensing & registration.

I am intimately familiar with the regulatory process and the impact and challenges regulations have on the producers in my state. For those who may not be overly familiar with New Mexico, I invite you all to visit and experience the rich diversity of our specialty crop industries, which include: chiles (our signature crop); pecans; onions; greenhouse & nursery production; an emerging aquaponics industry; and countless other innovative and growing agricultural sectors.

[1] 7 U.S.C. §136, *et. seq.*

I also serve on EPA's Local Government Advisory Committee (LGAC), which is a formal advisory committee, chartered under the Federal Advisory Committee Act[2] and has been in existence since 1993. The Committee is composed primarily of elected and appointed local officials, along with several state representatives, environmental interest groups, and labor interests from across the country. The LGAC provides advice and recommendations that assist the EPA in developing a stronger partnership with local governments through building state and local capacity to deliver environmental services and programs.

In my various roles, I protect consumers, promote agriculture, and oversee producers through a host of regulatory programs.

Successes, Challenges & Solutions

I sit before you today to discuss some of the federal partnerships and initiatives that are working well, highlight a few areas where the regulatory process – or lack thereof – has resulted in significant negative economic impacts to our producers. And finally, I will offer some solutions to ensure our growers, ranchers, and other agricultural stakeholders are able to continue to produce our nation's food, fiber, and fuel in a productive and collaborative manner while ensuring we have the safest food supply in the world.

Successes

One on-going success story that epitomizes the strength and value of the U.S. agricultural community is known as the State Managed Pollinator Protection Plan, commonly referred to as an "MP3."

The state departments of agriculture, 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.

There are numerous and complex factors associated with bee health, including: parasites and diseases, lack of genetic diversity, need for improved forage and nutrition, need for increased collaboration and information sharing, and a need for additional research on the potential impacts certain pesticides may have on honey bee health. The multitude of these stressors do not lend themselves to a single, uniform solution that will successfully address all of these variables across the diverse and robust agricultural community in all fifty states and four territories. However, the MP3 model utilizing the state departments of agriculture as the vehicle to unify, discuss, and develop best management plans has resulted in improved pollinator health and a more productive and synergetic relationship between

[2] 5 U.S.C. Appendix 2 (1972)

beekeepers, growers, applicators, and other agricultural stakeholders. In fact, this model is already a proven formula in a number of states (California[3], Colorado[4], Florida[5], Mississippi[6], and North Dakota[7]).

MP3s are built on robust communication efforts, Best Management Plans (BMP), and Integrated Pest Management (IPM) programs specifically crafted to serve and support local agricultural practices and to ensure informed and workable solutions are developed and implemented through public-private partnerships at the state level to achieve sound policy initiatives. We appreciate the support and partnership we have received from our partners at EPA, to date, in identifying MP3s as a successful, non-regulatory vehicle to achieve risk mitigation and enhance collaboration across the agricultural stakeholder community, and we note the White House's *National Strategy to Promote the Health of Honey Bees and Other Pollinators*[8] recognizes the MP3 as a model for success.

At the same time, we do have significant concerns with a current policy proposal EPA published for public comment that is currently under review. In this policy proposal, EPA identified 76 active ingredients that will impact over 3,500 crop protection tools as potentially "acutely toxic to honeybees" and subject these tools and uses to enhanced label restrictions. We are concerned with both the process and the substance of this proposal, neither of which are FIFRA compliant or based on a sound, science-based risk assessment approach. So we ask this Subcommittee to help ensure EPA's regulatory proposals are compliant with their obligations under FIFRA and consistent with their role as regulatory partners with the state departments of agriculture. We feel it is equally as important to allow the MP3s to continue to succeed before proceeding with any further regulatory action.

We see great value and applicability with the MP3 model as a tool to drive solutions for other challenge areas within the farm gate, and we are encouraged with USDA's Federal "Advisory Committee on Biotechnology & 21st Century Agriculture" (AC21) interest in evaluating the MP3 model as a possible vehicle to address some of the challenges around coexistence issues.

From the state perspective, we see the MP3 model as a means to cultivate public-private partnerships, and facilitate informed, science-based solutions that will address the various challenges around pollinator health, coexistence issues, and other complex matters. We stand ready to continue to work with EPA, USDA, and all of our federal partners in applying a model of collaboration and communication to every challenge we face.

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[3] California Department of Food and Agriculture. 2014. Bee and Beehive Information. http://www.cdfa.ca.gov/plant/pollinators/index.html

[4] Colorado Environmental Pesticide Education Program. Pollinator Protection 2013. http://www.cepep.colostate.edu/Pollinator%20Protection/index.html

[5] Florida Department of Agriculture and Consumer Services. 2014. Florida Bee Protection. http://www.freshfromflorida.com/Divisions-Offices/Agricultural-Environmental-Services/Consumer-Resources/Florida-Bee-Protection

[6] Mississippi Honeybee Stewardship Program. 2014 http://www.msfb.org/public_policy/Resource%20pdfs/Bee%20Brochure.pdf

[7] North Dakota Department of Agriculture. 2014. North Dakota Pollinator Plant. A North Dakota Department of Agriculture Publication. http://www.nd.gov/ndda/files/resource/NorthDakotaPollinatorPlan2014.pdf

[8] White House. (2015). National Strategy to Promote the Health of Honey Bees and Other Pollinators. *Retrieved from*:https://www.whitehouse.gov/sites/default/files/microsites/ostp/Pollinator%20Health%20Strategy%202015.pdf

Continuing the theme of "Success" and as we begin to look towards the next Farm Bill, there are two programs I want bring to your attention today that have seen great success and effectiveness in carrying out their respective missions. The first is known as the "Section 10007" Program and the other is the Specialty Crop Block Grants.

First, I want to commend this Subcommittee, the full Committee, APHIS and the grower groups involved with the "Section 10007" program under the 2014 Farm Bill. As you all well know, this program provides funding for federal, state, tribal, and nongovernmental efforts to protect U.S. plant health across the country. This program brings a broad range of stakeholders together to proactively identify and achieve plant health protection goals through the Plant Pest and Disease Management & Disaster Prevention Program and the National Clean Plant Network. This model facilitates cooperation and collaboration between federal, state, and impacted partners, and we feel this model has great promise and applicability to address some of the animal health and disease challenges on the livestock side.

Second, I want to note the significant value of USDA's Specialty Crop Block Grant program (SCBGP), which is another critical area of collaboration between the state departments of agriculture, the specialty crop industry, and USDA. Since 2009, the state departments of agriculture have distributed nearly $393 million dollars in grants to 5,400 project partners that have enhanced the competitiveness of specialty crops in the United States. These projects are not just increasing consumer access to safe and healthy food but are expanding economic opportunities across rural America.

While we highlight this program as a success and are pleased with both the expanded funding and the establishment of the Specialty Crop Multi-State Program (SCMP) in the 2014 Farm Bill, we have growing concerns that the flexibility the SCBG program was built upon is eroding due to increased and unnecessary bureaucratic processes. This is especially evident in the establishment of certain performance measures for the program. While we all want to ensure the wise use of tax dollars, we are concerned these bureaucratic requirements—especially new sales reporting requirements for marketing projects—are simply not feasible for many of the kinds of projects that have made this program so successful, and we ask this Subcommittee to take these concerns into consideration as we work towards the next Farm Bill.

Challenges

Unfortunately, there are a number of challenges impacting, complicating, and frustrating agricultural production across the county and the state agencies tasked with conducting on the ground compliance and enforcement activities. Those challenges include, but are not limited to: EPA's Agricultural Worker Protection Standards (WPS); EPA's proposed Certification of Pesticide Applicator Rule; EPA's Waters of the U.S. rule (WOTUS); EPA's National Pollutant Discharge Elimination System (NPDES) duplicative regulatory framework; EPA's proposal to Mitigate Exposure to Bees from Acutely Toxic Pesticide Products; implementation of the Food Safety Modernization Act (FSMA); the Department of Labor's H2-A program; and numerous other regulatory initiatives or proposals currently pending in the Federal Register.

I recognize WOTUS and the NPDES issues are not necessarily the focus of today's hearing, but I would be remiss not to mention the potential devastating impact these regulatory initiatives hold for agriculture across the country, and I refer this Subcommittee to my testimony last March in front of the House Agriculture Subcommittee on Conservation and Forestry for more information on those issues.

Worker Protection Standards

Last fall, EPA promulgated its final Worker Protection Standard rule that included numerous regulatory compliance and record keeping burdens with no definable regulatory benefits. We were especially disappointed with EPA's lack of compliance with its own obligations and requirements under: FIFRA; the Administrative Procedures Act (APA)[9]; the Unfunded Mandates Reform Act (UMRA)[10]; the Regulatory Flexibility Act (RFA)[11]; and Executive Orders 13132[12] and 13563[13].

I want to elaborate briefly on two specific provisions included the final WPS rule that illustrate the negative consequences of a lack of adherence to the rulemaking process. First is the final changes to the Application Exclusion Zone (AEZ) and the second is the "designated representative" provision, which essentially allows anyone to arrive at a farming operation and demand an accounting of records related to pesticide applications over the past two years.

EPA's insertion and final articulation of the AEZ provision goes far beyond the Agency's stated intent and creates a one-hundred foot buffer surrounding the application equipment that, according to the regulations now in place, extends beyond the agricultural establishment. This provision effectively constitutes a "taking" of the grower's land and prohibits appropriate pest mitigation activities if there is any kind of structure, permanent or otherwise, inhabited or vacant within one hundred feet of the agricultural establishment. Furthermore, any individual standing or a passing vehicle within one hundred feet of the property can effectively cease the grower's application activity.

I should point out that EPA's Office of General Counsel (OGC) is working to issue interpretive guidance stating these unintended consequences go beyond the Agency's intent. However, I must also emphasize that such guidance does not carry the weight and authority of a codified federal regulation, and courts may have a different interpretation from EPA's OGC on this matter. Unless and until EPA corrects and amends the regulation, this provision will continue to impose unreasonable regulatory and economic burdens for producers and subject state lead agencies to enforce unworkable regulations.

In addition to the AEZ, EPA included the "designated representative" provision which places an extraordinary burden on growers to produce a full accounting of two years of application records to anyone who arrives on their farm with a piece of paper claiming to represent a worker who may have been on that establishment at some point over the past two years. If the agricultural employer does not produce these records they subject themselves to enforcement actions. If the agricultural employer

[9] 5 U.S.C. § 500, *et. seq.*
[10] 2 U.S.C. § 1501
[11] 5 U.S.C. § 601, *et. seq.*
[12] Executive Order No. 13132, *Federalism*, 64 FR 43255 (1999)
[13] Executive Order No. 13563, *Improving Regulation and Regulatory Review*, 76 FR 3821 (2011)

does produce these records, the individual requesting them is free to use them for any purpose, propaganda, anti-marketing, litigious or otherwise that he or she sees fit.

The most frustrating part of the AEZ and "designated representative" provisions is that these oversights and misguided initiatives were implemented outside of the federal rulemaking process, in conflict with the information and input from EPA's state regulatory partners and the regulated community, and in violation of the Agency's obligations under FIFRA, the APA, and various Executive Orders. Perhaps worst of all, neither provision provides any enhanced regulatory protections or benefits. These realities, however, do not mitigate the economic burdens and liability our producers will be forced to absorb under this final federal regulation.

We know EPA did not include the "designated representative" provision in the final rule it provided to this Committee, as the Agency is required to do so under FIFRA. We have expressed our strong concern and disappointment with EPA's lack of consultation with their state regulatory partners, and we want to thank Chairman Conaway and Ranking Member Peterson for their attention and on-going engagement on this matter.

These rulemaking and process decisions have consequences. According to EPA, the WPS rule will impact an estimated 300,000 or more small farms, nurseries, and greenhouses, plus many hundred small commercial entities such as aerial and ground applicators contracted to control pests. EPA stated in its own economic analysis it could not quantify the complete economic impact of the rule. We agree with that conclusion, and we feel EPA's economic analysis significantly underestimated both the number of impacted operations and the true cost this rulemaking will have on the regulated community and the state regulatory agencies.

The new regulations will also require significant staff time to provide outreach to workers, handlers, applicators, agricultural employers, trainers and other stakeholders. For example, trainers will now require retraining, and, according to EPA's implementation timeline, this retraining must take place during the same period the state agencies are expected to conduct outreach and education to the producers in their states. In addition, the average actual on-site inspection under the former WPS rule averaged three hours in duration, but under the new rule these same inspections are anticipated to require approximately 50% more time due to the enhanced record keeping and site information requirements.

Equally concerning is that EPA is implementing the WPS rule with all of these enhanced regulatory burdens and record keeping requirements, but it has yet to provide educational resources or training materials to assist their state partners or the regulated community to understand the new requirements or how to comply with them. This approach to regulatory activity is in direct conflict with the fundamental principle of "educating before you regulate."

Without a sound and transparent regulatory framework and the resources necessary to educate the regulated community on how to comply, all EPA has created is another economic burden on the men and women who produce our nation's food, fiber, and fuel. It is absolutely essential for EPA to correct

the oversights in the WPS rule and provide their state partners and the regulated community the time and educational resources necessary to "educate before we regulate."

Certification of Pesticide Applicators

Similar to the Worker Protection Standards rule mentioned above, states have significant concerns with EPA's Certification of Pesticide Applicators pending rule changes.

As written, the proposed rule will significantly and uniquely affect small governments and the state lead agencies charged with implementing the proposed changes. In the vast majority of states, the proposed rule will require comprehensive regulatory changes and/or new state legislative authorities, additional training, staff time, and resources for both the state regulatory agency and regulated community that go far beyond EPA's Economic Analysis (EA) estimates in order to develop, implement, and comply with the proposed changes.

If EPA promulgates a final rule as written, without fundamentally and comprehensively changing substantial portions of its proposal, the end result will require a significant number of state lead agencies to terminate administration of their certification programs and revert this responsibility and cost back to EPA. In short, EPA's proposed rule incentivizes both the state regulatory agencies and the regulated community to respond to the implementation and compliance requirements in a manner that is in direct conflict with the stated objectives for publishing this proposed rulemaking.

This is not a trivial matter as EPA estimated the proposed rule will impact over 800,000 small farms and over 400,000 commercial applicators, and unfortunately, EPA's EA did not fully and accurately account for the costs associated with implementing, complying, and enforcing the proposed changes. As a result, the states conducted our own economic analysis of the proposed rule using the Texas A&M AgriLife Extension Service, Agricultural Economics, Agricultural & Environmental Safety's economic model, which found the actual estimated cost to state programs will increase by multiple factors of ten above what EPA estimated. Applying the Texas A&M economic model to all fifty states and four territories clearly demonstrates EPA did not satisfy the requirements under UMRA.[14]

EPA claims the primary economic benefits are monetized benefits from avoided acute pesticide incidents, qualitative benefits that include reduced latent effects of avoided acute pesticide exposures, and reduced chronic effects from lower chronic pesticide exposures (chronic diseases). To support this claim, EPA cites estimates of poorly reported data and anecdotal evidence from poison control centers. At the same time, EPA acknowledges the lack of economic integrity in these numbers, and subsequently notes it is "not able to quantify the benefits expected to accrue from the proposed changes."

It is inappropriate for EPA to indicate or imply a causal association between these incomplete data sources to any estimated benefits, and as the Secretary of a state agency, I consider it highly inappropriate to estimate benefits of a proposed rulemaking on possible associations when there is no scientific evidence supporting such causal connections.

[14] 2 U.S.C. § 1501

Furthermore, EPA is intimately familiar with the routine and robust investigations state lead agencies conduct in response to alleged pesticide exposure incidents, and we are disappointed EPA has drawn various conclusions through unknown and unsubstantiated data to support the EA's estimated benefits associated with this proposed rule. I want to contrast this dynamic with the reality that states provide EPA with volumes of data showing overwhelming compliance by the regulated community, and it is disheartening, at best, to see EPA does not discuss or incorporate that information into its regulatory decisions.

In addition to the understated costs to the state lead agencies, EPA failed to account for a number of factors impacting the regulated community. For example, the Small Business Administration's Advocacy Review (SBAR) Panel (hereinafter "Panel") reviewed this proposed rule and found "the rule will impose unnecessary and unjustified burdens on [small businesses] and that alternatives exist that would reduce the economic impact of the rule on small entities while still accomplishing the agency's objectives."[15] The Panel noted "EPA did not estimate travel expenses for applicators to obtain training or take exams for certification or recertification," which will "…impose excessive costs in operating their businesses as a result of increased time away from the job, travel expenses to attend recertification trainings, and the class fee for attending the CEUs."[16] The Panel further determined "EPA's proposal will result in decreased training and education rather than the agency's goal of increased training and education."[17]

The Texas A&M Economic Model and the SBA Panel's findings are greatly concerning and further demonstrate EPA's significant inaccuracies in the actual estimated costs and alleged benefits of the proposed rule. We should all be concerned with the lack of thoroughness around EPA's economic analysis. We have asked EPA to specifically address and respond to the Panel's written comments and recommendations, as required under the Small Business Jobs Act of 2010[18], before taking any further actions with this rulemaking, and I ask this Subcommittee to continue its oversight of EPA's actions in this process to ensure this proposed rulemaking does not become one more unfunded mandate on the states and one more unnecessary regulatory burden and cost to our producers.

In addition to understating the economic impact to state agencies and the regulated community and incentivizing actions contrary to the proposal's stated objectives, we are troubled by EPA's lack of compliance with its requirements under: FIFRA; Regulatory Flexibility Act (RFA)[19]; and Executive Orders 13132[20] and 13563[21].

[15] Panel Report of the Small Business Advocacy Review Panel on EPA Planned Revisions to Two Related Rules: Worker Protection Standards for Agriculture and Certification of Pesticide Applicators.
[16] Panel Report of the Small Business Advocacy Review Panel on EPA Planned Revisions to Two Related Rules: Worker Protection Standards for Agriculture and Certification of Pesticide Applicators.
[17] Id.
[18] Pub L. No. 111-240 § 124 Stat. 2504 (2010)
[19] 5 U.S.C. § 601, *et. seq.*
[20] Executive Order No. 13132, *Federalism*, 64 FR 43255 (1999)
[21] Executive Order No. 13563, *Improving Regulation and Regulatory Review*, 76 FR 3821 (2011)

EPA claimed to have "identified the potential for harmonized minimum requirements to enhance State-to-State reciprocity of applicator certifications…"[22] The Agency cited this claim as justification for mandating enhanced national minimum requirements across all fifty states and territories. In essence, EPA proposed to require all state, tribal, and territorial authorities to develop and implement a certification program equivalent to the most robust and comprehensive framework currently in existence. As a result, the proposed rule would place significant undue hardships and enhanced requirements on the vast majority of state certification programs, which do not have the staff, resources, or administrative capabilities to absorb these proposed changes under the proposed implementation timeline.

EPA further stated the proposed action does not contain any federalism implications and would not have substantial direct effects on the states or the relationship between the federal government and the states. However, the proposal has significant federalism implications and is in direct conflict with Executive Order 13132, which requires "[a]ny regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated."[23]

The states conducted our own in-depth review of the proposal's implications on state regulatory agencies and identified several potential federalism issues where a significant number of states will be required to amend their state regulations and/or legislative authority to comply with the proposed rule changes. We ask this Subcommittee to continue your work and oversight to ensure EPA complies with both the spirit and intent of Executive Order 13132 and work with their state regulatory partners to further review and resolve all potential federalism issues prior to any final rulemaking.

EPA noted this proposed rule[24] is part of its retrospective review plan; however, EPA did not include specific plans or identify specific measures needed to effectively evaluate the stated objectives of the proposed rule as required under Executive Order 13563[25] and the retrospective review for ex post evaluation.

The ex post evaluation under the retrospective review is essential to gauge whether the proposed rule was "designed and written in ways that facilitate evaluation of their consequences and thus promote retrospective analyses and measurement of 'actual results.'"[26] So we ask this Subcommittee to continue your work and oversight to ensure EPA identifies, articulates, and publishes the specific criteria it will use to analyze and measure the success of the proposed rule before taking any further action with this rulemaking.

[22] 80 FR 51369
[23] 64 FR 43257
[24] 80 FR 51368
[25] EO No. 13563, *Improving Regulation and Regulatory Review*, 76 FR 3821 (2011)
[26] United States. Office of Management and Budget. Office of Information and Regulatory Affairs. *MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: Retrospective Analysis of Existing Significant Regulations*. By Cass Sunstein. April 25, 2011.

In the preamble[27], EPA also referenced Executive Order 12866[28], which requires "[e]ach Agency shall identify the problem it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem."[29] EPA made several references to the time period that has elapsed since this rule was codified; however, a time interval, in and of itself, is not a sound justification for a proposed rulemaking and is not in compliance with the requirements laid out in any of the above referenced Executive Orders or the Agency's retrospective review standards. So we ask this Subcommittee to continue its work in ensuring EPA provides further explanation and specific information on the problem the Agency intends to address, as required under E.O. 12866.

Biotech NOI Proposal

Another area in need of greater review and discussion is USDA's Animal & Plant Health Inspection Service's (APHIS) Notice of Intent (NOI) to update Section 340 of the Plant Protection Act, published in conjunction with EPA and the U.S. Food and Drug Administration (FDA) this past February.

This NOI outlined alternatives that could change how the agencies regulate new breeding techniques and genetic material. The alternatives considered could vastly expand regulatory authority, giving APHIS the ability to more intensively regulate all but the most traditional of breeding techniques–both cutting edge techniques as well as generally accepted technologies used for decades.

States support our federal agency partners' willingness to revisit, revise, and improve federal regulations to better reflect modern technologies and to facilitate an informed and efficient regulatory framework that enables producers and other agricultural stakeholders to continue to produce our nation's food, fiber, and fuel in a collaborative and productive manner. And we appreciate USDA recognizing the need to improve the current 7 CFR part 340 regulations. However, there are concerns the potential impacts, benefits, and/or unintended consequences of several alternatives put forward under the current NOI have not been adequately reviewed or explored by the state regulatory agencies or the agricultural community.

One unclear aspect is how the proposal will distinguish between a new variety produced from different breeding techniques with the same end result. For example, traditional cross breeding and newer breeding techniques like gene editing can achieve identical results for disease resistance, drought tolerance, etc. The resulting new varieties from each process could be indistinguishable from one another with no possible test to identify which variety was produced using which process, requiring regulatory authorities to rely instead on breeder disclosure. Yet, under the proposed framework, one of these breeding techniques –gene editing– would be regulated while the other–traditional cross breeding–would not.

[27] 80 FR 51399
[28] 58 FR 51735
[29] Id.

We are concerned with any proposed revisions to Part 340 that may be inconsistent with the spirit and intent of the Coordinated Framework or the long-standing, scientific-sound advances demonstrated by more over than a century of developing improved and safe adapted plant varieties. One such departure from this longstanding framework and body of work is the proposed working definition for "biotechnology" in the NOI that goes far beyond the current regulations and focuses on the "process" by which a new plant variety is developed. If applied to Part 340, the proposed definition would require pre-market regulatory review of many modifications that could be achieved through conventional breeding, and this possible regulatory expansion would go beyond the scope and authority of the Coordinated Framework, APHIS's regulatory authority, and the science-based risk perspective.

Furthermore, any future proposed rule should ensure a risk-based, transparent, and predictable regulatory framework, and APHIS's regulatory oversight must be limited to transgenic products that pose a plant pest risk. Plant breeding techniques that do not introduce genes from other species—techniques such as gene editing and cisgenics—should not be regulated under APHIS's regulatory framework.

Given the regulatory complexity and the potential implications the proposed alternatives may raise throughout domestic and international markets, I caution against embarking upon any comprehensive program changes that have not been adequately explored or vetted. An enhanced consultation process will enable APHIS to improve its pre-market agricultural biotechnology regulatory system by identifying strategic and actionable solutions to address specific challenges and process improvements.

We want this Subcommittee to be aware that the states are encouraging USDA to undertake a more thorough and robust review, in conjunction and consultation with partner agencies responsible for regulating products of biotechnology and the agricultural community, to enhance continued alignment, agency roles and responsibilities, and improve communication between the federal, state, and agricultural stakeholders.

While the current regulatory process is not perfect, it has operated successfully for decades without adverse plant health impacts to U.S. agriculture. So, prior to publication of a proposed rule, we are requesting USDA continue to work with the state departments of agriculture, growers, producers, scientific experts, and the regulated community to execute a more robust review of the alternatives considered under the current NOI and identify specific modifications to enhance or supplement the proposed alternatives through improving clarity, transparency, regulatory predictability, and ease of implementation.

We see a clear and identifiable need for the agencies involved to conduct a thorough economic impact analysis and comprehensive cost-benefit analysis to better understand the potential impacts these proposed alternatives may have on the rural economy and our producers before proceeding further in this process. I believe an enhanced review process with the state regulatory agencies and the agricultural stakeholder community will result in greater understanding of the proposed changes,

enhance communication and collaboration among partners, and facilitate greater support for future implementation proposals.

Ag Labor & H-2A Program

Due to New Mexico's geographic and demographic composition, our producers are not actively involved with the Department of Labor's (DOL) H-2A program, but I hear from a number of my colleagues across the country that there are significant processing delays with the H-2A program. As the Secretary of Agriculture in New Mexico, I have engaged with the NASDA membership to discuss these concerns with DOL, and we continue to work with the producers across the country to identify solutions to these challenges.

The H-2A Temporary Agricultural Program is run through DOL and includes processing components from the U.S. Citizenship and Immigration Services (USCIS) and the Department of State. DOL has a statutory obligation (8 U.S.C. 1188(b)) to certify applications for workers no later than 30 days prior to the date of need, and if the application fails to meet certification requirements (if there is missing data) an employer must be notified within seven days of the date of filing. January through March is the peak time for DOL to receive applications for the H-2A program. In this peak time in 2016, DOL has received a 12% increase in applications over last year. Overall, the program has seen an 85% increase in requests over the last five years.

Currently, farmers and ranchers across the country are reporting delays between 20 to 40 days from the point they needed to receive their workers. Depending on the geographical location and crop production activity, producers may have a very short harvest window when they need H-2A labor. If these workers arrive late due to processing issues from DOL or USCIS, the grower is left with a reduced crop or no crop at all.

DOL says these delays result from a lack of resources or processing issues from USCIS and State. These agencies need to work together to streamline their resources, solve this backlog and communicate the status of their review to growers in a timely and transparent manner. Without a solution to the federal processing activities, farmers continue to face a pending crisis and a lack of ability to bring their crops to market.

Farmers and ranchers across the country deserve better, and the consumers across the world will endure serious economic hardship as the cost of their food will continue to rise. We ask this Subcommittee to continue your critical engagement on this matter, and we stand ready to assist our federal partners in reducing the economic hardship and uncertainty the current H-2A administrative process creates.

Food Safety Modernization Act

The Food Safety Modernization Act (FSMA), which was passed by Congress in 2010, is a massive overhaul of food safety authority which gives the U.S. Food and Drug Administration (FDA) authority to regulate growers and animal food producers for the first time. It also requires foreign producers to

meet the same standards, codifies additional practices regarding processed foods, and establishes transportation and intentional adulteration rules. While NASDA has long maintained support for the concepts of FSMA, we have concurrently maintained the need for FDA to get the rules right and the need for Congress to fund the implementation—especially the need for support for state partnerships.

NASDA has a robust and collaborative relationship with our partners at FDA and we appreciate the intense engagement FDA has undertaken with NASDA and state agencies. This change from reacting to contaminants to a preventative approach will require a significant cultural change at FDA and is not without its challenges. If the rules are too restrictive or the administration of the programs lack an understanding of farming, we risk upsetting the delicate balance between food security and food safety, as well as losing access to nutritious, high-quality fruits and vegetables.

NASDA continues to work with FDA regarding the right balance on water policy. We do not believe the consequences of FDA's policy have yet been fully realized by FDA and this remains a problem area that needs to be resolved. NASDA will continue to engage with FDA to find alternate means to achieve the same level of public health protection as provided by the published criteria.

While FDA has significant experience with regulating manufactured food facilities, state departments of agriculture bring additional needed expertise to the new regulatory framework under FSMA. Farms are not factories, and an understanding of farming will help to assure we have high-quality, wholesome food available that is safe. For example, FDA uses the development of guidance as a means to further explain/ describe the requirements of rules. If farmers are going to know what to do in order to comply, they will need to understand the nuances of guidance and what is expected of them. If this is to work, the states must have a seat at the table assisting in the development of guidance—another area NASDA is working hard to assure.

NASDA continues to stress that in order for prevention—as a policy—to be achieved we must approach FSMA via an "educate before and while you regulate" strategy. This will require a long-term commitment to continuing education as the backbone of the nation's food safety program.

NASDA believes the most effective way to achieve compliance—and reach food safety goals more quickly—is the On-Farm Readiness Reviews (OFRR) program. This program is being developed to be provided voluntarily, after interested farmers have attended an education program. It is intended to be non-regulatory, instructional and systematic. While FDA is supportive of this concept and program, OFRR must be a long-term goal of the program and funded long-term.

NASDA appreciates the investment in food safety Congress made in the FY16 omnibus bill by increasing funding for FSMA by $104.5 million. While this is a substantial down payment, more will be needed in the long run. For example, FDA recently announced $19 million in base funding for state programs for the Produce Safety rule implementation. However, if all 50 states apply for this base funding, over $28 million will be needed just for this initial program development. Further, NASDA estimates full funding—including a base to operate a program and additional funds to fund education, inspections, compliance actions, laboratory activities, etc.—will cost at least $40M per year. With the expanded involvement by states in the implementation of all three major FSMA rules (Produce, Human Food, and Animal Food Safety) we estimate a total of $100M annually for the state program needs.

No testimony on FSMA is complete without mentioning the need for concurrent implementation of the same requirements for imported food. NASDA requests that Congress ensure FDA is meeting the requirements outlined by the legislation regarding imported foods and achieving a balanced approach to regulating imported and domestic food.

While the actual costs to farmers to implement FSMA are still very much unknown, they will be significant. Some estimates put the cost to comply between $4,700 (for farms with sales from $25,000 up to $250,000) and $30,500 (for farms with sales above $500,000) per year. Though, these costs could go much higher. For example, estimates by some farmers on the costs for them to comply with the produce safety rule's water quality standards could reach as high as $65,000 per year for some farms in North Carolina and over $100,000 in Florida.

This uncertainty and estimated cost of compliance has already directly impacted producers, and I am familiar with a number of producers in New Mexico, who previously grew crops specifically for direct sales to consumers, that have since shifted their production to other, non-FSMA crops. The true economic impact on rural America is difficult, if not impossible, to quantify. But we know the consequences of this rulemaking will be far greater than the direct cost of compliance to our producers and will impact the availability of locally grown, fresh vegetables and produce across the county.

Finally, this committee should begin examining potential opportunities in the next Farm Bill to provide agriculture producers with programs to help meet FSMA's goals. While it is still early in the process, low-cost loan guarantee programs, rural development programs—perhaps aimed at infrastructure— and other Farm Service Agency or Risk Management Agency programs could be helpful options to consider.

The good news is there are solutions to all of these challenges.

Solutions

All of these uninformed or misguided regulatory initiatives place undue burdens on our agricultural producers, and all of these challenges stem from: (1) the lack of consultation with state regulatory agency partners; and (2) a lack of compliance with controlling statutes, such as FIFRA and the APA.

State departments of agriculture are co-regulators with EPA, USDA, FDA, and other federal agencies over significant aspects of the U.S. agricultural industry, and we are partners on numerous federal programs, such as the SCBG program. We have a particular interest in our federal partners' efforts related to reducing regulatory burdens, especially with respect to increased flexibility to state regulatory partners.

Last year, NASDA participated in a series of meetings with other associations representing state and local government hosted by Shaun Donovan, Director of the White House Office of Management and Budget (OMB) and Howard Shelanksi, Administrator of OMB's Office of Information and Regulatory Affairs. These discussions focused on the Administration's efforts around improving regulatory processes and improving retrospective regulatory review.

As we articulated in those discussions, there are several specific and actionable deliverables our federal agency partners and the Administration should consider that will result in a more informed, applicable, and consistent regulatory framework that both provides the necessary regulatory protections and minimizes the impact and regulatory burden on both state governments and our agricultural producers.

Those recommendations include:

1. Enhance Federalism Consultations: Federal agencies should conduct robust federalism consultations early in the regulatory process, and include participation of a wide range of state regulatory agencies, including state departments of agriculture. These consultations should occur prior to publication of a proposed rule. Throughout this process, it is important to emphasize 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 develop and implement regulatory programs.
2. Improve economic analyses that more realistically account for economic costs to states: Federal agencies should engage state regulatory agencies and stakeholders to evaluate proposed regulations, availability of required resources, and whether expected outcomes merit those expenditures.
3. Enhance public participation and greater transparency of the regulatory process: Federal agencies should improve public participation and increase transparency of the regulatory process.
4. Incorporate flexibility in regulatory programs: Federal agencies should engage state regulatory partners in creating programs that may provide local and state flexibility. We continue to encourage our federal partners to look for ways to engage state agencies in creating programs to provide additional flexibility—especially when the alternative may be an undue regulatory burden on the regulated community. Such consultation and robust outreach will facilitate recognition of state equivalency regulatory programs and prevent duplicative regulatory layers.
5. Renew focus on utilization of best available science: Regulations must be based on the best available, sound, validated, and peer-reviewed science and rely on science-based risk assessments. Moreover, regulatory agencies must ensure policymakers do not misuse or inappropriately apply invalidated or unrelated scientific findings to policy determinations. We especially appreciate the work the Office of Pest Management Policy (OPMP) executes to ensure policy or regulatory initiatives are based on scientifically sound positions. OPMP is an invaluable resource and advocate for including sound science in the development of regulatory actions impacting agriculture, and we encourage increased support for OPMP's activities, as well as ensuring OPMP's perspectives are advanced in the interagency review process.
6. Improve stakeholder outreach, especially to rural communities: Federal agencies should 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.

Conclusion

State departments of agriculture play a critical role in carrying out the regulatory programs impacting our agricultural producers. We serve as both enforcement agents and ambassadors to our agricultural producers, and at a minimum, we have a responsibility and an obligation to fulfill the spirit and intent of the statutes, programs, and Executive Orders controlling and directing that regulatory development process.

It is essential for our federal partners to utilize the expertise of the states and the producers in those states to inform, develop, and implement a scientifically sound, consistent, and transparent regulatory framework to ensure our producers are able to continue to produce the food, fiber, and fuel our country and much of the world depends upon.

Before I conclude my remarks, I want to offer a solution and point out a constant theme all of my colleagues as Secretaries, Directors and Commissioner of state departments of agriculture discuss throughout the country and that is the need to "Educate before you Regulate." We have renewed opportunity to ensure true federal-state partnerships. The 70th anniversary of the Administrative Procedure Act on June 11th is an opportunity to re-educate our federal partners on both their statutory obligations under the APA as well as the "spirit and intent" of the federal-state partnership.

I appreciate the opportunity to testify before you today, and I welcome any questions you may have.