

U.S. House of Representatives
Testimony Before the Committee on Oversight and Government Reform

Hearing on Regulatory Impediments to Job Creation

Tom Nassif
President and CEO of Western Growers

Thursday, February 10, 2011

9:30am

Good Morning. Chairman Issa, Ranking Member Cummings and members of the committee, thank you for the opportunity to appear before you today. I am Tom Nassif, President and CEO of the Western Growers Association which is an agricultural trade association headquartered in Irvine, California. Western Growers members are small, medium and large-sized businesses who produce, pack and ship almost 90 percent of fresh fruits, nuts and vegetables grown in California and approximately 75 percent of the fresh fruits, nuts and vegetables grown in Arizona. In total, our members account for nearly half of the annual fresh produce grown in the United States, providing American consumers with healthy, nutritious food.

Studies demonstrate that every California agricultural job supports two jobs, and for every dollar our farmers and processors add to the agriculture sector, they are adding an additional \$1.27 to the U.S. economy.

Nationwide, agriculture produces nearly \$300 billion in value. Agriculture is the backbone of our economy, maintaining a safe and secure domestic food supply is not only a matter of national security but also of economic recovery. We are critical to job creation and community support.

We are also members of the very communities in which we grow, pack, and sell our products. Many of us are multi-generational, family farmers. We have a vested interest in sustaining the environment because we rely on the land and other natural resources to continue producing a safe and healthy crop. We have a responsibility to treat our employees with dignity and fairness, first because it's the right thing to do, and second, because without a reliable workforce, our products will rot in the field—our livelihoods and the livelihoods of our communities would disappear.

This morning, I will highlight some of the regulatory pressures that are making it increasingly difficult for us to continue to do our jobs—to do business in the United States. Let me be clear from the outset, we believe that compliance with laws and regulations is an important component of our social and environmental stewardship.

Yet, as you'll hear in my testimony, today we are experiencing a regulatory climate which is expensive. According to a recent CRS report, an estimated \$1 of every \$9 of California farm capital investment goes toward regulatory compliance. Furthermore, these are dollars which are not being used to create additional jobs and economic activity. Beyond cost there are cases where regulatory requirements and restrictions are technically impossible to meet.

I would like to focus on two examples that are indicative of regulations that impact agriculture but which are advanced without valuable applied scientific knowledge, use of real world data, transparency and input from agricultural stakeholders. The result has been impractical controls, solutions and timelines that have severely impacted farmers.

Interpretation of the Endangered Species Act (ESA)

Situation

Current activity under the ESA threatens jobs supported by production agriculture. One of the more striking examples is the manner in which the ESA has been implemented in the Sacramento-San Joaquin Delta.

California's water needs are largely met through the complex storage and conveyance systems of the federal Central Valley Project (CVP) and California's State Water Project (SWP). The two systems rely on two large water pumping facilities at the southern end of the Sacramento-San Joaquin Delta, where millions of acre feet of water move annually into the projects' twin aqueducts that convey water to cities and farms to the south.

Following litigation by environmental groups under the ESA alleging that the projects' operations harm the protected Delta smelt, federal agencies released a new biological opinion in late 2008 to govern operation of the pumps and protect the species.

The biological opinion (BiOp) developed by the U.S. Fish and Wildlife Service (FWS) relative to the protected Delta smelt was followed by another BiOp issued by the National Marine Fisheries Service (NMFS) relative to protected salmonids. Both BiOps were implemented under ESA-required "reasonable and prudent alternatives" (RPAs) developed by the agencies that severely restricted the operation of the pumps and greatly reduced the amount of water delivered to users in the south. The implementation of these ESA-driven restrictions coincided with one of the most severe droughts California has experienced in decades.

As a result, in 2009, only 10 percent of contractual allocations were delivered to CVP contractors, an all-time low. While the drought contributed to this reduction, water contracting agencies estimate that without the BiOp restrictions, the CVP allocation would have been three times higher (30 percent of contracted water). Water users successfully challenged the BiOps in federal court.

In May 2010, a federal judge issued an order barring NMFS from implementing two actions that restrict water exports from the CVP and SWP pumping plants in the south Delta. The court repeatedly criticized the federal agency's biological opinion and actions included in the reasonable and prudent alternative, characterizing portions of those documents as "unsupported by reasonable explanation," "simply indefensible," "inexplicable," and "not rational nor scientifically justified."

The judge also issued an order declaring unlawful several portions of the biological opinion and reasonable and prudent alternative prepared by the FWS to protect delta smelt. The Court held that under the National Environmental Policy Act, or NEPA, the federal government should have considered impacts on the human environment when implementing the pumping restrictions and that the specific restrictions imposed by the federal government were not "adequately justified by generally recognized scientific

principles." A temporary plan will govern short-term Delta water operations while the agencies develop new BiOps.

Separately, in 2009, at the request of water users, members of Congress and the Administration, the National Academy of Sciences launched an independent study of the RPAs to determine whether they are scientifically valid and whether there are less economically damaging strategies for species protection. In March, 2010, the NAS panel issued a report that called into question the agencies' implementation of the BiOp RPAs, which had resulted in maximum water delivery reductions in most cases. While the panel found that restricting flows to the pumps is inherently "scientifically valid," in that *any* reduction of pumping operations certainly protects delta smelt and salmon smolts, it also stated:

"However, there is substantial uncertainty regarding the amount of flow that should trigger a reduction in exports. In other words, the specific choice of the negative flow threshold for initiating the RPA is less clearly supported by scientific analyses."

To the farmers and cities whose water is contractually delivered by the state and federal projects, this was confirmation that the federal fish agencies almost always selected the *most restrictive* response available rather than exercising the discretion available to them under the RPAs to mitigate water cutbacks.

Impact

The 2010 federal court decisions provide water users some hope for relief, as does the NAS report and, potentially, a second NAS report due later this year that will assess the impacts on protected fish species of the many other stressors, such as urban wastewater discharges, invasive and predatory non-native species, unscreened in-Delta water diversions, pesticide and other pollutant loading and other factors. Nonetheless, the damage caused by the implementation of the ESA in prior years cannot be undone. It includes, in 2009 alone, nearly 500,000 acres of farmland fallowed due to supply cutbacks and between \$340 million and \$370 million in economic harm. Estimated job losses vary widely, but there is no disagreement that the number of lost jobs runs in the thousands in this already-economically stressed region. Several San Joaquin Valley farm communities suffered unemployment of 40 percent or higher.

Solution

The solution is not to compel regulated communities to turn to the courts in costly and divisive litigation. Instead, as the court held in this matter, the agencies responsible for implementing the ESA should also comply with NEPA, which will require not only protecting endangered species but also considering and mitigating the human and economic impact of their regulatory decisions.

Accordingly, we are seeking an amendment to the ESA that would strengthen transparency through improved interagency coordination and consultation with potentially impacted stakeholders early in the process of developing RPAs.

An amendment to the ESA could provide a way forward that protects threatened and endangered species while minimizing economic impacts to humans and ultimately restoring the credibility of the ESA and the agencies charged with its implementation.

In addition, we ask the Committee to investigate how the Departments and agencies with the authority and responsibility to implement the ESA have modified their agency culture in light of recent, relevant court decisions and in this case, the findings of the National Academy, to avoid repeating the same flawed procedures.

H-2A Regulations

Situation

In the absence of immigration reform, the H-2A or temporary agricultural guest-worker visa program is specialty crop agriculture's only option to acquire with certainty the legal labor force necessary to harvest America's fruits and vegetables. Studies demonstrate that domestically-born workers are unwilling to work in America's specialty crop fields.

The regulations governing the H-2A program have been dramatically altered three times in the last three years. The program suffers crucial flaws including inconsistent interpretations of the Department of Labor (DOL) regulations by DOL employees and an institutional hostility towards agricultural labor programs. As a result agricultural employers are punished for using the only option we have to hire a legal workforce. Moreover, DOL's actions are actually undermining the objectives of the Department of Homeland Security.

Impact

While the examples of administrative challenges are numerous, the three egregious examples below highlight problems that should be easily resolved.

- DOL's Chicago Processing Center (CPC) is unresponsive to user concerns and questions, and delays in processing proper H-2A applications are common. It is impossible to contact a live person at the CPC to inquire about a pending H-2A application and Employment and Training Administration staff have refused our requests to allocate a staff person to answer phone calls from H-2A users. While there is an e-mail address devoted to this purpose, questions often go unanswered.

In addition, we have members who have submitted clean applications but received no response from the CPC for several months and only just before the employer's date of need for workers to harvest the crop. Only after repeated inquiry from our Association and various Members of Congress intervening did the CPC respond. Moreover, it is common for CPC's attorneys to reverse its adverse interpretation after an employer appeals the determination, rendering the appeal moot. However,

by the time the application is approved, the employer does not get the workers until several weeks after the date of need, resulting in adverse financial impact.

- The current regulations require filing of the application, recruitment, and securing of housing 60-75 days before date of need. However, it is difficult to predict labor needs and project the availability of recruited domestic workers so far in advance of the date of need. While DOL has ample time to certify an H-2A application (i.e., to make a determination that U.S. workers will not be adversely impacted by bringing in H-2A foreign workers and that the H-2A employer intends to comply with the program's requirements), the Department is still routinely delaying certifications and is slow to respond to questions and concerns.
- Agricultural employers that use the H-2A program often utilize multiple job classifications – some are H-2A while others are not H-2A. Fulltime, year round workers are not eligible for the H-2A program, since H-2A applications are granted only for temporary or seasonal work. The DOL has determined that any work performed by non-H-2A employees that is also performed by H-2A employees is to be considered "corresponding employment." As such, the non-H-2A employees are entitled to all benefits provided to H-2A employees including payment of the elevated wage rates of the H-2A program, free housing and in-bound and out-bound transportation. For example, if an employer has a crew of cabbage harvest workers who are H-2A visa holders, no other person on the farm can perform any cabbage harvesting work, even if the worker is a foreman providing instruction on harvesting, or the harvesting work being performed is incidental to the employee's primary occupation. If an employee is not primarily performing cabbage harvesting work, incidental cabbage harvesting work should not propel the employee into the H-2A job classification. This overbroad definition of "corresponding employment" creates further uncertainty, difficulty in planning, and financial loss.
- The DOL's Wage & Hour Division (WHD) is currently assessing H-2A employers hundreds of thousands of dollars in fines and backpay for technical compliance violations of the H-2A program. For example, WHD recently audited an H-2A employer and found they unwittingly failed to report the involuntary and voluntary separation of domestic workers to the CPC and/or state workforce agency. WHD assessed a fine of \$1,000.00 per worker; plus \$1,000 per worker for failure to pay the three-fourths guarantee (even though it is undisputed these workers were properly terminated or voluntarily quit); plus the three-fourths guarantee for hours not worked and wages not earned. Based on 56 domestic workers, the total fines and backpay levied was over \$475,000.00. Another H-2A employer who otherwise did everything correctly did not understand that the number of hours *offered* (not just worked) during the pay period is now required by regulation to appear on an employee's paystub.
- For this technical violation, the employer was assessed fines of nearly \$500,000.00. In neither case were workers, domestic or foreign, found to be

mistreated, or otherwise denied the wages, benefits or conditions set forth in the regulations. Unfortunately, the H-2A rules are so complicated, it's virtually impossible for an employer not to commit some technical violation, which could lead to financial ruin.

The financial harm caused by DOL's delays, and inconsistent interpretations, and overly punitive enforcement strategy has resulted in confusion, frustration, and pecuniary loss by employers struggling to use the program.

Oversight of DOL's management of the H-2A visa program is vital to ensuring the program runs as smoothly as possible. There is no other recourse for the specialty crop industry to address its need for labor. Yet, our substantive comments to inform the rulemaking process were disregarded by DOL.

At public meetings held by DOL officials to "explain" the current iteration of the rules and Agency resulting interpretations of the regulation, it was clear that DOL is instructing its employees to focus not on making the regulations operational but rather to focus on enforcement of unworkable regulations. As a result there is extreme concern among the H-2A user community about the DOL's systemic hostility towards and abuses against H-2A employers. Even longtime users have begun to abandon the H-2A program because of the risk that minor technical violations discovered during a DOL audit will result in fines and penalties that may lead to financial devastation.

Solution

Precious DOL staff resources are increasingly being devoted to audits and exacting of fines rather than seeking meaningful solutions to improve the dysfunctional visa program. We respectfully request this Committee use its oversight authority to examine DOL's administration of this visa program culminating in a report authored by DOL to this Committee explaining its decisions and rationale concerning issues such as: staff allocation, interpretations of the H-2A regulations, delays and inconsistency in its certification process, and assessments of fines and penalties for technical violations that are financially ruinous for family farmers.

Let me be clear, even if the DOL were to magically correct all issues related to the H-2A program tomorrow, it would not solve agriculture's labor crisis. We still need immigration reform legislation tailored for agriculture to deal with our existing experienced workforce, who are not currently eligible for the H-2A program. Moreover, the infrastructure is not in place for most agricultural employers to access the H-2A program, which is why H-2A users make up only 2-4% of the agricultural labor workforce. However, for those employers who choose or are compelled to use the H-2A program now, immediately correcting the systemic problems with H-2A is critical. Without improvements to this program and the manner in which it is implemented by DOL, United States agricultural and specialty crop production in particular will continue to suffer unnecessary financial loss due to product being left to rot in the field because

our farmers lack the labor they need and requested to get their food to consumers in America and around the world.

Conclusion

On behalf of American specialty crop agriculture we are appreciative of this Committee's willingness to examine the myriad of regulations American producers are forced to navigate in an attempt to continue to cultivate this great land of ours. The impact of the costs, job losses and competitive disadvantage for U.S. Specialty Crop production created by this regulatory environment is perhaps best brought home as follows:

I have members who have moved portions of their operations out of the United States, not because the cost of getting product to market is less in other countries, but because regulatory uncertainty is mitigated and there are local populations able and willing to work harvesting specialty crops.

Specialty crop producers in the United States today are subject to a variety of social responsibility audits, which include labor, conservation, environmental and food safety requirements. They are not moving production from the United States to avoid responsible business practices. They face these in other countries too, particularly if they want to sell to the United States. They are leaving because many regulations are not about common sense responsibility, but about compliance with an agency's' interpretation of the law regardless of the real world impact, available science and options for workable compliance.

Western Growers appreciates the Committee's willingness to listen to our concerns and looks forward to working with you to do something about them.