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

4/19/2011

8:30 a.m.

Salinas, Calif.

Written Testimony by Tom Nassif for April 19 Public Hearing before the House Oversight and Government Committee
Salinas, Calif.

Interpretation of the Endangered Species Act:
How EPA Court Settlements Affect Farmers

Good Morning. Chairman Issa, [Ranking Member Cummings] and members of the Committee. Thank you for the opportunity to appear before you today. My name is Tom Nassif, and I am President and CEO of the Western Growers Association, an agricultural trade association headquartered in Irvine, California. Western Growers members are small, medium and large-sized businesses in California and Arizona who produce, pack and ship nearly half the produce grown annually in the U.S. providing American consumers with healthy, nutritious food.

American farmers are at crossroads. With a regulatory environment that is stifling job creation and economic opportunity, the majority of us must rely on off-farm income to support our families, an increasing number of us are moving our production off-shore, and some of us are simply shutting down our operations. I have spoken previously to the Committee about the impact of regulations that are promulgated without the benefit of the best available science and experience, without public review of data and modeling and without serious stakeholder engagement. The resulting regulatory requirements are often inflexible and impractical.

This morning I'd like to shine a light on the impact and consequences of lawsuits brought against the Environmental Protection Agency (EPA) and other federal agencies by environmental groups that are reaping taxpayer-funded attorney's fees and resulting in a defacto rule -making process that is harmful to farming and of questionable benefit to the environment. The system is broken and Congress must fix it. Many of these lawsuits never actually go to a full trial, many are never appealed by the federal government, and some of those that do receive an unfavorable ruling by a judge give interveners no choice but to sign the settlement agreement to ease the onerous and outrageous consequences of the settlement. Often, when nonprofit environmental organizations sue the EPA and other federal government agencies such as the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (Services) for failure to comply with the Endangered Species Act, it isn't unusual for the federal government to settle the suit and avert a full trial. As the EPA continues these practices and pays the associated attorneys fees which run into the hundreds of thousands of dollars per case, the legal questions associated with environmental laws such as the Endangered Species Act are never adequately confronted and answered and worse, the settlement agreements put in place have adverse economic consequences for agricultural businesses and jobs with no evidence of protecting endangered species.

This is a defective way to make public policy as EPA and the environmental groups that sue it often work out the details of these settlement agreements without the farmers and agriculture industry at the table. To comply with the settlement agreements or injunctive orders from the court, the EPA and other agencies impose regulations without meaningful input from stakeholders, without considering any economic impact on the nation's farmers or workers, and with little regard to the intent of Congress when the law was passed. As multiple lawsuits are settled and the resulting biological opinions are issued from U.S. Fish and Wildlife Service or the National Marine Fisheries Service (Services), the process and schedule leaves little time for engaged input by the impacted stakeholders.

A top concern to agriculture in California and elsewhere is the increasing number and adverse impact of these lawsuits involving the Endangered Species Act. While this committee is familiar with the struggle between farmers and federal fish agencies in California for water, I'd like to make the committee aware that there is also increasing negative impact on agriculture's use of crop protection tools such as pesticides. Please know, we are not seeking pesticide deregulation - far from it. Farmers are incentivized to use the least amount of the softest pesticides needed to produce a crop. Pesticides cost a lot of money. Overuse harms the land and its productivity. But all crops need pesticides, whether conventional or organic just as the human body needs medicine when it is attacked by harmful bacteria and viruses. Rather, this testimony seeks to shine a light on a broken regulatory system, one that has been hijacked by the interest groups on one side in a manner that keeps the interest groups on the other side -- agriculture – out of the process. That is fundamentally wrong and contrary to every tenet of our regulatory system.

In these settlements, agencies are essentially putting in place restrictions and stipulations in a manner that replaces or overrides the transparent and public rulemaking process. This not only side-steps the authority of Congress, it also results in environmental regulations that are often redundant, humanly impossible to meet, expensive and of questionable benefit to either endangered species or the environment. It's an underhanded way of changing the rules on the nation's farmers that circumvents Congress and stakeholders.

During the mid-1980s, EPA requested and received Biological Opinions from the U.S. Fish and Wildlife Service on a number of pesticides. Based on this experience, EPA proposed the Endangered Species Protection Program (ESPP) as a mechanism for implementing its obligations under the ESA. Although voluntary, the proposed program raised public concern over the potential impact on agricultural land use, inaccuracies in the maps, inadequate public review and comment opportunities, and the need for additional education and training programs. This concern led Congress to enact Section 1010 of the ESA amendments of 1988. With the 1988 amendments, Congress was particularly concerned with protecting agricultural producers and pesticide applicators by lessening the economic impact of the ESA, specifically for persons engaged in agricultural food and fiber commodity production and other affected pesticide users and applicators. In late 2005, EPA announced changes to the ESPP program and in describing the necessity of those changes it acknowledged that Section 1010 "provided a clear sense that Congress

desires that EPA should fulfill its obligation to conserve listed species, while at the same time considering the needs of agriculture and other pesticide users." Moreover, EPA made a commitment that it would provide opportunity for public input during the phases of an assessment. Despite a 20 year old statute and a 2005 commitment by EPA made to include agricultural producers, pesticide applicators and other end users in the effects determination and consultation processes, EPA has yet to establish procedures to do so.

The issue of lawsuit settlements was raised by the U.S. House Agriculture Committee recently during a public hearing, on March 10. Lisa Jackson, administrator of the EPA, was the only witness. Members of Congress from both sides of the aisle told Jackson that farmers were unnecessarily and adversely affected by environmental rules and regulations that often don't make sense, don't take into account the economic impact on farmers, aren't good for jobs and the economy, and often don't result in measureable benefits to the environment. Minnesota Rep. Collin Peterson, ranking member of the House Agriculture Committee, terms this as a "sue and settle" strategy that harms agriculture by using the courts to twist the laws against our farmers. Representative Peterson wrote of this: "EPA says they are only doing what the courts tell them to do. The fact is environmental activist groups often sue the EPA but the cases don't even reach the point of a judge's decision. Instead, there seems to be a pattern of an activist lawsuit followed by an EPA settlement, resulting in new EPA regulations to comply with the settlement. This is no way to make public policy." The fresh produce industry is left to pick up the pieces of these myriad settlements that result in "worst-case scenario" restrictions on pesticides.

What's even more worrisome is the EPA's lack of transparency on the issue. Information about the settlements is not released or published by the EPA detailing the stipulations and how much the EPA pays environmental groups in the settlement. We are unable to get a complete list of these EPA settlements and we do not have the data or a mechanism to specifically identify and track the millions of dollars in attorney's fees paid to these environmental organizations. This erodes public confidence in the Agency, and it also lends credence to the House Agriculture Committee's charge that the EPA is engaging in agency activism to promulgate stricter rules on farmers. We believe the Agency imposes these resulting rules and regulations without understanding the issue completely or its consequences on American agriculture. We would like this committee to investigate this.

Endangered Species Act Lawsuit Settlements

Many of these lawsuits involve the Endangered Species Act's strict mandate to protect species regardless of the cost —instantly inviting special interest groups to sue the Agency for non-compliance and win, because compliance is nearly impossible. Taxpayers shoulder the burden of paying the legal fees of these interest groups.

Among the few settlements (we could find information about) regarding crop protection tools is a case in California's northern district court concerning pesticide use near areas inhabited by the California red-legged frog. This case is interesting because included in the stipulated injunction and order from court documents are strict guidelines setting

expansive pesticide-free zones until the EPA follows a timeline to consult with the U.S. Fish and Wildlife Service concerning how 66 pesticides may affect the frog. Settled in October 2006, the lawsuit brought by the Center for Biological Diversity against the EPA is an example of how EPA and the environmental organization agreed in the settlement that 66 pesticides cannot be used within 200 feet by air and 60 feet by ground from aquatic and land habitats of the frog, providing no flexibility regarding topographical differences, climate or weather patterns or type of commodity grown. Thousands of acres of agricultural land would be fallowed and taken out of production, causing serious economic loss to farmers and inducing a workforce reduction and negative effects on the local economy. The Center for Biological Diversity received $405,000 for the cost of attorney's fees in the settlement, according to court documents. Farmers were left to deal with the resulting strict buffer zone regulations and the case still did not resolve the legal issues at play within the Endangered Species Act. (Did they sign under duress or did they have no choice but to sign?)

Another lawsuit in Washington filed in 2001 by the Washington Toxics Coalition is still creating a domino effect in rules and regulations today. In it, the environmental nonprofit organization charges the EPA with failure to consult with federal fisheries on how certain pesticides affect Pacific salmon and steelhead. When it was all said and done, EPA paid the Earth Justice lawyers handling the case on behalf of the Washington Toxics Coalition more than $625,000 in attorney's fees, according to court documents. As a part of the stipulations in the case, EPA found that 37 products "may effect" at least one of 26 of the salmon runs.

In 2004, the legal battle continued and the EPA, National Marine Fisheries and the U.S. Fish and Wildlife Service adopted regulations to streamline the consultation process under the Endangered Species Act. That again failed to resolve the real issues at hand and Washington Toxics Coalition sued in 2006 and a judge overturned large portions of the rules. In 2007, another lawsuit brought by the Northwest Coalition for Alternatives to Pesticides sued the National Marine Fisheries for failing to properly complete these consultations stemming from the original 2001 lawsuit. National Marine Fisheries completed the consultation process required under the Endangered Species Act to mitigate the issue by releasing its own biological opinions on the effects of pesticides on the salmon species. These controversial biological opinions failed to take into account the best science available. Despite the dramatic fiscal impact these biological opinions could have on farms, no economic analysis was done and the entire process lacks the level of transparency needed to understand the decision making process utilized, complexity of these issues or formulate a solution for species protection with potentially impacted stakeholders.

A Broken Consultation Process

The ESA consultation process between the EPA and the Services adversely affects American agriculture and is an unnecessary duplication of government resources. The role of consultation is to provide the Service's opinion to EPA about whether a certain action would jeopardize the continued existence of a listed species or adversely affect critical habitat. But a definition of "consultation" is not provided in the ESA nor has Congress

spoken to this precise issue. When the ESA was enacted in 1973, there were only 109 species listed for protection. Today, there are more than 1800 and more than 40 million acres of critical habitat - numbers destined to continually increase stemming from the futility of a man-made law that seeks to save every living species in perpetuity. Compounding the problem is a high turnover of biologists at the Services, and their lack of knowledge of agricultural and integrated pest management practices; and EPA risk assessment methods, models and data requirements often evident in the biological opinions rendered by them. To put it plainly: the Biological Opinions delivered by the Services are critically flawed giving opportunity for others to challenge in court. The problems with ESA consultation are so vast that they cannot be solved through regulation only.

The Mother of all Lawsuits

Currently, the Center for Biological Diversity and the Pesticide Action Network North America are suing the EPA because they say the agency again is violating the Endangered Species Act when it registers pesticides under the Federal Insecticide Fungicide and Rodenticide Act (FIFRA). According to the more than 400-page court document detailing the complaint, the environmental organizations say the EPA is failing to adequately consult with other agencies regarding the effects of nearly 300 EPA-registered pesticides on more than 200 endangered and threatened species nationwide. This mega case follows in the footsteps of the ones before it, only its impacts are far greater—they aren't just limited to one set of species or certain geographical areas as in the cases of the California red-legged frog and Pacific salmon and steelhead. This case could cause severe economic harm and loss of jobs to tens-of-thousands of farmers, and cripple their ability to grow America's source of food and fiber on more than 112 million acres of farmland across the country, not just in California.

If the EPA settles the case, we could expect an interim court order of perhaps several years that imposes severe restrictions on the use of these crop protection tools, going far beyond the rules developed by EPA in the regular public rule-making process that resulted in registration of these materials initially. The pesticide approval process would become even longer and hopelessly complex. Farmers would have to work under constant uncertainty. And, even if a pesticide is approved, new restrictions imposed after a settlement of this case could render the safe and reasonable use of the products impractical. Lawsuit limitations could become de facto rules even though specific toxicological affects of most pesticides on most species is unknown and will take billions of dollars and decades to determine.

As this case heads toward a potential settlement, we recognize that the process is leaving out the voices and rights of people and industries with a stake in the outcome—those who will be expected to devise and pay for remedies and mitigation of a situation which may or may not be able to be remedied. As the Obama administration has broadcast its commitment to accountability, this process should follow that edict and ensure that Section 1010 of the ESA Amendments of 1988 be adhered to "to minimize the impact to persons

engaged in agricultural food and fiber commodity production and other affected pesticide user and applicators." The committee can help facilitate this.

Solution

The agriculture industry is willing to work with all levels of government to continue to do its part in the improvement of the environment and protection of human health and endangered species, if the regulations and rules under which federal agencies go about this process clearly state desired goals, identify outcomes, measure progress and success, are open and transparent to all stakeholders, use only the best and most current science and data, weighs and mitigates economic impacts, and follows through on its commitments. Without these, the revolving door of lawsuits, settlements and the de facto regulations that follow makes for very bad public policy and unintended consequences all around.

There are several solutions.

1. **Enforce the laws made by Congress**: Congress was particularly concerned with protecting agricultural producers by minimizing the economic impact of the Endangered Species Act consultation process on farmers when it amended the Endangered Species Act in 1988 (Section 1010). Yet, 20 years later, even with a commitment made by the EPA in 2005 to adhere to this law, nothing has changed. The best scientific and commercial data available is not sought out or used, the consultation process for EPA's registration of pesticides takes too long and it excludes input from affected stakeholders including state and local government agencies. The broken process is resulting in unwarranted restriction on pesticide products, regulatory burdens on farmers, and litigation resulting in court settlements that end up influencing the promulgation of rules and regulations far beyond the intent and purview of our elected lawmakers.

2. **Break the cycle of lawsuits, restore the right of public comment for all, and reform the consultation process:** The U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Services) must improve their consultation with EPA on pesticide registration as required by the Endangered Species Act. The biological opinions issued utilize outdated and irrelevant studies; cherry-pick data from selected studies; lack stakeholder input; demonstrate a lack of understanding about current product use; and provide no economic impact analysis of the effect of the proposed restrictions. In almost every case, significant economic harm to agricultural production is the result while no evidence of benefit to the endangered species or the environment is measured, required or defined. If the consultation process is not corrected, the onslaught of environmental lawsuits will not end. The consultation process is broken and makes a mockery of the public comment periods. The Congress could not have intended to replace an open and publicly accessible rule-making process with one that is driven by one set of stakeholders inside the closed confines of the courts. Rulemaking must be open, transparent, use the best available data, establish targets for acceptable levels of risk, include an analysis of the economic impact on agriculture and take into regard input from industry interveners as well as all stakeholders. One way to break this cycle is to reinforce EPA's primacy in all

pesticide decisions including the ability to make the effects determinations for listed or threatened species as part of the registration and review process would place the Services on even footing with all stakeholders in a well established regulatory structure.

3. **Make information about all court settlements public and easily accessible:** These EPA court settlements with environmental agencies should be taken out of the shadows and become open and transparent. The industry and public should have access to a complete list of all court cases and settlements where EPA chose not to fight an environmental lawsuit filed against it. That information should be posted promptly on the EPA website for anyone to access. If journalists, lawyers and other organizations should not have to file a Freedom of Information Act request to obtain records on all EPA court settlements.

4. **Make all attorney's and legal fees public and easily accessible:** hold federal attorneys accountable when they declare a settlement is "in the public interest:" Under the Equal Access to Justice Act, the awarding of attorney's fees continues to motivate nonprofit environmental groups to sue the EPA regarding such laws as the Endangered Species Act. This information regarding how much EPA pays to settle environmental lawsuits, and the criteria used to determine what's "in the public interest" when the Justice Department attorney decides to settle a suit (instead of pursuing a full trial and court judgment), should also be readily available and the EPA should release it to interested parties. Specifically, the public should know how much money is paid from the federal government's Judgment Fund when the Justice Department attorneys, representing federal government agencies in court, decide to settle a lawsuit. If the taxpayers are going to finance the legal departments of environmental activist groups, they should know what activities they are funding.

We respectfully request this Committee to launch a formal investigation of the EPA and the specific matters outlined in this testimony.