Eliminating and Reducing Regulatory Obstacles in Agriculture

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Federal regulations, which often are based on unsound science and data and extended beyond the scope of the underlying statute, impose significant burdens on farmers and ranchers. Regulations that interfere with the ability to manage the risk inherent in agriculture or that hinder technological innovation are particularly damaging. There are many current regulatory obstacles that need to be addressed, from federal overreach under the Clean Water Act to a failed Endangered Species Act that does not properly conserve species and tramples on property rights. Agricultural producers would be better able to engage in farming and ranching and meet market needs if they were freed from these intrusive regulatory requirements.

KEY POINTS

Too often federal agricultural policy focuses on helping farmers through massive programs rather than determining how government itself creates problems for farmers and ranchers. In particular, regulations need to be addressed.

Federal overreach under the Clean Water Act is very troubling. For example, the recent "waters of the United States" rule is a major federal power grab that seeks to regulate almost all waters, making it difficult to engage in even ordinary activities, such as farming.

The Endangered Species Act was enacted into law to promote the conservation of species, but it has failed to do so and has trampled on property rights, including the rights of farmers and ranchers.

The federal government should not be such a significant land owner— even states should not be massive land owners. Land, in general, should be in the hands of private citizens.

There should be no federal or state mandatory labeling of genetically engineered food. These labels misinform consumers, legitimize bad science, and undermine agriculture and genetic engineering.

Too often, federal agricultural policy focuses on helping farmers through massive programs rather than on determining how government itself creates problems for farmers and ranchers. Regulations, in particular, make agricultural production and innovation more difficult by limiting farmers' and ranchers' ability to address agricultural risk,[1] work their land, and meet market needs.

In general, federal regulation is often based on unsound science and data, and agencies develop regulations that extend beyond the scope of the underlying statute. For regulated entities, such as farmers and ranchers, these unnecessary regulations can impose major compliance costs and other significant burdens. They can also discourage a party from taking an action (e.g., using land for ordinary business activities) due to fear of being out of compliance or because the regulation prohibits the action or makes it cost prohibitive. Regulatory costs are borne not merely by those parties who are regulated, but also by third parties such as consumers who may have to pay higher prices for goods and services.

The list of regulatory obstacles for agricultural producers is extensive. However, there are some types of regulations that are particularly troubling. For example, any government intervention that makes it more difficult to manage the risk inherent in agriculture is a serious problem. Additionally, the overreach and scope of environmental regulations is inflicting serious harm on farmers and ranchers alike. Finally, because technology and innovation help the agriculture industry meet critical new challenges, any regulation that hinders important developments is a major concern.

This paper highlights just some of the biggest regulatory obstacles, focusing on regulations that affect risk management, hurt farmers because of environmental overreach, and undermine innovation. It also provides some specific policy recommendations to address these obstacles.

Overbroad Application of Title VII of Dodd–Frank

Like every business, agricultural producers face a number of serious risks. There are many ways that farmers and ranchers can manage different kinds of risk through private means. One of the best risk-management tools is to hedge risk through participation in the commodities market. Unfortunately, one regulatory development is making this risk-management tool far more difficult for farmers to use.

In 2010, the Dodd–Frank Wall Street Reform and Consumer Protection Act[2] (Dodd–Frank) was enacted to address the 2008 financial crisis.[3] Yet this law is being interpreted broadly by the Commodities Futures Trading Commission (CFTC) to cover businesses that had nothing to do with the 2008 crisis, including agricultural producers. As Senator Pat Roberts (R–KS), Chairman of the Senate Agriculture Committee, explained:

Farmers, ranchers and end-users did not cause the 2008 financial crisis, and Congress did not intend for them to be subject to Title VII of Dodd–Frank. However, five long years later, they continue to be subjected to a bounty of rules and regulations stemming from the regulatory implementation of Dodd–Frank.[4]

The use of commodity derivatives is extremely critical for farmers and is undermined by convoluted and restrictive regulations. For example, the CFTC is narrowly interpreting[5] the statutory term "bona fide hedge."[6] This interpretation has resulted in "many types of trading in

derivatives markets that were long recognized as legitimate hedging by commercial firms and regulators…now no longer afforded bona fide hedging treatment," according to the Commodity Markets Council, "a trade association that brings together exchanges and their industry counterparts,"[7]in comments made to the CFTC.[8]

The CFTC is making decisions as to what is the proper nature of hedging transactions, as if anyone could (or should) evaluate the variety of ways that risk can be managed effectively. CFTC Commissioner Jill Sommers, in her opening statement at a meeting to consider Dodd–Frank final rules (the final rule addressing "bona fide hedge" was vacated by a district court[9]) explained:

When analyzing the potential impact this rule will have on market participants, I am most concerned about the effect on bona fide hedgers—that is the producers, processors, manufacturers, handlers, and users of physical commodities. This rule will make hedging more difficult, more costly, and less efficient, all of which ironically can result in increased costs for consumers.[10]

A recent Cato Institute report by New York University Professor Bruce Tuckman captures the problem of making use of derivatives more difficult, stating that "rules that make derivatives harder to use will reduce derivatives risks; but the reduction will be at the expense of increasing business risks."[11]

Federal Overreach in Addressing Nonpoint Sources of Water Pollution

The Clean Water Act (CWA) expressly says that states are supposed to play the leading role in protecting water:

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.[12]

The U.S. Environmental Protection Agency (EPA) is ignoring this state role and instead seeking to expand its own power. This extension of federal control is evidenced by the EPA's efforts to address water quality in the Chesapeake Bay, where the agency is effectively seeking to regulate agricultural runoff and other nonpoint sources of pollution (pollution coming from multiple sources over a wide area, as opposed to pollution from a point source that is a specific and identifiable source).[13]

Specifically, the EPA is allocating specific limits of pollution for numerous segments of the Bay by source, including nonpoint sources. There is even concern that the EPA could determine where farming is allowed.[14] This Chesapeake Bay scheme was challenged in the Third Circuit Court of Appeals (the court upheld the agency's actions[15]), and petitioners, including the American Farm Bureau Federation, asked the United States Supreme Court to hear the case.[16] Former U.S. Secretary of Agriculture John Block warned of the consequences of the Court's declining to hear the case: "[I]n a matter of days or at most weeks the Environmental Protection Agency (EPA) could become our national zoning board."[17]On February 29, 2016, the Court declined to hear the case.[18]

This overreach by the EPA has practical impacts on farming. Secretary Block illustrated this point:

Myopic rigidity, typical of federal regulators and particularly EPA, has human costs. In lower court filings, Pendleton County, West Virginia, reported that "a significant amount of farmland will have to be removed from production" as a result. Pendleton, the court document noted, is a poor county where families "displaced from farming would have little to no opportunity to replace their loss."[19]

EPA's and Corps' Land- and Water-Grab Through the "Waters of the United States" Rule

On June 29, 2015, the EPA and the Army Corps of Engineers (Corps) published their final rule[20]defining what waters are covered under the CWA. Under the CWA, the federal government has jurisdiction over "navigable waters," which is further defined as "the waters of the United States, including the territorial seas."[21] This rule seeks to regulate almost any type of water, including certain man-made ditches and so-called waters that are dry land most of the time. This vast overreach is consistent with past attempts by the agencies to grab power by broadly interpreting the definition of "waters of the United States." In just over a decade, the United States Supreme Court twice struck down the agencies' efforts to regulate more waters: in 2001, in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,[22] and in 2006, in Rapanos v. United States.[23]

For property owners, including farmers and ranchers, this regulatory overreach is problematic. If a water is covered under the law (i.e., a jurisdictional water), property owners could be required to secure costly and time-consuming permits to take actions that affect these waters. Under the CWA, this impact can be nominal and does not even require environmental harm. Someone may need a permit just for kicking sand into a jurisdictional water.[24]

Property owners could be required to secure a permit if there is a discharge of dredged material (material excavated or dredged from waters of the U.S.) or fill material ("material placed in waters such that dry land replaces water—or a portion thereof—or the water's bottom elevation changes").[25]

In Rapanos v. United States, the late Justice Antonin Scalia cited a study highlighting the following costs and delays for one of the major types of permits (Section 404 dredge and fill permits): "The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes."[26]

Since there will be more jurisdictional waters, there will be a need to secure more CWA permits. This means that property owners, such as farmers, who want to use their property for normal business activities will have to secure more permits. They may choose not to engage in ordinary activities because of the time and cost of securing a permit.

The rule is also vague, making compliance difficult. The risk of not complying with the vague and subjective rule is another disincentive to using property for ordinary business activities.[27] The risk is compounded by the significant civil and criminal penalties for not securing a permit. One case now pending before a federal court involves a Wyoming family who

are facing $16 million in fines for constructing a stock pond on the family's eight-acre farm for the family's horses and cattle.[28]

The ESA's Failure to Protect Species and Its Disrespect for Property Rights

In 1973, the Endangered Species Act (ESA) was enacted into law to promote the conservation of species.[29] Unfortunately, the law has failed and, in so doing, has trampled on property rights.

There are 1,585 domestic species and 661 foreign species on the endangered species list (including both threatened and endangered species).[30] Only 33 species have been "recovered" and delisted from the endangered species list in the more than 40 years of the ESA.[31] Almost as many species (29 species) have been delisted because they never should have been on the list due to technical errors or because they became extinct.[32]

For as little success as the ESA has had, it has also had a negative impact on the rights of private property owners. Society has determined that protecting species is an important objective. Therefore, the costs of protecting species should be paid by society as a whole, not by individual property owners. Property owners need to be compensated for restrictions placed on the use of their land, as they have not created any harm that affects anyone else beyond their boundaries; there is no "polluter-pay" issue. Instead, the federal government expects property owners, who are merely using their land without harming others, to change how they use their property.

The Federal Government's Poor Management of Public Land

Federal land is important particularly for ranchers, many of whom draw their livelihood from use of public lands. According to the Public Lands Council, "Nearly 40% of western cattle herd and about 50% of the nation's sheep herd spend time on public lands."[33] The U.S. Department of the Interior's Bureau of Land Management (BLM) manages 139 million acres of grazing land,[34] and the Forest Service (under the Department of Agriculture) manages 93 million acres of public grazing land and 10 million acres of private land within those bounds.[35] The BLM and the Forest Service manage roughly 90 percent of federal lands in the West.[36]

The grazing lands are a sliver of the greater federal government estate of 640 million acres, in addition to millions of subsurface acres. Federal land management has a unique impact on farmers and ranchers in the western United States where nearly 47 percent of federal lands are located.[37] The federal government owns roughly 85 percent of Nevada, 64 percent of Utah, and 61 percent of Idaho, topping the ranks for federal ownership among states in the continental U.S.[38]

However, the federal government does not manage this land well. Federal land management decisions directly affecting states and ranchers are handled by federal bureaucrats and through omnibus appropriations bills and unilateral presidential designations. The sheer size and diversity of the federal estate are proving too much for distant federal bureaucracies.

For example, federal administration and management of public grazing lands is broken. The BLM has struggled to manage persistent grazing permit backlogs.[39] The Forest Service's most recent budget request sought more funding to manage a backlog in environmental improvements needed on grazing land.[40] Further, as explained by the Property and Environment Research Center, "the federal grazing system may be resulting in poor rangeland conditions. According to

the BLM, more than 21 percent of BLM grazing allotments are not meeting or making significant progress toward meeting the agency's own standards for land health."[41]

Both the BLM and the Forest Service have expressed frustration with the environmental review process under the National Environmental Policy Act (NEPA), the costs of which are exacerbated by nuisance litigation, often from extreme environmental activist groups. In recent years, the Forest Service has spent more on navigating the NEPA process for renewing grazing permits than it has on grazing allotments management.[42] The Forest Service writes that:

Challenges to this work [NEPA analysis] include increased complexity of analyses, increased workload associated with litigation, increased costs for obtaining comprehensive resource condition and trend data to support decisions, and the lack of completed assessments necessary to support the record for making management decisions.[43]

From 2009–2013, federal lands held by the BLM and the Forest Service also lost taxpayers nearly $2 billion a year on average, while the state trust lands evaluated in a recent Property and Environment Research Center study earned taxpayers $200 million.[44] Broken down per acre, federal lands lost $4.38 per acre, while state lands earned $34.6 per acre.[45] While the federal government can absorb unrecovered costs and spread expenses across federal taxpayers, state trust lands are required to turn a profit.[46]

There are also continual attempts to expand this federal estate, often hurting ranchers. For example, the Antiquities Act allows the President, independent of Congress, to restrict federal land use on the premise of protecting "objects of historic or scientific interest."[47] In doing so, Presidents have overridden the diverse interests and needs of the communities affected by these decisions and discounted the consensus building, trade-offs, goals, and local efforts to manage land, including the interests of the agricultural community. For instance, in 1996, President Bill Clinton designated 1.9 million acres in Utah. Though this designation was made 20 years ago, the BLM still does not have a grazing plan in place, thereby upsetting both ranchers and anti-ranching environmental groups.[48]

The federal government's management of public lands has drained taxpayers, but ranchers have contributed important economic and environmental benefits to these public lands. According to the Public Lands Council, "The work ranchers do to maintain the land saves the Bureau of Land Management approximately $750 million in taxpayer dollars each year."[49] Additionally, the BLM notes that:

Livestock grazing serves as an important tool that provides environmental benefits such as preservation of open space, managing fuel loads to reduce wildfire risks and enhancing distribution of available water for wildlife. Ranchers often serve as the eyes and ears for public land managers and assist with public health and safety. They provide public lands information, report wildfires, assist in wildfire suppression when appropriate, restore land health, and assist in search and rescue operations.[50]

The Undermining of Genetically Engineered Food Through Mandatory Labeling

People have been modifying the genetic makeup of food for thousands of years. Genetic engineering is just one method to achieve this same objective. Genetically engineered food has

been in the U.S. food supply since the 1990s. Through the genetic engineering process, scientists can introduce desired traits into a crop plant more efficiently and more precisely.

Genetically engineered crops are prevalent. In November 2015 guidance, the U.S. Food and Drug Administration (FDA) explained:

In 2013, in the United States, bioengineered soybeans made up 93 percent of the acreage of planted soybeans, bioengineered cotton made up 90 percent of the acreage of planted cotton, and bioengineered corn varieties made up 90 percent of the acreage [of] planted corn. In addition, bioengineered sugar beets accounted for 95 percent of the acreage of planted sugar beets in the 2009–2010 crop year. [internal citations omitted].[51]

The genetically engineered foods on the market today are as safe as their non–genetically engineered counterparts. There is wide agreement on this point, from the FDA and National Academy of Sciences to the World Health Organization.[52] If genetically engineered foods do differ in any material way from their non–genetically engineered counterparts, the FDA already requires labeling to disclose those differences.[53]

Despite the science and the safe and wide use of genetically engineered crops, there are some individuals and groups who want mandatory labeling that would indicate whether food has been genetically engineered. Vermont has a mandatory labeling law that will go into effect on July 1, 2016 (the first state law to go into effect).[54] Connecticut and Maine have passed laws, but they will not go into effect until bordering states take similar action.[55]

Ironically, mandatory labeling has been framed as a pro-consumer issue. It is exactly the opposite. Mandatory labeling could be harmful to consumers by misleading them into thinking that genetically engineered food is unsafe for consumption. Voluntary labeling efforts already exist.[56]Mandatory labeling, however, uses the force of government to compel companies to disclose information that has no bearing on health or safety. A government-mandated label would also likely send a signal to the consumer, whether intended or not, that the government has determined that genetically engineered food is dangerous or less nutritious. The labeling says nothing about the safety or nutritional value of ingredients, only about the process used to develop them.

What Needs to Be Done

To begin addressing these regulatory obstacles, Congress should:

Prohibit the application of Title VII of Dodd–Frank to farmers. This regulatory burden will make it more difficult for agricultural producers and possibly discourage the use of commodities markets to manage risk.

Protect the ability of states, communities, and individuals to manage water resources. Water bodies are unique, and so are their water quality issues. Therefore, a federal one-size-fits-all approach is bound to fail. States, local communities, and private citizens are closer to the problems facing local water bodies than the federal government is and should be empowered to develop solutions to these problems. New ideas, including water trading markets, will develop and provide the best solutions.

Prohibit federal efforts to regulate (directly or indirectly) nonpoint sources of pollution. Federal overreach to effectively regulate agricultural runoff and other nonpoint sources of pollution should be prohibited. States, local communities, and private citizens can address challenges to water quality, such as any problems that may exist in the Chesapeake Bay. If this does not happen, the EPA's expansive approach to water quality in the Chesapeake Bay will simply be applied to other water bodies.

Repeal the EPA and Army Corps' "Waters of the United States" rule. While there are legal challenges pending, Congress itself needs to repeal this rule.[57] This is the best way to stop a power grab that would undermine property rights and would also block another attempt by the EPA to ignore the state role in water policy.

Ultimately though, Congress needs to define "navigable waters," which is the actual statutory term, not "waters of the United States." This distinction is critical because any definition needs to recognize that Congress was seeking to regulate not just any waters, but those waters that were "navigable." Any definition should generally limit federal authority to regulation of traditional "navigable waters" only.

Reform the Endangered Species Act. There are many reforms that need to be made to the ESA, from improving the scientific analysis of designations to developing a better listing process. The law should be less of a regulatory scheme and more of a government program with clear appropriations for all of the government's actions, including covering any costs imposed on property owners. Regulation can hide the true costs of government action. The costs of all ESA-related efforts should be accounted for in a transparent manner.

An approach that infringes on property rights fosters a confrontational relationship between the federal government and property owners. If the federal government is going to seek to conserve species, it should work with property owners instead of creating an adversarial relationship. Respecting property rights will go a long way in promoting this partnership.

States should play a much greater role in protecting species, in large part because they are closer than the federal government to any situation that needs to be addressed. Most states, if not all, already have conservation programs.[58] By having states work in partnership with property owners, any threats to species can be addressed more effectively.

Transfer management of federal lands to states and private citizens. The responsibility to manage public lands should be shifted from the federal government to states and private citizens.Both groups are in a much better position to manage public land, and local control should benefit ranchers who seek a system that is more responsive to their needs. While the federal government can pass on the costs of poor or nonexistent management to federal taxpayers, states and the private sector have powerful incentives for better management of resources on federal lands. State governments and budgets can be more accountable to the people who will directly benefit from wise management decisions or be marginalized by poor ones, making it more likely that resources will be developed and that this development will be done in a way that protects the environment.[59]

Taxpayers and ranchers should benefit by the federal government's transferring the management of much of the federal land to states, as well as a cessation of continual attempts to expand the

federal estate. States will also face challenges, but the localized management approach, new innovations from multiple "laboratories of democracy," and greater accountability to state citizens, among other factors, should ultimately prove beneficial. Further, states should be strongly encouraged to transfer ownership and management of the lands, particularly those to be used for commercial production, to private interests, who are generally better suited to managing with financial prudence and enhanced stewardship.

Most important, as a matter of principle, the federal government should not be such a significant land owner; for that matter, even states should not be massive land owners. Land, in general, should be in the hands of private citizens.

Prohibit the mandatory labeling of genetically engineered foods. There should not be state or federal mandatory labeling of genetically engineered foods. The more complicated question is whether the federal government should preempt states like Vermont so that they are prohibited from imposing mandatory labeling.

This situation, especially because of the numerous problems connected to state mandatory labeling, looks to be one of those rare instances[60] where preemption is likely appropriate, assuming that labeling is prohibited on both the state and federal levels. Indeed, if unchecked, states would be damaging the interstate market for genetically engineered foods and creating a patchwork of laws. A federal mandate, though, just to avoid the patchwork problem ignores the even more important problems that mandatory labeling causes. Congress would merely be trading flawed state mandates for a flawed federal mandate.

Mandatory labeling requirements would be using the power of government to compel speech that will likely be misleading to consumers.[61] Government, whether federal, state, or local, should not force companies to engage in speech that is not justified by the science, including the FDA's own science. It also hurts the development of genetically engineered foods that are critical for the nation and global efforts to counteract malnutrition.[62]

Conclusion

Addressing the specific obstacles identified above, as well as other regulatory challenges, would only be the start of what needs to be done to remove government intervention that hampers farmers and ranchers. To remove obstacles that continue to hurt agricultural producers, the entire regulatory system itself has to be addressed.

Congress needs to stop delegating so much power to federal agencies, and when regulations are developed, there need to be statutory protections in place to ensure that those regulations are clearly authorized by statute and consistent with the intent of Congress when it passed the statute. If these protections were already in place, many of the existing regulatory obstacles facing farmers and ranchers would likely not exist.