National Association of State Departments of Agriculture
4350 North Fairfax Drive
Suite 910
Arlington, VA 22203
Tel: 202-296-9680
www.nasda.org

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Ms. Donna Downing
Office of Water (4502– T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Submitted via email: cwawotus@epa.gov; hanson.andrew@epa.gov

Re: Comments on EPA's Federalism Consultation on "The Definition of 'Waters of the U.S.'"

Below are comments from the National Association of State Departments of Agriculture's (NASDA) regarding the Environmental Protection Agency's (EPA) re-proposal of a Waters of the United States (WOTUS) rule to clarify jurisdiction under the Clean Water Act (CWA). NASDA submits these comments in response to Executive Order (EO) 13778 "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule"[1] and EPA's subsequent federalism consultation on April 19, 2017.

I. About NASDA

State departments of agriculture are responsible for a wide range of programs including conservation and environmental protection, food safety, combating the spread of plant and animal diseases and fostering the economic vitality of our rural communities. In forty-three states, the state departments of agriculture are the lead state agencies responsible for the regulation of pesticide use under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). A number of state departments of agriculture also administer Section 402 National Pollutant Discharge Elimination System (NPDES) permitting programs for Concentrated Animal Feeding Operations (CAFO).

A healthy environment, including clean air and water, is necessary for the agriculture industry. NASDA appreciates EPA's outreach and engagement through the federalism consultation process. NASDA supports cooperative federalism, a robust, co-regulatory partnership between states and federal agencies in policymaking, to ensure agriculture's economic vitality while guaranteeing safe and accessible food. The current federalism process ahead of a new WOTUS rule is a meaningful step in growing the relationship between EPA and NASDA members. Further, this process is a positive move towards restoring the cooperative federalism enshrined in the CWA, which outlines a federal-state partnership in overseeing the nation's waters. NASDA requests EPA view this as the beginning of the

[1] 82 FR 12497

process, and continues to engage with state and local governments beyond the final rule and implementation.

II. General Comments

The CWA is built on the concept of cooperative federalism. The CWA states, "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."[2] By acknowledging states role in providing clean water and using federal regulations as a framework, the CWA should be a prime example of cooperative federalism. As EPA considers re-proposing a WOTUS rule, EPA and the Army Corps of Engineers (USACE) ("the agencies") must uphold this framework.

As the agency's prepare a rule, NASDA recommends the following:

- Continue a robust federalism consultation process with NASDA, along with other state and local entities, throughout the rulemaking and implementation;
- Create a legally defensible rule that respects of state authority with utilizes clear, administrable definitions that acknowledge states also protect water, and Federal jurisdiction is limited;
- Protect statutory exemptions for farming operations for past, present and future farmland;
- Create cohesive guidance documents and implementation processes across the agencies and regions; and
- Ensure the rule is scientifically sound and that the agencies conduct a thorough economic analysis on the rule's impacts.

NASDA's comments center on the theme of cooperative federalism, which we have previously articulated to the Office of Management and Budget (OMB), White House Office of Information and Regulatory Affairs (OIRA), [3] and EPA on ways to improve engagement in EPA's retrospective regulatory review and to minimize the impact of regulations on both local governments and the regulated community. Our recommendations included the following specific and identifiable actions:

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.
2. Improve economic analyses that more realistically account for economic costs to states: Federal agencies should engage state regulatory agencies and stakeholders to evaluate the financial impact of proposed regulations, availability of required financial and other resources, and whether expected outcomes merit those expenditures.

[2] (33 U.S.C. 1251 et seq.) SEC. 101. (b)
[3] National Association of State Departments of Agriculture. (2015, March 6). NASDA Letter: OMB Retrospective Review Roundtable. http://www.nasda.org/Policy/filings/Letters/33163/33289.aspx

3. Enhance public participation and greater transparency of the regulatory process: OMB should exercise its authority to improve public participation and increase transparency of the regulatory process.
4. Incorporate flexibility in state regulatory programs: Federal agencies should engage state regulatory partners in creating programs that may provide local and state flexibility.
5. Renew focus on utilization of best available science: OMB should ensure agencies consistently and appropriately apply best available science to the regulatory system.
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.

These principles are important for ensuring a federal-state partnership that protects our nation's waters. Importantly, waters are protected even they are not a WOTUS under the CWA. Waters of the state and state voluntary conservation efforts continue to protect and enhance water quality. To ensure this work can continue, the agencies must promulgate a rule which creates clear jurisdictional lines without dramatically expanding federal authority. It is paramount that EPA develop a rule which utilizes quantifiable metrics or other objective criteria to establish jurisdiction that balances costs and benefits. Further, NASDA supports science-based regulations that provide necessary protections while also allowing for the regulated community to remain economically viable. These types of criterion would promote predictability and reduce uncertainty as described in the general principles of regulation found in the executive order.

State Departments of Agriculture Conservation Success

NASDA members are leaders in addressing agricultural non-point source runoff. State departments of agriculture have developed voluntary programs and in some cases, state regulatory programs, to implement best management practices, certify farming operations as environmentally sound, and directly address pollution sources to prevent problems. EPA's regulatory framework should be crafted in a manner that provides regulatory certainty for affected entities while also recognizing limits of Federal authority and the responsibility of states to protect water. States are in the best position to address the diversity of agricultural practices and environmental conditions across the country.

In the Mid-Atlantic, the Delaware Department of Agriculture has a nutrient management program that assists producers with protecting and improving the quality of Delaware's ground and surface waters and helps the state meet or exceed federally mandated water quality standards. The program, established in 1999, works on nutrient management, waste management for Animal Feeding Operations (AFO's) and NPDES permits for CAFOs. Between 2014 and 2016, nearly 271,000 acres in Delaware received assistance in planning their operations nutrient management strategies. The state program also yields valuable self-reported data on acres managed, fertilizer consumed, manure utilized and animals grown which serve as metrics for the return on investment of the program funding.

Out west, states leverage partnerships between agencies such as the Environmental Protection Agency, state departments of agriculture, state departments of environmental quality, state wildlife agencies, and universities to enhance stewardship practices within the watersheds. An example of these partnerships in New Mexico is the Paso del Norte Watershed Council's 319(h) Watershed Restoration Grant Program for the Lower Rio Grande, which started in 2000 and resulted in a Watershed Restoration Action Strategy to inventory best management practices for enhancing watershed health and reducing nonpoint source pollution, such as *e. coli*. The New Mexico Department of Agriculture supported this effort, which is ongoing, by serving as a fiduciary agency and sitting on the Paso del Norte Watershed Council's Executive Committee.

In 2013, the Iowa Nutrient Reduction Strategy was put into place to assess and reduce nutrients delivered to Iowa waterways and the Gulf of Mexico using a science and technology-based approach. The strategy outlines voluntary efforts to reduce nutrients in surface water from both point sources, such as wastewater treatment plants and industrial facilities, and nonpoint sources, including farm fields and urban areas, in a scientific, reasonable and cost effective manner. Based on statewide models, Iowa estimates that in 2015, nitrogen loading was reduced by over 3.8 million pounds through cover crops, bioreactors and other practices. In the same year, it is estimated that over 215,000 pounds of phosphorous loading was reduced. This statewide strategy, which follows the recommended framework provided by the Environmental Protection Agency, has served as a model for several states and has led to measurable progress in Iowa water quality.

The Florida Department of Agriculture and Consumer Services (FDACS) has developed and adopted over 950 best management practices covering all aspects of Florida agricultural production. These BMPs protect water quality and improve irrigation efficiency. Over 4.9 million acres of Florida farmland are enrolled in the BMP program, with more being added each day. In addition, the Department works with water management districts, local drainage districts, and other stakeholders to develop and implement regional water storage and treatment projects. In the Lake Okeechobee watershed alone, studies indicate that the FDACS cost-share BMP program has reduced total nitrogen (TN) losses by 245 tons/yr and total phosphorous (TP) losses by 47 tons/yr as the runoff leaves the edge of farms. Outside of that basin, annual reductions in nitrogen loading credited to BMPs through the statewide water quality protection program exceed 2.4 million pounds, while regional surface water treatment systems overseen by FDACS reduce phosphorous by over 9 tons/year.

The above examples demonstrate the leadership provided by the states in an effort to tackle non-point source pollution, but are not the only examples. Nearly every state department of agriculture has voluntary programs or state laws that work with producers to protect clean water. The net effect of these efforts retains and reduces nutrient loss into water. States are committed to nutrient management efforts and helping producers improve their operations to improve waters.

III. Protecting Farming Exemptions

While much of the discussion around CWA rulemaking has focused on what constitutes a WOTUS, the consequences of defining "normal farming activities" is particularly important for America's farmers and

ranchers. The jurisdictional scope of the CWA and the interpretation of what constitutes normal farming, silviculture, and ranching activities are inextricably linked and incredibly impactful for agricultural producers. As such, NASDA encourages the agencies to ensure the normal farming exemptions are interpreted consistently and sufficiently broadly to reflect the realities of agricultural production. NASDA has previously raised concerns with how the agencies have interpreted the statutory exemption for "normal farming activities."[4]

NASDA agrees that the conservation practices cited in the previous rulemaking are "normal farming activities" and are therefore covered by the Section 404 "normal farming" exemption, but notes that the list of practices considered in the previous effort (the "Interpretive Rule") arbitrarily excluded a multitude of other normal farming practices which presumably would not have been exempt. The listed practices were certainly "normal farming activities" that producers engage in every day. Whether building a fence, clearing brush, or utilizing conservation cover, producers utilize these practices as necessary tools for the management of their operations—regardless of if those practices are implemented in conjunction with a Natural Resources Conservation Service (NRCS) conservation program.

In the previous rulemaking, in order to qualify for the exemption, "activities must also be implemented in conformance with NRCS technical standards." Rather than expanding the exemptions for producers as Administrator McCarthy wrote in a March 25, 2014 Op-Ed[5], the actions undertaken by the administration actually narrowed the CWA's "normal farming" exemption by requiring—for the first time—that certain "normal farming activities" be conducted in compliance with specific NRCS technical standards. Linking standards for voluntary NRCS conservation practices to compliance with mandatory regulatory requirements sets a dangerous precedent that could undermine the successful paradigm of utilizing voluntary, incentive-based conservation practices to improve environmental quality. The unintended result of this would have been fewer water quality improvements.

NASDA encourages the Administration to dismiss any option that would either undermine the voluntary nature of on farm conservation practices, or limit the applicability of the existing statutory exemption for "normal farming activities." Instead, NASDA urges the EPA to pursue a policy with deference to U.S. Department of Agriculture (USDA), the various State Departments of Agriculture, and the agricultural community.

Past, Present, Future Farming Exemptions

Under current law, normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices are exempt from section 404 permitting requirements.[6] The agencies have also long interpreted "normal" to mean only activities conducted as part of an

[4] National Association of State Departments of Agriculture. (2014, November 14). NASDA Letter: Comments on Proposed Rule to Define "Waters of the United State" Under the Clean Water Act. http://www.nasda.org/Policy/filings/10937/30804.aspx

[5] EPA: Clearer Protections for Clean Water Support a Strong Farm Economy, March 25, 2014

[6] 33 U.S. Code § 1344(f)(1)(A)

"established (i.e. ongoing)" farming or ranching operation,[7] though we fail to find any reference to this temporal limitation in the underlying law.

In 1993, the U.S. Army Corps adopted a rule that established that agricultural lands that were converted from wetlands prior to 1985 (“prior converted croplands”) were categorically excluded from the definition of “the waters of the United States” and, therefore, were not subject to regulation under Section 404 of the CWA.[8]

Included in the public record is a suggestion that the EPA believes that to qualify for the normal farming exemption, "established" and "ongoing" means that the farming or ranching operation must have been ongoing at the particular location since 1977. Observers believe this to be the first time that EPA has provided any clarification on this point, so it provides important guidance for farmers and ranchers. Specifically, EPA suggests that when farming or ranching has not been ongoing since 1977, otherwise "normal" farming or ranching activities such as plowing, planting, etc. would require a section 404 permit—but only for the first year. After the first year, EPA indicates that the operation would be viewed as "established" for purposes of the exemption.

We believe that the including the caveats of “established” and “ongoing” in the agricultural exemption creates a barrier to entry for new or younger farmers and ranchers to begin operations on lands containing WOTUS features. Even if section 404 permitting were required "only for the first year," this is a major roadblock to new farming or ranching operations. EPA's own figures (adjusted for inflation) put the cost of individual section 404 permit application at $62,166, plus $16,787 per acre of impacts to WOTUS. For nationwide permits, costs are estimated at $24,004, plus $13,212 per acre of WOTUS impacted. Few new farmers and ranchers would be able to take on this burden—and yet, given the scope of the features to be regulated, in most parts of the country it literally would be impossible to avoid these features. They are simply too prevalent across the landscape to "farm around" them.

NASDA is likewise cognizant of efforts throughout the country, particularly in urban and suburban areas to convert lands for community gardens and other non-traditional commercial farming operations such as aeroponic and hydroponic facilities, regardless of their historical uses. NASDA asserts that had Congress intended to exempt some farming activities on some lands and not others, the law would have reflected such a limitation. Efforts within and among communities to raise food for local consumption should be facilitated through broad application of the statutory exemption for farming operations, not hindered, as they would be if an arbitrarily narrow interpretation were to prevail.

NASDA urges EPA to honor Congressional intent and apply the widest possible interpretation of the normal farming, silviculture and ranching exemption. NASDA takes note that the statute does allow for a single exclusion from the normal farming exemption. Specifically, the statute excludes from this exemption when dredged or fill material is discharged into the *navigable waters* (emphasis added)

[7] *See* 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 232.3(c)(1)(ii)(A)

[8] 33 U.S.C. § 1344. (*See,* Final Rule, Clean Water Act Regulatory Program, 58 Fed. Reg. 45,008 (Aug. 25, 1993) (“1993 Final Rule”) (codified at 33 C.F.R. § 328.3(a)(8) (2009)).

incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced.[9] NASDA urges the agencies to respect this limitation and ensure economic vitality in agriculture operations.

NASDA further urges EPA to consult with USDA, States, and agricultural industry stakeholders in developing a comprehensive cost benefits analysis to ensure that beginning farmers and non-traditional farming operations, such as those in the urban landscape are not negatively impacted by the EPA's final regulations.

Exemptions and Section 402

We are concerned that EPA's oversimplification of the "normal" farming and ranching exemption is misleading to farmers and ranchers. This exemption does not simply exempt ordinary or commonplace farming and ranching practices from CWA permit requirements—which is how most people would interpret EPA's prior statements. Instead, the exemption only applies to section 404 permits, not section 402 permits that would be required for applying fertilizer, manure, or pesticide in jurisdictional ephemeral streams, ditches, or wetlands. For this reason, a farmer or rancher grazing or moving cattle that deposit manure into a jurisdictional wetland or ephemeral feature could face vulnerability under section 402 of the CWA, notwithstanding the protections afforded under the section 404 farming exemption.

IV. Creating Administrable Definitions

NASDA urges any new rule to create legally defensible definitions that are administrable, clear to the public, and protect farmers and ranchers from citizen suits on their operations. The agencies muse use specific, concise language used regarding the concepts of "navigable water," "relatively permanent" and "continuous surface connection."

Navigability

The CWA provides federal jurisdiction over WOTUS defined as "navigable waters" and originally understood to mean interstate waters or intrastate waters connected to the sea that were navigable in fact. As federal assertions of jurisdiction over other waters have, over the last several decades, challenged the original narrow scope of the CWA as intended by Congress, the U.S. Supreme Court has been compelled to intervene on the question of CWA jurisdiction in three major cases to date.

The definition of navigable waters is at the heart of jurisdictional questions within the Clean Water Act. When considering jurisdiction, NASDA urges the agency to always consider frequency and duration of flow, magnitude, predictability and consequence of connections. In *Rapanos,* the court expressed concern over extending jurisdiction to waters that are far from traditionally navigable waters and carry minor flow. NASDA's view of the law goes back to the foundational CWA premise, that jurisdictional

[9] 33 U.S. Code § 1344(f)(2)

waters be tied in a clear, direct, substantive and non-speculative fashion to navigation and navigability. Other non-navigable waters are jurisdictional under the CWA, but it is through their close, direct and substantial hydrological contribution to these navigable waters that they can be considered as part of a navigable system and therefore WOTUS. By factoring in the above characteristics, we believe EPA will be able to make clearer jurisdictional lines that respect state authority and the limits of the CWA.

Further, NASDA urges the agencies to classify navigable waters as those able to be used as a highway for water transportation and carrying of commercial goods in addition to those that have enough connections and sufficient moving water through them to be considered part of a system of navigable waters. This clarity and certainty is necessary for farmers and ranchers to fulfill their responsibilities under the CWA. To supplement this effort, NASDA encourages the agencies to pursue a public process for determining traditionally navigable waters and publishing the results of such a process to further clarify jurisdiction.

Relatively Permanent and Continuous Surface Connection

Justice Scalia's opinion clearly delineates that jurisdictional waters under the CWA include "only relatively permanent, standing, or flowing bodies of water"[10] ***and*** "only those wetlands with a continuous surface connection to bodies that are 'waters of the U.S.' in their own right…are 'adjacent' to such waters and covered by the [CWA]".[11]Throughout the federalism consultation, EPA asked for input on how states would like to see the terms "relatively permanent" for tributaries and streams and "continuous surface connection" for wetlands defined in order to be consistent with the *Rapanos* plurality opinion. The options that were discussed for better defining the term "relatively permanent" were: 1) perennial streams plus streams with "seasonal" flow, 2) perennial streams plus streams with another measure of flow, 3) perennial streams.

When examining these definitions, NASDA urges EPA to examine statutory language along with the court's opinions with the goal of reducing regulatory uncertainty. From NASDA's perspective, "relatively permanent" should be limited to perennial rivers and streams and permanent lakes which contain water except in times of extreme drought. Further, "continuous surface connection" should be defined as wetlands which are directly and visibly connected to, relatively permanent, jurisdictional waters. Narrowing these definitions to this level will ensure that federal jurisdiction does not impede state authority but also provides necessary water quality protections.

EPA stated in a webinar with NASDA members on May 31, 2017 that waters can be jurisdictional if they are either relatively permanent **or** have a continuous surface connection. This seems at odds with Justice Scalia's opinion which clearly indicates that waters are jurisdictional only if they are both relatively permanent and have a continuous surface connection. NASDA supports this exclusionary interpretation of the Clean Water Act and encourages EPA to conform their administration of the act to Scalia's interpretation.

[10] *Rapanos v. United States*, 13
[11] *Rapanos v. United States,* 3

Ensure Definitions are Compatible with the 402 program

NASDA continues to have concerns related to a decision of the Sixth Circuit on January 9, 2009 in National Cotton Council v. EPA (553 F.3d 927; hereinafter, National Cotton Council) rejecting EPA's contention that, when pesticides are applied over, into, or near waterbodies to control pests, they are not considered pollutants as long as they comply with FIFRA, and held that NPDES permits are required for all pesticide applications that may leave a residue in water.

In vacating the rule and requiring NPDES permits for pesticide applications, the Sixth Circuit substituted its own interpretation of how federal laws apply to the use of pesticides for EPA's longstanding interpretation of the laws, and overlaid a new permitting process that is duplicative of FIFRA's longstanding regulatory objectives. In the process, the Court undermined the traditional understanding of how the CWA interacts with other environmental statutes, particularly FIFRA, and judicially expanded the scope of CWA regulation further into areas and activities not originally envisioned by Congress.

As a result of the Court's decision, EPA was required to develop and implement a new and expanded NPDES permitting process under the CWA to cover pesticide use. EPA estimated that the ruling would affect approximately 365,000 pesticide applicators that perform some 5.6 million pesticide applications annually virtually doubling the number of entities subject to NPDES permitting. The new permitting process has increased both the administrative difficulty and costs for pesticide applicators to come into compliance with the law. Compliance no longer means simply following instructions on a pesticide label. Instead, applicators have to navigate a complex process of identifying the relevant permit, filing with the regulatory authority a valid notice of intent to comply with the permit, and having a familiarity with all of the permit's conditions and restrictions. Some pesticide applicators also face significant monitoring, reporting, and recordkeeping costs complying with their permits.

Along with increased administrative burdens comes an increased monetary burden. Estimates are that the cost associated with the EPA permit scheme to small businesses and some local governments could be as high as $50,000 each or more annually. In addition to the costs of coming into compliance, pesticide users are subject to an increased risk of litigation and large fines. Non-compliant pesticide applicators face fines of up to $37,500 per day per violation. Given the fact that a large number of applicators had never been subject to the NPDES permitting process before expanded interpretation of WOTUS, even a good faith effort to be in compliance could fall short. Moreover, the CWA allows for private actions against individuals who may or may not have committed a violation. Thus, while EPA may exercise its judgment and refrain from prosecuting certain applicators, the applicators remain vulnerable to citizen suits.

In these comments, NASDA is mindful of the current regulatory framework impacting farmers, pesticide regulators, applicators and every day citizens, who rely on the public health benefits provided by pesticides and their responsible application. While it is up to Congress to take action to eliminate this costly and duplicative burden, we are concerned that regulatory proposals that expand the definition of WOTUS would not just impact programs administered under section 404 of the act, but also the NPDES

program under section 402. Narrowing the universe of waters that are jurisdictional, as proposed in these comments will undoubtedly help minimize the costs and burdens associated with the 6th circuit decision. NASDA also requests that in formulating a new rule, the agency examines the 402 program holistically and creates definitions that streamline, not impede this program.

Minimize Impact on Conservation and Mitigation Programs

NASDA emphasizes that with changes in jurisdiction, the rule could have an untoward impact on other agencies, such as USDA and state agencies. As such, NASDA strongly encourages EPA to engage in a comprehensive consultation with all potentially impacted federal, state and local governing bodies in each step of this process. As an example, USDA and EPA programs deliver technical assistance and financial assistance for timely restoration projects and important conservation efforts. Preventative watershed conservation projects, specifically NRCS and 319 projects, are much less costly than the mitigation and rehabilitation activities. These imperative, preventative measures cannot face increased costs or delays from permitting under a new rule.

Rule Process

Before the agencies issue a proposed rule, NASDA requests that the agencies share specifics regarding what direction the new rule is pursuing. The opportunity to view specific definitions and policy proposals would allow NASDA and other state and local entities to provide specific and meaningful input to the agencies.

As the agencies crafted the 2015 rule, there were widespread stakeholder concerns that the agencies had not drafted or finalized guidance documents for implementation. This concern was especially acute for state and local governments, including NASDA, who operate co-regulatory programs with EPA. To avoid this confusion, we urge the agencies to work through implementation before finalizing a new rule to ensure consistent application once the rule is finalized. In particular, consistent application of the rule between the agencies is necessary, particularly across the various regions. To achieve this, appropriate guidance documents should be available upon implementation of a final rule and accompanied by consistent and frequent outreach from the agencies. NASDA looks forward to assisting the agencies throughout the rulemaking process and into implementation as part of our philosophy of "educating before, and while, you regulate."

V. Conclusion

In summary, we encourage the EPA to create clear, administrable definitions and respect state authority while furthering the mission of protecting clean water. Further, we support protecting statutory exemptions for farming operations and a scientifically sound approach. As part of a new, comprehensive economic analysis, we encourage EPA to especially examine and minimize the impact new definitions could have on state permitting programs, voluntary conservation efforts, and the agricultural community. NASDA appreciates the opportunity to comment on EPA's federalism consultation before a new definition of WOTUS Rule is drafted. We look forward to continuing to work with EPA throughout this process and into implementation of the rule to ensure the rule provides needed clarity to the

regulated community. Please contact Britt Aasmundstad (britt@nasda.org) if you have any questions or would like any additional information.

Sincerely,

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