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Hearing on
Creating Abundant Water and Power Supplies and Job Growth by Restoring Common Sense to Federal Regulations

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Chairman McClintock, Ranking Member Napolitano, and members of the House Subcommittee on Water and Power, my name is Norm Semanko and I am the Executive Director and General Counsel of the Idaho Water Users Association (IWUA), located in Boise, Idaho. I am also the Chairman of the Federal Affairs Committee and Past President of the National Water Resources Association, a long-standing member of the Advisory Committee for the Family Farm Alliance, and a past member of the Western States Water Council. I appreciate the opportunity to provide testimony on the important topic of creating abundant water and power supplies and job growth by restoring common sense to federal regulations. It is a particular pleasure for me to appear before my Congressman, Subcommittee member Raul Labrador from Idaho's First Congressional District. We appreciate his ongoing dedication and support on issues of importance to our membership.

IWUA is a statewide, non-profit association dedicated to the wise and efficient use of our water resources. IWUA has more than 300 members, including irrigation districts, canal companies, water districts, municipalities, hydropower companies, aquaculture interests, professional firms and individuals. Our members deliver water to more than 2.5 million acres of irrigated farms, subdivisions, parks, schoolyards and other lands in Idaho.

Western water users are becoming increasingly concerned about the number of environmental regulations and policies that are currently being rewritten or reconsidered by the Obama Administration. In particular, recent rulemaking efforts at EPA and the White House Council on Environmental Quality carry the risk of real potential harm for Western irrigators and the rural communities that they serve.

These types of federal water resource actions and regulatory practices threaten to undermine the economic foundations of rural communities in the arid West by making farming and ranching increasingly difficult and costly. In the rural West, water is critically important to farmers and ranchers and the communities they have built over the past century. However, in recent decades, we have seen once-reliable water supplies for farmers steadily being diverted away to meet new needs. Rural farming and ranching communities are being threatened because of increased demand for limited fresh water supplies caused by continued population growth, diminishing snow pack, increasing water consumption to support domestic energy production, continually expanding environmental demands -- and additional, burdensome requirements imposed by EPA.

Our concerns with EPA's actions are numerous. Many of them are addressed in the testimony of other witnesses. I have focused my testimony on issues related to the use of pesticides and water storage, as detailed below.

1. Proposed Regulations and Consultations Regarding the Use of Pesticides Threaten Our Ability to Deliver Water.

Pesticide General Permit (PGP) for Point Discharges to the Waters of the United States from the Application of Pesticides (Draft)

On June 2, 2010 EPA released its draft National Pollutant Discharge Elimination System (NPDES) permit for point source discharges from the application of pesticides to waters of the United States. This permit is also known as the Pesticide General Permit (PGP). The PGP was developed in response to a 2009 decision by the Sixth Circuit Court of Appeals (*National Cotton Council, et al. v. EPA*). The court vacated EPA's 2006 rule that said NPDES permits were not required for applications of pesticides to U.S. waters. As a result of the Court's decision, discharges to waters of the U.S. from the application of pesticides will require NPDES permits when the court's mandate takes effect. EPA intends to issue a final general permit by October 31, 2011. Once finalized, the PGP will be implemented in six states, Indian Country lands and federal facilities where EPA is the NPDES permitting authority, and will be the benchmark for permit issuance in the 44 delegated states.

Western agricultural water users regularly apply aquatic herbicides, in accordance with FIFRA approved methodologies, to keep their water delivery systems clear and free from aquatic weeds. The use of aquatic herbicides provides for the efficient delivery of water, avoids flooding, promotes water conservation and helps avoid water quality problems associated with other methods of aquatic weed control. The organizations I represent include members responsible for irrigating millions of acres of farmland, as well as residential subdivisions, parks, schools, yards and other irrigated lands throughout the West. All of these working Americans and the general public stand to be directly impacted by regulations proposed by EPA in the draft PGP, as outlined further below.

Concern: Definition of "Waters of the United States"

One key concern with this draft general permit is that the definition of "Waters of the United States" used in the PGP is the one that existed in Federal Regulations prior to the U.S. Supreme Court's *Rapanos* decision. The decision was made by the Bush Administration not to issue a new rule, but instead to issue guidance in interpreting Clean Water Act jurisdiction under *Rapanos.* We have compared the December 2, 2008 guidance memo issued by the U.S. Army Corps of Engineers and EPA that takes into account the *Rapanos* decision to the current regulations and discovered discrepancies.

However, as we understand it, the guidance was not prepared in accordance with the Administrative Procedures Act and instead merely provides guidance to field offices. It therefore does not rise to the level of a regulation and technically does not supersede the pre-existing regulations. However, the guidance is, to our knowledge, the only post-*Rapanos* statement by either EPA or the U.S. Army Corps of Engineers on Clean Water Act jurisdictional

determinations. 33 CFR §§ 328.3(a)(1), (a)(5), and (a)(7), and 40 CFR §§ 230.3(s)(1), (s)(5), and (s)(7) defining "navigable waters" and "waters of the United States" all predate the Supreme Court decision in *Rapanos* and, to the extent they are inconsistent with the *Rapanos* decision, have been effectively voided by that decision. The proposed permit thus: (i) uses a regulatory definition that is inconsistent with the current judicial interpretation; (ii) incorporates language from antiquated definitions; and (iii) effectively attempts by administrative action to overturn Supreme Court precedent.

The guidance memo is much more detailed as to what is jurisdictional and what is not under *Rapanos*. We have recommended that the section of the draft permit that defines and addresses "Waters of the United States" be rewritten to provide consistency with the December 2, 2008 guidance memo. As was the case during the development of the guidance memo, EPA should coordinate with the Corps of Engineers in this endeavor.

The draft definition of "Waters of the United States" in the PGP opens up the potential for non-navigable "Waters of the State" enforcement through CWA citizen suits and federal penalties. NPDES permits should limit their coverage to federally protected waters of the U.S., and not extend federal enforcement (e.g. citizen suits) to every pond or other water of the states.

Our concern about EPA's expansive interpretation of "Waters of the United States" is further collaborated by the agency's statements that H.R. 5088 – legislation introduced during the last Congress that would have radically expanded jurisdiction under the Clean Water Act – is consistent with previous agency interpretations. Through administrative fiat, EPA is attempting to expand its jurisdiction beyond what Congress has chosen to do.

<u>Concern: The PGP Does Not Clearly Exempt Aquatic Weed and Algae Control Activities from Expensive and Duplicative Federal Clean Water Act Regulations</u>

The application of aquatic herbicides in canals, ditches, drains and other irrigation delivery and drainage facilities is statutorily exempt from the definition of "point source" under the Clean Water Act and therefore does not require an NPDES permit. The PGP fails to clearly state that NPDES coverage is not required for these activities. EPA appears to be employing the PGP as a vehicle to eliminate or dilute the existing statutory point source exemptions.

Canals, ditches, drains and other irrigation delivery and drainage facilities are <u>not</u> uniformly "waters of the U.S.". Therefore, the application of aquatic herbicides to these facilities does not automatically require an NPDES permit. Once again, EPA is using the PGP as a vehicle to summarily and inappropriately make these jurisdictional determinations.

<u>Concern: Multiple Opportunities for Stacked Clean Water Act Violations and Citizen Suits</u>

The current draft creates numerous, overlapping opportunities for paper violations to be tacked onto a violation associated with a water quality criteria exceedance or the observance of an adverse effect on a water body use. Such additional violations include the requirement for very timely mitigation ***plus*** very timely reporting ***plus*** updating of the pesticide discharge

management plan ***plus*** update of other records. Each of these could be separate violations according to EPA. We have suggested that EPA should eliminate such overlapping or stacked potential violations

Concern: Implications of Endangered Species Act requirements resulting from consultation

The current draft has a placeholder for the potential severe NPDES permit restrictions that the ongoing consultation with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) could produce. EPA's economic analysis does not take into account any such ESA restrictions. However, we know from the extremely stringent requirements for buffers around all Pacific Northwest waters that both Services' requirements and the economic consequences thereof can be severe. If the Services add significant restrictions to the permit prior to its finalization, EPA should conduct a new economic analysis and then re-propose the permit for public comment.

Concern: Draft PGP Requirements Are Unrealistic, Impractical and Burdensome for Local Governments and Small, Non-Profit Organizations to Implement

The measures set forth in the Draft PGP to "identify the problem", develop "pesticide discharge management plans" and provide new levels of record keeping and annual reporting are beyond the capacity of small government irrigation districts, and small non-profit canal company organizations. Irrigation districts and canal companies are responsible for irrigation delivery systems that often cover hundreds or thousands of square miles. These small government and small non-profit organizations do not have the staff or the budget to identify all areas with aquatic weed or algae problems, identify all target weed species, identify all possible factors contributing to the problem, establish past or present densities, or any of the other documentation requirements in the Draft PGP. Several of the measures set forth in the draft PGP are overly burdensome and, in many cases, impractical – if not impossible – to implement.

Concern: EPA Did Not Properly Solicit Public Comment on the PGP

I have personally witnessed EPA's failure to provide meaningful public input on this matter. Relying upon EPA's *Federal Register* notice, my organization – the Idaho Water Users Association – encouraged our members to attend the public meeting in Boise and provide oral comments. However, at the meeting, EPA staff told meeting attendees that comments would not be accepted, but instead would need to be submitted in writing afterwards; oral comments were not accepted at all. This meeting certainly was not conducted in accordance with the notice published in the *Federal Register*.

Concern: There are Legal Risks to Operators Associated with the Likelihood of EPA and States Meeting the Current October 31, 2011 Deadline

Some significant questions remain surrounding the current October 31, 2011 deadline. What is EPA's and states' contingency plan if the permits aren't operational? How are operators (applicators and decision-making organizations) expected to continue their work if their

protections under the 2006 EPA rule disappear on October 31, 2011? How are these organizations expected to plan between now and then? While we appreciate EPA and the Obama administration securing a recent extension of the stay from the Sixth Circuit Court of Appeals, extending the deadline from April 9 to October 31, 2011, this does little to alleviate our underlying concerns.

Concern: The Time for Action by Congress is Now

We are hopeful that a concerted good-faith effort working with EPA will result in a streamlined pesticide permitting regulatory process that will be efficient, fair and effective to American farmers and ranchers, as well as consistent with existing statutory exemptions in the Clean Water Act. However, because of our experience with EPA earlier on in the public comment process, and the agency's failure to defend the 2006 rule or pursue other reasonable alternatives, we have concerns about how serious our comments will be received. In addition, we are concerned about the possibility of so-called citizen lawsuits by activist environmental groups once the PGP is adopted and implemented. As a result, we believe the better course – and the necessary one -- is for Congress to approve legislation to eliminate the double-permitting requirement imposed by the Sixth Circuit Court of Appeals' decision.

We do not support, and believe it would be counterproductive, to pursue alternative regulatory or legislative approaches to the problem, as suggested by some. The solution is not to provide EPA with more regulatory authority under FIFRA or the Clean Water Act. Rather, the answer is to eliminate the unnecessary and burdensome double-permitting requirement imposed by the Court.

We applaud the U.S. House of Representatives' approval of H.R. 872, the Reducing Regulatory Burdens Act of 2011, on March 31, 2011, by a vote of 292-130. This was a significant step in the process of clarifying that the additional regulatory requirements of the NPDES permitting process are not necessary and that continued use of pesticide products pursuant to FIFRA is sufficient. We look forward to your Senate counterparts moving forward in a similar fashion so that legislation can be signed into law later this year, prior to the current October 31 deadline imposed by the Sixth Circuit Court of Appeals.

EPA's Failure to Improve Implementation of the Endangered Species Act

The Endangered Species Act (ESA) consultation process is broken. EPA and the National Oceanic and Atmospheric Administration (NOAA) have been required by a federal court to consult regarding how the pesticide registration process may affect salmon in the Pacific Northwest. The current process is not based on the "best available data." It takes too long, excludes input from affected stakeholders, and results in unneeded restrictions on pesticide use which will be harmful to food production while failing to help salmon. In Washington State, monitoring data shows that salmon are already being protected by current labeling laws.

Congress recognized the need to include agricultural producers in the implementation of the ESA when it wrote Section 1010 in the 1988 Amendments to the ESA. [Pub. L. No. 100-478, 102

Stat. 2306, Section 1010 (1988); codified as a note to 7 U.S.C.]. The intent of Section 1010 is to minimize harm to agricultural producers. The Conference Report states:

Agriculture is a major part of the U.S. economy and provides nutritional sustenance for our population and exports abroad…. The Conferees, therefore, anticipate that… [the Federal agencies shall] implement the Endangered Species Act in a way that protects endangered and threatened species while minimizing, where possible, impacts on production of agricultural foods and fiber commodities. [Conference Rpt. at 23-24 (Sept. 16, 1988).]

In 2005, when EPA announced changes to the Endangered Species Protection Program [ESPP; 70 Fed. Reg. 66392, 66400 (Nov. 2, 2005)], 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*."

EPA committed at that time to provide an opportunity for input at three points in an ESA assessment:

- Prior to making a "may affect" determination
- In identifying potential mitigation options, if necessary; and
- Prior to issuance of a Biological Opinion to EPA by the Services.

Despite a 20-plus year old statute and a 2005 commitment by EPA 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. Last year, a coalition of Western grower organizations was forced to file a petition with the court requesting EPA take immediate action to establish clear procedures for EPA's pesticide effects determinations and subsequent actions consistent with Section 1010 of the 1988 amendments to the ESA.

Failure to correct a process resulting in unnecessary restrictions without any indication that salmon will benefit puts producers along the West coast at a competitive disadvantage. The magnitude of the damage could be severe enough to drive fruit, berry, citrus and vegetable growers to foreign countries, costing both jobs and exports.

An additional problem with the consultation process, very frankly, is that the "federal family" is a dysfunctional family -- particularly EPA, NOAA and the U.S. Fish and Wildlife Service. The federal agencies' inability to coordinate – let alone agree – on critical aspects of the consultation process and resolution of important issues has adversely impacted agriculture and irrigators in terms of cost and time in meeting the requirements of the ESA.

We welcome continued Congressional oversight in this area in the days to come.

2. EPA Has Shown a Clear Anti-Water Storage Bias, Thereby Jeopardizing Our Ability to Provide Sufficient Water Supplies.

One key concern voiced by water users relates to administrative policy making occurring within EPA that will make it even tougher to accomplish what is already a daunting challenge: the obvious need to develop new water supplies to meet growing water demands and to adapt to, or mitigate for, the impacts on water supply due to climate change. For example - EPA Region 4 (which covers the Southeastern U.S.) - is implementing new guidelines that focus on proposals calling for additional storage capacity due to projected future demands. These guidelines were developed to inform local governments and water utilities of the actions EPA expects them to take "in order to eliminate or minimize the need for additional capacity before consideration of a water supply reservoir project on a stream or river." EPA will also use these guidelines to evaluate water demand projections for new or significantly increased public surface water withdrawals or public ground water supply wells which are being reviewed through the National Environmental Policy Act or EPA programs.

The Clean Water Act permit process requires a clearly stated project purpose, which for water supply reservoirs includes a projected demand analysis to support additional water capacity needs, and an analysis of alternatives. Before EPA considers a water supply reservoir as an alternative to address the need for additional water capacity, the water utility must take actions to ensure that, to the maximum extent practicable, they are implementing "sustainable" water management practices, which consist primarily of water use efficiency measures. According to EPA, these measures "are designed to help an applicant eliminate the need for, or reduce the impacts to aquatic resources from future water facility expansions including the construction of water supply reservoirs."

While these guidelines have been proposed for Region 4, and we don't yet know if similar standards will be proposed for the Western U.S., it is troubling that EPA is so blatantly biased against structural solutions to water challenges. EPA is already one of the more obstructionist agencies when it comes to developing new storage projects, something Colorado interests recently learned. On August 9, 2010, then-Colorado Governor Bill Ritter sent a letter to EPA Administrator Lisa Jackson describing the cooperative/collaborative efforts regarding the Chatfield Reservoir Reallocation Project, which involved numerous interests representing municipal, environmental and agricultural entities and would result in up to 20,600 acre-feet of additional storage space for beneficial uses in the Denver metro area. Although the U.S. Army Corps of Engineers supports the proposed reallocation plan, EPA Region 8 staff in June of 2010 stated that they would deny it, and recommended that the ultimate decision be elevated to higher levels in Washington, D.C.

"I am greatly concerned that a disagreement between two federal agencies could result in denial of a project so important to Colorado and fifteen of our communities," Gov. Ritter wrote Jackson. The Governor also asked that EPA proceed with "a thoughtful and transparent process that does not prejudge a project but instead balances important civic and environmental needs."

This should never occur when all of the stakeholder interests have agreed on a workable solution for all parties.

Unfortunately, based on the Region 4 guidelines and the behavior of Region 8 staff, it appears that some in EPA clearly have anti-storage biases and are not afraid to insert those biases into critical federal decision-making processes. This is reckless, arbitrary and short-sighted. Without new sources of water, increasing urban and environmental demands threaten to deplete existing agricultural supplies and seriously threaten the future of Western irrigated agriculture.

The often slow and cumbersome federal regulatory process is a major obstacle to realization of projects and actions that could enhance Western water supplies. We must continue to work with federal agencies and other interested parties to build a consensus for improving the regulatory process, instead of using administrative channels that create new obstacles.

Conclusion

Mr. Chairman, it appears that EPA and other federal agencies are moving in a direction where a heavier regulatory hammer will be wielded, litigious actions will be encouraged through the use of "citizen suits", and products used by American farmers and ranchers in the production of food and fiber will be foremost in the sights of federal regulators. Important water management and supply tools like pesticides and water storage have certainly been put at risk.

American family farmers and ranchers for generations have grown food and fiber for the world, and we will have to become more innovative than ever before to meet this critical challenge. That innovation must be encouraged rather than stifled with new federal regulations and uncertainty. Unfortunately, many existing and proposed federal policies on water issues make it more difficult for farmers in an arena where agricultural values are at a disadvantage to federal ecological and environmental priorities. Right now, it seems that water policies being developed at EPA and the White House Council on Environmental Quality are being considered separately from foreign and domestic agricultural goals. Many of these administrative changes are drawing praise from environmental organizations that have been advocating for them for some time, but ultimately the huge negative impacts of such destructive policies will be aimed at the heart of the economy in rural America.

We can only hope that the Obama Administration will give equal consideration to the concerns of agricultural organizations. We welcome your leadership to help make that possible.

While it may be difficult to get EPA and other Administration agency policy makers to change the approach they are taking, we are pleased that this Congressional hearing is being provided and that you are paying attention. We look forward to working with you and other Members of Congress towards this end.

Thank you for the opportunity to share this testimony with you today.