

Before the Transportation and Infrastructure Subcommittee on Water Resources and
Environment and the Agriculture Subcommittee on Nutrition and Horticulture

Hearing to Consider To Consider Reducing the Regulatory Burden Posed by the Case National
Cotton Council v. EPA (6th Cir. 2009) and to Consider Related Draft Legislation

February 16, 2011

1:00 p.m.

1300 Longworth House Office Building

Comments of
Norman M. Semanko
Executive Director & General Counsel
Idaho Water Users Association, Inc.
Boise, Idaho

Submitted on behalf of
The Idaho Water Users Association
And
The National Water Resources Association

Chairmen Gibbs and Schmidt, Ranking Members Bishop and Baca, my name is Norm Semanko and I am here on behalf of the Idaho Water Users Association (IWUA) and the National Water Resources Association (NWRA). I am the Executive Director and General Counsel of IWUA, Past President of NWRA, and a long-standing member of the Advisory Committee for the Alliance. We appreciate the opportunity to provide comments on the important topic of the Environmental Protection Agency's (EPA's) new regulations, potential missions and related legislation impacting rural job creation and ways of life.

IWUA is a statewide, non-profit association dedicated to the wise and efficient use of 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 farm land in Idaho.

NWRA is a federation of state water associations and represents the collective interests of agricultural and municipal water providers serving the seventeen Western Reclamation states. NWRA has an active Water Quality Task Force and has long been involved in matters regarding the Clean Water Act in Congress, before the administration, and in the courts. NWRA has also provided testimony and briefings for Congressional committees, members and staff on matters relating to the Clean Water Act and other environmental laws and regulations.

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.

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 Pesticides General Permit (PGP). The PGP was developed in response to a 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 next April. EPA intends to issue a final general permit by December 2010. 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 in this section.

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 Supreme Court *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.

As a result of the *National Cotton Council (NCC)* decision, the discharge of a pesticide from a "point source" to "waters of the United States" will require permit coverage by April 9, 2011, when the Sixth Circuit's ruling goes into effect. "Point Source" and "waters of the United States" are legal terms of art and a frequent topic of litigation, so that the full scope of permit requirements for particular pesticide uses remains unclear after the *NCC* decision. Activists and some courts take an extremely broad view of the scope of "waters of the United States" encompassing many features that farmers generally would not recognize as "waters". For this reason, potential enforcement targets will include those who apply pesticide to farmed wetlands or near intermittent streams, grass waterways, ditches, or other conveyances that flow to navigable waters.

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

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 does not 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 not 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.

Concern: Multiple Opportunities for Stacked Clean Water Act Violations and Citizen Suits

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. While we appreciated the opportunity to attend and interact with EPA staff, we were disappointed that the hearing was not conducted according to the notice that was published in the *Federal Register*. The June 4, 2010 *Federal Register* notice clearly stated: "EPA encourages interested and affected stakeholders to attend one of the scheduled public meetings and provide oral or written comments... Oral or written comments received at the public meetings will be entered into the Docket for this permit" (emphasis added). Unfortunately this was not at all the case.

In reliance upon EPA's Federal Register Notice, IWUA encouraged its members to attend the public meeting in Boise and provide oral comments. However, participants were told by EPA staff at the public meeting that comments would not be accepted, but instead would need to be submitted in writing afterwards; oral comments would be at all. While EPA allowed a limited number of questions to be asked, there was no opportunity to comment and comments were not entered into the Docket. This prevented meaningful participation by those interested and potentially affected stakeholders who relied upon the notice in the Federal Register and attended with the intent to provide oral comments. Many participants left the public meeting without being provided an opportunity to ask questions. Given the number of people that attended and the lengthy up-front presentations and explanations provided by EPA staff, there simply was not enough time. All in all, it was not a meaningful opportunity for the public to be heard. It 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 April 9, 2011 Deadline

Some significant questions remain surrounding the April 9, 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 April 9, 2011? How are these organizations expected to plan between now and then? EPA and the Obama administration should approach the 6th Circuit Court of Appeals now and get its approval for an additional stay beyond the current April 9, 2011 deadline.

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. As a result, we believe it is advisable for Congress to provide additional oversight -- and legislative relief -- to address this very serious matter.

Specifically, enactment of legislation such as H.R. 6087, introduced in the 111th Congress by the Agriculture Full Committee Chairman Frank Lucas, would clarify 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.

Committee on Agriculture
U.S. House of Representatives
Required Witness Disclosure Form

House Rules* require nongovernmental witnesses to disclose the amount and source of Federal grants received since October 1, 2008.

Name: Norm Semanko

Organization you represent (if any): Idaho Water Users' Association +
National Water Resources Association

1. Please list any federal grants or contracts (including subgrants and subcontracts) you have received since October 1, 2008, as well as the source and the amount of each grant or contract. House Rules do NOT require disclosure of federal payments to individuals, such as Social Security or Medicare benefits, farm program payments, or assistance to agricultural producers:

Source: NONE Amount: _____

Source: _____ Amount: _____

2. If you are appearing on behalf of an organization, please list any federal grants or contracts (including subgrants and subcontracts) the organization has received since October 1, 2008, as well as the source and the amount of each grant or contract:

Source: NONE Amount: _____

Source: _____ Amount: _____

Please check here if this form is NOT applicable to you: _____

Signature: N. M. S.

* Rule XI, clause 2(g)(4) of the U.S. House of Representatives provides: *Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof. In the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include a curriculum vitae and a disclosure of the amount and source (by agency and program) of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) received during the current fiscal year or either of the two previous fiscal years by the witness or by any entity represented by the witness.*

PLEASE ATTACH DISCLOSURE FORM TO EACH COPY OF TESTIMONY.

Committee on Agriculture
U.S. House of Representatives
Information Required From Nongovernmental Witnesses

House rules require nongovernmental witnesses to provide their resume or biographical sketch prior to testifying. If you do not have a resume or biographical sketch available, please complete this form.

1. Name Norm Semanko
Organization you represent: Idaho Water Users Association + National Water Resources Association
2. Please list any occupational, employment, or work-related experience you have which add to your qualification to provide testimony before the Committee:
 - Idaho Water Users' Association Executive Director + General Counsel since July 2020
 - Practicing Water Rights Attorney in the state of Idaho
3. Please list any special training, education, or professional experience you have which add to your qualifications to provide testimony before the Committee:
 - J.D. Georgetown Law School - 1993
 - Frequent lecturer on water quality and supply issues
5. If you are appearing on behalf of an organization, please list the capacity in which you are representing that organization, including any offices or elected positions you hold:
 - Idaho Water Users' Association - Executive Director and General Counsel
 - Nat. Water Resources Association - Federal Affairs Committee Chairman + Past President

PLEASE ATTACH THIS FORM OR YOUR BIOGRAPHY TO EACH COPY OF TESTIMONY.