

Before the House Rural Solutions Working Group

Congressional Forum on
The Environmental Protection Agency's New Regulations, Potential Missions and Related
Legislation Impacting Rural Job Creation and Ways of Life

September 29, 2010
2:00 pm
House Visitor Center, Room 201

Comments of
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Submitted on behalf of
The Family Farm Alliance
The National Water Resources Association and
The Idaho Water Users Association

Co-Chairmen Graves, Hastings, and Lucas and members of the House Rural Solutions Working Group, my name is Norm Semanko and I am here on behalf of the Family Farm Alliance (Alliance), the National Water Resources Association (NWRA), and the Idaho Water Users Association (IWUA). 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.

The Alliance advocates for family farmers, ranchers, irrigation districts and allied industries in 17 Western States to ensure the availability of reliable, affordable irrigation water supplies. The Alliance's members use a combination of surface and ground water, managed through a variety of local, state and federal arrangements. Alliance representatives have testified on matters important to Western water users before Congressional committees 25 times in the past five years.

NWRA is a collection of state water associations and represents the collective interests of agricultural and municipal water providers in the Western 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.

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.

In addition to NWRA and the Alliance, I would like to acknowledge the input that I received from the Oregon Water Resource Congress and the Washington State Water Resources Association in preparing these comments.

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.

Several actions taken by EPA in the past year have catalyzed these concerns:

- On June 2, 2010 EPA released its draft National Pollutant Discharge Elimination System (NPDES) general permit for point source discharges from the application of pesticides in, near or above waters of the United States. EPA intends to finalize the Pesticide General

Permit (PGP) in December and implement it by the April 9, 2011 deadline set by the Sixth Circuit Court of Appeals. This EPA permit, and similar permits required in all delegated states, will adversely impact pest and weed control activities throughout the United States. As part of this effort, and other recent activities, EPA has signaled its intent to broaden federal jurisdiction over an expanded number and variety of water bodies.

- Earlier this year, EPA released its draft Strategic Plan for 2011-2016, which strongly indicates that EPA will attempt to take control of watershed and water planning activities from the states, place more emphasis on regulating greenhouse gases, setting nutrient standards for water bodies, environmental cleanup, chemical regulation, and enforcing environmental laws through “vigorous and targeted civil and criminal enforcement” actions.
- The Central Arizona Project (CAP) awaits a critical decision from EPA on emissions upgrades that may be mandated for the Navajo Generating Station (NGS). The emission requirements being considered by EPA are intended to satisfy unique visibility criteria – driven in part by the proximity of NGS to Grand Canyon National Park - and they carry with them a heavy cost to local farmers and ranchers.
- Recent guidance from EPA regional offices show a clear bias against water storage projects that appears to prejudge potential projects without consideration of important civic, economic and environmental needs.
- The Obama administration is reconsidering a 2008 EPA rule recently upheld in the 11th Circuit Court of Appeals that allows water transfers from one water body to another without Clean Water Act permits. This new level of regulation, permitting and certain litigation could hamstring the economies of states like Arizona, California, Idaho, Oregon and Colorado, where millions of acre-feet of water are transferred every year.
- EPA has failed to establish clear procedures for its pesticide effects determinations and subsequent actions consistent with 1988 amendments to the Endangered Species Act. This has resulted in unnecessary restrictions without any indication that Pacific Northwest salmon will benefit and puts producers along the West coast at a competitive disadvantage.
- EPA’s relationship with certain litigious environmental groups needs to be understood by taxpayers and closely monitored.

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.

A recent United Nations study finds that global food production must be increased by 70% in the next four decades to meet escalating world hunger demands. American family farmers and ranchers for generations have grown food and fiber for the world, and we will have to muster even more innovation to meet this critical challenge. That innovation must be encouraged rather than stifled with new federal regulations and uncertainty over water supplies for irrigated farms and ranches in the rural West.

Our concerns with EPA's actions are further detailed below.

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 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.

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 recent statements that H.R. 5088 – legislation that would radically expand 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.

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. 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 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 H.R. 6087, introduced by this Working Group's Co-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.

EPA Strategic Plan for 2011-2015 (Draft)

Another document that provides a preview of further reliance by EPA on “regulatory management” is the draft EPA Strategic Plan for 2011-2015 (“draft Plan”) that was recently released for public review and comment. The draft Plan will provide a blueprint for

accomplishing agency priorities for the next five years and also sets forth five cross-cutting fundamental strategies as a companion to these goals.

Based on this document, it appears that EPA intends to take control of watershed and water planning activities from the states, place more emphasis on regulating greenhouse gases, setting nutrient standards for water bodies, environmental cleanup, chemical regulation, and enforcing environmental laws through “vigorous and targeted civil and criminal enforcement” actions.

Concern: EPA Attempt to Take Control of Watershed and Water Planning Activities from States

The draft Plan includes provisions to develop state watershed implementation plans. We are concerned with how these plans may impact existing and ongoing watershed planning efforts being conducted at the state and local levels. Thousands of watershed councils exist throughout the West and they are engaged in a variety of conservation and restoration projects which could be derailed or delayed by the imposition of new federal planning requirements. Water users are active participants in these efforts and have a large stake in ensuring that these projects continue. It is unnecessary and a waste of public resources for EPA to develop and impose new watershed planning programs. In addition, EPA needs to be cognizant of the difference between water quality regulation under the Clean Water Act and water resource management which is conducted pursuant to state law. In a time when our nation is struggling to return to the path of economic prosperity, we cannot support the creation of a new federal watershed planning program, particularly for those states that have existing, productive watershed programs in place. Federal participation should be channeled through existing state programs, rather than creating uncertainty through cumbersome new federal requirements which threaten to derail important water quality and water conservation projects already underway.

Concern: EPA Use of Regulatory Tools to Address Climate Change and Air Quality

The draft Plan recognizes current EPA efforts to reduce greenhouse gas (GHG) emissions under authorities provided by the Clean Air Act (CAA), and states that climate change must be considered and integrated into all aspects of EPA’s work. The draft Plan also mentions that EPA will use all available regulatory tools as warranted, including the CAA. We support EPA’s efforts to set forth a plan to work with partners on the state and local level on attaining this goal. However, the draft Plan does not specifically mention working with industry or agriculture in developing and implementing these tasks under this goal. Potential impacts to agriculture could include increased costs associated with new requirements for motorized equipment to meet tighter air quality/GHG reduction goals. EPA must work with the regulated community in a collaborative manner on these issues.

EPA has proposed to reduce the threats of climate change by reducing GHG emissions and taking actions that help communities and ecosystems become more resilient to the effects of climate change. The Family Farm Alliance and over 100 other national organizations are on record as opposing EPA’s decision to regulate carbon dioxide and other GHGs under the CAA.

Such regulatory actions will carry severe consequences for the U.S. economy, including America's farmers and ranchers, through increased input costs and international market disparities.

Both the current and past Administrations have acknowledged that the CAA is not the appropriate vehicle for establishing greenhouse gas policy. However, the EPA finding that greenhouse gases endanger public health and welfare will trigger CAA regulatory actions such as application of National Ambient Air Quality Standards, New Source Performance Standards, and provisions of the Prevention of Significant Deterioration and Title V programs, essentially establishing greenhouse gas policy through the CAA by default. The compliance costs for these CAA programs would be overwhelming as millions of entities, including farms and ranches, would be subject to burdensome CAA regulations. While EPA has attempted to craft a "tailoring rule" to ease such a burden, our experience in these matters is that attempts to administratively relax environmental requirements are routinely challenged in court.

The EPA rule itself establishes only a weak, indirect link between greenhouse gases and public health and welfare, going so far as to admit there are uncertainties over the net, direct health impacts of the greenhouse gases it is attempting to regulate. EPA's finding puts the agricultural economy at grave risk based on a weak, indirect link to public health and welfare and despite the lack of any environmental benefit.

Concern: EPA Use of Regulatory Tools to Protect U.S. Waters

Setting water quality standards is usually a state responsibility, and we do not believe that EPA should usurp state roles in this activity. Updating water quality standards, especially for nutrients, could prove both controversial and costly, as "numeric" nutrient pollution standards have not been universally used and/or accepted. Yet, EPA has shown a preference for such standards in Florida and other states where they have taken a more aggressive role, despite the absence, in many cases, of any proven nexus between the regulated parameters and the identified designated water body use being protected.

The draft Plan rightly states that EPA has made significant progress since enactment of the landmark Clean Water Act and Safe Drinking Water Act almost forty years ago. We agree that the enhanced quality of our surface waters and the greater safety of our drinking water are testaments to decades of environmental protection and investment. We also understand that other challenges remain and that EPA intends to "work more aggressively" to reduce and control pollutants that are discharged from industrial, municipal, agricultural, and stormwater point sources and nonpoint sources.

We are concerned that, so far, as EPA develops its objectives for "advancing the vision" of the Clean Water Act, that the agency has not recognized, respected and reflected existing CWA exemptions for regulating agricultural runoff and related construction, operation and maintenance activities on upland ditches and drains.

Concern: Greater Emphasis on Enforcing Environmental Laws

The draft Plan states that EPA will target the most serious water, air, and chemical hazards using vigorous civil and criminal enforcement, and advance environmental justice by protecting low income, minority, and tribal communities that are disproportionately impacted by such hazards. EPA clearly appears intent on ramping up efforts to pursue vigorous civil and criminal enforcement actions. It appears that benchmarks for 5-year EPA enforcement cases are still being developed. However, the draft Plan apparently intends to ramp up federal inspections and evaluations so that 105,000 such actions are conducted by FY 2015. This is compared to a baseline total of 21,000 annual inspections and evaluations conducted between FY 2005-2009. Does EPA really intend to increase the federal presence by 500% in the next five years? How much of this burden will ultimately fall on already strapped state regulatory agencies? EPA needs to provide a summary of the costs incurred with this and similar measures contemplated in the draft Plan. This seems heavy-handed and expensive. We also question the effectiveness of this policy direction. We believe that incentive-driven, voluntary and collaborative approaches are the best means of effectively dealing with our nation's environmental challenges.

While uniform and transparent application of enforcement is good public policy, we fear that increased use of enforcement actions can lead to overzealous application of environmental laws and cause undue burdens on businesses and the economy. We have urged that EPA focus on working with first-time polluters to improve environmental practices, which can alleviate noncompliance activities quickly and at minimal cost to business and the environment. EPA professional judgment will be key to making good public policy decisions with respect to enforcement of environmental laws.

Concern: EPA Must Recognize that Environmental Justice and Children's Health Challenges Also Exist in Rural, Agricultural Communities

EPA intends to support communities through strengthened oversight to ensure environmental programs are consistently delivered nationwide and to protect children and low income, minority and tribal populations disproportionately impacted by environmental and human-health hazards. The draft Plan states "environmental justice and children's health protection will be achieved when all Americans, regardless of age, race, economic status, or ethnicity, have access to clean water, clean air, and healthy communities."

In California's Central Valley and in the Klamath Basin of Oregon and California, crises are happening now that are in large part due to failed implementation of federal environmental policies. Tens of thousands of farm workers have lost their jobs, and some communities are staggering from 50% unemployment rates. EPA's efforts to achieve environmental justice should place the same focus and consideration on farm families and their communities who have been harmed (at least in part) due to flawed draconian government implementation of federal environmental laws.

Concern: Local Partnerships Need to Be Strengthened

The draft Plan commits to a clean and healthy environment through consultation and shared accountability with states, tribes, and the global community for addressing the highest priority problems. Local governments and agricultural producers should be afforded the same level of collaboration. Western water managers, ranchers and farmers are resourceful and creative individuals. They should be actively solicited by EPA water policy makers to participate in resolving the water conflicts of the West.

Concern: EPA's Strategic Philosophy Could Lead to Increased Litigation

The draft Plan suggests that individual citizens and community groups that monitor and document environmental trends can “expand the reach of EPA's own field presence”. The term “citizen” immediately brings to our mind the term “citizen suit”. Large, corporate environmental groups often use "citizen suits" to reap rich rewards for themselves with little positive impact on the environment, and we are concerned that this disruptive behavior will only be encouraged under the current language in the draft plan.

Most major federal environmental statutes allow citizens to sue for violating the laws. But most of these suits are brought by environmental organizations, not individuals, and most of the filings do not end in a court decision; they end in settlements. According to a 2006 report prepared by the *Property and Environment Research Center* (PERC), from 1995-2002, there were 4,438 notices of intent to sue under four environmental statutes - 6.6 times more than actual federal court decisions in citizen suits. Presumably most of the others were settled. According to the PERC report, there is a clear and compelling reason for this: settlements bring in money environmental groups can use to pursue other goals. Although statistics are hard to come by, most citizen suits appear to be filed under the Clean Water Act and the Resource Conservation Recovery Act (RCRA) – both laws that govern EPA activities. Provisions in these laws enable citizen prosecutors to craft settlements that compensate them generously for legal costs (amounts well above actual costs). According to PERC, “These laws make prosecutions easy because they require companies to keep detailed records of their activities; in other words, evidence of technical violations is provided by the companies themselves.” Furthermore, the laws saddle "violators" with very heavy penalties (up to \$27,500 per day), but these penalties can be waived if the case is settled. And RCRA even allows citizens to prosecute past violations, not just ongoing ones.

An August 9, 2006 editorial piece in the *Wall Street Journal* (WSJ) noted that most of the violations are trivial and technical. “Defendants who have not even minimally harmed the environment are roped in,” said the article in the WSJ. “Companies settle simply to avoid expensive litigation.”

Given the manner in which some environmental groups abuse citizen lawsuit provisions of environmental laws, we are very concerned that EPA is apparently advocating that citizen science can help communities “spur local industry and others to do a better job of complying

with environmental laws and regulations.” In fact, EPA should urge a completely different approach, and suggest moving away from using citizen lawsuit provisions, particularly those in laws that authorize large monetary fines. This would help some environmental groups refocus on activities that actually enhance environmental quality. It would also allow EPA to dedicate more of its resources to constructive, on-the-ground actions to protect the environment, rather than defending itself in litigation.

Air Visibility & Food Security: How Emissions Standards Can Impact Food Production

The Central Arizona Project (CAP) awaits a critical decision from EPA on emissions upgrades that may be mandated for the Navajo Generating Station (NGS). The emission requirements being considered by EPA are intended to satisfy unique visibility criteria – driven in part by the proximity of NGS to Grand Canyon National Park - and they carry with them a heavy cost.

NGS is a coal-fired plant that provides 95% of the power to move Colorado River water into Central Arizona. Any added cost to that plant translates into higher bills for every single water user in the state that receives CAP water. EPA is reviewing two options it could impose to meet these unique emissions standards. Each of these options carries significant costs, but one of the alternatives is clearly preferable to CAP water users, while the other could actually drive existing surface water users out of business or force them to begin extracting limited groundwater resources rather than using renewable CAP water.

A recent report released by the National Parks Conservation Association will likely bring more political pressure to bear on this matter. The new report finds several man-made threats are contributing to the deterioration of Grand Canyon National Park, from mining to aircraft flyovers to management of the Colorado River upstream from the canyon. Notably, regional haze from power plants and cities hundreds of miles away can mar the views of the canyon, the report said. However, what is also hazy is the degree of public health and aesthetic benefits that will result from the various emissions upgrade options under consideration at NGS. When comparing alternatives, experts predict there will be no noticeable difference to the human eye, but there could be a difference registered on sensitive measuring devices.

There is a limit to what businesses, consumers and citizens can absorb when government regulations increase operating costs. That is clearly the case with NGS, where costs associated with improving air emissions standards - driven in large part by concerns to protect air clarity in Grand Canyon National Park and other protected federal lands – could put many farmers out of business, and impact the economies of Southwest Tribes. And these very real costs do not even reflect possible future cap-and-trade decisions contemplated in Washington, D.C., that would also add cost to pumping CAP water to Central Arizona.

Other questions remain that demand answers. What is food security worth? Is it more or less important than perceived aesthetic values of nature? How much of the water that produces crops are we willing to shift to other uses?

The importance of this matter cannot be overstated. Imposing the most costly visibility measures could lead to the loss of NGS, which could have disastrous ramifications for food security, water delivery, Native Americans, and the economy of Arizona.

EPA's Anti-Water Storage Bias

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. Colorado Governor Bill Ritter on August 9th 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 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 on August 9. 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, a sentiment apparently shared by the Governor of Colorado.

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 of inserting those biases into critical federal decision-making processes. This is dangerous, and short-sighted. Without new sources of water, increasing urban and environmental demands will 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.

EPA Reconsideration of the “Water Transfers Rule”

The Obama administration may discard a 2008 U.S. EPA rule that allows water transfers from one water body to another without Clean Water Act permits, according to documents filed in a federal appeals court last year. EPA is reconsidering the Water Transfers Rule, which was promulgated by EPA on June 13, 2008 and clarified that such transfers are excluded from the NPDES permitting requirements of section 402 of the CWA, which regulates the “addition of any pollutant to navigable waters from any point source”. The Water Transfers Rule states that a mere transfer of water from one meaningfully distinct navigable body of water to another, without any intervening addition of pollutants, does not require an NPDES permit, even though the water being transferred may not be the exact same quality as the receiving body of water.

The Water Transfers Rule was upheld by a 3-judge panel of the Federal Court of Appeals for the 11th Circuit on June 4, 2009, which found in *Friends of the Everglades v. South Florida Water Management District* that EPA’s interpretation of the CWA excluding water transfers from NPDES permitting requirements was reasonable. The decision did not state that it was the *only* reasonable interpretation, leaving the door open for EPA to revisit the issue. The Justice Department has evidently said that EPA may abandon the rule, a move that would subject water transfers throughout the nation to pollution permitting requirements. EPA could begin permitting and regulating trans-basin water diversions, which is a state responsibility delegated at statehood.

This new level of regulation, permitting and certain litigation could hamstring the economies of states like Arizona, California, Idaho, Oregon and Colorado, where millions of acre-feet of water are transferred every year.

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

The Endangered Species Act (ESA) consultation process is broken. EPA and the National Marine Fisheries Service have been required by the 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-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. A coalition of Western grower organizations earlier this month 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.

How Greenhouse Gases and ESA Administrative Revisions Can Hurt Farmers

In the last two years, we have seen increased pressure applied by environmental groups and their associates in academia and the media to unravel the Bush Administration reform efforts and remold the ESA into a regulatory hammer. It appears that this administration is moving in a direction that often supports their position.

Concern: Activist Efforts to Use Global Warming to Strengthen ESA Regulations

Nearly 130 scientists last year asked the Interior Department to change the policy set under the Bush administration guiding how agencies decide whether a species is endangered. Around the same time, the Endangered Species Coalition released a report that names America's top ten endangered wildlife, birds, fish and plant species impacted by global warming. The report, "America's Hottest Species" attempted to demonstrate that a changing climate is increasing the risk of extinction for eleven American species. World Wildlife Fund at the same time released its annual list of some of the most threatened species around the world, saying that the long-term survival of many animals is increasingly in doubt due to a host of threats, including climate change, and calling for a step up in efforts to save them. On both lists are several key species and their habitats which could impact Western water users, including Pacific salmon and bull trout. Prior to the release of that report, some of these same environmental groups elevated public criticism of the Obama Administration's USFWS for not listing more endangered species. These groups – led by the Center for Biological Diversity (CBD) – are critical of the Obama administration's proposal so far to list only two plant species, out of nearly 250 on the ESA "candidates" list. USFWS officials say that other litigation and funding constraints have hampered its abilities to list more species, and that they are handcuffed by litigation on species issues and a lack of money for listings. However, USFWS officials last year said the agency in the coming year would fund listing determinations for 60 species and final listings for another 50 species.

Concern: EPA Endangerment Determination for Greenhouse Gases

The Center for Biological Diversity and other environmental organizations petitioned EPA to designate greenhouse gases as "criteria" air pollutants, which would require EPA to establish allowable nationwide concentrations for the gases. Later in the month, in an apparent effort to boost President Obama's political leverage at international climate change talks in Copenhagen, Denmark, EPA Administrator Lisa Jackson unveiled the Administration's final endangerment determination, which sets the stage for broad nationwide regulations to limit greenhouse gas emissions. In response to a Clean Air Act petition and litigation, the U.S. Supreme Court ruled in 2007 that greenhouse gases could be considered "air pollutants" under the Clean Air Act if the

EPA were to determine through an “endangerment finding” that they “may reasonably be anticipated to endanger public health or welfare.” The EPA had previously released a draft endangerment finding and was moving forward with greenhouse gas pollution reductions under several sections of the Clean Air Act. The final endangerment finding poses a risk to all Western resource producers, as further described below.

Concern: The Environmental Litigation Industry, Greenhouse Gases and the ESA

Budd-Falen Law Offices of Cheyenne, Wyoming set out to determine the amount of litigation filed by environmental organizations and the amount of attorneys’ fees these groups have received from the federal government for these cases. The results are shocking, and they only include federal district court cases. Between 2000 and 2009, eight environmental groups filed at least 1,596 federal court cases against the federal government. These same environmental groups are receiving billions of tax dollars in attorney fees for settling or “winning” cases against the federal government. The real rub is that in many cases working farmers and ranchers, though not actual defendants in these cases, must hire lawyers out of their own pocket to protect grazing allotments, water rights and other interests put in peril by suits against the government. No fund exists to compensate them should they prevail.

Budd-Falen has developed information that shows how new climate change policy regarding greenhouse gases could impact Western irrigators and other taxpayers, alike. According to Budd-Falen, environmental groups have been “winning” attorney fees for litigating over greenhouse gases for some time, now. For example, in California Bay-Delta litigation, the federal court rejected a biological opinion because it “failed to consider” climate change data. The environmental litigants and the federal government have agreed to “negotiate” how much in taxpayer dollars the environmental groups will be paid for those cases.

According to the Congressional Research Service, CBD seems to have spearheaded the effort to use the ESA to enforce its global warming beliefs. The CBD has a list of 350 species it believes should be listed and critical habitat designated for under the ESA to protect them from greenhouse gases and global warming. Just between five states and the District of Columbia, the CBD has amassed over \$6.7 million in attorneys fees, all paid by taxpayers. The vast majority of these cases were suits over the failure of the federal government to “timely” respond to CBD’s ESA listing petitions. As with the greenhouse gas Clean Air Act litigation, the environmental groups are not asking the federal court to decide whether a species is scientifically threatened or endangered or whether greenhouse gases adversely impact the species; the majority of litigation is only over the timing of the federal government’s decisions or the process used to make the decisions.

In a related matter, the Center for Biological Diversity has sued EPA, saying it violated the ESA by failing to curb use of pesticides that have been accumulating in the Arctic food chain and in the fat of polar bears, a species listed as threatened. According to CBD, the lawsuit is probably the first to target the impact of pollutants emitted far away on an ESA-listed population. CBD

claims that “persistent organic pollutants commonly contained in pesticides are known to be carried by atmospheric and ocean currents thousands of miles northward to the Arctic.” None of the pesticides listed in the lawsuit is used in Alaska.

Conclusion

There are some positive initiatives underway at EPA. However, overall it appears that EPA is 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 EPA regulators.

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 forum 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 this opportunity to share our comments with the Working Group.