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Committee on Natural Resources

Subcommittee on Water and Power

Hearing on *"Empowering States and Western Water Users Through Regulatory and Administrative Reforms."*

Testimony of

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National Water Resources Association

Sunnyside Valley Irrigation District

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Introduction

Chairman Fleming, Ranking Member Huffman, and members of the subcommittee, thank you for giving me the opportunity to appear before you today, and for your attention to the many natural resources challenges facing our nation. My name is Larry Martin and I am an attorney in central Washington State, where I represent many irrigation districts, water providers, and farmers. The most critical element to my clients' livelihoods is the reliable, safe, and efficient delivery of water for the production of food and crops. Yakima County, where I reside, contains some of the most productive farm ground in the nation with its farmers growing apples, cherries, pears, grapes, mint, hops, and other important food crops. We are proud to call our area home to Committee member, Representative Dan Newhouse.

Today, I am here on behalf of the National Water Resources Association; more commonly known as NWRA, as well as the Sunnyside Valley Irrigation District ("SVID") located in central Washington. I am on the Board of Directors, and serve as Co-Chair of the Regulatory Committee for NWRA, and as a member of the Federal Affairs, Water Quality, and Litigation Task Forces. NWRA has long been involved in matters regarding the administration of the Clean Water Act ("Act" or "CWA") and its interpretation. NWRA is committed to working with the agencies and Congress to provide a clearly defined, efficient process for all permitting requirements.

Our members have historically been, and will continue to be supporters of the goals of preserving clean water, taking care of the land, and leaving resources for future generations. These goals are not new to, or in conflict with the agricultural community. To further those goals, our members continue to make necessary improvements to their systems to increase efficiencies, conservation, and environmental protections.

NWRA and its members do not oppose regulation outright. In fact, we view ourselves as responsible members of the regulated community. We believe that appropriate regulation can be beneficial if it is correctly developed and applied. As an example, the tragic situation in Flint, Michigan highlights the fact that dire consequences can occur if meaningful regulations are not followed.

However, it is important to note that unnecessary regulation can also have adverse impacts. Water is one of the most basic and vital elements; there is no substitute for water. We must consume it in order to survive. That means that we must have a means of delivering it. Unnecessary regulation makes supplying the water we all depend on more difficult, and in some instances, can prevent the development or maintenance of vital water infrastructure.

Today, I will discuss a number of regulatory issues including the Clean Water Act, and the Waters of the United States Rule. However, this rule is just one of many proposals to come out in recent years that stand to impact water providers and water users. In the view of NWRA and agribusiness, some of these proposals are solutions searching for actual

environmental problems. And, unfortunately, such proposals tend to affect our farmers and food providers in disproportionate and unfair ways.

In the last two years NWRA has filed comments on nearly two dozen federal regulations; agency policies; directives; standards; practices and procedures. We have provided comments to the Bureau of Reclamation, the Environmental Protection Agency, the Army Corps of Engineers, the Federal Emergency Management Agency, the Fish and Wildlife Service, the National Marine Fisheries Service, the Council on Environmental Quality, the Forest Service and others.

Irrigation Districts and their members are operating in a regulatory system that is difficult and time-consuming to navigate. That system requires a high-level of understanding of technical language (including seemingly endless agency acronyms and terminology), as well as an ability to navigate among conflicting and ambiguous rules. Furthermore, such rules may not be enforced uniformally and consistently. I am frequently asked by clients "What are the risks if I fail to comply with this regulation?" They are not asking because of a desire to avoid the fundamental environmental requirements, but rather because the complexity, number, and sometimes conflicting nature of the rules make compliance almost impossible.

The Los Angeles Times recently highlighted one example of this challenge. The San Bernardino Municipal Water District uses thousands of UV lamps to kill viruses and bacteria in urban runoff water to comply with the Clean Water Act. To maintain this system, lamps must be replaced when they go out. To replace or fix broken lamps, the water treatment plant stops the outflow of water (because it is not yet treated). When the outflow from the water treatment plant stops, the amount of water in the Santa Ana River drops. This drop can unfortunately imperil Santa Ana Sucker Fish. This puts the District in a position of being caught between compliance with the Clean Water Act; or compliance with the Endangered Species Act.

We need our governments to provide simplified regulations and clear information regarding the permitting and regulatory process, so that the good purposes of the laws do not get undermined by unnecessary bureaucracy, costs, and time lost.

In Washington State alone, 12 different agencies have some jurisdiction over agricultural activities. These state agencies and regulations are in addition to the numerous federal environmental requirements rules such as the Clean Water Act; the Clean Air Act; and the Endangered Species Act, which regularly and comprehensively affect day-to-day operations of NWRA members. And as previously noted, in many instances the federal and state regulations overlap and may be inconsistent. The burdens on irrigation districts and farmers to comply with the ever expanding regulations and requirements has continued to rise with no end in sight. Irrigation Districts on their own have neither the legal/regulatory expertise nor the operational manpower and resources to handle all of the growing body of regulatory procedures. Additionally, many agricultural producers are also subject to private, third party environmental requirements imposed by their customers.

If all of the regulations and requirements were uniform (or, at least *more* uniform), compliance would be much more efficient. Instead, the various regulations create confusing, overlapping, redundant, and ambiguous requirements. The costs to comply with regulations and permitting obligations will eventually be passed on to consumers, which disproportionately affects citizens with limited resources. Some costs cannot be passed on, and instead are absorbed by the producers. These increasing regulations and permitting requirements discourage infrastructure improvements, limit efficient and cost effective operations, and could encourage large segments of our farming industry to relocate to other locations or countries.

One of the primary concerns of NWRA members is the expanded scope of the proposed rule on "Waters of the United States," which is currently under review by our federal courts. Although the Clean Water Act may not be within the Committee's direct jurisdiction, it may have more effect on water supplies and irrigation districts than any other regulations. If not thrown out by the courts or fixed by legislation, the rule will expand the historical scope of federal jurisdiction under the Clean Water Act, and the various Court decisions interpreting the Act. This jurisdictional creep has been to the detriment of local communities and water users who rely on the efficient delivery of water for crops, jobs, and the health of our economy. The reach and scope of the Clean Water Act's jurisdiction has kept EPA and the courtrooms busy, notwithstanding jurisdictional limitations contained in the original 1972 Act, and the judicial decisions by the U.S. Supreme Court in *SWANCC* and *Rapanos.* Now, the Rule threatens to expand the reach of federal environmental laws in ways not intended by Congress with the passage of the Clean Water Act.

Sunnyside Valley Irrigation District

Two years ago I was before this committee to discuss the overreach of regulatory agencies in regards to the Clean Water Act. Some of my comments today are similar to my past testimony, but need to be repeated as it provides an example of what can go wrong with uncertain and overreaching regulations. As stated earlier, I represent the Sunnyside Valley Irrigation District, who along with the neighboring Roza Irrigation District joined together to voluntarily, and I stress "voluntarily" to address water quantity and water quality projects. In a short five year period, SVID and Roza collaborated to remove 95% of the suspended sediment from the irrigation districts' return flows discharging back to the Yakima River. Twice the Irrigation Districts have received the State of Washington's Environmental Excellence Award.

Additionally, SVID has partnered with the Bureau of Reclamation and the State of Washington in a multi-year conservation project through the federal Yakima River Basin Water Enhancement Project Act.

Despite its leadership role in water conservation and improvements to water quality, SVID was the unfortunate subject of the uncertainty regarding "waters of the United States" and jurisdiction by the federal government. SVID was performing routine

maintenance in a ditch within its system. Because the ditch had meandered over the years, it was creating erosion and drainage issues which needed to be fixed. The ditch was straightened and armored with rock to correct the problem, which also benefits water quality. The activity performed by SVID was a routine action that is performed on an almost daily basis by other irrigation providers in the West. In SVID's 100 years of existence, at no time had it been advised that a Section 404 permit would be needed for such routine work. Later, a complaint was filed with the Army Corps of Engineers. The Corps investigated and advised SVID that project ditches were "waters of the U.S." and therefore subject to the Corps' Sec. 404 permitting process.

The Corps advised SVID that its only option was to return the ditch back to its previous poorly functioning condition, and any permit request by SVID to do the repair work was likely to be denied. The Corps added that in its opinion, the work performed on the irrigation ditch by SVID was not necessary or justified. The Corps also advised SVID that virtually all of the operation and maintenance activities that take place on a daily basis are subject to Corps jurisdiction; meaning that even if such activities were to fall under an exemption, contact must be made with the Corps for them to make that determination. In other cases where permits could be required, it was made clear the Corps would not approve much of the regular and necessary work needed by the Irrigation District to maintain its canals and ditches, and that requesting a permit to do such work would likely be futile.

After four years of negotiation, numerous meetings and trips to Washington D.C. to meet with EPA and the Corps, and the issuance of the Corps Regulatory Guidance Letter 07-02, *Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act;* the Corps eventually advised SVID that its work on the ditch did not require a permit. SVID and other water suppliers can neither afford to wait four years nor expend the financial and human resources to determine whether a permit is even required.

At the same time as the Corps 404 permitting controversy was underway, my good friend, the late Jim Trull, a widely respected irrigation district manager for SVID was served with a criminal citation because of SVID's work on the ditch. The criminal citation was instigated by the Washington State Department of Fish and Wildlife, in coordination with the Corps of Engineers. The agencies were operating under a misguided assertion that SVID also needed a permit from Fish and Wildlife to work on the irrigation ditch. Eventually, the County prosecutor realized that no crime was committed and the charges were dropped. Criminal charges for irrigation districts conducting routine activities should <u>not</u> be an option.

Experiences such as SVID's will continue to occur until there are clear definitions and regulations to identify which waters are properly subject to jurisdiction of both federal and state agencies. Regulatory requirements should expressly provide that waters in irrigation canals, ditches, drains and other conveyance facilities are not navigable waters, waters of the United States, or tributary waters, and, therefore, are not subject to the federal agencies' jurisdiction.

Irrigation water providers, and farmers who rely on those waters, use a distribution system of canals, ditches, and drains to move water efficiently and reliably for crop production. It is mandatory that such ditches be maintained and operated efficiently and timely. As the Committee is well aware based on recent droughts in the West, any lack of water during critical periods can be disastrous to crops, farmers, and our economy.

Irrigation ditches were never intended to be considered a "water of the United States" and yet the proposed Rule under the CWA perpetuates the misconception. According to the majority opinion written by the late Justice Scalia in ***Rapanos***; "waters of the United States" was intended to be limited to "relatively permanent, standing or flowing bodies of water. The definition refers to water as found in 'streams,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'" Justice Scalia goes on to say that phrase does not include, "ordinarily dry channels through which water occasionally or intermittently flows." Nor are man-made irrigation and drain ditches to be included as "waters of the United States."

The federal government has a vested interest in seeing that its federal reclamation facilities are maintained in a condition that allows irrigation districts to properly operate and maintain their facilities for the continued conveyance of agricultural waters. Irrigation Districts and water providers maintain thousands of miles of canals and ditches and perform routine maintenance work in their conveyance facilities every year. If the Districts and water providers are required to obtain permits for each such activity, these routine activities would become exponentially more expensive, time consuming, and difficult.

Irrigation Districts and water providers are also required to make more extensive improvements in the form of rehabilitation or replacement of their systems. As demand for water in the West grows, water conservation activities such as lining or piping canals and drains are commonplace activities. Without the ability to conduct these necessary activities, free from time consuming and costly governmental processes, the efficient and essential delivery of agricultural water will be severely challenged, if allowed at all.

Need to Maintain Open and Transparent Regulatory Process

The federal government has a responsibility to propose rules, regulations, and agency procedures in an open and transparent manner that encourages comment. For official rules and regulations this process is legally required under the Administrative Procedures Act. Unfortunately, in recent years we are seeing some federal agencies make significant proposals not through the official rule making process, but as more informal "directives." As one example, in 2014, the Forest Service attempted to institute a proposed "groundwater directive." This "directive" constituted a significant policy shift that largely ignored the long vested authority of states in groundwater management. Fortunately, after a significant amount of push back from numerous stakeholders, the Forest Service withdrew this deeply flawed directive. But we have heard rumblings that it could be coming back.

In the meantime, we are now concerned about another recent Forest Service proposal relating to public comment processes. The proposal, published in the federal register late last year, discusses expanding public comment opportunities, which on its face is a good principle. However, the proposal envisions a departure from the time-tested and public comment procedures under the Administrative Procedure Act. In their place, the Forest Service would substitute other undefined processes that may limit transparency and access to agency decision making – particularly for stakeholders.

We are concerned that an agency that has previously attempted to move significant policy changes through its directives process is considering abandoning the APA process. NWRA's concern about this is shared by a number of other organizations including the Western Governors Association. We encourage the Forest Service to expand its outreach efforts, but do not think it should abandon the Administrative Procedure Act process.

Yakima River Basin Water Enhancement Project (YRBWEP)

Rather than additional regulations; improvements to water and land can be more efficiently made through programs such as YRBWEP. In 1979, Congress directed the Bureau of Reclamation to conduct a feasibility study of the Yakima River Basin Water Enhancement Project. The congressional directives of the YRBWEP study were to develop a plan that would make irrigation supply more reliable, increase instream flows for aquatic life, and provide a comprehensive plan for efficient management of Yakima Basin water supplies. YRBWEP partners the Bureau of Reclamation, the State of Washington, and participating irrigation districts to make these improvements.

The first phase of YRBWEP authorized fish ladders and fish screens on river diversions as needed and was completed many years ago. The second phase involved water conservation, for which SVID served as a key component of the plan. Because of the particular location of SVID within the Yakima River system and its senior water rights, SVID became a prime focus of Phase II.

As part of the YRBWEP program, SVID has constructed 3 Re-regulation reservoirs; installed 30 fully automated water level control structures; and added a control system that can remotely monitor and control water levels and gate operations. Additionally, SVID piped, and continues to pipe, many miles of its extensive delivery systems. This program benefits all interests in that it has increased efficiencies to its farmers within the District, and will add over 43,000 acre feet of water each year to instream flows in the Yakima River for purposes of fish and other environmental benefits. The conservation program by SVID has received broad support from all parties in the Yakima River Basin and has been recognized with awards both locally and nationally.

Yakima Basin Integrated Plan

The third phase of YRBWEP is the innovative Yakima Basin Integrated Plan. It has brought together water users representing agriculture; municipal; tribal; and environmental interests throughout the region who have put aside their differences to craft a water plan that meets everyone's needs. The Yakima Integrated Plan provides both instream and out-of-stream benefits by:

- Providing more water for stream flows that fish need to survive.
- Building fish passage to allow salmon, steelhead, and bull trout to travel throughout the basin, and reestablishing what could be the largest sockeye run in the lower 48 after extirpation from the Yakima Basin over a century ago.
- Providing greater water supply reliability for farmers and communities.
- Securing the water that communities need to meet current and future demand.
- Protecting over 200,000 acres of currently unprotected forest, shrub steppe, and river habitat.
- Stretching the amount of water available by using it more efficiently.
- Enhancing habitat along the Yakima River and its tributaries.

Summary

NWRA members, both agricultural and municipal water providers, and the farmers and water users they represent, support the goals of the Clean Water Act, the Endangered Species Act and similar laws which protect our resources. We are committed to working with the agencies in a collaborative manner that respects states' rights. Our members have, and will continue to meet their obligations to provide an efficient and safe water supply and remain dedicated to the protection of our natural resources.

Unfortunately, many of the rules and regulations impose additional burdens on water suppliers, farmers, local communities, and economies, with only marginal environmental benefits. Federal regulations must be a last resort and minimally intrusive. Only where federal regulations are absolutely necessary, should regulations be used and should not be used for matters that are not best addressed by state and local governments or by non-regulatory approaches.

We also encourage Congress and the agencies to incorporate the positive trends in environmental quality in recent decades into the regulatory decision-making process. Some regulatory programs have achieved their goals, and further regulations are no longer needed.

We thank you for this opportunity to testify. Despite our concerns, NWRA and its members are committed to assisting Congress and the agencies to address these issues in providing certainty to regulatory requirements. On behalf of our members, I thank you for your attention and for supporting our members as they continue to be stewards of our nation's water supply and a critical part of the economy.

Respectfully submitted,
Lawrence E. Martin