



Statement of the U.S. Chamber of Commerce

**ON: Hearing on Oversight of Regulatory Impact Analyses for U.S.
Environmental Protection Agency Regulations**

**TO: U.S. Senate Environment and Public Works Committee,
Subcommittee on Superfund, Waste Management and Regulatory Affairs**

DATE: October 21, 2015

1615 H Street NW | Washington, DC | 20062

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

**BEFORE THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON SUPERFUND, WASTE MANAGEMENT AND REGULATORY
OVERSIGHT**

**Hearing on Oversight of Regulatory Impact Analyses for U.S. Environmental Protection
Agency Regulations**

**Testimony of William L. Kovacs
Senior Vice President, Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce**

October 21, 2015

Good morning, Chairman Rounds, Ranking Member Markey, and distinguished Members of the Committee. My name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. I am pleased to appear before you to discuss the U.S. Chamber's views on "Oversight of Regulatory Impact Analyses for U.S. Environmental Protection Agency Regulations." This is an appropriate topic in light of three high-impact regulations issued by the U.S. Environmental Protection Agency within the last five months, as discussed below.

Let me first state that the U.S. Chamber of Commerce recognizes the importance of regulation. Regulations are essential to the orderly running of society, the protection of health and environment, and to the operation of a free market for business and job creation. To this end, the goal of the regulatory process should be to produce regulations that implement the intent of Congress in the most efficient way possible.

To properly implement congressional intent, agencies must develop regulations with a process that is accountable and transparent, so the American public can trust in its integrity. Considering that agencies have used a "New Deal"-era regulatory process to issue almost 200,000 regulations since the 1946 Administrative Procedure Act (APA), the regulatory process has generally worked well in managing routine matters.

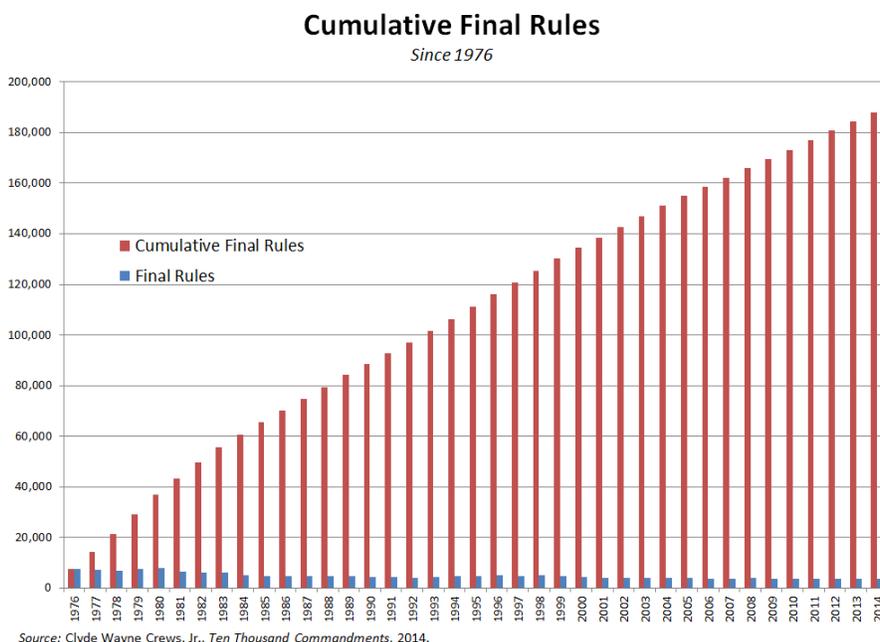
Unfortunately, however, the system breaks down for the most complex and costly regulations. Congress needs to pay far more attention to how agencies develop these multi-billion dollar rules because they control major, often critical segments of the nation's activities. It is for this reason that a Regulatory Impact Analysis ("RIA") is such an important tool. The RIA guides agencies on how to examine and understand the need for the regulation, the alternative mechanisms for implementing it, the benefits and costs to society, and it provides an understanding of the resources state and local governments will need to implement it and its impact on jobs and the economy.¹

¹ The RIA is not a statutory term. Rather it is a term of art that came into widespread use following the creation of the Office of Management and Budget's Office of Information and Regulatory Affairs ("OIRA") in 1980.

Agencies should want to understand all these factors so they can understand what the regulation will do when implemented in the real world. Unfortunately, agencies often fail to gather the type of information needed to develop the best regulatory product for the most costly and complex regulations. The remainder of my testimony will focus on the types of impacts analyses that agencies fail to conduct.

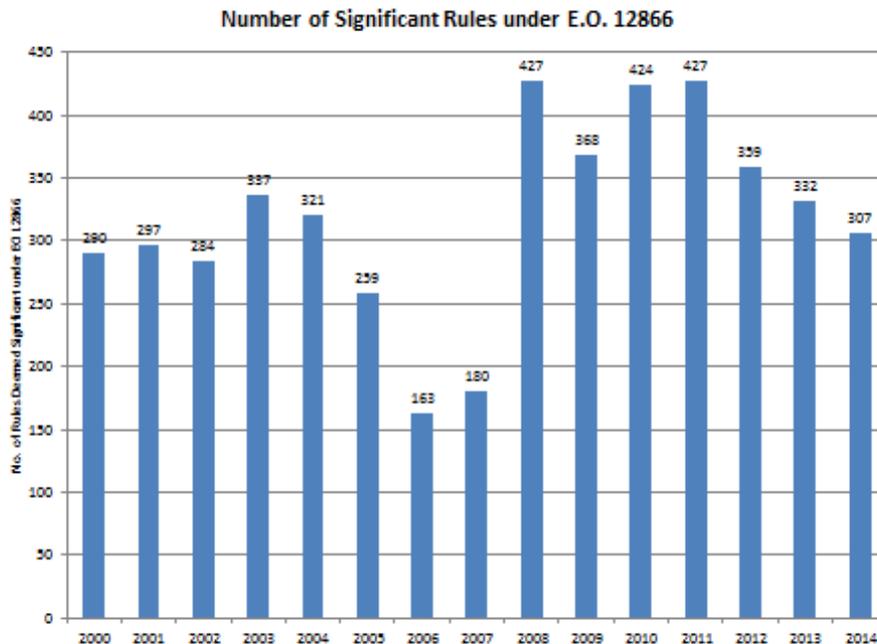
I. HISTORICAL IMPACTS OF THE REGULATORY PROCESS

The U.S. Chamber has spent several years examining the federal regulatory process in detail.² Our research reveals that each year, federal agencies churn out thousands of new regulations. The cumulative number of federal regulations since 1976 is now approximately 185,000.



² See U.S. Chamber of Commerce, *Truth in Regulating: Restoring Transparency to EPA Rulemaking* (Apr. 2015) (available at https://www.uschamber.com/sites/default/files/021935_truthinregulating_opt.pdf); U.S. Chamber of Commerce, *Charting Federal Costs and Benefits* (Aug. 2014) (available at https://www.uschamber.com/sites/default/files/021615_fed_regs_costs_benefits_2014reportrevise_jrp_fin_1.pdf); U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) (available at <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf>); U.S. Chamber of Commerce, *Impacts of Regulations on Employment: Examining EPA's Oft-Repeated Claims that Regulations Create Jobs* (Feb. 2013) (available at https://www.uschamber.com/sites/default/files/documents/files/020360_ETRA_Briefing_NERA_Study_final.pdf); U.S. Chamber of Commerce, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012) (available at https://www.uschamber.com/sites/default/files/documents/files/1207_ETRA_HazeReport_Ir_0.pdf); U.S. Chamber of Commerce, *Project No Project, Progress Denied: A Study on the Potential Economic Impact of Permitting Challenges Facing Proposed Energy Projects* (Mar. 2011) (available at http://www.projectnoproject.com/wp-content/uploads/2011/03/PNP_EconomicStudy.pdf).

Putting aside the tens of thousands of small, “run-of-the-mill” rules, there is a smaller subset of rules that impose annual compliance costs of \$100 million or more.³ These rules are at times referred to as “economically significant” or “major” rules that are subject to the preparation of an RIA and review by the Office of Information and Regulatory Affairs within the Office of Management and Budget.



Beginning in the late 1990s, a new category of rules was finalized – those having an annual cost of over \$1 billion. Proposed legislation in this Congress has termed a rule in this category a “high impact rule” because they are very costly and impact critical segments of the activities of the nation and they impact most citizens.⁴

From 2000 to 2014, a total of **31** rules were promulgated by Executive Branch agencies, each with a cost of more than **\$1 billion** per year. Those same rules are now imposing nearly **\$110 billion** in costs each year on the U.S. economy.⁵

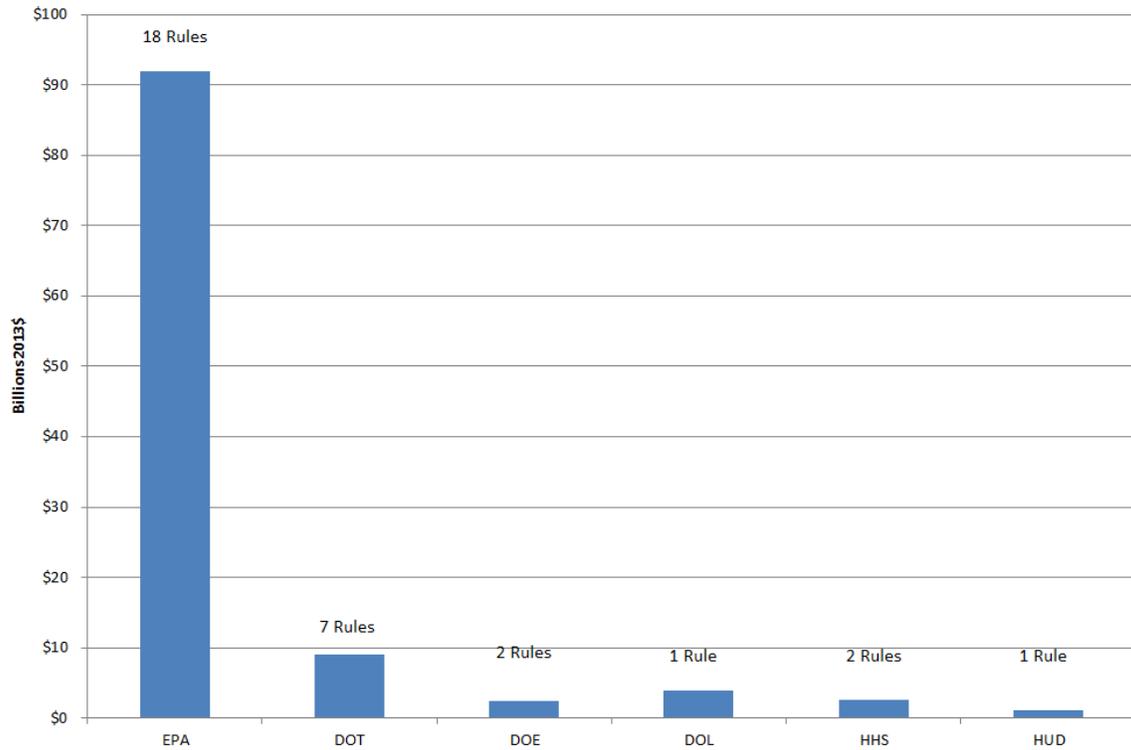
³ Executive Order 12,866, “Regulatory Planning and Review,” 58 Fed. Reg. 51,735 (Sept. 30, 1993).

⁴ See H.R. 185 (114th Congress, 1st Session); S. 2006 (114th Congress, 1st Session).

⁵ Independent regulatory agencies (e.g. the Federal Communications Commission (FCC), Securities and Exchange Commission (SEC), and Commodities Futures Trading Commission (CFTC)) are not subject to Executive branch oversight by the Office of Management and Budget (OMB) and do not routinely perform RIAs as directed by OMB Circular A-4 guidance on cost-benefit analysis. Consequently, even in the cases when independent regulatory agencies estimate the costs and benefits of their regulations, they generally do not adhere to the standards established and enforced by OMB and the. As a result, their cost estimates are often not complete or comparable.

Billion Dollar Rules by Agency

2000-2014

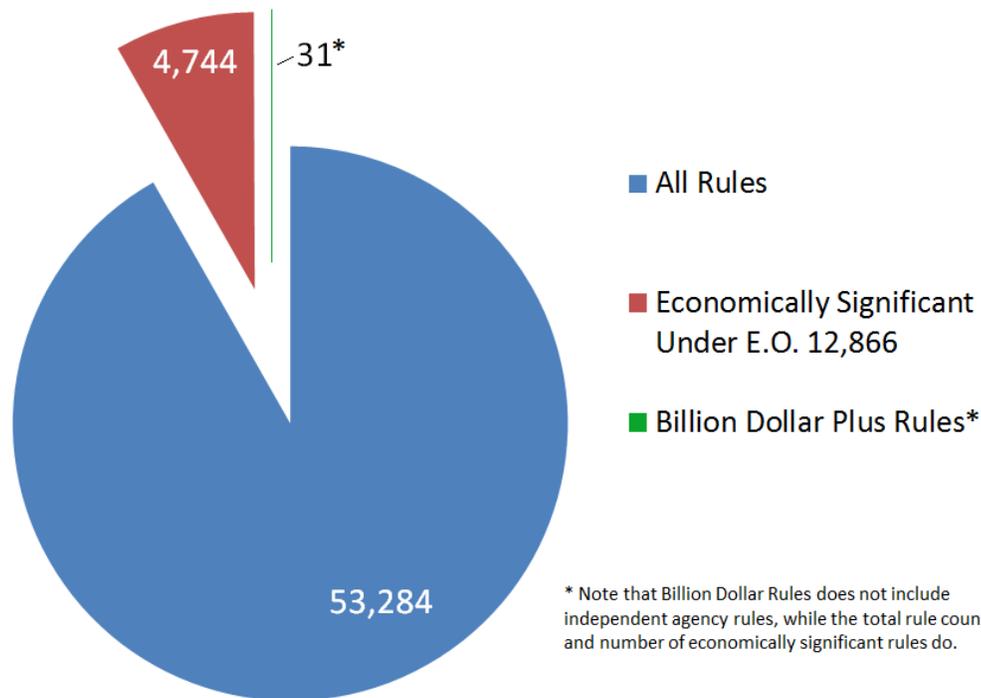


While the high cost of these rules is important, these rules typically are also highly complex and burdensome. Regulated entities—including small businesses and small governmental entities like city and county governments—must spend time and resources to comprehend what is required by a new regulation and to take steps to comply. These billion dollar rules are far more intrusive than smaller rules because they have the potential to have profound effects (often unintentional) on fundamental sectors of our national economy (e.g., energy, financial institutions, healthcare, education, and the Internet).

Requiring agencies to provide greater care and analysis in the development of these high impact billion dollar rules will not be a burden on agencies. As the chart below shows, these billion dollar rules with nationwide impact constitute less than a fraction of a percent of all rules promulgated.

Billion Dollar Rules as a Share of All Final Rules: 2000-2014

There were 58,090 rules finalized between 2000 and 2014, of which 4,775 were considered "economically significant" under E.O. 12,866 and 31, or 0.0005% of the total, imposed annual compliance costs of \$1 billion or more.



Significantly, 18 out of 31 of the \$1 billion or more per year rules issued by federal Executive Branch agencies were issued by the EPA. Based on the government's data, the 18 EPA rules made up 82.5% of the cost of all 31 rules.⁶

One agency in particular—the U.S. Environmental Protection Agency (EPA)—uses its regulatory power to issue more multi-billion dollar rules than all other executive agencies combined. And there is no end in sight given that EPA has issued three additional multi-billion dollar rules in just the last five months:

- On May 27, 2015, the EPA finalized the “waters of the United States” (WOTUS) definition rule under the Clean Water Act. The rule dramatically expands federal jurisdiction over land uses, usurps state and local water quality programs, and threatens property rights across the country.
- On August 3, 2015, the EPA released final regulations for greenhouse gas emissions from power plants in the U.S.⁷ These rules, in which the EPA asserts unprecedented authority over the way energy is used within states, could adversely impact the reliability and affordability of electricity in this country.

⁶ See U.S. Chamber of Commerce, Charting Federal Costs and Benefits (Aug. 2014) available at: https://www.uschamber.com/sites/default/files/021615_fed_regs_costs_benefits_2014reportrevise_jrp_fin_1.pdf.

⁷ These rules have not yet been published in the Federal Register; until they are published in the Federal Register, the rules are not final.

- On October 1, 2015, the EPA lowered the ozone National Ambient Air Quality Standard from 75 ppb to 70 ppb. This new standard will cause many counties across the country to be classified as “non-attainment” areas for ozone.⁸ A nonattainment designation can make it very difficult for areas to attract new business and grow existing businesses, which translates into a loss of jobs as well as an inability to grow our economy and compete globally.

All of this means that within a period of five months, the EPA will have issued three high-impact, complex, and very costly regulations intended to push the boundaries of federal authority further than they have ever been extended. The result could be significant negative impacts on our economy, our ability to create jobs, and the ability of states to implement these new standards.

With all of this regulatory activity in a very short period of time, the immediate question that comes to mind is – ***how did we get here?*** How did we get to the point at which a single federal agency of unelected officials is regulating not only environmental protections, but land use, economic development, and the country’s energy portfolio? The short answer is: the regulatory process for complex and costly regulations is broken and it has proven difficult for Congress to fix. As discussed below, several factors contribute to the current dysfunction in the process used to develop high impact regulations.

For the most costly and impactful new rules, informal rulemaking procedures are simply not adequate because of the following factors:

- ***Agencies make unwarranted and unproven assumptions without factual basis.*** Recent EPA rulemakings have relied upon factual assumptions that are speculative or unproven, yet these assumptions are often the foundation upon which the RIA rests. The ordinary notice-and-comment rulemaking process gives stakeholders virtually no real opportunity to question these assumptions. Instead, agencies only have to show that they have considered an adverse comment and are essentially free to disregard its substance, even if it is factually accurate and contrary to an assumption the agency relied upon.⁹

⁸ According to the American Petroleum Institute, based upon ozone data from 2012-2014, there are 217 counties in the United States that are measured or projected to be out of attainment or in metropolitan areas that do not meet the 2008 75 ppb standard. At a 70 ppb standard – the number that EPA finalized earlier this month – the number of counties in nonattainment increases fourfold to 958. See <http://www.api.org/news-and-media/news/newsitems/2015/september-2015/epa-data-show-absurdity-of-changing-ozone-standards>.

⁹ See e.g. *Environmental Protection Agency, Regulatory Impact Analysis: Proposed Brick and Structural Clay Products NESHAP*, available at <http://www3.epa.gov/ttn/atw/brick/20141120-brick-proposal-ria.pdf> (July 2014).” For example, in the recent Brick and Structural Clay Products NESHAP rulemaking, EPA contended in its [RIA](#) that virtually all covered sources could meet the proposed mercury emissions standard without having to install control devices. This assumption was critical because the mercury control devices represent the vast majority of the costs from the rulemaking. By making this unsupported assumption, based on a sample of only one source, that virtually all sources could meet the most expensive part of the standard, EPA reduced the estimated compliance costs in the RIA by as much as 80% below what they otherwise would have been.

- ***The public (and very often the agency itself) does not have enough information to fully understand how a rule will work in real life.*** Federal agencies frequently fail to grasp the impact that a large new regulation – added to prior rules and those of ***other agencies*** – has on businesses, communities, and the economy as a whole.
- ***30-, 60-, or 90-day comment periods are too short to allow stakeholders to develop detailed comments about complex or opaque proposed rules.*** By the time a full analysis of a rule’s impact can be completed, the comment period has closed and/or the rule is final and has already taken effect.
- ***The information agencies rely upon is often of poor quality, or is not verifiable.*** Agencies often rely upon data that is difficult to obtain or verify independently, that is based on too few data points, or that was developed using improper methodology. For example, the House Committee on Science, Space, and Technology issued a subpoena for data maintained by Douglas W. Dockery and C. Arden Pope, III, which has been relied upon by EPA for decades to justify regulations on air pollution. Members of the Senate Environment and Public Works Committee raised concerns that studies such as those by Pope and Dockery calculated extraordinarily high benefits for costly regulations. Pope and Dockery have refused to release the data based on privacy grounds. The privacy justification for refusing to turn over the data is specious because the U.S. Department of Health and Human Services issued guidelines for de-identifying personal data and has worked with institutions producing data upon which EPA has relied.¹⁰
- ***Agencies are required by law to consider the impacts a new rule will have on regulated entities,¹¹ but these reviews are limited, rushed, or ignored altogether.*** Agencies have to take shortcuts to meet tight rulemaking deadlines, and often do not complete the research or analyses necessary to develop a rule that accomplishes its purpose without inflicting unnecessary harm.

Sections II and VI below set forth what the Chamber believes to be the cause of this regulatory dysfunction.

II. THE EPA REGULARLY MISSES ITS STATUTORY DEADLINES

Under several of the major environmental laws, such as the Clean Air Act and the Clean Water Act, the EPA is required to promulgate regulations or review existing standards by statutorily-imposed deadlines. Without a doubt, the EPA more often than not misses those deadlines. For example, according to a 2014 *Harvard Journal of Law & Public Policy* article,

¹⁰ United States Senate Committee on Environmental and Public Works, Minority Staff Report, EPA’s Playbook Unveiled: A Story of Fraud, Deceit, and Secret Science (2014) available at <http://www.epw.senate.gov/public/cache/files/2d30f39e-2fde-4b37-8810-32fa21b6e6bd/epaplaybookunveiled.pdf>.

¹¹ Executive Order 12,866, “Regulatory Planning and Review,” 58 Fed. Reg. 51,735 (Sept. 30, 1993).

“[i]n 1991, the EPA met only 14% of the hundreds of congressional deadlines” imposed upon it.¹²

Another study by the Competitive Enterprise Institute (CEI) examined the EPA’s timeliness in promulgating regulations or reviewing standards under three programs administered under the Clean Air Act: the National Ambient Air Quality Standards, the National Emissions Standards for Hazardous Air Pollutants, and the New Source Performance Standards.¹³ The CEI study concluded that since 1993, “98 percent of EPA regulations (196 out of 200) pursuant to these programs were promulgated late, by an average of 2,072 days after their respective statutorily defined deadlines.”¹⁴ When the EPA misses these deadlines, its subsequent actions are what can cause the real harm.

a. Citizen Suits and Sue and Settle Agreements

Once a deadline is missed, outside groups, using the “citizen suit” provisions in twenty environmental statutes,¹⁵ will sue the agency for failure to promulgate the subject regulation or to review the standard at issue. While limited resources, budgetary constraints, and time restrictions may play into some of these missed deadlines, the EPA consistently fails to argue in opposition that it is using its discretion in determining which environmental regulation or standard should be addressed in a preferential order. Instead, the Agency many times will enter into a “sue and settle” agreement, the effect of which is to allow private advocacy groups to set agency policy through court supervised orders, negotiated, in secret, behind closed doors.

Our research shows that from 2009 to 2012, a total of 71 lawsuits were settled under circumstances such that they can be categorized as sue and settle cases under the Chamber’s

¹² Henry N. Butler and Nathaniel J. Harris, *Sue, Settle, and Shut Out the States: Destroying Environmental Benefits of Cooperative Federalism*, HARVARD JOURNAL OF LAW & PUBLIC POLICY, Vol. 37, No. 2 at 599 (2014) (available at http://www.harvard-jlpp.com/wp-content/uploads/2014/05/37_2_579_Butler-Harris.pdf) (citing Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law* 54 LAW & CONTEMP. PROBS. 311, 323 (1991) (available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1158&context=facpub>). According to Lazarus, “the 14% compliance rate refers to all environmental statutory deadlines, 86% of which apply to EPA.” *Id.* at 324 (citing *Statutory Deadlines In Environmental Legislation: Necessary But Need Improvement* 13-14 (ENVIR. & ENERGY STUDY INST. AND ENVIR. L. INST., 1985)).

¹³ William Yeatman, *EPA’s Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, “Sue and Settle”* (July 10, 2013) (available at <https://cei.org/web-memo/epas-woeful-deadline-performance-raises-questions-about-agency-competence-climate-change-re>).

¹⁴ *Id.*

¹⁵ Act to Prevent Pollution from Ships 33 USC § 1910; Clean Air Act 42 USC § 7604; Clean Water Act 33 USC § 1365; Superfund Act 42 USC § 9659; Deepwater Port Act 33 USC § 1515; Deep Seabed Hard Mineral Resources Act 30 USC § 1427; Emergency Planning and Community Right-to-Know Act 42 USC § 11046; Endangered Species Act 16 USC § 1540(g); Energy Conservation Program for Consumer Products 42 USC § 6305; Marine Protection, Research and Sanctuary Act 33 USC § 1415(g); National Forests, Columbia River Gorge National Scenic Area 16 USC § 544m(b); Natural Gas Pipeline Safety Act 49 USC § 60121; Noise Control Act 42 USC § 4911; Ocean Thermal Energy Conservation Act 42 USC § 9124; Outer Continental Shelf Lands Act 43 USC § 1349(a); Powerplant and Industrial Fuel Use Act 42 USC § 8435; Resources Conservation and Recovery Act 42 USC § 6972; Safe Drinking Water Act 42 USC § 300j-8; Surface Mining Control and Reclamation Act 30 USC § 1270; Toxic Substances Control Act 15 USC § 2619.

definition.¹⁶ These cases include EPA settlements under the Clean Air Act and the Clean Water Act, along with key Fish and Wildlife Service settlements under the Endangered Species Act. Significantly, settlement of these cases directly resulted in more than 100 new federal rules, many of which are “significant regulatory actions” estimated to cost more than \$100 million annually to comply with.

Examples of Sue and Settle Agreements Create Costly Federal Rules	
1.	Utility MACT rule - up to \$9.6 billion annual costs ¹⁷
2.	Lead Repair, Renovation & Painting rule - up to \$500 million in first-year costs ¹⁸
3.	Oil and Natural Gas MACT rule - up to \$738 million annual costs ¹⁹
4.	Florida Nutrient Standards for Estuaries and Flowing Waters - up to \$632 million annual costs ²⁰
5.	Regional Haze Implementation rules: \$2.16 billion cost ²¹
6.	Chesapeake Bay Clean Water Act rules - up to \$18 billion cost to comply ²²
7.	Boiler MACT rule - up to \$3 billion cost to comply ²³
8.	Standards for Cooling Water Intake Structures - up to \$384 million annual costs ²⁴
9.	Revision to the Particulate Matter (PM _{2.5}) NAAQS - up to \$350 million annual costs ²⁵
10.	Reconsideration of 2008 Ozone NAAQS - up to \$90 billion cost ²⁶

b. Chevron Deference Allows for More Aggressive Regulation

The U.S. Supreme Court’s decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (“*Chevron*”) has played an important role in the expansion of federal agencies’ regulatory missions and claimed authority. As Justice Scalia noted in a subsequent case, “[u]nder *Chevron* . . . if a statute is unambiguous the statute governs; if, however, Congress’ silence or ambiguity has ‘left a gap for the agency to fill,’ courts must defer to the agency’s interpretation as long as it is ‘a permissible construction of the statute.’”²⁷

¹⁶ U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) (available at <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPOR-Final.pdf>.)

¹⁷ Letter from President Obama to Speaker Boehner (August 30, 2011), Appendix “Proposed Regulations from Executive Branch Agencies with Cost Estimates of \$1 Billion or More.

¹⁸ 75 Fed. Reg. 24,802, 24,812 (May 6, 2010).

¹⁹ Fall 2011 Regulatory Plan and Regulatory Agenda, “Oil and Natural Gas Sector-NSPS and NESHAPS,” RIN: 2060-AP76.

²⁰ EPA, *Proposed Nutrient Standards for Florida’s Coastal, Estuarine & South Florida Flowing Waters*, available at <http://nepis.epa.gov/Exe/ZyPDF.cgi/P100MQID.PDF?Dockey=P100MQID.PDF>

²¹ William Yeatman, *EPA’s New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012).

²² Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans on Key Maryland Industries* (April 2011); *Chesapeake Bay Journal* (Jan. 2011).

²³ Letter from President Obama to Speaker Boehner, *supra* note 17.

²⁴ 2012 Regulatory Plan and Unified Agenda, “Standards for Cooling Water Intake Structures,” RIN: 2040-AE95.

²⁵ EPA, “Overview of EPA’s Revisions to the Air Quality Standards for Particle Pollution (Particulate Matter) (2012).

²⁶ Letter from President Obama to Speaker Boehner, *supra* note 17.

²⁷ *Stinson v. United States*, 508 U.S. 36, 44 (1993).

It should come as no surprise that agencies have invoked *Chevron* to pursue increasingly aggressive regulatory agendas, claiming Congress vested them with policy-making power through alleged “ambiguities” in statutes written in the 1970s and 1980s. Unfortunately, some courts have agreed with them, finding so-called “gaps” in statutes where Congress did not intend them. The exceptionally broad deference afforded agency decision-making by some courts clearly diminishes the ability of both Congress and the courts to effectively oversee agency action. The result is that poorly-conceived and poorly-drafted rules too often survive legal challenges and take effect. If Congress desires to regain even minimal control over agencies, the scope of court deference to agency interpretations of statutes must be clearly delineated and limited.

III. STATES IMPLEMENT MOST FEDERAL ENVIRONMENTAL REGULATIONS, NOT THE EPA

The real victims of these missed deadlines and the consequential sue and settlement deals are the states. States implement approximately **96.5%** of the environmental laws that are delegated to them.²⁸ As a result, the success of EPA-issued rules depends on the states, to which the Agency provided \$3.6 billion in 2013 for the administration of its programs.²⁹ That means that in 2013, federal grants represent between 26% - 29% of the environmental budgets of the states.³⁰ The bottom line: states continue to do the lion’s share of the implementation of federal environmental programs without being fully compensated.

The management of federal environmental programs is a tremendous burden for states, particularly from a time, money and resource perspective. To add to the difficulties that states face, according to the Environmental Council of States (ECOS), states have seen a trend in declining funds from the federal government to implement these programs.³¹ Federal budget documents confirm that the EPA’s State and Tribal Assistance Grants (STAG) budget has decreased significantly in recent years.³² While the largest funding source for state environmental agencies is permit fees, federal funding is the second largest source³³. ECOS reports that “[d]ecreasing funds from the federal government jeopardize states’ ability to implement federally delegated programs and policies.”³⁴ These problems will be significantly compounded by the fact that now the states now have to administer the EPA’s WOTUS rule, the Clean Power Plan and new Ozone Standards.

²⁸ “Environmental Council of the States, E-Enterprise for the Environment, What it is, why it matters, *available at* http://www.exchangenetwork.net/ee/EEEnterprise_What_it_is_Why_it_Matters_July2014.pdf (July 2014).

²⁹ See EPA FY 2014 Budget in Brief, p. 87 (<http://www2.epa.gov/planandbudget/fy2014>).

³⁰ See Steven Brown, *Environmental Council of the States, ECOS Green Report, Status of State Environmental Agency Budgets, 2011-2013*, *available at* http://www.ecos.org/section/green_reports/ (Sept. 2012).

³¹ *Id.*

³² *Id.*

³³ See Appendix Table 1 at p.6 in http://www.ecos.org/files/4157_file_August_2010_Green_Report.pdf.

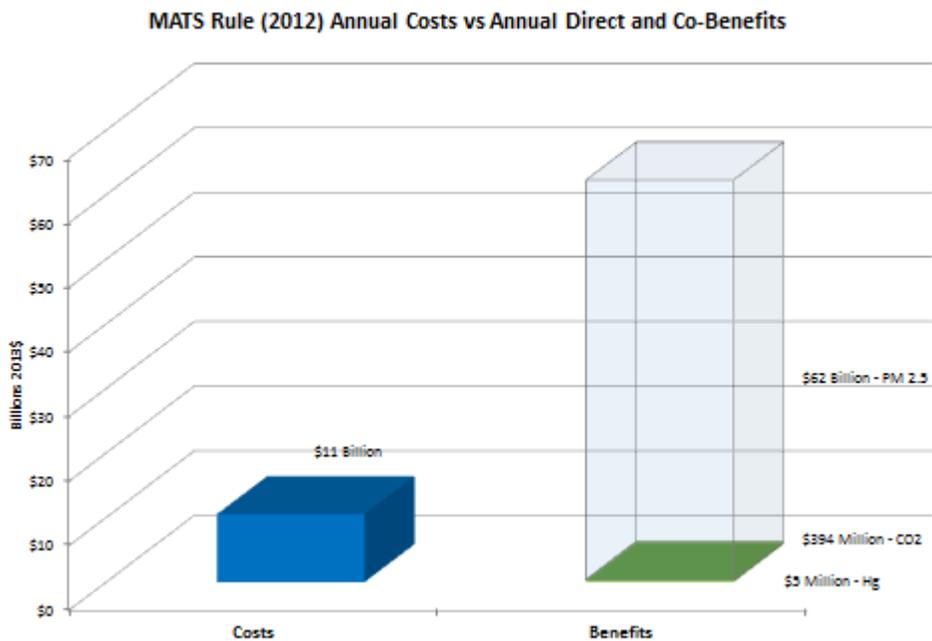
³⁴ See Steven Brown, *supra* note 28.

IV. The EPA Misleads the Public About the True Goals of its Regulations

The first step in a well-functioning rulemaking process is for the agency to clearly tell the public which pollutant (or pollutants) it is trying to reduce and what value those targeted reductions will have to the public. The EPA in recent years has obscured important, basic information to the general public. This pattern consists of the agency first claiming it intends to regulate one (or more) specific pollutants. The EPA then writes a proposed rule that has extremely high costs, but is offset by even higher calculated benefits and so-called “co-benefits.”

What the agency fails to tell the public is that almost all of the rule’s calculated benefits actually come from purely incidental reductions in only one pollutant—fine particulate matter (PM2.5). The EPA has relied on estimated PM2.5 reductions in almost every major Clean Air Act rulemaking since 2000, and for one important reason: the calculated co-benefit of each ton of PM2.5 reduced is so high that the agency can always rely upon PM2.5 reductions to “show” that any enormously costly rule has benefits that far outweigh its costs.

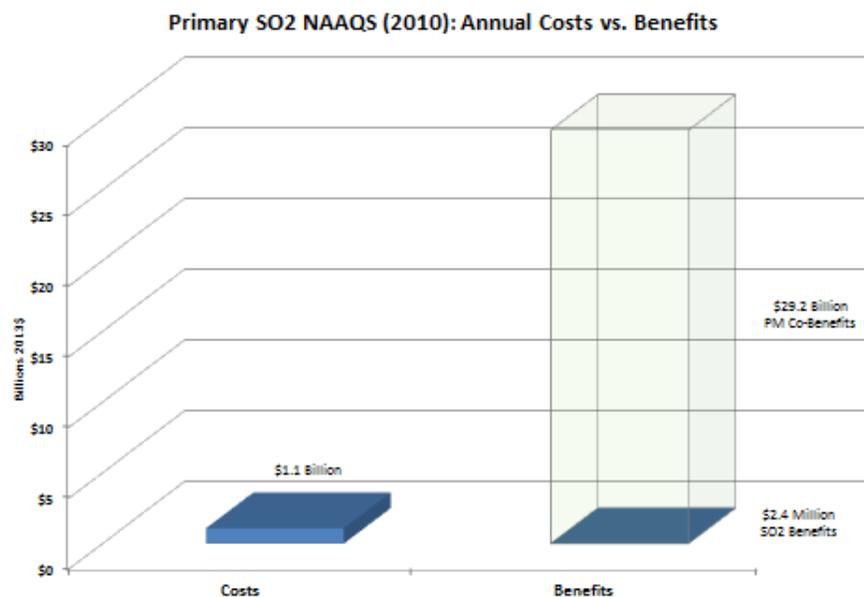
For instance, the 2012 Mercury Air Toxics Standard (MATS) rule³⁵ was widely touted by the EPA and environmental advocacy groups as a powerful and essential tool to reduce mercury from power plants. The agency estimated that the rule’s \$10.6 billion price tag was more than justified by at least \$60 billion in new health benefits. What EPA didn’t explain, however, was that the calculated benefits of mercury reductions from the rule are only about **\$4 to 6 million**. As the chart below shows, 99.4% of the estimated benefits come from reductions in PM2.5—a pollutant that is already well controlled by its own National Ambient Air Quality Standard (NAAQS).



³⁵ 77 Fed. Reg. 9,304 (February 16, 2012).

In a recent decision involving a legal challenge to the MATS rule, where the billions of dollars in “co-benefits” from PM2.5 and CO2 reductions were cited by the EPA, the U.S. Supreme Court questioned the use of co-benefits in a standard specifically designed to reduce an entirely different pollutant—mercury.³⁶

In the 2010 NAAQS standard for sulfur dioxide (SO2), all but \$2.4 million in benefits from a rule ostensibly designed to reduce SO2 actually come from PM2.5 reductions.

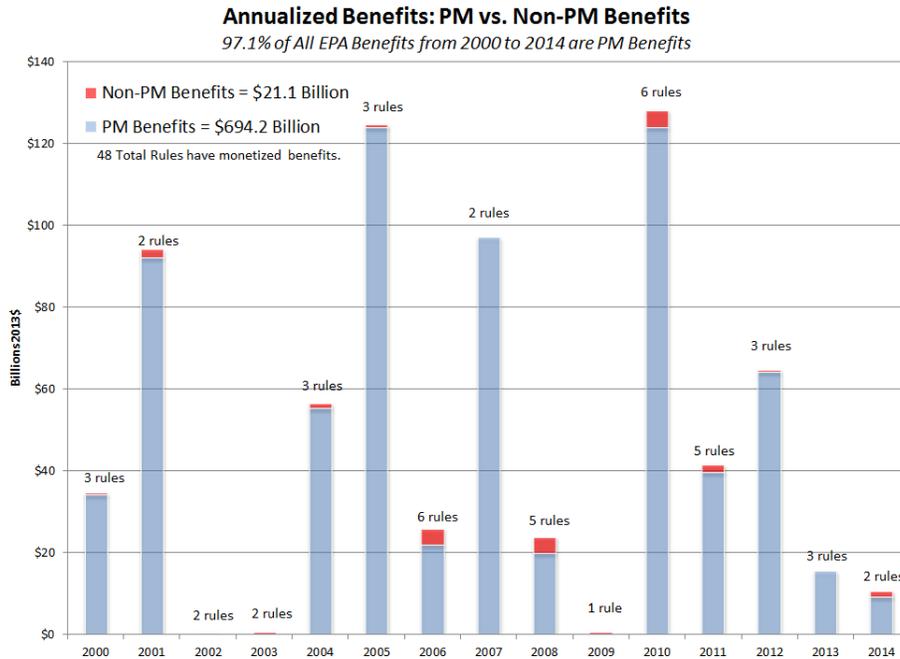


The MATS and SO2 NAAQS rules reliance on co-benefits is in no way unique. On the contrary, they illustrate how the EPA chooses to obscure the true costs and benefits of its rules. Indeed, the Chamber evaluated all EPA rules issued between 2000 and 2014 which contained an RIA and found that 97.1% of all calculated benefits actual come from estimated PM2.5 reduction benefits.³⁷ According to a recent report by the Congressional Research Service (CRS), “co-benefits” associated with reductions in PM 2.5 emissions accounted for more than half the benefits used to justify 21 out of 28 of the EPA’s economically significant regulations promulgated from 2004-2011.³⁸ In other words, relying on PM 2.5 co-benefits, and according to CRS, 75% of the major regulations cannot be justified.

³⁶ *Michigan v. EPA*, 576 U.S. (2015). At oral argument, Chief Justice Roberts goes so far as to question the legitimacy of using collateral benefits. See Transcript, *Michigan v. EPA*, at 64 (Mar. 25, 2015)

³⁷ The Chamber examined all EPA regulations from 2000 through 2014 for which the agency prepared an RIA or other economic analysis. The findings of this analysis (see [Charting Federal Costs and Benefits](#)) revealed that for the 48 rules for which EPA estimated monetized benefits, 97.1% of the total value of those benefits came from a single pollutant, fine particulate matter or PM2.5. The source of the data for the Chamber study was EPA RIAs for cost-benefit analyses and Federal Register notices for regulatory preamble text.

³⁸ Mem. from James E. McCarthy, CRS, to House Committee on Science, Space, and Technology Subcommittee on Energy and Environment (“House Subcommittee”), at 3 (Oct. 5, 2011), App. To Letter from House Subcommittees to Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (Nov. 15, 2011) (hereinafter referred to as “CRS 2011 Report”).



To accomplish needed transparency and accountability in its regulatory decision-making, the EPA needs to:

- Return to its former policy of telling the public exactly what pollutants are being targeted by each regulation;
- Return to its former policy of telling the public how much the reductions in those targeted pollutants will cost;
- Inform the public how much the targeted pollutant(s) will actually be reduced, and how those specific reductions will benefit the public; and
- Move away from relying on inflated benefits estimates for purely incidental “co-benefits” like PM2.5 reductions.

For the American public to have confidence that the EPA is choosing the “right” level of regulatory protection, the EPA needs to provide more information about why it ultimately chose one level of stringency in a final rule over other alternatives available to it.

V. AND NOW, THE PERFECT REGULATORY STORM

Within just a five-month time span of 2015, EPA issued three massive, sweeping regulatory programs. Each of these new programs has the potential to profoundly affect people in every region of the country, and in virtually every community.

A. Ozone NAAQS Revision

The EPA recently concluded its five-year review of the NAAQS for ground-level ozone. On October 1, 2015 (as part of a court order), the EPA tightened the national ozone standard to

70 parts per billion (ppb).³⁹ In December 2014, the Agency had proposed lowering the ozone NAAQS from its current level of 75 ppb to a range between 65-70 ppb. Lowering the ozone standard to those levels could lead to nonattainment designations for many areas of the country. A nonattainment designation can severely hamper economic development and construction in an area. According to the American Petroleum Institute, based upon ozone data from 2012-2014, there are 217 counties in the United States that are measured or projected to be out of attainment or in metropolitan areas that do not meet the 2008 75 ppb standard.⁴⁰ At a 70 ppb standard – the number that EPA finalized earlier this month – the number of counties in nonattainment increases fourfold to 958.⁴¹

During the recent ozone NAAQS review, the Chamber, along with other business and industry stakeholders, advocated for EPA to retain the 2008 ozone standard (75 ppb) for a number of reasons. Most notably, the 2008 standard still has not been fully implemented due to EPA's self-inflicted delays. Counties were not designated as nonattainment under the 2008 standard until April 2012. Also, EPA did not finalize the 2008 implementation guidance until just recently in February 2015. States have been committing time and resources to meet the 75 ppb standard; the new 70 ppb standard will strain limited state resources and fail to give states a chance to meet the 75 ppb standard.

Other concerns with the new tightened standard include EPA's failure to justify the need for a lower standard in the record, its failure to address the fact that a tightened standard is approaching natural background levels of ozone in certain areas, and its failure to consider significant evidence showing the movement of ozone from foreign sources, including Asia, Canada and Mexico. Having failed to address these issues, EPA likely set a new ozone standard with which it will be difficult, if not impossible, for many areas of the country to comply.

B. The Waters of the United States Rule

The revised definition of "Waters of the United States" issued jointly on May 27, 2015 by the EPA and the U.S. Army Corps of Engineers (Corps), expands federal Clean Water Act jurisdiction far beyond the limits explicitly established by Congress and affirmed by the courts. The rule will, for the first time, give federal agencies direct permitting and enforcement authority over many land use decisions that Congress intentionally reserved to the States. It will intrude so far into traditional State and local land use authority that it is difficult to imagine that any discretion would be left to State, county and municipal governments.

The WOTUS rule will affect many sectors of the U.S. economy, including construction, homebuilding, agriculture, transportation, real estate, energy production and transmission, and manufacturing. The rule will have a chilling effect on project development and force property owners to hire consultants, specialists, and lawyers to understand how they will be impacted and whether current or planned land uses will trigger federal permitting or enforcement. The rule

³⁹ See <http://www3.epa.gov/airquality/ozonepollution/pdfs/20151001fr.pdf>.

⁴⁰ See <http://www.api.org/news-and-media/news/newsitems/2015/september-2015/epa-data-show-absurdity-of-changing-ozone-standards>.

⁴¹ *Id.*

puts heavy new burdens on states and localities to comply with federal requirements, including having to wait for federal approval before undertaking critical infrastructure maintenance projects. In sum, the WOTUS rule creates confusion and an unwillingness to move forward with ordinary activities and projects for businesses, property owners, and state and local governments.

To date, 31 states and state agencies have filed lawsuits challenging the final WOTUS rule. On October 9, 2015 the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the rule until that court has decided whether it has jurisdiction or if the federal district courts have jurisdiction. The court's order states that petitioners challenging the rule have a "substantial probability of success on the merits."⁴²

C. Proposed Greenhouse Gas Regulations on Power Plants

In August 2015, the EPA released its final rule for regulating greenhouse gas emissions from new power plants.⁴³ The rule's emission limit for new coal-fired power plants is still stringent enough that any new coal-fired power plant will require at least partial carbon capture and sequestration (CCS) technology in order to comply. The EPA, however, failed to show that CCS is a commercially-viable and adequately-demonstrated technology for new coal-fired power plants. This regulation also has raised serious concerns about the ability to maintain a diverse energy supply in order to ensure steady and reliable streams of electricity to power the country.

The EPA also released in August 2015 the final "Clean Power Plan (CPP)," a rule under the Clean Air Act that will regulate greenhouse gas emissions from existing power plants.⁴⁴ The rule sets a goal of a 32% nationwide reduction of 2005 GHG emission levels by 2030. Using Section 111(d) of the Clean Air Act, the CPP creates state-specific reduction goals that "reflect the EPA's calculation of the emission reductions that a state can achieve through the application of 'best system of emissions reduction (BSER).'"⁴⁵ Portions of those reduction goals would have to be met on an interim basis in 2022, and then the full reductions achieved by 2030.⁴⁶

There are many significant concerns with the legality of EPA's Clean Power Plan and the impacts that it will have on reliable and affordable electricity in the U.S. for industrial and residential consumers. From a legal perspective, the Clean Air Act does not authorize the EPA to regulate GHG emissions from existing power plants under Section 111(d) because these same power plants are already regulated by the EPA under Section 112 of the Clean Air Act. Even if the EPA believes it has the basic authority to regulate existing facilities already regulated under Section 112, the CPP violates the Clean Air Act because it imposes "standards of performance" for the entire energy sector and not for individual sources as the Act requires.⁴⁷

⁴² Order of Stay, *Ohio v. U.S. Army Corps of Eng'rs*, No. 15-3799, at 4 (Oct. 9, 2015), ECF No. 49-2.

⁴³ See <http://www2.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Altering its approach from the proposed CPP, EPA developed the state-specific goals in the final rule using three "building blocks": (1) heat rate improvements at coal-fired electricity generating units (EGUs); (2) replacing coal-fired electricity with increased generation at existing natural gas combined cycle EGUs, although on a lower scale and under a delayed timetable than that used in the proposed CPP; and (3) increasing renewable EGU capacity.

⁴⁷ Clean Air Act §111(a)(3).

Moreover, the only way to achieve the emission reductions required by the CPP is to shift generation away from coal-fired power plants to gas-fired power plants and particularly to new renewable sources. That shifting requires actions that cannot be implemented by the rule's regulated sources themselves, but with other sources that are not subject to regulation under the CPP rule. These are just two examples of numerous legal issues that have been raised regarding the CPP.

Economically, the CPP threatens to cause serious harm to the U.S. economy, raising energy prices. Regarding electric reliability, the EPA has failed to conduct much-needed comprehensive and independent reliability analyses to determine the impacts of the proposed CPP on the country's electrical grids. This is particularly critical given that the EPA itself projects that the proposal would cause significant coal-fired electric generating capacity to retire by 2022. Despite the extension of compliance deadlines, the final CPP still suffers from rushed timelines and deadlines. Serious questions remain about whether the infrastructure needed to comply with the CPP can be built within the rule's deadlines.

VI. THE EPA HAS NOT CONSIDERED THE INCONSISTENT AND INCOMPATIBLE IMPACTS OF THE THREE REGULATORY ACTIONS

Since the first agency was established, Congress has attempted to control agency rulemakings through legislation, oversight and funding, but with little to no impact. Many of the adverse impacts of the regulations being discussed today would have been addressed by the EPA (or at least identified) had it merely implemented congressional mandates concerning the impact on jobs, the use of the best data in rulemakings, the impact of the regulations on small business, state and local governments, and the cumulative impact of regulations.

Before taking the unprecedented step of issuing three such sweeping and complex new programs within months of one another, the agency should have taken the time to fully understand how each of these rules would complement—or conflict with—the others. Congress has mandated such consideration numerous times but the EPA refuses to comply with the direction being given by Congress.

A. The EPA Failed to Conduct the Congressionally Mandated Ongoing Employment Impacts Evaluation

Congress has debated whether regulations cause adverse impacts on industry, communities and job loss since at least 1970. In the 95th Congress (1977-1978) the debate over the employment impacts of regulation was clear, direct, and extensive. The Committee noted:

Among the issues which have arisen frequently since the enactment of the 1970 Amendments is the extent to which the Clean Air Act or other factors are responsible for plant shutdowns, decisions not to build new plants, and consequent losses of employment opportunities.

* * *

[I]t has been argued that environmental laws have in fact been responsible for significant numbers of plant closings and job losses.

In any particular case in which a substantial job loss is threatened, in which a plant closing is blamed on Clean Air Act requirements, or possible new construction is alleged to have been postponed or prevented by such requirements, the committee recognized the need to determine the truth of these allegations. For this reason, the committee agreed to . . . a mechanism for determining the accuracy of any such allegation.⁴⁸

The Committee went on to state:

[T]he Administrator is mandated to undertake an ongoing evaluation of job losses and employment shifts due to requirements of the act. This evaluation is to include investigations of threatened plant closures or reductions in employment allegedly due to requirements of the act or any actual closures or reductions which are alleged to have occurred because of such requirements.⁴⁹

In conference, the Senate concurred with the House employment effects provision that addressed the EPA Administrator's evaluations and investigations of loss of employment and plant closure.⁵⁰

Subsequently, in the Clean Air Act Amendments of 1977, Congress enacted a provision, now codified as section 321(a) of the Clean Air Act, which reads:

(a) Continuous evaluation of potential loss of shifts of employment

The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this chapter and applicable implementation plans, including where appropriate, investigating threatened plant closures, or reductions in employment allegedly resulting from such administration or enforcement.”⁵¹

Over the years, the EPA has chosen to ignore this Congressional mandate. As a result, the debate over the impacts on jobs due to regulations has continued without the EPA ever providing Congress with the mandated information, which is critical for effective oversight of the agency.

In 2009 when a large number of regulations were being issued by the EPA, six U.S. Senators wrote to the EPA requesting the results of its continuing Section 321(a) evaluation of potential loss or shifts of employment which may result from the suite of regulations the EPA

⁴⁸ 95 Cong. House Report 294; CAA77 Leg. Hist. 26 at 227.

⁴⁹ *Id.*

⁵⁰ 95 Cong. Conf. Bill H.R. 6161; CAA77 Leg. Hist. 24.

⁵¹ Section 321(A) of the Clean Air Act; 42 U.S.C. § 7621. This section became law as part of the 1977 Amendments to the Clean Air Act.

had proposed or finalized.⁵² On October 26, 2009, the EPA responded to the six Senators stating “EPA has not interpreted CAA section 321 to require the EPA to conduct employment investigations in taking regulatory actions.”⁵³

Therefore, a debate that started 45 years ago and which resulted in Congress directly mandating a study of the employment effects of regulations so as to determine the truth of conflicting allegations about whether regulations adversely impact jobs is still unresolved due to EPA’s refusal to reform the evaluation of potential shifts in employment due to its regulations. The EPA, the agency charged with doing the continuous evaluation of potential loss or shifts in employment due to its regulations, has steadfastly refused to conduct such an evaluation.

If the EPA had been conducting Section 321(a) employment evaluations since 1977, Congress would be in a much better position to understand how the three new rules—taken individually or in combination with one another—would affect the lives of ordinary Americans. Congress and the public would have a baseline against which new regulatory actions could be measured.

The EPA must comply with its statutory obligation under section 321(a) of the Clean Air Act and conduct a continuing evaluation of the employment impacts of CAA regulations.

B. The EPA Failed to Utilize the Information Quality Act

Perhaps the most effective mechanism for ensuring federal agencies use high quality data in their rulemakings is to vigorously implement the Information Quality Act (IQA).⁵⁴ The IQA was designed to impose greater transparency and improve the quality of agency information, especially with respect to non-regulatory information disseminated by administrative agencies with respect to scientific and statistical matters. It requires:

- Compliance with OMB’s information quality guidelines that mandate transparency, full disclosure of all data and reports used to justify or formulate an agency position on a given topic, and full disclosure of all uncertainties or error sources so that a member of the public may evaluate and reproduce the results of an agency analysis or study.
- Use of the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices and data collected by accepted methods or best available methods.
- For claims, statements or policies regarding human health or environmental risks, the agency must specify (1) each population addressed by any estimate of public health

⁵²Letter from Senators Vitter, Risch, Johanns, Inhofe, Ensign and Hatch to EPA Administrator Lisa Jackson, October 13, 2009.

⁵³ Letter from EPA Assistant Administrator Gina McCarthy to Senator Inhofe (October 26, 2009) at 2.

⁵⁴44 U.S.C. §§ 3504(d)(1), 3516.

effects; (2) the expected risk or central estimate of risk for the specific populations; (3) each appropriate upper-bound or lower-bound estimate of risk; (4) each significant uncertainty identified in the process of the assessment of public health effects and studies that would assist in resolving the uncertainty; and (5) peer-reviewed studies that support, are directly relevant to, or fail to support any estimate of public health effects and the methodology used to reconcile inconsistencies in the scientific data.⁵⁵

- A procedure to allow affected persons to “seek and obtain” correction or disclosure of information that fails OMB information quality requirements.

Unfortunately, federal agencies have taken the position that they need not comply with the IQA because there is no private right of action to enforce the statute.⁵⁶

The EPA should follow the IQA by fully disclosing data and reports used to justify its positions and utilizing the best peer-reviewed science.

C. The EPA Failed to Comply with the Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (“UMRA”) requires federal agencies to assess the effects of the rule on state and local governments and the private sector before imposing mandates on them of \$100 million or more per year without providing federal funding for state and local governments to implement the mandate. In essence, UMRA is intended to prevent federal agencies from shifting the costs of federal programs to the states. In the WOTUS rule, the EPA and the Corps certified that “[t]his action does not contain any unfunded mandate under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995, (12 U.S.C. §§ 1531-1538), and does not significantly or uniquely affect small governments.”⁵⁷ This definitive statement is clearly at odds with the facts, however. For example, according to the National Association of Counties, 1,542 of the 3,069 counties in the nation (50%) have populations of less than 25,000,⁵⁸ are considered “small governments” and are therefore protected by both the UMRA and RFA.

These counties are responsible for building and maintaining 45% of the roads and associated ditches in 43 states,⁵⁹ which is where some of the largest permitting impacts of the WOTUS rule are expected to be felt. As a result of the WOTUS rule, these counties will be

⁵⁵ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452, 8457-58 (Feb. 22, 2002).

⁵⁶ *Harnoken v. Dep’t of Justice*, No. C 12-629 CW. 2012 U.S. Dist. LEXIS 17145, at *24 (N.D. Cal. Dec. 3, 2012) (ruling on the DOJ and OMB’s assertion that IQA does not provide a private right of action or judicial review).

⁵⁷ U.S. Environmental Protection Agency & U.S. Department of the Army, Economic Analysis of the EPA-Army Clean Water Rule (May 2015), at 61, *available at* http://www2.epa.gov/sites/production/files/2015-05/documents/final_clean_water_rule_economic_analysis_5-15_2.pdf. *See also* Definition of “Waters of the United States” Under the Clean Water Act; Proposed Rule, 79 Fed. Reg. 22,220 (April 21, 2014).

⁵⁸ Testimony of Warren Williams, General Manager, Riverside County Flood Control & Water Conservation District, submitted on behalf of the National Association of Counties, before the House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment (June 11, 2014) at page 2.

⁵⁹ *Id.*

required to bear the cost of obtaining Clean Water Act permits in greatly-expanded areas, but will receive no additional federal funding for the increased responsibility imposed by the rule.

The EPA should fulfill its statutory obligation under UMRA by not imposing unfunded mandates over \$100 million on state and local governments without providing funding.

D. The EPA Failed to Comply with the Regulatory Flexibility Act

Congress passed the Regulatory Flexibility Act (“RFA”) in 1980 to give small entities a voice in the federal rulemaking process.⁶⁰ Put simply, the RFA requires federal agencies to assess the economic impact of their planned regulations on small entities and to consider alternatives that would lessen those impacts. The RFA requires each federal agency to review its proposed and final rules to determine if the rule in question will have a “significant economic impact on a substantial number of small entities.”⁶¹ If the rule is expected to have such an impact, the agency must assess the anticipated economic impacts of the rule and evaluate whether alternative actions that would minimize the rule’s impact would still achieve the rule’s purpose.

Since 1996, the EPA specifically has been required to conduct Small Business Advocacy Review Panels when a planned rule is likely to have a significant impact. Small entity representatives—who speak for the sectors that are likely to be affected by the planned rule—advise the Panel members on real-world impacts of the rule and potential regulatory alternatives. The Panel process is the best opportunity for the EPA to get face-to-face interaction with small entities and get a sense of the ways that small entities differ from their larger counterparts in their ability to comply with regulatory mandates. Because the Panel occurs early, before the planned rule is publicly proposed, it also represents the best opportunity for small entities to have real input into the final design of a rule.

In the case of the CPP, the EPA argues that the “emissions guidelines established under CAA Section 111(d) do not impose any requirements on regulated entities and, thus, will not have a significant economic impact upon a substantial number of small entities,”⁶² so the RFA does not apply. Electricity prices – one of the largest concerns of small businesses – will go up as a result of this proposal.⁶³ It is also very possible that small businesses themselves (e.g., small refiners) will be called upon to shoulder some of the compliance burden for the proposal. If individual states as part of their State Implementation Plan choose to go beyond EGUs to achieve emissions reductions under the rule, small businesses, particularly industrial and manufacturing facilities, could be faced with the expenses associated with reducing emissions from their

⁶⁰ 5 U.S.C. §§ 601-612.

⁶¹ 5 U.S.C. §605(b).

⁶² 79 Fed. Reg. 34,947 (June 18, 2014).

⁶³ ERCOT releases report on potential Clean Power Plan impacts available at http://www.ercot.com/news/press_releases/show/76880 (Oct. 16, 2015). See also ERCOT Analysis of the Impacts of the Clean Power Plan, available at http://www.ercot.com/content/news/presentations/2015/ERCOT_Analysis_of_the_Impacts_of_the_Clean_Power_Plan-Final_.pdf (Oct. 16, 2015).

facilities. These are all issues that the EPA is required by law to evaluate and analyze through the RFA and a Small Business Advocacy Review Panel process.

Likewise, the EPA certified without any factual evidence that the WOTUS rule actually represents a *reduction* in the regulatory burdens affecting small entities, and that the rule would not have a substantive or direct regulatory effect on any small entity, so the RFA doesn't apply. Yet, because the WOTUS rule defines "tributaries" to include ditches, flood channels, and other infrastructure, businesses and small governmental jurisdictions will be subject to section 404 permitting requirements for work in ditches, on roads adjacent to ditches, on culverts and bridges, etc. that disturbs soil or otherwise affects the "tributary." These permits can take more than a year to obtain, at a median cost of \$155,000.⁶⁴ This is why the U.S. Small Business Administration's Office of Advocacy has publicly advised the EPA and the Corps that they improperly certified the WOTUS proposal under the RFA.⁶⁵

The EPA should satisfy its statutory obligations under the RFA by convening a Small Business Advocacy Review Panel for important proposed regulations, like the Clean Power Plan and the WOTUS rule.

E. The EPA Failed to Examine Inconsistent or Incompatible Regulations as Required by Executive Order 12,866

Executive Order 12,886⁶⁶ requires federal agencies to conduct several analyses prior to proposing or finalizing new regulations. The Executive Order makes agencies responsible to ensure that a new regulation will not conflict with other requirements, specifying that "each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies."⁶⁷

In the case of the three rules at issue, the EPA should have fully considered how each rule, if finalized, might affect regulated entities' ability to comply with the other two. For example, as noted above, the EPA itself projects that the Clean Power Plan will cause significant coal-fired electric generating capacity to retire by 2022. To replace this generating capacity, utilities will need to construct fuel delivery infrastructure such as pipelines, storage, railroad track, and improved roads. In order to compensate for a lack of generating capacity, these infrastructure projects will have to be completed before the existing coal-fired generating units are taken off-line. Yet these projects will be subject to more extensive permitting and reviews by virtue of the WOTUS rule. The EPA did not properly account for the increased costs and delays that utilities, pipeline companies, railroads, and other companies will face in complying with the

⁶⁴ EPA and U.S. Army Corps of Engineers, *Economic Analysis of Proposed Revised Definition of Waters of the United States* (March 2014) at 12.

⁶⁵ Letter from Winslow Sargeant, Chief Counsel for Advocacy, to Gina McCarthy, Administrator, EPA and General John Peabody, Deputy Commanding General, Corps of Engineers, on Definition of "Waters of the United States" Under the Clean Water Act (October 1, 2014) at 4.

⁶⁶ Executive Order 12,866, "Regulatory Planning and Review," 58 Fed. Reg. 51,735 (Sept. 30, 1993).

⁶⁷ *Id.* at section 1(b)(10).

WOTUS rule, which is made necessary because of the need to comply with the Clean Power Plan or the ozone rule.

The EPA should consider whether a conflict exists regarding regulated entities' ability to comply with stricter ozone standards, the redefinition of WOTUS, and the Clean Power Plan at the same time pursuant to Executive Order 12,866.

F. The EPA Failed to Analyze the Cumulative Impacts of the Regulations as Required by Executive Order 13,563

Executive Order 13,563, issued by the Obama administration in 2011,⁶⁸ even more clearly calls on federal agencies to review and understand the cumulative impacts of their regulatory programs. Section 1(b)(2) provides that each agency must, among other things, “tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, *taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.*”⁶⁹ Again, the EPA should have complied with this Executive Order when it planned to develop three massive rulemakings that would be timed to take effect virtually one on top of the other.

The EPA should conduct a cumulative review of costs imposed on regulated entities by stricter ozone standards, the redefinition of WOTUS, and the Clean Power Plan pursuant to Executive Order 13,563.

G. What the EPA Would Have Discovered If It Had Used Congressionally and Executive Mandated Analytical Regulatory Tools

If the EPA had not chosen to ignore the vast array of analytical requirements under the Clean Air Act section 321, Unfunded Mandates Reform Act; the Information Quality Act; and the Regulatory Flexibility Act, as well as Executive Orders 12,866 and 13,563, it would have discovered serious inconsistencies and conflicts between its three rules. Here are a few examples of those inconsistencies:

- As noted above, the massive new infrastructure requirements that are at the heart of the Clean Power Plan will be complicated and delayed by the expanded number of Clean Water Act permits required by the WOTUS rule. In addition to the cost of applying for federal permits, infrastructure developers will have to pay mitigation costs for wetlands restoration, which often approach or exceed all other project costs.
- When the EPA was estimating the attainment area impact of Ozone NAAQS, it completely ignored the probable shifts in criteria pollutant levels resulting from the Clean

⁶⁸ Executive Order 13,563, “Improving Regulatory and Regulatory Review,” 76 Fed. Reg. 3,821 (Jan. 18, 2011).

⁶⁹ *Id.* at 3,821 (emphasis added).

Power Plan. Because the CPP requires such a massive reorganization of the nation's electric generation infrastructure, reshuffling of the deck will dramatically shift the current map of criteria pollutant concentrations as power companies site new generation facilities away from existing sites. In particular, this could undermine the ability of many air districts to meet the current standards, let alone the tightened Ozone NAAQS standards the EPA finalized around the same time as the CPP.

- This reshuffling will make it extremely difficult for states to properly model their ozone reduction efforts. The Ozone NAAQS will also make the job of obtaining preconstruction permits for new power plants under Section 165 of the Clean Air Act much more difficult and costly, because more areas will either be classified in non-attainment—thus requiring costly offsets (if they are available)—or the area will be much closer to non-attainment. More extensive modeling and air monitoring will be required to show that a new project made necessary by the CPP can be built, adding significantly to the cost and delays for each project.
- In its economic analysis of the WOTUS rule, the EPA based its conclusion that the rule would only increase the amount of federal jurisdictional waters under the CWA by 2.84% to 3.65% on a *very* small sample of negative determinations from two preceding years, essentially using just a tiny slice of pre-WOTUS determinations. The EPA ignored conflicting evidence from federal and state authorities that the rule could impose anywhere from a 300% to 800% increase in federal jurisdictional waters. By ignoring these congressional mandates for developing effective regulations, the EPA fails to secure an understanding of the real world impacts of its rules.

Undoubtedly, more examples of inconsistencies will be discovered as these three major regulations continue to move through the regulatory process and eventually must be implemented. Much of the confusion and deficiencies stemming from these inconsistencies could have been avoided had the EPA conducted a more thorough analysis of the cumulative impacts of these regulations.

VII. LEGISLATIVE RECOMMENDATIONS

A. The Regulatory Accountability Act (H.R. 185)

A modernized Administrative Procedure Act is needed to restore the kinds of checks and balances on federal agency action that the 1946 Administrative Procedure Act—the “bill of rights” for the regulatory state—intended to provide the American people. Congress has a huge stake in getting the rulemaking process right if it is to preserve its Article 1 Constitutional Responsibility. H.R. 185, the “Regulatory Accountability Act of 2015” 114th Congress, 1st Session, which passed the House on January 13, 2015, would address this deficiency. The Senate version of this legislation, S. 2006, the “Regulatory Accountability Act of 2015,” 114th Congress, 1st Session, was introduced on August 6, 2015. The legislation would put balance and accountability back into the federal rulemaking process, without undercutting vital public safety and health protections. The bill focuses on the process agencies must use when they write the

biggest regulations. Compelling agencies to carefully follow this process will produce better substance, which results in better regulations.

The Act would require federal agencies do a better job of explaining the rationales for new rules and being more open and transparent when they write those rules. The Act simply requires additional process to ensure a better rulemaking product; it does *not* compel any particular rulemaking outcome. The Act will bring the Administrative Procedure Act of 1946 into a modern era where Congress must oversee more than 425 agencies and hundreds of thousands of rules, and now these new high impact rules that have nationwide impact. The Regulatory Accountability Act recognizes that the Administrative Procedure Act of 1946 works well for 3,000 plus routine regulations issued each year. However, for the few (1-5) high impact regulations, agencies must undertake more detailed analysis to fully understand that these rules implement the intent of Congress.

B. The Sunshine for Regulatory Decrees and Settlements Act (H.R. 712)

On February 4, 2015, the Sunshine for Regulatory Decrees and Settlements Act of 2015 was introduced in the House as H.R. 712 and in the Senate as S. 378. The bill would (1) require agencies to give notice when they receive notices of intent to sue from private parties, (2) afford affected parties an opportunity to intervene *prior to the filing* of the consent decree or settlement with a court, and (3) publish notice of a proposed decree or settlement in the *Federal Register* and take (and respond to) public comments at least 60 days prior to the filing of the decree or settlement. The bill also would require agencies to do a better job of showing that a proposed agreement is consistent with the law and in the public interest.

VIII. CONCLUSION

The goal of a regulatory agency should be to produce regulations that implement the intent of Congress in the most efficient way possible. Congress has provided significant guidance as to the analyses agencies must undertake to achieve Congressional intent. The analyses required by Congress are to guide the agency to make decisions based on fact, sound science and economic reality.

Unfortunately, over the decades, the EPA has ignored the guidance given by Congress and Executive Order for developing rules in a cost-effective manner that achieve congressional intent. The result of such conduct is an agency that issues unrestrained mandates that the states and the business community must implement regardless of cost. By ignoring the Congressional mandates and Executive guidance concerning the types of analyses to be performed, provided by Congress and the Executive as to how to develop regulations, the EPA fails to provide Congress with the information it needs to legislate. While that is a travesty, Congress has the ability to protect itself.

There is an even deeper harm inflicted by the EPA's failure to fully analyze the impact of its regulations. That harm is the deliberate avoidance of any attempt to reach out to the people and the communities that will be adversely impacted by its actions. If the goal of every agency

is to produce quality rules that implement the intent of Congress, why would an agency fail to evaluate job impacts, the cumulative impacts of regulations, or develop regulations using peer reviewed studies, the best science and economics?

Thank you for allowing me to testify today and I look forward to answering your questions.