



**DIRECT FROM THE SOURCE:  
UNDERSTANDING REGULATION  
FROM THE INSIDE OUT**

**Senator Ron Johnson, Chairman  
Committee on Homeland Security and Governmental Affairs  
United States Senate**



**114<sup>th</sup> Congress  
January 15, 2016**

**MAJORITY STAFF REPORT**

**U.S. Senate**  
**Committee on Homeland Security and Governmental Affairs**

**Memorandum**

**To:** Members of the Committee  
**From:** Chairman Ron Johnson  
**Date:** Friday, January 15, 2016  
**Re:** Committee Efforts and Bipartisan Outreach on the Regulatory Process and Reform

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As you know, one of my priorities for the Committee is to develop and pass bipartisan solutions to improve the federal government’s approach to regulations—easing the burden on the private sector by cutting red tape, while balancing the public interests to ensure health and safety.

President Obama has expressed his support for commonsense regulatory reform, including the need to “weed out regulations that aren’t contributing to the health and public safety of our people.”<sup>1</sup> Clearing out the regulatory “underbrush”, as the President put it, is truly “something that should be non-ideological.”<sup>2</sup>

I couldn’t agree more. And I am proud of the work that our committee is doing to find areas of bipartisan agreement on this issue.

Since last January, we have held four full committee hearings – including a joint hearing with the Senate Budget Committee and a field hearing – to help us better understand the impact of regulations and the need for reform. The Subcommittee on Regulatory Affairs and Federal Management has also held several more hearings and roundtables. In September, we had the opportunity to hear from our colleagues who are offering legislative proposals for regulatory reform. And in October, we passed out of committee several proposals aimed at reforming the regulatory process, all with bipartisan support.

This is just the start of our important work on regulatory issues. I hope to continue to make progress on regulatory improvement in 2016, working with my Senate colleagues to move reform proposals forward in the legislative process. Though we may disagree on specific points, many of us fundamentally agree that the current regulatory system is just too burdensome to the American economy and in need of commonsense changes.

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<sup>1</sup> Ezra Klein, “President Obama lays out his second term,” Washington Post, October 24, 2012.

<sup>2</sup> Ibid.



To that end, I wanted to share with you the results of bipartisan outreach that our committee conducted last year to help inform your views about the need for updating the regulatory process.

In March, Senators Carper, Lankford, Heitkamp and I sent a letter to private sector stakeholders soliciting their input about the regulatory process. We solicited feedback from a wide range of parties, including organizations representing industry, labor unions, and environmental advocates. My staff worked together to follow up with these groups to collect their responses. We received over fifty responses.

Included with this memo is an overview of the responses prepared by my committee staff, including representative quotes from each of the respondents. Also attached is an appendix that contains a copy of all of the responses to our inquiry. I hope that you will find them informative as you consider legislative proposals related to regulatory reform.

We've also collected feedback through other more informal outreach efforts like individual conversations, submissions through our Committee website and the #CutRedTape initiative.<sup>3</sup> One thing we've learned through these efforts is that federal rules touch every sector and every part of our lives. To take one example, I've heard from representatives from universities who point out that up to 25 percent of research spending is on regulatory compliance,<sup>4</sup> and up to 42 percent for federally-funded projects.<sup>5</sup>

In my view, the federal government's current approach to regulations and rulemaking is one of the reasons why our economy continues to struggle six years after the Great Recession, and why so many of our fellow citizens remain out of work, underemployed, or struggling to make ends meet.

I understand that some of us have different views about specific regulations. But I know that we all share the goal of a more efficient and effective regulatory process.

As Michael Mandel of the Progressive Policy Institute told the Committee back in February, "[I]f policymakers allow the regulatory burden to become too heavy, innovation and entrepreneurial energy can be suppressed. So the long-term performance and competitiveness of the American economy and the long-term growth of living standards depends on periodically

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<sup>3</sup> <https://www.hsgac.senate.gov/subcommittees/rafm/cut-red-tape>.


<sup>4</sup> "The Cost of Federal Regulatory Compliance in Higher Education: A Multi-Institutional Study," Vanderbilt University, October 2015, p. 2.

<sup>5</sup> Sandra L. Schneider, et. al., "2012 Faculty Workload Survey," Research Report, Federal Demonstration Partnership, April 2014, p. 10.

lightening the regulatory load—the equivalent of scraping the barnacles off the bottom. This is a goal where Democrats and Republicans can find common ground.”<sup>6</sup>

I want to thank Tom, Heidi, and James for working with me to tackle these issues. And I thank each of you for your time and hard work on this important issue over the past year.

I look forward to what we will accomplish together this year.



Ron Johnson  
Chairman

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<sup>6</sup> Michael Mandel, Written statement to the Senate Committee on Homeland Security and Governmental Affairs. *Toward a 21<sup>st</sup> Century Regulatory System*, Hearing, February 26, 2015.

**Senators' Outreach Letter on Regulations**

RON JOHNSON, WISCONSIN, CHAIRMAN

JOHN McCAIN, ARIZONA  
ROB PORTMAN, OHIO  
RAND PAUL, KENTUCKY  
JAMES LANKFORD, OKLAHOMA  
MICHAEL B. ENZI, WYOMING  
KELLY AYOTTE, NEW HAMPSHIRE  
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BEN SASSE, NEBRASKA

THOMAS R. CARPER, DELAWARE  
CLAIRE McCASKILL, MISSOURI  
JON TESTER, MONTANA  
TAMMY BALDWIN, WISCONSIN  
HEIDI HEITKAMP, NORTH DAKOTA  
CORY A. BOOKER, NEW JERSEY  
GARY C. PETERS, MICHIGAN

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

KEITH B. ASHDOWN, STAFF DIRECTOR  
GABRIELLE A. BATKIN, MINORITY STAFF DIRECTOR

March 18, 2015

Dear XXXXXXXX,

The U.S. Senate Committee on Homeland Security and Governmental Affairs is initiating a review of the impact of federal regulations. The Committee, which has jurisdiction over federal regulatory policies and programs, is interested in understanding their real-world effects. As a part of this effort, it is important that we hear directly from a wide range of those affected by federal regulations every day.

The significant impact of regulations has been acknowledged by officials across the political spectrum. For example, President Obama has recognized that they “play an indispensable role in protecting public health, welfare, safety, and our environment, but they can also impose significant burdens and costs.”<sup>1</sup> While those of us signing this letter may have different views about specific regulations, we all share the goal of an efficient and effective regulatory process that allows input by those affected by that process.

As we heard repeatedly in a recent Committee hearing, there is no central venue where businesses and citizens can voice their thoughts about regulations across the federal government.<sup>2</sup> Our hope is that as we continue to hold hearings, conduct investigations, and examine potential improvements, our committee will be a place where Americans feel their concerns are heard.

To that end we are requesting your assistance in identifying existing and proposed regulations that have had or will have a real impact on your organization. We ask that you identify concerns with the regulatory process, using where appropriate a description of how specific rules affect your organization or its members, the rules that you believe merit attention by the Committee, along with a description of how the rules affect your organization. In particular, the Committee is very interested in older regulations that may warrant modification or even revocation, the impact any significant delays in the regulatory process have had on your business or members of your organization, and any views you may have on the cumulative impact of regulations. The Committee also welcomes suggestions you may have to improve the regulatory process.

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<sup>1</sup> Executive Order No. 13610, May 14, 2012.

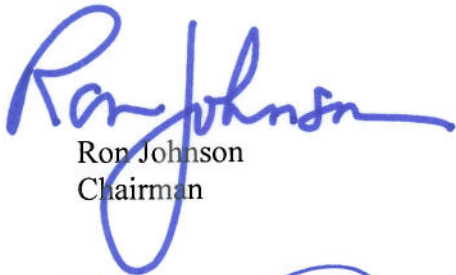
<sup>2</sup> U.S. Senate, Committee on Homeland Security and Government Affairs. *Toward a 21<sup>st</sup>-Century Regulatory System*, Hearing, February 25, 2015

Additionally, as part of the larger effort to gain better insight into how regulations affect everyday Americans, we are launching the #CutRedTape online portal. A project of the Subcommittee on Regulatory Affairs and Federal Management, the portal will be accessible through the Committee website and facilitate ongoing input from the wider public.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate “the efficiency, economy, and effectiveness of all agencies and departments of the Government.”<sup>3</sup> Additionally, S. Res. 253 (113th Congress) and S. Res. 73 (114th Congress) authorize the Committee to examine “the efficiency and economy of all branches and functions of Government with particular references to the operations and management of Federal regulatory policies and programs.”<sup>4</sup>

We ask that you please submit your response as soon as possible, preferably no later than April 17, 2015 to: U.S. Senate, Committee on Homeland Security and Governmental Affairs, Dirksen 340, Washington, DC 20510. If you have any questions, please feel free to contact [REDACTED] or [REDACTED]. Thank you for your prompt attention to this important request.

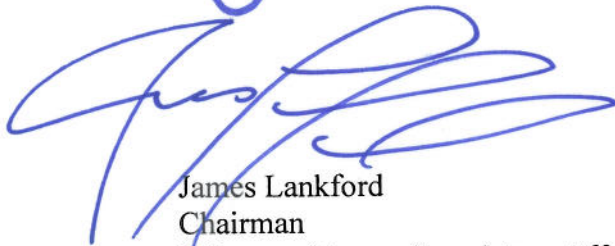
Sincerely,



Ron Johnson  
Chairman



Thomas R. Carper  
Ranking Member



James Lankford  
Chairman  
Subcommittee on Regulatory Affairs  
and Federal Management



Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
and Federal Management

<sup>3</sup> S. Rule XXV(k); *see also* S. Res. 445, 108th Cong. (2004).

<sup>4</sup> S. Res. 253 § 12, 113th Cong. (2013).

## **Overview of Responses to Senators’ Outreach Letter on Regulations**

On March 18, 2015, the Senate Homeland Security and Governmental Affairs Committee sent a letter to trade associations, industry leaders, and non-profit organizations seeking to better understand the real-world effects of federal regulations. The aim of this bipartisan outreach effort was to better understand the effect of current and potential regulations on the private sector as well as health and public safety.

Senators Johnson, Carper, Heitkamp, and Lankford sent letters to a broad spectrum of stakeholders, including trade associations, businesses, think tanks, and advocacy organizations. In all, the Committee received forty-nine responses. A copy of the Senators’ letter and each of the responses received is provided in the attached appendix.<sup>1</sup>

These responses offered varying perspectives on the issues of regulatory reform. The following are key findings of the stakeholder perspectives. Attached is a 26-page document with representative quotes from each response that the committee received.<sup>2</sup>

- Environmental regulations are a top concern of industry leaders. Concerns stem from varying groups and industries over a wide range of environmental regulations including more strict National Ambient Air Quality Standards (NAAQS)<sup>3</sup>, the redefining of “Waters of the United States,”<sup>4</sup> and greenhouse gas reporting and reduction rules.<sup>5</sup>

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<sup>1</sup> Included with the letters are also any additional materials that may have been included in the submission.

<sup>2</sup> All quotes are taken verbatim from direct responses to the committee’s letter, with contextual inserts indicated in brackets, with all emphasis in the original and without corrections. The names listed below each quote are limited to signatories (if any) to the letter to the Committee. In some cases, quotes are taken from supplemental material included in the submission, which may or may not have been authored by the signatories. Additionally, footnotes and other references were removed but can be found by referring to the original letter included in the appendix.

<sup>3</sup> Fifteen responses noted concerns about the National Ambient Air Quality Standards (NAAQS). For example, in December 2014, the EPA proposed lowering the ozone NAAQS from the current 75ppb standard to between 65ppb and 70ppb. According to a 2015 National Association of Manufacturers (NAM) study, the currently a 65ppb standard could reduce U.S. GDP by \$140 billion annually, and lead to 1.4 million fewer jobs. [Letter from Jay Timmons, President and CEO, National Association of Manufacturers, to Ron Johnson, Chairman, Comm. on Homeland Sec. and Governmental Affairs, (May 1, 2015).]

<sup>4</sup> The proposed EPA/Army Corps of Engineers definition of “waters of the United States” (WOTUS) drew criticism because it expands the current definition to include temporary waters and other features that are not downstream. Twelve respondents commented negatively on the WOTUS definition. The definition vastly expands the regulatory scope of the federal government beyond protectable downstream U.S. waters.

<sup>5</sup> Greenhouse gas (GHG) reporting requirements and attempts to reduce GHG emissions were a concern for twelve respondents. [Edison Electric Institute raised concern over the feasibility of reductions by 2020 because the EPA did not recognize the time required to design, site, permit, and build the necessary infrastructure to achieve the reductions. Letter from Thomas R. Kuhn, President, Edison Electric Institute, to Ron Johnson, Chairman, Comm. on Homeland Sec. and Governmental Affairs, (April 16, 2015).] American Iron and Steel Institute (AISI) is concerned that the new regulations will lead to a less affordable and reliable electricity supply. [Letter from Thomas J. Gibson, President and CEO, American Iron and Steel Institute, to Ron Johnson, Chairman, Comm. on Homeland Sec. and Governmental Affairs, (June 5, 2015).]



- Industry representatives note that new workplace regulations and rules promulgated will harm businesses due to increased compliance costs and additional burdens placed on employers while failing to achieve the intended effects of the regulations.<sup>6</sup>
- Respondents routinely stated that agencies frequently underestimate the implementation costs and broader effects, both costs and benefits, of rules and regulations they implement.<sup>7</sup> Respondents contend this deficiency is the result of either improper calculations from using old data or outdated information, or seeking to maximize the benefits though counting obscure, tangential benefits while ignoring or underestimating the concrete effects.
- Financial regulations arising from Dodd-Frank continue to affect how businesses operate<sup>8</sup> and banking regulations may have a ripple effect on the economy as a whole. Many respondents call for a modernization and streamlining of the regulatory regime, including codifying cost-benefit directives and ensuring sound science is used in agency decision making principles.
- Respondents representing labor organizations, environmental protection, consumers, and progressives expressed strong support for the value of many regulations to protect health, public safety, the public, and the environment.<sup>9</sup> Several of the organizations also raised concerns about the regulatory process, including the timelines of implementation, pointing to instances when delays led to adverse impacts.

The outreach effort underlying this report was an attempt to hear directly from private sector and non-governmental stakeholders. By asking them about their own regulatory priorities, the respondents told the committee in their own words about the positive and negative effects of federal

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<sup>6</sup> Nine industry leaders also mentioned tightening OSHA Permissible Exposure Levels (PELs) for varying substances, namely crystalline silica, and OSHA's failure to update PELs for other substances for decades, despite new scientific information and advances in risk assessment. Between 2003 and 2009, thirty percent of general industry was not in compliance and the remaining seventy percent will likely find themselves out of compliance upon implementing the new standard. [Letter from Thomas J. Gibson, President and CEO, American Iron and Steel Institute, to Ron Johnson, Chairman, Comm. on Homeland Sec. and Governmental Affairs, (June 5, 2015).] Five respondents suggest OSHA's proposed injury and illness reporting rule would burden employers, present privacy issues, and provide misleading information about workplace safety. The proposal would require employers to report worker injuries and illnesses, even if injuries are not work-related.

<sup>7</sup> For example, The DOT finalized its Trucking Hours of Service rule in December of 2011. The Federal Motor Carrier Safety Administration (FMCSA) estimated \$133 million in net benefits, but an industry analysis of the FMCSA resulted in a \$189 million net loss. Letter from Thomas J. Donohue, President and CEO, Chamber of Commerce of the United States, to Ron Johnson, Chairman, Comm. on Homeland Sec. and Governmental Affairs, (April 17, 2015).

<sup>8</sup> Section 953(b) of Dodd-Frank requires business to disclose the ratio of CEO pay to the pay of the median worker of the company. Respondents are concerned that this provision will add "significant" data collection burdens on companies, considering many companies have operations overseas. A 2014 Chamber of Commerce report estimated that the rule would impose over \$700 million in costs on the economy— one-tenth of what the SEC estimated. [Letter from Thomas J. Donohue, President and CEO, Chamber of Commerce of the United States, to Ron Johnson, Chairman, Comm. on Homeland Sec. and Governmental Affairs, (April 17, 2015).

<sup>9</sup> For example, the responses included letters from the AFL-CIO, the Center for Effective Government, the National Resources Defense Council, the Center for Progressive Reform, Coalition for Sensible Safeguards, Consumer Federation of America, the Environmental Defense Fund, and the Waterkeeper Alliance. These responses cited many examples about the value of existing regulations and raised concern about regulatory compliance, as well as raising questions about the effects of potential regulatory reforms.

regulations. The responses provide a meaningful input to the committee's regulatory reform work—adding a much-needed real world perspective on the effect of regulation on the private sector, the American public, and the nation as a whole.



## **Representative Excerpts from Stakeholders' Responses to the Committee's Bipartisan Letter**

### The Aluminum Association

“The United States aluminum industry supports 670,000 jobs, generating \$152 billion in economic output – nearly 1% of U.S. Gross Domestic Product – and contributes more than \$6 billion in state and local revenue and another \$9 billion for the federal government.”

[Regarding Air Permitting for Aluminum Facilities] “State implementation plans and conflicting federal statutes result in a regulatory patchwork of requirements which culminate in permitting processes that drag out into years-long negotiations. The regulatory uncertainty resulting from the process has a chilling effect on investment.”

- Heidi Brock, President and CEO, April 30, 2015

### American Association of Advertising Agencies, Association of National Advertisers, and Interactive Advertising Bureau

“The undersigned associations believe that the appropriate approach to address consumer online privacy is through industry self-regulation and education. Existing and emerging robust self-regulatory principles address privacy concerns while ensuring that the Internet can thrive, thereby benefitting consumers and the U.S. economy. In contrast, attempts to develop ‘one size fits all’ consumer privacy legislation and broaden FTC regulatory discretion will hinder U.S. competitiveness.”

“In particular, the undersigned associates are concerned that legislation should not establish prescriptive requirements for when or how consumer notice and control should be provided. While we are committed to promoting consumer transparency and control related to data practices, the Administration’s Consumer Privacy Bill of Rights and other specific legislative mandates in this area would thwart innovation and ultimately disadvantage consumers by reducing companies’ ability to communicate effectively with their customers.”

- Letter signed by the above associations, April 30, 2015

### American Chemistry Council

“ACC is America’s oldest trade association of its kind, representing companies engaged in the business of chemistry—an innovative, \$812 billion enterprise that is helping solve the biggest challenges facing our nation and the world.”

“ACC appreciates the priority the Committee has given to improving the federal regulatory system. We acknowledge that federal regulations provide substantial benefits to the country

and its citizens, including an important measure of certainty to the regulated community. These benefits, however, are not distributed evenly across all regulatory programs. The cost of regulation is also significant and growing.”

“Legislation to modernize the regulatory process is clearly within the Committee’s jurisdiction. Two good examples include streamlining the federal permitting process and institutionalizing retrospective review.”

- Michael P. Walls, Vice President, Regulatory & Technical Affairs, April 30, 2015

#### American Composites Manufactures Association

“On behalf of the approximately 3,000 U.S. companies using fiber reinforced polymer composites to manufacture a wide variety of important and beneficial products...

“We take this opportunity to describe how certain EPA regulations and regulatory processes under the Clean Air Act (CAA) are harming our industry without providing any real improvement in the health and welfare of Americans.”

“For example...[s]tate implementation of EPA requirements to address ozone concentrations in excess of its ambient air quality standard will cause considerable uncertainty for smaller manufacturers. Even when companies are able to show on case-by-case basis that there are no feasible options for additional emissions reductions, successfully making this showing can be an especially time-consuming and costly exercise for smaller companies.”

- Tom Dobbins, President, April 29, 2015

#### American Farm Bureau Federation

“While we have attempted to cover a range of regulations that create real costs and substantive burdens to our members, the examples we cite should in no way be considered an exhaustive list. Federal regulations – as well as the state and local regulations that often flow from them – permeate virtually every phase of agricultural production. It would probably be the work of a lifetime to annotate all of the implications of Federal rules.”

[On Waters of the United States] “The EPA and the Army Corps of Engineers are now engaged in a sweeping regulatory proposal that would redefine what constitutes a ‘water of the United States’ (WOTUS), bringing with any such designation a legal obligation and legal exposure to citizen lawsuits....[I]t is worth noting that the agency has received nearly 1 million comments on the proposal; of those, an estimated 20,000 or more of the filed complaints were viewed as substantive – and of those substantive comments, over half opposed to the agencies’ proposal. Yet the agency appears to be little concerned with those substantive concerns and has just sent its final proposal to OMB for final inter-agency review....We find it astonishing that the agencies intend to move forward on a rule that has raised bipartisan concerns in Congress and among other Federal agencies, and which has

met with opposition from over half the states. Perhaps more than any other proposal, this entire proceeding amply demonstrates how agencies can ignore stakeholder input and even simple fairness when they have set their sights on expanding their regulatory reach.”

- Dale More, Executive Director, Public Policy, April 16, 2015

American Federation of Labor and Congress of Industrial Organizations

[Regarding OSHA standards] “I have witnessed first-hand how these rules have made a difference, changing conditions and practices in workplaces, significantly reducing exposures, preventing injuries and illnesses and savings workers’ lives. At the same time, over the past three decades, I have seen the system and process for developing and issuing worker safety rules devolve from one that worked to produce needed rules in a relatively timely manner to the current broken and dysfunctional system which is failing to protect American workers and costing workers’ lives.”

“The cost of job injury, illness and death are staggering. A 2012 study by Dr. J. Paul Leigh estimated the total annual cost at \$250 billion a year, similar to estimates by the National Safety Council and the Liberty Mutual Safety Index when both direct and indirect costs are taken into account.

“The failure to regulate and control workplace hazards is falling squarely on the backs of the American workers and their families. Unfortunately, these cost impacts are rarely taken into account in any of the economic analyses that are conducted on regulations. The only costs that are considered are on regulated entities.”

[Regarding OSHA silica standard] “The failure to regulate silica has allowed uncontrolled exposure and more unnecessary disease and death. According to OSHA’s risk assessment prepared for the proposed rule, a new silica standard of 50 ug/m<sup>3</sup> would prevent 688 deaths and 1,600 cases of silicosis a year. This translates into 12,384 deaths that could have been prevented since rulemaking began in 1997, if the standard had been in effect.”

- Peg Seminario, Director, Safety and Health Department, May 1, 2015

American Forest & Paper Association and American Wood Council

“Poorly designed regulations unintentionally can cause more harm than good, waste limited resources, undermine sustainable development, and erode the public’s confidence in government.”

“The forest products industry is heavily regulated. Under one statute alone, the Clean Air Act, our industry faces a dozen major regulations over the next 5 to 8 years that are projected to cost between \$10 and 19 billion in capital.”

“Congress should codify into statute the longstanding presidential directive that the benefits of regulation justify its costs. This would ensure that regulators balance trade-offs and

ensure that regulators balance trade-offs and ensure that regulations do more harm than good.”

- Donna A. Harman, President and CEO, American Forest & Paper Association, May 1, 2015

#### American Gas Association

“There are more than 72 million residential, commercial, and industrial natural gas customers in the United States, of which 92 percent – more than 68 million customers – receive their gas from AGA members.”

“Regulations pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act were intended to protect natural gas utilities, which are nonfinancial, non-speculating end-users of commodity products in the financial and physical energy markets. Costs borne by utilities are largely passed to consumers through rates set by state regulatory authorities. Key rules need significant overhaul because they are raising costs and reducing liquidity for utilities. In the long run, inaction will hurt American energy consumers, and raise the price of reliable, affordable, and abundant natural gas.”

- George Lowe, Vice President, Federal Affairs, April 17, 2015

#### American Iron and Steel Institute

“AISI serves as the voice of the North American steel industry in the public policy arena and is comprised of 19 member companies, including integrated and electric furnace steelmakers, and approximately 125 associate members who are suppliers to or customers of the steel industry.”

“A consistent theme throughout many of the regulations that concern AISI members is the fact that the actions of the EPA are driven by court imposed deadlines from citizen suits brought by environmental groups. These deadlines bind the agency to rush through the regulatory process in a less than transparent manner and often result in new rules that were not well thought out or given the benefit of rigorous review and consideration from all interested stakeholders.”

- Thomas J. Gibson, President and CEO, June 5, 2015

#### American Petroleum Institute

“API is the only national trade association representing all facets of the oil and natural gas industry, which supports 9.8 million U.S. jobs and 8 percent of the U.S. economy.”

“API actively engages with regulatory agencies and the White House Office of Management and Budget (OMB) to provide appropriate input in the regulatory process. Nevertheless,

agencies often move forward with rulemakings that stifle the economic well-being of the nation.”

[Regarding the EPA’s proposed new Ozone rules] “Restricting the standards to 60 ppb would place 94% of the U.S. population out of compliance. Even at 65 ppb, 45 of the lower 48 states would have areas deemed in non-attainment, including pristine areas like Yellowstone National Park. To comply with standards approaching or below naturally occurring peak levels of ozone, states could be required to restrict everything from manufacturing and energy development to infrastructure projects like roads and bridges....the new regulations could cost as much as \$270 billion per year and put millions of jobs at risk.”

- Jack Gerard, President and CEO, May 4, 2015

#### Associated Builders and Contractors, Inc.

“A large percentage of ABC’s members are small businesses, and as you know, small businesses are the backbone of our nation’s economy. Their ability to operate efficiently and free of unnecessary regulatory burdens is critical for our county’s economic recovery.”

[Regarding Department of Labor (DOL) prevailing wage rules under Davis-Bacon] “As a result of flawed, unscientific wage calculation methodology, federal ‘prevailing’ wages in construction fail to reflect actual local wages. An April 2011 Government Accountability Office (GAO) report found that the Davis-Bacon wage survey process does not produce true prevailing wages, and DOL’s efforts to improve wage determinations to date have not addressed key issues with accuracy, timeliness, and overall quality.... Absent full repeal, employers and employees in the construction industry would be well-served by requiring the use of job descriptions and earnings data from the Bureau of Labor Statistics (BLS)—which is acquired through proven statistical sampling technique—to calculate and set these wages in a transparent manner.”

- Geoffrey Burr, Vice President, Government Affairs, May 1, 2015

#### The Associated General Contractors of America

“The complexity of the rulemaking process and the regulations promulgated through it are a constant topic of frustration for our members. The construction industry uses a lot of labor, materials, equipment and acreage, so we are governed by regulations that deal with personnel, production, process and the environment. As such, we are very sensitive to rules, regulations and enforcement efforts by federal agencies that seem impractical, imprudent or impossible to comply with.”

[Regarding Waters of the United States] “The proposed rule is a drastic expansion of federal [Clean Water Act] CWA jurisdiction....Expanding jurisdiction affects the entire Clean Water Act. EPA’s economic analysis has been limited to costs associated with section 404

of the Clean Water Act and fails to consider the full costs of implementing expanded jurisdiction.”

- Jeffrey D. Shoaf, Senior Executive Director, Government Affairs, May 1, 2015

#### Association of American Railroads

“The Association of American Railroads (AAR) is a trade association whose membership includes freight railroads that operate 83 percent of the line-haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States.”

“AAR and its members urge consideration of the cumulative effect of regulatory burdens....This is a particularly material consideration for the railroad industry given its long history of regulation, which has resulted in an accumulated burden of overlapping, often outdated regulations, on top of which new rules are constantly being layered even as the industry is being transformed by changes in technology.”

“Railroads continue to encounter environmental permitting obstacles to infrastructure projects. There are a number of simple ways to make environmental permitting more efficient for the railroads without jeopardizing environmental interests.”

- Edward Hamberger, President and CEO, April 23, 2015

#### The Brick Industry Association

“Founded in 1934, the BIA represents the U.S. clay brick industry, which includes hundreds of manufacturers, distributors, and suppliers that provide employment for thousands of Americans in 44 states. Over 85 percent of the manufacturers are small businesses.”

“There are numerous regulations that could adversely impact our industry, including the national ambient air quality standards (NAAQS) and greenhouse gas (GHG) regulations currently being developed by the U.S. Environmental Protection Agency (EPA), and the recent state implementation plan (SIP) call to reform start-up and shutdown requirements in many State SIP programs.”

“Our industry is committed to doing our share to protect both the environment and our employees; however, we believe that the two rules discussed above represent more than our share. Either one of these rules individually has the potential to threaten the viability of our industry. Together, they appear to be an insurmountable obstacle. If our nation is to survive as a manufacturing force, we need regulators to understand that our ability to respond to one regulation is impacted by other regulations that we already have to meet. Manufacturers have finite resources. There needs to be some way to recognize the cumulative impact of these regulations and to identify priorities for manufacturer’s finite resources. We ask for your help in getting that message heard.”

- Susan J. Miller, Vice President, Environment, Health, and Safety, May 1, 2015

### Business Roundtable

“Business Roundtable’s CEO members lead companies with \$7.2 trillion in annual revenues and nearly 16 million employees....[and] invest \$190 billion annually in research and development – equal to 70 percent of U.S. private R&D spending.”

“Federal regulation has provided substantial benefits to the country. These benefits, however, have come at a substantial cost.”

“Based on past member surveys, pending regulations of greatest concern include, but are not necessarily limited to, certain regulatory proposals or recently finalized regulations emanating from the Clean Air Act including changing the Ozone standard, reducing greenhouse gas emissions from the power sector, the Affordable Care Act, and the Wall Street Reform and Consumer Protection Act (e.g., derivatives trading used to reduce business risk, CEO pay ratio, conflict minerals).”

- John Engler, President, April 16, 2015

### Caterpillar

“In 2014, Caterpillar employed some 114,000 people around the world with more than 51,000 of those in North America. In addition, Caterpillar dealers around the world accounted for nearly 162,000 employees. With more than 60 percent of our sales outside the United States, Caterpillar remains a leading exporter from the U.S. with more than \$15 billion in exports in 2014.”

[Regarding Labor/Employment] “Caterpillar has spent significant time reviewing the impact of proposed regulations from the Department of Labor (DOL), the National Labor Relations Board (NLRB), and the Equal Employment Opportunity Commission (EEOC). To simply review proposed regulations and Executive Orders takes an employer such as Caterpillar hundreds of hours per year. For example, determining whether we have the systems and resources to track and comply with a rule like the Fair Pay and Safe Workplaces Executive Order, required substantial amounts of time from Caterpillar’s Legal, Human Resources and Governmental Affairs groups.

“In addition, federal agencies often grossly underestimate the cost of implementing a proposed rule. For example, the proposed rule and guidance stemming from the Fair Pay and Safe Workforces Executive Order was deemed ‘not economically significant’ by the Department of Labor and Federal Acquisition Regulatory Council. However, the business community provided their own cost analysis showing that the proposed rule will easily cost over the \$100 million threshold required for a more rigorous, detailed economic review. Federal agencies could easily make a more accurate cost analysis by considering stakeholder input.”

- Christopher J. Myers, Director, Federal Government Affairs, May 1, 2015

### Center for Effective Government

“The Center for Effective Government is a national policy organization that works to ensure that government operations are open and transparent, that our regulatory system protects people and the environment, and that public officials advance the interests and priorities of all Americans.”

“We believe that an efficient and effective regulatory process is one that allows agencies to adopt safeguards that provide an *adequate level of protection* from hazards and harms *before accidents happens*. Delayed rules have real-world impacts—to public health, safety, and the environment, and to our national economy. But too often, our government acts only after a preventable tragedy has occurred—the global financial crisis, the chemical facility explosions in West, Texas, the General Motors auto recall, and exploding rail cars carrying crude oil are just a few examples.”

[Regarding ozone air quality standard] “EPA estimates that meeting a revised ozone standard of between 65 and 70 parts ppb by 2025 would avoid between 880 to 3,100 premature deaths, 360 to 1,100 respiratory hospital admissions, 1,100 to 3,500 emergency department visits for asthma attacks, and 300,000 to 910,000 asthma exacerbations in children, among other benefits, each year. EPA estimates the economic benefit from the avoided health effects at between \$2 billion and \$11 billion annually.”

- Ronald White, Director of Regulatory Policy, May 1, 2015

### Center for Progressive Reform

“We the undersigned are Member Scholars and Staff with the Center for Progressive Reform (CPR), a think tank and research institute that is composed of a network of sixty scholars across the nation and that is dedicated to protecting health, safety, and the environment through analysis and commentary.”

“The regulatory system has become heavily tilted in favor of powerful corporates so that it is now more attentive to their narrow interests, rather than the broad public interest in protecting people and the environment against unacceptable harms that the agencies were created to address. The result is that the Clean Air Act, the Federal Food, Drug, and Cosmetic Act, the Occupational Safety and Health Act, and other public interest laws that Congress has enacted over the past several decades are not being implemented as intended.”

“In its most recent report to Congress, the Office of Management and Budget (OMB) estimates that the total benefits of significant regulations for the past ten years exceeded their costs by a ratio as high as 16 to 1. The Environmental Protection Agency (EPA) estimates that the regulatory benefit of the Clean Air Act exceeds its cost by a ratio of 25 to 1. Similarly, a study of EPA rules issued during the Obama Administration found that their regulatory benefits exceeded costs by a ratio as high as 22 to 1.”



“As documented in a 2009 CPR white paper entitled The Hidden Human and Environmental Costs of Regulatory Delay, just the delays of rulemakings impose a serious cost on the public interest as well. Each year dozens of workers are killed, thousands of children are harmed, and millions of dollars wasted because of unjustifiable delays in federal regulatory action. The costs of regulatory delay accrue every time the federal protector agencies—those created by Congress to protect health, safety, and the environment—fail to take timely action to prevent the kind of serious and pressing threats Congress intended for them to address.”

- Rena Steizor, Professor of Law, University of Maryland Francis King Carey School of Law / Robert R.M. Verchick, Gauthier ~ St. Martin Eminent Scholar Chair in Environmental Law, Loyola University, New Orleans / James Goodwin, Senior Policy Analyst, May 1, 2015

### Coalition for Sensible Safeguards

“The Coalition for Sensible Safeguards (CSS) is an alliance of more than 150 labor, environmental, public health, scientific, consumer, financial reform, small business, and public interest organizations joined in the belief that our country’s system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all.”

“Cost-benefit analysis has become a staple of the regulatory process; however, the current methodology has significant intrinsic flaws and limitations. In addition to the ethical concerns about putting a price on human life or suffering, these analyses are highly dependent on the assumption upon which projections are based.”

“Historically, industries impacted by regulations have often overinflated predicted compliance costs. According to a study from the academics at the Center for Progressive Reform, agencies, especially the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA), primarily rely on industry to supply the estimated costs of proposed rules. Because companies know the purpose of the surveys, they have a strong incentive to overstate costs in order to skew the final cost-benefit analysis toward weaker regulatory standards. In some cases, OSHA and EPA regulation cost estimates have been inflated by at least 30% and generally by more than 100% of the actual cost of compliance.”

- Katherine McFate and Robert Weissman, Co-Chairs, May 1, 2015

### ConocoPhillips

“We spend a tremendous amount of time, effort, and resources on understanding, and correctly applying regulations to our activities. Whenever we assess a business opportunity, the cost of regulatory compliance is one of the key drivers for determining whether to make an investment or not.”

[Regarding the National Environmental Policy Act] “Congress should consider streamlining the NEPA process so that individual projects do not have to go through more than one analysis.... We have experienced agencies taking a completed NEPA analysis and each of them using their own internal evaluation criteria and processes to reach far different conclusions.”

[Regarding proposed waters of the United States rule]: “What is particularly troubling about this proposed rule is that it appears to be relying on one sentence of Justice Kennedy’s concurring opinion in *Rapanos vs. the U.S.*, as opposed to the plurality opinion of the majority that sought to clearly limit the jurisdiction of water bodies governed.... The impact of this proposal will be increased permitting costs, delays and risks of permit denials, citizen suits, and governmental enforcement actions for Exploration and Production operations.”

- Andrew Lundquist, Senior Vice President, Government Affairs, May 21, 2015

#### Construction Industry Round Table

“When the design/construction industry is burdened with unnecessary or ineffective mandates that often take valuable time they also cost jobs... thus, regulatory delays, redundancies, inefficiencies, and red tape collectively have a direct impact on costs and therefore the vitality and ability of our industry to remain profitable and hire more people.”

“The cacophony of laws, regulations, and rules that we insist on heaping on our private sector job creators is *unprecedented* and their *cumulative burden* is not really known or fully appreciated.

“In an effort to better understand the general impact or burden created by the ‘regulatory complex’ on the design/construction industry, CIRT undertook a series of steps to try to quantitatively measure the costs with its members.... The findings are extraordinary – when the answers were weighed the additional *costs* and *time* as the result of ‘red tape was 10 percent. If extrapolated out to cover the annual dollar activities of the industry (even at the sluggish levels of the past few years) – it still amounts to somewhere around \$90-100 billion dollars in waste and inefficiency (per year) for infrastructure related projects.”

- Mark A. Casso, Esq., President, April 16, 2015

#### Consumer Federation of America

“Consumer Federation of America (CFA) is a nonprofit association of nearly 300 consumer groups that, since 1968, has sought to advance the consumer interest through research, advocacy, and education. Our members represent millions of people.”

[Regarding product safety] “Since June 2011, the new federal crib standard have stopped the sale, re-sale, manufacture, and distribution of drop-side cribs and also prohibits drop-side cribs at motels, hotels, and childcare facilities. Drop side cribs have resulted in the deaths of

at least 32 infants since 2011. The [Consumer Product Safety Commission's] crib standards also made mattress supports stronger, crib hardware sturdier, and compliance testing more rigorous. This was the first time in nearly 30 years that federal crib standards have been updated. Thus, the benefits are profound for consumers but took an incredibly long time to be finalized with the vast cost of at least 32 infant deaths.”

[Regarding the cost of inadequate regulation of high cost lending] “Currently 35 states authorize triple digit interest rate loans with few, if any, consumer protections. As a result 81 percent of Americans live in states that would see a considerable improvement in consumer protections for payday loans if the [Consumer Finance Protection Bureau] rule is enacted. According to the CFPB, 75 percent of payday loan fees are generated by borrowers trapped in at least 11 loans per year and, according to the Center for Responsible Lending, this loan churning results in \$3.5 billion in fees paid by payday loan borrowers and \$3.6 billion in fees paid by title loan borrowers each year.”

- Rachel Weintraub, Legislative Director and General Counsel, May 1, 2015

### Consumers Union

“Since our founding in 1936, Consumers Union and Consumer Reports have worked to promote a safe, fair, and just marketplace for consumers, and to empower consumers to protect themselves.”

“We have found in our experience that the rulemaking process – following the Administrative Procedures Act and other relevant statutes Congress has enacted over the years and developed more fully in each agency to fit the matters it regulates – has generally worked well to solicit and consider all viewpoints. The resulting rules often reflect careful and lengthy consideration of the ramifications of various alternative approaches.”

[Regarding review of existing regulations] “Regulated entities need to have a key role in the review, but their desire to minimize compliance burdens and costs needs to be carefully weighed against the more important objective of ensuring that the regulations continue to provide effective protection and accountability....Regulated entities are not always in the best position to objectively evaluate which costs are necessary.”

- George P. Solver, Senior Policy Council, William C. Wallace, Policy Analyst

### Council of Industrial Boiler Owners

“In recent years, EPA has used the [Clean Air Act] as a battering ram to further the Administration's ambitious environmental agenda. In the Agency's rush to promulgate as many pollution control rules as possible in a short period of time, mistakes have been made and deliberate oversights have gone uncorrected.”

“CIBO recommends that Congress carefully examine EPA's attempts to use environmental regulations to permanently alter U.S. energy trajectories. The CAA does not give EPA the

authority to establish its own national energy policy, regardless of that policy's supposed or theoretical benefits.”

- Robert D. Bessette, President, May 1, 2015

#### Credit Union National Association

“Today, credit unions face a crisis of creeping complexity with respect to regulatory burden. The regulations to which credit unions are subject are ever increasing, never decreasing. While credit unions were already challenged by significant regulatory burden prior to the financial crisis, the changes to regulations coming as a result of the crisis have exacerbated the burden on credit unions, and are a key driver to consolidation within the credit union system. Since the beginning of the financial crisis, credit unions have been subjected to more than 190 regulatory change[s] from nearly three dozen Federal agencies totaling nearly 6,000 Federal Register pages. Credit union volunteers and executives are particularly frustrated that they are required to comply with these new and complex regulations notwithstanding the fact that they did not cause or contribute to the financial crisis.”

“Because many credit unions employ a small staff and have limited resources, the proportional impact of regulation on credit unions is greater than it is for large banks. Resources – both time and money – diverted to complying with rules designed for large banks are resources that cannot be used to serve credit union members.”

- Jim Nussle, President and CEO, April 16, 2015

#### Crop Life America

“CLA and its members share the Committee's goals of a fair, efficient, and effective federal regulatory process that allows meaningful input by those affected.”

[Regarding EPA's proposed revisions to the Agricultural Worker Protection Standard]  
“CLA's cover letter and attached report lays out in detail serious flaws, gaps and erroneous presumptions in EPA's economic and risk-benefit analyses used to justify the proposed revisions.”

“Four years ago now, when this effort was initiated on 22 regulations, policies, and processes and procedures relative to pesticide regulation where we felt there was room for improvement... At that time, the bewildering array of 15 separate dockets left some confusion about where comments should be submitted, and we are not certain that our comments made it to the right place. In reviewing that list from our 2011 comments, most are all still relevant to today's discussion and still in need of improvement.”

- Beau Greenwood, Executive Vice President, May 1, 2015

#### Direct Selling Association

“Direct Sellers had more than \$34 billion in domestic sales last year. The 18 million individual direct sellers who sell for direct selling companies are independent contractors; they frequently sell on a part-time basis to their neighbors, relatives and friends as a means of supplementing other income sources.”

“Unfortunately, over the years, numerous regulatory and legislative proposals at both the federal and state levels would have unintentionally hampered individual independent contractor direct sellers. Most recently among federal proposals, the Department of Labor (DOL) continues to consider a rule that would require burdensome disclosure requirements and documentation related to an independent contractor’s employment status.”

“Such an expansion of the authority of the DOL without prior Congressional hearings would be of concern as DOL’s proposed rulemaking could, whether intentionally or inadvertently, lead to the improper classification of independent sales personas and entrepreneurs as employees. Such an interpretation of DOL’s actions could lead to the demise of the direct selling industry and the opportunity it currently provides to 18 million Americans who generate over \$34 billion in sales.”

- Joseph N. Mariano, President, May 1, 2015

### Duke Energy

“The investor-owned electric power sector is highly regulated at the federal and state level and is an \$840 billion industry that powers nearly 70 percent of America’s homes and businesses. Consequently, the regulatory process has the ability to profoundly affect Duke Energy, our customers (which include residential, commercial, manufacturing and industrial customers), the communities we serve, and our nation’s electric power sector.”

“The sometimes unnecessary layering of regulations across the industry, without the various federal agencies communicating amongst themselves, lead to inefficient investment and planning decisions, which ultimately affect the cost of supplying electricity to our customers.”

“It’s important for federal agencies to understand that certain rules and regulations may have unintended consequences. If left unaddressed, these unintended consequences will raise electricity rates and reduce capital expenditures that offer an important source of much-needed, high-quality job creation in many local towns and communities.”

[Regarding cybersecurity] “Cybersecurity is one of the most important and challenging issues facing electric utilities and other critical infrastructure industries. Industry regulations tend to rely on performance requirements instead of performance objectives. For example, the North American Electric Reliability Corporation Critical Infrastructure Protection (NERC CIP) regulations attempt to specify specific actions based on security principles, as opposed to asking electric utilities to implement cybersecurity programs that address security objectives. This results in burdensome regulatory requirements with sometimes limited benefit.”

- Jennifer Weber, Executive Vice President, External Affairs and Strategic Policy, May 1, 2015

### Edison Electric Institute

“The Edison Electric Institute (EEI) is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for 220 million Americans, operate in all 50 states and the District of Columbia, and directly employ more than 500,000 workers. With \$90 billion in annual capital expenditures, the electric power industry is responsible for millions of additional jobs. Reliable, affordable, and sustainable electricity powers the economy and enhances the lives of all Americans.”

“We believe it is imperative that all environmental standards established by EPA are achievable, coordinated with other environmental requirements, and provide realistic timeframes in which to make changes to the complex electricity system necessary to achieve these goals. These environmental requirements also must not hamper the sector’s obligation and commitments to providing reliable and affordable electricity for all Americans.”

“EPA’s proposed guidelines for reducing GHG emissions from existing power plants under section 111(d) of the Clean Air Act (CAA) is potentially the most wide-ranging and impactful regulation affecting the electric power industry ever issued by the federal government....One major concern with the proposed guidelines is that reductions assumed by 2020 do not recognize the time required to design, site, permit and build the necessary infrastructure, including natural gas plants and pipelines, and transmission and distribution lines.”

- Thomas R. Khun, President, April 16, 2015

### Environmental Defense Fund

“The Environmental Defense Fund (EDF) is a nonpartisan nonprofit organization with over a million members across our nation and is dedicated to working towards innovative, cost-effective solutions to the most serious environmental problems.”

“History has demonstrated that regulations like those established to protect Americans’ drinking water, reduce harmful toxic emissions, and rein in climate-destabilizing emissions have saved and improved countless lives. We also urge the Committee to carefully evaluate assertions of economic harm from environmental regulations; more often than not American businesses are able to innovate and find efficient, cost-effective solutions to curb pollution.”

[Regarding the Clean Air Act] “The *net* benefits of the Clean Air Acts from 1970 to 1990 are valued at over \$21 trillion. By 2020, the Environmental Protection Agency (“EPA”) estimates the 1990 Clean Air Act Amendments will annually prevent a projected 230,000 deaths; 2.4 million asthma attacks; 200,000 heart attacks; and 5.4 million lost school

days....Additionally, EPA projects a net overall improvement in economic growth due to the benefits of cleaner air.”

- Elizabeth B. Thompson, Vice President, U.S. Climate & Political Affairs, May 1, 2015

### ExxonMobil

“As the scope and complexity of regulations continue to increase in the U.S., so have the impacts to our business and to society. To compound the issue, underlying authorizing statutes often establish unreasonable deadlines, require unnecessary technology and risk reviews, and provide broad discretion to executive branch agencies. Many agencies have gone unchecked in their implementation actions, and are using regulatory hurdles to impede progress on even the most ordinary of projects.”

[Regarding the Renewable Fuel Standard] “The EPA regulations for the RFS are unrealistic, unworkable and should be repealed. For example, the Congressional Research Service estimates that by 2022, the RFS could increase food costs for Americans by \$3 billion annually.”

“ExxonMobil believes regulatory reform is essential for the U.S. to maximize its productivity and fully realize its competitive advantage – both domestically and in the international marketplace.”

- Theresa M. Fariello, Vice President, Washington Office, June 1, 2015

### FIA

“FIA is the leading trade association for the futures, options and cleared swaps markets.”

“Generally speaking, FIA encourages the Committee to review the various cost-benefit regimes applied across regulatory agencies. FIA supports efforts to subject regulations to both qualitative and quantitative cost and benefit analysis, such as the legislation passed by the House last year to ensure that the cost-benefit analysis conducted by the Commodity Futures Trading Commission closely tracks President Obama’s Executive Order No. 13563, which does not extend to independent regulatory agencies.”

- Walt L. Lukken, President and CEO, April 22, 2015

### Ford Motor Company

“The regulatory process and its outcomes have a long-lasting and widespread impact on the millions of Ford customers, the tens of thousands of Ford employees and the thousands of Ford suppliers in the United States. Making sure we get these regulations right is essential to the health of not only Ford’s business, but the entire U.S. economy.

“To that end, it is essential that regulations and the regulatory process be based on meaningful, data-driven analysis of behavior, science, and engineering. It is also important that the process take into account both the societal and consumer costs and benefits of regulations, including alternatives. As new data becomes available, we must use it to reevaluate our initial regulatory assumptions to assure that the policy goals align with this new data and market conditions.”

“An example of a regulatory process that was not data driven can be found in EPA’s decision to allow up to 15 percent ethanol (E15) into fuel prior to the completion of critical vehicle testing. The vast majority of vehicles on the road today were designed, certified and warranted to only withstand up to 10 percent ethanol in gasoline (E10).”

- Curt Magleby, Vice President, Government Affairs, May 5, 2015

### The Heritage Foundation

“We share your concern over the growing burden of regulation, and commend your efforts to address this critical issue.

“The regulatory burdens on Americans have increased at an alarming rate. Based on data from the Government Accountability Office, we have calculated that an unprecedented 184 major new regulations have been imposed by Washington since 2009, with additional costs to consumers and the economy in excess of \$80 billion annually.”

“Increasingly, rulemaking is being conducted by independent agencies outside the direct control of the White House. Regulations issued by agencies such as the Federal Communications Commission, the SEC, and the Consumer Financial Protection Bureau are not subject to review by OIRA, or even required to undergo a cost-benefit analysis. This is a serious loophole in the rulemaking process.”

- Jim DeMint, President, May 1, 2015

### Independent Community Bankers of America

“On behalf of the more than 6,000 community banks represented by ICBA, thank you for your interest in regulatory burden and an efficient and effective regulatory process.”

[Regarding data collection requirements] “The requirement compels the bank to create a separate bureaucracy within the bank that cannot be integrated with lending operations. When this mandate is not feasible, such as in organizations that are too small to accommodate firewall structures, additional notice requirements apply. The cost of these new requirements will be disproportionately high for community banks that do not have the scale to spread compliance costs over a large asset base.”

- Camden R. Fine, President and CEO, April 24, 2015



## Independent Petroleum Association of America

“IPAA represents the thousands of independent oil and natural gas exporters and producers, as well as the service and supply industries that support their efforts, that have been, or will be, most significantly affected by regulatory actions. Independent producers drill about 95 percent of American oil and natural gas wells, produce about 54 percent of American oil, and more than 85 percent of American natural gas.... Based upon a 2012 survey of IPAA’s membership, the typical IPAA member employs 12 full-time and 2 part time employees and has been in business for 23 years.”

[Regarding hydraulic fracturing rulemaking] “This new rule requires pre-approval of hydraulic fracturing operations, regulations on well integrity, disclosure of chemicals used and storage of recovered fluids.... DOI has never made a compelling case that this rule is necessary or identified a state that has insufficient regulations in place to properly regulate hydraulic fracturing activities in their states. This rule will be difficult and costly for industry and the Bureau of Land Management (BLM) to implement and the agency has no clear plan on how to properly train field staff to act on the new measure. The rule is unnecessary and will add another layer of burden to independent producers already struggling to navigate the complex and confusing regulatory program governing federal lands.”

- Barry Ressel, President and CEO, Independent Petroleum Association of America, April 30, 2015

## Murray Energy Corporation

“Murray Energy is the largest privately-held coal company in the United States. We own seventeen underground coal mines, which provide high paying, well-benefitted jobs to over 8,600 people in six states. We mine over 88 million tons of coal per year, which is used to provide reliable, low cost electric power to millions of Americans.”

“The availability, reliability, and cost of electric power, a stable of life, is being destroyed in America today. Our citizens on fixed incomes will not be able to pay their electric bills, and our manufacturers of products in our Country for the global marketplace will not be able to compete.”

[Regarding Clean Power Plan] “EPA’s treatment of coal under its proposed New Source Performance Standards for Electricity Generating Units (‘NSPS’), flouts congressionally-stated public policy by mandating a fuel-discriminatory standard that requires commercially unproven carbon capture and storage technologies to be used on all new coal plants, while requiring nothing of new gas plants. The effect of the proposal will be to prevent the construction of any new coal-burning units and to impede the very efforts to develop the clean coal technologies that Congress, the Department of Energy, and the power industry have worked so hard to foster. This regulatory approach to the power sector is also directly contrary to the public policy, declared by Congress, to ‘promote national energy policy and

energy security, diversity, and economic competitiveness benefits that result from the *increased* use of coal.”

- Robert E. Murray, Chairman, President, and CEO, April 21, 2015

#### National Association of Chain Drug Stores

“NACDS represents traditional drug stores and supermarkets and mass merchants with pharmacies. Chains operate more than 40,000 pharmacies, and NACDS’ 125 chain member companies include regional chains, with a minimum of four stores, and national companies. Chains employ more than 3.8 million individuals, including 175,000 pharmacists. They fill over 2.7 billion prescriptions yearly, and help patients use medicines correctly and safely, while offering innovative services that improve patient health and healthcare affordability.”

[Regarding DEA regulations] “The issue of lack of DEA transparency remains an ongoing concern among DEA registrants, including pharmacies. Often, the agency conducts its operations and implements policies in a relatively opaque manner, seemingly unaware of the impact on healthcare delivery....[T]he [Controlled Substances Act] requires pharmacists to take on diverse and sometimes conflicting roles. On the one hand, pharmacists have a strong ethical duty to serve the medical needs of their patients in providing neighborhood care. On the other hand, community pharmacists are also required to be evaluators of the legitimate medical use of controlled substances.”

- Steven C. Anderson, President and CEO, May 1, 2015

#### National Association of Manufacturers

“The NAM is the nation’s largest industrial trade association and voice for more than 12 million men and women who make things in America. The NAM is committed to achieving a policy agenda that helps manufacturers grow and create jobs.”

“According to the annual information collection budget, the paperwork burden imposed by federal agencies excluding the Department of Treasury increased from 1.509 billion hours in fiscal year (FY) 2003 to 2.446 billion hours in FY 2013, an increase of 62.1 percent. To put this number into perspective, federal agencies—not including the Department of Treasury—imposed more than 279,000 years’ worth of paperwork burden in FY 2013.”

[Regarding the EPA’s emission standards for industrial, commercial, and institutional boilers and process heaters] “In January 2013, the EPA published its final Boiler MACT (maximum achievable control technology) rule. The NAM and business and environmental groups filed legal challenges in a federal appeals court, and the agency received 10 petitions for reconsideration, including one filed by the NAM that also requested reconsideration of related rules involving air pollutants for area sources (Boiler GACT, or generally available control technology) and commercial and solid waste incineration units. The EPA estimates that the MACT portion of the rule alone will impose capital costs of near \$5 billion, plus \$1.5 billion more in annual operating costs. The NAM will continue to advocate for

achievable and affordable Boiler MACT regulations. While the rule itself has improved over time, there are still flaws and unsettled legal and regulatory issues that impose significant costs and uncertainty for manufacturers.”

- Jay Timmons, President and CEO, May 1, 2015

#### National Black Chamber of Commerce

“The number of regulations impacting American business is greater than ever and growing every day, but not all regulations are created equal with respect to the burden they impose on business. Thus, review and reform of regulations currently on the books makes sense, provided it targets the regulations that really impose the greatest burden. Further, the large number of regulations on the books that are harmful to Americans’ ability to start and run a business successfully is an indication that the system is broken, and attention should be focused on avoiding adding more bad regulations by fixing the regulatory process in addition to reforming and/or eliminating existing bad regulations.”

[Regarding FCC net neutrality rule] “The Open Internet rules open the possibility that the FCC will now regulate broadband internet service prices through a complex system of rate regulation and fees, including additional state and local fees, potentially raising prices to consumers, especially small business customers who generally buy internet service the same way home users do.... Use of broadband technology to start a business is one of the few ways that lower income individuals in urban areas possess to easily and quickly start a business based on their ideas and hard work, rather than their access to credit, credentials, and ability to navigate the world of permits and licensing.”

- Harry C. Alford, President and CEO, April 28, 2015

#### National Federation of Independent Businesses

“NFIB represents about 350,000 independent business owners who are located throughout the United States.”

“Small businesses are disproportionately burdened by federal regulations. Numerous studies have shown this to be true. The most recent study, performed for the National Association of Manufacturers, found that businesses with fewer than 50 employees spent about 29 percent more per employee per year complying with federal regulatory mandates than those businesses with 100 or more employees. A 2010 edition of this study, performed for the U.S. Small Business Administration’s Office of Advocacy, and which looked more specifically at smaller companies, found that small businesses with fewer than 20 employees spent 36 percent more per employee per year than their larger counterparts.”

“NFIB believes that agencies should waive fines and penalties for small-business owners the first time they commit a harmless error on regulatory paperwork. NFIB encourages Congress to explore requiring agencies to provide small businesses with a grace period to fix minor violations when the public and their employees are not in imminent danger.”

- Dan Danner, President and CEO, April 24, 2015

### National Mining Association

“Our members supply energy, metals, minerals and materials used by every sector of our economy that are indispensable for the development of technology and manufacturing of products that improve and sustain our quality of life. The U.S. mining industry operates under a wide range of federal and state laws that cover the production, beneficiation, transportation and use of coal, metals, minerals, and materials.”

“Focused and efficient regulatory frameworks can produce tangible benefits for the public and business. However, poorly designed, inefficient, and antiquated rules divert capital from more productive use, impair economic and job growth, impose barriers to innovation and impede sustained performance and improvement. The burden of federal regulations as of 2012 exceeds \$2 trillion, or 12 percent of GDP.”

[Regarding EPA Utility MATS rulemaking] “The MATS regulation—the most expensive in EPA history—is a poster child for unbalanced regulations that dismiss the real costs and inflate the benefits to convince the public that the enormous expense is justified. Even by EPA’s own calculation the rule will cost American consumers almost \$10 *billion* each year, but bring, at most, only \$4-\$6 *million* in benefits. To make matters worse, more than half of the costs are attributable to imposing standards for emissions the agency found pose *no danger* to public health. EPA’s position is that while it was allowed to consider costs in choosing whether to regulate, it also retained the discretion to ignore them. And ignore them it did, with a rule that demands consumers pay \$1,600 in exchange for \$1 in benefits.”

- Hal Quinn, President and CEO, May 6, 2015

### National Stone, Sand & Gravel Association

“[NSSGA] members – stone, sand and gravel producers and the equipment manufacturers and service providers who support them – produce the essential raw materials found in homes, buildings, roads, bridges and public works projects and represent more than 90 percent of the crushed stone and 70 percent of the sand and gravel mined annually in the United States.”

“The government should consider cumulative impacts of compliance before more rules are imposed. This would allow capital costs and feasibility of compliance associated with a new rule to be more thoughtfully understood both by regulators and stakeholders.”

“Agencies regularly utilize ‘guidance’ to circumvent formal notice and comment rulemakings allow the government to avoid providing needed notice to the regulated and interested public. In these instances, industry and citizens are bereft of a suitable opportunity to analyze risk abatement, management and compliance costs.”

- Michael W. Johnson, President and CEO, April 30, 2015

### Natural Resources Defense Council

“Since 1970, NRDC has participated in the legal and regulatory processes to promote public health and the environment. Our organization brings decades of expertise in regulations that protect the public and those that do not.”

“The Toxic Substances Control Act (TSCA) is widely considered to be the greatest failure of any of the environmental laws of the 1970s. The main reason that EPA has historically failed to regulate chemicals under TSCA is the provision requiring the agency to select the regulatory alternative that is ‘least burdensome’ on industry. In 1989, after spending 10 years and millions of dollars, to develop a 45,000 page record, EPA proposed to ban most uses of asbestos in the United States. Roughly 10,000 people die in the U.S. every year as a result of asbestos exposure. Yet in 1991, a federal court overturned EPA’s ban on existing uses of asbestos. The court held that EPA did not meet the ‘least burdensome’ test by conducting a thorough cost benefit analysis of each of the potential regulatory options at the agency’s disposal and demonstrating that the one it chose was the least costly effective approach.”

[Regarding BP’s Deepwater Horizon disaster] “Safety regulations were never updated to reflect the proliferation of specialized service contractors. These entities perform many critical well safety functions yet were not directly overseen by regulators...Regulations were also never updated to require better reporting of uncontrolled hydrocarbon releases or near accidents...The result was an obsolete regulatory framework configured towards a bygone era of oil and gas production.”

- [unsigned], May 1, 2015

### Public Citizen

“For more than 40 years, Public Citizen has successfully advocated for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.”

“Regulatory paralysis is the most important problem currently facing our regulatory process. The regulatory process is simply too inefficient and ineffective in developing and finalizing new standards to protect the public’s health, safety, and financial security.”

“Implementation of the bipartisan Food Safety Modernization Act (FSMA), passed in the wake of a string of food safety scandals in 2010 that sickened consumers, fatally in some instances, around the country, is another tragic example of regulatory delay. Despite Congress directing the Food and Drug Administration (FDA) to finalize the critical new food safety rules in seven key areas by 2012, all of those rules missed this mandated Congressional deadline and none have even been finalized to date.”

- Robert Weissman, President, May 1, 2015

Regulatory Studies Center [The George Washington University]

“An academic center of the Trachtenberg School of Public Policy and Public Administration, we are a network of scholars from around the globe with experience and credibility on regulatory matters who conduct objective, empirically-based analysis of regulatory policies and practice.”

“Presidents of both parties for over 30 years have supported ex ante impact analysis of regulations. Despite enjoying bi-partisan support, however, these requirements are not codified in statute. Codifying these requirements could have several advantages.”

“Agencies seldom look back to evaluate whether existing regulations are achieving their intended effects. While long-standing executive orders require agencies to conduct retrospective review of their rules, these initiatives have been met with limited success largely because they did not change underlying incentives.”

- Susan E. Dudley, Director, May 1, 2015

Schneider

[Regarding Drug Hair Testing] “Under applicable DOT regulations, motor carriers perform urine drug tests upon drivers in the following scenarios: pre-employment, random, and post-accident. Although the DOT *does not prohibit* testing hair for the presence of drugs, it *does not recognize* drug hair testing as a substitute. A number of leading motor carriers, including Schneider, are electing to test hair for drugs in the pre-employment and random test scenarios. Hair testing can detect drug use in the prior 90 day period, while urine testing can only detect usage over a much shorter period of time (48-72 hours), and is more easily circumvented, as many of the drugs of abuse are water soluble. At Schneider, the positive rate for hair testing is 3.56% compared to 0.30% for urine testing. In other words, about 12 times more drug users are identified through hair testing than urine testing. Schneider and other responsible motor carriers are spending literally hundreds of thousands of dollars annually on urine tests which are entirely duplicative of hair test, albeit with only a fraction of the efficacy of hair testing.”

[Regarding the Transportation Worker Identification Credential “TWIC”] “Duplicative background checks and redundant credential requirements are imposed upon drivers of hazardous materials. Currently, drivers who transport hazardous materials must submit to a finger-print based background check at a cost of approximately \$90 to obtain an endorsement for their commercial driver’s license. Many of these drivers also access port facilities and therefore must obtain a TWIC at a cost of \$105.25. The background checks for the hazardous material endorsement and the TWIC are identical.”

- Thomas E. Vandenburg, Director, Government Relations, April 29, 2015

## SPI [The Plastics Industry Trade Association]

“Founded in 1937, SPI promotes growth in the \$380 billion U.S. plastics industry. Representing nearly 900,000 American workers in the third largest U.S. manufacturing industry, SPI delivers advocacy, market research, industry promotion, and the fostering of business relationships and zero waste strategies.

“SPI and the plastics industry have many concerns regarding the regulatory environment, and many concerns about specific regulations. Some of the specific areas of concern for SPI are the Food Material Safety regulations that are expected later this year, Green Buildings, National Ambient Air Quality Standards for Ozone, Conflict Minerals, and Third-Party Testing Requirements for Lead and Phthalate Content.”

[Regarding National Ambient Air Quality Standards for Ozone] “SPI’s concerns are that the ozone standard levels considered in EPA’s proposal could push the entire country into ‘nonattainment.’ Emissions have been cut in half since 1980, leading to a 33% drop in ozone concentrations, which is a major accomplishment.

“The negative impact of raising the air quality standards and pushing states into nonattainment is that it limits business expansion in nearly every populated region of the United States and impairs the ability of U.S. companies to create new jobs. Increased costs associated with restrictive and expensive permit requirements would likely deter companies from siting new facilities in a nonattainment area.”

- Robert Helminiak, Vice President, Science and Regulatory Affairs, April 23, 2015

## SSM Coalition

“The SSM coalition is an *ad hoc* group of over 15 national trade associations concerned about how the Environmental Protection Agency regulates air emissions from sources that are undergoing startup, shutdown or malfunction (‘SSM’) events.”

[Regarding National Ambient Air Quality Standards] “EPA would require states to change their SIPs [State Implementation Plans] so that all exceedances of emission limitations during SSM events will be deemed violation of the Clean Air Act, even when those excess emissions are unavoidable despite proper design, maintenance, and operation of the source. EPA asserts that SIPs are substantially inadequate unless they match EPA’s latest view on how SSM events should be treated, without any attempt by EPA to tie current SIP SSM provisions to any failure to meet National Ambient Air Quality Standards.”

- Russell Frye, Counsel, May 1, 2015

## Toyota

“Toyota’s economic impact in the US includes 10 manufacturing facilities, in addition to R & D and sales facilities. Our direct employment exceeds 32,000 and our direct investment over \$20 billion, including 11 expansions since 2011 resulting in over 4,000 new jobs.

“Toyota is committed to manufacturing vehicles where we sell them. Over 70 percent of the vehicles we sell in the US are produced in North America. However, in order for automakers to continue to invest in the development and manufacture of vehicles that meet consumer expectations at an affordable price, it is important to maintain a strong focus on regulatory consistency, clarity, simplification and feasibility in order to minimize the cost and enhance the effectiveness of regulations.”

[Regarding motor vehicle fuel economy and greenhouse gas emissions] “Toyota believes that the construct of the ONP [One National Program] regulations are a step in the right direction toward minimizing the regulatory complexity that originally prompted the ONP agreements, but are not an optimal solution for the long-term given the considerable differences that remain between the EPA and NHTSA programs and regulations. Without addressing the underlying statutory differences between EPCA/EISA and the CAA, automakers have no certainty that we will not face the same untenable situation in the future, likely forcing all stakeholders to once again negotiate a way out from under the legislative overlap and inconsistency..”

- Stephen Ciccone, Group Vice President, Government Affairs, April 28, 2015

### Union of Concerned Scientists

“At the Union of Concerned Scientists, our 450,000 members and supporters throughout the country are committed to science-informed regulation that makes a real difference in the lives of our families and the lives of future generations.”

[Regarding backover accidents] “Assuming that rear-view technology would eliminate just one-third the deaths and accidents caused because the driver did not see a pedestrian behind him, the statistics are dramatic: the seven-year delay of a regulation required by Congress to be implemented by 2011 means that up to 35,000 people were injured and an estimated 500 persons needlessly died in the intervening years.”

“The Food and Drug Administration is considering requiring food makers to report added sugars on the Nutrition Facts label, a move that would provide much needed information to consumers about the amount of sugar that has been added to their food....If enacted the rule could lead to better health outcomes because of both changes in consumer behavior and manufacturing practices. Such changes could mitigate Americans’ sugar overconsumption and lower their risks for diabetes, cardiovascular disease, and other adverse health effects.”

- Andrew Rosenberg, Ph.D., Director, Center for Science and Democracy, [undated]

### United States Chamber of Commerce



“As the world’s largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, the Chamber has been actively involved in analyzing—and raising concerns about—the long-term impacts from regulations.”

“The Chamber recognizes that regulations are essential for maintaining the health, safety, and prosperity of our society. It is essential, however, that agencies use adequate data to support new regulations, that they fully evaluate the impacts their rules have on people and communities, and that they hold themselves accountable to the people and Congress.”

“Agencies now routinely ignore or downplay the procedural requirements that apply to them. They fail to adequately explain why a new rule is needed. They make entirely unrealistic assumptions about the cost of new mandates and the ability of regulated parties to pay those costs or obtain bank loans. They ignore data that contradicts their preferred policy choice. They ignore less burdensome alternatives. They rely on inflated benefits estimates to offset high costs in their cost-benefit analyses.”

- Thomas J. Donahue, President and CEO, April 17, 2015

United Steelworkers (United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union)

“Our union is the largest industrial union in North America. We represent 850,000 workers in the US and Canada, in sectors across the economy including metals, rubber, chemicals, paper, oil refining, plus the service and public sectors.”

“For our members, regulations protect the safety and health of our members at work, protect their rights to collective action, and allow them to live in safer, cleaner communities across the country.”

[Regarding OSHA silica rule] “Our members are exposed to silica in foundries, shipyards, and glass manufacturing....The passage of time and the advances in science and technology have rendered the 1971 standard weak and inadequate to properly protect worker health....Unfortunately, the updated silica standard is a classic example of delays in the regulatory process that cost lives.”

- Anna Fendley, Legislative Representative, May 1, 2015

USTelecom

“USTelecom is the nation’s oldest and largest association for providers of wired communications, and the overwhelming majority of its members offer broadband in rural and urban areas across the United States.”

[Regarding Federal Communications Commission Title II regulation] “The imposition of 19<sup>th</sup> century railroad regulation on 21st century Internet is misguided policy that will harm

consumers, stifle innovation, and suppress investment. Indeed. By 1996 Congress has already repealed it for the traditional common carriers – rail carriers, motor carriers and air carriers – under the leadership of a Democratic Administration, House, and Senate.”

“Whether through the imposition of Title II common carrier regulations on broadband ISPs, or the continued application of outdated monopoly telephone regulations to the now-competitive voice market, such regulations hinder the national policy goals of broadband deployment and competition.”

- Walter B. McCormick, Jr., President and CEO, May 21, 2015

### Waterkeeper Alliance

“Founded in 1996, Waterkeeper Alliance is a global movement uniting more than 250 Waterkeeper Organizations around the world in shared vision for clean water and strong communities. In the United States, Waterkeepers working in 156 distinct watersheds combine firsthand knowledge of their waterways with an unwavering commitment to the rights of their communities and to the rule of law.”

“While the federal laws and regulations have been very effective in controlling pollution in many respects, many of our major waterways remain polluted, and by some indications pollution appears to be increasing.”

“Waterkeeper organizations all over the country have been responding to an increasing number of major spills into waterways from the fossil fuel industry, including the following: [a] one billion gallon coal ash spill into the Emory River from the Tennessee Valley Authority Kingston coal-fired power plant in Tennessee” and “[a] 50,000 gallon crude oil spill from a CSX train derailment and explosion that set the James River on fire and caused the evacuation of downtown Lynchburg, Virginia.”

- Marc Yaggi, Executive Director, April 17, 2015

**Appendix: Stakeholders' Responses to the Committee's Bipartisan Letter**



April 30, 2015

Senator Ron Johnson, Chairman  
Committee on Homeland Security  
and Government Affairs  
United States Senate  
340 Dirksen Building  
Washington, D.C. 20510

**Office of the President**

hbrock@aluminum.org

703.358.2980

Suite 800 1525 Wilson Boulevard  
Arlington, Virginia 22209

Dear Senator Johnson:

Thank you for the opportunity to provide input to the Committee on Homeland Security and Government Affairs regarding the impacts federal regulations have on American manufacturing. On behalf of 104 member companies we represent, the Aluminum Association applauds your leadership on this important issue.

Companies that manufacture and sell aluminum are an integral part of the nation's economy. The United States aluminum industry supports 670,000 jobs, generating \$152 billion in economic output – nearly 1% of U.S. Gross Domestic Product – and contributes more than \$6 billion in state and local revenue and another \$9 billion for the federal government. The industry is especially proud of the fact that the average wage in the aluminum industry nationwide is \$60,800 per year – well above the national average of \$43,000.

Aluminum is one of the few products and industries left in America that truly impacts every community in the country, either through physical plants and facilities, recycling, heavy industry, or consumption of consumer goods. In terms of both its positive economic and environmental impact, the aluminum industry remains one of our most significant national and international success stories.

The domestic primary aluminum industry was the largest in the world until the 1990s, but due to global market forces and burdensome domestic federal regulation, it has declined significantly. In contrast, projected increases in the use of aluminum to lightweight vehicles, combined with stable demand in all other major markets, is leading to unprecedented demand growth for aluminum in the United States. To meet this future demand, it is imperative that we have reasonable and efficient regulations what will allow us to continue to produce in the United States.

Among the aluminum industry's concerns are specific impacts associated with the Environmental Protection Agency's Chemical Data Reporting Rule, and longstanding concerns regarding air permitting for large stationary sources. These two federal regulations pose a great threat to the aluminum industry's ability to operate in a cost effective manor, putting thousands of American jobs at risk. Per your request, below are two examples of existing federal regulations which should be more efficient in order to benefit the environment and human health.

#### **TSCA Chemical Data Reporting**

*Rules for chemical reporting have resulted in massive waste of industry and agency effort, in order to disclose data that is already publically available, for aluminum products which have been determined to be safe and well regulated.*





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The Aluminum industry has engaged EPA in a 12 year dialogue to utilize the partial reporting exemption process to improve Chemical Data Reporting. The exemption petition process is a tool meant to improve the usefulness and efficiency of reporting by cutting down on needless and burdensome reporting of information that is of low or no importance to human health or ecological toxicity. EPA's criteria for reporting were first published in 2002, and have not been revised. In the case of aluminum and aluminum oxide, the EPA, after an 8-year deliberation process, denied exemption under the rationale "the information needs of EPA."

The reporting burden for even "low current interest" substances has only increased since the EPA began collecting data, and except for a small cohort of substances, nothing has been removed from the list of reportable chemicals. New requirements introduced in 2011, when the Inventory Update Rule was revised and re-deployed as the Chemical Data Reporting rule, expanded the burden for aluminum producers. These new rules introduced irrational requirements which make the data collected inaccurate through double counting of aluminum in several processes. The industry has documented this double counting to EPA, but the agency has taken no action to clarify or correct these issues.

At this point, the aluminum industry has expended thousands of hours and millions of dollars complying with a data reporting requirement for which the EPA has no clear justification. The Aluminum industry supports efforts to reform the Toxic Chemicals Act, and we seek further oversight to ensure that these burdensome data reporting requirements are made more efficient.

#### **Air Permitting for Aluminum Facilities**

*State implementation plans and conflicting federal statutes result in a regulatory patchwork of requirements which culminate in permitting processes that drag out into years-long negotiations. The regulatory uncertainty resulting from the process has a chilling effect on investment.*

Well documented overlap between federal statutes and state plans, especially in the area of air permitting, has complicated the approval process for aluminum smelters and remelters. Our members can provide facility-specific examples of permitting application processes that are taking years to complete. Our industry supports fully transparent rulemaking and permitting processes, but conflicts between overlapping and redundant regulation should not result in regulatory limbo for U.S. manufacturers. Federal efforts to address permitting reform should look beyond greenfield permitting, to also streamline the process for existing facilities.

Our industry is a global one – and will provide the materials for tomorrow's more energy efficient buildings and automobiles. However, we need efficient and effective regulation to ensure that our products can be made with aluminum manufactured in the U.S., and that our members can continue to invest in the domestic economy.



**Office of the President**

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Suite 600 1525 Wilson Boulevard  
Arlington, Virginia 22209

Thank you for this opportunity to work with you to improve the regulations which affect the domestic aluminum industry. Please let me know if you need more information from our industry.

Sincerely,

Heidi Brock  
President and CEO  
The Aluminum Association

April 30, 2015

Via email: [josh\\_mcleod@hsgac.senate.gov](mailto:josh_mcleod@hsgac.senate.gov); [kata\\_sybenga@hsgac.senate.gov](mailto:kata_sybenga@hsgac.senate.gov)

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security and Governmental Affairs  
United States Senate  
Washington, DC 20510

The Honorable Thomas Carper  
Ranking Member  
Committee on Homeland Security and Governmental Affairs  
United States Senate  
Washington, DC 20510

Re: Comments on the U.S. Senate Committee on Homeland Security and Governmental Affairs' review of the impact of federal regulations.

Dear Chairman Johnson and Ranking Member Carper,

The American Association of Advertising Agencies, Association of National Advertisers, and Interactive Advertising Bureau (collectively "we" or the "undersigned associations") appreciate the opportunity to provide our views in response to the U.S. Senate Committee on Homeland Security and Governmental Affairs' ("Committee") review of the impact of federal regulations. In conducting this review, we encourage the Committee to consider the tremendous value created by online advertising for both consumers and the economy and the impact that self-regulation has on consumer privacy.

The undersigned associations believe that the appropriate approach to address consumer online privacy is through industry self-regulation and education. Existing and emerging robust self-regulatory principles address privacy concerns while ensuring that the Internet can thrive, thereby benefiting consumers and the U.S. economy. In contrast, attempts to develop "one size fits all" consumer privacy legislation and broaden FTC regulatory discretion will hinder U.S. competitiveness.

**I. Online advertising generates a significant consumer and economic benefit.**

For almost two decades, online advertising has been an economic driver that has fueled Internet growth and delivered innovative tools and services used by consumers and business to connect, communicate, and contribute to the continued evolution of the Internet. This advertising-based model continues to drive Internet growth and deliver consumer benefit. According to a September 2012 study entitled Economic Value of the Advertising-Supported Internet Ecosystem conducted for the Interactive Advertising Bureau by Harvard Business School Professor John Deighton, between 2007 and 2011, a period when U.S. civilian employment remained flat, the number of jobs that rely on the U.S. ad-supported internet doubled to 5.1 million. The study found that the ad-supported digital industry directly employs 2 million Americans, and indirectly employs a further 3.1 million in other sectors.<sup>1</sup>

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<sup>1</sup> Deighton, Economic Value of Advertising-Supported Internet Ecosystem, (September 2012), available at [http://www.iab.net/media/file/iab\\_Report\\_September-24-2012\\_4clr\\_v1.pdf](http://www.iab.net/media/file/iab_Report_September-24-2012_4clr_v1.pdf).



Calculating against those figures, the interactive marketing industry contributed \$530 billion to the U.S. economy in 2011, also close to double figures from 2007 that placed it at \$300 billion. The study, designed to provide a comprehensive review of the entire Internet economy and answer questions about its size, what comprises it, and the economic and social benefits Americans derive from it, revealed key findings that analyze the economic importance, as well as the social benefits, of the Internet.

The revenue generated by online advertising supports the creation and entry of new businesses, communication channels (*e.g.*, micro-blogging sites and social networks), and free or low-cost services and products (*e.g.*, email, photo sharing sites, weather, news, and entertainment media). Online advertising enables consumers to compare prices, learn about products, and find out about new and local opportunities. Additionally, the Internet empowers small businesses, enabling them to flourish and compete where costs would otherwise hinder their entry into the market. Consumers value the tremendous benefit that they gain from such ad-supported services and products and from the diversity of online companies.

**II. We believe the current U.S. regulatory approach strikes the right balance, and that online advertising can be successfully addressed under current privacy frameworks.**

Because of the importance of online advertising for consumers and the economy, as well as the rapid pace of innovation in this industry, it is essential for the government to exercise caution when considering regulation of data practices. The U.S. approach to regulating data practices is primarily “sector-specific.” Targeted laws have been enacted (and continue to be considered by Congress) in areas where unauthorized or inappropriate use of data could cause concrete harms to consumers. These laws include the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act, and the Health Insurance Portability and Accountability Act. These laws are rooted in the longstanding Fair Information Practice Principles, and focus on preventing identifiable harms to consumers that could occur through misuse of certain types of information. The Federal Trade Commission (FTC) also exercises its authority under the federal prohibition against unfair or deceptive acts or practices to address privacy and data security issues that it perceives as harmful to consumers. Additionally, there are state laws that prohibit unfair or deceptive practices against consumers, and authorize state attorneys general to enforce them. The FTC and other federal and state agencies vigorously enforce these important consumer protection laws.

**III. Self-regulation addresses concerns with online advertising.**

Existing consumer protection laws are complemented by robust, enforceable industry self-regulatory programs. As one example of this type of program, the undersigned associations, with other prominent trade associations, have led a successful effort to develop and implement a uniform choice mechanism with respect to interest-based advertising, based on a set of technology-neutral principles developed by the nation’s leading media, marketing and technology companies, known as the Digital Advertising Alliance (“DAA”). The DAA’s Advertising Option Icon and related website provide an easy-to-use choice option that gives consumers the ability to conveniently opt-out of some or all online behavioral ads delivered by companies participating in the self-regulatory program.<sup>2</sup> In 2011, the program expanded beyond the collection of data for interest based advertising purposes to cover all uses of web viewing data collected from a particular computer or device. This program is enforced through accountability mechanisms run by the Direct Marketing Association and the Council of Better

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<sup>2</sup> See The Program’s Consumer Choice Page, available at <http://www.aboutads.info/choices>.



Business Bureaus. Industry stakeholders continue to adapt this self-regulatory program to respond to evolving technologies. Most recently, in 2013, the DAA issued guidance to inform companies about how the Self-Regulatory Principles apply to certain data practices in the mobile and other environments. There are numerous other self-regulatory programs that exist to guide privacy practices in relevant industries.

Given the complexity of today's online environment, companies need flexibility in how they communicate with their customers and must be able to tailor notices for the underlying technology involved and needs of their customers. Self-regulation strikes a measured balance by ensuring meaningful communication with consumers and providing companies flexibility in how they provide this information.

Building on the success of the Digital Advertising Alliance, in 2014 the undersigned associations developed the Trustworthy Accountability Group ("TAG") – a cross-industry accountability program to create transparency in the business relationships and transactions that undergird the digital advertising industry. TAG was created with a focus on four core areas: eliminating fraudulent digital advertising traffic, combating malware, fighting ad-supported Internet piracy to promote brand integrity, and promoting brand safety through greater transparency. In less than six months TAG has made significant progress towards eliminating bad actors in the digital advertising supply chain, including through the creation of an information sharing partnership between industry and the FBI to combat malware.

#### **IV. There is no need for new "one size fits all" consumer privacy legislation.**

As discussed above, the undersigned associations believe that existing privacy frameworks, as implemented through the current combination of sector-specific laws and robust self-regulation, are sufficient to address privacy issues relating to online advertising. Accordingly, there is no need for new consumer privacy legislation that would apply "one size fits all" restrictions across industries and data practices.

In February 2015, the Administration released a discussion draft of the Consumer Privacy Bill of Rights Act of 2015, its legislative proposal that would enshrine elements of the Administration's 2012 Consumer Privacy Bill of Rights into law. The proposal addresses the collection, sharing, and use of personal data by covered entities, individual access to and control of personal data, and the security measures that covered entities must adopt to protect personal data. It also would develop a safe harbor through enforceable codes of conduct. Legislation is, by its nature, inflexible and prescriptive. Imposing new legislative mandates, such as the Consumer Privacy Bill of Rights Act, that apply across industries would strike a severe blow to U.S. innovation and competitiveness. The adoption of monolithic restrictions would threaten both the economic benefits and consumer satisfaction that come from beneficial data uses.

In particular, the undersigned associations are concerned that legislation should not establish prescriptive requirements for when or how consumer notice and control should be provided. While we are committed to promoting consumer transparency and control related to data practices, the Administration's Consumer Privacy Bill of Rights and other specific legislative mandates in this area would thwart innovation and ultimately disadvantage consumers by reducing companies' ability to communicate effectively with their customers. For example, the explosive growth of the "Internet of Things" sector illustrates how quickly prescriptive notice and control requirements can become obsolete and meaningless as technology evolves at a rapid pace. Notice and control issues can be most effectively

addressed through industry self-regulation, which can more easily adapt and respond to changes in technology and consumer expectations as evidenced by the DAA and TAG.

**V. There is no need for broader FTC regulatory discretion.**

Decades ago Congress determined the Federal Trade Commission ("FTC") had repeatedly overstepped its regulatory authority. In response, procedural safeguards were imposed that require the FTC to use the notice-and-comment rulemaking procedures followed by most federal agencies and provide enhanced safeguards, including more public input opportunities when the FTC seeks to outlaw specific acts or practices as "unfair" or "deceptive." These procedures have improved the quality of agency decision-making and increase public accountability and support.

Despite the success of this procedure, the FTC has continually sought the removal of existing checks on the FTC's enforcement powers. While we support the FTC's mission to prevent and punish unfair and deceptive acts or practices, we believe that the current limits on the FTC's discretion are appropriate given the significant consequences of any enforcement action for a targeted company and its shareholders and employees.

\* \* \*

We thank you for the opportunity to offer our comments and we look forward to continuing to work with you as the Committee reviews the impact of federal regulations. Please contact Mike Zaneis at [mike@iab.net](mailto:mike@iab.net) with any questions.

Sincerely,

American Association of Advertising Agencies  
Association of National Advertisers  
Interactive Advertising Bureau

Cc: The Honorable James Lankford  
The Honorable Heidi Heitkamp



**MICHAEL P. WALLS**  
VICE PRESIDENT  
REGULATORY & TECHNICAL AFFAIRS

April 30, 2015

The Honorable Ron Johnson  
Chairman, Committee on Homeland  
Security and Governmental Affairs  
United States Senate  
Washington, DC 20510

The Honorable Thomas R. Carper  
Ranking Member, Committee on Homeland  
Security and Governmental Affairs  
United States Senate  
Washington, DC 20510

The Honorable James Lankford  
Chairman, Subcommittee on Regulatory  
Affairs and Federal Management  
Committee on Homeland Security and  
Governmental Affairs  
United States Senate  
Washington, DC 20510

The Honorable Heidi Heitkamp  
Ranking Member, Subcommittee on Regulatory  
Affairs and Federal Management  
Committee on Homeland Security and  
Governmental Affairs  
United States Senate  
Washington, DC 20510

Dear Chairman Johnson, Ranking Member Carper, Chairman Lankford, and Ranking Member Heitkamp:

On behalf of the American Chemistry Council (ACC), I appreciate the opportunity to respond to your letter of March 18, 2015, soliciting ACC's views on specific regulations of concern and on the federal regulatory process.

ACC is America's oldest trade association of its kind, representing companies engaged in the business of chemistry—an innovative, \$812 billion enterprise that is helping solve the biggest challenges facing our nation and the world. The products of chemistry will make it possible to satisfy a growing world population by providing a healthy and plentiful food supply, clean air and water, safe living conditions, efficient and affordable energy sources and lifesaving medical treatments in communities around the globe. To enable these ongoing innovations, ACC supports public policies that will drive creation of groundbreaking products that improve lives and our environment, enhance the economic vitality of communities and protect public health.

ACC appreciates the priority the Committee has given to improving the federal regulatory system. We acknowledge that federal regulations provide substantial benefits to the country and its citizens, including an important measure of certainty to the regulated community. These benefits, however, are not distributed evenly across all regulatory programs. The cost of regulation is also significant and growing. The big challenge in

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modernizing regulation is determining which of the many reform proposals are most likely to reduce regulatory burden while maintaining or increasing public benefits.

To navigate this challenge, ACC believes that focusing attention on three key areas would help the Committee and stakeholders better target their efforts on meaningful change. Progress in these areas would help reduce opportunity costs associated with regulation.

“Opportunity cost” in the context of regulation refers to the lost opportunities from taking any particular regulatory approach. Opportunity cost is central in the Office of Management and Budget’s (OMB’s) guidance to regulatory agencies.<sup>1</sup> For example, mandating a particular compliance pathway precludes alternative compliance pathways that may be more or less costly. Requiring organizations conducting research and development (R&D) to comply with a regulation diverts resources away from innovation that directly increases productivity. In both cases, according to OMB guidance, regulators have an obligation to choose the regulatory alternative that maximizes net benefits, and thereby minimizes opportunity cost. Importantly, the opportunity cost of a regulation may change over time due to evolving circumstances, development of new technology, and the like.

ACC is acutely aware of the opportunity cost associated with federal regulatory programs designed to manage the risk posed by chemical products in commerce. The Government Accountability Office (GAO) included two such programs on its high-risk list: the Toxic Substances Control Act and the Environmental Protection Agency’s Integrated Risk Information System. We are actively involved in efforts to modernize both, with the aim of reducing opportunity costs.

With this theme in mind, we suggest that the Committee consider a “roadmap” for improving the federal regulatory process that includes three elements: (1) legislation to modernize the regulatory process, (2) oversight of the Obama Administration’s smart regulation initiatives, and (3) capacity building in Congress on regulatory matters.

#### Legislation to Modernize Regulation

Legislation to modernize the regulatory process is clearly within the Committee’s jurisdiction. Two good examples include streamlining the federal permit process and institutionalizing retrospective review.

We are very pleased that the Committee is considering legislation to streamline the federal permit process for major infrastructure projects. Economists point out that for every \$1 billion spent on infrastructure, more than 25,000 jobs are created. It stands to reason that delays in federal permitting delay job creation. Unfortunately, federal permit decisions can

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<sup>1</sup> See, e.g., Office of Management and Budget, Circular A-4, September 17, 2003 (estimating opportunity cost in the analysis of the benefits and costs of different regulatory provisions).

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take many years, especially for complex projects. It is appropriate for the Committee to focus on this issue because the cost of delay – the cost of delayed or lost opportunity – is extremely high.

At least two bills have been introduced in Congress to advance retrospective reviews of regulatory programs. Both would mandate the creation of a bipartisan commission that would develop a package of regulatory reforms subject to an up-or-down vote by Congress. Unlike the Administration's retrospective review process, which is agency-driven, these legislative proposals would put Congress in the driver's seat. This is appropriate because every regulation has its origin in statutes drafted by Congress, and because an agency could be biased toward its own regulations.

Should the Committee consider this legislation, we recommend considering a focus on replacing overly prescriptive standards with performance standards where appropriate. By definition, a performance standard will achieve a particular regulatory objective at less cost. The regulated community is often frustrated when a regulatory agency chooses a very narrow compliance pathway while ignoring a wide array of cost-effective alternatives – an all-too-common situation.

#### Committee Oversight of “Smart Regulation” Initiatives

ACC also suggests that the Committee exercise greater oversight of the Obama Administration's three “smart regulation” initiatives:

- Permit streamlining for selected infrastructure projects
- Retrospective review plans developed by regulatory agencies
- International regulatory cooperation (through trade agreements such as the Trans-Pacific Partnership, the Trans-Atlantic Trade and Investment Partnership, and ongoing implementation of the North American Free Trade Agreement)

Each of these initiatives is positive (and garnered support from the President's Council on Jobs and Competitiveness), but the results to date have been rather modest. More can and should be done. Congressional oversight of these initiatives should focus on a central question: How will the Administration ensure that these initiatives are institutionalized post-2016? It is evident that lasting progress in regulatory review and reform can only be made over the long-term, across multiple administrations. Congressional involvement can only help increase the public benefits of these initiatives and, we suggest, is necessary.

#### Enhanced Congressional Capacity on Regulation

ACC also believes there is great value in building greater capacity within Congress on regulatory issues. The Committee has taken a substantial step toward this objective already by reorganizing to focus greater attention on regulatory matters. We applaud this development.

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Other actions by the Committee and Congress can also advance regulatory reform. For example, the Congressional Budget Office (CBO) ought to have expertise in cost-benefit analysis of major regulations (to counterbalance the role of OMB in the executive branch). Congress is likely to have greater confidence in a CBO estimate than an executive branch estimate of the costs and benefits of a major regulation; CBO could offer a welcome check on agency-derived numbers.

Most importantly, Congress should scrutinize more carefully the regulatory authority delegated to agencies in authorizing statutes. Many of the most significant regulatory issues today derive from statutory mandates, not agency discretion. For example, the Clean Air Act mandates a five-year review of the National Ambient Air Quality Standard (NAAQS) for ozone, where cost can play no role in the setting of the standard. Because of such mandates, any reform must necessarily originate in Congress.

Taken together, ACC's three suggestions provide a path toward modernizing regulation that can garner bipartisan support and stakeholder consensus. We urge you to consider taking this path; we look forward to working with you and your staff on this important initiative.

As suggested in your March 18, 2015 letter, we are also submitting a list of regulatory programs that have had a significant impact on the business of chemistry (attached).

Thank you again for the opportunity to comment on these issues. If you would like additional information on any of our recommendations in this letter, please feel free to contact me at 202 249 6400, or [mike\\_walls@americanchemistry.com](mailto:mike_walls@americanchemistry.com).

Sincerely,



Michael P. Walls  
Vice President  
Regulatory and Technical Affairs

Attachment

## Existing and Proposed Regulations with an Impact on the Chemical Industry

The American Chemistry Council (ACC) appreciates the opportunity provided by the Committee to identify specific regulations of concern. This submission complements our response to the March 18<sup>th</sup> letter from the Committee. In our response, we urged Congress to change authorizing statutes, exercise greater oversight of the Administration's regulatory initiatives, and build greater capacity/expertise on regulatory issues. In this submission, we provide specific examples of regulations and regulatory programs that would benefit from such actions by Congress.

### Change Authorizing Statutes

The Committee has held hearings featuring experts in regulation. These experts have emphasized that regulatory agencies are constrained by authorizing statutes and, in many cases, changes in such statutes are necessary to reform problematic regulations. The following examples illustrate the value of statutory changes to improve regulation.

Permit Streamlining. The Committee is considering legislation to streamline the federal permit process by focusing on large, complex infrastructure projects, often involving multiple federal agencies and crossing statutory boundaries. For such projects, it is appropriate that Congress consider changes to authorizing statutes to ensure that permit applications are acted upon in reasonable timeframes.

Retrospective Review. For a variety of reasons, including statutory mandates, the priority of regulatory agencies is new regulation; review of existing regulation receives relatively little attention. Two bills in Congress would establish a politically appointed commission to develop a package of regulations for elimination or modification, subject to an up-or-down vote. Such an approach to retrospective review is deserving of consideration by the Committee.

TSCA Reform. When the Toxic Substances Control Act (TSCA) was enacted in 1976, it focused Environmental Protection Agency (EPA) review on new chemicals in commerce. Although the new chemicals program has worked well, EPA has languished in its review and evaluation of "existing chemicals"—chemicals that were in commerce when TSCA was first implemented. The Government Accountability Office (GAO) has been critical of this state of affairs; it has included TSCA on its High-Risk List of federal programs. Legislation currently before Congress would focus EPA attention on existing chemicals to ensure that all chemicals meet a science-based safety standard. ACC supports modernization of TSCA.

Clean Air Act NAAQS. The Clean Air Act (CAA) requires that EPA review and revisit the national ambient air quality standard (NAAQS) for ozone and certain other pollutants every five years. In setting the standard, EPA is not to consider cost, ongoing progress in lowering ozone concentrations, or the decades-long process states undertake to control

for ozone pollution. These statutory constraints limit EPA's ability to respond to concerns from states, which differ in their ability to control ozone due to unique circumstances that differ by geography. Congress can and should revisit these statutory requirements to ensure continued progress in reducing air pollution at the lowest cost.

EPA NAAQS SIP Calls. In addition, EPA currently is engaged in a rulemaking that would declare existing State Implementation Plans (SIPs) of 38 states "substantially inadequate" to meet NAAQS or otherwise meet requirements of the Clean Air Act, pursuant to CAA § 110(k)(5). These "SIP Calls" would require states to change their SIPs so that all exceedances of emission limitations during startup, shutdown and malfunctions events will be treated as violations of the Clean Air Act, even when those excess emissions are unavoidable despite the proper design, maintenance, and operation of the source. EPA has not made any demonstration that changing the treatment of SSM events in SIPs would improve the ability of a state to meet a NAAQS. Instead, the primary effect of the SSM SIP changes would be to penalize companies that have taken all reasonable steps to comply and minimize their emissions.

EPA's SIP Call rulemaking will divert limited state resources away from needed air regulatory efforts to the revision of SIPs that will produce little or no environmental benefit. Likewise, EPA will have to spend its time reviewing these SSM-related SIP revisions, at a time when EPA already has a backlog of over 650 SIP revisions awaiting review. The diversion of state resources to unproductive efforts will result in increased processing times for state permitting actions necessary for businesses to expand production capacity, improve productivity, implement pollution reduction measures, and so on. EPA should abandon this regulatory activity, and focus its efforts on working with states' limited resources to achieve the greatest environmental benefit.

OSHA PELs. The Occupational Safety and Health Administration (OSHA) is currently seeking public suggestions on modernizing its permissible exposure limits (PELs) for chemicals in the workplace. As OSHA makes clear in a recent Federal Register notice, the agency is constrained by statute and has not been able to update its PELs for decades, even though new scientific information and advances in the science of risk assessment compel change. OSHA can and should take appropriate actions within its authority to update PELs (and ACC has made recommendations to accomplish this), but Congress also has an obligation to consider and eliminate statutory constraints when regulations are in need of modernization.

### **Exercise Greater Oversight of Administration Regulatory Initiatives**

The Obama Administration has undertaken three initiatives to reform regulation: retrospective review of existing regulations, international regulatory cooperation to lessen trade barriers, and permit streamlining for infrastructure projects. Although we support each initiative in concept, we are disappointed in the Administration's effort (too little) and results (too modest). The Committee can and should exercise greater oversight of these initiatives and press the Administration to do more. Special attention should be paid to institutionalizing each initiative through enactment of legislation (such as that



described in the previous section). Otherwise, these promising initiatives may end when a new President takes office.

Aside from these ongoing Administration initiatives that focus on existing regulations and regulatory programs, federal agencies continue to propose new regulations at a high rate (approximately 3,500 per year). Keeping up with new regulatory requirements is challenging. Representing a sector of the economy that is highly regulated, ACC is continuously working with our member companies and federal agencies to address concerns with pending regulations.

Retrospective Review. The Administration has required each agency to develop a retrospective review plan listing existing regulations in need of elimination or improvement and updating this list twice per year. The most recent update is from March 15<sup>th</sup>. We recommend changes to these plans to address the following concerns.

EPA's retrospective review plan includes an entry for "modernizing science and technology methods in the chemical regulation arena: reducing whole animal testing, reducing costs and burdens, and improving efficiencies." ACC supports the inclusion of this reform, but we note a lack of specifics as to which requirements will be changed and when. EPA's plan includes no timetable by which a third party could measure progress. Absent specifics, EPA's entry is merely hortatory. The Agency should revise this entry to be more concrete.

ACC is pleased to see that EPA included in its retrospective review plan a new compliance option—use of an optical gas imaging instrument—for meeting Clean Air Act requirements for leak detection and repair (LDAR). Unfortunately, the timeframe the Agency identified to adopt such an option is too long; EPA can and should move more quickly to add this compliance option. We note with irony that EPA enforcement personnel utilize advanced monitoring techniques (such as the use of optical gas imaging devices) to detect leaks and then cite facilities for noncompliance. As EPA continues to review NESHAP and New Source Performance Standard (NSPS) rules, it can and should include provisions for facilities to use advanced monitoring equipment for compliance.

Many federal regulatory programs are designed to reduce risk to human health, safety, and the environment. Unfortunately, many of these regulatory programs are in need of modernization. EPA's Integrated Risk Information System (IRIS), for example, is on the GAO High-Risk List because the Agency is unable to develop and update chemical-specific risk information in any reasonable period of time. One solution to this problem would be to leverage non-governmental resources to speed the process while adhering to the highest scientific standards. Although EPA has recently initiated reforms to address concerns expressed by the National Academy of Sciences, the reforms do not go far enough and are not likely to meet the needs of users of IRIS information. EPA ought to add IRIS reform to its retrospective review plan.

EPA ought to add its electronic reporting tool (ERT) to its retrospective review plan. Within the Agency's air program, certain reports must be filed electronically. However,

the current ERT is deficient for two reasons. (1) It is a Microsoft Access program, whereas the vast majority of facilities utilize Microsoft Excel spreadsheets for managing emission data. (2) It does not support a number of test methods; in such cases, facilities and laboratories must continue to submit paper copies. We recommend that EPA develop an ERT that utilizes Excel as the foundation. Furthermore, EPA should work with facilities to streamline data collection and submission.

We recommend that EPA include reform of its National Emission Inventory (NEI) in its retrospective review plan. The NEI is a comprehensive and detailed estimate of both criteria and hazardous air pollutants from all air emissions sources. The NEI is based primarily upon emission estimates and emission model inputs provided by state, local, and tribal air agencies for sources in their jurisdictions, and supplemented by data developed by the EPA. Unfortunately, information in the database is often in error, and sources associated with the emissions do not have the ability to correct information that may have changed, such as the owner/operator of the facility. To reform the NEI, the Agency should consider its electronic Greenhouse Gas Reporting Tool (e-GGRT) as a model. The e-GGRT database features a portal for facilities to directly report required emissions data. The tool was developed in collaboration with the reporting facilities, and EPA can securely communicate with each facility's designated representative as necessary.

We recommend that EPA include reform of its emergency contact information under the RCRA hazardous waste regulations at 40 CFR 264.52(d) and 40 CFR 265.52(d). Currently, EPA requires names, office and home phone numbers, and addresses for persons designated as emergency response coordinators and alternates. ACC believes that with current technologies (e.g. cell phones and pager systems), names, home addresses, and home telephone numbers for those facility individuals designated as emergency coordinators and alternates should no longer be required, particularly with regards to the personal privacy and security of those individuals.

Over the past few years, EPA has completed a number of Risk and Technology Reviews (RTR) rules that apply to the chemical industry. For all of these RTR rules, EPA has added a burdensome new requirement relating to the use of pressure relief devices (PRDs), and has essentially prohibited any PRD from discharging to the atmosphere. PRDs play an essential role in ensuring the safety of a chemical plant. PRDs are designed and installed to prevent equipment from exceeding maximum allowable working pressures during upset conditions. Under the rules, EPA is asking plant operators to choose either to allow the release to occur resulting in a violation, or prevent the release, thus creating the potential for a catastrophic breach that will endanger safety. Rather than impose burdensome requirements on facilities, EPA should first have to justify such requirements with data demonstrating a clear need as well as a comprehensive cost-benefit analysis.

The HHS retrospective review plan does not include reform of the NIEHS Report on Carcinogens (RoC), a decades-old statutory mandated report that is based on procedures that fall short of meeting current scientific standards for data evaluation and weight of evidence determinations. In addition, the report fails to comport with a statutory mandate

to describe the nature of exposures of concern and the number of people exposed to levels of concern. HHS ought to add reform of the RoC to its retrospective review plan.

We would be remiss if we did not point out a serious deficiency in the agency plans for retrospective review: they are written on spreadsheets in a type size that is impossible for someone with 20/20 vision to read without the aid of magnification. We find it telling that the Administration encourages public input yet issues its agency plans in a manner that discourages public comment.

International Regulatory Cooperation. The Obama Administration is seeking changes to existing regulations in the context of international trade agreements: TPP and TTIP, and also ongoing implementation of NAFTA. ACC supports efforts to reform regulations that act as trade barriers. A few existing and/or pending regulations offer opportunities to reduce trade barriers, and we identify them here but note these could also be addressed via statutory changes and/or retrospective review.

- In 2012, OSHA finalized its hazard communication standard to ensure alignment with the Globally Harmonized System of Classification and Labeling of Chemicals (GHS). However, OSHA has not yet issued guidance to provide needed clarity to the regulated community about compliance. Such guidance is needed before industry can update labels as well as adopt practices and policies by the regulatory deadline of June 1, 2015. OSHA should issue such guidance as soon as possible to avoid creating enforcement issues that can easily be avoided. We urge the Committee to ask the Administration to issue this needed guidance and/or delay enforcement of requirements until such guidance is issued.
- The Department of Homeland Security (Customs and Border Protection) issued a ruling in 2009 on the residue (whether hazardous material or not) left inside transportation containers that are returning to the USA to be refilled after export movements. CBP claims it lacks statutory authority to set de minimis amounts that would exempt companies from having to manifest and enter “movements” of a residue material. CBP should reverse its 2009 ruling or else Congress should introduce and pass legislation to address this issue.

Permit Streamlining. The Administration has identified a few dozen major infrastructure projects in which it will lessen the time it takes to obtain a required federal permit. ACC members sometimes have difficulty obtaining timely agency approval of a federal permit for major construction projects (e.g., a Title V permit under the Clean Air Act). Streamlining the permit process where it makes sense to do so would provide greater certainty for business planning and investment. ACC supports legislation that would set reasonable timeframes for agency processing of submitted applications and for judicial review of agency decisions. In the absence of such legislation, the Committee should work with the Administration to expand its efforts to include more projects and to ensure continuity post-2016 (e.g., the creation of a permitting dashboard to track the status of submitted applications for major projects across all federal agencies, in accordance with the President’s budget request).

Pending Regulations. Existing regulations and programs impose opportunity costs on our members, and these three Administration initiatives could, if wisely directed, reduce the opportunity cost. New and pending regulations and regulatory programs also pose a significant challenge. In preparing this submission, we asked our members to identify specific examples to bring to the Committee's attention. The following examples illustrate the high opportunity cost associated with proposed regulations that are not designed with appropriate care.

- The Department of Interior (DOI) is in the process of developing its five-year leasing plan for the Outer Continental Shelf (OCS). Thanks to the natural gas production boom, the United States has become the most attractive country in the world to invest in chemical and plastics manufacturing. Natural gas supply constraints, especially in the OCS, could inhibit the chemical industry's continued expansion. For that reason, ACC supports an expanded 5-year leasing plan. The federal government has taken an important step by considering energy development in the Atlantic. DOI should also move forward with a robust leasing plan for the Gulf of Mexico, in particular the full Eastern Gulf planning area.
- The Department of Transportation (DOT) is finalizing new requirements that may hinder the ability of ACC members to move certain hazardous materials by railcar. The proposed rule is intended to reduce the risk of rail accidents involving crude oil, but the proposal would impose new tank car standards and operational requirements for a much larger universe of materials. ACC has asked DOT to deal first with crude oil and ethanol tank cars that move in high-volume unit-train configurations, which DOT has determined pose the greatest risk.
- The Department of Labor (OSHA) is pursuing a regulation that would require employers to develop and implement Illness and Injury Prevention Programs (I2P2). ACC favors a final rule that sets performance standards that can be met by a variety of well-designed and established voluntary programs. ACC opposes a final rule that is overly prescriptive and precludes well-designed and established programs.
- The Consumer Product Safety Commission has proposed a regulation that would ban certain phthalates, including di-isononyl phthalate (DINP), in toys and child care articles. The proposed rule is based upon a deeply flawed cumulative risk assessment conducted by the CPSC's Chronic Hazard Advisory Panel (CHAP). The CHAP based its recommendations on data nearly 10 years old that does not reflect current "likely" exposures and is not the "best available data" required under the Consumer Product Safety Improvement Act of 2008. ACC has urged CPSC to follow the OMB Peer Review Guidelines, pursuant to the Information Quality Act and the Paperwork Reduction Act, and subject the CHAP report to a public review where the serious flaws in the report could be addressed prior to the use of the report as the justification for regulatory decision-making.

ACC opposes a final rule based upon exposures that no longer exist, and opposes the use of a cumulative risk assessment to ban a chemical that has a negligible contribution to cumulative risk where other phthalates drive over 99% of the risk. In essence, the CPSC seeks to ban DINP because using outdated exposure data

from 2005-06, DINP in combination with a phthalate (now permanently banned in toys and child care articles) that the CPSC has determined alone exceeds the level of concern, DINP might have a negligible contribution to cumulative risk (of perhaps 1% under the old data).

### **Build Greater Capacity/Expertise in Congress on Regulatory Matters**

Congress can and should build greater capacity on regulatory matters. We recommend two actions. First, the Congressional Budget Office (CBO) should develop expertise in cost-benefit analysis, a tool that has a significant impact in the shaping of major regulations. Every President in recent memory has required regulatory agencies to undertake a cost-benefit analysis of each major rule to ensure the rule maximizes net benefits. ACC supports the use of cost-benefit analysis but remains concerned about the objectivity of a regulatory agency conducting analysis of its own rules. To ensure objectivity, we support OMB review of cost-benefit analysis, and we encourage Congress to develop its own expertise via CBO.

In addition, we recommend that GAO consider retaining expertise in chemical risk assessment (e.g., exposure assessment, toxicology). Because certain programs on the GAO High-Risk List (TSCA, IRIS), as well as other federal programs, rely centrally on chemical risk assessment, GAO expertise in this area is warranted.

Thank you for this opportunity to provide specific examples of regulations that could be improved through congressional action. ACC stands ready to assist the Committee in its efforts to advance reform.



*YOUR VOICE. YOUR RESOURCE. YOUR ASSOCIATION.*

April 29, 2015

Committee on Homeland Security and Governmental Affairs  
United States Senate  
340 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairmen Johnson and Lankford and Ranking Members Carper and Heitkamp,

On behalf of the approximately 3,000 U.S. companies using fiber reinforced polymer composites to manufacture a wide variety of important and beneficial products, the American Composites Manufacturers Association appreciates your March 18 request for information on regulations that have a real impact on our industry.

We take this opportunity to describe how certain EPA regulations and regulatory processes under the Clean Air Act (CAA) are harming our industry without providing any real improvement in the health and welfare of Americans.

\* \* \* \*

### **EPA's ambient ozone implementation burdens manufacturers but without health benefit**

As required by the CAA, at regular intervals EPA updates its ambient air quality standards for ozone, lead and other common air contaminants that can be harmful to health. For each pollutant, the agency then identifies those areas of the country that will be in "non-attainment" relative to the new ambient air quality standard, and requires state or local agencies to issue regulations aimed at improving air quality in these areas to the level proscribed by EPA.

For example, EPA revised its ambient air quality standard for ground level ozone in 2008, and just recently issued regulations requiring state and local authorities to address the higher ozone levels in the areas that are non-attainment. For these ozone non-attainment areas, state and local authorities are required by EPA to institute a variety of measures designed to reduce ambient ozone concentrations, including requirements for manufacturing operations to reduce the emissions of solvents and other "volatile organic compounds" that react in the atmosphere with sunlight to form ozone, further limitations on emissions from cars and trucks, and restricting the growth in local economies that may indirectly contribute to increased ozone concentrations.

There are many composites manufacturers with plants in areas that are in non-attainment for EPA's 2008 ozone standard. These companies will face increased regulatory pressures from state and local regulators, even though these operations are already highly controlled under other parts of the CAA, and are primarily smaller businesses with limited ability to further reduce emissions. This regulatory focus on manufacturing operations will occur even though most of the ozone typically comes from harder to regulate mobile sources (cars and trucks), or is "transported" from outside the non-attainment area. In many ozone non-attainment areas, all of the manufacturing



operations could be shut down without achieving any measureable reduction in ambient ozone concentrations.

State implementation of EPA requirements to address ozone concentrations in excess of its ambient air quality standard will cause considerable uncertainty for smaller manufacturers. Even when companies are able to show on a case-by-case basis that there are no feasible options for additional emission reductions, successfully making this showing can be an especially time-consuming and costly exercise for smaller companies.

### **An EPA attempt to reduce GHG emissions ignores long term impact**

In response to a White House initiative to reduce emissions of heat-trapping greenhouse gases, under the CAA's stratospheric ozone provisions EPA is proposing a short term phase out of a chemical called HFC-134a, which is used to manufacture light weight and durable insulating composite panels for refrigerated trucks. While EPA's plan would result in a modest short term reduction in the emission of this substance, the long term effect would be a significant increase in GHG releases.

The manufacture of refrigerated trucks and trailers using insulating composite panels produced using HFC-134a actually provides significant GHG reductions because these panels provide a much greater degree of insulation compared to available alternatives, meaning much less fuel is needed to operate the refrigeration units keeping the cargos cold. Second, these composite panels are lighter than the available alternatives, meaning it takes less fuel to drive the trucks. And finally, these durable composite panels provide much longer service life than the alternatives, saving the energy required to more frequently disassemble and dispose of trucks and trailers at the end of their service life.

The industry has proposed that EPA allow a longer phase-in period to allow the testing and qualification of replacements to HFC-134a. (This chemical is also used to provide flotation in composite recreational boats, a use that has safety implications and needs Coast Guard approval before changes can be made.) So far, however, EPA insists that the White House direction mandates short term GHG reductions regardless of the long term consequences.

\* \* \* \*

We suggest the Committee examine EPA's implementation of the relevant sections of the CAA and explore options for reducing the unproductive burdens and uncertainty placed on businesses, especially smaller manufacturers.

In addition to our concerns with the CAA described above, there is an underlying issue with the quality of federal science that should be kept in mind. As one of the hundreds of industries that are part of the chemical value chain, composites manufacturers and industry suppliers are directly impacted by the litany of different federal programs that assess and regulate the health and environmental hazards and risks of chemical use and exposure.

While the specific purpose of each program differs, they share a common goal of understanding actual concerns and promoting public health through high quality information. However, these programs fail to use a uniform standard for scientific practice, often using outdated techniques, taking short cuts and ignoring the full breadth of available data on a specific chemical. This often

Chairmen Johnson and Lankford and Ranking Members Carper and Heitkamp  
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programs fail to use a uniform standard for scientific practice, often using outdated techniques, taking short cuts and ignoring the full breadth of available data on a specific chemical. This often leads to conflicting information, creating a regulatory environment that is overly burdensome and difficult to navigate. Further, the lack of sound scientific study frequently results in assessments and regulations that are far too stringent, limiting the ability of companies to manufacture the highest quality products they can without providing any additional public health benefit.

When looking at the full picture of regulatory reform, the Committee should consider taking steps to implement a uniform standard for science that all assessment and regulatory programs must follow.

Thank you for considering our concerns. For more information, please contact John Schweitzer of ACMA's regulatory affairs staff, at 734.604.9095 or [jschweitzer@acmanet.org](mailto:jschweitzer@acmanet.org).

Sincerely,



Tom Dobbins  
President

cc:

Keith Ashdown - Majority Staff Director, Committee on Homeland Security and Governmental Affairs  
Gabrielle Batkin - Minority Staff Director, Committee on Homeland Security and Governmental Affairs  
John Cuaderes - Majority Staff Director, Subcommittee on Regulatory Affairs and Federal Management  
Eric Bursch - Minority Staff Director, Subcommittee on Regulatory Affairs and Federal Management





April 16, 2015

The Honorable Ron Johnson  
Chairman  
Senate Committee on Homeland  
Security and Governmental Affairs  
340 Senate Dirksen Office Building  
Washington, DC 20510

The Honorable Thomas R. Carper  
Ranking Member  
Senate Committee on Homeland  
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340 Senate Dirksen Office Building  
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The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs  
and Federal Management  
B40C Dirksen Senate Office Building  
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The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
and Federal Management  
502 Hart Senate Office Building  
Washington, DC 20510

Dear Chairman Johnson, Chairman Lankford, and Senators Carper and Heitkamp:

Thank you for your letter on March 18 in connection with your review of the impact of Federal regulations. American Farm Bureau Federation (AFBF) applauds your bipartisan effort. In particular, we commend your desire to understand the “real-world effects” of Federal regulations. Such a review is timely and, in our judgment, will permit policymakers to gain a greater appreciation for the very real effects Federal regulations have on farmers and ranchers, how farmers and ranchers respond to the demands of regulations and how those regulations affect agricultural producers in their efforts to produce food, fiber and fuel.

By way of assistance to your effort, I am including as an attachment with this letter a copy of material AFBF supplied to the House Committee on Government Reform and Oversight in 2011; at that time, the House Committee was engaged in a similar effort to your own and we were pleased to participate in that process as well. Federal regulations have an undeniable, long-lasting impact on farmers and ranchers and we support efforts to bring greater sense, flexibility and balance to develop a more rational approach to the Federal rulemaking process.

In our view, the Committee could not have chosen a more appropriate time to initiate such a review. Farmers and ranchers today are faced with an increasing array of regulatory demands and requirements that appear to be unprecedented in scope. We note that your letter asks us to “identify concerns with the regulatory process” as well as providing “a description of how specific rules affect” farmers and ranchers, as well as “rules that...merit attention by the Committee, along with a description of how the rules affect” our members. You also invite scrutiny of “older regulations that may warrant modification or even revocation.” We are pleased to respond to this inquiry, and stand ready to elaborate on any of the topics raised in this response with staff of the Committees. It appears that the request falls largely into two areas: process-related matters and substantive requirements of regulatory rules. We have attempted to organize our response along those lines.

Clearly this is a topic that could generate a response that could run to thousands of words. While we have attempted to cover a range of regulations that create real costs and substantive burdens to our members, the examples we cite should in no way be considered an exhaustive list. Federal regulations – as well as the state and local regulations that often flow from them – permeate virtually every phase of agricultural production. It would probably be the work of a lifetime to annotate all of the implications of Federal rules.

AFBF policy speaks to specific issues related to the regulatory process, as well as to specific regulations. As a general observation, our members believe that Federal regulations should respect property rights; be based on sound scientific data; be flexible enough to recognize varying local conditions; be transparent; and include an estimate of the costs and benefits associated with public and private sector compliance prior to being promulgated.

### Concerns with the Regulatory Process

Recent proposals have underscored how critical it is to reform and improve the rulemaking process. Above all, it is paramount that agencies

- be transparent in their proceedings;
- rely upon science that can be replicated and that is peer-reviewed;
- not assume authority not granted by Congress;
- provide ample opportunity for public and stakeholder input;
- not abuse the regulatory process; and
- adhere to judicial rulings that put clear limits on an agency's authority.

We cite below several instances where we believe Federal agencies have either abused the regulatory process or ignored Congressional intent in imposing regulatory obligations on farmers and ranchers. This list is illustrative, not exhaustive.

#### A. Water rights<sup>1</sup>

The U.S. Forest Service is engaged in an ongoing effort to encroach upon long-standing state water rights and expand its authority over water rights that – by tradition, law and court rulings – come under state authority. Beginning with an effort that was declared illegal and invalidated by a U.S. District Court – the USFS has sought to revise portions of the USFS Handbook, by which it would require permittees to surrender to the Federal government lawfully acquired state water rights in order to maintain access to Federal special use permits. While this effort has so far been targeted primarily at ski resorts, it has also been used to compromise the rights of cattlemen who graze on public lands in the West. Perhaps of most concern is that the agency has attempted to do this through directives and modifications to its handbook – not through the formal notice-and-comment procedure, which would provide affected stakeholders the opportunity to review, evaluate and comment on any changes that

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<sup>1</sup> Legislation addressing this issue passed the House of Representatives in the 113<sup>th</sup> Congress but was not taken up by the Senate. We understand this legislation will soon be reintroduced by Rep. Tipton in the House and by Senator Barrasso in the Senate.

could affect their rights.

#### B. Agricultural exemptions under the Clean Water Act

Last year, the EPA and the Army Corps of Engineers promulgated – effective immediately – an ‘interpretive rule’ whereby the agencies sought to limit rights of farmers and ranchers that were granted by Congress for normal agricultural activities. This “interpretive rule” (which, in the eyes of many legal experts, was in fact a regulatory rule that should have been subject to notice and comment) was so controversial that it was repealed by Congress last December.

#### C. Wetland delineations

Wetlands occur frequently on farmland and ranchland. Traditionally, wetlands have been determined by the presence of three criteria: hydrology (inundation or near-surface water for a set amount of time); hydric soils; and hydric vegetation. While disputes over the Army Corps of Engineers wetland manual are literally decades old, we have witnessed occasions in which Federal bureaucrats have sought, on their own, to modify the wetland characteristics, going from the traditional three-criteria evaluation to two or even one. Such a regulatory step has the effect of immediately imposing upon the landowner more restrictive requirements; potentially implicating Federal programs such as Sodbuster or Swampbuster; and potentially undermining the value of the land.

#### D. National Environmental Policy Act (NEPA)

As more than 40 years of experience with implementing NEPA have demonstrated, overly broad NEPA reviews can add significant and unreasonable costs and lengthy delays to projects and can, in turn, challenge the viability of projects that grow the economy, promote favorable environmental outcomes and further energy development at home. It is imperative that government programs impacting economic development in the U.S. – including NEPA - are implemented in a manner that supports and does not hinder growth.

The Council on Environmental Quality (CEQ) proposed Revised Draft Guidance for Federal Departments and Agencies Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews in December 2014. In group comments filed<sup>2</sup>, concerns were raised that the guidance goes beyond the scope of NEPA and would impose additional burdens on permitting agencies and significant delays on project applicants.

#### E. Endangered Species Act (ESA)

The Endangered Species Act (ESA) is one of the most far-reaching environmental statutes ever passed. It has been interpreted to put the interests of species above those of people, and through its prohibitions against “taking” of species it can restrict a wide range of human activity in areas where species exist or may possibly exist. The ESA can be potentially devastating for a landowner – and the extent of the problem can be large when it is noted that 70% of all listed species occur on private lands.

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<sup>2</sup> Please see attached NEPA comments

One of the most recent procedural problems occurred with the listing of the Northern Long-eared Bat. In publishing its species-specific 4(d) rule, the Fish and Wildlife Service has potentially called into question the legal activities of many farmers and ranchers. In its proposal last year, the agency was quite clear in noting that the bat's problems stem almost entirely from the prevalence of white-nose syndrome. But the FWS also mentioned pesticides as affecting the bat; yet when the Service published its 4(d) rule and exempted certain forestry and other activities, it made no mention whatsoever that normal, lawful pesticide applications would be covered by the provisions of the 4(d) rule. We are greatly concerned that the process the agency followed may subject farmers to potential legal liability – even when the activities in which they engage fully conform with the law.

#### A. Waters of the United States

The EPA and the Army Corps of Engineers are now engaged in a sweeping regulatory proposal that would redefine what constitutes a “water of the United States” (WOTUS), bringing with any such designation legal obligations and legal exposure to citizen lawsuits. While we deal with the substance of the proposed rule below, it is worth noting that the agency has received nearly 1 million comments on the proposal; of those, an estimated 20,000 or more of the filed comments were viewed as substantive – and of those substantive comments, over half opposed to the agencies’ proposal. Yet the agency appears to be little concerned with those substantive concerns and has just sent its final proposal to OMB for final inter-agency review. This is all the more bewildering because the Office of Advocacy with the Small Business Administration (SBA) filed formal comments with the agencies stating that “Advocacy believes that EPA and the Corps have improperly certified the proposed rule under the Regulatory Flexibility Act (RFA) because it would have direct, significant effects on small businesses. Advocacy recommends that the agencies withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking.”<sup>3</sup> We find it astonishing that the agencies intend to move forward on a rule that has raised bipartisan concerns in Congress and among other Federal agencies, and which has met with opposition from over half the states. Perhaps more than any other proposal, this entire proceeding amply demonstrates how agencies can ignore stakeholder input and even simple fairness when they have set their sights on expanding their regulatory reach.

In our judgment, a thorough Congressional oversight review of EPA’s conduct of this rulemaking is amply justified. We believe that, in many important respects, the agency has failed in its duty to conduct an impartial, fair rulemaking.

#### Substantive Regulatory Concerns

##### A. H-2A Regulations

The H-2A program permits agricultural producers who are unable to obtain domestic workers

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<sup>3</sup> See the Office of Advocacy’s letter at <https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act>.

the opportunity, under certain conditions, to obtain visas for foreign workers to come and perform work in the U.S. for a limited period of time. The genesis of the program dates to the 1950s, but its current statutory authorization stems from the Immigration Reform and Control Act of 1986. The statutory language is brief; the Department of Labor, however, has done everything in its power to make the program unusable by growers (see the attachment to the House Government Reform and Oversight Committee for one example). The program is inefficient, expensive, time-consuming and a hindrance to growers. DOL's abuse of its authority to administer the H-2A program alone would merit an investigation by your Committee.

#### B. EPA's Waters of the U.S. proposal

We discussed above procedural problems that have infected the EPA/Army Corps of Engineers proposal. Yet the substantive problems of the rule are even greater. Attached is a copy of an economic analysis of the WOTUS proposal prepared by David Sunding, Ph.D. It provides a detailed description of the impact this regulation will have on the regulated community.

#### C. EPA's proposal on ozone

EPA's proposal to tighten the National Ambient Air Quality Standards (NAAQS) for ozone has the potential to cause real and significant costs to farmers and ranchers and rural America while providing uncertain and unverified benefits. In comments filed both individually<sup>4</sup> and with a broader industry group<sup>5</sup>, AFBF identified significant concerns about the impact lower ozone standards will have on agriculture, rural communities, and the overall economy. Despite over three decades of cleaner air, EPA is now proposing a new stringent standard that would bring vast swaths of the country into nonattainment. These new stringent standards have the potential for damaging economic consequences across the entire economy and would place serious restrictions on farmers, increasing input costs for items like electricity, fuel, fertilizer and equipment. Further, as ozone standards are ratcheted down closer to levels that exist naturally, more farmers will be forced to abide by restrictions on equipment use and land management, making it harder to stay in business. EPA's own estimates show that a new ozone rule could cost tens of billions of dollars per year and has the potential to be the most costly regulation in our nation's history.

#### D. EPA's proposal on greenhouse gases

EPA's Clean Power Plan and regulations for new power plants create important questions about the reliability and affordability of electricity across the country. Farming and ranching are energy-intensive businesses. Farmers and ranchers depend on reliable, affordable sources of energy to run their daily operations, including using tractors and operating dairy barns, poultry houses and irrigation pumps. For many farmers that compete in a global economy, energy represents a major input cost that can ultimately determine viability and prosperity. In

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<sup>4</sup> Attach AFBF Comments

<sup>5</sup> Attach group Ozone Comments

comments<sup>6</sup> filed regarding EPA's GHG regulations, we raised serious concerns about the billions of dollars in cost on the U.S. economy that these regulations would impose while failing to meaningfully reduce CO<sub>2</sub> emissions on a global scale.

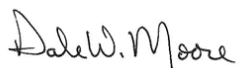
#### E. ESA

The Office of Management and Budget is currently reviewing two proposed regulations by the Fish and Wildlife Service governing the process for designating critical habitat under the ESA and the definition of "adverse modification" as applied in ESA, Section 7 consultations. The proposed rules depart from the limited scope and purpose intended by Congress by 1) allowing the agency to designate critical habitat based on speculative conditions, including designation of areas that do not have physical and biological features needed by the species; 2) allowing for broader designation of unoccupied areas as critical habitat; and (3) providing unfettered discretion to establish the scale of critical habitat—extending to landscape or watershed-based designations that do not look to whether all areas within the designation actually meet the criteria for designation as critical habitat. If finalized, these regulatory changes would grossly expand the scope of the ESA and provide the Service greater reach in critical habitat land designations that could have a significant negative impact on farmers' and ranchers' ability to maintain active farm and ranch operations on both private and Federal lands.

We would also urge the Committee to incorporate in its review consideration of legislative proposals that could address some of the above concerns. Such a review should include consideration of H.R. 185, the *Regulatory Accountability Act*; this legislation passed the House of Representatives on January 13 and is now pending before your Committee.

In closing, we commend the Committee for its work in this important area. We stand ready to work with you on substantive and procedural remedies that will alleviate the regulatory burden for farmers and ranchers.

Sincerely,



Dale Moore  
Executive Director  
Public Policy

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<sup>6</sup> Attach AFBF ESPS EGU Comments

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# Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States

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PREPARED FOR


The Waters Advocacy Coalition

PREPARED BY

David Sunding, Ph.D.

May 15, 2014

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This report was prepared for the Waters Advocacy Coalition. All results and any errors are the responsibility of the authors and do not represent the opinion of The Brattle Group, Inc. or its clients.

*Acknowledgement:* We acknowledge the valuable contributions of many individuals to this report and to the underlying analysis, including members of The Brattle Group for peer review.

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## Executive Summary

The Environmental Protection Agency's (EPA) March 2014 *Economic Analysis of Proposed Revised Definition of Waters of the United States* (EPA analysis) presents the agency's estimates of the probable costs and benefits associated with a definitional change to the term "waters of the United States" used throughout Clean Water Act (CWA) programs. EPA is proposing an expansion of the definition of the term "waters of the United States" to include categories of waters that were previously never regulated as waters of the United States, such as all waters in floodplains, riparian areas, and certain ditches. The inclusion of these waters will broaden the scope of the CWA and will increase the costs associated with each program. Unfortunately, the EPA analysis relies on a flawed methodology for estimating the extent of newly jurisdictional waters that systematically underestimates the impact of the definitional changes. This is compounded by the exclusion of several important types of costs and the use of a flawed benefits transfer methodology, which EPA uses to estimate the benefits of expanding jurisdiction. The errors, omissions, and lack of transparency in EPA's study are so severe as to render it virtually meaningless. The agency should withdraw the economic analysis and prepare an adequate study of this major change in the implementation of the CWA.

## I. Introduction

The March 2014 *Economic Analysis of Proposed Revised Definition of Waters of the United States* represents EPA's estimate of the economic impacts associated with a change in the scope of the waters regulated under the CWA. The analysis centers on the meaning of the term "waters of the United States," which determines whether the requirements of the federal CWA apply. After several landmark Supreme Court decisions rejected expansive federal jurisdiction, EPA produced several guidance documents explaining how the agency would proceed in making jurisdictional determinations in the CWA section 404 program. The guidance documents were not legally binding and created additional uncertainties about the scope of CWA jurisdiction.

Recently, EPA proposed a rule to revise the “waters of the United States” definition for all CWA programs (402, 401, 311, etc.). The draft rule, for the first time, includes a regulatory definition of “tributary” that explicitly includes many kinds of irrigation, storm water, roadside and other ditches. The draft rule also extends jurisdiction to “adjacent waters,” which includes, for the first time, adjacent non-wetlands. It also defines a new component of the “adjacent” definition—“neighboring.” The term “neighboring,” for the purposes of defining the term “adjacent” in the new rule, includes waters located within riparian and floodplain areas. The draft rule also defines “riparian areas” and “floodplain” for the first time. The new rule would also regulate all “other waters” if they have significant nexus, which would be determined on a case by case basis. EPA asserts that these changes would improve the clarity of the CWA and would expand environmental benefits by requiring additional compensatory mitigation for discharges of dredged or fill material into such waters. It also recognizes the possibility of increased costs to permit seekers and regulatory agencies, albeit for a very narrow range of potential actions. EPA’s economic analysis, which is required by law for a proposed rule change, outlines the economic impacts associated with a change in the definition of “waters of the United States.”

A threshold problem with EPA’s analysis is that it deals only with the “other waters” category of CWA jurisdiction. The economic analysis focuses on how jurisdiction might change for “isolated waters” that are not jurisdictional under the current CWA framework as a result of *SWANCC*, but are likely to become jurisdictional under an expanded definition of “other waters”. This would allow for jurisdiction over isolated areas that, when aggregated, are found to have a significant nexus to traditional navigable waters.

According to EPA’s analysis, “‘other waters’ is a regulatory term for wetlands and non-wetlands waters that do not fall into the category of waters susceptible to interstate commerce (e.g., ‘traditional navigable waters’ or TNWs), interstate waters, the territorial seas, tributaries, or waters adjacent to waters in one of the first four categories on this list.” As discussed in more detail below, to determine how jurisdiction would change for the “other waters” category, the U.S. Army Corps of Engineers (Corps) performed a sample review of 262 project files from the Corps’ ORM2 database “isolated waters” category. All of these 262 records are considered outside

the scope of CWA jurisdiction under current regulatory policies, but the agencies predicted that approximately 17% of these records would be subject to CWA jurisdiction under the new rule.<sup>1</sup> The agencies did not do a similar sample review to determine how jurisdiction might change for other jurisdictional categories of waters (i.e., tributaries and adjacent waters, as newly defined). EPA's Economic Analysis simply assumes that the small percentage of FY 2009-2010 ORM2 streams and wetlands records that are not jurisdictional under current regulatory policies (2% of streams and 1.5% of wetlands) would become jurisdictional under the new rule.

But the agencies' draft rule does much more than just expand the scope of the "other waters" category. As previously explained, it also includes several new categories of jurisdiction and new definitions for regulatory terms, which will result in regulation of new features and areas that are not jurisdictional or considered waters of the United States under the current CWA framework. These changes will sweep in many new areas yet EPA's analysis does not quantify or address this change.

This report provides an analysis of the calculations employed by EPA. In many cases, the lack of transparency and supporting documentation in EPA's analysis made the replication of calculations difficult. The following sections address the methodology behind the incremental acreage determination, the program cost calculations, and the benefit calculations.

## **II. EPA Cannot Accurately Quantify Increases in Jurisdiction by Using the Corps' ORM2 Database**

To quantify the increased extent to which EPA and the Corps will assert CWA jurisdiction as a result of the draft waters of the U.S. rule, EPA evaluated data records from FY 2009-2010 in the Corps' ORM2 (Operation and Maintenance Business Information Link, Regulatory Module) database. Although records from the Corps' internal ORM2 database are not available to the

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<sup>1</sup> Given the existing confusion regarding 404 jurisdiction that has been well documented, see GAO-04-297, it is questionable whether the assertion of jurisdiction by the Corps was consistent or accurate. Indeed, many have questioned existing assertions as overbroad.

public, we obtained a portion of the underlying ORM2 data used for these calculations through a Freedom of Information Act request. EPA's use of the ORM2 numbers to calculate how much the draft rule will increase CWA jurisdiction is problematic because the ORM2 database was not designed for this purpose and its data do not fit this exercise.

EPA cannot accurately quantify increases in jurisdiction by relying solely on the Corps' ORM2 database for several reasons. As is explained more fully below, the categories of ORM2 records do not marry up with the draft rule's categories of jurisdictional waters. In addition, the ORM2 data fail to capture the entire universe of areas that are jurisdictional under the current CWA framework because it only accounts for situations in which regulated entities engage in the section 404 jurisdictional determination or permitting process. Even for those instances where regulated entities engage in that process, the ORM2 database does not capture all aquatic resources on the subject parcel because the Corps focuses only on impacted areas and mitigation sites. Finally, because Corps staff is not required to fill in the "aquatic resource type" field in the ORM2 database, EPA failed to account for a large portion of records in its calculations of the increase in jurisdiction.

#### A. THE ORM2 RECORDS ARE NOT COMPATIBLE WITH THE DRAFT RULE'S JURISDICTIONAL CATEGORIES

The categories of records available on the ORM2 database do not match up with the categories of jurisdictional waters provided in the proposed "waters of the US" rule. The ORM2 records are categorized according to "aquatic resource types" based on EPA's and the Corps' 2008 Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in *Rapanos v. U.S.* and *Carabell v. U.S.* Therefore, the ORM2 database records are categorized based on concepts developed by the agencies after *Rapanos* and *SWANCC*, such as "traditional navigable waters,"

“relatively permanent waters,” “wetlands adjacent to relatively permanent waters,” and “isolated waters.”<sup>2</sup>

In the draft rule, the agencies introduce new categories of jurisdictional waters and new definitions for important terms. The draft rule provides, for the first time, a regulatory definition of “tributaries,” which explicitly includes ditches. It also includes an “adjacent waters” category that includes both wetlands and non-wetlands. As it did previously, the draft rule defines “adjacent” as “bordering, contiguous or neighboring.” But the rule, for the first time, defines “neighboring” to include riparian areas and floodplains, and provides new, broad definitions of “riparian area” and “floodplain.” The rule also, for the first time, provides a regulatory definition for “significant nexus,” and provides that “other waters” may be jurisdictional on a case-specific basis if they, individually or when aggregated with other similarly situated waters, have a significant nexus with other jurisdictional waters.

Importantly, the ORM2 database does not track information on these new terms and categories of jurisdiction. For example, EPA’s analysis recognizes that the ORM2 “isolated waters” category does not take into account the rule’s new aggregation principle and explains that EPA could not assess the potential impacts of aggregation of other waters within a watershed without “actual field experience.” Indeed, EPA’s analysis also acknowledges that there will be additional costs to the Corps to update the ORM2 system to “reflect needed data elements” as a result of the rule’s new jurisdictional categories. But EPA does not alter its analysis to account for this major deficiency. As a result, numbers extrapolated from the ORM2 records, which do not marry up

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<sup>2</sup> When inputting records into the ORM2 database, a Corps field officer can select any one of the following aquatic resource types: (1) traditional navigable waters (TNWs); (2) wetlands adjacent to TNWs; (3) relatively permanent waters (RPWs) that flow directly or indirectly into TNWs; (4) wetlands directly abutting RPWs that flow directly or indirectly into TNWs; (5) wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs; (6) non-RPWs that flow directly or indirectly into TNWs; (7) wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs; (8) tributary consisting of both RPWs and non-RPWs; (9) isolated (interstate or intrastate waters), including isolated wetlands; (10) uplands; (11) wetlands assessed for delineation purposes only (and not for jurisdictional purposes); and (12) impoundments. Alternatively, as discussed below, the Corps field officer may input records without completing the “aquatic resource type” field.

with the draft rule's categories of jurisdiction, are not useful for approximating the percentage of increase in jurisdiction or the increase in jurisdictional acreage.

## **B. THE ORM2 RECORDS UNDERREPRESENT THE UNIVERSE OF JURISDICTIONAL AREAS**

The ORM2 data does not capture the entire universe of jurisdictional areas under the current CWA framework. First, the Corps records account only for situations in which regulated entities seek a section 404 permit, approved jurisdictional determination (AJD), or wetland delineation. The ORM2 database does not include records for preliminary jurisdictional determinations (PJDs), which allow for a party to voluntarily waive or set aside questions regarding CWA jurisdiction over a particular site, usually in the interest of allowing the landowner to move ahead expeditiously to obtain a Corps permit. With a PJD, the landowner agrees to treat all waters and wetlands that would be affected in any way by the permitted activity on the site as if they are jurisdictional waters of the U.S.<sup>3</sup> Thus, EPA's Economic Analysis fails to account for large numbers of acres across the country that may be impacted by the regulations. Indeed, most regulated entities in the 404 program have relied on PJDs after 2008 due to the uncertainty of jurisdiction stemming from inconsistency across agency policies. Waters for which jurisdiction is unclear is precisely the group of waters that the agencies are purporting to address in this draft rule. Accordingly, EPA's claim that these waters are irrelevant for analyzing the draft rule's economic impacts is incorrect.

Second, EPA purports to account for its failure to capture the entire universe of jurisdictional areas by explaining,

Landowners and developers may assume that some waters are non-jurisdictional and not request a determination or engage in the permitting process. These waters would not be represented in the ORM2 FY2009-2010 database. However, these waters are also likely to be the most isolated and the least connected to

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<sup>3</sup> See U.S. Army Corps of Engineers, Regulatory Guidance Letter 08-02 (June 26, 2006).

other waters and therefore the least likely to have their status changed under this proposed rule.

In other words, EPA is saying that the waters for which a reasonable person is likely to have never needed a JD are only those so isolated that they would not be jurisdictional anyway. But the new rule, by capturing ditches, intermittent streams, streams that are connected only underground, adjacent waters, and waters that have been disconnected from downstream waters by barriers, includes many waters that no reasonable person every would have thought of as jurisdictional.

In relying on the Corps' ORM2 database, EPA's Economic Analysis does not recognize the instances in which landowners have not engaged in the section 404 permitting process because they have not sought to fill areas of their land or because their property is not jurisdictional under the current regulatory framework. This situation is not limited to areas with isolated waters. The draft rule brings in many features (*e.g.*, adjacent waters, ditches) that were not previously jurisdictional and would not be included in the Corps' ORM2 records.

Third, even for those instances where landowners engage in the jurisdictional determination or permitting process, the ORM2 database does not capture all aquatic resources on the subject parcel. Rather, the Corps records focus on *impacted* areas and mitigation sites. For example, if an applicant seeks a permit to impact .25 acres on a 5-acre parcel of land, only the aquatic resources on the .25 acres that would be impacted are captured in the ORM2 database. Aquatic resources on the remainder of the parcel would not be captured.

Fourth, "aquatic resource type" is not a required field for Corps staff to fill out in the ORM2 database. As a result, of the 196,208 ORM2 FY2009-2010 records used by EPA in its calculations, 36,063 (18.4%) did not have an associated aquatic resource type selected. This "water type null" category was not accounted for in EPA's calculation of the 2.7% increase in jurisdictional waters under the new rule or any other calculations in the economic analysis.



Finally, by relying on only ORM2 data, EPA fails to evaluate the extent to which the expansion of jurisdiction could have consequences for activities other than the discharge of dredged or fill material. EPA's analysis simply assumes that the distribution of water body types and the relative distribution of jurisdictional vs. non-jurisdictional waters will be the same, regardless of whether the activity in question is the discharge of dredged or fill material, the discharge of wastewater or stormwater, or an activity subject to CWA section 311 or similar spill control requirement. EPA did not make any attempt to evaluate whether the numbers and types of water affected by these activities were the same as those affected by activities subject to 404.

For all these reasons, EPA's use of ORM2 data throughout its economic analysis to quantify the increase in jurisdiction is highly suspect and results in woefully inaccurate projections.<sup>4</sup>

### **III. Errors with EPA's Incremental Acreage Calculations**

Calculations of costs and benefits in EPA's analysis rely on an estimate of the acreage that would become jurisdictional under a definitional change. The Corps estimates this incremental acreage by examining their ORM2 database of CWA permit applications. Corps staff reviewed a sample of 262 old project files relating to section 404 using the new jurisdictional criteria. Of these files, 67% pertained to streams, 27% to wetlands, and 6% to "other waters." The Corps found that 98% of the streams, 98.5% of the wetlands, and 0% of the other waters were jurisdictional under existing guidance. Under the new criteria, it found that 100% of the streams and wetlands and 17% of the other waters would become jurisdictional.<sup>5</sup> Corps staff concluded that an expanded definition of "waters of the United States" would result in 2.7% more jurisdictional waters than under the current definition. These calculations are summarized in Table 1.

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<sup>4</sup> As explained more fully below, EPA's sensitivity analysis does not adequately make up for this deficiency because the 2.7% percentage increase figure used throughout the economic analysis is based on ORM2 data without sensitivity analysis calculations.

<sup>5</sup> EPA reviewed a subset of 50 project files for "other waters" and determined 15% would be jurisdictional.

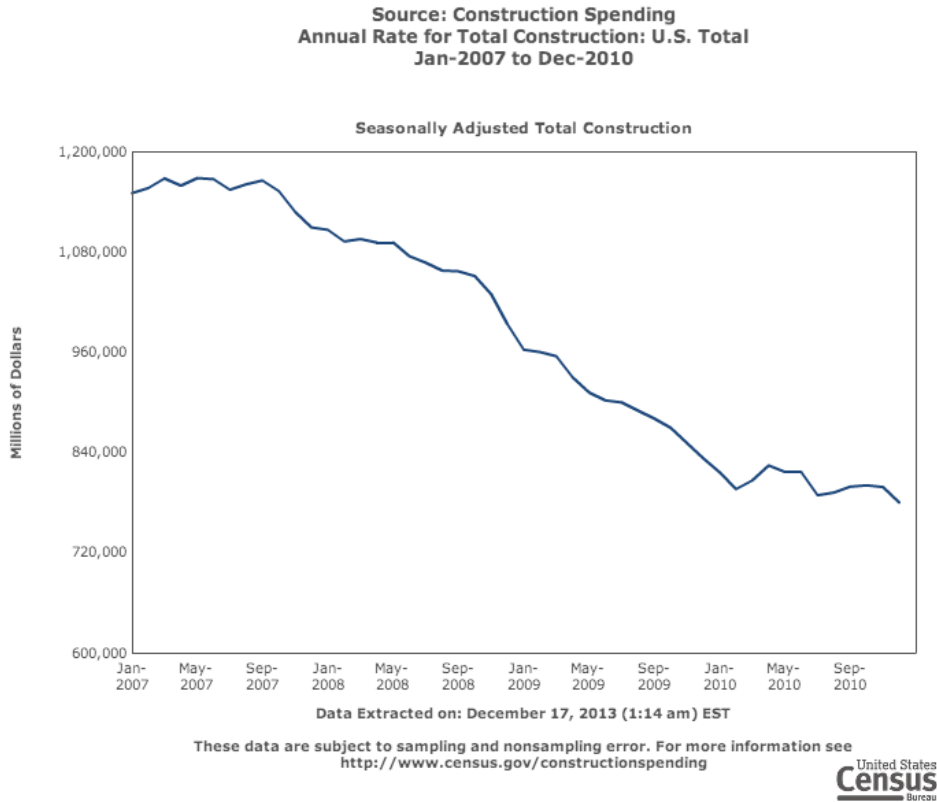
**Table 1: Calculation of Increased Jurisdiction**

	No. ORM Records	No. Positive Juris.	Proj. Positive Juris.	% Total ORM2		
				Records	% Positive Juris.	Proj. Positive Juris.
Streams	95,476	93,538	95,476	67%	98.0%	100.0%
Wetlands	38,280	37,709	38,280	27%	98.5%	100.0%
Other Waters	8,209	0	1,396	6%	0.0%	17.0%
Total	141,965	131,247	135,152	100%	92.5%	95.2%

EPA’s analysis arrives at the conclusion that the new rule will result in a total of 1,332 acres of added impacts from additional permits under section 404 alone. This incremental acreage represents a 2.7% increase in the number of permits multiplied by the average impact per permit (see Table 3). Although EPA argues that it has used upper bound estimates of costs for many of the cost categories, its analysis is flawed in at least four major ways. This leads to a significant underestimation of total added impacts.

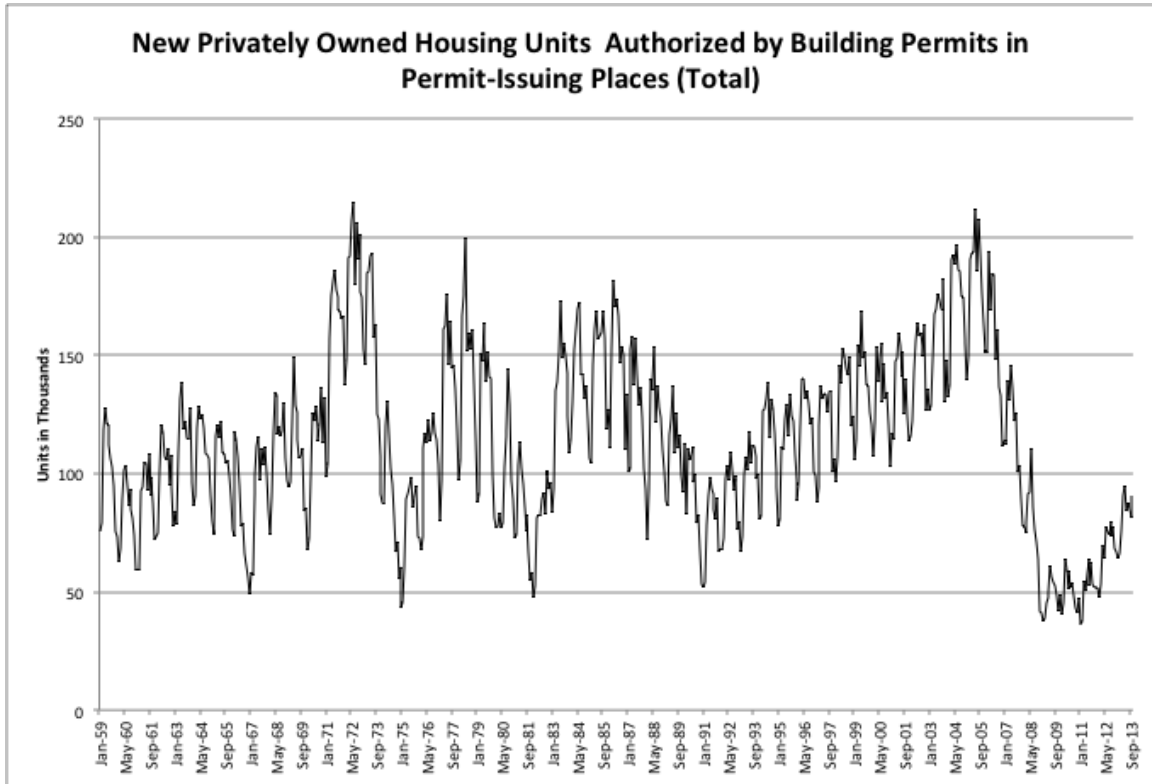
The analysis uses FY 2009/2010 as the baseline year to estimate impacts. FY 2009/2010 was a period of significant contraction in the housing market due to the financial crisis. As Figure 1 indicates, construction spending during these two fiscal years was 24% below that of the previous two-year period. In statistical terms, this is an issue of sample selection, where due to exogenous events the sample selected for the analysis is not representative of the overall population. The report bases its finding on a period of extremely low construction activity, which will result in artificially low numbers of applications and affected acreage. Even if the percent increase in added permits is correct, using the number of permits issued in 2010 as a baseline is very likely a significant underestimation of the affected acreage in years not subject to a crisis in the building sector.

**Figure 1: United States Construction Spending, 2007-2010**



If one examines building permit data for all types of construction since 1959, it is apparent that choosing FY 2009/2010 as representative years is problematic, as building permit filings were at an all-time low during this period. Figure 2 displays Census data on building permits at the national level. Again, this figure shows that the baseline time period chosen by EPA is not representative and biases the added acres calculation downwards, unless the nation's building sector never recovers.

**Figure 2: New Privately Owned Housing Units Authorized by Building Permits**



EPA’s analysis uses an expert review to calculate a percent increase in jurisdiction. In order to arrive at the 2.7% estimate, EPA reviewed historical filing and made judgment calls as to which filings would be subject to the new rule. According to its analysis the projected percent of positive jurisdiction would rise to 100% for streams and wetlands filings (up from 98% and 98.5%, respectively) and 17% for “other waters” (up from 0%). This analysis assumes that the new rule will not affect the number of total filings. It is clear that projects that were previously not thought to be subject to the new rules did not file permitting requests. Under the new rules, however, more projects likely will be required to seek permits. What this means is that the share of projects entering the permitting process is likely to increase, which will increase the projected number of positive jurisdictional determinations and the incremental acreage estimates.

Although the report’s conclusions remain unchanged, EPA provides a brief sensitivity analysis to address the influx of new applicants that had previously not entered the permitting process. It acknowledges that permit applications associated with “other” waters could double under the

proposed rule and provides several alternative estimates of the incremental effects associated with this increase. These scenarios are included in Table 2, which is reproduced from the EPA analysis.

**Table 2: Alternative Incremental Jurisdiction Results from EPA Analysis <sup>6</sup>**

Scenario <sup>1</sup>	Description	Option 1: Proportional Doubling <sup>2</sup>		Option 2: Non-Juris. Doubling <sup>3</sup>	
		% Other Waters Juris.	% Incremental Increase	% Other Waters Juris.	% Incremental Increase
A	5% of non-jurisdictional other waters are jurisdictional under the proposed rule	21.0%	2.9%		
B	10% of non-jurisdictional other waters are jurisdictional under the proposed rule	26.0%	3.2%		
C	There are double the number of other waters	17.0%	3.5%	8.5%	2.7%
D	There are double the number of other waters and 5% of non-jurisdictional other waters are jurisdictional under the proposed rule	21.0%	4.0%	13.0%	3.2%
E	There are double the number of other waters and 10% of non-jurisdictional other waters are jurisdictional under the proposed rule	26.0%	4.5%	18.0%	3.6%
1	Scenarios A and B do not include a doubling of records. Their impacts are listed under the proportional doubling columns for simplicity				
2	Proportional doubling refers to the doubling of records for both jurisdictional and non-jurisdictional other waters "in the same proportions as the original set of records"				
3	Non-Jurisdictional doubling refers to the doubling that "includes only [non-jurisdictional] other waters, and that adjacent other waters are only represented in the original set of records".				

EPA suggests that the doubling of records for only non-jurisdictional waters and an additional 5% increase in jurisdictional waters (scenario D, option 2) is the most likely alternative. Thus, EPA's upper bound estimate of the incremental increase in jurisdiction associated with a definitional change is 3.2%. However, the assertion is completely unjustified and is not accompanied by an explanation for why the number of section 404 permits may double with only a 5% increase in residual positive jurisdictional determinations. Additionally, this

<sup>6</sup> The derivation of these values is complex and omitted from this table. There are small discrepancies between EPA values and the author's recreation of EPA values, presumably due to rounding.

assessment is completed as an afterthought to the economic analysis and has no bearing on the calculations of costs and benefits associated with a definitional change.

The analysis considers only permitting data from section 404 and applies the estimated shares to all other relevant sections of the CWA. There is no reason to believe that this is a valid approach given the significant differences in the location of these types of economic activities and the nature of the activities that give rise to permitting requirements across the sections. EPA recognizes this limitation, writing “while there is only one CWA definition of ‘waters of the United States,’ there may be other statutory factors that define the reach of a particular CWA program or provision.”<sup>7</sup> Unfortunately, this warning is ignored in the current analysis, and the incremental acreage estimation for all programs relies wholly on section 404 estimates.

EPA derived the number of acres per permit using the FY 2009/2010 data, taking the total number of acres permitted during that period and dividing this number by the number of permits issued. The analysis as presented does not allow one to study the underlying heterogeneity at the state level. There is a danger of significantly underestimating the impacts by using a 2.7% increase in combination with the average project size. If the new rules disproportionately affect larger projects, the proposed approach using averages underestimates the affected acres. There is no way of knowing whether this is the case without being able to review the expert judgment analysis conducted by EPA and the Corps.

Before turning to the calculation of incremental costs, it is worth noting that there are scientifically valid approaches to determining the number of acres that would become jurisdictional under the proposed rule. For the reasons describe above, the ORM2 database used by EPA is not a valid basis for inferring incremental impacts. The most important reason is that it is not a random or representative sampling of all affected projects and areas, rather it suffers from potentially severe selection bias.

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<sup>7</sup> EPA 2011. *Draft Guidance on Identifying Waters Protected by the Clean Water Act*. p 3.

## IV. Errors with EPA's Incremental Cost Calculations

### A. SECTION 404

EPA's analysis calculates the costs of the proposed definitional change for several CWA regulatory programs, but emphasizes costs associated with section 404. Since many 404 permits are issued for development near wetlands and small streams, the systematic inclusion of these waters in the CWA is expected to increase costs to developers and administrative entities. Authors of EPA's analysis recognize four categories of costs associated with section 404 compliance. These include: permit application costs; compensatory mitigation costs; permitting time costs; and impact avoidance and minimization costs. Due to information constraints, the report quantifies only the first two types of costs.

Section 404 permit application costs are calculated by taking the number of individual and general section 404 permits that were issued in FY 2009/2010 and determining how many more would be issued under the new rule (2.7%).<sup>8</sup> These additional permits are multiplied by the average geographic impact per permit to determine how many additional acres would be impacted under the revised definition.<sup>9</sup> This incremental acreage of newly jurisdictional waters is multiplied by two different estimates of per-acre costs; a 1999 Corps review of permitting costs for "typical" projects up to three acres in size and a study by Sunding and Zilberman in 2000 that synthesized internal estimates of permitting costs from a sample of public and private developers. These calculations are summarized in Table 3.

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<sup>8</sup> Information about section 404 permits comes from the Corps' ORM2 database.

<sup>9</sup> Average impact per added permit reflects an average of permanent impacts from projects in FY2010 and excludes temporary impacts, ecological restoration and conversion activities.

**Table 3: Derivation of Permit Application Costs**

Permit Type	Permits issued FY2010	Added Permits (2.7% increase)	Average Impact Per Added Permit (Acres)	Total Added Impacts (Acres)	Costs from Corps' Analysis (2010\$)	Costs from Sunding and Zilberman Study (2010\$)	Additional Annual Cost (2010\$ millions)
Individual	2,766	75	12.81	960	\$31,400 / permit	\$57,180 / permit + \$15,441 / acre	\$2.4 - \$19.1
General	49,151	1,327	0.28	372	\$13,100 / permit	\$22,079 / permit + \$12,153 / acre	\$17.4 - \$33.8
Total	51,917	1,402		1,332			\$19.8 - \$52.9
<i>Calculations</i>	<i>A</i>	$B = A * 0.027$	<i>C</i>	$D = B * C$	<i>E</i>	$F_{1,2}$	Lower: $E * B$ Upper: $(F_1 * B) + (F_2 * D)$

The distinction between individual and general permits is important for the purpose of evaluating the cost of a definitional change. Individual permits are required for activities that are expected to have significant impacts on a nearby water body. General permits are issued for projects that will have minimally adverse effects and fit within specific categories (i.e., bank stabilization projects, hydropower projects, etc.). The EPA analysis ignores any potential changes to the distribution of individual and general permits. The addition of jurisdictional waters could force a restructuring in the permitting system where projects that were previously eligible for general permits must apply for individual permits. These changes would have notable implications to the overall cost of the definitional change, but they are omitted from the analysis.

The EPA analysis also ignores the heterogeneity in impacted acreage within these two categories. Instead, they calculate an average for each type of permit that provides a single estimate of project size. This estimate is derived from FY 2009/2010 ORM2 data and suffers from the same sampling limitations discussed above. Since projects developed during this period were likely smaller (in addition to less numerous), this has the effect of compounding the underestimation of project costs. To illustrate the implications of this methodology, suppose the incremental



increase estimates are “updated” by increasing the number of new permits by 24% and the average size of impacts by 10%.<sup>10</sup> The incremental acreage estimates would be 36% higher (1,812 acres), with associated costs ranging from \$24.5 million to \$68.0 million (a 24-28% increase from EPA estimates). While this methodology still suffers from important shortcomings, this exercise reveals how sensitive section 404 permitting costs are to issues of sampling bias.

EPA’s analysis of section 404 permit application costs suffers from several additional deficiencies. The data on permitting costs from the Sunding and Zilberman study are nearly 20 years old and are not adjusted for inflation or any other changes in the permit system. Thus, they likely underestimate the present cost of the permitting process. This underestimation is enhanced by the exclusion of other costs addressed in the Sunding and Zilberman study. Specifically, the EPA analysis ignores the costs of avoidance and delay, which are likely to dominate the out-of-pocket expenses for permit application and mitigation. The study suggests that general permits cost \$28,915 and take an average of 313 days to complete, and individual permits cost \$271,596 and take an average of 788 days to complete, not counting the costs of mitigation or design changes.<sup>11</sup> These delay estimates are likely to be larger if the influx of new permits is not offset by additional staff and infrastructure for processing. Delays and forced design changes stifle economic output and may prevent businesses from functioning at their full potential. Thus, the Sunding and Zilberman study is misused in the EPA analysis to generate upper bound estimates that markedly underestimate the cost of section 404 permitting.

The incremental costs of compensatory mitigation were calculated by taking the amount of wetland and stream mitigation that occurred in each state during FY 2010 and multiplying by EPA’s expected 2.7% growth in the acreage of jurisdictional waters. This incremental mitigation

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<sup>10</sup> As discussed above, construction spending at the end of 2010 was 24% below spending at the end of 2008. A 10% increase in project size is a reasonable adjustment to account for the use of FY 2009/2010 data in cost estimations.

<sup>11</sup> Sunding and Zilberman, 2002. *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 *Natural Resources Journal* 59, pp 74-76.

requirement is multiplied by an average unit cost for mitigation (a weighted average across all states) to get an estimate of the annual costs of compensatory mitigation. These calculations are summarized in Table 4.

**Table 4: Derivation of Compensatory Mitigation Costs**

Water Body Type	Units of Mitigation	Unit Costs (\$2010)	Annual Cost (2010\$ millions)
Streams	49,075 feet	\$177 - \$265	\$8.7 - \$13.0
Wetlands	2,042 acres	\$24,989 - \$49,207	\$51.0 - \$100.5
Total			\$59.7 - \$113.5
<i>Calculations</i>	<i>A</i>	<i>B</i>	<i>C = A*B</i>

The EPA analysis derives estimates for the amount of mitigation using methods discussed in their 2011 economic analysis.<sup>12</sup> It assumes that all non-jurisdictional streams would become jurisdictional, requiring 49,075 feet (9.3 miles) of mitigation. The 2011 estimate of incremental wetland mitigation where all non-“other” waters are jurisdictional and 17% of “other” waters are jurisdictional (the same assumptions adopted in the current EPA analysis) is 2,517 acres. This value is more than 23% higher than the estimate provided in Table 5. This discrepancy results from different estimations of baseline mitigation in the two analyses.<sup>13</sup> Despite this difference, EPA suggests the current estimate “is consistent with the level of mitigation the Corps has estimated for the past 10-15 years” and provides no justification of the discrepancy. For reasons discussed above, this is likely to underestimate the extent of mitigation in a “normal” year.

<sup>12</sup> EPA 2011. *Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of Clean Water Act Jurisdiction*.

<sup>13</sup> The 2014 analysis suggests there were approximately 32,500 acres of permittee-responsible mitigation documented in ORM2 records, 8,200 acres of bank mitigation documented in the Regional Internet Bank Information Tracking System (RIBITS) database, and 2,200 acres of in-lieu fee (ILF) mitigation in FY 2010 (Description to Exhibit 7). The 2011 analysis suggests there were approximately 44,000 acres of permittee-responsible mitigation, 7,000 acres of bank mitigation, and 2,000 acres of ILF mitigation in FY 2010 (EPA 2011, footnote 3).

The unit costs of mitigation also do not match 2011 EPA estimates. The weighted average utilized in the current analysis relies on state-level unit costs that are systematically lower than previously published. Table 5 provides a sample of these discrepancies for the first 10 states (listed alphabetically). While the lower bound estimates are the same between the two analyses, the upper bound estimates are depressed in the 2014 analysis. There is no discussion of these differences. If the higher estimates are accurate, this creates a strong downward bias of mitigation cost estimates in the 2014 analysis. Even if the lower estimates are more accurate, the exclusion of proper documentation and explanation is troublesome and reduces the validity of the current analysis.

**Table 5: Discrepancies Between EPA Estimates for Unit Costs of Mitigation**

State	2011 Analysis				2013 Analysis			
	Unit Cost Stream- Low	Unit Cost Stream- High	Unit Cost Wetland- Low	Unit Cost Wetland- High	Unit Cost Stream- Low	Unit Cost Stream- High	Unit Cost Wetland- Low	Unit Cost Wetland- High
AK	\$170	\$316	\$500	\$30,000	\$170	\$243	\$500	\$15,250
AL	\$350	\$888	\$10,000	\$20,000	\$350	\$619	\$10,000	\$15,000
AR	\$170	\$316	\$2,000	\$5,000	\$170	\$243	\$2,000	\$3,500
AZ	\$170	\$316	\$9,000	\$23,000	\$170	\$243	\$9,000	\$16,000
CA	\$170	\$316	\$18,500	\$300,000	\$170	\$243	\$18,500	\$159,250
CO	\$170	\$316	\$32,000	\$100,000	\$170	\$243	\$32,000	\$66,000
CT	\$170	\$316	\$124,000	\$160,000	\$170	\$243	\$124,000	\$142,000
DE	\$170	\$316	\$40,000	\$40,000	\$170	\$243	\$40,000	\$40,000
FL	\$170	\$316	\$35,000	\$145,000	\$170	\$243	\$35,000	\$90,000
GA	\$106	\$293	\$12,000	\$122,000	\$106	\$200	\$12,000	\$67,000

EPA estimates administrative costs associated with a rule change to be between \$7.4 and \$11.2 million annually. This calculation is based on a 2.7% increase in the number of employee hours needed to make jurisdictional determinations, process permits, consult with various stakeholders, generate environmental impact statements, ensure program compliance, and enforce permit regulations. Additionally, EPA suggests that additional permit applications may require increased consultation with other agencies (to comply with the Endangered Species Act and other statutes). This would increase costs to these agencies and drive up the price tag of a definitional change. These costs are omitted from this analysis.

## B. OTHER (NON-404) PROGRAMS

EPA calculated costs associated with other CWA programs by adopting previous estimates and accounting for growth in jurisdictional waters and changes in program size. The cost analysis of other CWA programs is simplistic and relies on the same 2.7% acreage increase figure derived for section 404. This is especially problematic given the errors associated with the derivation of this estimate. Unsubstantiated assumptions from the incremental acreage calculations are revisited and recycled in subsequent sections to generate other cost estimates. Some of these errors could be avoided through a careful assessment of program-specific effects. Unfortunately, the EPA analysis falls short in this regard.

In its sensitivity analysis regarding the incremental acreage estimate, EPA recalculates costs and benefits under the alternative assumptions for project files related to other waters. Depending on the scenario, upper or lower bound designation, and type of doubling, they acknowledge costs could be as high as \$422 million (compared to its working upper-bound estimate of \$231 million). EPA's most-likely alternative estimate is that costs could be \$278 million, a 20% increase from current estimates. The variation between these values reveals how relatively small changes in the assumptions used to generate incremental acreages can have substantial impacts on the cost estimates. Since the validity of these assumptions is highly suspect, it becomes clear that the EPA analysis is entirely insufficient at predicting the costs associated with a "waters of the United States" definition change.

EPA explicitly omits costs to some programs that may be affected due to lack of data. EPA asserts that other programs are likely to be "cost-neutral or minimal" without providing an analysis to support this conclusion. Specifically, EPA states that a definitional change will have little to no effect on section 303 (state water quality standards and implementation plans) and section 402 (National Pollutant Discharge Elimination System (NPDES) permitting). These are bold claims that should be substantiated with a thorough analysis.

## 1. Section 401 State Certification

Section 401 of the CWA requires any applicant for a federal license or permit to conduct any activity that will result in a discharge to waters of the United States to obtain a state water quality certification from the state where the discharge will occur. 33 U.S.C. § 1341(a)(1). With the proposed rule's expanded definition of "waters of the United States," more activities that require federal licenses (in particular, activities requiring section 404 permits) are likely to discharge into "waters of the United States" and will therefore require section 401 certification. EPA estimated that state certification under section 401 would experience increased annual costs of \$737,100 as a result of the proposed rule. This figure is the result of a 2.7% increase in full time employees (FTE) needed to staff state permitting offices. This figure may partially account for the increased amount of state resources needed to accommodate additional state certification requests, but it does not account for the increased costs to applicants that must now obtain 401 state certification. EPA's analysis recognizes that there will be additional section 404 permits required under the proposed rule, but it does not account for the increased costs of obtaining 401 certification that are triggered by those additional section 404 permits. Nor does it address the cost of delay caused by increased Section 401 certification requirements.

## 2. Section 402 NPDES Permits

The CWA section 402 National Pollutant Discharge Elimination System (NPDES) permit program controls water pollution by regulating point sources that discharge pollutants into "waters of the United States." As discussed in further detail below, EPA states that the proposed rule would be cost-neutral or minimal with respect to traditional section 402 discharge permits such as those for municipal wastewater treatment facilities or industrial operations.

To calculate the incremental costs of the rule with respect to section 402 construction stormwater permitting, EPA used the October 1999 *Economic Analysis of Final Phase II Storm Water Rule*. EPA then adjusted for a 2.7% increase in jurisdictional waters and a 30% increase in

program size.<sup>14</sup> Accounting for inflation, this yields costs of \$25.6 to \$31.9 million per year. EPA concluded that the cost impacts for Municipal Separate Storm Sewer Systems (MS4s) would be negligible. However, under the agencies' proposed rule, which, for the first time, includes a regulatory definition of "tributary" that explicitly includes ditches and extends jurisdiction to "adjacent waters," including adjacent non-wetlands, many of the stormwater systems and features themselves could now be classified as "waters of the United States." EPA's economic analysis does not address or quantify the increased permitting requirements for stormwater conveyances that would result from the proposed rule. For example, work on the stormwater conveyances, including work aimed at achieving environmental best management practices (BMPs) as well as routine improvements required by stormwater permits, will trigger section 404 permitting requirements. Additionally, if stormwater conveyances are deemed "waters of the United States," then they will be subject to water quality standards. The costs of complying with water quality standards are discussed in more detail below.

EPA calculated incremental costs from section 402 Concentrated Animal Feeding Operations (CAFO) permitting in a manner similar to EPA's calculations for construction stormwater costs. It scaled up values from a 2003 rulemaking by 2.7% to account for increase in jurisdictional waters, but reduced them by 50% to account for a reduction in program size.<sup>15</sup> After converting to 2010 dollars, the incremental costs totaled approximately \$5.5 million per year.

EPA calculated costs associated with increased numbers of Pesticide General Permits (PGP) to be between \$2.9 and \$3.2 million annually for operators, but made no attempt to calculate the increased impact on government entities. Growth in PGP permitting was determined to be

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<sup>14</sup> 30% program growth is derived from 130,000 "construction starts" in 1994 (from 1999 Economic Analysis) to 169,000 construction sites with permit coverage in 2011 (from EPA's GPRA management measures tracking).

<sup>15</sup> Benefit values taken from Federal Register volume 68 number 29. 50% decrease in program growth derived from ~15,000 CAFOs considered in 2003 analysis to 7,318 permit holders in 2011 (from EPA's GPRA management measures tracking).

almost 1000%, from 35,376 affected entities where EPA administers permits to a potential group of 365,000 entities where states administer permits.

EPA claims that a definitional change will have little to no effect on traditional Section 402 NPDES discharge permits such as those for municipal wastewater treatment facilities or industrial operations.

The exclusion of potential section 402 costs associated with the NPDES permitting is troubling. EPA provides several possible explanations for its observation that discharging entities are likely to acquire permits regardless of the jurisdictional status of the receiving water, and will not be impacted by a definitional change. One explanation is that EPA has authorized 46 states to administer section 402 permitting. Because state-level jurisdictional waters must be at least as inclusive as “waters of the United States,” many states already have implemented the sort of programmatic changes being proposed in this analysis. However, this explanation has limited merit, given EPA’s assertion that “approximately two-thirds of all states place some legal constraint on the authority of state and local government officials to adopt aquatic resource protections beyond waters of the U.S.” Either way, all states will need to revisit their programs and EPA will need to reassess whether states comply with the definitional changes. As a result, both federal and state agencies will incur additional costs. Moreover, EPA completely fails to acknowledge or account for the fact that the proposed rule could affect compliance feasibility and costs for facilities that already have NPDES permits, by classifying as jurisdictional ditches, ponds, and other water features on facility sites, that facilities use for plant operations and/or compliance, and for which no discharge permit has been required previously. EPA does not account for additional costs that facilities will incur to comply with effluent limits and implement BMPs for these newly jurisdictional features. Nor does EPA’s analysis account for the fact that work done to comply with NPDES permits for these newly jurisdictional ditches, ponds, and other water features (*e.g.*, installation of structures for sediment removal) will trigger costly section 404 permitting requirements and requirements to comply with water quality standards.

### 3. Section 311 Oil Spill Prevention Plans

Under section 311, inland non-transportation oil facilities of a certain size that have potential to discharge to “waters of the United States” must prepare and implement a Spill Prevention, Control, and Countermeasures (SPCC) Plan. *See* 40 C.F.R. § 112.1(d)(1). EPA calculated incremental costs to Section 311 oil spill prevention plans by using average annual costs from production and storage facilities, and scaling up based on an estimate of 1,000 new facilities that will need to spend money on compliance. The average annual clean-up cost is \$9,128 for production facilities and \$13,038 for storage facilities.<sup>16</sup> Production facilities make up approximately 35% of all facilities, while storage facilities make up the remaining 65%. After adjusting for inflation, this yields approximately \$11.7 million annually in incremental costs.

The expansion of the “waters of the United States” definition will mean a significant increase in the number of facilities that could “reasonably be expected” to discharge oil to jurisdictional waters. As a result, many facilities not previously subject to the SPCC program requirements (because they did not previously have potential to discharge to “waters of the United States”) will now be required to develop and implement an SPCC plan. This is particularly true in the arid west, where companies generally do not maintain SPCC plans because their operations are not located near navigable waters.

### 4. Section 303 Water Quality Standards

EPA claims that a definitional change will have little to no effect on section 303 (state water quality standards and implementation plans). This is a bold claim that should be substantiated with a thorough analysis. For example, section 303(c) requires states to establish water quality standards (consisting of uses, criteria, and an anti-degradation policy) for all navigable waters. EPA (p. 6) assumes that states may simply apply uses and criteria developed for other categories of waters (e.g., freshwater rivers and streams used by the public for fishing, swimming, boating,

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<sup>16</sup> Derived from EPA 2009, *Regulatory Impact Analysis for the Final Amendments to the Oil Pollution Prevention Regulations*.



and as sources of drinking water) for ditches, ephemeral streams, and other newly jurisdictional waters for which those uses and criteria would seem to be wholly inappropriate. In reality, though, states will have to designate uses and set water quality criteria for new waters and features that now meet the agencies' expanded definition of "waters of the United States." This process is extremely costly and burdensome for the states. Indeed, if states do not designate water quality standards for these newly jurisdictional waters, they are likely to be sued by third parties. In the past, states have been sued for failure to assign uses and set water quality criteria for all jurisdictional waters located within the state. EPA's analysis does not account for these obligations that will be forced upon the states and the states' increased litigation risk created by the proposed rule.

Similarly, Section 303(d) requires states to generate a list of impaired waters that do not meet specific water quality standards. States also must calculate total maximum daily loads (TMDLs) of various pollutants that are necessary to bring these waters into compliance. It stands to reason that the addition of newly-jurisdictional waters would increase the surveying, planning, monitoring, and enforcement necessary to achieve these tasks. EPA claims: "[t]o the extent that this proposed rule may increase the coverage where a state would wish to apply its monitoring resources, states are likely to adjust sampling locations or sampling frequency without a net cost increase."<sup>17</sup> This is simultaneously disingenuous and discouraging, suggesting states must make important decisions about water quality from a less-comprehensive scientific investigation by spreading already scarce resources even thinner.

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<sup>17</sup> This quote is in reference to Section 305(b), which requires states to issue a report about the water quality in all navigable waters and how they meet specific water quality goals. However, it appears to reflect the EPA's position about all programs where water quality monitoring is necessary.

## V. Errors with EPA's Incremental Benefits Calculations

### A. SECTION 404

EPA lists several section 404 benefits that will result from a change in the “waters of the United States” definition. These include avoidance and minimization of permit impacts, which result from improved clarity in the CWA, and ecosystem benefits associated with additional compensatory mitigation that will now be required. Since quantifying the former is difficult, its analysis focuses on benefits from incremental compensatory mitigation requirements.<sup>18</sup> The authors use a benefits transfer approach and adopt estimates of the value of wetland mitigation from previous studies. Specifically, they select 10 contingent valuation studies that provide willingness to pay (WTP) estimates for wetland preservation. Those studies span 12 states and yield estimates for wetlands that “provide a suite of services expected to be similar to those provided by waters incrementally protected under the proposed rule”. The results from these studies were standardized by determining WTP at the per-household per-acre level.<sup>19</sup> The authors then calculate an average WTP, weighted by the number of respondents in each study. This yields values of \$0.016 and \$0.012 per household per acre using a 3% and 7% discount rate, respectively.

EPA calculates benefits for incremental compensatory mitigation by multiplying WTP estimates by the number of households and the number of acres impacted in eight different “wetland regions.” These regions were developed by the US Department of Agriculture’s Economic Research Service, and the analysis operates under the assumption that “per acre benefits values

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<sup>18</sup> EPA only addresses benefits associated with wetland mitigation and omits benefits from stream mitigation.

<sup>19</sup> For studies that reported annual WTP, total present value was determined over a period of 50 years using a 3% and 7% discount rate. For studies that reported WTP per individual, one individual per household was assumed.

accrue to all citizens in the region.”<sup>20</sup> The calculations used to generate incremental compensatory mitigation benefits are presented in Table 6.

**Table 6: Derivation of Compensatory Mitigation Benefits**

Region	Incremental Impact Estimate (Acres)	Number of Households	Present Value of Benefits per Year- 7% Discount (2010\$ millions)	Present Value of Benefits per Year- 3% Discount (2010\$ millions)
Central Plains	30	3,201,336	\$1.20	\$1.50
Delta and Gulf	85	14,521,178	\$14.80	\$19.80
Mountain	145	7,390,812	\$12.90	\$17.30
Midwest	322	23,909,088	\$92.30	\$123.70
Northeast	240	23,839,690	\$68.70	\$92.10
Pacific	79	16,163,714	\$15.30	\$20.50
Prairie Potholes	241	2,176,626	\$6.30	\$8.40
Southeast	187	20,485,107	\$46.10	\$61.70
Other	3	234,779	\$0.00	\$0.00
National	1,332	111,922,330	\$257.60	\$345.10
<i>Calculations</i>	<i>A</i>	<i>B</i>	<i>C = A*B*0.012</i>	<i>D = A*B*0.016</i>

The benefit transfer analysis used to approximate section 404 benefits is poorly documented and not consistent with best practices in environmental economics. EPA synthesizes ten previous studies to estimate an average WTP for each acre of wetland mitigation. Those studies are largely irrelevant and do not provide accurate estimates of benefits. Nine of the ten studies were conducted more than a decade ago, and the earliest was written nearly 30 years ago. Several of the studies EPA relies on were never published in peer-reviewed journals. Given these shortcomings, it is reasonable to suspect that WTP estimates may not reflect the actual preferences of individuals for expanding jurisdiction over various types of waters.

While EPA attempts to value ecological services provided by wetland mitigation, it assumes that the wetlands included in the contingent valuation studies have identical functions as the wetlands that are being considered in the current analysis. This is an important flaw that undermines EPA’s benefit transfer analysis. Benefit transfer analysis operates under the

<sup>20</sup> Heimlich, R.E., R. Claassen, K.D. Wiebe, D. Gadsby, and R.M. House. 1998. Wetlands and Agriculture: Private Interests and Public Benefits. AER-765, U.S. Dept. Agr. Econ. Res. Serv., Aug.

presumption that benefits calculated for a specific geography and time can be readily applied elsewhere. This oversimplification comes at the expense of accuracy. For example, the Loomis et al. study used in the EPA analysis examined WTP to reduce contamination from agricultural drainage in wetlands in California. While this service may have considerable value, this value is likely highly localized. Indeed, Loomis found that respondents near the wetlands in question had WTPs approximately 15% higher than respondents elsewhere in the state.<sup>21</sup> This pattern is likely to be more pronounced when extrapolating benefits to regions containing multiple states and heterogeneous patterns of wetlands.

EPA's analysis rests on an unstated assumption that all of the incremental wetlands affected by the definitional change would be compromised if federal jurisdiction is not expanded. Conversely, it also assumes that all would be preserved or mitigated if federal jurisdiction is extended. The reality is likely to be quite different. State and local regulatory programs frequently protect wetlands even in the absence of federal jurisdiction. State-level planning, monitoring, and enforcement activities can be carried out with state-specific concerns in mind, and may be better-suited to effectively preserve wetland resources. Thus, the benefits associated with expanding federal jurisdiction over wetlands could be partially offset by programmatic changes that pass control from states to federal agencies.

EPA makes little effort to account for changes in economic trends, recreational patterns, and stated preferences over time. It simply applies a multiplier based on the growth (or decrease) in permit applications. This suffers from the same error discussed above, where growth is based only on the subset of individuals who have already sought a permit. It does not address those who may seek a permit under the proposed rule. Even in the sensitivity analysis, which was conducted to address this issue, alternative calculations are carried out using the same multipliers and many of the same assumptions from the initial analysis. EPA concludes: "because estimated

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<sup>21</sup> Respondents in the San Joaquin Valley had a WTP of \$174 annually to prevent the degradation of an 85,000 acre tract of wetlands. Respondents in the rest of the state had a WTP of \$152.

benefits would also rise with more wetland protection, benefits would continue to justify costs.” This amounts to a doubling down on the original benefits estimates, which contain all of the original biases and shortcomings. This is insufficient for evaluating the benefits associated with programmatic changes of this scale.

## B. OTHER (NON-404) PROGRAMS

Much like its cost estimates, EPA calculates benefits to other CWA programs by scaling up previous estimates according to the growth in jurisdictional waters and program size. Incremental benefits associated with section 402 stormwater permitting are estimated to be between \$25.4 and \$32.3 million per year. This is based on programmatic growth of 30% and a jurisdictional expansion of 2.7% from original 1998 estimates.<sup>22</sup> Incremental benefits from additional section 402 CAFO permitting range from \$3.4 to \$5.9 million per year, and are based on a 50% contraction in program size from 2001 estimates.<sup>23</sup> These estimates reflect benefits to large CAFOs, which comprise 85% of the operator costs and 66% of the administrative costs.

Incremental benefits associated with section 311 (oil spill prevention plans) are calculated by summing expected annual benefits of \$14,255 per spill over 1,000 non-complying facilities.<sup>24</sup> This calculation yields annual benefits of approximately \$14.3 million.

The EPA analysis does not quantify benefits derived from expanded state certification of waters (section 401). It recognizes the lack of uniformity in section 401 implementation across states, and suggests: “[t]o the extent that states condition permits, added costs to permittees and environmental benefits associated with compensatory mitigation would be accounted for in the methodology for assessing those incremental impacts: they would accrue to the same extent as represented in the baseline.”

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<sup>22</sup> See footnote 14.

<sup>23</sup> See footnote 15.

<sup>24</sup> Average spill volume of 1,290 gallons (2000-2005 National Response Center data) multiplied by average clean-up costs of \$221/gallon, assuming a 1/20 chance of a spill.

Benefits to some programs that may be affected are explicitly omitted due to lack of data. EPA suggests there may be “across the board” savings in program enforcement related to increased clarity in the CWA. While there may be some legitimacy to this claim, it remains unquantified and thus plays little value in the economic analysis. Whatever enforcement benefits are realized may be offset by programmatic changes that expand permitting and administrative requirements.

A summary of costs and benefits associated with a change in the “waters of the United States” definition are provided in Table 7.

**Table 7: Summary of Costs and Benefits (2010\$ millions)**

Program	Costs		Benefits	
	low	high	low	high
§404 Mitigation- Streams <sup>2</sup>	\$8.7	\$13.0		
§404 Mitigation- Wetlands	\$51.0	\$100.5	\$257.6	\$345.1
§404 Permit Application <sup>3</sup>	\$19.7	\$52.9		
§404 Administration	\$7.4	\$11.2		
§401 Administration <sup>4</sup>		\$0.7		
§402 Construction Stormwater	\$25.6	\$31.9	\$25.4	\$32.3
§402 Stormwater Administration		\$0.2		
§402 CAFO Implementation <sup>5</sup>		\$5.5	\$3.4	\$5.9
§402 CAFO Administration		\$0.2		
§402 Pesticide General Permit <sup>6</sup>	\$2.9	\$3.2		
§311 Implementation		\$11.7		\$14.3
<b>Total</b>	<b>\$133.7</b>	<b>\$231.0</b>	<b>\$300.7</b>	<b>\$397.6</b>

Notes (from EPA documents):

- |   |   |
|---|---|
| 1 | §303 impacts are assumed to be cost-neutral; §402 impacts are components of costs and benefits previously identified for past actions, not new costs and benefits associated with this proposed rule  |
| 2 | Benefits of stream mitigation are not quantified  |
| 3 | Costs of potential delayed permit issuance and costs and benefits of avoidance/minimization are not quantified, nor are any benefits from reduced uncertainty   |
| 4 | Costs to permittees and benefits of any additional requirements as a result of §401 certification are reflected in the mitigation estimates to the extent additional mitigation is the result, yet not calculated to the extent avoidance/minimization is the result. |
| 5 | Benefits apply to large CAFOs only, which account for 85% of implementation costs and 66% of administrative costs   |
| 6 | PGP benefits and government administrative costs are not available  |

## VI. Conclusion

The estimates associated with section 404 compensatory wetland mitigation, which contain some of the most glaring errors, represent approximately 40% of the total costs and 85% of the total benefits. This suggests the entire analysis is fraught with uncertainty as to render it insufficient for evaluating programmatic impacts of this scale. Estimates of economic impacts to other programs rely on an incremental jurisdiction determination that is deeply flawed. Additionally,

the systematic exclusion of various costs and benefits ignores important impacts to permit applicants and permitting agencies.

In addition to the methodological errors discussed above, EPA's analysis suffers from a lack of transparency. Explanations of calculations, basic assumptions, and discrepancies between various EPA analyses are rarely provided. This is particularly troubling given that the entire report is based on records from the Corps' internal ORM2 database, which is unavailable to outside entities. The author of this report spent considerable time replicating the calculations used in the analysis, but was unable to vet the validity of the underlying data. Any errors or inconsistencies in documentation, sample selection, or data extraction are necessarily overlooked. These shortcomings indicate that a more thorough analysis is required to properly assess the economic impacts of a definitional change.



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March 25, 2015

Mr. Horst Greczmiel  
 Associate Director for NEPA Oversight  
 Council on Environmental Quality  
 722 Jackson Place, NW  
 Washington, D.C. 20503

Re: Revised Draft Guidance for Federal Departments and Agencies Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 79 Fed. Reg. 77,802 (December 24, 2014)

Dear Mr. Greczmiel:

The American Chemistry Council, American Farm Bureau Federation, American Forest & Paper Association, American Fuel & Petrochemical Manufacturers, American Highway Users Alliance, American Iron and Steel Institute, American Petroleum Institute, American Public Power Association, American Wood Council, America’s Natural Gas Alliance, Association of Oil Pipe Line, Corn Refiners Association, Council of Industrial Boiler Owners, Gas Processors Association, Independent Petroleum Association of America, Interstate Natural Gas Association of America, National Association of Manufacturers, National Rural Electric Cooperative Association, Natural Gas Supply Association, Portland Cement Association, The Fertilizer Institute, and the U.S. Chamber of Commerce (collectively, “the Associations”)<sup>1</sup> appreciate the opportunity to submit the following comments in response to the Council on Environmental Quality’s (“CEQ’s”) Revised Draft Guidance for Federal Departments and Agencies

<sup>1</sup> A description of each Association is included in Appendix A.

Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 79 Fed. Reg. 77,802 (December 24, 2014) (“Revised Draft Guidance”).

### **Introduction and Summary of Comments**

The Associations represent the United States’ leading energy, agriculture, manufacturing, and transportation sectors that form the backbone of the nation’s industrial ability to grow our economy and provide jobs in an environmentally-sustainable and energy-efficient manner. Projects and activities by the Associations’ members that realize these joint goals of economic growth and environmental stewardship often require permits, licenses, or approvals from federal agencies and, hence, may be subject to review under the National Environmental Policy Act (“NEPA”). The Associations’ members thus have a strong interest in ensuring that the agencies implement NEPA and achieve its goals effectively, efficiently, and consistently with established regulations and case law.

As more than forty years of experience with implementing NEPA have demonstrated, overly broad NEPA reviews can add significant and unreasonable costs and delays to projects and can, in turn, challenge the viability of projects that grow the economy, promote favorable environmental outcomes, and further energy development at home. As the nation works to recover from the recent economic recession, it is essential that government programs impacting economic development in the United States—including NEPA—are implemented in a manner that supports and does not hinder growth. Many of the key drivers of economic growth in this country are impacted by NEPA reviews. For example, increased oil and gas development—which is leading directly towards U.S. energy independence—is frequently subject to NEPA reviews, both for development on federal land as well as other infrastructure needed to transport and process products. Likewise, the manufacturing renaissance is inextricably tied to feedstock supply chains and infrastructure projects that are subject to NEPA review. Thus, adopting guidance that goes beyond the scope of NEPA imposes additional burdens on permitting agencies and significant delays on project applicants that could threaten to slow or even stop our ongoing economic recovery. Moreover, adopting unduly broad guidance could impede implementation of other federal policies, including those designed to reduce GHG emissions. Thus, to the extent CEQ elects to proceed with final guidance, it is imperative that the guidance stay firmly within the scope of the NEPA statute and CEQ’s implementing regulations and does not unduly threaten economic growth, energy independence, or implementation of other environmental programs.

The unique nature of GHG emissions and climate change presents fundamentally different considerations than any other environmental issue and, in turn, bars a one-size-fits-all approach for all agencies addressing all projects in all situations as CEQ proposes. As CEQ explains in the Revised Draft Guidance, “GHG emissions from an individual agency action will have small, if any, potential climate change effects. Government action occurs incrementally, program-by-program, and climate impacts are not attributable to any single action, but are exacerbated by a series of smaller decisions, including decisions made by the government.” 79 Fed. Reg. at 77,825. Because the contribution of any project with GHG emissions is minute relative to the atmospheric concentration of GHGs and relative to the GHG emissions from other natural and anthropogenic sources and because the effects of GHG emissions are global in

nature, it is virtually impossible to draw connections between a specific federal action and specific climate change effects.

As a result, consistent with decades of NEPA precedent and practice, it is critical that any guidance that addresses the evaluation of GHG emissions under NEPA provides appropriate and necessary limits to ensure that agencies remain focused on the specific proposed action before them. CEQ must ensure that its guidance to agencies appropriately prohibits them from venturing beyond the scope of what NEPA requires by restricting the evaluation of GHG emissions and related climate change effects that are so unrelated, speculative, or remote that they are unable to inform the agency's ultimate decision regarding a specific proposed action. Without such necessary limits in place, addressing GHG emissions has the risk of increasing uncertainty regarding critical government approvals and decisions. This will dramatically increase the time and cost of NEPA reviews into a boundless exercise that will overwhelm the agencies, cause unworkable delays to important projects, lead to legal and litigation burdens for all parties, and as such damage the international competitiveness of the Associations' members.

Despite the unique challenges posed by GHG emissions and climate change, at a minimum, CEQ must ensure that any guidance incorporating climate change considerations into NEPA analyses is consistent with NEPA itself, CEQ's implementing regulations, and the significant case law that has evolved in the courts over four decades. The distinct challenges of climate change do not authorize CEQ and the agencies to act inconsistently with long-established foundational principles of NEPA review that have been enforced consistently by the courts. Guidance documents serve a limited purpose of explaining and interpreting laws and regulations. They should have no binding legal effect and cannot be used as a tool to amend, revise, or repeal existing regulations without following proper administrative procedures. Where guidance goes too far and effectively expands existing interpretations of laws and regulations, it is unlawful and should not be issued or followed. Thus, it is critical that any final CEQ guidance for consideration of GHG emissions is grounded in existing CEQ regulations, particularly those that define the scope of appropriate NEPA reviews.

In light of these guiding principles, the Associations, who share decades of experience working with NEPA in a broad range of industry sectors subject to the law, have several serious concerns that we believe render the Revised Draft Guidance inconsistent with NEPA, its implementing regulations and established case law.

- In light of these serious deficiencies identified below by the Associations, the Revised Draft Guidance should be withdrawn.
- In no case should any final guidance issued by CEQ be applied to ongoing NEPA reviews that have proceeded past the scoping stage.
- CEQ's proposal to include upstream and downstream emissions in NEPA analyses significantly risks being applied in a manner that is inconsistent with NEPA regulations. The NEPA regulations are designed to limit and bound the scope of NEPA review by ensuring that potential environmental effects that are too remote, too speculative, or beyond the scope of the deciding agency's decision making authority are not included as indirect or cumulative effects.

- CEQ’s proposal inappropriately expands the scope of the NEPA review of GHG emissions and climate change effects by including transnational environmental effects.
- CEQ’s proposal inappropriately expands the scope of the Revised Draft Guidance to land and resource management actions. In doing so, CEQ fails to address the unique and diverse challenges that such NEPA reviews face, overlooks the paralyzing effect this one-size-fits-all guidance will have on the land management decision-making process both procedurally and from legal challenges, and exacerbates the risk that NEPA challenges will prevent agencies from fulfilling their statutory mandates to promote and authorize multiple, diverse uses of federal land. CEQ should expressly exclude land and resource management actions from any final guidance, as it initially proposed to do in 2010.
- CEQ’s proposal inappropriately directs agencies to include the draft Office of Management and Budget (“OMB”) social cost of carbon estimates when seeking to monetize costs and benefits in NEPA reviews.
- By directing agencies to incorporate climate change mitigation measures and monitoring into final decision documents as part of their NEPA review, CEQ’s proposal exceeds the scope of NEPA and CEQ’s implementing regulations.
- CEQ’s proposal inappropriately sets an arbitrary 25,000 tons CO<sub>2</sub>e/year threshold for including GHG emissions in NEPA reviews.

In light of these serious deficiencies, the Associations urge CEQ to withdraw the Revised Draft Guidance at the earliest opportunity. Withdrawing the Revised Draft Guidance will avoid any confusion related to the applicable requirements for addressing potential climate change impacts in a NEPA review. Withdrawing the Revised Draft Guidance will not impede the agencies’ ability to use their discretion to continue to address all potential environmental impacts of a proposed action in a manner that is consistent with NEPA, CEQ’s implementing regulations, and NEPA case law.

While the Associations believe that withdrawal of the Revised Draft Guidance is the best option available to CEQ at this time, we offer CEQ a number of suggestions for improvement if CEQ moves forward with revised or final guidance. These suggestions are presented as alternative arguments and are not intended to waive the Associations’ primary position that the Revised Draft Guidance should be withdrawn.<sup>2</sup> At the outset, it is essential that CEQ ensure that any final guidance be fully consistent with CEQ’s implementing regulations and case law and does not venture beyond the scope of what NEPA allows by incorporating GHG emissions and potential climate change impacts that cannot be attributed to the proposed action. To avoid duplicative efforts and unnecessary delay, CEQ should clarify that any final guidance will not be applicable to proposed actions that have already begun the scoping process. CEQ should also clarify that, consistent with existing NEPA law, transnational impacts should not be evaluated in NEPA reviews. Further, CEQ should exclude land and resource management actions from any

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<sup>2</sup> Nor is this intended to waive any future arguments the Associations or their members may have regarding the Revised Draft Guidance or any of the provisions contained in it.

final guidance and proceed, if at all, with sector-specific guidance tailored to the unique challenges posed by land and resource management decisions. In addition, EPA should eliminate or, at a minimum, substantially increase the presumptive threshold for quantifying GHG emissions and allow agencies more discretion to determine whether qualitative or quantitative approaches to evaluating potential climate change effects should be employed. Finally, we urge CEQ and affected agencies to work with the Associations to develop approaches to address GHG emissions and climate change effects that focus on identifying the proper scope of NEPA review, establish a clear process and timeline for NEPA reviews, and avoid the creation of overwhelming burdens, delays, and litigation risk to new projects.

### **NEPA Overview**

A fundamental tenet of NEPA is that it is a procedural statute. NEPA does not mandate any particular outcome or require an agency to select an alternative that has the fewest environmental consequences or the lowest GHG emissions. NEPA simply requires that an agency take a “hard look” at the environmental consequences of any major federal action it is undertaking. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989); *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976). Once the procedural elements of NEPA have been satisfied and the environmental consequences of a proposed action have been given the required scrutiny, an agency may issue its decision relying on the factors and considerations specified in the statute under which it is acting.

When evaluating a proposed agency action under NEPA, an agency can begin by conducting an Environmental Assessment (“EA”), which is a concise environmental analysis that allows an agency to evaluate the significance of any potential environmental impacts of the proposed action. *See* 40 C.F.R. § 1508.9. If the agency determines that the environmental impacts of a proposed action will not be significant, it can issue a Finding of No Significant Impact (“FONSI”) and conclude its NEPA obligations. *Id.* §§ 1508.9, 13. However, if an agency determines—either before or after conducting an EA—that a project’s environmental impacts will be significant, it must prepare an Environmental Impact Statement (“EIS”) that addresses, among other things, “the environmental impact of the proposed action” and “alternatives to the proposed action.” 42 U.S.C. § 4332(C).

To complete this analysis, an agency must consider the direct, indirect, and cumulative effects of the proposed action 40 C.F.R. §§ 1508.7, 8. However, the scope of such a review is appropriately limited by the requirement that such effects be “reasonably foreseeable” and, for indirect effects, proximately caused by the proposed action under review. *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004); *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005). In addition, the agency must evaluate mitigation measures which, if implemented, could reduce the environmental impact of the proposed action. *Id.* §§ 1508.20, 25.

Importantly, as discussed in more detail below, the scope of a NEPA analysis is not unlimited, and only that information that is useful to the environmental decision maker need be presented. *See Dep’t. of Trans. v. Public Citizen*, 541 U.S. 752, 767-770 (2004) (“Rule of reason” limits agency obligation under NEPA to considering environmental information of use and relevance to decision maker. An agency need not evaluate an environmental effect where it “has no ability to prevent a certain effect due to its limited statutory authority over the relevant

actions”). Thus, despite its lack of substantive requirements, these procedural obligations, coupled with opportunities for public involvement, *see* 40 C.F.R. Part 1503, ensure that agencies are fully informed of potential environmental impacts before taking final action with respect to a proposed federal action. As discussed below, CEQ’s Revised Draft Guidance fundamentally and unlawfully alters several of these current statutory and regulatory obligations.

## **I. CEQ Must Withdraw the Revised Draft Guidance**

At the outset, the Associations urge CEQ to withdraw the Revised Draft Guidance. As explained in the sections that follow, the Revised Draft Guidance is inconsistent with NEPA and CEQ regulations and, if implemented, would unlawfully expand the scope of NEPA analyses. For example, the Revised Draft Guidance could be interpreted to expand the indirect and cumulative impacts that an agency must consider under NEPA and to require agencies to adopt and enforce mitigation measures as part of the NEPA process. In doing so, the Revised Draft Guidance would effectively transform NEPA from a procedural statute into a substantive one that directs agencies to adopt alternatives with the lowest GHG emissions. Thus it is critical that CEQ take action to ensure that neither agencies nor the courts utilize CEQ’s Revised Draft Guidance in a manner that unlawfully contradicts NEPA or CEQ’s implementing regulations. In the alternative, if CEQ determines that guidance is necessary, the Associations urge CEQ to prepare a second revised draft that addresses the Associations’ concerns below in a manner that is consistent with NEPA and CEQ’s implementing regulations and abandons a one-size-fits-all approach to addressing GHGs under NEPA for all federal actions—including land and resource management actions—that fails to consider the diverse scenarios under which NEPA can be triggered.

### **A. Addressing Climate Change Impact Under NEPA**

GHG emissions and climate change are fundamentally different from other types of emissions and environmental impacts that agencies are required to evaluate in NEPA analyses. As EPA stated in its endangerment determination for GHG emissions from mobile sources, “greenhouse gas emissions emitted from the United States (or from any other region of the world) become globally well-mixed, such that it would not be meaningful to define the air pollution as greenhouse gas concentrations over the United States as somehow being distinct from the greenhouse gas concentrations over other regions of the world.” 74 Fed. Reg. 66,496, 66,517 (Dec. 15, 2009). As a result, the GHG concentration at a given location cannot be traced to a specific source or subset of sources, but instead is the product of the incremental contributions of all sources of GHG emissions across the planet. As CEQ acknowledges, “GHG emissions from an individual agency action will have small, if any, potential climate change effects.” 79 Fed. Reg. 77,825.

The global nature of GHG emissions and climate change has important implications for NEPA analyses and the evaluation of the potential environmental effects of a proposed federal action. As CEQ and other federal agencies have recognized:

climate change presents a problem that the United States alone cannot solve. Even if the United States were to reduce its greenhouse gas emissions to zero, that step would be far from

enough to avoid substantial climate change. Other countries would also need to take action to reduce emissions if significant changes in global climate are to be avoided.

Interagency Working Group on Social Cost of Carbon, Technical Support Document: - Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order 12866 at 10 (Feb. 2010) (hereinafter “2010 Social Cost of Carbon Report”). In light of the comparative magnitude of GHG emissions from other sources, it is virtually impossible to isolate and evaluate the climate change impact of GHG emissions from a single federal action, let alone the incremental differences in climate change impacts between various alternatives. Because individual projects make such small contributions to atmospheric GHG concentrations, it is difficult to imagine a scenario where the potential climate change impacts of a given project could be considered “significant” in any meaningful way. While CEQ suggests in the Revised Draft Guidance that this is simply “a statement about the nature of the climate change challenge,” 79 Fed. Reg. at 77,825, it is nonetheless a factual and accurate statement that cannot simply be ignored as agencies assess obligations under NEPA.

In recognition of these unique challenges posed by the global nature of GHG emissions and climate change, CEQ has proposed to use GHG emissions as a “proxy for assessing a proposed action’s climate change impacts.” 79 Fed. Reg. at 77,825. It is important to recognize, however, the limitations with respect to establishing a causal link between GHG emissions from a particular source and the environmental and climate change impacts related to such source. Since the proportional emissions from any given project are infinitesimally small, CEQ must ensure that agencies avoid any temptation, as described in Section III, *infra*, to expand the scope of the NEPA review to include other upstream or downstream GHG emissions that lack the requisite causal connection to the proposed action in an effort to artificially increase the significance of a proposed project’s climate change impacts. Instead, a qualitative approach that recognizes the causal disconnect—or at least the minute causal relationship—between any given project and potential climate change impacts may be more appropriate under NEPA.

At the same time, quantifying GHG emissions, in appropriate and specific circumstances, can be an effective tool in comparing various alternatives in a NEPA analysis. However, in order for such an approach to achieve NEPA’s primary goal of informing agency decision making, it is critical that the GHG emissions included in the comparison are appropriately limited to those that are closely related to the proposed project and thus are useful to inform the agency’s decision. As explained in Section III, *infra*, as the causal connection between a proposed action and potential upstream and downstream effect becomes more attenuated, attempts to quantify GHG emissions also become more speculative and uncertain. Thus, given the global nature of GHG emissions and climate impacts, any final guidance issued by CEQ must vigorously apply existing regulatory and legal limits on the scope of NEPA reviews, including the proximate cause and foreseeability limits included in the evaluation of indirect and cumulative effects. If appropriate limits are applied, quantifying GHG emissions can be an effective way for agencies to take the requisite hard look at the potential environmental impacts of a proposed action and alternatives. Without such limits in place, however, the scope of a NEPA review could become boundless and preclude any meaningful comparison between alternatives.



At this time, many federal agencies have been developing significant experience and expertise in analyzing climate change in NEPA reviews that are specifically tailored to the types of actions that those agencies undertake. In that context, CEQ's one-size-fits-all approach in this Revised Draft Guidance is both unnecessary and counterproductive to the extent that it interferes with agencies' existing efforts to address climate change under NEPA. In light of the progress made by individual agencies and the serious deficiencies in the Revised Draft Guidance, the Associations urge CEQ to withdraw the Revised Draft Guidance and consider whether such centralized guidance is even necessary. In the event that CEQ determines that such guidance is still necessary, it must narrow the scope to ensure the NEPA analysis is appropriately limited, in accordance with CEQ regulations and case law, and does not include other emissions that are not properly attributable to the proposed action.

## **B. Risks to Associations If the Revised Draft Guidance Is Finalized in this Form**

If finalized in its current form, the Revised Draft Guidance effectively could amend CEQ's existing regulations in a manner that unlawfully expands the scope of the NEPA analysis and imposes substantive obligations on agencies and project sponsors without following proper rulemaking procedures. Because of their global nature, GHG emissions and climate change impacts can be evaluated on extremely broad scales, and it is imperative that the procedural and substantive limits on NEPA be vigorously enforced in this context, not expanded. Guidance documents are intended to serve a limited purpose, which is to interpret and explain laws and regulations, not to replace or amend them. It would be unlawful for CEQ to issue guidance that would effectively amend regulations without the necessary procedural protection afforded by the Administrative Procedures Act ("APA"). *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (asserting that overreaching guidance documents allow an agency to make law "without notice and comment, without public participation, ... without publication in the Federal Register or Code of Federal Regulations[,] and without judicial review).

Despite CEQ's admonition that, if finalized, the Revised Draft Guidance would not be a binding rule or regulation, 79 Fed. Reg. at 77,823, the Associations are concerned that it may be treated as such by agencies or by the courts. If that were to occur, the Associations' members could find themselves and the agencies with which they interact effectively bound by the unlawful and overreaching provisions in the Revised Draft Guidance without being afforded the full complement of procedural protections the APA is intended to provide. In some cases, agencies elect to apply CEQ guidance in a binding manner, even if it overrides actual CEQ regulations. *See, e.g., Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 409 (6th Cir. 2013) ("[T]he Corps appears to read the CEQ Guidance as overriding the [40 C.F.R.] § 1508.7 requirements to consider past impacts. . . . Yet, the Corps offers no authority that allows an interpretive guidance to work such a substantive change to a duly promulgated regulation) (internal citation omitted)).<sup>3</sup> As described below, the Revised Draft Guidance would expand the NEPA review for GHG emissions beyond what NEPA and CEQ regulations otherwise require,

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<sup>3</sup> In fact, EPA is already urging other agencies to comply with the Revised Draft Guidance in comments on draft EISs. *See*, EPA Region 10, Comments on the Draft Environmental Impact Statement for the Jordan Cove Energy Project, (Docket No. CP13-483-000) and Pacific Connector Pipeline (Docket No. CP12-492-000) at 14 (Feb. 11, 2015) (recommending that FERC "consider the approaches for climate impact assessment outlined in CEQ's recent 'Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts.'")

and an Association member seeking approval of a project would have little recourse if an agency imposed such requirements on their projects during the NEPA process. As a result, they could be subject to additional costs, delays, and potentially unlawful substantive obligations. In addition, CEQ appears to pre-judge certain potential climate change effects by, for example, labeling geographies and ecosystems as vulnerable to climate change. *See, e.g.*, 79 Fed. Reg. at 77,821. Agencies may be hesitant to critically assess the likelihood of potential climate change impacts if they perceive that CEQ has already reached a conclusion within the context of this guidance.

Likewise, courts effectively can make a CEQ guidance document *de facto* binding in their jurisdictions by endorsing and adopting it as the correct interpretation of NEPA or a CEQ regulation. *See, e.g., Russell Country Sportsmen v. U.S. Forest Service*, 668 F.3d 1037, 1045 (9th Cir. 2011) (“The First, Eighth, and Tenth Circuit have adopted this CEQ guidance as a framework for applying [40 C.F.R.] § 1502.9(c)(1)(i) .... We now join them in doing so.” (internal citations omitted)); *Great Old Broads for Wilderness v. Kimbell*, 790 F.3d 836, 854 (9th Cir. 2013) (“[W]e have adopted the Council for Environmental Quality’s (“CEQ”) guidance that ‘supplementation is not required when two requirements are satisfied: (1) the new alternative is a *minor variation* of one of the alternatives discussed in the draft EIS, and (2) the new alternative is *qualitatively within the spectrum of alternatives* that were discussed in the draft [EIS].’” (emphasis in original)). If a court were to adopt final CEQ guidance on GHG emissions in a project-specific NEPA challenge that was unrelated to the Associations’ missions, the Associations could be foreclosed from full participation in the judicial review process due to a lack of perceived legal interest in the project at issue sufficient to justify intervention in the case.

Moreover, the broad principles in the Revised Draft Guidance that are discussed more fully below, including the requirement to incorporate upstream and downstream GHG emissions, to include the draft OMB social cost of carbon estimates when monetizing costs and benefits, and to consider mitigation measures and monitoring plans, will further complicate the NEPA review process for agencies in a manner that will not only add time and cost to the NEPA review process, but will also increase the risk of litigation over the sufficiency of the agencies’ attempts to incorporate these new obligations into NEPA analyses. Thus, even if the final guidance is applied by agencies and the courts as nonbinding guidance, NEPA’s history has shown that litigation is inevitable and would produce additional costs and delay for both agencies and project applicants. To the extent litigation is based on confusion over the guidance or assertions that the guidance imposes obligations that are inconsistent with NEPA and CEQ’s implementing regulations, neither the litigation nor the associated costs and delays would further NEPA’s ultimate goal of improving agency decision making.

Thus, in the event that CEQ decides to go forward with guidance on considering the effects of GHG emissions and climate change effects in NEPA analyses, it must ensure that the guidance is consistent with NEPA and CEQ’s existing regulations.

## **II. Any Final Guidance Should Not Be Applied to Ongoing NEPA Reviews**

In the event CEQ proceeds to issue final guidance for addressing potential climate change impacts in NEPA analyses, the Associations request that CEQ clarify and amend the proposed effective date for a final guidance document. In the preamble, CEQ recognizes that “[t]he

revised draft guidance will be effective immediately once finalized for newly proposed actions ....” 79 Fed. Reg. at 77,818. However, CEQ goes on to state in the Revised Draft Guidance that “[a]gencies are encouraged to apply this guidance to all new agency actions moving forward, *and, to the extent practicable, to build its concepts into currently on-going reviews.*” *Id.* at 77,831 (emphasis added). While it is appropriate to delay the effective date until a final guidance is issued, the Associations are concerned by the costs and confusion that would follow if an agency attempts to apply the final guidance to NEPA reviews that are already underway when the guidance becomes effective. An agency’s NEPA analysis is a frequently long, costly, and litigious process that demands considerable resources from the lead and coordinating agencies, private parties whose permit or license application is under review, and the general public that participates in the NEPA process. Project developers that have already completed a public scoping process have expended time and resources developing NEPA-required information established through this process and under nearly four decades of NEPA precedent, which the Revised Draft Guidance fundamentally alters. The same is true of lead and coordinating agencies. Therefore, imposing any final guidance on projects that are already well along in the permitting and NEPA review process would cause unplanned additional cost and considerable delay. Moreover, such retroactive applicability is bad public policy. Rather than creating confusion and uncertainty by requiring the final guidance to be incorporated into ongoing agency review “to the extent practicable,” the Associations urge CEQ to adopt a bright-line rule that any final guidance will only apply to new NEPA reviews that have not yet undergone the scoping process.

As CEQ states in the Revised Draft Guidance, the provisions of any final guidance would not “establish legally binding requirements in and of itself.” 79 Fed. Reg. at 77,823. Furthermore, as described below, agencies are already incorporating potential climate change impacts into NEPA analyses guided by existing laws, regulations, and legal precedent. *See, e.g.,* FERC, Draft EIS: Jordan Cove Energy and Pacific Connector Gas Pipeline Project 4-892 to 895 (Nov. 7, 2014).<sup>4</sup> Those same laws and regulations will remain applicable after any guidance is finalized. While the Associations continue to have concerns with the manner in which agencies are currently conducting NEPA reviews, completing a NEPA review under the existing legal framework would be less burdensome than starting the NEPA process over again. Therefore, applying a bright-line applicability rule that excludes projects that have begun the scoping process will not create any risk that potential climate change impacts will be ignored in NEPA analyses already underway. Interested stakeholders will continue to have the full procedural protections afforded by NEPA in the event that they believe an agency’s consideration of climate change impacts was insufficient. Thus, the Associations urge CEQ and the agencies to avoid unnecessary cost and confusion surrounding the NEPA review process by limiting application of any final guidance to new proposals that have not yet begun the NEPA review process when guidance is finalized and relying, in the interim, on existing regulations, case law, and established agency procedures.

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<sup>4</sup> Available at <https://www.ferc.gov/industries/gas/enviro/eis/2014/11-07-14-eis.asp>.

### **III. The Proposal to Include Upstream and Downstream GHG Emissions Is Incompatible with CEQ's NEPA Regulations for Indirect and Cumulative Impacts**

As proposed, the Revised Draft Guidance would create significant risks of being interpreted to transform and unlawfully expand the requirement in 40 C.F.R., Part 1508, that federal agencies consider the direct, indirect, and cumulative impacts of other federal and nonfederal actions. CEQ's regulations and current case law appropriately limit the scope of an agency's evaluation of such impacts to ensure that agencies remain focused on the proposed federal action before them. By imposing a requirement to account for the effects of upstream and downstream GHG emissions from other federal and nonfederal actions, 79 Fed. Reg. at 77,826, the Revised Draft Guidance could require agencies to consider environmental effects that may be outside of the scope of what is contemplated by existing regulations and case law. If finalized, this directive would prevent agencies from applying reasonable limits in determining which indirect and cumulative impacts bear a sufficient causal relationship to the agency action to be included in the related NEPA review and could subject agencies to unnecessary judicial review whenever irrelevant upstream and downstream GHG emissions are not addressed. Eliminating agency discretion to determine which potential indirect or cumulative impacts should be considered would, as the Supreme Court recognized in *Andrus v. Sierra Club*, 442 U.S. 347, 355 (1979), "trivialize NEPA."

As CEQ recognizes, climate change is unique among environmental impacts because "diverse individual sources of emissions each make relatively small additions to global atmospheric GHG concentrations ...." 79 Fed. Reg. at 77,825. In this respect, "climate change is the ultimate 'small handle' problem, where an individual project has only a very small individual contribution to an extremely significant cumulative problem." Neal McAliley, NEPA and Assessment of Greenhouse Gases, 41 *Env'tl. L. Rep. News & Analysis* 10,197, 10,199 (2011). However, CEQ should not respond to this "small handle" situation by requiring agencies to cast their nets more broadly to encompass more and virtually unlimited GHG emissions within the scope of their NEPA reviews by requiring the inclusion of upstream and downstream GHG emissions as indirect or cumulative effects.

The fundamental purpose of a NEPA review is to inform agency decision making and, as a result, NEPA and CEQ's regulations include important limitations to ensure that agencies do not consider environmental impacts that are either so far removed from the proposed federal action or so speculative that they are not relevant to the discrete project and decision before the agency. *See* 40 C.F.R. 1508.7, 8 (limiting scope of indirect and cumulative impact analysis to future actions that are "reasonably foreseeable"). These appropriate limits not only promote informed agency decision making by ensuring that decisions are based on environmental impacts over which the federal agency has control, but also protect agencies and private entities whose permit or license applications are subject to NEPA review against unnecessary litigation over hypothetical, tangential, or *de minimis* environmental effects. These limits must be strictly enforced in the unique context of GHG emissions and climate change where, unlike other environmental impacts, GHG emissions are universally mixed in the atmosphere and bear no specific geographic nexus to the climate impacts they may cause.

For decades, CEQ's NEPA regulations have required federal agencies to evaluate indirect effects of a proposed action, which are defined as effects that "are caused by the action and are

later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). The concept of causation is central to understanding an agency’s obligation under NEPA to consider indirect effects and must continue to serve as a critical limit in an agency’s obligation to evaluate the effect of GHG emissions. While upstream and downstream GHG emissions may bear a relationship to a federal action, that is not the test for inclusion in a NEPA review. The Supreme Court has explained that “a ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations.” *Public Citizen*, 541 U.S. at 767. Indirect effects must only be considered when there is a “reasonably close causal relationship” that would qualify as a “proximate cause” under tort law. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983); *see also Public Citizen*, 541 U.S. at 767 (citing W. Keeton, *et al.*, *Prosser and Keeton on Law of Torts* 264, 274-75 (1983) for proximate cause standard). Thus, for example, an agency need not consider environmental effects of actions over which the agency has no control. *Public Citizen*, 541 U.S. at 770 (“We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”); *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667 (2007) (same).

Application of this proximate cause standard for indirect effects has significant implications for consideration of upstream and downstream GHG emissions. Specifically, a federal action cannot be considered a proximate cause of an upstream or downstream action if such other action is likely to occur without the proposed federal action. Courts have frequently addressed this issue in the context of induced growth, finding that an agency need not consider the environmental effects of third party development when the federal project is responding to development that would occur anyway. *See, e.g., Citizens for Smart Growth v. Dep’t of Transp.*, 669 F.3d 1203, 1205 (11th Cir. 2012) (no need to evaluate “the project’s stimulation of commercial interests in a previously residential area” when “commercial uses in the study area were already being planned or developed”); *City of Carmel-By-The-Sea v. Dep’t of Transp.*, 123 F.3d 1142, 1162 (9th Cir. 1997) (“The construction of Hatton Canyon freeway will not spur on any unintended or, more importantly, unaccounted for, development because local officials have already planned for the future use of the land, under the assumption that the Hatton Canyon Freeway would be completed.”); *Morongo Band of Mission Indians v. Fed. Aviation Administration*, 161 F.3d 569 (9th Cir. 1998) (“[T]he project was implemented in order to deal with existing problems; the fact that it might also facilitate further growth is insufficient to constitute a growth-inducing impact under 40 C.F.R. § 1508(b).”).

The same analysis applies to upstream effects. For example, in *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010), the court held that environmental effects associated with oil production in Canada need not be considered when evaluating a pipeline project because the oil would be produced and transported regardless of whether the pipeline project would be completed. Thus, a proposed federal action cannot be considered a proximate cause of upstream and downstream action simply because it is part of the same chain of events.

In addition, an agency’s obligation to evaluate indirect and cumulative impacts is limited to those effects which are “reasonably foreseeable.” 40 C.F.R. §§ 1508.7, 1508(b). “‘Reasonable foreseeability’ does not include ‘highly speculative harms’ that ‘distort[] the decisionmaking process’ by emphasizing consequences beyond those of ‘greatest concern to the

public and greatest relevance to the agency's decision.'" *City of Shoreacres*, 420 F.3d at 453 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989)) (alteration in original). Applying this standard, courts have frequently affirmed agency decisions to limit the scope of NEPA analyses in order to exclude speculative future events. In *City of Shoreacres*, the court agreed that the Army Corps of Engineers' NEPA review for an evaluation of a proposed ship terminal did not need to evaluate cumulative effects from the potential deepening of the harbor at some future date. *Id.* at 453. In another case, the Fifth Circuit affirmed the Department of Transportation's decision to exclude from its cumulative impacts analysis of a proposed LNG facility the potential environmental effects of other proposed federal projects for which draft EISs had not yet been prepared. *Gulf Restoration Network v. Dep't of Transp.*, 452 F.3d 362, 370 (5th Cir. 2006). The court explained that the agency was "entitled to conclude that the occurrence of any number of contingencies could cause the plans to build the ports to be cancelled or drastically altered." *Id.*

Despite CEQ's recognition that "a reasonably close causal relationship" is required for consideration of upstream and downstream emissions, 79 Fed. Reg. at 77,826, other portions of the Revised Draft Guidance appear to ignore this critical legal limit by directing federal agencies to evaluate all upstream and downstream GHG emissions. Thus, the Revised Draft Guidance, if finalized, unnecessarily creates risks that it could be applied in a manner that defeats the purpose of a proper NEPA review by distracting federal agencies from proposed federal action through the inclusion of a host of upstream and downstream emissions that should be irrelevant to the agency's decision making process because they are either outside of the agency's control, too speculative, and/or not reasonably foreseeable. These risks are clearly evidenced in the example of a hypothetical open pit mine included in the Revised Draft Guidance. *See* 79 Fed. Reg. at 77,826. There, CEQ asserts that an agency considering whether to permit an open pit mine would need to evaluate the GHG emissions from every activity from "clearing the land for extraction" to "using the resource." 79 Fed. Reg. at 77,826.

Determining which upstream or downstream GHG emissions may be included within the scope of indirect or cumulative effects of a proposed action is necessarily context-driven and should not be subject to a categorical rule. In many cases, demand for minerals is driven largely by economic development and responds very little, if at all, to changes in supply. Thus, for example, construction of a new open pit copper mine is unlikely to induce growth in copper demand, and any emissions associated with final use of the product could be excluded from a NEPA analysis because it meets an existing rather than new demand. *See, e.g., City of Carmel-By-The-Sea*, 123 F.3d 1142, 1162 (9th Cir. 1997) (no need to consider downstream effects when federal action will not spur additional demand for development). Similarly, when conducting a NEPA analysis for a pipeline intended to transport hydrocarbons from an established production basin to a central collection hub or refining and processing region, an agency would not need to consider upstream emissions associated with resource extraction because the hydrocarbons would be produced and transported to market even if the proposed pipeline were not built. *See Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010); *see also*

As a result, CEQ cannot direct agencies to categorically incorporate all upstream and downstream GHG emissions into a NEPA analysis without first establishing that such emissions meet threshold standards as either indirect or cumulative effects. Several federal agencies already have set limits on the upstream and downstream impacts that are properly included in a

NEPA analysis for projects within their jurisdiction. *See, e.g., Algonquin Gas Transmission, LLC*, 150 FERC ¶ 61, 163, at P 128 (2015) (“The potential environmental effects associated with shale gas development are neither sufficiently causally related to the AIM Project to warrant a detailed analysis nor are the potential environmental impacts reasonably foreseeable, as contemplated by the CEQ regulations.”); *Freeport LNG Development, L.P.*, 148 FERC ¶ 61,076 at PP 77-78 (2014) (explaining that upstream production activities are beyond the scope of FERC’s NEPA review of an LNG export terminal application); *Constitution Pipeline Company, LLC*, 149 FERC ¶ 61,199, at P 98-101 (2014) (finding an insufficient causal link between proposed natural gas pipeline and increased natural gas development using hydraulic fracturing); *Central New York Oil and Gas Company, LLC*, 137 FERC ¶ 61, 121, at P 84 (2011) (“Marcellus Shale development and its associated potential environmental impacts are not sufficiently causally-related to the MARC I Project to warrant the more comprehensive analysis that commenters seek”), *aff’d sub nom. Coalition for Responsible Growth and Resource Conservation v. FERC*, 485 Fed. App’x 472, (2d Cir. 2012) (“FERC included a short discussion of Marcellus Shale development in the EA, and FERC reasonably concluded that the impacts of that development were not sufficiently causally-related to the project to warrant a more in-depth analysis.”); DEPT. OF ENERGY, ADDENDUM TO ENVIRONMENTAL REVIEW DOCUMENTS CONCERNING EXPORTS OF NATURAL GAS FROM THE UNITED STATES 2 (2014) (“DOE cannot meaningfully estimate where, when, or by what method any additional natural gas would be produced. Therefore, DOE cannot meaningfully analyze the specific environmental impacts of such production . . . [n]or can DOE meaningfully consider alternatives or mitigation measures as they relate . . . [n]atural gas production . . .”). Thus, if CEQ issues a final guidance rather than withdrawing the Revised Draft Guidance, the Associations urge CEQ to clarify that the guidance is not intended to expand existing requirements to consider indirect and cumulative effects and to ensure that any examples, such as the open pit mine, are consistent with existing regulations and case law.

If the Revised Draft Guidance is finalized in its current form, the directive to consider upstream and downstream GHG emissions would add a large degree of regulatory uncertainty and significantly increase the time and cost of conducting NEPA reviews, both for the agencies and for parties seeking permits and licenses for development projects. At the same time, directing agencies to include upstream and downstream effects that lack the requisite causal connection to the proposed action will not fulfill NEPA’s goal of improving agency decision making. As CEQ acknowledges in the Revised Draft Guidance, climate change is the result of “relatively small additions to global atmospheric GHG concentrations” made by “diverse individual sources.” 79 Fed. Reg. at 77,825. It will be costly and time consuming for an agency to identify and quantify the GHG emissions from each diverse individual source that may be considered upstream or downstream of a proposed federal project. Furthermore, given the global nature of climate change, an open-ended directive to consider upstream and downstream emissions has the potential to dramatically increase legal challenges to NEPA analyses as critical stakeholders seek to identify potential upstream and downstream emissions that were not accounted for by the agency. Thus, rather than focusing on indirect and cumulative effects that are closely related to a proposed federal action and have the potential to inform an agency’s decision, the Revised Draft Guidance’s broad and open-ended directive to consider upstream and downstream GHG emissions could shift the agency’s time and resources toward increasingly tangential issues that are unlikely to inform the agency’s ultimate decision on a proposed action.

Thus, the result would be significant costs and delay without a proportional improvement in the quality of agency decision making.

#### **IV. CEQ Should Clarify that Transnational Impacts Should Not Be Evaluated**

If CEQ proceeds to issue final guidance, it must explicitly affirm that NEPA does not require consideration of international and global impacts of GHG emissions, consistent with established law that agencies are only required to examine impacts within the United States. Congress' purpose in establishing NEPA was to "foster and promote the general welfare ... and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a) (emphasis added). Thus, to the extent that limited upstream and downstream GHG emissions are included in a NEPA review as indirect or cumulative effects, agencies must limit that analysis to domestic emissions. The rule regarding consideration of international impacts under NEPA was established by Executive Order 12114, which limits the scope of an EIS to the sovereign territory of the United States. The Executive Order was confirmed in *Natural Resources Defense Council v. Nuclear Regulatory Comm.* 647 F. 2d 1345 (D.C. Cir. 1981), where the court upheld an EIS that did not address impacts outside the United States. Other federal courts have been unanimous in declining to require an EIS to study any impacts beyond those set in E.O. 12114. *See, e.g., Consejo de Desarrollo Economico de Mexicali v. United States*, 438 F. Supp. 2d 1207 (D. Nev. 2006) (NEPA does not apply to impacts in Mexico of actions to a canal located solely in the United States); *Born Free USA v. Norton*, 278 F. Supp. 2d 5 (D. D.C. 2003) (NEPA does not apply extraterritorially in areas under the sovereign control of another nation). This conclusion is further supported by CEQ's recognition that "it is not useful, for NEPA purposes, to link GHG emissions from a proposal to specific climatological changes to a particular site." 79 Fed. Reg. at 77,808.

The impacts of climate change are no different from other environmental impacts that agencies have long considered. Although climate change may be global in nature due to the fact that GHGs from all sources become well-mixed in the atmosphere, the only impacts that NEPA requires an agency to consider are those within the United States. Indeed, the global nature of climate change further reinforces the need to provide appropriate limits on the scope of NEPA reviews, as inclusion of transnational climate change impacts would make the scope of any NEPA review potentially boundless. Imposing such an obligation on agencies would be extremely onerous and would impose significant costs on agencies and project sponsors without a commensurate improvement in environmental decision making. Thus, CEQ should confirm this long-standing law and explicitly state that agencies need not include transnational climate change impacts in NEPA analyses.

#### **V. The Revised Draft Guidance Should Not Be Applied to Land and Resource Management Actions**

In a significant departure from CEQ's proposal in 2010, *see* 75 Fed. Reg. 8046 (Feb, 23, 2010), the Revised Draft Guidance includes land and resource management actions. 79 Fed. Reg. at 77,825. In doing so, CEQ fails to fully appreciate the complex nature of many land and resource management actions, the significant uncertainty related to climate change impacts from such actions, and the fact that there is no "one size fits all" approach to the myriad land and resource management activities that trigger NEPA. By failing to address the complex and



unique nature of land and resource management actions, the Revised Draft Guidance is particularly ill-suited in this context and will exacerbate many of the ongoing challenges that already plague NEPA reviews, particularly at the programmatic planning level. Moreover, the Revised Draft Guidance offers no specific insight into how climate change effects can be incorporated into the broad and diverse range of land and resource management actions which differ so significantly from other agency actions. We, therefore, urge EPA to explicitly exclude land and resource management actions from the scope of any final guidance.

Federal land management agencies are bound by statutory requirements to manage lands for diverse resource uses. *See* Multiple-Use Sustained-Yield Act 16 U.S.C. § 528 *et seq.*; National Forest Management Act 16 U.S.C. § 1604 *et seq.*; Federal Land Policy and Management Act (“FLPMA”) 43 U.S.C. §1701 *et seq.*; Alaska National Interest Lands Conservation Act 16 U.S.C. § 3101 *et seq.* Managing lands for diverse use of resources means that agencies must promote and authorize a wide variety of activities, many of which will have some environmental impacts associated with them. As an example, under FLPMA, the BLM is required to manage public lands for multiple uses. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 57 (2004); *Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 76 (D.C. Cir. 2011); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 710 (10th Cir. 2009). “‘Multiple use’ means ‘a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.’” *New Mexico ex rel. Richardson*, 565 F.3d at 710 (citing 43 U.S.C. § 1702(c)). These statutes drive the need for federal agencies to have comprehensive resource management plans which are, in effect, living documents establishing guiding principles for agency actions at the site-specific level. They are highly varied, dynamic and vast. Moreover, agencies have a legal obligation to revise resource management plans in response to changing conditions or changing public needs. *E.g.*, 16 U.S.C. § 1604(a); 43 U.S.C. § 1712(a).

Because resource management plans are intended to establish long-term management principles for subsequent agency actions, it is often difficult to predict the environmental effects of establishing such plans *ex ante*. As a result, decisions made in the land and resource management context frequently involve a greater degree of speculation than other federal actions subject to NEPA. At the time NEPA review is required, many details regarding resource development proposals remain uncertain. Final decisions regarding when, or even if, resources are extracted may depend on unpredictable market conditions. Likewise, the scope and eventual impact of a given project or series of projects may depend on additional exploratory activities. Thus, while a qualitative assessment of the potential environmental impacts of the multiple uses included in a resource management plan may be possible, a more detailed analysis that quantifies the potential environmental impacts of such a diverse array of future actions is virtually impossible to conduct at the resource management plan stage.

Further, resource management plans are part of a multi-phased decision-making structure that is unique to land and resource management actions. In this decision making structure, broad programmatic resource management plans are followed at a later date by site-specific plans where decisions are made with respect to specific proposals for action. As a result, NEPA review may be triggered multiple times and at various degrees of specificity within the land and

resource management structure. This phased structure can create uncertainty regarding whether, and at what level of detail, potential climate change impacts must be considered at the various stages. In particular, to ensure efficient and meaningful consideration of potential environmental effects under NEPA it is critical to understand how the various levels of NEPA review interact and the degree to which certain potential environmental effects—such as climate change impacts—can be addressed more effectively at earlier or later stages of the NEPA review process. For example, as the Revised Draft Guidance notes, in some contexts, it may be most efficient to address environmental impacts primarily at the programmatic level and then incorporate those analyses by reference at the site-specific stage. 79 Fed. Reg. at 77,830. In other cases, it may be reasonable to defer a substantial portion of the NEPA analysis to the site-specific decision-making stage where potential environmental impacts may be less speculative.

Given the challenges associated with applying NEPA in the context of land and resource management actions, it is not surprising these actions, particularly the development of comprehensive resource management plans, can be effectively paralyzed by legal challenges brought by interest groups opposing a particular use. Thus, interest groups opposed to land and resource management actions such as snowmobiling, timber harvests, and oil and gas development can use NEPA challenges based on potential impacts related to climate change or any host of other potential environmental effects can use NEPA challenges as a way to stall implementation of actions with which they disagree. As a result, litigation of programmatic EISs can paralyze implementation of the management plans, and any subsequent agency decision under the plan threatening to extinguish any reasonable possibility to engage in activities on federal land. For example, in *People of the State of California v. United States Department of Agriculture*, No. CIV-s-05-0211 (E.D. Cal., filed May, 26, 2005), a NEPA challenge to the 2004 Sierra Nevada Forest Plan amendment was litigated for seven years before the judge eventually ordered a supplemental NEPA analysis. Such litigation can effectively block any land or resource management actions. As long as such legal challenges can proceed, agencies attempting to manage their resources in accordance with their multi-use mandates will rarely, if ever, reach decisions or implementation of decisions in a reasonable time frame.

The end result of the general agency paralysis produced by such NEPA litigation is the agencies' unlawful failure to comply with their statutory mandates to develop and revise resource management plans and promote multiple uses on federally managed lands. Indeed, by preventing land use agencies from taking action to implement their statutory mandates, the litigation-based delays that have become so common for programmatic EISs have in many cases barred the government from achieving NEPA's primary goal by impeding rather than informing agency decision making. However, despite CEQ's suggestion to the contrary, applying the Revised Draft Guidance generally to the wide and diverse universe of land and resource management decisions will do nothing to alleviate existing challenges in applying NEPA and, instead, will almost certainly have the effect of making things worse.

CEQ asserts in the preamble that it is extending the Revised Draft Guidance to include land and resource management actions in order to “ensure consistency and certainty about whether and how agencies should address GHG emissions and impacts of climate change in their NEPA analyses and documents.” 79 Fed. Reg. at 77,803. Despite that stated goal, the Revised Draft Guidance offers virtually no concrete assistance to help agencies achieve it. Instead, the Revised Draft Guidance makes vague statements such as: “The revised draft guidance sets out

the broad principles to assist agencies when they make determinations on how to conduct NEPA analyses with respect to the effects of GHGs and climate change ....” *Id.* at 77,805. CEQ compounds these generalized exhortations by referring repeatedly to existing regulations, such as 40 C.F.R. § 1502.22, that direct agencies’ response to uncertainty and a lack of data in a NEPA review. *Id.* at 77,803, 77,805, 77,806. CEQ continues by urging agencies to “apply their best judgment and expertise when determining how to consider the level of GHG emissions and impacts of climate change at the programmatic and project or site-specific level of NEPA analysis and documentation” and to “use their discretion to determine the appropriate comparison and balancing of long- and short-term emissions and impacts of climate change with other long- and short-term resource impacts and benefits.” *Id.* at 804.

Directing agencies to comply with these broad principles in a diverse number of settings without providing any concrete guidance on how they can be implemented will do little to ensure consistency and certainty in NEPA analyses for land and resource management actions. To the contrary, establishing a guidance that instructs agencies to use their “best discretion” and “best judgment” while also directing them to apply broad principles such as indirect and cumulative impacts (both upstream and downstream) will further exacerbate existing confusion related to NEPA reviews for land and resource management decisions and lead to the paralysis of public policy. The Associations do not dispute the need to defer to the expertise of land and resource management agencies in this context; however, the structure of the Revised Draft Guidance, which is simultaneously prescriptive and vague, is particularly ill-suited as a one-size-fits-all approach for land and resource management actions. By failing to address the unique challenges posed by specific and varied types of land and resource management actions—including compliance with statutory management mandates, evaluating highly speculative environmental effects associated with future site-specific action, and balancing NEPA obligations at various stages of the agency planning and implementation process—applying the Revised Draft Guidance to land and resource management actions would add to the existing complexity of such NEPA reviews and give opponents of agency actions even more opportunities to disrupt the agencies’ planning processes through time consuming NEPA litigation. For these agencies with specific statutory mandates to actively manage federal lands for multiple uses, a default “no action” alternative brought about through virtually endless NEPA challenges is contrary to Congress’ intent in drafting their organic statutes and unlawfully deprives end users of the benefits that a multiple use mandate is intended to provide.

As CEQ correctly notes, land and resource management decisions are highly complex and frequently involve the potential for countervailing environmental effects associated with both carbon emissions and carbon sequestration. *Id.* at 826. A single guidance based solely on broad principles simply cannot provide the level of analysis necessary to improve decision making across a wide range of agency actions that include forest management and grazing plans, recreational use plans, and resource extraction permitting covering hydrocarbons, coal, and a wide variety of hard-rock minerals. As a result, extending the Revised Draft Guidance to include land and resource management actions, in its current form, would be counterproductive and ill-advised, burdening agencies to respond to litigation, and threatening the legal rights of mineral interest holders. In the absence of concrete guidance applicable to land and resource management actions, requiring agencies to apply such broad principles will subject them to even greater scrutiny during judicial review by stakeholders and courts who in the absence of any concrete guiding principles articulated by CEQ could seek to apply their own standards instead.

For these reasons, we urge CEQ to expressly exclude land and resource management actions from any final guidance, as it originally proposed to do in 2010. The Revised Draft Guidance will exacerbate greatly any perceived flaws in existing NEPA case law and regulations by failing to take into account the unique contexts for land and resource management decisions both generally as distinct from other types of actions under NEPA and the specific contexts in which specific land management decisions arise. To the extent that CEQ believes that guidance is necessary for land and resource management actions, it should proceed through a separate process for individual types of land use management actions rather than subjecting them to an ill-suited approach that fails to account for the complex nature of land and resource management decisions. Specifically, in the event CEQ moves forward with guidance for land and resource management actions, we urge it to proceed on a sector-by-sector approach that addresses the challenges described above in a concrete manner that is specific to the multitude of different land and resource management decisions that agencies may face.

## **VI. The Draft OMB Social Cost of Carbon Estimates Should Not Be Applied in NEPA Analyses**

The Revised Draft Guidance adds further uncertainty, confusion, and vulnerability to the NEPA review process by directing federal agencies to apply the draft OMB social cost of carbon estimates when monetizing the costs and benefits of a proposed action and alternatives. 79 Fed. Reg. at 77,827. The Associations have identified a host of critical problems with the draft OMB social cost of carbon estimates in prior comments submitted to the OMB. We incorporate those comments here by reference.<sup>5</sup> In light of some fundamental and critical flaws in the draft OMB social cost of carbon estimates and the process that led up to it, a decision to include this metric in NEPA analyses would be antithetical to the purposes of transparency and improved decisionmaking that NEPA seeks to achieve. Unless and until a more rigorous, balanced, and transparent social cost of carbon estimate can be developed as part of an appropriately open and public process, CEQ must rescind this aspect of the Revised Draft Guidance and, for the reasons explained below, explain that the draft OMB social cost of carbon estimates should not be included in NEPA reviews unless and until the flaws and deficiencies identified in comments to OMB are corrected. Directing agencies to apply flawed social cost of carbon estimates would impede NEPA's goal of promoting informed decision-making. For example, overestimating the benefits of reducing GHG emissions could cause an agency to consider alternatives with inappropriately expensive (and cost-ineffective) mitigation measures that would not be justified under a more accurate assessment of climate benefits.

Several flaws and deficiencies are of particular relevance in the context of a NEPA review. First, the goal of this concept—projecting cost to society for carbon emitting activities—

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<sup>5</sup> See Comments of The American Chemistry Council *et al.* re: Technical Support Document: Technical Update to the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order No. 12866 (Appendix A); American Natural Gas Alliance *et al.*, Petition for Correction: Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 1286 (February 2010) and Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866 (May 2013) (Appendix B); Comments of The American Public Power Association re: The Technical Support Document, Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order No. 12866 (February 26, 2014) (Appendix C).

can be manipulated by simply changing relevant timeframes, adjusting discount rates, including particular risks, and arbitrarily calibrating other data inputs. Thus, the outcome of a social cost of carbon analysis based on the draft OMB social cost of carbon estimates will have less to do with the possible environmental impacts of a proposed action than with the assumptions of the agency that performs the analysis. As a result, rather than informing agency decision making, the inclusion of draft OMB social cost of carbon estimates may instead be used to advance policy priorities rather than the permitting and licensing of proposals from private parties.

Second, the draft OMB social cost of carbon estimates were developed by OMB and other federal agencies through a process lacking both transparency and any opportunity for peer or public review. As the Associations have explained, the process failed to comply with OMB guidance for developing influential policy-relevant information under the Information Quality Act, Pub. L. No. 106-554 § 515, and legal standards for promoting public participation and transparency in understanding and replicating models. Further, the process used to develop the draft OMB social cost of carbon estimates is antithetical to the NEPA's central premise that transparency and open discourse are critical to informed agency decision making.

Third, the draft OMB social cost of carbon estimates are based on global rather than domestic effects. In fact, in its 2010 Report, the Interagency Working Group on Social Cost of Carbon concluded that 90 to 93 percent of the benefits of reducing GHG emissions would occur outside of the United States. 2010 Social Cost of Carbon Report at 11. As discussed in Section IV, *supra*, agencies must confine NEPA reviews to environmental impacts that will occur within the United States. Thus, applying the draft OMB social cost of carbon estimates without first excluding international benefits would be inconsistent with NEPA.

Fourth, many of the key assumptions and data inputs to the draft OMB social cost of carbon estimates—including damage functions and modeled time horizons—remain highly uncertain, casting significant doubt on the accuracy of any estimates that an agency may include in a cost benefit analysis. Further, OMB has failed to disclose and quantify key uncertainties to inform decision makers and the public about the effects and uncertainties of alternative actions which are required by OMB and central to a proper NEPA analysis. Given the opaque process by which the draft OMB social cost of carbon estimates were developed and the unlawful failure to give the public an opportunity to test and recreate the models used to develop the draft OMB social cost of carbon estimates, the supposed accuracy of the draft OMB social cost of carbon estimates—and their usefulness in agency decision making—is unsupportable.

In light of these significant deficiencies and the uncertainty surrounding the draft OMB social cost of carbon estimates, directing agencies to include draft OMB social cost of carbon estimates in cost benefit analyses would be inconsistent with CEQ's existing regulations. CEQ's implementing regulations provide agencies with detailed instructions for addressing incomplete or unavailable information. 40 C.F.R. § 1502.22. The central function of this regulation is to allow the agency to explain the information that is missing and its relevance to the agency action so that both the agency and interested stakeholders are fully informed of the uncertainty associated with potential environmental effects. In earlier versions of the regulation, agencies faced with incomplete or unavailable information were directed to prepare a hypothetical worst-case scenario in lieu of complete or available information. *See, e.g., Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1474 (9th Cir. 1983); *Sierra Club v. Sigler*, 695

F.2d 957 (5th Cir. 1983). In rescinding the “worst case analysis” requirements, CEQ explained that such catastrophic outcomes should only be included in a NEPA review “if the analysis is supported by credible scientific evidence and is not based on pure conjecture.” 51 Fed. Reg. 15,618, 15,618 (Apr. 25, 1986). Instead, CEQ stressed that “when preparing an EIS, agencies must disclose the fact that there is incomplete or unavailable information,” *id.* at 15,621, in order to “better inform the decision maker and the public,” *id.* at 15,620. By now directing agencies to include draft OMB social cost of carbon estimates in cost benefit analyses, CEQ fails to fully inform agency decision makers and the public of the significant uncertainty in these estimates and suggests instead that they are based on credible scientific evidence. Using NEPA guidance to validate this flawed and controversial metric would be utterly inconsistent with NEPA’s goals.

The problems associated with applying the draft OMB social cost of carbon estimates to NEPA analyses are readily observable in *High Country Conservation Advocates v. U.S. Forest Service*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 2922751 (D. Colo. June 27, 2014). In that case, which involved three agency actions related to a coal mine on federal land, several organizations challenged the final EIS, alleging that the agencies failed to appropriately address the draft OMB social cost of carbon estimates in their cost benefit analysis. The court found that the final EIS was arbitrary and capricious because the agencies failed to justify their decision not to apply the draft OMB social cost of carbon estimates. *Id.* at \*10. Significantly, however, the court did not mandate the inclusion of the draft OMB social cost of carbon estimates in NEPA cost benefit analysis and observed that “the agencies might have justifiable reasons for not using (or assigning minimal weight to) the social cost of carbon protocol to quantify the cost of GHG emissions from the Lease Modifications.” *Id.* at 11. This case highlights the challenges that agencies face when seeking to monetize the costs and benefits of a proposed federal action, particularly when GHG emissions and climate change effects must be evaluated. Given the critical flaws and deficiencies in the draft OMB social cost of carbon estimates and the district court’s clear direction that agencies have discretion to exclude the draft OMB social cost of carbon estimates from cost benefit analysis when properly justified, it is critical that CEQ provide guidance to the agencies that explains the deficiencies in the draft OMB social cost of carbon estimates and assist agencies in articulating a reasoned basis for excluding the metric from cost benefit analyses in future NEPA reviews at this time.

Thus, the Associations urge CEQ to rescind its proposal to apply the draft OMB social cost of carbon estimates in NEPA reviews and instead direct agencies to comply fully with 40 C.F.R. § 1502.22 when seeking to monetize the environmental costs and benefits of proposed actions. To that end, until draft OMB social cost of carbon estimates are improved significantly as a result of a fully public and transparent process, this will require agencies to fully disclose the uncertainties and inadequacies of current efforts to calculate the social cost of carbon. Only after these uncertainties and inadequacies are resolved should CEQ and the agencies consider whether to include draft OMB social cost of carbon estimates in NEPA analyses.

## **VII. Agencies Cannot Be Compelled to Adopt Mitigation Measures as Part of a NEPA Analysis**

In the Revised Draft Guidance, CEQ makes a number of statements that could be construed as requiring federal agencies to take affirmative action to mitigate GHG emissions from federal projects as part of their NEPA review. Specifically, CEQ calls on federal agencies

to evaluate the permanence, verifiability, enforceability, and additionality of proposed mitigation measures. 79 Fed. Reg. at 77,828. The Revised Draft Guidance then goes further and directs agencies when adopting either a FONSI (which accompanies an EA) or Record of Decision (“ROD”) (which follows an EIS) to “identify those mitigation measures [adopted to address climate change] and ... consider adopting an appropriate monitoring program.” *Id.*

The Associations are concerned that these directives could be construed by federal agencies, public stakeholders, or the courts as establishing a legal obligation to adopt climate change mitigation measures as part of any NEPA review. For example, the Revised Draft Guidance’s reference to “permanence, verifiability, enforceability, and additionality,” *id.*, refer to substantive obligations imposed in offset programs used to mitigate emissions in other contexts and blurs the line between procedural and substantive requirements. Further applying these standards in the context of potential climate change impacts is even more problematic because, as described in Section I, *supra*, the climate change impacts, if any, attributable to a specific action and, by extension, any related mitigation measures are too small to be measured. The risk that these directives would be construed as imposing a legal obligation is further heightened by CEQ’s response to comments on the 2010 Draft Guidance. There, CEQ noted that some commenters requested that CEQ “explicitly acknowledge that adoption of mitigation measures considered under NEPA are not *per se* required, and should not be required under the NEPA statute.” *Id.* at 77,819. CEQ has declined to do so in this Revised Draft Guidance.

Requiring mandatory adoption of climate change mitigation measures would impermissibly transform NEPA from a procedural statute into one with substantive requirements. As such, the Revised Draft Guidance cannot be reconciled with the Supreme Court’s holding that, while “NEPA does set forth significant substantive goals for the Nation, ... its mandate to the agencies is essentially procedural.” *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978). This is among the most critical limiting factors of NEPA and applies to all aspects of an agency’s decision making process, including the decision whether or not to adopt measures to mitigate potential environmental effects of a proposed action.

CEQ’s implementing regulations require that the scope of an EIS include, as alternatives to the proposed action, “[m]itigation measures (not included in the proposed action).” 40 C.F.R. § 1508.25(b)(3); *see also id.* §1508.20 (defining mitigation). Thus, as the Supreme Court has noted, “one important ingredient of an EIS is the discussion of the steps that can be taken to mitigate adverse environmental consequences.” *Methow Valley*, 490 U.S. at 351. The Court went on to explain that “[t]here is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted on the other.” *Id.* at 352. As a result, the Court reversed an appellate court ruling requiring each EIS to include “a detailed explanation of specific measures which *will* be employed to mitigate the adverse impacts.” *Id.* at 353 (emphasis in original). Citing *Methow Valley*, appellate courts have routinely confirmed that there is no substantive obligation to adopt mitigation measures identified in an EIS. *Westlands Water District v. Department of Interior*, 376 F.3d 853, 873 (9th Cir. 2004); *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 176-77 (5th Cir. 2000); *City of Caramel-By-The-Sea*, 123 F.3d at 1154.

In contrast to EISs, CEQ's regulations allow agencies to include appropriate mitigation measures in EAs to avoid an action rising to the level of a significant impact to the environment. *See Akiak Native Community v. U.S. Postal Service*, 213 F.3d 1140, 1147 (9th Cir. 2000) ("We must keep in mind that NEPA does not require that Environmental Assessments include a discussion of mitigation strategies."). Promoting voluntary adoption of mitigation measures in the EA context is a helpful tool that agencies can use to ensure that a proposed action's environmental effects will not reach a level of significance. By adopting such measures in a "mitigated FONSI," an agency can avoid the added cost and burden of preparing a full EIS while ensuring that environmental impacts are minimized. Thus, the decision whether to address (and ultimately adopt) mitigation measures in an EA and FONSI are left to the discretion of the agency conducting the NEPA analysis, and such discretion should not be curtailed by the mandates that would be imposed by the Revised Draft Guidance.

The courts have made clear that neither NEPA nor CEQ's implementing regulations impose a duty on federal agencies to adopt mitigation measures in a FONSI or ROD after completing an EA or EIS. Thus, to the extent the Revised Draft Guidance would direct federal agencies to do so, it is unlawful. The Associations urge CEQ to clarify in the final guidance that, consistent with settled NEPA law, the duty to consider mitigation measures while preparing an EIS is strictly a procedural requirement and imposes no substantive obligation on federal agencies to adopt measures to mitigate climate change in the subsequent ROD or FONSI. Consistent with CEQ regulations and established case law, the Associations also urge CEQ to clarify that agencies have no legal obligation under NEPA to evaluate mitigation measures when conducting an EA, but instead have discretion to consider mitigation options when evaluating the significance of potential environmental impacts in the context of a mitigated FONSI. Without these changes, the Revised Draft Guidance could be construed as impermissibly amending CEQ's existing regulations in a manner that is fundamentally inconsistent with NEPA's role as a procedural statute designed to improve agency decision making. Further, it will invite needless litigation from stakeholders whose preferred mitigation measures are not included in final RODs.

The Associations also urge CEQ to clarify that, consistent with existing law, NEPA is a procedural statute that does not require agencies to include monitoring programs in their RODs if they elect to adopt mitigation measures. *See* 79 Fed. Reg. at 77,828 (urging agencies to "consider adopting an appropriate monitoring program"). Regardless of the value, if any, that such monitoring programs may provide, those programs are clearly outside the scope of NEPA. As explained above, NEPA cannot be used to impose obligations of any kind on an agency after a decision on a proposed project has been made. For example, the Supreme Court rejected a demand for a supplemental EIS to address increased use of a forest road by off-road vehicles, holding that, because there was no "ongoing major federal action," there was no duty under NEPA to reopen an EIS that had been completed years earlier. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004). Thus, NEPA cannot provide a cause of action to require a monitoring program in a ROD that adopts mitigation measures.

Likewise, the Associations urge CEQ to clarify that NEPA imposes no substantive requirements with respect to government goals for emission reduction targets. The Revised Draft Guidance states that agencies can "incorporate by reference applicable agency emissions targets such as applicable Federal, state, tribal, and local goals for GHG emissions reductions ... and make it clear whether the emissions being discussed are consistent with such goals." 79 Fed.



Reg. 77,826. CEQ must make clear that complying with any relevant emission reduction goals is not required under NEPA. Failure to do so could create the risk both of federalizing state, tribal, and local emission reduction goals and of making compliance with such goals a statutory obligation under NEPA. Either of these outcomes would be unlawful under NEPA. Further, to the extent CEQ elects to reference such emission reduction goals in any final guidance, the Associations urge CEQ to expressly acknowledge that many such goals include provisions to allow for growth and for the development of new projects.

Finally, the Associations have concerns with the list of potential mitigation measures identified in the Revised Draft Guidance, which include “enhanced energy efficiency, lower GHG emitting technology (e.g. using renewable energy), carbon capture, carbon sequestration (e.g. forest and coastal habitat restoration), sustainable land management practices, and capturing or beneficially using fugitive GHG emissions such as methane.” 79 Fed. Reg. at 77,828. Contrary to CEQ’s suggestion in the Revised Draft Guidance, many of these proposed alternatives will not be available to agencies or project applicants as a practical matter. In many cases, these options are not provided for in existing regulations and pose significant technical, financial, and logistical challenges. In particular, the Associations note that carbon capture and sequestration (“CCS”) is technically infeasible due to the short-term and long-term uncertainty and risks surrounding the design, installation and operation of CCS projects, and the absence of a regulatory infrastructure to oversee and regulate long-term CO<sub>2</sub> storage. Mandating CCS for proposed projects would impose technical and regulatory uncertainties in project development, force unacceptable delays to the project, and could impose costs that would likely render the project unviable. Likewise, in most cases, a renewable energy project would be outside the scope of a proposed action and thus outside of a proposed project’s boundary and control. Directing agencies to consider these theoretical mitigation measures will not improve agency decision making if, as a practical matter, they cannot be implemented due to technical, financial, or logistical constraints.

### **VIII. CEQ Should Not Adopt A Presumptive Threshold For GHG Quantification, And, In Any Event, The Proposed 25,000 Metric Ton Threshold Is Inappropriate**

In the Revised Draft Guidance, CEQ retains a presumptive 25,000 metric ton threshold for quantifying GHG emissions from a proposed federal action. First, the blanket presumed threshold is contrary to established NEPA procedures and the “rule of reason” that is designed to guide agency NEPA reviews. The Guidance makes no attempt to scientifically support its 25,000 metric ton “reference point” as an appropriate threshold for analysis. This, at the outset, contravenes the NEPA requirements for “accurate scientific analysis” and “scientific integrity.” 40 C.F.R. § 1500.1. Further, CEQ provides no rational basis in the Revised Draft Guidance for selecting 25,000 metric tons as the threshold and fails to provide clear guidance as to how such a threshold should be assessed. Finally, to the extent such a threshold is warranted, the threshold selected by CEQ is far too low and should be set significantly higher to better capture projects that are truly substantial in nature and reflect the level of GHG emissions that may be relevant to agency decision making.

First, adopting a presumptive threshold for quantifying GHG emissions is both unnecessary and inconsistent with prior NEPA practice. There is no established “threshold” for reporting or quantifying emissions or discharges of other conventional pollutants, and there is no

reason to establish such a uniform threshold for all federal agencies with respect to GHG emissions. Thus, CEQ should refrain from establishing a black line quantitative threshold and instead, consistent with prior practice, allow agencies to apply the “rule of reason” to govern when they should consider GHG emissions and climate change.

Despite CEQ’s suggestions to the contrary, it is a likely scenario that, if the final guidance were to contain such a threshold, agencies applying the guidance would treat the 25,000 metric ton reference point as a binding threshold point for quantifying GHG emissions, if not for making significance determinations. As described in Section I, *supra*, federal agencies frequently apply CEQ guidance strictly. As a practical matter, agencies are unlikely to “use their experience and expertise to determine when a more detailed analysis of GHG emissions is required,” 79 Fed. Reg. at 77,811, and instead will mechanically apply the threshold provided by CEQ. Thus, adopting a presumptive threshold would likely cause agencies to mechanically apply the threshold rather than relying on their own expertise and the rule of reason as Congress intended.

Second, CEQ offers no rationale to support the proposed threshold of 25,000 metric tons. The Revised Draft Guidance asserts that 25,000 metric tons is “an appropriate reference point that would allow agencies to focus their attention on proposed projects with potentially large GHG emissions.” *Id.* at 77,828. However, it makes no attempt to explain why 25,000 metric tons is an appropriate level to distinguish between large and small emissions. Instead, it appears that CEQ may be relying implicitly on its prior justifications from the 2010 Draft Guidance. *See* 2010 Draft Climate Change Guidance at 3 (stating that the 25,000 metric ton threshold was selected because it is consistent with EPA’s use of that threshold for GHG emission reporting under the Clean Air Act). As the Associations explained in comments on the 2010 Draft Guidance, these considerations are irrelevant in the NEPA context. NEPA’s primary goal is to ensure that the potential environmental impacts of major federal actions are considered. Ensuring a proper balance between capturing enough emissions and avoiding too great a burden for purposes of the reporting scheme, as EPA has attempted to do, is an entirely different goal from ensuring that potential environmental issues are properly evaluated. Indeed, EPA never intended or implied that this threshold was relevant to an analysis of potential environmental impacts. Further, in any event, EPA in choosing a threshold for regulation of GHG emissions under the agency’s Tailoring Rule subsequently adopted a much larger emission threshold in final GHG regulations. 75 Fed. Reg. 31,514 (June 3, 2010) (applying emissions thresholds of 75,000 and 100,000 metric tons under the prevention of significant deterioration program). Thus, to the extent that CEQ does adopt an emissions threshold in the final guidance, a much higher threshold should be adopted.

Third, CEQ fails to provide necessary guidance for determining when the threshold is met and what an “emission quantification analysis means.” For example, CEQ fails to clarify whether the threshold would apply only to direct emissions from the proposed action or also includes indirect and cumulative impacts such as the upstream and downstream emissions discussed in Section III, *supra*. Given the concerns that the Associations have identified with the Revised Draft Guidance’s proposed treatment of indirect and cumulative impacts, it is critical that any emissions threshold focus solely on direct emissions from the proposed federal action. To do otherwise would exacerbate the uncertainty and confusion that CEQ’s proposed treatment of indirect and cumulative emissions will produce.

## **Conclusion**

The Associations thank CEQ for the opportunity to present comments on the Revised Draft Guidance. As indicated, the Associations, who share decades of experience working with NEPA in a broad range of industry sectors subject to the law, have several serious concerns with the Revised Draft Guidance and with CEQ's proposed approach to evaluating potential climate change effects under NEPA. As explained above, addressing climate change under NEPA poses unique challenges because the relative contribution of any project with GHG emissions is minute relative to the atmospheric concentration of GHGs and to the GHG emissions from other natural and anthropogenic sources domestically and globally. Thus, because the effects of GHG emissions are global in nature it is virtually impossible to draw connections between a specific federal action and specific climate change effects. In light of these challenges, it is imperative that CEQ and the agencies avoid venturing beyond the scope of what NEPA requires and restrict evaluation of climate change effects and GHG emissions that lack an adequate causal relationship with the proposed action to inform the agency's ultimate decision. For the reasons explained above, the Revised Draft Guidance fails to meet these criteria and is inconsistent with NEPA, its implementing regulations, and established case law. Therefore, the Revised Draft Guidance should be withdrawn. In the event CEQ decides to finalize this Revised Draft Guidance, it must first address the deficiencies identified above and ensure that the final guidance is consistent with NEPA and CEQ's implementing regulations. We look forward to meeting with CEQ and, as appropriate, the relevant agencies to discuss these comments at the earliest convenience.

Respectfully Submitted,

**American Chemistry Council**

**American Farm Bureau Federation**

**American Forest & Paper Association**

**American Fuel and Petrochemical  
Manufacturers**

**American Highway Users Alliance**

**American Iron and Steel Institute**

**American Petroleum Institute**

**American Public Power Association**

**American Wood Council**

**America's Natural Gas Alliance**

**Association of Oil Pipe Lines**

**Corn Refiners Association**

**Council of Industrial Boiler Owners**

**Gas Processors Association**

**Independent Petroleum Association of  
America**

**Interstate Natural Gas Association of  
America**

**National Association of Manufacturers**

**National Rural Electric Cooperative  
Association**

**Natural Gas Supply Association**

**Portland Cement Association**

**The Fertilizer Institute**

**U.S. Chamber of Commerce**

## Appendix A

The **American Chemistry Council** (“ACC”) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$812 billion enterprise and a key element of the nation's economy.

The **American Farm Bureau Federation** is the nation’s largest general farm organization, representing agricultural producers in all 50 states and Puerto Rico growing commodities in virtually all sectors of agriculture.

The **American Forest & Paper Association** (“AF&PA”) is the national trade association of the paper and wood products industry, which accounts for approximately 4 percent of the total U.S. manufacturing GDP. The industry makes products essential for everyday life from renewable and recyclable resources, producing about \$210 billion in products annually and employing nearly 900,000 men and women with an annual payroll of approximately \$50 billion.

The **American Fuel & Petrochemical Manufacturers** (“AFPM”) (formerly known as NPRA, the National Petrochemical & Refiners Association) is a national trade association whose members comprise more than 400 companies, including virtually all United States refiners and petrochemical manufacturers. AFPM’s members supply consumers with a wide variety of products and services that are used daily in homes and businesses.

The **American Highway Users Alliance** represents motorists, RV enthusiasts, truckers, bus companies, motorcyclists, and a broad cross-section of businesses that depend on safe and efficient highways to transport their families, customers, employees, and products. Highway Users members pay the taxes that finance the federal highway program and advocate public policies that dedicate those taxes to improved highway safety and mobility.

The **American Iron and Steel Institute** (“AISI”) serves as the voice of the North American steel industry and represents member companies accounting for over three quarters of U.S. steelmaking capacity with facilities located in 43 states.

The **American Petroleum Institute** (“API”) represents over 625 oil and natural gas companies, leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, has invested nearly \$2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

The **American Public Power Association** (“APPA”) is the national service organization representing the interests of the more than 2,000, not-for-profit municipal and other state and local community-owned electric utilities that collectively provide electricity to approximately 47 million Americans. These utilities, or “public power” systems, are among the most diverse of the electric utility sector, providing power to small, medium, and large communities in 49 states, except Hawaii, and in many American territories, such as the U.S. Virgin Islands, Puerto Rico, American Samoa, and Guam.

The **American Wood Council** (“AWC”) is the voice of North American traditional and engineered wood products, representing over 75% of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products industry makes products that are essential to everyday life and employs more than 360,000 men and women in family-wage jobs.

Representing North America’s leading independent natural gas exploration and production companies, **America's Natural Gas Alliance** (“ANGA”) works with industry, government and customer stakeholders to promote increased demand for and continued availability of our nation’s abundant natural gas resource for a cleaner and more secure energy future.

The **Association of Oil Pipe Lines** (“AOPL”) is a national trade association that represents owners and operators of oil pipelines across North America and educates the public about the vital role oil pipelines serve in the daily lives of Americans. AOPL members bring crude oil to the nation’s refineries and important petroleum products to our communities, including all grades of gasoline, diesel, jet fuel, home heating oil, kerosene, propane, and biofuels. AOPL members operate approximately 90% of the energy liquids pipeline miles in the United States.

The **Corn Refiners Association** (“CRA”) is the national trade association representing the corn refining (wet milling) industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture sweeteners, ethanol, starch, bioproducts, corn oil and feed products from corn components such as starch, oil, protein and fiber.

The **Council of Industrial Boiler Owners** (“CIBO”) is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information about issues affecting industrial boilers, including energy and environmental equipment, technology, operations, policies, laws and regulations.

The **Gas Processors Association** (“GPA”) has served the U.S. energy industry since 1921 as an incorporated non-profit trade association. GPA is composed of 130 corporate members of all sizes that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as "midstream activities." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead, as well as the extraction for sale of natural gas liquid products (“NGLs”) such as ethane, propane, butane and natural gasoline. GPA members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. Our members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs.

The **Independent Petroleum Association of America** (“IPAA”) serves as an informed voice for the exploration and production segment of America’s oil and natural gas industry. IPAA represents the thousands of independent oil and natural gas producers and service companies across the United States. Independent producers develop 95 percent of domestic oil and gas wells, produce 54 percent of domestic oil and produce 85 percent of domestic natural gas.

The **Interstate Natural Gas Association of America** (“INGAA”) is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in North America. INGAA’s 24 members represent the vast majority of the interstate natural gas transmission pipeline companies in the United States, operating approximately 200,000 miles of pipelines, and serving as an indispensable link between natural gas producers and consumers.

The **National Association of Manufacturers** (“NAM”) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than \$1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The **National Rural Electric Cooperative Association** (“NRECA”) is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric service to over 42 million people in 47 states or 12 percent of nation’s electric customers. NRECA is dedicated to representing the national interests of cooperative electric utilities and the consumers they serve. NRECA member electric cooperatives are private, independent electric utilities, owned by the members they serve.

Established in 1965, the **Natural Gas Supply Association** (“NGSA”) represents integrated and independent companies that produce and market approximately 30 percent of the natural gas consumed in the United States. NGSA encourages the use of natural gas within a balanced national energy policy and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. customers.

The **Portland Cement Association** (“PCA”) represents 27 U.S. cement companies operating 82 manufacturing plants in 35 states, with distribution centers in all 50 states, servicing nearly every Congressional district. PCA members account for approximately 80% of domestic cement-making capacity

The **Fertilizer Institute** (“TFI”) represents the nation’s fertilizer industry including producers, importers, retailers, wholesalers and companies that provide services to the fertilizer industry. TFI’s members provide nutrients that nourish the nation’s crops, helping to ensure a stable and reliable food supply.

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.

# **APPENDIX B**

February 26, 2014

VIA WWW.REGULATIONS.GOV

Administrator Howard Shelanski  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
New Executive Office Building  
Washington, D.C. 20503

**Re: Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order No. 12866; Docket ID OMB-OMB-2013-0007; Comments of The American Chemistry Council, the American Coalition for Clean Coal Electricity, the American Exploration & Production Council, the American Forest & Paper Association, the American Fuel & Petrochemical Manufacturers, the American Iron & Steel Institute, the American Petroleum Institute, America's Natural Gas Alliance, the Brick Industry Association, the Council of Industrial Boiler Owners, The Fertilizer Institute, the Independent Petroleum Association of America, the National Association of Home Builders, the National Association of Manufacturers, the National Mining Association, the National Oilseed Processors Association, the Natural Gas Supply Association, the Portland Cement Association, and the U.S. Chamber of Commerce**

Dear Administrator Shelanski:

The American Chemistry Council, the American Coalition for Clean Coal Electricity, the American Exploration & Production Council, The American Forest & Paper Association, the American Fuel & Petrochemical Manufacturers, the American Iron & Steel Institute, the American Petroleum Institute, America's Natural Gas Alliance, , the Brick Industry Association , the Council of Industrial Boiler Owners, The Fertilizer Institute, the Independent Petroleum Association of America, the National Association of Home Builders, the National Association of Manufacturers, the Natural Gas Supply Association, the National Mining Association, the National Oilseed Processors Association, the Portland Cement Association, and the U.S. Chamber of Commerce (collectively, "the Associations")<sup>1</sup> hereby submit the following comments in response to the November 26, 2013, Office of Management and Budget ("OMB") invitation for public comments on the Technical Support Document entitled *Technical Update of*

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<sup>1</sup> See Attachment 1 for each organization's statement of interest.



*the Social Cost of Carbon (“SCC”) for Regulatory Impact Analysis Under Executive Order 12866.*<sup>2</sup>

Member companies of the Associations will be impacted by the SCC Estimates because many of them manufacture products that, when combusted, result in greenhouse gas (“GHG”) emissions (including carbon dioxide (“CO<sub>2</sub>”)), and because, in the course of their business, they emit CO<sub>2</sub>. When this Administration, or any subsequent one, promulgates further regulation of these products or emissions, under Executive Order 12866, such proposals and rules to the extent permitted by law, must be based on “a reasoned determination that the benefits of the intended regulation justify its costs.” The SCC Estimates are generated through a formal interagency process, whose purpose is to affect and bind agency regulatory actions and regulations. As such, the SCC Estimates, though subject to periodic re-examination, mark the consummation of the government’s cost-benefit analysis, which, in turn, is binding on federal agencies pursuant to Executive Order 12866. Indeed, the pattern and practice of the government has confirmed that federal agencies view the SCC Estimates as binding and already have relied upon them in crafting and adopting regulations that affect the Associations’ members.<sup>3</sup> Our members, therefore, have a direct and concrete interest in ensuring that any SCC Estimates are based on transparent processes, accurate information, and rational assumptions, and are within the reach of the current scientific understanding and impact models. To be clear, the Associations are not herein discussing the existence or potential causes of climate change. Instead, we are questioning the IWG’s estimates of the social cost of carbon, based on estimates of complex economic impacts hundreds of years in the future, which in turn are based on present day understanding of current and future carbon emissions.

These comments address issues related to the SCC Estimates published in February 2010<sup>4</sup> and May 2013,<sup>5</sup> including the most recent technical update issued in November 2013.<sup>6</sup> On

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<sup>2</sup> 78 Fed. Reg. 70,586 (Nov. 26, 2013).

<sup>3</sup> E.g., The U.S. Environmental Protection Agency (“EPA”) frequently has used the 2010 SCC Estimates in cost-benefit analyses supporting Clean Air Act rules. See, e.g., 77 Fed. Reg. 62,624 (Oct. 12, 2012) (light-duty vehicle CAFE standards); 77 Fed. Reg. 49,489 (Aug. 16, 2012) (NESHAPs for the oil & gas source category); 77 Fed. Reg. 9,304 (Feb. 16, 2012) (NESHAPs for the power plant source category); 75 Fed. Reg. 25,324 (May 7, 2010) (tailpipe GHG/CAFE rules). The Department of Energy (“DOE”) has used the May 2013 SCC Estimates in connection with a rulemaking addressing the energy efficiency standard for microwave ovens. 78 Fed. Reg. 36,316 (June 17, 2013). Likewise, DOE used the May 2013 SCC Estimates to support a recently finalized energy efficiency rule for metal halide lamp fixtures (79 Fed. Reg. 7,746 (Feb. 10, 2014)) and proposal rules for commercial refrigeration equipment (78 Fed. Reg. 55,889 (Sept. 11, 2013)); walk-in coolers and freezers (78 Fed. Reg. 55,888 (Sept. 11, 2013)); residential furnace fans (78 Fed. Reg. 64067 (Oct. 25, 2013)); commercial and industrial electrical motors (78 Fed. Reg. 73,590 (Dec. 6, 2013)); Industrial Air Compressors (79 Fed. Reg. 6,839 (Feb. 5, 2014)); and, external power supplies (79 Fed. Reg. 7,846 (Feb 10, 2014)).

<sup>4</sup> Interagency Working Group on Social Cost of Carbon, United States Government, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* (February 2010) (“2010 Estimate”).

<sup>5</sup> Interagency Working Group on Social Cost of Carbon, United States Government, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* (May 2013; revised Nov. 2013) (“2013 Estimate”).

September 4, 2013, a group of trade associations, including many of the undersigned parties, submitted a Petition for Correction of the 2010 and 2013 Estimates pursuant to the Information Quality Act<sup>7</sup> (“IQA”) requesting that the Technical Support Documents (“TSD”) and SCC Estimates be withdrawn and not used in rulemaking and policymaking for a variety of reasons further explained herein.<sup>8</sup> Importantly, while OMB responded to that IQA Petition the evening of January 24, 2014, OMB’s response merely defended the TSD through text borrowed from the TSD, provided no additional details about the interagency processes that developed the TSD or the SCC Estimates, declined to withdraw the TSD or SCC Estimates, or prohibit their use in rulemaking.<sup>9</sup> Accordingly, the Associations request OMB reconsider its response to this IQA petition and continue to urge OMB to withdraw and instruct federal agencies to cease the rulemaking and policymaking uses of the SCC Estimates and TSDs for the following reasons:

1. The SCC Estimates fail in terms of process and transparency. The SCC Estimates fail to comply with Office of Management and Budget (“OMB”) guidance for developing influential policy-relevant information under the IQA. The SCC Estimates are the product of a “black box” process and any claims to their supposed accuracy (and therefore, usefulness in policymaking) are unsupported.
2. The models with inputs (hereafter referred to as “the modeling systems”) used for the SCC Estimates and the subsequent analyses were not subject to peer review.
3. Even if the process used to develop the SCC Estimates was transparent, rigorous, and peer-reviewed, the modeling conducted in this effort does not offer a reasonably acceptable range of accuracy for use in policymaking.
4. The Interagency Working Group (“IWG”) has failed to disclose and quantify key uncertainties to inform decision makers and the public about the effects and uncertainties of alternative regulatory actions as required by OMB.
5. By presenting only global SCC estimates and downplaying domestic SCC estimates in 2010 and 2013, the IWG has severely limited the utility of the SCC for use in cost-analysis and policymaking.
6. The IWG must (i) supplement the record to provide all of the data, models, assumptions and analyses relied on to arrive at the SCC Estimates, and (ii) allow the public a reasonable opportunity to review and comment on the supplemented record.

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<sup>6</sup> See Howard Shelanski, Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget, *Refining Estimates of the Social Cost of Carbon* (Nov. 1, 2013) (available at [www.whitehouse.gov/blog/2013/11/01/refining-estimates-social-cost-carbon](http://www.whitehouse.gov/blog/2013/11/01/refining-estimates-social-cost-carbon)) (“November 2013 Revision”).

<sup>7</sup> P.L. 106-554, §515, 144 Stat. 2763 (2001).

<sup>8</sup> The November 2013 Revision contained no substantive analytical changes. As such, the comments detailed regarding the February 2010 and May 2013 Estimate herein and in the Associations’ IQA Petition apply with equal force to the most recent SCC Estimate issued in November 2013.

<sup>9</sup> January 24, 2014 Letter from Howard A. Shelanski (Director, Office of Information and Regulatory Affairs to Wayne D’Angelo (Kelley Drye & Warren, LLP) (“OMB IQA Response”).

Importantly, that OMB is now providing a mechanism for public comment does not make OMB's SCC estimation effort transparent or the process collaborative.<sup>10</sup> Despite repeated requests from Congress, the Associations, and many other individuals and organizations, OMB has not made available to the public all of the information necessary to allow the public and regulated community to evaluate the SCC Estimates. By not providing any information on the policy decisions, inputs, and assumptions that underpin the SCC Estimates, OMB's "request for comments" is meaningless. By withholding this information from the public, OMB deprives the IWG and this Administration of the benefit of outside input on the validity of the critical decisions, inputs, and assumptions that form the basis of the SCC Estimates. Providing an opportunity to comment, but then denying or withholding access to the data necessary to inform such comments, may be designed to give a superficial appearance of transparency and collaboration, but, in reality, merely perpetuates an impermissibly opaque process.<sup>11</sup> Instead of including the critical inputs and assumptions that serve as the basis for the SCC Estimates in the rulemaking docket or other public forum, some of the undersigned Associations have been compelled to seek these necessary documents through the Freedom of Information Act ("FOIA"). While some of the participating agencies have provided partial, and heavily redacted responses to the FOIA requests, many of the participating agencies unlawfully have refused to respond to these requests at all.<sup>12</sup> The record should remain open until these agencies have complied with the law and produced these documents.

That the Environmental Protection Agency ("EPA") and Department of Energy ("DOE") are proceeding to utilize the SCC Estimates<sup>13</sup> without even waiting for the comment period to close on the docket for such estimates confirms the tangible harm to the Associations' members

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<sup>10</sup> For example, several regulatory actions and proposals have been issued prior to OMB seeking public comment on the SCC Estimates, yet none have been retracted pending receipt and review of the comments sought here. *See, e.g.*, 78 Fed. Reg. 79,419 (Dec. 30, 2013) (U.S. DOE, *Energy Conservation Program for Consumer Products and Commercial and Industrial Equipment: Effect of Revised Estimates of the Social Cost of Carbon*). Critically, DOE even finalized one rule that relied on the SCC without awaiting the consummation of this rulemaking (metal halide lamps (78 Fed. Reg. 7,746)). EPA has identified 19 rulemakings since 2009 that utilized federal SCC Estimates. *See* Letter dated January 16, 2014, from Joel Beauvais, EPA Associate Administrator, Office of Policy, to Senator David Vitter (Table 1).

<sup>11</sup> To be able to meaningfully comment on the SCC Estimates, the public record must be supplemented with, at a minimum: (i) the specific versions of the IAMs upon which the government relied to generate the SCC Estimates (including the source codes for the models); (ii) the inputs and assumptions used in the model runs upon which the government relied to generate the SCC Estimates (including, but not limited to, assumptions on discounting, equilibrium climate sensitivity, and socio-economic variables); (iii) the results of any modeling runs or scenarios generated by the IAMs upon which the government relied; (iv) technical analyses regarding the government's decision on how it averaged the results of the IAM model runs; and (v) any analyses conducted by and conclusions reached by the government regarding the uncertainties associated with each of the IAMs and calculating the SCC Estimates. Without this information in the record, the public does not have a meaningful opportunity to understand, evaluate and comment upon the SCC Estimates

<sup>12</sup> 5 U.S.C. §552(a)(6).

<sup>13</sup> 78 Fed. Reg. 79,419 (Dec. 30, 2013); *See* Regulatory Impact Analysis for the Proposed Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units (EPA-452/R-13-003 (Sept. 2013)).

and unambiguously confirms that OMB does not intend to use the public comment process as a means of updating and improving its SCC Estimates or to obtain the best available information.

Although the Associations are concerned that OMB is simply replacing the IWG's "black box" analysis with its own opaque process, the importance of this issue compels us to provide input to the best of our abilities using the limited (and inadequate) information made available to the Associations. As such, the Associations reiterate that, given the significant issues described herein, the SCC Estimates and Technical Support Documents should be withdrawn, pending correction through a transparent, public process.<sup>14</sup> Further, we request OMB not to utilize, and to direct publicly other executive branch agencies not to utilize, the SCC Estimates for any regulatory action or policymaking.

## **I. BACKGROUND**

In June 2013, the IWG released the revised TSD on SCC recommended for use in Regulatory Impact Analysis ("RIA"). In the revised TSD, the IWG continued to express the SCC as the dollars/ton of monetized damages associated with an incremental increase in carbon emissions in a given year. The IWG used the same basic methodology that it used in 2010 to estimate the SCC figures. As per the 2010 TSD, the SCC values were estimated using the average results from the same three integrated assessment models at the same discount rates – 2.5%, 3%, and 5% – and a fourth value using the 95<sup>th</sup> percentile estimate at the 3% discount rate. The IWG used the same five climate change scenarios utilized in 2010. The IWG indicated the only changes that altered the SCC values were the new versions and runs of the three assessment models.

For example, the new SCC values estimated for 2020 in 2007 dollars were \$12, \$43, \$65, and \$129 for the 5%, 3%, 2.5%, and 95<sup>th</sup> percentile of the 3% discount rates, respectively. By comparison, the SCC values in the 2010 TSD for 2020 were \$7, \$26, \$42, and \$81, respectively (all in 2007 dollars). At the key discount rate of 3% (considered the central value), the new SCC

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<sup>14</sup> Such a process is mandated by Executive Order 13563, January 18, 2011, which states:

Sec. 2. Public Participation. (a) Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.

(b) To promote that open exchange, each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days. To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.

Estimate of \$43 is approximately 65% higher than the 2010 value. By comparison, in 2009, the IWG estimated a central value of \$19 and, in 2008, the U.S. Department of Transportation (“DOT”) estimated a central value of \$7.<sup>15</sup> Thus, in a span of five years, the central SCC Estimate to be used in regulation has changed multiple times and increased 600 percent.

The size and frequency of these increases to IWG’s SCC Estimates call into question the accuracy and reliability of the IWG’s most recent estimate (the third proffered in 2013 alone), and further indicate that the process and models through which the estimates were generated were either flawed or unsuitable for generating estimates that reasonably could inform important regulatory and policy decisions. As discussed further below, the first step in addressing these potential flaws and suitability issues is for OMB and IWG to shed light on these processes, allow for an informed and transparent discussion, and present IWG’s estimates as accurately as possible.

## **II. INFORMATION QUALITY ACT GUIDELINES**

The process for generating the SCC Estimates violates the IQA. The IQA requires federal agencies to take steps to maximize the quality, objectivity, and integrity of the information they disseminate, and to provide a mode of redress to correct flawed or incomplete information. Consistent with its directive to other agencies and entities, OMB developed its own guidelines (“IQA Guidelines”) that require that the information it disseminates meets standards for objectivity, utility, and integrity.<sup>16</sup> The “objectivity standard” focuses on whether the information is “accurate, reliable, and unbiased and whether the information is presented in an accurate, clear, complete, and unbiased manner.”<sup>17</sup> The “integrity standard” refers to information security, such as protection of information from unauthorized access or revision, while the “utility standard” refers to the usefulness of the information for the intended audience’s anticipated purposes.<sup>18</sup>

OMB’s Guidelines require it to maximize the quality of disseminated information that it classifies as influential. “Influential information” generally refers to information that “will have a clear and substantial impact on important public policies or important private sector decisions.”<sup>19</sup> Without question, the SCC Estimates, upon which a number of agencies already have based regulations and which numerous agencies may base billions, if not trillions, of dollars of regulation, are “influential information” that has had and will have a clear and substantial impact on important public policies and important private sector decisions.<sup>20</sup>

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<sup>15</sup> 2010 TSD at 4.

<sup>16</sup> Office of Management and Budget, *Information Quality Guidelines* (Oct. 1, 2002).

<sup>17</sup> *Id.* at 8.

<sup>18</sup> *Id.* at 1.

<sup>19</sup> *Id.* at 8.

<sup>20</sup> *Id.*

Further, under OMB Guidelines, such influential information must meet a higher level of “transparency.”<sup>21</sup> According to OMB, transparency requires that its findings be reproducible, within an acceptable range of imprecision, by third parties.<sup>22</sup> Influential information must also be transparent with respect to: (1) the source of the utilized data; (2) the various assumptions employed; (3) the analytic methods applied; and (4) the statistical assumptions employed.<sup>23</sup> All these transparency elements are important considerations in any objective, third-party review and analysis of Agency information.

OMB imposes these guidelines on itself as well as on the information on which it relies. It requires OMB staff, and the working groups it oversees, to acquire relevant information by acceptable and unbiased methods.<sup>24</sup> Further, information collected must generally display indicia of reliability such as being subjected to peer review or being founded on transparent and reproducible methods.

OMB’s obligations under the IQA are significant, requiring OMB to issue government-wide guidelines that “provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.” These obligations were put in place by Congress and are supported by an Administration-wide effort to make informed and transparent decisions based on sound science.<sup>25</sup> The IQA guidelines, peer review guidelines, and internal protocols that OMB uses are intended to ensure the Administration’s disseminations are objective, unbiased, and robust. Importantly, OMB, as the entity that developed and oversees the IQA’s guidelines to federal agencies, has a profound and unique interest in ensuring those guidelines are followed to the greatest extent possible in its own regulatory decision making. As detailed below, the development of the SCC Estimates failed to follow these OMB guidelines.

### **III. THE SCC ESTIMATES ARE THE PRODUCT OF A FUNDAMENTALLY FLAWED AND IMPERMISSIBLY OPAQUE PROCESS**

The SCC Estimates represent specific monetary values per metric ton of CO<sub>2</sub> intended to be used in regulatory impact analyses required under Executive Order 12866 to estimate the costs and benefits of major federal regulations.<sup>26</sup> These values, developed by the IWG, reflect an incredibly broad range that corresponds to different assumed discount rates that purport to translate estimated future dollar damages from current emissions into a present value. These estimates are derived from values obtained from computer models, known as the Integrated

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<sup>21</sup> *Id.* at 2.

<sup>22</sup> *Id.*

<sup>23</sup> 67 Fed. Reg. 369, 374 (Jan. 3, 2002).

<sup>24</sup> *Id.* at 23.

<sup>25</sup> See President Obama’s Memorandum for the Heads of Executive Departments and Agencies: Transparency and Open Government (74 Fed. Reg. 4685 (Jan. 21, 2009)) (“My Administration is committed to creating an unprecedented level of openness in Government.”); see also President Obama’s Memorandum for the Heads of Executive Departments and Agencies: Scientific Integrity. (“Science and scientific processes must inform and guide decisions of my Administration on a wide range of issues.”).

<sup>26</sup> Neither the TSDs nor the SCC Estimates attempt to monetize costs of methane emissions. See 2010 TSD.

Assessment Models (“IAMs”), that, in short, purport to represent the linkage from (1) greenhouse gas emissions, to (2) global temperature changes, to (3) the “climate change impacts” projected to result from these temperature changes, to (4) the monetized economic damages of these effects. The 2010 and 2013 SCC Estimates were derived by inputting a set of undisclosed assumptions developed by the IWG into three particular IAMs selected by the IWG from a wider class of IAMs: DICE (Dynamic Integrated model of Climate and Economy), FUND (Framework Uncertainty, Negotiation and Distribution), and PAGE (Policy Analysis for the Greenhouse Effect).<sup>27</sup>

The process of selecting the models and input assumptions, including much of the basic information underlying these decisions, has been insulated from public scrutiny. The resulting SCC Estimates are a product of this fundamentally flawed process that failed to comply with basic IQA requirements designed to enhance and ensure the credibility of data used to make critical regulatory decisions.<sup>28</sup> These flaws are discussed in detail below.

#### **A. The IWG Estimation Process Was Not Transparent**

In his March 9, 2009, “Memorandum for the Heads of Executive Departments and Agencies” on “Scientific Integrity” (“Scientific Integrity Memo”), President Obama called on his Administration to commit to procedures and a code of conduct that ensures scientific integrity and builds public trust. President Obama’s opening line of that memorandum could not be more relevant and directly applicable to the SCC Estimates and the processes which underlie them:

Science and the scientific process must inform and guide decisions of my Administration on a wide range of issues, including improvement of public health, protection of the environment, increased efficiency in the use of energy and other resources, mitigation, and protection of national security. The public must be able to trust the science and the scientific process informing public policy decisions.

In furtherance of these important goals, President Obama instructed “[t]o the extent permitted by law, there should be transparency in the preparation, identification, and use of scientific and technological information in policymaking.” The requirement of transparency is at the core of

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<sup>27</sup> DICE (W. Nordhaus, Yale University), PAGE (C. Hope, University of Cambridge UK), and FUND (R. Tol, Ireland Economic and Social Institute and Carnegie Mellon University).

<sup>28</sup> In addition to the procedural flaws discussed in detail below, the SCC Estimate itself is contrary in significant ways to OMB’s own guidance on conducting cost-benefit calculations intended to guide regulatory agency decision makers. See OMB Circular A-4, “Regulatory Analysis” (Sept. 2003) (as amended) (“OMB Circular A-4”). For example, cost-benefit normally applies to specific decisions relating to individual rulemakings. OMB Circular A-4 states that a good regulatory analysis cannot be formulaic. *Id.* at 2, ¶5. Yet the SCC Estimate provides a formulaic result – developed in isolation – that is intended to be applied to any regulatory action addressing carbon emissions. It is necessary only to plug in the proper cost number and calculate benefits for any planned regulatory actions. The SCC Estimate similarly ignores Circular A-4’s requirement that costs and benefits must be evaluated and compared to each other. The SCC Estimate is based entirely on the projected benefit of avoiding each ton of carbon that is modeled to cause damage at some point in the future. Further concerns with OMB’s compliance with Circular A-4 are discussed in subsequent sections of these Comments.

the OMB's IQA reproducibility standards mandated for "influential information" such as the SCC Estimates.

Under OMB's IQA Guidelines, "influential information" must meet a higher level of "transparency."<sup>29</sup> According to OMB, transparency requires that the OMB/IWG findings be reproducible, within an acceptable range of imprecision, by third parties.<sup>30</sup> Influential information must be transparent with respect to: (1) the source of the utilized data; (2) the various assumptions employed; (3) the analytic methods applied; and (4) the statistical assumptions employed. All of these elements of transparency are important considerations in any objective, third-party critical review and analysis of the SCC Estimate.<sup>31</sup>

According to OMB in the IQA Rule:

[T]he primary benefit of public transparency is not necessarily that errors in analytic results will be detected, although error correction is clearly valuable. The more important benefit of transparency is that the public will be able to assess how much an agency's analytic results hinge on the specific analytic choices made by the agency. Concreteness about analytic choices allows, for example, the implications of alternative technical choices to be readily assessed. This type of sensitivity analysis is widely regarded as an essential feature of high-quality analysis, yet sensitivity analysis cannot be undertaken by outside parties unless a high degree of transparency is achieved.<sup>32</sup>

OMB, as the disseminator of the SCC Estimates, and the overseer of the IWG, has a duty to ensure the transparency of the IWG estimation process. That duty has not been met. The public knows nothing about the IWG other than the identity of the agencies and entities that make up the group and the fact that this group of unspecified officials provided three substantially different SCC estimates in the period between 2010 and 2013.

OMB has not revealed the identity of the IWG participants or any information from which to make an assessment as to their expertise or qualification to participate in a group tasked to estimate the SCC. According to OMB Circular A-4's directive to agencies (presumably applicable also to OMB): "You should also disclose the use of outside consultants, their qualifications, and history of contracts and employment . . . ."<sup>33</sup> The public does not even know whether all the IWG's listed agencies and entities provided personnel or what levels of engagement each of the agencies actually had in the development of the SCC Estimates. The public does not know whether or how government contractors were used in the development process. Further, OMB has not revealed how these unidentified individuals collaborated. The public does not know whether, or how often, they met, what was discussed, what information

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<sup>29</sup> OMB IQA Guidelines at 2.

<sup>30</sup> 67 Fed. Reg. at 378.

<sup>31</sup> 67 Fed. Reg. at 374.

<sup>32</sup> 67 Fed. Reg. at 374.

<sup>33</sup> OMB Circular A-4 at 17.



was considered, what information was rejected, or how decisions were made. This information must be made available so that the public can conduct a critical review.

For sake of perspective, consider EPA's recent efforts to evaluate whether the Agency can quantify with sufficient accuracy the "economy-wide" impacts of its air regulations.<sup>34</sup> Unlike OMB's SCC Estimates, which attempt to monetize global impacts of U.S. emissions of a ubiquitous substance centuries into the future, EPA's efforts are far more modest because the Agency is only attempting to consider: (1) domestic costs; (2) of traditional pollutants with more direct "dose-response" functions; (3) emitted by far fewer industrial sources; (4) within discrete timeframes.

Even still, EPA claims its effort presents "serious technical challenges . . ."<sup>35</sup> To address these challenges, EPA presented the issue to the independent Science Advisory Board ("SAB") and provided public notice in the Federal Register. EPA published detailed draft charge questions it would present to the SAB and a similarly detailed analytical blueprint and list of materials for the SAB to consider. Importantly, EPA provided public notice of the provision of all these materials and is seeking comment on them.

In undertaking the far more complex and ambitious task of estimating the SCC, OMB undertook a conspicuously different approach. OMB tasked its effort to the IWG without any public notification. OMB never published nor took comment on its charge questions to the IWG, or the analytical blueprint or materials it requested the IWG consider. The public only learned of the IWG, its important role within the Federal government, and its SCC estimates when they were referenced in an efficiency standard for microwave ovens.

The SAB also operates in a starkly different manner than the IWG. The SAB provides notice of its meetings, as well as opportunities to observe and participate. The SAB's advisories and consultations with EPA are published, as are EPA's responses to such. The SAB discloses its members, provides detailed biographies of each members' affiliation and expertise, publishes criteria for participation in the SAB, and offers the public an opportunity to nominate members.

The IWG, on the other hand, provides no notice of its meetings (before or after they occur), and the public has no opportunity to observe, participate in, review minutes, communications, or even summaries of such. The IWG's interaction and consultation with OMB is unknown, and no records of charges or instructions are made available. The IWG's members are secret, as are the means by which they are selected. Their expertise are entirely unknown. All that is known about IWG members are the identities of the federal entities on whose behalf they participate. It is not even known whether they are Federal employees, contractors, or third parties.

While EPA and SAB processes are by no means perfect, and the Associations may well disagree with their outcomes, the contrast between the transparency and engagement in EPA's

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<sup>34</sup> 79 Fed. Reg. 6899 (Feb. 5, 2014).

<sup>35</sup> *Id.* at 6900.

“economy-wide modeling effort,” and the opacity of OMB’s “global” modeling effort is both striking and disturbing. OMB has failed to comply with the transparency policies that it promulgated for developing influential policy-relevant information under the IQA and imposes on other agencies and executive offices. The SCC Estimates are the product of an opaque process, riddled with uncertainties. Any claims to their supposed accuracy (and, therefore, usefulness in policymaking) are unsupported. None of these failures in transparency has been remedied by allowing for after-the-fact comment on the SCC Estimates. As noted above, without access to the fundamental information underlying the SCC Estimates necessary to formulate comments and some indication that OMB actually will consider comments, OMB’s solicitation provides only the impression of transparency.

**B. The Modeling Systems (Models With Inputs) And Subsequent Analyses Were Not Subject To Peer Review**

OMB and the IWG masked the inherent flaws and limitations of the SCC Estimates by not exposing the modeling systems, inputs, and results (the SCC Estimates) to peer review. As OMB’s Final Information Quality Bulletin for Peer Review (“Peer Review Bulletin”) states, “[p]eer review is one of the most important procedures to ensure that the quality of published information meets the standards of the scientific and technical community.”<sup>36</sup> Further, President Obama’s 2009 Scientific Integrity Memorandum states that “[w]hen scientific or technical information is considered in policy decisions, the information should be subject to well established scientific processes, including peer review . . . .”

OMB’s IQA Guidelines recognize the critical importance of peer review in government decision-making, and point to the existence of peer review as providing a presumption of objectivity.<sup>37</sup> Similarly, EPA, which already has relied upon the SCC Estimates, recognizes that the hallmark of scientific integrity is a robust and independent peer review process.<sup>38</sup> According to EPA guidance,

[p]eer review is conducted by qualified individuals (or organizations) who are independent of those who performed the work, and who are collectively equivalent in technical expertise (*i.e.*, peers) to those who performed the original work. Peer review is conducted to ensure that activities are technically supportable, competently performed, properly documented, and consistent with established quality criteria.<sup>39</sup>

Further, EPA has recognized in its peer-review guidance that, particularly when reviewing influential findings such as the SCC Estimates, a peer reviewer must be independent to be

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<sup>36</sup> Memorandum for Heads of Departments and Agencies from Josh B. Bolton, Director, OMB “Issuance of OMB’s ‘Final Information Quality Bulletin for Peer Review’” at 2 (Dec. 16, 2004).

<sup>37</sup> 67 Fed. Reg. at 377.

<sup>38</sup> *Peer Review Handbook, 3<sup>rd</sup> Edition, Prepared for the U.S. Environmental Protection Agency by Members of the Peer Review Advisory Group for EPA’s Science Policy Council, EPA/100/B-06/002.*

<sup>39</sup> *Id.* at 12.

credible, defensible, and unbiased.<sup>40</sup> Indeed, peer review and adherence to sound scientific methods are required by EPA's guidelines implementing the IQA.<sup>41</sup>

Despite the fact that OMB's IQA Rule and Guidelines, as well as its Peer Review Bulletin, recognize the critical need for peer review in administrative decision-making, neither OMB nor the IWG subjected the final SCC Estimates, or their key foundations, to peer review. This failure is a critical flaw and undermines the credibility of the SCC Estimates.

That the IWG utilized models that generally may be available to the public does not sufficiently demystify the IWG selection process. There is no evidence, for example, of how the IWG addressed, if at all, the limitations of each of the selected models. The class of models known as IAMs are continuously changing and evolving. While such models attempt to predict the near and far future, they all rely on numerous assumptions – including many that are decades old, and others that simply cannot be calibrated or verified. Yet, one of the models used claims to have the capacity to predict climate impacts through the year 2595. Further, it is not clear if or how modest changes to the inputs to the FUND, DICE, and PAGE models could drastically change the SCC Estimates (*i.e.*, the sensitivity of inputs to model outcomes is not transparent). Without access to information regarding the hundreds of model inputs (or the people or processes that selected them, or developed them, or both), and their sensitivities, expertise, or biases, it is impossible to call the SCC Estimates rational or supportable. Indeed, in an analysis focused on the “damage function” component of the SCC Estimates (a source of substantial uncertainties in the models, as discussed further below), the authors admit that “the range of possible parameters leads to enormous differences in estimated [SCC] values.”<sup>42</sup> The process of selecting these input parameters must be subject to transparency and peer review.

On July 18, 2013, Administrator Howard Shelanski of OMB's Office of Information and Regulatory Affairs (“OIRA”) suggested in testimony before the House Committee on Oversight and Government Reform Subcommittee on Energy Policy, Healthcare, and Entitlements that peer review of the IWG decisions was unnecessary because the FUND, DICE, and PAGE models all were subjected to their own peer review.<sup>43</sup> This suggestion is incorrect, or at least misleading, for several reasons. The SCC Estimates are not just the product of the models (flawed or limited as they may be). Rather, the SCC Estimates are the product of the data, and the policy choices that were inherent in the model input data selection. Other than for a few of

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<sup>40</sup> *Id.* at 13.

<sup>41</sup> *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency*, EPA/260R-02-008 (Oct. 2002).

<sup>42</sup> NERA Economic Consulting, “A Review of the Damage Functions Used in Estimating the Social Cost of Carbon” at 17 (Jan. 2014) (“*Damage Function Report*”) (attached).

<sup>43</sup> OMB now provides a bit more nuance that the models may not have actually been reviewed by peers, but rather than they were made available for peer review because they “were published in peer reviewed journals.” (OMB IQA Response at 3-4). However, when publishing the IQA Guidelines, OMB found that the effectiveness of “journal peer review” was “overstated,” cited to instances where flawed science was published in respected journals, and ultimately concluded that “[f]or information likely to have an important public policy or private sector impact, OMB believes that additional quality checks beyond peer review are appropriate.” (67 Fed. Reg. at 8455)

the hundreds of variables that comprise the input data set for the three models used, most members of the public, other than those allowed access by the participating executive branch agencies, have no idea of what the inputs underlying the SCC Estimates were or how they were determined. This critical “black box” encompasses not only the deterministic inputs (*i.e.*, assumed values for those inputs held constant), but also, importantly, the stochastic inputs (*i.e.*, those inputs that were selected to be variable) that supported the Monte Carlo analysis.<sup>44</sup> Model inputs, and the judgments, principles, and processes that generated those inputs, are critical to the model output. As the developer of the FUND model prominently and candidly acknowledges on the model’s website:

It is the developer’s firm belief that most researchers should be locked away in an ivory tower. Models are often quite useless in unexperienced hands, and sometimes misleading. No one is smart enough to master in a short period what took someone else years to develop. Not-understood models are irrelevant, half-understood models treacherous, and mis-understood models dangerous.<sup>45</sup>

The SCC Estimates are as much a product of the inputs to the models as they are the product of the models themselves. Stated plainly, if unreliable or questionable data are entered into the models, there is no basis for concluding that reliable estimates would result. The inputs that drive the SCC Estimates (and the input selection criteria) were never peer reviewed – nor are the majority of them even known. Further, the final estimates (*i.e.*, the products of these opaque models and inputs) were never peer reviewed. That is critical, as the output of the models was manipulated further by the IWG through averaging that may be inappropriate and misleading (*see infra* §V.A). That versions of the models were made available for peer review during the model development process, or utilized in papers that were themselves peer reviewed, is necessary and important, but not sufficient. OMB and the IWG must subject the current SCC Estimates, and the decisions that generated those values, to peer review. Nor does accepting comments on the IWG’s conclusions, without providing commenters with the underlying information necessary for credible evaluation, provide a substitute for peer review. OMB’s suggestion to the contrary in the OMB IQA Response<sup>46</sup> is without merit. Indeed, these actions reinforce the need to conduct peer review on all subsequent model changes and inputs, which alter the estimates coming out of the models. After all, ***the May 2013 SCC Estimate is 60 percent higher than the one developed just three years ago and required further amendment within six months.*** Unfortunately, OMB and the IWG have sheltered and insulated the model choice criteria, data inputs, and analyses from outside scrutiny and peer review – and continue to do so in the present “request for comments.”

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<sup>44</sup> Consider, for instance, the selection of discount rates for one of the few model inputs that was disclosed. If a discount rate of 7% were utilized, (as mandated by OMB Circular A-4 (at 12)), the SCC Estimates would be closer to zero and potentially even demonstrate benefits. We raise this issue, not to advocate for a particular discount rate, but to highlight that even a single model input of the hundreds can materially affect the outcomes of the models.

<sup>45</sup> Available at [www.fund-model.org](http://www.fund-model.org) (accessed Jan. 9, 2014).

<sup>46</sup> OMB IQA Response at 4.

The SCC Estimates/TSD are precisely the type of influential scientific information that OMB envisioned in its Final Information Quality Bulletin for Peer Review when it stated “[m]ore rigorous peer review is necessary for information that is based on novel methods or presents complex challenges for interpretation. Furthermore, the need for rigorous peer review is greater when the information contains precedent-setting methods or models, presents conclusions that are likely to change prevailing practices, or is likely to affect policy.”<sup>47</sup> Importantly, the Final Information Quality Bulletin for Peer Review and the IQA under which they were promulgated characterize these as the “*minimum standards* for when peer review is required for scientific information . . .”<sup>48</sup>

**C. Selection Of The Discount Rates Used To Estimate The SCC Violated OMB Requirements And Should Be An Open Process**

The choice of the discount rate arguably is the most significant factor in derivation of the SCC Estimates. Depending on the discount rate selected (as noted above and *infra* §IV.A), there is substantial variation in the amount of damages calculated and, hence, the SCC Estimate that ultimately is derived. In short, the higher the discount rate used, the lower the future predicted damage impacts. The IPCC 4th Assessment report confirms the critical nature of the discount rate used to estimate the SCC:

Notwithstanding the differences in damage sensitivity to temperature..., the effect of the discount rate on estimates of SCC is most striking. The 90th percentile SCC, for instance, is US\$62/tC for a 3% pure rate of time preference, \$165/tC for 1% and \$1,610/tC for 0%. Stern (2007) calculated, on the basis of damage calculations, a mean estimate of the SCC in 2006 of US\$85 per tonne of CO<sub>2</sub> (US\$310 per tonne of carbon)... Other estimates of the SCC run from less than US\$1 per tonne to over US\$1,500 per tonne of carbon. Downing et al. (2005) argued that this range reflects uncertainties in climate and impacts, coverage of sectors and extremes, and choices of decision variables.

The IWG recognized in the 2010 TSD that “the interagency group has been keenly aware of the deeply normative dimensions of both the debate over discounting in the intergenerational context and the consequences of selecting one discount rate over another.”<sup>49</sup> Despite the criticality of the discount rate to the SCC estimation process, OMB has failed to subject the IWG’s selection of the discount rate to peer review.

Moreover, in selecting the discount rates used for the SCC Estimates, OMB disregarded explicit instructions from Congress, embodied in the Regulatory Right to Know Act, intended to guide the cost-benefit analysis of federal regulations. The Regulatory Right to Know Act requires OMB to issue standardized guidelines to federal agencies on the measurement of costs

<sup>47</sup> *Final Information Quality Bulletin for Peer Review* at 12.

<sup>48</sup> *Id.* at 7 (emphasis added).

<sup>49</sup> 2010 TSD at 19.

and benefits. These guidelines are to be subjected to external peer review. Circular A-4 represents the current version of these guidelines and includes a discussion of the best practices to be used for applying discount rates to future benefits and costs:

As a default position, OMB Circular A-94 states that a real discount rate of 7 percent should be used as a base-case for regulatory analysis. The 7 percent rate is an estimate of the average before-tax rate of return to private capital in the U.S. economy. It is a broad measure that reflects the returns to real estate and small business capital as well as corporate capital. It approximates the opportunity cost of capital, and it is the appropriate discount rate whenever the main effect of a regulation is to displace or alter the use of capital in the private sector. OMB revised Circular A-94 in 1992 after extensive internal review and public comment. In a recent analysis, OMB found that the average rate of return to capital remains near the 7 percent rate estimated in 1992. Circular A-94 also recommends using other discount rates to show the sensitivity of the estimates to the discount rate assumption.<sup>50</sup>

Circular A-4 also allows “a further sensitivity analysis using a lower but positive discount rate” when a rule “will have important intergenerational benefits or costs,” but requires that the 7% rate be used for the base-case analysis.<sup>51</sup>

By selecting discount rates lower than prescribed by current OMB guidelines, and failing to subject the change in discount rates to the external peer review process, OMB has failed to follow the procedures mandated by Congress in the Regulatory Right to Know Act.

These comments do not advocate for use of a particular discount rate. Rather, consistent with the emphasis throughout these comments on process, the Associations similarly urge OMB and the federal government generally to pursue an open process – with full disclosure of information and how various factors and considerations are weighed – regarding the selection of an appropriate discount rate for use in development of the SCC Estimates. As Cass Sunstein, former head of OIRA/OMB, recently remarked:

Reconsideration of existing judgments must be subjected to a demanding and time-consuming process of internal review (and potentially to external review as well). Institutional constraints, including the need to obtain consensus, can

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<sup>50</sup> OMB Circular A-4 at 33 (emphasis added).

<sup>51</sup> *Id.* at 36 (“If your rule will have important intergenerational benefits or costs you might consider a further sensitivity analysis using a lower but positive discount rate in addition to calculating net benefits using discount rates of 3 and 7 percent.”). A 3% rate is prescribed “when regulation primarily and directly affects private consumption (e.g., through higher consumer prices for goods and services),” a scenario that is not primarily implicated with respect to the SCC.

impose obstacles to efforts to rethink existing practices, especially in an area like discounting, which is at once technical and highly controversial.<sup>52</sup>

Mr. Sunstein argues for caution in revisiting the discount rates used by the IWG for the SCC Estimates. The need for such caution is appropriate, but also underscores the importance of subjecting departures from existing federal guidelines to proper scrutiny and an open and transparent process. In departing from the discount rates prescribed by Circular A-4, the IWG and OMB process should and must be subjected to public comment and peer review to allow proper vetting of the choice of this “technical and highly controversial” factor.

#### **IV. THE BROAD RANGE OF SCC ESTIMATES GENERATED BY THE COMPUTER MODELING SYSTEMS MAKES THEM UNSUITABLE FOR USE IN RULEMAKING AND POLICY DECISIONS**

Predicting the future in terms of impacts stemming from the emission of GHGs, as one might expect, is a massively imprecise exercise reliant on assumptions, hypotheses, and judgments about future technological advances, principles, and decisions that directly impact emissions scenarios, mitigation, and adaptation. While the undersigned Associations support the use of economic modeling, there are limits to the effectiveness of certain modeling techniques. For instance, the imprecision inherent in modeling assumptions, hypotheses, and judgments are significantly magnified when impacts (and costs) are projected over a longer time period. While certainty is not a characteristic of any modeling effort, OMB and the IWG cannot push prognostications so far beyond the capabilities of current science and economic modeling that the estimates become little more than guesswork. There is a threshold beyond which uncertainties become so profound, widespread, and compounded that, when further undermined by data limitations and the inherent limitations of the models, render the ultimate estimate flawed and unusable. Even the Intergovernmental Panel on Climate Change (“IPCC”) limits its future climate predictions and presents a range of possible scenarios (*see infra* §IV.B).

In the OMB IQA Response, OMB seems to acknowledge that such a tipping point exists whereby data are so uncertain they render the ultimate estimate unusable, and that “[i]n the absence of quantitative estimates, we would use a qualitative description of the types of impacts on society that we would expect.”<sup>53</sup> OMB further stated that, “[i]t is not clear to us, however, how the SCC estimates would be near such a threshold.”<sup>54</sup> While the Associations welcome OMB’s acknowledgement that a threshold exists where quantitative estimates become unworkable, we do not share OMB’s view that impacts predicted in 2300 are not yet “near such a threshold.”

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<sup>52</sup> Sunstein, Cass, “On Not Revisiting Official Discount Rates: Institutional Inertia and the Social Cost of Carbon” (2014) (draft) (forthcoming in *American Economic Review: Papers and Proceedings*).

<sup>53</sup> OMB IQA Response at 4.

<sup>54</sup> *Id.*

Significantly, the 2010 TSD appears to be somewhat in agreement with the Associations on this point. After noting extensively the “uncertainty, speculation, and lack of information” on key inputs necessary to estimate the SCC, the TSD disclaims that “[t]he purpose of the SCC estimates presented here is to make it possible for agencies to incorporate the social benefits from reducing carbon dioxide emissions into cost-benefit analysis of regulatory actions that have small, or ‘marginal,’ impacts on cumulative global emissions.”<sup>55</sup> Again, the Associations do not endorse the notion that the SCC Estimates are useful for even “marginal” regulatory actions, but we concur with the 2010 TSD’s apparent conclusion that the SCC Estimates have limited utility in rulemaking. To the extent that the OMB IQA response is articulating OMB’s new position that these highly uncertain SCC Estimates have broad utility in all types of regulatory decisions, the Associations urge OMB to either reconsider, or provide some support in the record, for this new conclusion.

Further, that the 2013 SCC Estimates increased by 60 percent from the previous estimate developed only a few years prior (and, once again, within six months of publication) using the same set of models demonstrates that this exercise is massively uncertain and not sufficiently robust for policymaking. That degree of variability over the short term (2010-2013) should give OMB and the IWG pause and a heightened concern that estimating the SCC with a level of accuracy suitable for policymaking is perhaps beyond the capabilities of the model systems utilized.

Importantly, a subset of the Associations made a similar point in their IQA petition (before the SCC Estimate changed for the second time in 2013), to which OMB responded that this variability was a “reflection of the rapid pace of ongoing research on a topic of profound interest to the scientific community . . . and that rapidly evolving scientific understanding makes it more important, not less, to review and update the estimates on a periodic basis.”<sup>56</sup> The Associations believe that OMB misinterpreted the nature of our concern over the degree of “variability over the short term.” We fully agree that scientific understanding of these issues is “rapidly evolving” and changing based on “the rapid pace of ongoing research,” but we do not understand why OMB fails to view these frequent and fundamental changes in scientific understanding as evidence that the estimates are highly uncertain. If the scientific understanding is in flux, then the conclusions derived from that scientific understanding are *per se* uncertain.

#### **A. Model(s) Structure And Damage Functions**

OMB and the IWG rely on three models which purport to predict the ultimate costs of a long chain of impacts stemming from the emission of GHGs (*i.e.*, the impact of temperature on sea-level rise, the impact of sea-level rise on waterside cities, the monetization of the impacts on waterside cities, *etc.*). These models have a similar “stacked” structure, shown in the figure below.<sup>57</sup> These models do not provide a detailed representation of the impact that climate

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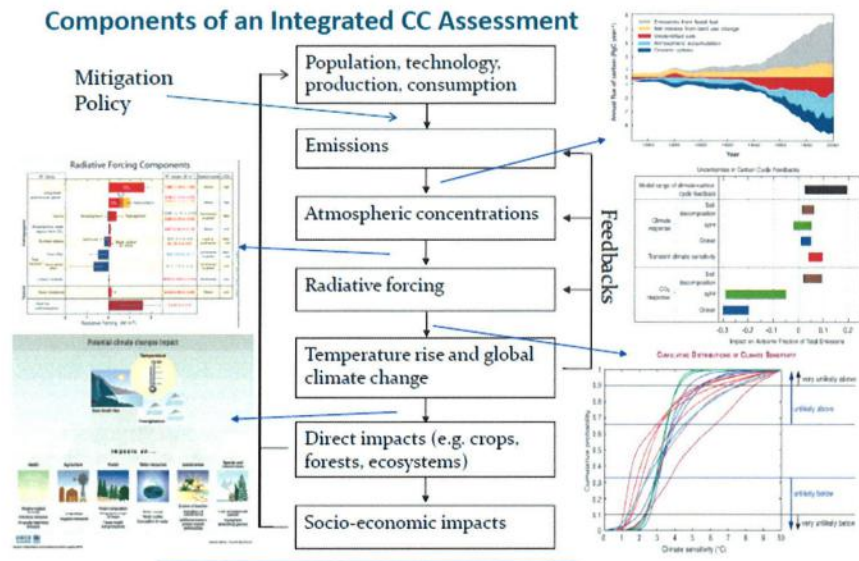
<sup>55</sup> 2010 TSD at 4-5.

<sup>56</sup> OMB IQA Response at 5.

<sup>57</sup> Taken from a presentation by Traeger, C., *The Economics of Climate Change*.



change may have on health, the environment, or the (global or domestic) economy, particularly at the regional or local levels.



The models on which the IWG relied utilize simplifying assumptions and judgments reflecting the modeler’s attempts to aggregate the available scientific and economic research characterizing these relationships. In particular, the “damage functions” used in these models simply reflect a guess about the relationship between changes in temperature and GDP. The record does not reflect an adequate scientific or factual basis for the “damage function” in any of the models upon which the government relies. As a result, the SCC Estimates are plagued by a high level of uncertainty that spans several orders of magnitude. The final socioeconomic impact prediction at the end relies on the cascading series of uncertain inputs in the prior steps. Model uncertainty, at any stage, is affected and magnified by all of the uncertainties in the prior steps (including model input and structure uncertainties, as well as the uncertainties of climate science), and the uncertainties associated with that particular step. This is especially true if socioeconomic outputs are predicted over very long time periods, as with the SCC Estimates.

Based in part on these compounded uncertainties, for the 2010 Estimates the authors noted that the IWG offered the new SCC values “with all due humility” about the uncertainties embedded in them and with a “sincere promise to continue work to improve them.”<sup>58</sup> In contrast, the 2013 SCC Estimates have done seemingly nothing to alleviate the uncertainty, but have nevertheless downplayed any discussion of that uncertainty. Only a small paragraph on “research gaps” is provided on the last page of the TSD for the 2013 SCC Estimates.

Other than a brief reference back to the 2010 SCC Estimates, the “humility” with which the estimates were originally provided has been lost. To our knowledge, modeling science has not made any quantum leaps in the intervening three years to merit this loss of humility. The

<sup>58</sup> 2010 Estimate at 29.

meager discussion of uncertainty in the most recent SCC Estimates promotes the unsupported and misleading idea that the updated SCC values are highly accurate figures.

The OMB IQA Response suggests that each subsequent iteration of the TSD (May 2013 and November 2013) should be viewed as having been appropriately discussed, uncertainty because those versions reference back to the 2010 TSD, which contained a more substantive discussion.<sup>59</sup> The Associations disagree. We believe it is important that wherever OMB presents changes to its SCC Estimates and the changes that lead to the amended estimate, it should provide a full discussion of the context for those estimates – including disclosing sources of uncertainty. Incorporating by reference a discussion of uncertainty buried 30 pages into a TSD issued multiple years and multiple versions previous makes it unnecessarily difficult for rule writers and regulators to view the SCC Estimates in the context of their profound uncertainty. Indeed, each of the subsequently issued TSDs utilize the same exact text as the 2010 TSD (except for those portions referencing the change in the estimate). The discussion of uncertainty, however, is uniquely shorthanded down to a reference to the 2010 TSD, in what seems like a calculated effort to split off the TSD’s discussions of the SCC estimates from the TSD’s discussions of uncertainty. While the easiest approach would be to leave the text in place when updating the TSD, it required an affirmative step to remove the uncertainty discussion and replace it with a shorthanded reference.

That there are key and substantial differences in the IAMs is not in dispute. The range of uncertainty across and within the two IAMs generating the lowest and highest average SCC estimate used by the IWG are demonstrated in Table 1 of the attached *NERA Damage Function Report*, reproduced here:

**Table 1. Average SCC Estimates by Individual IAMs in IWG’s Analysis<sup>(\*)</sup>**  
 (\$/ton for emissions in 2020)

Discount Rate	Lowest Average SCC Estimate (from FUND)	Highest Average SCC Estimate (from PAGE)	Ratio of Highest to Lowest Average SCC
5%	\$3	\$22	8.3
3.0%	\$19	\$71	3.7
2.5%	\$33	\$101	3.1

<sup>(\*)</sup> The average dollar values were calculated by taking each model’s average SCC value across the IWG probability distribution of climate sensitivity values for each of the five IWG socioeconomic scenarios, and taking a simple average of those five values. They have been rounded to the nearest dollar. The ratios are based on the unrounded averages. The underlying data to compute these averages are in Appendix A of IWG (2013b), Tables A2-A4. In each case, the DICE estimate is the middle value, hence not affecting the range; DICE’s average values are \$12, \$38 and \$57 for the 5%, 3% and 2.5% discount rates, respectively.

This range of values reflects the average model estimates across five baseline input assumptions (and the probability distribution for climate sensitivity), and is presented for the three discount rates used in the IWG report. These results indicate a wide range of SCC values across the two models. Holding constant the other variables that the IWG standardized across the three models,

<sup>59</sup> OMB IQA Response at 5-6.

the average SCC estimates from the two models differ by a factor of 3 to 8, depending on the discount rate.

Given the degree of standardization already applied to the model input assumptions, these variations are substantial. The reasons for these variations are numerous. A considerable source of uncertainty and variability with the IAMs, not addressed by the IWG, is the “damage function” component of the models.<sup>60</sup> In fact, the NERA report suggests that the range of potential SCC values based upon uncertainties in the damage function is even larger than the structural variations across the DICE, FUND and PAGE models. This variability is because the formulation and utilization of the damage function in the three models are *ad hoc* and arbitrary, lack any theoretical or empirical foundation, and depend crucially on the views of the individual model builders.

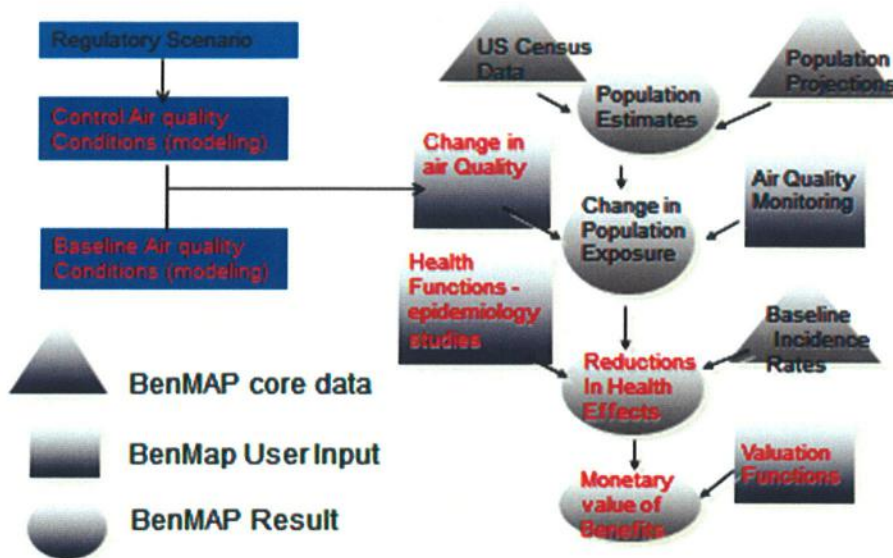
The damage function is the point in the flow of computation within an IAM where the focus shifts from scientific relationships to economic relationships. Damage functions translate variables, such as projected sea level rise, to estimated economic damages. The simplified “damage function” approach used for the IAMs contrasts significantly with the traditional approach, used by EPA and others, to estimate the economic impact of pollutant emissions. Under the traditional approach, the available scientific evidence is evaluated to identify health and environmental effects deemed to be caused by the emitted pollutants. Concentration response functions are developed to define the frequency of the effects expected to result from exposure to the pollutant at varying concentrations. Finally, the estimated health and environmental effects are monetized using a valuation methodology. The following figure is adapted from EPA’s regulatory analysis for the final revisions to the National Ambient Air Quality Standards for Particulate Matter.<sup>61</sup>

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<sup>60</sup> For a detailed analysis of the critical role of “damage functions” in the development of the SCC Estimates, and how treatment of the damage function in the IAMs contrasts with traditional regulatory impact analysis, see the attached *Damage Function Report*.

<sup>61</sup> EPA-452/R-12-005 (Dec. 2012). Importantly, the Associations do not herein suggest that EPA’s analysis for PM NAAQS was accurate or appropriate. Instead, we are merely pointing out that EPA’s approach to assessing and monetizing damage from pollutants provides far more detail and a more tangible and supported connection between the pollutant at issue and the damage presumed therefrom.

## The EPA Benefits Mapping and Analysis Program (BenMap) <http://www.epa.gov/air/benmap>



In contrast to this traditional approach to damage functions, the “damage function” of the IAMs utilized by the IWG neglects each of the traditional elements of a true damage function approach. To develop the SCC Estimates, the determination of the health, environmental, and physical damages attributed to GHG emissions is left to the authors of the IAMs, who translate these effects into an estimate of economic damage using a simple overall damage function of GDP versus temperature change. In doing so, the IWG defers to the model authors’ critical evaluations of the causal framework between GHG emissions and climate change impacts; the concentration-response function for various climate effects; and the monetization of those effects. Consequently, the subjective assumptions of the three model authors about the future can have great consequence to U.S. policy decisions.

The modelers recognize and readily concede the limitations of their models. Richard Tol, developer of the FUND model, admits that the result is not “a climate change impact model that is adequate. The accompanying static impact assessment is far from perfect, with many pieces missing and a lot of questionable assumptions.”<sup>62</sup> William Nordhaus, developer of the DICE model, similarly states that “the damage functions continue to be a major source of modeling uncertainty.”<sup>63</sup> According to a well-known economist, “developers of IAMs can do little more than make up functional forms and corresponding parameter values. And that is pretty much

<sup>62</sup> Tol, R. S., “Estimates of Damage Costs of Climate Change – Part 2: Dynamic Estimates,” *Environmental and Resource Economics*, 21:135-160, at 136 (2002).

<sup>63</sup> Nordhaus, W., *A Question of Balance*, New Haven: Yale University Press, at 51 (2008).



what they have done. . . . The bottom line here is that the damage function used in most IAMs are completely made up, with no theoretical or empirical foundation.”<sup>64</sup> Nordhaus similarly stated that the damage function analysis “involves the economic impacts of climate change, which is the thorniest issue in climate-change economics. These estimates are indispensable for making sensible decisions about the appropriate balance between costly emissions reductions and climate damages. However, providing reliable estimates of the damages from climate change over the long run has proven extremely difficult.”<sup>65</sup>

There are numerous examples of the arbitrary outcomes created by the subjective judgment-based damage functions in the IAMs. For example, one of the key differences in the IAMs is the degree to which adaptation is considered to occur. FUND considers a significantly higher degree of adaptation to occur than DICE or PAGE. Similarly, each of the models considers the impact of catastrophic events in sharply dissimilar ways.

The variability and arbitrariness of the parameters that define the judgment-based damage functions can lead to profoundly different GDP impacts. For example, the *Damage Function Report* finds that the estimates of global damages due to a given temperature change can differ substantially depending upon the parameters of the presumed damage function.<sup>66</sup> The quantitative importance of the choice of damage function parameters is illustrated by considering the estimate of global damages when just two damage function parameters are varied from the lowest to the highest values for each that are discussed in the IAM literature. The figure below graphs the values that these four different damage functions would project at temperature changes up to 15°C. The sensitivity of results over this wide range of temperature change is shown because temperature changes up to 13°C may have been projected in some of the IWG’s IAM runs by the later end of the modeling period, the year 2300.

The sensitivity analyses show that the magnitude of the difference depends upon the level of temperature change, with the sensitivity greater at higher temperature changes. Although the large temperature changes are not important in the near term years of the projections, these temperature changes can be relevant in the later years of the projections.

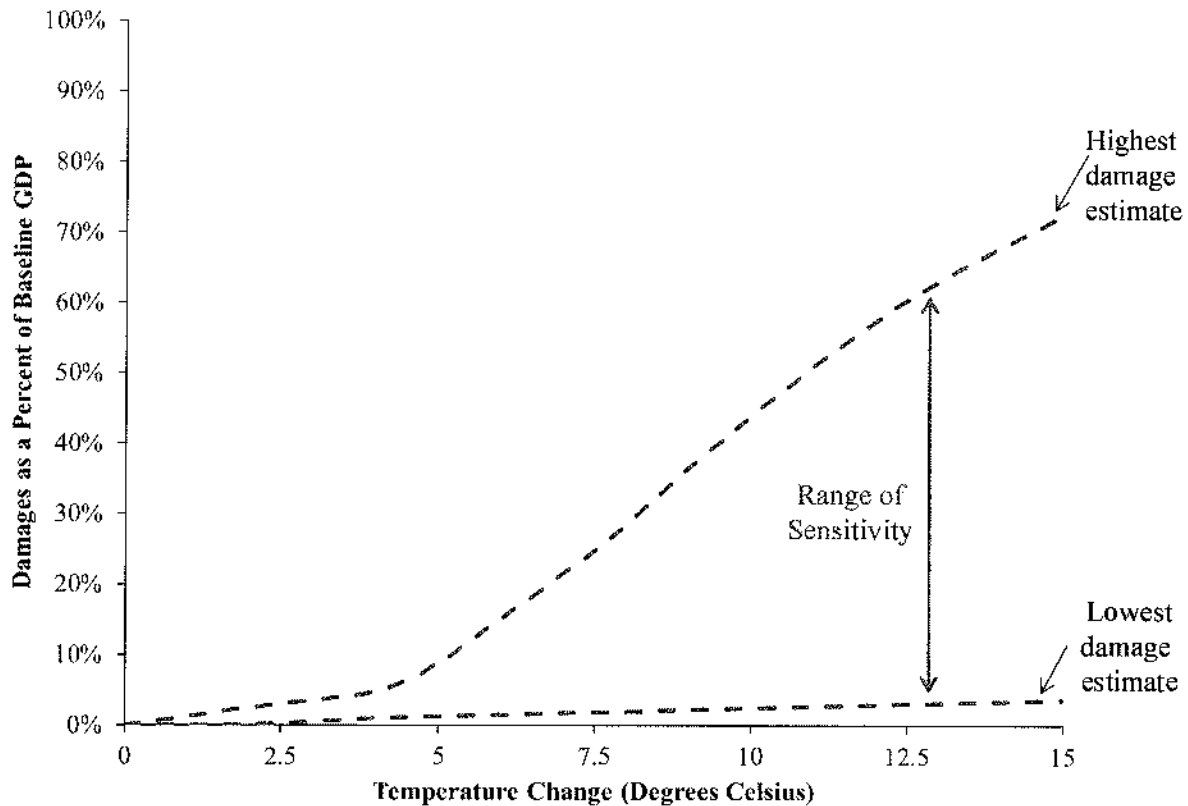
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<sup>64</sup> Pindyck, R.S., “Climate Change Policy: What Do the Models Tell Us?,” NBER Working Paper Series, WP 19244, at 11, 13 (July 2013) (Attachment 4).

<sup>65</sup> Nordhaus, W, *et. al.*, “DICE 2013: Introduction and User’s Manual,” at 10 (May 2013).

<sup>66</sup> *Damage Function Report* at 3-4.

**Range of Damage Estimates with Variations in Two Damage Function Input Assumptions**



According to the 2013 TSD, the larger SCC values reflect only changes made to the underlying IAMs. Directionally, all of the changes appear to be towards higher impacts. For the DICE model, the primary changes relate to the explicit representation of sea level rise (“SLR”) and associated damages and an updated calibration of the carbon cycle. The primary changes in the FUND model are updated damage functions for space heating, SLR agricultural impacts, changes to transient response of temperature buildup of GHG concentrations, and inclusion of indirect climate effects of methane. For PAGE, the key changes mentioned were explicit representation of SLR damages, revisions to damage functions to ensure damages do not exceed 100% of GDP, changes to regional scaling of damages, revised treatment of potentially abrupt damages, and some updated assumptions on adaptation.

Importantly, nothing in the IWG’s TSD effectively captures the arbitrary nature of how the updated IAMs have repeatedly changed the SCC estimates. For example, the authors of the DICE model claim the key damage function they used was based on a study by Tol (2009).<sup>67</sup> However, the Tol (2009) study indicates that up to a temperature rise of 2° C, climate change results in an *increase* in GDP.<sup>68</sup> In contrast, the damage function used in DICE presents a

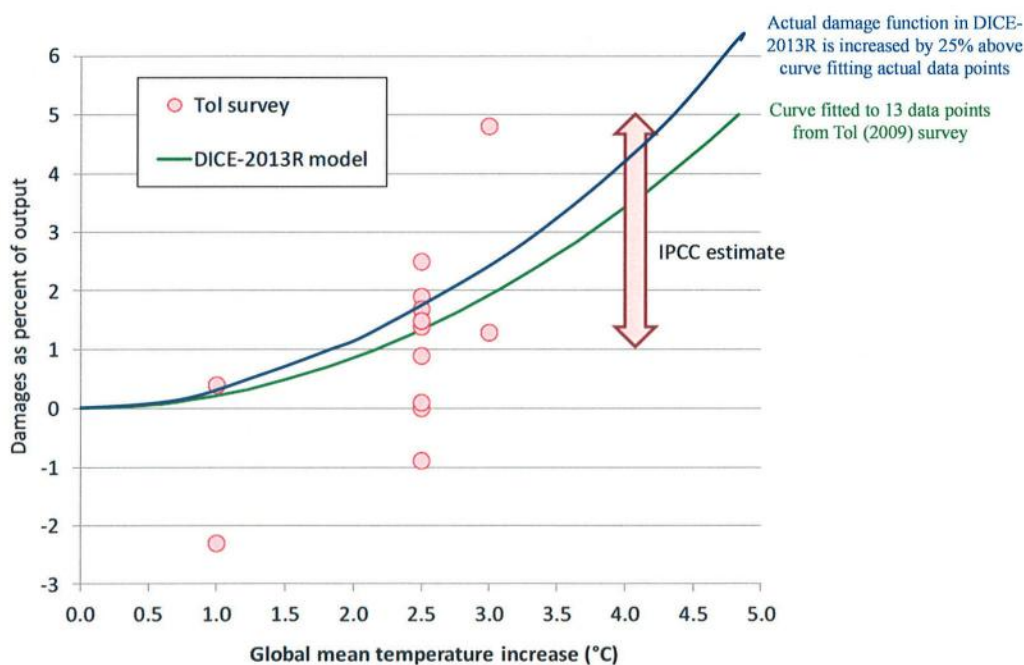
<sup>67</sup> This study is cited because it was used in or cited by models utilized for the TSD. The Associations are not endorsing this study or data to the exclusion of other information.

<sup>68</sup> See figure on page 18 in Tol (2009).

negative GDP change across all temperature changes considered. It is not clear how the authors of DICE altered the damage function presented in Tol (2009) or what the scientific basis was for this significant change.

Furthermore, the 25% increase in monetary value coming out of the updated 2013 DICE model was not produced by the IAM itself. Rather, the lead author, William Nordhaus, added an adjustment of 25% to the monetary damages to adjust for certain factors, including biodiversity, ocean acidification, and sea level rise.<sup>69</sup> See the figure below for the results of the survey conducted by Tol (2009), the DICE model's summary of that survey and the impact of the 25% adjustment. As the figure shows, for an assumed 4° C increase in global mean temperature rise, DICE predicts "damage" at the very high-end of the range that the IPCC projects. While the factors considered by Norhaus are certainly worthy of potential consideration to include in an evaluation of the SCC, the arbitrary nature by which the 25% increase in monetary value was assigned is troubling – estimates of economic damages should be scientifically derived, not assigned by one individual because those adjustments can have significant impacts on the output from the models.

**Figure: DICE-2013R Damage Function (Before And After Adjustment)**



Source: Nordhaus and Sztorc, "DICE-2013R: Introduction and User's Manual," Oct 2013. (Blue curve added to Nordhaus' figure by NERA to show damage function with the 25% adder assumed by Nordhaus to reflect non-monetized effects.)

<sup>69</sup> See Attachment 3

Similarly, the increase in the SCC in the PAGE model is based largely on the opinions of the authors as described in Hope (2011). In the updated PAGE2009 model used to derive the 2013 SCC figures, the authors assume far less adaptation will occur in response to climate change than they previously assumed. However, the authors cite no references to support this change. Nonetheless, this single change in assumption results in a 1.3-fold increase in the SCC versus the projections from PAGE2002. Another key change was how transient climate response (“TCR”), one of several components of climate sensitivity, was considered. To illustrate the importance of this one factor, a change in one standard deviation of the TCR can increase the SCC by 67%. In PAGE2009, a different triangular distribution of the TCR function was used than in PAGE2002. This resulted in a 1.5-fold increase in the SCC.<sup>70</sup> Further, in PAGE2009, the possibility for a catastrophic outcome or “discontinuity” above a fixed temperature threshold due to climate change was increased to 10% from the 1% used in PAGE2002. No documentation was provided to support these changes.

Subjective and arbitrary “adjustments” are troubling because those adjustments can have significant impacts on the output from the models. For example, compare the DICE damage function with that estimated by the IPCC, as shown in the figure above. For an assumed 4° C increase in global mean temperature rise, as the figure shows, DICE predicts “damage” at the very high-end of the range that the IPCC projects. Therefore, the inputs from DICE into the predicted SCC Estimates are biased extremely high relative to the IPCC estimated range of damages.

Ultimately, the authors of the *Damage Function Report* concluded:

[A]lthough the mathematical form of the damage function is relatively simple, plausible parameters for this mathematical formulation lead to very different estimates of global damages. We find, for example, that possible damage estimates at a given point in time can differ by up to a factor of 20 within the range of parameters and range of temperature changes found in the IAM literature. . .

The large degree of uncertainty regarding the damage function has implications for the uncertainty in the SCC values developed by the IWG. A comprehensive representation of damage function uncertainties – analyzed in combination with the other IAM input uncertainties – is needed to characterize how much more uncertain the IWG’s SCC estimates would be as a result of that damage function uncertainty. The IWG did not conduct such an analysis. Since the damage estimate is a central input to the ultimate SCC estimate, the large uncertainty in the damage function translates into uncertainty in the estimates of the social cost of carbon that may be correspondingly large.<sup>71</sup>

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<sup>70</sup> We note that use of a crude triangular distribution for this key climate sensitivity factor itself is a reflection of the high degree of guesswork involved in the estimation of this factor.

<sup>71</sup> *Damage Function Report* at 36-37.



Indeed, the SCC calculations in the DICE, FUND and PAGE models are the product of a highly simplified and aggregated formulation of the detailed calculations of climate science that goes directly from projected change in temperature to economic loss stated as change in GDP.<sup>72</sup> The IWG acknowledges the consequences of the use of such models:

These models are useful because they combine climate processes, economic growth, and feedbacks between the climate and the global economy into a single modeling framework. At the same time, they gain this advantage at the expense of a more detailed representation of the underlying climatic and economic systems. DICE, PAGE, and FUND all take stylized, reduced form approaches. Other IAMs may better reflect the complexity of the science in their modeling frameworks but do not link physical impacts to economic damages.<sup>73</sup>

As one expert noted to William Nordhaus (developer of the DICE model): “I marvel that they can translate a single number, an extremely poor surrogate for a description of the climatic conditions, into quantitative estimates of impacts of global economic conditions.”<sup>74</sup>

## **B. Model Time Horizons**

The 2010 and 2013 SCC Estimates are ambitiously projected for very long time horizons – specifically, until 2300.<sup>75</sup> The 2013 TSDs note that the DICE model, for example, can be run for an even longer time horizon (until 2595). The ability of any of these models (and their input assumptions) to hold for three centuries or more is not clear and certainly not verifiable. That the SCC Estimates increased 60 percent and changed three times in three years provides sufficient evidence to question the viability and usefulness of modeling that purports to render predictions nearly 300 years into the future. Incorporation of climate-affecting inputs – such as population changes, economic development, consumption patterns (regional and global), and technological advancements for mitigation (including the role of innovation and disruptive technologies) – as well as material stochastic variables, such as volcanic eruptions that can affect the underlying climate-forcing functions of GHG concentrations and temperature rise, over such time frames rely on identifying empirical relationships imbued with significant uncertainties. If we were to consider back to the year 1713, who could have predicted where the world is today?

Based on these key variables and uncertainties, IPCC does not attempt predictions beyond the year 2100.<sup>76</sup> Among other reasons, this constraint is due to the widely predicted

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<sup>72</sup> See NERA *Damage Function Report* at 10-14. The NERA report discusses in detail how the “damage function” component of the IAM models is a highly simplified approach to the traditional “damages function method” in which economic assessments are narrowly confined to valuing a specific set of projected adverse effects.

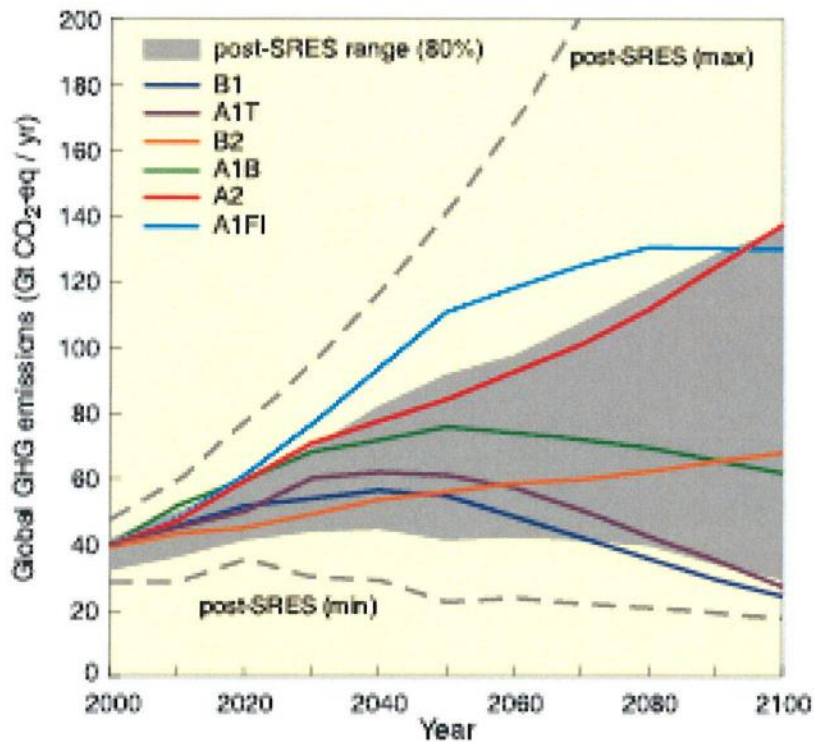
<sup>73</sup> 2010 TSD at 5.

<sup>74</sup> Nordhaus, W., “Expert Opinion on Climatic Change,” *American Scientist*, 82:45-51 (1994).

<sup>75</sup> 2013 Estimate at 7.

<sup>76</sup> See [www.ipcc.ch/publications\\_and\\_data/ar4/syr/en/mains3.html](http://www.ipcc.ch/publications_and_data/ar4/syr/en/mains3.html). This reference should not be viewed as an endorsement of the IPCC’s conclusions, but rather as a reference point from which to compare the three models used in the SCC Estimates. The Fish and Wildlife Service & National Marine Fisheries Service often limit their modeling of potential climate impacts on species to even shorter time horizons.

variances in critical inputs, such as predicted model emissions. For example, the figure below, taken from the most recent IPCC work, shows how wide the emission predictions from various scenarios are, through just the year 2100.



As the authors of the *Damage Function Report* state:

[I]n the case of climate change, many of the impacts are very far in the future (up to 300 years hence, in the case of the IWG analyses), and also highly variable in terms of the region affected. Thus [condensing projections of economic damages across many years and regions into a single present-value global measure of welfare] raises issues regarding inter-generational and inter-regional equity that seem largely ethical rather than economic.<sup>77</sup>

Clearly, attempting to extrapolate SCC Estimates to 2300 is simply too speculative and uncertain for use in policymaking.

## V. CONCERNS WITH THE PRESENTATION OF THE SCC ESTIMATES

In addition to the Associations' concerns with opacity and accuracy of the modeling and SCC estimation process, we are further concerned that OMB and the IWG present the SCC Estimates in a confusing and potentially misleading manner. Failure to present this information

<sup>77</sup> *Damage Function Report* at 12.

in a way that appropriately identifies (and quantifies) uncertainty, neglects to explain the use and impact of averaging, and focuses on the global, rather than domestic, SCC, diminishes the utility of the SCC Estimates and increases the likelihood that they will be misused or misinterpreted by risk managers.<sup>78</sup>

**A. Uncertainty Is Not Addressed Appropriately**

While there is no requirement that the SCC Estimates be absolutely precise and accurate, OMB's Circular A-4 requires key uncertainties to be disclosed and quantified to the extent possible "to inform decision makers and the public about the effects and uncertainties of alternative regulatory actions."<sup>79</sup> Circular A-4 requires uncertainties to be analyzed qualitatively and quantitatively, delineated, and disclaimed.<sup>80</sup> Further, OMB's Circular A-4 admonishes that:

Your estimates cannot be more precise than their most uncertain component. Thus, your analysis should report estimates in a way that reflects the degree of uncertainty and not create a false sense of precision. Worst-case or conservative analysis are [sic] not usually adequate because they do not convey the complete probability distribution of the outcomes, and they do not permit calculation of an expected value of net benefits.<sup>81</sup>

Rather than appropriately quantifying and disclaiming the profoundly speculative nature of the SCC Estimates, the IWG downplays the wide variability in the three models' outputs through averaging. Similar to the 2010 Estimates, the 2013 Estimates are based on the average outputs of the three models. Individual model predictions, however, vary significantly. For example, at a 3% discount rate, the cost per ton varies from a high of \$71/ton for PAGE to a low of \$21/ton for FUND, with the DICE estimate between these two costs at \$38/ton. This is shown in the table below.<sup>82</sup>

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<sup>78</sup> As detailed in the attached comments submitted by many of the undersigned Associations, problems with the implementation of the SCC Estimates by federal agencies in rulemakings already have been identified with regard to several proposed rulemakings, including DOE's proposed energy efficiency standards for metal halide lamps, walk-in coolers and freezers, and commercial refrigeration equipment. *See, e.g.*, Comments submitted October 12, 2013 by the Associations on DOE's Proposed *Energy Conservation Standards for Metal Halide Lamp Fixtures* (77 Fed. Reg. 51,563 (Aug. 20, 2013)); Comments submitted November 12, 2013 by the Associations on DOE's Proposed *Energy Conservation Standards for Walk-In Coolers and Freezers* (78 Fed. Reg. 55,782 (Sept. 11, 2013)); Comments submitted October 12, 2013 by the Associations on DOE's Proposed *Energy Conservation Standards for Commercial Refrigeration Equipment* (78 Fed. Reg. 55,890 (Sept. 11, 2013)); Comments submitted January 23, 2014 by Associations on Notice of Proposed Rulemaking for Energy Conservation Standards for Residential Furnace Fans 78 Fed. Reg. 64,067 (Oct. 25, 2014)); and Petition for Reconsideration filed by Associations on September 16, 2013 of Standards for Standby Mode and Off Mode for Microwave Ovens (78 FR 36316 (June 17, 2013)). These comments are attached (Attachment 5) and hereby incorporated by reference.

<sup>79</sup> OMB Circular A-4 at 38.

<sup>80</sup> *Id.* at 40.

<sup>81</sup> *Id.* at 40.

<sup>82</sup> November 2013 TSD at 21, Table A5.

Table A5: Additional Summary Statistics of 2020 Global SCC Estimates

Discount rate:	5.0%				3.0%				2.5%			
Statistic:	Mean	Variance	Skewness	Kurtosis	Mean	Variance	Skewness	Kurtosis	Mean	Variance	Skewness	Kurtosis
DICE	12	26	2	15	38	409	3	24	57	1097	3	30
PAGE	22	1616	5	32	71	14953	4	22	101	29312	4	23
FUND	3	560	-170	35222	21	22487	-85	18842	36	68055	-46	13105

While the differences in the “average” values between the models (a factor of ~3.5 between \$21/ton from the FUND model to \$71/ton from the PAGE model) are problematic enough, the predicted model variances are even more striking, as shown in the table above. For example, it is simply meaningless to predict a “mean” of \$21/ton based on FUND, when the corresponding variance is predicted to be \$22,487. The same is true for each of the other predictions.

This broad range reflects not only the effects of the various inputs and model structure uncertainties, but also the impact of taking the *average* of the three models for the five climate change scenarios at the four discount rates used in the SCC development analysis. The average values are much higher than the 50<sup>th</sup> percentiles for all three models, but are particularly higher than the 50<sup>th</sup> percentile figure in the case of the PAGE model.

Using the 3% discount rate as an example, the average values per ton versus the 50<sup>th</sup> percentile values per ton for the PAGE, DICE, and FUND models are \$71/\$27, \$38/\$34, and \$21/\$17, respectively. Therefore, for the PAGE, DICE, and FUND models, the value used to derive the final SCC figure of \$43/ton at the 3% discount rate is the 75<sup>th</sup> percentile value for the PAGE model and the overall SCC value of \$43.1 per ton corresponds to the 68<sup>th</sup> percentile. Thus, the high-end tail of the distribution of the PAGE model has an important influence on the final SCC Estimates. These final SCC Estimates should not be viewed as central figures, but rather as skewed toward the upper tail of the distribution of SCC values. Indeed, there is no rational basis for “averaging” the results, on an equally-weighted basis, from the three IAM models, which differ significantly in the assumptions they use to estimate SCC. Rather than make an effort to determine which of the three models provides the best estimates, the government instead combines all of the estimates and divides to obtain a simple average.

OMB must adhere to the directives it imposes on other agencies and executive offices with respect to providing accurate information. It has not done so with the SCC Estimates. The IWG and OMB have failed to disclose and quantify key uncertainties and to inform fully decision makers and the public of those uncertainties as required by OMB. Consistent with OMB Guidelines for Economic Analysis, the 2013 TSD must be withdrawn and amended to include a separate section that identifies the key sources of uncertainty in the derivation of the SCC. This section should include a qualitative assessment of the impact of key factors on the final SCC values and, to the extent feasible, a quantitative assessment of these factors.



**B. By Presenting Only Global SCC Estimates, The IWG Severely Limits The Utility Of The Estimates For Use In Cost-Benefit Analysis And Policymaking**

OMB's IQA Guidelines require that information disseminated by agencies meet the standard of utility. This part of the IQA requires agencies to assess the usefulness of the information to its intended users, including the public. For the 2013 Estimates, by presenting only global SCC estimates, and excluding domestic SCC estimates altogether, the IWG severely limits the utility of the SCC Estimates for use in cost-benefit analysis.

Further, OMB Circular A-4 mandates calculation of a domestic cost-benefit estimate in federal rulemakings, with non-U.S. estimates considered as *optional* – the reverse of the presentation published by IWG/OMB. Moreover, neither the May 2013 TSD, nor the November 2013 TSD mention the global nature of the values or note that the domestic SCC is a small fraction (7-23%) of the global SCC. Thus, policymakers who apply the SCC values from this table and have not read the previous 2010 TSD may be unaware that a large percentage of the economic benefits they are estimating from their rule will occur outside the United States.<sup>83</sup>

The IWG's recommendation that rule writers and policymakers use only the global SCC in cost-benefit analysis results in a significant misalignment of costs and benefits. For this reason, we strongly recommend presenting both the domestic and global SCC figures in RIAs, with a preference for use of the domestic values. This approach would allow risk managers to more readily align the costs with the benefits. Consistent with OMB guidance, the costs of a rule for entities in the United States should be presented in comparison with the benefits occurring in the United States. The benefits using the global SCC should be presented separately. Along with the global SCC benefits, federal agencies proposing a rule should be encouraged to present at least a qualitative accounting of similar regulatory efforts underway or proposed in other countries for the specific type of problem their rule is proposed to address. This approach would meet the goal of Executive Order 13609 that federal agencies evaluate how rules they are proposing differ from requirements for key United States trading partners.

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<sup>83</sup> For example, the 2010 TSD states:

As an empirical matter, the development of a domestic SCC is greatly complicated by the relatively few region- or country-specific estimates of the SCC in the literature. One potential source of estimates comes from the FUND model. The resulting estimates suggest that the ratio of domestic to global benefits of emission reductions varies with key parameter assumptions. For example, with a 2.5 or 3 percent discount rate, the U.S. benefit is about 7-10 percent of the global benefit, on average, across the scenarios analyzed. Alternatively, if the fraction of GDP lost due to climate change is assumed to be similar across countries, the domestic benefit would be proportional to the U.S. share of global GDP, which is currently about 23 percent.

On the basis of this evidence, the interagency workgroup determined that a range of values from 7 to 23 percent should be used to adjust the global SCC to calculate domestic effects. Reported domestic values should use this range.

We note that the approach of presenting only a global benefit value while comparing it to a domestic cost value is inconsistent with policies used in the United States to perform cost-benefit analysis for rules intended to address other significant environmental issues that are global in scope. For example, ground level ozone is now recognized by many as a health and environmental issue that is global in nature. Recent studies clearly demonstrate that emissions from the Asia Pacific region affect compliance with the United States NAAQS for ozone.<sup>84</sup> However, the current approach of performing cost-benefit analysis of air rules for NAAQS compliance purposes does not consider the global nature of the issue. Rather, the costs to comply with the NAAQS are borne entirely by entities in the United States and the damages of ozone are estimated without any recognition of the impact of the emissions from outside the continental United States.

The IQA Petition filed with OMB raised substantially similar concerns on the TSD's presentation of global impacts, to which the OMB IQA Response simply quoted from the 2010 TSD the justification for its presentation of global impacts.<sup>85</sup> OMB's recital of its earlier justification for its presentation of global impacts was not altogether responsive. The Associations are aware of the justification provided in the 2010 TSD, but disagree with it, find it inconsistent with OMB Circular A-4 and analogous regulatory actions with potential global impacts, and misleading to risk managers. We are herein requesting that OMB change this presentation.

## **VI. ADMINISTRATIVE PROCEDURE ACT**

The Administrative Procedure Act's ("APA") broad definition of a "rule" includes "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy," such as "the approval or prescription of . . . valuations, costs, or accounting."<sup>86</sup> When promulgating a substantive rule, an agency must comply with the APA's procedural requirements by providing notice of proposed action describing its substance and the legal authority under which it is proposed, by allowing for public comment, and by including in the rule a description of its basis and purpose.<sup>87</sup> Agency rules are subject to judicial review and may be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>88</sup>

At the outset, we note that OMB identifies no authority under which it can adopt the SCC Estimates as a rule, or the statutory or regulatory basis for this proceeding. OMB's exercise of regulatory discretion without identifying explicit direction from Congress therefore raises serious

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<sup>84</sup> Cooper O.R., et al. (2010). Increasing springtime ozone mixing ratios in the free troposphere over western North America. *Nature* 463(21): 344-348.

<sup>85</sup> OMB IQA Response at 6-7.

<sup>86</sup> 5 U.S.C. § 551(4); *see also Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983) ("rule" includes "virtually every statement an agency can make").

<sup>87</sup> 5 U.S.C. § 553; *see id.* § 553(b) (only certain non-substantive rules exempted from procedural requirements).

<sup>88</sup> 5 U.S.C. § 706(2)(A).

constitutional concerns, including concerns about breaching the separation of powers between the legislative and executive branches and violating the non-delegation doctrine. If OMB nonetheless adopts the SCC Estimates presented in the TSD absent identification of clear statutory authority to do so, its action will be subject to challenge as unlawful rulemaking. In this regard, according to statements made by OMB, the SCC Estimates are intended to “prescribe law or policy” by specifying “valuations, costs, or accounting” to govern federal agencies’ analyses of the costs and benefits of their regulatory actions.<sup>89</sup> Indeed, many federal programs require that agencies consider the direct and indirect costs of proposed actions. For example, Exec. Order No. 12,866 states that agencies must “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.” And prior SCC estimates adopted by OMB have already influenced agencies’ consideration of regulatory costs, as was the case with the microwave oven efficiency standards and other rules. Because the SCC Estimates in this TSD are designed to constrain agency decision-making regarding how carbon costs are to be evaluated in future agency proceedings and because, once finalized, they are to be imposed across the federal government as a common cost valuation for carbon, this proceeding represents unlawful rulemaking. For these reasons and those discussed below, the proposed TSD fails to comply with the APA’s procedural and substantive requirements.

Additionally, use of the SCC Estimates in subsequent rulemakings will result in agency violations of the APA. Under the APA, a court will look to ensure that the information collection and analysis process is lawful and reasonably coherent, and that the ultimate agency action which results from use of that information is not arbitrary and capricious.<sup>90</sup>

From a substantive perspective, an agency engaged in rulemaking must examine the relevant data and articulate a satisfactory explanation for its action, including a “rational connection between the facts found and the choice made.”<sup>91</sup> Agency action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>92</sup>

Use of the SCC Estimates in rulemaking will violate the APA. For instance, the record does not show what roles each of the IWG participating agencies actually played in developing the estimates. The record does not show which staff from the participating agencies participated in the process. The record does not show how the three models that underlie these estimates were selected (from the universe of similar available models). The record does not show who ran the models (agency staff? contractors?) or their qualifications or level of expertise. The

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<sup>89</sup> See, e.g., 78 Fed. Reg. at 70,586 (Through the SCC, OMB will “ensure that agencies are appropriately measuring the social cost of carbon emissions as they evaluate the costs and benefits of rules.”); OMB IQA Response (OMB seeks “public comment on the SCC through the formal public comment process that applies to all Federal rulemakings.”).

<sup>90</sup> See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>91</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>92</sup> *Id.*

record does not show who developed the inputs for the model runs, including both policy as well as technical choices, and it is not clear how such inputs were developed. The record does not show how the various statistical Monte Carlo analyses actually were implemented (which inputs were held constant and why, which inputs were selected to be variable and why, and the assumptions regarding the assumed distribution functions for the latter variable inputs, *etc.*). These are but a few of the flaws, uncertainties, and unknowns that should preclude the use of the SCC Estimates/TSD.

Each of these failures violates fundamental precepts of administrative procedure and the scientific method – and none credibly can be stated to be the result of a difference of opinion, interpretation, or Agency expertise. To the contrary, these are examples where the Administration drove its conclusions far beyond the capacity of sound science and modeling. Even if the three models themselves were entirely sound, the non-public inputs into those models most certainly render the model output (*i.e.*, the SCC Estimates) arbitrary and capricious.

APA's decision-making standards also demand compliance with the IQA, including requirements for complete, unbiased analysis grounded in accepted methods. "Determination of whether the agency complied with prescribed procedures requires a plenary review of the record and consideration of applicable law."<sup>93</sup> More specifically, the APA requires that agencies relying on SCC Estimates in rulemaking review all credible relevant information, utilize unbiased peer review, and make Agency assumptions, methods, and models transparent and reasonably reproducible and understandable in response to an appropriate request for information. If OMB allows or directs other agencies to use the SCC Estimates, any agency that bases a rule on these estimates would violate the IQA and the APA, and the legality of such regulation would be called into question. The ultimate rationality of subsequent agency action depends in part on whether it has thoroughly complied with applicable procedural requirements, including those set forth in the IQA.<sup>94</sup>

## **VII. CONCLUSION**

The Associations appreciate the opportunity to comment on the SCC Estimates. However, without the benefit of any of the information underpinning the SCC Estimates or any indication that OMB intends to actually consider comments, this process does little more than suggest, incorrectly, the appearance of transparency and collaboration. Given the significant process shortcomings, lack of peer review, and weaknesses and uncertainties in the modeling systems highlighted in these comments and related IQA Petition, the undersigned Associations

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<sup>93</sup> See *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994).

<sup>94</sup> Even if a particular statute, such as the IQA, does not provide for judicial review, "the agency's decision may still be overturned because of an analysis so defective as to render its final decisions unenforceable, or, in the absence of any analysis, because of a failure to respond to public comment concerning" the legal infirmities identified pursuant to that statute. *Michigan v. Thomas*, 805 F.2d 176, 188 (6<sup>th</sup> Circuit 1986); *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Circuit 1984.) (The flawed rule "is set aside, ... not because the regulatory flexibility analysis [not subject to direct judicial review] was defective, but because the mistaken premise reflected in the regulatory flexibility analysis deprives the rule of its required rational support ....").



urge OMB and the IWG to withdraw the 2010 and 2013 Technical Support Documents, pending correction through an informed, transparent, and public process. OMB's November 26, 2013 solicitation of comments certainly is not such an informed, transparent, and public process. As such, we further ask OMB to refrain from using the SCC Estimates and to direct publicly other executive branch agencies not to utilize the SCC Estimates as part of any regulatory action or policymaking. Finally, as per the February 24, 2014 Request for Reconsideration of the OMB IQA Response filed by many of the Associations, and for the reasons noted throughout these comments, the Associations request that OMB reconsider its denial of the September 4, 2013 Petition calling on OMB to ensure that the SCC Estimates and TSD comply with IQA guidelines.

We appreciate the opportunity to submit the foregoing comments. If you have any questions or need any further information about these comments, please contact our counsel Wayne D'Angelo at 202.342.8525 or [WDAngelo@Kelleydrye.com](mailto:WDAngelo@Kelleydrye.com).

Respectfully submitted,

**American Chemistry Council**

**American Coalition for Clean Coal Electricity**

**American Exploration &  
Production Council**

**American Forest & Paper Association**

**American Fuel & Petrochemical  
Manufacturers**

**American Iron and Steel Institute**

**American Petroleum Institute**

**America's Natural Gas Alliance**

**Brick Industry Association**

**Council of Industrial Boiler Owners**

**The Fertilizer Institute**

**Independent Petroleum Association of America**

**National Association of Home Builders**

**National Association of Manufacturers**

**Natural Gas Supply Association**

**National Mining Association**

**National Oilseed Processors Association**

**Portland Cement Association**

**U.S. Chamber of Commerce**

**Cc: Mabel Echols**

## **Attachment 1 Statements of Interest**

The American Chemistry Council: The American Chemistry Council (“ACC”) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$770 billion enterprise and a key element of the nation's economy. It is one of the nation’s largest exporters, accounting for twelve percent of all U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation’s critical infrastructure.

The American Coalition for Clean Coal Electricity: The American Coalition for Clean Coal Electricity (“ACCCE”) is a trade association of more than 30 companies associated with the production of electricity from coal. ACCCE’s members span the production, transportation, and consumption of coal that has provided nearly half of the reliable electricity Americans depend upon each and every day over the past decade. ACCCE supports policies that will ensure affordable, reliable, domestically produced energy, while supporting the development and deployment of advanced technologies to further reduce the environmental footprint of coal-fueled electricity generation.

The American Exploration & Production Council: American Exploration & Production Council (“AXPC”) is a national trade association representing 32 of America's largest and most active independent oil and natural gas exploration and production companies. AXPC members are "independent" in that their operations are limited to exploration for and production of oil and natural gas. Moreover, our members operate autonomously, unlike their fully integrated counterparts, which operate in additional segments of the energy business, such as downstream refining and marketing. AXPC members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce oil and natural gas, both offshore and onshore, from unconventional sources.

The American Forest & Paper Association: The American Forest & Paper Association (“AF&PA”) serves to advance a sustainable U.S. pulp, paper, packaging, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry’s sustainability initiative - Better Practices, Better Planet 2020. The forest products industry accounts for approximately 4.5 percent of the total U.S. manufacturing GDP, manufactures approximately \$200 billion in products annually, and employs nearly 900,000 men and women. The industry

meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 47 states.

**The American Fuel & Petrochemical Manufacturers:** The American Fuel & Petrochemical Manufacturers (“AFPM”) is a national trade association of more than 400 companies, including virtually all U.S. refiners and petrochemical manufacturers. AFPM members operate 122 U.S. refineries comprising approximately 98% of U.S. refining capacity. AFPM petrochemical members make the chemical building blocks which go into products ranging from medical devices, cosmetics, furniture, appliances, TVs and radios, computers, parts used in every mode of transportation, solar power panels and wind turbines. As an energy intensive industry, AFPM members are directly impacted by the government’s calculation of the social cost of carbon.

**The American Iron and Steel Institute:** The American Iron and Steel Institute (“AISI”) is a non-profit, national trade association headquartered in the District of Columbia. AISI serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI represents member companies accounting for more than three quarters of U.S. steelmaking capacity.

**The American Petroleum Institute:** The American Petroleum Institute (“API”) is a national trade association representing over 500 member companies involved in all aspects of the oil and natural gas industry. API’s members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

**America’s Natural Gas Alliance:** Representing North America’s largest independent natural gas exploration and production companies, America's Natural Gas Alliance (ANGA) works with industry, government and customer stakeholders to promote increased demand for our nation’s abundant natural gas resource for a cleaner and more secure energy future and to ensure its continued availability.

**The Brick Industry Association :** Founded in 1934, the Brick Industry Association represents the U.S. clay brick industry, which includes 270 manufacturers, distributors, and suppliers that provide employment for nearly 200,000 Americans in 44 states and historically generate approximately \$9 billion to the U.S. economy annually. Our members and our industry could potentially be needlessly harmed by this rulemaking. Given the large number of small businesses affected by this rule, including in the brick industry, additional time is justified.

**The Council of Industrial Boiler Owners:** The Council of Industrial Boiler Owners (“CIBO”) is a broad-based association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates with members representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information within the industry and between industry and

government relating to energy and environmental equipment, technology, operations, policies, law and regulations affecting industrial boilers. Since its formation, CIBO has been active in the development of technically sound, reasonable, cost-effective energy and environmental regulations for industrial boilers. CIBO supports regulatory programs that provide industry with enough flexibility to modernize -- effectively and without penalty - the nation's aging energy infrastructure, as modernization is the key to cost-effective environmental protection.

**The Fertilizer Institute:** The Fertilizer Institute (“TFI”) represents the nation’s fertilizer industry including producers, importers, retailers, wholesalers and companies that provide services to the fertilizer industry. TFI members provide nutrients that nourish the nation’s crops, helping to ensure a stable and reliable food supply. TFI’s full-time staff, based in Washington, D.C., serves its members through legislative, educational, technical, economic information and public communication programs.

**The Independent Petroleum Association of America:** The Independent Petroleum Association of America (IPAA) is the national trade organization representing thousands of American oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts. These businesses will be significantly affected by the proposed actions in this regulatory framework. IPAA member companies drill about 95 percent of American oil and natural gas wells, produce about 54 percent of American oil, and more than 85 percent of American natural gas.

**The National Association of Home Builders:** The National Association of Home Builders (“NAHB”) is a nationwide federation of more than 850 state and local home builder associations representing more than 140,000 members including individuals and firms engaged in land development, single and multifamily construction, multifamily ownership, building material trades, and commercial and industrial projects. More than 80 percent of NAHB members are classified as “small businesses” and meet the federal definition of a “small entity,” as defined by the U.S. Small Business Administration. The use of the Social Cost of Carbon report as a basis for future rulemakings will have a profound impact on the way homes and communities of the future will be built.

**The National Association of Manufacturers:** The National Association of Manufacturers (“the NAM”) is the largest industrial trade association in the United States, representing over 12,000 small, medium and large manufacturers in all 50 states. NAM is the leading voice in Washington, D.C., for the manufacturing economy, which provides millions of high wage jobs in the U.S. and generates more than \$1.6 trillion in GDP. In addition, two-thirds of NAM members are small businesses, which serve as the engine for job growth. NAM’s mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

**The National Mining Association:** The National Mining Association (“NMA”) is a national trade association whose members produce most of America’s coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral

processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership, and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources.

**The National Oilseed Processors Association:** The National Oilseed Processors Association ("NOPA") is a national trade association that represents 13 companies engaged in the production of vegetable meals and vegetable oils from oilseeds, including soybeans. NOPA's member companies process more than 1.6 billion bushels of oilseeds annually at 63 plants located in 19 states, including 57 plants that process soybeans.

**The Natural Gas Supply Association:** The Natural Gas Supply Association ("NGSA"), established in 1965, represents integrated and independent companies that produce and market approximately 40 percent of the natural gas consumed in the United States. NGSA encourages the use of natural gas within a balanced national energy policy and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. customers.

**The Portland Cement Association:** The Portland Cement Association ("PCA") is the national trade association for the United States cement manufacturing industry. PCA's 26 member companies operate 79 manufacturing plants in 34 states, accounting for almost 80 percent of domestic cement manufacturing capacity. In 2011, the cement manufacturing and related industries generated nearly \$44 billion in annual revenues and supported more than 150,000 high quality manufacturing jobs in the United States.

**The U.S. Chamber of Commerce:** The U.S. Chamber of Commerce ("the Chamber") 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.

# APPENDIX C



**U.S. CHAMBER OF COMMERCE**

September 4, 2013

Data Quality Coordinator  
Assistant Director for Administration  
Office of Management & Budget  
Washington, D.C. 20503  
correction@omb.eop.gov  
Fax: 202.395.3888

Re: Petition for Correction: Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866 (February 2010) and Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866 (May 2013).

Dear Sir/Madam:

America's Natural Gas Alliance, the American Chemistry Council, the American Petroleum Institute, the National Association of Home Builders, the National Association of Manufacturers, the Portland Cement Association, and the U.S. Chamber of Commerce respectfully submit to the Office of Management and Budget ("OMB"), pursuant to the

Information Quality Act<sup>1</sup> (IQA), this Petition for Correction of the Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (February 2010) (“2010 Estimate”) and Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (May 2013) (“2013 Estimate”) (collectively, the “SCC Estimates”).<sup>2</sup> As described in this petition, the Technical Support Documents and SCC Estimates should be withdrawn and not used in rule-making and policy-making for the following reasons:

1. The SCC Estimates fail in terms of process and transparency. The SCC Estimates fail to comply with OMB guidance for developing influential policy-relevant information under the Information Quality Act. The SCC Estimates are the product of an opaque process and any pretensions to their supposed accuracy (and therefore usefulness in policy-making) are unsupported.
2. The models with inputs (hereafter referred to as “the modeling systems”) used for the SCC Estimates and the subsequent analyses were not subject to peer review as appropriate.
3. Moreover, even if the SCC Estimate development process was transparent, rigorous, and peer-reviewed, the modeling conducted in this effort does not offer a reasonably acceptable range of accuracy for use in policy-making.
4. The Interagency Workgroup (“IWG”) has failed to disclose and quantify key uncertainties to inform decision makers and the public about the effects and uncertainties of alternative regulatory actions as required by OMB.
5. By presenting only global SCC estimates and downplaying domestic SCC estimates in 2013, the IWG has severely limited the utility of the SCC for use in benefit cost analysis and policy-making.

Given these significant issues described herein, we are submitting this Petition for Correction to urge OMB and the IWG to withdraw the 2010 and 2013 Technical Support Documents, pending correction through a transparent, public process. Furthermore, we ask OMB to not utilize either the 2010 or 2013 SCC Estimates and to publicly direct other executive branch agencies not to utilize the 2010 and 2013 SCC Estimates for any regulatory action or policy-making.

## **I. INTEREST OF PETITIONERS**

Representing North America’s largest independent natural gas exploration and production companies, America’s Natural Gas Alliance (ANGA) works with industry, government and customer stakeholders to promote increased demand for our nation’s abundant

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<sup>1</sup> P.L. 106-554, §515, 144 Stat. 2763 (2001).

<sup>2</sup> As the SCC Estimates were developed in conjunction with the Interagency Working Group on the Social Cost of Carbon (“IWG”), we are simultaneously providing copies of this Petition for Correction to the Data Quality Coordinators for each agency and entity that participated in the IWG.



natural gas resource for a cleaner and more secure energy future and to ensure its continued availability.

The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$770 billion enterprise and a key element of the nation's economy. It is one of the nation's largest exporters, accounting for twelve percent of all U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure.

The American Petroleum Institute (API) is a national trade association representing over 500 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

The National Association of Home Builders (NAHB) is a nationwide federation of more than 850 state and local home builder associations representing more than 140,000 members including individuals and firms engaged in land development, single and multifamily construction, multifamily ownership, building material trades, and commercial and industrial projects. More than 80 percent of NAHB members are classified as "small businesses" and meet the federal definition of a "small entity," as defined by the U.S. Small Business Administration. The use of the Social Cost of Carbon (SCC) report as a basis for future rulemakings will have a profound impact on the way homes and communities of the future will be built.

The National Association of Manufacturers (NAM) is the largest industrial trade association in the U.S., representing over 12,000 small, medium and large manufacturers in all 50 states. NAM is the leading voice in Washington, D.C., for the manufacturing economy, which provides millions of high wage jobs in the U.S. and generates more than \$1.6 trillion in GDP. In addition, two-thirds of NAM members are small businesses, which serve as the engine for job growth. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The Portland Cement Association (PCA) is the national trade association for the United States cement manufacturing industry. PCA's 26 member companies operate 79 manufacturing plants in 34 states, accounting for almost 80 percent of domestic cement manufacturing capacity. In 2011, the cement manufacturing and related industries generated nearly \$44 billion in annual revenues and supported more than 150,000 high quality manufacturing jobs in the U.S.

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.

Our members may be impacted by this proposal because many of them manufacture products that, when combusted, result in greenhouse gas ("GHG") emissions (including carbon dioxide ("CO<sub>2</sub>")), and because, in the course of their business, they emit CO<sub>2</sub>. Should this Administration, or any subsequent one, promulgate further regulation of these products or emissions, such proposals and rules could potentially be based, in large part, on the SCC Estimates. Our members, therefore, have a direct and meaningful interest in ensuring that any SCC Estimates are based on transparent processes, accurate information, rational assumptions, and are within the reach of the current scientific understanding and impact models. To be clear, we are not herein discussing the existence or potential causes of climate change. Instead, we are questioning the IWG's estimates of the social cost of carbon, based on complex economic impacts hundreds of years in the future, which in turn are based on present day understanding of current and future carbon emissions.

## **II. GOALS AND IMPORTANCE OF INFORMATION QUALITY ACT GUIDELINES**

The IQA requires that federal agencies take steps to maximize the quality, objectivity, and integrity of the information they disseminate, and to provide a mode of redress to correct flawed or incomplete information. Consistent with its directive to other agencies and entities, OMB developed its own guidelines ("IQA Guidelines") that require that the information it disseminates meets standards for objectivity, utility, and integrity.<sup>3</sup> The "objectivity standard" focuses on whether the information is "accurate, reliable, and unbiased and whether the information is presented in an accurate, clear, complete, and unbiased manner."<sup>4</sup> The "integrity standard" refers to information security, such as protection of information from unauthorized access or revision, while the "utility standard" refers to the usefulness of the information for the intended audience's anticipated purposes.<sup>5</sup>

OMB's Guidelines require it to maximize the quality of disseminated information that it classifies as influential. "Influential information" generally refers to information that "will have a clear and substantial impact on important public policies or important private sector decisions."<sup>6</sup> Without question, the SCC Estimates, upon which numerous agencies may base billions, if not trillions, of dollars of regulation, are influential information that will have a clear and substantial impact on important public policies and important private sector decisions.<sup>7</sup>

Further, under OMB Guidelines, such influential information must meet a higher level of "transparency."<sup>8</sup> According to OMB, transparency requires that its findings be reproducible,

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<sup>3</sup> Office of Management & Budget Information Quality Guidelines (Oct. 1, 2002).

<sup>4</sup> *Id.* at 8.

<sup>5</sup> *Id.* at 1.

<sup>6</sup> *Id.* at 8.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 2.

within an acceptable range of imprecision, by third parties.<sup>9</sup> Influential information must also be transparent with respect to: (1) the source of the utilized data; (2) the various assumptions employed; (3) the analytic methods applied; and (4) the statistical assumptions employed.<sup>10</sup> All these transparency elements are important considerations in any objective, third-party review and analysis of Agency information.

OMB imposes these guidelines on itself as well as on the information on which it relies. It requires OMB staff, and the working groups it oversees, to acquire relevant information by acceptable and unbiased methods.<sup>11</sup> Further, information collected must generally display indicia of reliability such as being subjected to peer review or being founded on transparent and reproducible methods.

OMB's obligations under the IQA are significant. These obligations were put in place by Congress and are supported by an Administration-wide effort to make informed and transparent decisions based on sound science.<sup>12</sup> The IQA guidelines, peer review guidelines, and internal protocols that OMB uses to ensure the Administration's disseminations are objective, unbiased, and robust. Importantly, OMB, as the entity that developed and oversees the IQA's guidelines to agencies, has a profound and unique interest in ensuring those guidelines are followed to the greatest extent possible in its own regulatory decision-making. As discussed below, OMB failed to follow these guidelines.

### **III. REQUEST FOR CORRECTION**

#### **1. The IWG Estimation Process was Not Transparent**

In his March 9, 2009 "Memorandum for the Heads of Executive Departments and Agencies" on "Scientific Integrity" ("Scientific Integrity Memo"), President Obama called on his Administration to commit to procedures and a code of conduct that ensures scientific integrity and builds public trust. President Obama's opening line of that memorandum could not be more relevant and directly applicable to the SCC Estimates and the processes which underlie them:

Science and the scientific process must inform and guide decisions of my Administration on a wide range of issues, including improvement of public health, protection of the environment, increased efficiency in the use of energy and other resources, mitigation, and protection of national security. The public must be able to trust the science and the scientific process informing public policy decisions.

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<sup>9</sup> *Id.*

<sup>10</sup> 67 Fed. Reg. 369, 374 (Jan 3, 2002).

<sup>11</sup> *Id.* at 23.

<sup>12</sup> See President Obama's Memorandum for the Heads of Executive Department and Agencies: Transparency and Open Government (74 Fed. Reg. 4685 (Jan. 21, 2009) ("My Administration is committed to creating an unprecedented level of openness in Government."); see also President Obama's Memorandum for the Heads of Executive Department and Agencies: Scientific Integrity. ("Science and scientific processes must inform and guide decisions of my Administration on a wide range of issues.")

In furtherance of important goals, President Obama instructed “[t]o the extent permitted by law, there should be transparency in the preparation, identification, and use of scientific and technological information in policymaking.” These transparency issues are at the core of the OMB’s IQA reproducibility standards required for influential information.

Under OMB’s IQA Rule, such influential information must meet a higher level of “transparency.”<sup>13</sup> According to OMB, transparency requires that the OMB/IWG findings be reproducible, within an acceptable range of imprecision, by third parties.<sup>14</sup> Influential information must also be transparent with respect to: (1) the source of the utilized data; (2) the various assumptions employed; (3) the analytic methods applied; and (4) the statistical assumptions employed. All these transparency elements are important considerations in any objective, third-party review and analysis of the SCC Estimate.<sup>15</sup>

According to OMB in the IQA Rule:

[t]he primary benefit of public transparency is not necessarily that errors in analytic results will be detected, although error correction is clearly valuable. The more important benefit of transparency is that the public will be able to assess how much an agency’s analytic results hinge on the specific analytic choices made by the agency. Concreteness about analytic choices allows, for example, the implications of alternative technical choices to be readily assessed. This type of sensitivity analysis is widely regarded as an essential feature of high-quality analysis, yet sensitivity analysis cannot be undertaken by outside parties unless a high degree of transparency is achieved.<sup>16</sup>

OMB, as the disseminator of the SCC Estimates, and the overseer of the IWG, has a duty to shed light on the IWG estimation process. That duty has not been met. The public knows nothing about the IWG other than the identity of the agencies and entities that make up the IWG and the fact that they estimated the SCC in 2010 and 2013.

OMB has not revealed the identity of the participants or any information from which to make an assessment as to the participants’ expertise or their qualification to participate in a group tasked to estimate the SCC. According to OMB Circular A-4’s directive to agencies and presumably OMB itself, “You should also disclose the use of outside consultants, their qualifications, and history of contracts and employment . . . .”<sup>17</sup> The public does not even know whether all the IWG’s listed agencies and entities provided personnel or what levels of engagement each of the agencies actually had in the development of the SCC Estimate. The public does not know whether or how government contractors were used in the development

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<sup>13</sup> OMB IQA Guidelines at 2.

<sup>14</sup> 67 Fed. Reg. at 378.

<sup>15</sup> 67 Fed. Reg. at 374.

<sup>16</sup> 67 Fed. Reg. at 374.

<sup>17</sup> OMB Circular A-4, p. 17 (2003).

process. Further, OMB has not revealed how these unidentified individuals collaborated. The public does not know whether, or how often, they met, what was discussed, what information was considered, what information was rejected, or how decisions were made.

OMB has failed to comply with the transparency policies that it drafted for developing influential policy-relevant information under the Information Quality Act and imposes on other agencies and executive offices. The SCC Estimates are the product of an opaque process, are fraught with uncertainties, and any pretensions to their supposed accuracy (and therefore usefulness in policy-making) are unsupported.

## **2. The Modeling Systems (Models with Inputs) and the Subsequent Analyses were Not Subject to Peer Review as Appropriate**

OMB and the IWG masked the inherent flaws and limitations of the SCC Estimates by shielding the modeling systems (the models with the inputs with which they were run), and the SCC Estimates themselves from peer review. As OMB's Final Information Quality Bulletin for Peer Review ("Peer Review Bulletin") states, "[p]eer review is one of the most important procedures to ensure that the quality of published information meets the standards of the scientific and technical community."<sup>18</sup> Further, President Obama's 2009 Scientific Integrity Memo states that "[w]hen scientific or technical information is considered in policy decisions, the information should be subject to well established scientific processes, including peer review . . ."

OMB's IQA Guidelines recognize the critical importance of peer review in government decision-making, and point to the existence of peer review as providing a presumption of objectivity.<sup>19</sup> Similarly, EPA, which will likely utilize the SCC Estimates more than most agencies, recognizes that the hallmark of scientific integrity is a robust and independent peer review process.<sup>20</sup> According to EPA guidance, "[p]eer review is conducted by qualified individuals (or organizations) who are independent of those who performed the work, and who are collectively equivalent in technical expertise (i.e., peers) to those who performed the original work. Peer review is conducted to ensure that activities are technically supportable, competently performed, properly documented, and consistent with established quality criteria."<sup>21</sup>

Further, EPA has recognized in its peer review guidance that, particularly when reviewing influential findings such as the SCC Estimates, a peer reviewer must be independent in order to be credible, defensible, and unbiased.<sup>22</sup> Indeed, peer review and adherence to sound scientific methods are required by EPA's guidelines implementing the IQA.<sup>23</sup>

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<sup>18</sup> Memorandum for Heads of Departments and Agencies from Josh B. Bolton, Director, OMB "Issuance of OMB's 'Final Information Quality Bulletin for Peer Review'" (Dec. 16, 2004) p. 2.

<sup>19</sup> 67 Fed. Reg. at 377.

<sup>20</sup> *Peer Review Handbook, 3<sup>rd</sup> Edition, Prepared for the U.S. Environmental Protection Agency by Members of the Peer Review Advisory Group for EPA's Science Policy Council*, EPA/100/B-06/002.

<sup>21</sup> *Id.* at 12.

<sup>22</sup> *Id.* at 13.

<sup>23</sup> *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency*, EPA/260R-02-008 (Oct. 2002).

Despite the fact that OMB's IQA Rule and Guidelines, as well as its Peer Review Bulletin, recognize the critical need for peer review in administrative decision-making and in support of administrative findings, neither OMB nor the IWG subjected the final SCC Estimates, or their key foundations, to peer review. This failure is a critical flaw and undermines the credibility of this estimate.

Significantly, that the IWG utilized models that are generally available to the public does not sufficiently demystify the IWG process. There is no discussion, for example, of the limitations of each of the models used. The class of models from which the three that the IWG used were selected is still in its infancy, from a developmental standpoint. While such models attempt to predict the near and far future, they all rely on numerous assumptions – including many that are decades old, and others that simply cannot be calibrated or verified. Yet one of the models used supposedly has the capacity to predict climate impacts till the year 2595.<sup>24</sup> Further, it is not clear if and/or how modest changes to the inputs to the FUND, DICE, and PAGE models could drastically change the SCC Estimates (*i.e.*, the sensitivity of inputs to model outcomes is not transparent). Without any information as to the hundreds of model inputs (or the people or processes that selected and/or developed them), and their sensitivities, expertise, or biases, it is impossible to call the SCC Estimates rational or supportable. On July 18, 2013, Administrator Howard Shelanski of OMB's Office of Information and Regulatory Affairs ("OIRA") suggested in testimony before the House Committee on Oversight and Government Reform Subcommittee on Energy Policy, Healthcare, and Entitlements that peer review was unnecessary because the FUND, DICE, and PAGE models were all peer reviewed. This suggestion is incorrect, or at least misleading, for several reasons as will be described below. The SCC Estimates are not just the product of the models (flawed or limited as they may be) – they are the product of the data (and/or policy choices) that were inherent in the model input data selection. Other than for a few of the hundreds of variables that comprise the input data set for the three models used, the public has no idea of what the inputs are or how they were determined. This critical data gap – or black box – includes not only the deterministic inputs (*i.e.*, assumed values for those inputs held constant), but also, importantly, the stochastic inputs (*i.e.*, those inputs that were selected to be variable) that supported the Monte-Carlo analysis.<sup>25</sup> Model inputs, and the judgments, principles, and processes that generated them, are critical to the model output. As the developer of the FUND model prominently and candidly disclaims on the website for accessing the FUND model:

It is the developer's firm belief that most researchers should be locked away in an ivory tower. Models are often quite useless in unexperienced hands, and sometimes misleading. No one is smart enough to master in a short period what took someone else years to

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<sup>24</sup> For context, consider the technological and societal changes that occurred in the last 582 years and question whether and to what extent those changes were predictable. A technology expert in 1950 probably could not have predicted the internet or the iPhone, much less someone who lived before Christopher Columbus sailed to America.

<sup>25</sup> Consider, for instance, the selection of discount rates for one of the few model inputs that was disclosed. If a discount rate of 7% were utilized, per OMB Circular A-4 (p. 12), the SCC Estimate could be closer to zero and even demonstrate benefits. We raise this issue, not to advocate for a particular discount rate, but to highlight that even a single model input of the hundreds can materially affect the outcomes of the models.

develop. Not-understood models are irrelevant, half-understood models treacherous, and mis-understood models dangerous.<sup>26</sup>

The SCC Estimates are as much a product of the inputs to the models as they are the product of the models themselves. The inputs that drive both the 2010 and 2013 SCC Estimates were never peer reviewed – nor are the majority of them even known. Further, the final 2010 and 2013 Estimates (*i.e.*, the products of these opaque models and these inputs) were never peer reviewed. This fact is critical, as the output of these models was further manipulated by IWG through averaging that may be inappropriate and misleading (discussed below). That versions of the models were peer reviewed does not absolve OMB and the IWG from the need to subject the current SCC Estimate to peer review. Indeed, it reinforces the need to conduct peer review on all subsequent model changes and inputs, which alter the estimates coming out of the models. After all, ***the 2013 SCC Estimate is 60% higher than even the one developed just three years ago.*** Unfortunately, OMB and the IWG have sheltered the model choices, models, data inputs, and analyses from peer review.

### **3. The SCC Estimate Modeling Systems Do Not Demonstrate an Acceptable Range of Accuracy**

Predicting the future, as one might expect, is a massively imprecise exercise reliant on assumptions, hypotheses, and judgments about future technological advances, principles, and decisions that directly impact emissions scenarios, mitigation, and adaptation. While the Petitioners support the use of economic modeling and often rely on models for our own analyses, there are limits to the effectiveness of certain modeling techniques. For instance, the imprecision inherent in modeling assumptions, hypotheses, and judgments are significantly magnified when impacts (and costs) are projected over a long time period. While certainty is not a characteristic of any modeling effort, OMB and the IWG cannot push prognostications so far beyond the capabilities of current science and economic modeling that the estimates become little more than indefensible guesses. There is a threshold beyond which uncertainties become so profound, widespread, and compounded that, when further undermined by data limitations and the models' lack of complexity, render the ultimate estimate flawed and unusable. Even the IPCC limits its future climate predictions and presents a range of possible scenarios (more on that below). That the 2013 SCC Estimate changed by 60% the 2010 SCC Estimate developed just a few years ago using the same set of models demonstrates that this exercise is massively uncertain and not robust enough for policy-making. Such variability over such a short term should have given OMB and the IWG pause and a heightened concern that estimating the SCC with accuracy is perhaps beyond the capabilities of the model systems utilized.

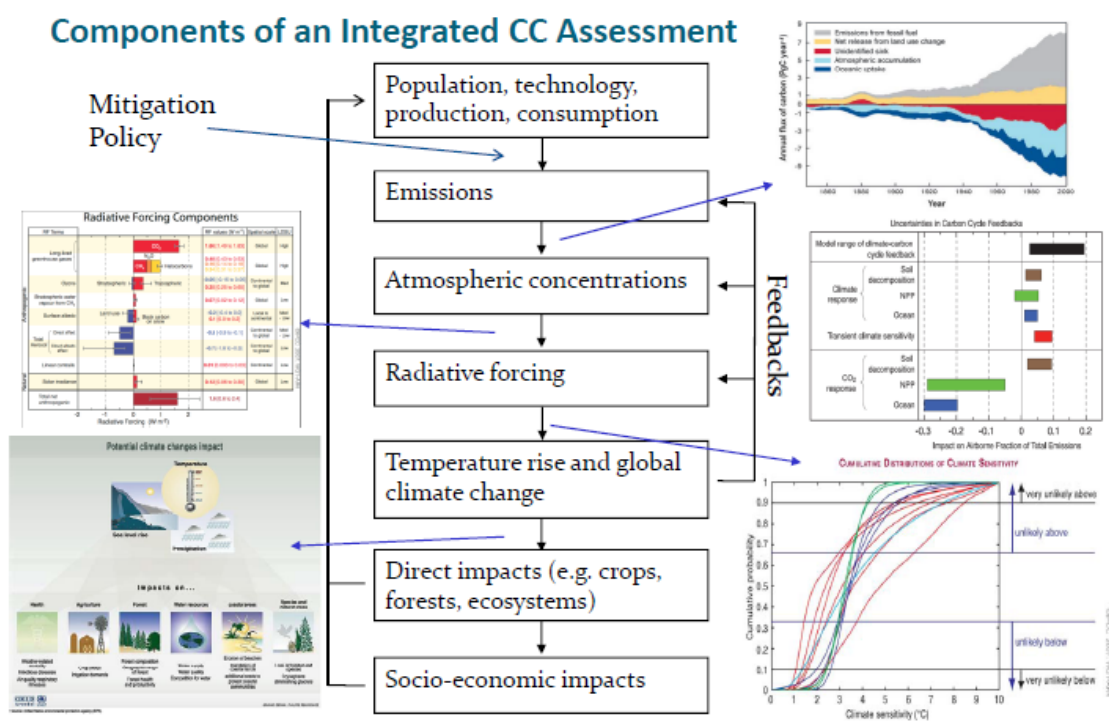
OMB and the IWG rely on three models which purport to predict the ultimate costs of a long chain of impacts stemming from the emission of GHGs (*i.e.*, the impact of temperature on sea-level rise, the impact of sea-level rise on a waterside cities, the monetization of the impacts on the waterside cities, *etc.*). The following subsections provide a nonexclusive list of the uncertainties that demonstrate the modeling conducted does not offer a reasonably acceptable range of accuracy for use in policy-making.

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<sup>26</sup> <http://www.fund-model.org/> (accessed 7/26/2013)

### i. Model(s) Structure

Both the 2010 and 2013 SCC Estimates rely on three Integrated [Climate Change] Assessment Models (“IAMs”) in order to develop its estimates – DICE (Dynamic Integrated model of Climate and Economy), FUND (Framework Uncertainty, Negotiation and Distribution), and PAGE (Policy Analysis for the Greenhouse Effect).<sup>27</sup> These models have a similar “stacked” structure, shown in the figure below.<sup>28</sup> The final socio-economic impact prediction at the end relies on the cascading series of inputs in the prior steps. Model uncertainty, at any stage, is affected by all of the uncertainties in the prior steps (including model input uncertainties, as well as model structure uncertainties), and the uncertainties associated with that particular step. This is especially true if such socio-economic outputs are predicted over very long time periods, as they are in the SCC Estimates.



Based in part on these compounded uncertainties, in the 2010 Estimate the authors noted that the IWG offered the new SCC values “with all due humility” about the uncertainties embedded in them and with a “sincere promise to continue work to improve them.”<sup>29</sup> In contrast, the 2013 SCC Estimate has scant discussion of uncertainties. Only a small paragraph on “research gaps” is provided on the last page of the 2013 SCC Estimate. Other than a brief reference back to the 2010 SCC Estimate, the “humility” with which the estimates were originally provided seems to have been lost. It is our belief that modeling science has not made any quantum leaps in the intervening three years to merit this loss of humility. The meager

<sup>27</sup> DICE (W. Nordhaus, Yale University), PAGE (C. Hope, University of Cambridge UK ), and FUND (R. Tol, Ireland Economic and Social Institute and Carnegie Mellon University.).

<sup>28</sup> Taken from a presentation by Traeger, C., The Economics of Climate Change.

<sup>29</sup> 2010 Estimate at 29.



discussion of uncertainty in most recent SCC Estimates promotes the unsupported and misleading idea that the updated SCC values are highly accurate figures.

That there are key and substantial differences in the IAMs is not in dispute. Consider, for example, the degree to which catastrophic events, i.e. temperature changes of, for example, 4.5° to 6° C due to climate change, are included in the various models. FUND does not consider this possibility, whereas the other two models do. Or, consider adaptation. Again, FUND assumes a higher degree of adaptation than the other two models. Whether and to what extent these key variables are considered matters to the outcome of the model. These key differences in the data that the models consider further evince the uncertainty inherent in climate modeling.

*ii. Model Time Horizons*

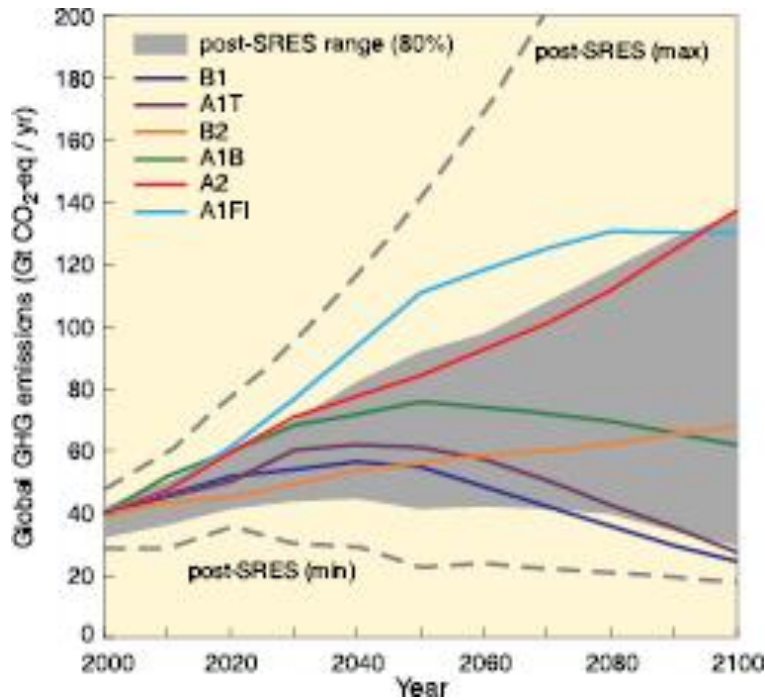
The 2010 and 2013 SCC Estimates are ambitiously projected for very long time horizons – namely until 2300.<sup>30</sup> The 2013 Estimate notes that the DICE model, for example, can be run for an even longer time horizon – until 2595. The ability of any of these models (and their input assumptions) to hold over even the 2300 time horizon is not clear and certainly not verifiable. The fact that the SCC estimates increased 60% in three years provides sufficient evidence to question the viability and usefulness of modeling that purports to render predictions 300+ years into the future. Incorporation of climate-affecting inputs such as populations, economic development, consumption patterns (regionally and globally), technological advancements (including role of innovation, including disruptive technologies) for mitigation, as well as material stochastic variables such as volcanic eruptions that can affect the underlying climate forcing functions such as GHG concentrations and temperature rise over these time frames rely on empirical relationships imbued with significant uncertainties.

Based on these key variables and uncertainties, the Intergovernmental Panel on Climate Change (“IPCC”) does not attempt predictions beyond the year 2100, even in its long-term predictions.<sup>31</sup> Among other reasons, this constraint is due to the widely predicted variances in critical inputs such as predicted model emissions. For example, the figure below, taken from the most recent IPCC work, shows just how wide the emissions from the various scenarios are, just through the year 2100. Clearly, attempting to further extrapolate this (and many other similar critical inputs) to 2300 is simply too speculative and uncertain for use in policy-making.

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<sup>30</sup> 2013 Estimate at 7.

<sup>31</sup> [http://www.ipcc.ch/publications\\_and\\_data/ar4/syr/en/mains3.html](http://www.ipcc.ch/publications_and_data/ar4/syr/en/mains3.html). The petitioners have large and diverse memberships, including members that do not endorse IPCC’s conclusions. As such, this reference should not be viewed as an endorsement of the IPCC’s conclusions. It is merely a reference point from which to compare the three models used in the SCC Estimates.



### iii. Damage Functions

Consider, for example, the critical role played by “damage functions” in these IAMs. These damage functions translate variables, such as projected sea level rise, to estimated economic damages. By their nature, we know very little about the correct functional form of damage functions. According to a well-known economist, “...developers of IAMs can do little more than make up functional forms and corresponding parameter values. And that is pretty much what they have done.”<sup>32</sup> Furthermore, “The bottom line here is that the damage function used in most IAMs are completely made up, with no theoretical or empirical foundation.”<sup>33</sup> The author of the DICE model similarly stated: “Equation (5) involves the economic impacts of climate change, which is the thorniest issue in climate-change economics. These estimates are indispensable for making sensible decisions about the appropriate balance between costly emissions reductions and climate damages. However, providing reliable estimates of the damages from climate change over the long run has proven extremely difficult.”<sup>34</sup>

<sup>32</sup> Pindyck, R.S., “Climate Change Policy: What Do the Models Tell Us?,” NBER Working Paper Series, WP 19244, July 2013, p 11.

<sup>33</sup> Id., p 13.

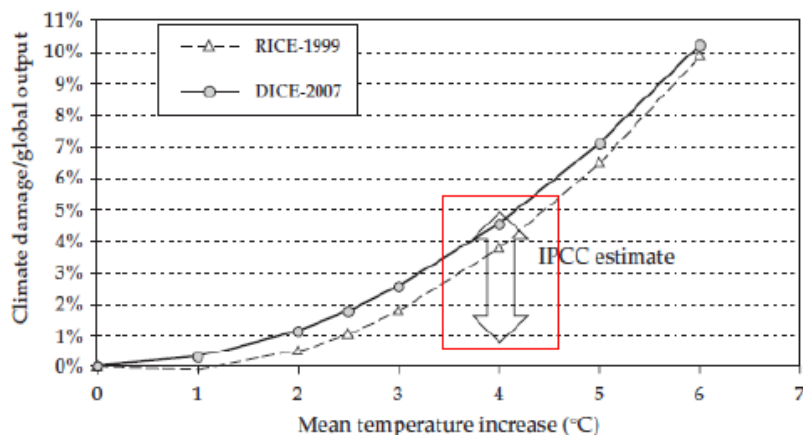
<sup>34</sup> Nordhaus, W, et. al., “DICE 2013: Introduction and User’s Manual,” May 2013. p. 10. Equation 5 refers to the damage function in the DICE model.

The arbitrariness of damage functions are clearly demonstrated by the following example. In the DICE model, discussed above, a quadratic damage function<sup>35</sup> is specified in which the socioeconomic damage is related to the extent of climate change in a non-linear manner such that this damage is assumed to accelerate much faster as the extent of predicted climate change increases. In doing so, DICE relies on estimates of monetized damages from the Tol (2009) survey as the starting point for its damage function. It then enhances the damage function, however, to account for factors such as biodiversity loss, ocean acidification, sea-level rise, changes in ocean circulation, and even political reactions to climate change by adding a further 25 percent upward adjustment, recognizing that this adjustment is purely “judgmental.”

Such subjective (i.e., arbitrary) “adjustments” in monetary value (made by William Nordhaus) are troubling because those adjustments have significant impacts on the output from the models. Even expert judgments have to be supported. For example, compare the DICE damage function with that estimated by the IPCC, as shown in the figure below.<sup>36</sup>

### Aggregate Damage Estimates DICE-2007

- Adding estimates for catastrophic damages and
- Aggregating over Regions and
- Extrapolating for temperature changes other than 2.5°C yields Damage



Source: Nordhaus (2007), Figure 3-3, Damage function in DICE-2007 versus earlier model (RICE-1999) and estimated range from IPCC AR4, which reports that “global mean losses could be 1–5% GDP for 4°C of warming”.

For an assumed 4° C increase in global mean temperature rise, as the figure shows, DICE predicts “damage” at the very high-end of the range that the IPCC projects. Therefore, the inputs from DICE into the predicted SCC Estimates are biased extremely high relative to the IPCC range of damages.

<sup>35</sup> Traeger, C. (2009). The Economics of Climate Change. Presented at UC Berkeley; Part 6.

<sup>36</sup> Id.

#### 4. Uncertainty is not Addressed Appropriately

While there is no requirement that the SCC Estimates be absolutely precise and accurate, OMB's Circular A-4 requires key uncertainties to be disclosed and quantified to the extent possible "to inform decision makers and the public about the effects and uncertainties of alternative regulatory actions."<sup>37</sup> Circular A-4 requires uncertainties to be analyzed qualitatively and quantitatively, delineated, and disclaimed.<sup>38</sup> Further, OMB's Circular A-4 admonishes agencies and presumably itself that:

Your estimates cannot be more precise than their most uncertain component. Thus, your analysis should report estimates in a way that reflects the degree of uncertainty and not create a false sense of precision. Worst-case or conservative analysis are [sic] not usually adequate because they do not convey the complete probability distribution of the outcomes, and they do not permit calculation of an expected value of net benefits.<sup>39</sup>

Far from appropriately quantifying and disclaiming the profound speculative nature of the SCC Estimates, the IWG downplays the wide variability in the three models' outputs through averaging. Similar to the 2010 Estimates, the 2013 Estimates are based on the average outputs of the three models. Individual model predictions, however, vary significantly. For example, at the 3% discount rate, the cost per ton varies from a high of \$71/ton for PAGE to \$21/ton for FUND, with the DICE estimate in between at \$38/ton. This is shown in the table below, taken from page 21 of the 2013 Technical Support Document.

Table A5: Additional Summary Statistics of 2020 Global SCC Estimates

Discount rate:	5.0%				3.0%				2.5%			
	Mean	Variance	Skewness	Kurtosis	Mean	Variance	Skewness	Kurtosis	Mean	Variance	Skewness	Kurtosis
DICE	12	26	2	15	38	409	3	24	57	1097	3	30
PAGE	22	1616	5	32	71	14953	4	22	101	29312	4	23
FUND	3	560	-170	35222	21	22487	-85	18842	36	68055	-46	13105

While the differences in the "average" values between the models (almost a factor of 3.5 between the \$21/ton from the FUND model to the \$71/ton from the PAGE model) are problematic enough, the predicted model variances are even more striking as shown in the table above. For example, it is simply meaningless to predict a "mean" of \$21/ton based on FUND, when the corresponding variance is predicted to be \$22,487. The same can be said for each of the other predictions as summarized in the table above.

This broad range reflects not only the effects of the various inputs and model structure uncertainties, but also the impact of taking the *average* of the three models for the five climate change scenarios at the four discount rates used in the SCC development analysis. The average values are much higher than the 50<sup>th</sup> percentiles for all three models, but are particularly higher than the 50<sup>th</sup> percentile figure in the case of the PAGE model.

<sup>37</sup> OMB Circular A-4 at 38.

<sup>38</sup> Id. at 40.

<sup>39</sup> Id. at 40.

Using the 3% discount rate as an example, the average values versus the 50<sup>th</sup> percentile values per ton for the PAGE, DICE, and FUND models are \$71/\$27, \$38/\$34, and \$21/\$17, respectively. Therefore, for the PAGE, DICE, and FUND models, the value used to derive the final SCC figure of \$43/ton at the 3% discount rate is the 75<sup>th</sup> percentile value for the PAGE model and the overall SCC value of \$43.1 per ton corresponds to the 68<sup>th</sup> percentile. Thus, the high end tail of the distribution of the PAGE model has an important influence on the final SCC Estimates. These final SCC Estimates should not be viewed as central figures, but rather skewed toward the upper tail of the distribution of SCC values.

OMB must adhere to the directives it imposes on other agencies and executive offices with respect to providing accurate information in its disseminations. They have not done so here. The IWG has failed to disclose and quantify key uncertainties and to fully inform decision-makers and the public of those uncertainties as required by OMB. Given these uncertainties, OMB and the IWG should grant this petition for correction before the SCC Estimates are utilized for any regulatory action or policy-making.

**5. By Presenting Only Global SCC Estimates and Excluding Domestic SCC Estimates Altogether in 2013, the IWG has Severely Limited the Utility of the SCC for Use in Benefit-Cost Analysis and Policy-making by Executive Branch Agencies**

OMB's IQA Guidelines require that information disseminated by Agencies meet the standard of utility. This part of the IQA requires Agencies to assess the usefulness of the information to its intended users, which includes the public. In 2013, by presenting only global SCC estimates and excluding domestic SCC estimates altogether, the IWG has severely limited the utility of the 2013 SCC recommended for use in benefit cost analysis.

The manner in which the final SCC values are presented in Table 2 of 2013 TSD is also misleading to risk managers and the public, further limiting the utility of the SCC. The table does not mention the global nature of the values or note that the domestic SCC is a small fraction (7-23%) of the global SCC. Thus, policy-makers who apply the SCC values from this table and have not read the previous 2010 TSD may be unaware that a large percentage of the economic benefits they are estimating from their rule will occur outside the United States.

The recommendation to use only the global SCC in benefit cost analysis results in a significant misalignment of costs and benefits. For this reason, *if and when reliable estimates of the SCC become available*, we strongly recommend presenting both the domestic and global SCC figures separately.

This approach, while recognizing the global nature of climate change, would allow risk managers to align the domestic costs with the domestic benefits. Consistent with OMB guidance, the costs of a rule for entities in United States would be presented in comparison with the benefits occurring in the United States. The benefits using the global SCC would be presented separately.

#### IV. ADMINISTRATIVE PROCEDURE ACT

Use of the 2010 and 2013 SCC Estimates in rulemaking will subsequently cause agencies that rely on the SCC Estimates to violate the Administrative Procedure Act (“APA”).<sup>40</sup> The APA requires a court to set aside agency actions, findings, and conclusions that are found to be arbitrary, capricious, abuses of discretion, not in accordance with law, or without observance of procedure required by law.<sup>41</sup> In determining the SCC Estimates’ legal sufficiency, a court will require that the processes by which information is collected are lawful and reasonably coherent and that the ultimate agency action which results from use of that information is not arbitrary and capricious.<sup>42</sup>

From a substantive perspective, an agency engaged in rulemaking must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.”<sup>43</sup> Agency action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>44</sup>

Use of the SCC Estimates in rulemaking will not meet the requirements of the APA as interpreted and developed by the courts. For instance, it is not clear what roles each of the participating agencies in the IWG that developed these estimates actually played in developing the estimates. It is not clear which staff from these agencies participated in the process. It is not clear how the three models that underlie these estimates were selected (from the universe of similar models). It is not clear who ran the models (agency staff? contractors?) or their qualifications or level of expertise. It is not clear who developed the inputs for the model runs, including both policy as well as technical choices, and it is not clear how such inputs were developed. It is not clear how the various statistical Monte-Carlo analyses were actually implemented (which inputs were held constant and why, which inputs were selected to be variable and why, and the assumptions regarding the assumed distribution functions for the latter variable inputs, *etc.*). These are but a few of the flaws, uncertainties, and unknowns that should preclude the use of both the 2010 and 2013 SCC Estimates. Each of these failures violates fundamental precepts of administrative procedure and the scientific method – and none can be credibly stated to be the result of a difference of opinion, interpretation, or Agency expertise. To the contrary, these are examples where the Administration drove its conclusions far beyond the capacity of sound science and modeling. Even if the three models themselves were entirely sound, the inputs into those models most certainly render the model output (*i.e.*, the SCC Estimates) arbitrary and capricious.

APA’s decision-making standards also demand compliance with the information quality procedures of the IQA, including IQA requirements for complete, unbiased analysis grounded in accepted methods. “Determination of whether the agency complied with prescribed procedures

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<sup>40</sup> 5 U.S.C. § 706.

<sup>41</sup> *Id.*

<sup>42</sup> See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>43</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>44</sup> *Id.*

requires a plenary review of the record and consideration of applicable law.”<sup>45</sup> More specifically, the APA requires that agencies relying on SCC Estimates in rulemaking review all credible relevant information, utilize unbiased peer review, and make Agency assumptions, methods, and models transparent and reasonably reproducible and understandable in response to an appropriate request for information. If OMB does not direct other agencies to not use the 2010 and 2013 SCC Estimates, any agency that bases a rule on these estimates would violate the IQA and the APA, and the ultimate rationality of such regulation would be called into question. The ultimate rationality of subsequent agency action depends in part on whether it has thoroughly complied with applicable procedural requirements, including those set forth in the IQA.<sup>46</sup>

Further, while it is not an issue we are raising within this Petition for Correction, we believe the 2010 and 2013 SCC Estimates violate the APA for failure to provide stakeholders notice and an opportunity to comment on proposed SCC Estimates and because they are arbitrary, capricious, and not in accordance with the law. While we hope that OMB complies with the requests contained in this petition, we specifically reserve the right to bring legal action under the APA, and other authorities, to enforce mandated procedures.

## V. CONCLUSION

Given the significant process shortcomings, lack of peer review, and weaknesses and uncertainties in the modeling systems highlighted in this petition, the undersigned associations urge OMB and the IWG to withdraw the 2010 and 2013 Technical Support Documents, pending correction through a transparent, public process. Furthermore, we ask OMB to refrain from using both the 2010 and 2013 SCC Estimates and to publicly direct other executive branch agencies to refrain from utilizing both the 2010 and 2013 SCC Estimates as part of any regulatory action or policy-making.

**America's Natural Gas Alliance**

**The American Chemistry Council**

**The American Petroleum Institute**

**The National Association of Home Builders**

**The National Association of Manufacturers**

**The Portland Cement Association**

**The U.S. Chamber of Commerce**

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<sup>45</sup> See *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994).

<sup>46</sup> Even if a particular statute, such as the IQA, may not provide for—or even withholds—judicial review, “the agency’s decision may still be overturned because of an analysis so defective as to render its final decisions unenforceable, or, in the absence of any analysis, because of a failure to respond to public comment concerning” the legal infirmities identified pursuant to that statute. *Michigan v. Thomas*, 805 F.2d 176, 188 (6<sup>th</sup> Circuit 1986); *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Circuit 1984.) (The flawed rule “is set aside, ... not because the regulatory flexibility analysis [not subject to direct judicial review] was defective, but because the mistaken premise reflected in the regulatory flexibility analysis deprives the rule of its required rational support ....”)

# APPENDIX D



**Comments of the American Public Power Association (APPA)**

**on**

**The Technical Support Document, *Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order No. 12866***

**Submitted Electronically to:**

**The Office of Management and Budget  
Attention Docket OMB-OMB-2013-0007**

**February 26, 2014**

## Introduction and Background

The American Public Power Association (APPA) would like to thank the Office of Management and Budget (OMB) for the opportunity to comment on its Technical Support Document (TSD), *Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order No. 12866*, which was produced by the Interagency Working Group on the Social Cost of Carbon (IWG).<sup>1</sup>

APPA appreciates that the OMB has made the updated TSD available. APPA and its member utilities remain dedicated to providing feedback to the OMB on its formulation of Social Cost of Carbon (SCC) estimates. APPA believes the OMB is endeavoring to ensure that SCC estimates are developed through a public, objective, and transparent interagency process. APPA hopes OMB will continue to ensure SCC estimates reflect the most up-to-date scientific literature, and are held to the same analytical and methodological standards as the rules reviewed by the Office of Information and Regulatory Affairs (OIRA).

The American Public Power Association is the national service organization representing the interests of the more than 2,000, not-for-profit publicly owned electric utilities that collectively provide electricity to approximately 47 million Americans. These utilities, or “public power” systems, are among the most diverse of the electric utility sectors, representing utilities in small, medium, and large communities in every state but Hawaii, and in the U.S. territories of the Virgin Islands, Puerto Rico, American Samoa, and Guam. Overall, public power accounts for about 16 percent of all kilowatt-hour sales to retail electricity consumers.

Created in 1940 as a non-profit, non-partisan organization, APPA’s purpose is to advance the public policy interests of its members and their consumers, and to provide member services to ensure adequate, reliable electricity at a reasonable price with the proper protection of the environment. Seventy percent of public power systems are located in cities with populations of 10,000 or less. Public power utilities meet the definition and qualify for consideration as small businesses under the Small Business Act (SBA) and the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA).

Public power has made significant investments in modern emission controls for its power plants. Based on an analysis of the Energy Information Administration’s most recent data, significant reductions in emissions of traditional air pollutants and greenhouse gases (GHGs) already have been, and will continue to be, made.<sup>2</sup> This important fact illustrates the ability of the power sector to improve efficiencies in a cost-effective, consumer-centered manner. Many of the energy-related political objectives set forth on a state-by-state basis include significant increases in renewable generation portfolios.<sup>3</sup> To that end, municipal utilities have made and continue to make significant investments in renewables energy in order to meet local, state, and national policy goals. Some cities have even used the inherent flexibility provided in the public power business model to implement their own renewable portfolio standard.

In addition, new federal environmental regulations addressing electricity generation, and conservation standards addressing products that use electricity, are imminent. These regulations, which will be subject to the requirements of Executive Order 12866, Regulatory Planning and Review, will be aimed at further reducing GHG emissions related to electricity generation and use. Consequently, APPA’s members have an interest in the regulatory tools that will underpin these regulations.

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<sup>1</sup> Where appropriate these comments reference both the 2010 TSD and the 2013 TSD.

<sup>2</sup> <http://www.eia.gov/environment/emissions/carbon/>

<sup>3</sup> [http://www.dsireusa.org/documents/summarymaps/RPS\\_map.pdf](http://www.dsireusa.org/documents/summarymaps/RPS_map.pdf)

Within OMB, the OIRA provides neutral technical guidance to the Executive Office of the President on issues related to regulatory analysis. OIRA seeks to ensure analytical integrity and identify sources of potential bias. To APPA, this means OIRA has a role in ensuring data are objective and will not ignore or discount positions contrary to an individual agency's political objectives. The issues raised below are intended to provide OIRA with a set of analytically driven comments, which could be applied to enhance the credibility, objectivity, and analytic integrity of SCC estimates:

**1. The selection of the three integrated assessment models (IAMs) for use in the analysis and the synthesis of the resulting SCC estimates**

**The interagency working group (IWG) should clearly address potential technical deficiencies in its selection of the three IAMs.** APPA agrees with the Edison Electric Institute (EEI) that a more suitable distribution function should be sought for equilibrium climate sensitivity (ECS) models. ECS is defined as “the long-term increase in the annual global-average surface temperature from a doubling of atmospheric CO<sub>2</sub> concentration relative to pre-industrial levels” in the 2010 TSD at page 12. To estimate ECS, the IWG used the Roe-Baker distribution function as an input in all three of the IAMs.

In selecting the Roe-Baker function, the IWG compared four candidate ECS distribution functions: Roe-Baker, lognormal, gamma, and Weibull. The IWG's primary reason for selecting the Roe-Baker was that it: “is the only one of the four that is based on theoretical understanding of the response of the climate system to increased greenhouse gas concentrations. On the contrary, the other three distributions were arbitrarily chosen based on simplicity, convenience, and general shape.”<sup>4</sup> However, Roe-Baker is not the only ECS distribution model rooted in climate system theory.

The Roe-Baker distribution function determines the probability that positive or negative feedback loops, which represent the role of natural or anthropogenic forces on global temperatures, will be a certain strength or value. This is also known as the feedback factor. However, as Pindyck<sup>5</sup> points out:

“[T]he physical mechanisms that determine climate sensitivity involve crucial feedback loops, and the parameter values that determine strength (and even the sign) of those feedback loops are largely unknown, and for the foreseeable future may even be unknowable.”

Subsequent analyses of the Roe-Baker distribution indicate that it may be “fat-tailed,” i.e., is skewed to one side of the mean, as opposed to normally distributed. There is debate among experts surrounding the impact of fat-tailed distributions on global warming abatement costs given probabilities of “rare events” beyond the 5<sup>th</sup> and 95<sup>th</sup> percentiles (Weitzman, 2009 at 2). Others have found this not necessarily to be the case, though they do not refute it as a potential outcome (Pindyck, 2011). In light of this, the reliance on the Roe-Baker distribution function may overstate the probabilities of extreme events occurring far into the future, thereby increasing the SCC estimates.

**APPA believes the IWG should consider additional alternative models presented in more recent studies**, such as one by Aldrin, *et al.*, presented in 2012, which is based on empirical observations of surface temperatures and global ocean heat contents and that is conditioned on estimates of historical radiative forcing (Aldrin, 2012), and others that were also grounded in an understanding of climate science (Lewis, 2013, and Otto, et al., 2013).

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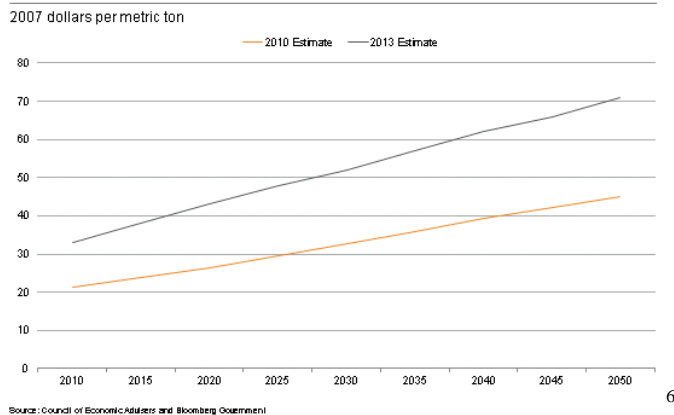
<sup>4</sup> See 2010 TSD at 14

<sup>5</sup> Robert S. Pindyck, Climate Change Policy: What Do the Models Tell Us, NBER Working Paper 19244, 8-9 (July 2013).

**In considering alternative models, the IWG should also consider incorporating more up-to-date data.** A number of recent studies offer ECS distributions that take updated data into account (Dayaratna, 2013). These studies find that the feedback factor may lie outside the lower end of the range of feedback factors assumed in current IAMs (Otto, et al., 2013). The central value of SCC has increased significantly from the 2010 to the 2013 TSD. The difference between 2010 and 2013 estimates can be seen illustrated in a presentation given by Bloomberg July 24, 2013. This result appears to be in part due to the selection of ECS distribution functions. In addition, the models do not appear to provide proper credit, or feedback, for the current state of declining CO<sub>2</sub> emissions.

### THE SCC “CENTRAL VALUE”: 2010 VS. 2013

The government’s 2013 estimate for the SCC is nearly 60 percent above its 2010 estimate. The SCC varies by year; for example a reduction in 2013 is valued at \$36, whereas a reduction in 2050 is valued at \$71.



## 2. The strengths and limitations of the overall approach

**Depending on its use and application, the SCC could have adverse impacts with significant economic consequences.** The OMB invited comments regarding the model structure and inputs, the strength and limitations of the overall approach, and the proper use of the SCC estimates in regulatory impact analyses. APPA notes that profound modeling uncertainties contribute to the overall limitations of the approach, which strongly suggest that the use, and influence, of the estimates in regulatory impact analyses should be circumscribed.

The limitations of the overall approach stem from the enormity of the undertaking. Discerning how CO<sub>2</sub> emissions will affect climate and weather for decades to come and then translating those projected changes into monetized economic impacts are daunting tasks that truly challenge our current capabilities. This approach presumes that complicated, interrelated processes spanning the fields of chemistry, biology, meteorology, climatology, agricultural science, geography, physics, medicine, sociology and economics, can be accurately modeled. Given these challenges, APPA appreciates that the revised TSD includes a disclaimer, stating that SCC values are subject to “many uncertainties” and should be updated regularly as the IAMs are improved and new data come to light.

However, OMB should understand that these limitations are of great concern because SCC estimates might drive policies that lead to significant, adverse impacts on various sectors of the economy. For example, application of these highly uncertain results within the electricity sector might very well impose significant, direct costs on utility customers in the form of substantially higher electric rates, which can

<sup>6</sup> July 24, 2013 Bloomberg Presentation - The Social Cost of Carbon

also lead to additional indirect costs through negative impacts on electric intensive industries and technologies. The negative impacts might include lower industrial output, job losses and slower market penetration for environmentally beneficial electro-technologies, e.g., electric and hybrid vehicles.

To help alleviate these concerns, OMB should require that the TSD (and all future updates) specifically state that the SCC estimate is not to be used except in assessing the costs and benefits of federal regulations in the required Regulatory Impact Analyses, consistent with the requirements of Executive Order 12866. In particular, the TSD and related materials should make it clear that the SCC, which is a speculative assessment of the future costs of damages that might occur as a result of GHG emissions, is not an estimate of the current costs of reducing emissions. It is not a price on carbon. Accordingly, this disclaimer should be expanded to provide an illustrative list of scenarios in which it would be inappropriate to utilize the SCC estimate, including: state-level policy decisions (such as, comparing alternative fuel sources in electricity rate setting, determining pollution abatement technologies, or establishing emissions caps or the value of CO<sub>2</sub> allowances in regional cap-and-trade programs), federal regulatory proceedings in which costs to consumers or manufacturers/producers are computed, and environmental impact statements.

Some state regulators, environmental advocates and other parties are using (or proposing to use) SCC estimates to determine the stringency of federal standards; as an externality value for electric utility resource planning, affecting decisions on resource investments and retirements and the timing of those decisions; as an estimate of avoided environmental harms in establishing tariffs paid to owners of rooftop solar systems; and for other applications. The TSD should make clear that these uses are inappropriate.

For example, the tables below illustrate how imprudent use of the SCC estimates could impose substantial costs on electric utility customers. Table 1 shows the potential one-year rate impacts for a hypothetical utility, with characteristics reflecting average values for large public power entities.<sup>7</sup> The objective is to show how a particular application of the OMB SCC estimates will affect electric rates. In this case it is assumed that the estimated social cost for each unit of CO<sub>2</sub> emitted in the production of the utility's electric output is fully internalized into the cost of electricity.<sup>8</sup> Rates are shown before and after incorporation of the SCC estimates and the rate impacts are expressed as the percent change in rates between the cases. As described in more detail below, the rate increases brought about by use of the SCC estimates in this way range from 7.3% to 108.4%, depending on the SCC estimate used and the generation portfolio of the utility.

These summary results are made clear by a closer look at Tables 1 and 2. Each table has four columns and four rows. The entries in each column pertain to one of the four summary SCC values for a given year, as presented in the 2013 OMB report. These values appear in row one. The values from row one, expressed as \$/metric ton of CO<sub>2</sub> emitted, are shown in row 2 expressed on a \$/MWh basis.<sup>9</sup> The average (\$/kWh) electric rate before internalization of the social costs, which doesn't vary across the columns, is shown in row three. Electric rates after incorporation of the SCC values are provided in row four and the rate impacts are entered in row five.

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<sup>7</sup> The average rate is \$.09/kWh, sales are 60,000 MWh and total cost of service is \$6.0 million. It is assumed that power cost, before internalization of SCC values, make up \$3.6 million, or 60%, of the \$6.0 million total cost of service. The supply portfolio contains 40% coal and 20% gas, with non-fossil resources making up the rest.

<sup>8</sup> This could be achieved through a tax, a cap-and-trade program, or some other mechanism. Also, the estimates could be applied without full internalization. There is no single prescribed method for applying these values but full internalization as shown on the tables is one approach that would be consistent with the concept.

<sup>9</sup> Conversion is based on heat rates of 8.0 and 10.5 for gas and coal respectively. CO<sub>2</sub> content for gas is 120lbs/MBTU and 200lbs/MBTU for coal. Values reflect weighted averages based on assumed portfolio shares of 40% coal and 20% gas.

	<u>\$/Metric Ton</u>	<u>\$/Metric Ton</u>	<u>\$/Metric Ton</u>	<u>\$/Metric Ton</u>
OMB Estimate of SCC \$/Metric ton <sup>10</sup>	\$14.00	\$43.00	\$67.00	\$128.00
OMB Estimate of SCC \$/MWh	\$10.92	\$33.54	\$52.26	\$99.85
Average Rate Before CO2 Adder (\$/kWh)	\$0.09	\$0.09	\$0.09	\$0.09
Average Rate After CO2 Adder (\$/kWh)	\$0.10	\$0.11	\$0.12	\$0.15
Rate Impact %	7.28%	22.36%	34.84%	66.56%

**Table 1: portfolio comprising 20% gas, 40% coal and 40 % non-fossil**

In Table 1 the rate increases, which range from 7.3% to 66.6%, are clearly significant for each SCC estimate presented in the 2013 report. As troubling as these results are, the situation will be even worse for utilities that rely more heavily on coal than does the hypothetical utility depicted in Table 1, which has an assumed portfolio comprising 20% gas, 40% coal and 40% non-fossil. Table 2 shows the rate impacts for a hypothetical utility with a portfolio made up of 80% coal and 20% non-fossil. In this case the rate impacts range from 11.9% to about 108.4%.

	<u>\$/Metric Ton</u>	<u>\$/Metric Ton</u>	<u>\$/Metric Ton</u>	<u>\$/Metric Ton</u>
OMB Estimate of SCC \$/Metric ton	\$14.00	\$43.00	\$67.00	\$128.00
OMB Estimate of SCC \$/MWh	\$13.33	\$40.95	\$63.81	\$121.90
Average Rate Before CO2 Adder (\$/kWh)	\$0.09	\$0.09	\$0.09	\$0.09
Average Rate After CO2 Adder (\$/kWh)	\$0.10	\$0.12	\$0.14	\$0.19
Rate Impact %	11.85%	36.40%	56.72%	108.36%

**Table 2: portfolio comprising 80% coal and 20% non-fossil**

The rate impacts may be even greater than stated in the tables because the results presented implicitly assume that the fossil generators will continue to operate the same way after internalizing the estimated SCC values as they did before. However, this may not be the case, particularly for the coal plants. It is conceivable that under certain applications of the SCC concept, it may no longer appear to be economic to run these plants, causing them to be shut down, mothballed or retired. **Based on the potentially significant impact of the SCC as applied to rulemakings, or as used by planning agencies, APPA believes the TSD and all future updates should be peer reviewed and subject to a review and comment period.**

<sup>10</sup> OMB estimates for year 2015 inflated at 2% per year to derive estimated values in 2015 dollars.

APPA notes that the models, climate sensitivity distribution, and socio-economic scenarios employed by the IWG were subjected to the peer review process.<sup>11</sup> However, it is unclear whether the TSD was subject to the peer review process.

In 2005, OMB issued its *Final Information Quality Bulletin for Peer Review*, 70 *Fed. Reg.* 2664 (Jan. 14, 2005), which was part of a larger OMB effort to improve the scientific drivers of public policy. This *Bulletin* includes the following definition of a “highly influential” scientific assessment:

A scientific assessment is considered ‘highly influential’ if the agency or the OIRA Administrator determines that the dissemination could have a potential impact of more than \$500 million in any one year on either the public or private sector or that the dissemination is novel, controversial or precedent setting, or has significant interagency interest

**In light of the fact that the TSD meets at least two of the criteria listed, OMB should designate them as “highly influential,” and subject them to the strict peer review requirements reserved for “highly influential” scientific documents** established in Section III of the *Bulletin* in order to ensure analytic and methodological quality.

**The TSD should contain a concise clarification of appropriate and inappropriate uses of SCC estimates.** As a preliminary matter, OMB should clarify what the SCC estimate is and for what uses it was developed. As the agency charged with managing this comment period and the interagency process in which the SCC estimate was derived, OMB has ultimate ownership for the TSD. Thus, this document should be viewed as an OMB guidance document for application solely within the Executive Branch. More specifically, the OMB should clarify that the SCC estimate is a regulatory tool designed only to be used when assessing the costs and benefits of federal regulatory actions. Any other use of the SCC estimate is inappropriate and clearly outside the scope of its intended purpose.

For example, The Department of Energy (DOE) inappropriately uses SCC estimates when determining the stringency of conservation standards for appliances. The Energy Policy and Conservation Act requires that DOE determine that any new appliance efficiency standard is designed to achieve significant additional conservation of energy and is technologically feasible and economically justified. *See* 42 U.S.C. 6295(a)(3)(B). As DOE makes these determinations, the Department is required, among other things, to consider, to the greatest extent practicable, the economic impact on the consumers of the affected product.

While the IWG notes that the SCC estimates should be treated as provisional and revisable, and are inherently uncertain, DOE uses these estimates in the various economic analyses that underpin energy conservation standards. This creates a false sense of precision as to the benefits associated with any standard. Moreover, it has the potential to obscure the costs to the actual consumers of appliances in the United States. This requires consumers to bear the cost of SCC uncertainty in their appliance purchases.

Forcing consumers to pay for uncertainty via SCC estimates illustrates a functional disconnect between cause and cost that persists in the TSD. The modeling process attempts to link domestic CO<sub>2</sub> levels and domestic damages to a global model when that nexus is only partially true. While some effort has been made to properly apportion the US percentage of CO<sub>2</sub> emissions, and therefore marginal costs, OMB should ensure more scientific effort is spent to determine the degree to which a CO<sub>2</sub> increase from a single source, or country, would have produced the demonstrated results in the presence of a larger foreign contribution.

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<sup>11</sup> Based on the *Federal Register* notice and the TSD itself

**Using the SCC estimate in state-level policy decisions, federal regulatory proceedings or environmental impact statements is inappropriate and raises serious concerns of false precision and in appropriate weighting of global and long-term benefits against local and near-term costs.** Groups seeking to use the SCC estimate in such efforts are essentially employing the SCC estimate as if it were a proxy for a price on carbon. In fact, the SCC estimate is significantly higher than market prices for carbon, which are benchmarks for carbon reduction costs under current cap-and-trade programs. For example, European Emission Allowances were \$5.71 per ton on July 19, 2013 and California Carbon Allowances were \$14.30 per ton on July 19, 2013. Compounding this, the Energy Information Administration estimated that allowance prices would be \$19 per ton in 2013 under Waxman-Markey.

**The SCC estimate is not, and was not designed to be, a price on carbon, and its use as such is inappropriate.** The SCC estimate has the potential to impose hardships on electric consumers, especially low income consumers. The IWG derived SCC estimates solely to facilitate uniform assessment of the value of GHG emissions reductions across federal agencies. OMB should clarify this in the TSD.

Thank you for your review and consideration of our comments.

Respectfully submitted,

AMERICAN PUBLIC POWER ASSOCIATION

By \_\_\_\_\_/s/\_\_\_\_\_

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*A-and-R-Docket@epa.gov*

November 19, 2014

U.S. Environmental Protection Agency  
EPA Docket Center (EPA/DC)  
Mailcode 28221T  
Attention Docket ID No. OAR–2013-0602  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460

**RE: Docket ID No. EPA-HQ-OAR-2013-0602– Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units**

To Whom It May Concern:

The American Farm Bureau Federation (Farm Bureau) is the nation’s largest general farm organization, representing agricultural producers of nearly every type of crop and livestock across all 50 states and Puerto Rico. We have a vital interest in enhancing and strengthening the lives of farmers and ranchers. Farm Bureau appreciates this opportunity to provide comments regarding the Proposed Standards of Performance for Greenhouse Gas Emissions from Existing Sources: Electric Utility Generating Units (Proposed Standard) published in the *Federal Register* on June 18, 2014.

Farming and ranching are energy-intensive businesses. Farmers and ranchers depend on reliable as well as affordable sources of energy to run their daily operations including using tractors and operating dairy barns, poultry houses and irrigation pumps. Farm Bureau supports the availability and affordability of all sources of energy, including, coal, gas, nuclear, wind, solar and other sources. A diverse energy supply is not only critical in keeping energy costs reasonable, but it is essential in ensuring steady and reliable streams of energy to power farms and heat our member’s homes. For many farmers that compete in a global economy, energy represents a major input cost that can ultimately determine viability and prosperity.

Farm Bureau believes that the Proposed Standard creates important questions about the reliability and affordability of electricity across the country while punishing one sector – agriculture - that is doing more than its part in supporting energy independence and reducing fossil fuel use.

Farmers and ranchers are leading the way to a cleaner renewable energy future by increasing ethanol and biodiesel production, installation of methane digesters and promoting greater use of wind energy. These methods of renewable energy will help drive our domestic economy to energy independence. The Proposed Standard will negatively affect all Americans, including farmers and ranchers, who are already committed to producing cleaner, renewable fuels. Farmers

and ranchers, and agriculture in general, are particularly disadvantaged, however, because of the energy intensive nature of producing food, feed, and fiber.

One of the toughest challenges farmers and ranchers face is dealing with the obstacles and variability Mother Nature often hands them. Our grassroots members, comprised of hard-working farmers and ranchers from across the country from virtually every sector of agriculture, have clearly enunciated a strong opposition to regulation of greenhouse gas emissions. The presence of CO<sub>2</sub> in the atmosphere is ubiquitous. Imposing added energy costs on our own economy while other economies are not held to the same standard not only puts U.S. producers and consumers at a disadvantage, it serves little environmental purpose.

The Proposed Standard does little to address the problem it seeks to solve. EPA's regulations will impose billions of dollars in costs on the U.S. economy but fail to meaningfully reduce CO<sub>2</sub> emissions on a global scale. For example, the projected CO<sub>2</sub> emission reduction from the Proposed Standard is, at most, 555 million metric tons (mmt) in 2030, which represents only 1.3 percent of projected global CO<sub>2</sub> emissions in that year.<sup>1</sup> This reduction in 2030 would offset the equivalent of just 13.5 days of CO<sub>2</sub> emissions from China.<sup>2</sup>

Meanwhile, the U.S. has led the world in reducing CO<sub>2</sub> emissions. Since 2005, U.S. emissions have fallen by 13 percent while China's have grown by 69 percent and India's have increased by 53 percent. International emissions will only continue to grow rapidly. In fact, between 2011 and 2030, CO<sub>2</sub> emissions from non-OECD nations are projected to grow by nine billion tons per year. In other words, for every ton of CO<sub>2</sub> reduced in 2030 as a result of EPA's proposed rule, the rest of the world will have increased emissions by more than 16 tons. Reducing fossil fuel emissions without producing a measurable impact on world temperatures or climate cannot be regarded as a success.

The Proposed Standard does not provide the certainty that producers need in order to assure that they will continue to receive an affordable and reliable supply of energy. EPA's estimates project that the Proposed Standard will cause nationwide electricity price increases averaging between 6 and 7 percent in 2020 and up to 12 percent in some locations. EPA estimated annual compliance costs between \$5.4 and \$7.4 billion in 2020, rising up to \$8.8 billion in 2030. These are power sector compliance costs only and do not capture the subsequent adverse spillover impacts of higher electricity rates on overall economic activity.

The costs utilities will incur in order to comply with the new standards will be passed on to their customers and in many cases, farmers and ranchers. Farmers and ranchers are price takers and not price makers, so they lack the ability of many other sectors of recouping their costs by passing them on to customers. Higher energy costs for farmers and ranchers mean higher farm input costs.

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<sup>1</sup> EPA, *Regulatory Impact Analysis for the Proposed Carbon Pollution Guidelines for Existing Power Plants and Emission Standards for Modified and Reconstructed Power Plants*, June 2014; EIA, *International Energy Outlook 2013* (projecting global emissions of 41, 464 mmt in 2030).

<sup>2</sup> The Energy Information Administration projects that China will emit more than 14 billion tonnes of CO in 2030. Source: <http://www.eia.gov/forecasts/ieo/table21.cfm>

The Proposed Standard is also expected to retire up to an additional 45,000 more megawatts of coal-fired electric generating capacity. 45,000 megawatts is greater than the entire electricity supply of New England. Most of these retirements are projected to occur within the next five years, further increasing the threat to electric reliability. This uncertainty in electric reliability is of great concern to farmer and ranchers. When working in agriculture, we need reliable electric service to care for our animals, irrigate our crops and power many other essential tasks on our farms throughout the country.

Additionally, farmers and ranchers could be affected in another, more direct way by any wide volatility in natural gas prices. While recent trends have lessened the linkage of domestic natural gas and fertilizer prices, natural gas is the principal feedstock in the production of nitrogen fertilizer, which is a vital input for farmers and ranchers to grow crops.

While the main target of the Proposed Standard is coal-fired electricity generation, natural gas is the second largest source of electric power in the United States after coal, and natural gas is also the largest cost in manufacturing commercial fertilizer used to grow crops. As a principal input in manufacturing nitrogen fertilizer, changes in natural gas prices have a direct effect on the price of commercial fertilizer.

In its regulatory impact analysis of the Clean Power Plan, the EPA projected that 4.6 percent of current electricity generation may be removed from operation by 2020 due to a reduction in coal-fired power plants. In order to meet increasing demand for electric power, power plants are projected to increase their use of natural gas, pushing natural gas prices up by an estimated 11.5 percent by 2020. This Proposed Standard will undoubtedly increase the average cost of electricity generation as well as increase the price for nitrogen fertilizer through increased demand for natural gas.

The Proposed Standard sets a dangerous precedent for other sectors of the economy. EPA has asserted that it has the authority to regulate greenhouse gas emissions across the entire economy. As a result, the ultimate impacts of these regulations could extend to the rest of the industrial economy, from refining to manufacturing and potentially agriculture. Farmers will not only be impacted by higher electricity and natural gas prices in the future, but will get hit with higher prices for other important inputs. Increases in other energy prices, fertilizer and machinery, will hold negative consequences for agriculture while at the same time making U.S. farmers and ranchers less competitive internationally. In many cases, higher production costs due to increased energy prices lower net producer returns and farmers will respond by reducing overall production.

What EPA has proposed is unprecedented not only in its policy reach, but in the significant number of proposed actions that exceed its authority in the Clean Air Act (CAA). Farm Bureau is troubled that the Proposed Standard seemingly crosses a line by adding to EPA's 40-year charge as the regulator of the environment to the nation's primary regulator of energy. The Proposed Standard dictates not only what types of fuel should be used to generate our nation's electricity, but how and in what quantities end-user should consume it.

Under the plain language of the CAA, the EPA is prohibited from regulating GHG emissions from existing power plants. The agency lacks the legal authority to regulate GHG emissions from existing power plants that are already subject to Section 112 National Emissions Standard for Hazardous Air Pollutants (“NESHAP”) of the Clean Air Act.

Based upon the language of the CAA, Supreme Court case law, and the EPA’s own words, the agency does not have the legal authority to regulate GHG emissions from existing power plants that are already being regulated under Section 112 (NESHAP).

- Plain Language of Clean Air Act: The EPA seeks to regulate GHG emissions from existing power plants under Section 111(d) of the Clean Air Act (Existing Source Performance Standards or “ESPS”). Those same power plants are already regulated as “existing sources” under Section 112 of the Clean Air Act (NESHAP). Under the plain language of Section 111(d), the EPA cannot establish ESPS for existing sources for any air pollutant emitted from any source category that is regulated under a Section 112 NESHAP.
- Supreme Court Precedent: Supreme Court case law unequivocally affirms the prohibition on regulating pollutants under Section 111(d) if they are already regulated under Section 112. In *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), the Supreme Court noted that “EPA may not employ [ESPS under Section 111(d)] if existing stationary sources of the pollutant in question are regulated under the [NAAQS] program ... or the [NESHAP] program [under Section 112]....” *AEP*, 131 S. Ct. at 2537 & n.7.
- EPA’s Words: In its proposed Clean Air Mercury Rule, the EPA recognized that a literal interpretation of Section 111(d) would prevent the agency from regulating pollutants from sources regulated under Section 112. *See* 69 Fed. Reg. 4651, 4685 (Jan. 30, 2004).

The Proposed Standard also usurps the rights of states. Under section 111(d) of the CAA, the states, not EPA, have the authority to establish standards of performance under section 111(d) of the CAA. EPA’s authority under 111(d) is clearly limited to “establishing procedures” by which states submit plans establishing standards of performance. EPA misinterprets the unambiguous language in section 111(d) by commandeering the establishment of standards of performance from states. EPA’s final rule should allow states the flexibility to establish their own performance standards based on the unique circumstances of their state.

EPA cannot set a performance standard for states that the agency itself lacks the authority to implement should states fail to submit a satisfactory implementation plan. EPA does not have the authority to implement building blocks two, three or four in a state and thus cannot impose these requirements.

EPA cannot implement building block two because it does not have authority to make electricity dispatching decisions. Under the Federal Power Act (“FPA”), states are given authority to regulate electricity within their borders. Along these lines, states have exclusive jurisdiction over

the distribution of electricity to end-use customers. States also retain the authority to determine the rules for the operation of power plants within their borders. Thus, EPA's reliance on building block two in setting performance standards exceeds its CAA authority.

EPA cannot implement the nuclear component of building block three because the National Regulatory Commission ("NRC") has authority over permitting, re-permitting and commissioning of nuclear power plants. EPA has no authority to extend the permitting life of a nuclear power plant and is equally misguided to assume that all existing nuclear plants will ultimately be relicensed by the NRC. Equally, EPA cannot implement the renewable energy component of building block three because states, and not the federal government, have the authority to establish renewable portfolio standards ("RPS"). The decision of whether or not to adopt, change, or abandon an RPS is reserved exclusively to the states and cannot be usurped by the EPA *via* the CAA. EPA's reliance on building block three in setting performance standards also exceeds its CAA authority.

Additionally in building block three, EPA assumes that states can increase the construction and utilization of renewable energy facilities by assuming an average of various future state RPS requirements and then imposing that partial average upon all states in an EPA-defined region. This approach ignores the differences and unique challenges that exist from state to state when it comes to increasing renewable energy deployment and provides no weight to states that have chosen not to implement an RPS. Renewable energy resources can vary greatly between neighboring states, and in fact, even within a state. Further, state RPSs are often aspirational and contain "safety valve" mechanisms that slow or pause requirements if, for example, electricity rates increase above a threshold level. Thus, just because a state has adopted a state RPS requirement that does not mean that the technical or economic achievability of the standard has been demonstrated for that state or its neighboring states. EPA's approach for building block three as it relates to renewable power is deeply flawed and is not adequately supported by experience.

EPA fails to adequately or reliably analyze the potential costs and benefits of the Proposed Standard in its Regulatory Impact Analysis ("RIA"). By simultaneously overestimating the potential benefits of the proposal and underestimating the costs, EPA claims (in error) that the proposed rule will produce economic benefits. If done properly, a cost-benefit analysis of the Proposed Standard would reveal significant costs in both the short term and the long term.

EPA's cost-benefit analysis for the Proposed Standard has numerous problems. First, EPA's reliance on the "social cost of carbon" is wholly inappropriate because that calculation has not been subject to a rigorous and transparent rulemaking process. The analysis fails to properly address international benefits and costs. Second, EPA fails to use full-economy modeling to evaluate employment impacts. Among other problems, this approach fails to account for the negative impact on employment likely to be experienced by other industries that support or rely upon coal generation and the communities surrounding them. Finally, EPA's reliance on co-benefits from simultaneous reductions in pollutants other than GHGs is misplaced and must be revised to reflect the health benefits that would actually be attributable to this proposed rule.

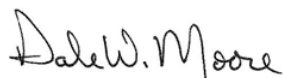
Most farms and ranches are small businesses. EPA has failed to convene a Small Business Advocacy Review panel and conduct a regulatory flexibility analysis to evaluate the proposed rule's impact on small businesses. EPA has failed to convene a Small Business Advocacy Review panel and conduct a regulatory flexibility analysis to evaluate the proposed rule's impact on small businesses as required by the Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act<sup>11</sup>

Instead of conducting this analysis, EPA claims that the proposed rule “will not have a significant economic impact on a substantial number of small entities” because States, not EPA, are ultimately responsible for implementing Section 111(d).<sup>3</sup> This claim is completely inaccurate because the impact on electricity prices and the potential regulation of entities beyond the fence line undoubtedly will impact small businesses.

EPA itself recognizes that the proposed rule would result in increases in electricity prices in some areas by as much as twelve percent. Electricity costs are a significant concern for many small businesses and are a top three business expense for 35% of all small businesses.<sup>4</sup> This alone demonstrates the widespread impact that the proposed rule would have on small businesses. Consequently, EPA should withdraw the current proposal, convene a Small Business Advocacy Review panel, and prepare a regulatory flexibility analysis before proceeding with a new proposal under Section 111(d).

The Proposed Standard has many uncertainties that cause Farm Bureau significant concerns. Farmers and ranchers are primarily end-users of the products from power plants and, thus, must completely depend on those who operate and own them. Farm Bureau appreciates the opportunity to express these concerns and looks forward to working with the agency to address them in any final rule.

Sincerely,



Dale Moore  
Executive Director  
Public Policy

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<sup>3</sup> 79 Fed. Reg. 34,946.

<sup>4</sup> National Federation of Independent Business, Energy, *available at* <http://www.nfib.com/advocacy/energy/>.



March 17, 2015

**VIA ELECTRONIC FILING AND ELECTRONIC MAIL**

U.S. Environmental Protection Agency  
 Attention: Docket ID No. EPA-HQ-OAR-2008-0699  
 1200 Pennsylvania Ave., N.W.  
 Washington, DC 20460

**RE: Docket ID No. EPA-HQ-OAR-2008-0699  
 Comments on EPA's December 2014 Proposed Revisions to National Ambient Air  
 Quality Standards for Ozone**

Dear Sir or Madam:

The attached Comments are submitted jointly by the U.S. Chamber of Commerce, the National Association of Manufacturers, the Alliance of Automobile Manufacturers, the American Bakers Association, the American Chemistry Council, the American Coalition for Clean Coal Electricity, the American Coke & Coal Chemicals Institute, the American Farm Bureau Federation, the American Forest & Paper Association, the American Fuel & Petrochemical Manufacturers, the American Iron and Steel Institute, the American Petroleum Institute, the American Wood Council, America's Natural Gas Alliance, the Associated Builders & Contractors, Inc., the Brick Industry Association, the Corn Refiners Association, the Council of Industrial Boiler Owners, the Glass Packaging Institute, the Independent Liquid Terminals Association, the Industrial Energy Consumers of America, the Institute of Shortening and Edible Oils, the National Mining Association, the National Oilseed Processors Association, the National Rural Electric Cooperative Association, the National Waste & Recycling Association, the Portland Cement Association, The Fertilizer Institute, the US Oil & Gas Association, and the Utility Air Regulatory Group (collectively, the Associations) on the proposed rule issued by the

U.S. Environmental Protection Agency (EPA) on December 17, 2014 (79 Federal Register 75234) to revise the National Ambient Air Quality Standards (NAAQS) for ozone.

The Associations submitting these Comments are described below.

The **U.S. Chamber of Commerce** (the Chamber) 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.

The **National Association of Manufacturers** (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than \$1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The **Alliance of Automobile Manufacturers** (Auto Alliance) is the voice for a united auto industry. The Auto Alliance is committed to developing and implementing constructive solutions to public policy challenges that promote sustainable mobility and benefit society in the areas of environment, energy and motor vehicle safety. The Auto Alliance is the leading advocacy group for the auto industry and represents 77% of all car and light truck sales in the United States, including the BMW Group, Fiat Chrysler Automobiles, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota, Volkswagen Group of America, and Volvo Cars North America.

The **American Bakers Association** (ABA) is the Washington D.C.-based voice of the wholesale baking industry. Since 1897, ABA has represented the interests of bakers before the U.S. Congress, federal agencies, and international regulatory authorities. ABA advocates on behalf of more than 700 baking facilities and baking company suppliers. ABA members produce bread, rolls, crackers, bagels, sweet goods, tortillas and many other wholesome, nutritious, baked products for America's families. The baking industry generates more than \$102 billion in economic activity annually and employs more than 706,000 highly skilled people.

The **American Chemistry Council** (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is an \$812 billion enterprise and a key element of the nation's economy.

The **American Coalition for Clean Coal Electricity** (ACCCE) is a partnership of companies involved in producing electricity from coal. Coal, an abundant and affordable American energy resource, plays a critical role in meeting our country's growing need for affordable and reliable electricity. ACCCE recognizes the inextricable linkage between energy, the economy and our environment. Toward that end, ACCCE supports policies that promote the use of coal, one of America's largest domestically produced energy resources, to ensure a reliable and affordable supply of electricity to meet our nation's growing demand for energy.



The **American Coke and Coal Chemicals Institute** (ACCCI), which was founded in 1944, is the international trade association that represents 100% of the U.S. producers of metallurgical coke used for iron and steelmaking, and 100% of the nation's producers of coal chemicals, who combined have operations in 12 states. It also represents chemical processors, metallurgical coal producers, coal and coke sales agents, and suppliers of equipment, goods and services to the industry.

The **American Farm Bureau Federation** (Farm Bureau) is an independent, non-governmental, voluntary organization governed by and representing farm and ranch families united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and social advancement and, thereby, to promote the national wellbeing. Farm Bureau is local, county, state, national and international in its scope and influence and is non-partisan, non-sectarian and non-secret in character. Farm Bureau is the voice of agricultural producers at all levels.

The **American Forest & Paper Association** (AF&PA) is the national trade association of the paper and wood products industry, which accounts for approximately 4 percent of the total U.S. manufacturing gross domestic product. The industry makes products essential for everyday life from renewable and recyclable resources, producing about \$210 billion in products annually and employing nearly 900,000 men and women with an annual payroll of approximately \$50 billion.

The **American Fuel & Petrochemical Manufacturers** (AFPM) (formerly known as NPRA, the National Petrochemical & Refiners Association) is a national trade association whose members comprise more than 400 companies, including virtually all United States refiners and petrochemical manufacturers. AFPM's members supply consumers with a wide variety of products and services that are used daily in homes and businesses.

The **American Iron and Steel Institute** (AISI) serves as the voice of the North American steel industry and represents member companies accounting for over three quarters of U.S. steelmaking capacity with facilities located in 43 states.

The **American Petroleum Institute** (API) represents over 590 oil and natural gas companies, leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, has invested nearly \$2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

The **American Wood Council** (AWC) is the voice of North American traditional and engineered wood products, representing over 75% of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products industry makes products that are essential to everyday life and employs approximately 400,000 men and women in family-wage jobs.

**America's Natural Gas Alliance** (ANGA) represents America's leading independent natural gas exploration and production companies. ANGA works with industry, government and customer stakeholders to promote increased demand for and continued availability of our nation's abundant natural gas resource for a cleaner and more secure energy future.

The **Associated Builders & Contractors, Inc. (ABC)** is a national construction industry trade association representing nearly 21,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers, whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of ABC's contractor members are classified as small businesses. Its diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value. This process assures that taxpayers and consumers will receive the most for their construction dollar.

The **Brick Industry Association (BIA)**, founded in 1934, is the recognized national authority on clay brick manufacturing and construction, representing approximately 250 manufacturers, distributors, and suppliers that historically provide jobs for 200,000 Americans in 45 states.

The **Council of Industrial Boiler Owners (CIBO)** is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information about issues affecting industrial boilers, including energy and environmental equipment, technology, operations, policies, laws and regulations.

The **Corn Refiners Association (CRA)** is the national trade association representing the corn refining (wet milling) industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture sweeteners, ethanol, starch, bioproducts, corn oil and feed products from corn components such as starch, oil, protein and fiber.

The **Glass Packaging Institute (GPI)**, which was founded in 1919 as the Glass Container Association of America, is the trade association representing the North American glass container industry. On behalf of glass container manufacturers and suppliers to the industry, GPI promotes glass as an optimal packaging choice, advances energy, environmental and recycling policies, advocates industry standards, and educates packaging professionals.

The **International Liquid Terminals Association (ILTA)** is an international trade association that represents 84 commercial operators of aboveground liquid storage terminals serving various modes of bulk transportation, including tank trucks, railcars, pipelines, and marine vessels. Operating in all 50 states, these companies own more than 600 domestic terminal facilities and handle a wide range of liquid commodities, including crude oil, refined petroleum products, chemicals, biofuels, fertilizers, and vegetable oils. Customers who store products at these terminals include oil companies, chemical manufacturers, petroleum refiners, food producers, utilities, airlines and other transportation companies, commodity brokers, government agencies, and military bases. In addition, ILTA includes in its membership nearly 400 companies that are suppliers of products and services to the bulk liquid storage industry.

The **Industrial Energy Consumers of America (IECA)** is a nonpartisan association of large energy intensive manufacturing companies with \$1.0 trillion in annual sales, over 2,900 facilities nationwide, and more than 1.4 million employees worldwide. It is an organization created

to promote the interests of manufacturing companies through advocacy and collaboration for which the availability, use and cost of energy, power or feedstock play a significant role in their ability to compete in domestic and world markets. IECA membership represents a diverse set of industries including: chemical, plastics, steel, iron ore, aluminum, paper, food processing, fertilizer, glass/ceramic, building products, independent oil refining, and cement.

The **Institute of Shortening and Edible Oils (ISEO)** is a trade association representing the refiners of edible fats and oils in the U.S. Its 19 member companies process over 20 billion pounds of edible fats and oils annually, which are used in baking and frying fats, salad and cooking oils, margarines and spreads, confectionary fats and as ingredients in a wide variety of foods.

The **National Mining Association (NMA)** is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership, and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources.

The **National Oilseed Processors Association (NOPA)** is a national trade association that represents 13 companies engaged in the production of vegetable meals and vegetable oils from oilseeds, including soybeans. NOPA's member companies process more than 1.6 billion bushels of oilseeds annually at 63 plants in 19 states, including 57 plants which process soybeans.

The **National Rural Electric Cooperative Association (NRECA)** is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to over 42 million people in 47 states or 12 percent of nation's electric customers. NRECA is dedicated to representing the national interests of cooperative electric utilities and the consumers they serve. NRECA member electric cooperatives are private, independent electric utilities, owned by the members they serve.

The **National Waste & Recycling Association (NWRA)** is the trade association that represents the private sector waste and recycling services industry. Association members conduct business in all 50 states and include companies that collect and manage garbage, recycling and medical waste, equipment manufacturers and distributors and a variety of other service providers. More information about how innovation in the environmental services industry is helping to solve today's environmental challenges is provided at [www.wasterecycling.org](http://www.wasterecycling.org).

The **Portland Cement Association (PCA)** represents 27 U.S. cement companies operating 82 manufacturing plants in 35 states, with distribution centers in all 50 states, servicing nearly every Congressional district. PCA members account for approximately 80% of domestic cement-making capacity.

The **Fertilizer Institute (TFI)** represents the nation's fertilizer industry including producers, importers, retailers, wholesalers and companies that provide services to the fertilizer industry. TFI's members provide nutrients that nourish the nation's crops, helping to ensure a stable and reliable food supply.

The **US Oil & Gas Association** (USOGA), founded in 1917, is a national trade association with over 5,000 members. USOGA's Divisions in Texas, Oklahoma, Louisiana, Mississippi and Alabama represent companies of all sizes as well as the various segments of the industry, so that it can unite and advocate policies of mutual concern at the local, state, regional and national level.

The **Utility Air Regulatory Group** (UARG) is a voluntary group of electric generating companies and national trade associations. The vast majority of electric energy in the United States is generated by individual members of UARG or by other members of UARG's trade association members. UARG's purpose is to participate on behalf of its members collectively in Clean Air Act proceedings that affect the interests of electric generators.

For the reasons given in the attached Comments, the Associations oppose any revision of the NAAQS for ozone and submit that such a revision would be unlawful.

Thank you for your consideration of this important matter. If you have any further questions, please feel free to reach out to Gregory Bertelsen, Director, Energy and Resources Policy, National Association of Manufacturers, at 202-637-3174 or [gbertelsen@nam.org](mailto:gbertelsen@nam.org).

Respectfully submitted,

U.S. Chamber of Commerce  
National Association of Manufacturers  
Alliance of Automobile Manufacturers  
American Bakers Association  
American Chemistry Council  
American Coalition for Clean Coal Electricity  
American Coke & Coal Chemicals Institute  
American Farm Bureau Federation  
American Forest & Paper Association  
American Fuel & Petrochemical Manufacturers  
American Iron and Steel Institute  
American Petroleum Institute  
American Wood Council  
America's Natural Gas Alliance  
Associated Builders & Contractors, Inc.  
Brick Industry Association  
Corn Refiners Association  
Council of Industrial Boiler Owners  
Glass Packaging Institute  
Independent Liquid Terminals Association  
Industrial Energy Consumers of America  
Institute of Shortening and Edible Oils  
National Mining Association  
National Oilseed Processors Association  
National Rural Electric Cooperative Association  
National Waste & Recycling Association  
Portland Cement Association  
The Fertilizer Institute  
US Oil & Gas Association  
Utility Air Regulatory Group

# **Comments on EPA's December 2014 Proposed Revisions to National Ambient Air Quality Standards for Ozone**

**Docket ID No. EPA-HQ-OAR-2008-0699**

**March 17, 2015**

## **Submitted by:**

U.S. Chamber of Commerce  
National Association of Manufacturers  
Alliance of Automobile Manufacturers  
American Bakers Association  
American Chemistry Council  
American Coalition for Clean Coal Electricity  
American Coke & Coal Chemicals Institute  
American Farm Bureau Federation  
American Forest & Paper Association  
American Fuel & Petrochemical Manufacturers  
American Iron and Steel Institute  
American Petroleum Institute  
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National Mining Association  
National Oilseed Processors Association  
National Rural Electric Cooperative Ass'n  
National Waste & Recycling Association  
Portland Cement Association  
The Fertilizer Institute  
US Oil & Gas Association  
Utility Air Regulatory Group

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**Attachments:**

- A. *BRAC Public Commentary: Eighteen of Twenty Top-Performing Metro Economies at Risk from New Ozone Standards.* Prepared by Baton Rouge Area Chamber. March 2, 2015.
- B. *Economic Impacts of a 65 ppb National Ambient Air Quality Standard for Ozone.* Prepared by NERA Economic Consulting for National Association of Manufacturers. February 2015
- C. *EPA Regulatory Impact Analysis of Proposed Federal Ozone Standard: Potential Concerns Related to EPA Compliance Cost Estimates.* Prepared by NERA Economic Consulting for National Association of Manufacturers. March 2015



## **I. INTRODUCTION AND SUMMARY**

### **A. Introduction**

On December 17, 2014, the United States Environmental Protection Agency (EPA or Agency) issued a proposed rule to revise the National Ambient Air Quality Standards (NAAQS) for ozone (sometimes abbreviated O<sub>3</sub>) under the Clean Air Act (CAA or Act), as published in 79 Fed. Reg. 75234 (December 17, 2014). If finalized, this rule could cost more than one trillion dollars, making it the most expensive regulation ever issued by the U.S. government and potentially halting economic growth and development across the nation.

These comments on the proposed rule are submitted by the U.S. Chamber of Commerce, the National Association of Manufacturers, and the other associations listed on the cover of these comments (collectively, the Associations). The Associations collectively represent the nation's leading energy, agriculture, manufacturing, construction, and solid waste management sectors that form the backbone of the nation's industrial ability to grow our economy and provide jobs in an environmentally sustainable and energy-efficient manner. Over the history of the Clean Air Act, the Associations and their member companies have demonstrated the strongest record of driving economic growth while simultaneously placing the utmost priority on compliance with the Clean Air Act and realizing significant reductions in air emissions. At the same time, the activities of the Associations' member companies are significantly impacted by the setting of NAAQS nationally and by their implementation in the states where those companies operate. The Associations' members thus have a strong interest in ensuring that the EPA sets NAAQS informed by sound science and based on reasonable and supportable policy analysis, and that regulators are fully apprised of the impacts of such standards on companies' abilities to operate and grow projects that are critical to economic development, while serving as effective stewards of environmental protection. While some of these Associations are also submitting separate comments on the proposed rule, they have joined in these comments that address issues of common concern.

### **B. Executive Summary**

Under Section 109(b) of the Act, primary NAAQS must be set at a level requisite to protect the public health with an adequate margin of safety, and secondary NAAQS must be set at a level requisite to protect the public welfare from any known or anticipated adverse effects. In 2008, EPA issued revised primary and secondary NAAQS for ozone, establishing both of those standards as a stringent 8-hour ozone concentration of 75 parts per billion (ppb), based on the annual 4<sup>th</sup> highest daily maximum 8-hour average concentration over a three-year period. In its December 2014 proposal, EPA has proposed to retain the indicator, averaging time, and form of the current 8-hour primary standard, but to reduce the level of the standard to a level

within the range of 65 to 70 ppb, although it also asks for comment on reducing the standard further to 60 ppb and on retaining the current standard. In addition, EPA has proposed to set the secondary standard at the same reduced level as the primary standard, although it also asks for comment on setting a separate secondary standard using a different, seasonal form.

The Associations strongly oppose EPA's proposal to reduce the level of the primary and secondary NAAQS. Such a reduction in the NAAQS would have widespread and potentially irreparable adverse impacts on the Associations' diverse member companies, as well as their customers, the states and local communities in which they operate, and the overall U.S. economy. Ground-level ozone concentrations have steadily declined over the past decade and are expected to continue to decline under the current standard. In fact, while significant progress is being made in realizing lower ozone concentrations, the 2008 standard has not yet been fully implemented. State and local agencies are still in the process of revising the state implementation plans (SIPs) to meet that standard, and substantial resources are being expended by the states, local governments, and the regulated community in doing so. Any further reduction in the level of the standard even before the current standard has been fully implemented would impose a massive additional burden on the states and local governments and on regulated sources, including the Associations' members, before the health and environmental benefits of the current standard are realized.

The reduction of the NAAQS to a level within the 65 to 70 ppb range proposed by EPA would place a large number of additional areas critical to the nation's economic and energy growth and development into nonattainment, while the adoption of a standard at the even lower (60 ppb) level identified by EPA would force most of the nation into nonattainment. For example, Figure 1 (at the end of this Executive Summary) shows the areas that are currently designated nonattainment under the current NAAQS (top panel) and those that would be projected to be designated as nonattainment areas under a revised standard of 65 ppb based on data for 2011 through 2013 (bottom panel). This figure illustrates the massive increase in nonattainment areas nationwide that would result from such a reduced standard. Further, an analysis by the Baton Rouge Area Chamber (copy attached to these comments) shows that, of the nation's top 20 metropolitan area economies based on performance through recession and recovery, 15 would be classified as nonattainment for a 70 ppb standard and 18 would be classified as nonattainment for a 65 ppb standard.

To achieve the proposed standards, extraordinary additional reductions in the emissions of precursor pollutants, notably nitrogen oxides (NOx) and volatile organic compounds (VOCs), would be necessary across all sectors of the economy. This is especially true when background ozone concentrations (i.e., those that are not attributable to anthropogenic U.S. sources) are taken into account. In fact, as EPA acknowledges, the proposed NAAQS could not be achieved in many areas through the use of existing emission control technologies, and thus states, along

with regulated sources, would have to rely on controls that are not even known at this time and whose availability and costs cannot be reliably predicted. Indeed, it is likely that more than 60 percent of the necessary emissions reductions would need to come from such unknown controls, and that such controls could be responsible for the great majority of the compliance costs. Moreover, the impacts of the revised standards would be particularly severe in the expanded nonattainment areas, where any new and modified sources would be subject to additional costly and stringent permitting requirements under the nonattainment new source review (NNSR) program, with the result that businesses may not be able to locate new operations or grow existing operations in such areas. In addition, the proposed reduction in the NAAQS would adversely affect local communities and the economy by potentially raising prices for the goods and services produced by the Associations' members and negatively impacting economic growth. For example, in a recent analysis (copy attached to these comments), NERA Economic Consulting (NERA) estimates that a standard of 65 ppb could have a present-value cost of nearly \$1.1 trillion based on costs over the period from 2017 through 2040, reduce the U.S. Gross Domestic Product (GDP) by an average of about \$140 billion per year or a total of about \$1.7 trillion over that period, result in a loss of approximately 1.4 million job equivalents, and reduce the average U.S. household consumption by about \$830 per year over the same period. This could make such a revised ozone NAAQS the most expensive regulation ever issued by the U.S. government.

As demonstrated in the Associations' comments, this proposed revision of the NAAQS is arbitrary, capricious, and unlawful under applicable legal standards for several reasons:

- EPA's statement that its selection of a primary standard level that is requisite to protect the public health with an adequate margin of safety is a "policy choice" left to "the Administrator's judgment" (79 Fed. Reg. at 75238) does not insulate its decision from scrutiny. The Agency must still provide a reasoned explanation for its decision, demonstrate that its decision comports with applicable legal requirements, and give reasonable consideration to contextual factors affecting its policy decision. For the reasons discussed below, EPA has not done so here.
- In proposing to lower the level of the standard, EPA has failed to take into account the impact of background concentrations of ozone on the attainability of the standard – specifically, the fact that such background levels could prevent attainment of the proposed standard in large parts of the country. In this regard, EPA's proposal fails to take into account an important relevant factor under the Act, as required by fundamental principles of administrative law; and it contravenes the Act's requirement that NAAQS be set at levels than can be achieved through regulation via SIPs (or plans issued by EPA if states fail to adopt approvable SIPs). EPA's description of potential regulatory mechanisms to provide relief from nonattainment due to background concentrations is

no substitute for complying with the law; and in any case, those mechanisms are wholly inadequate.

- EPA's proposal is based primarily on a change in its interpretation of the scientific evidence (e.g., the levels of risk that are judged acceptable), rather than any fundamental change in the scientific understanding of ozone effects, since the Agency's last round of standard-setting in 2008. EPA has failed to provide a reasoned explanation or justification for that change in judgment, as required by law.
- Given the limitations and uncertainties in the scientific data regarding the effects of ozone exposure on human health and welfare at levels below the current standard (as recognized by EPA and pointed out by other commenters), it would be arbitrary for EPA to reduce the level of the current standard when that standard has not yet been fully implemented.
- While the Act does not allow EPA to consider compliance costs when establishing or revising NAAQS, it does not require EPA to eliminate all risks at any economic cost, and it allows EPA to consider contextual factors, including the acceptability of the risks, in determining the level "requisite" to protect public health and welfare. Given the acknowledged uncertainties regarding the risks of ozone exposure at levels below the current standard and regarding the incremental benefits that may accrue from lowering that standard (especially in light of background concentrations), such a contextual assessment should include consideration of the adverse social, economic, and energy impacts from lowering the standard. EPA has failed to take such impacts into account, and that failure would render its decision arbitrary and capricious.
- EPA's proposal is also arbitrary and capricious because the Agency has not provided an adequate justification for reducing the level of the primary standard. The Act requires that NAAQS be set at a level that is sufficient, but not more stringent than necessary, to protect public health and welfare. Given this requirement, and considering the above-mentioned uncertainties and limitations in the evidence regarding the occurrence of adverse health effects at levels below the current standard and the other relevant factors discussed above (e.g., background concentrations, the attainability of a reduced standard, the fact that the current standard has not been fully implemented, and the adverse impacts of a reduced standard), the record does not support lowering the current primary standard.
- Similarly, EPA has not provided an adequate justification for reducing the level of the secondary standard given the significant uncertainties and limitations in the available data on welfare effects at these low levels, as recognized by EPA and others. By

contrast, however, EPA has provided an adequate justification to retain the form of the current secondary standard, rather than adopting a standard using the untested W126 form.

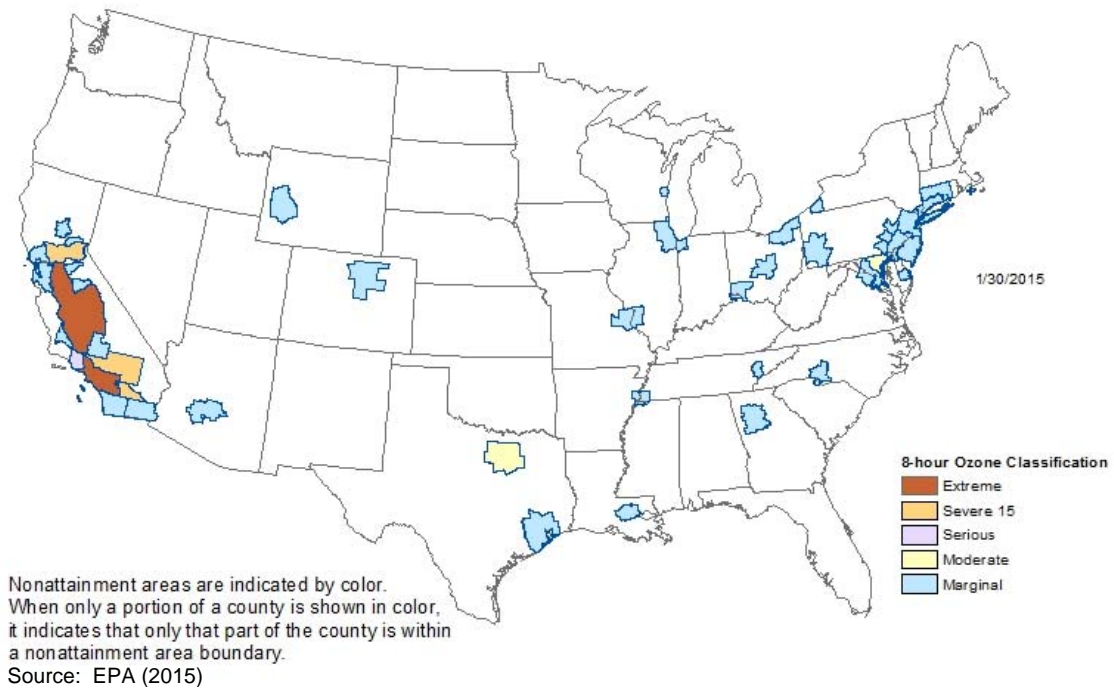
In addition to the forgoing points, these comments, supported by analyses conducted by NERA (copies attached), show that EPA's Regulatory Impact Analysis (RIA) for its proposal significantly underestimates the costs of revising the ozone NAAQS through a series of faulty assumptions, and at the same time overstates the asserted benefits attributable to such a reduction in the ozone standard.

Finally, in these comments, the Associations address seven other issues raised by EPA's proposal. Specifically, they show that:

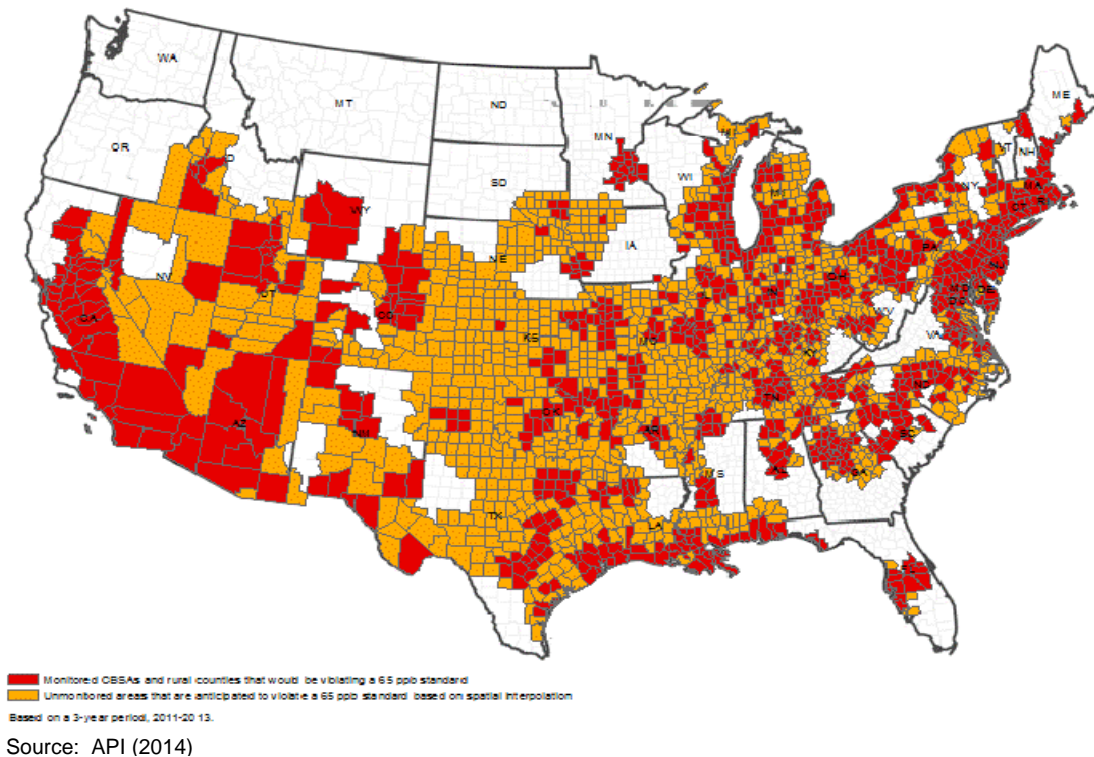
- EPA should allow the flagging and documenting of “exceptional events” causing exceedances of the NAAQS at any time prior to an attainment decision or, at a minimum, should extend the time for flagging and documenting such events as it has proposed;
- EPA's proposal to “grandfather” certain pending applications for Prevention of Significant Deterioration (PSD) permits, if finalized, could provide limited relief from the immediate burden imposed on certain PSD permit applicants by a revised NAAQS, but provides no workable solution to the broader problem for building or expanding the types of sources that fuel economic growth;
- If EPA finalizes revisions to the NAAQS, it should provide states with the necessary implementation guidance and regulations at the time of promulgating the revised NAAQS and give states as much time as possible to implement the revised NAAQS;
- Even if EPA finalizes revisions to the NAAQS, it should not revise its Air Quality Index because such a revision is not required and would produce misleading information for the public;
- EPA should not extend the ozone monitoring season, as it has proposed for 33 states;
- EPA's proposal does not comply with the federal Information Quality Act; and
- EPA has not complied with the Unfunded Mandates Reform Act in its proposal.

**Figure 1 : Current Nonattainment Areas and Projected Nonattainment Areas Under a 65 ppb Standard**

**8-Hour Ozone Nonattainment Areas (2008 Standard)**



**Projected 8-Hour Ozone Nonattainment Areas for 65 ppb**



## II. BACKGROUND INFORMATION

### A. Legal Requirements

Section 108 of the Act directs EPA to set NAAQS for pollutants “the emissions of which . . . cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare” (§ 108(a)(1)(A)).<sup>1</sup> The NAAQS must be based on “air quality criteria . . . [that] accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare” (§ 108(a)(2)). Section 109 of the Act further provides that EPA must review NAAQS at least every five years and revise them “as may be appropriate” in accordance with Sections 108 and 109(b) of the Act (§ 109(d)(1)). Primary NAAQS must be set at a level “requisite to protect the public health” with “an adequate margin of safety” (§ 109(b)(1)). Secondary NAAQS must specify a level of air quality “requisite to protect the public welfare from any known or anticipated adverse effects” (§ 109(b)(2)).

NAAQS are not intended to eliminate all risk. As the Supreme Court has explained, “requisite to protect” means “not lower or higher than is necessary.” *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 476 (2001). Thus, in setting NAAQS, EPA must determine the levels of a pollutant that are “sufficient, but not more than necessary” to protect the public health and welfare. *Id.* at 473 (internal quotation marks omitted). This requires an assessment of the extent to which the risks from exposure to the pollutant are unacceptable; and that assessment, in turn, requires EPA to take into account background considerations and context. As noted by Justice Breyer in *Whitman*, Section 109 “does not require the EPA to eliminate every health risk, however slight, at any economic cost, however great.” *Id.* at 494 (Breyer, J., concurring in part and concurring in the judgment). Instead, it allows the EPA Administrator, in determining the levels “requisite” to protect the public health, to consider various contextual factors, including: “background considerations, such as the public’s ordinary tolerance of the particular health risk in the particular context at issue”; “the severity of a pollutant’s potential adverse health effects, the number of those likely to be affected, the distribution of the adverse effects, and the uncertainties surrounding each estimate”; “comparative health consequences”; and “the acceptability of small risks to health.” *Id.* at 494-95. The D.C. Circuit recently confirmed that setting primary NAAQS may require such a contextual assessment as described by Justice Breyer. *Mississippi v. EPA*, 744 F.3d 1334, 1343 (D.C. Cir. 2013).

In addition, the legislative history of Section 109 makes clear that Congress intended the primary NAAQS to be set at a level requisite to protect sensitive subpopulations but not the most sensitive individuals within those subpopulations. See S. Rep. No. 91-1196 at 10 (1970). As stated in that report, in establishing NAAQS that will protect the health of sensitive

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<sup>1</sup> For ease of reference, these comments cite directly to sections of the Clean Air Act; parallel citations to the U.S. Code (42 U.S.C. § 7401 *et seq.*) are not included.

populations, “reference should be made to a representative sample of persons comprising the subgroup rather than to a single person in such group.” *Id.* EPA and the courts have consistently recognized that the NAAQS are not required to protect the most sensitive individuals within a population.<sup>2</sup>

With respect to the secondary standard, the Act does not require a secondary standard that differs from the primary standard. A secondary standard may be the same as the primary standard so long as the level specified is shown to be “requisite to protect the public welfare from any known or anticipated adverse effects” (§ 109(b)(2)). *See American Farm Bureau Federation v. EPA*, 559 F.3d 512, 530 (D.C. Cir. 2009); *Mississippi*, 744 F.3d at 1358. In fact, EPA has established secondary NAAQS that are the same as primary NAAQS for several pollutants.<sup>3</sup>

Consistent with the recognition that NAAQS are not intended to result in zero risk and may take into account contextual factors such as the public’s tolerance of acceptable risks, NAAQS are not intended to reduce pollutant concentrations to or below background levels – i.e., levels that would exist in the absence of anthropogenic emissions that are subject to regulation under the Act. Rather, NAAQS are to be standards that can be attained by regulation of U.S. sources. This is demonstrated by the requirement in Section 107(a) that SIPs are to specify the manner in which the NAAQS “**will be** achieved and maintained,” as well as the requirement of Section 110(a)(2)(C) that SIPs must include an enforcement and regulation program “as necessary **to assure that [NAAQS] are achieved**” (emphases added). These provisions demonstrate Congress’s intention that NAAQS are to consist of standards that **can be** achieved through SIPs, which would not be the case if such attainment is prevented by emissions that are not subject to regulation under the SIPs.

The CAA also specifies the role of the Clean Air Scientific Advisory Committee (CASAC). It provides that, at five-year intervals, CASAC shall review the EPA-prepared air quality criteria and the primary and secondary NAAQS and shall recommend to the Administrator any new NAAQS or revisions of existing criteria and NAAQS as may be appropriate (§ 109(d)(2)(B)). The Act provides further that, if a NAAQS proposal by EPA “differs

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<sup>2</sup> See 75 Fed. Reg. 6474, 5475 n.2 (Feb. 9, 2010) (primary NAAQS for nitrogen dioxide); 71 Fed. Reg. 61144, 61145 n.1 (Oct. 17, 2006) (NAAQS for particulate matter); 50 Fed. Reg. 37484, 37488 (Sept. 13, 1985) (NAAQS for carbon monoxide), 44 Fed. Reg. 8202, 8210 (Feb. 8, 1979) (NAAQS for photochemical oxidants); *see also Lead Industries Ass’n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980) (upholding EPA’s establishment of the initial NAAQS for lead at a level that it estimated would protect 99.5% of the sensitive population from “potentially adverse” effects); *Safe Air for Everyone v. Idaho*, 469 F. Supp. 2d 884, 892 (D. Idaho 2006) (recognizing that the NAAQS “are designed to protect sensitive populations but not required to protect the most sensitive within a population”).

<sup>3</sup> See, e.g., 24-hour NAAQS for particulate matter with a mean diameter less than 10 micrometers (PM<sub>10</sub>) (40 C.F.R. § 50.6); annual NAAQS for nitrogen oxides (NO<sub>x</sub>) (*id.* § 50.11); NAAQS for lead (*id.* § 50.12).



in any important respect” from CASAC’s recommendations, EPA must provide “an explanation of the reasons for such differences” (§ 307(d)(3)). The D.C. Circuit has reiterated that requirement (see *American Farm Bureau*, 559 F.3d at 521); but it has also made clear that, since the setting of NAAQS is ultimately the EPA Administrator’s decision, the Administrator may depart from CASAC’s recommendations so long as an explanation is provided, and that even the requirement to provide a scientific explanation for disagreeing with CASAC applies only to CASAC’s recommendations on **scientific** issues, not to its recommendations based on **policy** judgments, which are entitled to a lesser degree of deference. *Mississippi*, 744 F.3d at 1355-58. Further, in addition to providing advice on NAAQS, CASAC is charged with advising EPA on various other matters, including “the relative contribution to air pollution concentrations of natural as well as anthropogenic activity” and “any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance” of the NAAQS (CAA § 109(d)(2)(C)).

## **B. Historical Context**

### **1. 1997 NAAQS**

In 1997, EPA revised the primary NAAQS for ozone from a one-hour average standard of 0.12 parts per million (ppm) (with one allowable exceedance per year) to an 8-hour standard of 0.08 ppm, based on the annual 4<sup>th</sup> highest daily maximum 8-hour average concentration over a three-year period. 62 Fed. Reg. 38856 (July 18, 1997). In doing so, EPA concluded that “[t]he 8-hour averaging time is more directly associated with health effects of concern at lower O<sub>3</sub> concentrations than is the 1-hour averaging time,” and that “an 8-hour standard would limit both 1- and 8-hour exposures” (*id.* at 38861). With regard to the level of the standard, EPA first acknowledged that, as increasingly stringent standards were evaluated, including an 8-hour standard of 0.07 ppm, the estimated risks decreased for respiratory functional and symptomatic effects and for hospital admissions for respiratory causes (*id.* at 38864). EPA also acknowledged that there might be no ozone level “below which absolutely no effects are likely to occur” (*id.* at 38863). Nevertheless, EPA determined that a standard more stringent than 0.08 ppm was “not requisite to protect the public health with an adequate margin of safety” (*id.* at 38868). In support of this determination, EPA noted, among other things, that “there is no . . . bright line that differentiates between acceptable and unacceptable risks within [the] range” of 0.07 to 0.09 ppm (*id.* at 38864), and that a standard of 0.07 ppm “would be closer to peak background levels that infrequently occur in some areas due to nonanthropogenic sources of [ozone] precursors” (*id.* at 38868).

With respect to the secondary standard, EPA recognized in 1997 that it had considerable evidence on the effects of ozone on vegetation. It also acknowledged that “the available scientific information supports the conclusion that a cumulative seasonal exposure index . . . is more biologically relevant than a single event or mean index” (*id.* at 38875).

Nevertheless, the Administrator chose to set the secondary standard equal to the new 8-hour primary standard (*id.* at 38877). Specifically, the Administrator decided not to set a seasonal secondary standard due to the “substantial uncertainties” as to whether increased welfare protection would result from such a standard (*id.* at 38877-78).

The primary and secondary NAAQS promulgated in 1997 were challenged in court as both overly stringent and not stringent enough, but were ultimately upheld against those challenges. See *American Trucking Ass’ns v. EPA*, 283 F.3d 355, 378-80 (D.C. Cir. 2002), *upon remand from* 531 U.S. 457 (2001). In rejecting the challenge that the standard was not stringent enough, the D.C. Circuit held that EPA had engaged in reasoned decision-making in selecting a level of 0.08 ppm rather than 0.07 ppm. In reaching this conclusion, the court referred to EPA’s determination that a standard of 0.07 ppm was too close to background, and it stated that, “although relative proximity to peak background ozone concentrations did not, in itself, necessitate a level of 0.08, EPA could consider that factor when choosing among three alternative levels” (283 F.3d at 379).

## **2. 2008 NAAQS**

Following an extensive review, EPA issued revised primary and secondary NAAQS for ozone in 2008. 73 Fed. Reg. 16436 (March 27, 2008). In that rulemaking, EPA revised the primary standard to a level of 0.075 ppm (75 ppb), concluding that the prior standard was not requisite to protect the public health. In reaching that conclusion, EPA relied in particular on controlled human exposure (clinical) studies, which it said showed consistent evidence of respiratory effects (lung function decrements and respiratory symptoms) in healthy subjects at ozone levels of 80 ppb and above, along with two new such studies (Adams, 2002, 2006) showing such effects in some subjects at lower levels (specifically, 60 ppb), as well as an EPA statistical re-analysis of the data from one of those studies indicating that the effects shown at 60 ppb were statistically significant (see, *e.g.*, 73 Fed. Reg. at 16445, 16454-55, 16476, 16478). In addition, EPA relied on information indicating that people with asthma or other lung disease are likely to experience larger and more serious effects than healthy people (*e.g.*, *id.* at 16445, 16470, 16471, 16476). Further, EPA asserted that there was new epidemiological evidence showing significant associations of ozone exposure with a wide range of health effects, including respiratory emergency room visits and hospital admissions and premature mortality, at ozone levels at and below 80 ppb (*e.g.*, *id.* at 16446, 16471, 16476).

At the same time, although CASAC had recommended setting the primary standard in the range of 60 to 70 ppb, EPA determined that the data did not warrant adoption of such a lower standard due to the “limited” human clinical evidence of effects at lower levels and the uncertainties in the epidemiological studies regarding causal relationships between the effects reported and ozone exposures at levels below the then-current standard (*e.g.*, *id.* at 16476, 16479). Overall, EPA reached the following conclusion:

“Taking into account the uncertainties that remain in interpreting the evidence from available controlled human exposure and epidemiological studies at very low levels, the Administrator notes that the likelihood of obtaining benefits to public health with a standard set below 0.075 ppm O<sub>3</sub> decreases, while the likelihood of requiring reductions that go beyond those that are needed to protect public health increases. . . . The Administrator believes that a standard set at 0.075 ppm would be sufficient to protect public health with an adequate margin of safety, and does not believe that a lower standard is needed to provide this degree of protection.” (*Id.* at 16483.)

EPA also revised the secondary standard for ozone to be the same as the primary standard. Taking into account CASAC’s views and findings from the previous ozone NAAQS review, EPA concluded that a cumulative, seasonal standard, such as the “W126” sigmoidally weighted index, was the most “biologically relevant way to relate [ozone] exposure to plant growth response” (*id.* at 16500). Nevertheless, based on an analysis comparing the protection that would be afforded by revised primary NAAQS and the top of the range (21 ppm-hours) of proposed levels under consideration as a W126 standard, EPA determined that adopting a cumulative, seasonal standard was unnecessary due to the “significant overlap between the revised 8-hour primary standard and selected levels of the [W126] standard form being considered” (*id.*). Acknowledging that an 8-hour standard might not provide the “appropriate degree of protection” for vegetation in some areas, EPA nonetheless determined that establishing a W126 standard “would result in uncertain benefits beyond those provided by the revised primary standard” and was therefore unnecessary (*id.*). Accordingly, EPA decided to revise the existing 8-hour secondary standard by making it identical to the revised primary standard (*id.*).

### **3. EPA’s 2010 Reconsideration and Withdrawal**

In January 2010, EPA issued a notice of proposed rulemaking to reconsider the 2008 NAAQS. 75 Fed. Reg. 2938 (Jan. 19, 2010). In that notice, EPA proposed to reduce the level of the primary standard from 75 ppb to a level in the range of 60 to 70 ppb, and to establish a new secondary standard using a seasonal form. After receiving comments from the public and CASAC on that proposal, EPA ultimately withdrew that reconsideration proceeding and consolidated it with the Agency’s next statutory review.

### **4. D.C. Circuit’s Decision on 2008 NAAQS**

In July 2011, the D.C. Circuit issued a decision ruling on several challenges to the 2008 NAAQS in the *Mississippi* case. The court upheld the 2008 primary standard of 75 ppb against both arguments that it was overly stringent and arguments that it was not stringent enough. The court held that EPA reasonably determined that the previous standard of 0.08 ppm (which rounded to 84 ppb) needed to be reduced given “numerous epidemiological studies linking

health effects to exposure to ozone levels below 0.08 ppm and clinical human exposure studies finding a causal relationship between health effects and exposure to ozone levels at and below 0.08 ppm” (744 F.3d at 1345). At the same time, the court held that EPA was not required to reduce the standard below 75 ppb (0.075 ppm). In so holding, the court relied on EPA’s determination that the new human clinical evidence from the Adams studies was “too limited” to support a reduction to 60 ppb (0.06 ppm) (*id.* at 1350). It stated: “The Adams results at 0.06 ppm indicate some degree of risk that some number of individuals might continue to experience health effects at and below 0.075 ppm, but we have previously acknowledged the impossibility of eliminating all risk of health effects from ‘non-threshold’ pollutants like ozone” (*id.* at 1350-51). Further, the court explained that EPA reasonably relied on the limitations and uncertainties in the epidemiological studies with respect to whether the effects reported could be attributed to ozone levels below 75 ppb (*id.* at 1351-52). Additionally, the court found that EPA was not required to provide a scientific explanation for departing from CASAC’s recommendations since CASAC did not make clear whether its recommendations were based on science rather than policy (*id.* at 1356-58).

The court remanded the secondary standard to EPA, holding that the Agency had not satisfied the CAA’s requirements because EPA had not identified the level of protection that was “requisite to protect the public welfare” (*id.* at 1359). The court concluded that “it is insufficient for EPA merely to compare the level of protection afforded by the primary standard to possible secondary standards and find the two roughly equivalent” (*id.* at 1360-61). Instead, EPA was obligated to expressly determine the requisite level of protection and provide a rationale for that determination (*id.* at 1361). Further, the court found that EPA’s comparison between the revised 8-hour standard and a seasonal standard was insufficient to treat one as a surrogate for the other because “EPA failed to explain why it looked only at one potential seasonal standard that the primary standard would arguably protect as well as” (*id.*).

## **5. EPA’s Review of Post-2008 Information and Comments to EPA and CASAC**

During the latest review cycle (which had begun during the reconsideration discussed above), EPA staff prepared a variety of documents to inform its decision on revising the NAAQS. These documents included the Integrated Science Assessment (ISA) (EPA, 2013), the Health Risk and Exposure Assessment (HREA) (EPA, 2014a), the Welfare Risk and Exposure Assessment (WREA) (EPA, 2014b), and the Policy Assessment (PA) (EPA, 2014c). Drafts of these documents were subject to review by CASAC and the public, and the documents were finalized following those reviews.

*Health Effects Evidence.* In discussing controlled human exposure studies, the EPA staff documents relied in particular on two new studies that had been published since 2008 (see ISA at 6-11 – 6-20; PA at 3-56 – 3-59). The first was a study by Schelegle *et al.* (2009), who reported the responses of 31 healthy subjects, during and after periods of exercise, with 6.6-

hour inhalation exposure to mean ozone levels of 88, 81, 72, and 63 ppb.<sup>4</sup> These investigators reported that, at the 72 ppb exposure level, the subjects had a statistically significant decrease in lung function (mean decrease of approximately 5% in forced expiratory volume in one second [FEV<sub>1</sub>]) and an increase in subjective symptoms (mean score of approximately 13 on a severity scale of 0 to 40), but that there were no statistically significant effects at 60 ppb. The second new study was a study by Kim *et al.* (2011), who investigated the effects of 6.6-hour exposure to 60 ppb ozone on 59 healthy exercising subjects. These investigators found small but statistically significant changes in lung function and inflammatory markers, but no increase in respiratory symptoms. Additionally, EPA staff referred to exposure models based on these studies along with the prior Adams (2002, 2006) studies (see ISA at 6-17 – 6-18).

Comments on the EPA staff documents provided to CASAC explained that these new studies did not fundamentally alter the understanding of the respiratory effects of ozone based on the human clinical data, compared to the information available during the previous ozone NAAQS review. As they indicated, the previous studies, particularly those of Adams (2002, 2006), showed that these types of responses occur at ozone levels at and above 80 ppb and decrease in size and severity and in the number of individuals affected at levels down to 60 ppb, and the new studies simply confirm those conclusions. For example, comments by Jon Heuss and George Wolff to CASAC explained that “[r]ecent human clinical studies do not change what was known about ozone effects in the last review” (Heuss and Wolff, 2012, at 12), and that “[a]lthough there are now more studies of 6- to 8-hour exposures to low ozone concentrations while exercising heavily, EPA’s estimate of the dose-response curve at low concentrations has not changed appreciably” (Heuss *et al.*, 2014, at 10). No new clinical studies on the effects of ozone exposure on asthmatics or other “at-risk” individuals were identified.

The EPA staff documents also discussed the epidemiological studies that had become available since the prior review, concluding that those more recent studies largely support and strengthen EPA’s prior conclusions regarding a likely causal association between ozone exposure and respiratory effects (see, *e.g.*, ISA at 6-152, 6-165, 6-261). However, commenters demonstrated that those newer studies are subject to the same uncertainties as the prior studies regarding the ability to attribute the effects to ozone exposure, particularly at levels below the current standard (see, *e.g.*, Gradient, 2013a,b,c; Heuss and Wolff, 2012 at 19-27).

Overall, during the course of these reviews, substantial comments were submitted to EPA and CASAC pointing out the limitations and uncertainties of the available health effects information on the relevant issues, including: (a) the statistical and health significance of the lung function and symptomatic responses reported in human clinical studies at ozone levels below the current standard of 75 ppb; (b) the evidence regarding larger or more serious effects

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<sup>4</sup> The target ozone levels in this study were 87, 80, 70, and 60 ppb, respectively, but those listed in the text were the actual mean ozone exposure levels during the study,

in asthmatics and other “at-risk” individuals; (c) the consistency of the epidemiological studies and their ability to reliably attribute the morbidity and mortality effects reported to ozone levels at and below the current standard; (d) the reliability of EPA’s exposure and risk analyses in the HREA for estimating risks to the U.S. population; and (e) potential benefits of a revised standard in preventing those risks (see, e.g., Goodman and Sax, 2014a,b; Goodman *et al.*, 2013a; American Chemistry Council *et al.*, 2014; Gradient, 2013a,b,c; Heuss and Wolff, 2012; Heuss *et al.*, 2014).

*Welfare Effects Evidence.* With respect to the secondary standard, the ISA identified new studies that EPA said enhanced its understanding of ozone welfare effects. For instance, the ISA identified a 2009 meta-analysis, Wittig *et al.* (2009), as providing important new information on ozone impacts on root biomass and root:shoot ratio (ISA at 9-42 to 9-45). Comments on the ISA, however, pointed out that Wittig *et al.* relied on studies that made use of highly unreliable models to establish pre-industrial ozone concentrations (see UARG, 2012, at 7). The ISA also addressed new scientific information related to crop yield loss (ISA at 9-57 to 9-67), although commenters pointed out that there is no information on how to account for agricultural management and competing agricultural policies in devising a secondary NAAQS to address this welfare effect (UARG, 2012, at 9). In addition, the ISA reviewed new research addressing broader ecosystem effects of ozone but acknowledged that most of the new studies merely confirmed what was already known at the time of the previous review (ISA at 9-67 to 9-98). The ISA did place significant emphasis on a study by Grulke *et al.* (2008) linking ozone concentrations and increased forest susceptibility to wildfire (ISA at 9-88). Commenters pointed out, however, that Grulke *et al.* (2008) did not show a statistical correlation between ozone and wildfires and that numerous confounders, such as drought and insect infestations, were not controlled for (UARG, 2012, at 8).

EPA’s WREA included several quantitative analyses related to the key welfare effects that EPA chose to evaluate. With respect to relative biomass loss (RBL) in trees, a key effect in this review of the secondary standard, EPA calculated exposure-response functions based on seedling RBL values and then extrapolated those values to RBL estimates for mature trees (WREA at 6-4 to 6-6). Commenters on the WREA explained that the exposure-response functions were highly uncertain due to limitations in EPA’s W126 estimates, both because of the limited number of tree species studied and because of problems inherent in extrapolating effects from seedlings to trees at other developmental stages (Gradient, 2014, at 7, 13-16). The WREA also included a national scale assessment for tree RBL using a 2% RBL benchmark recommended by CASAC (WREA at 7-19 to 7-34). Commenters explained, however, that there was no justification for the 2% benchmark (Gradient, 2014, at 16).

The WREA included additional analyses related to visible foliar injury effects of ozone, including a screening assessment of impacts at 214 national parks and a case study

assessment of three national parks in an attempt to quantify the value of mitigating foliar injury (WREA at 7-34 to 7-58). Comments on these analyses pointed out that the screening-level assessment had significant uncertainties because none of the available studies linking ozone exposures to foliar injury used or reported the W126 metric (Gradient, 2014, at 10). With respect to the case studies, EPA itself acknowledged that it was unable to quantify “the monetary value of the [relevant] services given the data and methodology limitations inherent in such an effort” (WREA at 7-34).

In the PA, EPA staff concluded that there was a basis for finding the current secondary standard inadequate and recommended that the Administrator consider revising the secondary ozone standard to a W126 form set at a level ranging from 17 ppm-hrs to 7 ppm-hrs (PA at 6-57 to 6-58). In addition to addressing scientific issues, comments on the PA explained that the PA did not provide an adequate basis for determining that the observed or projected welfare impacts were adverse (UARG, 2014, at 43-44). Commenters also noted that the record supported a finding that the current 75 ppb secondary standard would provide welfare protection consistent with the range of W126 values that the staff recommended for consideration (Gradient, 2014, at 3-6).

*Background Ozone Concentrations.* In addition to the forgoing issues, the EPA staff documents contained discussions of “background” ozone concentrations and various ways to account for such background. In its prior review in 2007, EPA introduced the term Policy Relevant Background (PRB), which was defined as ozone concentrations in the U.S. in the absence of anthropogenic emissions of precursor pollutants – i.e., volatile organic compounds (VOCs), nitrogen oxides (NO<sub>x</sub>), methane (CH<sub>4</sub>), and carbon monoxide (CO) – from sources in the U.S., Canada, and Mexico; and it attempted to model such concentrations. In initial drafts of the ISA, the EPA staff continued to follow that approach, based on the erroneous assumption that emissions from sources in Canada and Mexico could be controlled by treaties or international agreements for purposes of NAAQS implementation. In the final ISA and PA, EPA included three definitions of background: (1) natural background, consisting of concentrations that would exist in the absence of any anthropogenic emissions of precursor pollutants; (2) North American background, consisting of concentrations that would exist in the absence of anthropogenic precursor emissions from North America; and (3) U.S. background (USB), consisting of concentrations that would exist in the absence of anthropogenic emissions from sources in the U.S. For the reasons discussed above, only USB constitutes true background for purposes of evaluating the implications for setting NAAQS, since only U.S. sources are subject to regulation under the SIPs. However, during the reviews of the EPA staff documents, several commenters pointed out that EPA had still not adequately determined USB, was underestimating USB concentrations, and was still not properly taking into account the impact of USB on projected attainment of the ozone NAAQS (see, e.g., Wolff *et al.*, 2014; Lefohn and



Oltmans, 2012, 2014 [the latter showing that a large percentage of the risks calculated by EPA is associated with ozone concentrations in the background range]; Kaiser, 2014).

*Other Issues.* Finally, in the course of these reviews, many of the Associations urged CASAC to comply with its statutory obligation to provide advice to EPA on any adverse social, economic, and energy effects from efforts to attain revised ozone NAAQS, as required by CAA § 109(d)(2)(C) (see, e.g., Air-Conditioning, Heating, and Refrigeration Institute *et al.*, 2014). However, CASAC did not do so.

### **C. EPA's Proposed Rule**

In its December 2014 proposal, EPA proposes to retain the indicator, averaging time, and form of the current 8-hour primary standard, but to reduce the level of the standard to a level within the range of 65 to 70 ppb, although it also asks for comment on reducing the standard further to 60 ppb and on the option of retaining the current standard of 75 ppb (79 Fed. Reg. 75234, 75236). In addition, EPA proposes to reduce the level of the secondary standard by making it the same as the revised primary standard, although it also asks for comment on setting a separate secondary standard using the seasonal W126 form (*id.* at 75237). In its proposal, EPA itself acknowledges the uncertainties in the interpretation of the scientific data, as discussed below.

#### **1. Statements on Level of Primary Standard**

To support the proposed change in the level of the primary standard, EPA relies most heavily on the controlled human exposure studies which it says showed adverse respiratory effects in healthy subjects at ozone levels “as low as 72 ppb” (*id.* at 75288, 75288-89, 75291, 75304). Specifically, EPA relies on the Schelegle *et al.* (2009) study, discussed above, which reported a statistically significant group mean decrease in FEV<sub>1</sub> and an increase in subjective symptoms at the 72 ppb exposure level. EPA asserts in several places that the responses observed in the Schelegle *et al.* study meet the criteria for adverse health effects (*id.* at 75288, 75289, 75304). However, these assertions must be referring to responses of individual study subjects, since EPA does not claim that transitory FEV<sub>1</sub> decrements less than 10% (such as the mean change of ~ 5% identified in this study) are adverse. Indeed, only six of the 31 subjects in this study exhibited an FEV<sub>1</sub> decrement equal to or greater than 10%. Moreover, in this study, individuals that exhibited FEV<sub>1</sub> decrements in response to 72 ppb ozone were not always the same individuals that reported the respiratory symptoms, making the results of this study confusing at best. Further, the Agency states that, for healthy people, including children, FEV<sub>1</sub> decrements between 10% and 20% and/or moderate symptomatic responses “would likely interfere with normal activity for relatively few sensitive individuals” (*id.* at 75263).



EPA also continues to assert, as it did in 2008, that “at-risk” individuals, such as children and people with asthma, could experience larger and/or more serious effects at the same levels (*id.*, 75263, 75280, 75288). However, it recognizes that there are no direct data to support that claim since “the controlled human exposure studies that provided the basis for health benchmark comparisons have not evaluated at-risk populations” (*id.* at 75273).

EPA further relies on single-city epidemiological studies that reported associations of ozone with respiratory effects in cities where EPA believes that the current standard would have been met (*id.* at 75289, 75291, 75307). In particular, it cites a study in Seattle by Mar and Koenig (2009), who reported associations of ozone levels with respiratory emergency department visits for asthma in a location that EPA says would likely have met the current standard of 75 ppb but would not have met a standard of 70 ppm (*id.* at 75280, 75289, 75307). At the same time, EPA recognizes that epidemiological studies are subject to a general uncertainty in determining “the extent to which reported health effects are caused by exposures to O<sub>3</sub> itself, as opposed to other factors such as co-occurring pollutants or pollutant mixtures,” and that “this uncertainty becomes an increasingly important consideration as health effect associations are evaluated at lower ambient O<sub>3</sub> concentrations” (*id.* at 75282). Further, EPA notes specifically that the extent to which the reported ozone-associated emergency department visits in the Seattle study could have been reduced by a standard at or below 70 ppb is uncertain (*id.* at 75307).

EPA places supporting, but less, weight on the multi-city epidemiological studies (*id.* at 75280-81, 75289, 75291, 75307-08). However, the Agency recognizes “important uncertainties” in reliance on these studies – *e.g.*, uncertainties stemming from the heterogeneity in effect estimates among locations, uncertainties in linking multi-city effect estimates (aggregated across multiple cities) to ozone levels below the current standard, uncertainties in identifying concentration-response relationships, etc. (*id.* at 75282, 75307). EPA also acknowledges that the long-term studies of respiratory effects, including mortality, were not conducted in locations that would have met the current standard and have not reported concentration-response relationships that indicate confidence in health effects associated with ozone concentrations meeting the current standard (*id.* at 75282).

EPA relies further on the modeled risk estimates derived from its HREA (*id.* at 75289-91). Again, the Agency relies primarily on risk estimates derived from the controlled human exposure studies and gives less weight to risk estimates derived from epidemiological studies due to substantial uncertainties about those estimates. Specifically, EPA recognizes numerous “key uncertainties” in the epidemiologic-based risk estimates, including “the heterogeneity in effect estimates between locations, the potential for exposure measurement errors, and the uncertainty in the interpretation of the shape of the concentration-response functions for O<sub>3</sub> concentrations in the lower portions of ambient distributions” (*id.* at 75289 & 75303; see also *id.*

at 75277-79). As an example of the last of these, EPA recognizes that “lower confidence” should be placed in the HREA’s estimates of respiratory mortality from long-term ozone exposure, which are based on a study by Jerrett *et al.* (2009), due to the uncertainties in that study about the attribution of the effects to any particular concentration of ozone (*id.* at 75277, 75300). It should also be noted that EPA’s HREA evaluates exposures and risks from all sources, including natural sources and non-U.S. anthropogenic sources as well as U.S. anthropogenic sources, and thus does not characterize the exposures and risks that could be addressed by a change in the NAAQS.

In its proposal, EPA rejects the need to set a primary standard at a level below 65 ppb. In this regard, EPA notes that, at levels below 72 ppb, “the combination of statistically significant increases in respiratory symptoms and decrements in lung function has not been reported,” citing the findings of Adams (2006), Schelegle *et al.* (2009), and Kim *et al.* (2011) of no statistically significant increases in symptoms at 60 and 63 ppb (*id.* at 75304). The proposal thus states that “[t]he Administrator has decreasing confidence that adverse effects will occur following exposures to O<sub>3</sub> concentrations below 72 ppb” (*id.*). EPA states further that a standard below 65 ppb would not be warranted “given the uncertainties associated with the adversity of exposures to 60 ppb O<sub>3</sub>, particularly single occurrence of such exposures; uncertainties associated with air quality analyses in locations of multicity epidemiologic studies; and uncertainties in epidemiology-based risk estimates, particularly uncertainties in the shape of the concentration-response functions at lower O<sub>3</sub> concentrations and uncertainties associated with the heterogeneity in O<sub>3</sub> effect estimates across locations” (*id.* at 75309).

## **2. Statements on Secondary Standard**

As stated above, EPA is proposing to revise the secondary ozone standard to be the same as the revised primary standard. Its basis for this proposal is the proposed determination that air quality providing exposures within the range of 13 ppm-hours to 17 ppm-hours would be “requisite to protect the public welfare” and that an 8-hour standard set at the level of 70 ppb would achieve such air quality. Accordingly, EPA’s proposed rule is composed of statements made in support of its proposed W126 range of protective air quality and its assessment of equivalency between that range of air quality and an 8-hour standard in a traditional NAAQS form.

To support its proposed determination that a 13 ppm-hour to 17 ppm-hour range is requisite to protect public welfare, EPA cites three categories of welfare effects: (1) impacts on tree growth, productivity, and carbon storage; (2) crop yield loss; and (3) visible foliar injury (*id.* at 75315). With respect to all three categories, the proposed rule acknowledges that the current body of scientific evidence confirms prior conclusions and that no major scientific advances have occurred that have altered fundamental knowledge with respect to these effects (79 Fed. Reg. at 75314, 75316, 75317, 75319).

The proposed rule relies in particular on relative biomass loss (RBL) in trees to support the proposed revision to the secondary NAAQS (*id.* at 75335). The exposure-response functions developed from studies of 11 species of tree seedlings are the centerpiece of this area of the science (*id.* at 75318). The proposed rule acknowledges key limitations in the exposure-response functions – namely, that they are derived from a limited number of studies (and in some cases only a single study) per species (*id.* at 75318), that effects on seedlings are not equal to effects on mature trees (*id.* at 75339), and that they are based on studies of less than 0.8% of tree species in the United States and may not be representative of sensitivity in other species (*id.* at 73256). The proposed rule also points to assessments in the WREA indicating that, under the current secondary standard, only approximately 0.2% of the country would experience 2% RBL; and it recognizes that another WREA study indicated that, in most counties where a species experienced a 2% RBL during air quality conditions that meet the current standard, that effect was found only for a single, sensitive species (*id.* at 75324). Most importantly, in the proposed rule, EPA acknowledges that the 2% RBL benchmark it had previously relied upon was actually based on “no explicit rationale” (*id.* at 75321); and it proposes to conclude that a 6% RBL benchmark is a more reliable measure by which to judge adverse RBL effects (*id.* at 75349).

The proposed rule also describes the science characterizing crop yield loss and visible foliar injury. As to crop yield loss, however, EPA states that “agricultural crops do not have same need for additional protection from the NAAQS as forested ecosystems and, while research on agricultural crop species remains useful in illuminating mechanisms of action and physiological processes, information from this sector on O<sub>3</sub>-induced effects is considered less useful in informing judgments on what level(s) would be sufficient but not more than necessary to protect the public welfare” (*id.* at 75348). With respect to visible foliar injury, the proposed rule notes that there are likely to be only minimal effects at air quality levels meeting the current secondary standard (*id.* at 75328), and that there is little scientific information and no guidance from federal land managers to help make reliable determinations as to what constitutes adverse visible foliar injury effects (*id.* at 75316, 75334). Accordingly, EPA places less emphasis on these welfare effects in its proposed determination that a range of 13 ppm-hours to 17 ppm-hours would be requisite to protect the public welfare.

The proposed rule relies on an assessment included in the rulemaking docket entitled “Comparison of Ozone Metrics Considered in the Current NAAQS Review” (Wells, 2014), referred to herein as the Metrics Comparison Memorandum, to establish that its proposed secondary 8-hour NAAQS is justified. That assessment reviews air quality data from 2001 to 2003 and 2011 to 2013 and concludes that, in general, W126 and 4th highest daily maximum 8-hour ozone concentrations are both decreasing over time. The proposed rule also notes that all areas that would meet a 70 ppb standard would achieve protection consistent with EPA’s

proposed range of 13 ppm-hours to 17 ppm-hours as the level at which adverse effects to public welfare would be anticipated.<sup>5</sup>

### 3. **Statements on Background Sources of Ozone**

In the proposal, EPA identifies several types of background ozone sources that can increase ambient ozone concentrations and contribute to exceedances of the ozone NAAQS. These background sources include international transport, stratospheric ozone intrusions, and ozone originating from natural sources such as wildfires (79 Fed. Reg. at 75342). EPA also acknowledges that it can account for background concentrations when setting NAAQS. Citing *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1156 n.1 (D.C. Cir. 1980), and *Mississippi*, 744 F.3d at 1351, EPA asserts that “[t]he CAA does not require the Administrator to establish a primary NAAQS at a zero-risk level or at background concentrations” (79 Fed. Reg. at 75238). EPA also recognizes, based on the court’s 2002 decision in *American Trucking Ass’ns* (283 F.3d at 37), that “EPA may consider proximity to background levels as a factor in the decision whether and how to revise the NAAQS when considering levels within the range of reasonable values” (*id.* at 75242), as it did in setting the 1997 NAAQS.

Nevertheless, EPA has proposed to revise the ozone standards to levels where compliance will likely be significantly more difficult – if not impossible – in many areas due to background ozone concentrations from sources other than U.S. anthropogenic sources. Despite asserting that “U.S. anthropogenic emissions sources are the dominant contributor to the majority of modeled O<sub>3</sub> exceedances of the NAAQS across the U.S.” (*id.* at 75382), EPA acknowledges that its own modeling showed that “there can be events where O<sub>3</sub> levels approach or exceed the concentration levels being proposed in this notice (i.e., 60-70 ppb) in large part due to background sources” (*id.*). In fact, EPA acknowledges that “there can be episodic events with substantial background contributions where O<sub>3</sub> concentrations approach or exceed the level of the **current** NAAQS (i.e., 75 ppb)” (*id.* at 75242; emphasis added). However, EPA dismisses the concern that areas could be at risk of a nonattainment classification based on background ozone concentrations. See *id.* at 75382 (“In most locations in the U.S., these events are relatively infrequent and the CAA contains provisions that can be used to help deal with certain events, including providing varying degrees of regulatory relief for air agencies and potential regulated entities.”); see also *id.* at 75383-85 (describing options for regulatory relief). As discussed in Section III.C below, these conclusions are erroneous and unjustified.

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<sup>5</sup> In fact, as discussed in Section III.G below, EPA's own air quality analyses show that meeting the current 75 ppb standard would also reduce W126 concentrations generally within the range recommended by EPA (13-17 ppm-hrs), except at a few monitors in the Southwest and West, where modeled predictions have significant uncertainties.

#### **4. Regulatory Impact Analysis**

In connection with its proposed rule, EPA prepared a Regulatory Impact Analysis (RIA) pursuant to Executive Order 12866 (EPA, 2014d). In the RIA, EPA estimated the potential costs and benefits of revising the ozone NAAQS to 70, 65, and 60 ppb. In each case, EPA concluded that the benefits of the revision would outweigh the costs of complying with the revised standard.

Rather than attempting to evaluate the costs associated with implementation of the revisions to the ozone NAAQS over time, EPA focused solely on the costs associated with a 2025 baseline year (RIA at ES-1-2). To determine what the baseline ambient ozone concentrations would be in 2025, EPA projected an emissions scenario that incorporated future reductions in ozone concentrations from implementation of the Mercury Air Toxics Rule (MATS), the Clean Air Interstate Rule (CAIR), the Tier 3 Motor Vehicle Emission and Fuel Standards, the proposed Section 111(d) Clean Power Plan, and full attainment of the current 75 ppb ozone NAAQS (*id.* at ES-1 to ES-2). EPA selected 2025 for this snapshot of projected costs “because most areas of the U.S. will likely be required to meet a revised ozone standard by 2025” (*id.*). EPA acknowledged, however, that nonattainment areas classified as marginal or moderate would likely have to demonstrate attainment prior to 2025, and in some cases could be as early as 2020 (*id.*). EPA adopted a later baseline for California based on the fact that most regions of the State would be given substantially later attainment deadlines in response to higher ambient ozone concentrations.

After modeling baseline ozone concentrations in 2025, EPA then estimated the degree of emission reductions that would be required to attain the proposed ozone NAAQS of 70, 65, and 60 ppb. EPA first evaluated emission reductions from “known controls,” which “are based on information available at the time of this analysis and include primarily end-of-pipe control technologies” (*id.* at ES-6). Costs for known controls were based on EPA’s Cost Strategy Tool (CoST). Where additional controls were needed, EPA then applied “unknown controls,” for which it estimated an average cost of \$15,000 per ton. With respect to the costs of these unknown controls, EPA also performed a sensitivity test with costs of \$10,000 per ton and \$20,000 per ton. Significantly, EPA conducted its cost analysis on a coordinated regional basis to identify least-cost opportunities to reduce ambient ozone concentrations, even if emissions reductions necessary for a state to attain the NAAQS took place in neighboring states.

With respect to benefits, EPA relied on the same 2025 baseline year and evaluated health benefits associated with reduced ozone and PM<sub>2.5</sub> concentrations as well as some welfare-related benefits. EPA applied a “damage-function” approach to calculating ozone-reduction benefits (*id.* at ES-10). EPA explained that “[t]his approach estimates changes in individual health endpoints ... and assigned values to those changes assuming independence of the values for individual endpoints. Total benefits are calculated as the sum of the values for

all non-overlapping health endpoints” (*id.*). For PM<sub>2.5</sub> co-benefits, EPA applied a benefit-per-ton approach based on prior analyses EPA completed for other regulatory actions (*id.* at ES-11). EPA did not attempt to monetize benefits from reductions in other co-pollutants (*id.* at ES-11-12). With respect to welfare co-benefits, EPA focused on a subset of benefits associated with the agriculture and forestry sectors (*id.* at ES-12). EPA recognized that ozone-related improvements are not a primary driver of the cost-benefit analysis, since it stated that “PM<sub>2.5</sub> co-benefits account for approximately two-thirds to three-quarters of the estimated benefits” (*id.* at ES-13).

Overall, EPA’s analysis produced net benefits for each proposed standard. Table ES-6 from the RIA (copied below) shows EPA’s projected costs and benefits of reducing the ozone NAAQS (excluding California):

**Table ES-6. Total Annual Costs and Benefits<sup>a</sup> for U.S., except California in 2025 (billions of 2011\$, 7% Discount Rate)<sup>b</sup>**

	Proposed Alternative Standard Levels		Alternative Standard Level
	70 ppb	65 ppb	60 ppb
<b>Total Costs (7%)</b>	\$3.9	\$15	\$39
<b>Total Health Benefits (7%)<sup>c</sup></b>	\$6.4 to \$13.0	\$19 to \$38	\$34 to \$70
<b>Net Benefits (7%)</b>	\$2.5 to \$9.1	\$4 to \$23	(\$5) to \$31

<sup>a</sup> Benefits are nationwide benefits of attainment everywhere except California.

<sup>b</sup> EPA believes that providing comparisons of social costs and social benefits at 3 and 7 percent is appropriate. Estimating multiple years of costs and benefits is not possible for this RIA due to data and resource limitations. As a result, we provide a snapshot of costs and benefits in 2025, using the best available information to approximate social costs and social benefits recognizing uncertainties and limitations in those estimates.

<sup>c</sup> The benefits range reflects the LOW and UPPER core estimates of short-term ozone and long-term PM mortality.

As discussed in Section IV of these comments, EPA’s RIA substantially underestimates the costs and overestimates the benefits of the proposed rule.

#### **D. Current Status**

As EPA acknowledges in its ISA, ground-level ozone has steadily declined over the past decade. The ISA states that “[t]he median annual 4<sup>th</sup>-highest 8-h daily max dropped from 88 ppb in 1998 to 71 ppb in 2010” (ISA at 3-120). Reductions have been widespread, with more than 80% of monitoring sites reporting a reduction of at least 6 ppb between 2003 and 2010 (*id.* at 3-124). Furthermore, the reductions have occurred in both attainment and nonattainment areas (*id.* at 3-137). Thus, the data compiled by EPA in preparation for this rulemaking demonstrate that ambient ozone levels have decreased substantially.

Although these changes have been achieved at significant cost to industry and the American public, they have occurred largely in the absence of a focused effort to achieve compliance with the 2008 revision of the ozone NAAQS to 75 ppb. While the revised standard was promulgated seven years ago, implementation by the states was delayed significantly for

the following reason: Following promulgation of the 2008 revised standard, EPA announced, on September 16, 2009, that it would commence a rulemaking to reconsider the revised 2008 ozone NAAQS.<sup>6</sup> As a result, “states were given the impression that if the NAAQS were revised as a result of the reconsideration, the 3-year deadline [to submit infrastructure SIPs] would be reset.” 78 Fed. Reg. 34178, 34183 (June 6, 2013). Because many states relied on EPA’s reconsideration process (see Section II.B.3) and did not submit timely infrastructure SIPs, EPA was forced by court order to find that 28 States, the District of Columbia, and Puerto Rico failed to make timely SIP submissions. 78 Fed. Reg. 2882 (Jan. 15, 2013). This finding established a 24-month deadline for EPA to establish federal implementation plans unless the states submitted approvable infrastructure SIPs before the February 14, 2015 deadline. Thus, as a result of EPA’s action to reconsider the 2008 ozone NAAQS, development of SIPs was significantly delayed and many states are still in the process of preparing and implementing infrastructure SIPs to comply with the revised 2008 standard.

Furthermore, EPA postponed designating areas as attainment, nonattainment, or unclassifiable for the 2008 NAAQS until more than four years after that standard was promulgated. 77 Fed. Reg. 30088 (May 21, 2012); 77 Fed. Reg. 34221 (June 11, 2012). States are only beginning to implement the reduction in the 8-hour ozone NAAQS from 84 ppb (0.08 ppm) to 75 ppb. Indeed, EPA’s rule explaining its requirements for SIPs for areas that were designated nonattainment for the current standard was not published in the *Federal Register* until March 6, 2015. 80 Fed. Reg. 12263.

Completion of the development and implementation of SIPs to meet the current standard is continuing to require the expenditure of significant resources by federal, state, and local regulators and regulated entities. It is expected that such implementation would result in further reductions in ambient ozone levels. However, EPA is proposing to reduce the standard further before that task is completed.

## **E. Impacts of EPA’s Proposed Rule**

If finalized, the proposed revisions to the ozone NAAQS will have significant adverse impacts on members of the Associations, their customers, the communities and states in which they operate, and the overall U.S. economy. The Associations’ members emit ozone precursors that are the subject of regulation under the Act, notably NO<sub>x</sub> and VOCs, and thus will be directly impacted by any revision to the ozone NAAQS. Promulgation of a revised NAAQS triggers requirements for state, local, and tribal entities to adopt new NAAQS in their jurisdictions and to develop NAAQS-specific SIPs to plan for the achievement and maintenance of the revised

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<sup>6</sup> See EPA, Press Release, EPA Announced it Will Reconsider National Smog Standards (Sept. 16, 2009), available at <http://yosemite.epa.gov/opa/admpress.nsf/0/85F90B7711ACB0C88525763300617D0D>.



NAAQS. See CAA. §§ 110(a)(2) (infrastructure SIPs), 172(c) (general requirements for nonattainment area SIPs), 182 (specific requirements applicable to SIPs for ozone nonattainment areas). States and other entities preparing SIPs do not have discretion to target air quality values that are less stringent than the NAAQS adopted by EPA. As a result, revising the NAAQS will require states and local communities to commit significant resources to develop new SIPs and these SIPs will ultimately subject the Associations' members to costly and more stringent emissions controls.

Although ambient ozone concentrations continue to decrease, a significant number of air quality control regions will be unable to attain the proposed NAAQS unless states mandate additional reductions in emissions of ozone precursors beyond those included in SIPs designed to attain the current NAAQS of 75 ppb. For example, Figure 1 (presented above) shows areas that are currently designated nonattainment under the current NAAQS (top panel) and those that would be projected to be designated as nonattainment areas under a revised standard of 65 ppb based on data for 2011 through 2013 (bottom panel). This figure illustrates the massive increase in nonattainment areas nationwide that would result from such a reduced standard. Further, an analysis by the Baton Rouge Area Chamber (copy attached as [Attachment A](#)) shows that, of the nation's top 20 metropolitan area economies, as ranked by the Brookings Institution's assessment of performance through recession and recovery, 15 would be classified as nonattainment for a 70 ppb standard and 18 of the 20 would be classified as nonattainment for a 65 ppb standard (compared to 8 for the current standard).

EPA's own RIA projects that significant emissions reductions beyond the baseline case will be required to attain the proposed NAAQS. The RIA's projections (including California) indicate that a NAAQS of 70 ppb would require NO<sub>x</sub> emission reductions of approximately 700,000 tons/year and VOC emission reductions of approximately 55,000 tons/year, and that a NAAQS of 65 ppb would require NO<sub>x</sub> emission reductions of nearly 2,000,000 tons/year and VOC emission reductions of approximately 106,000 tons/year (RIA at ES-8 to ES-10). In fact, the required emissions reductions and associated costs would likely be even greater than EPA's projections. This is demonstrated by two recent studies conducted by NERA Economic Consulting (NERA) – one evaluating the economic impacts of a 65 ppb NAAQS for ozone (NERA Impacts Report, copy attached as [Attachment B](#)) and the other presenting a review of the RIA's cost estimates (NERA RIA Review, copy attached as [Attachment C](#)). These studies demonstrate that the RIA significantly underestimates the incremental reduction in emissions of ozone precursors that will be required if EPA revises the ozone NAAQS and significantly underestimates the per-ton costs of reducing emissions of ozone precursors. See also Section IV.A below. As a result, the emission reduction and cost burdens imposed on U.S. businesses will be even greater than what EPA estimates.



EPA acknowledges that existing emission control technologies will not be sufficient to achieve the proposed NAAQS, and that states, along with the regulated community, will instead have to rely on what EPA refers to as “unknown controls” to further reduce ambient ozone levels to achieve attainment with the proposed NAAQS. See RIA at ES-6 & 7-10. The RIA itself estimates that, for a 65 ppb standard, unknown controls represent over 40 percent of the total emissions reductions projected by EPA (*id.* at 4-22 to 2-23, Tables 4-10 & 4-11), but comprise more than 70 percent of the costs of compliance (see NERA RIA Review at 14-15). In fact, as shown by the NERA Impacts Report, achievement of such a standard will require greater reliance on unknown controls than projected in the RIA. For example, that report estimates that over 60 percent of the emissions reductions to achieve a 65 ppb standard would need to come from unknown controls. Since these controls are not known, their technological feasibility and costs are likewise unknown, and the proposed rule could thus lead to the early closure of plants and the early scrapping of equipment. For example, in California, some air quality management districts have completely exhausted cost-effective control technologies for reducing ozone precursors and thus have none left to require.

Moreover, reliance on these unknown emission control technologies could have serious regulatory repercussions. Under the CAA, the ability to rely on unknown new or improved technologies is limited to “extreme” nonattainment areas (§ 182(e)(5)). The SIPs for other nonattainment areas (i.e., moderate, serious, and severe nonattainment areas) must specify how the NAAQS will be achieved (§§ 182(b), (c), (d)). Thus, if a state is forced to rely on unknown controls to reduce ambient ozone concentrations to achieve the revised standard in such areas, EPA may disapprove the SIP and promulgate a federal implementation plan (FIP) under § 110(c) (or be sued to compel such action), and could impose sanctions under § 179(b), which can include an increase in the ratio for emissions offsets and/or a cutoff of federal funds for highway projects. The imposition of such sanctions would have severe adverse impacts for regulated entities and/or local communities. Alternatively, if the state were to reclassify the area to extreme nonattainment, that designation would result in the imposition of the more stringent requirements applicable in such areas (described below), with the associated negative consequences for regulated businesses.

In short, the need to rely on yet-undefined controls to achieve the proposed revised standards will further increase the costs and further undermine the technological feasibility of achieving the proposed standards.

In addition, as discussed in Sections II.C.4 and III.C.1, EPA’s proposed NAAQS may be at or below background ozone levels for some air quality control regions, meaning that no amount of technological innovation will allow those regions to reach attainment status. Any facilities located in such areas will likely face even more severe burdens as states are forced, however futilely, to reduce emissions as far as possible.

Furthermore, the burdens on the Associations' members and other businesses will not be limited to those imposed by the states in future SIP revisions. Once a revised standard is finalized and EPA makes new attainment designations, the Associations' members and other members of the regulated community will be subject to more stringent obligations under the New Source Review (NSR) program. First, for new and modified sources in areas designated as attainment or unclassifiable – either before or after new attainment designations are made – granting of a Prevention of Significant Deterioration (PSD) permit will be dependent on a showing that emissions from the new or modified facility “will not cause, or contribute to, air pollution in excess of” the revised ozone NAAQS. See CAA § 165(a)(3). A revised NAAQS will make that showing more difficult. Second, for new and modified sources in regions that are designated as nonattainment as a result of the revised ozone NAAQS (which, as shown above, will be greatly expanded over current nonattainment areas), NSR obligations become much more onerous. Under the Nonattainment New Source Review (NNSR) permitting program, new and reconstructed facilities must install emission controls that incorporate the Lowest Achievable Emission Rate (LAER) as opposed to the less stringent Best Available Control Technology (BACT) requirement applicable to PSD permits. In addition, new and modified sources subject to NNSR are required to obtain emissions offsets at a greater than 1:1 ratio from other facilities in the region to ensure that ambient ozone concentrations will not increase as a result of the project. These more stringent NNSR requirements will impose significant burdens on the Associations' members and could stymie economic growth in nonattainment areas by discouraging the location of new businesses and restricting the growth of existing businesses in those areas.

Overall, the economic impact of the proposed revisions to the ozone standard will be unprecedented. The NERA Impacts Report estimates, for example, that over the period from 2017 through 2040, a standard of 65 ppb could cost almost \$1.1 trillion (present value), reduce the U.S. GDP by an average of about \$140 billion per year or a total of about \$1.7 trillion, result in a loss of approximately 1.4 million job equivalents, and reduce the average U.S. household consumption by about \$830 per year. All sectors of the economy would be affected by a reduced standard, both directly through increased emission control costs and/or plant closures and indirectly through potential impacts on the affected entities' customers and/or suppliers. Tables S-9 and S-10 of the NERA Impacts Report present the estimated changes in output for various sectors of the economy.<sup>7</sup>

Finally, contrary to EPA's assertion in the proposed rule, revising the ozone NAAQS will have a significant effect on energy supply, distribution, and use. EPA claims in the proposed

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<sup>7</sup> In addition, the solid waste management industry notes that landfills facing cost-prohibitive advanced control equipment requirements will turn to flaring of biogas instead of beneficially using the landfill gas as a source of energy. This will increase overall emissions because equivalent energy generation from fossil fuels will no longer be avoided.

rule that revising the ozone NAAQS “is not a significant energy action” under Executive Order 13221 because emissions reduction strategies “will be developed by states on a case-by-case, basis and the EPA cannot predict whether the control options selected by states will include regulations on energy suppliers, distributors, or users.” 79 Fed. Reg. at 75386. This assertion cannot be squared with EPA’s own estimate in the RIA that, to attain a NAAQS of 65 ppb for example, Electric Generating Units (EGUs) would have to reduce NOx emissions by more than 200,000 tons/year RIA at ES-8, Table ES-2). Given the significant across-the-board emission reductions that EPA identifies in the RIA, it is inconceivable that the states could all achieve a revised ozone NAAQS without imposing some additional emission reduction obligations on EGUs. The NERA Impacts Report points out (at S-12 to S-13) that a 65 ppb standard would impact U.S. energy sectors, largely because it would lead to the premature retirement of many coal-fired EGUs, and could cause the average residential cost of electricity to rise by an average of 1.7% per year through 2040 compared to what it would otherwise be without such a standard. Thus, it is disingenuous for EPA to assert that it is State SIPs – not the revised NAAQS – that will affect energy supply, distribution, and use, when EPA leaves the states no choice but to do so.

### **III. DEFICIENCIES IN EPA’S PROPOSAL**

#### **A. Legal Standard**

Section 307(d)(9) of the Act establishes the standard by which EPA’s decisions on NAAQS will be reviewed in the courts – a standard which is similar to that provided in the Administrative Procedure Act (5 U.S.C § 706). Under that provision of the Act, an EPA decision on a NAAQS revision is subject to reversal by the reviewing court if, among other things, it is: “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”; or “(C) in excess of statutory jurisdiction, authority, or limitations.” To survive judicial review, an agency must “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Further expanding on this standard, the Supreme Court has held that “an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.*

Applying this standard, courts have vacated agency actions that failed to consider all of the relevant factors that could influence the agency’s ultimate decision. For example, in *Motor Vehicle Mfrs. Ass’n*, the Court considered the National Highway Traffic Safety Administration’s

decision to rescind a regulation requiring passive occupant restraint systems, which consisted of seat belts or airbags. *Id.* at 37. While the agency sought to justify rescission based solely on the asserted ineffectiveness of seat belts, the Court vacated the agency's decision, holding that "the mandatory passive-restraint rule may not be abandoned without any consideration whatsoever of an airbags-only requirement." *Id.* at 51. Likewise, in a case involving control of hazardous air pollutants under Section 112, the D.C. Circuit vacated an EPA standard for brick and ceramic kilns for failure to consider a full range of factors affecting emissions when setting so-called MACT floors. *Sierra Club v. EPA*, 479 F.3d 875, 883 (D.C. Cir. 2007). In that case, EPA had limited its analysis to technology-based emissions controls and failed to evaluate the role of "non-technology factors [that] affect emission levels." *Id.* See also *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1145 (D.C. Cir. 2005) (setting aside an agency rule on training for commercial vehicle drivers for failure to consider key study); *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004) (setting aside an agency rule limiting the driving time and work of commercial vehicle operators for failure to consider the impact of the rule on the health of drivers, as required by the statute). As these cases demonstrate, an agency cannot pick and choose from among relevant factors when deciding whether to revise an existing regulation. It must consider the full range of factors that are relevant to the decision, either as a result of statutory obligations or previous regulatory actions. A myopic approach that focuses solely on the factors that support an agency's proposed course of action while ignoring countervailing factors will be vacated.

Nor is it sufficient for an agency to privately consider these factors; it must justify its decision in the administrative record so that both the courts and the general public can be assured that the agency considered all of the relevant factors and provided a rational basis for its ultimate decision. Where the administrative record lacks such a reasoned justification, it cannot be provided after the fact by the agency or by the courts. Thus, courts vacate or remand agency decisions when the agency fails to fully explain its decision in the rulemaking record.<sup>8</sup>

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<sup>8</sup> See, e.g., *Sierra Club v. EPA*, 294 F.3d 155, 163 (D.C. Cir. 2002) ("The EPA made no mention of these [challenged emission control] measures or measures like them, . . . . This omission – whether the result of inadvertence or of an unexplained change of course – renders the EPA's decision arbitrary and capricious."); *North Carolina v. EPA*, 531 F.3d 896, 917 (D.C. Cir. 2008) ("Nowhere does EPA explain how reducing Title IV allowances will adequately prohibit states from contributing significantly to downwind nonattainment of the PM<sub>2.5</sub> NAAQS."); *Arteva Specialties S.a.r.l. v. EPA*, 323 F.3d 1088, 1092 (D.C. Cir. 2003) ("EPA may well be correct that the availability of the alternatives it cites adequately answers the petitioners' concern over the cost-effectiveness of the cited provisions. We are unable, however, to discern this from the administrative record because EPA did not take into account these particular alternatives in conducting its cost effectiveness analysis. We therefore have no evidence of their cost or of their effectiveness."); *Mossville Envtl. Action Now v. EPA*, 370 F.3d 1232, 1243 (D.C. Cir. 2004) ("While EPA may be able to know that a correlation exists between one known pollutant and some other unknown pollutants, it has not memorialized that knowledge in such a fashion that commenters, interested members of the public, regulated entities, or most importantly, a reviewing court, can assess. We cannot review under any standard the adequacy of the EPA's correlation determination if we do not

Thus, an agency cannot simply rely on discretionary freedom or policy judgment to justify its rules. Even where a court's ultimate standard of review is deferential, the agency has an obligation to fully explain how it has elected to exercise that discretion so that the court has a basis on which to review the agency's decision.

Moreover, when an agency issues a rule that reverses a prior determination without providing a proper factual basis that justifies the change, its rule will be found to lack a rational basis and thus be arbitrary. Otherwise, an agency would be free to change regulatory obligations based solely on policy reasons. For example, in a case involving attainment determinations for the 1997 particulate matter NAAQS, the D.C. Circuit vacated EPA's nonattainment designation for a county in New York where EPA interpreted the same data in a different manner in order to justify more stringent regulatory standards. *Catawba Cnty., N.C. v. EPA*, 571 F.3d 20 (D.C. Cir. 2009). There, in order to justify a nonattainment decision, EPA reclassified the county's commuter numbers from "low" to "significant" even though "there was no intervening change in the data." *Id.* at 52. Similarly, a court vacated a U.S. Forest Service rulemaking in which the Bush Administration rescinded a "Roadless Rule" that limited development on certain federal lands. *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 904 (N.D. Cal. 2006) *aff'd*, 575 F.3d 999 (9th Cir. 2009). There the court found that the agency failed to demonstrate any change in facts that would justify a change in the Roadless Rule. *Id.* ("Here, the Forest Service reversed course without citing any new evidence that would lead to a different conclusion or explaining why it had concluded that the protections of the Roadless Rule were no longer necessary for the reasons it had previously laid out in detail, and without properly invoking a categorical exclusion."). As these cases indicate, an agency cannot simply operate on a blank slate for each successive regulatory action. Instead, its actions must be informed by prior decisions, and an agency cannot depart from those decisions for policy reasons when the factual evidence does not support a change.

Finally, of course, an agency rule will be set aside when it contravenes the requirements of the underlying statute or exceeds the agency's authority under the statute. See, e.g., *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (holding that EPA could not lawfully apply PSD and Title V permit requirements to stationary sources based solely on their potential to emit greenhouse gases, or alter statutory applicability thresholds for PSD permits in response to an unlawful interpretation of the Act); *Mississippi*, 744 F.3d at 1361-62 (holding that EPA's secondary ozone standard violated the Act because "EPA failed to determine what level of protection was 'requisite to protect the public welfare,'" as required by the Act).

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know what correlation the EPA found to exist."); *Bluwater Network v. EPA*, 370 F.3d 1, 21 (D.C. Cir. 2004) ("However, we can find nothing in the record indicating that the Agency evaluated or reached any conclusions as to the cost of discontinuing [snowmobile] models to which advanced technology could not be applied by 2012. Absolute certainty and precision on this point are not required, but a reasonable explanation clearly is necessary.").

This section of the Associations' comments demonstrates that, in several respects, EPA's proposed rule revising the NAAQS for ozone, if finalized, would be subject to reversal under the foregoing standards and case law.

## **B. EPA's "Policy Choices" Are Not Insulated from Scrutiny.**

In its proposal, EPA states that the selection of a primary standard that is requisite to protect public health with an adequate margin of safety requires "judgments based on an interpretation of the scientific evidence and exposure/risk information that neither overstates nor understates the strengths and limitations of that evidence and information, nor the appropriate inferences to be drawn therefrom" (79 Fed. Reg. at 75303-04). According to EPA, "[t]he selection of any particular approach for providing an adequate margin of safety is a **policy choice** left specifically to the Administrator's judgment," in which EPA "considers such factors as the nature and severity of the health effects, the size of sensitive population(s) at risk, and the kind and degree of uncertainties that must be addressed" (*id.* at 75238 & 75304 n.157; emphasis added).

EPA's invocation of "policy choice" and "the Administrator's judgment" cannot insulate its decision from scrutiny. While the selection of a primary standard level is ultimately a policy decision based on the Administrator's judgments, particularly in the face of the considerable uncertainties in the scientific information such as exist here, that does not mean that EPA has discretion to set the standard at any level based on its policy choice. The Agency must still explain and consistently apply the criteria that will inform that policy decision. As explained in Section III.A, an agency must provide a reasoned explanation for its decision in the administrative record. Thus, as the D.C. Circuit has explained, a court cannot review the adequacy of EPA's decision if the agency "has not memorialized that knowledge in such a fashion that commenters, interested members of the public, regulated entities, or most importantly, a reviewing court, can assess." *Mossville Env'tl. Action Now*, 370 F.3d at 1243. Furthermore, the Agency must demonstrate that its policy decision comports with the applicable legal requirements discussed above – i.e., to set the standard at a level that is sufficient but not lower than necessary to protect the public health, to set the standard at a level requisite to protect sensitive subpopulations but not the most sensitive individuals within those subpopulations, to take account of background concentrations and set the standard at a level that can be achieved by regulation of sources subject to SIPs. Additionally, EPA needs to give reasonable consideration to the contextual factors affecting its policy decision, which are within its authority to consider. See Section II.A above. As shown in the following sections of these comments, EPA's proposal to reduce the level of the NAAQS does not meet the foregoing requirements.

In addition, EPA's proposal cannot be justified by CASAC's efforts to constrain the Administrator's decision in favor of a more stringent standard by characterizing as science what

are in fact policy choices. For example, the basic issue of whether the current standard is requisite to protect public health depends, in large part, on the interpretation of whether the responses reported in human clinical studies at lower levels are adverse health effects, the determination of what levels of risk are acceptable in the general population, and the determination of how to weigh the uncertainties in the epidemiological studies regarding the attribution of effects to ozone exposure at levels below the current standard. Those are ultimately policy judgments for the EPA Administrator. CASAC, however, asserted that “there is clear scientific support for the need to revise the standard” and “substantial scientific certainty of a variety of adverse effects” at 70 ppb (Frey, 2014, pp. ii, 8) when it is clear that its conclusions are actually based on its interpretation of the evidence and its views on the above-mentioned policy issues. Additionally, as both EPA and even CASAC appear to recognize, the determination of an adequate margin of safety is a policy judgment, not a scientific judgment (see 79 Fed. Reg. at 75303; Frey, 2014, p. ii), and thus CASAC’s views on the adequacy of the margin of safety should have little weight. All of these issues are policy issues for EPA to decide; and as shown in the prior paragraph, EPA’s decision on those issues must comply with applicable requirements and be adequately justified and is subject to scrutiny as to whether it has done so.<sup>9</sup>

### **C. EPA Has Failed To Give Adequate or Proper Consideration to Background Air Quality.**

As explained in Section III.A above, a central tenet of reasoned agency decision-making is that an agency must consider all of the factors required by Congress. *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43. Thus, it is arbitrary and capricious for EPA to consider only a subset of relevant factors, while ignoring or providing an inadequate explanation of others. See, e.g., *Sierra Club v. EPA*, 479 F.3d at 883 (vacating EPA standard that evaluated only technology-based emission controls while ignoring emissions reductions from non-technology factors that affect emissions levels). Here, in proposing to reduce the level of the NAAQS for ozone, EPA has failed to take into account the extent to which the lowered standard would be infeasible to achieve due to background ozone concentrations, which is a key consideration under the Act. Moreover, in this case, setting a standard at a level that may be impossible to achieve due to background concentration conflicts with the statutory requirement, discussed in Section II.A, that NAAQS be set at levels that **can be** achieved through state regulation under SIPs, and such a standard would thus be unlawful. Further, as explained below, EPA cannot simply ignore background ozone concentration at the standard-setting stage by claiming that it is building in flexibility at the implementation and enforcement stage. Putting aside the fact that those responses are wholly inadequate, EPA cannot simply pass the buck on the statutory requirement when setting the NAAQS in the first instance.

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<sup>9</sup> Likewise, CASAC’s review of drafts of the EPA staff documents (i.e., the ISA, the HREA, the WREA, and the PA) cannot isolate the conclusions reached in those documents by EPA from further scrutiny.

**1. EPA Has Unlawfully Failed To Take into Account That Background Ozone Levels Can Prevent Attainment of the Proposed NAAQS.**

Ozone's presence in this nation's ambient air is attributable to a number of causes. Anthropogenic emissions of ozone precursors – including VOCs, NO<sub>x</sub>, CH<sub>4</sub>, and CO – in the United States contribute to the formation of ozone (see 79 Fed. Reg. at 75241). Ozone in ambient air may also result from natural sources such as lightning, wildfires, and vegetative emissions or occasionally, at higher elevations, from atmospheric intrusions from the stratospheric ozone layer (*id.* at 75241). Furthermore, ozone in the U.S. can result from transport of ozone and ozone precursors from other countries. In the context of setting NAAQS for ozone, the term “background” must refer to ozone that results from events other than human activities in the U.S. that lead to the emission of ozone precursors (see *id.* at 75242). No other approach makes sense, since those are the only activities that are subject to regulation under SIPs.<sup>10</sup>

Background ozone levels are variable (see PA at 2-17), but they can be substantial. EPA reports seasonal mean background concentrations of as much as 50 ppb (PA at 2-18). Peak 8-hour average background levels – those matching the averaging time for the present and proposed ozone NAAQS – are necessarily higher than the overall seasonal average. In fact, as EPA recognizes, background levels can cause exceedances of even the present ozone NAAQS:

“[O]bservational and modeling analyses have concluded that [ozone] concentrations in some locations in the U.S. can be substantially influenced by sources that may not be suited to domestic controls measures. In particular, certain high-elevation sites in the western U.S. are impacted by a combination of non-local sources like international transport, stratospheric [ozone] and [ozone] originating from wildfire emissions. . . . [T]here can be episodic events with substantial background contributions where [ozone] concentrations approach or even exceed the level of the current NAAQS (i.e., 75 ppb).” 79 Fed Reg. at 75242.

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<sup>10</sup> As mentioned above, in its most recent prior review of the ozone NAAQS, EPA focused on PRB, which it defined as “the [ozone] concentrations that would be observed in the U.S. in the absence of anthropogenic emissions of precursors (e.g., VOC, NO<sub>x</sub>, and CO) in the U.S., Canada, and Mexico” (73 Fed. Reg. at 16443 n.13), when discussing ozone background. The alternative focus here on what EPA sometimes calls “U.S. Background” (*i.e.*, ozone levels that are not attributable to anthropogenic activities in the U.S.) is appropriate. The Act relies primarily on states to implement NAAQS, CAA §§ 107(a), 110(a)(1), 172(b). States have no authority over emissions that originate in Canada or Mexico. Moreover, the rigid schedules that the Act imposes for states to bring areas into compliance with NAAQS or face sanctions (CAA § 181) are inconsistent with the time required for the negotiation, formalization, and implementation of agreements with Canada and Mexico to implement emission controls to contribute to timely attainment in states in the U.S.



A recent study conducted in Clark County, Nevada confirms this. It reports:

“The mean surface [maximum daily 8-hour average] ozone at Jean, NV in rural Clark County was 67 ppbv during May and June of 2013, which is only 8 ppbv less than the current 2008 NAAQS and greater than some values that are currently being considered. . . . The number of days in Clark County during the 43-day [Las Vegas Ozone Study (LVOS)] field campaign would have increased from 3 to 14 if the NAAQS had been 70 ppbv instead of 75 ppbv, and from 3 to 25 if the NAAQS had been 65 ppbv. In other words, exceedances of the NAAQS generated by high background concentrations and stratospheric intrusions would have occurred on 60% of the days during LVOS, making these events the rule rather than the exception.” (Langford *et al.*, 2014)

Similarly, Zhang *et al.* (2011) reported “some occurrences” of background ozone levels above 60 ppb, particularly in the West, as shown in Figure 7 of that paper, and noted that if the NAAQS were reduced to the 60-70 ppb range, “areas of the intermountain West will have little or no ability to reach compliance through North American regulatory controls.”

Nor are high background concentrations limited to the Intermountain West or to high elevations. EPA has explained that high background concentrations are also found in northern New York and “other areas bordering Canada and Mexico” (ISA at 2-6), and figures in its PA (Figures 2-12 and 2-13) show significant contributions of background (over 50%) to seasonal means at sites throughout the country (PA at 2-22). The Agency has also recognized that “the influence of background sources on high surface [ozone] concentrations is not always confined to high elevation sites,” particularly in areas impacted by ozone formed due to emissions from Asia (ISA at 3-39). Moreover, the contribution of emissions from Asia to background is likely to increase, given that Asia, in particular eastern Asia, has the world’s highest growth rate for emissions of ozone precursors (Cooper *et al.*, 2010). In addition, Lefohn *et al.* (2012, 2014) have shown high background concentration sites at various locations throughout the country – not limited to the Intermountain West or high-elevation sites.

In recent comments submitted on the proposed rule, EPRI (2015) shows, using the GEOS-Chem model, that U.S. background ozone concentrations have been steadily increasing in the western and southwestern U.S. (including in cities such as Denver, Los Angeles, and Phoenix) and are predicted to continue to increase, at least through 2020, due to increased emissions from Asia and Mexico. These concentrations are predicted to reach 4<sup>th</sup> highest daily maximum 8-hour levels close to 65 ppb in some locations, thus making it difficult, if not impossible, to attain the proposed reduced standards through controls on U.S. sources.<sup>11</sup>

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<sup>11</sup> Moreover, since NO<sub>x</sub> is not only an ozone precursor but also destructive of ozone, a reduction in anthropogenic NO<sub>x</sub> emissions in an effort to meet a lowered standard will also have the effect of

Given the proximity of background ozone levels to the present NAAQS and the more stringent alternatives that EPA has proposed, the role that background pollutant levels play in determining the appropriate level for a NAAQS is a key question in this rulemaking. EPA recognizes that the Act does not require the Agency to set NAAQS at background levels (79 Fed. Reg. at 75238), and acknowledges that it “may consider proximity to background levels as a factor in the decision whether and how to revise the NAAQS when considering levels within the range of reasonable values (*id.* at 75242). Nevertheless, the Agency asserts that it must “set the NAAQS at levels requisite to protect public health and welfare ***without regard to the source of the pollutant***” (*id.* at 75242; emphasis added). Thus, when explaining the decision to propose to reduce the level of the primary NAAQS from 75 ppb to within the range of 70 ppb to 65 ppb, EPA does not acknowledge that background ozone levels would, at least in some locations, approach or potentially exceed the level of a NAAQS within this range.<sup>12</sup> Further, by evaluating exposures and risks from all sources, including background, EPA’s HREA fails to characterize the exposures and risk that could be addressed by a change in the NAAQS. Indeed, as concentrations get closer and closer to background, the percentage of the overall risk that can be addressed by NAAQS becomes smaller and smaller.

In this regard, EPA has misinterpreted both the Act and the relevant case law. As mentioned in Section II.A, the Act places the burden on “each state” to develop a plan specifying how the NAAQS “***will*** be attained and maintained” (§ 107(a); emphasis added). Background ozone, pollution that is attributable either to natural phenomena or to emissions from outside of the U.S., is plainly beyond a state’s (or EPA’s) control. Congress did not intend to require states to do the impossible. Indeed, in its report on the 1977 Amendments to the Act, the House of Representatives specifically explained that it did not intend NAAQS to be set at background levels. See H.R. Rep. No. 294, 95th Cong., 1st Sess. 127 (1977) (“Some have suggested that since the standards are to protect against all known or anticipated effects and since no safe thresholds can be established, the ambient standards should [b]e set at zero or background levels. Obviously, this no-risk philosophy ignores all economic and social consequences and is impractical.”).

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decreasing the ability of NO<sub>x</sub> to reduce background concentrations, such that background ozone will become a larger relative contributor to total ozone concentrations as the absolute abundance of background ozone increases.

<sup>12</sup> EPA only mentions background in passing in its justification for not considering further standards more stringent than 65 ppb (see 79 Fed. Reg. at 75310). It apparently believes that the Agency has policies in place adequate to provide regulatory relief for situations in which background ozone would lead to NAAQS exceedances (*id.* at 75242, 75382-85). The availability of such regulatory relief, even if it were useful, would not excuse EPA’s failure to take background ozone levels properly into account in revising the NAAQS, as discussed herein. See *Prill v. NLRB*, 755 F.2d 941, 948 (D.C. Cir. 1985). Moreover, as discussed in Section III.C.2, the cited policies do not provide significant relief for situations in which background ozone leads to NAAQS exceedances.

Against this clear Congressional direction that NAAQS should not be set at background levels, EPA cites *API v. Costle*, 665 F.2d 1176, 1184-86 (D.C. Cir. 1981). According to EPA, this 30-year-old case, which was decided when ozone levels were dramatically higher than they are today (see Air Quality Trends, <http://www.epa.gov/airtrends/aqtrends.html>, noting a 33% decline in 8-hour ozone levels between 1980 and 2013), stands for the propositions that (1) attainability is not a relevant consideration in promulgation of NAAQS, and (2) “EPA need not tailor the NAAQS to fit each region or locale” (79 Fed. Reg. at 75239).

However, in addressing attainability, the *API* court focused on cost and technological feasibility, not on other factors that render attainment impossible. The court merely quoted its more lengthy discussion in *Lead Industries Ass’n* that “the Administrator may not consider economic and technological feasibility in setting air quality standards” (665 F.2d at 1185, quoting 647 F.2d at 1149). To the extent that it addressed unattainability resulting from other factors, the court was addressing an argument by the city of Houston that natural factors make attainment impossible in that area, and the court simply decided that Houston’s particular circumstances were not a basis for vacating a national standard. See *API*, 665 F.2d at 1186 (“[T]he agency need not tailor national regulations to fit each region or locale.”). We are not claiming here that EPA is required to tailor the NAAQS to fit particular areas, but rather that EPA is required, in issuing nationally applicable NAAQS, to consider the impact of background levels on the attainability of those national standards. The court in *API* did not address the issue of whether a NAAQS that was unattainable not just in a single locale such as Houston, but throughout much of the nation due to factors beyond the control of the states or even regulated industries would be consistent with the Act.

In fact, in subsequent decisions, the court suggested that setting a standard that could not be achieved due to such uncontrollable background levels may be inappropriate. In the first *American Trucking Ass’ns* opinion, the court addressed EPA’s support of the 1997 ozone NAAQS on the ground that a lower standard would be “closer to peak background levels that infrequently occur in some areas due to nonanthropogenic sources of O<sub>3</sub> precursors.” *American Trucking Ass’ns v. EPA*, 175 F.3d 1027, 1036 (D.C. Cir. 1999), *reversed in part and affirmed in part on other grounds* in *Whitman*, 531 U.S. 457 (2001). The court stated: “EPA’s language, coupled with the data on background ozone levels, may add up to a backhanded way of saying that, given the national character of the NAAQS, it is inappropriate to set a standard below a level that can be achieved throughout the country without action affirmatively **extracting** chemicals from nature. **That may well be a sound reading of the statute**, but EPA has not explicitly adopted it.” 175 F.3d at 1036 (first emphasis by court; second emphasis added). Further, as mentioned in Section II.B.1, following remand from the Supreme Court, the D.C. Circuit again relied, in part, on EPA’s determination that a standard of 70 ppb was too close to background, and stated that the “relative proximity to peak background ozone

concentrations” was a factor that “EPA could consider” when choosing among alternative levels. *American Trucking Ass’n*, 283 F.3d at 379.

The present situation directly raises the issue of potential widespread unattainability of the proposed revised NAAQS in many parts of the country due to background levels that are not subject to control under SIPs. Revising the NAAQS without appropriately taking that issue into account would ignore a key factor for setting the NAAQS at the requisite level, rendering the NAAQS revision arbitrary and capricious. See *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43, and other cases cited in Section III.A. In fact, setting an NAAQS that could not be attained in many parts of the country due to background levels would be inconsistent with the Act’s text and legislative history and thus would be illegal.<sup>13</sup>

## **2. EPA Is Not Planning Effective Regulatory Relief from Nonattainment Due to Background Ozone.**

Instead of taking unattainability due to background levels into account in determining the appropriate level of the ozone NAAQS, EPA identifies three programs that it claims it will use to provide regulatory relief for situations in which ozone levels “approach or exceed the concentration levels being proposed in this notice (i.e., 60-70 ppb) in large part due to background sources.” 79 Fed. Reg. at 75382. Specifically, EPA discusses use of (a) exceptional event exclusions, (b) treatment as rural transport areas, and (c) international transport provisions. 79 Fed. Reg. at 75383-85. The availability of such regulatory mechanisms, even if they were useful, would not excuse EPA’s failure to take background ozone levels properly into account in revising the NAAQS. Moreover, these regulatory mechanisms would not, in fact, provide any significant relief from NAAQS exceedances due to background ozone levels. While each of these provisions could in theory provide limited relief from such exceedances, each has been a part of the Act for a decade or more without being used effectively by EPA. As discussed below, they provide little hope of relief if EPA adopts a more stringent NAAQS that is even more likely to be exceeded as a result of background ozone. This demonstrates further that EPA’s identification of these regulatory mechanisms is no substitute for taking background into account in setting the level of the standard.

### **a. EPA’s Exceptional Events Program Has Not Been Successful.**

Section 319(b), which was added to the Act in 2005, required EPA to develop regulations to govern the review and handling of monitored air quality data influenced by exceptional events, including specification of “criteria and procedures” for states to use when

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<sup>13</sup> CASAC was not informed that setting a NAAQS at or below background levels would be illegal, and indeed questioned the role of background levels in setting NAAQS. See letter from the CASAC Chair to EPA dated June 26, 2014 (Frey, 2014) (“The Second Draft PA was silent as to how the EPA intends to navigate between these two legal guidelines when considering background ozone in a policy and standard-setting context. This question became an important issue in the CASAC deliberations . . .”).

petitioning for the exclusion of monitoring data “that is directly due to exceptional events” from consideration when judging NAAQS exceedances or violations (§ 319(b)(2)(B), (b)(3)(B)(iv)). EPA’s Exceptional Events Rule (EER) was published in 2007. 72 Fed. Reg. 13560 (March 22, 2007)). Although EPA now suggests that the EER provides “regulatory relief” from NAAQS exceedances due to background (79 Fed. Reg. at 75382-83), the Agency has previously specifically disavowed that role for the EER. EPA’s Draft Guidance on the Implementation of the EER stated: “Exceedances due to natural emissions that occur every day and contribute to policy relevant background, such as biogenic emissions, do not meet the definition of an exceptional event and are thus not eligible for exclusion under the EER. Routine anthropogenic emissions outside of the U.S. contribute to policy relevant background, but are not exceptional events.” 77 Fed. Reg. 39959 (July 6, 2012). Similarly, in a memorandum dated May 10, 2013 from Stephen D. Page, Director of EPA’s Office of Air Quality Planning and Standards, to Regional Air Directors, EPA stated that “the demonstration to justify data exclusion shall provide evidence that the event is associated with a measured concentration in excess of normal historical fluctuations, **including background**” (Page, 2013, at 3; emphasis added).

Even if EPA intended the EER to be used to address NAAQS exceedances attributable to background, however, it has not been an effective tool for doing so. Although the EER was published almost eight years ago, EPA’s website indicates that the Agency has granted only three exceptional event determinations under it with regard to ozone, one concerning stratospheric ozone intrusion and two related to fires.<sup>14</sup>

States have expressed frustration with EPA’s implementation of the Act’s exceptional events provision. Recently, for example, Utah’s senators and representatives wrote to the EPA Administrator:

EPA’s reliance . . . on the Exceptional Events Rule (EER) to deal with high ozone background “episodes” effectively condemns the intermountain West to “guilty until proven innocent” and incurs a high resource burden to meet the “but for” demonstration. The EER has not been effective to date in excluding background concentrations from determination of NAAQS attainment. The application by Utah for EER exclusions have routinely been denied by EPA regional officials following years of work by state and industry staff. (Hatch *et al.*, 2014.)

They quoted testimony by the Executive Director of Utah’s Department of Environmental Quality, Amanda Smith, in 2013:

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<sup>14</sup> EPA, Exceptional Events Submissions Table, *available at* <http://www.epa.gov/ttn/analysis/exeventstable.htm> (last visited March 5, 2015).

Since 2008 Utah has submitted 12 exceptional event demonstrations for particulate matter, requiring about 4,000 hours of technical work, that have not been approved by [EPA] Region 8. There were many other events, including ozone levels affected by western wildfires that we did not even attempt to demonstrate as exceptional events because the technical criteria were too difficult to meet. If the exceptional event process doesn't work for particulate matter – it certainly won't work for the complicated science behind rural background ozone. (Smith, 2013.)

Although Ms. Smith's testimony focused on the difficult technical criteria for obtaining an exceptional event determination, EPA's interpretation of the Act is also unreasonably constrained. Thus, EPA interprets the EER to exclude ozone attributable to "natural emissions from vegetation, microbes, animals, and lightning" from exceptional event treatment. 79 Fed. Reg. at 75383 n.274. The Act, however, defines exceptional events as those affecting air quality that are "not reasonably controllable or preventable" and are due to "an event caused by human activity that is unlikely to recur at a particular location **or a natural event**" (§ 319(b)(1)(A); emphasis added). Elevated ozone levels due to natural emissions would certainly appear to qualify for treatment as exceptional events under this statutory definition. However, EPA's unduly narrow interpretation of the Act – in conjunction with the unreasonable technical demonstration burdens imposed by its EER – renders the statutory exceptional events provision virtually useless.

b. The CAA Provision Concerning Rural Transport Areas Has Not Historically Provided Effective Relief for Ozone Nonattainment Areas.

Section 182(h) allows EPA to determine, at its discretion, that an ozone nonattainment area is subject only to the requirements applicable to a "marginal" area (rather than those applicable to an area with a higher classification) if (1) the area in question is not in or adjacent to a Metropolitan Statistical Area (MSA) or Consolidated Metropolitan Statistical Area (CBSA), and (2) does not contain sources of VOC or NO<sub>x</sub> emissions that "make a significant contribution to" ozone concentration in that or another area (§182(h)). EPA notes in the proposed rule that, "[h]istorically, the EPA has recognized few nonattainment areas under this statutory provision." 79 Fed. Reg. at 75384. This is an understatement. Although EPA classified three areas as "rural transport" areas for the 1-hour ozone NAAQS,<sup>15</sup> no area has ever been designated as a

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<sup>15</sup> EPA mentions only Essex County, New York, and Smyth County, Virginia in the proposed rule (79 Fed. Reg. at 75384 n.284), but the Agency's Technical Support Document for designations for the 1-hour NAAQS also identifies Door County, Wisconsin as a rural transport area for ozone. Technical Support Document for Ozone and Carbon Monoxide Designations and Classifications Under Section 107(d) of the Clean Air Act Amendments of 1990, at 52 (Oct. 1991), *available at* <http://www.epa.gov/airquality/ozonepollution/designations/1997standards/tech.htm> (follow "Chapter 6: additional Supporting Documents" hyperlink, then go to page 728).

rural transport area with regard to an 8-hour NAAQS. Further, with the proposed decrease in the primary and secondary standards and the corresponding increase in the number and size of nonattainment areas adjacent to MSAs and CBSAs, the prospects of being able to use the Section 182(h) authority in a meaningful way grow even dimmer.

EPA initially planned an “overwhelming transport” classification for nonattainment areas for the 1997 8-hour NAAQS that would be implemented under Subpart 1 of Part D of Title I of the Act. See 68 Fed. Reg. 23951, 23964 (Apr. 30, 2004). Even before the Agency’s plan to use Subpart 1 to implement the NAAQS was rejected by the court,<sup>16</sup> however, EPA backed away from such a classification, since the Agency had agreed to reconsider it. 71 Fed. Reg. 15098 (Mar. 27, 2006).<sup>17</sup> For nonattainment areas that EPA planned to address under Subpart 2 of Part D of Title I of the Act, the Agency indicated that it “did not believe that there are any 8-hour nonattainment areas covered under subpart 2 that are ‘rural’ and therefore eligible for consideration of coverage under section 182(h).” 70 Fed. Reg. 71612, 71623 (Nov. 29, 2005). More recently, in its March 2015 SIP rule for nonattainment areas for the 2008 ozone NAAQS, EPA noted the existence of Section 182(h), but explained that it had not identified any rural transport areas “during the designations process” (80 Fed. Reg. at 12292 & n.64).

Furthermore, while pointing to the rural transport provision in the proposed rule as a potential source for appropriate regulatory relief, EPA at the same time limits its usefulness. First, the Agency explains that it will not consider any rural area with a monitor “heavily influenced by short-range upwind contributions from a nearby urbanized area” a candidate for relief as a rural transport area (79 Fed. Reg. at 75384 n.277). In doing so, EPA is administratively limiting the scope of the relief that Congress provided for rural transport areas. Second, EPA cites with approval draft guidance requiring that a demonstration to support a rural transport classification must include “assembling emissions, air quality, meteorological and/or photochemical grid modeling data” and must describe “analyses performed, data bases used, key assumptions and outcomes of each analysis, and why a State believes that the evidence, viewed as a whole, supports a conclusion that the area is overwhelmingly affected by transport and does not significantly contribute to downwind problems.”<sup>18</sup> This guidance would impose a substantial analytical burden on a state in preparing its designations that must be submitted to

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<sup>16</sup> *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 892 (D.C. Cir. 2006), *modified* 489 F.3d 1245 (D.C. Cir. 2007).

<sup>17</sup> At that time, EPA sought comment on its draft guidance on “Criteria For Assessing Whether an Ozone Nonattainment Area is Affected by Overwhelming Transport” (71 Fed. Reg. at 15100), calling into question the continuing viability of that draft. Nevertheless, EPA cites that uncertain draft guidance in the proposed rule (79 Fed. Reg. at 79384 & n.279), as discussed below.

<sup>18</sup> 79 Fed. Reg. at 79384 & n.279 (citing EPA, Criteria for Assessing Whether an Ozone Nonattainment Area is Affected by Overwhelming Transport 3 (Draft June 29, 2005), *available at* [http://www.epa.gov/ttn/scram001/guidance/guide\\_guidance\\_07-13-05.pdf](http://www.epa.gov/ttn/scram001/guidance/guide_guidance_07-13-05.pdf)).



EPA within a year after the Agency's promulgation of a revised NAAQS and would likely discourage states from seeking the rural transport classification.

In short, no ozone nonattainment area has been classified as a rural transport area for almost 14 years, despite increasingly stringent standards over that period. Further, while citing that classification as a potential source of regulatory relief for areas facing nonattainment designations as a result of background ozone level, EPA now seeks to limit the applicability of the rural transport classification further and to impose substantial burdens on states that might seek to use it. As a result, it is disingenuous to conclude that this provision will provide effective relief should EPA now adopt an even more stringent NAAQS.

c. The Act Provides Only Limited Relief for Areas that Would Not Meet a More Stringent Ozone NAAQS Due to International Transport of Ozone and Ozone Precursors.

Section 179B, titled International Border Areas, requires EPA to approve a SIP submittal for a nonattainment area if (1) the submittal meets all the applicable requirements except "a requirement that such plan or revision demonstrate attainment and maintenance of the relevant [NAAQS]" by the applicable attainment date, and (2) the state demonstrates that the SIP "would be adequate to attain and maintain the relevant [NAAQS]" by that date "but for emissions emanating from outside of the United States" (§ 179B(a)). For ozone specifically, if those conditions are met, the Act provides exemptions from Section 181(a)(2) (establishing a severe-17 classification),<sup>19</sup> Section 181(a)(5) (providing for two possible 1-year extension of the attainment date), and Section 185 (concerning failure of severe and extreme nonattainment areas to achieve timely attainment (§ 179B(b))).

As recognized in the proposed rule, this provision cannot be used to avoid a nonattainment designation or as the basis for a lower classification for a nonattainment area, but only to avoid "adverse consequences" for failing to attain the NAAQS by the applicable deadline (79 Fed. Reg. at 75384). In other words, states to which this provision is applicable get only limited regulatory relief. They must still adopt a SIP that addresses the control requirements associated with the initial classification for the area (e.g., reasonable further progress plans and nonattainment new source review provisions that utilize a more stringent definition of a major source) (see § 181(a)-(d)).

EPA does not define what information will be required for a state to establish that an area qualifies for relief because of the impact of background ozone attributable to international

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<sup>19</sup> EPA has suggested that this statutory reference is intended to be to Section 181(b)(2) of the Act, which concerns reclassification upon failure to attain, instead of to Section 181(a)(2). 68 Fed. Reg. 32802, 32829 n.38 (June 2, 2003). This suggestion is sensible, but the Agency has provided no support for it.



transport. EPA has repeatedly indicated that it will review requests for relief under Section 179B on a case-by-case basis. See 78 Fed. Reg. at 34205; 70 Fed. Reg. at 71624. Although the proposed rule refers to a 1991 guidance document on “Criteria for Assessing the Role of Transported Ozone/Precursors in Ozone Nonattainment Areas” (1991 Guidance) for use in Section 179B demonstrations (79 Fed. Reg. at 75384 & n.280), EPA previously “retracted” that guidance.<sup>20</sup> Thus, states face an undefined – but potentially heavy – burden in qualifying for the limited relief provided by this provision of the Act. It is therefore not surprising that the proposed rule identifies only one instance in which EPA relied on Section 179B to approve an ozone SIP and none within the past decade.<sup>21</sup>

In short, none of the options that EPA has identified as providing future regulatory relief when background leads to exceedances of a revised ozone NAAQS has consistently provided such relief in the past. Indeed, EPA has previously and unnecessarily limited the applicability of these provisions and continues to do so in the proposed rule. The theoretical availability of these tools cannot excuse EPA’s proposal to reduce the level of the ozone NAAQS illegally to one that is below background levels in many areas.

#### **D. EPA Has Failed to Provide a Reasoned Explanation for Its Change in Interpretation of the Relevant Public Health and Welfare Science.**

As discussed in Section II.B.2, in adopting the current primary standard of 75 ppb in 2008, EPA relied on three main bases: (1) The “strong body of clinical evidence” of lung function decrements, respiratory symptoms, and other airway responses in healthy subjects at exposure levels of 80 ppb and above, as well as “some indication of lung function decrements and respiratory symptoms at lower levels”; (2) the clinical evidence indicating that asthmatics are “likely to experience larger and more serious effects than healthy people”; and (3) the epidemiological evidence indicating associations for “a wide range of serious health effects “ at and below 80 ppb (73 Fed. Reg. at 16476). Based on these principal considerations, EPA made the judgment that a standard of 75 ppb was “requisite to protect public health with an adequate margin of safety, including the health of sensitive subpopulations, from serious health

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<sup>20</sup> EPA cited the 1991 Guidance in its 2003 Proposed Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard in conjunction with its proposal to create an “overwhelming interstate transport classification.” 68 Fed. Reg. 32802, 32814 n.15 (June 2, 2003). When it promulgated the Phase I implementation rule, however, in the context of discussing its decision to provide an “overwhelming transport” classification, EPA “retracted” the 1991 “guidance document “ referenced in the June 2, 2003 Proposed Rule. 69 Fed. Reg. 23951 23965 (April 30, 2004).

<sup>21</sup> 79 Fed. Reg. at 75835. In that instance, which concerned the 1-hour ozone NAAQS, EPA approved the demonstration only after the area had already attained the NAAQS, as shown through air quality monitoring, 69 Fed. Reg. 32450, 32451-52 (June 10, 2004), and thus the role of Section 179B is unclear. Further, EPA indicated at that time that “all section 179B approvals should be on a contingent basis” and are “valid only as long as the area’s modeling data continue to show . . . attainment, but for emissions from outside the United States” (*id.* at 32452).

effects,” and that a lower standard was not needed or warranted (*id.* at 16483). The court in *Mississippi* upheld that judgment.

As discussed above in Section II.B.5, while some new studies have become available since 2008, they do not alter in any basic way the information on which EPA relied in 2008. As EPA states in its 2014 proposal, the strongest body of evidence on the occurrence of effects in healthy subjects in clinical studies still comes from studies of ozone exposures at and above 80 ppb (79 Fed. Reg. at 75304). While two new controlled human exposure studies were published (Schelegle *et al.*, 2009; Kim *et al.*, 2011), they do not change the fact that, as EPA stated in 2008, the evidence provides “some indication” of lung function decrements and respiratory symptoms at lower levels, given that the effects reported in those two studies were admittedly small – namely, a mean FEV<sub>1</sub> decrease of approximately 5% and a modest increase in subjective symptoms at 72 ppb in Schelegle *et al.* (2009) and a mean FEV<sub>1</sub> decrease of less than 2% and no increase in subjective symptoms at 60 ppb in Kim *et al.* (2011). As such, these studies do not provide any new basic information regarding the types or magnitude of subjects’ responses at these levels. Further, EPA continues to claim that asthmatics are likely to experience larger and more serious effects than healthy people (79 Fed. Reg. at 75288), but it recognizes that there are no new clinical studies on this topic (*id.* at 75272). Additionally, while there are some new epidemiological studies, EPA continues to acknowledge that there remain uncertainties regarding the extent to which the effects reported in those studies can be attributed to ozone exposures below the current standard level, and it thus puts less reliance on them (see Section II.C.1 above). Recent comments by Gradient (2015) show further that the new health effects evidence cited in EPA’s proposal does not differ substantially from the evidence cited in the previous ozone NAAQS review.

Similarly, as discussed in Section II.C.2, above, EPA acknowledges in the proposed rule that “[t]he current body of [ozone] welfare effects evidence **confirms the conclusions reached in the last review** on the nature of [ozone]-induced welfare effects” (79 Fed. Reg. at 75314; emphasis added). No significant scientific advances have occurred since the prior review that reduce key uncertainties that were identified during the last review (see *id.* at 75314, 75316, 75317, 75319). See also Gradient (2015).

EPA must provide a reasoned explanation for a change in judgment. EPA may not reverse prior policy decisions without providing a reasoned explanation for the change. *Dillmon v. NTSB*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009) (citing *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009)) (“Reasoned decision making ... necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent.”); see also *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 42; *AT&T Corp. v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001) (reasoned decision-making standard requires explanation for departure from prior decision); *Troy Corp. v. Browner*, 120 F.3d 277, 286 (D.C. Cir. 1997) (citing

*Nat'l Ass'n for Better Broadcasting v. FCC*, 849 F.2d 665, 669 (D.C. Cir. 1988)) (“an agency is obligated ‘not to depart without reasoned explanation from its prior conclusions.’”). Indeed, as discussed in Section III.A and shown by the cases cited there, when an agency issues a rule that changes a prior determination without providing a proper factual basis justifying the change, its rule will be held to be arbitrary. See, e.g., *Catawba Cnty.*, 571 F.3d at 52; *California ex rel. Lockyer*, 459 F. Supp. 2d at 904.

In the case of ozone, as discussed above, the main change since EPA’s last review in 2008 is EPA’s **interpretation** of the evidence – i.e., its definition of the level of protection that is “requisite” to protect public health and welfare – not the basic evidence itself. In other words, given the absence of any fundamental change in the scientific understanding of ozone effects, EPA appears to have determined simply that levels of risk that were judged acceptable in the prior standard-setting exercise are no longer acceptable.<sup>22</sup>

While EPA’s proposal contains lengthy discussions of the scientific evidence, including the new studies, it does not present a reasoned explanation or justification for this apparent change in the policy judgment regarding the level of risk that is acceptable – i.e., for why levels of risk judged acceptable in 2008 are no longer consistent with a proper legal interpretation of the risk level consistent with “requisite” protection of public health and welfare. Without such a reasoned explanation, EPA’s adoption of a revised standard would be arbitrary and capricious.<sup>23</sup>

#### **E. EPA’s Revision of the Standard Prior to Completion of Implementation of the Current Standard Would be Arbitrary.**

As discussed in Section II.D, the current ozone NAAQS of 75 ppb adopted in 2008 has not been fully implemented. Federal, state, and local regulators are still working on revising SIPs to implement that standard. As a result, there has not been time to assess the impacts and asserted health benefits from implementation of that standard.

At the same time, as shown in Section II.B.5 and III.D, commenters have pointed out that the new scientific information that has become available since the adoption of the current standard is relatively limited and does not fundamentally alter the understanding of ozone

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<sup>22</sup> A similar consideration applies with respect to the consideration of background levels. As discussed in Section II.B.1, in setting the 1997 NAAQS, EPA relied in part on the fact that a standard of 70 ppb would be too close to background. However, EPA has apparently now concluded that, despite such proximity to background (which remains true), setting at standard at 70 ppb or below is appropriate. EPA has not provided an explanation for that change in interpretation.

<sup>23</sup> Although a similar challenge to the 2008 NAAQS was rejected by the D.C. Circuit in *Mississippi* (744 F.3d at 1343-44), the Associations submit that EPA nonetheless has an obligation to present a reasoned explanation for such a change in judgment.

effects on public health and welfare. Further, as discussed in Sections II.B.5 and II.C, a number of commenters have pointed out, and EPA itself recognizes in its proposal, that there remain considerable uncertainties regarding the occurrence of adverse health and welfare effects at ozone levels in the range of the proposed revised standards. See also Sections III.G and III.H below.

Given the continued limitations and uncertainties in the data regarding effects at these lower levels, it would be unreasonable and unjustified for EPA to reduce the level of the standard further, as it has proposed, without first fully implementing the 2008 standard of 75 ppb. Indeed, in light of those limitations and uncertainties, EPA has no obligation to reduce the standard, let alone to a particular level; and hence it is important to allow the current standard to be fully implemented and to assess the results of doing so before making another change. For example, in its proposal, EPA discusses at length and relies upon *modeled estimates*, set forth in its HREA, of the potential exposures and risks that the Agency has calculated would result from the current standard and from various alternative standards. However, implementation of the current standard may allow EPA to obtain some additional real-world data on the concentrations and potentially the effects of ozone in areas meeting the current standard, which could allow EPA to verify and refine the assumptions and inputs to its model so as to reduce uncertainties, and could provide important additional information for determining the need to reduce the standard level further.

Moreover, reducing the ozone NAAQS at this time would force states back to the drawing board to develop new SIPs to implement an even more stringent standard. In light of the significant resources that states and members of the regulated community have already spent and are continuing to spend to achieve the current standard, states should be given a full opportunity to implement current plans to reduce ambient ozone concentrations. Revising the standard now, without first providing the states such an opportunity, would place a substantial and unnecessary additional burden on the both states and regulated entities.

In short, in light of the significant uncertainties associated with the current information regarding effects at levels below the current standard, EPA should not reduce the level of the standard before there has even been time for that standard to be fully implemented. Doing so in the present circumstances would constitute a “fail[ure] to consider an important aspect of the problem” and would thus be arbitrary under *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43, and the other cases cited in Section III.A.<sup>24</sup>

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<sup>24</sup> In addition, prior to making any decision on reducing the standard level, EPA needs to conduct an analysis of whether and the extent to which the number of allowable exceedances would appropriately be increased under a reduced standard, using a similar analysis to that which originally led to using the 4<sup>th</sup> highest daily maximum 8-hour average over a three-year period. Such an analysis needs to be conducted in order to make an informed judgment on the level of the standard.

## **F. EPA Has Failed To Consider the Adverse Impacts from Revising the Standard.**

In the proposed rule, EPA fails to adequately consider the adverse impacts on the Associations' members and the general public if the ozone NAAQS were revised lower. While the Supreme Court has held that EPA cannot consider costs when establishing or revising primary or secondary NAAQS (*Whitman, supra*, 531 U.S. at 471), this does not absolve EPA from all consideration of adverse impacts. Instead, as Justice Breyer explained, EPA may take into account contextual factors when determining the levels that are requisite to protect public health with an adequate margin of safety. See *id.* at 495 (Breyer, J. concurring in part and concurring in the judgment) (The Clean Air Act allows EPA "to take account of context when determining the acceptability of small risks to health."). As discussed in Section II.A, Justice Breyer explained that "§ 109 [of the Act] does not require the EPA to eliminate every health risk, however slight, at any economic cost, however great, to the point of 'hurtling' industry over 'the brink of ruin' or even forcing 'deindustrialization.'" *Id.* at 494 (quoting *American Trucking Ass'ns*, 175 F.3d at 1037, 1038 n.4). Thus, "what counts as 'requisite' to protect public health will ... vary with background circumstances, such as the public's ordinary tolerance of the particular health risk in the particular context at issue." *Id.* Further, EPA may consider "comparative health risks," such as possible adverse health risks stemming from implementation of the standard. *Id.* at 495. In other words, the prohibition on consideration of costs does not give EPA *carte blanche* to ignore all adverse impacts in all cases.

Here, as explained in Section II.E, revising the ozone NAAQS will result in severe adverse impacts on the Associations' members, other businesses, and the public. In order to obtain the emissions reductions necessary to achieve the proposed ozone NAAQS, states will have to impose significant additional emission reduction obligations on existing sources across all sectors of the economy, many of which have already incurred substantial capital expenditures for pollution control and may not be sustain more. In many cases, those sources will have to rely on "unknown controls" that have yet to be developed and whose feasibility and costs cannot be reliably predicted. Further, new and modified sources will be subject to more costly and stringent permitting obligations under the NSR program. This is particularly true in nonattainment areas, which will be greatly expanded under the proposed NAAQS and where the more stringent LAER standard will be applied and emissions offsets will be required. In addition to imposing new burdens on the Associations' members, along with other regulated sources, the proposed standard revisions could adversely affect the economy as a whole by potentially raising prices for the goods and services produced by the Associations' members and by negatively impacting economic growth. As indicated above, for example, the NERA Impacts Report (Attachment B) estimates that, over the period from 2017 through 2040, achieving a standard of 65 ppb could reduce the U.S. GDP by an average of about \$140 billion

per year, result in a loss of approximately 1.4 million job equivalents, and reduce the average U.S. household consumption by about \$830 per year.

In this case, consideration of these adverse impacts is particularly relevant given the uncertainties, acknowledged by both EPA and other parties, regarding the health and welfare risks of ozone exposure at levels below the current standard and regarding the incremental benefits that may accrue from lowering that standard. In the face of such uncertainties, consideration of the adverse impacts from reducing the standard becomes even more important in judging what level in the continuum of exposures/effects is “requisite” to protect public health and welfare.

Other factors also raise questions regarding the incremental risk reductions that will occur if the standard is reduced. First, as discussed in Section III.C, revised standards proposed by EPA are near, if not below, background ozone concentrations in portions the country when all non-anthropogenic and non-U.S. ozone emissions are appropriately included in the background. As a result, even if the standard is reduced in accordance with EPA’s proposal, there is no guarantee that the incremental risk reductions projected by EPA can be realized, regardless of the implementation efforts undertaken by states. Second, states have only begun implementing the 2008 ozone standard (as discussed in Section II.D), and further reductions in ambient ozone concentration may well occur as states move toward compliance with the current standard. Thus, at least a portion of the incremental risk reduction anticipated by EPA may occur anyway, simply through implementation of the ozone NAAQS revisions that have already been promulgated.

In short, the small incremental risk reductions projected by EPA, when coupled with the recognized uncertainty associated with adverse effects from ozone at lower ambient concentrations, make this the exact type of situation where Justice Breyer contemplated a more contextualized analysis. Yet, in reaching its decision to propose lowering the ozone standard, EPA did not take into account any analysis of the adverse social, economic, and energy effects that would likely occur if that proposed reduction in the standard were adopted. Nor did EPA solicit the CASAC’s advice on this important issue, despite the requirement of Section 109(d)(2)(C)(iv) of the Act directing CASAC to “advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.” In these circumstances, it would be arbitrary and capricious and an abuse of discretion for EPA to finalize this proposal without first evaluating “the public’s ordinary tolerance for the particular health risk in the particular context at issue.” *Whitman*, 531 U.S. at 924. And that broader context must include the adverse social, economic, and energy effects resulting from a reduced standard.

## **G. EPA Has Not Provided an Adequate Justification for Reducing the Primary Standard Level.**

As explained more fully in Section III.A, to avoid arbitrary rulemaking, EPA must provide an adequate justification for the rules that it issues and must consider all relevant factors. See *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, and other cases cited in Section III.A. In the case of NAAQS, those factors include contextual background. *Whitman*, 531 U.S. at 494-93 (Breyer, J., concurring); *Mississippi*, 744 F.3d at 1343. EPA's proposed reduction in the level of the primary NAAQS for ozone fails to meet that test.

As discussed in Sections II.B.5 and II.C.1, EPA has acknowledged and other commenters have pointed out considerable uncertainties in what the controlled human exposure studies and the epidemiological studies show regarding the occurrence of adverse health effects at levels below the current primary standard of 75 ppb. In particular, with the respect to the controlled human exposure studies, notably that of Schelegle *et al.* (2009), on which EPA places heaviest reliance, EPA's own statements regarding the significance of the reported effects are contradictory (see Section II.C.1), and several public comments to CASAC demonstrated the uncertainties in the significance of these reported responses to public health (see Section II.B.5). Similarly, with respect to the epidemiological studies, EPA recognizes the numerous uncertainties in attributing the effects reported to ozone exposures at levels below the current standard (see Section II.C.1), and several comments to EPA and CASAC further demonstrated those uncertainties, including the lack of reliable evidence that such ozone exposures caused the effects observed (see Section II.B.5). In addition, recent analyses and comments submitted to EPA in the present rulemaking further demonstrate the adequacy of the current primary standard and highlight the limitations and uncertainties in the current health effects evidence in terms of the need to reduce that standard in order to protect public health (e.g., Goodman *et al.*, 2015; Gradient, 2015).

EPA recognizes that there is no bright line for the selection of a primary standard level, and that its determination of the level "requisite" to protect public health with "an adequate margin of safety" is a policy decision. Yet, as shown in Section III.B, that policy decision is subject to scrutiny; it must be consistent with the legal requirements, supported by a reasoned explanation, and consistent with an appropriate consideration of contextual factors. In this case, given the above-discussed uncertainties and limitations in the health effects information, it is critical for EPA to consider those and other uncertainties and limitations along with the other relevant contextual factors that we have discussed – including background concentrations, the attainability of a reduced standard, the fact that the current standard has not been fully implemented, and the adverse impacts of a reduced standard – in evaluating what level is "requisite" in terms of being sufficient but not more stringent than necessary to protect public

health. When these factors are properly considered, there is no adequate justification for a reduction in the primary standard level.

In the alternative, even if EPA were to reduce the primary standard level, there is no justification for reducing it to the specific levels being considered by EPA – i.e., 70, 65, or 60 ppb. EPA concedes that there are no human clinical studies showing a combination of statistically significant lung function decrements and increases in respiratory symptoms at levels below 72 ppb, and that it thus has “decreasing confidence that adverse effects will occur following exposures to O<sub>3</sub> concentrations below 72 ppb” (79 Fed. Reg. at 75304). Thus, a reduction in the standard to lower levels would be unwarranted given the above-mentioned contextual factors. Additionally, the acknowledged uncertainties in the epidemiological studies are exacerbated when trying to link the reported effects to levels of 65 or 60 ppb. As discussed in Section II.C.1, EPA states in its proposal that setting a standard below 65 ppb would not be appropriate given the uncertainties associated with the adversity of exposures to lower levels, the uncertainties associated with air quality analyses in epidemiological studies, and the uncertainties in epidemiology-based risk estimates (*id.* at 75309). In fact, those same uncertainties also weigh against setting a standard in the proposed range of 65 to 70 ppb.

#### **H. EPA Has No Justification for Changing the Secondary Standard.**

EPA proposes two related, but distinct actions with respect to the secondary ozone standard: (1) a proposal that the level of the standard should be made more stringent; and (2) a proposal to retain the form of the existing standard. The first action is not supported by the record developed during the rulemaking. The second action, however, is fully justified.

As noted in Sections II.B.5 and II.C.2, significant scientific uncertainties and limitations exist in the available data related to the three key welfare effects that EPA describes in the proposed rule. As shown there, with respect to RBL in trees, the driving effect behind EPA’s proposed revision of the standard, EPA acknowledges and commenters demonstrated that at air quality just meeting the current standard, there are likely to be few impacts even using the stringent 2% RBL benchmark that EPA evaluated throughout the rulemaking process. Moreover, as also described above, commenters questioned the reliability of that 2% biomass loss value; and EPA, in the proposed rule, has accepted that it is inappropriate to rely on that value (see 79 Fed. Reg. at 75349). Thus, the RBL information provides no reasonable basis to set a more stringent secondary NAAQS.

Nor do the other welfare effects addressed in the proposed rule offer a valid reason for revising the secondary standard. As EPA recognizes and commenters have explained, the record shows that ozone concentrations that meet the current NAAQS are unlikely to have significant impacts on crop yields or visible foliar injury. See Section II.C.2. Public policy considerations related to these welfare effects, recognized by EPA, also support retaining the



current standard. As noted above, EPA acknowledges that “it is unclear how to consider crop yield effects in terms of potential adversity to the public welfare” (79 Fed. Reg. at 75322), and that there is no credible way to link visible foliar injury to adverse effects (*id.* at 75316, 75348). Accordingly, the record supports retaining the existing 75 ppb secondary standard. See also Gradient (2015).

On the other hand, EPA has fully justified its proposal to retain the form of the current NAAQS. As noted above, EPA has identified a range of cumulative, seasonal exposures – 13 ppm-hours to 17 ppm-hours – that is requisite to protect the public welfare (*id.* at 75237). EPA has then assessed whether those values could be achieved through a standard that retains the form of the current secondary NAAQS – i.e., the annual 4th highest daily maximum 8-hour ozone concentration, or “4th max.” EPA initially examined these issues in the WREA, but the most significant assessment appears in the 2014 Metrics Comparison Memorandum (Wells, 2014), which establishes that, for recent 2011 to 2013 air quality, all areas that would have met a 70 ppb 4th max standard would have also received welfare protection equivalent to a 13 ppm-hour to 17 ppm-hour range (Wells, 2014, at 5 & Table 4; 79 Fed. Reg. at 75345). Indeed, the record suggests that even the current secondary standard would provide protection within EPA’s identified range. EPA’s RIA, for instance, describes modeling results that show that a 70 ppb 4th max standard would achieve air quality equal to or below 13 ppm-hours, **lower than the results of the Metrics Comparison Memorandum** (RIA section 3.4.2, Figures 3-9 and 3-10). If EPA performed similar modeling for a 75 ppb standard, it appears that it, too, would provide protection within the 13 ppm-hour to 17 ppm-hour range.<sup>25</sup> In fact, comments submitted to the Agency demonstrate, based on EPA’s own air quality analyses, that attainment of the existing 75 ppb standard would substantially reduce W126 concentrations so that they would already fall generally within the range recommended by EPA (13-17 ppm-hrs), with the exception of a few monitors in the Southwest and West, where modeled projections carry significant uncertainties and are likely to be overpredicted (Gradient, 2015, at 16-17; Gradient, 2014, at 3-4).

EPA’s proposal to retain the current form of the secondary standard is also consistent with the D.C. Circuit’s decision in *Mississippi*. In that decision, the court remanded the secondary ozone standard, which had been set equal to the revised primary standard, because the Agency had failed to identify the level of air quality that is requisite to protect the public welfare. *Mississippi*, 744 F.3d at 1359. By failing to do so, the Agency could not reasonably conclude that the primary standard would provide the requisite level of protection for the public welfare. Here, EPA has expressly identified the level of protection that is required – 13 ppm-hours to 17 ppm-hours – and has determined that that level of protection can be provided by an 8-hour NAAQS using the 4<sup>th</sup> max form (see Section II.C.2). In fact, as previously noted, EPA’s

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<sup>25</sup> At a minimum, EPA must conduct similar modeling for a 75 ppb standard before making a decision that a lower standard is requisite (i.e., sufficient, but not more than necessary) to protect the public welfare.

own air quality analyses indicate that the same level of protection can generally be provided by the current standard. This demonstration that the standard will provide the requisite level of protection is all that *Mississippi* requires.

In addition to the reasons that EPA has given, there are strong public policy reasons for retaining the current form of the secondary standard. Implementation of a W126 standard has never been attempted, and past experience has shown that states frequently encounter unforeseen problems when seeking to implement a significantly changed standard for the first time. Indeed, as pointed out in public comments in the record, the existing monitoring network was developed with a current form of the NAAQS in mind; and there is no evaluation in the record of whether that network could provide sufficient information to accurately measure and implement a W126 standard (see Gradient, 2014, at 8). As noted in the proposed rule, EPA can take programmatic stability into account when evaluating the form that a revised NAAQS might take (79 Fed. Reg. at 75294 n.123). These considerations also support EPA's proposal not to change the form of the secondary ozone standard.

Finally, it should be noted that, although EPA's proposed determination differs from judgments made by CASAC, the Administrator is not bound by CASAC's advice. Under the CAA, when EPA proposes or finalizes a rule promulgating or revising a NAAQS, the rule must "set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments" by CASAC and, if the proposal or rule "differs in any important respect from any of these recommendations," EPA must provide "an explanation of the reasons for such differences" (§ 307(d)(3), (6)(A)). EPA has satisfied that standard. As explained above, EPA has identified uncertainties in the science – key among them being the limitations in the RBL exposure-response functions and the unreliability of the CASAC-recommended 2% RBL benchmark – that counter CASAC's advice to consider a range of 7 ppm-hours to 15 ppm-hours. Similarly, EPA's assessment of the relationship between a W126 standard and a 4th max standard satisfies EPA's obligation to explain why it decided not to adopt a standard with a W126 form, as CASAC recommended.

In sum, the scientific uncertainties documented in the record and acknowledged in EPA's proposed rule remove any justifiable basis for revising the secondary ozone standard to make it more stringent. EPA has, however, provided an adequate rationale for retaining the form of the current secondary standard and has provided more than sufficient explanations for its proposed determinations that differ from CASAC's advice.

#### **IV. CRITIQUE OF REGULATORY IMPACT ANALYSIS**

In accordance with Executive Order 12866, EPA prepared an RIA to accompany the proposed rule. However, EPA's projections that the proposed rule will result in health and welfare benefits that exceed the costs of compliance are flawed and dramatically overstate the

benefits of revising the ozone NAAQS. EPA significantly underestimates the costs of revising the ozone NAAQS through a series of assumptions that both overstate baseline reductions in ozone concentrations and understate the incremental costs of additional controls for ozone precursors. Moreover, EPA overstates the health benefits that can be appropriately attributed to this rulemaking. While it is difficult to quantify the scope of EPA's errors in the RIA, it is almost certain that the costs of revising the ozone NAAQS will significantly exceed the benefits to human health and welfare.

#### **A. The RIA Underestimates the Costs of Complying with a Revised Ozone Standard.**

As previously mentioned, in response to the RIA and EPA's assertion that the costs of complying with the proposed revisions to the ozone NAAQS will be manageable, NERA was commissioned to conduct a review of the RIA's cost estimates and also to conduct an independent assessment of the costs of a standard of 65 ppb. The NERA RIA Review (Attachment C) identified seven significant concerns with the RIA's assumptions that result in a "major understatement" of compliance costs. The serious deficiencies that NERA has identified call into question the conclusions that EPA draws in the RIA and the likelihood that states can successfully implement the proposed standard. In fact, as discussed in Section II.E, the NERA Impacts Report (Attachment B) showed that the actual costs of a 65 ppb standard could be an order of magnitude higher than estimated in the RIA. At a minimum, to comply with Executive Order 12866 and fully inform its decision-making here, EPA must revise the RIA to address the deficiencies identified in the NERA RIA review and summarized below.

First, EPA has significantly underestimated the costs of complying with the proposed revisions by focusing solely on emissions reductions needed from a 2025 baseline. EPA selected 2025 as a baseline year because it falls after the deadline when most states would have to demonstrate attainment of the revised ozone NAAQS. In fact, states will have to demonstrate compliance with the revised standard much earlier than 2025, with deadlines for marginal and moderate nonattainment areas likely to be in 2020 and 2023, respectively. Because EPA assumes that baseline ozone concentrations will decline steadily through 2025, the incremental emissions reductions necessary to achieve attainment will be much smaller in 2025 than in 2020 or 2023 when states will actually have to meet the revised NAAQS. In other words, contrary to EPA's assumptions in the RIA, states will not be able to take advantage of baseline emissions reductions that will occur after the 2020 or 2023 compliance deadlines. EPA's analysis thus ignores the additional costs that states must incur in order to comply with the NAAQS prior to 2025.

In addition to the points raised by NERA, EPA's focus in the RIA on a 2025 baseline masks significant costs that will be incurred by states and regulated entities in complying with the proposed revised NAAQS. For example, EPA asserts that in 2025, only 9 counties outside

of California would exceed a level of 70 ppb and 68 counties would exceed a level of 65 ppb (RIA at ES-7). However, nonattainment designations will be based on air quality data collected over the next few years and will more closely resemble current ozone concentrations rather than those in 2025. As a result, many more than 9 (or 68) counties will exceed the proposed NAAQS at the time that attainment designations are made. As a result, states will face much more significant burdens in developing nonattainment SIPs; and, as described in Section II.E, many more regulated entities will be subject to onerous NNSR permitting requirements when they seek to construct new facilities or modify existing facilities. Further, even in 2025, nonattainment areas would likely exceed the few counties listed in the RIA. As a practical matter, EPA rarely makes designation determinations for individual counties. Instead, it typically applies the same designation to entire metropolitan statistical areas (MSAs). As a result, even if only 9 counties exceeded 70 ppb in 2025 as EPA suggests, it would still designate much larger MSAs as nonattainment for ozone. In fact, based on the county data included in the RIA (RIA at ES-7), it appears that the entire Dallas, Houston, Philadelphia, and New York MSAs would be designated as nonattainment.<sup>26</sup> In short, by focusing on the 2025 baseline and looking only at individual counties that exceed the proposed NAAQS levels, the RIA underestimates the cost of the proposed rule.

Second, EPA has underestimated the costs of the proposed rule by basing its analysis on multi-state regions rather than individual states. By conducting regional analyses, EPA's models identify and apply emissions controls at specific locations within a region without regard to whether the control location and ozone monitor are located in the same state. In doing so, EPA is implicitly assuming that states in a given region will coordinate their control strategies in a manner that minimizes overall compliance costs. However, NAAQS are implemented through state-specific implementation plans, and neither the proposed rule nor past experience suggests that states will develop their implementation plans in such a coordinated fashion. If compliance costs were appropriately modeled on a state-by-state basis in accordance with the typical SIP revision process, compliance costs would likely be higher, as low-cost cross-state controls would be replaced with additional in-state controls that are likely to have higher incremental costs.

Third, EPA's reliance on significant baseline reductions in emissions from mobile sources is misplaced. The baseline emissions reductions projected by EPA are based on existing regulations for new motor vehicles such as the Tier 3 rule and Corporate Average Fuel Efficiency (CAFE) standards, as well as assumption about vehicle usage patterns and vehicle

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<sup>26</sup> According to current delineations by the Office of Management and Budget (OMB), these four MSAs include a total of 58 counties: Dallas (13 counties), Houston (8 counties), Philadelphia (11 counties), and New York (25 counties). See OMB Bulletin No. 13-01, *Revised Delineations of Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and Guidance on Uses of the Delineation of These Areas* (Feb. 28, 2013), available at <https://www.whitehouse.gov/sites/default/files/omb/bulletins/2013/b-13-01.pdf>.

fleet turnover. As an initial matter, EPA's reliance on these regulations is questionable here. The emissions reductions attributable to the CAFE standards are far from certain, as these standards are subject to a mid-term evaluation in 2018. Until that review process is complete, it is inappropriate to consider future CAFE standards as "on the books." Furthermore, EPA's assumptions about vehicle fleet turnover are likely too optimistic. The regulations on which EPA relies for reductions from mobile sources apply only to new motor vehicles, meaning that emissions reductions only occur when existing vehicles are replaced by new vehicles subject to more stringent standards. However, vehicle turnover is a consumer-driven process and cannot be controlled by EPA. In particular, vehicle fleet turnover could be slowed if complying with Tier 3, CAFE standards, and other mobile source regulations increase the costs of new motor vehicles. Thus, without costly incentive programs to encourage scrapping of existing vehicles, baseline emissions from motor vehicles may not decrease to the degree that EPA projects.

Fourth, EPA inappropriately relies on emissions reductions attributable to the **proposed** Section 111(d) Clean Power Plan. As a general rule, EPA does not include proposed rules in the baseline for cost analyses. This is for good reason, as proposed rules are subject to change. This is particularly true for a proposal that is as controversial and complicated as the Clean Power Plan. In fact, EPA has already suggested that it may consider changes to the interim emission reduction targets that would apply between 2020 and 2029 and are the source of EPA's projected emission reductions in the RIA. See, e.g., 79 Fed. Reg. 64543 (Oct. 30, 2014). The uncertainty surrounding potential emission reductions associated with the proposed Clean Power Plan is heightened by the purported flexibility that states will have regarding both how to reduce greenhouse gas (GHG) emissions and when, during the interim period, they will do so. Thus, even if the Clean Power Plan is finalized and implemented in its current form, there is no guarantee that the projected NO<sub>x</sub> emissions reductions will occur by 2025, if at all. In light of the significant uncertainty related to the proposed Clean Power Plan, it was inappropriate for EPA to incorporate 300,000 tons of NO<sub>x</sub> emissions reduction into the 2025 baseline based on the proposed Clean Power Plan (see NERA RIA Review at 26-27). If those 300,000 tons of NO<sub>x</sub> emissions were appropriately excluded from the baseline, the costs of the proposed rule would increase significantly. Even using EPA's assumption that additional unknown NO<sub>x</sub> controls would cost \$15,000 per ton, the incremental cost of the proposed revisions would increase by \$4.5 billion. When added to EPA's current cost estimates of \$15 billion (RIA at ES-14, Table ES-6), the total cost of the proposal would be \$19.5 billion, which exceeds the lower end of EPA's projected benefits (see *id.*, projecting benefits of \$19 to 38 billion).

Fifth, EPA fails to account for the significant discrepancy between its current base case projection of emissions reductions and its projection of such reductions in the proposed Clean Power Plan. Specifically, EPA now projects base case NO<sub>x</sub> emissions that are 79,000 tons lower than it did less than a year ago when it proposed the Clean Power Plan (see NERA RIA

Review at 29). In each case, EPA relied on the same Integrated Planning Model (IPM) which was calibrated to the same *Annual Energy Outlook* from the U.S. Energy Information Administration (*id.*). EPA offers no explanation for this discrepancy, which could underestimate the additional emissions reductions needed to meet the revised ozone NAAQS. Because EPA subtracts the projected emissions reductions attributable to the Clean Power Plan from the base case in the proposed rule, the discrepancy in base cases may indicate that some of the projected emissions reductions are also included in the base case for the proposed rule and thus are being double-counted (*id.*). Again, correcting this apparent anomaly could increase the emissions reductions and costs needed to comply with the proposed revisions to the NAAQS.

Sixth, EPA's fixed cost estimate of \$15,000 per ton for emissions from "unknown controls" is likely to significantly underestimate the actual costs of achieving the proposed ozone NAAQS. Despite its simplicity, there is no factual basis on which to assert the accuracy of this assumption. Instead, EPA asserts that some currently available controls would qualify as "unknown controls," and further assumes that the costs of unknown controls will decline over time as technologies improve and companies gain experience working with new controls. But EPA cannot justify this arbitrary value of \$15,000 per ton by simply adding assumptions on top of assumptions. Nor does EPA offer any basis for abandoning the so-called "hybrid methodology" that it used in the 2008 revisions, under which the incremental costs of unknown controls were projected to increase as more unknown controls were needed to attain the NAAQS. Rather than relying on a fixed cost estimate, NERA suggests that EPA should have undertaken a greater effort to provide a factual basis to support cost estimates for these additional controls.

Seventh, EPA's sensitivity analysis for the cost of unknown controls is unduly narrow and likely understates the actual costs of these controls. In its sensitivity analysis, EPA evaluates fixed cost estimates of \$10,000 and \$20,000 per ton. This assumed range of plus or minus 33% for unknown controls is unduly narrow, given EPA's assertion that the accuracy range for known controls is 30%. Furthermore, when data from the "hybrid methodology" in EPA's 2008 ozone NAAQS revision is evaluated, the average cost per ton is greater than \$20,000. Yet EPA offers no explanation of why the cost per ton should be presumed to be so much lower than it was six years ago. The end result, then, is that EPA's use of a fixed cost estimate of \$15,000 per ton with a 33% sensitivity analysis is likely to significantly understate the actual costs per ton that will be incurred by companies that would be forced to install unknown controls.

In sum, EPA relies on a series of highly questionable assumptions about both the amount of emissions reductions that will be needed to attain the proposed NAAQS and the expected cost of those controls. These deficiencies cut to the core of EPA's RIA and raise significant questions regarding EPA assumption that the costs of complying with the proposed

standard will be both manageable and small in comparison to benefits. In fact, NERA has estimated that the cost of complying with NAAQS of 65 ppb could have a present value of almost \$1.1 trillion over the period from 2017 through 2014, compared to a present value of about \$167 billion based on EPA's annualized cost estimate (see NERA Impacts Report at S-9 to S-10). At a minimum, the Associations urge EPA to revise the RIA to account for the deficiencies identified by NERA and then make the revised RIA available for public comment by interested stakeholders.

## **B. The RIA Overestimates the Benefits of the Proposed Standard.**

At the same time that it understates the cost of the proposed revised standard, the RIA overstates the benefits of such a standard. Even if one were to accept the purported ozone-related benefits from revising the standard to within the range that EPA has proposed (which, for reasons discussed above, we do not), the benefits would be vastly overstated. Most of the benefits that the Agency attributes to a revised standard are related not to ozone, but to reduced levels of particulate matter. See RIA at 5-3, Table 5-1. EPA separately sets and implements NAAQS for particulate matter that, by definition, protect public health from particulate matter in ambient air, allowing an adequate margin of safety (§ 109(b)(1)). The particulate matter NAAQS were revised in 2013 to provide additional health protection, and were set at levels that the Administrator found “would be requisite to protect public health with an adequate margin of safety against health effects potentially associated with long- and short-term PM<sub>2.5</sub> exposures.” 78 Fed. Reg. 3086, 3164 (Jan. 15, 2013). EPA has provided no basis for concluding that those standards do not, in fact, protect public health and provide a margin of safety in doing so. Thus, there is no justification for EPA now to report benefits from reductions in the level of ambient particulate matter beyond those reductions required to meet the particulate matter NAAQS.<sup>27</sup>

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Taking into account both the understated costs and the overstated benefits, it is clear that the proposed ozone NAAQS revisions are not cost-effective.

We also note that, in addition to proposing a revision of the NAAQS, EPA's proposed rule includes provisions altering the procedures and requirements for ambient air monitoring and reporting by the states. These changes in procedures are distinct from the setting of the NAAQS level, and they will require equipment, personnel training, labor time, and other resource costs for the affected states (even those in attainment of any potential NAAQS). EPA has a duty under Executive Order 12866 to consider the costs and benefits of the proposed

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<sup>27</sup> The RIA also refers to other benefits of revised ozone NAAQS that it has not quantified (RIA at 5-3). To the extent these benefits are too uncertain to be quantified (*id.* at 5-5), they are too uncertain to be considered benefits of a revised ozone NAAQS.

changes in monitoring requirements and of alternative monitoring requirements, and to choose the monitoring requirement regulation approach that yields given benefits at the least cost. EPA has not presented any analysis of those costs and benefits, nor has it presented any evidence that the proposed monitoring requirements are necessary to implement the proposed NAAQS or to protect public health and welfare. In this regard, EPA has failed to comply with Executive Order 12866. In fact, even if EPA may not consider costs in establishing NAAQS themselves, there is no such prohibition on considering costs as well as benefits in its decision regarding these separate elements of the proposed rule, and EPA should do so.

## V. OTHER ISSUES

### A. EPA Should Extend the Deadlines for Reporting Exceptional Events.

As discussed previously (Section III.C.2.a), EPA adopted its Exceptional Events Rule in 2007 (72 Fed. Reg. 13560 (March 22, 2007)), allowing a state to seek to exclude certain data from consideration in NAAQS attainment decisions if the data were caused by exceptional events. As also discussed there, that program has not been successful due to EPA's unwarranted narrow interpretation of the requirements for an event to qualify as an exceptional event. Nevertheless, in the hope that this rule, if properly interpreted, can give States relief when a NAAQS is exceeded through events that are beyond the States' ability to control, the Associations submit that EPA should allow for reporting of exceptional events information at any time prior to an attainment decision or, at a minimum, should extend the submission deadlines for reporting such information as EPA has proposed.

EPA appropriately recognizes that the current deadlines for flagging and documenting exceptional events pose challenges for the proposed revision to the ozone NAAQS. First, exceptional events must be flagged by the State no later than July 1 of the year after the exceptional event occurred. 40 C.F.R. § 50.14(c)(2)(iii). In addition, the State must justify its claim of an exceptional event within three years after the data were collected and submit all information to EPA at least one year before a decision is to be made. *Id.* § 50.14(c)(3)(1). As EPA explains in the proposal, attainment decisions for a revised ozone NAAQS may be based on data going back as far as 2013 (79 Fed. Reg. at 75354). As a result, attainment designations under a revised standard may be based in part on data that were collected before the revised ozone NAAQS was issued (or even proposed). This may pose significant problems for states that experience (or have experienced) exceptional events prior to promulgation of a revised standard. To the extent that a data point is below the current NAAQS, but above the revised NAAQS, a state would not have had an incentive to investigate, flag, and then document whether an exceptional event occurred. Under the current deadlines, a state could risk being designated as nonattainment even though exceedances of the revised NAAQS were



caused by exceptional events that should have been excluded from the attainment determination.

In general, the Associations believe that there should be no specific deadlines, prior to an attainment decision, for flagging and documenting exceptional events. If, at any time before an attainment/nonattainment designation, a state discovers prior monitoring or other data to support an exceptional event claim, it should be able to exclude those data in making the attainment decision. At a minimum, however, for the reasons discussed above, EPA should finalize its proposal to extend the deadlines for flagging and documenting exceptional events causing exceedances of the NAAQS until after final revisions to the NAAQS, if any, have been issued.

#### **B. EPA's Proposed Transitional Provisions for PSD Are Insufficient To Allow Economic Growth.**

Economic growth in this country requires that businesses, including members of the Associations, be able to build new facilities and expand or otherwise modify existing facilities. Although the nation and the Associations recognize the value of – indeed, need for – such growth, experience has shown that such necessary growth can occur without unfettered increases in air pollution. As explained in the proposed rule, the Act requires preconstruction permitting for new major stationary sources or major sources undergoing major modifications, which is intended to ensure that growth can occur without significant increases in emissions of air pollutants (see 79 Fed. Reg. at 75375). The Act includes a PSD program for sources in areas designated unclassifiable or attainment (§ 161), along with an NNSR program for areas designated nonattainment (§ 173). EPA states that “the CAA and implementing PSD regulations . . . require that PSD permit applications must include a demonstration that new major sources and major modifications will not cause or contribute to a violation of any NAAQS that is in effect as of the date the PSD permit is issued”; but the Agency recognizes that it has the “discretion to issue regulations . . . to achieve both CAA objectives to protect the NAAQS and to avoid delays in processing PSD permit applications” (79 Fed. Reg. at 75377).

In conjunction with its proposed revision of the ozone NAAQS, EPA is proposing a transition program for PSD permitting. The Agency proposes to “grandfather” (i.e., exempt from a requirement to demonstrate that the activity to be permitted will not cause or contribute to a violation of the revised NAAQS) certain pending permit applications (*id.* at 75378). Specifically, EPA is proposing to revise its regulations to “grandfather” (1) applications that the permitting agency had determined to be complete prior to the signature date of the revised NAAQS, and (2) applications for which the permitting agency had provided public notice of a draft permit prior to the effective date of the revised NAAQS (*id.* at 75378, 75404). EPA is also proposing to allow states that issue permits under a SIP-approved program “discretion to allow grandfathering consistent with the grandfathering provision contained in the federal rule

provisions, even in the absence of an express grandfathering provision in their state rules” (*id.* at 75378). These proposals are analogous to provisions that EPA adopted in conjunction with its recent revision of the PM<sub>2.5</sub> NAAQS (*id.*). In the event that EPA ultimately decides to revise the ozone NAAQS, these provisions provide limited relief from the immediate burden imposed on applicants for PSD permits. Thus, if EPA should finalize a revised ozone NAAQS standard, it should include such a grandfathering approach. Moreover, given the inconsistencies in EPA’s proposal regarding the milestone dates for these grandfathering provisions (i.e., signature date or effective date), such grandfathering should be permitted for permit applications that are either determined to be complete or noticed prior to the effective date of any new NAAQS.

Unfortunately, the proposed grandfathering provisions do not go nearly far enough. They will provide relief to only a very small subset of PSD permit applicants. By the time that an application is deemed complete or has been publicly noticed, the permitting process is already well underway, and much of the “significant . . . effort, resources, and time involved in preparing all the information necessary for a complete permit application,” which EPA mentions (*id.*), will already have been expended. Despite their expenditure of “effort, resources, and time,” permit applicants who fall even a little short of a completeness determination or a public notice will be sent back to the drawing board to address the new standard, at the cost of even more “effort, resources, and time.” For these applicants, EPA’s proposal exacerbates rather than “avoid[s] delays in processing PSD permit applications” (*id.* at 75377).

Moreover, some permit applicants who are sent back to the drawing board will be unable to establish that their facilities will not cause or contribute to a violation of the new NAAQS. This would be the case, for example, for a source in an area in which current monitoring data indicates the revised NAAQS is not being met. Once designations are finalized for the revised NAAQS two or three years in the future, such areas may well be designated nonattainment. Sources seeking to expand or locate there will then proceed under the NNSR program instead of the PSD program, and will be required to obtain emission offsets instead of making an impossible demonstration that the NAAQS will not be exceeded. For permit applicants in this situation, the proposed rule offers the promise, in the interim prior to the revised attainment designation, of using emissions offsets “to mitigate [the source’s] adverse impact on the NAAQS and ultimately meet the PSD demonstration requirement” (*id.* at 75379). These offsets would have to be shown by the applicant “to compensate for the source’s adverse impact at the location of violation” (*id.* at 75380).

A program of this nature could theoretically be helpful. The parameters of the program, however, have not been adequately addressed. How would the application demonstrate that the impact at the location of violation has been offset? Existing ozone models are exceedingly

resource-intensive and cannot provide information of that nature.<sup>28</sup> Where will the offsets come from, and are they the same types of offsets required under the NNSR program? States implementing an NNSR program commonly operate offset banks, but in areas currently attaining the ozone NAAQS, such banks are unlikely to exist and they take time and resource to establish. How would this be accomplished? Indeed, even in nonattainment areas, sources of offsets can be difficult to identify. This problem would be exacerbated by more stringent NAAQS, which would likely result in more areas without any significant sources of ozone precursors being designated as nonattainment. Some such areas, however, are exactly those places that could benefit most from economic development.

Given that all new and modified sources subject to either the PSD or NNSR program must already address the current ozone NAAQS and use emissions controls that satisfy either the BACT or the even more stringent LAER requirement, a more workable solution would be to grandfather all PSD permit applications until final designations are made for the new NAAQS.<sup>29</sup>

**C. EPA Should Provide the Necessary Guidance and Regulations To Implement Revised Ozone NAAQS at the Time the NAAQS Is Promulgated and Give States as Much Time as Possible To Implement Revised NAAQS.**

The Act imposes strict timelines for implementation after NAAQS are promulgated. According to EPA, applicants for PSD permits must address new NAAQS as soon as the NAAQS become effective (79 Fed. Reg. at 75377). Other aspects of implementation are mandated to follow shortly thereafter. States must submit to EPA proposed designations of areas within their borders as “attainment,” “nonattainment,” or “unclassifiable” no more than a year after promulgation of revised NAAQS, and EPA must finalize the designations no more than a year after that, classifying nonattainment areas as “marginal,” “moderate,” “serious,” “severe,” or “extreme” (§§ 107(d)(1), 181(a)&(b)).<sup>30</sup> Infrastructure SIPs for all areas are due within three years of promulgation of revised NAAQS (or less at EPA’s discretion) (§ 110(a)). State submissions of various aspects of SIPs for nonattainment areas are required in as little as six months after a nonattainment designation (see § 182(a)(2)(A) relating to plans providing for

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<sup>28</sup> See Letter from then-Assistant Administrator Gina McCarthy (2012), acknowledging that the “complex chemistry of ozone” has “presented significant challenges to the designation of particular models for assessing the impacts of individual stationary sources” on ozone formation.

<sup>29</sup> As discussed above, EPA has adequately supported its decision to retain the current form of the secondary NAAQS, although EPA has not made an adequate case for lowering the level of the secondary standard. If EPA should, however, adopt a distinct secondary NAAQS (e.g., one using a W126 indicator), the Associations support the reliance on the new source permitting program that has been developed for the primary NAAQS as a surrogate for a separate permitting program for the secondary NAAQS. See 79 Fed. Reg. at 75380.

<sup>30</sup> A one-year delay of the final designations and classifications is allowed under certain circumstances. CAA § 107(d)(1)(B)(i).

reasonably available control technology in marginal nonattainment areas). States have some additional time to submit aspects of SIPs for areas in higher nonattainment classifications.<sup>31</sup>

States have primary responsibility for these implementation steps (§ 107(a)), and EPA is charged with reviewing and approving (or disapproving) state plans (§ 110(k)). If EPA is not satisfied with the states' implementation of their responsibilities, EPA may demand changes (§ 110(k)(5)), or, ultimately, take over implementation responsibilities from the states (§ 110(c)(1)).

EPA has historically issued rules and guidance that explain how states are to fulfill their responsibilities.<sup>32</sup> In the proposed rule, EPA indicates that it plans to issue rules and guidance to address implementation of any revised NAAQS. It has not yet done so, however. Instead, the Agency provides a timetable that it plans to follow for doing so. Thus, EPA states that it “intends to issue guidance concerning the designations process within 4 months of promulgation of the NAAQS, or approximately 8 months before state recommendations are due” (79 Fed. Reg. at 75372). EPA also indicates its intent “to develop and propose a new SIP Requirements Rule” that will be proposed “within 1 year after” promulgation of a revised NAAQS and will be finalized “no later than the time the designations process is finalized” (*id.* at 75374). Similarly, the Agency “anticipates finalizing” guidance on emissions inventory development, attainment demonstrations, and conformity demonstrations “by the time areas are designated nonattainment” (*id.* at 75373). Unfortunately, EPA has a history of failing to issue guidance and rules governing implementation in a timely manner. As noted above, implementation rules for the 1997 ozone NAAQS were not finalized until as late as 2007. EPA’s implementation rule for nonattainment area SIPs for the 2008 NAAQS was not published in the *Federal Register* until March 6, 2015 (80 Fed. Reg. 12263), although designations of certain areas as nonattainment for that standard were published by EPA in May 2012, with an effective date of July 20, 2012,<sup>33</sup> meaning that several statutory deadlines for implementation of that rule had already passed before the SIP rule was promulgated. Similarly, EPA has yet to even **propose** a rule concerning implementation of the revised annual NAAQS for PM<sub>2.5</sub>, although it has stated its intention to “**finalize** the implementation rule around the time the initial area designations

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<sup>31</sup> For example, Section 182(b)(1) provides a three-year deadline after nonattainment designation for submission of plans that provide for reasonable further progress in areas classified as moderate nonattainment, and Section 182(c)(2) provides a four-year deadline after nonattainment designation for an attainment demonstration using photochemical grid modeling for areas classified as serious nonattainment.

<sup>32</sup> See, e.g., Clean Air Fine Particle Implementation Rule, 72 Fed. Reg. 20586 (Apr. 25, 2007); Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard-Phase 2, 70 Fed. Reg. 71612 (Nov. 29, 2005); Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard – Phase 1, 69 Fed. Reg. 23951 (Apr. 30, 2004).

<sup>33</sup> Air Quality Designations for the 2008 Ozone National Ambient Air Quality Standards, 77 Fed. Reg. 30088 (May 21, 2012).

process is finalized” (78 Fed. Reg. at 3251; emphasis added), and the initial designations were published on January 15, 2015 (80 Fed. Reg. 2206).

EPA acknowledges that it has been asked by “a variety of states and other organizations” for more timely guidance (79 Fed. Reg. at 75372). EPA’s response to these requests is, first, to say that the Act “does not require” the Agency to “promulgate new implementing regulations every time that a NAAQS is revised” (*id.* at 75369), and, second, to suggest that existing regulations and guidance “may be sufficient in many cases to enable the EPA and the states to begin the process of implementing a new NAAQS” (*id.*). Even assuming that these statements may be true in some situations, they are certainly not uniformly true. For example, EPA solicits comments on “establishing area designation boundaries for the proposed revised primary and secondary NAAQS, including any relevant technical information that should be considered” (*id.* at 75375). Apparently, EPA is reevaluating the basis for designations. Thus, it would be foolish for states to proceed to make designations, their earliest implementation obligation, on the basis of existing guidance for the designations process.

More generally, EPA has announced its intention in this instance to issue additional implementation rules and guidance as noted above. States and those they regulate will reasonably be reluctant to proceed with implementation under existing regulations when they have been told that new regulations will be forthcoming. EPA’s promise to provide new implementation rules and guidance – together with the Agency’s history of significant delays in providing such materials in the past – calls into question the states’ ability to meet their statutory NAAQS implementation deadlines. In these circumstances, EPA should provide the necessary implementation regulations and guidance at the time of promulgating a revised ozone NAAQS.<sup>34</sup>

At a minimum, to reduce the likelihood that states will be put in the untenable position of being required to act prior to receiving instruction on the standards by which the adequacy of their actions will be judged, EPA should allow the maximum possible time under the statutory timeline for implementation. Although, as noted above, the Act in some instances allows EPA to require states to act sooner than by the default statutory deadline, the Agency should not impose earlier deadlines. Indeed, the Agency should consider an extended effective date for the rule to allow the Agency sufficient time to finalize implementation and guidance before the statutory deadlines for implementation are triggered. Furthermore, EPA should not allow the timeline to begin running before the effective date of the revised NAAQS. Thus, EPA should

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<sup>34</sup> EPA cites *Nat’l Ass’n of Manufacturers v. EPA*, 750 F.3d 921, 926-97 (D.C. Cir. 2014), for the proposition that “issuance of implementation rules and guidance is not a part of the NAAQS review process” (79 Fed. Reg. at 75372). The claim here, however, is not that such rules and guidance are part of the NAAQS process, but rather that – having indicated that it intends to issue such rules and guidance – EPA should do so in a timely manner that does not impede states’ ability to fulfill their obligations under the Act.

recognize that the effective date, not the date of signature, is the promulgation date for a NAAQS.<sup>35</sup>

**D. EPA’s Proposed Revisions to the Air Quality Index Are Inappropriate.**

Section 319 of the Act instructs EPA to promulgate a “uniform air quality index” (AQI) on which “daily analysis and reporting of air quality” is to be based (§ 319(a)(1),(3)). As EPA has explained previously, this requirement “is independent of the statutory provisions governing establishment and revision of the NAAQS.” 64 Fed. Reg. 42530, 42532 (Aug. 4, 1999). Indeed, EPA recognizes “there is no statutory requirement that the AQI be linked to the NAAQS” (*id.* at 42532). Although EPA has historically “keyed” the AQI to the NAAQS (*id.* at 42531), the Act keys the index to air quality.

As shown in the table below, which repeats Table 6 from the proposed rule (*id.* at 75311), the AQI describes air quality using an index that ranges from 0 to 500, with 0 representing the cleanest air and 500 representing the worst air quality. These index values are used to characterize air quality as “Good,” “Moderate,” “Unhealthy for Sensitive Groups,” “Unhealthy,” “Very Unhealthy,” and “Hazardous.”

**TABLE 6 – PROPOSED AQI BREAKPOINTS**

<b>AQI category</b>	<b>Index values</b>	<b>Existing breakpoints (ppb, 8-hour average)</b>	<b>Proposed breakpoints (ppb, 8-hour average)</b>
Good	0-50	0-59	0-(49 to 54)
Moderate	51-100	60-75	(50 to 55)-(65 to 70)
Unhealthy for Sensitive Groups	101-150	76-95	(66 to 71)-85
Unhealthy	151-200	96-115	86-105
Very Unhealthy	201-300	116-374	106-200
Hazardous	301-400 401-500	375-	201-

At present, as shown in Table 6, index values of 0 to 50, characterized as “Good” air quality, are associated with 8-hour ozone levels of 0 ppb to 59 ppb; index values of 51 to 100, characterized as “Moderate” air quality, are associated with 8-hour ozone concentrations of 60 ppb to 75 ppb; and higher index values, which characterize less desirable air quality, are associated with higher concentrations of ozone in the air. Not surprisingly, in light of its past

<sup>35</sup> The version of the EPA rule signed by the Administrator is not the official version and may change before its publication. Indeed, the copies that EPA releases of a rule that has been signed note that it is not official. For example, the signed version of the recent rule revising the NAAQS for particulate matter states: “This document is a prepublication version, signed by EPA Administrator, Lisa P. Jackson on 12/14/2012. We have taken steps to ensure the accuracy of this version, but it is not the official version.”

focus on keying the AQI to the NAAQS, EPA is proposing to make “confirming changes” to the AQI, as shown on the table, if it revises the NAAQS. Those changes would lower the ranges of ozone levels in each category, so that, for example, ozone air quality in the range of 50 or 55 ppb (depending on the level of the revised NAAQS) to 59 ppb would no longer be considered “Good,” but would be labeled as “Moderate,” and ozone air quality at the level of the current standard (75 ppb) would be changed from “Moderate” to “Unhealthy for Sensitive Groups.”

These “conforming changes would mean air quality that is actually improving would, in some instances, be reported as less healthy. An area for which the ozone level improved from 75 ppb to 72 ppb on its most polluted day, for example, would report “Moderate” air quality on that day under the current AQI. If the AQI were revised as EPA has proposed, however, that area would be required to report air quality on that day as “Unhealthy for Sensitive Groups,” thus labeling cleaner air as less healthy. Essentially, the revised AQI would fail to capture air quality improvements and would suggest degradation in air quality when none has occurred. As a result, members of the public would likely conclude, erroneously, that air quality had degraded. Indeed, they might question whether EPA and state regulators were doing their jobs.

Fortunately, there is no requirement that the Agency revise the AQI, leading to such misleading results. The Act does not require it. As EPA explained previously (64 Fed. Reg. at 42532), the Act does not tie the AQI to NAAQS. Indeed, the purpose of Section 319(a) of the Act is to provide a consistent, uniform means of gauging *air quality*. EPA’s proposal to revise the AQI runs counter to such uniformity. EPA’s proposal would change the *air quality* significance of a given index value and its associated AQI category. By contrast, retention of the current AQI would allow continued provision of uniform information on air quality.

#### **E. EPA Should Not Extend the Ozone Monitoring Season.**

EPA’s proposed rule includes a proposal to extend the ozone monitoring season for 33 states from anywhere from one to seven months (79 Fed. Reg. at 75358-60). In describing that proposal, EPA erroneously refers to days with maximum 8-hour average concentrations above 60 ppb as “exceedance days” (*id.* at 75358). While EPA states that this threshold is used as “simply a conservative benchmark that is below the levels proposed for the revised NAAQS” (*id.*), these references are clearly misleading to the public. If the Agency uses any ozone concentration as an indicator of exceedances, that concentration should be the same as the NAAQS. As previously discussed, the Associations believe that the NAAQS should not be changed.

In any event,, the Associations oppose any lengthening of the ozone monitoring season regardless of whether the NAAQS is retained or revised as proposed. The months in which ozone monitoring is currently required vary from state to state and, for each state, include the months with conditions most “conducive to ozone formation” based on factors that include

temperature, strength of solar insolation, and hours of daylight (*id.*). Newer science does not suggest that those considerations are no longer the appropriate ones. Indeed, as EPA recognizes, ozone concentrations are generally correlated with temperature, with higher concentrations in warmer months (*id.* at 75242); and numerous epidemiological studies have reported stronger associations of ozone concentrations with respiratory effects in the warm seasons or summer months (*id.* at 75257 n.54, 75258). Many areas proposed for extended ozone monitoring seasons have average high temperatures less than 50 degrees Fahrenheit in the “extended” month(s). Thus, we do not believe that the proposed extensions of the ozone monitoring season for 33 states is necessary or appropriate. The proposal will needlessly increase the costs of monitoring by extending the ozone monitoring season while generating little or no improved health benefits.

#### **F. EPA’s Proposal Does Not Comply with the Federal Information Quality Act.**

The federal Data Quality Act, also known as the Information Quality Act (IQA), enacted as Section 515(a) of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554), required federal agencies, such as EPA, to issue guidelines “ensuring and maximizing the quality, objectivity, utility, and integrity of information . . . disseminated by the agency.” EPA has issued such guidelines (EPA, 2002). Those guidelines apply to information disseminated by EPA and establish certain rigorous quality standards for “influential scientific, financial, or statistical information,” including information that will have a “clear and substantial impact . . . on important public policies or private sector decisions” (*id.*) They require, among other things, that the substance of that information be “accurate, reliable and unbiased,” including the use of “the best available science and supporting studies conducted in accordance with sound and objective scientific practices” (*id.*). The guidelines also provide mechanisms for challenges to and correction of information that the Agency disseminates. Clearly, the proposal and adoption of revised NAAQS would qualify as the dissemination of “influential scientific” information that will have a “clear and substantial impact” on “important public policies or private sector decisions,” and thus they are subject to the requirements of the IQA. This is particularly true given the CAA requirement that NAAQS revisions must “accurately reflect the latest scientific knowledge” (§ 108(a)(2)).

In this case, the Associations submit that EPA’s proposal to revise the NAAQS for ozone and the associated RIA do not comply with the IQA. The Agency’s proposal is not “accurate, reliable and unbiased” for many of the reasons discussed in Section III – i.e., that EPA has failed to properly take account of background concentrations, has failed to adequately explain its change in interpretations, has failed to take account of the adverse impacts of its proposal, and has failed to provide an adequate scientific justification for reducing the level of the standard. As one further example, EPA has not applied an appropriate causal framework, such



as that described by Goodman *et al.* (2013b), in evaluating the health effects data.<sup>36</sup> In addition, EPA's RIA is not "accurate, reliable and unbiased" for the reasons given in Section IV.

### **G. EPA Has Not Complied with the Unfunded Mandates Reform Act.**

The Unfunded Mandates Reform Act (UMRA) requires that, before promulgating any notice of proposed rulemaking that is likely to result in the promulgation of a rule that includes a federal mandate that may result in the expenditure by state or local governments or the private sector of \$100 million in any year, the agency must prepare a written statement that includes, among other things, an assessment of the costs and benefits of the mandate to the state and local governments or the private sector, the estimated costs of compliance, and the effect of the mandate on the national economy (2 U.S.C. § 1532(a)). In its current proposal, EPA dismisses the requirement to produce such an economic cost analysis under the UMRA on the apparent ground that EPA cannot consider costs in setting NAAQS (79 Fed. Reg. at 75386).

However, the UMRA requirement to publish a cost analysis is separate from considerations affecting EPA's decision on the NAAQS, and, rather, is intended to inform the public, state and local governments, and Congress regarding the potential that a regulation, however decided, may have budget implications for state and local governments of which they need to be aware. A revised ozone NAAQS will inevitably impose costs on the state and local government entities that must monitor their attainment status and must develop and enforce policies to attain and maintain compliance. It will also impose economic impacts on private sector businesses and individual citizens within the affected states, and those economic impacts on the private sector will likely have further repercussions on state and local governments in terms of tax revenues and social welfare program expenditures. Even if EPA is correct that the costs identified under an UMRA analysis cannot affect EPA's decision on the NAAQS, the purpose of the UMRA is served by providing credible and good-faith estimates of impacts so that states are informed to facilitate appropriate budget planning.

An UMRA analysis is also intended to inform Congress, so that legislators may consider the need to mitigate the identified cost impacts. There is evidence that existing federal funding to states through grants for air quality monitoring and policy enforcement is inadequate. See the 2004 report by the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials, "The Critical Funding Shortfall of State and

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<sup>36</sup> We also note that, although EPA no longer places substantial weight on the Harvard Six Cities Study or American Cancer Society-Cancer Prevention Study II, it does rely in part on a recent follow-up from that study (Jerrett *et al.*, 2009); and yet it has failed to provide the underlying data, analysis, and reanalysis of that study after FOIA request by industry, six requests by the House Science, Space, and Technology Committee, and a Congressional subpoena by the House Science, Space and Technology Committee (see <http://science.house.gov/sites/republicans.science.house.gov/files/documents/Subpoena%20link.pdf>).

Local Air Quality Agencies,” at <http://www.4cleanair.org/sites/default/files/Documents/FundingNeedsOverview.pdf>. Budget trends since 2004 have undoubtedly made the funding (or “unfunding”) situation worse. The delays in compliance with the existing NAAQS promulgated in 2008 are due, in part, to the effect of existing under-funding of EPA mandates affecting state and local environmental enforcement agencies, and the additional burden of new ozone NAAQS will only make matters worse. EPA has a duty under the UMTRA to present the facts about the costs of the proposed changes in the NAAQS so that the affected agencies and Congress will be aware of them and be able to plan and respond. EPA has not complied with that requirement.<sup>37</sup>

## VI. CONCLUSION

Industry and federal, state, and local regulators are working diligently to implement the current ozone NAAQS. A further reduction in the level of the NAAQS would impose massive additional burdens on state and local governments and regulated sources, including the Associations’ members, and would produce widespread and substantial adverse economic, social, and energy impacts on all sectors of the U.S. economy, with the risk of bringing economic growth in many parts of the country to a halt. The imposition of those additional burdens and impacts is not necessary to protect public health and welfare. In fact, as shown in this comments, a reduction in the level of the ozone NAAQS as proposed by EPA would be unlawful under the standard of Section 307(d)(9) of the Act as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” and in excess of EPA’s authority under the Act.

## VII. REFERENCES

*Note: The references listed below that were not located in EPA Docket ID No. EPA-HQ-OAR-2008-0699 (or an associated docket) or cited in the references in EPA’s proposed rule (79 Fed. Reg. at 75387-95) are marked with asterisks. Those references will be submitted to EPA under separate cover as part of Docket ID No. EPA-HQ-OAR-2008-0699.*

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<sup>37</sup> For the same reasons given in the paragraph at the end of Section IV, a full and complete cost assessment under the UMTRA would also need to consider the costs and benefits of the proposed changes in the procedures and requirements for ambient air monitoring and reporting by the states.

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## **ATTACHMENT A**





**Baton Rouge Area Chamber®**

*Leading Economic Development  
in the Baton Rouge Area*

**BRAC Public Policy Commentary:  
*Eighteen of Twenty Top-Performing Metro Economies at Risk from New Ozone  
Standards***

*Published on Monday, March 2, 2015*

All but two of the nation's top twenty metropolitan area economies, as ranked by the Brookings Institution's assessment of performance through recession and recovery, would fall into "ozone nonattainment" status if the Obama administration moves forward with its more aggressive regulatory plans for air quality, according to an analysis completed by the Baton Rouge Area Chamber (BRAC)

The proposed National Ambient Air Quality Standards (NAAQS) for ground level ozone rule, issued by the Environmental Protection Agency (EPA) on December 17, 2014, is designed to lower the current NAAQS of seventy-five parts-per-billion (ppb) to a range between sixty-five and seventy ppb. Should the Obama administration push forward with a standard of sixty-five ppb, eighteen of the U.S.'s twenty top-performing metropolitan economies would find themselves in a regulatory posture of "nonattainment," and all the regulatory consequences that entails.

<b>Brookings Institute Metro Monitor - September 2014</b>			
<b>City/Area</b>	<b>State</b>	<b>Overall Rank (Recession + Recovery)</b>	<b>Ozone Design Value 2011-2013</b>
Austin	Texas	1	73
Harris/ Houston	Texas	2	82
San Antonio/Bexar	Texas	3	81
Dallas	Texas	4	84
Oklahoma County	Oklahoma	5	79
Davidson/Nashville	Tennessee	6	70
Provo/Orem	Utah	7	73
San Jose/Silicon Valley (Santa Clara)	California	8	68
Delaware/Columbus	Ohio	9	80
El Paso	Texas	10	72
Denver/Boulder	Colorado	11	79
Portland	Oregon	12	56
Salt Lake	Utah	13	76
Raleigh/Durham	North Carolina	14	71
Omaha	Nebraska	15	67
Charleston	South Carolina	16	63
Pittsburgh	Pennsylvania	17	76
Spartanburg/Greenville	South Carolina	18	72
Grand Rapids	Michigan	19	74
<b>Baton Rouge</b>	<b>Louisiana</b>	<b>20</b>	<b>75</b>

[Brookings' Metro Monitor](#) tracks the performance of the one hundred largest U.S. metropolitan areas on four indicators: jobs, unemployment, output (gross product), and house prices. The analysis of these indicators is focused on change during three time periods: the recession, the recovery, and the combination of the two (recession + recovery).

Using the rankings from the Brookings combination assessment (recession + recovery), BRAC then cross-matched those metropolitan areas with their respective ozone design values (average of fourth highest readings over a period of three years), as compiled by the EPA. For instance, the Baton Rouge Area ranks as the twentieth best-performing metropolitan economy in the U.S., with an ozone design value of seventy-five ppb (parts per billion).\*

It should also be noted that, while this analysis makes use of the design value computed for the three-year period covering 2011 through 2013, the Baton Rouge Area was determined to meet the current standard (seventy-five ppb) in 2013 and again in 2014, and has continued to measure below

seventy-five ppb throughout its statistical area. **Yet while the Baton Rouge Area continues to make this positive environmental progress, it also has firsthand experience with what it means to be in nonattainment – a status that could soon apply to almost all other top-performing metros.**

A [report](#) published by the National Association of Manufacturers in July 2014 assessed the potential economic impact of the proposed new ozone standards, but it also touched upon what “nonattainment” means in practical terms. As the report explained:

“The greatest costs to comply with ozone regulations generally occur in nonattainment areas. The consequences for nonattainment are severe and can include a loss of industry and economic development resulting from increased costs, delays and uncertainties from restrictive permitting requirements; loss of federal highway and transit funding; requirements that any new emissions in the area be offset or the facility cannot be built; and technical and formula changes for commercial and consumer products.”

Mary Martin, who serves as Energy, Clean Air and Natural Resources Policy counsel for the U.S. Chamber, has [described](#) how these restrictions translate into consequences:

“[F]ailure to comply with existing ozone standards can lead to non-attainment designation, which are often viewed as a death knell for economic and business development in an area.

“Indeed, severe repercussion[s] result almost immediately from non-attainment designation, such as increased costs to industry, permitting delays, restrictions on expansion, as well as impacts to transportation planning. There are significant adverse consequences to being designated a non-attainment area, making it substantially harder for a community to attract new business or expand existing facilities. Furthermore, in non-attainment areas, EPA is able to revise existing air permits, which can cause tremendous uncertainty, delays, and increased costs in the permitting process for businesses.”

While the Baton Rouge Area Chamber believes in and stands for cleaner air and an improved environment, it continues to vehemently oppose the proposed reductions in ambient air quality standards from the current level of seventy-five ppb.

Since the EPA first proposed lowering the ozone standard in December, the Baton Rouge Area has seen four major industrial projects totaling 2,000 direct and indirect jobs, and more than \$7 billion in capital investment, either put on hold or redirected elsewhere. These losses are in direct correlation with the uncertainty created by the newly proposed ozone standards rule. The direct impact on the Baton Rouge Area, in terms of new payroll created from the projects themselves, would have been over \$86 million annually in wages for the local economy. Also, because these projects included foreign direct investment projects, they also represented new investment from multi-national corporations into the country. **Federal regulations concerning NAAQS are having a direct, negative effect on competing U.S. goals for increasing foreign direct investment and exports.**

## BRAC Public Policy Commentary

In the Baton Rouge Area case outlined above, these consequences came about merely from the regulation being *proposed*. Imagine the losses if it is actually implemented, losses not only for Baton Rouge but for other top-performing metros across the country. The implication is that U.S. government policy toward ozone, as proposed, runs in direct contradiction to America's economic goals. More time should be taken to plan solutions that avoid the negative effects on the national economy, and especially on the top-performing regional economies in the United States.

*\*EPA recommends using the [Core Based Statistical Area \(CBSA\)](#) as the starting point to determine boundaries of ozone nonattainment. Based on this approach the highest monitored value of ozone in a CBSA was provided.*

### **About the Baton Rouge Area Chamber**

The Baton Rouge Area Chamber (BRAC) leads economic development in the nine-parish Baton Rouge Area, working to attract new companies and assisting existing companies with growth and expansions. Today, BRAC investors include more than 1,300 businesses, civic organizations, education institutions, and individuals. In this capacity, BRAC serves as the voice of the business community, providing knowledge, access, services, and advocacy. More information is available at [www.brac.org](http://www.brac.org).

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## **ATTACHMENT B**

**Economic Impacts of a 65 ppb National Ambient  
Air Quality Standard for Ozone**  
*Executive Summary*



Prepared for:

National Association of Manufacturers

February 2015

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## **Report Qualifications/Assumptions and Limiting Conditions**

Information furnished by others, upon which all or portions of this report are based, is believed to be reliable, but has not been independently verified, unless otherwise expressly indicated. Public information and industry and statistical data are from sources we deem to be reliable; however, we make no representation as to the accuracy or completeness of such information. The findings contained in this report may contain predictions based on current data and historical trends. Any such predictions are subject to inherent risks and uncertainties. NERA Economic Consulting accepts no responsibility for actual results or future events.

The opinions expressed in this report are valid only for the purpose stated herein and as of the date of this report. No obligation is assumed to revise this report to reflect changes, events or conditions, which occur subsequent to the date hereof. The opinions expressed in this report are those of the authors and do not necessarily represent the views of NERA Economic Consulting, other NERA consultants, or NERA's clients.

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## EXECUTIVE SUMMARY

This study evaluates the potential compliance costs and impacts on the U.S. economy if the U.S. Environmental Protection Agency (EPA) were to set a National Ambient Air Quality Standard (NAAQS) for ozone of 65 parts per billion (ppb). Employing our integrated energy-economic macroeconomic model (N<sub>ew</sub>ERA), we estimate that the potential emissions control costs could reduce U.S. Gross Domestic Product (GDP) by about \$140 billion per year on average over the period from 2017 through 2040 and by about \$1.7 trillion over that period in present value terms.<sup>1</sup> The potential labor market impacts represent an average annual loss employment income equivalent to 1.4 million jobs (*i.e.*, job-equivalents).<sup>2</sup>

These results represent updated values from the results in our July 2014 report (NERA 2014), which developed estimates of the potential costs and economic impacts of achieving a 60 ppb ozone standard using the best information then available. In November 2014, the U.S. Environmental Protection Agency (EPA) released updated emissions and cost information supporting their proposal to revise the ozone standard (EPA 2014a); we have used that new information to update our analysis. Also, given that the proposed rule suggests setting a revised ozone NAAQS in the range of 65 ppb to 70 ppb, in this update we assess the economic impacts of a potential 65 ppb ozone NAAQS. This Executive Summary of our study begins with a summary of the differences between the information and methodology in our July 2014 report and those used in this updated study. It then provides summaries of our estimates of the costs and economic impacts of attaining a potential ozone NAAQS of 65 ppb.

### *Changes in Data and Methodology Since the July 2014 Report*

The methodology used for this study is largely similar to the methodology used in our July 2014 report. This section discusses changes to the three components of our analysis:

1. *The methodology for estimating emission reductions.* This study used updated EPA information on the future NO<sub>x</sub> and VOC emissions levels needed to comply with a potential 65 ppb standard (rather than a 60 ppb standard as in our July 2014 report).

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<sup>1</sup> All dollar values in this report are in 2014 dollars unless otherwise noted. The present value reflects impacts from 2017 through 2040, as of 2014 discounted at a 5% real discount rate; this discount rate falls in the 3% to 7% range recommended in EPA's *Guidelines for Preparing Economic Analyses* (2010a, p. 6-19), and it is consistent with the discount rate used in the N<sub>ew</sub>ERA model.

<sup>2</sup> "Job-equivalents" is defined as total labor income change divided by the average annual income per job. This measure does not represent a projection of numbers of workers that may need to change jobs and/or be unemployed, as some or all of the loss could be spread across workers who remain employed, thereby impacting many more than 1.4 million workers, but with lesser impacts per worker.

Additionally, we used updated cost and effectiveness information about emission controls that have been identified by EPA.

2. *The methodology for estimating compliance costs.* We updated the costs of the known controls that EPA identified to attain the 65 ppb standard using EPA's new cost data. However, even for a 65 ppb standard, more than half of the emissions reductions needed across the country would come from measures that EPA still has not identified. Using the same evidence-based approach for developing a cost curve that we used in our July analysis (but using the more recent inventory data, and updating the calculations for a later year of compliance spending), we calculated the costs of the set of further emissions reduction needs that EPA has left unidentified in its current analysis. We also updated all dollar figures from 2013 to 2014 dollars.
3. *The methodology for estimating economic impacts.* We used the same version of NERA's  $N_{ew}$ ERA macroeconomic model as our previous study to estimate the economic impacts of our estimated costs for reducing emissions in the amount necessary to attain a 65 ppb ozone standard. In contrast to EPA's analysis, we excluded the proposed EPA Clean Power Plan rule from our modeling baseline.

In our July 2014 report, we performed a sensitivity analysis on the possibility that nonattainment, especially in rural areas of the U.S., could create barriers to continued growth in oil and gas extraction. A national policy question that remains in a state of flux is whether or not new permitting requirements hinder growth in energy production. A tightened ozone standard has the potential to cause nonattainment areas to expand into relatively rural areas, where there are few or no existing emissions sources that could be controlled to offset increased emissions from new activity. If nonattainment expands into rural areas that are active in U.S. oil and gas extraction, a shortage of potential offsets may translate into a significant barrier to obtaining permits for the new wells and pipelines needed to expand (or even maintain) our domestic oil and gas production levels. The sensitivity analysis in our July 2014 report resulted in much larger natural gas price effects, and raised macroeconomic impacts of our base case by about 30 to 50%. Limitations of time have prevented us from conducting a similar sensitivity analysis for this update.

### ***Methodology for Estimating Emission Reductions***

The July 2014 report relied on projected 2018 baseline VOC and NO<sub>x</sub> emissions and EPA information from its 2008 and 2010 Regulatory Impact Analyses (RIAs) to estimate reductions required for all regions of the U.S. to come into compliance with a 60 ppb standard. The updated EPA information that we rely on in this study includes projected 2018 and 2025 base case and baseline emissions as well as EPA's estimates of reductions required from the 2025 baseline emissions to achieve a 65 ppb standard (EPA 2014a-g). We use the updated EPA estimates of

state-by-state emissions reductions from the 2025 baseline as the principal basis for our estimates of NO<sub>x</sub> emissions levels that would allow a 65 ppb standard to be attained nationwide.<sup>3</sup> In order to reach and maintain this level of NO<sub>x</sub> emissions consistent with a 65 ppb ozone concentration, states would need to reduce emissions at existing sources and prevent any *net* increases in emissions from new or expanded sources. We also rely on EPA’s revised data on the cost of emissions reductions for “known” control measures, which are provided by source sector and state.

Our methodology for estimating costs of emission reductions is similar to our July 2014 study. In both studies, we substituted our base case estimates of electricity generating unit (EGU) emissions for those of EPA, for consistency with our economic impact model, which estimates costs from EGU emissions reductions endogenously. As before, we adopted EPA’s cost estimates for those controls that EPA identifies as “known”—that is specific controls for which EPA had developed emission reduction and cost information—and we applied our own more evidence-based approach for estimating costs for the many required reductions that EPA treats as “unknown.” For estimating the impacts to the U.S. economy of our estimates of compliance costs, we assigned each state’s projected cost to specific calendar years, using assessments of their likely attainment dates. Also consistent with our prior study, we assigned the costs to specific sectors in each state; for the “known” control measures these assignments were based on the sector-specific information available in EPA’s data and for the “unknown” control measures, these assignments were based on emissions inventory data on the relative contribution of each source category to the remaining emissions in each state.

### ***Methodology for Estimating Compliance Costs***

Our methodology for developing estimates of compliance costs in this study is the same as in our July 2014 report, although of course the numerical values are different reflecting the additional information now available. As noted, EPA developed updated estimates of the annualized costs from “known” controls, and we used this updated information on “known” controls.

As in the July 2014 analysis, emission reductions from “known” controls were not sufficient to achieve attainment, in this case with a 65 ppb ozone standard. EPA has filled the gap with a rough estimate of costs of “unknown” controls, *i.e.*, controls for which no cost information was developed. In contrast to the two cost estimation methodologies presented in its 2008 and 2010 RIAs, this time EPA used a single simplistic assumption that annualized control costs for these “unknown” controls would be equal to \$15,000 per ton, regardless of the state, the sector, or the amount of emission reduction required. This estimate was not based upon any evidence-based

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<sup>3</sup> We focused our analysis on NO<sub>x</sub> emissions, but we also included EPA’s estimates of VOC emission control costs in our modeling.

analyses of the nature of the emissions that remain after “known” controls are in place, or of the costs of potential additional controls for these sources.

Our compliance cost estimates are based upon a synthesis of EPA estimates of emission reduction, our modifications of EPA’s assumptions regarding baseline reductions, EPA’s estimates of the costs of “known” controls, and our more detailed estimates of the costs of “unknown” controls. As in our July 2014 report, our “unknown” cost estimates are more evidence-based than EPA’s, as we use detailed information on the types of sources that account for the remaining emissions (EGUs, other point sources, on-road sources, off-road mobile sources, and area sources) as well as estimates of the potential costs of reducing emissions by scrapping existing emission sources prematurely. We updated our estimates of the costs of scrapping light-duty motor vehicles using up-to-date information. We also used updated information to assess the implications of these dollar-per-ton values for the marginal cost curve for reductions needed to achieve compliance. As in the July 2014 study, the result is a set of estimates of the costs for each state to comply with a more stringent ozone standard based upon the use of specific information to assess “unknown” control costs.

### ***Methodology for Estimating Economic Impacts***

Our methodology for estimating economic impacts of the estimated costs of compliance with a 65 ppb ozone standard is the same as in the July 2014 study for a 60 ppb standard, using NERA’s  $N_{ew}ERA$  macroeconomic model. In the  $N_{ew}ERA$  model, expenditures on emissions control measures to comply with a new ozone standard reduce investment in other productive sectors of the economy, which results in decreases in economic output in subsequent years. The capital costs associated with compliance spending are assumed to be incurred from 2017 until 2036 (the last projected compliance date, for extreme areas), while each state’s estimated operating and maintenance (O&M) costs are incurred for all years after the state’s attainment date. Our economic impact analysis accounts for the effects of costs projected to be incurred through 2040.

$N_{ew}ERA$  is an economy-wide integrated energy and economic model that includes a bottom-up, unit-specific representation of the electric sector, as well as a representation of all other sectors of the economy and households. It assesses, on an integrated basis, the effects of major policies on individual sectors as well as the overall economy. It has substantial detail for all of the energy sources used by the economy, with separate sectors for coal production, crude oil extraction, electricity generation, refined petroleum products, and natural gas production. The model performs its analysis with regional detail. As discussed above, this particular analysis uses state-specific cost inputs, and  $N_{ew}ERA$  has been run to assess economic impacts for each state. Appendix A of the July 2014 report provides a detailed description of the  $N_{ew}ERA$  model.

The macroeconomic analysis requires a baseline that projects economic outcomes in the absence of the incremental spending to attain the tighter ozone NAAQS. For this study,  $N_{ew}ERA$ ’s

baseline conditions were calibrated to reflect projections developed by Federal government agencies, notably the Energy Information Administration (EIA) as defined in its *Annual Energy Outlook 2014 (AEO 2014)* Reference case. This baseline includes the effects of environmental regulations that have already been promulgated as well as other factors that lead to changes over time in the U.S. economy and the various sectors. Our baseline does not include the effects of proposed regulations, such as the Clean Power Plan (CPP), although we do include power sector closures as an available way to attain the NAAQS, to the extent that we find such closures to be cost-effective elements of each state's control strategy.<sup>4</sup>

The July 2014 report and appendices provide details on the various aspects of our methodology, subject to the changes noted above. Although this Executive Summary report describes results for the United States as a whole and disaggregated to 11 regions,<sup>5</sup> the inputs and the results are built up using detailed state-specific and sector-specific cost information. The costs and impacts of a more stringent ozone standard differ substantially among states.

### ***Summary of National Results***

#### ***Emission Reductions Required to Achieve a 65 ppb Ozone Standard***

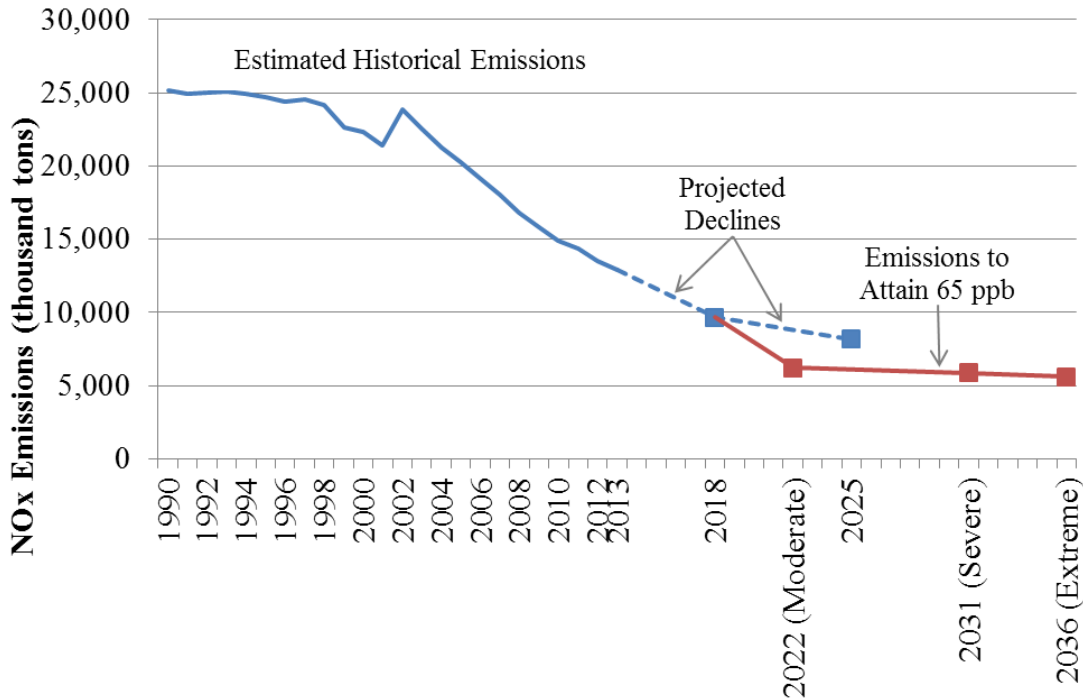
As Figure S-1 illustrates, national NO<sub>x</sub> emissions have already been reduced substantially, from about 25.2 million tons in 1990 to 12.9 million tons in 2013 (EPA 2014b). EPA currently projects that U.S. NO<sub>x</sub> emissions will be further reduced by existing rules and regulations to 8.2 million tons by 2025 (supplemented with N<sub>ew</sub>ERA's projected baseline EGU emissions, which does not include the proposed CPP). Those additional emissions reductions between 2013 and 2025 will involve costs beyond the compliance costs estimated in this study. Economic activity (as measured by real GDP) in 2025 is projected to be more than double the level in 1990 (CEA 2014, Table B-3 and OMB 2013, Table 2), suggesting that U.S. NO<sub>x</sub> sources will have been controlled by more than 80% by 2025, without the additional controls needed to attain a tighter ozone NAAQS.

---

<sup>4</sup> EPA's inclusion of the CPP in its baseline was inconsistent with its standard practice of only including promulgated regulations. This deviation from standard procedure seems particularly unjustified given the enormous uncertainty in what carbon limits may actually be applied and how states would comply, and hence what NO<sub>x</sub> emission reductions might actually occur as a result of this carbon regulation.

<sup>5</sup> "U.S." results are, formally, only for the lower 48 states, and exclude Alaska and Hawaii, as well as Washington DC. We refer to the lower 48 states as "U.S." hereafter.

**Figure S-1: U.S. NO<sub>x</sub> Emissions to Attain 65 ppb NAAQS Compared to Historical NO<sub>x</sub>**



Notes: Blue solid line: Estimated historical emissions.  
 Blue dotted line: Projected further declines through 2018 and 2025 (linear interpolation).  
 Red line: Emissions to attain 65 ppb on attainment schedule, with states not requiring reductions for 65 ppb held constant after 2025.  
 The slight increase in U.S. NO<sub>x</sub> emissions from 2001 to 2002 primarily reflects changes in EPA’s emission modeling methodology for onroad and nonroad sources (switching from MOBILE6 to the National Mobile Inventory Model and MOVES)  
 Source: NERA calculations as explained in text

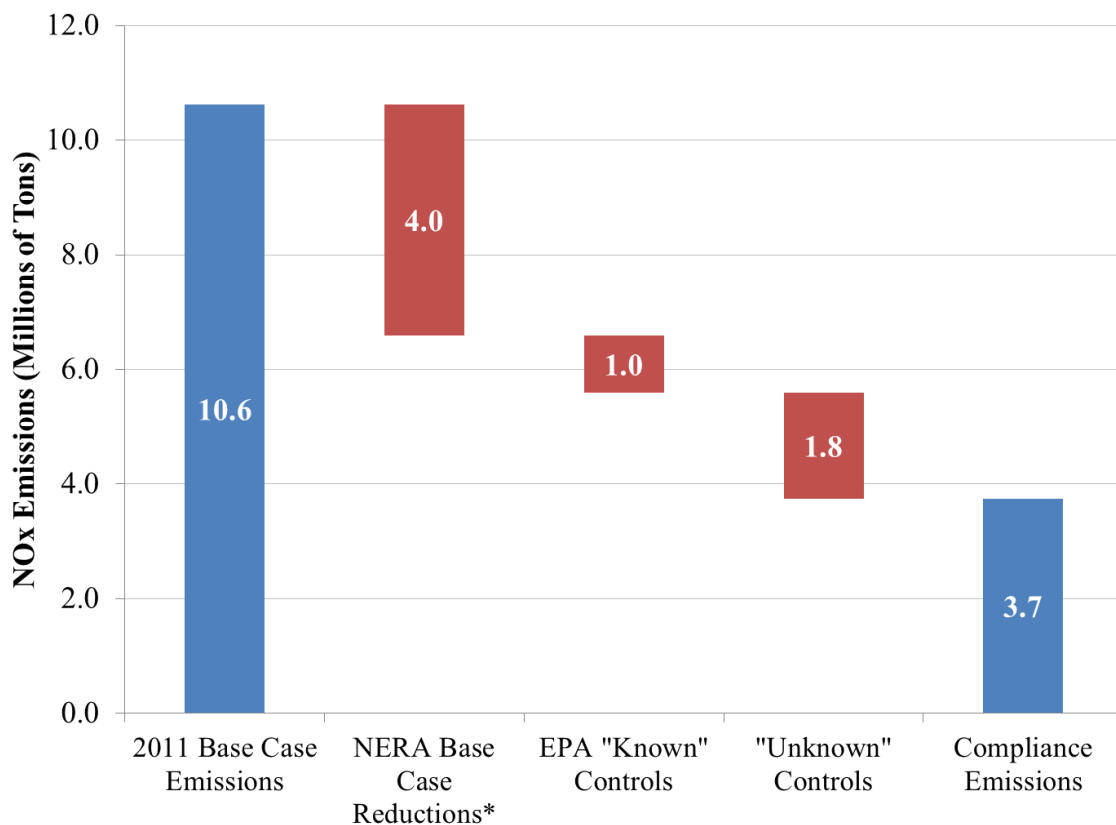
Based on the EPA information, total U.S. NO<sub>x</sub> emissions would have to be reduced to about 6.2 million tons by 2022 and 5.6 million tons by 2036 to meet a 65 ppb standard throughout the nation. This reduction appears as the red line above in Figure S-1, which also shows our prognosis of the timing of those reductions, based on our estimates of the likely severity classifications of the different states.<sup>6</sup>

Figure S-2 shows our estimates of emissions and emission reductions for the 34 states that would not attain a 65 ppb under baseline conditions. Despite the extensive controls already expected to

<sup>6</sup> Nonattainment areas are given different classifications—marginal, moderate, serious, severe or extreme—depending on how far out of attainment they are with the NAAQS at the time that designations must be made, two years after promulgation.

occur in the future, we estimate that about 2.6 million additional tons (in aggregate) would need to be eliminated by 2022 and an additional 300,000 tons would need to be eliminated by 2036 in order for those states to come into attainment on schedule. This is equivalent to roughly another 25% reduction from the reduction estimated solely based on those states' 2025 NO<sub>x</sub> emissions. It implies almost a 90% total reduction from all sizes and types of NO<sub>x</sub>-emitting sources from the relatively uncontrolled emissions rates in 1990 (after adjusting for growth).

**Figure S-2: NO<sub>x</sub> Emissions and Categories of NO<sub>x</sub> Reductions to Attain 65 ppb NAAQS (for 34 Non-Attaining States Only)**



Note: Emissions and reductions include only states requiring emission reductions for compliance with a new ozone NAAQS of 65 ppb in this analysis.

\*The NERA Base Case reflects 2022 conditions in each state requiring reductions, with two exceptions: The Base Case for UT and CA reflect conditions in 2031 and 2036, respectively, based on higher likely severity classifications in those two states.

Source: NERA calculations as explained in text

Figure S-3 shows the mix of emission reductions needed across 34 states that EPA projects will face compliance costs to achieve a 65 ppb ozone standard, including our estimates of the allocation of “unknown controls” to individual source categories. The dark green shows EPA’s

“known controls” and the light green shows NERA’s evidence-based assumptions regarding where “unknown controls” will likely come from.<sup>7</sup> The remaining sum (shown in the blue bars) is 3.7 million tons—the aggregate limit for those 34 states to achieve attainment in all the states projected to be in nonattainment under baseline conditions. This 3.7 million ton aggregate limit needs to be met by the attainment deadlines, which we assume to be 2022 for all states except California and Utah, which are assumed to have much later attainment dates.<sup>8</sup>

As noted above, NERA’s estimates of what the “unknown” controls will comprise includes deep cuts in the EGU sector, where emissions are concentrated in a few sources and costs per ton are thus lower than for the many smaller sources among the non-point source categories (*i.e.*, area, onroad mobile and nonroad mobile). NERA estimates that the remaining “unknown” controls outside of the EGU sector will involve much smaller incremental percentage reductions than from EGUs, because these will require programs such as scrapping a portion of vehicles and other small sources. These controls are also projected to come at a substantially higher cost per ton than the EGU controls—even though we assume that the small-source scrapping programs will only target the oldest, highest-emitting of each type of NO<sub>x</sub>-emitting equipment.<sup>9</sup>

---

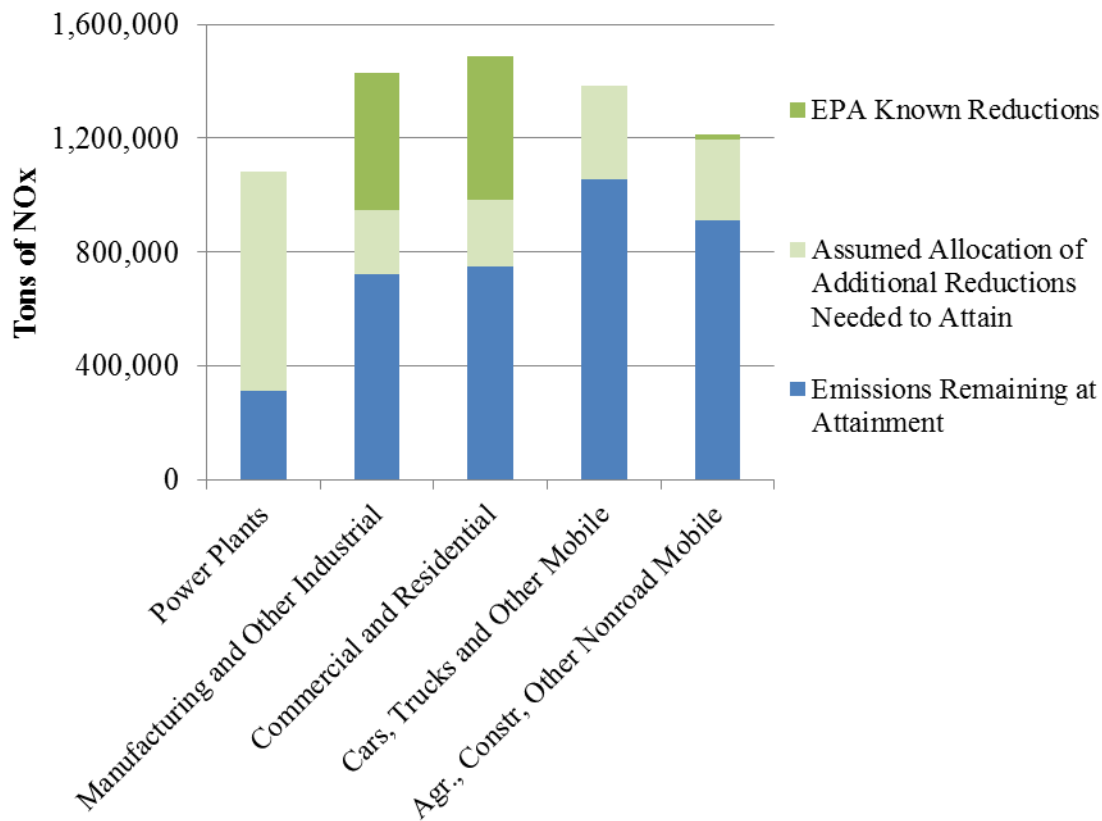
<sup>7</sup> This figure does not show the amount of EGU controls (mostly from installation of SCRs) that EPA has identified as “known” control in that sector because our analysis shows that one of the most cost-effective forms of control that EPA has called “unknown” will be to close those EGUs instead. Thus, we assume that the SCRs in EPA’s list of “known” controls will not actually be installed, and replace their reductions with the much larger reductions that would come from EGU closures that are cost-effective for meeting a 65 ppb NAAQS (which appear as the light green area on the EGU bar).

<sup>8</sup> States that will be classified as marginal nonattainment in 2017 will face a 2020 attainment date, or will be re-designated as moderate, and then must be in attainment by 2023. Our analysis suggests that some of the marginal states may reach attainment by 2020 without incremental controls other than the baseline reductions, and they face no compliance cost in our analysis. We have assumed that marginal states that would not attain by 2020 under their baseline forecast will not undertake early costly action to avoid reclassification as moderate, and will attain by the moderate attainment date along with states that will have been classified as moderate in 2017.

<sup>9</sup> For example, our estimates of costs and tons removed by scrapping of light-duty cars is limited to vehicles still on the road in 2022 that are of a pre-2008 model year (*i.e.*, pre-Tier 2 vehicles). We estimate that those older vintages of cars will account for about 40% of projected light-duty vehicle emissions in 2022.



**Figure S-3: NERA Analysis’s Allocation of Additional Reductions Necessary to Attain a 65 ppb NAAQS to Categories of Emissions Sources in the 34 Non-Attaining States**



Source: NERA calculations as explained in text

### ***Compliance Costs to Achieve a 65 ppb Ozone Standard***

We estimate that the potential costs of achieving a 65 ppb ozone standard could have a present value of almost \$1.1 trillion as of 2014 (based upon costs incurred from 2017 through 2040), not including any costs for forcing a massive cutback in generation from coal-fired EGUs to reduce NO<sub>x</sub> emissions from the power sector (whose costs are endogenously determined in the economic impact model).<sup>10</sup> These costs are reported in Figure S-4. As a rough point of

<sup>10</sup> Although the precise costs of the EGU closures is determined in the model, we used preliminary model runs to identify which closures would be as or more cost-effective than other unknown controls in our analysis. Based on this exercise, we estimate that the majority of the NO<sub>x</sub> emission reductions associated with the EGU closures cost an average of about \$16,000 per ton, and range well above \$30,000 per ton in some states. The result of the constraints that we applied was 34 GW of outright unit retirements, but a substantial number of additional GW of coal-fired capacity is left on-line but no longer generates in the model. This means that more than 34 GW is effectively closed down in our analysis.

comparison, we estimate that EPA’s annualized cost estimate implies a present value of about \$167 billion.<sup>11</sup> The primary difference in our methodologies is the extrapolation method used to estimate the cost of “unknown” controls; we attempted to assess the kinds of controls that would be required after “known” controls and based our method on the estimated costs per ton of one such control (vehicle scrappage), whereas EPA relied on an arbitrary constant value.

**Figure S-4: Potential U.S. Compliance Spending Costs for 65 ppb Ozone Standard**

	Present Value (Billions of 2014\$)			Cumulative
	Capital	O&M	Total	Coal Retirements
Compliance Costs	\$430	\$630	\$1,050	34 GW

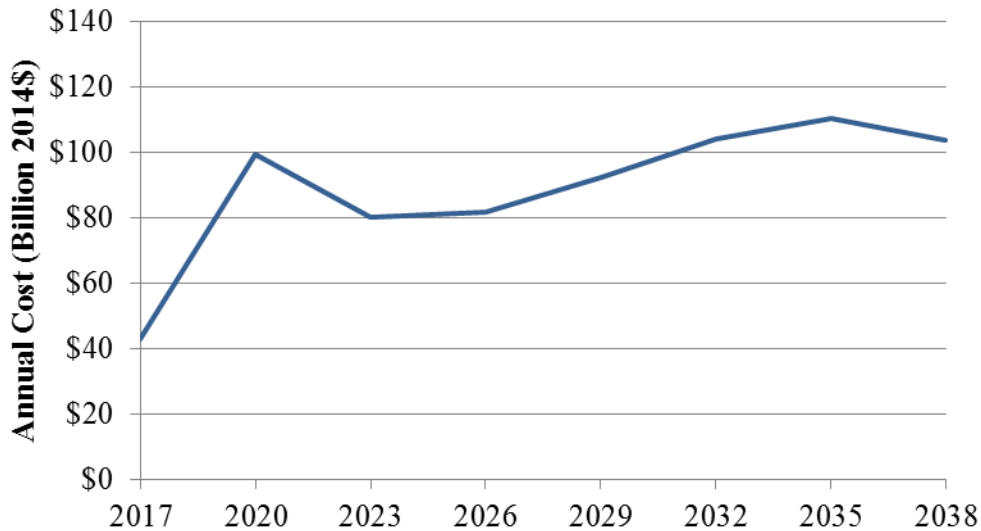
Notes: Total is not equal to the sum of capital and O&M due to independent rounding. Present value is from 2017 through 2040, discounted to 2014 at a 5% real discount rate. Cumulative coal retirements are incremental to baseline. These retirements are primarily due to assumed emission control measures but may also include indirect electric sector impacts of the ozone standards. This number is understated because it reflects only those plants that the model literally closes, while substantial additional GW of coal unit capacity is not reported by the model as “retired” but nevertheless is forced into a position of near-zero utilization.

Source: NERA calculations as explained in text

Allocating the estimated capital costs to spending in years prior to each state’s projected compliance deadline, and allocating O&M costs to years after the respective compliance deadlines, Figure S-5 shows the pattern of annual compliance spending across all states (except for the endogenously-determined costs of coal unit retirements.)

<sup>11</sup> This estimate assumes that EPA’s total annualized cost estimate of \$17 billion (including California) is incurred over a period of 20 years; that these 20 years begin in 2020, except in California where they begin in 2030; that these annual costs are converted to a present value in 2014 using a real annual discount rate of 5%; and that the present value is converted from 2011 dollars to 2014 dollars. Note that there are many differences in the EPA and NERA calculations so this estimate can only be viewed as providing a rough comparison.

**Figure S-5: Potential Annual U.S. Compliance Spending Costs for 65 ppb Ozone Standard**



Notes: Figure does not include compliance costs associated control measures in the electric power sector (scrappage of coal-fired power plants), which are modeled in N<sub>ew</sub>ERA.

Source: NERA calculations as explained in text

***Potential Impacts on the U.S. Economy and U.S. Households***

The potential costs we estimated for a 65 ppb ozone standard are projected to have substantial impacts on the U.S. economy and U.S. households. Figure S-6 shows the potential macroeconomic effects as measured by GDP and U.S. household consumption. The 65 ppb ozone standard is projected to reduce GDP from the baseline levels by about \$1.7 trillion on a present value basis from 2017 to 2040 (as of 2014, and in 2014 dollars) and by \$140 billion per year on a levelized average basis over that period (*i.e.*, when spread evenly over years but retaining the same present value). Average annual household consumption over those same years could be reduced by an average of about \$830 per household per year.

**Figure S-6: Potential Impacts of 65 ppb Ozone Standard on U.S. Gross Domestic Product and Household Consumption**

	<b>Annualized</b>	<b>Present Value</b>
GDP Loss (Billions of 2014\$)	\$140/year	\$1,720
Consumption Loss per Household (2014\$)	\$830/year	N/A

Notes: Present value is from 2017 through 2040, discounted at a 5% real discount rate. Consumption per household is an annualized (or levelized) value calculated using a 5% real discount rate.

Source: NERA calculations as explained in text

Figure S-7 focuses on several dimensions of projected impacts on income from labor (“worker income”) as a result of the 65 ppb ozone standard. Relative to baseline levels, real wages decline by about 0.6% on average over the period and labor income declines by about 0.9% on average, resulting in job-equivalent losses that average about 1.4 million job-equivalents. (Job-equivalents are defined as the change in labor income divided by the annual baseline income for the average job (see Figure S-7)). A loss of one job-equivalent does not necessarily mean one less employed person—it may be manifested as a combination of fewer people working and less income per worker. However, this measure allows us to express employment-related impacts in terms of an equivalent number of employees earning the average prevailing wage.<sup>12</sup> These are the *net* effects on labor and include the positive benefits of increased labor demand in sectors providing pollution control equipment and technologies.

**Figure S-7: Potential Impacts of 65 ppb Ozone Standard on Labor**

	Avg.
Baseline Annual Job-Equivalents (millions)	156
<b>65 ppb Case:</b>	
Real Wage Rate (% Change from Baseline)	-0.6%
Change in Labor Income (% Change from Baseline)	-0.9%
Job-Equivalents (Change from Baseline, millions)	-1.4

Notes: Average (Avg.) is the simple average over 2017-2040. “Job-equivalents” is defined as total labor income change divided by the average annual income per job. This measure does not represent a projection of numbers of workers that may need to change jobs and/or be unemployed, as some or all of the loss could be spread across workers who remain employed

Source: NERA calculations as explained in text

### ***Potential Effects on U.S. Energy Prices***

Emissions reduction costs of a 65 ppb ozone standard also is likely to have impacts on U.S. energy sectors, largely because the more stringent ozone standard is projected to lead to the premature retirement of many additional coal-fired power plants. Figure S-8 shows average energy price projections under the baseline and the 65 ppb ozone standard. The average delivered residential electricity price is projected to increase by an average of 1.7% over the period from 2017 through 2040 relative to what they could otherwise be in each year (which is

<sup>12</sup> The N<sub>ew</sub>ERA model, like many other similar economic models, does not develop projections of unemployment rates or layoffs associated with reductions in labor income. Modeling such largely transitional phenomena requires a different type of modeling methodology; our methodology considers only the long-run, equilibrium impact levels.

projected to be rising even without a tighter ozone NAAQS). Henry Hub natural gas prices are projected to increase by an average of 3.7% in the same time period (again, relative to what they could otherwise be in each future year), while delivered residential natural gas prices could increase by an average of 3.7%. Part of the increase in delivered natural gas prices reflects the increase in pipeline costs due to control costs for reductions in NO<sub>x</sub> emissions in the pipeline system that could be recovered through tariff rates.

**Figure S-8: Potential Impacts of a 65 ppb Ozone Standard on Energy Prices Relative to Their Projected Levels in Each Future Year**

		Avg. Baseline	Avg. 65 ppb Case	Change	% Change
Henry Hub Natural Gas	\$/MMBtu	\$6.22	\$6.47	\$0.25	3.7%
Natural Gas Delivered (Residential)	\$/MMBtu	\$14.23	\$14.76	\$0.53	3.7%
Natural Gas Delivered (Industrial)	\$/MMBtu	\$8.71	\$9.27	\$0.55	6.3%
Gasoline	\$/gallon	\$3.68	\$3.69	\$0.01	0.3%
Electricity (Residential)	¢/kWh	14.9¢	15.2¢	0.2¢	1.7%
Electricity (Industrial)	¢/kWh	9.7¢	10.0¢	0.3¢	2.8%

Notes: Average is the simple average over 2017-2040. The Baseline reflects expected growth in prices over the analysis period as predicted by the *Annual Energy Outlook 2014*. Figures in 2014\$.

Source: NERA calculations as explained in text

### ***Potential Effects on U.S. Sectors and Regions***

All sectors of the economy would be affected by a 65 ppb ozone standard, both directly through increased emissions control costs and indirectly through impacts on affected entities' customers and/or suppliers. There are noticeable differences across sectors, however. Figure S-9 and Figure S-10 show the estimated changes in output for the non-energy and energy sectors of the economy, respectively, due to the emissions reduction costs of a 65 ppb ozone standard.

**Figure S-9: Potential Impacts of 65 ppb Ozone Standard on Output of Non-Energy Sectors (Percentage Changes from Baseline)**

	<b>Agriculture</b>	<b>Commercial/ Services</b>	<b>Manufacturing</b>	<b>Commercial Transportation</b>	<b>Commercial Trucking</b>
Average (2017-2040)	-0.9%	-0.4%	-0.3%	-0.9%	-0.5%

Note: Values are the simple average of percentage change over 2017-2040.

Source: NERA calculations as explained in text

**Figure S-10: Potential Impacts of a 65 ppb Ozone Standard on Output of Energy Sectors (Percentage Changes from Baseline)**

	<b>Coal</b>	<b>Natural Gas</b>	<b>Crude Oil/Refining</b>	<b>Electricity</b>
Average (2017-2040)	-28%	3.9%	-0.8%	-1.5%

Note: Values are the simple average of percentage change over 2017-2040.

Source: NERA calculations as explained in text

Figure S-11 shows the estimated average annual change in consumption per household for individual New England regions. A region's attainment costs and its sectoral output mix determine to a large extent whether a region fares better or worse than the U.S. average, but all regions could experience lower household consumption.

**Figure S-11: Potential Impacts of a 65 ppb Ozone Standard on Annual Consumption per Household by Region**

<b>Region</b>	<b>2014\$</b>
Arizona and Mountain States	-\$690
California	-\$790
Florida	-\$250
Mid-America	-\$770
Mid-Atlantic	-\$1,370
Mississippi Valley	-\$640
New York/New England	-\$1,530
Pacific Northwest	-\$310
Southeast	-\$620
Texas, Oklahoma, Louisiana	-\$1,290
Upper Midwest	-\$490
<b>U.S.</b>	<b>-\$830</b>

Notes: Values are the levelized average over 2017-2040, annualized using a 5% real discount rate.

Maps of NewERA regions are provided in the report body and Appendix A.

Source: NERA calculations as explained in text

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## **ATTACHMENT C**

# **EPA Regulatory Impact Analysis of Proposed Federal Ozone Standard: Potential Concerns Related to EPA Compliance Cost Estimates**



Prepared for:

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## EXECUTIVE SUMMARY

This report reviews the data and methodology the U.S. Environmental Protection Agency (EPA) used to develop estimates of the compliance costs of a more stringent national ambient air quality standard (NAAQS) for ozone. Our assessment is supported by numerical examples based on emission reductions and costs of a tightening of the ozone standard to 65 parts per billion (ppb), relative to the current standard of 75 ppb; however, the data and methodological issues we discuss would apply to any of the alternative standards in the EPA ozone NAAQS Proposed Rule. In its Regulatory Impact Analysis (RIA),<sup>1</sup> EPA estimated that the additional annualized costs of achieving a 65 ppb standard beyond costs of attaining the current standard of 75 ppb, for areas other than California, would be about \$15.4 billion per year, of which about \$4.2 billion would be “known” controls and about \$11.3 billion would be “unknown” controls<sup>2</sup>—very substantial costs by any criterion. However, as summarized below and explained in more detail in our report, we find that EPA’s estimate understates likely compliance costs.

Figure E-1 summarizes our assessments of the most substantial concerns we identified with EPA’s emission reductions and cost information, divided into those affecting emission reductions and those affecting the estimated cost per ton for emission reductions.

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<sup>1</sup> U.S. EPA, *Regulatory Impact Analysis of the Proposed Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone*, EPA-452/P-14-006, Office of Air and Radiation, Research Triangle Park, NC, November 2014. Available: <http://www.epa.gov/tneacas1/regdata/RIAs/20141125ria.pdf>.

<sup>2</sup> We exclude California costs in our assessments because EPA used a different methodology and presented costs for California separately. The EPA RIA listed \$1.6 billion in unknown control costs in California.

**Figure E-1. Summary of Concerns with the EPA RIA Ozone Compliance Cost Estimates**

<b>Concern</b>	<b>Implication for EPA's Compliance Cost Estimate</b>
<i>Concerns Related to Calculation of Compliance Emission Reductions</i>	
1 EPA used a 2025 “snapshot” to estimate incremental attainment needs, but nonattainment designations and attainment deadlines are earlier	
(a) Number of areas that will be in nonattainment	Major Understatement
(b) Number of tons needing to be reduced compared to Baseline emissions, and timing of the spending	Understatement
2 EPA assumed controls for multistate regions rather than for individual states	Understatement
3 EPA projected large reductions in onroad mobile source “Base Case” emissions from 2018 to 2025	Understatement
4 EPA included the proposed Clean Power Plan in the Baseline	Major Understatement
5 EPA’s analysis used a different EGU “Base Case” emissions projection than in EPA’s Clean Power Plan analysis	Understatement
<i>Concerns Related to Calculation of Unknown Control Costs</i>	
6 EPA assumed an average value of \$15,000 per ton in its unknown control cost estimates	Major Understatement
7 EPA’s sensitivity analysis on the average cost per ton for emission reductions from unknown controls assumed a low of \$10,000 per ton and a high of \$20,000 per ton	Major Understatement

All seven of these concerns point to a conclusion that the EPA RIA understated the potential costs—including the range of potential costs—of meeting a more stringent ozone standard.<sup>3</sup> Four of the concerns listed in Figure E-1 seem in our judgment likely to lead to a major understatement:

<sup>3</sup> We also identified a number of concerns with EPA’s known control costs. Given the relatively small magnitude of those components as part of the total cost estimate, however, we do not expect that concerns with these estimates would have as substantial an effect as the concerns we identify in Figure E-1. We therefore did not focus any attention in this report on issues affecting the known control cost estimates.

1. *EPA used a 2025 “snapshot” to estimate incremental attainment needs, but nonattainment designations and attainment deadlines are earlier.* This assumption understates the number of areas that will be in nonattainment as well as the number of tons needed to be reduced compared to Baseline emissions and timing of the spending. Areas designated as marginal or moderate would likely have attainment dates around the end of 2020 and 2023, respectively, and would incur costs before 2025—costs that are disregarded (by assumption) in EPA’s analysis. (Our assessment does not consider the complications of potential reclassifications of individual non-attainment areas.)
4. *EPA included the proposed Clean Power Plan (CPP) in the Baseline.* EPA’s inclusion of CPP emission reductions is not only inconsistent with its standard practice of only including promulgated regulations, but such a deviation from standard procedure is particularly unjustified given the enormous uncertainty in what carbon limits may actually be applied and how states would comply, and hence what NO<sub>x</sub> emission reductions might actually occur as a result of EPA regulation of carbon emissions from existing electricity generating units. Without the proposed CPP in the Baseline, at least an additional 300,000 tons of NO<sub>x</sub> reductions would be required for the 65 ppb standard, leading to a substantial increase in the estimated compliance costs.
6. *EPA assumed a constant value of \$15,000 per ton for all unknown emission reductions.* Controls that EPA refers to as unknown (*i.e.*, for which no compliance controls are identified) represent about 40% of EPA’s estimated tons and about 73% of EPA’s estimated costs to attain a 65 ppb ozone standard (excluding California). As one indication of the importance of this single assumption, we calculated that unknown control costs would have increased by about \$3.7 billion per year (*i.e.*, from \$11.3 billion to \$15.0 billion, excluding California) if EPA had used an alternative methodology presented in its own most recent prior ozone NAAQS cost assessment in 2010, as described in the body of this report. Changing just this one aspect of the EPA methodology would lead to a total cost estimate of \$19.2 billion to achieve a 65 ppb ozone standard (excluding California).
7. *EPA assumed an uncertainty band for unknown costs of \$10,000 to \$20,000 per ton.* This arbitrary range seems likely to understate substantially the potential compliance costs. Given that unknown controls would have to reduce emissions from many diffuse area or mobile sources—since point sources are already highly controlled—the cost per ton could be substantial (*e.g.*, requiring early turnover of still productive capital stock such as motor vehicles and residential or commercial heating equipment).

The other three concerns listed in Figure E-1 also suggest that the EPA RIA understated the compliance costs of meeting a more stringent ozone standard.

2. *EPA allowed for multistate controls rather than for state-by-state compliance plans.* Although the Clean Air Act requires states to develop plans to achieve the ozone

standard—absent specific multi-state agreements that seem unlikely to be put in place by the time that states would be required to submit their State Implementation Plans (SIPs)—EPA’s modeling approach allows controls in other states to “count” toward a state’s compliance. Since EPA’s control strategy first implemented relatively inexpensive known controls throughout a region before moving to more expensive unknown controls, requiring state-by-state compliance would lead to greater dependence on unknown controls in some states and thus greater compliance costs.

3. *EPA projected large reductions from 2018 to 2025 in onroad mobile sources in the Baseline.* We have identified several concerns that these Baseline reductions may be overstated, which would have the effect of understating the emissions that need to be reduced and thus the overall cost of a more stringent ozone standard. One corollary of EPA’s disregard of the need for some states to achieve compliance before 2025 is that the large reductions in mobile source emissions after actual compliance dates (the end of 2020 and 2023) would not “count” toward compliance, and hence there will be costs for either speeding up the pace of those reductions, or making up for their absence by attainment deadlines. An additional concern is related to the lack of documentation by EPA of its assumptions regarding fleet turnover; fleet turnover is important because more stringent emission standards apply to new vehicles and the actual emission reductions thus depend in part upon the extent to which older vehicles are replaced by the lower-emitting new vehicles. Also, the tighter CAFE standard will be reviewed in 2018 and could be reduced if found to be too costly (as discussed in the report). If CAFE standards were to be relaxed, the rate of NO<sub>x</sub> reductions from onroad vehicles could be less than EPA has assumed in the Baseline. For all of these reasons, we are concerned that the Baseline NO<sub>x</sub> reductions achievable by 2025 from this source category may be overstated, with little likelihood that they are understated.
  
5. *EPA used different EGU emissions in the Baseline for its ozone analysis than in the Clean Power Plan analysis.* EPA’s analysis of the CPP indicates fewer EGU NO<sub>x</sub> emissions in the Baseline than assumed in the ozone RIA. Although we could not determine the reasons for this difference between two recent analyses, a lower Baseline EGU NO<sub>x</sub> level would likely imply fewer NO<sub>x</sub> reductions from the CPP than EPA assumes in the ozone RIA, leading to an increase in the compliance costs to achieve a more stringent ozone standard.

In summary, our evaluation suggests that EPA has understated the potential compliance costs—including their likely range—of meeting a more stringent ozone standard. Achieving a more stringent ozone standard could be substantially more costly than even the very substantial costs EPA has estimated.

## **I. INTRODUCTION**

This report provides an assessment of the compliance cost estimates provided in the Regulatory Impact Analysis (RIA) prepared by the U.S. Environmental Protection Agency (EPA) for its proposed revision to the federal national ambient air quality standard (NAAQS) for ozone. We focus on the EPA estimates of the incremental emission reductions and costs that would be required to achieve compliance with a potential 65 parts per billion (ppb) ozone standard. As in the RIA, all of these estimated reductions and costs are incremental to the effort needed to attain the existing standard of 75 ppb.

### **A. Background**

#### **1. EPA Ozone Proposal**

EPA released its ozone proposal on November 26, 2014 and published the proposal in the *Federal Register* on December 17, 2014. The current ozone standard is 75 ppb, established by EPA in 2008. In its proposal, EPA proposed a range for revised primary and secondary ozone standards of 65 to 70 ppb. The Agency also indicated it would take comment on a 60 ppb standard and that it also would take comment on the option to retain the current standard.

#### **2. EPA Regulatory Impact Analysis**

EPA released its RIA on November 26, 2014.<sup>4</sup> The RIA provides EPA's estimates of the potential societal benefits and costs for the proposed ozone standards. Costs and benefits were estimated relative to first achieving full attainment of the current standard of 75 ppb.

### **B. Objectives of This Report**

The objectives of this report are to summarize the emission and cost information developed by EPA in its RIA and to identify potential concerns with its accuracy. In particular, we concentrate on EPA's estimates of reductions in ozone precursor emissions (nitrogen oxides, or NO<sub>x</sub>, and volatile organic compounds, or VOCs) necessary to achieve a revised ozone standard and on EPA's estimates of the compliance costs that would be incurred.

As noted, we limit our examples to the 65 ppb proposed standard. The issues we raise would be relevant to other potential ozone standards, although the numerical magnitude would vary.

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<sup>4</sup> USEPA, *Regulatory Impact Analysis of the Proposed Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone*, EPA-452/P-14-006, Office of Air and Radiation, Research Triangle Park, NC, November 2014. Available: <http://www.epa.gov/ttnecas1/regdata/RIAs/20141125ria.pdf>.

### **C. Report Organization**

The remainder of this report is divided into two sections. Section II provides an overview of EPA's methodology and results. As noted, we focus on EPA's estimates of emission reductions and compliance costs related to a 65 ppb standard. Section III discusses concerns with the EPA's estimates, prioritizing the concerns as "major" concerns and "additional" concerns.

## **II. OVERVIEW OF EPA’S METHODOLOGY FOR ESTIMATING EMISSION REDUCTIONS AND COMPLIANCE COSTS**

This section provides an overview of EPA’s methodology for estimating the potential emission reductions and compliance costs to achieve a proposed ozone standard of 65 ppb, relative to the current standard of 75 ppb. We summarize EPA’s analysis in terms of three basic steps:

1. Develop a Baseline projection of ozone levels and precursor emissions;
2. Estimate the state-level reductions in emissions from the Baseline needed to comply with alternative ozone standards and identify “known” and “unknown” controls to achieve those reductions; and
3. Estimate the costs of the emission controls needed to comply with alternative ozone standards.

The sections below summarize EPA’s methodology and results for each of these three steps. We do not include EPA’s estimates for California, which are based on a different methodology than that developed for the other states. Note that in some cases we provide comments on EPA’s methodology that indicate our concerns with EPA’s methodology; these concerns are developed in more detail in Section III of this report.

### **A. EPA Baseline Projections of Ozone and Precursor Emissions**

The costs of attaining a new ozone standard depend on ambient air quality in the future, consistent with the timing of the attainment deadlines that areas will face under a revised ozone standard. EPA developed a Baseline projection of ozone concentrations and precursor emissions for the year 2025. The 2025 information formed the basis for a 2025 “snapshot” analysis of annualized attainment costs.

The EPA Baseline was developed by modifying a 2025 “Base Case” projection to reflect three additional modifications: (1) EPA’s proposed Clean Power Plan (CPP), (2) the current ozone NAAQS (75 ppb), and (3) post-2025 vehicle emissions in California.

#### **1. The 2025 “Base Case” Emissions Projection**

EPA began its analysis with the Ozone NAAQS Emissions Modeling Platform (2011v6.1), which projected NO<sub>x</sub>, VOC, and other emissions from 2011 inventory levels to future years 2018 and 2025. This projection included most regulations and programs currently “on the books,” including MATS, CAIR, most NSPS, and Tier 3 vehicle standards.

Emissions in this EPA “Base Case” projection are divided into sectors of emissions sources, which we group into five emissions “source categories”:

1. *EGU* – Electricity generating units;
2. *Point* – Non-EGU point sources, such as industrial boilers, cement kilns, and petroleum refineries;
3. *Area* – Area sources, such as dry cleaners, commercial buildings, and residential buildings;
4. *Onroad* – Onroad mobile sources such as passenger cars, light-duty trucks, and heavy-duty trucks; and
5. *Nonroad* – Nonroad mobile sources, such as locomotives, aircraft, marine vessels, construction equipment, and agricultural equipment.

EPA focused its ozone analysis on those anthropogenic emissions that can be reduced using domestic controls or programs. Fires and biogenic emissions, as well as tribal data and exclusive economic zone (EEZ) emissions, were excluded from EPA’s analyses (EPA 2014a p. 3-14 and Table 3-3). Figure 1 shows the 2025 “Base Case” emissions projection by source category for the lower 48 states excluding California.

**Figure 1. EPA 2025 “Base Case” Emissions by Source Category, Excluding California (1000s of tons)**

	<b>NO<sub>x</sub></b>	<b>VOC</b>
<b>Total</b>	<b>7,684</b>	<b>9,487</b>
EGU	1,442	40
Point	1,749	950
Area	1,706	6,368
Onroad	1,333	976
Nonroad	1,454	1,153

Note: Anthropogenic NO<sub>x</sub> and VOC emissions (excluding fires and biogenic sources) in the lower 48 states (excluding California, tribal regions, and EEZ emissions). Nonroad VOC emissions in EPA (2014a) Tables 3-1 and 3-3 differ slightly from nonroad VOC emissions in the raw 2025 “Base Case” projection files used for this figure (a difference of less than 10,000 tons).

Source: EPA 2014b and 2014c

## **2. Modifications to the 2025 “Base Case”**

To develop its Baseline scenario, EPA then made three adjustments to the 2025 “Base Case” to reflect other developments that (according to EPA) would take place regardless of whether a new ozone standard were implemented.



**a. EPA’s Proposed Clean Power Plan**

EPA adjusted the 2025 “Base Case” emissions to reflect compliance with EPA’s proposed CPP under section 111(d) of the Clean Air Act. The impact of the CPP on NO<sub>x</sub> emissions was estimated using simulations conducted with the IPM model of Option 1 of the CPP Proposed Rule,<sup>5</sup> and assuming “state-level compliance” with that option (EPA 2014a p. 4-1, 4-5, and 3-11).<sup>6</sup>

**b. The Current Ozone NAAQS (75 ppb)**

EPA further adjusted 2025 “Base Case” emissions to reflect compliance with the current ozone NAAQS of 75 ppb. EPA projected that 11 counties, all in California or Texas, would exceed the current 75 ppb standard in 2025 in the Base Case (EPA 2014a, Figure 4-1). Emission controls and compliance costs associated with meeting the current standard are not attributable to a new ozone NAAQS, so EPA includes them in the EPA Baseline.

**c. Post-2025 Vehicle Emissions in California**

EPA notes that parts of California probably would not be required to meet a new ozone standard until sometime in the 2030s (EPA 2014a p. 1-9). When simulating costs to attain the new standard in California, EPA attempted to look at incremental tons that would need to be reduced in the 2030s, rather than in 2025. Thus, for California’s attainment costs, EPA developed a Baseline from the 2025 inventory that is intended to reflect a yet-later year, called “post-2025.” This “post-2025” Baseline for California includes an additional reduction of 14,000 tons of NO<sub>x</sub> and 6,000 tons of VOC that EPA projected will occur between 2025 and 2030 due to further implementation of current vehicle regulations (EPA 2014a, p. 1-9, 3A-25).

Due to the later attainment year in California, EPA presented California information separately from the rest of the lower 48 states in its RIA. For consistency with the non-California tables in the EPA RIA, we have excluded California from all tables and figures in this report.

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<sup>5</sup> EPA estimated that Option 1 in the CPP Proposed Rule would reduce U.S. CO<sub>2</sub> power plant emissions by 30% in 2030, relative to the 2005 emission level. (Option 2 would have less stringent emission rate targets and different compliance timing.) This analysis was based on emission rate targets developed using four “Building Blocks” – heat rate improvements at coal units, increased utilization of natural gas combined cycle units, increases in renewables and nuclear energy, and increases in end-use energy efficiency.

<sup>6</sup> We presume that EPA adjusted only NO<sub>x</sub> emissions to get from its Ozone NAAQS “Base Case” to the Ozone NAAQS Baseline. This presumption is based on our review of EPA’s statements about VOCs in the RIA for the CPP Proposed Rule; this document suggests that EPA may have estimated VOC emissions changes due to the CPP in calculations outside of its compliance modeling (EPA 2014h, p. 4A-7), but it later states that VOC emissions changes from the CPP are insignificant as a reason why EPA did not account for them when assessing ozone co-benefits of the CPP Proposed Rule (EPA 2014h, 4A-17). Even if EPA did include undocumented VOC reductions from the CPP Proposed Rule in constructing the ozone NAAQS Baseline, this adjustment would have had minimal effect on emissions and cost estimates.

### 3. Summary of the EPA Calculation of Baseline NO<sub>x</sub> Emissions

Figure 2 summarizes the development of the EPA Baseline NO<sub>x</sub> emissions projection, including the three adjustments to the 2025 “Base Case” projection.

**Figure 2. Development of EPA Baseline NO<sub>x</sub> Emissions by Source Category (tons)**

	2025 "Base Case"	Baseline Adjustments		EPA Baseline
		Clean Power Plan	75 ppb (TX)	
<b>US (excluding CA)</b>	<b>7,683,845</b>	<b>431,155</b>	<b>44,830</b>	<b>7,207,434</b>
Northeast	1,184,694	55,250	-	1,129,444
Midwest	1,770,593	37,343	-	1,733,250
Central	2,175,956	160,340	45,256	1,970,360
Southwest	712,913	50,474	-	662,439
Rest of US (excluding CA)	1,839,690	127,748	-	1,711,941

Note: Anthropogenic NO<sub>x</sub> emissions (excluding fires and biogenic sources) in the lower 48 states (excluding California, tribal regions, and EEZ emissions).

Source: EPA 2014b, 2014e, 2014f, 2014k

#### **B. EPA Estimates of Required Precursor Emission Reductions and Known Controls**

Given its Baseline scenario, EPA then determined which areas of the U.S. would still be in nonattainment by 2025 if no additional controls were applied. EPA then estimated additional reductions in NO<sub>x</sub> and VOC emissions that would be needed to comply with new ozone standards and then developed an illustrative “control strategy” to achieve those reductions.

Note that EPA’s decision to focus on 2025 Baseline conditions does not account for nonattainment designations that will occur *prior to 2025*, which in turn can lead to an understatement of necessary emission reductions to achieve a revised ozone standard. EPA will likely make nonattainment designations in 2017 based on monitored ozone levels during 2014 through 2016 (EPA 2014a p. 1-8). Because substantial emissions reductions are projected to occur *between 2018 and 2025* in EPA’s “Base Case”, there would likely be substantially more areas that will actually be designated as nonattainment under a new ozone NAAQS than would be projected by considering only 2025 Baseline conditions. Those additional nonattainment areas would face attainment dates around the end of 2020 or 2023 (for marginal and moderate designations, respectively). Thus, to the extent that needed emissions reductions that EPA projected to occur in its Baseline *by 2025* do not actually occur before 2023, EPA’s method has understated the extent of nonattainment designations and also likely has understated the overall costs of attainment of a more stringent standard. This important feature of EPA’s methodology is discussed further in Section III.

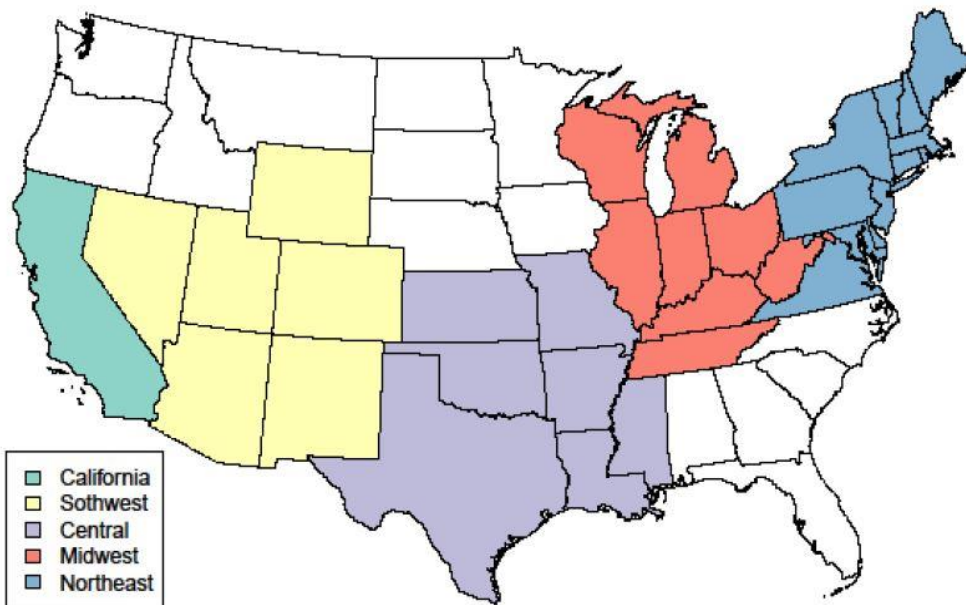
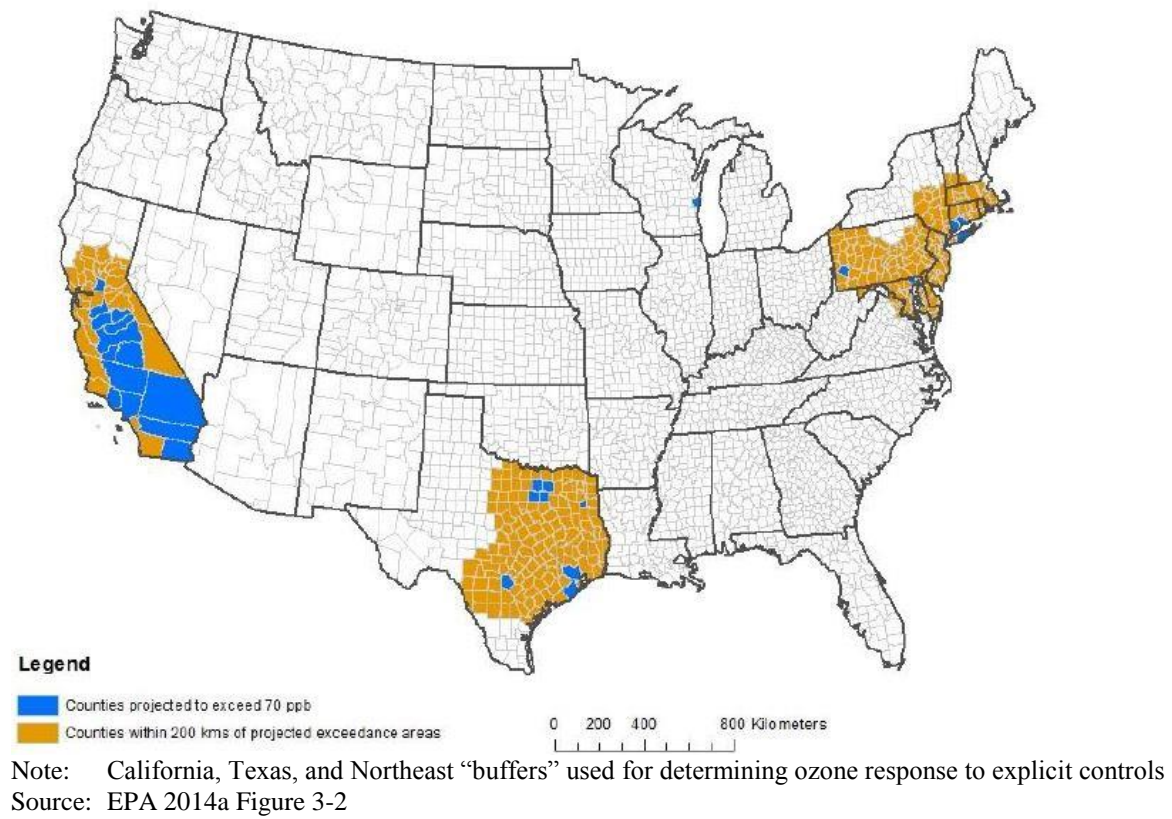
## 1. Required NO<sub>x</sub> Emission Reductions

Using only the 2025 “Base Case” conditions, EPA applied emissions scenarios to estimate the responsiveness of ozone design values to region-wide reductions in emissions. Figure 3 below shows the two sets of regions used to model the responsiveness of ozone to changes in NO<sub>x</sub> emissions.<sup>7</sup> The three smaller “buffer” regions in the top map were used to model the responsiveness of ozone to a set of identified NO<sub>x</sub> controls implemented near monitors with projected ozone concentrations greater than 70 ppb. The five larger regions following state borders shown in the bottom map were used to analyze responsiveness to across-the-board reductions in 2025 “Base Case” NO<sub>x</sub> emissions. For example, EPA estimated the change in ozone concentration at each ozone monitor in the Southwest if there were to be a 50% across-the-board reduction in 2025 “Base Case” NO<sub>x</sub> emissions throughout the Southwest region.

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<sup>7</sup> EPA also applied one nationwide air quality modeling scenario to estimate the responsiveness of ozone to the NO<sub>x</sub> reductions estimated by EPA to result from Option 1 of the proposed Clean Power Plan (EPA 2014a Table 3-2). EPA used the results of this scenario to develop the Baseline for its ozone RIA analysis.

**Figure 3. EPA Air Quality Modeling Regions**



Note: 5 regions used for determining ozone response to across-the-board emissions reductions  
Source: EPA 2014a Figure 3-3

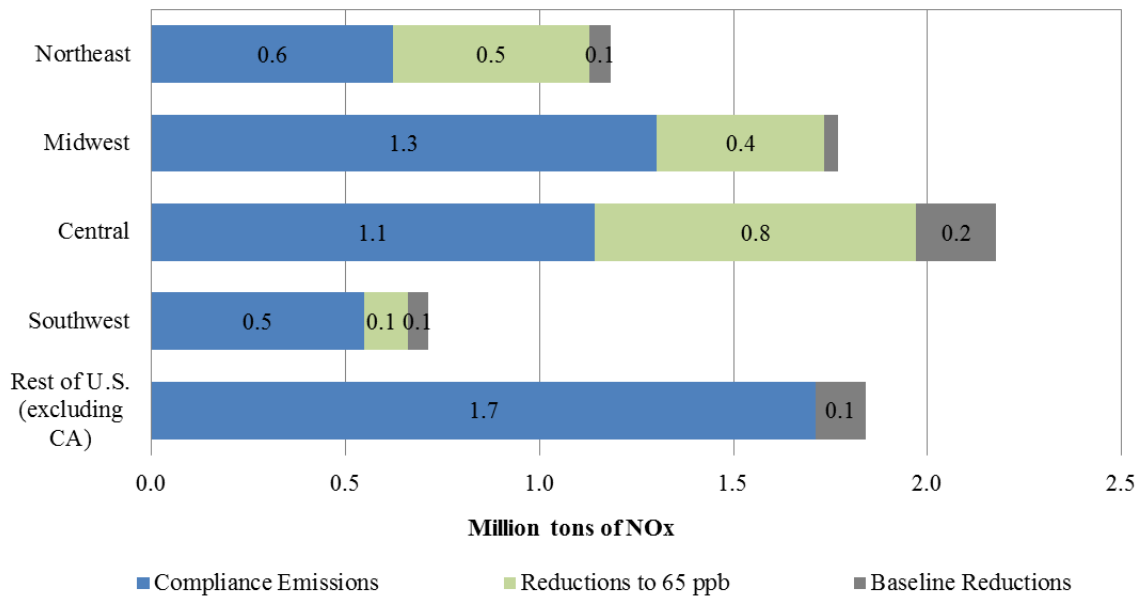
These air quality scenarios resulted in estimates of “relative response factors” – the approximate change in ozone design values at an ozone monitor estimated to result from a *regional* change in precursor emissions. To determine how many tons of emission reductions would be required to meet each alternative ozone standard, EPA applied emission reductions within each of the regions until the ozone concentration at every monitor within the respective region (as calculated using the “relative response factors”) was projected to meet that standard.<sup>8</sup> Figure 4 shows each region’s 2025 “Base Case” NO<sub>x</sub> emissions (as the full length of each horizontal bar), the regional emission reductions EPA assumed would be part of the RIA’s Baseline (*i.e.*, the grey portions of each bar), and additional NO<sub>x</sub> reductions EPA projected to be needed to comply with a 65 ppb standard in EPA’s analysis (green portions of each bar). The remainder of each bar (the blue portion) shows the total tons of NO<sub>x</sub> that EPA estimates may remain in each region while fully attaining the 65 ppb alternative standard. That remainder is called “compliance emissions.”

As noted above, these results are based on EPA’s approach that determined incremental tons of reduction needed for attainment only when the year 2025 has been reached, whereas the nonattainment designations will be based on conditions that exist prior to 2018, and EPA expects most of the associated attainment deadlines to be around the end of 2020 or 2023 (EPA 2014a p. 1-8).

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<sup>8</sup> Note that EPA excluded 26 rural or remote monitors in the West and Southwest from its analysis due to low modeled responsiveness to NO<sub>x</sub> reductions, mostly due to transport from California and Mexico (EPA 2014a p. 3A-54). EPA suggests that these areas could pursue regulatory relief from a tighter ozone NAAQS. EPA projected that all 26 of these excluded monitors would be in attainment with a 70 ppb ozone standard in EPA’s 2025 Baseline, but 15 of these monitors are projected to exceed a 65 ppb ozone standard. To the extent that these areas are *unable* to obtain exemptions from NAAQS requirements, they could require additional emissions reductions (and control costs) that are not captured in EPA’s analysis.

**Figure 4. Regional Base Case NO<sub>x</sub> Emissions and Amounts of Reduction Projected to Be Needed for Compliance with a 65 ppb Ozone Standard (Including Reductions EPA Has Assumed Will Be Part of Its Baseline)**



Note: Anthropogenic NO<sub>x</sub> emissions (excluding fires and biogenic sources) in the lower 48 states (excluding California, tribal regions, and EEZ emissions)

Source: EPA 2014b, 2014e, 2014f, 2014g, 2014k, 2014l

## 2. Develop Control Strategy

To achieve the emission reductions necessary for compliance (*i.e.*, the quantity of tons shown by the green portions of the horizontal bars in the above figure), EPA developed a control strategy consisting of “known” controls (*i.e.*, control actions that EPA has identified) and, if additional reductions are needed, “unknown” controls (*i.e.*, control measures that EPA has not identified in its data supporting this RIA).

### a. EPA Known Controls

EPA identified some known controls for four of the five emissions source categories. No controls were identified for emissions in the onroad source category “because they are largely addressed in existing rules such as the recent Tier 3 rule” (EPA 2014a p. 4-12).

- To reduce NO<sub>x</sub> emissions, EPA identified selective catalytic reduction (SCR) controls for EGUs; point and area source controls including low-NO<sub>x</sub> burners (LNB), catalytic reduction controls (SCR, selective non-catalytic reduction or SNCR, and non-selective catalytic reduction or NSCR), and OXY-firing; and diesel SCR and engine rebuild or upgrade retrofits for nonroad sources.

- For VOC emissions, EPA applied a variety of work practice and materials changes in addition to add-on controls for point and area sources (EPA 2014a p. 4A-12).

Figure 5 summarizes the known control technologies and associated NO<sub>x</sub> reductions that EPA developed for its 65 ppb control strategy.

**Figure 5. EPA Known Control Technologies for a 65 ppb Ozone Standard (Incremental to the EPA Baseline)**

<b>NO<sub>x</sub></b>		<b>VOC</b>	
<b>Control Technology</b>	<b>Emission Reductions (tons)</b>	<b>Control Technology</b>	<b>Emission Reductions (tons)</b>
<b>Total</b>	<b>1,123,514</b>	<b>Total</b>	<b>105,766</b>
<b>EGU</b>	<b>204,616</b>	<b>EGU</b>	<b>0</b>
SCR	204,616		
<b>Point</b>	<b>444,034</b>	<b>Point</b>	<b>4,118</b>
Low Emission Combustion	126,959	Permanent Total Enclosure (PTE)	1,554
SCR	94,970	Solvent Recovery System	842
LNB and SCR	66,610	Add-on controls, work practices & materials	564
LNB	37,383	Other	1,157
NSCR	33,553		
OXY-Firing	29,546		
Adjust Air to Fuel Ratio & Ignition Retard	27,057		
Other	27,956		
<b>Area</b>	<b>462,026</b>	<b>Area</b>	<b>101,649</b>
NSCR	291,136	Reformulation	55,990
LNB (1997 AQMD)	57,351	Incineration	26,164
Water heater + LNB Space Heaters	57,314	LPV Relief Valve	7,317
Low Emission Combustion	47,074	RACT	5,988
Other	9,151	Other	6,189
<b>Onroad</b>	<b>0</b>	<b>Onroad</b>	<b>0</b>
<b>Nonroad</b>	<b>12,837</b>	<b>Nonroad</b>	<b>0</b>
Diesel SCR and Engine Rebuild/Upgrade	12,837		

Note: EPA chose not to include any onroad controls in its NO<sub>x</sub> analysis because onroad vehicles are subject to Tier 3 emissions standards.

Source: EPA 2014g

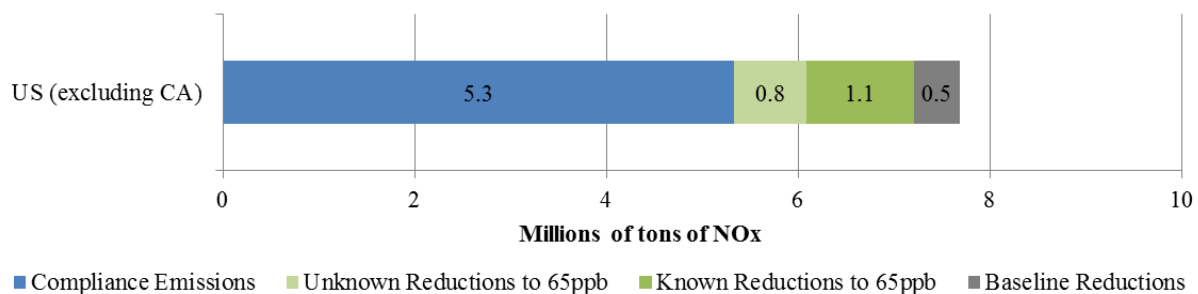
### **b. EPA Unknown Controls**

The known controls that EPA identified were insufficient for attainment with a new standard of 65 ppb in 2025 for every region except the Southwest. Rather than strive to determine what the remaining sources of emissions would be, and what types of controls might be viable for such

sources, EPA’s illustrative control strategy calls the remainder of the required reductions unknown controls. Indeed, EPA provided no numerical examples (much less a thorough accounting) of existing measures that could make up the necessary unknown controls.

Figure 6 summarizes EPA’s illustrative NO<sub>x</sub> control strategy for the lower 48 states for a 65 ppb standard. Starting from the EPA Baseline, known controls and then unknown controls were applied to achieve an emissions level consistent with 65 ppb. EPA’s NO<sub>x</sub> control strategy for 65 ppb relied upon approximately 750,000 tons of reductions from unknown controls (excluding California). This compares to reductions from known controls of about 1.1 million tons. Thus, EPA estimated that reductions from unknown controls represent approximately 40% of the total tons of NO<sub>x</sub> reductions required for attainment with a new standard of 65 ppb in 2025.

**Figure 6. U.S. Summary of EPA NO<sub>x</sub> Control Strategy for a 65 ppb Ozone Standard**



Note: Anthropogenic NO<sub>x</sub> emissions and reductions (excluding fires and biogenic sources) in the lower 48 states (excluding California, tribal regions, and EEZ emissions)

Source: EPA 2014b, 2014e, 2014f, 2014g, 2014k, 2014l

### C. EPA Estimates of Compliance Costs

The final step in EPA’s compliance cost analysis was to estimate the annualized costs of implementing the measures in EPA’s control strategy. The costs are divided into known and unknown controls.

#### 1. Cost of Known Controls

EPA estimated costs for the known point, area, and nonroad controls using the EPA Control Strategy Tool (CoST). Typically an average annualized cost-per-ton value was estimated and multiplied by emission reductions to find total cost. EGU costs for SCR controls were estimated using EPA’s input assumptions to the IPM model. Known control costs included EPA’s estimates of capital and O&M but excluded monitoring and administrative costs related to demonstrating compliance. Figure 7 summarizes the cost per ton and total cost of known controls in each source category for a 65 ppb ozone standard.



**Figure 7. EPA Annualized Known Control Costs by Source Category for a 65 ppb Ozone Standard (millions of 2011 dollars)**

	<b>Reductions for 65 ppb Incremental to Baseline (tons)</b>	<b>Average Cost per Ton (2011\$)</b>	<b>Total Annualized Known Control Cost (million 2011\$)</b>
<b>NO<sub>x</sub></b>	<b>1,123,514</b>	<b>\$2,953</b>	<b>\$3,317</b>
EGU	204,616	\$8,273	\$1,693
Point	444,034	\$2,727	\$1,211
Area	462,026	\$769	\$355
Onroad	-	-	-
Nonroad	12,837	\$4,536	\$58
<b>VOC</b>	<b>105,766</b>	<b>\$7,954</b>	<b>\$841</b>
EGU	-	-	-
Point	4,118	\$5,136	\$21
Area	101,649	\$8,068	\$820
Onroad	-	-	-
Nonroad	-	-	-
<b>Total</b>	<b>N/A</b>	<b>N/A</b>	<b>\$4,159</b>

Note: Known controls applied to anthropogenic emissions sources in the lower 48 states. California had no known controls incremental to the EPA Baseline.

Source: EPA 2014g

## 2. Cost of Unknown Controls

EPA applied an average cost of \$15,000 per ton to all reductions from unknown controls, regardless of the source category or location of the source. Figure 8 summarizes the implications of this assumption for the costs of unknown emission reductions to achieve a 65 ppb ozone standard. Note that although the figure lists cost estimates by region, the cost per ton does not differ among the regions.

**Figure 8. EPA Annualized Unknown Control Costs by Region for a 65 ppb Ozone Standard**

	<b>NO<sub>x</sub> Reductions (thousand tons)</b>	<b>Annualized Cost (million 2011\$)</b>
<b>Total (excluding CA)</b>	<b>752</b>	<b>\$11,282</b>
Northeast	337	\$5,048
Midwest	66	\$983
Central	350	\$5,252
Southwest	0	-

Note: Cost by region calculated using EPA's average cost assumption of \$15,000 per ton. There were no unknown VOC controls in EPA's control strategy for 65 ppb. Totals may differ slightly from U.S. summaries in the EPA (2014a) due to rounding in the RIA.

Source: EPA 2014l and NERA calculations

EPA noted that it is inherently difficult to estimate the cost of emission control measures that have not been identified. To address this uncertainty, EPA performed a sensitivity analysis with two different assumptions on the average cost of unknown controls—\$10,000 per ton and \$20,000 per ton. Figure 9 shows the unknown control costs in EPA’s analysis under these alternative cost assumptions.

**Figure 9. EPA Annualized Unknown Control Costs Sensitivity by Region for a 65 ppb Ozone Standard**

	<b>NO<sub>x</sub> Reductions</b>	<b>Annualized Cost (million 2011\$)</b>	
	Thousand Tons	"Low" (\$10,000/ton)	"High" (\$20,000/ton)
<b>Total (excluding CA)</b>	<b>752</b>	<b>\$7,522</b>	<b>\$15,043</b>
Northeast	337	\$3,365	\$6,731
Midwest	66	\$655	\$1,311
Central	350	\$3,501	\$7,002
Southwest	0	-	-

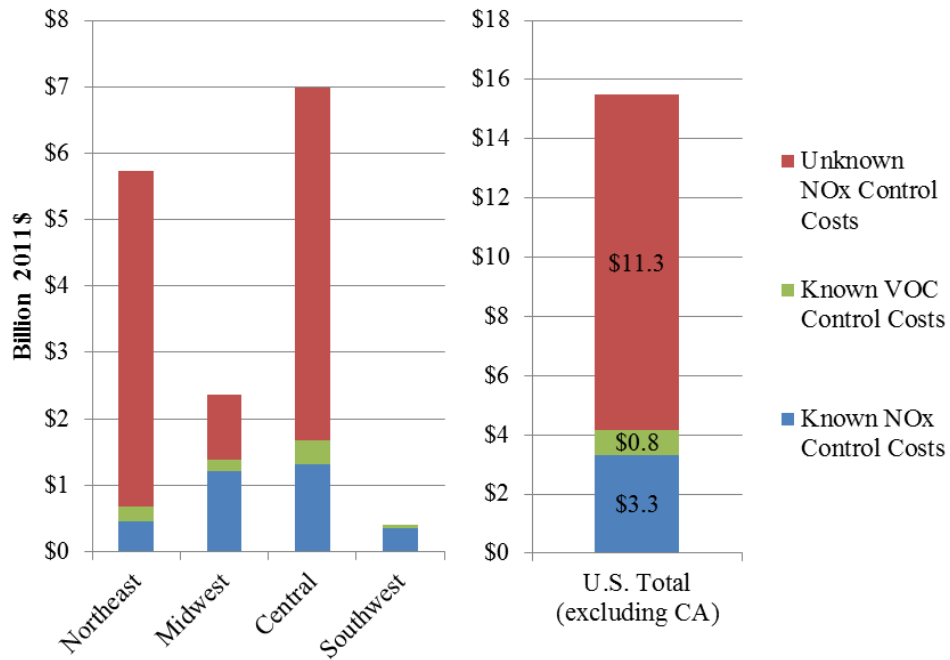
Note: Cost by region calculated using EPA’s average cost sensitivities of \$10,000 and \$20,000 per ton. There were no unknown VOC controls in EPA’s control strategy for 65 ppb. Totals may differ slightly from U.S. summaries in the EPA (2014a) due to rounding in the RIA.

Source: EPA 2014l and NERA calculations

### 3. Summary of EPA Compliance Costs

Figure 10 summarizes EPA’s compliance cost estimates for a 65 ppb ozone standard, both by region and for the lower 48 states as a whole. EPA estimated total U.S. annualized compliance costs of \$15.4 billion in 2025 (excluding California), about 73% of which is due to the estimate of the unknown controls’ costs.

**Figure 10. EPA Annualized Control Costs by Region for a 65 ppb Ozone Standard (Excluding California)**



Note: Costs are incremental to the EPA Baseline. There were no unknown VOC controls in EPA's control strategy for 65 ppb.

Source: EPA 2014g, EPA 2014l, and NERA calculations

### **III. CONCERNS WITH EPA'S EMISSION AND COMPLIANCE COST ANALYSIS**

This section summarizes our reviews of the emissions and cost information in the EPA RIA. We organize the review and discussion into two major areas.

1. Concerns related to EPA's determination of required emission reductions; and
2. Concerns related to EPA's estimates of unknown control costs.

For each of the individual issues, we summarize the key EPA assumption and then discuss potential concerns with the methodology and the implications of the concerns for EPA's estimated compliance costs. Where possible, we provide quantitative assessments of the magnitude of potential error. The final subsection provides our summary of the potential significance of these concerns.

#### **A. Concerns Related to EPA's Determination of Compliance Emission Reductions**

##### **1. EPA Assumed All States Would Need to Comply in 2025 Although Some States Are Likely to Require Compliance Earlier**

###### **a. EPA Assumption Regarding Compliance Date**

Under the Clean Air Act, if the ozone NAAQS is revised in 2015 as planned, nonattainment areas will be designated and assigned classifications and attainment years based on ozone design value data available in 2017. Design values are three-year averages of certified monitor readings, and so the nonattainment designations will be based on monitor readings taken during 2014 through 2016. In short, nonattainment with the proposed new ozone NAAQS will be determined based on essentially current conditions. Following the 2017 designations, states would then develop control strategies and implement controls over a period of years such that each nonattainment area's design value will be at the level of the new standard by its specified attainment year. Given current data, it is reasonable to expect that most areas that would be designated nonattainment in 2017 with a 65 ppb potential standard would be classified as either marginal or moderate status, with attainment dates around the end of 2020 and 2023, respectively. Areas that fail to comply by their attainment dates would be reclassified to a higher category, with the attendant more burdensome regulatory restrictions.

EPA's RIA cost analysis did not reflect these legal requirements. Instead, EPA performed a "snapshot" analysis of annualized compliance costs in 2025, citing three reasons:

1. Data and resource limitations made it difficult to estimate multiple years of costs (EPA 2014a, p. ES-14);

2. 2025 would reflect the “remaining air quality concerns” for nonattainment areas with moderate classifications (EPA 2014a p. 1-8); and
3. It would be a near-comprehensive picture of costs since most areas will probably be required to comply with a new ozone standard by 2025 (EPA 2014a p. 1-8).

The result is that the RIA did not correctly assess the likely timing of needed emission reductions, and hence also failed to correctly assess incremental emissions control costs of alternative ozone standards relative to Baseline spending. The RIA also failed to correctly characterize the extent of areas across the U.S. that will have to contend with nonattainment status from 2017 and for multiple years thereafter.<sup>9</sup> We discuss the concerns this creates for EPA’s compliance cost estimates in more detail below.

### **b. Concerns with EPA Assumption**

As EPA indicated, nearly all areas would need to comply with a new ozone standard by 2025, but the implications for attainment effort prior to 2025 are much more complex than the RIA analysis assumed. Following promulgation of a final rule, by 2017 EPA would develop designations and “classifications” for all areas, using the most recent design value available in 2017. Each classification would have an associated attainment year. Areas further from attainment of the new standard in the year when classifications are assigned would be given more time to comply. Figure 11 below summarizes EPA’s assessments of the likely attainment years associated with different state classifications.

**Figure 11. EPA Area Classifications and Likely Attainment Dates**

<b>Classification</b>	<b>Likely Attainment Date</b>
Marginal	late 2020 or early 2021
Moderate	late 2023 or early 2024*
Serious	late 2026 or early 2027
Severe 15	late 2032 or early 2033
Extreme	late 2037 or early 2038

\*Moderate nonattainment areas may qualify for two 1-year extensions  
 Source: EPA 2014a, p. 1-8

Nonattainment areas need to implement all necessary emission controls at least a year *prior* to their attainment date in order to demonstrate compliance on schedule.<sup>10</sup> This implies that

<sup>9</sup> Even if an area is marginal in its attainment, and successfully achieves attainment by 2020, it will not be able to be redesignated to attainment status for at least two additional years. States that are in moderate nonattainment are unlikely to be able to return to attainment status until about 2025 even if they do meet their attainment deadline of 2023.

<sup>10</sup> In order to demonstrate attainment, areas need to have a compliant “design value” – a 3-year average metric of historical ozone concentrations. The Clean Air Act allows for two one-year extensions of an area’s attainment date,

marginal areas would need to implement all controls prior to the area's ozone season in 2020 for an attainment date in early 2021, and moderate areas would need to implement all controls prior to the area's ozone season in 2023 for attainment in early 2024. (Available monitoring data indicate that nearly all areas that are likely to be designated as nonattainment would probably fall into the marginal or moderate classification for any of the proposed alternative standards.)

Despite these facts, in the RIA EPA implicitly equates the need for potential reductions to achieve attainment in 2025 (based on 2025 emission levels) with an area's attainment designation, which would be based on emission levels prior to area designations in 2017 or 2018. EPA's 2025 analysis does not indicate the number of areas of the U.S. that can be expected to fall into nonattainment in 2017 as a result of a downward revision of the ozone standard in 2015, but rather focuses on areas that will still have design values above the NAAQS in 2025. In reality, additional areas outside of the regions EPA projects will need more emissions reductions as of 2025 might be designated as nonattainment based on recent historical ozone concentrations and may need to come into attainment prior to 2025. The effect of EPA's approach is not only to understate the extent of nonattainment designations that will be made in 2017, but also to understate the timing of emissions reduction needs, and the potential number of reductions relative to the earlier Baseline years. EPA's cost analysis does not account for the need for some portion of its 2025 Baseline emissions reductions to occur at least two years earlier than EPA has projected them to occur – and at least five years earlier if marginally-classified areas are to avoid being bumped up to the more onerous moderate classification after 2020.

As a result, using 2025 for a “snapshot” analysis of emissions, reduction needs, and costs initially appears complete, but is misleadingly so because it is in effect assuming that marginal and moderate states will be able to take advantage of Baseline emissions reductions that EPA projects will not occur until *after their required (pre-2025) attainment dates*. The most significant concern is for marginal areas, which would need to implement controls by 2020; ozone precursor emissions in these areas would need to be reduced from their Baseline level down to a level consistent with attainment *by 2020*, while EPA's analysis does not “check” for this outcome until 2025. Baseline emissions are projected to decline over time from 2018 through 2025, so greater reductions would be needed for attainment at the end of 2020 than in 2025.

Our assessment does not take into account the additional legal and administrative complications that might arise for some nonattainment areas. The Clean Air Act does provide some flexibility with respect to attainment dates, but this flexibility usually comes with increased requirements and costs. Moreover, whether the flexibility is granted and what additional requirements (and costs) would be involved is difficult to assess. EPA did not provide such assessments as a

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but one year of historical concentrations below the ozone NAAQS (with one allowed exceedance) is still required by the attainment date (Clean Air Act, Section 181(a)(5)) in order to avoid being “bumped up” to a more severe classification, with attending more burdensome regulatory restrictions on the designated regions' emitters and governments.

rationale for assuming all non-California regions would comply in 2025, in conflict with their own estimates of compliance dates for marginal and moderate categories.

### c. Implications of EPA Assumption for Compliance Costs

To the extent that regions and states would need to comply before 2025 and thus not be able to take advantage of the substantial reductions in Baseline NO<sub>x</sub> emissions that EPA projects for the period from 2018 to 2025, EPA's methodology will overlook some of the actual costs that would be incurred. These costs are relevant for the regions and states that would be classified as marginal and moderate.

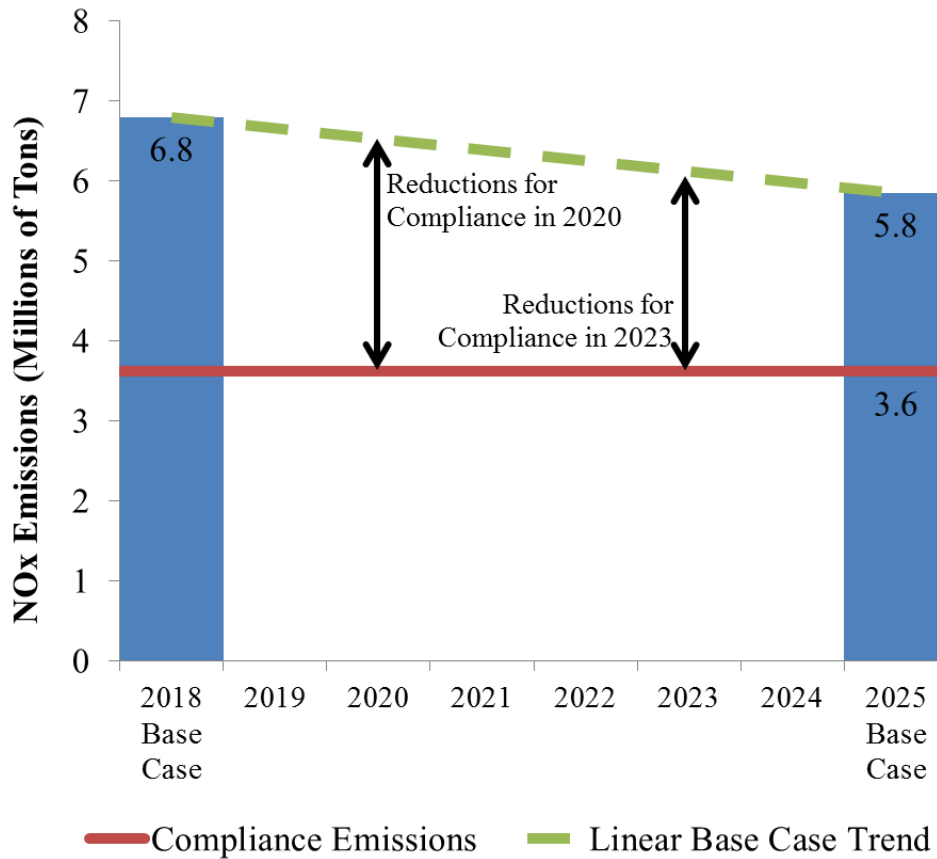
Figure 12 illustrates the relative importance of this concern. The bars on the chart show EPA's projections of 2018 and 2025 "Base Case" NO<sub>x</sub> emissions in states that EPA projects would require reductions *in 2025* to come into attainment with a 65 ppb standard.<sup>11</sup> The red line shows the level of NO<sub>x</sub> emissions that would bring these states into attainment with a 65 ppb ozone standard according to the EPA RIA. Based upon the likely attainment schedule for a revised ozone NAAQS, most states with nonattainment areas would need to finish implementing emissions controls *prior to 2025* (by 2020 for marginal states and by 2023 for moderate states). "Base Case" emissions (estimated by the green dotted line) are higher in earlier years, so the gap between the green and red line—the reductions needed to reach attainment—will be greater than EPA estimated using the 2025 projection.

In summary, this concern suggests that EPA has understated the non-California compliance costs of meeting a 65 ppb ozone standard, and made their timing appear to occur later than they will actually have to occur. Further, these data do not indicate the extent to which additional areas might be in nonattainment in 2017 and need to make reductions prior to 2025. This would represent an additional understatement of the overall regulatory impact of promulgating a tightened ozone standard in 2015.

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<sup>11</sup> As discussed above, additional states might have areas that will be in attainment *in 2025* but would require reductions for attainment in an *earlier* year (e.g., 2020). These states are not included in Figure 12.

**Figure 12. “Base Case” vs. 65 ppb Compliance NO<sub>x</sub> Emissions, 2018 – 2025 (States Requiring Reductions for 65 ppb, Excluding California)**



Note: Figure includes only states that required NO<sub>x</sub> reductions as part of EPA’s control strategy for 65 ppb, excluding California. The “compliance emissions” level consistent with an ozone concentration of 65 ppb is derived from EPA’s 2025 “snapshot” analysis and assumed to be constant across years.

Source: EPA 2014a, 2014d, and NERA calculations as described in text

## 2. EPA Assumes Controls for Multistate Regions Rather than for Individual States

### a. EPA Assumption

As discussed in Section II, EPA estimated the emission reductions needed to comply with alternative ozone standards using regional air quality modeling scenarios and the implied response factors at ozone monitors (*i.e.*, the responsiveness of ozone monitors to *regional* reductions in ozone precursor emissions). In broad terms, EPA first applied known NO<sub>x</sub> and VOC controls within each region, locating emission reductions near the monitors with the highest ozone readings where possible but ultimately extending throughout each region (EPA 2014a p. 3-24). If known controls alone could not bring all of the ozone monitors in a region into attainment, EPA then applied region-wide emission reductions from unknown controls.



## b. Concerns with EPA Assumption

As EPA acknowledged, the illustrative control strategy in the EPA RIA has little geographic specificity (EPA 2014a p. 3-23). Under EPA's approach, known controls were applied in specific locations, but they were applied in any location where they might be found within the multi-state region, even if they were not located in a state with a nonattaining monitor, or in close proximity to a nonattaining monitor within the state. Similarly, unknown controls were applied without any locational specificity across the entire multi-state region until all monitors throughout that region reached attainment. Applying reductions in such broad strokes using response factors is necessarily crude. EPA attempted to improve its estimates by performing multiple air quality modeling sensitivities in some regions,<sup>12</sup> but there is still significant uncertainty in this approach (even beyond the uncertainty inherent in any air quality modeling projection). To our knowledge, EPA did not perform air quality modeling of its final control strategies that would serve as a "check" that the final combination of regional controls in EPA's analysis (which were developed using response factors) actually corresponds closely to attainment in all areas.

Beyond general uncertainty, there are two potential issues with this modeling approach, both of which were acknowledged in the EPA RIA. First, except in a few areas along regional borders, EPA did not account for emissions transport across regions.<sup>13</sup> EPA concluded that this could lead to an overstatement of emission reductions necessary for compliance since downwind regions might benefit from emissions reductions in upwind regions (EPA 2014a p. 3-23). However, to the degree that regional ozone concentrations are affected by transport, the conditions in upwind regions could also *increase* the need for local emissions reductions; the net effect of ignoring regional transport on required emission reductions is ambiguous.

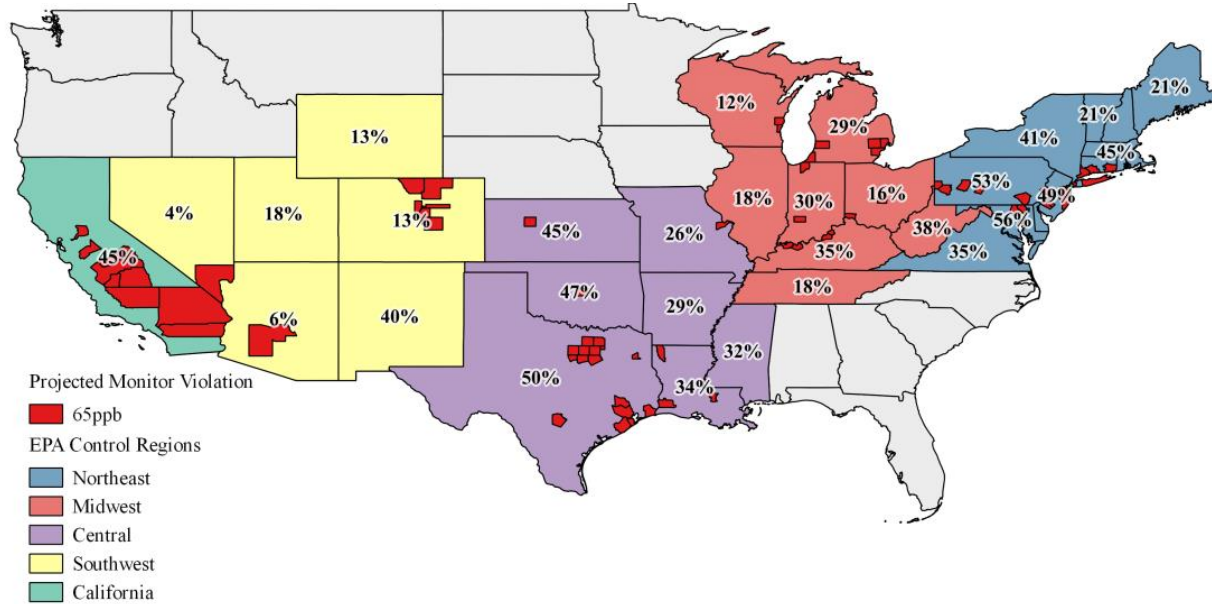
Second, EPA's approach hinges on the assumption that states in the same region would choose to coordinate their control strategies. More specifically, EPA's analysis implicitly assumes that states with less severe nonattainment areas or with no nonattainment areas at all would implement control measures to help other states (either by choice or requirement). Figure 13 shows the percentage NO<sub>x</sub> reductions from the EPA Baseline in each state for a 65 ppb standard. The figure also indicates counties where EPA projects monitors in nonattainment with a potential 65 ppb ozone standard in the 2025 Baseline.

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<sup>12</sup> These additional sensitivities captured some of the nonlinearity in the responsiveness of ozone concentrations to NO<sub>x</sub> emissions reductions.

<sup>13</sup> Except for monitors in Pittsburgh, Buffalo, and the Illinois suburbs of St. Louis, which fell along regional borders, monitors were assumed to only be affected by within-region emission changes (EPA 2014a p. 3-23).

**Figure 13. Percentage NO<sub>x</sub> Reduction Required by State and Counties with Nonattaining Monitors in the 2025 Baseline (65 ppb Standard)**



Note: State percentage reduction to 65 ppb assumes that regional unknown control reductions are distributed to states in proportion to 2025 “Base Case” emissions. We excluded remote, rural monitors in the Western U.S. that EPA estimates are relatively unresponsive to NO<sub>x</sub> reductions and may be able to pursue regulatory relief.

Source: EPA modeling regions from EPA 2014a, Figure 3-3. Counties with monitor violations from EPA 2014a, Tables 3A-7 through 3A-11. Percentage reduction to 65 ppb from NERA calculations using EPA 2014a, 2014g, 2014k, and 2014l.

In each of the regions in EPA’s analysis (except California), two or more states are projected to have no monitors above 65 ppb in the 2025 Baseline; however, due to EPA’s multi-state modeling approach and compliance strategy, every state in those regions has reductions and costs for a potential 65 ppb standard. Figure 14 summarizes the implications for EPA’s analysis, indicating the share of reductions and costs in each region coming from states that are projected to be in attainment of a 65 ppb standard in the 2025 Baseline.

**Figure 14. Regional NO<sub>x</sub> Reductions and Costs by Nonattainment Status for 65 ppb (Incremental to the EPA Baseline)**

	Northeast	Midwest	Central	Southwest	US (Excluding CA)
<b>Reductions (1000s of tons)</b>					
States with non-attaining monitors	389	294	767	74	1,524
States w/out non-attaining monitors	<u>119</u>	<u>137</u>	<u>57</u>	<u>39</u>	<u>352</u>
<b>Total</b>	<b>508</b>	<b>430</b>	<b>824</b>	<b>113</b>	<b>1,876</b>
<b>Costs (millions of 2011 dollars)</b>					
States with non-attaining monitors	\$4,502	\$1,644	\$6,490	\$245	\$12,882
States w/out non-attaining monitors	<u>\$1,233</u>	<u>\$726</u>	<u>\$440</u>	<u>\$160</u>	<u>\$2,559</u>
<b>Total</b>	<b>\$5,735</b>	<b>\$2,370</b>	<b>\$6,931</b>	<b>\$405</b>	<b>\$15,441</b>

Note: Cost by region calculated using controls applied to anthropogenic NO<sub>x</sub> and VOC emissions sources in the lower 48 states (excluding California, tribal regions, and EEZ emissions) and using EPA’s average unknown control cost assumption of \$15,000 per ton for unknown controls. Totals may differ slightly from U.S. summaries in the EPA (2014a) due to rounding in the RIA.

Source: EPA 2014a Tables 3A-7 through 3A-11; EPA 2014b, 2014e, 2014f, 2014g, 2014i; NERA calculations as described in text

Regional coordination similar to the assumptions in EPA’s RIA would require some mechanism – either a “SIP Call” or formal agreements among states.<sup>14</sup> Some regions may not develop multi-state programs to comply with a new ozone standard absent additional EPA regulations (which are not being proposed by EPA at this time).

### c. Implications of EPA Assumption for Compliance Costs

Modifying EPA’s methodology to reflect state-level compliance – concentrating emission reductions only in states with non-attaining monitors – would have two opposing effects on the cost estimates in EPA’s RIA. The states needing increased emission reductions would likely need to resort to more expensive control technologies in-state instead of relying on less expensive emission reductions in neighboring states, which would increase total compliance costs. However, EPA stated that “emissions reductions are likely to have lower impact when they occur further from the monitor location,” so fewer emission reductions might be required if all controls were implemented in states with nonattaining monitors (EPA 2014a p. 3-24).

In summary, the countervailing impacts on compliance costs make it impossible to unambiguously determine whether addressing this concern would lead to higher or lower compliance costs without a correct, state-specific analysis. However, we note that EPA’s clear difficulty in identifying as much as 40% of the needed controls (excluding California) indicates a strong likelihood that states with the most intensive nonattainment will be at a point of rapidly

<sup>14</sup> EPA references historical experience of the Ozone Transport Commission, which implemented the NO<sub>x</sub> Budget Trading Program for the mid-Atlantic and Northeast states in the 2000s (EPA 2014a p. 3-23).

increasing marginal costs of control. Our own analyses (discussed below) support this possibility. Rapidly increasing marginal costs could easily dominate the need for somewhat fewer tons of reduction if those reductions are shifted to in-state sources. In fact, some of the assumed out-of-state emissions reductions may occur closer to the nonattainment area than would additional in-state controls, since nonattainment areas are often near state borders (see Figure 14).<sup>15</sup> At a minimum, we note that the RIA’s approach of allowing controls from out of state to be a significant part of the assumed control strategy is too far from the reality of control strategies for its cost estimates to be considered reliable. EPA should provide an analysis that does include state-by-state compliance strategies.<sup>16</sup>

### **3. EPA Finds Large Reductions in Mobile Source “Base Case” Emissions from 2018 to 2025**

#### **a. EPA Assumption**

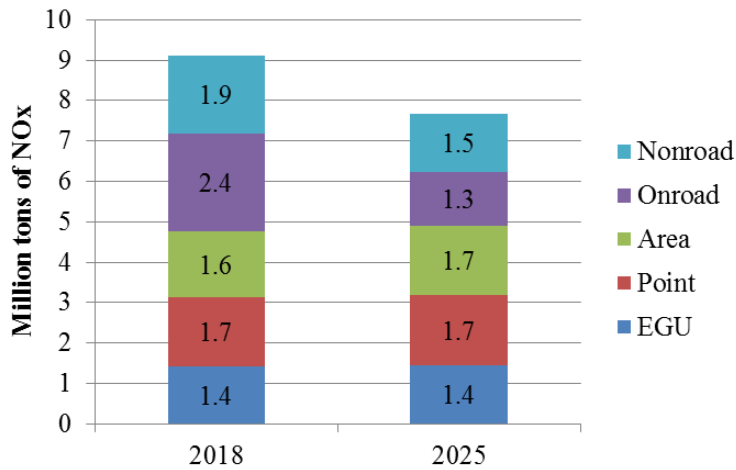
As discussed above, EPA’s compliance cost analysis was based on an emissions projection for 2025. EPA projects a dramatic decrease in “Base Case” onroad and nonroad NO<sub>x</sub> emissions between 2018 and 2025. This decrease reflects both implementation of on-the-books emissions standards for onroad vehicles (including Tier 3 standards), off-road equipment, and marine vessels, as well as projected vehicle usage patterns and vehicle fleet turnover. EPA’s projected “Base Case” NO<sub>x</sub> emissions in 2018 and 2025 are summarized by emissions source category in Figure 15.

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<sup>15</sup> Additionally, ozone forms from precursors emitted at sometimes relatively long distances. In fact, precursor emissions reductions can decrease ozone concentrations in their local vicinity, even as they elevate ozone concentrations at more distant locations.

<sup>16</sup> We also note, however, that doing so will be uninformative unless EPA also adopts a more realistic way to deal with whether marginal costs are increasing as more and more unknown controls are assumed, as we discuss later in this section.

**Figure 15. EPA “Base Case” NO<sub>x</sub> Emissions in 2018 and 2025 (Excluding California)**



Note: Anthropogenic NO<sub>x</sub> emissions (excluding fires and biogenic sources) in the lower 48 states (excluding California, tribal regions, and EEZ emissions).

Source: EPA 2014b

The large decrease in “Base Case” onroad and nonroad emissions has the effect of bringing nonattaining areas closer to attainment in the 2025 Baseline. Because EPA treated all costs associated with those reductions as “costless” with respect to the new ozone standard, these have the effect of resulting in lower costs for attainment than if attainment needs were assessed with respect to earlier points in time.

### **b. Concerns with EPA Assumption**

Tier 3 onroad vehicle emission standards presumably account for a large share of these “Base Case” NO<sub>x</sub> reductions. Tier 3 includes both a gasoline sulfur standard that will be fully implemented by 2017 and tailpipe emission standards for new vehicles which will phase in from 2017 to 2025.<sup>17</sup> It is important to note that Tier 3 tailpipe standards do not affect emissions from the existing stock of vehicles, so tailpipe emissions only improve as vehicles are scrapped and replaced with new, Tier-3-compliant vehicles over time (due to age, failure, accident, *etc.*). Credible assumptions about this fleet turnover are critical for any emissions projection accounting for Tier 3 standards.

EPA does not provide specific information on the important modeling assumptions used to estimate onroad mobile source NO<sub>x</sub> emissions. In addition to potential concern about whether the assumed fleet turnover rate is overly optimistic, another question is whether the NO<sub>x</sub> emission reductions are due in part to the vehicle greenhouse gas emission standards (commonly known as CAFE standards), which are scheduled to become increasingly stringent for the 2022

<sup>17</sup> Gasoline sulfur standards: <http://www.epa.gov/otaq/documents/tier3/420f14007.pdf>

Tailpipe standards: <http://www.epa.gov/otaq/documents/tier3/420f14009.pdf>

through 2025 model years. These standards are subject to a mid-term evaluation in 2018, which could result in less stringent requirements, and thereby result in fewer Baseline NO<sub>x</sub> reductions (e.g., through fewer electric cars in the fleet). In all, the onroad NO<sub>x</sub> reductions by 2025 may not be as large as EPA calculated, and if so, costs to attain the new NAAQS would be understated. Even without these understatement concerns, the need for some of those reductions to occur earlier than 2025 does imply an understatement of compliance costs.

### **c. Implications of EPA Assumption**

We were unable to analyze the fleet turnover assumptions or the effect of the greenhouse gas emission standards in EPA's onroad mobile emissions modeling for this report, so their implication for EPA's compliance cost estimates based on the 2025 conditions alone (as EPA relies on) is uncertain. If the reduction in onroad and nonroad emissions from 2018 to 2025 is overstated, additional emission controls would be required and EPA's compliance cost estimates would be understated; if the onroad and nonroad reductions were understated in EPA's 2025 "Base Case" projection, the compliance cost estimates would be overstated.

However, there is a more important concern with the reliance on the projected large downward trend in mobile source emissions that is not as ambiguous in its direction, and it is tied to the problematic use of the 2025 "snapshot" for determining the proposed rule's cost. It is quite clear that what may appear to be "anyway" attainment considered from the vantage point of 2025 could be hiding more extensive nonattainment starting substantially earlier. Much of those Baseline mobile source reductions may need to be sped up in time to deal with the need to reduce emissions for some regions and states substantially earlier than 2025. That will imply costs that the EPA RIA did not account for, and at earlier dates. Thus, even if the fleet turnover assumptions prove correct, the RIA would understate compliance costs by relying on that fleet turnover through 2025.

Furthermore, because the mobile source reductions are not under EPA's control, but depend on actual consumer decisions about when to buy new vehicles, the method for obtaining those reductions earlier than Baseline is either relatively costly incentives for early vehicle scrappage, or finding other types of controls that can be mandated directly by the regulator, which are presently unidentifiable (and hence also likely to have relatively higher marginal costs than EPA's RIA is assuming).

In summary, the heavy reliance of the RIA cost estimates on mobile source emissions reduction that will only occur gradually and which are not directly under the control of regulators has resulted in an understatement. We also note that given the importance of the dramatic reduction in mobile source emissions as a general matter, a reader of EPA's RIA should be concerned that projected vehicle age distributions and turnover are not discussed plainly and supported by evidence in either the EPA RIA or in the support documentation for the "Base Case" projection.

#### **4. EPA Included CPP in the Baseline, Resulting in Lower Compliance Costs to Achieve the Standard**

##### **a. EPA Assumption**

As discussed in Section II, EPA assumed that the proposed CPP rule will be adopted as part of its Baseline. While the objective of the proposed CPP is to reduce CO<sub>2</sub> emissions in the electric generation sector, the resulting shifts away from coal-fired generation and toward natural gas-fired and renewables generation would also result in significant NO<sub>x</sub> reductions for EGUs – 436,000 tons across the lower 48 states according to EPA’s analysis using the IPM model. These reductions would help areas to attain new, tighter ozone standards, but the costs of these shifts in the generation mix would be attributable to the CPP.

##### **b. Concern with EPA Assumption**

EPA does not generally include proposed rules in its Baseline; analytical baselines typically include only rules and regulations that are already on-the-books (as in EPA’s “Base Case” emissions projections). As EPA acknowledged in the ozone RIA, “There is significant uncertainty about the illustration of the impact of rules, especially the CPP because it is a proposal and because it contains significant flexibility for states to determine how to choose measures to comply with the standard” (EPA 2014a p. 4-24).

Including a proposed rule is not only inconsistent with its usual practice, but is particularly unwarranted given the vast uncertainty about the future of that proposed rule. The CPP proposal is subject to enormous dispute over its viability and legality. EPA has already signaled that it is considering changes to the proposed rule that could significantly alter its effects on emissions of ozone precursors prior to 2025. It is thus highly speculative for inclusion in any Baseline of another rule that will go into effect in the next few years. Even assuming the proposal is implemented as proposed, the potential impacts of the CPP on NO<sub>x</sub> emissions are also highly speculative.

If the CPP were not implemented, EPA’s Baseline NO<sub>x</sub> emissions in 2025 would be higher across the country. This would raise the ozone NAAQS’s estimated costs because the costs of some of the CPP reductions would then be attributed to compliance with the proposed ozone revision. It could also increase the number of areas that would be projected to be in nonattainment, though EPA’s projection of 2025 “Base Case” ozone design values suggests that new nonattainment areas for 65 ppb would fall within states that already require emissions reductions in EPA’s analysis (EPA 2014a Tables 3A-7 through 3A-11). This latter effect is thus less of a concern to us than the understatement of costs that has resulted from this assumption.

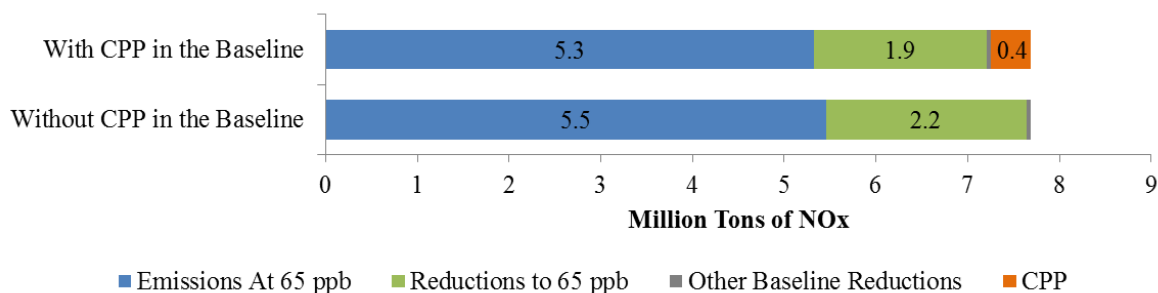
##### **c. Implications of EPA Assumption**

If the CPP were removed from EPA’s Baseline, our analysis finds that states with needs for emissions reductions would require an additional 300,000 tons of NO<sub>x</sub> reductions to get from the

Baseline to attainment with 65 ppb. (That is, we find that about 30% of NO<sub>x</sub> reduction under the CPP would occur in regions without any nonattainment areas according to EPA’s analysis, and thus would not be needed to for attainment of the 65 ppb standard.) We also determine that nearly all of these reductions will have to come from the unknown controls category. Figure 16 below summarizes the emissions and reductions impacts of the CPP for an ozone standard of 65 ppb. Since unknown controls are much more costly than known controls on a per-ton basis, this would dramatically increase the costs.

In an earlier NERA analysis (NERA, 2014) that illustrated how unknown control costs could be estimated from a more thorough review of the emissions inventory data and additional analysis, we determined that closure of power generating units in areas that affect projected nonattainment areas was one of the types of control that should be considered a part of EPA’s unknown tons of reduction. This was not because closing such plants is inexpensive, but because it appears to be much more cost-effective than the other alternatives, such as early vehicle turnover. Nevertheless, we found that it could cost, *on average*, about \$16,000/ton of NO<sub>x</sub> removed, and that some of the closures needed to achieve a potential 60 ppb NAAQS would cost well above \$30,000/ton. Whatever the cost per ton would be for meeting the 65 ppb alternative, it will likely be a candidate component of the unknown controls.

**Figure 16. NO<sub>x</sub> Reductions from Baseline for a 65 ppb Ozone Standard (Excluding CA)**



Note: Figure excludes California. Emissions at 65 ppb are marginally lower when the CPP is included in the Baseline because some of the CPP reductions occur in regions without any nonattaining monitors; these NO<sub>x</sub> reductions would not need to be “replaced” with additional controls if the CPP were removed from the EPA Baseline.

Source: EPA 2014b, 2014e, 2014f, 2014g, 2014k, 2014l

## 5. EPA’s Ozone Analysis Uses a Different EGU “Base Case” Emissions Projection than EPA’s Clean Power Plan

### a. EPA Assumption

EPA’s 2025 “Base Case” projection of EGU NO<sub>x</sub> emissions was significantly lower in the ozone analysis than in the recent CPP proposal. However, EPA applied NO<sub>x</sub> *reductions* from the CPP proposal analysis to the 2025 “Base Case” EGU emissions projection used for the ozone NAAQS analysis.



### **b. Concern with EPA Assumption**

As part of the RIA for the CPP Proposed Rule, EPA projected NO<sub>x</sub> emissions in both a base case without the CPP and a policy scenario including the CPP.<sup>18</sup> Base case EGU NO<sub>x</sub> emissions were 1,554,000 tons in 2025 in EPA's CPP analysis. EPA developed a separate projection of 2025 "Base Case" EGU emissions for this RIA for the ozone NAAQS Proposed Rule using the same electricity sector model (*i.e.*, IPM) and projected NO<sub>x</sub> emissions in this ozone "Base Case" of 1,475,000 tons – about 79,000 tons lower than the CPP base case.<sup>19</sup> A reduction in base case EGU emissions has the practical implication of reducing the emission controls needed for attainment of alternative ozone standards. It is concerning that there is such a significant change in base case EGU NO<sub>x</sub> emissions between two recent EPA analyses, particularly given that both analyses purportedly used version 5.13 of the IPM model, calibrated to the U.S. Energy Information Administration's (EIA's) *Annual Energy Outlook* 2013 (EIA 2013) demand to develop their base case projections (EPA 2014h p. 3-46; EPA 2014i p. 86).

As discussed above, we are concerned that the proposed CPP should not be included in EPA's Baseline. Even if the CPP were implemented as proposed, the difference between the CPP and ozone EGU base case projections raises an additional concern about the application of the CPP projected reductions to EPA's ozone Base Case. EPA estimated that the CPP would reduce EGU NO<sub>x</sub> emissions by about 436,000 tons in 2025 (EPA 2014e and 2014f).<sup>20</sup> The estimated emissions impact of the CPP depends in part on the assumptions in the base case used for EPA's CPP analysis. In its ozone analysis, however, EPA subtracted the CPP NO<sub>x</sub> reductions from the *ozone* "Base Case" projection of EGU emissions. Given that the ozone "Base Case" EGU NO<sub>x</sub> projection is significantly lower, it may reflect assumptions about additional coal and natural gas unit retirements or re-dispatch; these differing assumptions could lower the potential NO<sub>x</sub> emission reductions attributable to the CPP.

### **c. Implications of EPA Assumption**

We have not been able to determine why EPA's "Base Case" EGU NO<sub>x</sub> projection is lower in EPA's ozone analysis than in its CPP analysis. If EPA's "Base Case" EGU NO<sub>x</sub> emissions were understated, that understatement would reduce the controls needed for compliance with a new ozone standard and would cause EPA to understate compliance costs.

Applying the CPP NO<sub>x</sub> reduction estimates to a lower "Base Case" EGU emissions level likely overstates the NO<sub>x</sub> reductions attributable to the CPP (since some of the policy-induced NO<sub>x</sub> reductions from EPA's CPP modeling likely take place in the new "Base Case"). EPA assumed

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<sup>18</sup> Note that EPA's ozone analysis distinguished between a "Base Case" (which does not include the CPP) and a Baseline (which does include the CPP). EPA's CPP analysis has a single base case.

<sup>19</sup> These total EGU emissions figures exclude tribal and offshore data, but include data for California.

<sup>20</sup> These NO<sub>x</sub> reductions are for the Option 1 State CPP scenario, which was used in EPA's ozone analysis (EPA 2014a p. 3-11).

the CPP reduces NO<sub>x</sub> emissions by about 436,000 tons; given the complexities of dispatch modeling, it is difficult to tell how much this reduction would be diminished as a result of EPA's lower "Base Case" NO<sub>x</sub> projection. Regardless of the magnitude, this inconsistency in EPA's analysis understates the controls needed for compliance with a new ozone standard and thus understates compliance costs.

## **B. Concerns Related to EPA's Calculation of Unknown Control Costs**

Fully 40% of the estimated tons of reduction needed to attain a standard set at 65 ppb (excluding California) come from unknown controls, and even using EPA's approach, this category accounts for about 73% of the estimated compliance costs. EPA's approach probably greatly understated the costs of these unknown controls, as we explain in this section. Along with the use of the 2025 snapshot to determine the extent of nonattainment and emissions reduction needs, the way that EPA handled the unknown control costs is probably the other most significant reason to believe that the RIA is understating the costs of a potential revision to the ozone NAAQS.

### **1. EPA Assumed an Average Cost of \$15,000 per Ton of Emission Reductions from Unknown Controls as Its Basic Assumption**

#### **a. EPA Assumption**

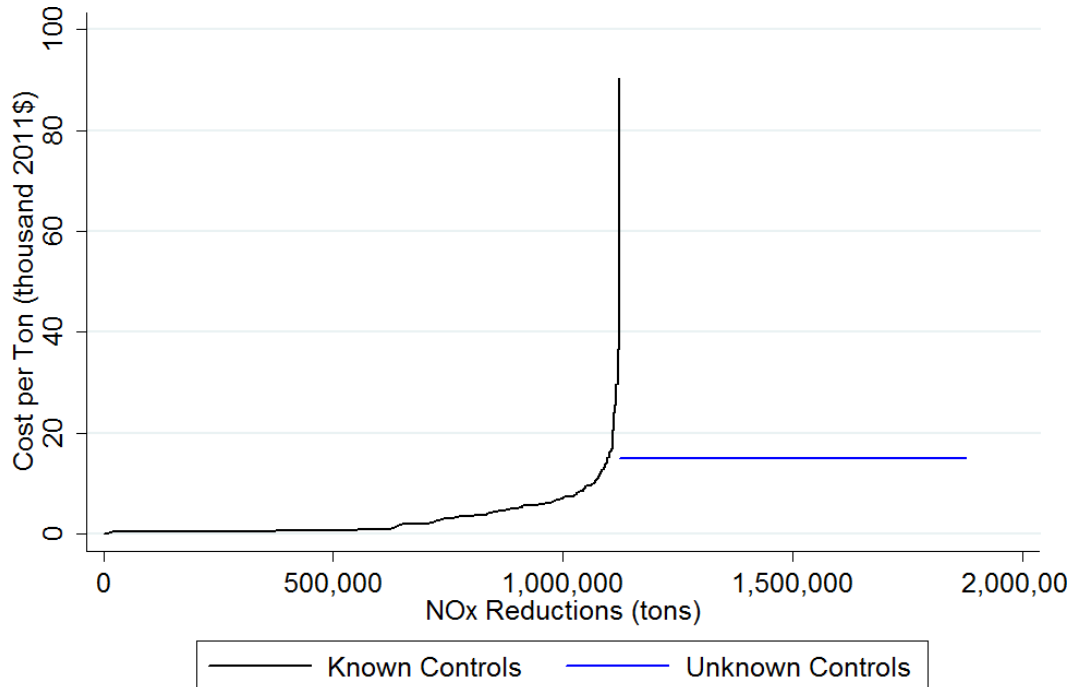
EPA applied a single average cost value of \$15,000 per ton to all reductions from unknown controls. EPA provided the following rationales for taking this simple approach:

- EPA's Science Advisory Board stated in 2007 that, of the three unknown control cost methods proposed by EPA, "assuming a fixed cost/ton appears to be the simplest and most straightforward" (EPA 2014a p. 7-27).
- The EPA analysis does not include all *currently* available controls since CoST focuses on a "limited set of emissions inventory sectors" (EPA 2014a p. 7-12 and 7-28). Unknown controls could include these currently available (and presumably less expensive) controls as well as more expensive technologies or more extreme measures.
- Historically, EPA has sometimes overestimated the cost of unknown controls and has failed to account for certain innovations (EPA 2014a p. 7-14).
- Future technological innovation can change the pollution abatement cost curve by making existing controls more efficient or less costly or by introducing new inexpensive controls (EPA 2014a p. 7-18).
- "Learning by doing" can reduce the cost of existing control technologies (EPA 2014a p. 7-20).

- Annualized NO<sub>x</sub> offset prices in several areas in nonattainment with the current ozone NAAQS (75 ppb) are still less than \$15,000 per ton.

Figure 17 shows the unknown controls required for 65 pp and EPA’s \$15,000 per ton assumption in the context of EPA’s known control costs for 65 ppb.

**Figure 17. U.S. NO<sub>x</sub> Reductions and Cost per Ton for EPA 65 ppb Control Strategy, Incremental to EPA Baseline (Excluding California)**



Note: Controls are from the EPA Baseline. EPA assumes the average cost of unknown controls is \$15,000 per ton. Figure excludes 105,000 tons of reductions from unknown controls in California. The few known controls greater than \$15,000 per ton in EPA’s analysis are either EGU SCR controls or non-EGU point source controls replacing existing controls (leading to a high *incremental* cost per ton).

Source: EPA 2014g and EPA 2014l

### **b. Concerns Regarding EPA Assumption**

There are many problems with EPA’s various justifications for assuming an average cost of \$15,000 per ton for reductions from unknown controls, which we explain here.

EPA argues that the EPA Science Advisory Board recommended the use of the “average cost” approach in 2007. The Science Advisory Board preferred the average cost method presented by EPA at the time because of its clarity and simplicity. This endorsement says nothing of the method’s *accuracy*. The original white paper reviewed by the Science Advisory Board explains the significant uncertainty in the value used for the average cost approach:

“The general argument against this option is that the \$10,000 per ton cap appears arbitrary - we have been unable to identify an independent basis for establishing

\$10,000 per ton as a reasonable ceiling on the costs of NAAQS compliance measures. In addition, there is some evidence that areas are spending more than this amount on some existing measures...” (812 Project Team 2007, p. 7).

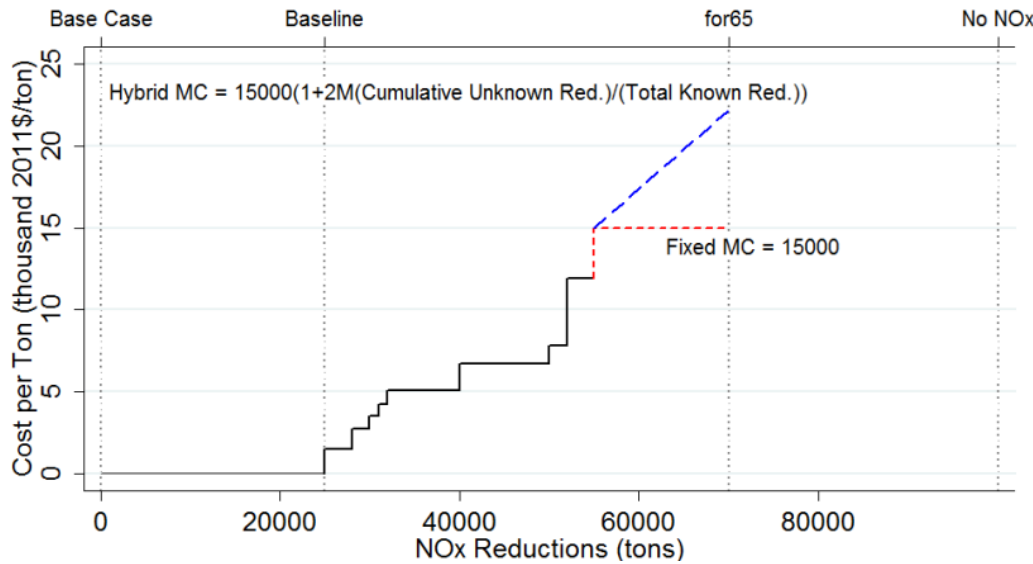
Naturally, some average cost per ton value exists that would approximate *actual* average compliance costs; however, the Science Advisory Board review gave no indication of what that value should be. Additionally, over seven years have passed since this 2007 guidance. EPA apparently has not prioritized the development of alternative methodologies and continues to rely on simplicity over improved accuracy in estimating unknown control costs.

During the 2008 and 2010 reviews of the ozone NAAQS, EPA did develop and present estimates based on an alternative methodology called the “hybrid” approach. This approach involved an upward-sloping extrapolation from the known control marginal abatement cost curve in order to estimate the cost of unknown controls. The slope of the extrapolation is dependent on the ratio of unknown to known control reductions; areas needing a high share of emission reductions from unknown controls have more rapidly increasing costs per ton for unknown controls. EPA explained the key advantage of this approach in its 2008 ozone analysis:

“The hybrid methodology has the advantage of using the information about how significant the needed reductions from unspecified [unknown] control technology are relative to the known control measures and matching that with expected increasing per unit cost for going beyond the modeled [known] technology” (EPA 2008 p. 5-13).

Figure 18 illustrates the methodology for this hybrid approach in the context of an example marginal cost curve for NO<sub>x</sub> reductions.

**Figure 18. Marginal Cost Curve Example of EPA Average (“Fixed”) and Hybrid Approach**



Note: The slope of the hybrid marginal cost segment (in blue) depends on M, a constant loosely based on the difference between the highest-cost known control and an assumed maximum cost for unknown controls, as well as the highest ratio of unknown to known control cost across all regions expected to come into attainment.

Source: NERA illustration based on hybrid approach described in EPA (2008) pp. 5-10 to 5-18

EPA did not develop similar hybrid method cost estimates in the current ozone NAAQS proposal. Figure 19 shows EPA’s estimates of unknown control costs using the average cost approach and NERA’s estimates of costs for the same controls if EPA had once again applied its hybrid “mid” methodology. We estimate that annualized compliance costs would be \$3.7 billion higher using EPA’s 2008 and 2010 hybrid method, with an average cost per ton for unknown controls of about \$20,000.

**Figure 19. Unknown Control Costs for 65 ppb Using EPA Average (“Fixed”) and Hybrid Approaches, Excluding California**

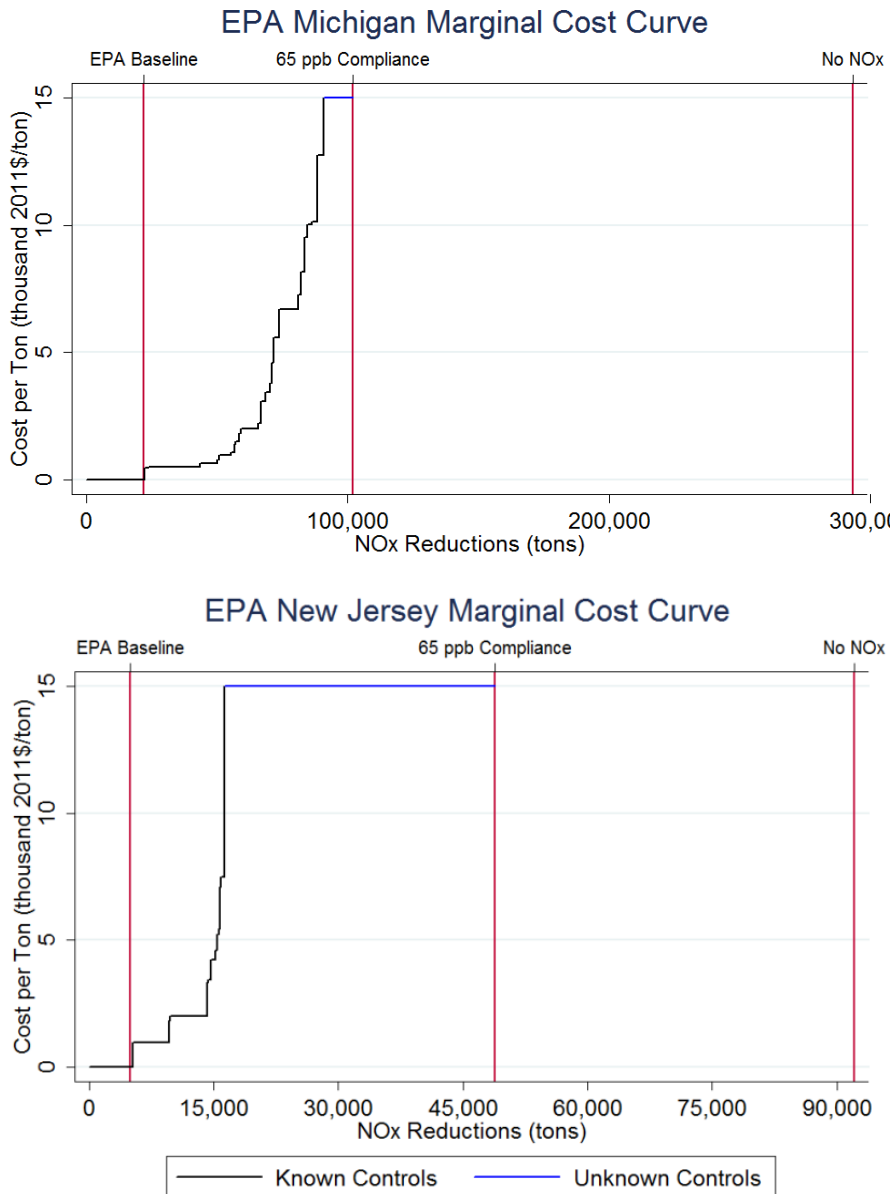
	Unknown Control Reductions (tons NO <sub>x</sub> )	Control Costs (billion 2011\$)	Average Cost per Ton (2011\$)
EPA Average Cost Approach (\$15k/ton)	752,162	\$11.3	\$15,000
EPA Hybrid "Mid" Approach (NERA Estimate)	752,162	<u>\$15.0</u>	<u>\$19,954</u>
Difference		+\$3.7	+\$4,954

Note: Figure excludes costs in California. Costs under the hybrid approach were calculated using the “mid”-multiplier (M = 0.24) chosen by EPA in its 2008 ozone analysis (EPA 2008). In EPA’s 2008 analysis of a potential 75 ppb ozone standard, the highest regional average cost per ton of unknown controls using the hybrid “mid” methodology was \$23,000.

Source: EPA (2008) pp. 5-10 to 5-18, EPA 2014l, and NERA calculations

The following examples illustrate the value of using regional information to inform assumptions about the cost of unknown controls (as in EPA’s 2008 and 2010 hybrid method). Figure 20 illustrates that EPA’s RIA analysis assumed \$15,000 per ton for unknown controls regardless of whether a state requires 1,000 tons or 100,000 tons of NO<sub>x</sub> reductions from unknown controls.

**Figure 20. State Marginal Cost Curve Illustrations of EPA’s 65 ppb Analysis**



Note: Reductions from the 2025 “Base Case” to the EPA Baseline are assumed to be zero-cost. EPA regional unknown control reductions were distributed to states in proportion to “Base Case” 2025 emissions (consistent with EPA air quality modeling).

Source: EPA 2014g, EPA 2014l, EPA 2014b, and NERA calculations

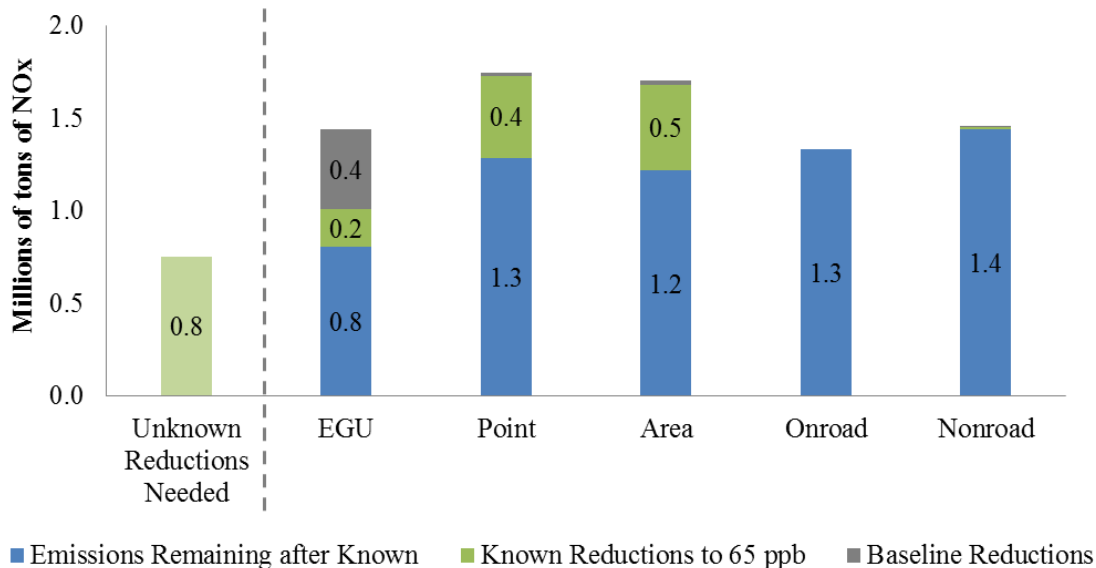
EPA further argued that the known controls analyzed did not represent all currently available controls. Given the heavy reliance on unknown controls in EPA’s analysis and the important

implications of unknown control costs for the likely impacts of a new ozone standard, EPA should have made every effort to conduct a truly comprehensive analysis of currently available known controls. EPA's argument – that currently available controls not included in the EPA analysis could be a significant source of additional, inexpensive NO<sub>x</sub> reductions – is not substantiated in EPA's RIA. In our 2014 analysis of a potential 60 ppb ozone standard, we concluded that “the identity of control options and their costs to achieve the emissions reductions needed for attainment” was perhaps the most important “gap” for EPA to address in future ozone analyses (NERA 2014 p. 45); four years after EPA's ozone NAAQS reconsideration in 2010 and six years after EPA developed the basic cost and emissions information, EPA has done relatively little to identify additional controls and address the largest uncertainty in its compliance cost analyses.

If additional controls do exist that would cost an average of \$15,000 per ton, that means there are controls that must cost a good deal less than that too; but if such less expensive controls were currently available, presumably they would have already been identified. Based on the distribution of NO<sub>x</sub> emissions remaining after the application of EPA's known controls, it is difficult to find an emissions source with both a large potential for additional reductions and an obvious additional control option. Figure 21 shows the emissions remaining in each emission source category after accounting for known controls. Many of the emissions remaining would be difficult or impossible for states to control further for the various major source categories.

- *EGU Sources.* Coal and natural gas power plants are already largely controlled as part of EPA's known control strategy.
- *Point Sources.* Large point sources are the easiest to regulate and have already been subject to significant control.
- *Area Sources.* Many area sources such as space heating are highly diffuse, and the stock is difficult to regulate.
- *Onroad Sources.* Tier 3 vehicle emission standards have significantly reduced projected onroad emissions, limiting the possibility of significant, inexpensive controls.
- *Nonroad Sources.* One-third of residual nonroad emissions are from freight rail, an interstate activity not amenable to state-level control. Other nonroad mobile sources like construction equipment and marine vessels are also difficult to control at the state level.

**Figure 21. NO<sub>x</sub> Emissions Remaining After Known Controls for 65 ppb by Source Category by 2025 (Excluding California)**



Note: Anthropogenic NO<sub>x</sub> emissions and reductions (excluding fires and biogenic sources) in the lower 48 states (excluding California, tribal regions, and EEZ emissions)

Source: EPA 2014b, 2014e, 2014f, 2014g, 2014k, 2014l

EPA’s arguments in favor of a \$15,000 average cost per ton for unknown controls relied heavily on assumptions about technological progress and “learning by doing.” While improved technology and learning do tend to improve the cost-effectiveness of emission control over time, both are highly uncertain, particularly in the short period between promulgation of a new ozone standard and the attainment dates for most areas. If area designations are determined in 2017, there would be three years for marginal areas and six years for moderate areas to implement necessary emission controls (and an even shorter timetable for moderate areas to submit an implementation plan); relying on new product development and significant production cost decreases seems highly problematic within such a tight timeframe. More importantly, as the figure above shows, most of the emissions remaining in 2025 will be from many diffuse sources, or from EGUs and point sources that are already highly controlled. New technologies are not likely to apply to retrofit of existing equipment and processes, and thus additional emission reductions are likely to require entirely new processes or replacements of existing equipment. This means that the implementation of “new technologies” would likely entail early scrapping or plant closures. It is this early turnover of still productive capital stock that translates into high compliance costs, likely much more than the cost of the replacement capital itself.

Finally, EPA suggested that historical NO<sub>x</sub> offset prices validate the \$15,000 average cost assumption. However, historical offset prices reflect the current ozone situation – a standard of 75 ppb, and that standard itself is only now starting to be implemented. Consistent with EPA’s database of known control measures, some relatively inexpensive known controls are still



available even in areas with nonattainment problems under the current standard. The relevant questions are 1) will additional controls be available *after* this supply of known controls is exhausted under a tighter ozone standard?, and, 2) at what cost? Until NO<sub>x</sub> offsets prices reflect increased demand for unknown controls under a tighter ozone standard, offset prices only confirm what is already known about the cost of currently available controls.

### **c. Implications of the Concern**

EPA's assumption on the costs of unknown controls has a major effect on its estimates of the overall compliance costs of a revised ozone standard. For a potential standard of 65 ppb, EPA found that about 40% of U.S. NO<sub>x</sub> reductions (excluding California) would need to come from unknown controls. However, these unknown controls represent a much larger share of the estimated compliance costs; for the 65 ppb standard, unknown compliance costs represent about 73% of EPA's estimate of total annualized compliance costs (excluding California and assuming a \$15,000 average cost per ton for emission reductions from unknown controls).

EPA's compliance cost estimates were primarily driven by a single, arbitrary assumption about the average cost of unknown controls, and modifications to that assumption could have a dramatic effect on the estimated costs and economic impacts of a new ozone standard.

## **2. EPA's Sensitivity Analysis Assumed a Low of \$10,000 per Ton and a High of \$20,000 per Ton for Emission Reductions from Unknown Controls**

### **a. EPA Assumption**

EPA noted that the costs of unknown controls are highly uncertain. To reflect the uncertainty, EPA calculated unknown costs assuming an average cost of \$10,000 per ton for the "lower bound" and an average cost of \$20,000 for an "upper bound."

### **b. Concerns with EPA Assumption**

Given the highly arbitrary nature of EPA's average cost approach and selection of \$15,000 per ton, EPA's sensitivity analysis on unknown control costs does little to indicate a range of likely values. The narrow sensitivity range is inconsistent with both the rest of EPA's cost analysis and with prior EPA analyses:

- EPA suggests that the accuracy range of the *known* control costs for non-EGU point and area sources is plus or minus 30%, yet EPA's sensitivity analysis of *unknown* control costs is performed at a range of only plus or minus 33% (EPA 2014a p. 7-39).
- The hybrid "mid" approach presented alongside the average cost method estimates in EPA's 2008 and 2010 ozone analyses would imply an *average* cost per ton of about \$20,000 in the current analysis (the "upper bound" of EPA's cost sensitivity).

- The 2007 white paper on unknown control costs that was reviewed by the Science Advisory Board suggested possible assumptions that were outside EPA’s \$10,000 to \$20,000 per ton sensitivity range. For example, “One option would be to use the effective marginal cost of I/M controls...between \$25,000 and \$30,000 per ton for both VOC and NO<sub>x</sub> reductions” (812 Project Team 2007, p. 7).

EPA’s only rationale for its cost sensitivity assumptions was, “This range is inclusive of the annualized NO<sub>x</sub> offset prices observed in recent years in the areas likely to need unknown controls to achieve the proposed standard, and if anything, suggests the central estimate of \$15,000/ton is conservative” (EPA 2014a p. 7-30). As discussed above, recent NO<sub>x</sub> offset prices are not indicative of the average cost of future unknown controls, and they certainly do not reflect the *uncertainty* in estimating future average control costs. The cost range of EPA’s sensitivity analysis and the declaration that EPA’s primary unknown control cost estimate is “conservative” are unfounded.

### c. Implications of EPA Assumption

Given indications of significant uncertainty in *known* control costs and the significant reliance on unidentified control measures to comply with a new ozone standard, EPA significantly understates the uncertainty in unknown control costs, and therefore significantly understates the uncertainty in total control costs.

## C. Summary of Concerns

All seven of the concerns summarized in this section point to a conclusion that the EPA RIA understated the potential costs—including the range of potential costs—of meeting a more stringent ozone standard. Four of these concerns seem in our judgment likely to lead to a major understatement of compliance costs.

- *EPA used a 2025 “snapshot” to estimate incremental attainment needs, but nonattainment designations and attainment deadlines are earlier.* This assumption likely leads to a major understatement in the number of areas that will be in nonattainment as well as an understatement of the number of tons needed to be reduced compared to Baseline emissions and timing of the spending. Areas designated as marginal or moderate would likely have attainment dates around the end of 2020 and 2023, respectively, and would incur costs before 2025—costs that are disregarded (by assumption) in EPA’s analysis. (Our assessment does not consider the complications of potential reclassifications of individual non-attainment areas.)
- *EPA included the proposed Clean Power Plan (CPP) in the Baseline.* EPA’s inclusion of CPP emission reductions is not only inconsistent with its standard practice of only including promulgated regulations, but such a deviation from standard procedure is particularly unjustified given the enormous uncertainty in what carbon limits may

actually be applied and how states would comply, and hence what NO<sub>x</sub> emission reductions might actually occur as a result of EPA regulation of carbon emissions from existing electricity generating units. Without the proposed CPP in the Baseline, at least an additional 300,000 tons of NO<sub>x</sub> reductions would be required for the 65 ppb standard, leading to a substantial increase in the estimated compliance costs.

- *EPA assumed a constant value of \$15,000 per ton for all unknown emission reductions.* Controls that EPA referred to as unknown (*i.e.*, for which no compliance controls are identified) represent about 40% of EPA's estimated tons and about 73% of EPA's estimated costs to attain a 65 ppb ozone standard (excluding California). As one indication of the importance of this single assumption, we calculated that unknown control costs would increase by about \$3.7 billion per year (*i.e.*, from \$11.3 billion to \$15.0 billion, excluding California) if EPA had used an alternate methodology presented in its own most recent prior ozone NAAQS cost assessment in 2010. Changing just this one aspect of the EPA methodology would lead to a total cost estimate of \$19.2 billion to achieve a 65 ppb ozone standard (excluding California).
- *EPA assumed an uncertainty band for unknown costs of \$10,000 to \$20,000 per ton.* This arbitrary range seems likely to understate substantially the potential compliance costs. Given that unknown controls would have to reduce emissions from many diffuse area or mobile sources—since point sources are already highly controlled—the cost per ton could be substantial (*e.g.*, requiring early turnover of still productive capital stock such as residential or commercial heating).

In summary, our evaluation suggests that EPA has understated the potential compliance costs—including their likely range—of meeting a more stringent ozone standard. The costs of achieving a more stringent ozone standard could be substantially greater than even the very substantial costs EPA has estimated.

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March 9, 2015

The Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460

**RE: Docket ID No. EPA-HQ- OAR-2008-0699 – National Ambient Air Quality Standards for Ozone**

Dear Administrator McCarthy,

The American Farm Bureau Federation (Farm Bureau) is the nation's largest general farm organization, representing agricultural producers of nearly every type of crop and livestock across all 50 states and Puerto Rico. We have a vital interest in enhancing and strengthening the lives of farmers and ranchers. Farm Bureau appreciates this opportunity to provide comments regarding the proposed revisions to the existing National Ambient Air Quality Standards (NAAQS) for ozone published in the *Federal Register* on Dec. 17, 2014. The proposed revisions tighten primary (health based) and secondary (welfare-based) standards, a move that will impose real and significant costs while providing uncertain and unverified benefits. Farm Bureau is concerned about the difficulty regulating volatile organic compounds (VOCs), nitrogen oxides (NOx), and other potential ozone precursors from agriculture and the chilling effect of these standards on the economy as a whole.

In the presence of heat and sunlight, atmospheric reactions of NOx and VOCs emitted from various biogenic and anthropogenic sources produce ozone. VOCs are defined in 40 CFR 51.100 as "any compound of carbon, excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate, which participates in atmospheric photochemical reactions." NOx are created from lightning, soil microbial activity, burning biomass, and fuel combustion. The Clean Air Act directs the EPA to set NAAQS for ozone at a level that is protective of human health and the environment, and to regulate both VOC and NOx emissions as ozone precursors.

For each state with areas not attaining the ozone NAAQS, EPA provides guidance to the state to develop its State Implementation Plan (SIP) to attain the standard by a required attainment date. Since 1970, EPA's strategy to reduce tropospheric ozone levels in nonattainment areas has focused mainly on reducing the total mass of VOC emissions. In the 1990s, the EPA developed a strategy to reduce NOx. The NOx reduction strategy and the VOC reduction strategy have helped decrease ozone levels. Since 1980, ozone forming emissions have already been cut in half and average ozone concentrations have dropped by 33 percent over the same period. EPA just updated ozone standards six years ago. These current standards are behind schedule due to EPA effectively suspending their implementation from 2010-2012 while the Agency

unsuccessfully pursued reconsideration. We can expect to see even greater reductions in ground-level ozone as states make up lost ground in putting the current standards into effect.

States are currently committing substantial resources – both in time and money – towards achieving emissions reductions under current ozone standards. Yet, despite over three decades of cleaner air, EPA is now proposing a new stringent range of standards from 70 to 65 parts per billion that would bring vast swaths of the country into nonattainment. In some areas, the proposed range is at or near the level of background ozone that is naturally occurring or internationally transported, pushing even rural counties far from industrial activity into nonattainment. In the past, lower ozone standards were reached by requiring industrial facilities to install control equipment for NO<sub>x</sub> and VOCs. Large power plants historically have been a relatively cost-efficient way to achieve NO<sub>x</sub> reduction, but those opportunities are quickly diminishing because the majority of existing coal-fired power plant capacity is equipped with some form of NO<sub>x</sub> controls and further controls are expected to be installed because of other EPA regulations.

Although a relatively small contributor, agriculture produces VOCs (from pesticides and livestock) and NO<sub>x</sub> (from engines and other sources) that may be regulated through monitoring and control measures. Restrictions limiting NO<sub>x</sub> and VOCs may create a significant problem for agriculture. Control measures could be implemented that would: curtail production activities; restrict pesticide applications; designate/limit pesticide application times; eliminate pesticide availability; restrict animal agricultural feeding operations due to emissions from animal waste handling and storage; prescribe costly control measures for animal agriculture; and prescribe costly and wasteful control measures for certain food and agricultural processing industries. The domestic renewable fuels industry (ethanol and biodiesel) could be greatly affected by control measures required for a more stringent standard since they too can contribute to VOCs and NO<sub>x</sub> during manufacture and use.

Agriculture also will be indirectly impacted by costs passed on to the consumer from special requirements for vehicles and fuels (diesel trucks and farm equipment), restrictive permitting requirements that affect plant expansions, and the loss of federal highway and transit funding. Farming and ranching are energy-intensive businesses. Farmers and ranchers depend on reliable, affordable sources of energy in their daily operations- including using tractors and operating dairy barns, poultry houses and irrigation pumps. For farmers and ranchers that compete in a global economy, higher energy costs and fewer transportation options not only hurt competitiveness, but can determine farm viability and prosperity.

If finalized, EPA's proposed stringent ozone standards could limit business expansion in nearly every populated region of the U.S. and impairs the ability of U.S. companies to create new jobs and agriculture to remain competitive. Local communities will face burdens to commercial, industrial and agricultural activity not only vital to creating jobs, but also to providing tax revenue that support local services like public safety and education. This is of great concern to Farm Bureau, whose mission is not only to increase the viability of farmers and ranchers but to improve the quality of life in rural communities. This proposal's hardship to rural America is real and immediate, while the benefits are unverified and uncertain.



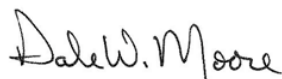
Building a new facility or performing major modifications to certain existing facilities that result in increased ozone concentrations in, or near, a nonattainment area will require permits that meet the most stringent Clean Air Act standard by installing the most effective emission reduction technology regardless of cost. In addition, states are mandated to offset any ozone-forming emissions from new projects or projects undergoing major modifications by reducing emissions from other existing sources in a nonattainment area. If no party is willing to provide offsets, then the project cannot go forward. Nonattainment designation also has profound impact on infrastructure development vital to the agriculture community. Beginning one year from the date of the nonattainment designation, federally-supported highway and transit projects cannot proceed in a nonattainment area unless the state can demonstrate that the project will cause no increase in ozone emissions.

The restrictions do not disappear when an area finally comes into attainment. Instead, former nonattainment areas face a legacy of EPA regulatory oversight. Before a nonattainment area can be redesignated to attainment, EPA must receive and approve an enforceable maintenance plan for the area that specifies measures providing continued maintenance of ozone standards and contingency measures to be implemented promptly if an ozone standard is violated.

In closing, the stringent new ozone standards have the potential for damaging economic consequences across the entire economy and would place serious restrictions on farmers, increasing input costs for things like electricity, fuel, fertilizer and equipment. Further, as ozone standards are ratcheted down closer to levels that exist naturally, more farmers will be forced to abide by restrictions on equipment use and land management, making it harder to stay in business. EPA's own estimates show that a new ozone rule could cost tens of billions of dollars per year and independent estimates indicate that the costs will likely be much higher, putting millions of jobs at risk. A new ozone rule has the potential to be the most costly regulation in our nation's history.

In light of the economic hardship a new ozone standard would cause to farmers throughout the country, including the reduction in funding for crucial civic services, and only providing uncertain benefits, Farm Bureau encourages the EPA to retain the existing ozone standard in the final rule. Our country's farmers cannot afford a stricter ozone standard.

Sincerely,

A handwritten signature in black ink that reads "Dale W. Moore". The signature is written in a cursive style with a large initial "D" and "M".

Dale Moore  
Executive Director  
Public Policy



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February 26, 2014

Air and Radiation Docket Information Center  
U.S. Environmental Protection Agency  
Mailcode 2822T  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460

**RE: Docket ID No. EPA-HQ-OAR-2013-0495 – Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units**

To Whom It May Concern:

The American Farm Bureau Federation (Farm Bureau) appreciates this opportunity to provide comments regarding the Proposed Standards of Performance for Greenhouse Gas Emissions for New Electric Utility Generating Units (Proposed Standard) published in the *Federal Register* on Jan. 8, 2014.

Farming and ranching are energy-intensive businesses. Farmers and ranchers depend on reliable and affordable sources of energy to run their tractors, and operate dairy barns, poultry houses and irrigation pumps, among many other uses. Farm Bureau supports the availability and affordability of all sources of energy, including, coal, gas, nuclear, wind, solar and other sources. The Proposed Standard for greenhouse gas emissions is therefore of great interest to the farm and ranching community.

One of the toughest challenges farmers and ranchers face is dealing with the obstacles and variability Mother Nature often hands us. Our grassroots members, comprised of hard-working farmers and ranchers from across the country, from virtually every sector of agriculture, have clearly enunciated in our policy strong opposition to regulation of greenhouse gas emissions. The presence of CO<sub>2</sub> in the atmosphere is ubiquitous. Imposing added energy costs on our own economy while others are not held to the same standard not only puts U.S. producers and consumers at a disadvantage, it serves little environmental purpose. In the end, merely reducing fossil fuel emissions without producing a measurable impact on world temperatures or climate cannot be regarded as a success. Energy-related CO<sub>2</sub> emissions from the United States have been falling since 2007, further raising our memberships' concern over proposed unilateral action.

The Proposed Standard does not provide the certainty that producers need in order to assure that they will continue to receive an affordable and reliable supply of energy. The Environmental Protection Agency (EPA) indicates there will be significant costs for utilities to comply with the

new standards. The costs utilities will incur in order to comply with the new standards will be passed on to their customers – in many cases, farmers and ranchers. Farmers and ranchers are price takers and not price makers, so they lack the ability of many other sectors of recouping their costs by passing them on to customers. Higher energy costs for farmers and ranchers mean higher farm input costs.

Farm Bureau has several concerns with the Proposed Standard for new power plants:

1. The Proposed Standard is admittedly unachievable for new coal-fired power plants given current technology. EPA proposes a standard of 1,100 lbs. of CO<sub>2</sub> per megawatt hour that it admits cannot be met by proposed new coal plants. EPA's proposed greenhouse gas New Source Performance Standards (NSPS), first issued in April 2012, demonstrated clearly that the administration seeks to end new coal generation through regulation. In that proposal, EPA admits that, under current technology, the Proposed Standard can only be met for fossil fuel plants "based on the performance of widely used natural gas combustion technology." The net effect of this "policy" seems essentially to eliminate the approval of any new coal-fired powered plants in the future.

Coal is an inexpensive, abundant and reliable source of energy in many parts of the country – the very type of electricity source that agriculture needs in order to remain viable and competitive in world markets. For farmers and ranchers in a large part of the country, coal supplies all or most of their electricity. As coal plants in these areas age and are de-commissioned, Farm Bureau is concerned that there will not be a reliable and affordable source of electricity to take their place. While existing and modified electric generating units (EGUs) are not included in this NSPS, this proposal is widely perceived as a pre-cursor to the standards that will ultimately be applied in the regulation of existing units. At a time when our country needs to consider all types of energy, the Proposed Standard appears to eliminate one of the most widely used and inexpensive sources of energy. Any standard for utilities should be realistic and achievable for all sources of energy.

2. The Proposed Standard relies on a process that is not even technologically proven nor commercially available. The Proposed Standard states that new coal-fired power plants could meet the new standards if they employ Carbon Capture and Storage (CCS) technology. Such a statement by the agency holds out illusory prospects. CCS technology is in its infant stages and is far from being a proven technology. As such, it is still extremely expensive and is not commercially available. Moreover, there is no certainty that commercially viable CCS technology will be available to proposed coal power plants any time in the near future. Basing a standard on a process that does not yet exist is unacceptable and will only drive investments where utilities can reasonably hope to achieve acceptable results.

Farmers and ranchers are among the most innovative people. Their contributions have allowed yields to rise significantly so that they produce more food and fiber on less land, and produce more milk and meat with fewer animals. Yet, even farmers and ranchers

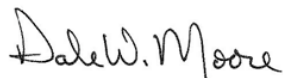
cannot gamble on technology that has not been developed and might not be available until some undetermined future time.

At a minimum, any standard must be grounded in technology that is predictable, reliable and certain. CCS does not yet provide this needed assurance and certainty.

3. The cost and availability of natural gas affects the price and availability of fertilizer for farmers and ranchers. Farmers and ranchers could be affected in another, more direct way by any wide volatility in natural gas prices. While recent trends have lessened the linkage of domestic natural gas and fertilizer prices, natural gas is the principal feedstock in the production of nitrogen fertilizer, which is a vital input for farmers and ranchers to grow crops. Natural gas prices are currently low, thanks to technological developments (such as hydraulic fracturing) that appear to have opened up large supplies. Yet, some activists oppose “fracking.” Should new supply sources be restricted while utility demand is increased, we could see increases in the price of natural gas that could raise input costs for farmers.
4. The Proposed Standard sets a dangerous precedent for other sectors of the economy. EPA has asserted that it has the authority to regulate greenhouse gas emissions across the entire economy. As a result, the ultimate impacts of these regulations could extend to the rest of the industrial economy, from refining to manufacturing and potentially agriculture. Farmers will not only be impacted by higher electricity prices in the future, but will get hit with higher prices for other important inputs. Increases in other energy prices, fertilizer and machinery will hold negative consequences for agriculture while at the same time making U.S. farmers and ranchers less competitive internationally.

The Proposed Standard has many uncertainties that cause Farm Bureau significant concerns. Farmers and ranchers are primarily end-users of the products from power plants and, thus, must completely depend on those who operate and own them. Farm Bureau appreciates the opportunity to express these concerns and looks forward to working with the agency to address them in any final rule.

Sincerely,



Dale Moore  
Executive Director  
Public Policy



# Statement of the American Farm Bureau Federation

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**TO THE  
REGULATORY AFFAIRS, STIMULUS OVERSIGHT AND  
GOVERNMENT SPENDING SUBCOMMITTEE  
HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE  
REGARDING THE HEARING “ASSESSING THE IMPACT OF  
GREENHOUSE GAS REGULATIONS ON SMALL BUSINESS”**

**April 5, 2011**

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The American Farm Bureau Federation (Farm Bureau) offers this Statement for the Record for the hearing entitled “Assessing the Impact of Greenhouse Gas Regulations on Small Business.”

On January 2, 2011, rules promulgated by the Environmental Protection Agency (EPA) went into effect that regulate the emissions of greenhouse gases (GHG) from cars and light trucks. Now that those gases are regulated pollutants under the Clean Air Act, EPA authority extends to GHG emissions from stationary sources as well; these sources include not only power plants and refineries, but also farms and ranches.

Farm Bureau opposes the regulation of GHGs by EPA under the Clean Air Act. The regulation of GHG does not fit within the current framework of the Clean Air Act. Unlike other regulated pollutants, for which Clean Air Act thresholds are sufficient to regulate the largest emitters, GHG regulation at statutorily required thresholds holds the prospect of costly and burdensome permit requirements on farms, ranches, schools, hospitals and even some large residences.

Farmers and ranchers receive a double economic jolt from the regulation of GHGs from stationary sources. First, any costs incurred by utilities, refiners, manufacturers and other large emitters to comply with GHG regulatory requirements will be passed on to the consumers of those products, including farmers and ranchers. As a result, our nation’s farmers and ranchers will incur higher input costs, in the form of higher fuel and energy costs, to grow food, fiber and fuel for our nation and the world. To a large degree, farmers and ranchers cannot pass along these increased costs of production. Moreover, the policies being pursued by EPA contemplate a much larger role for natural gas to replace coal and other fossil fuels. While many factors go into determining fertilizer prices, natural gas price is a principal component. Should EPA’s policies have the effect of pushing natural gas prices higher, we anticipate those costs will combine with other factors into pushing fertilizer prices up and making it even more difficult for domestic fertilizer manufacturers and farmers in an increasingly competitive international market.

Profit margins for most farms and ranches are already very thin. Increasing the costs of production will make it more difficult for U.S. producers to compete in a global market.

Second, EPA regulation of GHG at existing threshold levels will require farmers and ranchers to obtain Title V operating permits and New Source Review/Prevention of Significant Deterioration (NSR/PSD) permits under the Clean Air Act. The Clean Air Act defines a “major emitting source” for purposes of Title V permit requirements as any stationary source emitting, or having the potential to emit, more than 100 tons of a regulated pollutant per year. For NSR/PSD permits, the threshold is 250 tons per year.

Unlike for other regulated pollutants under the Clean Air Act, these statutory thresholds will, for the first time, subject thousands of farms and ranches to the permitting requirements of the Clean Air Act.

EPA itself estimates there are more than 37,000 farms that emit between 100 and 25,000 tons of GHG per year, and would thus have to obtain Title V operating permits. (We believe the number of farms and ranches that would be required to get permits is considerably higher than that.) EPA estimates the average cost of obtaining a Title V permit is more than \$23,000. Using EPA's numbers, just the expense of obtaining Title V operating permits will cost agriculture more than \$866 million. This expense does not include yearly fees under Title V or any costs that might be incurred for NSR/PSD permits.

Livestock producers would be especially impacted by these permit requirements. The U.S. Department of Agriculture (USDA), in comments on EPA's advanced notice of proposed rulemaking on possible GHG regulation in 2008 said, "Even very small agricultural operations would meet a 100-tons-per-year emissions threshold. For example, dairy facilities with over 25 cows, beef cattle operations of over 50 cattle, swine operations with over 200 hogs, and farms with over 500 acres of corn may need to get a Title V permit." According to the USDA publication *Farms, Land in Farms, and Livestock Operations, 2007 Summary*, National Agricultural Statistics Survey, (Feb. 2008) this covers more than 98.8 percent of milk production, 89.4 percent of beef inventory and 96.8 percent of hog inventory. At current Title V "suggested minimum fees" from the EPA, these yearly permit costs would amount to approximately \$175 per dairy cow, \$87.50 per beef cow and more than \$20 per hog above the threshold numbers.

EPA recognizes the economic impact that this regulation will cause and has sought to phase-in, or "tailor", permit requirements by starting with the largest emitters first. Unfortunately, the Clean Air Act is very specific in its requirements and fairly inflexible in its application. Courts have generally been reluctant to allow EPA to go beyond the letter of the law. Because this "tailoring" approach will not initially require permits for some entities that are required by the Clean Air Act to obtain permits, many legal experts seriously question whether this approach can withstand legal challenge. Were a court to strike down the "tailoring rule," all of the farms, ranches and other small entities that meet the Clean Air Act thresholds presumably would be subject to permit requirements immediately.

But even if this "tailoring" approach were to survive, farmers and ranchers would still incur the higher costs of compliance passed down from utilities, refiners and fertilizer manufacturers that are directly regulated as of January 2, 2011. In addition, farms and ranches that meet the Clean Air Act thresholds are eventually going to have to obtain Title V and PSD/NSR permits and will incur the direct costs described above. Even though EPA Administrator Lisa Jackson has said on

numerous occasions that EPA has no intention of regulating livestock emissions, intention and compliance with the law are two different considerations. To date, the agency has not proposed any regulation that would exempt livestock producers from GHG regulation, nor has it pointed to any regulation under which such an exemption might be claimed.

Farmers and ranchers will experience higher costs as a result of the EPA regulation of GHG, whether regulation is limited to only the largest sources of GHG emissions or whether Clean Air Act thresholds are applied. Either way, the position of American farmers and ranchers in an intensely competitive world market will be adversely affected.

We appreciate the opportunity to offer this statement for the hearing record.



January 10, 2011

The Honorable Darrell Issa  
Chairman  
House Committee on Oversight  
and Government Reform  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter requesting the assistance of the American Farm Bureau Federation (AFBF) in “identifying existing and proposed regulations that have negatively impacted job growth” in the agricultural sector. Your letter also solicited our suggestions for “reforming identified regulations and the rulemaking process.” We are pleased to respond to your request.

Unfortunately, the list of recent Federal regulatory actions that have had or may have a negative economic impact on the agriculture sector is long. The attached chart outlines some of the more important regulatory actions that have recently occurred or are in the process of being implemented. Where appropriate, we have identified specific remedies to the rule in question or more general reform of the rulemaking process that might help prevent a recurrence of abuse in the process.

The attached chart is not exhaustive. We have done our best to identify these immediate issues but also wish to draw your attention to additional policy matters that merit the committee’s attention. I will elaborate on these in a supplemental submission to the committee but I would like to draw your attention here to several matters that we believe also have significant economic implications, as well as due process concerns of the regulated community.

1. *Use of settlement agreements.* In a number of instances, EPA has utilized unilateral settlement agreements with environmental organizations to achieve policy ends outside the normal APA process. This is a serious matter that deserves the committee’s scrutiny and we would urge that you share your findings with the House Committee on the Judiciary, which has jurisdiction over the Administrative Procedures Act.
2. *Non-disclosure of disbursement of public funds.* The United States government pays millions of dollars annually in court costs and attorney fees to environmental activists and others who file actions against the United States. This money is paid from a Judgment Fund, and in some cases is paid from agency budgets. Entities do not have to

win their cases in order to be awarded fees and costs. In many cases, agencies settle with these groups and pay their costs. Until 1995, the Administrative Conference of the United States filed reports on some of these expenditures, and the Department of Justice filed reports on money paid from the judgment fund. In 1995, the ACUS was deactivated, and reporting requirements by DOJ were repealed as part of a paperwork reduction effort. These funds are now paid to groups that sue the government, and there is no accountability for these taxpayer funds being spent. ACUS was reauthorized in 2010 and public disclosure of these disbursed sums should be made.

3. *Use of computer modeling.* Use of computer models received much attention in the context of the global warming/climate change debate and the committee should look into the use of computer models in its review. Two recent instances of concern are the computer model used by EPA in its Chesapeake Bay TMDL and EPA's announced intention to give particular weight to modeling scenarios in determining NAAQS compliance even when actual data may conflict.
4. *Data Quality Act.* The committee may wish to evaluate whether the Data Quality could be strengthened by amending the law to provide for judicial review of such determinations.

We strongly support your committee's effort to exercise its oversight authority in this area, and we would encourage you as well to share your findings with the relevant committees of jurisdiction so that they may evaluate possible changes to the underlying statutes when appropriate. We will be pleased to work with you as the committee proceeds with its inquiry. If you have any questions about this subject, please contact Paul Schlegel at (202) 406-3687.

Sincerely,



Bob Stallman  
President

**Agency:** EPA  
**Issue:** Re-consideration of Atrazine  
**Status:** EPA will have further hearings in the spring of 2011  
**Discussion:** In 2009, in response to requests from environmental activists, EPA re-opened the re-examination of Atrazine's use as an agricultural herbicide, even though the chemical went through the normal re-registration process in 2006 and is not due for reconsideration until 2013. Atrazine is widely used in agriculture and is particularly important in the planting and harvest of corn and sorghum. The chemical has been the subject of numerous scientific studies (some estimates place the number at over 6,000). EPA's decision to re-open the registration of Atrazine is virtually unprecedented and has caused great anxiety among farmers who depend on this crop protection tool. Were Atrazine removed from the market, its removal could seriously erode farmers' profitability. (Notably, this chemical is particularly important in no-till agriculture, which has gained increasing acceptance over the last few decades and has been cited by some as an important means of keeping carbon stored in the soil.)

**Agency:** EPA  
**Issue:** Clean Water Act Permits for Normal Pesticide Use  
**Status:** EPA is planning to promulgate a new permit program by April 9, 2011  
**Discussion:** In 2009, a three-judge panel from the 6<sup>th</sup> Circuit Court handed down an unprecedented ruling. Ignoring nearly four decades of law, the court invalidated an EPA rule and declared that when a farmer uses a pesticide – even in complete accordance with Federal requirements under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) – that use may constitute a “discharge” under the Clean Water Act; the pesticide's use, therefore, according to the Court, requires a national pollutant discharge elimination system (NPDES) permit under Federal law – even though that use is currently regulated under FIFRA and FIFRA label instructions incorporate findings related to water quality impacts. The Secretary of Agriculture asked the Administrator of EPA to appeal this ruling and to defend its own rule but the agency failed to defend its own regulation. Instead, the agency is proposing a permit system that will be put in place by April 9, 2011 – a system that, by one estimate, would require 5.6 million application of pesticides by 365,000 applicators to have permits. Moreover, the agency in its original proposal opened the door to requiring NPDES permits for virtually *any* application of a FIFRA registered chemical – even when the application is done strictly in accordance with the FIFRA label. The economic impact of this policy change could be enormous. It will not only raise the costs of farming; it will potentially subject farmers and ranchers to lawsuits from environmental organizations who have philosophical objections to any pesticides.

**Recommendation:** Adopt legislation to clarify that application of FIFRA-registered pesticides do not require an NPDES permit when applied in conformance with the FIFRA label. (Bipartisan legislation was introduced in the 111<sup>th</sup> Congress to remedy this issue.)

**Agencies:** EPA and the Army Corps of Engineers (COE)

**Issue:** Regulatory treatment of prior converted croplands (PCC)

**Status:** Ongoing

**Discussion:** In 1993, the Clinton Administration issued a regulation to clarify the regulatory treatment of prior converted croplands. (NOTE: Prior converted croplands are wetlands that were drained before 1985 and that no longer exhibit the characteristics of wetlands. Such PCC are not treated as wetlands under Sec. 404 of the Clean Water Act unless they are abandoned for a period of 5 years.) The Clinton Administration stated that PCC were no longer to be considered “waters of the US” regardless of how the land was used. EPA and the COE have been trying to “recapture” such PCC by ignoring the regulation and promulgating guidance that claims that when there is a “change in use,” the PCC comes into regulation under the Clean Water Act. COE just lost a court decision on this matter, and the court explicitly rejected the agencies’ contention.

**Recommendation:** If EPA intends to change the regulatory treatment of prior converted croplands, it should be required to follow the appropriate procedures in the Administrative Procedures Act and not use guidance to undermine a policy that is nearly two decades old.

**Agency:** EPA

**Issue:** Interpretation of Court decisions and enforcement of Clean Water Act for concentrated animal feeding operations (CAFOs)

**Status:** Pending

**Discussion:** Several years ago, the 2<sup>nd</sup> Circuit Court invalidated an EPA rule in which the agency contended that all CAFOs propose to discharge pollutants and therefore had a “duty to apply” for an NPDES permit whether or not the CAFO actually discharged. The court clearly stated that Congress had given EPA only authority over actual discharges and the agency had no authority to compel entities to apply for a permit if they did not discharge or intend to discharge. EPA, however, has been working on regulations that may come out in 2011 and that are expected to require small- and medium-sized CAFOs to obtain NPDES permits, as well as mandating use of more aggressive nutrient management plans. The rule is

rumored to include a presumption that all CAFOs discharge – a policy determination that is clearly at odds with the ruling in the 2<sup>nd</sup> Circuit. Other ways in which the agency is seeking to increase regulation over CAFOs and increase costs to farmers and consumers are:

- Under a secret settlement agreement reached with environmental activists in current litigation over the 2008 CAFO rule, EPA will soon propose to collect information about farms and post that information on the internet.
- EPA entered into another settlement agreement to requirement permits for dust and feathers blown out of poultry house ventilation fans.
- EPA is proposing regulations to limit the use of manure nutrients and limit a farmer’s ability to sell manure nutrients to crop farmers.

**Agency:**

EPA

**Issue:**

Guidance undermining two Supreme Court decisions (*SWANCC* and *Rapanos*) and usurping congressional language on the legislative term “navigable waters”

**Status:**

A lengthy EPA guidance document is reportedly now under review at the Office of Management and Budget (OMB)

**Discussion:**

In two important decisions, (*SWANCC* in 2001 and *Rapanos* in 2007) the US Supreme Court declared that there are limits to Federal jurisdiction under the Clean Water Act, citing Congress’s use of the term ‘navigable’ to limit Federal authority. With the failure of legislation to delete that term in the 111<sup>th</sup> Congress, EPA is now reportedly developing guidance that will undermine the Court’s decisions and assert sweeping Federal jurisdiction over intrastate waters in ways never intended by Congress. Expanding federal control over intrastate waters will substantially interfere with the ability of individual landowners to use their private property and will significantly impair job creation from private and public investments in development and infrastructure projects including housing, schools, hospitals, roads, highways, agriculture and energy projects. Should such guidance reflect the policy direction of failed legislation, it could well empower EPA to assert Clean Water Act jurisdiction over even dry land.

**Agency:**

EPA

**Issue:**

Regulation of non-point sources of pollution

**Status:**

Ongoing

**Discussion:**

Under the Clean Water Act, states have primary authority to regulate non-point source pollution (Section 319 of the law). EPA, however, is encroaching upon state prerogatives and is engaged in a vigorous regulatory campaign to insert itself into non-point source pollution regulation. Specifically:

- The agency is trying to narrow the agricultural stormwater exemption – an exemption explicitly written into the law by Congress. In the Chesapeake Bay, EPA is seeking to do away with the exemption entirely.
- EPA has entered into a settlement agreement with environmental activists to adopt unrealistic and unattainable numeric nutrient criteria.
- EPA is advocating new total maximum daily load (TMDL) limits that would effectively limit CAFOs from expanding their operations.
- EPA is proposing to strengthen the water quality standards program. Key among EPA’s proposals are measures to tighten rules over point and nonpoint sources and give environmental advocates greater access to challenge livestock operations and land use activities of farmers and ranchers.

**Agency:** US Department of Labor

**Issue:** Regulations for the temporary and season agricultural (H-2A) program

**Status:** Final rule promulgated in 2010. Due to effective date, many H-2A employers will feel first impact when entering into contracts in 2011.

**Discussion:** 8 U.S.C. 1101(a)(15)(H)(ii)(a) authorizes a foreign guest worker program under which agricultural employers may, after meeting certain conditions, hire foreign workers for temporary or seasonal work. Revised regulations for this program, known commonly as the H-2A program, were promulgated in December, 2008; those reforms were eventually revoked and replaced by regulations promulgated by the Department of Labor in 2010. The 2008 regulations revised the wage methodology and streamlined the program; the 2010 revisions reverted to the previous wage structure but at the same time instituted new reforms that will make the program more costly and less attractive for farmers and ranchers. Although there are many problems with the new regulations, three items in particular are worth noting:

1. *Mandatory wage rate:* An employer utilizing the H-2A program must pay his workers the highest of (a) the state minimum wage; (b) the federal minimum wage; (c) the prevailing wage; or (d) the adverse effect wage rate (AEWR). In nearly all cases, this is the AEWR. The 2008 regulation modified the formula by which the AEWR was determined, bringing it much closer to the actual wages paid in the agricultural labor market. The 2010 final rule restored the earlier formula, which is not based on actual wages but is a formula based on a state-wide average of wages paid in differing jobs within agriculture. The practical effect of this change was to drastically increase labor costs for

employers who use the H-2A program and, consequently, to discourage employers from using the program.

2. *Worker eligibility*: One of the significant reforms of the 2008 rule was a requirement that state workforce agencies (SWAs), which receive Federal funds, be required to verify the work eligibility of individuals whom they refer to H-2A employers. Prior to that reform, SWAs would routinely refer prospective employees to H-2A employers not knowing whether the individuals themselves were eligible to work in the United States. Farmers complained that government agencies themselves were effectively compelling them to consider for employment individuals for whose eligibility the government itself could not attest. The '08 regulation remedied this ridiculous situation by simply requiring SWAs to verify work eligibility. The 2010 regulation repealed this common sense reform, thus restoring a situation which had the effect of requiring farmers to consider for hire workers not eligible to work in the U.S. The following explanatory note is taken from DOL's own website (full cite is at <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#h2a>:

***May I continue to rely on the SWA to verify the employment eligibility of the applicants it refers to my job opportunity?***

*Under the Immigration and Nationality Act (INA), the employer is responsible for verifying the employment eligibility of all of its hires. Department of Homeland Security (DHS) regulations do not require State agencies to verify the employment eligibility of job applicants they refer to employers but do permit employers to rely on employment verification voluntarily performed by a State employment agency under certain limited circumstances. Under the 2008 Final Rule the Department required the SWAs to perform I-9 verification on all applicants being referred to job openings for which H-2A workers were sought. Under the 2010 Final Rule, the SWAs will no longer be required to conduct I-9 employment eligibility verification of job applicants referred to job opportunities for which H-2A workers are sought. Employers should carefully examine the requirements under the INA and the DHS regulations to ascertain their obligations and ensure compliance with respect to employment eligibility verification.*

3. *50 percent rule*: A longstanding regulatory requirement under the H-2A program has been that farmers are required to recruit and hire eligible and qualified US workers before they receive certification (approval) to bring in foreign workers under H-2A visas. Customarily, a farmer would file an application specifying the number of workers he or she needs for the work in question. The

US DOL will ultimately reject or approve the application and certify for a certain number of H-2A workers. Through 50 percent of the contract period, a farmer is obliged to interview and hire eligible, qualified individuals (including those referred by an SWA) up to the number of workers certified on his H-2A application. For example, if a farmer were certified for 100 workers over a 6-month period, he would be required to interview and/or hire 100 workers during the first 3 months. For years, DOL had interpreted this rule to mean that once a farmer had interviewed or hired referrals up to the number certified on his H-2A application, the farmer had met his legal obligation. Under the 2010 Final Rule, DOL drastically changed this requirement.<sup>1</sup> (See the explanatory statements below taken from DOL's website at <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#h2ajoboffers15>.) DOL now requires that a farmer during the first half of the contract period hire any and all eligible US workers as long as at least one H-2A worker is employed. In real terms, this means that as long as a farmer has *one* H-2A employee, he must hire an unlimited number of US workers *regardless of the amount of H-2A workers actually certified by DOL*. This interpretation is wholly unworkable. From a practical perspective, it is frequently the case that US referrals either will not show up at the time and date required or, if they do, they will often not return or quit employment after a short period. A farmer will thus always keep some H-2A employees on the job because he cannot afford to lose his crop and he knows that referrals from SWAs are, in most instances, highly unlikely to result in a reliable supply of workers. The practical effect of DOL's new interpretation has been to raise costs and uncertainties for farmers who want to use the H-2A program. From a public policy standpoint (coupled with the changes mentioned in #1 and #2 above), the effect has been to discourage the use of legal employees under the H-2A program and to make it easier for workers with fraudulent documents to gain employment in the U.S.

***Am I required to hire every U.S. worker who applies, or is referred to me by the SWA, during the first 50 percent of the contract period?***

*For as long as an H-2A worker is employed in a certified position during the first 50 percent of the contract period, the employer must provide employment to any able, willing, qualified and available U.S. worker who applies to the employer until 50 percent of the period of the work contract has elapsed, regardless of the number of H-2A workers covered by the employer's*

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<sup>1</sup> It should be noted that the 50% rule, like nearly all the regulations governing the H-2A program, is wholly a regulatory creation. There is no language in the statute mandating such a requirement.



*certification. The start of the work contract timeline is calculated from the first date of need stated on the Application for Temporary Employment Certification under which the foreign worker who is in the job was hired.*

*An employer may continue to employ its H-2A workers under the work contract so long as it complies with all requirements of the H-2A program with respect to the H-2A workers and workers in corresponding employment. The employer may also choose to displace its H-2A workers with the newly hired U.S. workers so long as it pays for the H-2A workers' return transportation and subsistence in accordance with 20 CFR 655.122(h)(2). In the event the employer decides to displace its H-2A employees as a result of hiring U.S. workers, the employer is not liable for the payment of the three-fourths guarantee to the displaced H-2A workers.*

**October 1, 2010**

***What are my options if the newly hired U.S. workers under the 50 percent rule become unavailable after I have displaced some or all of my H-2A workers?***

*If all of the H-2A workers have been displaced, and some or all of the U.S. workers hired as a result of the 50 percent rule become unavailable, i.e., abandon the position or are terminated for cause, during the first 50 percent of the work contract period, the employer is under no obligation, but may continue, to hire any able, willing, qualified and available U.S. workers. However, so long as the employer continues to employ at least one H-2A worker in a certified position during the first 50 percent of the contract period, the employer must continue to hire any able, willing, qualified and available U.S. worker who applies to the employer until 50 percent of the period of the work contract has elapsed, regardless of the number of U.S. workers hired under the 50 percent rule who become unavailable.*

*If some or all of the newly hired U.S. workers become unavailable after the first 50 percent of the work contract period, the employer may, but is not obligated to, hire additional able, willing, qualified and available U.S. workers and/or engage in additional recruitment of U.S. workers.*

***Note: An employer whose Application for Temporary Employment Certification is approved for***

*the full number of workers requested may not apply to the National Processing Center for a redetermination of its need based on the unavailability of U.S. workers. Pursuant to the Department's regulations at 20 CFR 655.166, this option is only available to employers whose certifications were initially denied or whose applications were partially certified.*

**October 1, 2010**

**Agency:** EPA  
**Issue:** Lowering the national ambient air quality standards (NAAQS) for coarse particulate matter (PM<sub>10</sub>)  
**Status:** The agency is expected to recommend tighter standards in the near future  
**Discussion:** EPA is in the process of reviewing the NAAQS for PM<sub>10</sub>. Coarse particulate matter is much more prevalent in rural areas due to unpaved roads, working farm fields and blowing winds. With very little evidence of adverse health impacts from PM<sub>10</sub> (and virtually no evidence from rural areas), EPA is proceeding to revise its standards. While EPA has said that it is justified in retaining the current standard, all indications are that it will reduce the current allowable levels of PM<sub>10</sub> by half. Such a change will not have much impact in urban areas, but will cause significant economic concerns in rural areas that are already having difficulty in meeting the current standard. Reducing the standard will cause many rural areas to go into non-attainment, and bring more restrictions and controls on production. The effect will be to raise costs and reduce profitability for agriculture.

**Agencies:** EPA and US Fish & Wildlife Service  
**Issue:** Over-regulation and duplication of efforts under Section 7 of the Endangered Species Act  
**Status:** Ongoing  
**Discussion:** Section 7 of the ESA requires federal agencies to consult with either Fish & Wildlife Service or National Marine Fisheries Service (“Services”) regarding actions that could affect listed species. The Federal Insecticide Fungicide and Rodenticide Act (FIFRA) provides a procedure for EPA to register crop protection products, taking into account that product’s effect on wildlife, including listed species. Any crop protection registration has considered impacts of the registered product on wildlife. Because of this procedure, EPA has traditionally not consulted with the Services on registrations. Recent lawsuits have established a requirement for EPA to consult with the Services on crop protection registrations, even though EPA has already performed analyses of impacts on listed species during the registration process, thus creating a duplicative process. Crop protection use is often enjoined or restricted until consultations are complete. To make matters worse, the analyses done by EPA to assess impacts on listed species are

different from the analyses done by the Services to assess impacts on listed species. The processes employed by the agencies are not only duplicative, but they do not agree on the methodology to be used to perform the same analyses. Losers in this inter-agency dispute are farmers and ranchers who are restricted in the use of crop protection materials until section 7 consultation is completed.

**Recommendation:** Legislation should be adopted to resolve this conflict and to eliminate the duplication of costly and time-consuming reviews of impacts of pesticides on species listed under the ESA.

**Agency:** EPA

**Issue:** Regulation of greenhouse gases (GHGs)

**Status:** EPA regulatory authority commenced on January 2, 2011

**Discussion:** EPA began regulating greenhouse gas emissions at stationary sources (including farms and ranches) on January 2, 2011. The Clean Air Act requires that any such sources that emit, or have the potential to emit, 100 or 250 tons of GHGs per year obtain both Title V operating permits and preconstruction permits before building or renovating any structures. (EPA, under its “tailoring” rule, has claimed it has the authority to phase in these limits, starting at levels as high as 100,000 tpy – a level a thousand times above that explicitly set by Congress in the law. EPA’s claim of such authority is being challenged in court.) EPA estimates that when fully implemented, there will be over 37,000 farms and ranches subject to Title V operating permits alone, at an average cost of over \$23,200 per permit. In addition, EPA has stated that methane emissions from livestock are not classified as fugitive emissions, and thus would be required to obtain such permits. If so, this would affect over 90 percent of the livestock production in the United States.

**Recommendation:** Congress should act to halt EPA’s regulatory over-reach.

**Agency:** EPA

**Issue:** Regulation of ammonia emissions

**Status:** A proposed rule is expected in July, 2011

**Discussion:** In the course of revising national ambient air quality standards for sulfur dioxide (Sox) and nitrogen oxides (NOx), EPA is also seeking to regulate ammonia emissions. Livestock emit ammonia and would thus be regulated under these standards. The Clean Air Act only regulates emissions of “regulated pollutants,” which does not include ammonia. EPA is seeking to use a controversial and unproven method for the NOx and Sox standards that would incorporate the regulation of “reduced nitrogen,” which includes ammonia. The methodology has not been endorsed by the EPA Clean Air Scientific Advisory Committee which is reviewing these standards.

**Agency:** EPA  
**Issue:** Spill Prevention, Control and Countermeasures (SPCC) rule  
**Status:** Final regulation issued 2010  
**Discussion:** In 2009, EPA finalized regulations that will require any farm with above-ground oil storage capacity of greater than 1,320 gallons to have secondary containment measures in place; for farms with more than 10,000 gallons of such capacity, such plans must be certified by a professional engineer. This regulation is over thirty years old and was originally intended for the petroleum industry, although EPA contends that agriculture has never been exempt. There is no identifiable history of spills from agricultural tanks, and the agriculture community has repeatedly urged EPA not to extend this regulation to farms and ranches or, in the alternative, to do so in a way that minimizes burdensome costs (e.g., for farms with storage capacity of 20,000 gallons or more) and to provide a lengthy phase-in period (e.g., 4-5 years) to educate producers about their responsibilities. Those requests have not been granted and farms are now faced with spending literally thousands of dollars to undertake spill containment measures that will result in little to any environmental benefit.

**Agency:** EPA  
**Issue:** EPA settled a lawsuit with environmental groups to establish a regional Total Maximum Daily Load (TMDL) for the Chesapeake Bay. The administrator of the EPA is on record indicating her desire to use the Bay TMDL as a model for the entire nation.  
**Status:** Ongoing  
**Discussion:** The CWA requires that states identify impaired waters and establish Total Maximum Daily Loads (TMDLs). EPA must approve or disapprove all such TMDLs and, in the event of disapproval, directly establishes TMDLs. EPA appears to be exceeding its congressional mandate and authority in the law by pushing states to implement TMDLs as if they are effective caps on economic activity. Congress vested TMDL implementation with the states in order to balance the attainment of environmental goals with other important economic and social considerations. The Chesapeake Bay TMDL is unprecedented and contains far reaching consequences for the entire U.S. EPA's approach effectively ignores limits Congress prescribed in the CWA and will have the effect of erecting barriers to economic growth, as well as affecting a secure food supply. The implications are so far reaching that the regulations may well allow EPA to dictate virtually all economic activity including the ability to build roads, homes and grow food.

# American Federation of Labor and Congress of Industrial Organizations



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May 1, 2015

Honorable Ron Johnson  
Chairman  
Committee on Homeland Security and Governmental Affairs  
United States Senate  
Washington, DC 20510

Honorable Thomas R. Carper  
Ranking Member  
Committee on Homeland Security and Governmental Affairs  
United States Senate  
Washington, DC 20510

Dear Chairman Johnson and Ranking Member Carper:

Thank you for the invitation to provide my views on the costs and benefits of regulations and how the regulatory process can be improved to provide more timely and effective regulations.

I am Director of Safety and Health for the AFL-CIO where I have worked for more than three decades on safety and health regulations and regulatory policy issues. During that time I have participated in dozens of rulemakings on important OSHA standards including rules to protect workers from asbestos, lead, hazardous chemicals and safety hazards like confined spaces. A benefit of my long tenure is that I have witnessed first-hand how these rules have made a difference, changing conditions and practices in workplaces, significantly reducing exposures, preventing injuries and illnesses and saving workers' lives.

At the same time, over the past three decades, I have seen the system and process for developing and issuing worker safety rules devolve from one that worked to produce needed rules in a relatively timely manner to the current broken and dysfunctional system which is failing to protect workers and costing workers' lives.

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My comments on the regulatory process focus on my experience in the development of regulations under the Occupational Safety and Health Act, but many of the problems with the regulatory process outlined below extend to other government agencies as well.

### **The Occupational Safety and Health Act and its Regulations and Enforcement Have Significantly Reduced Job Fatalities, Injuries and Illnesses.**

The Occupational Safety and Health Act of 1970 was enacted more than 40 years ago with the purpose and promise of assuring “so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.” Since that time, great progress has been made. The job fatal injury rate has been cut by more than 80 percent from 18 deaths per 100,000 workers to a rate of 3.3/100,000 workers according to the latest BLS statistics (2013).<sup>1</sup> Reported job injury rates have declined by 70 percent. This progress has been seen across all sectors of the economy, with the most hazardous industries, including construction, where regulatory and enforcement activities have been focused, experiencing the greatest reductions in fatality and injury rates. And while data on occupational diseases remains limited and inadequate, significant reductions in workplace exposures to hazards like asbestos, lead, benzene, and blood-borne pathogens as a result of OSHA health rules, have been well documented.

Individual OSHA regulations have had a major impact in reducing injuries, illnesses and deaths. For example, OSHA’s 1993 construction lead standard significantly reduced the number of workers experiencing lead poisoning and elevated blood lead levels. According to surveillance data collected by NIOSH, ten years after the issuance of the lead standard, the rate of lead poisoning among US workers had been cut in half.<sup>2</sup> OSHA’s blood-borne pathogens standard to protect healthcare workers against HIV, Hepatitis B and other pathogens has had similar results. Following the issuance of the 2001 amendments to the standard requiring the use of safer needle devices, the rate of needle stick injuries experienced by healthcare workers was cut in half.<sup>3</sup>

### **The Cost Impacts of Job Safety Regulations Have Been Lower than Predicted.**

In order to set safety and health standards, OSHA is required to set standards that protect worker safety and health to the extent that is economically and technologically feasible. As part of all of its rulemakings OSHA conducts detailed cost estimates of its proposed rules. In most rulemakings, industry groups challenge OSHA’s cost estimates and feasibility analyses, claiming that proposed rules will cost many times estimated by OSHA and shut down industries and costs

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<sup>1</sup> Bureau of Labor Statistics, Census of Fatal Occupational Injuries and Illnesses, 2013.

<sup>2</sup> NIOSH, Adult Blood Lead Epidemiology and Surveillance Data, 1994 – 2001 and 2002-2005.  
[www.cdc.gov/niosh/topics/ABLES/data.html](http://www.cdc.gov/niosh/topics/ABLES/data.html)

<sup>3</sup> CDC Guidance for Evaluating Health-Care Personnel for Hepatitis B Virus Protection and for Administering Postexposure Management, Recommendations and Reports, Morbidity and Mortality Weekly Report, December 20, 2013 / 62(RR10);1-19



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jobs. In the 44 years since the enactment of the OSH Act, none of these industry claims or predictions have been borne out.

Indeed retrospective studies on the impacts of OSHA rules have found that the rules routinely cost less than estimated by OSHA or the industry. A 1995 review of major OSHA rules by the Office of Technology Assessment found that for most of the rules examined, the costs were overestimated because the agency had not adequately considered advances in technology. The report stated that “the actual compliance response that was observed included advanced or innovative control measures that had not been emphasized in the rulemaking analyses, and the actual cost burden proved to be considerably less than what OSHA estimated.”<sup>4</sup> For some standards, such as OSHA’s cotton dust standard and vinyl chloride standard, not only were the rules less costly than predicted, the rules led to technological innovations in the covered industries that made them more productive.

The comprehensive retrospective “look-back” reviews that OSHA has conducted of its rules under section 610 of the Regulatory Flexibility Act have made have also found that OSHA, and the industry groups, have routinely overestimated the costs of rules. Experience has shown that after rules are issued, employers develop technologies to comply with rules that were not even considered during the rulemaking.

### **The Toll and Cost of Workplace Injuries, Illnesses and Deaths Remains Enormous.**

Despite the progress that has been made in improving workplace safety, the toll of workplace injury, illness and death in the United States remains enormous. In 2013, the BLS reports that 4,585 workers were killed on the job and more than 3.8 million workers were injured. But research has shown that the BLS survey fails to capture many injuries due to limitations in the BLS survey and the underreporting of injuries.<sup>5,6</sup> The real toll of job injuries is likely two to three times greater than the number reported – 7.6 million to 11.4 million a year. These data do not reflect the toll of occupational disease, which NIOSH and other health researchers estimate result in 50,000 deaths a year.

Some groups of workers, including Latino workers and immigrant workers, are at much greater risk of job fatalities and injuries because of their concentration in dangerous jobs and vulnerability to employer exploitation and retaliation. In 2013, according to BLS, there were 817 fatal injuries among Latino workers and 879 fatalities among immigrant workers, with both these

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<sup>4</sup> Office of Technology Assessment, *Gauging Control! Technology and Regulatory Impacts in Occupational Safety and Health; An Appraisal of OSHA’s Analytical Approach*, Washington, DC, OTA, 1995.

<sup>5</sup> Boden, L.I. and A. Ozonoff, “Capture-Recapture Estimates of Nonfatal Workplace Injuries and Illnesses,” *Annals of Epidemiology*, Vol. 18, No. 6 (2008).

<sup>6</sup> Rosenman, K.D., Kalush, A., Reilly, M.J., Gardiner, J.C., Reeves, M. and Luo, Z., “How Much Work-Related Injury and Illness is Missed by the Current National Surveillance System?,” *Journal of Occupational and Environmental Medicine*, Vol. 48, No. 4, pp. 357–367, April 2006.

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groups experiencing fatality rates greater than the national average. In 2013 the fatality rate for Latino workers increased from 3.7/100,000 to 3.9/100,000, at the same time the number and rates of fatalities for all other groups of workers declined or stayed the same.

Hazards to young and inexperienced workers are a significant problem and there are growing concerns about safety and health challenges for older workers as more workers are staying on the job to an older age. Long recognized hazards such as silica, noise, and confined space hazards in construction remain serious problems, and ergonomic hazards, infectious diseases and most toxic chemicals have not been adequately addressed.

The growth in the oil and gas industry in recent years has come at a high cost to workers. The number and rate of fatalities in this industry have increased dramatically. Oil and gas extraction is more dangerous than coal mining.

The cost of job injury, illness and death is staggering. A 2012 study by Dr. J. Paul Leigh estimated the total annual cost at \$250 billion a year, similar to estimates by the National Safety Council and the Liberty Mutual Safety Index when both direct and indirect costs are taken into account.<sup>7</sup> This does not include the cost of pain and suffering to workers and their families. This is similar to, or greater than, the cost of other common diseases including cancer, diabetes and coronary heart disease.

Workers' compensation, which is supposed to be the main source of payment for medical costs and wage replacement for workers who suffer job injuries and diseases, only covers a small proportion of the costs – less than 21 percent according to recent research. The vast majority of the costs are borne by workers themselves (50 percent) or society as a whole (29 percent), shifted to private health insurance, Medicare, Medicaid and Social Security Disability.<sup>8</sup>

The failure to regulate and control workplace hazards is falling squarely on the backs of American workers and their families. Unfortunately, these cost impacts are rarely taken into account in any of the economic analyses that are conducted on regulations. The only costs that are considered are the impacts on regulated entities. Any examination of regulations and the regulatory process needs to start with a full review and accounting of the costs of failing to regulate are having on American workers and the public.

### **Layers and Layers of Regulatory Requirements Have Crippled the Regulatory Process.**

The OSHA law requires that health and safety standards be set to protect workers against significant risk of material impairment of health or loss of functional capacity to the extent that is

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<sup>7</sup> Leigh, J. Paul, "Economic Burden of Occupational Injury and Illness in the United States," *The Milbank Quarterly*, Vol. 89, No. 4, 2011.

<sup>8</sup> Leigh, J. Paul and James P. Marcin, "Workers' Compensation benefits and Shifting Cost for Occupational Injury and Illness," *Journal of Occupational and Environmental Medicine*, Vol. 54, No. 4, pp. 445-450, April 2012.



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technologically and economically feasible. Standards are to be based on the best available evidence, and established through an open, public process that goes well beyond the requirements of the Administrative Procedure Act. In addition to calling for public comments, the OSH Act requires that, upon request, a public hearing be conducted, where under OSHA regulations all interested parties have the opportunity to present testimony and ask questions of the agency and other witnesses. This process has produced good rules that have stood the test of time. Virtually all major OSHA standards have been subject to legal challenges, with the reviewing courts upholding most rules or ordering OSHA to make them stronger.

During the first decade of OSHA, promulgation of rules from start to finish took one to three years. Major rules were produced on asbestos, vinyl chloride, cotton dust, lead, and other hazards under both Republican and Democratic administrations. There were industry challenges and objections to most rules, but these objections were largely about how stringent the rule should be, not over the issue of whether regulation was needed at all.

But over the years, industry opposition to regulations increased. There were calls for more analyses and consideration of impacts of rules, particularly their costs, and more requirements were added to the rulemaking process through legislation, executive orders and other directives. Congress, the Paperwork Reduction Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Small Business Regulatory Enforcement Fairness (SBREFA) all imposed new requirements and restrictions on agency rules. SBREFA imposed special requirements on OSHA and EPA to subject rules with significant impacts to review by a small business panel even before the rule was proposed, adding months to the regulatory process.

From the Executive Branch, there were directives for more analysis, starting with executive orders requiring inflationary impact statements and economic impact statements during the Nixon and Ford administrations. These executive directives were expanded during the Reagan administration to require more comprehensive regulatory impact analyses and centralized review, which has continued, and currently operates under the requirements of Executive Order 12866, issued by President Clinton in 1993.

EO 12866 gives the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget the responsibility to oversee regulatory planning and review for the federal government. It calls for executive branch agencies to develop detailed analyses of the costs and benefits of economically significant rules, and to the extent permitted by law, adopt a regulation only upon a reasoned determination that the benefits justify the costs. EO 12866 also provides for OIRA to review all significant draft proposed and draft final rules to ensure compliance with the requirements of the order. The review is supposed to be completed within 90 days with the possibility of one 30 day extension at the request of an agency. Advance notices of proposed rulemaking or other preliminary regulatory actions may be reviewed, but only for a period of ten working days.

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The executive order includes some modest transparency measures, requiring a log to be kept of all meetings with outside parties along with the subject matter of discussions to be disclosed. It also requires that all documents exchanged between OIRA and the agencies, including changes in draft rules, to be made publicly available after the proposed or final rule has been published in the Federal Register.

But OIRA has routinely ignored the requirements of the executive order, second guessed agencies which have the authority and expertise to develop and issue rules, attempted to impose its judgment and held rules well beyond the maximum 120 day review period. During these lengthy reviews OIRA has welcomed and held many meetings with industry groups, both on draft proposed rules, when industry groups try to stop or weaken regulations, and then again when draft final rules are reviewed, giving opponents of rules yet another chance to try to delay, weaken or block needed rules.

It is important to point out that all of the communications with OIRA take place outside of the normal rulemaking process and are not subject to the terms of the Administrative Procedure Act, which governs rulemaking procedures for federal agencies. There is no record made of discussions that take place, nor any requirement that OIRA justify, based on evidence or fact, the positions it takes on agency rules. The process is one that is one sided - totally dominated by industry groups and regulated parties who have Washington representatives with ready access to the process. It is one of the worst forms of industry capture and corporate political dominance over our government. Citizens, including workers, who need these government protections simply have no voice.

#### **Delays in the Regulatory Process are Harmful and Costing Workers' Lives.**

The result of all of the additional requirements for regulatory analyses and review is a regulatory process that is dysfunctional and paralyzed and results in needless and harmful delays in regulations. In my view, these additional requirements are not producing rules that are better or more effective than the process that was in place 30 to 40 years ago. The process substitutes questionable analyses for common sense, ignoring industry practice and public health recommendations that have traditionally been the basis for recommended safety and health guidelines and voluntary safety standards. It is certainly not producing rules in a timeframe that is efficient or protective for workers' safety and health.

In 2012, GAO conducted a study of the OSHA standard setting process. That review found that for major rules issued between 1981 – 2010 the average time for developing and issuing a major safety or health rule was about 8 years.<sup>9</sup> This average included rules that were mandated by

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<sup>9</sup> Workplace Safety and Health: Multiple Challenges Lengthen OSHA Standard Setting, GAO-12-330, April 2012, [www.gao.gov/products/GAO-12-330](http://www.gao.gov/products/GAO-12-330).

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Congress and issued as a result of litigation and court ordered deadlines, which took much less time.

Moreover, the GAO report only covered rules that had been completed. It does not reflect those rules which are stuck in the regulatory process, many of which are taking much longer than the eight year timeframe calculated by GAO. For example, it did not include the confined space entry rule for the construction industry that was promised by OSHA after a confined space rule to protect workers in general industry was put in place in 1993 - more than 20 years ago. This rule requires atmospheric testing and protective measures when workers are entering enclosed tanks and other confined spaces. A draft rule for confined space entry in construction underwent SBREFA review in 2003, and a proposal was issued in 2007. After years of further delay, the final confined space construction rule will be issued next week. The GAO report also did not include the OSHA silica rule, which OSHA first considered for rulemaking back in 1974. The present rulemaking on silica, discussed more fully below, began in 1997, more than 18 years ago.

The impact of these delays is inadequate protection for workers and leads to unnecessary deaths, injuries and illnesses. Here are two examples of how a broken system is costing workers their lives:

### ***Cranes and Derricks***

In 2002, in response to a 1999 recommendation of the Advisory Committee on Construction Safety and Health – a group comprised of labor, management and public representatives, OSHA initiated a rulemaking to update and strengthen its construction safety standard for cranes and derricks. Since there was broad agreement that a new standard was needed, OSHA proposed to develop the rule through a negotiated rulemaking process with representatives of major interested parties participating. After a year of intensive work, in July 2004, the negotiated rulemaking committee produced a recommended draft proposed standard that had unanimous support from labor, management, and public and government representatives. Despite this support, the rule was still subject to all the analytical and review requirements for significant safety and health rules. OSHA had to prepare a full economic analysis and the rule had to undergo review by a SBREFA panel to get input from small business entities before it could be proposed. The SBREFA review was completed in October 2006, after which activity on the rule came to a halt.

But then in 2008 a series of deadly crane accidents claimed a dozen lives. On March 15, 2008, a crane collapsed at a high-rise construction site in Manhattan- killing 4 people and injuring more than a dozen. Less than 2 weeks later, two workers died in a Miami crane collapse. In May, another New York City crane collapse killed 2 more workers, and in July of that year 4 workers were killed when a crane collapsed at a Houston, Texas refinery. In response to these disasters, the Bush administration finally proposed the rule in October 2008. But the final rule was not

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completed and issued until August 2010, more than 11 years after the recommendation of the OSHA construction advisory committee, eight years after the rulemaking was initiated and seven years after a negotiated rulemaking committee unanimously agreed upon the text of a rule.

It is inexcusable and shameful that even where there was broad agreement that the cranes and derricks standard was needed and about what the rule should require, that the regulatory system failed to protect workers. In this case, according to OSHA, during the eight year rulemaking, 176 workers died in crane accidents that would have been prevented if the crane and derricks standard had been in place.

### *Silica*

Silica is a serious workplace health risk that causes the disabling and deadly lung disease silicosis. Its hazards have been recognized for centuries, and in 1991 it was determined to cause lung cancer. More than two million workers are exposed to silica, with bricklayers, cement masons, road workers, sandblasters, foundry workers and glass workers among the workers at greatest risk from exposure to this deadly dust. Public health experts estimate that there are 3,600 to 7,300 new cases of silicosis occurring in the United States each year.

The current OSHA silica standards for general industry and construction adopted back in 1972 are out of date and fail to protect workers. The standards set permissible exposure limits based upon the percentage of quartz that is present and allow exposures of up to 100 – 250  $\mu\text{g}/\text{m}^3$ . The construction standard is so out of date that the sampling equipment and technology that the standard is based on no longer even exist.

OSHA first started working on a new silica standard in 1974, more than 40 years ago, after NIOSH recommended that permissible exposure be reduced to 50  $\mu\text{g}/\text{m}^3$  to protect workers from silicosis. The current rulemaking on silica began in 1997. In 2003, the Bush administration designated the silica standard as a high priority for regulatory action and in that same year draft silica standards for general industry and construction underwent SBREFA review, which concluded in December 2003. Then progress came to a complete halt for the remainder of the Bush administration.

When the Obama administration took office in 2009, the AFL-CIO was hopeful that the OSHA silica standard and other needed rules that were also long overdue would move forward. And for two years, that was indeed the case. The required risk assessments and peer reviews for the silica rule were completed and in February 2011, the draft proposed silica standard was sent to OMB for review under Executive Order 12866. OMB held the draft proposed silica rule for two and one half years, in clear violation of the executive order which limits the time for review to no more than 120 days.

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The OSHA proposed rule on silica was finally issued in September, 2013. Three weeks of public hearings were held on the proposed rule last spring, and the public was given a year to provide comment on the rule. OSHA is now working to finalize the rule, and expects a final standard to be issued some time in 2016.

This failure to regulate silica has allowed uncontrolled exposures and more unnecessary disease and death. According to OSHA's risk assessment prepared for the proposed rule, a new silica standard of 50 ug/m<sup>3</sup> would prevent 688 deaths and 1,600 cases of silicosis a year. This translates into 12,384 deaths that could have been prevented since the rulemaking began in 1997, if the standard had been in effect.

### **There is No Tsunami of Workplace Safety Regulations.**

Many industry groups have claimed that under the Obama administration there has been a "tsunami" of regulations. No one familiar with regulation at the Occupational Safety and Health Administration can honestly claim that this is the case for workplace safety and health regulation in recent years.

Over the past decade few OSHA rules have been issued. For eight years, the Bush administration shut down OSHA rulemaking. Only three significant final OSHA rules were issued between 2001 and 2008 (electrical equipment installation, employer payment for personal protective equipment and hexavalent chromium), two of them a result of litigation by the unions. Under the Obama administration there has been one significant final OSHA health standard issued – the globally harmonized system for hazard communication – and four final safety rules, including the confined space entry standard for construction scheduled to be issued on May 4, 2015. All of these rules were years, if not decades in the making.

Indeed over its entire 44 year history, OSHA's regulatory activity has been fairly limited. Since 1971, there have been 36 significant health standards issued (some of these updates and revisions for the same hazard), and about 54 significant safety standards put in place by the agency. (Attachment 1). For many serious hazards there are no regulations or regulations are woefully out of date.

The majority of OSHA regulations that are on the books today come from industry consensus standards that were adopted right after the passage of the Act at Congress' direction. Many of these consensus standards were developed in the 1950's and 1960's and based on science and technology that is outdated and more than 60 years old. These standards do not protect workers.

As the regulatory process has become more lengthy and complex, fewer and fewer rules have been issued, and OSHA has fallen further and further behind in issuing needed rules to protect workers. The list of hazards that need regulatory action is long, and far exceed OSHA's capacity to address them. The AFL-CIO's top priorities for OSHA regulatory action are rules on silica,

beryllium, combustible dust, chemical process safety management, infectious diseases and chemical exposure limits and stronger rules to prohibit retaliation against workers who report job injuries.

### **Pending Regulatory Reform Legislation Would Make it Virtually Impossible to Issue Needed Worker Safety Protections.**

Numerous bills have been introduced in the Senate and House to “reform” the regulatory process. All of these measures would bring standard setting for worker safety to a grinding halt and make it impossible for OSHA to issue needed worker safety and health protections. The Regulation from the Executive in Need of Scrutiny Act (REINS Act) – S. 226, H.R. 427, would require both houses of Congress to approve every major rule within a 70 day time period. If Congress failed to act, the rule would be null and void.

The Regulatory Accountability Act (RAA) - H.R. 185- would override the Occupational Safety and Health Act, the Clean Air Act and other laws, and make costs and impacts on business, not protecting health and safety, the primary consideration in setting rules. It would also add additional requirements for regulatory analysis and risk assessment and give opponents of regulations more opportunities to object to and challenge rules.

Other bills which would add more analytical and review requirements, delaying the issuance of needed rules, include the Small Business Regulatory Flexibility Improvement Act (H.R. 185), and the Unfunded Mandates and Information Transparency Act (H.R. 50)

### **What Can Be Done to Fix the Broken Regulatory Process?**

It's taken more than 30 years to create the dysfunctional regulatory system that we have today. Fixing the process will not be easy or quick. But there are some things that can and should be done to improve the process and speed up the promulgation of needed rules.

The first order of business is to do no more harm. Most of the regulatory reform proposals that have been introduced in this Congress would further delay or cripple the promulgation of needed rules. These proposals should be opposed and rejected.

Second, there must be a renewed commitment, both from the Congress and from the administration, to implement the laws that have been enacted. Protecting the safety and health of workers and the public must be a priority. Without political leadership and support for needed rules, corporate opposition coupled with the quagmire that is the regulatory process will make it impossible to complete and issue these safeguards.

Congress must hold agencies and OIRA accountable for their failure to act. This can be done through ongoing monitoring and oversight, demands for timetables and action on rules and

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justification when deadlines are missed. Publicly highlighting the delays in rules and holding agencies accountable can help force action. If oversight does not produce action, Congress should introduce and enact legislation that mandates action on specific rules. Such legislation was enacted for OSHA's standards on blood-borne pathogens, lead in construction, and needle sticks and should be utilized again to ensure the adoption of priority rules.

Congress through the appropriate committees should also conduct a comprehensive review of the existing regulatory system, all the requirements that have been added through legislation and executive action, the costs and feasibility of meeting these requirements and whether these requirements have added any worthwhile benefit to improving regulations or have simply served to delay and thwart the issuance of rules. Over the many decades that requirements have been added to the regulatory process, there has never been a thorough evaluation of the usefulness of these measures and the impact of these requirements on the ability of government agencies to do their jobs. If requirements are found to be of minimal or no value for the burden they impose, they should be eliminated or reduced.

Congress should look to ways that the regulatory process can be streamlined. Where there is broad agreement on rules or rules are adopting existing practices that are well accepted and in place, requirements for regulatory analyses and review should be reduced.

Congress should provide adequate funding to the agencies to develop sound rules and to conduct the required analyses. All of the additional regulatory analysis and review requirements have been added without regard to their costs and without accompanying funding to meet these requirements. Agencies have fewer and fewer resources to meet greater responsibilities and growing obligations.

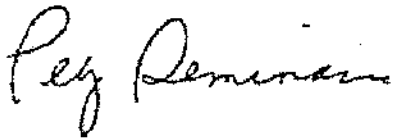
In the executive branch, OIRA must respect the authority and expertise of agencies and not attempt to substitute its judgment or policy views. Executive Order 12866 should be amended to allow agencies to proceed with rules if OMB fails to conclude its review within the required timeframe. The EO should provide for much greater transparency of the review of rules. It should not allow, and in fact should prohibit, meetings of OIRA with outside parties to prevent industry dominance and undue influence over the regulatory process. For communications between executive branch agencies, the order should mandate greater transparency and should require a public docketing by OIRA and agencies of all communications and notations of all changes made in rules during the review process.

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In conclusion, the regulatory process is broken and dysfunctional. It is failing to protect workers and the public, with delays costing lives, limbs and health. It's time for the Congress and the executive branch to fix this broken system and work for a regulatory process that serves the workers' and the public's good.

Sincerely,

A handwritten signature in cursive script that reads "Peg Seminario".

Peg Seminario, Director  
Safety and Health Department  
AFL-CIO

PS;pzb  
Opeiu#2:afl-cio





**American  
Forest & Paper  
Association**

*Office of the President*

May 1, 2015

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
and Government Affairs  
United States Senate  
Washington, D.C. 20510

The Honorable Thomas Carper  
Ranking Member  
Committee on Homeland Security  
and Government Affairs  
United States Senate  
Washington, D.C. 20510

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
Washington, D.C. 20510

The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
Washington, D.C. 20510

Dear Senators Johnson, Carper, Lankford and Heitkamp:

Thank you for your letter requesting examples of proposed and final regulations that either have or will have adverse impacts on the forest products industry, as well as recommendations for improving the regulatory process.

The American Forest & Paper Association works closely with The American Wood Council on matters relating to regulations and public policies. We have sought their input into the questions you raised, as we believe our collective perspectives will be most useful to the committee.

We believe that the American free enterprise system has been the greatest engine for prosperity and liberty in history, and we are optimistic about the future. We also recognize that sensible regulations provide important benefits, such as the protection of the environment, health and safety. Unfortunately, poorly designed regulations unintentionally can cause more harm than good, waste limited resources, undermine sustainable development, and erode the public's confidence in government. It therefore is essential that regulations be designed to provide net benefits to the public based on the best available scientific and technical information through a transparent and accountable rulemaking process, with due consideration of the cumulative regulatory burden.

We are grateful for your bipartisan efforts to highlight how regulations and the U.S. regulatory process can be improved, and we believe this can and must be accomplished. We would be happy to discuss the examples provided in the attached document in greater detail or to provide further information. If you have any questions, please have your staff contact Paul Noe, AF&PA's Vice President for Public Policy, at (202) 463-2777.

Best regards,



Donna A. Harman  
President and Chief Executive Officer  
American Forest & Paper Association

Enclosures

cc: Robert Glowinski  
President & CEO, American Wood Council





**American  
Forest & Paper  
Association**



AMERICAN WOOD COUNCIL

## Key Regulations of the Forest Products Industry

### Environmental Protection Agency:

#### **Air Rules:**

The forest products industry is heavily regulated. Under one statute alone, the Clean Air Act, our industry faces a dozen major regulations over the next 5 to 8 years that are projected to cost between \$10 and 19 billion in capital. Attached is a chart illustrating the cumulative effect of these multiple rulemakings on our industry. The American forest products industry operates in a highly competitive global marketplace. We hope this one example will help to convey the importance of government policymakers being sensitive to how the cumulative regulatory burden can undermine the competitiveness of U.S. manufacturers.

- **Ozone NAAQS:**

Under the Clean Air Act, EPA must update its assessment of the latest science and consider whether any changes are needed to National Ambient Air Quality Standards (NAAQS) at least every five years. EPA has significant discretion in determining what is “requisite” to protect public health when setting NAAQS. In December 2014, EPA proposed to lower the current 75 ppb limit to between 65 and 70 ppb. A court has ordered EPA to issue a final rule by Oct. 1, 2015.

The science does not support a further tightening of the standards. EPA continues to rely on studies that support their proposal while ignoring or giving little weight to negative or ambiguous studies. In addition, States have yet to implement the 2008 standards, which involve the designation of areas as non-attainment and then identifying additional controls from mobile and stationary sources through their State Implementation Plans. It is notable that air quality will continue to improve due to other EPA rules on the books even if the ozone NAAQS is not changed.

At 65 ppb, most of the country would fail to meet the standard, which would stifle economic development and job growth, even in rural areas. For the paper and wood products manufacturing industry, the costs could be more than \$3 billion in new capital costs. EPA’s own cost benefit analysis would make the ozone rule one of the most expensive air regulations in history, at over \$15 billion. As EPA contemplates driving the ozone standard toward background levels, it might also be driving companies to cancel job creating projects.

Although EPA cannot consider cost when setting the NAAQS (only during implementation), the health effect evidence has not changed significantly since EPA tightened the ozone NAAQS in 2008, so a further change in the ozone NAAQS is not justified. Constantly moving these air quality goal posts creates significant uncertainty for new mill investments that are critical to our global competitiveness.

- **Greenhouse Gas (GHG) Regulations for Existing Utilities:**

Last June, EPA published its proposed GHG regulations for existing electric utilities (known as the Clean Power Plan), one of the most costly and aggressive regulations EPA has ever issued. For the proposed rule, EPA has departed from traditional regulatory approaches by developing state-specific emission goals based on “inside the fence line factors” that focus on increasing efficiency at sources directly regulated by the proposal and “outside the fence line factors” such as increased dispatch of natural gas, increased use of low or non-emitting energy sources, and decreased energy usage from consumers that involve sources indirectly regulated by the proposal. The proposal would raise the cost of energy, further reshape our nation’s energy supply, forcing fuel choices on utilities and creating reliability concerns, and potentially impose obligations on renewable energy providers and end-users that states may rely on to meet their emission limits. EPA needs to further clarify its position on biogenic CO<sub>2</sub> emissions in a manner that provides carbon neutrality for paper and wood products’ biomass energy and clear direction to the states as they develop implementation plans.

- **Carbon Neutrality of Biomass:**

Current EPA regulations under the Clean Air Act do not distinguish between fossil fuel and biogenic CO<sub>2</sub> emissions from stationary sources (e.g. PSD permitting rules, proposed GHG regulation of utilities). EPA’s policy position on biogenic CO<sub>2</sub> emissions ignores the manner in which the forest products industry produces and uses biomass energy as part of the sustainable carbon cycle. Using manufacturing residuals from pulp, paper and wood products facilities for energy production harnesses energy value that would otherwise be lost to the atmosphere. Biomass energy should be considered carbon neutral as long as forest stocks are stable or rising on a broad geographical scale. EPA should recognize the forest products industry’s use of biomass energy as carbon neutral in air regulations.

- **NAAQS Permit Gridlock:**

Every five years, EPA must decide whether the National Ambient Air Quality Standards (NAAQS) are sufficiently protective of public health. Recently, EPA has systematically tightened the NAAQS for particulate matter, sulfur dioxide, nitrogen oxides, and ozone. Traditionally, the focus of the program has been on states developing plans to slowly improve air quality in nonattainment areas (usually cities) to meet the NAAQS over the next decade or so. However, since the NAAQS are effective immediately, facilities contemplating expansions or modifications that trigger a permitting review must demonstrate that emissions from the plant when combined with background air quality do not exceed the applicable NAAQS standard in order to obtain a permit.

As NAAQS have dropped closer to background levels, it is becoming more difficult to pass the test and get an approved permit. Regulated industries are approaching a permitting gridlock. EPA should defer any tightening of NAAQS, especially for ozone, until a smoother permitting process is reestablished. The challenges with the ever-tighter NAAQS is exacerbated by a lack of (or inappropriate) emission measurement methods, poor estimates of emissions, use of unrealistic air dispersion models, and several rigid permitting policies.

The inability to permit a project hurts the competitiveness of the facility, harms product development and innovation, and can thwart environmentally beneficial projects. Local communities will miss out on new jobs and economic growth while industry sectors face the risk of becoming uncompetitive.

EPA should address the rapidly developing air permitting gridlock by committing sufficient resources to adopt more flexible policies and allow use of more realistic emissions and modeling data within the next year.

- **Elimination of Start-up, Shut-down, and Malfunction Provisions, including Affirmative Defense:**

EPA is in the process of systematically eliminating long standing provisions in various air rules under section 111 and 112 governing how emissions during start-ups, shutdowns and equipment or process malfunctions (so-called SSM events), are treated under the Clean Air Act rules. In the past, EPA has acknowledged that even the best operating facilities have brief periods of higher emissions during SSM events. Furthermore, EPA has provided an affirmative defense for releases due to malfunctions to prevent penalties and fines for these unavoidable occurrences. For example, EPA is in the process of finalizing a rule that would direct 36 states to revoke SSM-related provisions, including the affirmative defense for malfunctions in their state rules, even though it is not required by law or necessary to meet air quality standards and will impose large burdens on states with limited resources. (For more details, see letter from SSM Coalition to which AF&PA and AWC belong).

Facilities already have a duty to minimize the occurrence and duration of SSM events, but these releases are necessary to protect process and pollution control equipment, and above all, worker safety. Restricting appropriate venting of explosive gases from dynamic manufacturing systems could lead to severe harm and even fatalities.

EPA should either retain current SSM provisions or, where SSM emissions are inappropriately lumped into limits covering “normal operations,” set separate work practices. No Clean Air Act regulation should treat companies as violators and subject them to possible citizen suits for events that are unavoidable even when facilities are operated according to best practices.

- **Regional Haze:**

States have been working to implement the Regional Haze (RH) program under the Clean Air Act based on EPA guidance to improve visibility, especially in National Parks.



The statute gives states the primary role for implementing air quality programs, including for regional haze. Recently, ENGOs have sued EPA for failing to act on state RH proposals. As a result, EPA is now second guessing state judgments in Texas, Oklahoma and Arkansas by issuing Federal Implementation Plans (FIPs) that could result in millions of additional expenses for an imperceptible visibility improvement. EPA should leave states to implement the Regional Haze program unless there are egregious oversights by states.

- **Chemicals Data Reporting:**

EPA's Chemical Data Reporting (CDR) rule requires reporting of production volume and processing and use information for the industry's pulping chemicals. In the industry's chemical pulping process, the chemical byproduct is burned for both energy and process chemical recovery in a continuous closed-loop cycle. These regenerated chemicals are treated under the CDR as being "manufactured" each time they circle through the regeneration route. As a result, when these numbers are reported by EPA, the industry looks like the largest manufacturer of chemicals in the country despite the fact that our industry recycles these chemicals in an extremely efficient process. AF&PA strongly believes that requiring pulp and paper manufacturing facilities to report this information for their pulping chemicals serves neither the public's interest nor the purposes of the CDR and is a wasteful and burdensome process.

- **Formaldehyde Emission Standards for Composite Wood Products Act:**

Currently, there are no national standards in place for formaldehyde in composite wood products. On July 7, 2010, President Obama signed into law the Formaldehyde Standards for Composite Wood Products Act. The statute directed EPA to establish nationwide formaldehyde emission standards that are identical to the current California-based standards for hardwood plywood, medium-density fiberboard, and particleboard sold in, manufactured in, or imported into the United States. The law directed EPA to promulgate the implementing regulations in a manner that ensures compliance with the standards. The act required EPA to issue final implementing regulations by January 1, 2013, but EPA has not met the deadline. EPA should retain the existing requirements of the California standard and finalize the regulation in a timely manner.

***Water Rules:***

- **Waters of the United States (WOTUS):**

EPA and the Army Corps of Engineers have proposed a rule to "clarify" the extent of federal Clean Water Act jurisdiction, but as numerous stakeholders have clearly stated in comments, the proposal would extend federal jurisdiction beyond that authorized by Congress and the Supreme Court. If promulgated, the rule could inappropriately subject ponds, ditches, etc. on mill property and forest lands to federal jurisdiction. The Administration should withdraw and repropose the rule to provide clarity and respond to the many comments it has received. Any rule should clearly exempt waters on commercial facilities used for commercial purposes.

- **Federal Human Health Water Quality Criteria (HHWQC) for the Pacific Northwest:**

Under the Clean Water Act, states have the primary responsibility for issuing water quality standards and establishing the acceptable risk levels in those standards. After already pressuring Oregon, EPA Region X has been pressuring Washington and Idaho to adopt EPA's preferred Fish Consumption Rate (one of the variables in the HHWQC derivation formula) and acceptable risk levels, which would result in extremely stringent HHWQC. In turn, those HHWQC would result in water permit limits that would impose very high compliance costs or are simply unattainable, all while not providing meaningful human health benefits. EPA Region X has begun its internal process to promulgate federal standards in Washington and has continued pressure on Idaho. EPA should allow the state processes to reach their conclusions and should not issue federal water quality standards for those states. Similar issues have arisen in Maine and Florida, as well.

***Comprehensive Procurement Guidelines:***

- **Procurement Guideline for Paper and Paper Products Containing Recovered Materials (mandating minimum amounts of "post-consumer" fiber in paper products purchased by federal agencies):**

The Resource Conservation and Recovery Act requires federal procuring agencies to buy recycled content products designated by EPA in the Comprehensive Procurement Guideline. In the case of paper, the "recycled-content" preference includes a requirement for minimum amounts of "post-consumer" recovered fiber. The current recommended amounts of "post-consumer" recycled content for specific paper and paper-based packaging products was updated by EPA in a 1998 Recovered Materials Advisory Notice (RMAN) and are included in the current (2007) EPA Comprehensive Procurement Guidelines.

EPA viewed "post-consumer" recycled content mandates as a beneficial policy tool to promote increased recovery of paper and paper-based packaging from sources like homes, schools and offices when it first established its Comprehensive Procurement Guideline for Paper Products in the late 1980's. Since then, the "post-consumer" recycled content mandate has become a distinction without a difference from an environmental and marketplace standpoint and has created unintended economic and environmental effects. It has become costly and impractical to collect, process and market "pre-consumer" and "post-consumer" recovered fiber separately. Because of the growth in single-stream recycling collection, it is typical to have a truck that hauls both "pre-" and "post-consumer" fiber to a recovery facility where the materials are processed together and sold to paper mills by grade rather than by "post-consumer" distinction. Maintaining mandates that dictate "post-consumer" content in products creates distortions in the market-driven supply/demand balance by driving up prices for some usable fiber ("post-consumer") while creating an artificial barrier to the use of other equally environmentally beneficial "pre-consumer" recovered fiber. This distinction without a difference extends to manufacturing, where both "pre-" and "post-consumer" fiber must undergo the same level of processing to be recycled into new paper and

paper-based packaging products. Finally, changes in the marketplace have overtaken the need for extraordinary measures to encourage recovery of fiber from consumers. There is strong evidence that “post-consumer” recycled content mandates have little if any effect on overall recovery rates when recovery rates are high, as they have been for some time in the U.S.

The EPA “post-consumer” recycled content requirement is outdated and carries unintended economic and environmental effects. EPA should eliminate the “post-recovered” fiber distinction. By doing so, it would align the Comprehensive Procurement Guideline with leading market-based certification systems such as the Sustainable Forestry Initiative and the Forest Stewardship Council which are giving equal weight to both “pre-“ and “post-consumer” recycled content in paper products.

### **Fish & Wildlife Service:**

- **Threatened Species Listing of Northern Long-Eared Bat:**

On April 2 the Fish and Wildlife Service (FWS) listed the Northern Long Eared Bat (NLEB) as threatened in 38 states and the District of Columbia under the Endangered Species Act (ESA). FWS also released an interim 4(d) rule that exempts some forest management activities from take under the ESA. White Nose Syndrome, a fungal disease presumed to be spread by spelunkers, is the sole threat to the species at a population level. While the FWS does not identify forest management as a threat to the NLEB, certain forest practices are not exempted in the 4(d) rule. FWS should clearly exempt all forest management activities through the final 4(d) rule.

### **Council on Environmental Quality:**

- **NEPA Guidance for Greenhouse Gases:**

Last December, the White House Council on Environmental Quality (CEQ) released revised draft guidance on how federal agencies should consider the impacts of greenhouse gas (GHG) emissions in National Environmental Policy Act (NEPA) reviews. NEPA requires federal agencies to disclose and consider potential environmental effects resulting from proposed actions, and analyze alternatives to mitigate these effects. This guidance will likely expand the scope of environmental impact statements and environmental assessments under NEPA. It also will provide additional grounds for third parties to challenge – on a project-by-project basis – federal approvals, permits and licenses. CEQ fails to address the unique and diverse challenges that NEPA reviews of land and resource management actions face, overlooks the negative effect this one-size-fits-all guidance will have on the land management decision-making process both procedurally and from legal challenges, and exacerbates the risk that NEPA challenges will prevent agencies from fulfilling their statutory mandates to promote and authorize multiple, diverse uses of federal land. CEQ should either withdrawal the guidance in its entirety or, at a minimum, expressly exclude land and resource management actions from any final guidance, as it initially proposed to do in 2010.



- **Social Cost of Carbon:**

EPA, the Department of Energy, and other federal agencies use the social cost of carbon (SCC) to estimate the climate benefits of rulemakings. The SCC is an estimate of the economic damages associated with a small increase in carbon dioxide (CO<sub>2</sub>) emissions, conventionally one metric ton, in a given year. This dollar figure also represents the value of damages avoided for a small emission reduction (i.e. the benefit of a CO<sub>2</sub> reduction). The models used to develop SCC estimates, known as integrated assessment models, do not currently include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature because of a lack of precise information on the nature of damages and because the science incorporated into these models naturally lags behind the most recent research. SCC should be withdrawn as a basis for the any proposed regulation. The SCC calculation should not be used in any rulemaking and/or policymaking until it undergoes a more rigorous notice, review and comment process. Despite repeated requests from Congress and many other individuals and organizations, OMB has not made available to the public all of the information necessary to allow the public and regulated community to evaluate the SCC methodology.

**Food and Drug Administration:**

- **Proposed E-Labeling Rule for Prescription Drug Inserts:**

FDA's proposed rule, "Electronic Distribution of Prescribing Information for Human Prescription Drugs, Including Biological Products," would require that the prescribing information intended for health care professionals be distributed electronically and, with few exceptions, not in paper form. This information currently is distributed in paper form on or within the package from which the medicine is dispensed, as Congress required by statute. Relying on electronic labeling as a complete substitute for paper labeling could adversely impact public health by limiting the availability of drug labeling for some physicians, pharmacists, and patients by requiring them to access drug labeling through an electronic medium with which they might be uncomfortable, that they might find inconvenient, or that might be unavailable. The net result could seriously harm public health. If paper drug labeling ceases to exist, costs also undoubtedly will shift from drug manufacturers to pharmacies to obtain and/or provide this information to patients who ask for it. The FDA has failed make a reasonable case for this proposed rule, and it should be withdrawn promptly.

**Occupational Health & Safety Administration:**

- **Globally Harmonized Hazard Communication Standard:**

OSHA's 2012 Hazard Communication Standard, which is in the process of being implemented, seeks to align workplace hazard communication in the U.S. with the Globally Harmonized System (GHS). The new regulation requires products that are shipped as articles (such as rolls or sheets of paper or lumber/wood panels) that may be processed by downstream users in such a way that combustible dust could potentially be generated to include an HCS-compliant label warning with the first shipment. However, companies that ship these products do not necessarily know with

certainty how the products will be used/processed by customers and should not be required to provide such warnings unless they are shipping a material that is itself a combustible dust. The HCS 2012 approach conflicts with the rules adopted by our trading partners. For instance, the Canadian version of the law does not classify these items as combustible dusts. The EU does not even recognize combustible dust hazards as a classified hazard because they are not inherent to the chemical, but depend on processing conditions.

### **Department of Homeland Security:**

- **H-2B Program Rule; H-2B Wage Rule:**

The H-2B Guestworker program—which provides labor for the hand-planting of trees throughout the U.S.—has been in crisis since the Department of Labor (DOL) published new regulations governing its Wage Rule (2011) and Program Rule (2012). Although DOL recently seems to have accepted a federal court’s ruling that the Department of Homeland Security (DHS), not DOL, actually has rulemaking authority over the program, this concession has not yet returned the program to stability. DOL has continued to expand its authorized role *to provide consultations* to DHS into pursuit of an anti-employer agenda in H-2B policy. Multiple “interim final rules” DOL and subsequently DHS have issued to regulate the program in response to court orders continue to impose burdens on H-2B employers, as well to create an unstable operating environment for the H-2B program. Specifically, one-sided rules governing competitive wage level determinations, timetables for identifying inspected housing, suspension of visas in response to late applications from domestic workers, refusing re-entry of past H-2B workers outside of the 66,000-worker annual cap, and disallowing staggered crossings to adjust labor availability to employers’ changing needs all undermine the viability of the program. Guestworkers from Central America and Mexico admitted under the H-2B program have become the only available source for legal, suitably vetted labor for manual reforestation. Decades of experience have demonstrated that U.S. workers are not interested in participating in tree planting crews, due to this work’s seasonal and itinerant structure and its lack of ties to a local community.

### **Recommendations for Improving the Regulatory Process**

AF&PA and AWC believe that there are many good ideas for improving the regulatory process, and many bills currently pending in Congress or suggested by others, such as the National Association of Manufacturers and the U.S. Chamber of Commerce, would be helpful. Here are a few ideas that we believe merit careful consideration and support:

- **Statutory Benefit-Cost Test:** Congress should codify into statute the longstanding presidential directive that the benefits of regulation justify its costs. This would ensure that regulators balance trade-offs and ensure that regulations do more good than harm.

- **Objective Risk Assessment Procedures:** Regulatory decisions must be based on the best available scientific and technical information. Congress should codify basic sound science principles to ensure that agencies base key decisions and analyses on objective, unbiased and transparent estimates of the risk-reduction benefits of environmental, health and safety regulations.
- **Stabilize Regulatory Goalposts:** Constantly changing regulatory standards create great uncertainties and inefficiencies. Too often, agencies change regulatory standards even before they have implemented the existing standards. Extending statutory review cycles for regulations such as National Ambient Air Quality Standards would provide greater regulatory certainty and facilitate efficient capital planning decisions.

The American Forest & Paper Association (AF&PA) serves to advance a sustainable U.S. pulp, paper, packaging, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative - [\*Better Practices, Better Planet 2020\*](#). The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures over \$200 billion in products annually, and employs approximately 900,000 men and women. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 47 states.

The American Wood Council (AWC) is the voice of North American wood products manufacturing, representing over 75 percent of an industry that provides approximately 400,000 men and women with family-wage jobs. AWC members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. Staff experts develop state-of-the-art engineering data, technology, and standards for wood products to assure their safe and efficient design, as well as provide information on wood design, green building, and environmental regulations. AWC also advocates for balanced government policies that affect wood products.

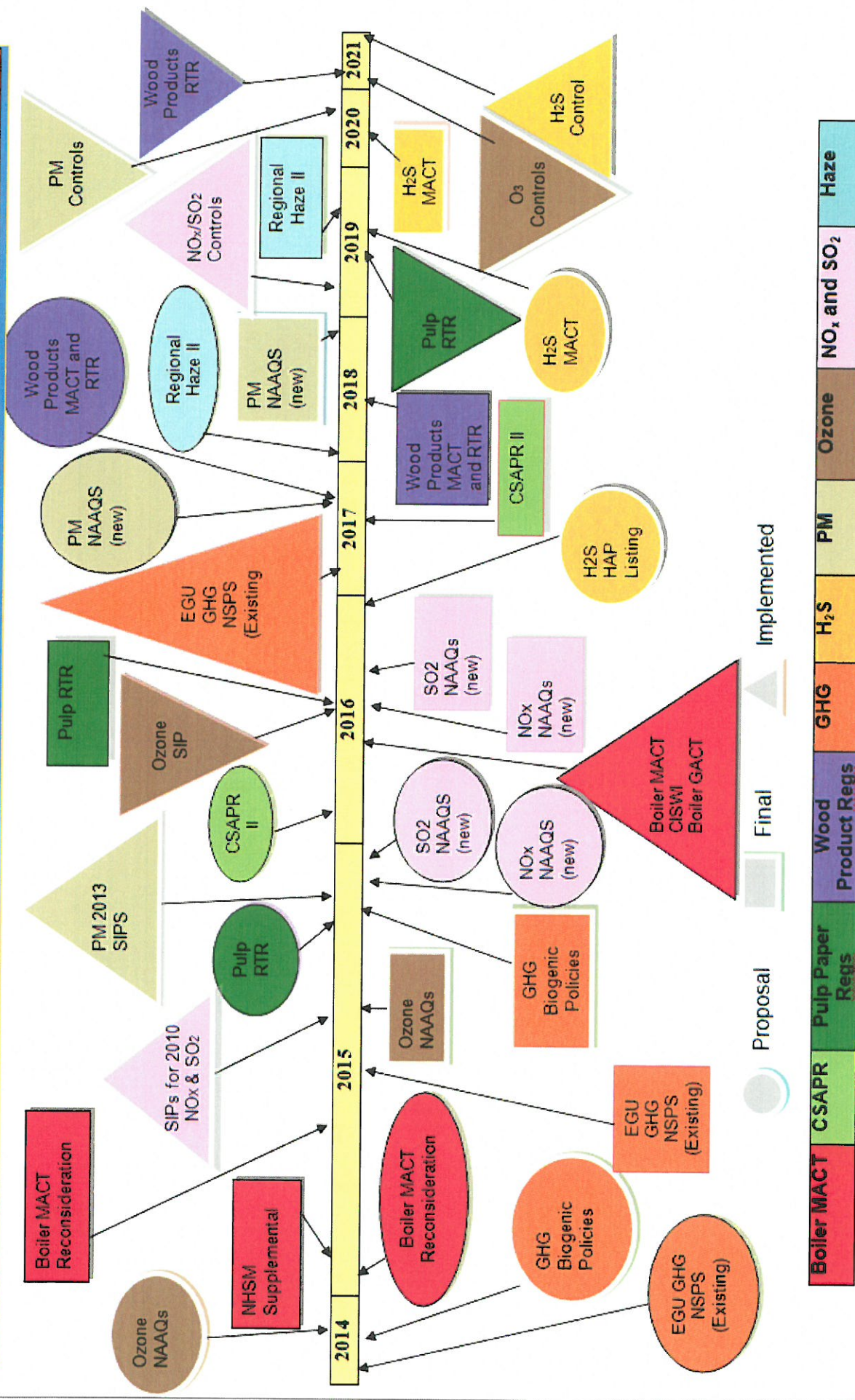
For more information:

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# Potential Air Regulations Affecting Forest Products (2015-2021)



Boiler MACT	CSAPR	Pulp Paper Regs	Wood Product Regs	GHG	H <sub>2</sub> S	PM	Ozone	NO <sub>x</sub> and SO <sub>2</sub>	Haze
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George Lowe  
Vice President, Federal Affairs  
P: 202-824-9091

The Honorable Ron Johnson  
Chairman, Committee on Homeland Security and Government Affairs  
340 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Tom Carper  
Ranking Member, Committee on Homeland Security and Government Affairs  
340 Dirksen Senate Office Building  
Washington, DC 20510

April 17, 2015

Dear Mr. Chairman Johnson and Ranking Member Carper,

I am pleased to provide the following information responding to your recent inquiry on ensuring efficient and effective regulatory processes. The American Gas Association (AGA) looks forward to Committee action that would provide a central venue for the public and businesses to voice their concerns about regulatory inefficiencies.

AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 72 million residential, commercial and industrial natural gas customers in the U.S., of which 92 percent — more than 68 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies and industry associates. Today, natural gas meets almost one-fourth of the United States' energy needs.

America's natural gas utilities comply with a wide variety of federal regulations that provide important protections for public health and safety, natural resources, transparent and stable financial markets, and affordable consumer prices for natural gas. In two key areas, regulatory programs require significant action and would benefit from the Committee's attention.


First, many regulatory programs needing reform are impacting the expense, timeliness and transparency of permitting natural gas infrastructure and pipeline projects. Agencies can make significant progress, without changing their regulations or enabling statutes, to support our industry's need for timely review of routine, temporary-impact, and minor natural gas distribution and pipeline construction and maintenance work that is critical to getting gas where it is needed. These projects are not the "Keystones" of energy. They are the ongoing projects we see on the sides of our roads, and in the lush, utility-supported natural corridors across the United States. Agencies can fix regulatory delays for these projects, now.

Also, regulations pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act were intended to protect natural gas utilities, which are nonfinancial, non-speculating end-users of commodity products in the financial and physical energy markets. Costs borne by utilities are largely passed to consumers through rates set by state regulatory authorities. Key rules need significant overhaul because they are raising costs and reducing liquidity for utilities. In the long run, inaction will hurt American energy consumers, and raise the price of reliable, affordable and

abundant natural gas. Congress should take action as well, to protect the interest of nonfinancial end-users and energy consumers.

Thank you for your interest and we appreciate your attention to these matters. Please do not hesitate to contact me for further information.

Sincerely,

A handwritten signature in cursive script that reads "George Lowe".

George Lowe  
Vice President, Federal Affairs

CC: The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs and Federal Management  
Committee on Homeland Security and Government Affairs  
340 Dirksen Senate Office Building  
Washington, DC 20510

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Ranking Member  
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## Submission of the American Gas Association

### Reducing Natural Gas Infrastructure Permitting Delays

**Regulatory Program:** Federal Implementation Plan for the Presidential Memorandum on Modernizing Infrastructure Permitting (Multiple Executive Agencies on Steering Group).

**Status:** Implementation Not Progressing, Some Agency Actions Require Revocation

**Requested Action:** Implement specific permitting reforms through existing regulatory frameworks that *do not* require changes to regulations, but *do require* high-level coordination among and within federal agencies. Tribal Consultations, Clean Water Act Permits, Water Resources Reform and Development Act, EPA Stormwater Construction Permits, Best Practices. Also withdraw proposals for “Waters of the U.S.” and guidance on Greenhouse Gases and Climate analysis for all federal agency permit applications undergoing National Environmental Policy Act reviews.

**Issue Areas:** The Implementation Plan requires agencies to collaborate and move forward with reducing permitting burdens and cutting timelines. However, AGA does not see movement to implement key reforms that we have requested. This is a critical issue: AGA members are primarily intrastate pipeline and distribution pipeline operators. Their projects have small footprints, and are temporary, routine, with minimal environmental impact. Yet, delays are plentiful when a federal agency is involved. The Implementation Plan provides direction to agencies to start fixing issues, including for routine and minor projects (not just “major projects”). (See, Recommendation 3.4, [Implementation Plan](#)).

These issues can be fixed now: without *new* legislation, and without formal rulemakings.

#### (1) Tribal Consultations Led by U.S. Army Corps of Engineers

##### **Tribal Historic Preservation Officer Consultations – Establish Timelines & Objective Criteria.**

Whenever a natural gas infrastructure project requires Tribal Historic Preservation Officer (THPO) consultations in association with U.S. Army Corps of Engineers (“Army Corps”) permitting programs, there are no established timeframes, deadlines, or objective criteria for such consultations. The tribal consultation process is somewhat of a “Pandora’s Box” for AGA members. We request that the Army Corps establish a time frame for this process and, if possible, objective criteria for THPO consultations.



## (2) Clean Water Act Permits

### **Set a Transparent Schedule for Clean Water Act Section 404 Permits.**

A recent Army Corps permit for an AGA member company working with the Army Corps in Missouri is a successful example of timely permitting according to a transparent schedule. The permit in question took about one year to secure. The Army Corps staff laid out the entire schedule at the beginning, set a deadline for each task, and were very helpful in coordinating with related agencies. This is not the experience across the country; there are no established timeframes for the Section 404 permitting process. The successful use of a transparent schedule should become a best practice to be implemented across all Army Corps districts.

### **Revoke and Reconsider EPA-Army Corps Waters of the U.S. Rule Proposal**

The White House Office of Management and Budget is currently reviewing a draft-final EPA-U.S. Army Corps joint rule that expands the definition of what constitutes “Waters of the U.S.”. The definition would now include adjacent wetlands, adjacent waters, many classes of ditches and depressions, and other features that are *not* downstream, protectable, significant U.S. waters that impact wetlands. The only practical effect of the rule will be to increase Clean Water Act permitting costs and delays for permittees like gas utilities – even for minor work, which has no permanent or significant effect on downstream U.S. waters. This is because the expanded definition will trigger individual permit reviews in hundreds, if not thousands, of cases where any project implicates any upstream areas drawn in by the expanded scope of “U.S. waters”. The proposed rule was so deficient, that it is impossible for the agencies to revise it, consistent with public comments, in a manner that is not a total change from the proposal. In other words, the final rule cannot be both a reasonable rule, and a logical outgrowth of, the proposed rule. The agencies must withdraw this rule and start again, with effective outreach to stakeholders and proper cost-benefit analysis. AGA is a member of the Waters Advocacy Coalition and is actively working on proposals to withdraw this rule.

## (3) Water Resources Reform and Development Act

### **Provide Guidance to Implement WRRDA – Funding Project Reviewers.**

The Army Corps headquarters should provide guidance to district and division personnel to implement the 2014 Water Resources Reform and Development Act (“WRRDA”) to kick-start utility project applicants’ ability to fund independent third party project managers within the Army Corps, to expedite the evaluation and processing of permits. WRRDA authorizes the Army Corps to accept funds from non-federal public interests, including public utility companies and natural gas companies, to expedite the processing of permits within the Army Corps’ regulatory program.



Our members report that they have sought implementation of this new authority and have offered to provide funding for consultation, but have been told that the district and division staff cannot move ahead until Headquarters issues guidance.

(4) EPA Stormwater Construction Permits

**Multiple Layers of Construction Stormwater Permitting.**

Existing EPA regulations provide that small towns all over the country may rely on a state-wide construction stormwater permitting program rather than be forced to regulate those activities themselves in addition to any state-wide regulation and EPA oversight of those activities. Nevertheless, some EPA regional offices have inexplicably mandated that delegated state programs mandate local oversight and require municipal ordinances to regulate these activities on top of state and/or federal regulation of these same activities. Multiple layers of government regulating the same activities do not necessarily result in better environmental protection. Regulated entities often experience frustration and delays attempting to satisfy the inconsistent permitting requirements for each level of government oversight. This is an unnecessary, wasteful, unfunded local government mandate that should be eliminated pursuant to existing regulatory authority. A guidance letter to the Regions from EPA headquarters would suffice.

(5) Agency Best Practices

**Designate One Army Corps Project Manager for a Utility's Multiple Project Reviews.**

When an Illinois regional office designated one Army Corps project manager for an AGA member utility's multiple project reviews, the member found this significantly expedited the review process. Monthly meetings with this project manager to discuss project applications and status have been very productive. The Army Corps project manager has provided valuable advice and guidance on some of the best permit options to pursue, which helped the member company reduce overall permitting timelines. Each regional office of the Army Corps should implement this best practice.

**Issue Guidance Preventing Eleventh-Hour Interventions.**

When agencies allow additional third parties -- including Native American Tribes -- into a multi-stakeholder permitting and review process at the eleventh hour, this leads to significant and unanticipated delays. A simple solution is to set and enforce reasonable deadlines for submitting stakeholder input.

## **Convene a Permitting Best Practices Workshop or Webinar for State and Local Agencies.**

Gas utilities often encounter permit delays related to coordinating state and local requirements as well as federal. For example, in states that have delegated authority for the Clean Water Act section 401 Water Quality Certification Program, utilities that file joint 404 and 401 applications need to coordinate with both the Army Corps and the state agency. Similarly, State Historic Preservation Officers (SHPOs) participate in both their state historic preservation programs and federal Historic Preservation Act section 106 consultations. These are just two examples illustrating the need for training to facilitate coordination among state, federal and local agencies and permitting requirements. Government agencies at all levels are struggling to do more with fewer resources, and they as well as project proponents would benefit from and would likely welcome learning about a few simple reforms that could make the process work better for everyone. While the White House departments and federal agencies have no jurisdiction to impose permitting reforms at the state and local level, they could help to spread the word about permitting best practices – perhaps collaborating with appropriate national level associations of state and local government officials -- and encourage state and local agencies to adopt these resource-saving measures. For just one example, online permitting can help reduce government costs and duplication, while expediting the permit process. A gas company with Missouri operations reports that moving land disturbance permitting online for the state permit has helped to mitigate an otherwise duplicative and lengthy process for obtaining both state and local land disturbance permits.

## **Withdraw Council on Environmental Quality Proposed “Guidance”.**

The White House Council on Environmental Quality has proposed draft guidance requiring *all* federal departments and agencies to consider greenhouse gas (“GHG”) emissions and the effects of climate change for *any* permit related to a *land or resource management decision* to which the National Environmental Policy Act (“NEPA”) applies. AGA members are service providers to and customers of facilities permitted and licensed by federal land and resource management agencies. Our members also build and repair natural gas delivery infrastructure requiring federal reviews and permits. This guidance would impact all members, across multiple agency review functions. AGA believes the proposal is fundamentally flawed and should be withdrawn.

The “guidance” imposes new regulatory requirements to govern federal agency permitting decisions. The draft requirements are vague and subjective. Natural gas pipeline and distribution companies routinely install and maintain existing lines across small streams and wetlands all over the United States. The vast majority of these activities are authorized under the U.S. Army Corps of Engineers Nationwide Permits, which are a type of blanket permit, determined to present minimal adverse environmental impacts. The Nationwide Permits provide a relatively efficient approval system for a myriad of daily utility activities all over the country. The CEQ draft guidance could make the Nationwide Permits useless for utility activities all over the country, and thus hamper their ability to maintain their systems and provide service to customers in a timely manner.

## Reducing Dodd-Frank Compliance Costs and Enhancing Regulatory Fairness

**Regulatory Program:** CFTC Interim Final Interpretation, Definition of “Swap”, Excluding Certain Forward Contracts with Embedded Volumetric Optionality

**Status:** Interim Final Rule Published (2012) and Comments Received; Clarifying Interpretation Not Finalized (2014)

**Requested Action:** Finalize the Interpretation, Pass End-User Relief in Congress via Commodity Exchange Act Reauthorization

**Issue:** The Commodity Exchange Act, as amended by the Dodd-Frank Act, includes a “swap” definition that [expressly excludes](#) “any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled.” The exclusion was designed to ensure physically-settled, nonfinancial commodity contracts are *not* regulated by the CFTC as financial instruments. The regulation of financial instruments like swaps, is onerous and can only be reasonably borne by the financial players it was designed to affect. However, when the CFTC attempted to apply this exclusion in a final rule defining what a “swap” is, the agency got it wrong. The CFTC ended up publishing a convoluted “interim final interpretation” that pulls in non-financial entities like gas utilities, into onerous requirements. Under the “interpretation”, the exclusion from “swaps” regulation *may not* apply to non-financial, non-swap contracts per a “seven-part test” if the contract gives a gas utility the flexibility to not take gas delivery when the weather is warmer than expected. The CFTC proceeded to issue even more guidance at the staff level, adding to the confusion. At present, this CFTC interpretation unduly includes natural gas physical demand management contracts within its scope, even though the flexibility in their delivery terms serves a single purpose – to reliably serve customers at affordable prices. *See* [Final Rule](#), 77 Fed. Reg. at pp. 48238. The market impact of confusion is significant. Gas procurement costs have gone up, and liquidity is down. Market players are not offering flexible, innovative gas delivery agreements out of concern that the CFTC may call them “swaps”. This includes a shortage that AGA members have seen in offerings for every-day physical delivery contracts they use to manage cold weather days, hot weather days, or other sudden changes in customer needs.

On the whims of CFTC staff, market participants have been casually informed to fend for themselves in interpreting the “seven factor” test, while the CFTC reviewed comments received, for over two years. The CFTC finally attempted to clarify what it meant to include and exclude, in a Proposed Interpretation (December 2014) (not a final rule). AGA asked for swift finalization of this relief. The timing of relief is critical, so that gas utilities can get a better offering from the physical marketplace to serve customers next winter. Swift finalization is far from what we have seen from the CFTC. The proposal was issued in [November 2014](#), and almost half the year is over in 2015. The CFTC must issue final guidance, and clarify its confusing “seven-part” test consistent with the comments received from the public.

There is, however, a fair chance that the CFTC will not adequately consider comments provided by the public on this interpretation. If that happens, and the final interpretation merely adds to the confusion, gas utilities will be worse off and so will their customers. This is why it is important for Congress to revisit the statutory exclusion. AGA supports the standalone relief, and

reauthorization language proposed in 2014 and urges the Committee on Agriculture, Nutrition and Forestry to include this relief in the course of 2015 reauthorization proceedings:

**2014 Commodity Delivery Relief Act:**

To Exclude from the meaning of "swap" also: (1) any purchase of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled; and (2) any stand-alone or embedded option for which exercise results in a physical delivery obligation.

**2014 Commodity Exchange Act Reauthorization, Section 354, Relief for end-users who use physical contracts with volumetric optionality:**

Section 1a(47)(B)(ii) of the Commodity Exchange Act ([7 U.S.C. 1a\(47\)\(B\)\(ii\)](#)) is amended to read as follows: “(ii) any purchase or sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled, including any stand-alone or embedded option— (I) for which exercise results in a physical delivery obligation; (II) that cannot be severed or marketed separately from the overall transaction for the purpose of financial settlement; and (III) for which both parties are commercial market participants.”



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**Thomas J. Gibson**  
*President and CEO*

June 5, 2015

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United States Senate  
Washington, DC 20510

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
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The Honorable Thomas Carper  
Ranking Member  
Committee on Homeland Security and  
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United States Senate  
Washington, DC 20510

The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
Washington, DC 20510

Dear Senators Johnson, Carper, Lankford, and Heitkamp:

Thank you for your letter requesting examples from the American Iron and Steel Institute (AISI) of final and proposed regulations that currently have or present the future potential to adversely affect our members. AISI serves as the voice of the North American steel industry in the public policy arena and is comprised of 19 member companies, including integrated and electric furnace steelmakers, and approximately 125 associate members who are suppliers to or customers of the steel industry.

While AISI's members recognize the role thoughtful regulations play in ensuring both a healthy environment and a safe workplace, the Administration over the past several years has undertaken an aggressive regulatory agenda across several program areas that could create severe competitive disadvantages for the industry and endanger domestic manufacturing jobs. An illustrative list of these final and proposed regulations is provided below. AISI believes that Congress should continue to conduct a comprehensive oversight program and applauds your Committee's continuing dedication to this issue. Future oversight programs should examine the cumulative impact the Administration's regulatory agenda has on domestic jobs and industrial

competitiveness; seek a greater emphasis in rulemakings on cost/benefit analysis; and encouraging greater transparency and access for industry stakeholders to the regulatory development and implementation process to help level the playing field for all interested parties.

## **Regulatory Initiatives Impacting AISI Members**

### *Environment Protection Agency (EPA)*

#### *Steel-Related Hazardous Air Pollutant Standards*

As part of its continuing obligations under Section 112 of the Clean Air Act (CAA), EPA staff continues to work toward proposing updated hazardous air pollution standards for the integrated steel industry's blast furnace operations. EPA has processed the emissions testing data previously submitted by member companies and continues to construct elements of its computer modeling files that will be used to assess the impacts of steel facilities. Notwithstanding our comments in opposition, EPA staff has decided to include adjacent emission sources such as coke ovens in the risk model even though they are under the jurisdiction of separate and distinct CAA regulations finalized in 2005.

#### *EPA Regional Haze Program*

AISI has been involved in challenging several recent EPA actions under the CAA's regional haze program. The program was established decades ago to improve and return visibility to natural background at National Parks and Wilderness Areas by 2064, with reviews every 10 years to monitor emission levels and to implement emissions reductions required to maintain a pathway toward achieving the 2064 goal. The Act contains clear provisions that place the responsibility for determining appropriate controls to attain visibility standards with each state that has an affected National Park or Wilderness Area. In recent cases, however, the agency has exceeded its limited authority under the CAA to review regional haze state implementation plans and supplanted state determinations with direct federal standards that reflect EPA's own preferences in contravention of the cooperative federalism regime Congress created when it developed the regional haze program. One of particular note for the steel industry was EPA's replacement of state plans in Minnesota and Michigan, despite lengthy dialogue between the domestic taconite industry and the states to ensure continued reductions in emissions would meet the visibility goals of the regional haze program by 2064. EPA continues to supplant its judgment for that of the states, most recently in a decision to replace a Texas and Oklahoma plan with its own standard, increasing the cost of controls for affected sources dramatically. AISI joined industry comments outlining how EPA has exceeded its legal authority yet again and is turning



the state-driven regional haze program into a federal program with less regard for state and affected industry input. AISI's brief to the Supreme Court in the Minnesota and Michigan case and the coalition comments on the Texas and Oklahoma state plans are attached to this letter.

*Greenhouse Gas (GHG) Standards for Electric Generating Utilities*

Over the past two years, the EPA has proposed two sets of regulations to limit GHG emissions from electric generating utilities, one for new power plants and one for existing facilities. In 2013, EPA proposed a rule for new power plants that would require new coal-fired power plants not to exceed 1,100 pounds of CO<sub>2</sub> emissions per megawatt hour (MWh), a level which will effectively require use of carbon capture and sequestration (CCS) technology. New gas-fired utilities will need to meet a proposed limit of 1,000 pounds of CO<sub>2</sub> per MWh. In addition, on June 2, 2014, the EPA proposed the "Clean Power Plan" to limit CO<sub>2</sub> emissions from existing power plants that would mandate an overall 30 percent reduction in CO<sub>2</sub> emissions from 2005 baseline levels by existing power plants to be achieved by 2030.

AISI is concerned about the potential impact of the proposals on the electricity supply for steelmaking facilities and the potential precedential effect it will have on future GHG regulations for steel plants. In particular, AISI raised concerns that the EPA proposal could lead to a less affordable and reliable electricity supply for major industrial customers such as steel. We believe that the proposed regulations could harm the international competitiveness of the steel industry while having a limited impact on reducing global GHG emissions.

AISI's member companies have already made investments over the past two decades to help lessen the steel industry's environmental impact in the U.S. Since 1990, the domestic steel industry has voluntarily reduced its energy intensity by 32 percent per ton of steel of shipped. Over the same period, our members have also reduced the amount of CO<sub>2</sub> they emit by 37 percent per ton of steel produced. Adding further layers of costly regulation to a domestic industry that has demonstrated its willingness to lessen its environmental impact could lead to more production offshore in less environmentally conscious areas.

*National Ambient Air Quality Standards (NAAQS) Program*

The Administration has been active in seeking changes to policies for implementing its NAAQS program, in particular seeking to shift from a reliance on actual monitoring data for emissions to a reliance on modeling (often based on assumptions adverse to industry) for designating attainment areas and issuing facility air permits. This policy shift will likely result in more non-attainment designations for local jurisdictions as well

as more difficulty in obtaining construction and operation permits as model data predicts emission levels well beyond actual air monitor results. AISI has actively opposed this move, and continues to file comments emphasizing that EPA should continue to rely on monitoring data for decision-making, rather than move to a modeling-based approach.

Also of concern in the NAAQS program is EPA's proposed rule to revise the ozone standard. The proposal recommends setting the primary air quality standard for ozone to between 65 and 70 parts per billion (ppb). EPA is also requesting comments on retaining the current NAAQS of 75 ppb set in 2008 or lowering it to 60 ppb. EPA is under a court-ordered deadline to finalize the ozone standard by October 1, 2015. AISI prepared written comments and participated in a public meeting advocating that the current standard be maintained, which are attached below for your review. We support legislation to prevent EPA from reducing the Ozone NAAQS below 75 ppb until 85 percent of counties achieve compliance with the current.

#### *Startup, Shutdown and Malfunction Emissions*

EPA currently is engaged in a rulemaking, which it committed to in an agreement with environmental advocacy groups to complete by May 22 that would declare existing state implementation plans of 38 states "substantially inadequate" to meet NAAQS program requirements. This action is based on alleged inconsistencies of the state plans with an evolving EPA policy on how emissions during periods of start-up, shutdown and malfunction (SSM) events should be treated. EPA would require states to change their plans so that all exceedances of emission limitations during SSM events will be treated as violations of the Clean Air Act, even when those excess emissions are unavoidable and often times in the best interests of safety despite the proper design, maintenance, and operation of the source. In the vast majority of cases, the state plans being amended have been demonstrated to be effective in practice at attaining the existing NAAQS standards, even with the existing allowances for SSM events in the plans. EPA is, therefore, diverting limited state resources away from other pressing areas and from other air pollution regulation efforts, to the revision of demonstrated effective state plans approved previously, despite the fact that such revisions will produce little or no environmental benefit.

#### *"Sue and Settle" Deadline Suits*

A consistent theme throughout many of the regulations that concern AISI members is the fact that the actions of EPA are driven by court imposed deadlines from citizen suits brought by environmental groups. These deadlines bind the agency to rush through the regulatory process in a less than transparent manner and often result in new rules that were not well thought out or given the benefit of rigorous review and consideration



from all interested stakeholders. As mentioned above, the integrated steel industry is currently going the review process with EPA for its CAA, Section 112 hazardous air pollutant rule. Our members have been actively engaged with EPA in providing data for and comments on the ongoing risk analysis mandated for our industry under the CAA. The agency, however, was recently sued by an environmental organization and has entered into settlement negotiations to impose an arbitrary deadline for completing this review. In addition, although our members have been active participants in the rulemaking process for years, they will not be allowed at the table to discuss and formulate a reasonable timeline for completing the review. Therefore, all the additional regulatory costs and burdens will be imposed on our members by two parties that do not represent their interests. AISI applauds past and current efforts in Congress to address this issue, such as the Sunshine for Regulatory Decrees Act, but the problem persists and continues to be a significant concern for our members.

### Occupational Safety and Health Administration (OSHA)

#### *Workplace Respirable Silica Standard*

OSHA issued a proposed rule in 2014 for the regulation of occupational exposure to crystalline silica. The proposed rule would develop a new, comprehensive permissible exposure limit (PEL) for respirable crystalline silica at work sites. The current OSHA PEL for general industry is 100 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ). The proposed rule from OSHA would lower the PEL to 50  $\mu\text{g}/\text{m}^3$ . The proposal would also create an "action level," at which air monitoring and analysis for silica exposure would be triggered, at 50% below the new PEL.

AISI, along with numerous other industry commenters, recommended that before moving to a lowered PEL, OSHA should consider the alternative of improved enforcement of and expanded outreach for the existing PEL of 100  $\mu\text{g}/\text{m}^3$  for general industry. Much like with EPA's actions in the Ozone NAAQS described above, OSHA is moving forward with lowering a standard before it has fully implemented and ensured compliance with the standard on the books currently. OSHA's own numbers show that between 1997 and 2002 under its Special Emphasis Program (SEP) for silica exposure in the workplace, 34 percent of general industry was not in compliance with the existing PEL. Furthermore, between 2003 and 2009 under the National Emphasis Program (NEP), some 30 percent of general industry was not in compliance with the PEL. By simply cutting the existing PEL for general industry in half, the agency will not ensure greater compliance, but will make it even more likely that the 70 percent of general industry that was in good standing will now find themselves in noncompliance. Moving towards full compliance with the existing PEL will also lower the health risks workers face from crystalline silica exposure, as more facilities would actually achieve

the 100 µg/m<sup>3</sup> standard or take necessary control measures, such as respirator use and medical surveillance, if they were unable to meet the standard.

AISI filed extensive comments with OSHA outlining industry concerns with the proposal and testified during a public hearing at the agency. Among the concerns raised in the AISI comments were that the proposal's prohibition of dry sweeping at industrial facilities and the use of compressed air in lieu of wet control methods creates safety hazards in the steel industry through the potential for steam explosions. Also, we noted that the proposal was unclear as to which employees must receive training on crystalline silica exposure, and creates confusion with the existing coal dust PEL. We also suggested that the proposed standard is duplicative to existing standards for metallurgical coking operations and such operations should be exempt from the proposed rule.

#### *Injury and Illness Recordkeeping Standard*

Another OSHA rulemaking of concern to AISI's members is the 2013 proposal to alter how employers currently report workplace injury and illness data to the agency. The proposal would amend OSHA's current recordkeeping regulations to require the electronic submission of injury and illness information from employers. The proposed rule would also permit OSHA to make publicly available establishment-specific injury and illness data, as well as details about specific incidents, to the general public via the internet. Among the concerns with the proposal is OSHA's intention to publicize injury and illness data without context, which may lead to inaccurate and incomplete conclusions about safety levels in certain industries and companies. Also, the potential exists that sensitive company- and employee-specific information could inadvertently become public through the posting process if sensitive information is not properly scrubbed from employers' injury and illness reports.

Almost a year into the rulemaking process and several months after the first round of public comments and hearings had closed, the agency released a supplemental rule adding language making it a violation for an employer to adopt certain requirements for reporting injuries and illnesses on the grounds that such reporting requirements are unreasonable and could discourage employee reporting and lead to retaliation against employees who report injuries and illnesses. AISI's members are concerned that this proposal would have detrimental impacts on existing company safety programs, such as safety incentive programs, and would impose unreasonable requirements on employers.

Senators Johnson, Carper, Lankford, and Heitkamp

June 5, 2015

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## Conclusion

AISI's members recognize that appropriate regulations are essential for maintaining the health, safety and prosperity of our society. It is important these rules are supported by quality data, sound science and are subject to an open and transparent public review process that welcomes all stakeholders to the table.

I thank you for your efforts to highlight the issues with our current regulatory system and to move important regulatory reform bills through your committee. If you have any further questions or need more information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas J. Gibson". The signature is fluid and cursive, with a large initial "T" and "G".

Thomas J. Gibson  
President and CEO



**Jack N. Gerard**  
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May 4, 2015

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Ranking Member  
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The Hon. Heidi Heitkamp  
Ranking Member  
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Dear Chairmen Johnson and Lankford and Ranking Members Carper and Heitkamp:

Thank you for your letter dated March 18, 2015, inviting the American Petroleum Institute (API) the opportunity to provide input to the U.S. Senate Committee on Homeland Security and Governmental Affairs on the impact of federal regulations. API is the only national trade association representing all facets of the oil and natural gas industry, which supports 9.8 million U.S. jobs and 8 percent of the U.S. economy. In all, API represents over 625 oil and natural gas companies, including producers, refiners, suppliers, pipeline operators and marine transporters of oil and natural gas, as well as the service and supply companies that support all segments of the industry.

Implementation of federal law, and subsequent regulations, are an important part of government's efforts to protect the health, safety and welfare of the American people. As part of that process, it is critical that regulations are based on sound science and comprehensive data. At the same time, it is imperative that our regulators don't impose undue, redundant or duplicative burdens that stifle economic growth, creating hardships for the same people the regulations assert to protect. API actively engages with regulatory agencies and the White House Office of Management and Budget (OMB) to provide appropriate input in the regulatory process. Nevertheless, agencies often move forward with rulemaking that stifle the economic well-being of the nation.

Specific to your request for input, first please see API's letter dated April 8, 2015 to EPA (attached), in response to EPA's periodic retrospective review of regulations. In our response, API noted concerns in six areas:

- **Greenhouse gas (GHG) reporting** – The burden on operators to comply with reporting requirements is excessive. EPA can reduce the reporting burden and still maintain an effective program. Further, EPA overestimates the potential for advanced monitoring techniques for more complex industries.
- **Gasoline and Diesel Regulations** – while EPA's efforts to streamline reporting related to the Tier 3 Rule are appreciated, much work remains to be done to improve the workability and reduce the compliance burden on the industry, specifically in regards to eliminating certain reformulated gasoline (RFG) provisions and clarification of provisions related to the renewable fuel standard (RFS).
- **New Source Review Requirements** – API has suggested a number of improvements to allowable alternative work practices (AWPs) that would result in earlier and more cost effective leak detection and repair of larger leaks.
- **Definition of Solid Waste** – EPA's January 2015 final rule represents a step back in encouraging beneficial recycling and reuse of materials, by imposing a variety of unnecessary burdens on environmentally-protective recycling activities.
- **RCRA e-Manifest System** – EPA's implementation of an electronic manifest system has the potential to simplify and reduce the regulated industry's reporting burden. However, in order to be effective, EPA must ensure that the system eliminates the need for redundant reporting at both the state and federal levels.
- **Oil and Gas NPDES Permits** – API encourages EPA Regions 4 and 6 to issue a single general permit across all Gulf states, to reduce confusion among producers working in both regions as they attempt to comply with varying requirements.

Please see the attached letter to EPA for a fuller description of API's concerns regarding the above regulatory areas.

In addition to the regulations identified above, API offers additional input on the following regulatory actions:

**Ozone** – In November 2014, EPA proposed lowering the existing ozone National Ambient Air Quality Standard (NAAQS) from the current 75 parts per billion (ppb) to a range between 65 – 70 ppb, and is accepting comments on lowering the standard even further, down to 60 ppb. Despite the significant progress already made under the existing standards – ozone levels in the U.S. have dropped 18% since 2000 – EPA is moving forward with unnecessary, stringent new ozone standards that could be the costliest regulations in history, even though the 2008 standards have not yet been fully implemented.

Restricting the standards to 60 ppb would place 94% of the U.S. population out of compliance. Even at 65 ppb, 45 of the lower 48 states would have areas deemed in non-attainment, including pristine areas like Yellowstone National Park. To comply with standards approaching or below naturally occurring peak levels of ozone, states could be required to restrict everything from manufacturing and energy development to infrastructure projects like roads and bridges. A recent study from NERA Consultants for the National Association of Manufacturers (NAM) showed that the new regulations could cost as much as \$270 billion per year and put millions of jobs at risk.

Peer-reviewed science confirms the current standards are effective in protecting public health. Imposing unachievable new standards could stifle job growth while accomplishing little to no additional health benefit. EPA should abandon its plans to lower the ozone NAAQS and simply reaffirm the existing standards that are currently working to improve air quality.

**Crude-by-Rail** – DOT PHMSA recently released a rulemaking on rail tank cars. While an improvement over the original proposed rule, whose impacts could have ended up costing US consumers up to \$38 billion between 2015 and 2024 according to a study by ICF International, the final rule remains problematic for the industry due to the short timeframe for retrofits. It appears, based on industry estimates of shop capacity, that PHMSA’s final schedule could result in a lack of shop capacity to retrofit tank cars by the required deadlines. Based on API estimates, up to 27% of the crude oil fleet would not be available for service due to lack of shop capacity to conduct retrofits.

**Waters of the United States** – EPA and the Army Corps of Engineers have proposed a rule redefining “waters of the United States” (WOTUS) that is intended to be a clarification of the existing definition. However, the proposed definition of WOTUS includes temporary waters such as drainage ditches, thereby vastly increasing the federal government’s role in overseeing projects that are currently handled at the state and local level. In fact, the Proposed Rule essentially offers EPA a “blank check” increase in jurisdiction because eight (8) other categories of water bodies lack key definitions or sufficient clarity for consistent interpretation. For the oil and gas industry, this creates another layer of federal bureaucracy that will serve as a hindrance to further oil and gas exploration and production, stifling job creation and economic development. Proceeding from the EPA’s extremely conservative estimate of an increase of 2.7 percent in Federal jurisdiction, API projected a loss to the U.S. economy of \$8 billion in GDP, including 67,200 jobs, \$34.5 billion in labor income, and \$1.3 billion in government revenue, arising from permit delays on oil and gas production activities in the first year of implementation.

**Methane regulations** – In January 2015, the Obama Administration announced its intent to develop new regulations and other programs to reduce methane emissions from oil and natural gas production. Oil and natural gas exploration and production emissions are minimal in the context to total U.S. greenhouse gas (GHG) emissions, and have been decreasing despite dramatically increased production of oil and natural gas. Recent EPA data show methane emissions are down 38% and natural gas production is up 35% over the period 2005-2013. According to Environmental Protection Agency (EPA) data, methane emissions from oil and natural gas exploration and production are 1.1 to 1.3 percent of total U.S. GHG emissions. Further reductions will occur because of “green” or “reduced emission completions” that have been phased-in through current EPA regulations. EPA should avoid the approach described in its January announcement, because it could disrupt the significant progress of the industry to voluntarily and substantially reduce methane emissions. In part through the increased use of natural gas and decreased use of coal to generate power, US total CO2 emissions are near 20 year lows according to EPA and EIA data.

**BLM Hydraulic Fracturing rule** – On March 26, BLM published its long-awaited final rule on hydraulic fracturing in the Federal Register. The rule will become effective June 24. This rule imposes new costs and delays on energy development without improving on existing state and federal regulations. Since 1949, hydraulic fracturing has been applied safely in over one million operations. Under the strong environmental stewardship of state regulators, hydraulic fracturing and horizontal drilling have opened up a new era of energy security, job growth, and economic strength. API is concerned that BLM’s HF rule will exacerbate current delays in federal permitting and discourage investment in developing energy

resources on federal lands. This duplicative layer of new federal regulation is unnecessary, and we urge the BLM to work carefully with the states to minimize costs and delays created by the new rule to ensure that public lands can still be a source of job creation and economic growth.

**Offshore well control rule** – On April 17th, the Bureau of Safety and Environmental Enforcement (BSEE) released its proposed well control rule that seeks to address various operational issues, including real time monitoring, adoption of industry standards, drilling margins, casing and cementing, BOP equipment, containment and inspection/mechanical integrity. Over the past five years, BSEE has implemented various regulatory changes to address safety in offshore operations. Many of the changes are based upon the efforts of the industry in the areas of standards development, capping stack technologies to contain wells, oil spill response, and safety and environmental management systems. Given the tremendous advancements already made by both the industry and government, the new well control rule should be carefully scrutinized to ensure that it actually minimizes risks and that the benefits outweigh the costs.

**CEQ NEPA guidance** – Though not strictly a regulatory action, in December 2014, the White House Council on Environmental Quality (CEQ) proposed a revision to federal agency guidance for conducting reviews under the National Environmental Policy Act (NEPA). The proposed guidance would require agencies to consider both the upstream and downstream GHG impacts of any major federal action. This would apply to oil and gas development projects on federal lands. Since the guidance would direct the government to consider the GHGs potentially released with the combustion of fuels that originate from these lands, this provision could be used by an aggressive administration to eliminate oil and gas development on federal lands altogether. Clearly, this is an overreach of federal powers and this proposed guidance should be withdrawn.

**OSHA Silica rules** – The Occupational Safety and Health Administration (OSHA) has proposed revisions to the respirable crystalline silica standard, despite clear evidence that the current standard is protective of human health. Further, OSHA's feasibility assessment does not account for labs' inability to measure levels at the proposed standard. The work practices recommended in the proposal are expensive, impractical and in some cases unworkable. Lastly, OSHA's review process leading up to the proposal was deeply flawed. The small business advocacy review (SBAR) was conducted 10 years prior to the rulemaking and did not include representatives from the hydraulic fracturing industry, a key target of the proposal. The hearings that were conducted were heavily biased, with little opportunity for industry representatives to question OSHA experts, but unlimited questioning of industry experts by OSHA. For hydraulic fracturing operations, these proposed requirements are but one more additional cost that must be factored into producers' budgets, reducing the viability of domestic production.

**Startup, Shutdown and Malfunctions (SSM)** – EPA currently is engaged in a rulemaking that would declare existing State Implementation Plans (SIPs) of 38 states "substantially inadequate" to meet NAAQS requirements due to their treatment of SSM events. This unnecessary "SIP Call" rulemaking will divert substantial state resources away from other air pollution regulation efforts, and will produce little or no environmental benefit. Please see the comments of the SSM Coalition for a fuller explanation of this and other SSM-related issues.

API is especially encouraged that the Committee has identified the cumulative impact of regulations as an issue of concern. While all of the above-listed regulations can have significant economic impacts individually, the cumulative impacts of regulations can be devastating. Consider, for example, a

hydraulic fracturing project in the inter-mountain west. Such a project could be adversely impacted by the following rules highlighted above: 1) GHG reporting, 2) ozone NAAQS, 3) crude-by-rail, 4) WOTUS, 5) methane regulations, 6) BLM hydraulic fracturing rule, 7) CEQ NEPA guidance, and 8) OSHA silica rule. That is at least 8 new rules that could add compliance costs to the project budgets of oil and gas producers. As stated above, the oil and gas industry supports nearly 10 million U.S. jobs and 8% of U.S. GDP. It has been a constant for economic growth as the nation has pulled itself out of the 2008 economic downturn. Now, as low energy prices threaten our energy renaissance, this “avalanche” of regulatory activity threatens to have a chilling effect on future investment in the oil and gas sector.

We look forward to providing further information to the Committee for your consideration, and thank you for the opportunity to provide input to the Committee on this important issue.

Sincerely,

A handwritten signature in black ink that reads "Jack Gerard". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Jack N. Gerard

Enclosure





**Derek D. Swick, PHD**  
Manager

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April 8, 2015

*VIA regulations.gov*

Mr. Nathaniel Jutras  
U.S. Environmental Protection Agency  
Office of Policy  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

**RE: EPA-HQ-OA-2011-0156**  
Request for Comment on Periodic Retrospective Review of Regulations

Dear Mr. Jutras:

The American Petroleum Institute (API) welcomes the opportunity to provide comments in response to the notice of the U.S. Environmental Protection Agency (EPA) requesting input for its periodic retrospective review of its regulations. [80 *Federal Register* 12372 - 12373, March 9, 2015] The review is required under Executive Order 13563, which calls on federal agencies to conduct a retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome and to modify, streamline, expand, or repeal them. API represents over 600 oil and natural gas companies, including producers, refiners, suppliers, pipeline operators, and marine transporters of oil and natural gas, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to protecting human health and the environment while developing and supplying energy resources. Our industry is comprehensively regulated at the local, state, and federal level, including by the EPA. Most of EPA's regulations affect our members either directly or indirectly, and our industry has a long history of compliance with them. Based on this experience, API has several contributions to offer EPA regarding the current review.

API strongly supports EPA's review of its regulations and urges the Agency to continuously undertake the process of streamlining its regulations to increase efficiency and effectiveness. In response to the current notice, API members have identified issues in six areas:

- Reporting Greenhouse Gas Emissions;
- Gasoline and Diesel Regulations;
- New Source Performance Standards;

- Definition of Solid Waste;
- RCRA e-Manifest System; and
- Oil and Gas NPDES Permits.

Each of these is discussed below.

### **Reporting Greenhouse Gas Emissions; 40 CFR Part 98**

**The requirement of annual reporting of greenhouse gas (GHG) emissions as prescribed by 40 CFR Part 98 for all facilities could be amended to reduce the frequency of reporting while maintaining an effective program.**

As API has previously communicated to EPA,<sup>1</sup> since the legislative mandate for the collection of GHG emissions data was to guide policy decisions and potential future legislation, the sustained burden of annual data collection under the GHG reporting program (GHGRP) is not justified. Although API recognizes that the statute permits EPA to seek data when reasonably required, seeking this data on an annual basis is not necessary or reasonable. EPA has not explained why it believes that annual data collection is supported by statute, is essential for future policy decisions, or why such decisions could not be developed based on less frequent data collection, or data collection for a limited time.

An annual reporting requirement creates a substantial burden on the industry with seemingly little correlative gain for EPA's awareness of the issues it seeks to understand. If industry were permitted to provide information every three to five years, EPA would receive substantially the same benefit, at significantly reduced cost to both industry and the Agency. Therefore, API respectfully requests that EPA consider alternatives for the reporting frequency, in particular reporting every three, four, or five years.

**The requirements of the mandatory greenhouse gas reporting program (GHGRP) should be streamlined to reduce burden.**

In multiple sets of comments submitted to EPA, API has indicated that the Agency's modeled cost estimates fall short of representing the full gamut of activities required for complying with the GHGRP, and in some cases exhibit a misunderstanding of how certain industrial sectors operate.<sup>2</sup> For example, EPA assumed that for 2013-2015, the overall burden for Subpart W reporting will be lowered by 25%, which is not supported by industry data provided by API. For API facilities that are subject to Subpart W reporting, the continuing burden may be close to \$400,000 on average (ranging from to \$25,000 to \$1,500,000). At the same time, operation and maintenance costs, which are part of this burden estimate, range from \$2,000 to

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<sup>1</sup> Docket ID EPA-HQ-OAR-2012-0333; API comments of December 27, 2012.

<sup>2</sup> Docket ID EPA-HQ-OAR-2012-0333; API comments of August 12, 2012.

\$15,000, per basin-wide facility per year. These may include the requirement to conduct a full inventory of pneumatic devices (starting in 2013), an effort that will require substantial contractor field support.

Similarly, in its latest regulatory action,<sup>3</sup> EPA has significantly underestimated the level of effort for reporting emissions associated with the newly defined Gathering and Boosting segment, requiring reporting of emissions for oil well completions and workovers, and has totally disregarded the burden associated with the requirement to report Well ID numbers, per further details provided in API's comments.<sup>4</sup> In implementing the GHG reporting program, EPA should not operate with the assumption that more data are always better. Moreover, EPA's data collection authority is limited and cannot be expanded to support requests for non-emission data such as Well ID numbers and so forth. At some point, the additional information that could be requested by EPA is redundant and subject to diminishing benefits, whereby the additional costs associated with collecting more data are not justified based on the limited new information that can be gleaned. It is also incorrect for EPA to contend that the increasing availability of electronic reporting tools offsets the additional resources that are necessary to respond to new reporting requirements.

While API supports the increased use of electronic reporting, the potential resource savings is significantly diminished, if not eliminated, by EPA's continuing inability to provide the necessary instructions and related reporting tools. For example:

- EPA provided the XML reporting instructions and schemas for some Monitoring Mechanism Regulation (MRR) subparts as late as March 2015, thus necessitating that some reporters expend considerable resources to manually input data into the reporting tools.
- The Inputs Verifier Tool (IVT) lacks the transparency necessary for reporters to be consistent with IVT calculations. Many equation inputs that are not provided by facilities, such as constants and conversion factors, are not explicitly stated in the IVT, making it time-intensive if not impossible to determine why there are inconsistencies between the IVT and regular GHG reports. As a calculation verification tool, it is incumbent that there is full transparency of the calculations to make sure they are consistent with the regulation.

Overlapping reporting requirements between California AB-32 Mandatory Reporting Requirements and the EPA MRR are excessively burdensome given that both state and federal requirements ask for GHG emission inventories from the same facilities. There is a significant opportunity to develop either a compliance equivalency and/or a shared system in order to minimize duplicative efforts.

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<sup>3</sup> Greenhouse Gas Reporting Rule: 2015 Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems; Proposed Rule (Docket EPA-HQ-OAR-2014-0831).

<sup>4</sup> Docket ID EPA-HQ-OAR-2014-0831; API comments of February 25, 2015.



API has repeatedly stressed the need for EPA to carefully consider the suggestions provided by industry for reducing the reporting burden without compromising data completeness and accuracy. We request that EPA address the issues raised above as part of this current regulatory review effort.

**EPA's assessment of the potential opportunity for using advanced monitoring techniques to improve regulations such as the GHGRP would not contribute to the overall accuracy and transparency of reported data.**

EPA has previously provided examples of industries and applications that have incorporated advanced innovative monitoring methods toward emission estimation. Although such examples may be applicable to some sectors that are characterized by large point sources with a small number of emission points, they are not relevant to quantifying emissions from, for example, a sector such as oil and gas exploration and production, with its highly variable operations, which are geographically scattered. Due to the fundamentally different structure and complexity of the petroleum and natural gas industry, particularly the exploration and production sector, there are several reasons why potential advanced innovative monitoring methods are not suitable for this application:

- Distributed nature and the large number of petroleum and natural gas facilities;
- Remote location of most petroleum and natural gas wells and gathering system facilities – often with no access to electricity, reliable communications, or other utilities;
- Nonsteady-state nature of many petroleum and natural gas emission sources coupled with the number and unconstrained nature of emissions (no stack or single emission point);
- Uncertainty introduced by atmospheric dispersion and flux calculations; and
- Uncertainty introduced by source apportionment.

Even if advanced ambient measurement techniques were feasible for application to Subpart W facilities, they would not be able to distinguish between specific emissions sources at a facility or even which facility these emissions were coming from in the case of closely located or co-located facilities. Hence, such techniques could not meet the primary goal of the GHGRP of informing policy mechanisms, and from this perspective would have little to no value.

### **Gasoline and Diesel Regulations**

EPA's recent Tier 3 rule amendments<sup>5</sup> included substantial revisions to gasoline and diesel reporting and recordkeeping regulations to simplify and streamline regulatory requirements. API appreciates this effort, and there remains much work to be done

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<sup>5</sup> 80 FR 9078 – 9124, February 19, 2015.

before the initiative of streamlining fuels regulations can be considered complete. Specific areas of concern follow.

### **Reformulated Gasoline (RFG)**

API respectfully requests that EPA consider implementing the following suggestions related to RFG regulations.

- Eliminate most distinctions between RFG and Conventional Gasoline (CG).
- Eliminate the requirement for independent laboratory sampling and testing for winter RFG.
- Change Volatile Organic Compound (VOC) standards to Reid Vapor Pressure (RVP) standards, and reduce required testing parameters.
- Eliminate the VOC per-gallon standard ratchet associated with Previously Certified Gasoline (PCG) blending for refiners opting for per-gallon VOC compliance.
- Allow Reformulated Blendstock for Oxygenate Blending (RBOB) to be downgraded to Conventional Blendstock for Oxygenate Blending (CBOB), without first blending ethanol to the RBOB.
- Create workable regulations for including oxygenates added downstream in a refiner's CBOB volumes.

### **Renewable Fuel Standard (RFS) and Alternative Fuels**

EPA should also implement the following improvements in the RFS program:

- Clarify issues concerning Renewable Volume Obligation (RVO) exclusions for heating oil, exports, and blendstock.
- Clarify how downstream re-designation of Ultra Low Sulfur Heating Oil and Motor Vehicle Non-Road Locomotive and Marine Diesel may take place and add clarity regarding accounting for exported vs. domestic volumes for RVO purposes.
- Clarify requirements for generation of RINs where the feedstock supplier partially refines the feedstock prior to delivery to the renewable fuel producer.
- Clarify issues concerning ethanol blends above 15% (e.g. sub-sim and registration) with a clear and reasonable regulatory framework that provide a level playing field across all fuels in a uniform, balanced, and equitable manner.

- Clarify labeling and RVP requirements that apply to E15, and prohibit the sale of E15 as an ethanol flex fuel.

### **Regulatory Restructuring**

The following are API suggestions for regulatory restructuring that would yield significant value as regulatory improvements.

- Consolidate similar provisions from various programs, and eliminate all obsolete provisions. For example:
  - Coordinate PCG and blendstock provisions across all gasoline regulations. Revise the PCG provisions to clarify that there is no need for a "net positive" volume requirement for CG, even for a refiner that meets RFG VOC standards on an average basis.
  - Include all gasoline PTD requirements in one section. Consider similar consolidation of recordkeeping and reporting requirements.
  - Eliminate all obsolete provisions from the RFG, Anti-Dumping, Gasoline Sulfur, Gasoline Benzene and Motor Vehicle Diesel Fuel regulations.
  - Set one definition for Responsible Corporate Officer that allows for delegation of responsibilities to a Refinery General Manager.
- Streamline reporting to require only annual reports to be submitted (except for RFS regulations) and require fewer parameters be included in the reports.
- Integrate important EPA Questions and Answers into the regulations, working with relevant stakeholders.
- Amend the attestation procedures and requirements for clarity and consistency with the applicable regulations.
- Streamline 40 CFR Part 80 registration to allow it to be effective immediately upon submittal.
- Amend 40 CFR § 80.80(e) such that it provides for reasonable parameter penalty values based on current "worst case" gasoline properties. Provide penalty values for PCG batches.
- Clarify the in-line blending requirements, and make them consistent across all programs.
- Provide that no report resubmission is required for *de minimis* reporting errors in gasoline or diesel reports.
- Eliminate butane loss adjustment calculations for composite sampling, or make it optional.



## New Source Performance Standards

API would like to highlight issues related to requirements at 40 CFR §60.18(g): Alternative Work Practice (AWP) for leak detection. API's suggestions stem from differences between the final AWP versus the proposed AWP. API requests that EPA consider the following alternatives:

- The AWP should not require periodic Method 21 monitoring. Requiring Method 21 fails to achieve the burden reductions needed to encourage use of this methodology.
- The AWP should include the option from the proposed rule that allowed using a default minimum detection level for the daily instrument check.
- The AWP should clarify that the requirement to document that each component can be identified in the video is a requirement for a one-time mapping of the facility, rather than requiring a video scan of identification tags of the equipment components with each survey.
- The AWP should allow a reasonable period of time to attempt and accomplish repair for difficult-to-access components, and allow for repair of unsafe-to-access components during periods when it is safe to do so. While difficult- or unsafe- to access components can be readily monitored using optical gas imaging (OGI), repair of such components will require additional time to build scaffolding or make other accommodations to safely access the component. The delay provisions of the conventional work practice are still required.

The conventional work practice for detecting leaking equipment components is to monitor each component with a handheld organic vapor analyzer or similar hydrocarbon detector, in accordance with EPA Method 21. This leak detection and repair (LDAR) work practice is extraordinarily labor intensive, with the vast majority of the labor expended on monitoring equipment components that are found to not leak. EPA promulgated an AWP for leak detection that involves the use of OGI. This remote sensing technology allows equipment components to be monitored much more efficiently, in that components can be monitored from a distance, rather than requiring the operator to physically access each component individually.

The premise of the AWP for LDAR is that the majority of the total mass of emissions is attributable to a very small percentage of the equipment component population. These primary contributors to emissions are the components with the highest leak rates. EPA and industry conducted a statistical study to determine monitoring intervals and detection levels that would be required in order for the AWP to achieve emission reductions equivalent to those achieved by the conventional work practice involving Method 21. EPA then proposed an AWP based on the results of this study. The final version of the AWP, however, included changes that were not

substantiated by EPA's own study, and which stripped the AWP of the very efficiencies that had been the objective of its development.

Improvements to the AWP such as those suggested above would result in earlier and more cost effective detection and repair of larger leaks, which constitute the majority of emissions from equipment interfaces. It would also have the benefit of routine inclusion of difficult-to-access components in the leak detection program.

In addition to the suggestions above, API offers some specific suggestions related to paperwork burden of the requirements in 40 CFR Part 60.

- 40 CFR §60.4(a) requires that all requests, reports, applications, submittals, and other communications to EPA pursuant to the requirements shall be submitted in duplicate to the appropriate Regional Office of the U.S. EPA to the attention of the Director of the Division indicated in the applicable EPA Regional Office(s). Submitting reports in duplicate is unnecessary and should not be required.
- An Alternate Monitoring Plan (AMP) submitted pursuant to 40 CFR § 60.13(i) should be deemed approved until acted upon, in a similar way that NSPS J/Ja inherently low sulfur streams applications are handled. EPA created a new process for AMPs specific to the NSPS Subpart Ja regulation (also mirrored in NSPS J) (40 CFR § 60.107a(b)). In that process, the effective date of the monitoring exemption is the date of submission of the application (§ 60.107a(b)(2)), and if the operation change results in conditions that EPA decides no longer qualify for the monitoring exemption, the facility has 180 days to install a Continuous Emission Monitoring System (CEM), coupled with daily grab sampling. API suggests that this process be used for an AMP submitted pursuant to 40 CFR § 60.13(i). This is necessary to address the situation in which a facility requests approval for substitute measures (e.g., periodic grab samples, parametric monitoring, etc.) in lieu of CEM, but in the interim the facility does not have approval. This leaves the facility in a potential non-compliance situation if it does not install the CEM because they are expecting EPA's approval of the AMP, which in some cases has taken years. In the case where EPA does not approve an AMP and requires CEM, the regulatory system should allow a facility adequate time (from the point of the non-approval decision) to install it.

#### **Definition of Solid Waste; 40 CFR § 261.4**

On January 13, 2015, EPA issued a final rule revising once again the regulatory definition of "solid waste" under subtitle C of the Resource Conservation and Recovery Act (80 FR 1694). EPA's rule represents a step back in encouraging legitimate and beneficial recycling and reuse of materials, and imposes a variety of unnecessary burdens on environmentally-protective recycling activities. EPA



continues to regulate certain secondary materials as solid or hazardous wastes, even when they are being recycled.

To be a hazardous waste, a material must fit the definition of a "solid waste." 42 U.S.C. § 6903(5). RCRA defines the term "solid waste" to include "discarded material." 42 U.S.C. § 6903(27). Thus, to be a solid waste, a material must be "discarded." Several court cases address this issue, including *American Mining Congress v. EPA* ("AMC I"), 824 F.2d 1177 (D.C. Cir. 1987), where the D.C. Circuit held that "solid waste" (and therefore EPA's regulatory authority under RCRA) is limited to materials that are "discarded" by virtue of being disposed of, abandoned, or thrown away. AMC I, 824 F.2d at 1193.

The January 13, 2015, rule expands EPA regulation to materials that should not be considered "discarded" and should be outside EPA's RCRA jurisdiction. The new regulation dials back new exclusions EPA created in its 2008 revisions to the Definition of Solid Waste such that fewer materials can be legitimately recycled without meeting the new regulatory burdens. EPA unnecessarily eliminated the exclusion from the 2008 rule that applied to materials transferred to third-parties for reclamation and imposed additional and unnecessary conditions and recordkeeping requirements for generators using the exclusion for materials that are legitimately reclaimed under the control of the generator. (40 CFR 261.4(a)(24) and 40 CFR 261.4(a)(23)).

In addition, the new rule creates an unnecessary recordkeeping requirement for "speculative accumulation" at 40 CFR 261.1(c)(8), and imposes the requirements on many long-excluded recycling activities, such as the exclusion for oil-bearing secondary materials reinserted into the refining process at 40 CFR 261.4(a)(12)(i) and the exclusion for reinsertion of recovered oil into the refining process at 40 CFR 261.4(a)(12)(ii). Petroleum refiners have relied on these exclusions to be able to recover and reuse thousands of barrels of oil each year. Without any evidence of mismanagement or information to suggest that petroleum refiners are speculatively accumulating these valuable secondary materials, EPA is imposing a speculative accumulation recordkeeping requirement that will be extremely difficult to apply at a complex refining operation. This speculative accumulation recordkeeping requirement is burdensome, difficult to implement, and unnecessary.

Similarly, EPA's application of four "legitimacy criteria" to existing excluded recycling activities is both unnecessary and burdensome (40 CFR 261.2(g) and 40 CFR 260.43). The purpose of these legitimacy criteria is to distinguish between legitimate and sham recycling. Yet EPA has not demonstrated that existing excluded recycling activities, such as the exclusions for oil-bearing secondary materials and recovered oil previously mentioned, as well as the exclusions for spent sulfuric acid recycling (40 CFR 261.4(a)(7)), reinsertion of recovered oil from an associated organic chemical manufacturing facility (40 CFR 261.4(a)(18)), and spent caustic from petroleum refining used to produce cresylic or naphthenic acid (40 CFR 261.4(a)(19))

are ever conducted in an illegitimate manner. Recycling under these exclusions has been conducted for years in a beneficial and protective manner. The imposition of the legitimacy criteria, which are difficult to apply in many circumstances, will impose significant paperwork and recordkeeping requirements and may halt important beneficial recycling.

API thinks that an important regulatory reform is for EPA to improve its RCRA policies and regulations so that secondary materials are not regulated as solid or hazardous wastes when they are being legitimately recycled.

### RCRA e-Manifest System

EPA's development and implementation of an electronic manifest ("e-Manifest") system as required under the 2012 Hazardous Waste Electronic Manifest Establishment Act has the potential to simplify the recordkeeping and paperwork burden associated with the manifesting of hazardous wastes. However, to achieve this objective, EPA must ensure that the following occurs.

- First, the e-Manifest system should be a national system such that users only have to use a single system without any conflicting or redundant State manifesting requirements.
- Second, because e-Manifest data will be readily available, EPA and State RCRA programs should eliminate either annual or biennial hazardous waste reporting.
- Third, the e-Manifest system should be fully integrated with Department of Transportation (DOT) hazardous materials shipping requirements such that the use of the system will fully satisfy DOT shipping paper requirements for hazardous wastes. If generators or transporters are required to maintain paper copies of manifests to comply with DOT requirements, it will defeat much of the purpose of the e-Manifest system.

### Oil and Gas NPDES Permits

Both EPA Region 4 and Region 6 implement National Pollutant Discharge and Elimination System (NPDES) regulations for General Permits for oil and gas production. Since producers in the Gulf of Mexico region often move between States covered under these two regions, it creates confusion with operators having to meet varying requirements. We encourage the two EPA Regions to work together to issue a single general permit across all Gulf States that satisfies the necessary requirements.

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April 8, 2015

API appreciates the opportunity to submit these regulatory reform ideas. Please contact me with any questions or should you require additional information from API.

Sincerely,

A handwritten signature in black ink, appearing to read "David A. And". The signature is written in a cursive style with a large, stylized initial "D".



May 1, 2015

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs  
340 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Thomas R. Carper  
Ranking Member  
Committee on Homeland Security  
and Governmental Affairs  
601 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs  
and Federal Management  
601 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
and Federal Management  
601 Hart Senate Office Building  
Washington, D.C. 20510

Dear Chairman Johnson and Ranking Member Carper/Chairman Lankford and Ranking Member Heitkamp:

On behalf of Associated Builders and Contractors (ABC), a national construction industry trade association with 70 chapters representing nearly 21,000 chapter members, I am writing in response to the Committee's request for assistance in highlighting regulatory burdens affecting our industry.

For the last six years, the White House has encouraged federal regulatory agencies to assert their power through rulemaking. These agencies operate relatively unchecked and unsupervised, especially during the early stages of the regulatory process. Many rulemakings are accompanied by poor or incomplete economic cost-benefit forecasting and other data analysis that could have helped to create practical and sustainable rules and regulations. At times, even the will of Congress and the American public are disregarded in order to issue regulations. We are committed to working with the Committee to help identify regulations and processes that need to be reviewed, revised, or removed.

A large percentage of ABC's members are small businesses, and as you know, small businesses are the backbone of our nation's economy. Their ability to operate efficiently and free of unnecessary regulatory burdens is critical for our country's economic recovery. Proposed and existing regulations need to be thoroughly examined from cost standpoints to ensure they do not encumber our country's primary job creators. The construction industry is one of the largest individual contributors to our nation's economy despite the fact we must constantly battle unnecessary, burdensome, and often antiquated regulations.

The regulatory concerns of our members include many issues commonly found across small businesses in general, but we in particular have several regulations adversely affecting our industry specifically. Attached to this letter, please find a memo outlining some of the regulatory areas important to ABC.

The need for regulatory reform is vital. We applaud the Committee for addressing these regulations and the environment of insecurity they create for America's job builders.

Sincerely,

Geoffrey Burr  
Vice President, Government Affairs





To: U.S. Senate Committee on Homeland Security and Governmental Affairs  
From: Associated Builders and Contractors  
Date: May 1, 2015  
Re: Existing and Proposed Regulations that will Impact the Construction Industry

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## Existing Regulations

- **National Labor Relations Board (NLRB): “Ambush” Election Procedures:**<sup>1</sup> On Dec. 15, 2014, the NLRB finalized a rulemaking which drastically changed how the Board handles union representation elections. The provisions dramatically reduce the amount of time between when a union files a representation petition and an election takes place from the current average of 38 days.<sup>2</sup> The final rule also creates privacy concerns by requiring employers to submit their employees’ personal contact information, including email addresses and phone numbers, to union organizers. The rule impedes an employer’s ability to present facts and information to its employees regarding union representation. The rule went into effect April 14, 2015.<sup>3</sup>
  - **Status/Action:** On Jan. 5, 2015, the Coalition for a Democratic Workplace filed a lawsuit against the final rule in the D.C. Federal District Court.<sup>4</sup> On Jan. 13, 2015, ABC of Texas and the Central Texas Chapter of ABC filed a joint lawsuit with NFIB of Texas in the U.S. District Court for the Western District of Texas.<sup>5</sup>
- **Department of Labor (DOL) - Wage and Hour Division (WHD): “Prevailing” Wage Rates under the Davis-Bacon Act:** As a result of flawed, unscientific wage calculation methodology, federal “prevailing” wages in construction fail to reflect actual local wages. An April 2011 Government Accountability Office (GAO) report found the Davis-Bacon wage survey process does not produce true prevailing wages, and DOL’s efforts to improve wage determinations to date have not addressed key issues with accuracy, timeliness and overall quality.<sup>6</sup> In addition, the study found that DOL’s failure to provide detailed information about job duties that correspond to each wage rate makes it difficult to determine the appropriate wage rate for many construction-related jobs. Absent full repeal, employers and employees in the construction industry would be well-served by requiring the use of job descriptions and earnings data from the Bureau of Labor Statistics (BLS)—which is acquired through proven statistical sampling techniques—to calculate and set these wages in a transparent manner.

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<sup>1</sup> See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubid=201404&RIN=3142-AA08> and <https://federalregister.gov/a/2014-28777>.

<sup>2</sup> ABC Release: *NLRB Doubles Down on Failure: Reissues Failed Ambush Elections Proposal*. See: <http://bit.ly/1kHBbVi>. ABC Newswire: *NLRB Again Seeks to Shorten Union Election Timeframes*. See: <http://bit.ly/1e6aSi7>.

<sup>3</sup> NLRB Release: *NLRB Issues Final Rule to Modernize Representation-Case Procedures*. See: <http://1.usa.gov/1uvnljm>.

<sup>4</sup> Business Groups File Lawsuit to Block NLRB’s Union-Organizing Rule  
<http://www.wsj.com/articles/business-groups-file-lawsuit-to-block-nlrbs-union-organizing-rule-1420505011>

<sup>5</sup> See: <http://bit.ly/1DGiuYI>.

<sup>6</sup> GAO: *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*. April 6, 2011. See: <http://www.gao.gov/new.items/d11152.pdf>.

- **Status:** In effect. Despite repeated calls from its own Office of Inspector General and others to reform federal construction wage determinations, DOL continues to use its flawed survey process.
- **Federal Acquisition Regulatory (FAR) Council: *Government-Mandated Project Labor Agreements (PLAs) on Federal Construction Contracts*:**<sup>7</sup> Government-mandated PLAs end open, fair and competitive bidding on taxpayer-funded construction projects. The Obama administration's push for PLA mandates and preferences on federal construction projects exceeding \$25 million, as outlined in Executive Order 13502, serves as a barrier to economic recovery and job growth for 86.1 percent of the U.S. private construction workforce—those who choose not to join a union. Government-mandated PLAs effectively limit bidding to unionized companies. Several independent and academic studies indicate government-mandated PLAs increase the cost of construction projects in numerous markets between 12 percent and 18 percent compared to similar non-PLA construction projects.<sup>8</sup>
  - **Status:** In effect. There has been a sharp increase in government-mandated PLAs on federally assisted projects. However, PLA requirements have been limited on direct federal contracts due to an effective campaign by ABC and the business community. The Government Neutrality in Contracting Act (S. 71), introduced in the 114<sup>th</sup> Congress by Sen. Vitter (R-La.), restricts government-mandated PLAs and preferences on federal and federally assisted projects. It has been referred to the Senate HSGAC and is supported by a broad coalition of construction industry and employer groups.

## Proposed Regulations

- **DOL - Office of Labor Management Standards (OLMS): *"Persuader" Reporting under the Labor-Management Reporting and Disclosure Act (LMRDA)*:**<sup>9</sup> Section 203 of the LMRDA deals with reporting requirements for employers and for those hired by employers "to persuade employees to exercise or not exercise or persuade employees as to the manner of exercising, the right to organize..." Attorneys and other third parties that do not have any direct contact with employees on this subject have been largely exempt from reporting under an "advice" exemption in Section 203(c). OLMS' proposed rule significantly narrowed the exemption, resulting in the drastic expansion of the types of circumstances that will trigger reporting—including communications between attorneys and their clients.<sup>10</sup> In effect, the proposal deprives employers of their right to free speech, freedom of association and legal counsel, and deprives employees of the right to obtain balanced and informed input from both sides as they decide whether to be represented by a union. DOL's proposal also works hand-in-glove with the NLRB's "ambush" elections final rule. Together, these two rules could achieve a primary objective of the deceptively named Employee Free Choice Act by forcing labor neutrality on employers.
  - **Status:** Final rule expected; nothing has been submitted to OIRA for review. Current regulatory agenda lists July 2015 as the agency's target date.
- **DOL - Occupational Safety and Health Administration (OSHA): *Crystalline Silica Exposure*:**<sup>11</sup> On Sept. 12, 2013, OSHA proposed to drastically revise its standards governing workplace exposure to crystalline silica, a material ubiquitous on construction sites as part of commonly used construction

<sup>7</sup> See: <https://federalregister.gov/a/2010-8118>. Executive Order 13502 available at: <https://federalregister.gov/a/E9-3113>.

<sup>8</sup> See: <http://www.abc.org/PLAStudies>.

<sup>9</sup> See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=1245-AA03>.

<sup>10</sup> The Hill: *Up In Arms Over Union 'Persuader' Rule*. See: <http://bit.ly/1g4K5qd>.

<sup>11</sup> See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=1218-AB70>.



materials including concrete, bricks, rocks, and stones.<sup>12</sup> Construction activities that can generate/spread silica dust include but may not be limited to: jackhammering, grinding, tuckpointing, milling, rock crushing, drywall finishing, earthmoving, sawing, and drilling. Currently, OSHA requires a Permissible Exposure Limit (PEL; the maximum amount of silica to which a worker may be exposed to during an 8-hour shift of a 40-hour week without control measures) of 250 micrograms per cubic meter of air in construction and 100 micrograms in general industry. OSHA aims to reduce all PELs to 50 micrograms and establish an “action level” (where constant monitoring must begin) of 25 micrograms. ABC, along with 25 other construction industry associations requested that OSHA withdraw its proposal until the agency can demonstrate any such rule is necessary and workable.<sup>13</sup> ABC cited technological and economical infeasibility of compliance as the primary reasons for its opposition, but ABC also strongly criticized OSHA’s construction-specific control methods—many of which were found to be impractical in the field and contradicted existing safety practices. ABC’s comments also questioned the need for the rule in the first place (especially the establishment of a lower PEL as a way to reduce the number of silica-related illnesses and deaths), citing a CDC report that found a 93 percent drop in silica-related deaths between 1968 and 2007, and OSHA’s admitted inability to properly enforce current standards.<sup>14</sup> ABC also criticized OSHA for severely underestimating the proposal’s compliance impact, which will affect 2.5 million more construction workers than the agency estimated, and cost at least *ten times* as much to implement.<sup>15</sup>

- **Status:** Comment period on the proposal closed in August 2014. Hearings on the proposal took place in March-April 2014.<sup>16</sup> According to the latest regulatory agenda, the agency plans to analyze public comments by June 2015.
- **DOL - OSHA: *Improve Tracking of Workplace Injuries and Illnesses (“Electronic Reporting”)*:**<sup>17</sup> OSHA has proposed amending its current recordkeeping regulations to add requirements for the electronic submission of injury and illness information. OSHA plans to use the data collected for enforcement purposes, and will also post the information on a publicly searchable online database—available to competitors, union organizers, etc. Under the rule, establishments (for construction, an ‘establishment’ would be an individual worksite) with 250 or more employees will be required to submit injury and illness records on a quarterly basis to OSHA. Establishments with 20 or more employees in industries with high injury and illness rates (including construction), will be required to electronically submit an annual summary of their work-related injuries and illnesses. Not only would the database be publicly available to unions, competitors, and other individuals/entities, but it would also offer DOL another tool to pressure employers with respect to labor standards in their supply chain. It will be important for employers to point out that injury and illness data made public without appropriate context is not a reliable measure of an employer’s safety record. In addition, in August 2014, OSHA again asked for comment—this time the agency proposed (without any regulatory text) amending the original proposal to: require employers to inform employees of their right to report injuries and illnesses; more clearly communicate the requirement that any injury and illness reporting requirements established by the employer be reasonable and not unduly burdensome; and provide

<sup>12</sup> See: <https://federalregister.gov/a/2013-20997>.

<sup>13</sup> ABC Release: *ABC Calls OSHA’s Proposed Silica Rule Unworkable: Joins Safety Coalition in Asking for Withdrawal*. See: <http://bit.ly/1f1GwmS>.

<sup>14</sup> House Education and the Workforce Committee: *Letter to OSHA on Crystalline Silica Standards*. See: <http://1.usa.gov/pwsEW2>.

<sup>15</sup> See: <http://www.abc.org/NewsMedia/NewsReleases/tabid/144/entryid/3660/-study-finds-that-osh-a-underestimated-cost-of-silica-rule-by-4-5-billion-a-year.aspx>.

<sup>16</sup> See: <https://federalregister.gov/a/2013-25863>.

<sup>17</sup> See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=1218-AC49>.



OSHA an additional remedy to prohibit employers from taking adverse action against employees for reporting injuries and illnesses.

- **Status:** Proposed rule issued Nov. 8, 2013.<sup>18</sup> Public meeting held Jan. 9, 2014.<sup>19</sup> On Aug. 14, 2014 OSHA issued a “supplemental” NPRM.<sup>20</sup> Current regulatory agenda lists August 2015 as the agency’s target date for finalization.
  
- **Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps): *Definition of “Waters of the United States” Under the Clean Water Act:***<sup>21</sup> On April 21, 2014, EPA and the Corps proposed to redefine “waters of the U.S.” under the Clean Water Act, which would significantly expand federal control of land and water resources nationwide.<sup>22</sup> ABC and other employer groups are concerned EPA’s proposal will result in increased need for unnecessary permits, which will establish new bureaucratic hurdles to job creation and economic growth. ABC filed comments opposing the proposal and asking that it be immediately withdrawn.<sup>23</sup>
  - **Status:** Final rule was sent over to OIRA on April 6, 2015 for review. Current regulatory agenda lists April 2015 as the agency’s target date for finalization.<sup>24</sup>
  
- **Department of Transportation (DOT): *Geographic-Based Hiring Preferences in Administering Federal Awards:*** On February 24, 2015, the DOT established a one year pilot program to allow state and local governments to use local geographic hiring preferences on contracts assisted by the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA).<sup>25</sup> In addition, on March 6, 2015, DOT issued a proposed rule to permanently allow recipients and subrecipients of FHWA and FTA assistance to impose geographic-based hiring preferences whenever not otherwise prohibited by Federal statute.<sup>26</sup> There have been – and will likely continue to be – several significant legal issues that will lead to legal challenges to local hiring preference programs because they have been found to be unconstitutional as they allow one state to discriminate against citizens of another state. Local hire preferences lead to retaliatory local hiring preferences from surrounding local governments. In short, local hiring preferences limits the pool of available labor, disrupts a business’s existing workforce, increases costs, and reduces competition.
  - **Status:** Proposed rule issued March 6, comments are due May 6.

## ABC’s Watch List

- **FAR - Executive Order 13673, “Fair Pay and Safe Workplaces” (aka, Blacklisting):**<sup>27</sup> On July 31, 2014, President Obama issued a sweeping executive order instructing federal agencies to determine whether an employer is “responsible” enough to receive a federal contract based on a subjective review of its recent compliance history with 14 federal labor, employment and safety laws and equivalent state laws. Flouting Congressional authority, the order disregards existing statutory enforcement powers

<sup>18</sup> See: <https://federalregister.gov/a/2013-26711>.

<sup>19</sup> See: <https://federalregister.gov/a/2013-27366>.

<sup>20</sup> See: <https://federalregister.gov/a/2014-19083>.

<sup>21</sup> See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=2040-AF30>.

<sup>22</sup> See: <https://federalregister.gov/a/2014-07142>.

<sup>23</sup> ABC Press Release: *ABC Asks EPA to Withdraw its “Waters of the U.S.” Proposal*. See: <http://bit.ly/1BXyuhL>

<sup>24</sup> See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=2040-AF30>

<sup>25</sup> See: [http://www.dot.gov/sites/dot.gov/files/docs/Contracting%20Initiative%20Notice\\_0.pdf](http://www.dot.gov/sites/dot.gov/files/docs/Contracting%20Initiative%20Notice_0.pdf) A provision in last year’s transportation appropriations legislation allowed transit agencies to use local hiring requirements on FTA-funded projects for FY 2015.

<sup>26</sup> <https://federalregister.gov/a/2015-05215>

<sup>27</sup> See: <http://1.usa.gov/1s7xA4p> and <http://1.usa.gov/1ptFLao>.



found in the Federal Acquisition Regulation (FAR) and various labor laws. In addition, the order imposes new and redundant data collection, review, inter-agency consultation and enforcement procedures. The order also unfairly restricts the ability of employers to use arbitration to resolve employee disputes in some circumstances (which federal law and subsequent Supreme Court decisions have made clear these arbitration agreements are acceptable). Ultimately, the order will create widespread disruption in the federal procurement process, significantly increase red tape and costs for both government and industry, and serve as a barrier to federal contracting for many businesses.

- **Status:** Proposed rule (and supplementary guidance from DOL) expected soon. Rule and guidance went over to OIRA on March 6, 2015. Employer groups continue to point out that the executive order is an open door to favoritism and abuse of government contractors by administration officials, as evidenced by statements during a Feb. 26, 2015, House Education and Workforce joint subcommittee hearing.<sup>28</sup> ABC has expressed these concerns directly with the White House, and voiced similar concerns in the media.<sup>29</sup>
- **DOL - Wage and Hour Division (WHD): *Defining and Delimiting Exemptions for Executive, Administrative, Professional Employees ("Overtime")*:**<sup>30</sup> On March 13, 2014, the White House issued a memorandum directing DOL to "modernize and streamline" the existing overtime regulations for executive, administrative, and professional employees, which were last updated in 2004.<sup>31</sup> In response, ABC criticized the administration's directive, and pledged to explore all avenues to ensure any proposed rule changes do not cause harm to merit shop contractors.<sup>32</sup>
  - **Status:** Proposed rule expected. Current regulatory agenda lists February 2015 as the agency's target date.
- **DOL - OLMS: *LM-21 Receipts and Disbursements Report*:**<sup>33</sup> OLMS intends to undertake a rulemaking to revise Form LM-21. This form must be filed annually by "persuaders" (individuals/entities hired by employers to persuade employees to exercise or not exercise the right to organize), discloses receipts and disbursements associated with covered persuader activity. According to the agency, the rulemaking will review the layout of the form and its instructions (including the detail required to be reported). When viewed together with the agency's primary persuader rulemaking (which could drastically broaden the range of "labor relations advice and services" considered to be persuader activity), the implications of more intrusive reporting forms is of concern to ABC, its members and the experts we rely upon for guidance in labor-relations matters.
  - **Status:** Proposed rule expected. Current regulatory agenda lists July 2015 as the agency's target date.
- **DOL - OFCCP: *Construction Contractors' Affirmative Action Requirements*:**<sup>34</sup> Citing data showing disparities in the representation of women and racial minorities in on-site construction occupations,

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<sup>28</sup> [The Blacklisting Executive Order: Rewriting Federal Labor Policies Through Executive Fiat](#). Joint hearing held by U.S. House Education and Workforce's Subcommittee on Workforce Protections and the Subcommittee on Health, Employment, Labor, and Pensions. Feb. 28, 2015.

<http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=398427>

<sup>29</sup> See: <http://www.abc.org/procurement.aspx>. ABC Newline: *Blacklisting Executive Order Meets Opposition from ABC at White House Meeting*. See: <http://bit.ly/1t70000>. Government Executive: *ABC's Burr to Obama - Nothing's Fair about Obama's Fair Pay Order*. See: <http://bit.ly/1tAgz5F>.

<sup>30</sup> See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=1235-AA11>.

<sup>31</sup> See: <http://1.usa.gov/Oqn7SJ>.

<sup>32</sup> ABC Release: *ABC Criticizes President's Directive to Change Overtime Pay*. See: <http://bit.ly/1jYke85>.

<sup>33</sup> See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=1245-AA05>.

<sup>34</sup> See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=1250-AA01>.



OFCCP plans to make changes to existing affirmative action obligations for federal construction contractors in the industry. Nothing else is known at this point, but based on recently-finalized OFCCP rules and enforcement actions, this potential rulemaking continues to concern ABC and its members.

- Status: Proposed rule expected; nothing has been submitted to OIRA for review. Current regulatory agenda lists September 2015 as the agency's target date.
- **DOL - WHD: *Right to Know under the Fair Labor Standards Act (FLSA)***:<sup>35</sup> This rulemaking would require employers to provide workers classified as independent contractors with a written "classification analysis," detailing why they are classified as such. In addition, employers would be required to justify workers status as exempt/non-exempt (from overtime laws) in writing on a rolling basis. This would inherently add new, burdensome paperwork requirements on employers. In addition, records of this kind would surely be discoverable during private litigation, increasing the likelihood of frivolous claims. In January 2012, the rule was shelved with no explanation. In January 2013, WHD announced its intent to deploy a new "worker classification survey," designed to "collect information about employment experiences and workers' knowledge of basic employment laws and rules so as to better understand employees' experience with worker misclassification." In November 2013, WHD announced a second round of public comments on the survey. The survey proposal is significant because it will directly impact future agency policy.
  - Status: Long-Term Action.<sup>36</sup>
- **DOL - OSHA: *Injury and Illness Prevention Program (I2P2)***:<sup>37</sup> OSHA is considering requiring employers of all sizes to develop and implement internal safety programs designed to "find and fix" workplace hazards on a rolling basis under penalty of enforcement. Significant cost and compliance burdens could be imposed on businesses, and the proposal could lead to "double-dip" citations for infractions (once under existing rules, and once under the new I2P2 requirements). In addition, the proposal could negatively impact employers that already have effective safety and health programs in place on their jobsites. Burdens on small businesses also must be closely scrutinized, as OSHA has been known to significantly underestimate costs. While safety and health management programs in the workplace are generally supported by employers, many have voiced concerns about OSHA's decision to issue a rule rather than utilize cooperative tactics to better proliferate these potentially useful programs.<sup>38</sup>
  - Status: Long-Term Action. Still at pre-rule, pre-SBREFA stage. OSHA previously stated publicly that I2P2 was the agency's highest regulatory priority.<sup>39</sup>

<sup>35</sup> See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=1235-AA04> and <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=1235-AA04>

<sup>36</sup> "Long-Term Actions" are items under development but for which the agency does not expect to have a regulatory action within the 6-12 months after publication in the regulatory agenda.

<sup>37</sup> See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=1218-AC48>.

<sup>38</sup> Coalition for Workplace Safety (CWS): *OSHA White Paper Makes Case for Prevention Programs but Not for Regulation*. See: <http://bit.ly/QCBxKt>. Rep. Tim Walberg (R-Mich): *More Bad News for U.S. Workers, Businesses from OSHA*. See: <http://bit.ly/RV4Tcb>.

<sup>39</sup> EHS Today: Safety 2013: OSHA Administrator Michaels Calls I2P2 "Highest Priority" See: <http://ehstoday.com/osha/safety-2013-osha-administrator-michaels-calls-i2p2-highest-priority>.

CHARLES L. GRECO, President  
MARK KNIGHT, Senior Vice President  
ART DANIEL, Vice President  
JOSEPH M. STELLA, Treasurer  
STEPHEN E. SANDHERR, Chief Executive Officer  
DAVID LUKENS, Chief Operating Officer

**AGC of America**  
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA  
**Quality People. Quality Projects.**



May 1, 2015

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
& Governmental Affairs  
United States Senate  
Washington, D.C. 20510

The Honorable Thomas Carper  
Ranking Member  
Committee on Homeland Security  
& Governmental Affairs  
United States Senate  
Washington, D.C. 20510

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
Washington, D.C. 20510

The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
Washington, D.C. 20510

Dear Chairman Johnson, Ranking Member Carper, Chairman Lankford and Ranking Member Heitkamp:

Thank you for the invitation to provide an overview of the mounting regulatory burdens faced by the construction industry. The complexity of the rulemaking process and the regulations promulgated through it are a constant topic of frustration for our members. The construction industry uses a lot of labor, materials, equipment and acreage, so we are governed by regulations that deal with personnel, production, process and the environment. As such, we are very sensitive to rules, regulations and enforcement efforts by federal agencies that seem impractical, imprudent or impossible to comply with.

Many of the rules and regulations detailed in the attached pages have been the subject of rulemakings, congressional oversight and modifications in enforcement or interpretation over the last few years. They are of concern for contractors working in all areas of the country. The list of agency actions attached to this letter is not an exhaustive list. It is, instead, a quick overview of issues we believe should be highlighted because of their negative or potentially negative impacts on the construction industry.

Thank you again for taking on this important inquiry. We look forward to working with you to flesh out any additional information that your committee may need during your investigative process, including information gathering, witnesses for hearings and background information on regulatory initiatives that impact the industry.

Sincerely,

Jeffrey D. Shoaf  
Senior Executive Director  
Government Affairs

Enclosures

Federal Election Campaign Act

Issue	Background	Negative Impact	Needed Modifications to Legislation
<p>The Federal Election Commission's (FEC's) onerous "prior approval" process for corporate trade association PACs.</p>	<ul style="list-style-type: none"> <li>The FEC's prior approval process is an anachronism that serves no substantive purpose and only functions to drain association resources.</li> <li>It comes from the 1978 amendments to the Federal Election Campaign Act in an overreaction to the FEC's "SUNPAC" decision (allowing corporations to form PACs), based on concerns that corporate political programs would dwarf other's and "exploit" the law to gain even more dominance via association PACs.</li> <li>The Act requires that association PACs must obtain separate and specific approval in writing from member corporations before soliciting their executive or administrative staff (or in very rare instances, shareholders). Furthermore, the regulation states that a corporate member may approve solicitations by only one trade association per calendar year.</li> </ul>	<ul style="list-style-type: none"> <li>Ensuring compliance with the prior approval regulation is extremely time-consuming and costly. A PAC manager spends countless hours communicating the need for prior approval to his or her association's membership. For larger associations with thousands of member companies, this becomes unduly taxing.</li> <li>Confusion at the corporate member company level is a consequence of the prior approval regulation. First, individuals eligible to contribute are confused as to why their company must first give permission for them to be solicited. Second, many companies are members of multiple corporate trade associations. When presented with the stipulation that prior approval can only be granted to one PAC in a calendar year, companies do not understand why they are limited. As a result, many are apprehensive to choose one PAC over another and simply choose not to participate at all.</li> <li>The documentation and retention requirement for prior approval is a recordkeeping nightmare for associations.</li> </ul>	<ul style="list-style-type: none"> <li>Amend the Federal Election Campaign Act of 1971 to expand the ability of trade associations to solicit contributions from the stockholders and executive or administrative personnel of their member corporations, and for other purposes. Specifically, Section 316(b)(4)(D) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30118(b)(4)(D)) should be amended by striking "to the extent that" and all that follows and inserting a period.</li> </ul>



U.S. ENVIRONMENTAL PROTECTION AGENCY

Contemplated, Recently Proposed or Issued Rule	Negative Impact to the Construction Industry	Needed Modifications to the Rule	Needed Modifications to the Rulemaking Process - regulation is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law...
<p><b>Clean Water Act Jurisdiction Proposed Rule</b></p> <p>The U.S. Army Corps of Engineers (Corps) and EPA proposed on April 21, 2014, a new "Definition of 'Waters of the United States' under the Clean Water Act" (proposed rule). This proposed rule intends to clarify the extent of federal control over construction work in "waters of the United States," which has been a continued source of confusion following competing decisions in two U.S. Supreme Court cases.</p> <p>The proposed rule was sent to the Office of Management and Budget (OMB) on Apr. 06, 2015.</p> <p>EPA also undertook a scientific report - "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence," which was developed at the same time as the rule instead of waiting for the Science Advisory Board to peer review the work before writing the rule. Unsurprisingly the study concludes that all waters are connected in some way but fails to distinguish "any connection" from a "significant connection."</p>	<p>The proposed rule is a drastic expansion of federal CWA jurisdiction. Beyond the traditionally navigable waters, many new waters are considered jurisdictional. Tributaries of traditionally navigable waters are jurisdictional, defined to specifically include ditches. If it is not a tributary, the rule also claims jurisdiction over waters neighboring or adjacent to navigable waters and their tributaries. This includes any water in the floodplain or riparian area, both terms without a clear jurisdictional limit. If there is anything left that is not considered a tributary or adjacent/neighboring water, agencies can aggregate "other waters" within a "single landscape unit" to find a significant nexus.</p> <p>Expanding jurisdiction affects the entire Clean Water Act. EPA's economic analysis has been limited to costs associated with section 404 of the Clean Water Act and fails to consider the full costs of implementing expanded jurisdiction. The cost of this expansion will impact all programs, including section 303 water quality standards, section 311 oil spill prevention control and countermeasures planning and reportable quantities of hazardous substances programs, section 401 water quality certifications, the section 402 National Pollutant Discharge Elimination System (NPDES) program, and the section 404 dredge and fill permit program - as well as various reporting requirements under the National Contingency Plan for CERCLA and the Oil Pollution Act (OPA). All of these programs affect construction, meaning EPA has significantly underestimated the costs.</p>	<p>Expanding jurisdiction causes delays and increases construction costs. Expanding federal authority over water and land use would massively increase the number of construction sites required to obtain a federal clean water act permit. The federal permitting process would slow economic growth by increasing the cost of, and delaying, necessary improvements to the public and private infrastructure that forms the foundation of our nation's economy, such as: highways, bridges, mass transit, airports, flood control, navigation, schools, and drinking and waste water facilities.</p> <p>The proposed rule creates more confusion about what is jurisdictional. The proposed rule will not provide clarity or streamline the permitting process as the agencies have claimed. The undefined and potentially unlimited floodplain and riparian area determinations would be made by "best professional judgment of the regulator," creating more guessing and potential for inconsistency. EPA also claims jurisdiction through aggregation of "other waters" within a "single landscape unit," which is undefined. This puts the burden of proof on the landowner to prove they are not jurisdictional.</p>	<p><b>Redo The Rule.</b> Recognizing that non-federal waters are not unprotected, just regulated at the state and local level, there is no reason for EPA to have rushed through the rulemaking prior to completing and peer reviewing their scientific analysis. They also settled for a deeply flawed and inadequate economic analysis. Starting from a standpoint of "all waters are in until they are out" is a backwards way of regulating and contrary to the central tenants of the CWA. AGC calls on the Corps and EPA to redo the rule, and address the serious process and substantive problems with this rulemaking.</p>
<p><b>Post-Construction Stormwater Requirements in Municipal Stormwater Permits</b> - The U.S. Environmental Protection Agency (EPA) has stopped work to promulgate a new national rule to restrict the discharge of stormwater from developed sites (after construction is complete). EPA continues to carry out the objectives of its <i>deferred</i> rulemaking via its existing permit</p>	<p>Even though EPA has abandoned its national rulemaking effort, the agency is still trying to control stormwater flow from newly developed and redeveloped sites via strict mandates in MS4 permits that apply in areas where EPA remains the National Pollutant Discharge Elimination System (NPDES) permitting authority [including Washington, D.C.; Albuquerque, N.M.; several small towns in New</p>		<p>AGC maintains that EPA lacks authority to mandate such results and is concerned by the precedent that is being set for future permitting in authorized states. Approximately half of all Phase II MS4 permits and a quarter of Phase I MS4 permits are currently expired, according to EPA. In most states, EPA has authorized</p>

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<p>process for municipal separate storm sewer systems (MS4s), which is legally questionable. EPA's "post-construction" rule for stormwater runoff was expected to significantly expand the federal program and set nationwide performance standards to retain/infiltrate stormwater discharges (onsite) at newly developed and redeveloped sites. At one point, EPA even considered requiring owners to alter/retrofit their current properties. But after the agency missed all of its deadlines to propose the rule, talks between EPA and the Chesapeake Bay Foundation - plaintiffs in the 2010 legal settlement that required the regulation - collapsed, leaving the agency with no formal target to publish a proposal. Recently, the agency confirmed that it has "reallocated" resources away from the rulemaking.</p> <p>AGC has met many times with EPA Office of Water leaders since 2009, and the association's advocacy work played a large part in helping to guide EPA to the correct conclusion that bringing all developed sites (nationwide) under the federal stormwater program does not make economic or regulatory sense and threatens to infringe on local land-use decisions. In lieu of a national rulemaking, EPA said it will provide incentives, technical assistance and other tools to communities to encourage them to implement strong stormwater programs. This includes leveraging existing requirements to strengthen municipal stormwater permits as well as the continued promotion of green infrastructure as an integral part of stormwater management.</p>	<p>Hampshire; and certain military bases]. Notable provisions include—</p> <ul style="list-style-type: none"> <li>• New or redevelopment projects creating or replacing <math>\geq 5000</math> ft<sup>2</sup> of "hard surfaces" must capture/retain all stormwater volume from the 95th percentile storm.</li> <li>• New or redevelopment projects creating <math>\geq 10,000</math> ft<sup>2</sup> of impervious surfaces cannot create stormwater flows that exceed pre-development flow conditions (i.e., forest land cover condition) for events up to the 50-year storm.</li> <li>• Municipalities must establish standards for site designs within their jurisdiction that "minimize the project's roadway surfaces and parking areas, incorporate clustered development, and ensure that vegetated areas are designed to receive stormwater dispersion from all developed project areas."</li> </ul>		<p>the state environmental agency to manage and administer the NPDES permit program.</p>

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<p><b>Chesapeake Bay Watershed Clean-up Plan</b> - A TMDL is the calculation of the maximum amount of a pollutant that a water body can receive and still meet water quality standards and how the "load" is allocated among the various sources of that pollutant. The Chesapeake Bay TMDL, which EPA developed in December 2010 as a result of a settlement reached with the Chesapeake Bay Foundation, includes nitrogen, phosphorus and sediment pollutant allocations for every source and every watershed in the region. The TMDL calls for all restoration actions to be completed by no later than 2025, with an interim goal of having sufficient practices in place by 2017 to reduce pollution loads by 60 percent. The watershed states of Delaware, Maryland, New York, Pennsylvania, and West Virginia, along with the District of Columbia, have developed the watershed implementation plans detailing the steps each will take to meet its obligations under the TMDL's. "Phase II" plans describing how individual states will work with localities within their boarders were due last March.</p> <p>Other states with water quality concerns will look to the Chesapeake Bay TMDL as a guide or model for developing their own discharge pollution limits.</p>	<p>Because EPA has identified development and developed land (including stormwater runoff from construction sites) as a contributor to the poor water quality of the Chesapeake Bay, the Bay TMDL will likely impact new construction in the Bay area in the future. The state WIP's all reference erosion and sedimentation controls and some states may include growth restrictions, low impact development strategies, strict effluent limits, and post-construction stormwater controls. Post-construction controls could include retrofits of stormwater controls for existing development, performance standards, tracking and reporting. States may heighten their inspection and enforcement activities. Implementation of the plans will be expensive and some states are entertaining stormwater fees and pollution trading schemes to pay for the TMDL.</p> <p>After 2013, states within the Chesapeake Bay watershed must have programs in place that "offset" all new or increased discharges of nutrients, phosphorus or sediment in the watershed (compared to the 2010 TMDL baseline) through the purchase of "credits", off-site mitigation, or other means. Many states have not finalized plans for trading, offsets for new growth programs, and addressing septic nutrient loadings.</p>	<p>The Chesapeake Bay TMDL will have severe economic impacts and its numeric limits are based on flawed data and modeling practices that have been implemented without adequate public comment, consideration or transparency. EPA should re-evaluate the loadings in the final TMDL, and address well-documented concerns with the underlying model before finalizing the clean-up plan for the Bay watershed. Alleged flaws in the data and modeling have led EPA to set overly aggressive timelines and pollution loadings.</p>	<p>The Bay TMDL is 2000+ pages and encompasses several sub-TMDLs for various tributaries. EPA did not provide enough time for the public to comment, especially considering that many small businesses, farms, and home-owners would be impacted by the TMDL. EPA failed to carry out a proper cost-benefit analysis before</p>
<p><b>National Ambient Air Quality Standards (NAAQS)</b> - After years of delay, the U.S. Environmental Protection Agency (EPA) announced on Nov. 26, 2014 that it is proposing to strengthen the federal ozone air quality standards to within a range of 65 to 70 parts per billion (ppb), while taking comment on a level as low as 60 ppb. The current ozone standard, set in 2008, is at 75 ppb.</p> <p>The proposal would greatly increase the number of counties that face "nonattainment" — thereby triggering the</p>	<p>Construction companies will feel the effects of tighter ozone limits, mainly via restrictions on equipment emissions in areas with poor air quality (direct impact), as well as additional controls on industrial facilities and planning requirements for transportation-related sources (indirect impact). Notably, nonattainment counties that are out of compliance with CAA ozone standards could have federal highway funds withheld, slowing or stopping badly needed transportation infrastructure improvements.</p>		<p>EPA should let existing air emission/fuel regulations and voluntary programs work before tightening NAAQS rules, especially considering the continual phase-in of new federal engine standards and the recent switch-over to exclusively ultra-low-sulfur diesel fuel.</p> <p>In the future, EPA should consider counties' progress towards current NAAQS before setting new ones as well as consider the cost of implementing new standards including the loss of opportunities, including transportation improvements.</p>

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<p>formation of state implementation plans (SIPs) to reduce ozone emissions. EPA maps show that 358 counties would violate a 70 ppb standard, based on 2011-2013 monitoring data. An additional 200 counties would violate a 65 ppb standard, raising the total to 558 counties.</p>			<p>In addition, Congress should amend the Clean Air Act to state that the EPA Administrator should consider costs when setting NAAQS. This would allow the EPA to consider economic tools such as benefit-cost analysis, cost-effectiveness analysis, and risk-analysis in setting NAAQS.</p>
<p><b>Lead Renovation, Repair and Painting (LRRP) Program</b> - EPA's final LRRP rule, which took effect on April 22, 2010, requires remodeling and renovation firms that child-occupied facilities to be EPA certified and follow rigorous, costly work practices supervised by an EPA-certified renovator when painted surfaces will be disturbed. In July, 2010, EPA removed the "Opt-Out" provision from the rule which allowed homeowners without children under age six or pregnant women residing in the home to allow their contractor to forego unnecessary work practices.</p> <p>In addition, EPA is gathering information on how to expand the LRRP Program requirements that are already on the books to cover public and commercial building renovation and remodeling. This action comes in response to a legal settlement agreement that the Agency made with several environmental and public health advocacy groups.</p>	<p>Removing the opt-out provision without any new data justifying such an action, more than doubled the number of homes subject to the LRRP Rule to 78 million and added more than \$336 million per year in compliance costs to the regulated community. Moreover, the costs are far greater because of EPA's flawed economic analysis, which significantly underestimated the true compliance costs.</p> <p>EPA has also failed to meet the requirements of its own rule by failing to approve an accurate lead test kit that produces no more than 10 percent false positives. This means in many cases, consumers are needlessly paying additional costs for work practices that are not needed and provide no benefit, but must be employed because of false positive test results.</p> <p>The public benefits of the rule have also been hindered by EPA's lack of consumer education, and the agency's focus on enforcing paperwork violations by certified contractors rather than safe work practices.</p> <p>EPA has now begun the process to consider extending the LRRP Program requirements to commercial and public. Commercial office buildings are re-painted and "renovated" on a continuous basis as part of on-going maintenance. Given that regulations are triggered in "target housing" if 6 square feet of painted surfaces are disturbed - simply taking residential rules and applying them to commercial buildings will mean a never-ending cycle of lead paint testing, contractor certification, worker training, and comprehensive management practices - all increasing the cost of construction. What is more, in the residential context, it is widely</p>	<p>Several changes to the current LRRP rule are needed, including 1) restoring the "Opt-Out" provision; 2) suspending LRRP rule implementation if EPA cannot approve a test kit that meets the regulation's requirements; 3) allowing a <i>de minimis</i> exemption for first-time paperwork non-compliance by certified contractors; and 4) providing an exemption for renovations after a natural disaster.</p> <p>In addition, EPA should not expand the LRRP rule to commercial and public buildings until it conducts a study demonstrating the need for such action. In order to regulate LRRP activities in commercial and public buildings, EPA would need to show that such activities create a lead-based paint hazard. EPA must conduct a study of lead paint hazards in commercial buildings before it can issue regulations on that subject. The agency has no alternative to avoid doing the study, and it cannot simply take a study from the residential context and use that as the basis to regulate renovation and remodeling in offices, stores, hotels, industrial sites and other commercial buildings where children largely are not present on a continuous basis.</p>	<p>The Toxic Substances Control Act (TSCA), 15 U.S.C. § 2682(c)-(d), requires EPA to first study lead hazards in commercial buildings that arise from renovation and remodeling activities before it develops pertinent regulations. EPA has never studied lead hazards in commercial space. Its staff and advisors from its Scientific Advisory Board freely acknowledge there is a lack of information on the existence of, and any causal impacts from, lead-based paint hazards caused by remodeling activities in commercial buildings. Congress should compel EPA to complete the commercial buildings study first before it issues pertinent regulations. Moreover, Congress should ensure that such a study is completed and released before the agency promulgates a <i>proposed</i> set of regulations in the <i>Federal Register</i>.</p>



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	<p>recognized that there are simply not enough certified contractors to perform remodeling activities that satisfy EPA's rules. That problem will be magnified exponentially for commercial buildings. In addition, expanded LRRP rules could likely impose regulatory costs that are so high they would nullify any financial incentives offered for energy efficiency projects, and thereby discourage building upgrades designed to lower power consumption and reduce greenhouse gas emissions.</p>		
<p><b>eReporting to EPA on Compliance with Storm Water Permits</b>  The proposed National Pollutant Discharge Elimination System (NPDES) Electronic Reporting Rule would require all construction site operators covered by an NPDES permit to submit a variety of permit-related information electronically instead of using paper reports. The proposed rule would make every construction company's stormwater permit records, inspection results and compliance history accessible to the public.</p>	<p>AGC expressed concern about the accuracy of data that would appear in EPA's publicly-available database(s), the likelihood that such data will be misinterpreted or misconstrued, and the potential disclosure of confidential business information. The proposed e-reporting rule would make each company's site-specific information, such as inspection and enforcement history, pollutant monitoring results, and other data required by permits accessible to the public through EPA's website.</p>		
<p><b>EPA Wage Garnishment</b>  The EPA has proposed a rule under which they could garnish employees wages for violations (or allegations) of environmental law without court order. EPA would be allowed to garnish up to 15 percent of the "disposable pay" of delinquent debtors who do not work for the federal government via a process known as administrative wage garnishment - all without a court order.</p>	<p>Environmental rules are complex and difficult to understand. With fines of up to \$37,500 per day per violation, civil penalties can reach into the millions of dollars. Under most programs, strict liability may impose daily penalties without regard to fault. And the regulated community often faces a long lag time between the inspection date and the date of enforcement action, which can rack up huge fines and make interpretation of the data more difficult. This precipitous garnishment of wages by EPA could quickly bankrupt small businesses or individual landowners. In one month's time, a landowner could be liable for millions in penalties. Even more troubling, recent reports show that EPA's wage garnishment proposal would do little to bring about a cleaner environment or solve delinquency problems. According to the American Action Forum's analysis of EPA's enforcement data, a majority of EPA fines for individuals involve paperwork infractions - not environmental</p>	<p>The rule should be rescinded in favor of EPA's existing fine collection processes.</p>	

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<p>Termination of Industry Partnerships - In early 2009, EPA terminated a long-standing voluntary program--the EPA Sector Strategies Partnership. For several years, AGC served as the construction industry's representative in this program. Together AGC and EPA sought to find workable solutions to long-standing industry-related environmental challenges, to ease regulatory burdens that impair environmental results, to increase the implementation of environmental management systems by contractors and to measure progress.</p>	<p>contamination -- including fines for failing to file notifications or reports with EPA.</p> <p>The threat of wage garnishment may unfairly compel anyone who is accused of violating an environmental rule to agree to costly settlements to end the disputed claims (and avoid racking up ruinous penalties for each day the alleged violation continues). The alternative would be to go through lengthy and costly litigation to challenge EPA's authority, also facing fines that the agency could garnish from your wages, while meeting the burden of proving that EPA acted arbitrarily or capriciously. Because, for example, the definition of "water of the United States" remains ill-defined, this is a very high hurdle.</p>		
	<p>The termination of this voluntary program, the denouncing of construction in the EPA's water action plan, and the agency's new budget that focuses on enforcement and the administrative support of new rules --- all demonstrate that this administration is not interested in educating the regulated community or working with industry to improve environmental performance.</p>	N/A	N/A

OFFICE OF MANAGEMENT AND BUDGET (OMB)

<p>Contemplated, Recently Proposed or Issued Rule/Legislation</p> <p>Project Labor Agreements</p>	<p>Negative Impact to the Construction Industry</p> <ul style="list-style-type: none"> <li>Encourages Federal agencies to force open shop contractors to enter into agreement with unions.</li> <li>This rulemaking has already caused great upheaval in the Federal market, created an environment that is encouraging bid protests, strained relationships between Federal owners and the contracting community, placed Federal agency career procurement personnel under an inordinate amount of political pressure to meet the Administration's expectations to award more PLAs.</li> <li>These many factors combined has created the potential to push many contractors out of the Federal market.</li> </ul>	<p>Needed Modifications to the Rule/Legislation</p> <ul style="list-style-type: none"> <li>Repeal Final Rule that was issued April 13, 2010.</li> </ul>	<p>Needed Modifications to the Rulemaking Process/Legislation</p> <ul style="list-style-type: none"> <li>President Obama issued this Executive Order in February 2009. Consequently, this rulemaking has already caused great discord amongst the Federal construction agencies. No one agency is implementing the rule the same way as the other. Some agencies, such as GSA, have gone so far as to give a price preference for bids accompanied by a PLA. We believe this is a violation of the Competition in Contracting Act (CICA) and deserves review.</li> <li>Congress should also investigate the possible reach the White House may have extended to the Federal agencies with respect to ensuring specific construction projects have PLA mandates.</li> </ul>
<p>"Fair Pay &amp; Safe Work Places" Executive Order</p>	<ul style="list-style-type: none"> <li>The EO will function in an unreasonable, inconsistent and ineffective manner, excluding from service to the government not only bad-actor contractors but also well-intentioned, ethical contractors.</li> <li>The EO needlessly creates a new, complicated and unmanageable bureaucracy to address problems for which a host of federal laws, regulations and bureaucracies already hold jurisdiction.</li> <li>The EO will lead to crippling delays in federal contracting, encourage unnecessary litigation, and increase procurement costs to the government and taxpayers.</li> </ul>	<ul style="list-style-type: none"> <li>Prohibit funding for or prohibit the rulemaking process to implement this EO.</li> </ul>	<ul style="list-style-type: none"> <li>Contractors are already subject to a multitude of federal laws, regulations and executive actions governing labor and employment. These laws include a host of exclusive penalties and remedies for violations. These statutes also provide exclusive remedies for violations. However, the EO provides an additional remedy not contemplated or addressed in these statutes.</li> <li>In addition, the Federal Acquisition Regulation (FAR) already provides a number of avenues, like suspension or debarment, for federal agencies to deal with bad actors that willfully or repeatedly violate the law. Reporting mechanisms for violations and performance issues already exist through the Federal Awardee Performance and Integrity Information System, the Contractor Performance Assessment Reporting</li> </ul>

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<p>Secret Department of the Army Rulemaking removal of technical experts from the contracting process</p>	<ul style="list-style-type: none"> <li>The Department of the Army issued a final regulation—without public notice or public comment—to the Army Federal Acquisition Regulation in January 2015 that would remove contracting authority for 400 U.S. Army Corps of Engineers (USACE) professional engineers.</li> <li>Eliminating 400 professionals with construction expertise would only serve to massively delay contract procurements and awards, contract modifications and other essential contracting steps necessary to deliver a construction project on budget and on time both domestically and internationally.</li> <li>The rule removes construction experts from having the authority to make construction contracting decisions for the safe and efficient construction of barracks that house and protect our soldiers and levees and dams that guard millions of Americans from floods.</li> <li>Delays in contract awards and contract modifications deleteriously impact contractors' finances. A contractor, especially small businesses, should not be expected to wait months and even</li> </ul>	<ul style="list-style-type: none"> <li>This rule should be repealed. At a minimum the rulemaking process should occur in the traditional way, which includes public comment.</li> <li>Government acquisition professionals should be encouraged to have expertise in the area from which they procure goods and services. This rule does the opposite.</li> </ul>	<p>System, Past Performance Information Retrieval System and System for Award Management, among others.</p> <ul style="list-style-type: none"> <li>If the Administration believes that the penalties in these laws and reporting mechanisms do</li> <li>not sufficiently deter violations, it should work with Congress to address this within existing laws rather than create a new bureaucratic system that will subjectively and inconsistently penalize contractors and lead to increased costs and delays in federal procurement.</li> <li>This rule should be repealed. At a minimum the rulemaking process should occur in the traditional way, which includes public comment.</li> </ul>

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	<p>years for payment because a contracting officer does not understand the business from which she is procuring services. Such an occurrence can lead many contractors to default on their projects or even close their doors.</p>		

**COUNCIL ON ENVIRONMENTAL QUALITY (CEQ)**

Contemplated, Recently Proposed or Issued Rule	Negative Impact to the Construction Industry	Needed Modifications to the Rule	Needed Modifications to the Rulemaking Process - regulation is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law...
<p>Updated Principles and Guidelines (P&amp;G) for Water and Land Related Resources Implementation Studies</p>	<p>Would substantially revise how the large range of modern water projects—locks and dams, levees, navigation channels, ecosystem restoration, flood risk management, watershed protection, water supply projects – are designed, and constructed. Many of these needed infrastructure projects may never be built if these regulations are promulgated.</p>	<ul style="list-style-type: none"> <li>• The final CEQ issued document should be scrapped and process restored with U.S. Army Corps of Engineers (USACE), as directed by Congress.</li> <li>• The P&amp;G is filled with ambiguity and is in dire need of substantial revision and clarification.</li> </ul>	<ul style="list-style-type: none"> <li>• The P&amp;G revision was ordered to be undertaken by USACE at the direct order by the Congress when it enacted the Water Resources Development Act (WRDA) of 2007.</li> <li>• Section 2031 of the Act directed the Secretary of the Army (Civil Works) to revise the P&amp;G adopted by the U.S. Water Resources Council in March 1983.</li> <li>• In 2009, CEQ -- in direct violation of the will of the Congress -- took control of the P&amp;G revision and expanded the scope to make the P&amp;G revisions apply to all Federal agencies.</li> <li>• In December 2014, CEQ issued a final P&amp;G document.</li> </ul>

US Occupational Safety and Health Administration

Contemplated, Proposed or Issued Rule	How it will negatively impact the construction industry	How the rule should be modified	How the rulemaking process should be modified
<p><b>Injury and Illness Prevention Program</b> - OSHA has proposed to develop a rule requiring employers to implement an Injury and Illness Prevention Program. The Agency currently has Voluntary Safety and Health Program Management Guidelines, published in 1989.</p>	<p>The proposed rule would require employers to establish and frequently update programs to address safety and health hazards that may not be currently regulated.</p>	<p>Remove the requirement for the development of company safety programs that address hazards that are not federally regulated. OSHA should instead provide simple guidelines to the small employer community to develop and implement an effective safety and health program that focuses on the regulated hazards that are significant threats in the workplace.</p>	<p>*Although the most recent DOL/OSHA regulatory agenda indicates this has been moved to "long-term actions," the agency still suggests that this is a priority.</p>
<p><b>Occupational Exposure to Crystalline Silica</b> - OSHA announced in the Agency's fall 2010 regulatory agenda to pursue a new comprehensive standard for crystalline silica to require exposure monitoring, medical surveillance, and worker training in 2011. The public comment period - including the informal public hearing - concluded in August 2014. The agency has since stated publicly that a final rule should be expected early-to-mid 2016 resulting in many stakeholders questioning whether the agency will fully consider the concerns raised with the proposed rule.</p>	<p>The proposed rule recommends permissible exposure limits (PEL) of 50µg/m3 or 25µg/m3 which may be impossible to comply with in the construction industry. During the</p>	<p>Provide realistic/achievable PEL's based on real testing in the industry.</p>	
<p><b>Cooperative Agreements</b> - OSHA proposes to revise its regulations for the federally funded On-site Consultation Program to: a) define sites which would receive inspections regardless of Safety and Health Achievement Recognition Program (SHARP) exemption status; b) allow Compliance Safety and Health Officers to proceed with enforcement visits resulting from referrals at sites undergoing</p>	<p>The proposed rule would eliminate the separation of OSHA's consultation program and enforcement subjecting small employers to enforcement activity while participating in the consultation program, SHARP, or Pre-SHARP status.</p>	<p>This rule will discourage the use of OSHA inspectors for preventative safety audits and will reduce cooperation between OSHA and the regulated industry. It should never be promulgated.</p>	<p>*OSHA withdrew proposal in 2013</p>

US Occupational Safety and Health Administration

<p>Consultation visits and at sites that have been awarded SHARP status; and c) limit the deletion period from OSHA's programmed inspection schedule for those employers participating in the SHARP program. SHARP is a recognition program that OSHA administers to provide incentives and support for small employers to develop, implement, and continuously improve effective safety and health programs at their jobsites.</p>			
<p><b>Musculoskeletal Disorders (MSD) Column</b> - OSHA is proposing to change its Recording and Reporting Occupational Injuries and Illnesses regulation. OSHA has reconsidered the need for a 300 Log column for WMSD, and for defining "musculoskeletal disorders" for checking the column.</p>	<p>This rule requires business owners to fill in additional speculative medical information on OSHA log for injuries for which there is no applicable standard. Requires those maintaining the OSHA 300 log to make medical assessments/diagnosis beyond their capabilities. Would also require additional medical costs to accurately assess/diagnose reported conditions to achieve compliance.</p>	<p>This added paperwork burden does not support a standard that has been issued, it should never be promulgated.</p>	
<p><b>Building Inspectors Partnership</b>- Secretary of Labor Hilda L. Solis sent letters to the mayors of selected cities proposing that OSHA work with and train local building inspectors on hazards associated with the four leading causes of death at construction sites. Under this program, building inspectors would notify OSHA when they observe unsafe work conditions. OSHA would then send a federal agency compliance officer to that jobsite for an enforcement inspection.</p>	<p>This policy provides building inspectors the authority to act as an extension of OSHA enforcement that lacks the specific knowledge and expertise to properly assess construction hazards. The training of the building inspectors as stated in the letters would be merely a 1 1/2 hour course which is inadequate to properly educate the building inspectors in the proper identification of the hazards mentioned in the letter. This policy also has the potential for placing additional strain on relationships between building inspectors and contractors.</p>	<p>This policy should never be implemented and has been rescinded</p>	<p>This policy should never be implemented and has been rescinded</p>
<p><b>Backing Operations</b> - OSHA is proposing to promulgate a rule regulating backing operations involving construction equipment.</p>	<p>Would require the use of engineering controls (cameras, radar, sonar, etc.) to minimize or eliminate the number of struck-by incidents on construction sites.</p>	<p>Consult with construction industry experts to explore alternatives (best practices, awareness materials, etc.) to the proposal.</p>	<p>*The current DOL/OSHA regulatory agenda indicates this has been moved to "long-term actions" with agency speaking very little about moving forward.</p>



US Occupational Safety and Health Administration

<p><b>Interpretation of Feasibility:</b>  <b>Noise Standards</b> - OSHA proposes to interpret the term <i>feasible</i> in these provisions as having the meaning of "capable of being done," or "achievable." <i>Feasibility</i> encompasses both economic and technological considerations, but this proposal addresses only economic feasibility. OSHA proposes to consider administrative or engineering controls economically feasible if they will not threaten the employer's ability to remain in business or if the threat to viability results from the employer's having failed to keep up with industry safety and health standards. OSHA further intends to change its enforcement policy to authorize the issuance of citations requiring the use of administrative or engineering controls when these controls are feasible in accordance with their interpretation.</p>	<p>Requires employers to implement costly engineering and/or administrative controls that may prove ineffective. It also imposes liability for a diagnosed hearing injury on a current employer without determining that injury was sustained during time of employment with current employer or even if the injury is work related.</p>	<p>OSHA should maintain current enforcement policy</p>	<p>*OSHA withdrew proposal in 2011.</p>
<p><b>Administrative Policy Change to Penalty Structure</b> - OSHA has implemented several changes to its administrative penalty calculation system. Administrative penalty adjustments have been made to several factors which impact the final penalty issued to employers. The most significant changes are 1) the time frame for considering an employer's history of violations will expand from three years to five 2) the time period for considering the classification of repeated violations will be increased from three to five years; and 3) the 10% reduction for employers with a strategic</p>	<p>This policy changes how penalties are calculated. It will result in more resources dedicated to vacating citations and penalties, increasing litigation by employers possibly creating a backlog of OSHA cases very similar to that currently being experienced by the Mine Safety and Health Administration (MSHA).</p>	<p>OSHA should maintain the current penalty structure.</p>	

US Occupational Safety and Health Administration

<p>partnership agreement will be eliminated.</p>			
<p><b>Improved Tracking of Workplace Injuries and Illnesses (Electronic Reporting):</b>          OSHA issued a proposed rule to amend its current recordkeeping regulations to require electronic submission of injury and illness information. The proposed rule would require employers with more than 250 employees to electronically submit detailed OSHA 300 A log information on a quarterly basis while employers with 20 – 249 employees would be required to submit their summary of injuries and illnesses annually. Information submitted by employers would then be made available for public access and review.</p>	<p>The submitted data will be misinterpreted and subsequently misused to disparage employers. Additionally, OSHA could use the information to circumvent their current enforcement targeting strategy for construction which does not rely on injury and illness data.</p>	<p>This rule should never be promulgated.</p>	
<p><b>Clarification of Employer's Obligation to Make and Maintain Accurate Records of Each Recordable Injury and Illness -</b>          After the decision of the United States Court of Appeals for the District of Columbia Circuit in <i>AKM LLC v. Secretary of Labor (Volks II)</i>, 675 F.3d 752 (D.C. Cir. 2012) which found that employers cannot be cited more than six months after the occurrence of a violation, OSHA has proposed to amend its recordkeeping regulations to clarify that the duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation. The duty to record an injury or illness continues for as long</p>	<p>This would potentially expose employers to citations and penalties extending for a five year period for errors found on the OSHA 300 A Log. Given the complexity of the recordkeeping rule, this could include "honest" mistakes made in the recording of an injury or illness.</p>	<p>This rule should never be promulgated.</p>	

US Occupational Safety and Health Administration

<p>as the employer must keep records of the recordable injury or illness.</p>			
<p><b>Crane Operator Qualification in Construction</b> — OSHA has developed a draft proposal to revise the certification requirement and include evaluation responsibilities for employers in the current standard. Additionally, the draft standard includes operator-evaluation responsibilities for controlling contractors.</p>	<p>While the removal of "capacity" in the certification process is a positive development, the draft revisions addressing evaluation/qualification present compliance challenges (feasibility and economic) to the industry while also misplacing the responsibility to validate evaluations conducted by another employer on general contractors and construction managers.</p>	<p>OSHA should stick with their longstanding definition and approach to qualified persons which allows the employer to best determine who is qualified and how to go about the qualification process. The rule should also relieve controlling contractors and construction managers of any responsibility to determine the validity of another employers evaluation process.</p>	

U.S. Occupational Safety and Health Administration

<p><u>Advisory Committee for Construction Safety and Health (ACCSH)</u> - The ACCSH is a continuing advisory body established by statute that provides advice and assistance in construction standards and policy matters to the Assistant Secretary.</p>	<p>ACCSH is tasked with advising the Assistant Secretary of Labor for OSHA in the formulation of construction safety and health standards and related policy under the Construction Safety Act (CSA) and OSH Act.</p>	<p>In the last three years, the committee's role/authority appears to have diminished considerably in advising the agency on construction safety and health issues. Frequently, rulemakings and/or policy changes have been initiated or implemented without consulting with the safety and health experts that make up this advisory committee. We believe that for the agency to be successful in reducing injuries and illness construction industry experts must be involved.</p>	
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**US Department of Transportation (USDOT)  
Proposed or Existing Rules**

Proposed Rule	Opportunities for Improvement
<p><b>DOT DBE regulations</b></p> <p>The US DOT Disadvantaged Business Enterprise (DBE) program has been operating since 1985. In June 2013, DOT's Office of Inspector General (OIG) issued a report highly critical of DOT's administration of the DBE Program. The OIG confirmed many of the concerns the industry has pointed out in the past specifically that the DBE goals set by states do not reflect the true availability of ready, willing and able DBEs.</p> <p>OIG found that:</p> <ul style="list-style-type: none"> <li>• State DOTs are focused on certifying firms for the program rather than on how successful these firms are once they've entered the program.</li> <li>• DOT has limited success in achieving its program objective to develop DBEs to succeed in the marketplace.</li> <li>• Due to the competitive advantages a successful DBE gains from the program, there is little incentive for firms to grow beyond the DBE program.</li> <li>• Nearly half of those DBEs randomly selected by OIG have been in the program over 10 years.</li> </ul>	<p><b>AGC Recommendation:</b> Many of the issues related to how the DBE program operates start with the fundamental problem of realistic goals and DBE responsibilities. It is shortsighted policy to focus on increasing the pool of DBEs in the program rather than on the success of DBEs that participate in the program. There are steps that can be made in the program that will hopefully improve its outcomes.</p> <p><b>Set Realistic Goals:</b> The goal for DBE participation that is set each year by the state with concurrence of the US DOT should be based on the percentage DBE subcontractors and prime contractors that are actively submitting quotes on US DOT funded work.</p> <p><b>Qualifications:</b> Certification of DBEs to participate in this program should include a determination about the firm's past experience and qualifications for undertaking highway construction work and that the firm will perform a commercially useful function (CUF).</p> <p><b>Business plan:</b> To be eligible for the DBE program a firm should be required to develop a business plan that demonstrates the following: ability to obtain bonding, ability to obtain a line of credit, equipment availability, key management personnel, past experience, plan for moving forward.</p>

<ul style="list-style-type: none"> <li>• DOT has had limited success in achieving its program objective to develop DBE firms to succeed in the marketplace, as OIG found that in the six sample states OIG found that less than 20 percent of certified DBEs actually participate on federally assisted contracts.</li> </ul>	<p><b>Supportive Services:</b> Current supportive services funding should be used in developing a DBEs business plan for success in the program.</p> <p><b>Contractor/DBE Exclusive Arrangement:</b> A pilot program should be created to allow a contractor and a DBE the option to enter into a business arrangement for a limited time period that allows the contractor to provide a certain level of business assistance to a DBE. This assistance could include: mentoring, financing, sharing equipment, sharing management personnel and other necessary assistance. In exchange the DBE could perform subcontracts exclusively for the contractor, although there would be no restriction on pursuing work outside this arrangement. Currently regulations prohibit this type of arrangement. However, outside of the DBE program it is not unusual for prime contractors to offer this type of assistance to newly emerging businesses.</p> <p>AGC suggests that such an arrangement would provide an incentive to contractors to assist them in meeting contract goal requirements and in working with a subcontractor with whom they are familiar and have a working relationship. The incentive for the DBE would be to receive the type of assistance that would help them be successful in the highway construction industry.</p>	
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<p>Proposed Regulations on Local Hiring  <b>Local Hiring Preference Prohibition</b></p> <p>DOT has proposed to drop its long standing prohibition against the use of local hiring preferences on construction contracts receiving federal funding from the Federal Highway Administration and the Federal Transit Administration. These provisions would require a contractor to hire a certain percentage of their work force from the geographic area where the project is located.</p>	<p><b>AGC Concerns</b></p> <p>The Supreme Court has ruled that the Privileges and Immunities Clause of the constitution prevents states from discriminating against non-residents except under very limited circumstances. In 1984, in <i>United Building &amp; Construction Trades Council v. Camden</i>, 465 U.S. 208 (1984), the U.S. Supreme Court held that, because labor preference acts discriminate against nonresidents, and thereby infringe upon their "fundamental" privilege to secure employment from private contractors (even if on public works), such acts fall within the "purview" of the Privileges and Immunities Clause of Article IV of the Constitution.</p> <p>Virtually all of the state courts that have adjudicated Privileges and Immunities Clause challenges to state preference laws have ruled that the hiring preference acts were unconstitutional.</p> <p>In addition, local hiring preferences harm the workers currently in the employ of the successful contractor and should not be permitted. These preferences are anti-competitive because they prevent contractors from bidding on projects if they do not hire a portion of their work force from a project's location. Such provisions can skewer the job market by forcing the hire of workers that may not have the skill set required for the project. Local preferences discriminate against workers that are not from the local area. These provisions also discriminate against contractors that operate under collective bargaining agreements.</p>
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<p><b>US Department of Transportation's Truck Driver Hours of Service Rule</b></p>	<p>On December 22, 2011 the Federal Motor Carrier Safety Administration (FMCSA) released its latest revision to the truck driver hours of service regulations. The rules are effective on July 1, 2013, except for the change to the definition of on-duty time which became effective February 21, 2012.</p> <p>The major provisions in the new rules that impact commercial motor vehicle drivers in the construction industry are as follows:</p> <ul style="list-style-type: none"> <li>• Daily driving time limit of 11 hours is maintained (FMCSA had proposed reducing this time to 10 hours).</li> <li>• Consecutive hours of driving are limited to 8 hours following an off-duty break of at least 30 minutes.</li> <li>• Maximum on-duty time will remain at 14 hours.</li> <li>• Construction industry drivers transporting construction materials and equipment to and from an active construction site within a 50-air-mile radius of the driver's normal work reporting location are allowed to restart the on-duty counting period following any off-duty period of 24 or more successive hours.</li> <li>• Drivers that do not meet the construction driver definition can restart the weekly on-duty clock following a 34-hour off duty period that includes at least two periods between 1:00 a.m. and 5:00 a.m.</li> </ul>
	<p>AGC commented twice on this specific proposed rule change and has provided comments on all of the various proposals going back to 2000.</p> <p>Congress recognized the impact of these regulations on the construction industry in 1993 and provided a construction exemption allowing a reset of the on-duty clock after a 24 hour rest for drivers that do not leave a 50 mile air radius distance from their work reporting station. Over time supplies of certain construction materials have become harder to obtain. Therefore this mile limit should be increased to a 100-air-mile radius. Drivers should be allowed 11 hours of driving time in each driving window and continue to be allowed 14 hours maximum on-duty time within driving window, "on duty" time for construction drivers should not include waiting time to deliver product.</p> <p>Studies that FMCSA placed in the public docket to support its effort to change the rules, demonstrate the very substantial differences between the driving patterns in various industries and different factors that impact different driver fatigue and crashes. AGC believes that these studies highlight the fact that a one size fits all rule is not the best way to approach the issue of driver fatigue. AGC continues to support the current portion of the HOS rule that is specific to construction. The findings in these new studies do not support</p>



altering the 11 hour driving and 14 hour on-duty times as contained in the current rules.



ASSOCIATION OF  
AMERICAN RAILROADS

**Office of the President**  
**Edward R. Hamberger**  
**President and Chief Executive Officer**

April 23, 2015

The Honorable Ron Johnson  
Chairman, Committee on Homeland  
Security and Governmental Affairs  
340 Dirksen Senate Office Building  
United States Senate  
Washington, DC 20510

The Honorable Thomas Carper  
Ranking Member, Committee on Homeland  
Security and Governmental Affairs  
340 Dirksen Senate Office Building  
United States Senate  
Washington, DC 20510

Dear Sen. Johnson and Sen. Carper:

This is in response to your letter of March 18, 2015, in which you asked for assistance in identifying existing or proposed regulations that have had or will have a significant impact on our members. The Association of American Railroads (AAR) is a trade association whose membership includes freight railroads that operate 83 percent of the line-haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States; and passenger railroads that operate intercity passenger trains and provide commuter rail service.

The United States is connected by the safest, most affordable, and most reliable freight rail system in the world. The nation's railroads, working in cooperation with thousands of rail customers, deliver economic growth and on various levels facilitate job creation. For example, as Secretary of Transportation Anthony Foxx has explained, "[i]nfrastructure projects, like [a] cutting-edge [railroad intermodal] facility are the backbone of a growing American middle class and a thriving American economy."<sup>1</sup> The rail industry also offers greater fuel efficiency than other modes of surface transportation, providing environmental benefits such as reduced greenhouse gas emissions. Freight railroads can move one ton of freight 476 miles on one gallon of fuel, and are four times more efficient than moving freight on the highway.

At the same time, the industry has a strong safety record. From 1980 thru 2014, the train accident rate fell 80 percent, the rail employee injury rate fell 84 percent, and the grade crossing collision rate fell 80 percent. Since 2000, the declines have been 45 percent, 47 percent, and 38 percent, respectively, indicating that rail safety continues to improve. America's railroads today

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<sup>1</sup> Vantuono, William C. "Biden, Foxx Visit CSX Northwest Ohio Intermodal Terminal." *Railway Age*. Nov. 7, 2013.



have lower employee injury rates than most other major industries, including trucking, transit, airlines, agriculture, manufacturing, and construction. In fact, the industry's employee injury rate is even lower than that of grocery stores. The drive for safety improvement never stops, which is why railroads support effective efforts to further improve rail safety.

With regard to your specific request, AAR and its member railroads have been reviewing and identifying federal regulations where there is an opportunity for positive change, and have been active in providing comments regarding meaningful regulatory review. On March 28, 2014, AAR commented<sup>2</sup> in response to the Department of Transportation (DOT)'s invitation for public comment on the next phase of its retrospective regulatory review process.<sup>3</sup> AAR had previously<sup>4</sup> submitted<sup>5</sup> comments to DOT's initial round of retrospective review under Executive Order 13563<sup>6</sup>, noting that meaningful review requires continued input from those affected by DOT regulations. AAR and its member railroads agree with President Obama that regulations should not hinder the development and use of new technology or advances that provide for a safer and more efficient railroad system of transportation; they should encourage it.

In particular, AAR and its members urge consideration of the cumulative effect of regulatory burdens. In its recent guidance to federal agencies, the Office of Information and Regulatory Affairs ("OIRA"), directed regulators to "consider cumulative effects and opportunities for regulatory harmonization as part of their analysis of particular rules, and carefully assess the appropriate content and timing of rules in light of those effects and opportunities." OIRA stated that the purpose of this exercise is to simplify requirements on the public and private sectors; to ensure against unjustified, redundant, or excessive requirements; and ultimately to increase the net benefits of regulations. This is a particularly material consideration for the railroad industry given its long history of regulation, which has resulted in an accumulated burden of overlapping, often outdated regulations, on top of which new rules are constantly being layered even as the industry is being transformed by changes in technology.

For example, the Federal Railroad Administration (FRA) should be supporting the upcoming implementation of congressionally-mandated advanced positive train control (PTC) technology by stepping back from consideration of prescriptive regulations for crew size. Data show that one-person crews operating PTC trains can be just as safe as two man crews. Right-sizing train crew size to reflect advances in technology like PTC is an appropriate business process, and could provide significant cost savings without sacrificing operational safety. The cost to implement PTC – an unfunded mandate – for the major railroads will be significant: the

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<sup>2</sup> See AAR's comments on DOT Proposed Rule: Review of Existing Regulations, available at: <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2014-0024-0021>.

<sup>3</sup> 79 Fed. Reg. 11051 (Feb. 27, 2014).

<sup>4</sup> See AAR's comments on DOT Rule: Regulatory Review of Existing DOT Regulations, available at: <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2011-0025-0066>.

<sup>5</sup> See AAR's comments on DOT Rule: Regulatory Review of Existing DOT Regulations, available at: <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2011-0025-0012>.

<sup>6</sup> See Executive Order 13563 Improving Regulation and Regulatory Review for DOT January 2011, available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>.



FRA itself has estimated total capital costs for full deployment on all affected railroads, as well as 20 years of maintenance, to be up to \$13 billion.

The rail industry is also in favor, in the appropriate scenarios, of federal regulations that promulgate performance-based standards instead of prescriptive requirements. The prescriptive, detailed nature of command and control requirements mandating the details of how objectives must be accomplished can be constraining, leads to inefficient solutions, and can chill technological advancement. Moreover, rigid specifications do not always fit every situation. Performance-based standards with clear, objective measures of compliance can in the right scenarios lead to a more collaborative relationship between government and industry, which in turn can lead to greater overall system-safety.

The railroads do see a number of opportunities for technology to promote rail safety – provided the regulatory scheme can adapt. For example, the industry continues to collect data to prove that wheel temperature detector systems can more effectively and reliably ensure brake safety than the visual intermediate brake inspection currently required.<sup>7</sup> Also, member railroads have been piloting continuous rail testing with high-speed vehicles that allow for substantially more rail to be inspected than using current methods, and that can detect substantially more rail defects.<sup>8</sup> The industry is also testing the use of electronic health monitoring systems to continuously and remotely monitor grade crossings, instead of regular visual inspections. These technological advances, and others yet to come, are stranded if the regulators are not ready, willing and able to accommodate them.

Last, I'd note that the railroads continue to encounter environmental permitting obstacles to infrastructure projects. There are a number of simple ways to make environmental permitting more efficient for the railroads without jeopardizing environmental interests. For example, some permitting reforms (such as time limits), have been put into place for some industries but not extended to railroad projects. Similarly, some categorical exclusions from environmental review arbitrarily apply to actions undertaken by one agency but not to another agency's actions. Senators Roy Blunt and Joe Manchin have introduced legislation (S.769) to streamline the permitting process for rail projects in a manner similar to the processes available for highway projects. Simple fixes like these can go a long way toward facilitating the continued growth of investment in the railroad industry.

AAR and its member railroads would be happy to discuss these various opportunities to improve the regulatory process in more detail. Thank you for your interest.

Sincerely,



Edward Hamberger  
President and CEO

<sup>7</sup> See AAR's waiver petition at FRA Docket No. FRA-2013-0080. Although FRA denied the waiver petition on August 22, 2014, the industry has been working to revise the waiver petition for resubmittal in 2015.

<sup>8</sup> See FRA Docket No. FRA-2011-0107 and Docket No. FRA-2014-0029.



May 1, 2015

U.S. Senate  
Committee on Homeland Security and Government Affairs  
Dirksen 340  
Washington, DC 20510

Dear Senators Johnson, Carper, Lankford, and Heitkamp,

The Brick Industry Association (BIA) Advocacy Committee is providing this response to your request for information from industries about regulatory programs and policies that have the potential to significantly and negatively impact industry. Founded in 1934, the BIA represents the U.S. clay brick industry, which includes hundreds of manufacturers, distributors, and suppliers that provide employment for thousands of Americans in 44 states. Over 85 percent of the manufacturers are small businesses.

There are numerous regulations that could adversely impact our industry, including the national ambient air quality standards (NAAQS) and greenhouse gas (GHG) regulations currently being developed by the U.S. Environmental Protection Agency (EPA), and the recent state implementation plan (SIP) call to reform start-up and shutdown requirements in many State SIP programs.<sup>1</sup> However, we will highlight two rules that have the potential to have the greatest and the most unjustifiable impacts on our industry, the “Brick MACT” recently proposed by the EPA and the proposed reduction in the permissible exposure limit (PEL) for silica that was proposed by Occupational Safety and Health Administration (OSHA) in 2013. Each of these rules is discussed briefly below.

**The “Brick MACT.”** The national emission standard for hazardous air pollutant (NESHAP), typically referred to as the “Brick MACT” because the level of control required by these rules is referred to as the maximum achievable control technology (MACT) was proposed on December 18, 2014. This rule is actually the second attempt by the EPA to promulgate a standard under §112 of the Clean Air Act (CAA) for our industry, with the first being vacated by the courts in 2007 after compliance was due and accomplished in 2006. While the EPA has taken advantage of some of the flexibilities provided by the CAA in proposing this rule, there are still significant issues with the rule. Attachment 1 to this letter includes a copy of two of the comment letters submitted to EPA on this proposed rule by the BIA’s MACT Task Force- our overall TF

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<sup>1</sup> A letter written on behalf of BIA and numerous other associations will be submitted separately by Russell Frye of Frye Law. We are in full support of that letter.

comment letter (signed by Susan Miller on behalf of the TF, Attachment 1A) and our letter outlining several legal issues (submitted on our behalf by William Wehrum of Hunton and Williams, Attachment 1B). The concerns detailed in those letters and in the hundreds of letters sent by brick manufacturers and other interested parties include:

- While the EPA correctly proposed health-based limits for 99 percent of our emissions, the numeric limits proposed for mercury and other HAP metals are overly stringent, based on limited test data, and are not achieved or achievable by many of our plants.
- EPA made baseless assumptions on the number of sources that could comply with the proposed limits, without data, and grossly misrepresented the actual burden of this proposed rule. The actual burden on our industry is significantly greater and will result in far more businesses, predominantly small businesses, closing their doors or being purchased by larger companies after operating for 100 years or more.
- EPA is basing compliance costs on unproven technology, supported only by brief conversations with control device vendors and experiences in other industries that are not similar to brick manufacturing.
- By EPA's own estimates, the HAP emission reductions that are targeted for reduction by this proposed rule (i.e., mercury and non-mercury metal particulates) would total 118 pounds of mercury and less than four tons of HAP metals nationwide at an annual cost of \$19 million. All other reductions claimed by the rule, approximately 336 tons of HAP, are based on EPA assuming that some plants will install controls to avoid the actual Brick MACT.

We strongly believe that EPA can fully meet the requirements of the CAA and the requirements to regulate mercury and non-mercury metal HAPs while still allowing our industry to continue to operate. We believe that work practice standards for these HAPs are warranted in the final rule.

**Silica PEL Reduction.** In 2013, OSHA proposed lowering the PEL for silica in all manufacturing by half. Prior to the proposal, and in comments on the proposed rule, the brick industry submitted numerous studies that demonstrate that the current PEL is more than sufficient to protect the workers in our industry. In fact, there is currently little to no silicosis identified in the brick industry. Therefore, we question how any standard can be justified, when OSHA must first demonstrate that there is a health risk that would be mitigated by the new standard. Simply put, if there is currently no silicosis in our industry with the current PEL, there can be no benefit from reducing the PEL. While it is not frequently done when establishing a PEL, OSHA is able to consider industries separately, when warranted. In fact, as we point out in our comment letter, OSHA is required to consider these differences when data are available. We ask that OSHA follow that directive. Attachment 2 includes two of the numerous comment letters submitted to OSHA on the proposed silica rule: the main EHS Task Force letter (signed by Susan Miller, Attachment 2A) and the letter outlining our legal concerns and our beliefs about OSHA's obligations to consider our industry separately (submitted on our behalf by Susan Wiltsie of Hunton and Williams, Attachment 2B).

**Closing Thoughts.** Our industry would welcome the opportunity to further discuss these rules and other numerous rules impacting our industry. Our industry is committed to doing our share

to protect both the environment and our employees; however, we believe that the two rules discussed above represent more than our share. Either one of these rules individually has the potential to threaten the viability of our industry. Together, they appear to be an insurmountable obstacle. If our nation is to survive as a manufacturing force, we need regulators to understand that our ability to respond to one regulation is impacted by other regulations that we already have to meet. Manufacturers have finite resources. There needs to be some way to recognize the cumulative impact of these regulations and to identify priorities for manufacturer's finite resources. We ask for your help in getting that message heard.

If you have any questions or require additional information to fully consider our standards in your analysis, please do not hesitate to contact me at [smiller@bia.org](mailto:smiller@bia.org) or by telephone at (919) 380-2191.

Sincerely,

A handwritten signature in cursive script that reads "Susan Miller".

Susan J. Miller  
Vice President  
Environment, Health and Safety  
The Brick Industry Association





March 19, 2015

Environmental Protection Agency  
EPA Docket Center  
Mailcode: 28221T  
Attn: Docket ID No. EPA-HQ-OAR-2013-0291  
1200 Pennsylvania Avenue NW  
Washington DC, 20460

**RE: Docket no. EPA-HQ-OAR-2013-0291 Brick and Structural Clay Products  
Manufacturing**

To Whom It May Concern:

The Brick Industry Association (BIA) MACT Task Force submits these comments on behalf of our member and non-member companies in the brick and structural clay manufacturing industry in response to the Environmental Protection Agency (EPA) proposed rule, NESHAP for Brick and Structural Clay Products Manufacturing (Docket: EPA- HQ -OAR-2013-0291). This rule, as proposed, has the potential to significantly and detrimentally impact the brick industry, while providing no commensurate improvement to human health or the environment. We believe that EPA has significantly underestimated the number of facilities impacted by the rule, the costs and reliability of the air pollution control devices used in the cost benefit analysis, and the ability of our facilities to finance and operate these controls. We believe that EPA has the ability to fulfill all requirements of the Clean Air Act (CAA) at significantly lower costs and is required to use these alternatives under Executive Order 13563 which directs agencies like EPA to select the lowest cost option that meets the requirements of the underlying authority, such as the CAA.

Founded in 1934, the BIA represents the U.S. clay brick industry, which includes hundreds of manufacturers, distributors, and suppliers that provide employment for thousands of Americans in 44 states. Our members and our industry could potentially be needlessly harmed by this rulemaking. Over 85 percent of the manufacturers are small businesses. While not all of these companies are members of our trade association, our industry works together on issues such as this proposed rule. In addition to the comments provided in this letter, the BIA MACT Task Force (TF) comments on this rule include a submittal made on January 20, 2015 to the Office of Management and Budget (OMB) concerning the reporting burden of this rule (copy included in Attachment A), letters from Paul Regina of the BIA on docket issues and an industry cost survey, letters detailing our concerns with the test methods, testing costs, and data manipulation from Mike Hartman of AirTech, submission from Terry Schimmel of Boral Brick and Irene Kuo of RTP Environmental, and a letter written on our industry's behalf by William Wehrum of Hunton and Williams. Numerous impacted brick manufacturers are also submitting comments.



We commend EPA on taking the steps to go with a health-based approach for the acid gases and believe the data we provided and the CAA language completely support this approach. None of our concerns with the remaining rule should be read to take away from our support of that decision. However, we believe that the remaining requirements of the rule, as proposed, negate the vast majority of any burden reduction that EPA's proposed health based rule would create. In this proposed rule, EPA is estimating the burden of the Brick MACT as more than 90 percent lower than the estimate of \$188 million per year (before mercury controls) provided during the Small Business Regulatory Enforcement Fairness Act (SBREFA) panel process. However, we believe the assumptions used to make this dramatic reduction in the burden estimate are not well grounded.

Despite the health-based approach being applied to over 99 percent of the emissions from our industry, the remaining numeric limits for mercury and non-mercury metal HAPs could still cripple many facilities in our industry. EPA has made numerous unsupported and unsupported assumptions in the proposal and supporting documentation, including assumptions that virtually all sources that remain in the category can comply with the standard. Without considering the complex factors that go into such a decision, EPA assumes that numerous sources would become non-major sources of HAP and avoid applicability of the rule. ***In fact, virtually ALL benefits reported for this proposed rule, including both HAP and non-HAP emission reductions, result from the sources that EPA says will install controls to avoid the rule.*** All but 4 of the 440 tons of the HAP emission reductions claimed in the proposal are for hydrogen fluoride (HF) and hydrogen chloride (HCl) emission reductions, primarily from sources that EPA assumes will become synthetic area sources; however, EPA has already demonstrated through modeling that the HF and HCl emissions from these sources cause no adverse impact to the environment.

BIA asserts that there should be no costs incurred by this rule when there is no benefit to human health and the environment resulting from those expenditures. We believe that EPA has taken an important first step in proposing health-based emission limits for more than 99 percent of the emissions from the brick and structural clay major source category. However, we implore the EPA to consider the work practice based standards allowed under the CAA and finalize work practice standards rather than the current approach that, even by EPA's low cost estimates would cost \$19 million per year to control 118 pounds of mercury and 3.79 tons of PM metal HAP that are targeted for reduction by this proposed rule for the entire source category.

## Overview of Comments

In the remainder of this comment letter, we will detail the following concerns:

- I. ***The brick industry commends EPA on the use of a health-based approach for acid gases, but believes an overly conservative approach was used to establish the limit.***
- II. ***EPA grossly underestimated the cost impacts of this rule***
- III. ***Mercury and non-Mercury numeric limits are not supportable as proposed and should be replaced with work practice standards***

- IV. **If work practice standards are not selected for mercury and non-mercury metal standards, EPA must correct severe deficiencies in how the numeric emission limits were selected.**
  - V. ***BIA supports the use of work practices for the BSCP MACT, with a few proposed clarifications***
  - VI. ***Malfunctions***
  - VII. ***Source category and affected sources***
  - VIII. ***Additional subcategories needed***
  - IX. ***“No Visible Emissions” requirement is not warranted in all cases***
  - X. ***EPA’s background memoranda are inconsistent and contain significant errors***
  - XI. ***Typos and clarifications needed in regulatory language***
- I. ***The brick industry commends EPA on the use of a health-based approach for acid gases, but believes an overly conservative approach was used to establish the limit.***

The BIA commends the EPA for the use of §112(d)(4) for the control of over 99 percent of the emissions from major sources in the brick industry. For the reasons discussed in the letter submitted by Bill Wehrum of Hunton and Williams on behalf of BIA, we believe that the use of a health based standard is fully supportable and justified under the CAA. The brick industry worked extensively with EPA to provide data on virtually every plant in the source category to remove the concerns raised in previous rules where health-based standards were considered, but rejected. The letter from Bill Wehrum also discusses why a single limit is not justified.

**One size fits all is not warranted.** BIA contends that the current proposed approach of setting a single “one limit fits all” for the entire industry is overly restrictive and causes at least one facility to install controls with no benefits. The single limit based on a single worst case source needlessly limits the potential for all facilities to expand at their current locations. Expansion close to raw materials is more important in our brick industry than in other industries because the mineral content and other properties of our locally mined raw materials are what gives each brick its distinctive look. There is no reason to limit growth for an existing plant when there is no adverse impact on the environment.

Unlike other source categories where EPA evaluated the potential to use a health-based approach where model units and facilities were used in the analysis, the brick industry provided detailed facility information for every kiln at every major source facility in our industry. Actual stack parameters were provided for more than 95 percent of the sources. For the remaining sources, BIA identified “worst case” parameters for use. These worst-case parameters would likely not allow for the actual production of brick, but represented the worst case scenario for modeling for each parameter.

The modeling was conducted for each source to identify the worst case hazard index (HI) for each facility, by assuming full capacity for each kiln at each facility every hour of the year (i.e., 8760 hours per year) and evaluating under the worst meteorological conditions. Despite the

worst case approach, no facility was over 0.4 cumulative for all kilns in any single hour. This clearly demonstrates that no facility should have to do anything to control emissions of the acid gases. Rather than acknowledging this lack of risk, the EPA established a single number based on the facility in the industry with the highest hazard index (HI) for the combined acid gases and developed an allowable emission rate for that facility that was assigned to all facilities.

Despite all facilities modeling well below safe level, EPA's approach leads to an allowable emission level that cannot be met by one facility and needlessly limits expansion and flexibility at other facilities. EPA identified Belden Brick in Sugarcreek, Ohio as the facility that would not be able to meet the health-based hourly emission limit for acid gases. Belden's cumulative HI when modeled using actual emissions and stack parameters is only 0.28. This would indicate that, even at maximum emissions from each of the 8 kilns, the concentrations at the fence-line would not be above EPA's safe levels. The "one limit fits all" approach in the proposed rule would needlessly require Belden to add controls to meet an overly restrictive emission limit that is well below levels required to protect human health and the environment. There is no justification to require this facility to install controls. The end result is a good performing, family owned business will be forced to install multimillion dollar controls to reduce emissions that have already been demonstrated to have no detrimental impact to the environment. BIA continues to assert that there should be no costs incurred when there is no benefit.

For all other facilities, the lower than required level would limit future growth, as all kilns are included in the same limit for any given site. BIA requests that EPA reevaluate this "one size fits all" approach and consider whether a large source, such as Belden, that can demonstrate no adverse impacts, but is over the conservatively set "one size fits all" limit represents a different subcategory. If EPA promulgates only one limit, the limit must be higher.

**If there is a single number, EPA must use a current facility in the category.** While BIA does not agree with the setting of a single number for our facilities, we also believe that EPA has established the "one limit fits all" number incorrectly. EPA is proposing a health-based emissions limitation on acid gases of 57 pounds/hour (lb/hr) HCl equivalent for new and existing sources. This limit was developed following the methodology presented in the technical memorandum "Risk Assessment to Determine a Health –Based Emissions Limitation for Acid Gases for the Brick and Structural Clay Products Manufacturing Source Category".<sup>1</sup> In setting the proposed emission limitation, EPA modeled impacts posed by a unit emission rate (1 tpy) from kilns at active, major sources in the category. The facility with the highest modeled chronic impact was used to derive an emissions level equivalent to a target-organ-specific hazard index (TOSHI) of one (1).

Following EPA's methodology, BIA has assessed that the top three ranking sources (i.e., worst performing) with respect to their modeled chronic impacts are:

1. International Chimney Corporation's Continental Clay facility in Kittanning, PA;

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<sup>1</sup> Memorandum "Risk Assessment to Determine a Health-Based Emissions Limitation for Acid Gases for the Brick and Structural Clay Products Manufacturing Source Category", Docket ID No. EPA-HQ-OAR-2013-0291

2. Interpace Industries Inc. located in Ogden, UT; and,
3. American Eagle Brick Co., located in Sunland Park NM.

The first two facilities should be removed from the risk assessment used to set the emissions limitation because they do not meet the criteria of being active, major sources in the category as set forth in the technical memorandum. Per Pennsylvania Department of Environmental Protection records, the Continental Clay facility is a true area source of HAP and is not within the source category being regulated.<sup>2</sup> And according to a local Ogden, UT publication, the Interpace Industries Inc. facility, which ceased operations in 2012, has been sold and will not continue as a brick-manufacturing facility under the new ownership.<sup>3</sup>

BIA reevaluated the health-based emissions limit using the modeled chronic impact posed by the American Eagle Brick Co. facility, a facility we believe to be major.<sup>4</sup> Scaling the unit emissions from the American Eagle Brick Co. facility such that they are equivalent to that which results in a non-cancer TOSHI of one yields an emission level of 92 lb/hr HCl equivalent.<sup>5</sup> Since the 92 lb/hr level of HCl-equivalent emissions is determined such that no facility would exceed a TOSHI of one, no facility in individual acid gas model runs should exceed this level.

**EPA never addressed BIA's position that mercury is a threshold pollutant.** In December 2013, the BIA sent a memorandum to EPA outlining the results of modeling of mercury emissions from all of our plants. This modeling was conducted in connection with a discussion raised at the 2013 SBREFA meeting that mercury is considered a threshold pollutant. In this memorandum, we detailed how all facilities in our source category, under the worst case meteorological conditions and operating at full capacity never exceeded an HI of 0.01, clearly below EPA's "safe" level of 1. EPA has never provided any comments on this memorandum. For a discussion of BIA's legal position that health-based standards can be used for mercury, please see the letter written on BIA's behalf by Bill Wehrum of Hunton and Williams.

We ask that EPA fully consider establishing a health-based emission limit for mercury emissions from our industry in lieu of a MACT-floor based emission limit.

## II. ***EPA grossly underestimated the cost impacts of this rule***

The EPA's estimated impacts of the proposed rule hinge on two primary memoranda, the Methodology and Assumptions Used to Estimate the Model Costs and Impacts of BSCP Air Pollution Control Devices (EPA-HQ-OAR-2013-0291-0118) and the Development of Cost and Emission Reduction Impacts for the BSCP NESHAP (EPA-HQ-OAR-2013-0291-0117). These memoranda, and supporting information, document unsupported and unrealistic assumptions made by EPA leading to grossly underestimated impacts. Based on these memoranda, the EPA incorrectly reduced the reported burden estimate for the proposed MACT from the more accurate estimate provided during the Small Business SBREFA panel review, when EPA

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<sup>2</sup> [http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults\\_singleSite.aspx?SiteID=465659](http://www.ahs.dep.pa.gov/eFACTSWeb/searchResults_singleSite.aspx?SiteID=465659)

<sup>3</sup> <http://www.standard.net/Business/2013/06/22/longtime-Harrisville-brickmaker-closes-doors-claiming-bank-misconduct.html>

<sup>4</sup> Since we have no data to the contrary, we will assume this facility is major. EPA may have data we do not.

<sup>5</sup> Based on a modeled unit concentration of .018 mg/m<sup>3</sup>. Scaling the unit emissions to yield a TOSHI of one (to one significant figure) results in an allowable HCl equivalent emission rate of 405 tpy. At 8760 hours/yr, the resulting hourly rate is 92 lb/hr.

estimated that the rule could cost \$188 million per year. It should be noted that the \$188 million per year did not include the control of mercury, which adds significantly to overall costs. While the proposal of a health-based standard negates the requirement for new air pollution control device (APCD) to control HF and HCl in most instances, the regulation of small amounts of mercury and non-mercury HAP metals has the potential to require the same multi-million dollar controls plus the additional of an undemonstrated activated carbon system to reduce mercury emissions. By EPA's own estimates, these controls (and controls used to avoid MACT applicability) would reduce 118 pounds of mercury and 3.79 tons of PM HAP, but would cost \$19 million each year. The BIA MACT TF asserts that the costs could actually be significantly higher, with substantially more sources being impacted. The minimal, if any, emission reductions would not be commensurate with these additional costs.

Our concerns with specific memoranda are detailed in later sections of this comment letter. A summary of our key concerns is presented below.

**Hours of operation.** The BIA MACT TF asserts that the costs of the control devices should have been estimated using 8760 hours per year, i.e., a full year of continuous operation. While EPA states that the estimated hours are based on industry submittals, the data have been misused. First, the data were reported for a low production year. However, even in low years, it is more likely that a single kiln would be operated at or near full capacity with other(s) left idle, rather than reduce the operating time for multiple kilns. To fully understand the operating costs, continuous operation should be assumed. This would also be critical if EPA is assuming that a baghouse system remains above the HAP dewpoints to reduce damage to the device.

**Number of impacted sources.** EPA underestimated the number of sources impacted by this rule, using assumptions that had no technical support, including:

1. EPA assumes numerous major source facilities are already synthetic minor sources if they have existing APCD on all kilns and EPA's estimated emissions are below various cutoffs. They state that these sources could become synthetic minors and the change could be made "at little to no cost" and then accounts for **no costs** from these sources. At a minimum, a facility would need to conduct a stack test to verify emissions, develop a permit application, and develop and implement a program to implement the permit requirements.

The EPA's approach ignores additional concerns that must be addressed before a decision of this magnitude is made. For example, if EPA's assessment that virtually all small kilns can meet the proposed rule, why would a facility unnecessarily take a limit on future growth? This assumption is used to reduce the number of sources that EPA uses when estimating the reporting burden of this rule. These sources should be included in the burden estimate since any actions taken by a facility that would not have been taken in the absence of the proposed rule are a burden created by the rule.

2. In the evaluation of the number of affected sources, the EPA assumes that 14 facilities will install DLAs to become synthetic minor/area sources to avoid the MACT, again

based on an over-simplified analysis. In this case, the analysis was cost-based. However, in truth, such a decision is more complex. Becoming a synthetic minor/area source would impact future growth potential and, in some states, could trigger additional compliance requirements.

In addition, there could be technical limitations to the installation of a DLA. If the kiln exhaust contains more than approximately 18-20 ppm SO<sub>x</sub>, as explained later in this comment letter, a DLA may not be possible. This would significantly increase the cost of becoming a synthetic minor/area source. Any cost savings from installing a DLA or other control would need to be weighed against the negative impacts of becoming synthetic minor/area source. It appears that EPA made this assessment to slightly reduce the reported impact of the proposed rule, including the reporting and recordkeeping burden reported to EPA. In addition, the assumption that 14 sources would install the DLAs is the basis for the vast majority of the benefits claimed by this rule, including over 99 percent of the unsupported claimed SO<sub>2</sub> reductions and over 85 percent of the HAP reduction.

3. The EPA uses questionable assumptions in estimating the number of sources that can meet the standard. Examples include:
  - EPA bases their assumption that **all** small uncontrolled kilns in the source category can meet the mercury limit on the fact that the **controlled kiln used to set the standard** can meet the standard. While the approach of assessing the percent of kilns with data may be reasonable in larger and more distinct data sets, it is not a reasonable approach for this diverse group of sources. EPA should not equate uncontrolled and controlled sources.
  - Without data, EPA assumes that 21 of 24 kilns that could not meet the mass/ton based or concentration-based standard would be able to meet the hourly mass emission rate. No reference was provided to support such an assumption and we do not agree that such an assumption is reasonable.

### ***III. Mercury and Particulate Matter/non-Mercury Metal HAP numeric limits are not supportable as proposed and should be replaced with work practice standards***

The BIA MACT TF strongly urges the EPA to replace the numeric limits for mercury and Particulate Matter (PM)/non-mercury metal HAP with work practice standards under the authority of Section 112(h) of the CAA. Section 112(h) allows for the use of a work practice standard when compliance demonstration is technically and economically impracticable. As explained in more detail in other letters submitted on the industry's behalf<sup>6</sup>, we believe that there is adequate information available for EPA to conclude that a numeric emission limit is both technically and economically impracticable to enforce with reasonable confidence and

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<sup>6</sup> These letters include letters submitted on our industry's behalf by William Wehrum and Mike Hartman

repeatability. A summary of our major reasons we believe work practice standards are appropriate and necessary are presented below:

- EPA acknowledges that the test data submitted by the brick industry, developed by numerous stack testing firms and testing labs across the country, required significant manipulation to arrive at revised “usable” data. This is largely because data are very close to the detectable/measurable limits. In fact, the EPA did not even use the information that was submitted through the ERT, but obtained the detailed analytical data that was developed by the testing labs and redeveloped the data. Many of our companies will not have the technical expertise onsite to make these same adjustments. Therefore, they will be unable to assess their own compliance status. At a minimum, the facilities would need to hire additional consultants; these expenses are not accounted for in EPA’s costs and make compliance demonstrations economically infeasible.
- The EPA identified a number of issues with stack test reports, often discarding a test run and evaluating only two runs for a facility. These tests were discarded for problems like sample contamination, manganese contamination, filter failure, and other failures that were not identifiable during the tests. Some of these issues are due to the tested values being so close to method and analytical detection limits. While the EPA states that they can use two of three runs for establishing emission limits, the proposed Brick MACT requires a minimum of three qualifying test runs for demonstrating compliance. If any of these errors are identified after a stack test is completed, the facility will have to rerun a stack test to attempt to get three acceptable runs. These expenses make compliance demonstrations economically infeasible.
- The ability for an regulated facility to reasonably demonstrate compliance with a standard must be considered as part of the determination of whether a numeric standard is technically or economically infeasible. EPA appears to only consider whether the stack test data they used to set the standard can be manipulated to produce a dataset of “at or above detection level” data to set a standard. Many, if not most, of our facilities will not have the technical understanding to manipulate the data received from a testing firm and assess their compliance status. This makes the standard technically infeasible to enforce.
- EPA Test Method 29, the test method used for gathering the data used to set the standard and required for demonstrating compliance was designed for significantly higher concentration stacks. As a result, the lack of detailed quality assurance procedures that could lead to small errors could have significant impact on our final assessments since the size of the errors can be as large as or larger than the values being measured. Mike Hartman has detailed significant issues with different aspects of the Test Method 29 and electronic reporting, the test method used to verify compliance with our numeric limits.
- We do not believe that EPA has demonstrated that Activated Carbon Injection (ACI) systems will be able to control any of the minute amounts of mercury that our facilities may emit. If the ACI does not work, then the cost effectiveness of controlling mercury is infinite. If the cost effectiveness is infinite due to no available control, there is no technically or economically practicable way to demonstrate compliance with the limits.

Work practices could take several approaches. The work practices that are proposed in this rule for dioxin/furan, i.e., burner checks, would ensure effective production of brick and reduce any additional trace mercury emissions that would occur for replacing lower quality brick with acceptable brick. As described in more detail in the letter submitted on our behalf by Bill Wehrum of Hunton and Williams, we assert that EPA is precluded from basing any MACT limits on mined materials. However, our industry is ready to work with EPA to establish work practice limits that are reasonable and meet the requirements of §112.

**IV. If work practice standards are not selected for mercury and non-mercury metal standards, EPA must correct severe deficiencies in how the numeric emission limits were selected.**

While the BIA MACT TF strongly believes that we have demonstrated that work practice standards already in the proposed rule and those suggested in BIA's comment letters are warranted and justified for our operations, we feel compelled to comment on the approach used by EPA to establish numeric limits. While the detailed discussion of our concerns about the mercury limits and PM is presented in a separate comment letter submitted on BIA's behalf by Terry Schimmel of Boral and Irene Kuo of RTP Environmental Associates, we are including our general concerns about the establishment of numeric limits here.

- **MACT floors.** For the reasons presented in Bill Wehrum's comment letter submitted on our behalf, we assert that EPA can only consider kilns within the source category when establishing the MACT floor for each category or subcategory. The EPA *incorrectly* equates the terms "source category" and "industry" throughout this proposal. They are not the same, as the industry includes area sources (both "true" and "synthetic"), as well as the major sources in the regulated source category. EPA is permitted to consider the area sources only when evaluating options "above the floor," but not for establishing the MACT floor. We believe that EPA is unlawfully ignoring the phrase "in the category or subcategory" that is included in the CAA §112(d)(3)(A) because of an incorrect belief that it would be "unreasonable" to ignore the best controlled sources in the industry. We assert that since the MACT floor precludes the consideration of costs that it is *unreasonable* to arbitrarily ignore key phrases within the CAA with respect to how the "floor" is established.
- **Percent of Sources Included in the Floor.** EPA correctly describes why it is appropriate to base the MACT floor for PM on the top performing 12 percent of sources in the category (or subcategory), as opposed to 12 percent of the sources for which there is stack test data. First, the dataset was knowingly skewed by EPA to only include the best performing sources for PM and mercury, i.e., the DIFF-controlled systems. This was discussed at length during the information collection request (ICR) testing conducted for this proposed rule. Second, while stack test data may not be available for each source in the category or subcategory, there is sufficient information to estimate the emissions of each unit since size, fuel, and other emissions information is available. We ask that EPA extend the approach taken for PM to the approach for calculating the MACT floor for numeric mercury limits, if a numeric limits remain in the rule. Again, this was specifically discussed with EPA during the ICR process and during a December 1,



2010 meeting with EPA upper management, when EPA assured industry that all tests would be included for the reasons discussed above. We also request that the impact of counting covented sources twice in a floor calculation be reevaluated.

- **Format of the standard.** We commend EPA for the inclusion of multiple formats for both PM/non-mercury metal HAPs and mercury. The inclusion of each of these formats, as well as the inclusion of small and large kiln subcategories, provides needed flexibility to our numerous facilities, including a large number of small businesses, to find that standard that best suits their operations, while still ensures that the CAA requirements are being met. We believe that the inclusion of three alternate compliance formats is so critical to the development of this standard that EPA must **re-propose this rule** if it maintains numeric limits, but deletes any of these alternative formats.

#### **V. BIA supports work practices proposed in the rule, with a few clarifications**

BIA supports EPA's use of work practice standards in this rulemaking and believes that the use of work practice standards should be expanded. We believe the use of work practices is justified under §112(h) for the reasons detailed in the preamble and commend EPA on their use. BIA is providing the following recommendations for changes or clarifications for each of the proposed work practice standards.

**Periodic kilns.** The work practice requirements for periodic kilns are acceptable and reasonable. *We ask that EPA clarify that the facility may opt to list the maximum load on the required label in either dry or fired tons.*

**Dioxin/furan for tunnel kilns.** The work practice requirements for control of dioxin/furan emissions from tunnel kilns are acceptable and reasonable. Since our kilns are designed to operate for extended periods of time, the maximum of a three-year time period between checks will allow us to check the systems during normal shutdown and maintenance time. *We ask that EPA allow the inspections conducted within three years of the initial compliance demonstration to be accepted.*

**Start-up and Shutdown for tunnel kilns.** We commend EPA for the use of work practice standards for periods of start-up and shutdown; however, *we ask that EPA correct the rule to not simultaneously enforce work practice requirements under §112(h) of the CAA and numeric limits under §112(d).* In addition, we believe that EPA has been overly prescriptive in the proposed rule and has developed procedures that will be impossible for several facilities to meet. *We ask that EPA provide a more basic work practice requirement in the final rule and require facilities to develop site-specific trigger temperatures as part of their permitting process.*<sup>7</sup>

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<sup>7</sup> This would be comparable to the provision that EPA recently proposed in the context of the Boiler MACT startup provisions, where a mechanism would be provided for site-specific determinations of the appropriate period for starting up PM control devices. See 80 Fed. Reg. 3090, 3095 (Jan. 21, 2015) ("Also in the alternate work practice requirement, we are proposing to allow a source to request a unit-specific case-by-case extension to the 1-hour period for engaging the PM controls. However, the EPA will only

This will ensure that operations minimize emissions during start-up and shutdown, while recognizing site-specific differences.

In the proposed rule, §63.8420(a) states that

You must be in compliance with the emission limitations (including operating limits) in this subpart at all times, except during periods of routine control device maintenance as specified in paragraph (d) of this section.

Unless EPA adds the exclusion for periods of start-up and shutdown to this paragraph, the rule would be simultaneously requiring compliance with both a numeric limit under §112(d) and a work practice limit under §112(h). Section 112(h) clearly states that a work practice is allowed “in lieu of” a limit established under §112(d). We ask that EPA clarify that only the work practice requirements are in effect during periods of start-up and shutdown by revising §63.8420 to read:

You must be in compliance with the emission limitations (including operating limits) in this subpart at all times, except during periods of routine control device maintenance as specified in paragraph (d) of this section and during periods of start-up and shutdown.

In addition to the above correction, we are concerned that the proposed requirements for start-up and shutdown are too prescriptive and will not allow many brick plants to operate. The operating procedures for tunnel kilns vary by plant; therefore, a work practice requirement based on a single plant or even a single company cannot be broadly applied to all kilns within the BSCP industry, as EPA appears to have done. We do believe that proper work practices for a kiln controlled by an air pollution control device (APCD) would include limitations on when new product is pushed into and through the kiln, based on when the kiln exhaust is vented through the APCD. However, the exact temperature will vary. In addition, there does not appear to be any environmental basis for requiring start-up and shutdown procedures for an uncontrolled kiln. Facilities would not push product through a kiln before proper temperature is achieved because to do so would impact the final quality of the brick or structural clay product. The EPA should not require a facility to follow any procedures that have no impact on emissions levels.

The wording of the requirements seems to incorrectly imply that no brick of any kind can be in the kiln until it reaches an established temperature and possibly even during shutdown.

- Start-up requirements in Table 3, 3(a)(i) states “Do not put any bricks into the kiln until the exhaust temperature reaches 204 °C (400 °F)”
- Shutdown requirements in Table 3, 4(a)(i) state, “Do not put any bricks into the kiln once the kiln exhaust temperature falls to 149 °C (300 °F)”

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consider extensions for units that can provide evidence of a documented manufacturer-identified safety issue and can provide proof that the PM control device is adequately designed and sized to meet the filterable PM emission limit.”).

The phrase “do not put any bricks into the kiln” could easily be misunderstood by an inspector to mean “no brick can be in the kiln.” As EPA is aware, it is common practice by virtually all manufacturers to have a kiln full of product for proper start-up. We ask the EPA to clarify that this is intended to mean that brick production, i.e., processing brick to make a saleable product, should not occur before the kiln is vented to the air pollution control device, if present.

In a tunnel kiln, the kiln cars effectively form the bottom of the kiln envelope. A continuous line of kiln cars provides a seal that protects the wheels and underside of the kiln cars from damage from the high heat. Since these cars are loaded with product pulling cars out of the kiln to remove the product would be the only way to even partially satisfy the current rule language at shutdown and no way to meet the language during startup. Typically, if a kiln has been previously fired, the bricks that were in the tunnel kiln during the previous firing are put back in the kiln in the position they were before a shutdown. In some cases, they are moved back in the process a few car lengths. If there was a kiln car crash or collapse that caused the shutdown, repositioning all kiln cars to their position at shutdown or to an earlier point in the process may not be possible. Finally, if a kiln is returning from a long shutdown, as is likely as our industry returns from the extended recession that we have experienced, fresh brick may need to be in the kiln at start-up. ***This is typical operation for our industry and to require anything different would be to go beyond the floor” for our industry and costs must be considered as well as the practicality of the revised procedures.***

The final rule needs to clearly state that a kiln containing any combination of unfired, partially fired or finished product is acceptable and allow facilities to formalize their procedures for various types of start-up conditions, with approval by the regulating authority.<sup>8</sup> A limit on pushing, i.e., charging new product into the kiln, until the operating temperature in the kiln is reached would be reasonable. The exception would be that kilns burning solid fuel may sometimes need to push product from the initial gas fired zones into solid fired zones until a temperature profile can be established such that the solid fuel ignition temperatures in those zones is high enough to achieve combustion. Due to these and other considerations a prescriptive one size fits all scenario is not possible and must be developed on a site specific basis.

There are also concerns with the temperature triggers included in the proposal language, as addressed below:

- **In some cases, the exhaust temperature in our kilns never reaches 400 °F.** The proposed wording of the start-up requirement in the proposed Table 3, 3(a)(i) [“Do not put any bricks into the kiln until the exhaust temperature reaches 204 °C (400 °F)”] would unnecessarily cause a problem for both uncontrolled and controlled kilns, even if the language was corrected to limit pushing fresh product.

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<sup>8</sup> As noted in footnote 7, above, such an approach is comparable to the procedure proposed in the Boiler MACT that would allow for site-specific startup practices to be approved. Alternatively, EPA could specify several different alternative procedures that reflect the variety of standard practices currently in use, and then allow affected facilities to select the procedure that matches their circumstances.

- As stated above, this subparagraph is not needed for uncontrolled kiln as it does nothing to reduce emissions.
- For controlled kilns, the kiln would never be allowed to push product because the stack temperature would never be achieved.
- In a few cases, kiln exhaust stack temperatures hover close to 300 °F and may occasionally drop below this temperature before a facility would want to- or need to- stop pushing product through a kiln. There is no reason to set a single temperature or to apply this requirement to any tunnel kiln. A limitation for a kiln to cease charging in new product before a kiln stops venting to an APCD may be reasonable.
- In a few cases, exhaust stack temperatures may not ever reach 300 °F , which would mean that no product could ever be pushed through the kiln since the shutdown procedures require “Do not put any bricks into the kiln once the exhaust temperature falls to 149 °C (300 °F).” Replacing this sentence with “Do not charge new product into the kiln once kiln shutdown begins and the temperature in the exhaust stack reaches the shutdown temperature approved as part of your site-specific parameters” is requested.

In conclusion, we ask for the following changes in the final rule:

- Make start-up and shutdown procedures applicable only to kilns with air pollution control devices (APCD).
- Clarify that any limitations apply to the introduction, or charging, of new brick or structural clay product through a kiln and do not impact the initial staging of kiln cars in a kiln before start-up. In addition, allow a facility to establish alternate procedures for cold start up after an extended period of time or after a kiln car crash.
- Maintain a work practice requirement, but require each facility to justify the proper temperatures for switching to a control device and when starting and stopping the push of product through the kiln, based on their site-specific operations. This would require approval of the regulating authority and would be established at the same time as the operating parameters for ongoing compliance demonstration.

## **VI. Malfunctions**

Malfunctions are, by EPA’s own definition, unavoidable and unpredictable. EPA accepts that all facilities will have malfunctions, but then determines that they should ignore knowing this fact when establishing a standard. While we understand that this has been EPA’s approach recently, this is the first time our industry has been impacted by this approach and we do not agree it is reasonable. It is not reasonable to take a stack test that was conducted on a kiln during normal operation and apply that emission limit to the kiln during a malfunction. EPA acknowledges that these malfunctions happen, even at the best performing sources. Therefore, malfunctions happen “in the floor.” Going to a standard that requires compliance at all times is going “beyond the floor.” EPA is clearly allowed to do this under the CAA, but must look at it as a “beyond the floor” option and consider costs. For our facilities with APCDs to comply with a

MACT limitation during a period of malfunction would require that we install redundant controls. Clearly this has not been done in our industry. Said another way- applying a stack test that occurs during steady operation to malfunction periods is going beyond what is “achieved” by a source and into what EPA is assuming is “achievable.” This is going “beyond the floor” and costs must be considered.

A work practice standard is the appropriate approach for our industry as EPA has acknowledged that it is technically infeasible to test during a malfunction since it is impossible to know when an event will occur and economically infeasible to have a stack test team ready to go at all times in order to test during a malfunction. Since it is not technically or economically infeasible to test during these periods, malfunctions meet the criteria of §112(h) of the CAA that allows for work practice standards.

A reasonable work practice would be to require each facility with a control device to develop a malfunction plan, similar to the one required by the now-vacated 2003 Brick MACT. The work practice could require a facility to develop, maintain, and follow a plan for periods of malfunctions and revise a plan, as needed. For example, a plan revision would be warranted if a malfunction occurred that was not included in the current malfunction plan.

#### **VII. Source category and affected sources**

There are at least two other MACTs that have the potential to overlap brick and structural clay operations: the Refractories MACT and the Ceramic Tile MACT. Section 112 plainly requires that only one categorical MACT standard may apply to a given emission source at the same time. Each rule should clearly delineate that an emissions unit subject to one of the standards is not simultaneously subject to another standard.

In the proposed rule, the EPA defines small and large kilns based on the kiln’s “design capacity.” Unlike many emissions sources that EPA has regulated previously, the “design capacity” of some kilns can vary based on the void space in the brick, the push rate for the kiln, and even the stacking pattern. EPA should clarify that the “design capacity” for a kiln is the level that is Federally-enforceable and listed in their Title V operating permit. Most typically this is listed in a permit as tons of fired brick throughput per hour or per year. Any yearly capacity should be converted to an hourly throughput for purposes of determining large or small by dividing yearly throughput by 8,760 hours per year.

#### **VIII. Additional subcategories needed**

The possible need and justification for subcategories under the health-based compliance alternative is discussed in the letter written on BIA’s behalf by Bill Wehrum. However, there are two additional areas where a subcategory may be warranted. The full research to support these possible subcategories has not been completed. However, the BIA and our member companies continue to work to provide the information to EPA and appreciate EPA’s willingness to continue

to work towards a reasonable rule even as the comment period ends. The two potential areas that should be considered for subcategorization include:

- **Sawdust-fired kilns venting to a sawdust dryer.** A sawdust-fired kiln with a sawdust dryer represents a distinctly different operating scenario from other brick manufacturing operations. When a sawdust-fired kiln operation includes a sawdust dryer, the sawdust dryer is integral to the overall process. In most cases, some of the kiln exhaust is vented through the sawdust dryer, while the remaining exhaust is directed out of the regular kiln exhaust. The exhaust typically serves as both the heat source and the transport air forcing the sawdust through the dryer. In the proposed rule, EPA treats the exhaust that is cycled through the dryer identically to the exhaust that is vented directly from the kiln. These two exhausts are inherently different. The exhaust from the sawdust dryer is naturally both cooler and contains more moisture than the direct exhaust since it has passed in direct contact with the wet sawdust. Since the emissions profile is inherently different, the ability to add an air pollution control device to the sawdust dryer exhaust is also different.

Under the previous MACT, the emissions from a sawdust dryer were treated as a separate emissions source type. Emissions were recognized to be different, based on AP-42, and the rule required no additional numeric emission limits. We believe that these sources may again warrant treatment separately. To respond to data needs to support this differentiation, one of BIA's small businesses in this potential subcategory is currently evaluating the potential to test their stack emissions. To date, they have been unable to finalize these plans but hope to have the test conducted in the near future. As one of only two plants that currently operate in this potential subcategory, and as the only small business, we believe that the tests at this plant, if conducted, will provide useful data. We intend to continue to keep EPA informed of the progress and the results of the test.

- **Kilns with low stack temperatures.** There are numerous uncontrolled kilns in our industry that never attain the necessary stack temperature to effectively vent their exhaust to the control devices currently identified by EPA and used as the basis for all MACT burden calculations. These include kilns that never reach 300 °F and those kilns that do not maintain their stack temperatures above 300 °F. In both cases, venting the exhaust from these kilns through a DIFF or a DLA would not be possible because the stack temperature will not remain above the dewpoint for HF and HCl. EPA recognized the limitation of venting gas below the dewpoint when they established the proposed work practices for this proposed rule. Venting gas below the dewpoint would quickly and perhaps permanently render the controls useless.

Since the controllability of these kilns is inherently different, they warrant consideration for subcategorization as a different class or type of kiln. It is likely that these kilns will tend to be smaller and older kilns. However, as this issue was only identified recently as the industry reviewed the work practice requirements for start-up and shutdown, we do not yet have the definitive information to provide to EPA. We will provide the information

to EPA by mid- to late- April. This will allow us time to gather the information on these sources and identify a recommended approach for subcategorization and regulation.

**IX. “No Visible Emissions” requirement is not warranted in all cases**

The proposed rule requires that all facilities demonstrate that they can meet PM standard by conducting a stack test. Ongoing compliance is then demonstrated by daily documentation of “no visible emissions.” However, a facility may be able to demonstrate compliance with the PM emission limits even though periodic visible emissions may be witnessed during their performance test. For that reason, VE is not a reasonable parameter to prescribe for purposes of assessing ongoing compliance with the PM standard. At a minimum, in those instances, the facility should be allowed to prove ongoing compliance by demonstrating that the percent of operating time with visible emissions does not exceed the percent of time with visible emissions observed during the performance test.

1. In some normal operating scenarios, periodic “puffs” of visually detectable opacity are sometimes observed. This can happen in uncontrolled scenarios when product is charged into the kiln. It can also happen when a DLA cycles limestone and during some flashing operations. In rare instances, a “puff” may be detected even on DIFFs during bag cleaning cycling. This is a normal part of these processes and does not mean there is a malfunction- or even (necessarily) that any additional HAP are being emitted.
2. IF a facility can demonstrate compliance with one of the HAP emission limits (most likely the total metals per hour option if the visible emissions are carbon or limestone based) while having these periodic visible emissions, they should not be required to eliminate them under this MACT.
3. VE may also be visible during the filling of fresh reagent silos and emptying of spent reagent containments. This is normal operation and should not be considered a violation of the standard.
4. In some cases, visible emissions have nothing to do with HAP emissions. For example, condensable vapors, including water, can be visible under certain conditions. If a facility has demonstrated compliance with the hourly HAP metal limit, a “no visible emissions” requirement would be unnecessarily problematic.

BIA believes there should be an alternative approach that a facility could opt into if they have the visible emissions issues discussed above. We would not recommend that EPA remove the current option- just add an additional option if the duration of the puff is regular and anticipated. We suggest an addition to §63.8470(f) that would allow periods of visible emissions during normal operations to accommodate circumstances like those described above.

**X. EPA’s background memoranda are inconsistent and contain significant errors**

In this section, BIA identifies specific issues included in the background memoranda that are used as justification for the proposed rule. The lack of any specific list of the technical memoranda in the docket made the identification and acquisition of these documents more difficult than it should be, particularly when the EPA is regulating a very small industry with

limited resources. Our concerns with the docket approach, including the identification of several items we believe were excluded from the docket, are discussed in a separate comment letter submitted by Paul Regina of the Brick Industry Association.

***We believe that the Regulatory Impacts Assessment (RIA) is fatally flawed by the incorrect assumptions on both costs and the number of facilities impacted and must be redone.*** The RIA should evaluate the ability of every small business to finance a DIFF with ACI since, as discussed below, we believe that EPA erroneously assumed that all small kilns could meet the mercury standard based solely on the small kiln used to set the mercury standard meeting the limit. Similar unsupportable conclusions were made by using only data from DIFF controlled large kilns to estimate the ability for uncontrolled large kilns to meet the standard.

#### **A. Inconsistencies across memos**

One of our concerns about the technical memoranda is our inability to identify consistent information across the various memoranda. For example, the reported number of sources potentially impacted by the regulation do not match in at least two critical memoranda.

- In the Supporting Statement for the Standard Form-83 (EPA-HQ-OAR-2013-0291-0129), EPA states that there are **92** major sources and they project 25 will become synthetic area sources to avoid the MACT, leaving 67 major sources subject to the rule. Based on our review, we believe that this number is referencing facilities and not kilns at major source facilities; however, that is not completely clear.<sup>9</sup>
- In the memorandum, Development of Cost and Emission Reduction Impacts for the BSCP NESHAP (EPA-HQ-OAR-2013-0291-0117) EPA identifies that there are **86** major sources and that 15 sources plus 14 stacks located at an unidentified number of sources would become synthetic area.

In order to provide comments on the overall preamble and rule, it is important that all underlying documents consistently support the overall proposed rule and preamble. These do not. Therefore, we request an additional opportunity to review and comment on these memoranda once they are fixed and consistent.

Our comments and concerns about the two major memoranda that support EPA's burden estimates for this rule are detailed in the remaining subsections of this section.

#### **B. "Model" Cost memo**

The BIA MACT TF is concerned because this memorandum contains numerous assumptions that are either not supported by anything and are just "assumed" or are supported by a single telecon from a vendor who is clearly motivated to state that his equipment can meet any

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<sup>9</sup> See Appendix A for a copy of our full comment letter on the SF-83 Supporting Statement submitted to the Office of Management and Budget (OMB) on January 20, 2015. This letter outlines significant other issues with the numbers included in the Supporting Statement.



requirement. However, EPA appears to have been selective in which pieces of information it accepts from a vendor and which it does not, ignoring costs or other information provided. Examples follow:

- In the previous cost analyses for the 2003 MACT, the EPA used a lifetime for air pollution control devices (APCD) of 10 years. However, in the analysis to support this rule, the EPA changed the lifetime used in the analysis to 20 years, without justification of documentation. Other costs were simply escalated to 2011 dollars.
- The costs are reported in 2011 dollars with no explanation. A rule proposed in 2014, promulgated in 2015 and largely implemented in 2018 and 2019 should have been estimated in more recent dollar years.
- In one of the telecons documenting a discussion with a vendor (EPA-HQ-OAR-2013-0291-0221), in which the vendor says that activated carbon injection (ACI) systems would work for brick operations. The telecon then discusses the vendor statement, stating, “He said that they sell silos of carbon for \$500K to \$600K.” Instead of following up to get the details of this cost, EPA dismisses this cost because it was reportedly two to three times higher and “may have been referring to processes with much higher flow rates than brick kilns.” Instead, EPA took a lower number from a 2005 rulemaking and then still reduced that cost by scaling down to the flowrate of an average brick kiln.

The justification for this less costly approach appears to be due to a second vendor who claimed that you could just use a bag of activated carbon and a blower. This is not a practical way to operate a system required for compliance – facilities would install a storage silo with a reliable, accurate injection system with a variable injection rate so carbon isn’t wasted, and they could document the carbon flow rate, as required by the proposed MACT. No one would dump a bag of carbon in a bin with a blower, especially when they could have to inject 250 lb/day. In addition, some of the vendors that the brick industry has spoken to have indicated a concern that the addition of carbon could create an explosion danger that would need to be mitigated. The algorithm in the HWC document is  $\$90,000 \text{ capital cost scaled by } (\text{flow rate in acfm}/150,000)^{0.7}$ , making the cost for the much smaller flows in a typical brick plant about \$30,000 for a 30,000 acfm kiln, before escalation to 2011 dollars. It is not appropriate to scale something as simple as the system they have costed by size – it would likely be the same size system, you would just get deliveries of carbon more frequently for bigger kilns. This algorithm also results in some ridiculous indirect costs for the model kilns (startup \$538-\$772, performance test \$538-\$772, model study \$1,076-\$1,544).

The total capital investment is only \$102,224 for the small model kiln is unrealistic and not based on current day facts. The BIA MACT TF asserts that EPA must, **at a minimum**, use costs that were provided for this industry and for a system that the vendor “believed” would work. Sound science would dictate that both the applicability to our industry and the costs should be based on more than a vendor claims. Mixing costs for one system and claims for a more expensive system is bad science and should be corrected in the final rule.

- EPA appears to use vendor claims that bag degradation will “usually” not occur if “the bags are continuously operated above the acid gas dew points”. (P. 6 of Model Cost memo) EPA apparently uses this to justify costing out a fabric filter rather than a dry injection fabric filter for some applications. However, EPA then goes on to use less than continuous operation for both small and large kilns by using only 7300 and 7800 hour per year for small and large kilns, respectively. There is no way that a kiln operated only those hours would remain above the acid gas dewpoints; therefore, EPA either needs to use 8760 hours per year or cost out a DIFF. There are some documents in the docket where EPA is apparently trying to figure out if they can just use a fabric filter to control PM/Hg on a brick kiln and refute industry concerns about the acid gas destroying the bags and a concern about bags degrading at high temperature. EPA-HQ-OAR-2013-0291-0217 is correspondence from Gore that says “HF destroys fiberglass, so PTFE bags would be needed if HF emissions are a concern.” He noted that PTFE bags, unlike fiberglass bags, are chemically inert, but are very expensive, about 2 to 5 times more expensive than fiberglass.” There is no difference in bag cost between their DIFF model and their standalone FF model. The cost used in the analysis is based on the average from Section 114 survey response per cost memo EPA-HQ-OAR-2013-0291-0118 Table B-2. These would not be the PTFE bags. EPA also ignores the particulate reduction benefit that stems from the reagent filter cake buildup on the bags.
- While it is possible that a straight average of values reported in a 2008 survey would give you average operating hours of 7300 and 7800 for small and large kilns, respectively, these are not reasonable hours to use for estimating the costs of a system. The average hours likely resulted from averaging full operating kilns with kilns that were seasonal or only operated a fraction of the year, due to the downturned economy. In addition, as mentioned above, EPA assumes that the temperature in the systems never drops below the dewpoint for the compounds when they determined that a DIFF was not needed and they based the rule costs on a DLA. As EPA is aware, kilns are designed to remain operating constantly for months or even years once they begin operation. To realistically estimate the impacts of a control, the EPA should use the more accurate estimate of 8760 hours. If not, EPA must cost a DIFF for all applications and not a FF, as the HF and HCl, even in the small amounts emitted by a brick kiln would impact the APCD physical integrity and greatly reduce the lifetime of the unit.
- EPA should also use the lower level of operating hours, perhaps as low as 50 percent of a full year, to better understand the impacts of these controls on companies with kilns that operate only part of the year due to low demand. These kilns are often located at our smallest businesses that will be most severely impacted by this rule.
- The BIA MACT Task Force conducted a brief survey of our industry to confirm or refute other key cost elements. Results of that survey are presented in a separate letter submitted by Paul Regina of the BIA.

### **C. Development of Cost and Emission Reduction Impacts for the BSCP NESHAP, EPA-HQ-OAR-2013-0291-017**

The majority of assumptions used in this memo are not supported by any data, nor do they reference other memo where this support is provided. The end result is that EPA has reduced the number of sources potentially impacted by this rule from 171 potentially requiring new or upgraded controls to 34 requiring new controls and 4 requiring removal or enhancement of existing controls. The costs estimated based on this approach grossly underestimate the true potential impacts for this rule. Examples follow:

**Facilities with controlled kilns assumed to already be synthetic area/minor.** EPA assumes numerous facilities are already or will become synthetic minor/area sources if they have existing APCD on all tunnel kilns within the facility. They state that the sources would already be synthetic area/minor sources and not subject to the MACT because the change could be made “at little to no cost” and then accounts for **no costs** from these sources. This is not valid. At a minimum, a facility would need to conduct a stack test to verify emissions, develop a permit application, and develop and implement a program to implement the permit requirements. *These costs would not be incurred in the absence of the rule; therefore, they must be considered as costs imposed by this rule.*

No facility could make the determination and self-assert their non-major status as EPA did for this analysis and then be exempt from the MACT requirements. The EPA’s approach also ignores additional concerns that must be addressed before a decision of this magnitude is made. For example:

- If the tunnel kilns are co-located with periodic kilns, the periodic kiln emissions must be included in the determination of major source status. There is no evidence in this memorandum that EPA included emissions from co-located periodic kilns in their analysis.
- The remainder of EPA’s assessment basically concludes that virtually all small kilns can meet the proposed rule. If EPA makes this assumption, it is unclear why a facility would unnecessarily take a limit that could potentially impact future growth.
- A synthetic minor/area permit can also have an impact on future growth and can also add to a facility’s reporting burden as some states have different requirements for sources that are attempting to remain below regulatory limits. The EPA cannot simply assume that a facility that has thus far elected to remain a major source has not considered the options and chosen to remain a major source.

In one case, a facility that attempted to become a non-major source using their existing controls was told that it was not allowed because the state was enforcing the EPA’s “once in, always in” policy that prevents a facility from avoiding the applicability of a MACT by becoming non-major if the compliance date of the rule has already passed. This state regulatory authority, Alabama, determined that the Brick MACT promulgated in 2003 triggered “once in, always in.” One reason for this confusion could be that Subpart JJJJJ remains in the Code of Federal

Regulations even though the rule was vacated almost 8 years ago. For those who can benefit from becoming a synthetic minor source, we do request that EPA clarify that the “once in, always in” policy would not apply in this case since the 2003 Brick MACT was vacated by the courts.<sup>10</sup>

The decision to exclude sources that could be synthetic based on a simple paper study incorrectly removes the burden from this rule, including incorrectly reducing the number of sources that EPA uses when estimating the reporting burden of this rule for the SF-83 and Supporting Statement. These sources should be included in the burden estimate since any actions taken by a facility that would not have been taken in the absence of the proposed rule are a burden created by the rule.

**Sources opting to become synthetic sources to avoid the rule.** In the evaluation of the number of affected sources, the EPA assumes that 14 facilities will install DLAs to become synthetic minor/area sources to avoid the MACT, again based on an oversimplified analysis. This time, the analysis was a comparison of costs of compliance versus becoming a synthetic minor/area source. However, in truth, such a decision is more complex.

- Becoming a synthetic minor/area source would impact future growth potential. In addition, some states inflict additional compliance requirements on non-major sources.
- A vast majority of the small kilns in EPA’s analysis have never been stack tested. Even though EPA used slightly more conservative assumptions for facilities with no test data, there is simply no assurance that a facility would be able to comply with the synthetic area/minor emission levels without a stack test- and any regulatory authority would require such a test.
- If the kiln exhaust contains more than approximately 18-20 ppm SO<sub>x</sub>, as documented in a telecom during the previous MACT development (ref- Solios email), a DLA may not be possible. This would significantly increase the cost of becoming a synthetic minor/area source.

Any potential cost savings would need to be considered and weighed against the impacts of becoming synthetic minor/area. It appears that EPA’s assumption reduced the annual cost of the rule by less than \$2 million per year, less than other assumptions discussed in this section. However, the assumptions seemed to be used to provide EPA with virtually all of the benefits claimed by this rule. In total, the 14 sources assumed to install DLAs **to avoid the rule** provide 87.7 percent of the annual HAP emission reduction claimed by this rule (386 tons of the 440 tons)<sup>11</sup>, as well as 99.6 percent (254 of the 255 tons) of the annual SO<sub>2</sub> reduction. EPA needs to reassess the potential for sources becoming synthetic area/minor sources- and greatly

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<sup>10</sup> In any event, the “once in, always in” policy is unlawful because the statutory definition of “major source” unambiguously specifies that a facility is a major source only if its PTE exceeds the specified thresholds. If a facility is a major source and then reduces its PTE to below the HAP major source thresholds, that facility ceases to be a major source and may no longer be subject to MACT standards for major sources.

<sup>11</sup> An additional 46.8 tons of the HAP emission reduction (10.6 percent) is shown by EPA as coming from gaseous HAP emission reductions from one facility needlessly removing an ESP/SD and replacing it with a DIFF to meet the HCl<sub>equivalent</sub> standard. This facility models as well below the level established by EPA as safe, but would be required to install a control nonetheless to meet the HCl<sub>equivalent</sub> limit.

reduce the number of kilns assumed to do this. While it is a viable approach that our industry will consider, EPA's analysis does not address the real evaluations that must be considered. While 14 sources is not a large percent of the industry, it **represents 25 percent** of the sources that EPA had determined would otherwise be subject to the Brick MACT. *The BIA also questions whether the ability for the sources to borrow the money to "avoid" the rule was included in the Regulatory Impacts Analysis.*

**Estimating the number of sources that can meet the standard.** While the use of sources with data as a predictor of compliance percentage for units with no data has a history in MACT development, it must be used with caution. It is important to consider the population of sources that are being evaluated to ensure that the types of sources are reasonably similar and that the data has a reasonable potential to predict the likely outcome of remaining sources. For example, when evaluating the ability to comply with the PM limits, the EPA grouped kilns by control status and evaluated percent of sources with data meeting the proposed limit within these distinct categories. It is impossible with the data provided in this memorandum to calculate the percent of kilns within the category with stack data since EPA changes between the number of sources in the category and the number of sources in the industry interchangeable and generally without explanations.<sup>12</sup> However, we recognize that there is a reasonable population of data for large kilns and concur that it is reasonable to assume that the PM data for DIFF and DLS/FF controlled units that meet the standard represent a reasonable estimate of the number of similarly controlled kilns without data that would be able to meet the limits. However, EPA should assess whether these assumptions make sense each time they use them and use more conservative approaches, as necessary, to ensure that they are not irresponsibly lowering their burden estimates. Examples follow.

**Mercury control-small kilns.** EPA should not base the ability for all 77 small, uncontrolled kilns to meet the mercury standard on a single stack test of a controlled kiln, even if that control is "believed" to not control mercury. This is particularly egregious when a single test was the only test used **to set the standard**. Surely, it is clear that the stack test that was used to set the emissions limit would meet the standard based on that single stack test. However, as explained elsewhere in this document, that same facility has identified that the brick being produced on the day of the test do not represent the material believed to be the highest mercury emitting. Therefore, this same kiln may not be able to demonstrate compliance with the current limits if the test were to be conducted with a different product. The need for a variability factor to be added to any emission limit calculated from stack test data is discussed in more detail in the comment letter submitted by Terry Schimmel and Irene Kuo on behalf of the BIA MACT TF.

Using the fact that the stack test for the single tested small kiln could meet the limit that was calculated based on that stack test, the EPA assumed all small kilns could meet the

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<sup>12</sup> Table provides the Nationwide Baseline Estimates for the source category; however, when assessing data, EPA considered the entire industry, including synthetic minor sources that are not part of the regulated category. Therefore, for example, Table 3 lists 14 DIFF or DLS/FF controlled kilns in total for the category, but Table 5 lists 28 DIFF or DLS/FF having data.

standard, thus avoiding inclusion of any mercury controls on 77 small kilns. Without this assumption, EPA would have had to include the cost, at a minimum, to install and operate a fabric filter (FF) and activated carbon injection (ACI) system. For reasons discussed elsewhere in this comment letter, we believe a DIFF with ACI would be need to be costed out for this scenario, although we continue to assert that there is so data to support EPA's assumption that these controls could reduce Hg to the proposed limits. EPA does not even present the costs of a DIFF with ACI option on a small kiln in the memorandum. The EPA estimates that the FF alone would cost \$1.2 million control, with an annual cost of \$437,849. An ACI system for a large kiln is estimated by EPA to cost \$146,697 in capital costs with annual costs of \$96,482. We believe that these costs are an underestimate for a large system, as well as a small system. Since the large kiln ACI is all that is provided and we believe this cost is underestimated for large, we will use it for a small kiln to calculate cost effectiveness. Using the available EPA costs, installation of a DIFF with ACI on a small kiln would cost \$534,331 annually to reduce approximately 0.00136 tons (2.7 pounds) for a cost effectiveness of \$393 million per ton, if ACI would even work for our sources.

Because there is no mercury testing for uncontrolled small kilns, there is no way for us to able to accurately predict at this time what percent of the facilities would be able to comply with this standard. Our industry has begun a raw material testing program to begin to assess the potential compliance.<sup>13</sup> Based on preliminary review of the data, we believe that some fraction of small kilns will be able to comply with the standard, but our mercury study is not complete. Those that cannot meet the standard will face these astronomical costs that EPA ignores in their analysis.

We believe that it is wrong for EPA to assume 100 percent of small kilns can achieve compliance with the mercury standard. The ability to comply or not comply will completely depend on the amount of mercury that was deposited in our mined material millennia ago. If a facility cannot meet the limit without control, they will either have to install the control listed above and hope that it works, attempt to become a non-major source if that is possible, or cease operations. We do not believe any of these options are warranted for less than 3 pounds of mercury, particularly when there are significant questions about the ability for a facility to demonstrate compliance with these limits due to test method limitations. We believe that EPA needs to explore subcategorization alternatives based on mercury content or recognize that the extreme low levels of mercury make demonstrating compliance technically and economically infeasible and propose work practices for these operations.

**Mercury control- large kilns.** Similar to small kilns, the EPA grouped uncontrolled and controlled large kilns into a single evaluation. This time the EPA has data from 18 DIFF-controlled kilns and found that 16.7 percent met the lb/ton limit and 55.6 percent met the concentration limit. EPA then applied 55.6 percent to all categories of large kilns to

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<sup>13</sup> See BIA MACT TF letter submitted by Terry Schimmel and Irene Kuo for more information on this study.

arrive at the number of kilns that they believed could meet the standard. Without a determination that a DIFF achieves no mercury control, there is no justification for applying this percentage to any other group. In fact, absent data, EPA should take the conservative approach of assuming that no kiln meets the mercury limits. At most, the lower percentage of 16.7 might be used; however, there is no real basis for its application.

This highlights our industry's concern that there is simply insufficient data available to justify a numeric limit for mercury at this time. Absent more data, EPA must assume a higher percentage of noncompliant sources and accept that the potential cost of this rule is far higher than they stated in the proposed rule.

**PM control- Percent meeting hourly limit-small kilns.** Apparently without data, and certainly without citing the data, EPA assumed that 21 of 24 kilns that could not meet the mass/ton based or concentration-based standard would be able to meet the hourly mass emission rate. No reference was provided to support such an assumption.

**Other assumptions, with no support.** Following are some additional assumptions made in this memorandum that apparently have data support. While we understand that assumptions need to be made, we request that EPA provide some justification and support in the final memorandum to support this rulemaking (emphases added).

- “For large kilns with a DIFF or DLS/FF, it was assumed that the kiln stack not meeting either the PM lb/ton or concentration limits would meet the total non-Hg HAP metals lb/hr limit.”
  - There is no reference to a memo or data that supports this assumption.
  - EPA based the lb/hr limit on an average percentage of the best performing sources in the floor pool. Taking an average of the best performing sources further biases the data set. We do not believe that this is the correct approach since it would automatically mean that anyone above this “average” metal content would be out of compliance with the rule. We believe this overstates the number of sources that will comply with this limit format.
  - The high potential for problems Test Method 29, used for metals measurements, such as permanganate contamination, could further challenge sources to demonstrate compliance with this alternate limit.
- “For large kilns with a DLA, it was assumed that one of the kiln stacks not meeting the Hg lb/ton or concentration limits would meet the Hg lb/hr limit. It was also assumed that this kiln stack is one of the 12 stacks that can meet one of the PM limits, so no FF would be needed.”
  - Again, no basis or reference to a memo or to data that supports that this one kiln can meet any one of these numbers. Since the two emission rates were established from completely separate populations of sources, there is absolutely no data to support that both limits would be able to be met by the same source.

- “Based on the results of the analysis described in Section III of this memorandum, a total of 12 large uncontrolled kiln stacks are located at facilities that could become synthetic area sources with installation of a DLA on those stacks. For large uncontrolled kilns, it was assumed that owners or operators of three-fourths of these kiln stacks, or nine total stacks, would elect to install a DLA. To be conservative, it was estimated that most of the remaining kiln stacks would not be able to meet any of the Hg limits.”
  - In other areas of this memo, EPA assumes that ALL who could potentially meet the synth levels automatically do. While assuming that only 75% meet it may be slightly more conservative, there is again, NO basis for even this high an assumption provided by EPA.
  
- “It was expected that most small uncontrolled kilns would be able to meet the total non-Hg HAP metals lb/hr limit and would not need to install DLA to become a synthetic area source. Therefore, for small uncontrolled kilns, it was assumed that a little over 5 percent of the total kiln stacks, or five total stacks, were located at facilities that would elect to become synthetic area sources by installing a DLA. It was also assumed that 21 of the 24 remaining kiln stacks not meeting the PM lb/ton or concentration limits (88 percent) would be able to meet the total non-Hg HAP metals lb/hr limit.”
  - There is no basis provided for any of these numbers. As stated previously, the decision to become a synthetic area source is complicated and not without limitations.
  - The metals percentage used for this calculation was not based on the subset of small kilns, further weakening any rationale for its use.

**Apparent typos/errors.** There are several places within this memorandum where numbers do not agree with previous tables. As noted in Footnote 12, EPA does not clearly state when the population they are counting includes only those major sources in the regulated source category and when they are referring to the entire industry. We disagree that EPA uses these terms interchangeably, especially when looking at the MACT floor for existing sources. However, it is clear that EPA understands that these are two distinct populations when determining the impacts of the proposed rule. We ask that EPA clarify the table headings or footnotes to indicate which group they are summarizing in each table.

In addition, we note the following apparent typos:

- Table 3 indicates a total of 75 small kiln stacks (out of a total of 150) with one vented to a DIFF; Table 4 shows 79 small kiln stacks (out of a total of 132 stacks, reduced based on first “synth” cut) with 1 vented to SD/ESP; Table 5 repeats the numbers contained in Table 4.



- Page 5 states that 15 of 86 would become synthetic sources; Page 8 says 14 sources would become synthetic area sources.
- Table 6, p 9, has a typo- the large kiln, DIFF line indicates 4 kilns would install activated carbon injection (ACI), but the total in that column is only 3
- Table 7 indicates that 3 small kilns would need to install a FF to comply with the rule (this is supported by the text that states that “21 of 24” would meet the hourly rate). However, the next two tables include only 2 small kilns.

#### **XI. *Typos and clarifications needed in regulatory language***

1. In Table 5 of the regulation, in the first column, the “8. Existing, new or reconstructed periodic kilns” is missing.
2. The BIA MACT TF requests that EPA allow that stack tests conducted within 5 years of date of notification of compliance status be acceptable as long as the company can assert that the operations during the test are still representative of current operations and that all required data were collected during the test.
3. In some cases, two or more kilns are vented to a single control device. EPA acknowledges this in their analyses. However, the compliance demonstration requirements do not appear to address this situation. The BIA MACT TF requests that EPA clarify that co-venting through a common control device is acceptable.
4. The EPA provides compliance demonstration procedures for the  $\text{HCl}_{\text{equivalent}}$  standard for uncontrolled kilns and for controlled kilns. The BIA MACT TF requests that EPA specifically state that a combination of controlled and uncontrolled kilns can be used to meet this limit.
5. EPA should provide specific instruction on the use of “non-detects” when demonstrating compliance with the  $\text{HCl}_{\text{equivalent}}$  standard. Specifically, a “zero” emission rate should be used for non-detects found during Method 26A testing. Any value other than zero used for a non-detect for chlorine would be multiplied by 133 and could make it appear that a facility was violating the  $\text{HCl}_{\text{equivalent}}$  standard when they have non-detectable chlorine emissions.

#### **Conclusions**

We commend the EPA for taking an important first step towards the creation of a rule that both meets the requirements of the CAA and acknowledges that the vast majority of our emissions cause no harm to human health and the environment. The health-based standard for HF, HCl and  $\text{Cl}_2$  is fully supported by the CAA and addresses more than 99 percent of the HAP emissions from the brick and structural clay industry. However, we need EPA to finish the job they started and promulgate a MACT that continues to meet all CAA requirements but eliminates the huge burdens that would occur if the proposed rule were promulgated. We urge EPA to not erase the significant achievements made with the proposal of health-based

standards by imposing unrealistic and unnecessary limits on the remaining pollutants. The goals of the CAA can be achieved without destroying our industry and needlessly eliminating the jobs that we provide.

Our BIA MACT TF has worked extensively with EPA during the pre-proposal stage and remains committed to actively participating in the ongoing rulemaking process. We again would like to invite the new lead engineer, Sharon Nizich, to visit a brick plant at your earliest convenience so you can better understand the processes and the industry that you are regulating. If you have any questions or require additional information to fully consider our standards, please do not hesitate to contact me at [smiller@bia.org](mailto:smiller@bia.org) or by telephone at (919) 380-2191.

Sincerely,



Susan Miller  
Vice President  
Environment, Health and Safety  
Brick Industry Association

On behalf of the MACT Task Force:

Dr. Garth Tayler, Acme Brick, chair  
Terry Schimmel, Boral Brick, co-chair  
Bradley Belden, Belden Brick  
Howard Brown, Triangle Brick  
Mike Krzyzanowski, Glen-Gery Brick  
David McKeown, Hanson Brick  
Preston McMillan, Pine Hall Brick  
Barry Miller, Redland Brick  
John Miller, Whitacre Greer  
Warren Paschal, General Shale Brick  
Jeff Wyers, Nash Brick

**Attachment**

- A. Copy of January 20, 2015 comment letter by BIA on Supporting Statement for SF-83; submitting to the Office of Management and Budget
- B. Copy of December 5, 2013 memorandum from BIA outlining HEM-modeling results for mercury



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March 19, 2015

U.S. Environmental Protection Agency  
EPA Docket Center (EPA/DC)  
Mailcode 28221T  
1200 Pennsylvania Ave., NW  
Washington, DC 20460  
Attn: Docket ID No. EPA-HQ-OAR-2013-0291

Re: Comments on the Proposed NESHAP for Brick and Structural Clay Products  
Manufacturing

To Whom It May Concern:

I am pleased to present, on behalf of the Brick Industry Association (“BIA”), the following comments on the proposed rule entitled NESHAP for Brick and Structural Clay Products Manufacturing, published at 79 Fed. Reg. 75622 (Dec. 18, 2014).<sup>1</sup> BIA is the national trade association representing distributors and manufacturers of clay brick and suppliers of related products and services. Since its founding in 1934, the association has been the nationally recognized authority on clay brick construction and represents the industry in all model building code forums and national standards committees. These comments focus on the key legal issues presented by the proposal. They supplement BIA’s technical comments, which will be separately submitted to the docket.

**I. BIA Generally Supports the Proposal to Establish a Health-Based Emissions Limit for HAP Acid Gases**

BIA generally supports EPA’s proposal to set a Health-Based Emissions Limit (“HBEL”) for HAP acid gases pursuant to CAA § 112(d)(4). EPA has clear legal authority to set HBELs and ample justification in the context of this source category.

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<sup>1</sup> The public comment period for this proposed rule was extended from February 17, 2015 to March 19, 2015. 79 Fed. Reg. 78768 (Dec. 31, 2014).

For “pollutants for which a health threshold has been established,” § 112(d)(4) provides that EPA “may consider such threshold level, with an ample margin of safety, when establishing [§ 112(d)] emission standards.” Under the clear terms of this provision, EPA may set an emission standard at a level higher than what § 112(d)(4) otherwise would require (i.e., by applying the MACT standard-setting procedures), provided (1) the pollutant(s) being regulated is a threshold pollutant; and (2) that the standard provides an ample margin of safety. Both of these criteria are met in this case.

First, as EPA demonstrates in the proposed rule, the available health data indicate that hydrogen chloride (“HCl”), hydrogen fluoride (“HF”), and chlorine are all threshold pollutants. The data show that each of these pollutants has a discernable exposure threshold below which adverse human health effects are not expected to occur. In addition, none of the available data suggest that these pollutants reasonably should be expected to act as a carcinogen or mutagen, or exhibit a mode of action that would result in non-threshold effects. *See* 79 Fed. Reg. at 75638-75641.

Second, EPA has conclusively demonstrated that the proposed HBEL emission standard would provide an ample margin of safety as to emissions of HCl, HF, and chlorine from affected facilities. As EPA explains in the proposal, the Agency’s analysis was based on “site specific data on the operation of each tunnel kiln.” 79 Fed. Reg. at 75644. The proposed HBEL emissions standard was “developed from back-calculating the emissions that would result in an HQ of 1 at the worst-case facility.” *Id.* As a result, “[p]otential risks at other facilities (not the worst-case facility) are predicted to be well below 1.” *Id.*

This analysis thus assures, based on site-specific data from every affected source in the source category, that an ample margin of safety will be provided for the “worst case” facility in the industry and more than an ample margin will be provided for all other affected facilities.<sup>2</sup>

We note that the proposed standard is entirely in keeping with Congress’s expectations with regard to the implementation of § 112(d)(4). In the Senate report accompanying the legislation that was the source of § 112(d)(4), it was observed that, “For some pollutants a MACT emission limitation may be far more stringent than is necessary to protect public health and the environment.” S. Rep. No. 101-228, 101<sup>st</sup> Cong. 1<sup>st</sup> sess. at 171. In such situations, “[t]o avoid expenditures by regulated entities which secure no public health or environmental benefit, the Administrator is given discretionary authority to consider the evidence for a health threshold higher than MACT at the time the standard is under review.” *Id.*

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<sup>2</sup> As explained below, we believe that EPA’s analysis was overly-conservative in a number of ways. Thus, while we generally support the proposed HBEL emissions standard, we believe the proposed standard should be revised to eliminate the unneeded conservatism.

Here, rote application of the MACT standard setting provisions would result in emission standards that are far more stringent than are needed to protect health and the environment. Thus, these circumstances are exactly what Congress had in mind when it enacted § 112(d)(4). In short, there is no point in regulating for the sake of regulating. Section 112(d)(4) allows for § 112(d) emission standards to be tailored such that the public health is amply protected without imposing unreasonable and unnecessary standards on affected sources.

Lastly, as explained in more detail below and in BIA's own comments, the proposed mercury emissions limitations are highly problematic – both because the data supporting the proposed limits are inadequate and because of the costs and difficulty of meeting the proposed limitations. One solution to these problems could be establishing a HBEL for mercury emissions from affected brick manufacturing plants. EPA has concluded that mercury is a threshold pollutant.<sup>3</sup> As for the proposed HBEL for HAP acid gases, EPA could easily use this well-established threshold for mercury, in conjunction with the site-specific data EPA has collected on virtually all of the potentially affected brick plants, to determine a health-protective alternative emissions limitation for mercury emissions. We encourage EPA to do so as part of the final rule.

## **II. EPA Should Not Implement § 112(d)(4) Using a One-Size-Fits-All Standard**

As noted above, the proposed HBEL for HAP acid gases is based on the emissions and other relevant characteristics of the worst case facility in the source category. As a result, as the Agency acknowledges in the proposal, the “[p]otential risks at other facilities (not the worst-case facility) are predicted to be *well below* 1.” 79 Fed. Reg. at 75644 (emphasis added). This means that, for most facilities in the source category, the HBEL emission standard would be set at a level that is more stringent than needed to meet the § 112(d)(4) “ample margin of safety” criterion. Thus, the proposed standard would impose needless restrictions on current operations and growth.

This is an unreasonable and arbitrary outcome that can and should be rectified by setting multiple HBEL emission standards, with each designed to accommodate a set of facilities with specified emissions and site characteristics. The ultimate implementation of this concept would be a standard for each site that is tailored to the characteristics of the site. Given the relatively

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<sup>3</sup> See, e.g., Mercury Study: Report to Congress, EPA-452/R-97-003 (Dec. 1997), Vol. 1 at O-2 (“The reference dose (RfD) is an amount of methylmercury, which when ingested daily over a lifetime is anticipated to be without adverse health effects to humans, including sensitive subpopulations. At the RfD or below, exposures are expected to be safe. The risk following exposures above the RfD is uncertain, but risk increases as exposures to methylmercury increase. Extrapolating from the high-dose exposures that occurred in the Iraq incident, the U.S. EPA derived a RfD for methylmercury of 0.1 µg/kg bw/day.”).

limited number of affected facilities in this source category, this approach should not be out of the question.

EPA already has ample information for implementing this sort of approach because the Agency has “site specific data on the operation of each tunnel kiln.” *Id.* Implementing this approach is just a matter of organizing the source category into an appropriate number of subsets and calculating an emissions rate that provides an ample margin of safety (i.e., an HQ of 1 or less).

EPA has clear legal authority to take this approach. Section 112(d)(1) states that EPA “may distinguish among classes, types, and sizes of sources within a category or subcategory in establishing standards” under § 112(d). Under this provision, it would be entirely reasonable for EPA to avoid costly and unnecessary over-regulation by establishing multiple subsets within the Brick Manufacturing source category for purposes of more closely tailoring the HBEL emission standards to the characteristics of each subset. This would fulfill Congress’s clear intent that MACT emissions standards should not be “far more stringent than is necessary to protect public health and the environment.” S. Rep. No. 101-228 at 171.

### **III. “Synthetic Area” Sources Cannot be used in Calculating the Existing Source MACT Floor.**

The proposed rule applies only to brick manufacturing operations located at a major source of HAPs. *See, e.g.*, 79 Fed. Reg. at 75673 (proposed § 63.8385 – “You are subject to this subpart if you own or operate a BSCP manufacturing facility that is, is located at, or is part of, a major source of HAP emissions ....”). In other words, the rule applies to a major source category and is not applicable to non-major sources, which do not belong to the source category.

Yet, EPA relied on emissions data from a class of non-major sources – the so-called “synthetic area sources” – in determining existing source MACT floors and the corresponding MACT standards.<sup>4</sup> As described below, relying on emissions data from sources that do not belong to the source category being regulated violates the unambiguous requirements of § 112(d). To correct this problem, EPA must recalculate the existing source standards using emissions data only from major source brick manufacturing plants.

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<sup>4</sup> *See, e.g.*, 79 Fed. Reg. at 75635 (“As of January 1, 2014, there were 225 operating BSCP tunnel kilns in the industry (including kilns at major sources and synthetic area sources); the top 12 percent of the kilns in the industry would be represented by the 27 best performing kilns. Therefore, we ranked the kilns with a FF-based APCD in terms of lb/ton (as described in section IV.E of this preamble) and identified the 27 best performing sources from that group.”).

CAA §§ 112(d)(3)(A) and (B) are the provisions that describe how EPA is required to determine the MACT floor for existing sources. These provisions state the following:

Emission standards promulgated under this subsection for existing sources in a category or subcategory may be less stringent than standards for new sources in the same category or subcategory but shall not be less stringent, and may be more stringent than –

(A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emission information) ... in the category or subcategory for categories and subcategories with 30 or more sources, or

(B) the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory for categories or subcategories with fewer than 30 sources.

These provisions plainly state EPA's obligations. The Agency must base the existing source MACT floor for source categories or subcategories containing 30 or more sources on emissions information from the best performing 12 percent of existing sources "in the category or subcategory." Similarly, EPA must base the existing source MACT floor for source categories or subcategories containing fewer than 30 sources on emissions information from the 5 best performing sources "in the category or subcategory." In other words, for both large and small categories or subcategories, the existing source MACT floor must be based on emissions information from the better performing sources "in the category or subcategory." This language is not ambiguous and cannot be construed to mean that EPA may use emissions information from sources outside the given category or subcategory.

The U.S. Supreme Court has established clear rules to guide administrative agencies in construing the statutes they implement. In *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), the court explained that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.<sup>5</sup> Under this so-called "Chevron I" analysis, because EPA is unambiguously directed to use emissions information from sources "in the category or subcategory" being regulated, the Agency has no choice but to follow this command.

Notably, the current proposal does not include any explanation as to why EPA thinks it has authority to consider emissions data from synthetic area sources in setting existing source standards for facilities belonging to the major source category. In the 2003 BSCP rulemaking,

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<sup>5</sup> The court goes on to explain that, if the statute is ambiguous, then courts should defer to any reasonable interpretation adopted by the implementing agency – the so-called "Chevron II" analysis.



however, an explanation was provided. EPA reasoned that, in the § 112(a)(1) definition of “major source,” “the reference to a source’s potential to emit considering controls allows the interpretation that a source’s potential to emit before and after controls is relevant, such that synthetic area sources may be considered within the meaning of this definition and included in MACT floor determinations for categories of major sources.” 68 Fed. Reg. at 26698.

This is an irrational interpretation of the definition of “major source” and, as such, it provides no support for EPA’s position. Under this interpretation, a synthetic area source actually would meet the definition of “major source” and, thus, should be regulated as a major source under applicable MACT standards. Yet, EPA has not sought to regulate synthetic area sources under this rule or any major source MACT standard issued to date.<sup>6</sup> So, if a “synthetic minor” area source is not a major source for purposes of applying a potentially applicable MACT standard for major sources, there is no rational basis for asserting that emissions data from the same source can be used in determining the existing source MACT floor for the major source standard.

Alternatively, although EPA has not advanced such an argument, the only way that EPA could use emissions information from area sources in setting existing source MACT floors in the BSCP rule would be to include area sources within the source category and to regulate major and area sources together under a single standard. But, this approach is not plausible because it too would run afoul of unambiguous CAA requirements. Section 112(c)(3) provides authority for EPA to list “each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment ... warranting regulation under this section.”<sup>7</sup> This provision unambiguously authorizes EPA only to list “category[ies] or subcategory[ies] of area sources” based on findings specific to the given categories or subcategories. *Id.* (emphasis added). This language cannot be construed as meaning that an area source category or subcategory for which the requisite finding is made can somehow be extended such that it also include major sources or otherwise merged with a major source category. A

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<sup>6</sup> See, e.g., 79 Fed. Reg. at 75665 (“There are no major sources producing ceramic tile. The five facilities that were major sources at the time of the 2008 and 2010 EPA surveys have already taken the necessary steps to become synthetic area sources. Consequently, none of the known tile facilities will be subject to the provisions of the Clay Ceramics manufacturing rule ...”). Also note that this assessment does not take into account EPA’s “once in, always in” policy, where EPA asserts that once a major source is subject to substantive requirements under a major source MACT standard, that source cannot subsequently avoid the applicability of the standard by becoming an area source. That policy also is legally flawed and, thus, has no bearing on these arguments.

<sup>7</sup> This was the authority EPA cited in listing BSCP as an area source category in 2002. See 67 Fed. Reg. 70427 (Nov. 22, 2002). EPA also cited § 112(k)(3)(B)(ii) as authority for the listing, but that provision is limited to “source categories or subcategories ... that are or will be listed pursuant to subsection (c).” So, § 112(k) provides no additional authority to list area source categories.

“category or subcategory of area sources” must include only area sources – plain and simple. In any event, there no longer is an area source category for brick plants.

This is consistent with the BSCP area source listing notice, which unambiguously characterized the source category as a new “area source category.” *See* 67 Fed. Reg. at 70428 (“The additional *area source categories* being listed pursuant to section 112(c)(3) and 112(k)(3)(B)(ii) are ... Brick and Structural Clay Products Manufacturing.”) (emphasis added). Thus, the statute requires an area source category for a given sector to be listed separately from a major source category for the same sector. EPA is without authority to take any other approach.

**IV. EPA Has Ample Authority and Justification For Establishing Subcategories Based on the Mercury Content of Clay and is Prohibited From Establishing a Mercury Standard The Effectively Requires the Use of Alternative Source of Clay.**

EPA asserts in the proposal that it has broad authority to “create a subcategory applicable to a single HAP” and that it is considering creating subcategories for mercury that would reflect “the mercury concentration of the raw materials in the kiln’s clay mine, or geographic location.” 79 Fed. Reg. at 75650. However, the Agency explains that it does not currently have adequate data to determine: (1) “if mercury emissions correlate with the mercury content of the clay used as raw material by the kiln”; (2) “to what extent mercury content of clay varies by kiln location (i.e., geographical distinction) or within a given source of clay”; and (3) “to what extent a source could reduce mercury emissions by using an alternate source of clay with lower mercury content.” *Id.*

EPA also says that it would need data to show: (1) “sharp disparities in raw material mercury content that readily differentiate among types of sources”; (2) “that alternate sources of raw materials with lower mercury content are not available or feasible”; and (3) “the availability of low mercury clay and the feasibility of using low mercury clay to reduce emissions.” *Id.* at 75651. If such data were available, EPA posits that “kilns using raw materials with higher mercury content might be considered a different type or class of kiln because their process necessarily requires the use of that higher-mercury raw material.” *Id.*

BIA agrees that EPA has broad authority to subcategorize – including the ability to create HAP-specific subcategories. However, BIA does not agree that EPA has inadequate data to justify subcategories under this rule based on the mercury content of the clay raw material. As described below, none of EPA’s perceived data gaps actually exists. As a result, EPA has ample authority and justification to create subcategories for purposes of setting mercury standards based on the mercury content of clay.

The six data “gaps” described in the proposal can be condensed into four categories:

**(1) There is a strong positive correlation between mercury emissions and mercury content of clay:** The available data plainly show that mercury that is emitted by a brick plant is not generated in the brick-making process. Clearly, the mercury that is emitted must come from one of the fuels or raw materials used in a brick plant. Most brick kilns are fired by natural gas or a non-fossil fuel. These fuels are inherently low in mercury and cannot account for the measureable amounts of mercury that sometimes are detected in brick plant emissions. Thus, the only other possible significant source of mercury at most brick plants is the clay raw material.

Data submitted in BIA's technical comments clearly show, for several representative brick plants, a strong correlation between mercury measured in the clay raw material and mercury measured in the emissions from these plants. This provides strong evidence that, in fact, mercury emissions are tied to the mercury content of the clay raw material.

**(2) Mercury content varies within mines and among mines:** BIA's data show significant differences in the mercury content of clay both within particular mines and among the several mines that were tested. These data are being submitted as part of the comments on behalf of BIA from B.T. Schimmel and Irene Kuo. Thus, ample information is available to "differentiate among types of sources" for purposes of creating subcategories based on the mercury content of clay.

**(3) Alternative sources of clay are not reasonably available to most brick plants:** As detailed in BIA's technical comments, there are a variety of reasons why most brick plants cannot reasonably choose to use an alternative source of clay. Most importantly, brick manufacturing is a low margin business. Transporting clay is an expensive endeavor. Thus, most brick plants are located in close proximity to a clay mine in order to minimize the cost of transporting clay to the plant. Requiring a plant to switch to clay from a more distant mine would impose significant transportation costs that simply cannot be accommodated by most facilities.

Another key factor is that clay is not a fungible raw material. Rather, the character and quality of a brick heavily depends on the clay that is used to make the brick. Thus, even if an alternative source of clay is available and economically feasible for a given plant, there is no guarantee that that clay would result in bricks that are comparable to those produced using the currently available clay.

For these reasons, alternative sources of clay are not reasonably available to most brick plants.

**(4) It is not legally permissible for EPA to prescribe the use of alternative sources of clay as a means of controlling mercury emissions:** Another highly relevant factor that is not set out by EPA in the proposal is whether EPA has legal authority to prescribe or rely on the use of low-mercury clay for purposes of meeting a mercury emissions limitation. In short, EPA does not have such authority. So, even if EPA concludes that it does not have sufficient factual data to support subcategorization, it may not set a mercury emissions limitation that is premised on assumption that switching to low mercury clay is a legally viable compliance alternative.

The most authoritative source of legislative history for the 1990 Clean Air Act Amendments (the legislation that included the current § 112 toxics program) is the Conference Report, H. Rep. No. 101-952, 101<sup>st</sup> Cong. 2<sup>nd</sup> sess. Congress provided scant commentary in this report, which emphasizes the importance of issues that the Members agreed to address. One of the few specific issues in the toxics program addressed by the report is the use of mined materials in MACT standard setting. The entire passage is quoted below:

For categories and subcategories of sources of hazardous air pollutants engaged in mining, extraction, beneficiation, and processing of nonferrous ores, concentrates, minerals, metals, and related in-process materials, the Administrator shall not consider the substitution of, or other changes in, metal- or mineral-bearing raw materials that are used as feedstocks or materials inputs, or metal- or mineral-bearing materials processed or derived from such feedstocks or materials in setting emission standards, work practice standards, operating standards or other prohibitions or requirements or limitations under this section for such categories and subcategories. The prohibition of the preceding sentence shall not apply to the substitution, modification, or changes of chemicals (not including metal- or mineral-bearing materials) used in mining, extraction, beneficiation, or processing of nonferrous ores, concentrates, minerals, metals, and related in-process materials which is necessary to reduce air emission of such chemicals and for which substitutes that are safe and effective in performing the intended function of the chemical to be substituted are reasonably available.

*Id.* at 339. In relevant part, Congress instructed that, for sources engaged in the “processing” of mined raw materials, “the Administrator shall not consider the substitution of, or other changes in, metal- or mineral-bearing raw materials that are used as feedstocks or materials inputs ... in setting emission standards, work practice standards, operating standards or other prohibition or requirements or limitations under this section.” Since brick manufacturing indisputably constitutes the “processing” of a “mineral-bearing raw material” that is “used as a

feedstock,” EPA is forbidden from considering or relying upon “the substitution” of clay in setting standards for this source category.<sup>8</sup>

Notably, the record contains no information demonstrating that any particular type of air pollution control device would be effective in controlling mercury emissions from a brick plant. Instead, EPA assumes without any proof or analysis that activated carbon injection would be effective. *See, e.g.*, Development of Cost and Emission Reduction Impacts for the BSCP NESHAP, Docket ID No. EPA-HQ-OAR-2013-0291-0117. Additionally, there is no analysis in the record demonstrating that, even if particular types of air pollution control are expected to be effective in controlling mercury emissions from a brick plant, that sufficient emissions reductions would be achieved such that affected sources could comply with the standard. For lack of such demonstrations, the proposed rule effectively relies on the ability of affected sources to switch to low-mercury clay for purposes of meeting the proposed mercury emissions limit. This is impermissible.<sup>9</sup>

Lastly, there is a strong case that “the application of measurement methodology” for mercury emissions from brick plants “is not practicable due to technological and economic limitations” and, therefore, work practices should be prescribed instead of numeric emissions limitations. CAA § 112(h) The words “not practicable” do not mean “not possible.” Rather, according to *Black’s*, “practicable” means “not feasible *under the circumstances.*” *Black’s Law Dictionary* 1172 (6<sup>th</sup> Ed. 1990) (emphasis added).

As described in BIA’s technical comments, there are significant “technological limitations” that would prevent the proper application of EPA Method 29 to emissions from brick plants, such as the fact that Method 29 was developed for gas streams with significantly more mercury than typically exists in brick plant emissions. In addition, the “economic limitations” here are obvious – i.e., testing for mercury emissions is extremely costly, particularly in relation to the marginal profitability of most brick plants. For these reasons, there is ample justification for EPA to conclude that, due to these technical and economic limitations, it is not feasible under these particular circumstances for a typical brick plant to demonstrate compliance with a numeric mercury emissions limitation.

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<sup>8</sup> This approach is not precluded by prior D.C. Circuit cases because the meaning and applicability of this legislative history has not been considered by the court.

<sup>9</sup> Because EPA lacks the data and information needed to make a fully informed decision as to how to regulate mercury emissions from brick plants, EPA would be fully justified in deferring a decision to set mercury standards until the time that adequate information is available. *See Portland Cement Ass’n v. EPA*, 665 F.3d 177, 193-194 (D.C. Cir. 2011) (rejecting a challenge to a decision not to regulate greenhouse gases on the grounds that there is no reviewable final agency action and observing that any claim of failure to fulfill a nondiscretionary duty should be brought in the district court).

U.S. Environmental Protection Agency  
March 19, 2015  
Page 11

\* \* \* \* \*

Thank you for your consideration of these comments. Please do not hesitate to contact me if you have questions or need more information.

Sincerely,

A handwritten signature in black ink, appearing to read 'W L Wehrum', with a long horizontal flourish extending to the right.

William L. Wehrum  
Counsel for BIA

cc: P. Tsirigotis



January 27, 2014

OSHA Docket Office  
Docket No. OSHA-2010-0034  
U.S. Department of Labor  
Room N-2625  
200 Constitution Avenue NW  
Washington, DC, 20210

**RE: Docket no. OSHA-2010-0034 Occupational Exposure to Respirable Silica- Comment on Proposed Rule**

To Whom It May Concern:

The Brick Industry Association (BIA) submits these comments on behalf of our member and non-member companies in the brick and structural clay manufacturing industry in response to the Occupational Safety and Health Association (OSHA) proposed rule, Occupational Exposure to Respirable Silica” (Docket: OSHA-2010-0034). This rule, as proposed, has the potential to significantly and detrimentally impact the brick industry, while providing no commensurate improvement to the health or wellbeing of our employees. This is fundamentally opposed to OSHA’s requirements under the Occupational Safety and Health Act (OSH Act) which authorizes the agency to issue permanent standards only where there is a significant risk of material health impairment in the industries it seeks to regulate.

Founded in 1934, the Brick Industry Association represents the U.S. clay brick industry, which includes 270 manufacturers, distributors, and suppliers that provide employment for nearly 200,000 Americans in 44 states and historically generate approximately \$9 billion to the U.S. economy annually. Our members and our industry could potentially be needlessly harmed by this rulemaking. Our industry currently has 176 plants owned by 69 companies that would be impacted by the proposed silica rule. Over 85 percent of those companies are small businesses. While not all of these companies are members of our trade association, our industry works together on issues such as this proposed rule. In addition to the comments provided in this letter, the BIA comments on this rule include submittals made on our behalf by Susan Wiltsie of Hunton and Williams and by Robert Glenn of Glenn Consulting.

In addition to the letters from BIA directly, numerous comments are being submitted by individual clay brick manufacturers and distributors. Our industry is a part of the American Chemistry Counsel (ACC) Silica Panel and supports the comments submitted by the Silica Panel on behalf of all members. While we assert that no standard should be applicable to our operations without further justification, we feel obligated to comment on the clear deficiencies that exist in the current rule, as proposed. For this reason, our industry is also a member of other coalitions seeking a reasonable and supportable regulation, including comments submitted by the National Association of Manufacturers.

### **Overview of comments**

The BIA has the following comments on the proposed rule:

- A. There is an enormous body of scientific data demonstrating that no significant workplace risk exists to justify any reduction in the crystalline silica permissible exposure limit (PEL) for brick industry workers. The brick industry is unique; while the brick manufacturing process consists virtually entirely of employees working with crystalline silica-bearing materials, *silicosis caused by exposure to crystalline silica is essentially non-existent in the brick industry's workers*. Therefore, reducing the PEL would have no benefit.
  - B. When information is available for an individual industry, OSHA should conduct a separate finding of whether a standard is justified.
  - C. Implementation of the new OSHA PEL would have a significant and unwarranted economic impact on our industry. OSHA is significantly underestimating economic impacts and is using revenue and profit estimates that do not reflect recent or likely future performance for our industry.
  - D. OSHA Should Reconvene a Small Business Panel under SBREFA to Assess Changes in Current Industry Practices and Better Evaluate Impacts of the Proposed Rule in Today's World. A Panel Held More Than 10 Years Ago cannot be seen as fulfilling OSHA's Obligation under SBREFA.
- A. There is an enormous body of scientific data demonstrating that no significant workplace risk exists to justify any reduction in the crystalline silica permissible exposure limit (PEL) for brick industry workers. The brick industry is unique; while the brick manufacturing process consists virtually entirely of employees working with crystalline silica-bearing materials, *silicosis caused by exposure to crystalline silica is essentially non-existent in the brick industry's workers*. Therefore, reducing the PEL would have no benefit.**

The brick industry has a significant body of data that has been previously submitted, ***and is being resubmitted during this comment period***, that clearly demonstrates that there is little-to-no silicosis in



our industry, despite historical exposures well above the current PEL. If there is little-to-no silicosis at the current PEL, there can be no improvement by lowering the PEL.

The brick industry has previously provided documentation of numerous studies to OSHA during the rulemaking process. On October 21, 2009, BIA sent an extensive letter to OSHA detailing numerous studies relevant to OSHA's work reviewing the silica PEL.<sup>1</sup> We summarized the key finding of each letter and offered any and all reports to the peer reviewers who were reviewing OSHA's technical basis for a reduced PEL was warranted. Rather than being added to the relevant work for this review, OSHA cast the information aside. When OSHA responded in early 2010, they mischaracterized the data submittal as a premature comment letter and refused to put the letter into the docket or to forward the important information on to the peer reviewers.<sup>2</sup>

On page 56333 of the proposal preamble, OSHA acknowledged at least a passing knowledge of some of the studies contained in the 2009 BIA submittal, stating:

The finding of reduced silicosis risk among pottery workers is consistent with other studies of clay and brick industries that have reported finding a lower prevalence of silicosis compared to that experienced in other industry sectors (Love et al., 1999; Hessel, 2006; Miller and Soutar, 2007) as well as a lower silicosis risk per unit of cumulative exposure (Love et al., 1999; Hessel, 2006; Miller and Soutar, 2007).

In the Preliminary Quantitative Risk Assessment (QRA), OSHA mentions additional information about the role of physical factors that appear to influence the toxicity of silica, stating on page 265 of the QRA that "A number of physical factors appear to influence the toxicity of silica. Freshly fractured silica has been shown to be more toxic than aged. Aluminum, by itself or as part of an aluminosilicate clay coating, appears to decrease toxicity." However, OSHA then goes on to conclude that there is insufficient data to "predict how risks might vary among exposed employees in different industry sectors." Speaking only for clay brick operations, we disagree. The studies presented in Mr. Glenn's comment letter and report demonstrate that the risk of silicosis is clearly lower than projected for clay brick operations. OSHA is obligated to consider the total of the report as clear and convincing evidence to support a determination that a change in the PEL is not warranted

Given this understanding and the presence of significant data, OSHA was obligated to develop a separate determination that a reduction in the PEL was justified. OSHA did not make this determination, nor did they provide a reason for combining brick with other industries.

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<sup>1</sup> A copy of this letter (without attachments) is included in Attachment 1 to this letter.

<sup>2</sup> A copy of the response is included in Attachment 1 to this letter.

***The brick industry requests that OSHA correct this oversight before continuing with a reduced PEL applicable to brick manufacturing operations.***

**B. When information is available for an individual industry, OSHA should conduct a separate finding of whether a standard is justified.**

While not often exercised, OSHA also has the legal ability to establish a different PEL or to exempt an industry from a PEL. In fact, when data are available, OSHA is required to consider individual industries. BIA's outside counsel will be submitting comments arguing that OSHA has exceeded its statutory authority by including the brick and structural clay manufacturing industry among those industries covered by the proposed rule. The Occupational Safety and Health Act authorizes the agency to issue permanent standards only where there is a significant risk of material health impairment in the industries it seeks to regulate. In addition, the agency is further constrained by the Act's requirement that the best available evidence show that the proposed standard would eliminate the risk. BIA believes that its members should be exempt from compliance with the proposed rule because the low toxicity of crystalline silica in the brick and structural clay industry does not cause a material risk of health impairment that may be remedied by the proposed rule.

BIA submits that because OSHA is required to address any evidence that contradicts its findings and conclusions that a lower exposure limit is necessary it makes practical sense that OSHA adapt its rule to exclude the brick industry from the scope of its rulemaking at the outset if the empirical data does not evidence a "significant" health risk within the brick manufacturing industry. This is particularly so since OSHA is clearly empowered by the OSH Act to tailor its standards as it deems fit, including drawing distinctions between industries if the body of evidence so justifies. BIA is asking OSHA to evaluate and provide the brick industry with the same treatment as done with other industries in the past. OSHA has carved out and targeted hazard specific requirements for other industries as the pulp, paper and paperboard mill industry in 29 CFR 1910.216, the textile industry in 29 CFR 1910.262, the entire subpart R of 29 CFR 1910 is dedicated to specific industries.

**C. Implementation of the new OSHA PEL would have a significant and unwarranted economic impact on our industry, which is significantly comprised of small businesses. OSHA is significantly underestimating economic impacts and is using revenue and profit estimates that do not reflect recent or likely future performance for our industry.**

Since there is little to no silicosis with current exposure levels, and even with significantly higher exposures, OSHA cannot reasonably conclude that a further reduction would have any additional benefit. However, Figure 2-1 (Attachment 2) shows the increase in the number of operations that would be subject to increased monitoring as a result of the reduced PEL. This information was obtained from a 2008 survey of brick plant operations and provided to the Office of Management and Budget's Office of

Information and Regulatory Affairs (OMB/OIRA) in 2010. Obviously, an increase in the monitoring at these locations and potential installation of additional engineering controls, as well as ancillary requirements, would cost our industry significant resources.

The fact that the brick industry would face an average cost well above the average industry is well demonstrated. Even in OSHA's estimates of the impacts of proposed changes, which we and other industries believe are grossly underestimated<sup>3</sup>, OSHA acknowledges that the brick industry would be disproportionately impacted, listing us as the industry with the second highest average costs. In the preamble (see 78 FR 56368), OSHA states:

The annualized cost of the proposed rule for the average establishment in all of general industry and maritime is estimated at \$2,571 in 2009 dollars. It is clear from Table VIII-11 that the estimates of the annualized costs per affected establishment in general industry and maritime vary widely from industry to industry. These estimates range from \$40,468 for NAICS 327111 (Vitreous china plumbing fixtures and bathroom accessories manufacturing) and \$38,422 for NAICS 327121 (Brick and structural clay manufacturing).

OSHA estimates that the average clay brick manufacturing operation will experience costs that are 15 times the cost of the average manufacturing operation (i.e., brick's average \$32,928 divided by the general industry average of \$2,571, per 78 FR 56368). Similarly, the cost to our small businesses is among the highest, with an average cost of \$32,928 per OSHA (see 78FR56411, Table VIII-28) as compared to an average of \$2,103 for the average small entity in general industry (see 78FR373, Table VIII-12). The fact that the cost to the average clay brick manufacturer is 13 to 15 times the general industry average should, on its own, lead OSHA to conduct a separate determination of economic feasibility for clay brick manufacturing. Combined with the lack of silicosis in the clay brick industry, OSHA's omission is unconscionable.

In assessing the impacts of the proposed changes to the silica PEL, OSHA relies on outdated information about both revenues and profitability for the brick industry. In the proposal preamble (78 FR 56372-56380), OSHA indicates that they used data from the years 2000 through 2006 to represent "normal year variation" in profits and prices. These data were then used in estimating the percentage of profits and revenues that would be consumed by the estimated costs for implementing the new OSHA PEL for silica in the years following promulgation of the final standard (i.e., 2015 and beyond). We strongly question OSHA's rationale for the use of data that is both dated and ignores the economic recession of more recent years. The years in OSHA's analyses were among the most productive the brick industry has seen in recent decades and are far above the levels we have seen since 2006 or expect to see in the

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<sup>3</sup> See the letter from the American Chemistry Council's comment letter on this rule.

immediate future. It is disingenuous of any government agency to assess the economic impacts of any rulemaking by ignoring data that includes the economic recession that occurred just subsequent to the years used to represent “normal.” Our industry has suffered through enormous economic hardship in recent years, with our average industry operating at less than 40 percent of capacity.

In Attachment 3, BIA presents the results of a recent survey of our industry. These figures show the drop in brick production and revenues from brick production between 2005 and 2011. Recovery from these record lows will take time. Our industry may well not see levels from the timeframe used by OSHA as “normal” for years, perhaps never. OSHA must use more representative and more recent years in all of their analyses and reassess economic feasibility of the proposed PEL changes.

**D. OSHA Should Reconvene a Small Business Panel under SBREFA to Assess Changes in Current Industry Practices and Better Evaluate Impacts of the Proposed Rule in Today’s World. A Panel Held More Than 10 Years Ago cannot be seen as fulfilling OSHA’s Obligation under SBREFA.**

The brick industry is comprised largely of small businesses, as defined by the U.S. Office of Management and Budget (OMB), with 85 percent of brick manufacturers having fewer than 500 total employees. The brick distributors that would also be adversely impacted by a rule that needlessly increases the costs of brick are almost exclusively small businesses. These small businesses, as well as all businesses in our industry, have been severely impacted by the recession of the past half a decade and cannot continue to rebound from the recession if our limited resources are spent needlessly. The small business impact of this rule cannot be trivialized—or covered up by using inaccurate data.

The brick industry actively participated in the small business panel under the Small Business Regulatory Enforcement Fairness Act (SBREFA) in 2002. Given the passage of time and the great potential for changes in operational procedures, we believe that a new panel is warranted.

***Conclusion***

The BIA strongly believes that the current OSHA PEL for crystalline silica is amply protective of brick manufacturing workers and should not be reduced for our industry and, in fact, may not even be justified for our industry. OSHA has the statutory authority to maintain the current PEL for brick manufacturing workers, even should OSHA reduce that PEL for industry in general, unless you can demonstrate that a reduced PEL is: 1) Needed to protect workers in the brick industry, 2) technically feasible for the brick industry, and 3) economically feasible for the brick industry.

January 27, 2014

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For the reasons set out in this letter, as well as in the supporting letters and documentation cited within this letter, we believe OSHA has failed on all three counts. ***We respectfully request that OSHA remove the applicability of the revised PEL from the brick industry.***

Please do not hesitate to contact me at [smiller@bia.org](mailto:smiller@bia.org) if you would like to further discuss these comments, comments referenced within this letter, or require any additional information to complete your analyses.

Sincerely,

Susan J. Miller  
Vice President  
Environment, Health and Safety  
Brick Industry Association

Cc: BIA EHS Task Force

# Attachment 1

- Letter from BIA to Jordan Barab (2009)
- OSHA Response (2010)

(insert letters here)

Attachment 2

DATA REQUESTED BY OMB/OIRA  
 CRYSTALLINE SILICA EXPOSURE DATA (2008)  
 THE BRICK INDUSTRY ASSOCIATION

PROCESS DESCRIPTION	SAMPLES (n)	PERCENT OF SAMPLES GREATER THAN	
		100 µg/m <sup>3</sup>	50 µg/m <sup>3</sup>
<b>MATERIAL PREPARATION</b>			
Grinding	152	17.80%	58%
Sand Preparation	60	61.70%	80.00%
<b>BRICK MANUFACTURING</b>			
Hand Molded Bricks	17	5.90%	70.60%
Machine Molded Bricks	114	49.10%	80.70%
Extruded Bricks	185	21.10%	51.90%
Shapes Operator	29	51.70%	69.00%
Dryer Operator	13	7.70%	30.80%
<b>SETTING</b>			
Manual Hacking	44	50.00%	68.20%
Machine Hacking	91	19.80%	46.20%
<b>KILN</b>			
	24	0.00%	16.70%
<b>PACKAGING</b>			
Manual Dehacking	171	26.90%	58.50%
Dehacker	73	4.10%	23.30%
Kiln Car	81	9.90%	34.60%
Material Handler	23	4.30%	30.40%
<b>MISCELLANEOUS</b>			
Sample Operator	23	4.30%	30.40%
Maintenance	22	0.00%	36.40%
Yard Work	9	33.30%	77.80%
Rail Car Loading	4	0.00%	50.00%
Clean Up	56	25.00%	71.40%

Figure 2-1. Information on percent of operations exceeding select silica exposure levels (presented at 2010 meeting between the Brick Industry, SBA, and OMB)



Attachment 3

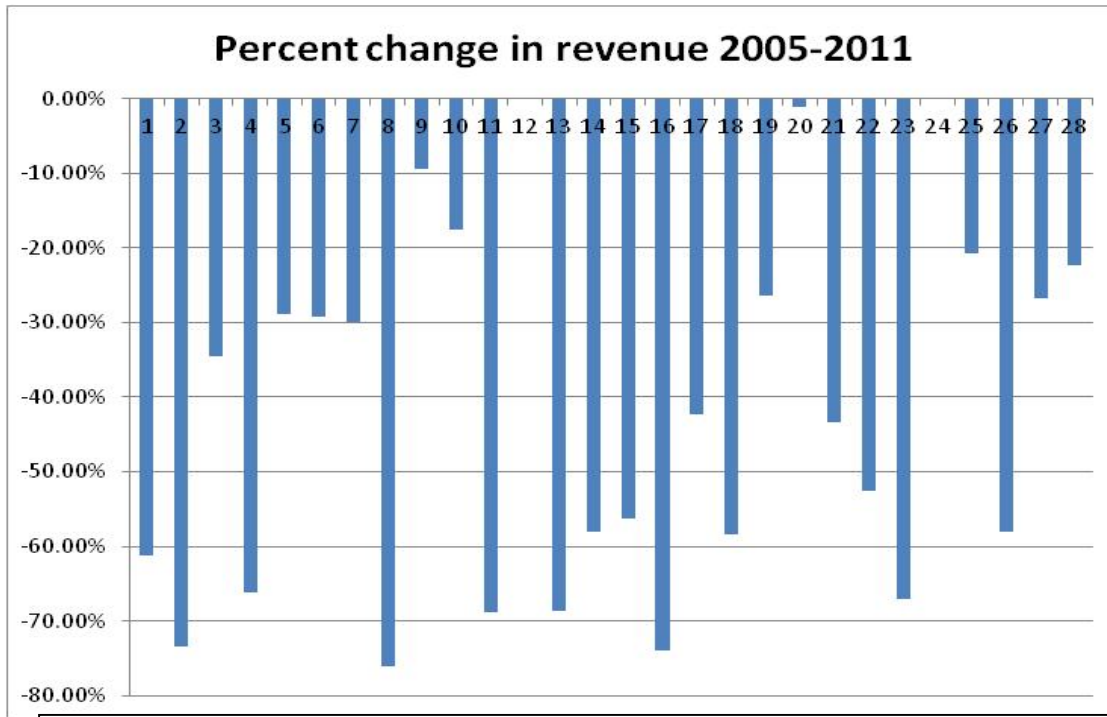


Figure 3-1. Brick Industry- Change in Revenue between 2005 and 2011.

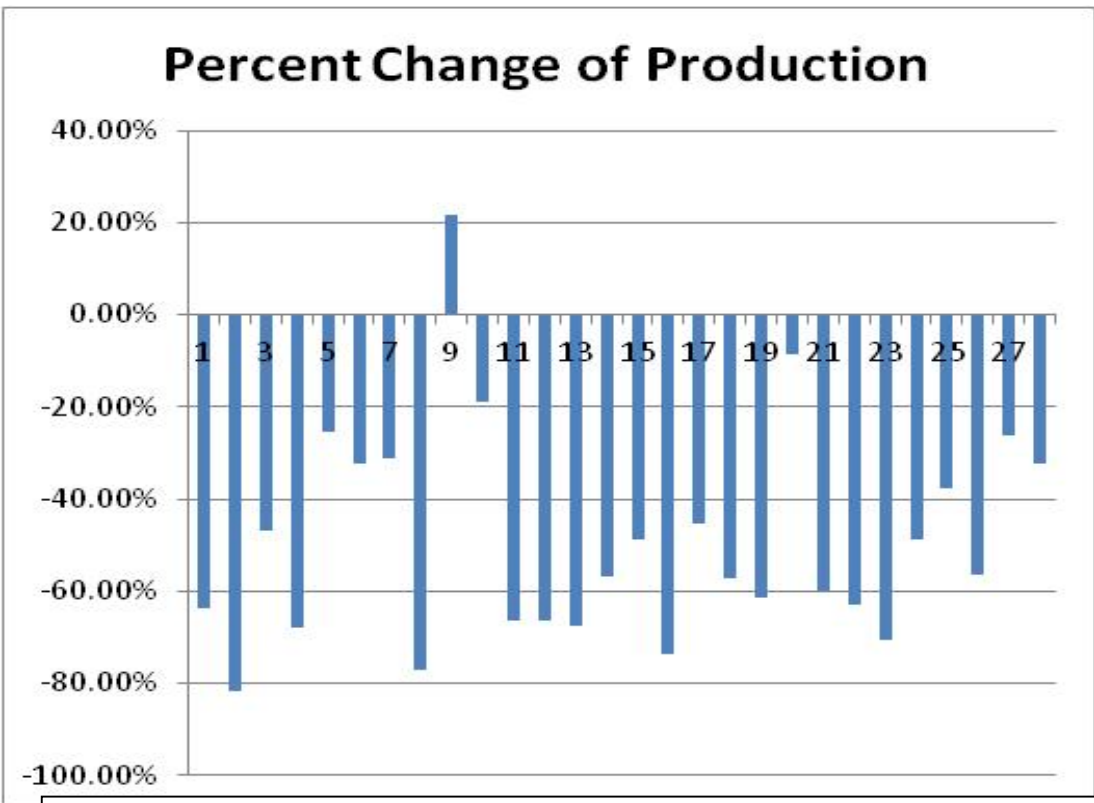


Figure 3-2. Brick Industry- Change in Production between 2005 and 2011.



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**In the Matter of Proposed Rulemaking on Occupational Exposure to Crystalline Silica,**  
**No. OSHA-2010-0034**

To Whom It May Concern:

Please find enclosed Comments of the Brick Industry Association in response to the Occupational Safety and Health Administration's September 12, 2013 "Notice of Proposed Rulemaking" on Occupational Exposure to Crystalline Silica.

Sincerely,

Susan F. Wiltsie

SFW:rij

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

IN THE MATTER OF PROPOSED )  
RULEMAKING ON OCCUPATIONAL )  
EXPOSURE TO CRYSTALLINE )  
SILICA )  
\_\_\_\_\_ )

No. OSHA-2010-0034

**COMMENTS OF THE BRICK INDUSTRY ASSOCIATION**

Pursuant to 29 C.F.R. § 1910.3, the Brick Industry Association, on behalf of its member companies, hereby submits these Comments in response to the Occupational Safety and Health Administration's ("OSHA" or "the Agency") September 12, 2013 "Notice of Proposed Rulemaking" ("NPRM") on Occupational Exposure to Crystalline Silica. *See* 78 Fed. Reg. 56273.

The Brick Industry Association ("BIA") is the national trade association representing the brick industry, consisting of companies that manufacture and distribute quality clay brick products (both face and paver brick) across the United States. It frequently represents its members before Federal agencies, courts, and Congress in matters of common concern, and has filed comments before OSHA in various proceedings affecting the interests of its members, who are subject to the agency's jurisdiction. Thirty-five manufacturer members of the BIA produce between 80 to 85 percent of all ten billion bricks produced annually. Most of these manufacturers are small businesses as defined by the Small Business Association ("SBA"). The approximate number of workers employed in our industry (production, distribution, professional services, masons, etc.) is 215,000. All told, the brick industry, otherwise known as the brick and structural clay manufacturing industry, historically has contributed more than \$20 billion annually to the U.S. economy.

BIA recognizes that OSHA's overarching policy goal in this proceeding is to promote the health and safety of employees exposed to respirable crystalline silica. However, the core mission of BIA's members is to ensure the health and safety of its employees while also manufacturing and providing structural brick to their customers at reasonable prices. Accordingly, BIA, on behalf of its members, now seeks improvements to OSHA's proposed regulations to ensure that its members' mission will not be imperiled by revisions to the current rule for respirable crystalline silica that would dramatically increase its members' costs without producing any appreciable health or safety benefits for its members' employees.

Specifically, BIA believes that its members should be exempt from compliance with the proposed rule, and that this exemption is consistent with OSHA's policy goals for three important reasons. First, the proposed rule is not reasonably necessary and appropriate to ensure a safe or healthful employment environment for the employees of BIA's members because there is no "significant risk" of material health impairment to those employees. Second, the best available evidence provides no support for the conclusion that the proposed rule would result in the elimination of any significant risks to health or safety for the employees of BIA's members. And third, OSHA should, in the exercise of its discretion, prioritize its resources and enforcement capabilities by applying the proposed rule only to those industries in which employees face a significant risk from exposure to crystalline silica under the current rule, which do not include the brick and structural clay manufacturing industry employees.

**I. The Agency May Regulate Only Significant Risks of Material Health Impairment Under Section 3(8) of the Occupational Safety and Health Act.**

OSHA lacks the statutory authority to impose the proposed rule upon the brick and structural clay manufacturing industry because employees in that industry do not face a significant risk of material impairment of health or functional capacity that may be eliminated by

this proposed change. Section 3(8) of the Occupational Safety and Health Act of 1970 (“the Act”) authorizes OSHA to promulgate permanent occupational safety and health standards only where they are “reasonably necessary or appropriate” to provide safe or healthful places of employment. *See* 29 U.S.C. § 652(8). Where toxic materials or harmful physical agents pose the hazard OSHA seeks to regulate, the proposed standard must also comply with section 6(b)(5) of the Act, which limits the Agency’s regulatory authority to only those circumstances in which the “best available evidence” shows that the standard would prevent employees from suffering a “material impairment of health or functional capacity [that] is technologically and economically feasible.” *See* 29 U.S.C. § 655(b)(5).

The Supreme Court has read these two provisions in conjunction with one another to authorize regulation only where the workplaces subject to the regulation are “not safe,” meaning that there are “significant risks present [that] can be eliminated or lessened by a change in practices.” *Indus. Union Dep’t, AFL-CIO V. Am. Petroleum Inst.*, 448 U.S. 607, 642 (1980) (“the *Benzene* case”). As such, OSHA is obligated to exempt industries from proposed rulemaking at the outset if the empirical data does not evidence a “significant” health risk therein.

**A. The Agency must examine industry-specific data in evaluating whether a significant risk of material health impairment exists due to crystalline silica.**

OSHA must exempt the brick and structural clay manufacturing industry from the proposed silica rule because the crystalline silica to which brick industry employees are exposed does not cause deleterious health effects in the industry. Courts regularly limit OSHA’s ability to regulate specific industries in which there is no “significant risk” even where a quantitative risk assessment based on aggregated industry data indicates that such a risk exists more broadly. Here, OSHA has taken the position that the risk exists across all industry sectors covered by the

proposed rule. Although Agency determinations of fact or policy are generally accorded deference by the courts, regulation based upon aggregated industry data only has been upheld where OSHA can show that the promulgation of multiple, industry-specific standards would impose administrative or enforcement burdens upon the agency. Or, stated another way, disaggregating the data would not be feasible (or practical) due to challenges in differentiating between affected industries.

Settled law establishes that OSHA has the authority to modify specific standards according to the unique problems of specific industries or specific functions within those industries. *See, e.g., United Steelworkers v. Marshall*, 647 F.2d 1294, 1310 (D.C. Cir. 1980); *Forging Indus. Ass'n v. Sec'y of Labor*, 773 F.2d 1436, 1454-55 (4th Cir. 1985). For example, in *National Grain & Feed Association v. Occupational Safety and Health Administration*, the Fifth Circuit upheld a standard that applied to grain elevators while exempting grain mills. The Agency believed that grain mills were unlikely to cause the significant risk of harm the standard was designed to remedy. *See Nat'l Grain & feed Ass'n v. O.S.H.A.*, 866 F.2d 717, 727 (5th Cir. 1988). In reaching this conclusion, the court determined that the grain mill dust at issue contained a "myriad of ingredients" that rendered it far less flammable than grain elevator dust such that grain mills did not give rise to a "significant risk" of harm that would legitimize the imposition of the standard. *See id.* Similarly, in *Forging Industry Association v. Secretary of Labor*, the United States Court of Appeals for the Fourth Circuit found that OSHA's decision to exempt the oil and gas drilling industry from compliance with an amended standard was not arbitrary and capricious because working conditions unique to that industry gave rise to a lower risk of harm that could be remedied by a different standard. *See Forging Indus. Ass'n v. Sec'y of Labor*, 773 F.2d 1436, 1454-55 (4th Cir. 1985). And, in *American Dental Association v.*

*Martin*, the United States Court of Appeals for the Seventh Circuit explicitly stated that “OSHA cannot impose onerous requirements on an industry that does not pose substantial hazards to the safety or health of its workers merely because the industry is a part of some larger sector or grouping and the agency has decided to regulate at wholesale.” 984 F.2d 823, 827-28 (7th Cir. 1993). The court ultimately held that OSHA was not obligated to make workplace-by-workplace distinctions in that particular instance due to the nature of the specific risk at issue, bloodborne pathogens. However, the court warned the Agency that it was obligated to consider industry-specific mitigating circumstances at the rulemaking stage before imposing a standard of general applicability, instead of simply waiting for affected industries to challenge the standard in later enforcement proceedings. *See id.* at 830.

Courts have excused the Agency from its obligation to make industry-specific determinations for purposes of administrative convenience only where the Agency can show that there are “obvious barriers to disaggregation.” *See Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. O.S.H.A.*, No. 89-1559, 1991 WL 223770 (D.C. Cir. Sept. 16, 1991). In *International Union*, the United States Court of Appeals for the District of Columbia Circuit remanded a case challenging the imposition of a universal “lockout-tagout” standard so that OSHA could justify its reliance on what the court believed to be overbroad industry categories and its refusal to disaggregate industries for risk evaluation purposes. *See id.* (“Just because paper mill equipment . . . poses a significant hazard does not mean that sewing machines do.”). Accordingly, courts typically only permit an aggregated approach where it is unable to “precisely defin[e] and clearly distinguish[ ] between affected industries and operations” or where multiple PELs would require employers to monitor for multiple exposure

levels in the same workplace. *See Pub. Citizen Health Research Group v. U.S. Dep't of Labor*, 557 F.3d 165, 173 (3d Cir. 2009).

Substantial evidence exists of mitigating circumstances unique to the brick and structural clay industry to justify its exemption from this proposed rule. Individual employer members of BIA have and will be submitting comments regarding the lack of adverse health effect in the brickmaking industry due to exposure to crystallized silica, as demonstrated by an absence of workers compensation claims and other verifiable evidence. Furthermore, an enormous body of scientific data exists to show a lack of significant risk from silica to the health of employees in the brick and structural clay manufacturing industry; this scientific data is consistent dating back to the beginning of the 20<sup>th</sup> century. *See* Comments of B. Glenn on behalf of BIA, submitted February 11, 2014.

OSHA acknowledges this scientific data in the Notice of Proposed Rulemaking, but failed to make exception for the brick and structural clay manufacturing industry despite the data-driven demonstration that no significant health risk exists. In surveying the scientific literature pertaining to the risk of pulmonary diseases arising out of exposure to crystalline silica, OSHA notes that certain studies of workers in the pottery industry reveal a risk level that is “generally below the range of risks estimated from the other studies and may reflect a lower toxicity of quartz particles in that work environment due to the presence of alumino-silicates on the particle surfaces. . . . The finding of a reduced silicosis risk among pottery workers is consistent with other studies of clay and brick industries that have reported finding a lower prevalence of silicosis compared to that experienced in other industry sectors.” 78 Fed. Reg. 56333. Similarly, OSHA cites a study of Chinese pottery workers that revealed “[n]o reported increase in lung cancer with increasing exposure” to respirable crystalline silica.” 78 Fed. Reg.



56327. Nor does the Notice of Proposed Rulemaking cite any study that indicates a significant risk of any other pulmonary disorder arising in brick and structural clay workers due to silica exposure.

In addition, OSHA implicitly acknowledges that it can disaggregate the quantitative risk assessment data by industry, because it, in fact, articulates the data by industry in the Notice of Proposed Rulemaking. OSHA states that it has identified 104 total entities, 204 total establishments, and 15,132 total employees in the brickmaking industry that would potentially be affected by OSHA's proposed silica standard. 78 Fed. Reg. 56344. As such, if OSHA were subject to legal challenge in this rulemaking, it would have difficulty credibly arguing that it was unable to accurately define and exclude the brick and structural clay industry from the proposed silica standard at the rulemaking stage.

**B. The Agency may not regulate where the proposed standard would not mandate a change in industry practices that will eliminate a significant risk of material health impairment.**

In order for a standard to be "reasonably necessary or appropriate" under section 3(8) of the Act, a finding of significant risk must be accompanied by a finding that the industry OSHA seeks to regulate is capable of imposing a change in practices that would eliminate that significant risk. As such, OSHA should exempt the brick manufacturing industry from the proposed silica rule because the absence of a significant risk of harm to industry employees necessarily precludes a finding that the standard would eliminate or lessen such a risk. In short, where no significant risk exists, the agency has no risk to diminish. As a result, OSHA is asking this industry to spend capital and human resources for no material change to the health of its workers.

Courts have reinforced this point by reading into section 3(8) of the Act a requirement that standards bear "a reasonable relationship to the costs imposed by the standard." *Ala. Power*

*Co. v. O.S.H.A.*, 89 F.3d 740, 746 (11<sup>th</sup> Cir. 1996). For example, although the Supreme Court eschewed an explicit cost/benefit analytical scheme in the *Benzene* case, the Court nonetheless invalidated OSHA’s proposed standard in part because it would require significant capital investments and a high cost of compliance for various industries while providing minimal protection for a relatively small number of employees. See “*Benzene Case*,” 448 U.S. at 628-30.

The brick and structural clay industry is analogous to the industry in the *Benzene* case. While BIA does not contend that crystalline silica in the brick industry is entirely benign, the weight of the relevant evidence establishes that regulation beyond the current rule would impose costs that far outweigh benefits that are speculative at best. OSHA’s Notice of Proposed Rulemaking itself indicates that compliance with the standard would be uniquely burdensome for the brick and structural clay industry and only would impact a small number of employees. See 78 Fed. Reg. 56369 (indicating that the brick and structural clay manufacturing industry would incur total annualized costs of \$7.8 million and annualized costs per affected establishment of \$38,422—costs per establishment exceeded by only one other industry sector). As such, the imposition of the proposed rule in this instance would be highly vulnerable to challenge on the basis that it would not result in a change in practices that produces a benefit bearing a “reasonable relationship” to the costs.

**II. The Agency’s Standards Must Be Justified By the Best Available Evidence Under Section 6(b)(5) of the Occupational Safety and Health Act.**

OSHA also should decline to apply the revised silica rule to the brick and structural clay industry because its quantitative risk assessment does not rely upon the best available evidence as required by section 6(b)(5) of the Act. Section 6(b)(5) provides that in promulgating health standards dealing with toxic materials or harmful physical agents, OSHA must set the standard that most adequately assures “on the basis of the best available evidence” that no employee will

suffer material impairment of health or functional capacity even if that employee has regular exposure to the hazard dealt with by the standard for the rest of his working life. *See* 29 U.S.C. § 655(b)(5).

In applying that standard, a reviewing court must “give OSHA some leeway where its findings must be made on the frontiers of scientific knowledge.” *Benzene*, 448 U.S. at 656. Thus, while OSHA's significant risk determination must be supported by substantial evidence, the Agency “is not required to support the finding that a significant risk exists with anything approaching scientific certainty.” *Id.* Furthermore, “the Agency is free to use conservative assumptions in interpreting the data with respect to carcinogens, risking error on the side of over protection rather than under protection,” so long as such assumptions are based in “a body of reputable scientific thought.” *Id.*

Courts have found that OSHA’s decision to impose a revised standard on an industry is not based on the best available evidence under section 6(b)(5) where the studies upon which the Agency relied in formulating its preliminary risk assessment concerned industries with characteristics distinct from those of the industries it seeks to regulate. For example, in *Texas Independent Ginners Association v. Marshall*, the United States Court of Appeals for the Fifth Circuit rejected OSHA’s quantitative risk assessment where it improperly inferred a correlation between studies of foreign cotton ginning operations and a study of American cotton gins. 630 F.2d 398, 407 (5th Cir. 1980). The study of foreign ginning operations found an increased incidence of byssinosis from exposure to cotton dust, but the American study found no evidence of byssinosis or other chronic respiratory disease among American gin workers. *See id.* As such, the court found that OSHA’s reliance on the foreign study did not provide substantial evidence of a significant risk of material health impairment where a more relevant study of

American textile workers showed no adverse effects and the absence of those effects was plausibly attributable to different conditions unique to the American textile industry. *See id.* at 408-09.

Similarly, in *Public Citizen Health Research Group v. U.S. Department of Labor*, an OSHA standard was subject to challenge on the basis that the Agency had relied on a study establishing toxicity of a toxic agent in use in a certain industry and improperly relied upon that study to establish health risks in a second industry. 557 F.3d 165, 186-87 (3d Cir. 2009). Although the court rejected the challenge, it did so simply because the challenger was unable to adduce any evidence to support its position, but indicated the party would have been successful had it been able to provide scientific evidence to support its contention that the toxicity of the chemical agent and the resulting health risk varied by industry. *See id.*

Unlike the challenger in *Public Citizen Health Research Group*, BIA has submitted comments surveying studies dating back to the early 20<sup>th</sup> century in support of its contention that respirable crystalline silica lacks the toxicity in the brick and structural clay manufacturing industry to cause a significant risk of material harm. As described above, even OSHA's Notice of Proposed Rulemaking makes note of the divergent health results in the brickmaking industry due to silica exposure. As such, OSHA's reliance on studies detailing the impact of crystalline silica in industries with qualities distinct from those of the brickmaking industry are insufficient evidence to justify the application of this proposed rule to the brickmaking industry.

### **III. The Agency Should Exempt the Brick and Structural Clay Manufacturing Industry From the Proposed Standard Pursuant to Section 6(g) of the Occupational Safety and Health Act.**

Even if OSHA were to have the statutory authority to extend its revised silica rule to the brickmaking industry, OSHA should exercise its discretion under section 6(g) of the Act to regulate only those industries in which the risk of harm is the greatest before regulating those

industries that pose a lower risk. Section 6(g) authorizes the agency to “give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments.” 29 U.S.C. § 655(g). As such, OSHA may target particular industries to address their “unique problems” while exempting industries in which those problems are not present. *See United Steelworkers of Am., AFL-CIO-CLC v. Aucter*, 763 F.2d 728, 738-39 (3d Cir. 1985).

OSHA should do so here. The Agency concedes that it lacks sufficient information to make industry-based distinctions regarding the toxicity of crystalline silica and the resulting health risks. 78 Fed. Reg. 56310 (“Although it is evident that a number of factors can act to mediate the toxicological potency of crystalline silica, it is not clear how such considerations should be taken into account to evaluate lung cancer and silicosis risks to exposed workers.”). As a result, OSHA should exercise its discretion to exempt the brickmaking industry from compliance with the proposed rule unless and until it determines how best to take into account the industry’s low incidence of adverse health effects from silica toxicity.

Date: February 11, 2014

Respectfully submitted,

BRICK INDUSTRY ASSOCIATION



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April 16, 2015

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The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory  
Affairs and Federal Management  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510

The Honorable Thomas R. Carper  
Ranking Member  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510

The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
and Federal Management  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510

Dear Senators:

Business Roundtable is an association of over 200 chief executive officers of leading U.S. companies working to promote sound public policy and a thriving U.S. economy. Business Roundtable's CEO members lead companies with \$7.2 trillion in annual revenues and nearly 16 million employees. Business Roundtable member companies comprise more than a quarter of the total market capitalization of U.S. stock markets and invest \$190 billion annually in research and development – equal to 70 percent of U.S. private R&D spending. Our companies pay more than \$230 billion in dividends to shareholders and generate more than \$470 billion in sales for small and medium-sized businesses annually. The Roundtable companies also make more than \$3 billion a year in charitable contributions.

The issue of federal regulation is a high priority to our members, and we appreciate the Committee's commitment to pursue improvements in both the efficiency and effectiveness of regulatory programs. Federal regulation has provided substantial benefits to the country. These benefits, however, have come at a substantial cost. Business Roundtable believes in smart regulation: achieving our shared regulatory objectives while reducing the significant opportunity cost posed by regulation.

Your letter asked us to identify existing and proposed regulations that have a real impact on our membership. Based on past member surveys, pending regulations of greatest concern include, but are not necessarily limited to, certain regulatory proposals or recently finalized regulations emanating from the Clean Air Act including changing the ozone standard<sup>1</sup>, reducing greenhouse gas emissions from the power sector<sup>2</sup>, the Affordable Care Act, and the Wall Street Reform and Consumer Protection Act (e.g., derivatives trading used to reduce business risk, CEO pay ratio, conflict minerals). We are also concerned about pending FCC regulation (e.g., net neutrality). The issue to Business Roundtable members is the potentially large opportunity cost associated with many of these regulations. In some cases, this is partly or entirely due to statutory construction. In others, the concern stems from the exercise of – or, in some cases, the failure to exercise – agency discretion under the authorizing statute. Finally, we are deeply concerned by “rulemaking through enforcement actions” and the lack of due process by some agencies.

With respect to recommendations to improve the regulatory process, Business Roundtable has a long history. In 1994, Business Roundtable issued *Toward Smarter Regulation*<sup>3</sup> which described concerns with the regulatory system and recommended improvements. In 2011, Business Roundtable published *Achieving Smarter Regulation*,<sup>4</sup> which reaffirmed the recommendations contained in *Toward Smarter Regulation* and provided greater detail. These two reports, along with our 2012 report, *Permitting Jobs and Business Investment*<sup>5</sup> represent the position of the Roundtable on smart regulation.

In the remainder of this letter, I would like to highlight three of the most important process reforms: (1) permit modernization, (2) cost-benefit analysis, and (3) retrospective review. Each of these reforms, if adopted, would lower the opportunity cost of regulation and enhance job growth. These recommendations align with those of the President’s Council on Jobs and Competitiveness.

The federal permitting process ought to be modernized to ensure that decisions are timely and more certain. We support S.280, the Federal Permitting Improvement Act, which would implement a number of major reforms necessary to modernize the federal permitting process; require deadlines and schedules for processing permit applications while designating a lead agency for each project; and codify and expand the Administration’s efforts to make the

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<sup>1</sup> See Business Roundtable’s comments on EPA’s Proposed Rule on National Ambient Air Quality Standards for Ozone, <http://businessroundtable.org/resources/comments-epas-proposed-rule-national-ambient-air-quality-standards-ozone>

<sup>2</sup> See Business Roundtable’s comments on EPA’s Proposed Rule on Carbon Pollution Emission Guidelines for Existing Stationary Sources, <http://businessroundtable.org/resources/comments-epas-proposed-rule-carbon-pollution-emission-guidelines-existing-stationary>

<sup>3</sup> *Toward Smarter Regulation*: <http://businessroundtable.org/resources/toward-smarter-regulation>

<sup>4</sup> *Achieving Smarter Regulation*: <http://businessroundtable.org/resources/achieving-smarter-regulation>

<sup>5</sup> *Permitting Jobs and Business Investment*: <http://businessroundtable.org/resources/permitting-jobs-and-business-investment>

permitting process more transparent by creating an Internet-based infrastructure project-tracking dashboard. We also support approval of the Keystone XL pipeline.

Cost-benefit analysis is an essential tool for crafting sound regulations, and Business Roundtable CEOs believe agencies can do a better job of using it. Congress can: (1) codify key executive requirements for conducting sound analyses; (2) require that all federal agencies, including independent agencies, boards and commissions, conduct cost-benefit analyses on major rules; and (3) provide resources for implementation and oversight. The Office of Management and Budget (OMB) can require agencies to conduct more thorough analyses and create greater transparency so that experts outside of the government can replicate agency analyses.

Retrospective review, a concept we support in principle, refers to the evaluation of regulation to determine if it has achieved its objectives. We have followed with interest the Obama Administration's efforts on retrospective review in which agencies have published plans that identify existing regulations in need of updating or elimination. These plans have been updated every six months. The latest agency plans were posted in mid-March.

The President's initiative, while laudable, could be improved through: (1) leveraging input from stakeholders; (2) greater OMB oversight; and (3) incorporating a plan for retrospective review into every new major rule. Our recommendations align with those of the Administrative Conference of the United States (ACUS).<sup>6</sup>

We believe that retrospective review should focus on regulations posing the largest opportunity cost, to ensure that limited agency resources are focused on rule changes that provide the largest net benefit. Opportunity cost is likely to be most significant when existing regulations: (1) are based on prescriptive (rather than performance) standards, (2) pose significant recurring costs (as opposed to one-time, up-front capital costs), (3) are based on outdated science/technology, and/or (4) impose burdens on very productive economic activities (e.g., R&D).

A focus on cumulative burden is also warranted. Executive Order 12866, which requires a retrospective review effort by each agency, includes the "aggregate burden" of regulation on a sector of the economy as one potential focus of retrospective review. Unfortunately, the federal government has no means to identify cumulative burden. One step toward this goal would be to require cost-benefit analysis for each major regulation, including those from independent regulatory agencies and commissions. Another is to make regulatory information accessible online to allow the use of data analytics and other techniques to bridge across multiple databases and integrate information (including local, state, federal, and international regulatory information) in a useable form. Some private sector firms are already moving to

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<sup>6</sup> See Recommendation 2014-5, adopted by ACUS on December 4, 2014.



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address this market need. Business Roundtable recommends the creation of a task force of experts from the public and private sectors to develop a long-term roadmap for identifying and reducing cumulative burden.

Thank you for reaching out to the public for information on how to achieve our shared regulatory objectives more efficiently and effectively. If you would like any additional information on this topic, please feel free to contact me. We look forward to working with the Committee on this initiative.

Sincerely,

A handwritten signature in black ink that reads "John Engler". The signature is written in a cursive, flowing style.

John Engler



**Caterpillar Inc.**

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Washington, District of Columbia 20005 USA  
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May 1, 2015

The Honorable Ron Johnson  
United States Senate  
Chairman  
Committee on Homeland Security and Governmental Affairs  
Washington, DC 20510

Dear Senator Johnson:

I write in reply to the letter of March 18, 2015 to Caterpillar Chairman and CEO Doug Oberhelman signed by you and Senators Carper, Lankford and Heitkamp.

For 90 years, Caterpillar Inc. has been making sustainable progress possible and driving positive change on every continent. Customers turn to Caterpillar to help them develop infrastructure, energy and natural resource assets. With 2014 sales and revenues of \$55.184 billion, Caterpillar is the world's leading manufacturer of construction and mining equipment, diesel and natural gas engines, industrial gas turbines and diesel-electric locomotives. The company principally operates through its three product segments - Construction Industries, Resource Industries and Energy & Transportation - and also provides financing and related services through its Financial Products segment.

In 2014, Caterpillar employed some 114,000 people around the world with more than 51,000 of those in North America. In addition, Caterpillar dealers around the world accounted for nearly 162,000 employees. With more than 60 percent of our sales outside the United States, Caterpillar remains a leading exporter from the U.S. with more than \$15 billion in exports in 2014.

Caterpillar appreciates the opportunity to share our views on federal regulatory policies and programs. Attached you will find examples of Caterpillar's experience and views on federal regulations in working with a number of agencies. These highlight regulations that we have found particularly burdensome.

Should you, your colleagues or your staff have any questions regarding our submission to the Committee, please contact me.

Again, we appreciate the opportunity to provide comment on such an important matter.

Regards,

A handwritten signature in black ink, appearing to read "Christopher J. Myers". The signature is fluid and cursive, with the first name "Christopher" written in a larger, more prominent script than the last name "Myers".

Christopher J. Myers  
Director, Federal Government Affairs

Attachment

## **Labor/Employment**

Caterpillar has spent significant time reviewing the impact of proposed regulations from the Department of Labor (DOL), the National Labor Relations Board (NLRB), and the Equal Employment Opportunity Commission (EEOC). To simply review proposed regulations and Executive Orders takes an employer such as Caterpillar hundreds of hours a year. For example, determining whether we have the systems and resources to track and comply with a rule like the Fair Pay and Safe Workplaces Executive Order, required substantial amounts of time from Caterpillar's Legal, Human Resources and Governmental Affairs groups.

In addition, federal agencies often grossly underestimate the cost of implementing a proposed rule. For example, the proposed rule and guidance stemming from the Fair Pay and Safe Workforces Executive Order was deemed "not economically significant" by the Department of Labor and the Federal Acquisition Regulatory Council. However, the business community provided their own cost analysis showing that proposed rule will easily cost over the \$100 million threshold required for a more rigorous, detailed economic review. Federal agencies could easily make a more accurate cost analysis by considering stakeholder input.

The "Equal Pay Report" proposed rule from the Office of Federal Contract Compliance Programs (OFCCP) is another recent example of a proposal that obligates Caterpillar spends more time in additional recordkeeping. While we understand the importance of pay equality, it takes many measures to ensure pay practice non-discrimination. Unfortunately, even with the additional required data collection, results will not be more meaningful than the current data collected by the OFCCP. Our company, in addition to many others, has provided recommendations to the OFCCP on less-burdensome alternatives, such as combining the current EE0-1 requirements with the compensation collection requirement. It is unclear at present time if the agency will incorporate this feedback into their final rules.

As a large federal contractor, we ask that the Office of Management and Budget (OMB) and regulatory agencies listen to our comments and the impact the rules will have on our company. The regulatory process can significantly impact companies, such as Caterpillar, without providing due diligence to gain feedback from companies and utilize the feedback that meets the needs of both the regulatory agenda, as well as U.S. employers.

Lastly, Caterpillar was significantly impacted by changes to Section 503 of the Rehabilitation Act and VEVRAA regulations by the Department of Labor. While Caterpillar is committed to a diverse and inclusive environment that values the uniqueness of our employees and fully supports initiatives to attract and retain qualified veterans and individuals with disabilities, these regulations imposed significant changes to our organization. We appreciated that OFCCP Director, Pat Shiu, actively listened to employer concerns by reviewing feedback and holding listening sessions. This feedback led to revised regulations which were much less burdensome and more reasonable from the employer's perspective. Yet, even with significant revisions, it took a full year to implement these changes to policies and practices which we felt already reflected Caterpillar's strong commitment to diversity.

In addition to the problems and challenges with the processes outlined above, we wanted to provide some specific examples of various regulations that have, or will have, a significant impact on our business.

### ***OFCCP – Federal Contractor Affirmative Action Obligations under the Rehabilitation Act Final Rule***

In 2001, the OFCCP published a notice of rulemaking that altered the regulations implementing Section 503 of the Rehabilitation Act. Finalized in 2013, the regulations establish utilization goals for contractors to require ask employees and applicants to self-identify as individuals with disabilities. By its own calculations, OFCCP has said this rule will cost Federal contractors \$659 million per year. The U.S. Chamber has pointed out that despite this large monetary cost, there is no guarantee the rule will actually increase disabled individuals in the workplace.

### ***OSHA – Improve Tracking of Workplace Injuries & Illnesses proposed rule, 29CFR §1904***

The Occupational Safety and Health Administration (OSHA) issued a proposed rule requiring all injuries and illnesses to be documented and submitted at least once annually. OSHA would then post the injury and illnesses online in a searchable database. In Caterpillar's view, the standard for recording workplace injuries is overbroad insofar as it requires the inclusion of injuries that are not caused by work conditions. Specifically, under its "geographic presumption," OSHA presumes that all injuries that occur in the work environment are work-related (with a few listed exceptions). This creates situations where injuries such as employees sneezing and injuring their backs or tripping on a smooth, clean floor, or sustaining injuries hitting the ceiling in a bathroom on an airplane during turbulence are considered recordable, despite the employer's inability to control those conditions.

There is no safety benefit in recording injuries that lack work-related causation and doing so unfairly inflates the number of injuries beyond those situations that were within the control of the employer. Further, publicly posting an employer's injury and illness reports does not improve safety. It does, however, raise legitimate concerns with privacy and how to safeguard information provided to OSHA.

### ***OSHA - Powered Industrial Trucks: 29CFR §1910.178(l)(4)(iii)***

Caterpillar recognizes the necessity and value of the powered industrial trucks standard. However, one provision in this standard that does not add value is the requirement in subsection (l)(4)(iii) that employers complete operator performance evaluations every three years. As required by the OSHA standard, monitoring the work practices of powered industrial vehicle operators is an on-going process. If operators engage in conduct that is unsafe or inappropriate, the situation is addressed immediately, including immediate retraining or even revocation of a license (or more significant discipline). The problem is that the OSHA rules also mandates a more formal, three year evaluation cycle on top of the day-to-day observations of the drivers.

For example, of the thousands of three-year evaluations we have completed, none has resulted in retraining or license withdrawal. It has become a bureaucratic burden with no evident benefit. The regulation also creates a formidable administrative burden in keeping up with the three-year timing for each of the thousands of licenses used by Caterpillar employees.

***OSHA - Access to Employee Exposure and Medical Records: 29CFR §1910.1020(c)(5)(iii) & (iv) & 29CFR §1910.1020(d)(1)(ii)(B)***

Caterpillar recognizes employees need reasonable access to workplace exposure records, sometimes after their employment with the company ends. However, the requirement for employers to maintain a record of every work location where every chemical was used for thirty years imposes a large burden on employers, particularly when compared to the potential benefits of the requirement. At Caterpillar, a large database is required to store this information and several employees are tasked with gathering and maintaining this data at a considerable overall cost. Yet, on a company-wide basis we have received fewer than one request per year from employees or former employees/retirees for this information.

***MSHA - Health Standards for Coal Mines; Periodic Examinations: 30 CFR §72.100 and 42 CFR §37.100***

These sections impose medical surveillance requirements for employees of coal mining companies, and were recently extended to include medical surveillance for employees of other companies who are present at coal mines for more than five consecutive days or are present according to a regular pattern of exposure (1 day per month or more). Caterpillar sends many employees to coal mines each year who fall into this category. Two aspects of the requirement are problematic:

- Employees who are present at coal mines for infrequent or relatively brief visits are not exposed to dangerous levels of coal dust or silica. For these employees and their employers, intensive medical surveillance requirements are an unnecessary burden with no corresponding substantive health protection.
- The requirement specifies that the medical examinations must be provided at a NIOSH-approved facility. Because NIOSH was not adequately prepared for MSHA's new rule, NIOSH has not yet approved a facility for the required exams, thus leaving employers with no practical means of fully complying with the rule.

**Securities and Exchange Commission**

***Dodd-Frank Act, §953(b) (Executive Compensation/Pay Ratio)***

The United States Securities and Exchange Commission ("SEC") has proposed a rule (the "Rule") pursuant to section 953(b) of Dodd-Frank, that if adopted would require public

reporting companies, including Caterpillar, to disclose annually the ratio of CEO pay to that of the company's median employee.

Caterpillar Inc. employs over 100,000 people around the world in approximately 60 countries and maintains many payroll processing and human resource management systems. In addition, human resource management systems and compensation and benefit plans are often tailored to specific countries or regions of operation.

In the absence of a standardized, global compensation methodology, it would be a burdensome exercise to accurately pinpoint a median income level, and a preliminary review suggests that an investment of a minimum of 700 hours would be required to establish adequate tools to capture useful data or to standardize it for evaluation should the Rule be adopted as proposed.

A survey and report released by the U.S. Chamber of Commerce last year estimated that the Rule would impose costs of over \$700 million on the economy. Further, little evidence has been presented to demonstrate the benefits of this disclosure and this would ultimately provide no useful information to investors.

### ***Dodd-Frank Act, §1502 (Conflict Minerals)***

In August 2012, the United States Securities and Exchange Commission ("SEC") issued a final rule (the "Rule") to implement the requirements of Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to sourcing of tin, tantalum, tungsten and gold ("Conflict Minerals") from the Democratic Republic of the Congo and its adjoining countries (collectively, the "DRC"). The Rule requires public reporting companies, including Caterpillar, to file a public report annually with the SEC disclosing whether products it manufactures or contracts to manufacture contain Conflict Minerals and whether such Conflict Minerals are financing or benefitting armed groups in the DRC. The Rule requires an independent private sector audit of the report, except during a two year transition period if the status of Conflict Minerals in a company's products is not determinable.

Caterpillar supports the underlying humanitarian goal of Section 1502, which is to help end the human rights abuses in the DRC. However, legislation that addresses humanitarian issues, such as the crisis in DRC, must be both effective and economically sustainable.

Several years after the Rule's adoption, recent reports suggest that Section 1502 has had little positive effect and has led to unintended and damaging consequences, such as harming legitimate miners, their families and others who were the intended beneficiaries of the Rule.

At the same time, compliance with the Rule has proved to be a time-consuming and costly undertaking, particularly for a large, diversified manufacturing company such as Caterpillar. In 2014 alone, Caterpillar estimates that it spent approximately \$8.5 million on activities related to compliance with the Rule. The National Association of Manufacturers has estimated the overall cost of compliance to U.S. industry as between \$9-\$16 billion.





2040 S Street NW, Second Floor  
Washington, DC 20009

May 1, 2015

The Honorable Ron Johnson  
Chairman  
U.S. Senate  
Homeland Security & Governmental Affairs Committee  
Washington, DC 20510

The Honorable Thomas Carper  
Ranking Member  
U.S. Senate  
Homeland Security & Governmental Affairs Committee  
Washington, DC 20510

The Honorable James Lankford  
Chairman  
U.S. Senate  
HSGAC Subcommittee  
Regulatory Affairs & Federal Management  
Washington, DC 20510

The Honorable Heidi Heitkamp  
Ranking Member  
U.S. Senate  
HSGAC Subcommittee Regulatory Affairs &  
Federal Management  
Washington, DC 20510

Dear Senator Johnson, Senator Carper, Senator Lankford, and Senator Heitkamp:

Thank you for the opportunity to share our perspective on the federal government's regulatory system and to identify specific rules that merit further attention. The Center for Effective Government is a national policy organization that works to ensure that government operations are open and transparent, that our regulatory system protects people and the environment, and that public officials advance the interests and priorities of all Americans.

A critical function of our government is to protect us from preventable hazards and harms. We expect our government to keep contaminated food out of restaurants and supermarkets. We expect a safe and healthy workplace and fair wages for a hard day's work. We expect businesses to operate without polluting our air or water, destroying natural habitats, or violating the public trust. These are basic, fundamental tenets of our society that serve as a foundation from which we can pursue and achieve the American dream.

Because of our federal system of standards and safeguards, over the past 100 years, we have succeeded at reducing workplace fatalities, reducing air and water pollution, and ensuring our food is safe to eat. At the same time, we have encouraged American entrepreneurship and business innovation, and in turn created new jobs, produced broadly shared prosperity, and achieved some of the highest living standards in the world.

But continued progress is at risk. Duplicative and unnecessary procedural hurdles affixed to our regulatory process, as well as sharp cuts in agency budgets, have significantly impacted the ability of agencies to modernize existing safeguards to keep pace with new scientific or technological developments or to adopt new rules to address emerging risks. Adding more obstacles, analyses, and legal challenges to this process will further erode our regulatory system, putting the American public at risk of preventable injuries, illnesses, and deaths, leaving our planet to suffer from the impacts of an unstable climate, and crippling our economy.

We believe that an efficient and effective regulatory process is one that allows agencies to adopt safeguards that provide an *adequate level of protection* from hazards and harms *before an accident happens*. Delayed rules have real-world impacts—to public health, safety, and the environment, and to our national economy. But too often, our government acts only after a preventable tragedy has occurred—the global financial crisis, the chemical facility explosion in West, Texas, the General Motors auto recall, and exploding rail cars carrying crude oil are just a few recent examples.



## Selected High-Priority Rules

### *Chemical Facility Safety*

President Obama's Aug. 1, 2013 Executive Order (E.O.) 13650 on Chemical Facility Safety and Security directs federal agencies to modernize chemical plant safety and security policies in order to protect workers and communities. In issuing the E.O., President Obama made it clear that existing federal and state programs were not protecting the safety and security of the workers or community.

Existing programs have failed because none of the rules or safety standards require facilities to identify or adopt inherently safer technologies and systems. Instead, current programs are limited to "managing" or "mitigating" risks. Since the West, Texas chemical explosion tragedy that served as the impetus for the executive order, there have been over 355 chemical accidents resulting in 79 deaths and 1,500 hospitalizations.<sup>1</sup>

In response to the executive order, the Chemical Facility Safety and Security Working Group co-chaired by the Environmental Protection Agency (EPA), Occupational Safety and Health Administration, and the Department of Homeland Security issued its report to the president, *Actions to Improve Chemical Facility Safety and Security – A Shared Commitment*.

Included in this report is a commitment by the EPA to initiate a regulatory process to modernize the EPA's Risk Management Program (RMP), which serves as a key federal program for addressing industrial facility risks, such as those posed by chemical facilities. However, the EPA's Risk Management Program (RMP) lacks fundamental requirements to protect public health and the environment from catastrophic chemical releases through common-sense prevention measures.

In July 2014, EPA initiated a lengthy process of soliciting public input on the improvements needed to strengthen the RMP program through a request for information. Among the key recommendations from more than 150 national and local organizations<sup>2</sup> was that the RMP be revised to require *all* chemical facilities to conduct and submit an alternatives assessment to determine the availability of safer available chemical processes and/or inherently safer technologies (IST), as well as a requirement that all RMP facilities adopt the use of safer chemicals and processes wherever feasible.

EPA intends to propose revisions to the RMP program by September 2015, and the Workgroup report contains a commitment to complete modifications of the RMP that may include specific safer alternative analysis and requirements for companies to document actions they've taken to implement feasible alternatives before the end of fiscal year 2016. Given the importance of making changes to the RMP that focus on the prevention of chemical facility accidents, it is imperative that EPA complete its rulemaking well before September 2016.

### *Ozone Air Quality Standard*

The Clean Air Act of 1970 requires that EPA review and, where necessary, revise national ambient air quality standards at no more than five-year intervals. The national ambient air quality standard for ozone was last revised in 2008, from 80 parts per billion (ppb) to 75 ppb. However, this standard was above the 60 to 70 ppb level recommended by the agency's Clean Air Scientific Advisory Committee, which committee members said was necessary to adequately protect public health<sup>3</sup>.

In December 2014, the agency proposed to revise the ozone standard to a level of between 65 to 70 ppb while accepting comment on a standard set at 60 ppb. EPA estimates that meeting a revised ozone standard of between 65 and 70 parts ppb by 2025 would avoid between 880 to 3,100 premature deaths, 360 to 1,100 respiratory hospital admissions, 1,100 to

<sup>1</sup> Senator Barbara Boxer, Chemical Accidents since West, TX Explosion (April 17, 2013), December 11, 2014. Available at <https://www.documentcloud.org/documents/1380842-epw-12-11-14chemical-accidents-charts-v5.html>

<sup>2</sup> Comments submitted by 156 organizations in response to Federal Register Notice - Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7); Rule Modernization Under Executive Order 13650; Request for Information (July 31, 2014). Available at <https://www.documentcloud.org/documents/1350484-coalition-to-prevent-chemical-disasters-rfi.html>

<sup>3</sup> Letter from U.S. EPA Clean Air Scientific Advisory Committee Chair H. Christopher Frey to U.S. EPA Administrator Gina McCarthy, June 26, 2014. Available at

[http://yosemite.epa.gov/sab/sabproduct.nsf/5EFA320CCAD326E885257D030071531C/\\$File/EPA-CASAC-14-004+unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/5EFA320CCAD326E885257D030071531C/$File/EPA-CASAC-14-004+unsigned.pdf)

3,500 emergency department visits for asthma attacks, and 300,000 to 910,000 asthma exacerbations in children, among other benefits, each year. EPA estimates the economic benefit from the avoided health effects at between \$2 billion and \$11 billion annually.

However, as medical and public health organizations such as the American Thoracic Society and the National Association of County and City Health Officials have noted,<sup>4</sup> a significant body of scientific evidence indicates that a revised ozone standard of 60 ppb is necessary to protect public health. Compared to the current ozone standard, attaining the more health-protective 60 ppb standard would avoid up to 5,800 premature deaths, 2,100 respiratory hospital admissions, 6,600 emergency department visits for asthma attacks, and 1.7 million asthma exacerbations in children, among other benefits, each year. EPA estimates the economic benefit from these avoided health effects at between \$12 billion and \$20 billion annually.

All of the above estimates of avoided health impacts and economic benefits from a revised ozone standard exclude the substantial avoided health impacts in California, which would meet these standards after 2025, and do not include their economic benefits.

To ensure that the American public, and in particular vulnerable populations such as children, the elderly, and those with lung and heart disease, receive adequate protection from breathing unhealthy levels of ozone pollution, it is imperative that EPA adopt a revised ozone standard of 60 ppb.

#### *Crude-by-Rail Standards*

As a result of the rapid expansion in domestic oil extraction, the volume of train traffic carrying crude oil has increased by 4,000 percent over the past five years. Unfortunately, this has resulted in a significant surge in oil train accidents over the same time period, rising from nine incidents in 2010 to 144 incidents in 2014.<sup>5</sup> While the majority of these incidents have not resulted in massive tragedy, the destruction of much of the town of Lac-Mégantic, Quebec in 2013, which killed 47 people, exemplifies the potential devastation that could occur from crude oil train accidents in highly populated areas.

In response to this increasing threat to public safety, the Pipeline and Hazardous Materials Safety Administration (PHMSA) and the Federal Railroad Administration (FRA) proposed rules in August 2014 to improve crude oil train safety and finalized them on May 1, 2015. However, the rules do not address the issue of the volatility of transported crude oil, and they allow unsafe train cars to remain in service for an extended period. It is imperative that these regulations be strengthened to address these additional requirements and ensure that a major national tragedy related to oil train transport does not occur in the United States.

#### *OSHA's Silica Rule*

Overwhelming scientific evidence indicates that exposure to silica causes silicosis, chronic obstructive pulmonary disease, lung cancer, chronic kidney disease, and autoimmune disorders. In 1974, the National Institute for Occupational Safety and Health (NIOSH) issued criteria for a recommended standard limiting occupational exposure for all forms of crystalline silica to a level of 50 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ). The NIOSH criteria prompted OSHA to begin developing a rule shortly thereafter, but over forty years later, OSHA has yet to complete a rulemaking to revise the permissible exposure limit from 100  $\mu\text{g}/\text{m}^3$  to the NIOSH-recommended 50  $\mu\text{g}/\text{m}^3$  level.

Adopting this revised standard would prevent more than 350 deaths and 630 illnesses annually. OSHA has estimated the value of these avoided deaths and illness at \$1.7 to \$2.5 billion, with compliance costs of \$339 to \$351 million, resulting in an annual net benefit of \$1.3 to \$2.2 billion.<sup>6</sup>

It is imperative that OSHA expedite completion of the revised permissible exposure limit for silica to ensure that workers exposed to this dangerous hazard receive the necessary protections to safeguard their lives and their health.

<sup>4</sup> Multiple group letter to H. Christopher Frey, Ph.D., May 19, 2014. Available at <http://www.lung.org/get-involved/advocate/advocacy-documents/health-medical-org-letter-casac-o3-naaqs.pdf>

<sup>5</sup> U.S. Department of Transportation, Pipeline and Hazardous Material Safety Administration, Yearly Incident Summary Reports, available at <https://hip.phmsa.dot.gov/analyticsSOAP/saw.dll?Dashboard>

<sup>6</sup> Occupational Safety and Health Administration, Proposed Rule: Occupational Exposure to Respirable Crystalline Silica, 78 FR 56274, Table SI-2.

## Causes of Regulatory Delay

In our view, our federal regulatory system has become slow, complex, and opaque as a consequence of unnecessary procedural hurdles being added to the process, continual cuts to agencies' budgets, and a fundamental misunderstanding about the role of regulations in promoting a sustainable and competitive economy.

### *OIRA Delays and Lack of Transparency*

Under Executive Order (E.O.) 12866, many executive branch agencies must submit drafts of "economically significant" rules (rules that will have an annual economic impact of \$100 million or more) to the Office of Information and Regulatory Affairs (OIRA) within the White House Office of Management and Budget (OMB) for review. OIRA reviews the agency's analyses, including any cost-benefit analyses and impact analysis the agency has conducted, to determine if the office believes the rule should be proposed and/or adopted as written.

The E.O. provides OIRA with discretion to determine which rules qualify as "significant." This has resulted in an unwieldy and inappropriately broad assertion of OIRA review authority to agency guidance documents and pre-rulemaking actions.

OIRA also has a poor record of following the deadlines or transparency requirements of the executive order. The E.O. requires that OIRA's review be completed within 90 days unless the agency agrees to a one-time extension of an additional 30 days. If OIRA makes changes to the proposed rule during the review process, the agency is supposed to identify those changes in a clear and understandable manner and make this information available to the public. If OIRA sends a rule back to an agency for further analysis, the office is required to explain in writing why more analysis is needed. But OIRA has earned a reputation for blocking rules indefinitely without giving the affected agency or the public any explanation of its reasons for doing so. The pattern is for rules to emerge from the OIRA review process significantly changed, almost always with weaker public protections as a result.

To address these concerns and improve the effectiveness and efficiency of our regulatory system, Congress should raise the economic threshold of \$100 million for defining "economically significant" rules, which has not been updated since 1978. Congress should also prohibit OIRA from reviewing agency guidance documents, pre-rulemaking actions, and other non-economically significant actions. OIRA should not be allowed to exceed the 90- or 120-day deadline set in the executive order. Failure to meet the deadline should be considered default approval of a rule. OIRA should also be required to provide copies of pre- and post- review versions of the rule in the rulemaking docket with a description of all substantive changes made by the office or any other person or agency.

Moreover, OIRA has forced agencies to use significant amounts of their time and resources conducting "regulatory lookbacks." This contributes to delay by taking resources away from agencies efforts to complete rulemakings and to identify and investigate emerging risks to our health, safety, and environment. In practice, identifying and removing outdated and inefficient regulations is sensible, but in reality, the savings to the economy have been relatively modest at best (OIRA Administrator Howard Shelanski has estimated \$10 billion<sup>7</sup>). And the opportunity costs to the agency and to public health are unmeasured. Since the primary mission of regulatory agencies is to evaluate and protect against potential risks to the American people, the economy, and the environment, agencies should not be forced to engage in resource-intensive backward exercises in paring back outdated rules when they need to be scanning for emerging threats.

## Regulations and the Economy

Our federal regulatory system bolsters the voice of big businesses and unreasonably elevates industry concerns about regulatory costs over imminent risks to our health, safety, and environment. Much of this dynamic of costs vs. benefits rests on the incorrect belief that regulations are bad for business.

Regulations ensure that a business or industry that creates a hazard bears the cost of controlling it. Without strong, enforceable regulations, companies may choose to forego investments in cleaner equipment and instead choose to use

<sup>7</sup> OIRA Administrator Howard Shelanski, Oral testimony before the Senate Committee on Government Affairs and Homeland Security Committee, Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce, March 11, 2014.



equipment that pollutes more but costs much less. In this way, a company can pass the cost of its pollution on to the public—who pays through higher incidences of sickness, injuries, and even death.

Trade associations and corporate lobbyists often cloak their anti-regulatory arguments in discussions of the purported “burdens” they would impose on small businesses. We too are concerned about *real* small businesses and family farmers but believe the problems they face have more to do with industry consolidation and unfair competition from large producers—not from health and safety standards.

Small business owners are also parents, homeowners, consumers, and concerned neighbors who want their families protected from environmental contamination, contaminated foods, and unsafe toys, just like other Americans. Research shows actual small business owners support energy and climate legislation, and many believe such legislation would aid their businesses. One poll found 86 percent of small business owners believe “some government regulations are necessary for a modern economy,” and 78 percent believe “regulations are important to level the playing field with big business.”<sup>8</sup>

We urge Congress to reinvigorate antitrust and competition policy. Agribusiness monopolies are particularly damaging. Oligopolistic control over seed markets increase farmer costs and threaten biodiversity. Small livestock and poultry farmers are increasingly unable to sell to competitive markets and instead work as *de facto* contract workers for giant packers and processors.

The Small Business Regulatory Enforcement Fairness Act could be amended to require agencies to conduct more outreach, education, and compliance assistance to small businesses. Many agencies already have existing Small Business Ombudsman offices that help small businesses with compliance issues once regulations are issued. But legislation could encourage (and fund) these offices to proactively reach out to and educate small businesses about how they can comply with rules more efficiently. With a proactive approach, real small businesses would receive direct and tangible assistance to help them comply with regulations and profit from the health and safety benefits of regulations.

#### *Resource Constraints*

Regulatory delay is also caused by Congress continuing to cut agency resources. In fact, over the past decade, most agency budgets have barely held even. For example, OSHA’s enforcement budget today is at the level it was in 1981, even though the number of workplaces it is supposed to oversee has doubled. Funding in recent years for the EPA’s compliance and enforcement efforts, which support the majority of inspections and enforcement to ensure compliance with major environmental laws, have been at historical low levels.

Declining resources put pressure on agencies’ ability to issue adequate protections in a timely manner and make it impossible for agencies to respond to known hazards, as well as emerging risks. Resource constraints also make it difficult for agencies to offer businesses training or compliance assistance with regulations that are on the books. An efficient and effective regulatory process is impossible without adequate funding and resources.

#### **Conclusion**

In considering improvements to the nation’s regulatory process, we urge the committee to recognize that the current complex process results in extensive delay in providing essential public protections. These delays result in significant costs to the American public in terms of lives lost and additional illness. The benefits to public health and welfare from public protections are often difficult to quantify and are therefore frequently underestimated while costs associated with their implementation are often overestimated. Proposals that result in additional requirements and procedural hurdles for agencies involved in rulemaking will only result in further delays that divert agencies from their important efforts.

Sincerely,

Ronald White  
Director of Regulatory Policy

American Sustainable Business Council, Opinion Survey: Small Business Owners’ Opinions on Regulations and Job Creation, February 1, 2012. Available at [http://asbcouncil.org/sites/default/files/files/Regulations\\_Poll\\_Report\\_FINAL.pdf](http://asbcouncil.org/sites/default/files/files/Regulations_Poll_Report_FINAL.pdf)



May 1, 2015

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Chairman Johnson,  
Chairman Lankford,  
Ranking Member Carper, and  
Ranking Member Heitkamp  
U.S. Senate Committee on Homeland Security & Governmental Affairs  
Washington, DC

Re: March 18, 2015 Letter Requesting Views on Improving Federal  
Regulatory Process

**Advisory Council**

Patricia Bauman  
Frances Beinecke  
Eula Bingham  
W. Thompson Comerford, Jr.  
Sally Greenberg  
John Passacantando  
Henry Waxman  
Robert Weissman

Dear Honorable Johnson, Lankford, Carper, and Hietkamp:

We the undersigned are Member Scholars and Staff with the Center for Progressive Reform (CPR), a think tank and research institute that is composed of a network of sixty scholars across the nation and that is dedicated to protecting health, safety, and the environment through analysis and commentary. We appreciate this opportunity to provide the members of the U.S. Senate Committee on Homeland Security and Government Affairs with my views on the problems with the U.S. federal regulatory system and reforms that are needed to address those problems. Broadly speaking, the regulatory system has become heavily tilted in favor of powerful corporations so that it is now more attentive to their narrow interests, rather than the broad public interest in protecting people and the environment against unacceptable harms that the agencies were created to address. The result is that the Clean Air Act, the Federal Food, Drug, and Cosmetic Act, the Occupational Safety and Health Act, and other public interest laws that Congress has enacted over the past several decades are not being implemented as intended. Meanwhile, the public continues to bear the high costs of corporations' polluting and other harmful activities, and corporations continue to remain unaccountable for the harm their activities are causing.

Congress can and should take steps to address the many problems that are undermining the effective performance of the regulatory system. Below, we sketch out three major defects in regulatory process that, if addressed, would enable the regulatory system to once again work in the public interest. They include:

- The use of economic cost-benefit analysis;
- The role of centralized regulatory review at the White House Office of Information and Regulatory Affairs; and
- Interference by the Small Business Administration's (SBA) Office of Advocacy.

- Dozens of retrospective evaluations of regulations adopted by the EPA and the Occupational Safety and Health Administration (OSHA) pursuant to the Regulatory Flexibility Act have found that the regulations were still necessary and that they did not produce significant job losses or have adverse economic impacts for affected industries, including small businesses.

A second myth that needs to be dispensed with is that agencies are “unaccountable” when developing regulations. This myth ignores the fact that agencies are already subject to a thick web of analytical and procedural requirements to prevent agencies from issuing unnecessary or excessively burdensome regulations and their final decision-making in most major rules is then subject to judicial review by federal appellate courts. If anything, there are already too many of these overlapping and duplicative requirements, resulting, as described below, in the need to conduct years of analysis before significant rules may be adopted. In addition, existing federal laws that govern the rulemaking process already provide many opportunities for stakeholders to participate to make their views known, inform the agency if its regulatory proposals reflect factual misunderstandings, and protect their interests.

The Administrative Procedure Act (APA) requires agencies to provide persons potentially affected by their regulations a fair opportunity to influence the rulemaking process, and several mechanisms exist for holding agencies accountable for their regulatory actions. Under traditional APA rulemaking, a regulatory proposal is meant to start the discussion, not end it. Indeed, the agency must solicit and actually *consider* comments it receives from the public on the proposal. If the agency discovers during the comment process that it has strayed beyond its statutory authority, neglected relevant considerations, or misunderstood the science on which it based its proposal, the APA requires the agency to revise the rule accordingly before finalizing it, or not adopt the rule at all. This is not some hollow exercise. Rather, the courts strictly enforce it. If an agency adopts a rule without taking into account relevant public comments, the court in a challenge to the validity of the rule has the power to send the rule back to the agency and preclude its implementation.

The APA has provided these protections during the rulemaking process for affected interests since 1946, but statutes and executive orders adopted beginning in the 1980s have added multiple layers of new rulemaking procedures and analytical requirements not required by the APA. As a result, the rulemaking process has become an inordinately complex, time-consuming, and resource-intensive process:

- As of 2000, an agency was subject to as many as 110 separate procedure requirements in the rulemaking process.<sup>3</sup> Additional procedural requirements have been added since 2000.<sup>4</sup>
- A flowchart developed by Public Citizen to document the rulemaking process covers several square feet, and, because of the complexity involved, it still requires tiny font in order to include every last rulemaking step.<sup>5</sup>

<sup>3</sup> See Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. L. REV. 533 (2000) (documenting that executive orders and statutory requirements could require as many as 110 different requirements for rulemaking), available at <http://www.law.fsu.edu/journals/lawreview/downloads/272/Seid.pdf>.

<sup>4</sup> See, e.g., Exec. Order No. 13,586, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

which increases the possibility that another catastrophic coal ash spill similar to the one that occurred at the Tennessee Valley Authority's (TVA) Kingston Fossil Fuel Plant in December of 2008 may take place again very soon.<sup>8</sup>

As documented in a 2009 CPR white paper entitled *The Hidden Human and Environmental Costs of Regulatory Delay*,<sup>9</sup> just the delays of rulemakings impose a serious cost on the public interest as well. Each year dozens of workers are killed, thousands of children harmed, and millions of dollars wasted because of unjustifiable delays in federal regulatory action. The costs of regulatory delay accrue every time the federal protector agencies—those created by Congress to protect health, safety, and the environment—fail to take timely action to prevent the kind of serious and pressing threats Congress intended for them to address. Such delays in regulatory action have become commonplace, part of the wallpaper of Washington's regulatory process for the protector agencies—the Consumer Product Safety Commission (CPSC), EPA, the Food and Drug Administration (FDA), the National Highway Traffic Safety Administration (NHTSA), and OSHA.

Such unacceptable delays in agency rulemakings have become commonplace in the U.S. regulatory system. To be sure, careful analysis of both the need for and consequences of regulation is important. But, the regulatory process has become so ossified by needless or duplicative procedures and analyses that larger rulemakings commonly require several years—possibly more than a decade—to complete. As Professor Richard Pierce of the George Washington University Law School has observed, “[I]t is almost unheard of for a major rulemaking to be completed in the same presidential administration in which it began. A major rulemaking typically is completed one, two, or even three administrations later.”<sup>10</sup> The EPA told the Carnegie Commission that it takes about five years to complete an informal rulemaking.<sup>11</sup> A Congressional report found that it took the Federal Trade Commission five years and three months to complete a rule using more elaborate hybrid rulemaking procedures.<sup>12</sup> These reports do not take into account additional analytical requirements that have been imposed since their publication date.

The fact that it may take five years or more to complete the process for adopting important rules should be no surprise, as the following, entirely realistic time schedule for significant rules indicates:

- 12-36 months to develop a proposed rule
- 3 months for OIRA review of the draft proposal
- 3 months for public comment
- 12 months to review comments and write final justification
- 3 months (or more) for OIRA review of the final rulemaking

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<sup>8</sup> Rena Steinzor et al., *Barack Obama's Path to Progress in 2015-16: Thirteen Essential Regulatory Actions - Coal Ash Waste Disposal Standards* (Ctr. for Progressive Reform, Issue Alert 1406, 2014), available at <http://www.progressivereform.org/13RulesCoalAsh.cfm> (last visited Apr. 30, 2015).

<sup>9</sup> A copy of the white paper has been attached to the end of this letter. It is also available online at [http://www.progressivereform.org/articles/CostofDelay\\_907.pdf](http://www.progressivereform.org/articles/CostofDelay_907.pdf)

<sup>10</sup> Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 912 (2007).

<sup>11</sup> CARNEGIE COMM'N, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 108 (1993).

<sup>12</sup> FEDERAL TRADE COMM'N, 98<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 155-66 (Comm. Print 98-cc 1984).

- The second case study examines how EPA has for decades abdicated its clear duty under the Clean Water Act to control the spread of invasive species from ships' ballast water discharges. A federal court recently ordered EPA to begin regulating these discharges, but invasive species have already done considerable damage. For example, since it was first introduced in the 1980s, the zebra mussel—an invasive species carried to the United States in ships from Eastern Europe—has spread to hundreds of U.S. waterbodies, causing an estimated \$1 billion in damages every year, by clogging water intake pipes at power plants and other industrial facilities. Zebra mussel infestations have also permanently altered the fragile ecosystems of lakes and rivers across the country.
- The third case study examines how a much-needed new rule updating regulatory standards for the use of cranes, derricks, and other heavy machinery at construction sites has remained stalled at OSHA for the last five years. The existing standards are now 40 years old and are in dire need of updating to account for changes in technology and construction practices. OSHA's failure to issue the new rule has been costly: The agency estimates that it would save dozens of lives and prevent well over 100 injuries every year.

These case studies are now a bit dated, but more current case studies could be found with the ongoing delays of EPA's pending rulemaking to update its ozone National Ambient Air Quality Standards (NAAQS) and the Department of Transportation's suite of regulatory actions to address the threat to public safety and the environment caused by the massive movement of highly flammable crude oil on U.S. railways. Nevertheless, the broader lessons that *The Hidden Human and Environmental Costs of Regulatory Delay* raises are still applicable and in need of careful consideration.

## **Economic Cost-Benefit Analysis**

Economic cost-benefit analysis—as enshrined in Executive Order 12866—has long been leveraged by regulated industry and other antiregulatory forces to weaken and delay rulemakings. In other words, the institution of economic cost-benefit analysis as both an analytical tool and a methodology for informing agency rulemaking has long played a key role in undermining the effectiveness of the U.S. regulatory system.

The use of economic cost-benefit analysis in the regulatory process should be discontinued for two major reasons: (1) It is inconsistent with the law in most cases and (2) it has failed as a tool of regulatory analysis. In the vast majority of public health, safety, and environmental statutes, Congress has not chosen to incorporate cost-benefit analysis. It has instead directed agencies to use a variety of well-established alternative methods for setting standards. These include technology-based standard-setting, effects-based standard setting, and multi-factor balancing.

Moreover, economic cost-benefit analysis is a failed approach to regulatory analysis, producing reliably unreliable results. To be clear, economic cost-benefit analysis is not in need of mere tweaking. It is inherently flawed. Over a quarter century of use by administrations of both parties, it has failed to accurately or adequately capture the benefits of proposed regulations, and it has even ignored some benefits altogether because they defied monetization. At the same time, it has frequently overstated the costs to industry of compliance. As a result, cost-benefit



**Only Two Statutory Provisions Protecting Health, Safety, and the Environment Call for Cost-Benefit Analysis**

Reliance on Cost-Benefit Analysis?	Statutory Standard	Provisions in Environmental Health and Safety Statutes	Number of Provisions
<b>Prohibited by statute: 23</b>	<i>Technology-Based</i>	<ul style="list-style-type: none"> <li>Clean Water Act (existing sources standard)</li> <li>Clean Water Act (new sources standard)</li> <li>Clean Air Act (non-attainment areas standard)</li> <li>Clean Air Act (prevention of significant deterioration standard)</li> <li>Clean Air Act (national emissions standards for hazardous air pollutants)</li> <li>Clean Air Act (mobile sources standard)</li> <li>Clean Air Act (new sources standard)</li> <li>Occupational Safety and Health Act</li> <li>Resource Conservation and Recovery Act (land disposal restrictions)</li> <li>National Traffic and Motor Vehicle Safety Act</li> <li>Surface Mining Control and Reclamation Act</li> </ul>	<b>11</b>
	<i>Effects-Based</i>	<ul style="list-style-type: none"> <li>Clean Water Act (ambient water quality standards and anti-degradation policy)</li> <li>Clean Air Act (national ambient air quality standards)</li> <li>Food, Drug, and Cosmetic Act (Delaney Clause)</li> <li>Food, Drug, and Cosmetic Act (pesticide residues standard)</li> <li>National Forest Management Act (diversity protection provision)</li> <li>Endangered Species Act (species listing, take, and jeopardy standards)</li> <li>Wilderness Act</li> <li>Wild and Scenic Rivers Act</li> <li>National Wildlife Refuge Administration Act</li> <li>National Park System Organic Act</li> </ul>	<b>10</b>
<b>Permitted but not required by statute: 6</b>	<i>Phased Ban</i>	<ul style="list-style-type: none"> <li>Clean Air Act (ozone depleting materials standard)</li> <li>Toxic Substances Control Act (polychlorinated biphenyl standard)</li> </ul>	<b>2</b>
	<i>Multi-factor Balancing</i>	<ul style="list-style-type: none"> <li>Comprehensive Environmental Response, Compensation, and Liability Act</li> <li>Federal Insecticide, Fungicide, and Rodenticide Act</li> <li>Toxic Substances Control Act</li> <li>National Forest Management Act (multiple use and sustained yield standard)</li> <li>Federal Land Policy and Management Act (multiple use and sustained yield standard)</li> </ul>	<b>5</b>
	<i>Tech-Based / C-B Hybrid</i>	<ul style="list-style-type: none"> <li>Safe Drinking Water Act*</li> </ul>	<b>1</b>
<b>Required by statute: 2</b>	<i>Cost-Benefit</i>	<ul style="list-style-type: none"> <li>Consumer Product Safety Act</li> <li>Accountable Pipeline Safety and Partnership Act</li> </ul>	<b>2</b>

\*Under SDWA Amendments of 1996, EPA is authorized but not required to deviate from the technology-based standards on the basis of cost-benefit analysis.

adverse effects on the environment.”<sup>19</sup> Congress defined unreasonable adverse effects on the environment as “any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits” of the pesticides’ use.”<sup>20</sup>

### **Congress Rejected Economic Cost-Benefit Analysis for Good Reason; It Produces Irrational and Unreliable Results**

Congress has good reason to be skeptical of economic cost-benefit analysis. Put simply, when applied to environmental health and safety regulation, economic cost-benefit analysis rests on the untenable assumption that complex ecological and human health processes can be quantified and expressed in dollar terms. In practice, scientific understandings are rarely fine-grained enough to predict impacts in quantifiable terms. Even where they are, data are inevitably vastly incomplete. And even for those quantifiable data that do exist, the process of converting such data into dollar terms raises intractable practical and theoretical difficulties that make most monetized estimates of impacts endlessly contestable. As a result, economic cost-benefit analysis fails miserably at its appointed task. Rather than providing a common sense tool for insuring reasonable regulation, economic cost-benefit analysis as practiced today produces Alice-in-Wonderland results that most of the time are so incomplete and unreliable, they provide endless opportunity for interest groups to manipulate and contest the results.<sup>21</sup>

There is a litany of theoretical conundrums that plague efforts to apply cost-benefit analysis to environmental health and safety regulation. Economic cost-benefit analysis attempts to assign value to things based on people’s willingness-to-pay, but this is a notoriously problematic measure of value. A person’s willingness to pay, for example, is tied in part to her wealth. This leads to ethically questionable practices like valuing the lives of people in the U.S. 30 times higher than the lives of people in India.<sup>22</sup> The practice of discounting the benefits of regulation that will accrue in the future also creates unending controversy. After decades of debate, there has been no agreement on what discount rate is appropriate for valuing future benefits, particularly those that accrue to future generations. Some argue that no discount rate at all should be used. The White House Office of Management and Budget suggests a rate of seven percent. Yet final benefits estimates can vary enormously—by orders of magnitude—depending on the discount rate used. Not incidentally, the discount rate results in reducing to zero any benefit of protecting the environment for the benefit of our children and their children.

In the end, the intractable practical and theoretical difficulties that plague any attempt to apply economic cost-benefit analysis to environmental health and safety regulation inevitably produce irrational and unreliable results. This indeterminacy only undercuts the justifications for its use—namely, that by providing a rational standard for decision-making, economic cost-benefit analysis increases transparency and reduces the undue influence of interest groups. In fact, its

<sup>19</sup> 7 U.S.C. § 136a(d)(1)(C) (2000).

<sup>20</sup> 7 U.S.C. § 136(bb) (2000).

<sup>21</sup> For a collection of critiques of cost-benefit analysis from a wide variety of accomplished academics, many of whom are CPR scholars, see THOMAS O. MCGARITY, SIDNEY A. SHAPIRO, & DAVID BOLLIER, *SOPHISTICATED SABOTAGE: THE INTELLECTUAL GAMES USED TO SUBVERT RESPONSIBLE REGULATION* (2004).

<sup>22</sup> See David W. Pearce, W.R. Cline, A.N. Achanta, Samuel Fankhauser, R.K. Pachauri, Richard S.J. Toi, & P. Vellinga, *The Social Costs of Climate Change: Greenhouse Damage and the Benefits of Control*, in *CLIMATE CHANGE 1995: ECONOMIC AND SOCIAL DIMENSIONS OF CLIMATE CHANGE* 179, 197 ( J.P. Bruce, H. Lee, & E.F. Haites eds. , 1995).

Congress also chose to delegate rulemaking authority to the executive agencies with the knowledge that a number of existing procedures and institutions ensure that such agencies can be held accountable for the substantive decisions they make. For example, through the oversight process, the democratically elected Congress is able to keep tabs on each agency's regulatory actions, and to encourage agencies to act in accordance with the provisions of the statutes it has enacted. In addition, either through the APA or through the provisions of some public health, safety, and environmental statutes, individuals and organizations have the ability to challenge the substance of an agency's regulatory decision-making as well. Through these accountability measures, regulatory agencies have a very strong incentive to abide closely to the provisions of the statutes they are implementing when they promulgate new regulations.

In contrast, there is no effective means for holding OIRA politically accountable. Congressional oversight of OIRA has been largely ineffective and sporadic. No statutory provisions, including those in the APA, authorize individuals and organizations to challenge the substance of any decisions that OIRA makes. And because OIRA operates so far below the radar of the general public and the media, presidential elections can hardly be viewed as an effective check on OIRA's exercise of its regulatory review authority.

Given its high degree of influence, its institutionally antiregulatory bent, and its relative freedom from effective accountability measures, OIRA has become a powerful refuge for corporate interests seeking to weaken and delay rulemakings they find inconvenient to their bottom line. For example, data available on the OIRA website indicate that regulated industry participates far more frequently in meeting concerning rules undergoing OIRA review than do public interest groups. A 2011 CPR white paper entitled *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety and the Environment*<sup>23</sup> analyzed these data and found that special interest representatives' meetings with OIRA's economists and White House political appointees vastly outnumber OIRA's meetings with public interest organizations, and that these meetings with special interests resulted in agency rules being weakened and delayed. The white paper's specific findings include the following:

- **Industry dominates the OIRA meetings process.** OIRA makes no effort to balance its meeting schedule by hearing from even a rough equivalence of organizations supporting protective regulations. In the roughly 10 years studied in the white paper, OIRA hosted 1,080 meetings, with 5,759 appearances by outside participants. Sixty-five percent of the participants represented regulated industry interests; 12 percent of participants appeared on behalf of public interest groups.
- **OIRA meetings correlate with changes to rules.** Rules that were the subject of meetings were 29 percent more likely to be changed than those that were not. OIRA does not disclose its changes, but the evidence is that OIRA functions as a one-way ratchet, exclusively weakening agency rules.
- **The EPA is OIRA's favorite punching bag.** While EPA rules made up only 11 percent of all reviews by OIRA, 41 percent of all OIRA meetings targeted EPA rules. EPA rules

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<sup>23</sup> A copy of the white paper's Executive Summary has been attached to the end of this letter. The full report is available online at [http://www.progressivereform.org/articles/OIRA\\_Meetings\\_1111.pdf](http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf).

the process, funneling special interest pressure into agency rulemakings, even though such interests have already had ample opportunity to comment on proposed regulations.

A 2013 CPR white paper entitled *Distorting the Interests of Small Business: How the Small Business Administration Office of Advocacy's Politicization of Small Business Concerns Undermines Public Health and Safety*<sup>24</sup> shines light on the SBA Office of Advocacy's anti-regulatory work, examining how its participation in the rulemaking process further degrades an already weakened regulatory system. As a preliminary matter, the nominal objective of the SBA Office of Advocacy—subsidizing small businesses through preferential regulatory treatment—is based on a needless and destructive tradeoff; the government has several policy options for promoting small businesses without sacrificing public health and safety. The SBA Office of Advocacy nevertheless devotes much of its time and resources to blocking, delaying, or diluting regulatory safeguards or to supporting general anti-regulatory attacks from industry and its allies in Congress. In short, blocking regulations has become the SBA Office of Advocacy's *de facto* top priority, and its commitment to this goal has led the SBA Office of Advocacy to engage in matters that have little or nothing to do with advancing small business interests or with ensuring that federal policy reflects the unique needs of these firms.

More specifically, the white paper finds that the SBA Office of Advocacy:

- Pursues an inherently flawed mission that needlessly sacrifices public health and safety;
- Adds several unnecessary roadblocks to the rulemaking process, preventing agencies from achieving their respective missions of helping people and the environment in an effective and timely manner;
- Sponsors anti-regulatory research designed to bolster politicized attacks against the U.S. regulatory system;
- Testifies at congressional hearings aimed at advancing politicized attacks against regulations that are inconvenient to well-connected corporate interests;
- Takes advantage of overly broad small business size standards to weaken regulations for large firms;
- Enables trade association lobbyists to subvert its small business outreach efforts;
- Interferes with agency scientific determinations despite lacking both the legal authority and relevant expertise to do so; and
- Pushes for rule changes that would benefit large firms instead of narrowly tailoring its recommendations so that they help only truly small businesses.

The white paper concludes by identifying several reforms that would enable the SBA Office of Advocacy to work constructively with regulatory agencies during the rulemaking process to advance small business interests without undermining those agencies' mission of protecting public health and safety.

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<sup>24</sup> A copy of the white paper has been attached to the end of this letter. It is also available online at [http://www.progressivereform.org/articles/SBA\\_Office\\_of\\_Advocacy\\_1302.pdf](http://www.progressivereform.org/articles/SBA_Office_of_Advocacy_1302.pdf).

within a short time frame, the REINS Act has the potential to stop (or at least slow down) important other business, assuming that legislators and their staffs actually spent the time necessary to understand complex regulations.

### **The Regulatory Accountability Act**

The Regulatory Accountability Act would drastically overhaul the Administrative Procedure Act (APA), by amending the statute to add 74 new procedural and analytical requirements to the agency rulemaking process. The bill would make more than 30 pages worth of changes to the current, relatively simple structure of the APA. All of these additional analytical and procedural requirements would add significant delays to the rulemaking process. In fact, for bigger rules, the Regulatory Accountability Act would likely add at least 21-33 months to the already bloated rulemaking process under current law:

- 6-12 months to complete the additional analytical requirements
- 3 months for the Advanced Notice of Proposed Rulemaking (ANPRM) process
- 6-12 months to respond to comments received after the ANPRM
- 6-12 months to complete the formal rulemaking procedures

**Total: 21-39 months (1.75-3.25 years) extra**

As noted above, it already takes four to eight years for an agency to promulgate and enforce many significant rules, and the proposed procedures could potentially add another 21 to 39 months to that process. Under the Regulatory Accountability Act, the longest rulemakings could take more than 12 years—spanning potentially four different presidential administrations—to complete.

### **Approaches to Regulatory Reform That Should be Pursued**

To fix the regulatory system, we should instead focus on finding ways to help agencies effectively achieve their statutory missions, such as protecting people and the environment. Here are some places to start:

**Provide agencies with the resources they need.** One of the reasons that regulatory agencies cannot fulfill their statutory missions is that financial resources and available personnel have been reduced or maintained at constant levels in recent years. This has been occurring as the agencies' missions have become more complex, forcing these agencies to effectively do more with less. Many agencies' budgets have stagnated for decades, while the job at hand – more food and imported toys to inspect, for instance – has grown. And the situation is getting worse, not better. For example, past rounds of sequestration hundreds of millions of dollars from the EPA's already historically low budget. Among other things, these cuts have forced the agency to scrap several air pollution monitoring sites and scale back its program for assessing the human health impacts of several potentially harmful chemicals.

**Provide agencies with enhanced legal authority.** For many regulatory agencies, the statutes under which they operate have not been reviewed or refreshed in decades. The intervening years have revealed shortcomings in those statutes while new public health, safety, and environmental



# **Distorting the Interests of Small Business:**

**How the Small Business Administration Office  
of Advocacy's Politicization of Small Business  
Concerns Undermines Public Health and Safety**

**by CPR Member Scholar Sidney Shapiro  
and CPR Policy Analyst James Goodwin**

## About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information. CPR is grateful to the Public Welfare Foundation for funding this white paper.

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## Executive Summary

It's likely that few outside of Washington have heard of the Small Business Administration's (SBA) Office of Advocacy, but this tiny and largely unaccountable office has quietly become a highly influential player in the federal regulatory system, wielding extraordinary authority over the workplace safety standards employers must follow, the quantity of air pollution factories can emit, and the steps that food manufacturers must take to prevent contamination of the products that end up on the nation's dinner tables.

The Office exercises this authority by superintending agency compliance with an expanding universe of analytical and procedural requirements—imposed by a steady stream of statutes and executive orders issued during the past three decades—that purportedly seek to ensure that agencies account for small business interests in their regulatory decision-making. Controversial rules can quickly become mired in this procedural muck, and an agency's failure to carry out every last required analysis with sufficient detail and documentation can spell doom for even the most important safeguards. This system provides the Office of Advocacy with a powerful lever for slowing down rules or dictating their substance.

The Office of Advocacy's role in the regulatory system bears a striking resemblance to that played by the White House Office of Information and Regulatory Affairs (OIRA). Both operate to similar effect, functioning as an anti-regulatory force from within the regulatory structure, blocking, delaying, and diluting agency efforts to protect public health and safety. Moreover, both offices have entry into the regulatory process on the strength of seemingly neutral principles and policy goals—promotion of economic efficiency and protection of small business, respectively. But in actual practice, both offices serve to politicize the process, funneling special interest pressure into agency rulemakings, even though such interests have already had ample opportunity to comment on proposed regulations. Despite these similarities, however, OIRA receives the bulk of attention from policymakers, the media, and the public.

This report shines light on the Office of Advocacy's anti-regulatory work, examining how its participation in the rulemaking process further degrades an already weakened regulatory system. As a preliminary matter, the nominal objective of the Office of Advocacy—subsidizing small businesses through preferential regulatory treatment<sup>1</sup>—is based on a needless and destructive tradeoff; the government has several policy options for promoting small businesses without sacrificing public health and safety. The Office of Advocacy nevertheless devotes much of its time and resources to blocking, delaying, or diluting regulatory safeguards or to supporting general anti-regulatory attacks from industry and its allies in Congress. In short, blocking regulations has become the Office of Advocacy's *de facto* top priority, and its commitment to this goal has led the Office to engage in matters that have little or nothing to do with advancing small business interests or with ensuring that federal policy reflects the unique needs of these firms.

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More specifically, the report finds that the Office of Advocacy:

- Pursues an inherently flawed mission that needlessly sacrifices public health and safety;
- Adds several unnecessary roadblocks to the rulemaking process, preventing agencies from achieving their respective missions of helping people and the environment in an effective and timely manner;
- Sponsors anti-regulatory research designed to bolster politicized attacks against the U.S. regulatory system;
- Testifies at congressional hearings aimed at advancing politicized attacks against regulations that are inconvenient to well-connected corporate interests;
- Takes advantage of overly broad small business size standards to weaken regulations for large firms;
- Enables trade association lobbyists to subvert its small business outreach efforts;
- Interferes with agency scientific determinations despite lacking both the legal authority and relevant expertise to do so; and
- Pushes for rule changes that would benefit large firms instead of narrowly tailoring its recommendations so that they help only truly small businesses.

The report concludes by identifying several reforms that would enable the Office of Advocacy to work constructively with regulatory agencies during the rulemaking process to advance small business interests without undermining those agencies' mission of protecting public health and safety. These recommendations are summarized in Table 1.

**Table 1: Recommendations for Reforming the Office of Advocacy**

<p><b>A New Mission: Promote “Win-Win” Regulatory Solutions that Ensure Both Small Business Competitiveness and Strong Protections for People and the Environment</b></p>	<ul style="list-style-type: none"> <li>• Congress should amend the Office of Advocacy’s authorizing statutes to focus on promoting small business “competitiveness” instead of on reducing regulatory impacts or burdens.</li> <li>• Congress should provide the SBA with additional legal authorities to establish new subsidy programs that affirmatively assist small businesses meet effective regulatory standards without undermining their competitiveness.</li> <li>• Congress should establish and fully fund a network of small business regulatory compliance assistance offices.</li> <li>• Congress should significantly increase agency budgets so that they can effectively account for small business concerns in rulemakings without hindering their ability to move forward with needed safeguards.</li> <li>• The Office of Advocacy should identify and implement regulatory solutions that will enable small businesses to meet strong public health and safety standards while remaining competitive with larger firms. At a minimum, these solutions should include regulatory compliance assistance, finding opportunities to partner small businesses in mutually beneficial ways, and securing subsidized loans to cover compliance costs.</li> <li>• The Office of Advocacy should develop new guidance that helps agencies better address small business concerns in rulemakings by working toward win-win regulatory solutions.</li> <li>• The President should revoke Executive Order 13272, which empowers the Office of Advocacy to work with OIRA to interfere in agency rules.</li> </ul>
<p><b>Restored Focus: Helping Truly Small Businesses Only</b></p>	<ul style="list-style-type: none"> <li>• Congress should revise the Office of Advocacy’s small business size standards so that they (1) focus on truly small businesses (<i>i.e.</i>, those with 20 or fewer employees) and (2) prevent the Office from working on behalf of all firms, regardless of size, that work in industrial sectors that pose a high risk to public health and safety.</li> <li>• Congress should prohibit the Office of Advocacy from working with non-small businesses and should establish legal mechanisms for ensuring that this prohibition is observed.</li> <li>• Congress should conduct more frequent and thorough oversight of the Office of Advocacy.</li> </ul>

In recent years, corporate interests and their anti-regulatory allies in Congress have championed several bills that would enhance the Office of Advocacy's power to prevent agencies from carrying out their statutory missions of protecting public health and safety. Two bills—the Regulatory Flexibility Improvements Act and the Freedom from Restrictive Excessive Executive Demands and Onerous Mandates Act—would require agencies to complete several new analytical and procedural requirements purportedly aimed at reducing regulatory burdens on small businesses. The bills would empower the Office of Advocacy to monitor agency compliance with these requirements, bolstering its ability to interfere in individual rulemakings. A third bill, the Clearing Unnecessary Regulatory Burdens Act, would authorize the Office of Advocacy to second-guess agency civil enforcement actions against small businesses for certain first-time violations of regulatory reporting requirements.

These bills are part of the broader wave of anti-regulatory attacks that has dominated the political landscape ever since the Republican Party's success in the 2010 congressional elections. When launching these attacks, anti-regulatory advocates frequently invoke small-business concerns. Small business has become a highly romanticized, almost mythological concept among the public and policymakers alike, evoking images of small “mom and pop” stores lining the idyllic Main Street of some quaint village. Because no politician wants to run the risk of being painted as “anti-small business,” anti-regulatory advocates have worked tirelessly to promote their cause as essential to helping small businesses. Moreover, recent high profile catastrophes involving inadequately regulated large businesses—including the BP oil spill and the Wall Street financial collapse—have provided anti-regulatory advocates with additional impetus to adopt the frame of small business to advance their agenda. In this atmosphere, proposals to expand the powers of the reliably anti-regulatory Office of Advocacy have become especially attractive to policymakers intent on weakening the nation's already fragile regulatory system.

## Background: The Pervasive Problem of Under-Regulation

The United States faces a problem of under-regulation. The regulatory system is supposed to protect public health and safety against unacceptable risks, but the destructive convergence of inadequate resources, political interference, and outmoded legal authority often prevents regulatory agencies from fulfilling this task in a timely and effective manner. Unsupervised industry “self-regulation” has filled the resulting vacuum, yielding predictably catastrophic results.

Evidence of inadequate regulation and enforcement abounds—from the BP oil spill in the Gulf of Mexico to the Upper Big Branch Mine disaster that claimed the lives of 29 men; from the decaying natural gas pipeline networks running beneath our homes to the growing risk of imported food tainted with salmonella, botulism, or other contaminants showing up on grocery store shelves. And, of course, inadequate regulation of the financial services industry triggered the current economic recession and left millions unemployed, financially ruined, or both.

The proliferation of analytical and procedural requirements in the rulemaking process is a significant cause of this dysfunction.<sup>2</sup> Regulatory agencies must negotiate these analytical hurdles, even as their statutory responsibilities expand and their budgets remain constant or shrink. As agencies grow more “hollowed-out”—stretched thin by the demands of doing more with less—their pursuit of new safeguards becomes subject to increasing delays, while many critical tasks are never addressed at all.<sup>3</sup> Careful analysis is important, but the regulatory process has already become so ossified by needless procedures and analyses that rulemakings commonly require between four and eight years to complete.<sup>4</sup> Many of these analyses and procedures also provide powerful avenues for political interference in individual rulemakings, as the Office of Information and Regulatory Affairs’ (OIRA) centralized regulatory review process clearly illustrates.<sup>5</sup> A recent CPR study found that OIRA frequently uses this review process to delay or weaken rules following closed-door meetings with corporate lobbyists.<sup>6</sup>

**The Office of Advocacy has morphed into an institutionalized opponent of regulation, slowing the regulatory process and diluting the protection of people and the environment against unreasonable risks.**

## **The Office of Advocacy Pushes the Regulatory Process Toward Less Effective Regulation**

Since its creation, the Office of Advocacy's role in the rulemaking process has continually expanded, providing it with numerous opportunities to intervene in and potentially undermine individual rulemakings. Congress created the Office to represent small business in the regulatory system and to advocate for reduced regulation of small business. From this limited mandate to advocate on behalf of small businesses, the Office has morphed into an institutionalized opponent of regulation, slowing the regulatory process and diluting the protection of people and the environment against unreasonable risks. Yet, there is insufficient public recognition of how the Office participates in the rulemaking process and why its participation ends up making it more difficult for agencies to reduce safety, health and environmental risks. In addition, the Office engages in activities that bolster political attacks on regulation, such as publishing estimates of regulatory costs that are wildly inaccurate, and that fly in the face of estimates from other agencies of government with considerably greater expertise in the area. Such activities are frequently undertaken in conjunction with interest groups and trade associations that represent large business, not small ones. At times it is difficult to find any difference between the positions taken by the Office and those taken by such prominent regulatory opponents as the U.S. Chamber of Commerce.

Significantly, when the Office interferes in agency efforts to do the people's business—that is, implement and enforce duly enacted legislation—it does so free of virtually any public accountability mechanisms. The Office is housed within, but institutionally insulated from the Small Businesses Administration (SBA), a federal agency that supports America's small business sector through subsidized loans, preferential government contracting, and other assistance programs. As such, no chain of command connects the Office to either the head of the SBA or the President.<sup>7</sup> At the same time, Congress has shirked its responsibility to provide meaningful oversight of the Office's activities. While Office of Advocacy officials have testified at dozens of hearings in the last 16 years, only four of those hearings could be described as oversight hearings for the Office.<sup>8</sup> (In reality, two of those four hearings focused on supposed weaknesses in the Office's legal authorities and proposals for strengthening those authorities, rather than critically evaluating its performance.) By comparison, Congress has held dozens of oversight hearings for the EPA in the last year alone. Because of the lack of active oversight, Congress has no way to keep track of the Office's participation in the regulatory process or to ensure that it is not abusing its authority to intervene in rules to benefit politically powerful corporate interests at the expensive of public health and safety.

## **A Flawed Mission: Needlessly Sacrificing Public Health and Safety**

Preferential regulatory treatment for small business can include regulatory exemptions; less stringent or delayed regulatory requirements; and relaxed enforcement for regulatory violations, such as waived or reduced penalties. As with other subsidies that small businesses receive—such as subsidized loans, tax breaks, and preferential government procurement and contracting policies<sup>9</sup>—preferential regulatory treatment makes it easier for people to start and sustain small businesses. But it also enables these businesses to avoid taking responsibility for pollution, workplace risks, or any other socially harmful byproducts of their activities. In other words, preferential regulatory treatment involves an explicit policy choice to shift the costs of these social harms from small businesses to the general public.

Governments typically subsidize an activity because they want more of the benefits that the activity produces. Accordingly, policymakers typically justify small business subsidies on the grounds that these businesses generate greater job growth and innovation as compared to non-small businesses. As numerous studies have demonstrated, however, small businesses actually create very few jobs on net, and the evidence is at best mixed as to whether these firms create more innovation (however that concept is defined and measured).<sup>10</sup>

Whatever jobs or other economic benefits small businesses do create come at a certain societal price. As Professor Richard Pierce of The George Washington University Law School has pointed out, preferential regulatory treatment for small businesses can be “socially destructive,” because such firms produce greater amounts of many social harms as compared to their larger counterparts—including dangerous workplaces, instances of racial discrimination, and air and water pollution.<sup>11</sup> For example, one study found that the risk of a fatal work-related accident is 500 times greater for employees of small businesses than for employees of large businesses. In addition, small businesses are less likely than their larger counterparts to reduce their social harms in the absence of enforcement-backed regulation.<sup>12</sup> Since the cost of reducing social harms is often disproportionately greater for small businesses, they have a stronger economic incentive to avoid pursuing reductions as much as possible. Further, both reputational concerns and fear of lawsuits are less likely to motivate small businesses to reduce their social harms. Because many small businesses work in relatively anonymity, they tend not to suffer significant reputational costs when they are caught polluting or operating a dangerous workplace. Typically lacking “deep pockets,” small businesses also tend not to be attractive defendants, even when their socially harmful activities have clearly injured others.

**There is a fundamental flaw in the Office of Advocacy's core mission: Its work to weaken regulatory requirements for small businesses comes at too high a cost in terms of increased risks to public health, safety, and the environment.**

Preferential regulatory treatment doesn't just let small businesses off the hook for the social harms they create; it can also enable larger businesses to avoid taking responsibility for their social harms as well.<sup>13</sup> When small firms are exempted from regulation, larger businesses have a strong incentive to try to game the system by outsourcing their more socially harmful activities to them.

These concerns expose the fundamental flaw in the Office's core mission: Its work to weaken regulatory requirements for small businesses comes at too high a cost in terms of increased risks to public health, safety, and the environment. Preferential regulatory treatment is the worst kind of subsidy to provide for small businesses, since, as compared to larger firms, they often produce disproportionately greater amounts of the kind of social harms that regulations are meant to alleviate. To the extent that the Office succeeds at securing preferential regulatory treatment for small businesses, it is affirmatively promoting the uniquely disproportionate amount of social harms they create.

### **The Office of Advocacy Creates Roadblocks to Effective Regulation**

Passed by Congress in 1976, Pub. L. 94-305<sup>14</sup> created the Office of Advocacy and charged it with representing small businesses before federal agencies. With the passage of the Regulatory Flexibility Act<sup>15</sup> (Reg-Flex) in 1980, Congress made preferential regulatory treatment of small businesses an explicit goal of the rulemaking process and empowered the Office to push agencies to pursue this goal. The enactment of the Small Business Regulatory Enforcement Fairness Act (SBREFA) in 1996 and the issuance of Executive Order 13272 by George W. Bush in 2002 has further strengthened the Office's role as an opponent of effective regulation.

Using its authority under Pub. L. 94-305, Reg-Flex, and Executive Order 13272, the Office has employed compliance guidance, regulatory comments, and congressional communications to push agencies to delay, weaken, or abandon crucial rulemakings.

#### ***The Regulatory Flexibility Act's Analytical Requirements***

Reg-Flex requires agencies to perform several resource-intensive and time-consuming analyses of their rules to assess their potential impacts on small businesses. These analyses, layered as they are on top of the existing morass of regulatory-impact analyses, create an additional battery of procedural obstacles, further contributing to the ossification problem that already prevents agencies from developing effective new safeguards in a timely fashion.

Reg-Flex's analytical requirements apply only if, prior to proposing the rule, the agency finds that it would have a "significant economic impact" on a large number of small businesses, a concept that the Act fails to define. Otherwise, the agency can "certify" that the rule will not have such an impact, exempting it from the statute's remaining requirements. For rules found to have a significant impact, the agency must prepare two different "regulatory flexibility" analyses, an "initial" analysis for the proposed version of the rule and a "final" one for the final version.

The two regulatory flexibility analyses provide an inherently distorted picture of the regulations being assessed—one that is heavily biased against protective safeguards. Agencies must focus exclusively on the rule's potential costs on small businesses; the rule's benefits—the reason the agency is developing the rule at all—are ignored. In addition, the agency must evaluate possible alternatives that would "minimize" the rule's costs for small businesses. Among the alternatives that agencies must consider are rules that exempt small businesses, impose weaker standards, or phase in regulatory requirements over a longer timeline. Again, benefits are ignored: Such analysis automatically disregards any alternatives that would provide greater protections at equal or only slighter greater cost to small businesses.

Within 10 years of their completion, significant impact rules must go through still a third analysis—the Reg-Flex periodic look-back requirement. Reg-Flex requires that agencies review these rules to determine whether they should be eliminated or amended to "minimize" costs on small business. Again, this one-sided, anti-regulatory analytical framework ignores regulatory benefits and does not allow agencies to consider expanding rules that have proved to be successful.

#### ***Reg-Flex's Look-Back Requirement: The Real Record***

**A recent CPR study reviewed the Reg-Flex look-backs for nearly 40 Environmental Protection Agency and Occupational Safety and Health Administration regulations and found that nearly every one had concluded that the regulations were still necessary and did not adversely impact small businesses.**

*Source: Sidney Shapiro et al., Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation 10 (Ctr. for Progressive Reform, White Paper 1109, 2011), available at [http://www.progressivereform.org/articles/RegBenefits\\_1109.pdf](http://www.progressivereform.org/articles/RegBenefits_1109.pdf).*



In 1996, Congress amended Reg-Flex to make agency compliance with several of its provisions—including certification that a rule will not have a significant impact on small businesses—judicially reviewable. This amendment makes all agency analyses part of the record for judicial review, and it authorizes reviewing courts to reject a rule on the sole basis that the agency had failed to adequately comply with one of the Act’s procedural requirements.

### ***Guidance on Complying with the Regulatory Flexibility Act***

Responding to Executive Order 13272’s requirement that the Office of Advocacy “train” agencies on how to comply with Reg-Flex, the Office has issued a guidance document in which it spells out in great detail its excessively strict interpretation of Reg-Flex’s requirements. (The Office most recently updated and expanded the document in May of 2012.) For example, in the guidance, the Office seeks to strongly discourage agencies from certifying their rules (*i.e.*, formally concluding that the rules will not have a significant impact on small businesses, thereby exempting them from Reg-Flex’s procedural requirements) by demanding that they build a virtually bulletproof record to support the certification, including providing specific data on how many businesses the rule would affect and what economic effect the rule would have on those businesses.<sup>16</sup> In so doing, the Office sought to expand the range of rules subject to its influence (*i.e.*, by increasing the number of rules subject to Reg-Flex procedural requirements that the Office oversees). Moreover, generating such data about a rule’s potential impacts so early in a rulemaking is nearly impossible even under the best circumstances. Nevertheless, whenever agencies are unable to satisfy the Office’s strict certification record requirement, the guide advises agencies to conduct an initial regulatory flexibility analysis or even conduct a full-blown advanced notice of proposed rulemaking, procedures that add months to the process and waste scarce agency resources.

Remarkably, in the guidance, the Office also directs agencies to consider in their initial regulatory flexibility analysis regulatory alternatives that are not even within an agency’s legal authority to adopt. So, for example, the Office would encourage an agency to develop a rule that requires small businesses to test a piece of safety equipment only once a year, even though the underlying statute mandates that such equipment be tested at least twice a year. The guidance imposes this requirement even though Reg-Flex does not authorize it. Instead, the Act stipulates that any alternatives that agencies consider to minimize costs for small businesses must still meet applicable “statutory objectives.”<sup>17</sup> In clear contradiction of Reg-Flex’s plain language, the Office asserts in the guidance “that the IRFA [initial regulatory flexibility analysis] is designed to explore less burdensome alternatives and not simply those alternatives it is legally permitted to implement.”<sup>18</sup>

### **Regulatory Comments**

Pursuant to its authority under Pub. L. 94-305 to represent small businesses before federal agencies, the Office of Advocacy frequently comments on agencies' proposed rules in order to criticize agencies for not following its excessively strict interpretation of Reg-Flex's procedural requirements.<sup>19</sup> In its recent comments, the Office typically invokes the strict interpretation of these provisions that it has outlined in its Reg-Flex compliance guidance document.

Invariably, the faults that the Office of Advocacy asserts are aimed either at increasing the procedural burdens of Reg-Flex's requirements—and thus adding more delay to a rulemaking—or at weakening agency rules outright. The Office might claim that an agency has improperly certified that its rule will not have a large impact on small business (and thus is not subject to Reg-Flex's requirements). Or it might claim that the agency has not properly carried out required Reg-Flex analyses, perhaps alleging that an agency hasn't included enough detail or factual evidence, or that the agency has underestimated a rule's costs or has failed to consider adequate weaker alternatives. For example, in its recent comments on the U.S. Fish and Wildlife Services' (FWS) proposed rule that revises the agency's critical habitat designation for the Northern Spotted Owl, the Office argued that the FWS's evidentiary record in support of certification lacked the necessary specific data and detail called for in its compliance guidance document.<sup>20</sup> With such comments, the Office seeks to use procedural hurdles of its own creation as a way to hamstring federal regulators working to fulfill their statutory obligations to regulate within their areas of expertise.

Through Executive Order 13272, the President has given the Office's comments special weight, making it difficult for an agency to dismiss the comments, even when they lack merit. The Order directs agencies to “[g]ive every appropriate consideration” to these comments. The Order further requires that agencies specifically respond to any of the Office's written comments in the preamble to the final rule.

Many reviewing courts take the Office's comments as powerful evidence that an agency has failed to comply with Reg-Flex, though these courts are otherwise not obliged to defer to the Office's interpretations of Reg-Flex's provisions.<sup>21</sup> For example, a federal district court rejected a National Marine Fisheries Service (NMFS) rule setting commercial fishing quotas for Atlantic shark species after finding that the agency had failed to comply with various Reg-Flex procedures.<sup>22</sup> (As noted above, agency compliance with Reg-Flex's provisions is judicially reviewable, and courts have the authority to reject rules if they determine that an agency has failed to adequately comply with one or more of these provisions.) The court's analysis in support of this finding relied heavily on the comments that the Office submitted during the rulemaking process.<sup>23</sup>

**With its regulatory comments, the Office of Advocacy seeks to use procedural hurdles of its own creation as a way to hamstring federal regulators working to fulfill their statutory obligations to regulate within their areas of expertise.**

### ***Reports to Congress and Congressional Testimony***

Reg-Flex and Executive Order 13272 direct the Office of Advocacy to monitor and report to Congress annually on agency compliance with Reg-Flex's requirements. In these reports, the Office provides detailed critiques of each agency's purported failures to implement Reg-Flex in accordance with the Office's strict interpretation of the Act's provisions. For example, in its most recent report, the Office of Advocacy faulted the initial regulatory flexibility analysis that the Food and Drug Administration (FDA) performed for its proposed rules requiring dietary information labeling for chain restaurant menus and vending machines, arguing that the agency's analysis underestimated both the number of small businesses the rules would impact and the regulatory costs the rules would impose on those businesses.<sup>24</sup> The FDA developed these rules to implement two provisions in the Patient Protection and Affordable Care Act (PPACA)—the 2010 health care system reform law. One objective of the PPACA was to reduce overall health care costs in the United States, and these provisions were aimed at helping Americans to adopt healthier diets, which in turn would enable them to avoid potentially expensive medical problems in the future.

For agencies eager to avoid attracting unwanted attention from congressional members ideologically opposed to their statutory mission, the threat of negative reports from the Office can have a strong coercive on their activities. Many agencies take self-defeating preemptive actions, such as preparing overly elaborate or unrequired analyses or drafting inappropriately weak rules—actions that waste scarce agency resources and dilute public health and safety protections. The Office's negative report regarding the FDA's implementation of these two controversial provisions in the PPACA undoubtedly has supplied welcome ammunition to congressional Republicans who continue to wage a full-scale assault on the law.<sup>25</sup> The fear of attracting this kind of bad publicity likely pushes the FDA and others agencies engaged in implementing the health care reform law to be overly cautious with their Reg-Flex compliance, even when detrimental to the public interest.

In addition to the annual reports, Office of Advocacy officials also testify at congressional hearings to complain about what they claim are failures by agencies to properly fulfill Reg-Flex requirements. For example, in April of 2011, the Deputy Chief Counsel for the Office of Advocacy testified at a House Oversight Committee hearing dedicated to attacking the Environmental Protection Agency's (EPA) greenhouse gas regulations. In her testimony, the Deputy Chief Counsel argued that the EPA had failed to comply with several requirements, including criticizing the factual basis the agency supplied to justify certifying its first vehicle efficiency standard as not having a significant impact on small businesses.<sup>26</sup> As with the annual reports, the threat of negative publicity from Office of Advocacy testimony can push agencies to overcompensate in their Reg-Flex compliance efforts.

### ***Small Business Regulatory Enforcement Fairness Act Panels***

The 1996 Small Business Regulatory Enforcement Fairness Act (SBREFA) amended Reg-Flex to require the EPA and the Occupational Safety and Health Administration (OSHA) to give specially assembled small business panels a chance to oppose proposed rules before the rest of the public even has a chance to see them. Following the passage of the Dodd-Frank Wall Street reform bill, congressional Republicans quickly enacted a bill that subjected the Consumer Financial Protection Bureau (CFPB), an agency created by the Dodd-Frank statute to help implement many of its reform provisions, to the SBREFA panel requirement as well.

The three agencies must undertake the SBREFA panel process for all planned rules that are predicted to have a significant impact on small businesses—the same trigger for the various other Reg-Flex analytical requirements. However, as with the Reg-Flex requirements, an agency need not undertake the SBREFA panel process if it formally certifies that its planned rule will not have a significant impact on small businesses. As noted above, an agency's decision to certify is subject to judicial review. Given that the Office has set such a high bar for justifying certification, the threat of judicial review can strongly discourage agencies from certifying a rule, even when this step would be appropriate.

In some cases, the Office has pressured agencies into undertaking the functional equivalent of a SBREFA panel, even though their planned rule plainly would not have a significant impact on small businesses. For instance, OSHA buckled under Office of Advocacy pressure and conducted a pseudo-SBREFA panel process for its then-planned “300 log MSD column” rule, which would have added a column to the required injury and illness recording form so that employers can keep track of their workers' employment-related musculoskeletal injuries.<sup>27</sup> OSHA went through this process even though the rule's projected costs would amount to a mere \$4.00 per employer in its first year and \$0.67 every year thereafter.<sup>28</sup>

Much like the Office of Information and Regulatory Affairs' (OIRA) centralized review process, the SBREFA panel process focuses on weakening rules because the panels are dominated by interests opposed to strong regulatory requirements. Beside the rulemaking agency representatives, each SBREFA panel must include the Chief Counsel of the Office of Advocacy (*i.e.*, the individual who heads the Office), OIRA officials, and small business “representatives.” The Office works with these other outside participants to criticize an agency's rule with the goal of weakening it. At the end of the process, the panel prepares a report compiling all of the criticisms of the draft rule, which is then included in the official rulemaking record.

Reg-Flex requires that a rulemaking agency respond to the criticisms included in the panel's report, and a failure to do so can provide a reviewing court with a basis to reject the underlying rule. This process contributes to the ossification of the rulemaking process, mentioned earlier, and it can create a potent incentive for an agency to weaken the rule rather than mount a time-consuming defense of a stronger rule, which would require producing an elaborate analysis to respond to all the criticisms raised in the SBREFA panel report.

SBREFA panel-related delays can add up to a year to the rulemaking process if not longer. These delays come on top of the several months of delay that the other Reg-Flex requirements introduce into the rulemaking process. By law, the formal panel period is supposed to last around two months. But, eager to avoid extensive criticism during the SBREFA panel process, agencies frequently spend months revising their planned rules and any underlying economic analyses prior to convening the formal panel. For example, preparations for the SBREFA panel process appear to have delayed OSHA's work on the Injury and Illness Prevention Program (I2P2) rule by more than a year. In June of 2011, the agency had planned to convene a SBREFA panel for its rule by the end of the month. Eventually, OSHA pushed this date back to January of 2012 and then March of 2012.<sup>29</sup> According to Office of Advocacy records, OSHA still has not convened this panel,<sup>30</sup> bringing the total delay to 16 months and counting.

### ***Centralized Regulatory Review at the Office of Information and Regulatory Affairs***

Executive Order 13272 directs the Office of Advocacy to work closely with OIRA—another institution that serves to weaken regulation, as previous CPR reports have discussed—when intervening in agency rules. The Office frequently takes advantage of the Order's authorization to meet with OIRA to raise concerns about proposed agency rules. In fact, a 2012 report from CPR on OIRA meetings with outside advocates found that the Office participated in 122 of the 1,080 reported meetings (or more than 11 percent) that OIRA held over the 10-year period covered in the CPR study.<sup>31</sup> The Office was by far the most frequent non-White House participant in OIRA meetings and attended more than three times the number of meetings attended by the most active industry participant, the American Chemistry Council (39 meetings).<sup>32</sup>

This Executive Order builds off of a March 2002 Memorandum of Understanding, which establishes a formal partnership between the Office and OIRA to strictly enforce Reg-Flex's procedural requirements to "achieve a reduction" in regulatory burdens for small businesses.<sup>33</sup> The Memorandum directs the Office to seek OIRA's assistance in pushing agencies to take corrective action—including more detailed analyses, evaluating additional less costly alternatives, or even adopting a less costly alternative—when the Office determines that they have failed to satisfy its strict interpretation of Reg-Flex's requirements. Given that OIRA has the power to reject the rules it reviews, agencies are unlikely to ignore its demands for Reg-Flex-related corrective actions. As such, OIRA provides powerful reinforcement in the

unlikely event that the Office is unable to extract these corrective actions on its own. The Memorandum also deputizes OIRA to aid in monitoring agency compliance with Reg-Flex requirements as part of its normal regulatory review activities. Whenever OIRA determines that an agency has likely failed to satisfy the Office of Advocacy's strict interpretation of any Reg-Flex requirements, it must then work with the Office to push the offending agency to take corrective action.

### ***Participation in Lawsuits Challenging Rules***

Reg-Flex authorizes the Office of Advocacy to join in lawsuits brought by industry to challenge agency rules, enabling it to push the reviewing court to reject rules for failing to satisfy applicable Reg-Flex procedural requirements.<sup>34</sup> These lawsuits create the highly unusual scenario in which one office within the Executive Branch is actively engaged in a legally binding effort to undermine an action taken by another office within the Executive Branch.

The Office of Advocacy has already participated in several lawsuits in which the reviewing court returned the rule to the agency to bring the underlying analyses into compliance with one or more of Reg-Flex's provisions.<sup>35</sup> In response to these adverse rulings, agencies must undertake new and more detailed analyses, delaying the implementation of their rules and using up scarce agency resources.

## **The Office of Advocacy Bolsters Political Attacks on Regulations**

In addition to the previous rulemaking-related activities, the Office of Advocacy has taken actions to buttress the attacks that industry and its allies in Congress have waged against the U.S. regulatory system as a whole.

### ***Sponsoring Anti-Regulatory Research***

Over the years, the Office of Advocacy has doled out taxpayer money to sponsor several research projects brazenly designed to advance the cause of further weakening the U.S. regulatory system. Non-governmental researchers carry out these projects under contracts awarded by the Office with little in the way of oversight or peer review.

The most egregious Office of Advocacy-sponsored research project was the 2010 study by economists Nicole Crain and Mark Crain, which purported to find that the annual cost of federal regulations in 2008 was about \$1.75 trillion.<sup>36</sup> As a CPR white paper first found,<sup>37</sup> and a separate evaluation by the non-partisan Congressional Research Service later confirmed,<sup>38</sup> Crain and Crain were only able to achieve this outlandish cost figure by employing faulty models, biased assumptions, and erroneous data. The report's myriad methodological defects all have a distinctly anti-regulatory bias, each leading inevitably to overstated cost calculations. Beyond these methodological defects, the Crain and Crain



**The Crain and Crain report's biased frame and risibly overstated findings are tailor-made to support the false conservative narrative that eliminating regulatory safeguards will translate into economic growth and job creation.**

report is noteworthy for what it omits: any attempt to account for regulatory benefits. The report's exclusive focus on regulatory costs—absurdly high cost estimates, in fact—while ignoring benefits provides an inherently distorted picture of the regulatory system that is skewed against all safeguards, no matter how critical they are for protecting public health and safety

The Office's flawed management of the Crain and Crain report contract was equally disturbing. The contract failed to require the report's authors to disclose all of the report's underlying data, models, assumptions, and calculations, making it impossible to independently verify the integrity of the report's findings. In addition, the Office of Advocacy's peer review process for the report was woefully inadequate: One reviewer raised significant concerns with the report's underlying methodology which were never addressed while the other's review consisted of only the following 11-word comment: "I looked it over and it's terrific, nothing to add. Congrats[.]"<sup>39</sup>

Despite the Crain and Crain report's dubious provenance, regulatory opponents routinely cite its findings when attacking the U.S. regulatory system or pushing for legislation that would undermine agencies' ability to carry out their mission of protecting public health and safety. The report's biased frame and risibly overstated findings are tailor-made to support the false conservative narrative that eliminating regulatory safeguards will translate into economic growth and job creation. For example, the House Committee on Oversight and Government Reform, which has held dozens of anti-regulatory hearings since the committee returned to Republican control, cited the Crain and Crain report and its findings extensively in a February 2011 study, which attempts to make the specious argument that pending regulations are stifling job creation.<sup>40</sup> Similarly, Sen. Rand Paul (R-KY) invoked the Crain and Crain report when arguing for the Regulations from the Executive in Need of Scrutiny Act, a bill he sponsored that would effectively shut the regulatory system down by blocking all major regulations unless a majority in both Houses of Congress voted within 90 days to approve them.<sup>41</sup>

### ***Participating in Anti-Regulatory Congressional Hearings***

Office of Advocacy officials have long served as loyal allies in Congress's anti-regulatory hearings, consistently delivering testimony that reinforces the political case for weakening regulations and further hobbling the regulatory system. As noted, these officials frequently testify to criticize agency compliance with Reg-Flex procedural requirements, but the same testimony is also broadly critical of the regulatory system as a whole, echoing the talking points typically found in the testimony of industry representatives or in the opening statements of anti-regulatory Members of Congress. For example, the head of the Office of Advocacy during the George W. Bush Administration testified at a 2005 House Committee on Government Reform hearing focused on attacking various EPA regulations. His testimony helped advance the transparently political agenda of the hearing by strongly

criticizing EPA regulations as unduly burdensome—while conspicuously ignoring their benefits—and by advocating for rolling them back.<sup>42</sup>

Office of Advocacy officials have also testified at hearings to support passage of several pending anti-regulatory bills. In his testimony at a 2006 hearing, for example, the then head of the Office of Advocacy asserted that the Office “supports the goals of” a proposed bill that would amend Reg-Flex’s procedural and analytical requirements to make them more burdensome for agencies to complete.<sup>43</sup>

### **The Office of Advocacy Engages in Anti-Regulatory Activities Unrelated to Helping Small Businesses**

The focal point of the Office of Advocacy’s institutional mission has evolved from seeking preferential regulatory treatment for small businesses to opposing all regulations. Aided and abetted by industry groups and their political allies, the Office pursues this mission by working to block regulations opposed by large corporate interests and attempting to interfere in the scientific underpinning of agency regulations.

#### ***The Office of Advocacy’s Small Business Size Standards Are Overly Broad***

For the purposes of implementing Reg-Flex, the Office of Advocacy employs a definition of “small business” that is a far cry from the common understanding of that term’s meaning. Instead of being based on a single number (for example, any firm with 20 or fewer employees), the definition is actually a complex scheme that sets varying size standards for each industrial sector within the economy.<sup>44</sup> Critically, these standards are based on the relative size of different firms within each given industry, and, as a result, the “small businesses” in industries that comprise mostly large-sized firms can be huge. In some sectors, the definition of small business includes firms that employ more than 1,000 workers. For example, the Office considers a petroleum refinery to be a “small business” as long as it employs fewer than 1,500 workers. Similarly, chemical plants that employ fewer than 1,000 workers are a “small business” in the Office’s eyes.

Because of these overly broad small business size standards, the Office is able to push for preferential regulatory treatment for relatively large firms, firms far bigger than the term “small business” suggests. For example, in August of 2011, the Office submitted comments on the EPA’s proposed rule to reduce hazardous air pollution for fossil fuel-based power plants criticizing the agency’s efforts to comply with several Reg-Flex procedural requirements, including the SBREFA panel process. Among other things, the Office argued that the EPA had not adequately considered potentially less burdensome regulatory alternatives for “small business” power plants in its initial regulatory flexibility analysis.<sup>45</sup>



### ***Trade Association Lobbyists Subvert the Office of Advocacy's Small Business Outreach Efforts***

In addition, large corporate interests have supplied representatives for SBREFA panels. For example, a lobbyist from the American Farm Bureau—a politically powerful trade group that typically works to advance the interests of industrial-scale farms—recently served as a “small business” representative on the SBREFA panel for the EPA’s 2010 update to its renewable fuel standard program.<sup>46</sup> By permitting organizations such as the American Farm Bureau to participate in SBREFA panels, the Office of Advocacy has stretched the concept of small business representative beyond all recognition. The American Farm Bureau’s membership includes several industrial-scale agriculture operations that would not meet even the Office’s generous definition of small business. And, the interests of these industrial-scale operations often dictate the organization’s political agenda, even when those interests are antithetical to those of genuinely small farms.<sup>47</sup> For example, the catastrophic droughts that affected much of the United States this past summer provided a glimpse of the harsh impacts that climate change will have on America’s small farmers. Nevertheless, the American Farm Bureau worked tirelessly to help defeat the 2009 climate change bill that would have curbed greenhouse gas emissions through a comprehensive cap-and-trade system.<sup>48</sup>

In some cases, the small business representatives who participate in SBREFA panels come at the suggestion of lobbyists for large trade associations, such as the National Association of Home Builders, whose members include large corporations that do not meet the Office’s small business size standards.<sup>49</sup> This practice raises the concern that lobbyists operating to advance the interests of large corporations improperly use small businesses representatives as surrogates to attack rules they oppose, enabling these corporate interests to avoid incurring any potential political costs for opposing safeguards that are otherwise popular with the general public.

The participation of large corporate interests defeats the objective of SBREFA panels—namely, to gather the perspective of small business on pending regulations that would otherwise not be available in the absence of these panels. These panels offer small businesses a critical opportunity to offer their unique concerns regarding a planned rule—an opportunity that is all the more important because large corporate interests have come to dominate every other step in the rulemaking process, including notice-and-comment and OIRA’s centralized review.<sup>50</sup> By permitting lobbyists for trade associations and other large corporate groups take part in SBREFA panels, the Office risks allowing the voice of truly small businesses to be drowned out at this stage of the rulemaking process as well.

### ***The Office of Advocacy Interferes with Agency Scientific Determinations***

The Office of Advocacy frequently operates outside its legal authority and scientific expertise by weighing in on agencies' purely scientific determinations. For example, in October of 2011, the Office submitted regulatory comments criticizing the EPA's Integrated Risk Information System (IRIS) program.<sup>51</sup> A frequent target of industry attacks, IRIS is a centralized database that gathers human health risk assessments for various environmental contaminants, which the EPA can use to set regulatory standards.<sup>52</sup> Specifically, the Office criticized the data and models that the EPA had used in its IRIS risk assessment for the harmful chemical hexavalent chromium, and it urged the agency to revise its assessment, a process that would waste scarce resources and delay the final assessment by several months. The Office also recommended that the EPA reform the entire IRIS program, arguing that it lacked "objectivity" and adequate "scientific rigor."<sup>53</sup> Such recommendations are far beyond the expertise of the Office and have unique interests of small business. They do, however, bear a striking resemblance to the arguments that industry lobbyists make about IRIS assessments.

The Office intervenes in these kinds of scientific determinations despite the fact that they do not independently impose any regulatory requirements, and thus have no real impact on small businesses. In June of 2009, the Office intervened in the EPA's proposed greenhouse gas endangerment finding, which did nothing more than certify the federal government's official finding that greenhouse gases "endanger public health and welfare" by contributing to global climate change. Nevertheless, the Office argued in its comments that the EPA should abandon the effort completely.<sup>54</sup> The comments added nothing constructive to the EPA's endangerment finding efforts, failing to address any of the scientific questions at issue. Instead, the Office devoted its comments to arguing that the Clean Air Act's regulatory programs were not well suited to regulating greenhouse gases and might disproportionately harm small businesses—all hypothetical and unrelated matters that would be better addressed in comments on any actual Clean Air Act rules aimed at regulating greenhouse gases. Again, such arguments were not grounded in any expertise the Office might have, or in any unique small business interest, but they did comport with big-business criticisms of the EPA's finding.

The Office's decision to move into regulatory science is far removed from its statutory mission to argue for preferential regulatory treatment for small business. This interest in attacking regulatory science can only be understood as the Office assuming the role of arguing against more stringent regulation in all forums that may relate to regulatory protections, even ones where the agency has no expertise.

### ***The Office of Advocacy Pushes for Weaker Regulatory Requirements for Large Businesses***

The Office of Advocacy commonly seeks to weaken the requirements of proposed rules for all affected entities, rather than seeking rule changes that are tailored to reducing adverse impacts on small firms only. For example, in its comments on the EPA's proposed rule to limit hazardous air pollutants from oil- and coal-fueled power plants, the Office criticized the agency for not considering as a regulatory alternative a rule that would merely limit plants' mercury emissions. Remarkably, the Office recommended that this drastically scaled-back rule apply to all power plants, regardless of their size.<sup>55</sup> Such an alternative would provide no unique preferential regulatory treatment for "small" power plants. It would also leave unregulated all of the other toxic air pollutants that power plants release—including arsenic, lead, and formaldehyde—in clear violation of the Clean Air Act.<sup>56</sup> While this alternative would certainly reduce regulatory costs for small power plants, its primary effect would be to provide a huge regulatory subsidy to the large power plants that dominate the electricity generating industry. Here again, the Office offered commentary that could just have easily been written by big-business or special interest lobbyists, rather than focusing on an small-business interest in the proposed regulations.

The Office also frequently joins representatives of the largest corporations and trade groups in meetings with OIRA officials to push for rule changes that would benefit large businesses. For example, in July of 2010 an Office of Advocacy official attended a meeting with the U.S. Chamber of Commerce, the National Association of Manufacturers, and the National Association of Home Builders to try to push OIRA to block OSHA's 300 log MSD column rule.<sup>57</sup> In October of 2006 an Office of Advocacy official attended a meeting with ExxonMobil, the American Chemistry Council, and Bayer Corporation to push for changes to the EPA's pending rule to revise its definition of solid waste under the Resource Conservation and Recovery Act.<sup>58</sup>

In many cases, weaker regulatory requirements for large firms can actually have the perverse effect of harming small businesses—rather than helping them—and thus directly conflicts with the Office's mission. Regulatory subsidies for large firms can make it even more difficult for small businesses to remain competitive, inhibiting people's ability to start these firms and sustain them over the long run.

## Helping Small Businesses While Promoting Public Health and Safety: It's Time to Reform the Office of Advocacy

### A New Mission: Promoting Win-Win Regulatory Solutions

The role of the Office of Advocacy should be to develop “win-win” regulatory solutions that help small businesses meet the high regulatory standards needed to protect public health and safety, instead of lowering those standards for them. In other words, the Office should seek to protect small businesses “competitiveness” without undermining public health and safety. In many cases, the costs of complying with regulations can put small businesses at a competitive disadvantage with larger businesses, which are better equipped to pass many of these costs along to their consumers. Larger businesses are also able to afford attorneys, engineers, accountants, and other compliance consultants, who can help them devise cheaper ways to fulfill regulatory requirements.

Providing small businesses with preferential regulatory treatment helps them remain competitive with larger firms, but it comes at the expense of public health and safety. In effect, preferential regulatory treatment subsidizes small businesses by passing on to the public the socially harmful impacts of their activities, such as air and water pollution, hazardous working conditions, and unreasonably dangerous consumer products. In contrast, the Office's current approach of working to reduce regulatory burdens across the board for all firms reduces regulatory impacts on small businesses, but does nothing to promote small business competitiveness. This approach also likely undermines regulatory safeguards more severely than would an approach that merely focuses on providing preferential regulatory treatment to small businesses alone.

**The role of the Office of Advocacy should be to develop “win-win” regulatory solutions that help small businesses meet the high regulatory standards needed to protect public health and safety, instead of lowering those standards for them.**

Fortunately, if the public agrees that small businesses need to be subsidized, policymakers have an alternative strategy: They can promote small business competitiveness by affirmatively helping them to meet effective public health and safety standards. The Office should use its role in the regulatory process to explore and promote creative solutions for achieving this goal. Such creative solutions could include:

- **Providing monetary assistance to truly small businesses so that they can meet higher regulatory standards.** Monetary assistance could include direct subsidies to cover part or all of the costs of equipment upgrades required for regulatory compliance. Alternatively, the Office could work to obtain subsidized loans to help small businesses defray regulatory compliance costs.
- **Expanding regulatory compliance assistance programs.** SBREFA established several compliance assistance programs, including requiring agencies to produce “compliance guides” for each of their rules that have a significant impact on small businesses.<sup>59</sup> These compliance guides describe the rule and explain what actions small businesses need to take to comply. Congress can help improve the effectiveness of compliance guides by providing agencies with full funding to produce and distribute them. In addition, Congress can establish local offices throughout the country staffed with compliance consultants that can help small businesses understand their obligations under different regulations. To be effective, Congress must ensure that the network of compliance consultant offices is fully funded.
- **Partnering small businesses to promote beneficial synergies on regulatory compliance.** The Office could explore different ways of partnering small businesses that will help them meet regulatory obligations in mutually beneficial ways. For example, the Office could help establish a cooperative of small businesses within a given location, which could share the cost of compliance assistance services, such as those provided by accountants or engineering consultants. Alternatively, the Office could establish partnerships that build off the Small Business Administration’s (SBA) preferential government procurement and contracting policies for helping small businesses. For example, if a small business requires special services, such as accounting, to comply with a regulation, then the Office could explore ways to partner that business with another small firm that provides those special services. In this way, the Office can assure that one small business’s compliance with regulations help to create a profitable market for another small business.

To achieve these reforms, Congress will need to:

- Amend the primary statutory authorities under which the Office operates (P. Law. 94-305 and Reg-Flex) to replace their focus on reducing small businesses' regulatory costs with a new focus on promoting win-win regulatory solutions that ensure small business competitiveness without undermining public health and safety;
- Expand the Office's legal authority as necessary to enable it to explore and promote win-win regulatory alternatives that help small businesses meet high regulatory standards while maintaining competitiveness;
- Provide the SBA with additional legal authorities to establish and implement new win-win regulatory subsidy programs that affirmatively assist small businesses remain competitive while meeting high regulatory standards;
- Establish and fully fund a network of small business regulatory compliance assistance offices; and
- Increase agency budgets so that they are able to carry out Reg-Flex analyses and compliance assistance guides without displacing critical resources needed to advance their statutory mission of protecting public health, safety, and the environment.

In addition, the Office will need to:

- Significantly overhaul its Reg-Flex compliance guide for agencies, so that it helps them to work toward creative win-win regulatory solutions that enable small businesses to remain competitive while meeting high regulatory standards and
- Work with small businesses to develop and promote win-win regulatory solutions in comments on proposed regulations, SBREFA panels, lawsuits, and sponsored research. SBREFA panels in particular will be critical for gathering the unique views of small businesses for identifying how pending regulations might inhibit their ability to compete and for developing innovative solutions for helping these firms to meet high regulatory standards while remaining competitive.

Finally, the President should revoke Executive Order 13272. Given its strong anti-regulatory culture, OIRA is unlikely to provide the Office with much assistance in identifying ways to help small businesses meet regulatory standards needed to protect public health, safety, and the environment. Instead, OIRA will likely continue to push the Office to weaken agency rules, even where potential win-win regulatory solutions are appropriate and available.

**The Office of Advocacy should employ new small business size standards, applicable to all industrial sectors, that define a “small business” as only those firms with 20 or fewer employees.**

### **Restored Focus: Helping Truly Small Businesses Only**

The Office of Advocacy has become a potent anti-regulatory force, working to block, delay, and dilute all regulations, even those that do not have a clear impact on small businesses. Whatever the policy goals are that might justify shielding small businesses from fulfilling their regulatory obligations, they certainly do not extend to larger businesses. Accordingly, the Office should restrict its actions to helping truly small businesses only.

To accomplish this goal, Congress will need to do the following:

- **Enact legislation that revises the SBA’s small business size standards.** The new size standards should define a small business as any firm with 20 or fewer employees—regardless of which industry the firm is in—rather than basing the definition on the relative size of different firms within each given industry, as the current size standards do. This revision would not only better align the regulatory definition for small business with the popular understanding of that term, it would better effectuate the policy goals that the government seeks to achieve by providing truly small businesses with preferential regulatory treatment. In addition, the small size standards should exclude certain industrial categories that pose an inherently high risk to public health and safety, such as the dry cleaning industry. Businesses in these exempted industrial categories should not qualify for win-win regulatory subsidy programs, even if they have 20 or fewer employees, because their activities are too harmful to public health and safety.
- **Enact legislation that prohibits large corporate interests from participating in or using small business surrogates to participate in SBREFA panels.** To participate in SBREFA panels, a business must first qualify as a small business under the revised small business size standard. To make this mandate enforceable, the law should further require all businesses that participate in SBREFA panels to certify that they both meet the revised small business standard and are not acting as agents for any business or trade group that does not meet the revised small business standard. Congress should declare that making a false statement in this certification is a crime under 18 U.S.C. §1001. Furthermore, Congress should bar for at least three years any business that makes a false statement in the certification from participating in any future SBREFA panels and from qualifying for any win-win regulatory subsidy programs established and implemented either by the Office or by the SBA.
- **Conduct more frequent and thorough oversight.** The House and Senate committees with primary jurisdiction over the Office—presently, the House Small Business Committee and the Senate Small Business and Entrepreneurship Committee—should endeavor to conduct at least one oversight hearing for the Office every year. One of the goals of these oversight committee hearings should be to ensure that the Office is limiting its activities to helping only businesses that meet the revised small business size standard.

Again, the President can reinforce these reforms by revoking Executive Order 13272. Because OIRA has such a strong anti-regulatory culture, any continued collaboration with OIRA will likely encourage the Office to continue working to block, delay, and dilute regulations for businesses not meeting the revised small business size standard.



## Endnotes

- <sup>1</sup> We borrow term the “preferential regulatory treatment” with slight modification from a 1998 law review article by administrative law professor Richard Pierce. See Richard J. Pierce Jr., *Small is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L. REV. 537 (1998). The term includes regulatory exemptions; less stringent or delayed regulatory requirements; and relaxed enforcement for regulatory violations, such as waived or reduced penalties. See *id.* at 542-43.
- <sup>2</sup> PUBLIC CITIZEN, THE FEDERAL RULEMAKING PROCESS, available at <http://www.citizen.org/documents/Regulations-Flowchart.pdf>.
- <sup>3</sup> Sidney Shapiro et al, *Regulatory Dysfunction: How Insufficient Resources, Outdated Laws, and Political Interference Cripple the “Protector Agencies”* 6-8 (Ctr. for Progressive Reform, White Paper 906, 2009), available at [http://www.progressivereform.org/articles/RegDysfunction\\_906.pdf](http://www.progressivereform.org/articles/RegDysfunction_906.pdf) [hereinafter Shapiro et al, *Regulatory Dysfunction*].
- <sup>4</sup> *The “Regulatory Accountability Act of 2011”: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary*, 112th Cong. 6 (2011) (statement of Sidney A. Shapiro, University Distinguished Chair in Law, Wake Forest University School of Law, and Member Scholar and Vice President, Center for Progressive Reform), available at [http://www.progressivereform.org/articles/Shapiro\\_RAA\\_Tesimony\\_102511.pdf](http://www.progressivereform.org/articles/Shapiro_RAA_Tesimony_102511.pdf).
- <sup>5</sup> Shapiro et al, *Regulatory Dysfunction*, *supra* note 3, at 12-14.
- <sup>6</sup> Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (Ctr. for Progressive Reform, White Paper 1111, 2011), available at [http://www.progressivereform.org/articles/OIRA\\_Meetings\\_1111.pdf](http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf) [hereinafter Steinzor et al, *Behind Closed Doors*]. Specifically, the study found that OIRA routinely meets corporate interests behind closed doors during the review process and then delays or changes rules that are subject of such meetings at a disproportionately higher rate.
- <sup>7</sup> To illustrate the Office’s independence, the SBA’s organizational chart presents the Office as a “floating box” without any lines denoting a chain of command to the rest of the agency. See U.S. SMALL BUS. ADMIN., ORGANIZATION CHART, available at <http://www.sba.gov/sites/default/files/SBA%20Organization%20Chart%2003-16-2012.pdf>.
- <sup>8</sup> See *Office of Advocacy Fiscal Year 2012 Budget: Hearing Before the S. Comm. on Small Bus. & Entrepreneurship*, 112th Cong. (statement of Winslow Sargeant, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), available at [http://www.sba.gov/sites/default/files/test11\\_0331.pdf](http://www.sba.gov/sites/default/files/test11_0331.pdf); *The Small Business Office of Advocacy Improvements: Hearing Before the Subcomm. on Workforce, Empowerment, & Gov’t Programs and the Subcomm. on Regulatory Reform & Oversight of the H. Comm. on Small Bus.*, 108th Cong. (statement of Thomas M. Sullivan, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), available at [http://www.sba.gov/sites/default/files/files/test03\\_0401.pdf](http://www.sba.gov/sites/default/files/files/test03_0401.pdf); *Strengthening the Office of Advocacy: Hearing Before the H. Comm. on Small Bus.*, 107th Cong. (statement of Thomas M. Sullivan, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), available at [http://www.sba.gov/sites/default/files/files/test02\\_0320.pdf](http://www.sba.gov/sites/default/files/files/test02_0320.pdf); *Improving the Office of Advocacy: Hearing Before the H. Comm. on Small Bus.*, 106th Cong. (statement of Jere W. Glover, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin.), available at [http://www.sba.gov/sites/default/files/files/test00\\_0621.pdf](http://www.sba.gov/sites/default/files/files/test00_0621.pdf).
- <sup>9</sup> See Pierce, *supra* note 1, at 540-42.
- <sup>10</sup> *Id.* at 549-57. See also Ruth Marcus, Op-Ed., *The Little Engine That Can’t: The Myth About Small Businesses and Jobs*, WASH. POST, Sept. 15, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/14/AR2010091405459.html>; Veronique de Rugy, *America’s Small-Business Fetish: When It Comes to Job Creation, Size Doesn’t Matter*, REASON, June 2012, available at <http://reason.com/archives/2012/05/21/americas-small-business-fetish>.
- <sup>11</sup> Pierce, *supra* note 1, at 557-60.
- <sup>12</sup> *Id.* at 562-68.
- <sup>13</sup> *Id.* at 570-74.
- <sup>14</sup> 15 U.S.C. §§634a-634g.
- <sup>15</sup> Regulatory Flexibility Act, 5 U.S.C. §§601-612.
- <sup>16</sup> OFF. OF ADVOC., U.S. SMALL BUS. ADMIN., A GUIDE FOR AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT; IMPLEMENTING THE PRESIDENT’S SMALL BUSINESS AGENDA AND EXECUTIVE ORDER 13272, 11-14 (2012) available at [http://www.sba.gov/sites/default/files/rfaguide\\_0512\\_0.pdf](http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf) [hereinafter OFF. OF ADVOC., RFA GUIDE].
- <sup>17</sup> See 5 U.S.C. §603(c).
- <sup>18</sup> OFF. OF ADVOC., RFA GUIDE, *supra* note 16, at 38.
- <sup>19</sup> In Fiscal Year 2011, the Office of Advocacy submitted over 50 comment letters. See OFF. OF ADVOC., U.S. SMALL BUS. ADMIN., REPORT ON THE REGULATORY FLEXIBILITY ACT, FY 2011: ANNUAL REPORT OF THE CHIEF COUNSEL FOR ADVOCACY ON IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 13272, 4 (2012), available at [http://www.sba.gov/sites/default/files/11regflex\\_0.pdf](http://www.sba.gov/sites/default/files/11regflex_0.pdf) [hereinafter OFF. OF ADVOC. FY 2011 RFA REPORT].

- <sup>20</sup> Comments on Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Northern Spotted Owl from Winslow Sargeant, Chief Counsel for Advocacy, Off. of Advoc., U.S. Small Bus. Admin., and Janis C. Reyes, Assistant Chief Counsel, Off. of Advoc., U.S. Small Bus. Admin., to Daniel Ashe, Director, U.S. Fish & Wildlife Serv., Dept. of Interior (July 5, 2012), available at [http://www.sba.gov/sites/default/files/files/Advocacy\\_Spotted\\_Owl\\_Comment\\_Letter.pdf](http://www.sba.gov/sites/default/files/files/Advocacy_Spotted_Owl_Comment_Letter.pdf).
- <sup>21</sup> *Am. Trucking Ass'n v. EPA*, 175 F.3d 1027, 1044 (D.C. Cir. 1997), modified in other respect, 195 F.3d 4 (D.C. Cir. 1999), reversed in other respect, *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001).
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# **Behind Closed Doors at the White House:**

**How Politics Trumps Protection of Public Health, Worker Safety, and the Environment**

**By CPR Member Scholar Rena Steinzor, CPR Intern Michael Patoka, and CPR Policy Analyst James Goodwin**



## About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information. CPR is grateful to the Public Welfare Foundation for funding this white paper.

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## Executive Summary

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, and environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

*Executive Order 12,866, issued September 30, 1993 and still in effect today (attached as Appendix A).*

### Key Findings

Tucked in a corner of the Old Executive Office Building, an obscure group of some three dozen economists exerts extraordinary power over federal rules intended to protect public health, worker and consumer safety, and the environment. Known officially as the Office of Information and Regulatory Affairs (OIRA, pronounced oh-EYE-ra), this unit reports to the director of the White House Office of Management and Budget (OMB), but operates as a free-ranging squad that pulls an astounding number of draft regulatory actions—some 6,194 over the ten-year period covered in this report—into a dragnet that operates behind closed doors. No policy that might distress influential industries, from oil production to coal mining to petrochemical manufacturing, goes into effect without OIRA's approval. A steady stream of industry lobbyists—appearing some 3,760 times over the ten-year period we studied—uses OIRA as a court of last resort when they fail to convince experts at agencies like the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), and the Occupational Safety and Health Administration (OSHA) to weaken pending regulations.

OIRA keeps secret the substance of the changes it makes to 84 percent of EPA and 65 percent of other agencies' submissions. Despite this effort to obscure the impact of its work, every single study of its performance, including this one, shows that OIRA serves as a one-way ratchet, eroding the protections that agency specialists have decided are necessary under detailed statutory mandates, following years—even decades—of work. OIRA review is tacked on at the end of rulemakings that involve careful review of the authorizing statutes, lengthy field investigation, extended advice from scientific advisory panels, numerous meetings with affected stakeholders, days of public hearings, voluminous public comments,

and thousands of hours of staff work. When all else fails, regulated industries make a bee-line for OIRA's back door. (For an illustration of how OIRA's review fits into the rulemaking process, see Figure 1.)

This report is the first comprehensive effort to unpack the dynamics of OIRA's daily work, specifically with regard to the only information that is readily available to the public about its internal review process: records of its meetings with lobbyists. These records are perhaps the only accessible accounting of OIRA's influence, and they demonstrate that OIRA has persistently ignored the unequivocal mandates of three presidents—Bill Clinton, George W. Bush, and Barack Obama—by refusing to disclose the differences between regulatory drafts as they enter review and the final versions that emerge at the end of that process. Our study reveals that OIRA routinely substitutes its judgment for that of the agencies, second-guessing agency efforts to implement specific mandates assigned to them by Congress in statutes such as the Clean Air Act, the Food Quality Protection Act, and the Occupational Safety and Health Act. In so doing, OIRA systematically undermines the clear congressional intent that such decisions be made by specified agencies' neutral experts in the law, science, engineering, and economics applicable to a given industry.

Our study covers OIRA meetings that took place between October 16, 2001 and June 1, 2011. During this decade-long period, OIRA conducted 6,194 separate "reviews" of regulatory proposals and final rules. According to the available data, these reviews triggered 1,080 meetings with OIRA staff involving 5,759 appearances by outside participants. Our analysis, which is the most exhaustive evaluation of the impact of White House political interference on the mandates of agencies assigned to protect public health, worker safety, and the environment, reveals a highly biased process that is far more accessible to regulated industries than to public interest groups.

Of course, it is possible—and senior OIRA officials have claimed—that meetings with outside parties do not drive their final decisions on agency proposals. To accept this claim, any objective observer must reject the dual assumptions that underlie the entire regulatory system: first, that a pluralistic process based on a level playing field is crucial to a wise result, and second, that experts in law, science, engineering, economics, and other disciplines are best equipped to evaluate the self-serving claims of private-sector stakeholders. Neither assumption guides OIRA. Instead, OIRA's playing field is sharply tilted toward industry interests, a process that demeans all disciplines except economists practicing OIRA's narrow brand of cost-benefit analysis, and a wide avenue that allows political considerations to trump expert judgments much of the time. As just one example of the impact of this disturbingly secretive process, consider the participation of William Daley, President Obama's Chief of Staff, in OIRA deliberations that eventually compelled EPA Administrator Lisa Jackson to promulgate a National Ambient Air Quality Standard (NAAQS) for ozone pollution that she had described as "legally indefensible" only a few months earlier.<sup>1</sup>

**OIRA routinely substitutes its judgment for that of the agencies, second-guessing agency efforts to implement specific mandates assigned to them by Congress.**

# How OIRA's Review Fits into the Rulemaking Process

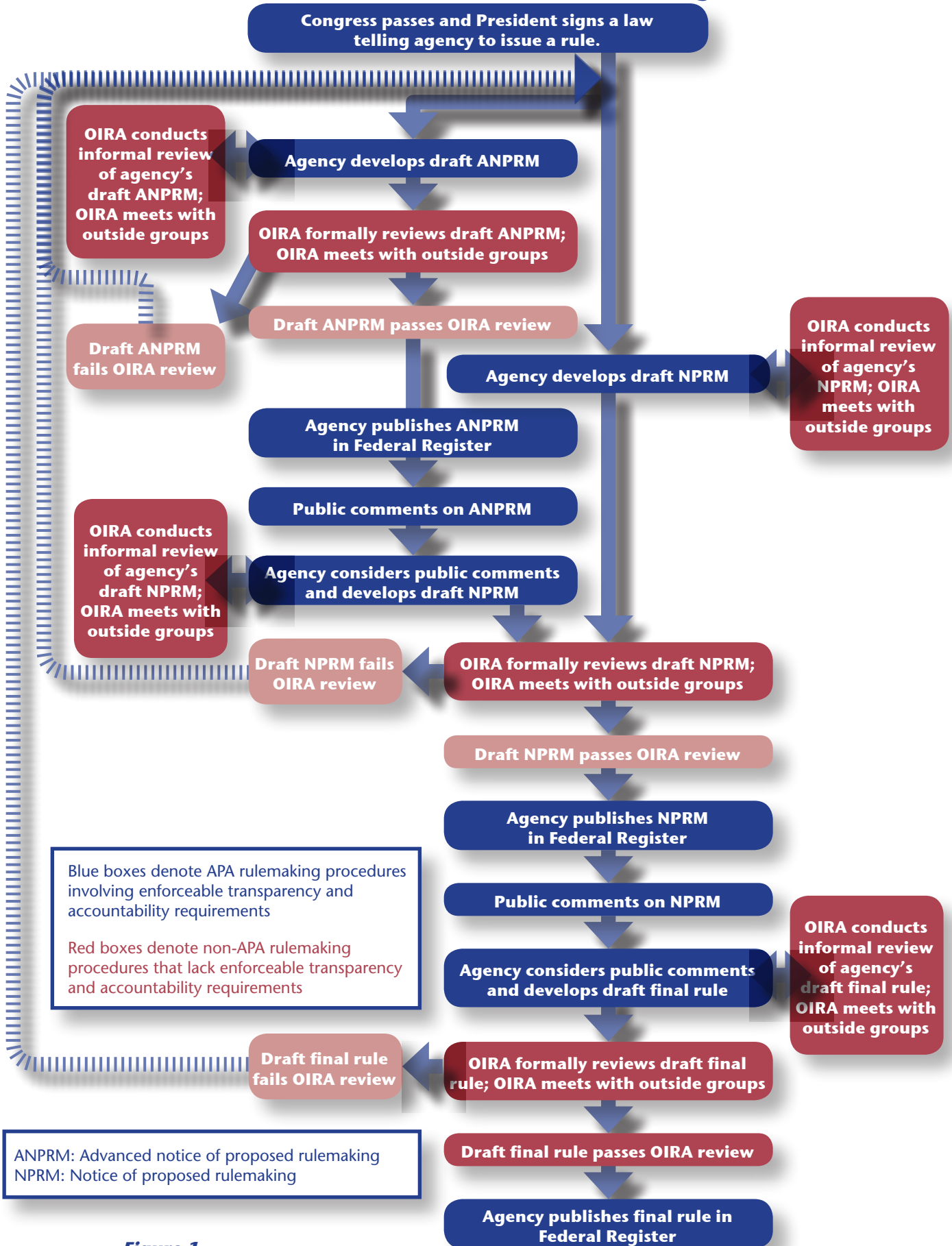


Figure 1

Our results tell a damning story of the relentless erosion of expert agency judgments by relatively junior White House staffers. OIRA economists use the window dressing of ostensibly objective cost-benefit analyses to camouflage politicized interventions that alter two-thirds of all regulatory drafts submitted by agencies other than EPA, and a shocking 84 percent of EPA submissions. Our specific findings include:

- 1. Routine Violations of Executive Order 12,866.** In 1993, President Bill Clinton attempted to reform OIRA's most significant shortcomings by issuing Executive Order (EO) 12,866, attached to this report as Appendix A. Underscoring the importance of these provisions, Presidents Bush and Obama continued EO 12,866 in effect with only minor amendments. The EO represented a compromise between regulated industries, urging strong presidential oversight of Executive Branch regulatory activities, and public interest groups, demanding greater transparency regarding the impact of such oversight on the protection of public health, worker and consumer safety, and the environment. Industry achieved broad oversight, while public interest groups achieved a set of disclosure requirements and deadlines that would allow public oversight of OIRA's work and prevent the Office from becoming a politicized sinkhole for proposals that moneyed special interests opposed.

In the 18 years since EO 12,866 was issued, OIRA has pressed the envelope of its extraordinarily broad review authority but has routinely flouted these disclosure and deadline requirements. The twin cornerstones of the transparency intended by EO 12,866 require (1) OIRA to make available "all documents exchanged between OIRA and the agency during the review by OIRA" and (2) all agencies to "identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA." The Obama Administration's determined neglect of these requirements is just as bad as it was under President Bush. The most important consequence of these secretive practices is the nondisclosure of communications between OIRA and the agencies, which makes it impossible for the public to undertake a systematic, rule-by-rule analysis of the impact of OIRA review.

- 2. Blown Deadlines.** Under EO 12,866, OIRA has 90 days to complete its review from the date the originating agency (for example, EPA) submits it. This period can be extended by 30 days *once*, for a total of 120 days, but only if the agency head agrees to the longer period. Of the 501 completed reviews that we examined (those in which OIRA was lobbied by outside parties), 59 reviews (12 percent) lasted longer than 120 days and 22 extended beyond 180 days (about six months).

Among recent examples of such delays, EPA's proposed coal ash rule, written in response to the spill of 1 billion gallons of coal ash sludge in Kingston, Tennessee in 2008, was held captive at OIRA for six months. OIRA's review was so withering, and the proposal that emerged was so altered, that the rule will not come out until after the 2012

**OIRA has pressed the envelope of its extraordinarily broad review authority but has routinely flouted its disclosure and deadline requirements.**



**The number of people representing regulated industries at OIRA meetings is five times the number appearing on behalf of public interest groups.**

election. A proposal to issue a “chemicals of concern” list under the Toxic Substances Control Act has languished at OIRA for 17 months as of this writing. EPA’s failure to regulate toxic chemicals more aggressively has landed the program on the Government Accountability Office’s (GAO) short list of failed, “high risk” government initiative that should be a priority for reform.<sup>2</sup> And a Department of Labor rule defining which farm work is too hazardous for children to perform gathered dust at OIRA for nine months, even though no records of meetings with concerned outside parties were ever disclosed and no interest group has publicly emerged to protest the rule. The need for the rule, which updates 40-year-old standards, became obvious in a series of gruesome accidents, including one in early August in which two Oklahoma 17-year-olds were pulled into a heavy, mechanized grain auger, badly injuring their legs.

- 3. Overwhelming Industry Dominance.** Over the last decade, 65 percent of the 5,759 meeting participants who met with OIRA represented regulated industry interests—about five times the number of people appearing on behalf of public interest groups. President Obama’s OIRA did somewhat better than President Bush’s in this regard, with a 62-percent industry participation rate to Bush’s 68 percent, and a 16-percent public interest group participation level to Bush’s 10 percent. Nevertheless, even under this ostensibly transformative President, who pledged to rid his administration of the undue influence of well-heeled lobbyists and conduct government in the open, industry visits outnumbered public interest visits by a ratio of almost four to one. As disturbing, only 16 percent of rule reviews that involved meetings with outside parties garnered participation across the spectrum of interested groups. Seventy-three percent attracted participation only from industry and none from public interest organizations, while 7 percent attracted participation from public interest groups but not industry, for an overall ratio of more than ten to one in favor of industry’s unopposed involvement.

Among our list of the 30 organizations that met with OIRA most frequently, five were national environmental groups (Natural Resources Defense Council at number 2, Environmental Defense Fund at 5, Sierra Club at 6, Earthjustice at 8, and Consumer Federation at 30). Seventeen were regulated industries, including the American Chemistry Council at 1, ExxonMobil at 3, American Forest and Paper Association at 4, American Petroleum Institute at 7, Edison Electric Institute at 9, American Trucking Association at 12, National Association of Home Builders at 13, Air Transport Association at 15, National Association of Manufacturers at 16, National Cattlemen’s Beef Association at 17, and DuPont at 19. Washington, D.C.-based industry law firms placed at 10 (Hunton & Williams), 14 (Hogan & Hartson), 18 (Crowell & Moring), and 20 (Barnes & Thornburg).

4. **EPA as Whipping Boy.** OIRA review is disproportionately obsessed with EPA. Fully 442 of OIRA's 1,080 meetings dealt with EPA rules. Only two other agencies had more than 100 meetings about their rules: the Department of Health and Human Services (HHS) with 137 meetings and the Department of Transportation (DOT) with 118 meetings. Compounding these disparities is the striking anomaly of this focus in the context of the overall number of rules reviewed: EPA submitted only 11 percent of the rulemaking matters reviewed by OIRA, but accounted for 41 percent of all meetings held.
5. **OIRA Overreach.** EO 12,866 instructs OIRA to focus on “economically significant rules,” generally defined as rules imposing more than \$100 million in annual compliance costs for affected industries. The order allowed OIRA to extend the scope of its review in very limited circumstances: for example, with respect to rules that interfere with other agencies’ work, materially change entitlement programs, or present “novel” legal or policy issues.

For the past decade, OIRA has ignored these limits, extending its reach into every corner of EPA's and other agencies' work. While OIRA reviews approximately 500 to 700 rules each year, only about 100 are economically significant, with the remainder supposedly falling under the limited exceptions of EO 12,866. Or, in other words, “non-economically significant rules” are reviewed at a ratio of six to one with the rules that should be the primary focus of OIRA's work. It's worth noting in this regard that because OIRA has such a small staff, and rulemaking proceedings at agencies like EPA are so complex, the temptation to hold small rules hostage in order to inspire changes in more significant rules must exist, although OIRA's secretiveness about what happens during its review makes it impossible to confirm this hypothesis.

6. **One-Way Ratchet.** The reasons why OIRA prefers to conduct reviews behind closed doors and agencies are too fearful to reveal these negotiations are obvious: OIRA changed 76 percent of rules submitted to it for review under President Obama, compared to a 64 percent change rate under President Bush. EPA rules were changed at a significantly higher rate—84 percent—than those of other agencies—65 percent—throughout the period of our study. And rules that were the subject of meetings with stakeholders were 29 percent more likely to be changed than those that were not, although the difference is not as severe under Obama—mainly because OIRA has been changing more rules even *without* meetings than it did under Bush, thus narrowing the gap. In light of previous studies suggesting that OIRA's changes exclusively weaken agency rules,<sup>3</sup> as well as a number of well-known examples where OIRA altered rules in exactly the ways requested by industry lobbyists, this evidence of OIRA's frequent changes cements its reputation as an aggressive one-way ratchet.

**OIRA changed 76 percent of rules submitted to it under President Obama, compared to a 64 percent change rate under President Bush.**



**7. Premature Intervention.** All of the above findings regarding industry dominance, lack of transparency, and inordinate OIRA interference with the substance of rules to protect public health and natural resources are compounded by OIRA's early interference in the formulation of regulatory policy. Of the 1,056 meetings that took place over the studied time period and that were identified with a rulemaking stage, 452 (43 percent) took place before the agency's proposal was released to the public. The percentage of meetings that occurred at this *pre-proposal* stage has actually been greater during the Obama Administration (47 percent) than it was during the Bush Administration (39 percent). Early interference frustrates transparency and exacerbates the potential for agencies to succumb to White House political pressure before they have even had the opportunity to seek public comment on more stringent proposals.

Such secret deliberations are especially prevalent when OIRA conducts "informal reviews" of agency rules. These informal reviews, conducted through phone calls and meetings between OIRA and agency staff, are very effective in changing the agency's regulatory plans. But the public has virtually no way of knowing what happens during these reviews, or even how long they last. Of the 1,057 meetings that could be linked to a formal review period, 251 (24 percent) were held prior to the formal review—in other words, during OIRA's *informal* review. To the Obama Administration's credit, the proportion of informal-review meetings was much greater under the Bush Administration (34 percent of all meetings) than it has been over the last two and a half years (10 percent).

### **A Word about EO 12,866**

We have included EO 12,866, which governs the process OIRA must follow in undertaking regulatory reviews, as an appendix to this report for one unfortunate reason. The EO is written in simple, straightforward, and highly prescriptive language, clearly stating deadlines and requirements that OIRA and the agencies "must" follow. Among the most striking findings of this report is that OIRA routinely violates these provisions. The violations are clear, not debatable, and no credible interpretation of the EO excuses them. Nevertheless, in our many years of experience watching OIRA's activities under both Presidents Bush and Obama, we have talked to numerous journalists who said that OIRA spokespeople had told them that EO 12,866 explicitly allows OIRA to behave in the manner that EO 12,866 in fact prohibits.

For example, EO 12,866 anticipates that OIRA will meet with outside parties as it reviews agency rules, and requires OIRA to disclose certain minimal information about its meetings (the date, the attendees, and the subject matter).<sup>4</sup> With regard to these meetings, OIRA has adopted an “open-door” policy, insisting that it is required by EO 12,866 to meet with all interested parties that request to do so.<sup>5</sup> In the words of OMB spokesman Tom Gavin, “The office has not refused a meeting with anyone who has asked for one.”<sup>6</sup> No matter how many similar meetings OIRA has already agreed to, or how lopsided the process becomes when most of the meetings are requested by regulated industries to complain about pending regulations, OIRA continues to grant meeting requests.

Despite OIRA’s assertion to the contrary, *nothing in the executive order requires such a policy*. In fact, all of these meetings are redundant of the extensive opportunities for regulated industries to file comments with EPA and other agencies, to testify at numerous public meetings, and to meet with agency staff innumerable times. If OIRA were truly concerned about appearing neutral and impartial, it would avoid the stampede of industry lobbyists that we have documented below. In actual practice, however, OIRA functions as little more—and nothing less—than a “fix it” shop for special interests and is oblivious to how its lopsided process and lack of transparency might appear to the American people.

We anticipate that OIRA’s efforts to distort the language of the EO will recur after we issue this report, as OIRA attempts to excuse the behavior catalogued below. We hope that journalists, Members of Congress and their staff, other government agencies and departments, private sector organizations, and the public will take the time to compare these justifications to the plain language of EO 12,866 attached as Appendix A.

## Recommendations for Reform

At the beginning of the Obama Administration, CPR Member Scholars urged OIRA Administrator Cass Sunstein to shift OIRA’s emphasis from reviewing individual rules to concentrating on cross-cutting regulatory problems, such as the threats posed by unsafe imports.<sup>7</sup> By the beginning of the third year of President Obama’s first term, it became clear that the Administration was determined to use OIRA as the leading edge of its political efforts to placate big business in an effort to neutralize its attacks on the Administration in general and its regulatory policies in specific. The most recent example is Cass Sunstein’s role as the White House official who instructed EPA Administrator Lisa Jackson to abandon efforts to tighten the NAAQS for ozone (known more familiarly as smog) that has been in effect since 1997 and is significantly weaker than the standard proposed by the Bush Administration.

So we have little hope that the Obama Administration will contemplate the fundamental overhaul of OIRA's role that is genuinely needed. For the record, however, such reform would include:

- Eliminating OIRA's review of individual regulatory proposals, and instead re-directing the Office to focus on cross-cutting regulatory problems that require coordinated actions by multiple agencies;
- Helping the agencies to develop proposals to strengthen their effectiveness administratively and legislatively; and
- Advocating targeted budget increases to enable the agencies to enforce existing laws.

Short of those meaningful, fundamental reforms, we offer here a series of more moderate proposals that should be regarded as a "first step" toward solving OIRA's burgeoning distortion of statutes like the Clean Water and Clean Air Acts, the Food, Drug, and Cosmetic Act, and the Mine Safety and Health Act. These suggested reforms are squarely within reach of the Obama Administration, certainly if it is granted a second term. Although we believe the reforms we offer fall far short of the wide-ranging reform that is needed, and even if followed, will not defuse OIRA's overly politicized process, one that trumps expert judgments on the protections Americans need and deserve, the changes below would at least eliminate blatant violations of EO 12,866 and make the review process fairer.

### ***Transparency***

1. Once OIRA has completed its review of either a proposed or final rule, the agency that originated the proposal should post on the Internet (including as part of the rule's electronic docket) a succinct explanation of the changes OIRA demanded, along with the version of the rule that was submitted to OIRA and the revised document that emerged at the end of the review period.
2. OIRA should post on the Internet (including, as part of the rule's electronic docket) all of the written communications that occurred between its staff and the originating agency during its consideration of any proposed or final rule.
3. OIRA should end the practice of undertaking "informal reviews" of agency policies before they are developed into regulatory drafts and officially submitted for review.

***Level Playing Field***

4. OIRA should stop meeting with outside parties during its consideration of a proposed or final rule, and instead confine its evaluation to dialogue with agency staff and, if necessary, review of the ample comments in the rulemaking record. The agency process of reviewing public comments is the appropriate venue for outside parties to make their case about how best to enforce the nation's laws via regulation.
5. Nevertheless, if OIRA continues to meet with outside parties, it should assume an active role in balancing the participation, whether through consolidating meetings with like-minded participants (seeing them all at once), reaching out to the relevant public interest groups to encourage their input, or both.

***Timeliness***

6. OIRA should abide by the deadlines set forth in EO 12,866 that allow a maximum of 120 days for rule review, provided that the agency head agrees to a delay beyond 90 days.
7. If OIRA asks for a 30-day extension, its request and the agency head's approval should be in writing and made public as soon as they are issued.
8. If OIRA misses these deadlines, agency heads should proceed with their rulemaking schedules and the President should support those decisions.

***Economically Significant Rules***

9. OIRA should focus its review on economically significant regulatory proposals and stop reviewing non-economically significant rules and guidance documents that do not fit under the exceptions provided by EO 12,866: namely, that a proposal would interfere with another agency's work, materially change entitled programs, or pose novel legal or policy issues.
10. In the rare instance when OIRA believes it must exercise its authority to pull a non-economically significant rule into its review process, it should explain in writing how the proposal fits under the exceptions set forth in EO 12,866, and it should promptly post this explanation on the Internet (both on its website and in the rule's electronic docket).

**OIRA review provides a redundant and unnecessary opportunity for industry lobbyists to overrun the White House, ensuring that politics trump substance.**

## *Analysis*

### **Who: The Kinds of Interest Groups Represented at OIRA Meetings**

#### **Background: A Process Dominated by Industry Participation at All Stages**

The rulemaking process offers many opportunities for public participation, from meetings with the agency to the submission of written comments and even post-rule judicial review. Ideally, these opportunities allow for a broad range of public input and subject the rulemaking process to robust, pluralistic oversight. But study after study reveals a process overwhelmingly dominated by industry participants from beginning to end, with public interest groups providing only a small fraction of the input.

In general, individual businesses participate in more than twice the number of rulemakings as other kinds of organizations, according to a 2005 survey of Washington-based interest groups.<sup>8</sup> This phenomenon is especially striking at the earliest stage of rulemaking: the development of an agency's proposed rule. In a study of EPA rules on hazardous air pollutants, industry groups communicated informally with the agency—through meetings, phone calls, and letters—170 times more than public interest groups did (about 84 informal contacts by industry per rule, as compared with 0.7 contacts by the public interest community).<sup>9</sup> Interviews with EPA staff and stakeholders also confirm that corporations and trade associations “get involved in the development of nearly every significant EPA rule.”<sup>10</sup>

Once the agency releases a proposed rule, the interest-group imbalance is no less evident at the formal notice-and-comment stage. A study of 40 rules from four different agencies found that 57 percent of comments were submitted by industry groups, with only 6 percent coming from public interest groups.<sup>11</sup> Indeed, the imbalance was even more severe in the above-mentioned study of EPA rules, where industry groups submitted over 81 percent of the comments, and public interest groups submitted only 4 percent.<sup>12</sup> Industry commenters participated in virtually all the rules studied, while public interest groups submitted comments for less than half of them.<sup>13</sup>

Even after a rule has been finalized, industry groups are more likely to challenge the rule in court (for being too stringent) than public interest groups are (for being too weak), at least where environmental regulations are concerned. Between 1970 and 1985, industry complaints against the government exceeded environmental-group complaints for every year but one.<sup>14</sup> And among 13 more recent rules on hazardous air pollutants challenged in court, 91 percent of the plaintiffs filing petitions were industry groups and only 8 percent were environmental groups.<sup>15</sup>

Despite subtle differences, these imbalances are all instances of the same general problem. Avenues of public input that are ostensibly neutral, permitting anyone to contribute to the rulemaking process, have fallen largely into the hands of the regulated industries themselves. With this study, we expand on the existing research by examining the patterns of interest-group participation in OIRA's centralized review, a less visible (and less studied) aspect of the rulemaking process.

*As the data show, OIRA's "neutral" meeting process is just as biased toward industry participants as the other aspects of rulemaking described above. More importantly, OIRA review provides a redundant and unnecessary opportunity for industry lobbyists to influence regulatory decisionmaking, and to do so in the more politicized environment of the White House, thus allowing politics to trump agency expertise.*

## Results

### ***At a Glance: The Kinds of Groups Represented at OIRA Meetings***

During the nearly ten-year period between October 16, 2001 and June 1, 2011, individuals made 5,759 appearances at OIRA meetings. On average, each meeting was attended by five individuals (not counting any representatives from OIRA, OMB, or the agency issuing the rule), with every individual representing some larger affiliation or group with an interest in the rulemaking. We placed each group into one of ten separate categories in order to make generalizations about the kinds of special interests participating in the meeting process. (See Appendix B for a more detailed explanation of our categorization methodology.)

Category	Subcategory	Number of Distinct Groups That Met With OIRA
Industry Groups	Individual companies	550
	Trade associations and business organizations	371
	Private hospitals and healthcare systems	31
	Professional associations*	22
Public Interest Groups	Environmental organizations	93
	Public health and safety organizations	34
	Education, advocacy, and research organizations	21
	Labor unions	16
	Community advocacy, public service, and citizens groups	13
	Civil and human rights organizations	10
	Consumer organizations	6
	Public interest law firms and legal-aid organizations	4
	Professional associations*	8
	Individuals	4
	Public interest hospital and community-health organizations	3
	Other public interest groups	6
State Government	States and state agencies	29
	Interstate organizations	18
	Indian tribes and intertribal organizations	6
Local Government	Local governments and agencies	11
	Local-government associations	2
Other Federal Agencies	Examples: U.S. Small Business Administration, U.S. Department of Agriculture, U.S. Department of Energy	27
Members of Congress	U.S. Representatives and House Committees	32
	U.S. Senators and Senate Committees	25
Law, Consulting, and Lobbying Firms	Law firms	132
	Consulting and lobbying firms	171
Foreign or International Government	Foreign governments and embassies	11
	Multinational governmental associations	4
Higher-Education	Universities	32
	Associations of colleges and universities	9
	Professional associations*	4
Other White House Offices	Examples: Council on Environmental Quality, Council of Economic Advisers, Domestic Policy Council	19

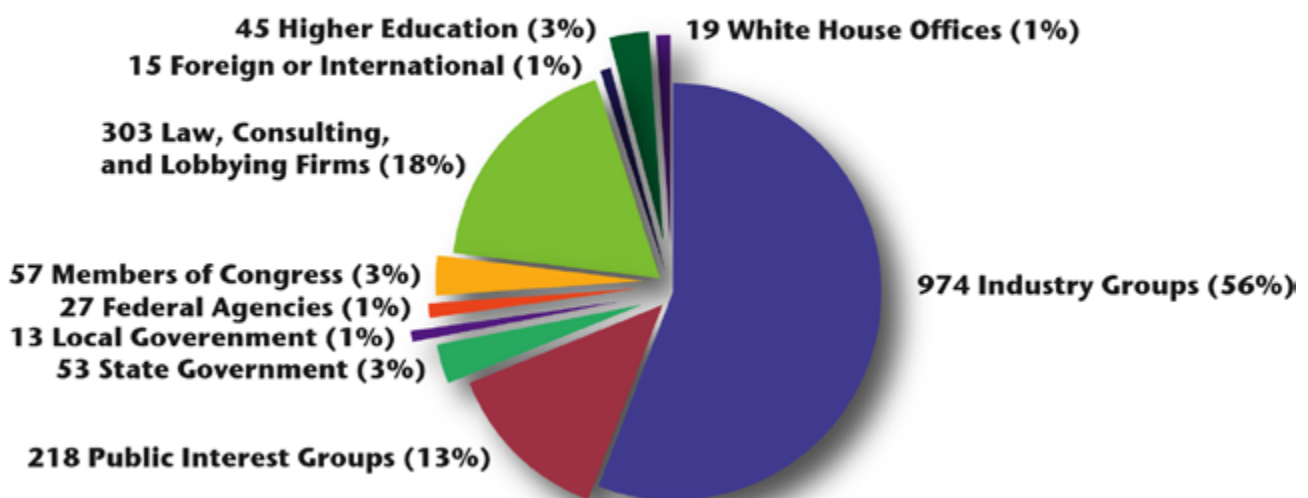
\* Categorization of professional associations is explained in greater detail in Appendix B.

### **Table 1. The Kinds of Groups Involved in the OIRA Meeting Process**

Table 1 above introduces the kinds of groups that met with OIRA during this time period, breaking down each category into more concrete subcategories and indicating just how many of these groups are involved in the meeting process.

As Figure 2 shows below, the industry groups participating in the meeting process outnumber the public interest groups by a ratio of 4.5 to 1—before even taking into account all the law, consulting, and lobbying firms that have met with OIRA on behalf of industry groups.

### The Universe of Distinct Groups Involved in the OIRA Meeting Process (2001-2011)



**Figure 2**

Approximately two-thirds of these groups (65 percent) met with OIRA more than once. Table 2 below puts names to the statistics by identifying those outside parties that have been the most active in the meeting process. Note that the table displays only groups outside the federal government and thus excludes federal agencies, members of Congress, and White House offices. Of the 30 organizations listed here, 17 are industry groups, 8 are law and lobbying firms, and 5 are public interest groups.

The fact that four prominent environmental organizations are among the eight most active groups is a promising sign that some public interest groups are capable of participating at levels similar to industry groups. However, it also demonstrates that a very small number of public interest groups become involved in the meeting process, either because their resources are quite limited or because they doubt their ability to influence OIRA, which they perceive as a hostile forum, or both.



Rank	Group Name	Description	Number of Meetings
1	American Chemistry Council	Trade association	39
2	Natural Resources Defense Council	Environmental organization	37
3	ExxonMobil	Industry	29
4	American Forest and Paper Association	Trade association	28
5	Environmental Defense Fund	Environmental organization	26
6	Sierra Club	Environmental organization	25
7	American Petroleum Institute	Trade association	24
8	Earthjustice	Environmental organization	24
9	Edison Electric Institute	Trade association	22
10	Hunton and Williams	Law Firm	22
11	Patton Boggs	Lobbying firm	20
12	American Trucking Association	Trade association	19
13	National Association of Home Builders	Trade association	19
14	Hogan and Hartson (now Hogan Lovells)	Law firm	17
15	Air Transport Association	Trade association	16
16	National Association of Manufacturers	Trade association	16
17	National Cattlemen's Beef Association	Trade association	15
18	Crowell and Moring	Law firm	15
19	DuPont	Industry	14
20	Barnes and Thornburg	Law firm	14
21	American Farm Bureau (Federation)	Trade association	13
22	American Meat Institute	Trade association	13
23	National Mining Association	Trade association	13
24	US Chamber of Commerce	Industry association	13
25	Latham and Watkins	Law firm	13
26	Mortgage Bankers Association	Trade association	12
27	Portland Cement Association	Trade association	12
28	Venable	Law firm	12
29	EOP Group	Lobbying firm	11
30	Consumer Federation of America	Consumer organization	10

**Table 2. The "Top 30" Groups Represented in the Most Meetings with OIRA**

The frequent participation of certain law, consulting, and lobbying firms is unsurprising, since they represent a number of different clients in their meetings with OIRA. As for the kinds of organizations that make use of these firms, however, the meeting records reveal them to be a remarkably homogenous set (see Table 3). Nearly 95 percent of the lawyers,

consultants, and lobbyists that attended these meetings (19 out of every 20) were acting on behalf of industry groups, with only 2.5 percent (1 out of every 40) representing public interest groups.

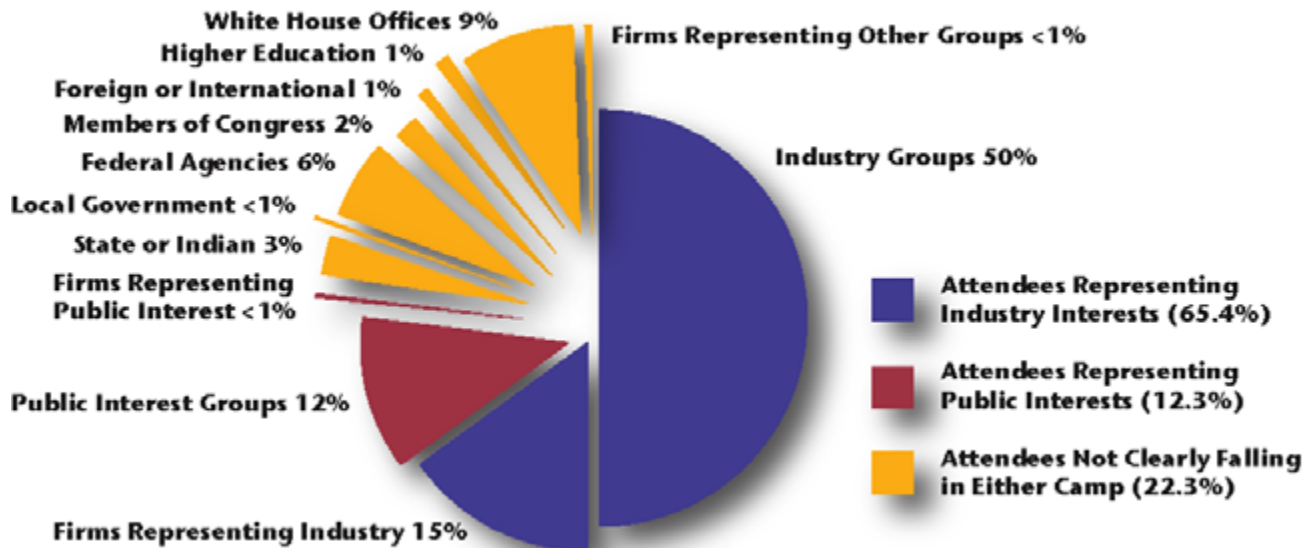
Type of Client	Number of Appearances by Lawyers, Consultants, and Lobbyists On Behalf of Clients	Percentage of All Appearances by Lawyers, Consultants, and Lobbyists
Industry Groups	853	94.3%
Public Interest Groups	23	2.5%
State Government	15	1.7%
Local Government	8	0.9%
Other Federal Agencies	2	0.2%
Other Lobbying Groups	1	0.1%
Higher-Education	1	0.1%
Other	2	0.2%
<b>Total</b>	<b>905</b>	<b>100.0%</b>

**Table 3. A Breakdown of the Groups Represented by Lawyers, Consultants, and Lobbyists**

#### ***A Deeper Look: Levels of Interest-Group Participation in OIRA Meetings***

Looking now at the number of individuals representing each kind of interest group from October 16, 2001 to June 1, 2011, we find a similar degree of industry dominance (see Figure 3). A total of 65 percent of all individual meeting attendees were lobbying OIRA on behalf of industry interests (adding together the percentages for industry groups and the firms that represented them)—about five times the number of attendees appearing on behalf of public interest groups.

## Interests Represented by Individual Attendees



**Figure 3**

The basic pattern of industry dominance remained largely consistent across the Bush II and Obama Administrations (results not shown), with about two-thirds of attendees representing industry interests (68 percent in the Bush years, 62 percent in the Obama years). The proportion of individuals representing public interest groups grew slightly in the Obama years (from 10 percent under Bush to 16 percent under Obama). The representation of other interest groups remained much the same, with two exceptions: (a) the percentage of attendees from other federal agencies shrunk in half (from 8 percent under Bush to 4 percent under Obama), and (b) the percentage of attendees from other White House offices nearly doubled (from 7 percent under Bush to 12 percent under Obama). First and foremost, these data suggest that the dominance of industry groups over public interest groups in the meeting process is an inherent feature of OIRA review, essentially unaffected by changes in administration. Secondly, the Obama White House appears to have participated more actively in OIRA meetings than its predecessor, perhaps taking over partially for the participation of the other federal agencies themselves on matters of cross-cutting policy interest—in other words, a somewhat greater degree of centralization in the review process.

Not only does industry participate in the greatest number of individual meetings, they also spread their efforts over the greatest number of reviews, as Figure 4 confirms. A review takes place whenever an agency submits a draft regulatory action (*e.g.*, a proposed rule, a final

rule) to OIRA, and the same regulatory action will likely go through at least two reviews (*i.e.*, at the proposal stage and the final rule stage) before it is promulgated. A particularly controversial regulatory action can be the subject of several meetings during a single OIRA review. Consequently, the rate of interest-group participation in reviews provides an alternative measure of industry's dominance in OIRA's review process. Industry groups make themselves heard in the greatest number of reviews, followed by law, consulting, and lobbying firms (almost exclusively representing industry groups), and then White House offices and federal agencies, with public interest groups coming in fifth.

### Number of OIRA Reviews in Which Each Type of Group Participated

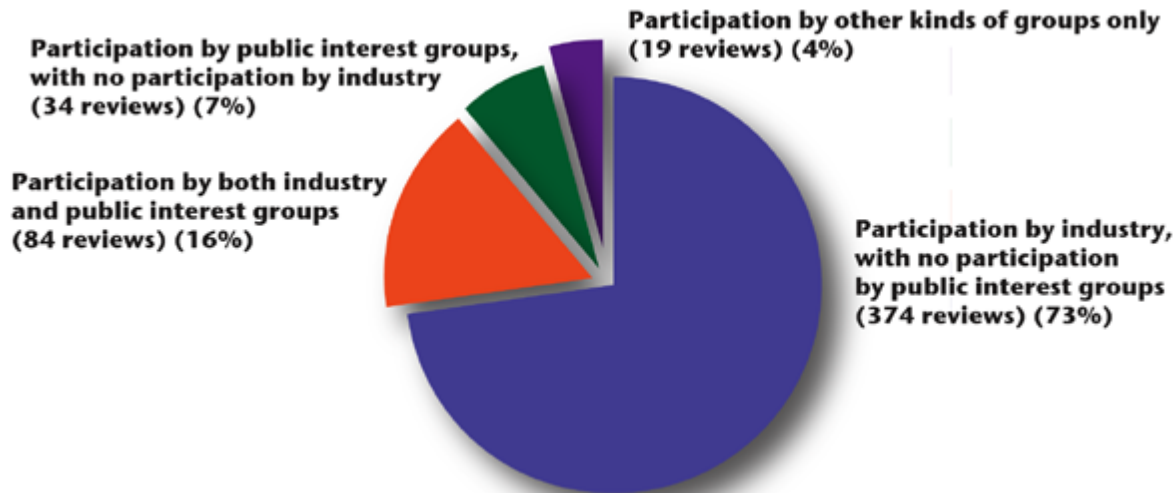


**Figure 4**

Methods of participating in the rulemaking process are supposed to facilitate *pluralistic* input, where the viewpoints of various groups combine to produce better informed policies. Thus, the extent to which these OIRA reviews are informed by one-sided input or more balanced participation by several kinds of groups is crucial to the legitimacy of the process. Figure 5 below exhibits the degree of overlap between industry and public interest group participation.

*Only 16 percent of reviews with meetings benefited from the input of both kinds of groups. A remarkable 73 percent of the reviews attracted participation by industry groups (and the firms representing them) but none by public interest groups, while only 7 percent attracted the latter but not the former—a ratio of more than ten to one in favor of industry's unopposed involvement.*

## Degree of Imbalanced Participation in Reviews with Meetings



**Figure 5**

### How OIRA's Meeting Policy Ensures Industry Dominance

These findings expose the hollow neutrality of OIRA's "all you can meet" policy. They confirm that equal access to OIRA does not ensure balanced participation. To the contrary, it serves instead to provide endless opportunities for industry groups to promote their interests in an influential forum, most of the time without scrutiny or opposition from public interest groups.

How and why does this imbalance arise? Some might argue that the public interest community is culpable for failing to engage in the meeting process to the same extent as industry, but such a view ignores the economic realities of interest-group advocacy. Once we consider that industry and public interest groups have vastly different resources and incentives, it becomes clear that "public participation" is far from a level playing field. Under such conditions, opening the door to any and all takers, and keeping it open until they have no more left to say, will inevitably reward those interest groups with the economic ability and self-interest to take maximum advantage of the process.

#### ***Imbalance in Resources***

In general, the financial resources of regulated industries simply dwarf the resources of public interest groups. The majority of participating industry groups are large (often multinational) corporations and nationwide trade associations, not to mention lobbying organizations like

the U.S. Chamber of Commerce. These groups have vast, often pooled resources at their disposal, especially when it comes to intervening in regulations that could affect a number of businesses or even an entire industry sector. Public interest groups, on the other hand, are typically funded by donations and have to conserve their resources for the most strategically useful opportunities for participation.

In some ways, the levels of interest-group involvement in meetings with OIRA simply track the levels of involvement in the rulemaking process in general. The economic incentives for industry involvement are much stronger and more consistent than they are for public interest involvement. Virtually every rulemaking ensures that some affected industry sector will be actively involved due to its inevitable self-interest in the outcome. In contrast, public interest groups are an imperfect proxy for the degree of public interest actually at stake in a rulemaking. Despite their desire to engage in a wide set of rulemakings, their participation is often limited to those that are newsworthy or capable of mobilizing widespread interest.<sup>16</sup> Less-salient regulatory issues are likely to be decided without robust advocacy from the public interest community, even though they may pose substantial risks to the public. Thus, while industry is guaranteed to be a constant presence in rulemakings (including meetings with OIRA), public interest groups will be more like occasional guests.

*Within a particular rulemaking, industry groups have the resources to engage in wide-ranging lobbying efforts. They can cover all their bases by advancing their interests in multiple forums—meetings with OIRA, informal contacts with the agency, submission of formal comments, lobbying efforts in Congress, public-relations campaigns—in the hopes that at least some of them will work in their favor. They also have the financial stamina to sustain that intense level of involvement throughout the entire rulemaking cycle, from pre-proposal to notice-and-comment and even post-rule litigation. In other words, they have the luxury of taking many bites out of the apple, often bombarding the agencies and OIRA with the same information and arguments over and over again. This kind of repetitive lobbying wastes government resources and unnecessarily duplicates notice-and-comment practices, albeit in a far less transparent setting.*

The disparity in resources between industry groups and public interest groups also has implications for *how* the groups go about lobbying OIRA. The immense resources of industry groups enable them to rely heavily on the specialized expertise of law, consulting, and lobbying firms. With their meters running by the hour, these hired consultants have every incentive to engage in excessive participation, lobbying the agency as well as OIRA with great frequency. To their clients, this overkill—“well beyond what is necessary to convey the message”<sup>17</sup>—is disguised as persistence and dedication, as if the advocates are simply doing everything they can to push the industry’s agenda at every opportunity. Public interest groups, in contrast, rarely have the resources to engage these firms in their lobbying efforts. Of the 905 appearances made by consulting, lobbying, and law firms in meetings with OIRA, 853 of them were representing industry groups, while only 23 were representing public interest groups.

**With their meters running by the hour, lawyers and consultants retained by industry groups have every incentive to engage in excessive participation.**

### ***Information Costs of Lobbying OIRA***

This imbalance in resources would be of little consequence if lobbying OIRA were cost-free. But effectively participating in any part of the rulemaking process is an information-intensive activity, and it takes resources (time, money, and personnel) to manage and produce information. Because industry has greater access to much of the relevant information, the costs of participating are often lower for industry than they are for the public interest community. And even where the costs would be similar for both groups, the greater resources of industry groups make their information burdens more manageable.

First, a participant has to decipher the lengthy rulemaking documents to become familiar with the issues and assumptions relevant to the outcome. Environmental rules, in particular, are filled with technical jargon and require a high level of specialized background knowledge to interpret.<sup>18</sup> A rule's cost-benefit analysis—often the focal point of OIRA's review—is typically one of the rule's most impenetrable parts due to its complex calculations and economic models. Of course, as we show below, stakeholders very often meet with OIRA before a proposed rule is even released, when there are no rulemaking documents to speak of. Nevertheless, an industry's long-practiced familiarity with the regulatory issues that might affect its self-interest leaves it well-prepared to participate at the first sign of trouble.

Second, after mastering the relevant materials, participants must find and assemble the information that might sway decisionmakers to a particular position. Because OIRA is tasked with ensuring that “the benefits of the intended regulation justify its costs,”<sup>19</sup> the information most likely to influence OIRA decisionmakers would address the estimated costs and benefits of the rule, preferably in economic terms. Much of this information, such as the expected cost to industry of complying with the regulation, lies within the particular knowledge of the industry itself. In order to dispute any inflated cost estimates supplied by industry, public interest groups would have to first gain access to “inside information” about the industry's operating costs.<sup>20</sup> Of course, public interest groups that study the harms of unregulated industry activity may have special knowledge of a regulation's expected *benefits*. However, they must expend considerable energy to make those benefits appear meaningful within the framework of OIRA's formal cost-benefit analysis, which reduces health and environmental benefits to dollars and cents in ways that grossly underestimate their true worth.

In addition to its greater access to relevant information, industry has another way to relieve its information burdens: hired help. With consulting, lobbying, and law firms at their disposal, large industry groups rarely feel discouraged by the avalanche of information that comes with participation. Within the public interest community, on the other hand, it falls to the groups themselves to sift through the prohibitively dense rulemaking docket and quickly compile the kind of technical documents and arguments that would prove influential with OIRA. Indeed, the speed with which groups can prepare their positions and present them to OIRA is crucial, given the importance of participating *early* in the rulemaking process, before the contours and boundaries of the proposed regulation become fixed.<sup>21</sup>



What these firms provide is processing power, which gives industry groups a significant edge in the race.

*The only reliable method for redressing the acute imbalance in resources between private sector industry versus public interest groups is to focus review on what the originating agency's experts, including economists, engineers, public health and ecological scientists, and lawyers, have to say about the merits of a rule, as well as what information was provided by interest groups on the rulemaking record.*

### **OIRA's Reputation as a Non-Neutral Forum**

One last explanation for industry's dominance of the OIRA meeting process relates to the nature of the forum itself. As we demonstrate here, OIRA has earned a reputation as a business-friendly forum—a place where health and environmental regulations go to die, or at least be weakened. Consequently, public interest groups may prefer to focus on more productive lobbying opportunities, rather than have their arguments fall on deaf ears at OIRA.

Historically, OIRA's involvement in the rulemaking process has functioned as a “one-way ratchet,” characteristically weakening agency regulations in the interest of economic considerations, and rarely if ever working in the other direction.<sup>22</sup> In a survey of 30 top political officials at EPA, encompassing both the Bush I and Clinton Administrations, 89 percent of them answered that OIRA often or always sought to make regulations less burdensome for regulated industries, and rarely or never sought to make regulations more protective of health and the environment.<sup>23</sup>

Indeed, the centralized review of agency regulations was introduced from the beginning as an explicit counterweight to the “runaway” regulatory tendencies of the agencies—particularly EPA—and so it was intended to have a dampening effect on aggressive rulemaking.<sup>24</sup> Former OIRA Administrator Sally Katzen has contrasted EPA's “laser”-like focus on environmental protection with the “broader view” taken by OIRA, which “temper[s]” EPA's approach by emphasizing a rule's economic impact.<sup>25</sup> OIRA is likely to greet the arguments of public interest groups in favor of robust regulation with a similar degree of skepticism and condescension. Given their scarce resources, public interest groups are understandably hesitant to spend them on lobbying OIRA, a forum which is virtually designed to be unreceptive to their arguments.

Beyond OIRA's generally anti-regulatory stance, the analytical tool that OIRA uses—cost-benefit analysis—is structurally biased to inflate a regulation's expected costs and trivialize its expected benefits, making the regulation appear unsound or unwise.<sup>26</sup> For example, the future benefits of a regulation (*e.g.*, cancers prevented, lives saved, species protected) are first converted into dollar amounts<sup>27</sup> and then “discounted” to their present values according to an interest rate.<sup>28</sup> And many of the expected benefits are simply left out of the analysis because they cannot be easily “monetized.”<sup>29</sup> Public interest groups, aware that OIRA's



methodology is inherently hostile to their aims, have little incentive to rush into these meetings.

Some might have expected OIRA to earn a more neutral reputation under the Obama Administration, given the President’s campaign language signaling his support for a robust regulatory system.<sup>30</sup> But in an apparent effort to appease business interests, Obama and Sunstein have hewn closely to the same kind of anti-regulation rhetoric that characterized the Bush II Administration, focusing on the perceived threat of “over-regulation” instead of addressing pervasive regulatory failures.<sup>31</sup> For example, in its 2011 report to Congress, OIRA reaffirmed its priorities—“economic growth, innovation, competitiveness, and job creation”—and suggested that “excessive regulation” is the main obstacle to their fulfillment.<sup>32</sup> These familiar refrains, combined with OIRA’s aggressive watering down of EPA’s coal-ash proposal,<sup>33</sup> have done little to improve the public interest community’s perception of OIRA’s usefulness. As our data already suggest, the Obama Administration is unlikely to attract a game-changing boost in public interest participation.

### The Implications of Interagency Participation in OIRA Meetings

Several bodies within the federal government participated vigorously in the meeting process, as displayed in Table 4 below. While the agency responsible for the rule under review was nearly always represented in meetings with OIRA, the federal agencies listed here are those that attended meetings concerning the rules of *other* agencies (for example, the U.S. Department of Agriculture attending a meeting about an EPA rule).

Rank	Name of Federal Entity	Description	Num. of Meetings
1	Council on Environmental Quality	White House office	148
2	Small Business Administration: Office of Advocacy	Federal agency	122
3	Council of Economic Advisers	White House office	62
4	Domestic Policy Council	White House office	48
5	National Economic Council	White House office	38
6	Office of the U.S. Trade Representative	White House office	32
7	Office of Science and Technology Policy	White House office	30
8	Department of Agriculture	Federal agency	29
9	Homeland Security Council	White House office	21
10	Department of Energy	Federal agency	21

**Table 4. The “Top 10” Federal Entities Represented at the Most Meetings**

*By far, the most active federal agency was the U.S. Small Business Administration (SBA), whose tiny Office of Advocacy<sup>34</sup> attended 122 meetings, or 11 percent of all meetings held—three times the number of meetings attended by the most active industry group (compare Table 2 above). The Office claims to represent the interests of “small businesses” by fighting against “overly burdensome” and “costly” regulatory requirements.<sup>35</sup> In*

*reality, the office has engaged in consistent and sweeping attacks against virtually all regulatory efforts by other federal agencies, functioning like a trade organization perched within the SBA—an anomaly in the federal government.*

Moreover, while the phrase “small business” evokes images of struggling storefronts on Main Street, many beneficiaries of the SBA’s advocacy efforts are not nearly so romantic. Under the SBA’s own rules, petroleum refineries, ammunition and aircraft manufacturers, line-haul railroads, and pipeline transporters of crude oil can have 1,500 employees and still qualify as “small businesses.”<sup>36</sup> Indeed, in their efforts to undermine health and environmental regulations, SBA’s Office of Advocacy representatives often shared OIRA meetings with industrial giants like the American Petroleum Institute, the American Chemistry Council, ExxonMobil, and Atlantic Southeast Airlines—all of them lobbying in tandem for weaker rules.<sup>37</sup>

Earlier this year, the SBA’s Office of Advocacy commissioned a study on the annual cost of federal regulations,<sup>38</sup> and the resulting estimate of \$1.75 trillion was so outlandishly overstated and poorly supported<sup>39</sup> that even OIRA Administrator Cass Sunstein ultimately denounced it after widespread criticism.<sup>40</sup> It is more than a little troubling that this tiny bureau, which has worked tirelessly to discredit the regulatory system as a whole, is so heavily involved in OIRA’s review of agency rules.

Beyond the SBA, it is difficult to generalize about the viewpoints likely to be promoted by the various agencies and White House offices. At least some of the time, however, they have strong incentives to back up industry’s objections to regulation. White House offices may want to maintain the political support of influential business sectors. Indeed, a survey of senior political appointees at EPA (10 from the Bush I era and 20 from the Clinton era) suggested that White House offices were more responsive to business interests than environmental interests when they got involved in EPA rulemakings.<sup>41</sup>

Federal agencies (other than the one issuing the rule) may worry about the effects of regulation on their industry contractors or program beneficiaries. The “interagency review” of EPA’s recent proposal to regulate coal ash offers a memorable example. Every other agency involved—the U.S. Departments of Agriculture, Energy, Transportation, and the Interior—had already approved of many uses for recycled coal ash (*e.g.*, in highway construction or for agricultural purposes) and thus echoed the complaints of the ash-recycling industry verbatim, criticizing EPA’s proposal for the effects it might have on the industry.<sup>42</sup> In fact, the White House Council on Environmental Quality (CEQ) voiced the same objections as well.<sup>43</sup>

Of course, the involvement of these federal-government entities in the review process may not consistently result in the weakening of health and environmental regulations. We suggest only that in addition to the blatant dominance of industry representatives in meetings with OIRA, some extra support for industry viewpoints is likely to be found in the deceptively neutral involvement of federal agencies and White House offices.

**The SBA’s Office of Advocacy often shared meetings with industrial giants like the American Chemistry Council and ExxonMobil—all of them lobbying OIRA in tandem for weaker regulations.**

## What: The Kinds of Rules Discussed at OIRA Meetings

### The Most Heavily Discussed Rules

Table 5 below lists the 20 rules that were the subject of the most meetings between October 16, 2001 and June 1, 2011 (in descending order). Each entry includes all the meetings held during all reviews of that particular rule (*i.e.*, at both the proposed-rule and final-rule stages).

Rank	Agency	Rule Title	Rule ID Number	Econ. Sig.?	Meetings
1	EPA/SWER	Standards for the Management of Coal Combustion Residuals Generated by Commercial Electric Power Producers	<a href="#">2050-AE81</a>	Yes	47
2	HUD/OH	RESPA--Improving the Process for Obtaining Mortgages	<a href="#">2502-AH85</a>	Yes	24
3	EPA/AR	Renewable Fuels Standard Program	<a href="#">2060-AO81</a>	Yes	18
4	ED/OPE	Program Integrity: Gainful Employment Measures	<a href="#">1840-AD06</a>	Yes	17
5	EPA/AR	Clean Air Interstate Rule; Formerly Titled Interstate Air Quality Rule	<a href="#">2060-AL76</a>	Yes	15
6	DOT/OST	Computer Reservations System Regulations Comprehensive Review	<a href="#">2105-AC65</a>	No	14
7	USDA/AMS	Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Fish, Perishable Agricultural Commodities, and Peanuts	<a href="#">0581-AC26</a>	Yes	12
8	DOD/COE	Programmatic Regulations for the Comprehensive Everglades Restoration Plan	<a href="#">0710-AA49</a>	No	12
9	USDA/FSIS	Mandatory Inspection of Catfish and Catfish Products	<a href="#">0583-AD36</a>	Yes	10
10	DOT/PHMSA	Hazardous Materials: Revisions to Requirements for the Transportation of Lithium Batteries	<a href="#">2137-AE44</a>	No	10
11	EPA/SWER	Definition of Solid Wastes Revisions	<a href="#">2050-AG31</a>	Yes	10
12	HHS/FDA	Use of Ozone-Depleting Substances: Removal of Essential Use Designation; Albuterol	<a href="#">0910-AF18</a>	Yes	9
13	HHS/OS	Modifications to Standards for Privacy of Individually Identifiable Health Information	<a href="#">0991-AB14</a>	Yes	9

Rank	Agency	Rule Title	Rule ID Number	Econ. Sig.?	Meetings
14	DOT/ NHTSA	Passenger Car and Light Truck Corporate Average Fuel Economy 2011 to 2015	<a href="#">2127-AK29</a>	Yes	9
15	EPA/AR	National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters	<a href="#">2060-AQ25</a>	Yes	9
16	EPA/AR	National Emission Standards for Hazardous Air Pollutants for Coal- and Oil-Fired Electric Utility Steam Generating Units	<a href="#">2060-AP52</a>	Yes	9
17	EPA/OCSP	TSCA Inventory Update Reporting Modifications	<a href="#">2070-AJ43</a>	No	9
18	HHS/CMS	ESRD Bundled Payment System	<a href="#">0938-AP57</a>	Yes	8
19	DOT/OST	Enhancing Airline Passenger Protections—Part 2	<a href="#">2105-AD92</a>	No	8
20	EPA/AR	Control of Emissions of Air Pollution From Nonroad Diesel Engines and Fuel	<a href="#">2060-AK27</a>	Yes	8

**Table 5. The “Top 20” Rules That Were the Subject of the Most Meetings with OIRA**

## The Disproportionate Targeting of EPA Rules

### **Background: OIRA’s Historic Fixation with EPA**

The history of centralized review is inseparable from the history of EPA. The original mechanism for White House oversight of agency rulemaking (an executive taskforce created in 1970) had two noteworthy features: (1) it explicitly solicited the input of top business leaders (even permitting them to serve in a decisionmaking capacity), and (2) it was targeted exclusively to the newly created EPA.<sup>44</sup> As that early mechanism evolved into modern centralized review, both of those features began to fade away, with OIRA officially taking a position of *neutrality* in both respects. No longer favoring the business community, OIRA purports to be neutral with respect to public participation by permitting *all* outside parties to schedule and attend meetings about agency rules. And no longer tailored to one agency, OIRA is charged with reviewing significant regulatory actions by *all* executive agencies. But as a practical matter, OIRA is not as far removed from that original model as it appears to be in either case. Its pretense of neutrality simply hides the fact that its review process is still industry-dominated (as we demonstrated in the previous section) and EPA-obsessed (as we demonstrate here).

**While EPA rules made up only 11 percent of all reviews by OIRA, 41 percent of all OIRA meetings targeted EPA rules.**

Of course, EPA typically engages in many significant rulemakings and thus makes up a large percentage of the rules that OIRA reviews in the first place. Even so, OIRA's excessive attention to EPA rulemakings is out of proportion to EPA's level of activity. During the Reagan-Bush era, critics charged that OIRA's reviews were being used specifically to undermine EPA rules.<sup>45</sup> In Steven Croley's study of centralized review in the Clinton era (1993-2000), not only did he find that OIRA was much more likely to change EPA rules than those of other agencies, but he also observed that EPA rules were "especially likely to generate OIRA meetings."<sup>46</sup> EPA rules made up 54 percent of the rules discussed at meetings, even though they represented only 10 percent of all rules submitted to OIRA for review.<sup>47</sup> He ultimately concluded that "the Clinton White House clearly appears to have used the review process to put its mark on environmental rulemaking, however friendly the Clinton administration was toward environmental regulation."<sup>48</sup>

In this part of our study, we extend Croley's analysis of EPA-related meetings into the years of Bush II and Obama (2001 to 2011). Whereas Croley focused on the number of EPA rules that were the subject of at least one meeting, we focus here on the number of meetings that concerned EPA rules, in order to gain some understanding of how the frequent, repetitive lobbying of OIRA might affect EPA's ability to function effectively.

### **Results**

Over the entire time period (October 16, 2001 to June 1, 2011), OIRA held a total of 1,080 meetings with outside parties. Of these, 442 meetings were about EPA rules, a far greater number than for any other agency. On average, OIRA held a meeting about an EPA rule *every eight days*, or roughly once a week. Only two other agencies had more than 100 meetings about their rules: the Department of Health and Human Services (HHS) with 137 meetings, and the Department of Transportation (DOT) with 118 meetings.

The number of meetings about EPA rules was also far greater than would be predicted from looking at the number of EPA rules submitted for review. OIRA reviewed 671 rules from EPA and 994 rules from HHS, but there were many more meetings about the former than the latter. While EPA meetings made up 41 percent of all meetings, EPA rules made up only 11 percent of all reviews by OIRA, a ratio of 3.8 to 1. This ratio is a measure of the disproportionate attention paid to EPA rules. Essentially, it means that in these meetings OIRA and outside parties devoted almost four times as much attention to EPA rules as the rules merited by their numbers. If OIRA's meeting policy were neutral toward the agencies, as OIRA maintains it is, then ideally the share of meetings about an agency's rules should be somewhat proportional to the share of reviews devoted to that agency. See Figure 6 below for a comparison of reviews and meetings by agency.

Remarkably, under both the Bush and Obama Administrations, OIRA paid equally disproportionate attention to EPA rules in these meetings (results not shown in charts):

- In the Bush years (October 16, 2001 to January 19, 2009), EPA meetings made up 36 percent of all OIRA meetings, while EPA rules made up only 10 percent of all reviews by OIRA, a ratio of 3.6 to 1.
- In the Obama years (January 20, 2009 to June 1, 2011), EPA meetings made up 51 percent of all OIRA meetings, while EPA rules made up only 14 percent of all reviews by OIRA, a ratio of 3.6 to 1.

*The fact that the ratio reflecting an undue focus on EPA is exactly the same (3.6 to 1) for both the Bush and Obama Administrations clearly indicates that the use of the meeting process to target EPA rules is an institutional characteristic of OIRA. In other words, it is not a problem only with a Republican OIRA or a Democratic OIRA, but rather a problem with OIRA itself, under any administration. These data also undercut criticisms by regulated industries and their congressional allies that the Obama Administration has not adequately supervised the rulemaking activities of EPA. After all, more than half of all meetings under the Obama Administration have been about EPA rules.*

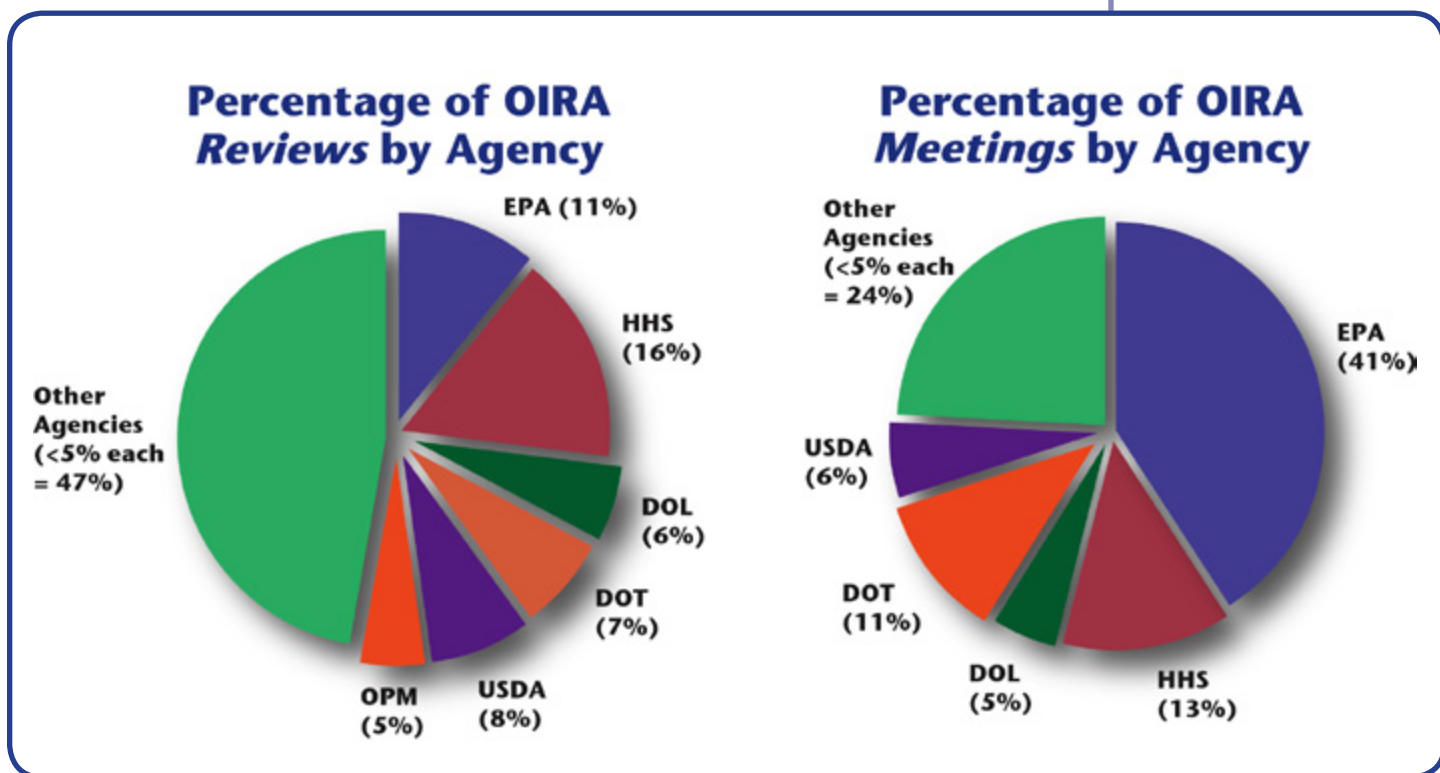


Figure 6



## How OIRA's Meeting Policy Impairs EPA Rulemaking

Because OIRA's meeting policy places no limits on outside parties' opportunities to participate, the number and frequency of meetings is limited only by the resources and interests of the outside parties. As a result, rules promulgated by EPA are especially likely to attract vigorous industry participation. Throughout its existence, EPA has served as the number-one target of deregulatory efforts by industry groups.<sup>49</sup> And the average environmental rule presents countless issues that are bound to whip regulated entities into a frenzy (*e.g.*, the feasibility of a pollution control standard, the cost and performance of available technologies, the requirements for monitoring and reporting).<sup>50</sup> Ultimately, OIRA's "all you can meet" policy permits industry groups with resources to spare to browbeat EPA rules—their favorite target—with a predictably constant stream of meetings.

Aside from any substantive effects on the rules themselves, EPA ends up wasting resources and personnel on these meetings, when its hands are already more than full contending with the same kinds of arguments in its own communications with industry stakeholders. EPA prudently sends agency representatives to most of the meetings in order to defend its rules from industry attack in front of OIRA. Indeed, Croley found that "EPA staff are especially likely to attend meetings about their rules, relative to all other agencies," probably due to the intensely controversial nature of environmental regulations.<sup>51</sup>

OIRA, as an institution, has a history of viewing EPA regulations as overly aggressive and economically unsound, so industry complaints along the same lines are almost certain to find a receptive audience. For example, in OIRA's recent review of EPA's proposal to regulate coal ash,<sup>52</sup> industry groups met with OIRA 33 times (out of 47 total meetings). They argued that EPA's rule would inadvertently impose a crippling "stigma" on the beneficial recycling of coal ash, spelling disaster for the reuse industry, and by extension, the environment.<sup>53</sup> Lo and behold, at the conclusion of its review, OIRA faulted the agency for neglecting such a compelling issue and demanded that the proposal incorporate industry's concerns before being released.<sup>54</sup> In its rush to accommodate industry stakeholders, OIRA ignored the fact that EPA had never observed such a stigma effect in its prior experience,<sup>55</sup> and it failed to address whether potential "market stigma" was even a permissible factor for consideration under the relevant statute.<sup>56</sup> When the proposed rule was finally released, its cost-benefit analysis suggested that the most effective regulatory option could result in an enormous stigma effect: *\$233.5 billion* in negative benefits (costs) to society.<sup>57</sup> Much to the detriment of communities affected by toxic coal ash, the weaker regulatory alternatives that would barely make a dent in the status quo were made to appear far more attractive—exactly the outcome that industry wanted in the first place.

EPA is already an embattled agency by any measure and is unable to count on the President for vital support when its authority or credibility is threatened.<sup>58</sup> And yet, among all agencies, EPA alone is confronted with this kind of steady, relentless information flow between industry groups and OIRA economists—a veritable tag team of opposition.

In the final section of this paper, we explore further the influence that these meetings might have on the outcome of OIRA's review of EPA rules.

## **Excessive Interference in Rules That Are “Not Economically Significant”**

### ***Background: The Scope of OIRA's Reviewing Authority***

In the Reagan-Bush era, Executive Order (EO) 12,291 gave OIRA the authority to review *all* proposed and final rules promulgated by federal agencies (except independent agencies), and it reviewed between 2,000 and 3,000 rules per year.<sup>59</sup> OIRA's overbearing involvement in agency rulemaking sparked intense controversy in Congress and in the press, raising concerns about the separation of powers, the transparency of the review process, and rulemaking delay.<sup>60</sup>

In 1993, soon after President Clinton was elected, he issued EO 12,866 to replace the previous executive orders (12,291 and 12,498).<sup>61</sup> This executive order was meant to define OIRA's authority and obligations in a clear and systematic way. Toward that end, it permits OIRA to review only “significant regulatory actions,” which may be identified as such by either the agency or OIRA.<sup>62</sup> According to section 3(f) of the order, a regulatory action is “significant” if it is “likely to result in a rule that may”:

1. Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
4. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.<sup>63</sup>

Rules that fall under subsection (1) are called “economically significant,” while rules that fall under subsections (2)-(4) are called one of several things: “not economically significant,” “non-economically significant,” “otherwise significant,” or “significant for noneconomic reasons.” For economically significant rules, agencies are required to prepare a full cost-benefit analysis, with extensive consideration of alternatives.<sup>64</sup> For non-economically significant rules, agencies must prepare only an “assessment” of costs and benefits (without the underlying “analysis”).<sup>65</sup>



As a result of OIRA's newly limited authority, in 1994 the total number of rules reviewed by OIRA dropped sharply to 831, and ever since 1995, the number has hovered approximately between 500 and 700 per year.<sup>66</sup> The portion consisting of economically significant rules stayed roughly the same size as before the new executive order (when they were called "major" rules), around 100 per year, with the rest (400-600) representing non-economically significant rules.

*The fact that, among all the rules reviewed by OIRA per year, non-economically significant rules greatly outnumber economically significant rules—at a ratio of 6 to 1—is at odds with the overriding purpose of EO 12,866. The order focused predominantly on the \$100 million threshold, the signature test for economically significant rules, as a way of constraining OIRA's authority.<sup>67</sup> OIRA's review of non-economically significant rules was meant to be the exception, not the rule. While the definitions of non-economically significant rules (sections 3(f)(2)-(4) above) are certainly capable of being applied generously—particularly the "novel legal or policy issues" criterion of subsection (4)—to do so would swallow the usefulness of limiting OIRA's authority in the first place.*

Unlike section 3(f)(1), which implicates OIRA's significant authority to scrutinize a regulation's effects on the economy, the environment, and public health, sections 3(f)(2)-(4) of EO 12,866 are written in a way that evokes OIRA's more moderate "coordinating" role.<sup>68</sup> And yet OIRA appears to treat sections 3(f)(2)-(4) as "catch-all" provisions, under which it can simply move any rules it desires to review into its "to-do" pile and proceed to exercise its full authority over them. Indeed, former OIRA Administrator Sally Katzen saw these provisions as preserving OIRA's authority to review any "controversial regulations" that fail to meet the \$100-million threshold, while still not requiring agencies to submit all rules to OIRA, as they had to under EO 12,291.<sup>69</sup> If this is the case, then EO 12,866's limitation of OIRA's authority was just for show, protecting from review only those rules that OIRA has no interest in reviewing.

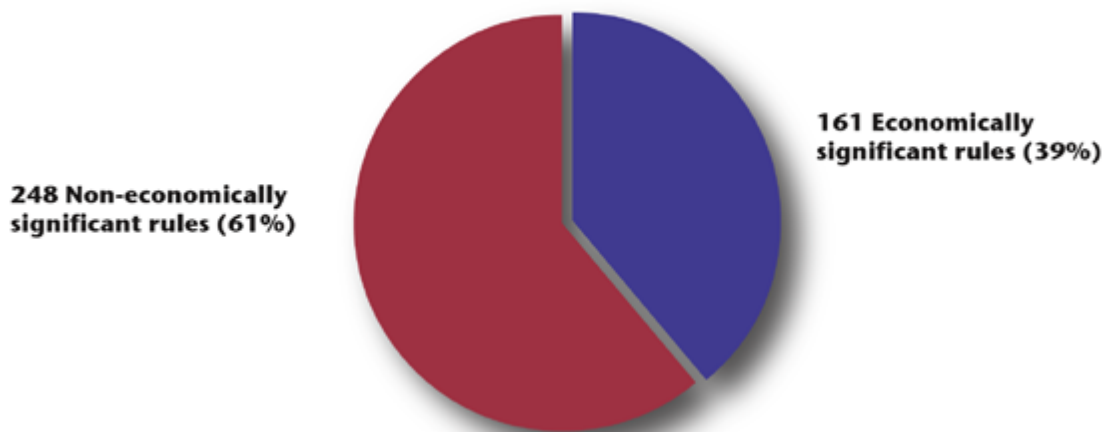
Moreover, the fact that the number of non-economically significant rules remains so steady from year to year suggests that OIRA simply converged on a manageable number of rules to select each year for review, regardless of whether they actually meet the order's criteria. After all, what are the chances that "serious inconsistenc[ies]" between agencies, "material[] alter[at]ions]" of budgetary impacts, and "novel legal or policy issues" arise at the same rate every year?

In this part of the study, we investigated the extent to which these non-economically significant rules, already on the border of OIRA's authority and over-selected for review, are also subjected to stakeholder meetings once brought into the system.

### Results

Out of 409 rules that were the subject of at least one OIRA meeting from October 16, 2001 to June 1, 2011, 161 of them (39 percent) were economically significant, while 248 of them (61 percent) were non-economically significant, as illustrated in Figure 7 below. If a rule's "significance" designation was changed between different review periods (*e.g.*, between the proposed-rule stage and the final-rule stage), we used its final designation for the study.

### Economic Significance of Rules Discussed at OIRA Meetings



### Figure 7

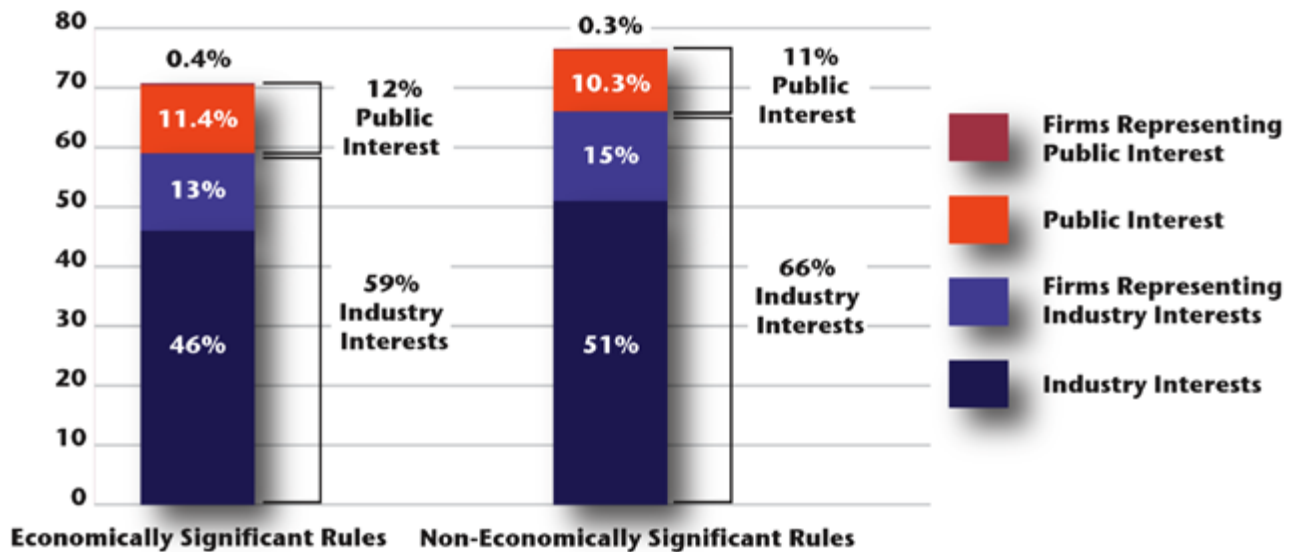
As for the number of meetings associated with each kind of rule, 592 meetings (56 percent) were held to discuss the 161 economically significant rules, while the other 462 meetings (44 percent) concerned the 248 non-economically significant rules. In other words, each economically significant rule generated an average of 3.7 meetings, while each non-economically significant rule generated an average of 1.9 meetings.

So, while economically significant rules generate roughly twice the number of meetings as non-economically significant rules, the number of non-economically significant rules that are discussed in *any* number of meetings is about 50 percent larger than the number of economically significant rules. These trends were relatively consistent across the Bush II and Obama Administrations, with the economically significant rules generating the most meetings (53 percent of meetings for Bush and 62 percent of meetings for Obama), but the non-economically significant rules making up the majority of rules that are the subject of meetings (63 percent of rules for Bush and 55 percent of rules for Obama). Even in the Clinton era, Croley found that most of the rules discussed at meetings (58 percent) were non-economically significant.<sup>70</sup>

Even though large numbers of meetings are most often associated with rules that surpass the \$100 million threshold, five of the “top 20” rules listed in Table 5 above—those that were the subject of the most meetings—were *not* economically significant (producing between 8 and 14 meetings each). We examined these five rules to get a sense of why they were considered “significant” and thus in need of review by OIRA. Two of them parroted the language of section 3(f)(4), citing “novel legal or policy issues” without any further explanation of what those issues were.<sup>71</sup> For another rule, the Department of Transportation cited “the amount of public interest” likely to be generated—not a valid criterion under EO 12,866, but a factor specified by the Department’s own regulatory policies.<sup>72</sup> The other two simply declared that the rule “is” or “has been determined” a significant regulatory action, with no more detailed justification anywhere in the rulemaking docket.<sup>73</sup> A larger-scale examination of non-economically significant rules would be beyond the scope of this paper, but already this small sample suggests that the decision to label a rule “significant” for noneconomic reasons, and thus bring it under OIRA’s authority, is far from systematic or transparent.

Because they may lack the newsworthiness of many economically significant rules, non-economically significant rules seem particularly likely to attract one-sided participation from industry groups that are directly affected, while escaping the attention of public interest groups with limited resources. Figure 8 below suggests that for non-economically significant rules, the proportion of meeting attendees representing industry interests is 7 percent greater than it is for economically significant rules. Indeed, this difference is slight, and the representation of public interest groups appears to show no difference at all. But the fact that non-economically significant rules are at least as susceptible to excessive industry lobbying as economically significant rules—if not more so—underscores the importance of keeping most of them properly out of OIRA’s review process to begin with.

### Percentage of Meeting Attendees Representing Industry and Public Interest, with Respect to Economic Significance of the Rule



**Figure 8**

President Obama scored points with the public interest community<sup>74</sup> when he revoked George W. Bush's EO 13,422, which had extended OIRA's authority to review non-binding guidance documents issued by agencies—a significant expansion of its reach that threatened to further impede agency action.<sup>75</sup> But as our data suggests, OIRA's extensive and arbitrary involvement in non-economically significant rulemakings may represent an even greater intrusion, one that has gone unnoticed and unaddressed due to the low-profile nature of the rules.

President Clinton's EO 12,866 triumphantly claimed to “reaffirm the primacy of Federal agencies in the regulatory decision-making process.”<sup>76</sup> In reality, OIRA undermines the agency system by micromanaging so many routine regulations and exposing them to industry lobbyists outside the notice-and-comment period—conduct that violates the spirit, if not the letter, of EO 12,866.

## When: The Timing of OIRA Meetings

### The Stages of the Rulemaking Cycle

#### ***Background: The Problem of Pre-Proposal Discussions with Stakeholders***

To a large extent, an agency's proposed rule defines and limits the possibilities of the final regulation. Courts have imposed the requirement that an agency's final rule must be a "logical outgrowth" of its proposed rule, such that the proposed rule should alert interested parties to all the relevant issues and alternatives that may play a part in the final rule.<sup>77</sup> If the final rule is materially different from the proposed rule in unanticipated ways, then stakeholders may have been deprived of a meaningful opportunity to comment on several aspects, and a court may order the agency to open another notice-and-comment period or even start over from scratch to remedy the defect.<sup>78</sup>

In an effort to withstand judicial review, agencies often seek the input of influential stakeholders as they develop their proposed rules, so that they will not be faced with unforeseen issues arising during notice-and-comment that require material changes in the final rule. The problem with this way of operating is twofold. First, these pre-proposal discussions lack the transparency of the agency's notice-and-comment period. The public is not privy to their contents, or even the fact that they occurred, because agencies are required to log only those contacts that take place *after* the proposed rule has been released.<sup>79</sup> Second, the shell-shocked agency's desire to build consensus or appease litigious stakeholders even at the brainstorming stage of rulemaking leads to policy that merely "satisfices," instead of the kind of imaginative problem solving that the agency's experts are capable of.<sup>80</sup>

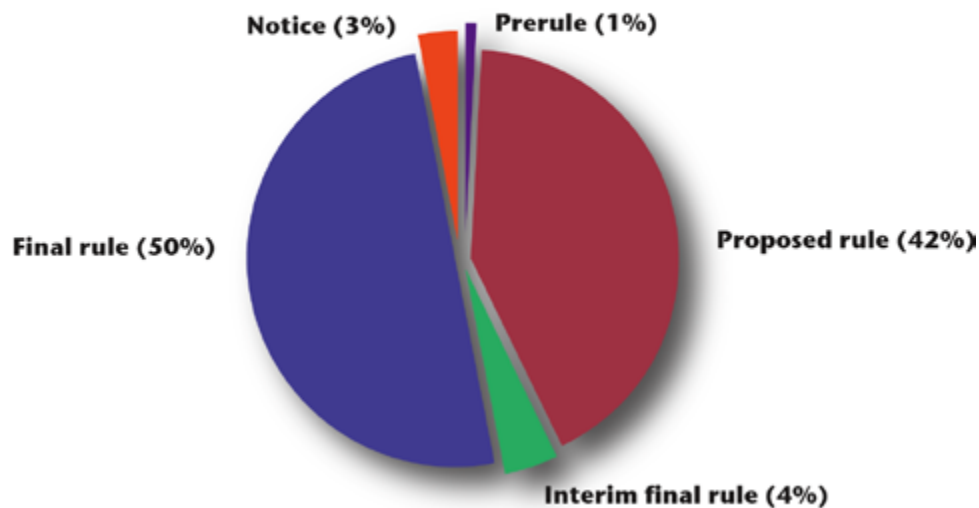
When the proposed rule is ultimately released as part of the agency's Notice of Proposed Rulemaking (NPRM), what the public sees is the result of a long process of negotiation that took place behind closed doors.<sup>81</sup> The available options and alternatives are largely fixed by this point, restricting decisionmakers to the task of choosing among them, and the compromises littered throughout the proposal render it muddled and nearly incoherent to those who were not involved in pre-proposal discussions.<sup>82</sup> Considering that industry groups vastly outperform public interest groups in these pre-proposal communications with the agency—at a ratio of 170 to 1 for one subset of EPA rules<sup>83</sup>—the battle for balanced and effective regulation is often lost before it begins.

Here, we extend this account by investigating the extent of pre-proposal communications with *OIRA*, which exacerbate the transparency and accountability issues present at the agency level.

### Results

Of the 1,056 meetings that took place over the studied time period and were identified with a rulemaking stage, 452 of them (43 percent) took place at the pre-proposal stage. These include a few meetings at the “prerule” stage (during which agencies “determine whether or how to initiate rulemaking”), but mostly they occurred at the “proposed rule” stage (during which agencies formulate and prepare to release their proposed rule),<sup>84</sup> as Figure 9 illustrates below.

### Percentage of OIRA Meetings Held at Various Stages of Rulemaking



**Figure 9**

*The percentage of meetings that occurred at the pre-proposal stage has actually been greater during the Obama Administration (47 percent) than it was during the Bush II Administration (39 percent), indicating an increasing degree of stakeholder influence over the shape of agency proposals that come out of OIRA’s review process.*

These pre-proposal meetings were marked by roughly the same imbalance in interest-group representation as all OIRA meetings generally (see Figure 3 above), with 63 percent of individuals representing industry interests (industry groups and the firms attending on their behalf) and only 14 percent representing the public interest community (public interest groups and the firms attending on their behalf). A similar, if not somewhat greater, imbalance also persisted through the final-rule stage (69 percent industry attendees, 10 percent public interest).

The consistency of industry's dominance throughout the rulemaking process is likely no coincidence. Often, the interest-group imbalance at an earlier phase of rulemaking sets the stage for an imbalance at a later stage.<sup>85</sup> Public interest groups that are not in on the ground floor of the OIRA review process—at the pre-proposal stage—will find it harder to penetrate the proposed rules and cost-benefit analyses informed by the process. As a result, these groups may have more trouble engaging critically with these documents in further OIRA reviews or in the notice-and-comment period.

Also of interest are the 50 percent of meetings that occurred at the “final rule” stage, immediately before the agency publishes its final rule. While not presenting exactly the same problems as pre-proposal meetings, these meetings are the most blatantly duplicative of the agency's notice-and-comment process. Even if the agency itself is unconvinced by a stakeholder's comments and plans not to bend to them in its final rule, the same stakeholder may have greater success convincing the technocrats at OIRA after the end of the agency's comment period. In other words, OIRA's final-rule review period enables participants with ample resources to make an end run around the agency's notice-and-comment process.

#### ***Undermining the Agencies' Autonomy in the Rule's Formative Stages***

When pre-proposal meetings are held with OIRA instead of the agency, the problems with transparency and accountability are sharpened. Because the body making the judgment calls is an outside group of economics-minded generalists instead of the agency's own experts, the lack of clarity about what concessions were made and who is responsible for them takes on a new significance.

On the transparency front, at least OIRA is required to log the *occurrence* of these pre-proposal meetings, unlike agencies.<sup>86</sup> But without detailed minutes of what was discussed, the public is afforded no window into the specific compromises and negotiations embedded within the resulting proposal. While OIRA is required by executive order to disclose “all documents exchanged between OIRA and the agency during the review by OIRA”<sup>87</sup>—at the least, the proposed rule originally submitted by the agency and the revised proposal returned by OIRA—it characteristically fails to comply with this provision. Without the two documents to juxtapose, any attempt to hold the agency or OIRA accountable for the proposal is confounded.

While the agencies themselves too often cede ground to regulated industries during the development of their proposed rules, at least when they refuse to do so, they should not be undermined at the last minute by bureaucrats at OIRA. For example, EPA was surely bombarded by industry lobbyists during the development of its proposal to regulate coal ash, but it resisted such pressures and submitted a straightforward, effective proposal to



OIRA.<sup>88</sup> When the proposal came through the other side of OIRA's looking-glass—after 33 meetings with industry groups—it had grown 50 percent longer, included two weaker options more desirable to industry, and was accompanied by an overhauled cost-benefit analysis that dramatically rigged the numbers against EPA's original plan.<sup>89</sup> Were it not for EPA voluntarily posting the before-and-after versions of the document in its rulemaking docket,<sup>90</sup> observers would never have known which parts represented EPA's expertise and which represented OIRA's misguided fiddling.

Much better for EPA to simply release its candid proposal and solicit comments, putting all stakeholders on an equal footing, than for OIRA to pre-process the proposal before it ever sees the light of day, with early participants (mostly industry representatives) serving as a sort of focus group. OIRA's meeting policy permits privileged stakeholders to jump the gun on the agency process, enlisting OIRA's aid to establish their own footholds in the agency's proposal, which is then presented as if those compromises had been there from the start.

## OIRA's Formal Review Period

### *Background: OIRA's Preference for "Informal" Reviews*

Thus far, we have focused exclusively on OIRA's "formal reviews" of agency rulemaking actions, those that operate under the provisions of EO 12,866. But this stylized process is just the tip of the iceberg of OIRA's involvement. The executive order imposed several restrictions on formal reviews, limiting them to "significant" rules,<sup>91</sup> imposing a 90-day maximum duration (with a possible extension of 30 days),<sup>92</sup> and requiring OIRA and the agencies to disclose the changes made during review.<sup>93</sup> OIRA, presumably frustrated with these constraints and fearing that its reviews would be ineffective if relegated to a few months at the "end of the pipeline," ramped up its usage of "informal reviews."<sup>94</sup> According to OMB, a rule is under informal review once "OIRA has started a substantive discussion with the agency concerning the provisions of a draft rule or OIRA has received the rule in draft."<sup>95</sup>

These informal reviews begin well before the formal-review period, and OIRA's involvement is apparently quite extensive. Donald Arbuckle, a former Deputy Administrator of OIRA, has emphasized the "continuous nature of OIRA–agency communication," adding that "an OIRA analyst may talk with agency counterparts several times daily, sometimes hourly."<sup>96</sup> In 2002, OIRA began to boast that agencies were becoming more receptive to these ongoing communications, eagerly soliciting OIRA's feedback early in the rulemaking process.<sup>97</sup> Some even prefer to call them "consultations" instead of "reviews" to impart a sense of friendly collaboration instead of supervision.<sup>98</sup>

At the same time, OIRA has made it clear that an agency faces the risk of having its rule ultimately "returned for reconsideration" if it waits until the formal-review period to get OIRA's input—an explicitly designed "incentive" to bring OIRA into the process as early as possible.<sup>99</sup> The agencies, well aware that OIRA holds the fate of their rules in its hands,



**Ironically, for an executive order designed to enhance the transparency and accountability of OIRA's review process, EO 12,866 seems to have encouraged OIRA to push its activities even further into the shadows to escape the order's requirements.**

are more than willing to keep OIRA in the loop. But it would be a mistake to read such cooperation, however cordial, as anything more than reluctant self-preservation. After all, a survey of top political appointees at EPA suggested that OIRA's feedback was fixated on reducing regulatory costs, often at the expense of the agency's substantive positions.<sup>100</sup> One respondent remarked that even when OIRA was helping to fend off attacks from other White House offices, "dealing with [OIRA] was excruciating,"<sup>101</sup> with another explaining that the White House Competitiveness Council "was much more sympathetic to what we wanted to do [than OIRA]."<sup>102</sup>

These informal reviews, conducted through phone calls and meetings between OIRA and agency staff, are said to be very effective at changing the agency's regulatory plans, according to EPA and DOT officials.<sup>103</sup> But the public has virtually no way of knowing what happens during these reviews, or even how long they last. OIRA has chosen to narrowly interpret the disclosure requirements of EO 12,866 so that the changes OIRA makes during informal review do not have to be identified for the public.<sup>104</sup> Both defenders and critics of OIRA's informal reviews point out that the resulting changes are not subject to the transparency requirements triggered by formal review.<sup>105</sup> What is especially puzzling about this distinction is that it assumes that OIRA and the agencies *do* in fact disclose the changes made during formal review, when nothing could be further from the truth. As we explore further below, OIRA seemingly never complies with its obligation to disclose the before-and-after documents connected with its formal reviews, and the agencies comply with their respective disclosure requirements only sporadically and in ways that often confound public scrutiny.

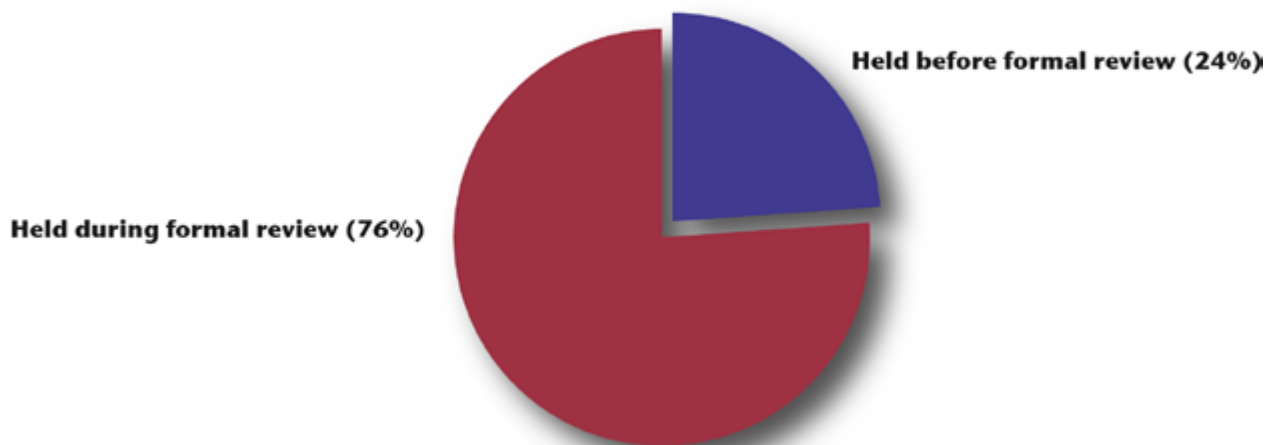
*In any event, the changes made during informal review simply become part of the agency's original submission to OIRA, which can then pass quickly through OIRA's formal review—sometimes a mere formality by this point, since OIRA's work may already be done—and the result shows none of OIRA's fingerprints.<sup>106</sup> Needless to say, OIRA pays no mind to the 90-day deadline when conducting informal reviews, allowing its involvement to stretch much longer and thus delay the release of crucial regulations, as observed in a few closely watched cases.<sup>107</sup>*

Ironically, for an executive order designed to enhance the transparency and accountability of OIRA's review process, EO 12,866 seems to have encouraged OIRA to push its activities even further into the shadows to escape the order's requirements. Somewhat inconsistently, though, OIRA *does* abide by the provisions requiring disclosure of its meetings with outside parties during informal reviews (deciding for itself which parts of the executive order are important enough to comply with).<sup>108</sup> These stakeholder meetings held before the formal review period are some of the only traces left behind by the informal review process. In many ways, they represent the earliest point in time that OIRA was provably involved in an agency's rulemaking. In this part of the study, we examine these meetings for what they reveal not only about the nature of interest-group participation, but also about the way that OIRA uses informal reviews to circumvent EO 12,866.

### Results

Of the 1,057 meetings that could be linked to a formal review period, 251 of them (24 percent) were held prior to the formal review—in other words, during OIRA’s *informal* review—as shown in Figure 10. The proportion of informal-review meetings was much greater under the Bush II Administration (34 percent) than it has been under the Obama Administration (10 percent), although the practice clearly continues to a significant extent.

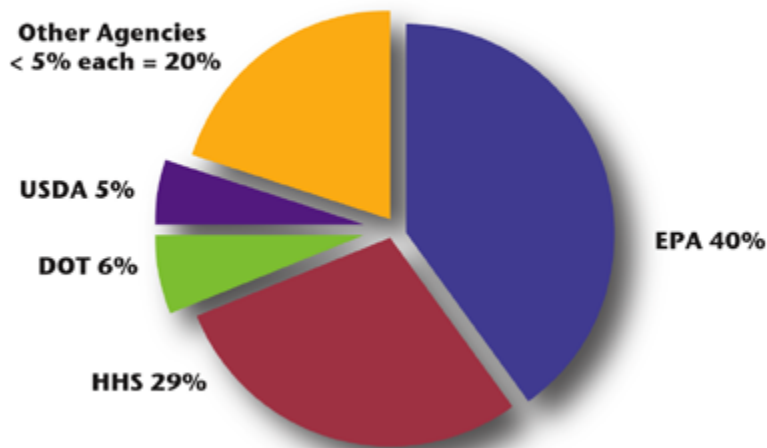
### Percentage of OIRA Meetings Held Before or During the Formal Review Period



**Figure 10**

The agency most often subjected to these premature meetings is EPA, with HHS coming in second. Of the 251 meetings held before the formal review period, 101 (40 percent) concerned EPA rules and 72 (29 percent) concerned HHS rules, as shown in Figure 11. As one might predict, the agencies responsible for protecting the environment and the public health—the favorite targets of regulated industries—*disproportionately* bear the brunt of OIRA’s informal-review meetings (recall from Figure 6 above that EPA rules and HHS rules constitute only 11 and 16 percent of all rules submitted to OIRA, respectively).

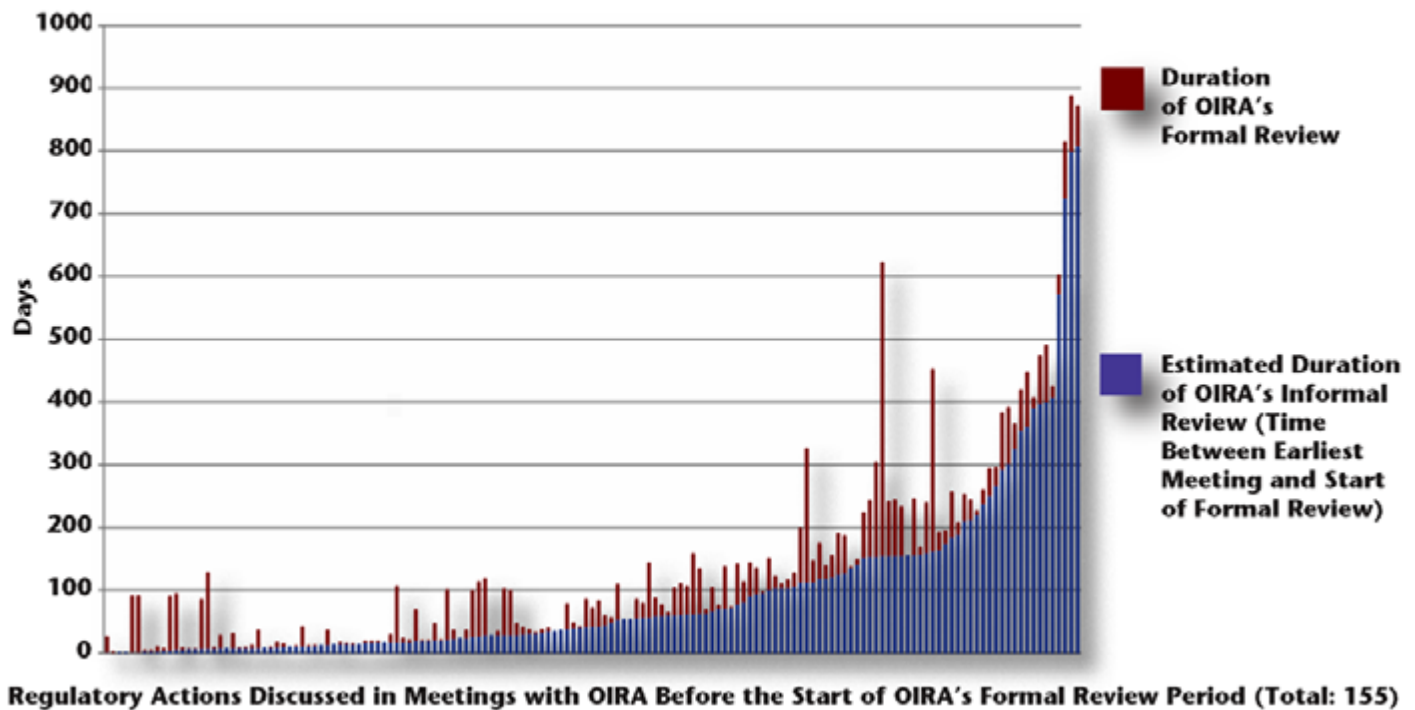
### OIRA Meetings Held Before Formal Review Period (by Agency)



**Figure 11**

For each rule that was the subject of a meeting prior to formal review, we identified the earliest such meeting and calculated the time between that first meeting and the beginning of the formal review period—a rough proxy for the length of OIRA’s informal review. This time-span is a reasonable estimate, given how little information is disclosed about the informal-review period. In reality, however, OIRA may become involved in agency rules well before these initial meetings, and no one knows whether these informal reviews ever “end” at some point before the start of the formal-review period. Nevertheless, we take OIRA at its word when it insists on the continuous nature of its informal communications (in an effort to show how impractical it would be to disclose them)<sup>109</sup> and so we assume that, once started, OIRA’s informal involvement continues until the beginning of its formal review. Figure 12 below juxtaposes the durations of the informal and formal review periods for each rule discussed in one of these early meetings.

## Estimating the Durations of OIRA's Informal Reviews and Comparing Them to the Durations of Its Formal Reviews



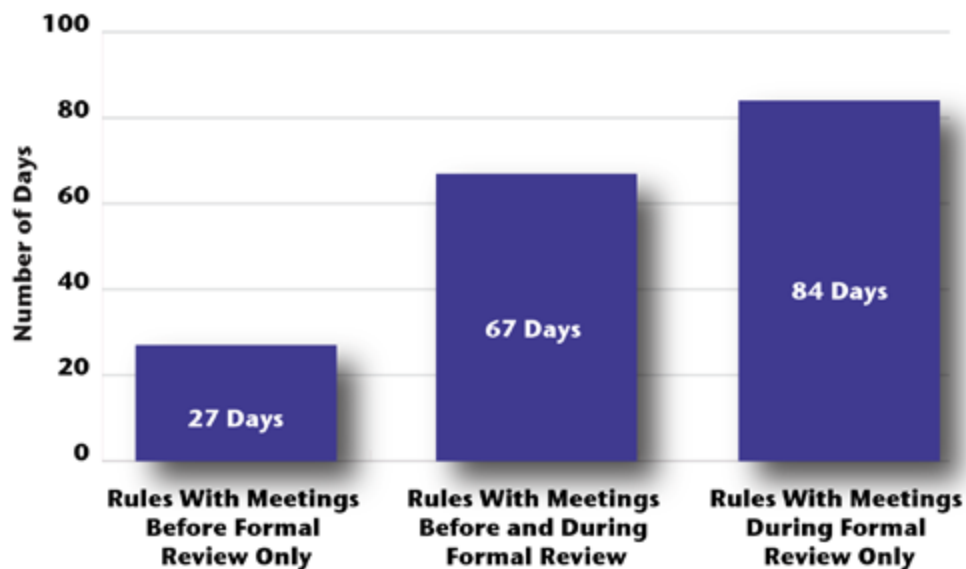
**Figure 12**

A total of 155 regulatory actions are displayed in the chart (three others were the subject of meetings during informal review as well, but their formal review periods have not ended yet, so a comparison would not be possible). The average estimated length of informal review was 95 days. As the chart illustrates, many of these informal reviews were significantly longer in duration than the formal reviews that followed. In many cases, the length of formal review is represented by a barely visible red “cap” of just a few days, on top of a long blue timeline of informal review (sometimes lasting hundreds of days, even more than a year on some occasions). In 16 cases, the formal review period lasted *zero* days—that is, it ended the same day it began. In another 15, the formal review period lasted just *one* day. Coming after extensive informal reviews, these perfunctory formal reviews suggest that OIRA had already made its desired changes and was simply “rubber-stamping a pre-negotiated outcome.”<sup>110</sup>

Figure 13 further indicates that when OIRA engages actively in informal review, the period of formal review is shortened. When OIRA meets with stakeholders exclusively during informal review (about one-fifth of the time), the average length of formal review (27 days) is one-third of what it is when OIRA seems to have waited until the formal review period to get

involved (84 days). In other words, the use of informal review appears to obviate the need for a typically extensive formal review, suggesting that both reviews fulfill the same function. OIRA apparently uses informal review not as an additional tool, but rather as a more convenient *substitute* for formal review—one that allows it to exert an even earlier influence over agency rules while keeping its suggestions off the record and evading the disclosure requirements of EO 12,866.

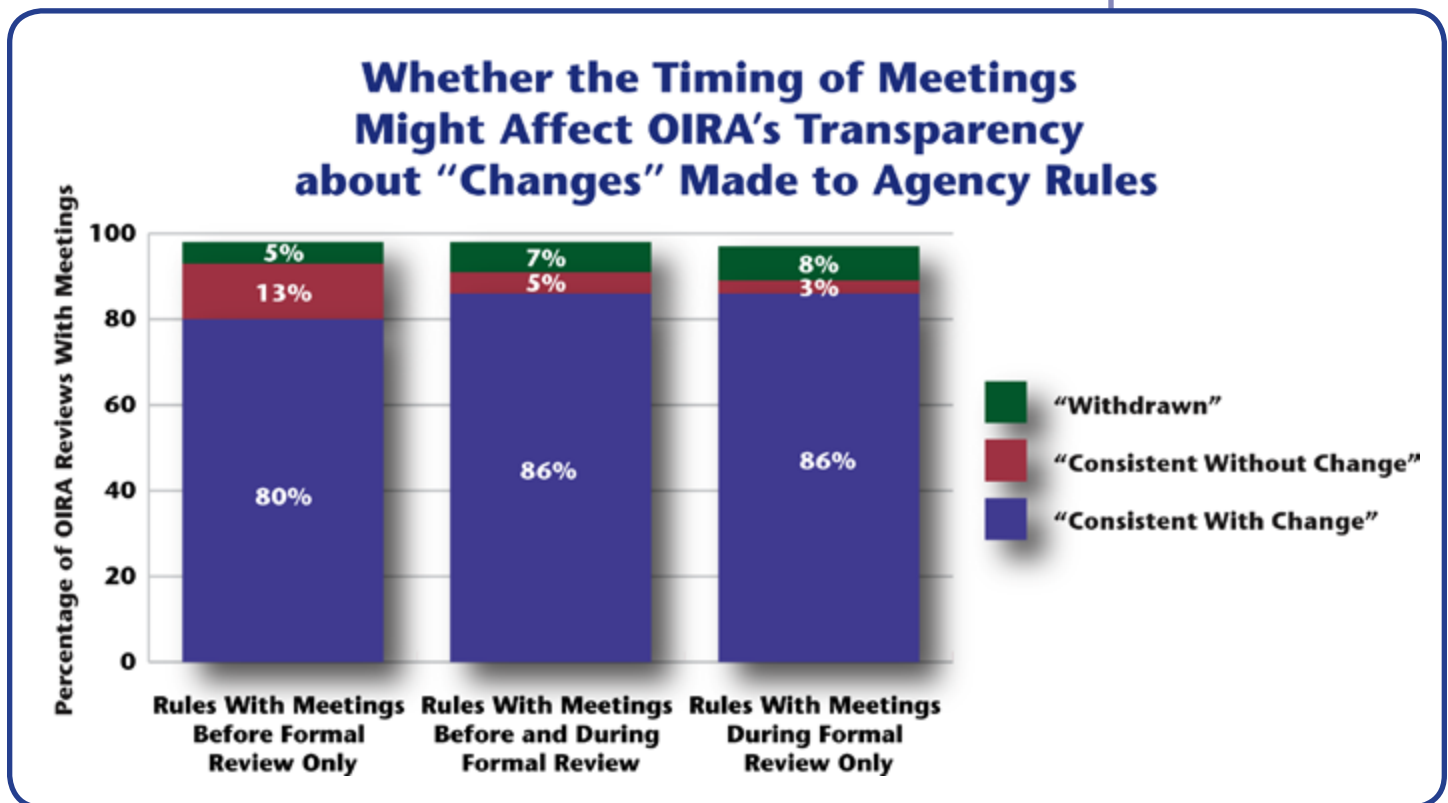
### Average Duration of Formal Reviews, with Respect to Timing of Meetings



**Figure 13**

Indeed, we found some evidence that a larger proportion of rules pass through formal review supposedly “without change” in cases where OIRA may have already accomplished most of its changes during informal review. OIRA discloses the general outcome of each formal review that it conducts. The two most common outcomes are “consistent with change” and “consistent without change” (“consistent” meaning that the final document complies with the principles of EO 12,866).<sup>111</sup> The label “consistent with change” is not very revealing since it does not specify whether the changes made during review were trivial or significant—but given OIRA’s scant disclosures, it is the best indication we have that OIRA altered an agency’s rule. The third most common outcome is “withdrawn,” indicating that the agency withdrew its draft rule from OIRA’s review process. In some cases, however, the circumstances suggest that OIRA may have pressured the agency into “withdrawing” a rule that OIRA disliked, so that OIRA could avoid officially “returning” the rule and thus having to spell out its objections for all to see in a Return Letter.<sup>112</sup>

As Figure 14 shows, if all the meetings about a given rule occurred during *informal* review (before formal review), the rule was over four times more likely to be passed through formal review “without change” than if all the meetings occurred during *formal* review (13 percent compared to 3 percent, respectively). The chart suggests that as the meetings increasingly occur during formal review, these “unchanged” rules start to dwindle, being replaced by more “changed” and “withdrawn” outcomes.



**Figure 14**

Although we cannot know for sure how to explain these statistics, we can supply a reasonable hypothesis. Meetings held before the formal-review period indicate that OIRA was actively involved in informal review and presumably making many of its changes then, so that by the time of formal review, it could simply approve the agency’s submission “without change”—that is, without *further* change. On the other hand, when OIRA’s involvement was concentrated in the formal-review period, and OIRA suddenly encountered agency rules that were developed largely without its input, it was more likely to officially demand changes at that time (hence the greater proportion of “changed” rules: 86 percent instead of 80 percent). Also, OIRA’s first impression of disapproval may trigger the agency to withdraw the rule (hence the slightly greater proportion of “withdrawn” rules: 8 percent instead of 5 percent).

Of course, we should not overlook the fact that at least 80 percent of these rules were “changed” during formal review in all three scenarios. Further studies might try to determine the significance of these changes, to investigate whether those made after a long period of informal review tend to be more trivial than others (*i.e.*, polishing changes).

Also, the significant percentage of “withdrawals,” especially where there seems to have been little involvement by OIRA prior to formal review (8 percent of rules were withdrawn), raises the suspicion that they are indeed being used as a less-transparent way for OIRA to “return” rules that it finds unacceptable. Recall that OIRA uses the threat of a “returned” rule as an incentive for agencies to cooperate with informal reviews, and then consider the fact that among the reviews we examined (those marked by meetings with outside parties) OIRA used its formal “return” mechanism only four times in ten years, while 36 reviews ended in “withdrawals.” Indeed, the U.S. General Accounting Office (GAO) found in 2003 that several withdrawals were at OIRA’s request or by “mutual decision” by OIRA and the agency.<sup>113</sup> The circumstances surrounding such withdrawals merit further study.

As for the kinds of interest groups that lobby OIRA during informal review, industry groups dominate the field once again, to an even greater extent than during formal review (see Figure 15 below). In meetings held during formal review, industry representatives outnumber public interest representatives by about 4 to 1. But during informal review, the ratio is nearly 10 to 1—an imbalance more than twice as severe. The more that OIRA pushes its process away from well-demarcated formal reviews and toward nebulous informal reviews, the more that public interest groups are left in the dust, most likely because they cannot afford to devote their attention or resources to modes of participation that are so speculative and premature.

*Taken all together, these data suggest that OIRA’s use of informal reviews is a way of gaming the system to avoid accountability for its role in agency rulemaking, a twisting of EO 12,866 that reduces the main event—formal review, with its various safeguards and restrictions—to a vestigial afterthought. And by maintaining its meeting policy during informal review, OIRA gives regulated industries an even earlier opportunity to disparage the agencies’ barely formed rules, with almost no balance from other viewpoints. Ironically, any public interest groups that join the process at the scheduled time (formal review) are likely to find that they arrived too late.*



### Percentage of OIRA Meeting Attendees Representing Industry and Public Interest, with Respect to Timing of the Meetings

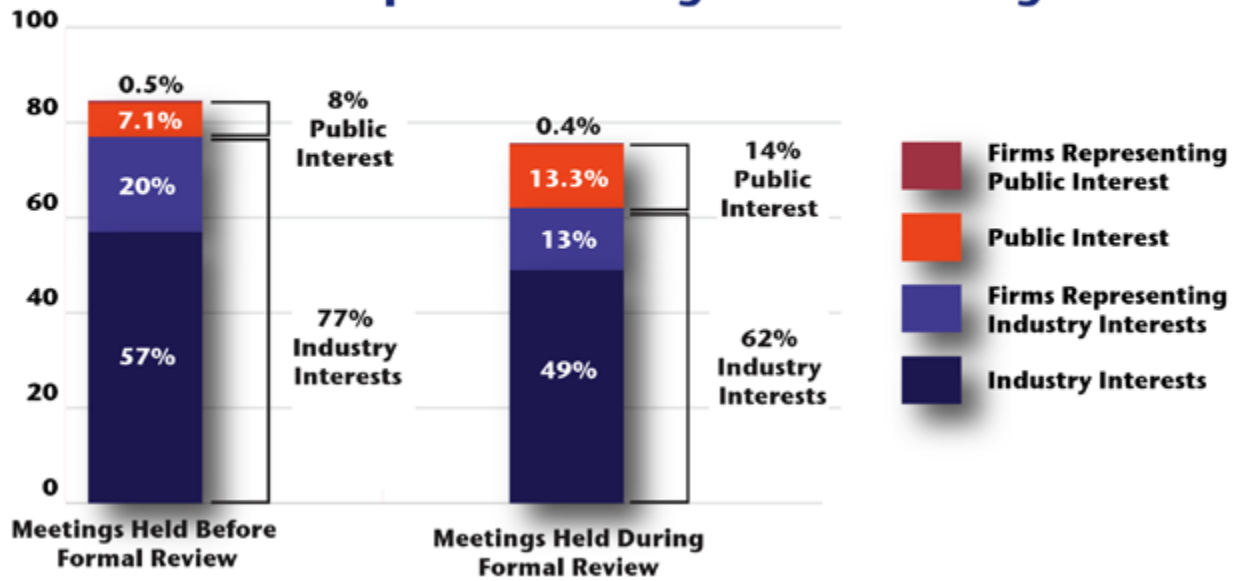


Figure 15



**These delays are particularly troubling and wasteful when they occur at the pre-proposal stage, in light of the additional delays still to come after the agency is permitted to publish its proposed rule.**

## **Why: The Purpose and Impact of OIRA Meetings**

### **Delaying the Publication of Agency Rules**

#### ***Background: The Problem of Rulemaking Delay***

From the beginning, OIRA's review process led to substantial delays in getting rules published in the *Federal Register*, sometimes holding up significant regulatory initiatives for years.<sup>114</sup> In 1993, EO 12,866 introduced a deadline of 90 days, allowing for a one-time extension of 30 days (with the approval of OIRA's director *and* at the request of the agency head),<sup>115</sup> and in most cases OIRA completes its work within the allotted time. But in a number of very noteworthy rulemakings, OIRA's reviews extend well beyond the maximum of 120 days. For example, OIRA's review of EPA's proposed coal-ash regulation lasted over six months, and EPA's proposal to list five dangerous chemicals under the Toxic Substances Control Act (TSCA) has been languishing in review ever since May 2010 (over 15 months, as of this writing).

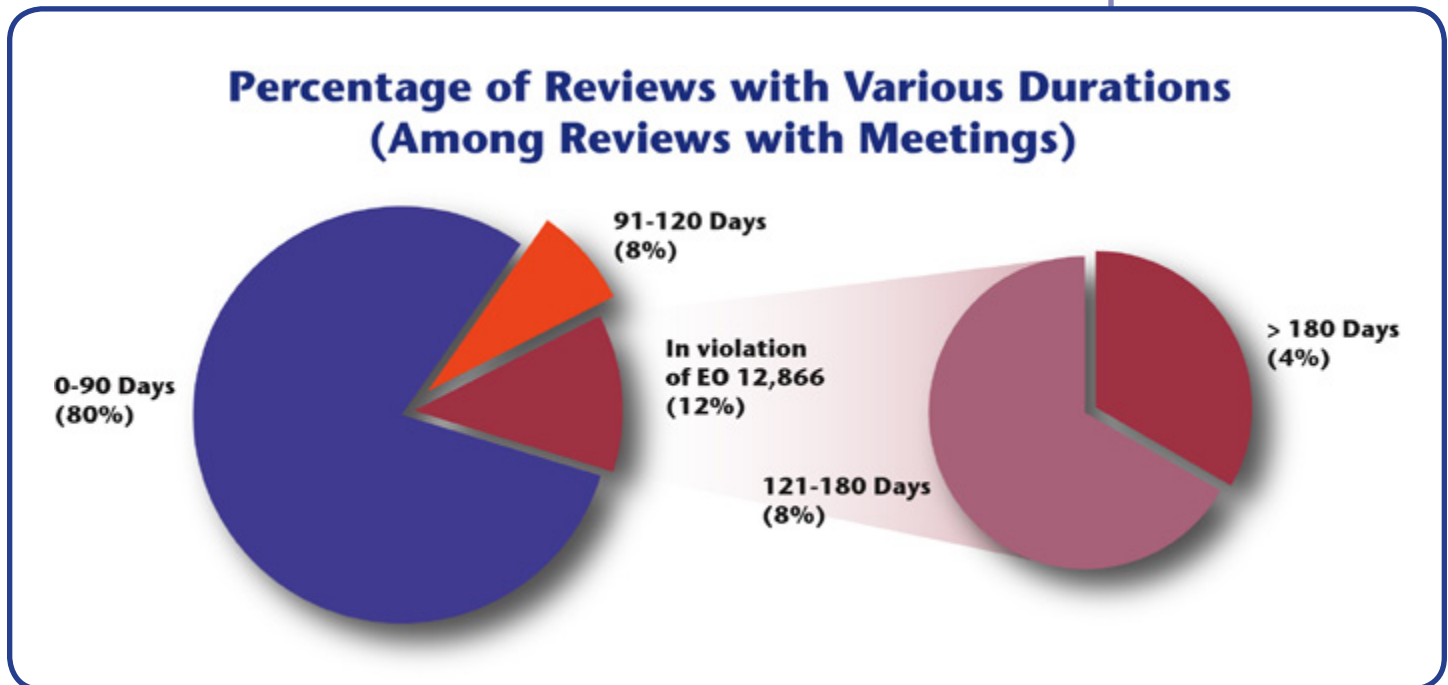
These delays are particularly troubling and wasteful when they occur at the pre-proposal stage, in light of the additional delays still to come after the agency is permitted to publish its proposed rule. For example, in the coal-ash rulemaking, after OIRA held onto EPA's proposal for six months, EPA was finally able to open its public comment period, which normally lasts 90 days but was extended by another 60 days to accommodate the flood of comments (many of which, incidentally, covered the same arguments presented to OIRA over the prior six months).<sup>116</sup> With 450,000 comments to sift through, EPA predicted it would take a year or more to issue a final rule.<sup>117</sup> As time ticks away, communities living near coal-ash dumps continue to suffer from poisonous groundwater, blowing piles of dry ash, and enormous ash ponds that threaten to spill.<sup>118</sup>

*Indeed, these delays are not merely frustrating or inconvenient; they permit ongoing hazards to go unabated (pollution, dangerous work conditions, food contamination) on a daily basis. Consider this current example: in early August 2011, while child labor rules proposed by the Department of Labor gathered dust on OIRA's desk for their ninth month, two 17-year-old boys had their legs severed by a large grain auger while on the job.<sup>119</sup> The rules, which classify certain farm work as too dangerous for minors, may have prevented such an accident if they had not been inexplicably stalled in review for so long.<sup>120</sup>*

In this part of the study, we investigate the relationship between meetings with OIRA and the length of OIRA's review—specifically, whether stakeholder participation tends to prolong OIRA's review period and exacerbate delays.

### Results

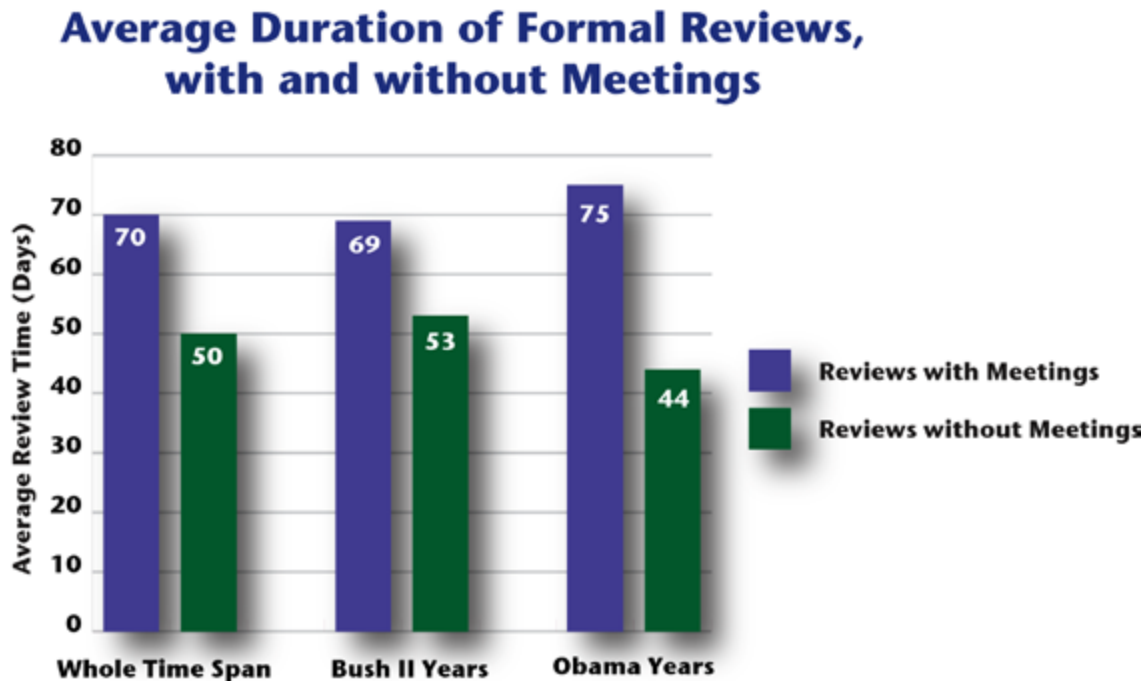
Of the 501 completed reviews that we examined (those in which OIRA met with outside parties), 59 reviews (12 percent) lasted longer than 120 days and were thus in violation of EO 12,866, as shown in Figure 16. Within these, 22 reviews extended beyond 180 days (about six months).



**Figure 16**

Of the 99 completed reviews that were longer than 90 days (and thus would require the 30-day extension under the executive order), 36 of them were not marked as “Review Extended” in OIRA’s online historical reports.<sup>121</sup> While this may indicate a simple omission on the website, it may also suggest that the 90-day deadline was permitted to lapse about one-third of the time, without OIRA going through the official procedure of obtaining the extension. Already it seems likely that OIRA extends these reviews without the consent of the agency head, in violation of EO 12,866. For example, we are unaware that EPA Administrator Lisa Jackson ever agreed to OIRA’s extended review of EPA’s coal-ash proposal.

As for any correlation between meetings and the length of review, Figure 17 suggests that reviews with meetings last, on average, 20 days longer than reviews without meetings. This disparity is twice as large under the Obama Administration (31 days longer) than it was under the Bush II Administration (16 days longer).



**Figure 17**

#### ***The Relationship between Meetings and Lengthy Reviews***

Whether this pattern is evidence of a cause-and-effect relationship between meetings and longer review periods is unclear. On one hand, meetings and longer durations may be reflections of a common underlying factor. For example, rules that are particularly controversial may be more likely to generate meetings among interested parties, and they may also take OIRA longer to evaluate because of the issues involved.

On the other hand, meetings may actually lengthen the review process. The need to schedule meetings with a large number of groups, in addition to the time and attention spent on the arguments of attendees instead of on the review itself, may unnecessarily prolong OIRA's review. Such delays might be especially likely when an entire industry launches an extensive campaign of participation, drawing on all its member companies and associations to hammer the same points in a succession of meetings (*e.g.*, 33 meetings attended by 88 industry representatives during the coal-ash review that lasted 200 days; 17 meetings attended by 67 industry representatives during the review of a rule on obtaining mortgages that lasted 97 days).<sup>122</sup> The association between meetings and longer reviews only encourages industry groups to act strategically by overwhelming the meeting process. Even if a regulation is sure to be issued at some point, large businesses can save an enormous amount of money in compliance costs just by delaying it for a few weeks or months.

Then again, quantity isn't everything: even a small handful of meetings with influential industry groups may be enough to alert OIRA to the high political stakes involved, and OIRA may simply stall the review in order to protect industry interests for as long as possible. For example, the FDA's final rule on cattle feed standards (to prevent the spread of mad cow disease) provoked only two meetings, attended by 14 individuals representing the "Who's Who" of the feed and rendering industries.<sup>123</sup> Yet OIRA still sat on the rule for 172 days. What ultimately jogged OIRA into action was a decision by South Korea to lift trade restrictions on U.S. beef if the U.S. would adopt cattle feed restrictions—the very ones that had been growing moldy at OIRA for nearly six months.<sup>124</sup> Two days after the trade announcement, OIRA suddenly wrapped up its review, thereby confirming that there had been no legitimate reason for the delay in the first place.<sup>125</sup> The only thing preventing OIRA from completing its review on time was its desire to appease powerful agribusiness companies that strongly objected to the rule under review.

## Changing the Substance of Agency Rules

### ***Background: Inadequate Documentation of Changes Made During Review***

Above, we concluded that OIRA uses informal reviews in part to make changes to agency rules without having to comply with EO 12,866's disclosure requirements. But even when OIRA waits until the formal review period to meddle with the agency's submission, it continues to shirk its transparency obligations and instead shifts all responsibility for making disclosures to the agencies themselves.

EO 12,866 assigns separate disclosure requirements to OIRA and the agencies. OIRA, for its part, is required to "make available to the public all documents exchanged between OIRA and the agency during the review by OIRA" after the rule is published in the *Federal Register* or the agency decides not to issue it.<sup>126</sup> At a minimum, these documents would include the agency's original draft as it was submitted and OIRA's final version returned to the agency (typically a "redlined" document showing OIRA's revisions), if not additional notes and suggestions passed between them.

***But OIRA does not disclose these before-and-after documents anywhere on its website. OIRA insists that the requirement applies only to "exchanges made between OIRA staff at the branch chief level and above, not documents exchanged between OIRA desk officers and staff in regulatory agencies."<sup>127</sup> Because review documents are virtually always exchanged between agency staff and OIRA desk officers<sup>128</sup> (perhaps by design), this self-serving interpretation seems to alleviate OIRA of its responsibility.***

The agency issuing the rule is required to identify the “substantive changes” between its pre-review draft and its final action “in a complete, clear, and simple manner,” specifying those changes “that were made at the suggestion or recommendation of OIRA.”<sup>129</sup> Without any government-wide guidance on what exactly to disclose, or monitoring of agency compliance, the transparency of agency disclosures has been wildly inconsistent.<sup>130</sup> Agencies often fail to identify changes, or specify whether any of them were attributable to OIRA, even upon personal request (on one occasion in 2002, a Department of Labor representative insisted that it would be illegal to disclose such information).<sup>131</sup> At the same time, some agencies (especially EPA) often go above and beyond their duties by disclosing before-and-after documents and other exchanges with OIRA.<sup>132</sup> The GAO found that it was actually harder to find the relevant documentation in 2009 than in 2003 due to the difficulty of searching the online “Federal Docket Management System” ([www.regulations.gov](http://www.regulations.gov)).<sup>133</sup> Rules typically do not even indicate whether any such documents are available in the docket, and the documents themselves are labeled and filed (by hired contractors) in non-uniform ways.<sup>134</sup>

In short, the reality of these disclosures is anything but “complete, clear, and simple.” As for now, the only readily available indications of OIRA’s changes are the terse labels that OIRA uses to describe its “completed action” for each review:

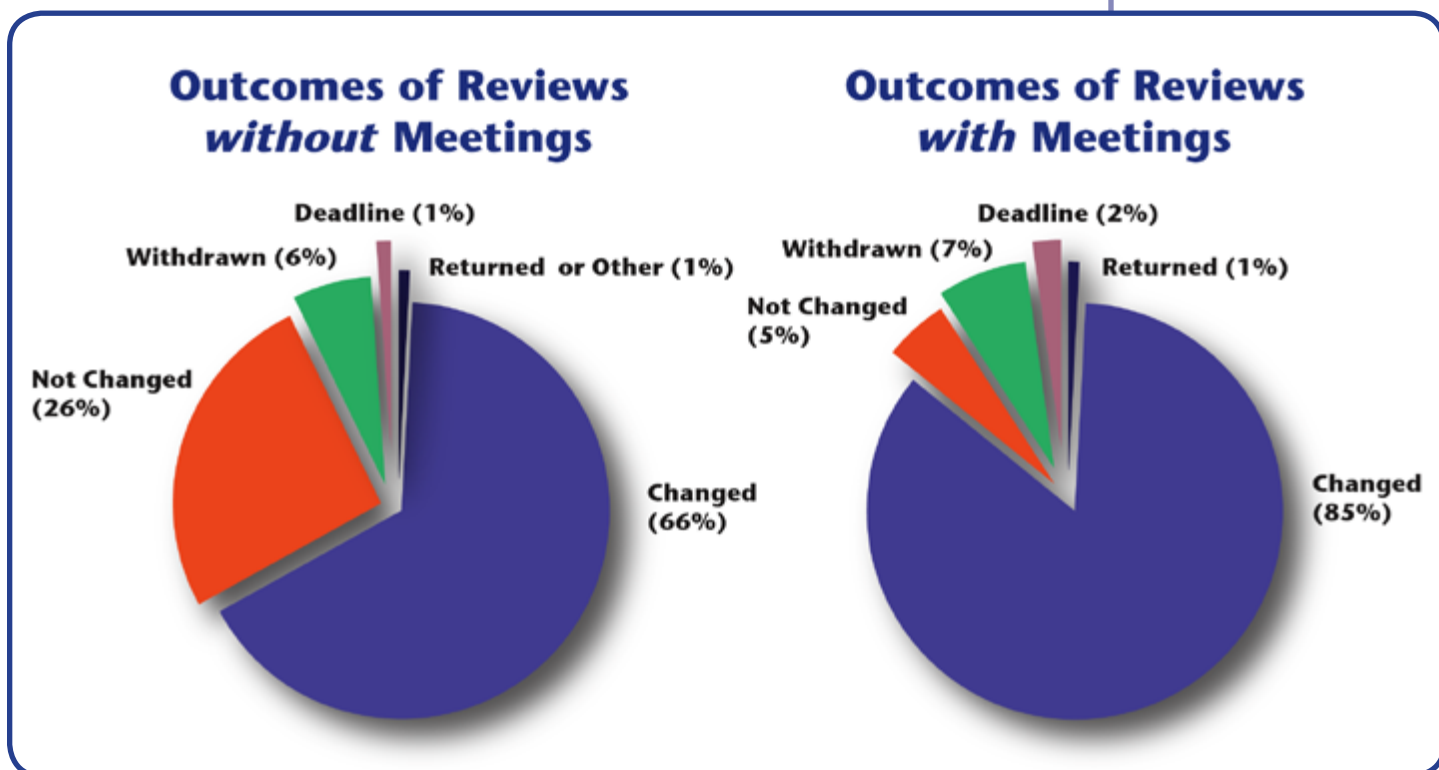
- **“Consistent with change”** where “consistent” means that the final document is consistent with the principles of EO 12,866
- **“Consistent without change”**
- **“Withdrawn”** by the agency
- **“Returned for reconsideration”** by OIRA
- A **“statutory or judicial deadline”** by which the rule was required to be issued, thus cutting short OIRA’s review
- Other outcomes that occur only rarely: **“sent improperly”** and **“emergency”**<sup>135</sup>

Admittedly, these labels are a crude instrument for measuring the extent of OIRA’s changes. Whether OIRA makes minor alterations to a rule’s punctuation or drastically rewrites its central provisions, the label is the same: “consistent with change.”<sup>136</sup> The label also gives no indication of the *direction* of any changes made, whether the rule was weakened or strengthened. Even worse, OIRA claims that the “changes” may have been made entirely on the issuing agency’s initiative while the rule was under review.<sup>137</sup> We would much prefer to evaluate OIRA’s influence in a more fine-grained, qualitative way, but the dearth of other sources of information leaves us to work with these labels as best we can.

In this part of the study, we examine any correlations between rules discussed in meetings with OIRA and rules that are “changed” during OIRA’s review, to estimate (very roughly) whether stakeholders are successful at obtaining their desired changes from participating in the process.

### Results

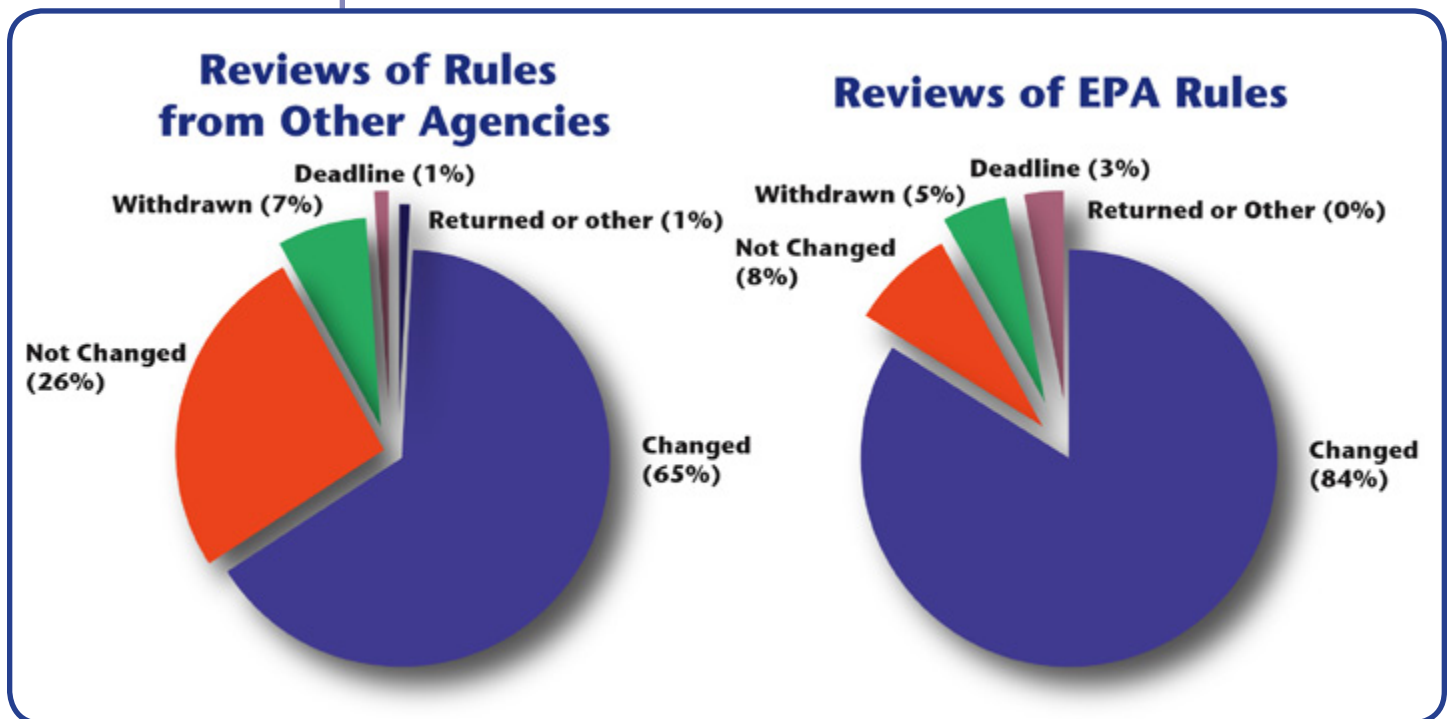
Over the entire time period studied (October 16, 2001 to June 1, 2011), reviews in which OIRA met with outside parties were 29-percent more likely to be “changed” than those with no meetings (85 percent divided by 66 percent, see Figure 18). During the Bush II years, reviews with meetings were 35-percent more likely to be changed than those without (85 percent divided by 63 percent). During the Obama years, the difference has been much less severe: reviews with meetings have been only 8-percent more likely to be changed (82 percent divided by 76 percent). Thus, among reviews with meetings, the proportion of “changed” rules has stayed remarkably consistent across both Administrations (85 percent under Bush, 82 percent under Obama). What has changed is that under Obama, OIRA has been changing more rules even without meetings (76 percent, compared to 63 percent under Bush), thus narrowing the gap.



**Figure 18**

In Steven Croley’s study of OIRA meetings in the Clinton era, he found that EPA rules were particularly likely to be “changed,” as compared to rules from other agencies, even if they were not the subject of meetings with OIRA.<sup>138</sup> Indeed, Figure 19 below demonstrates that among *all* OIRA’s reviews (those with meetings and those without), a greater proportion of EPA rules were changed (84 percent) than those of other agencies (65 percent). This pattern is further evidence that OIRA disproportionately targets EPA.

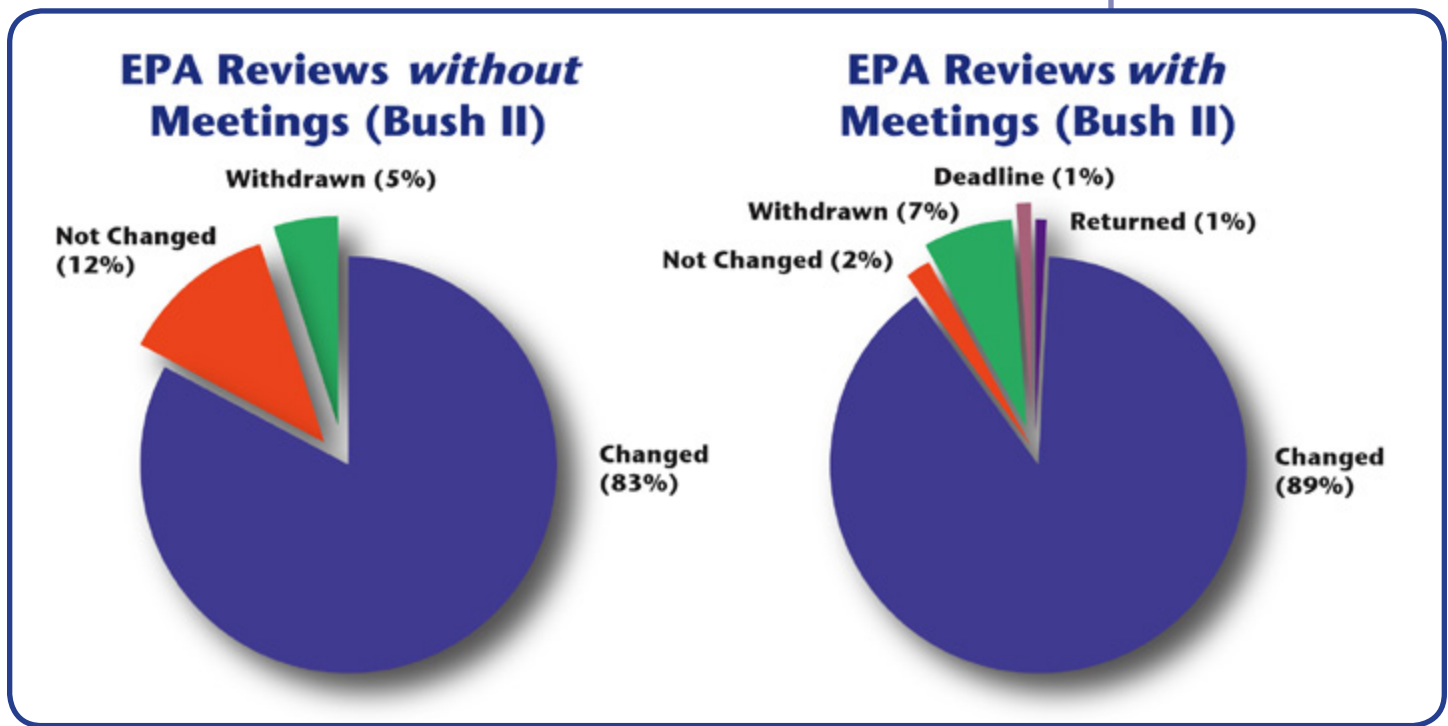




**Figure 19**

At first glance, the occurrence of meetings appears not to make a difference in OIRA's treatment of EPA rules. EPA rules that were the subject of meetings were changed 85-percent of the time, while EPA rules that were *not* discussed in meetings were changed 83-percent of the time (results not shown here)—hardly a significant difference. But when each Administration is examined separately, a different pattern emerges.

Under Bush II, OIRA's meetings with outside parties did in fact seem to result in more frequent changes to EPA rules (see Figure 20). Rules were 7-percent more likely to be "changed" when meetings occurred (89 percent divided by 83 percent) and were one-sixth as likely to pass through review "without change" (2 percent compared to 12 percent).



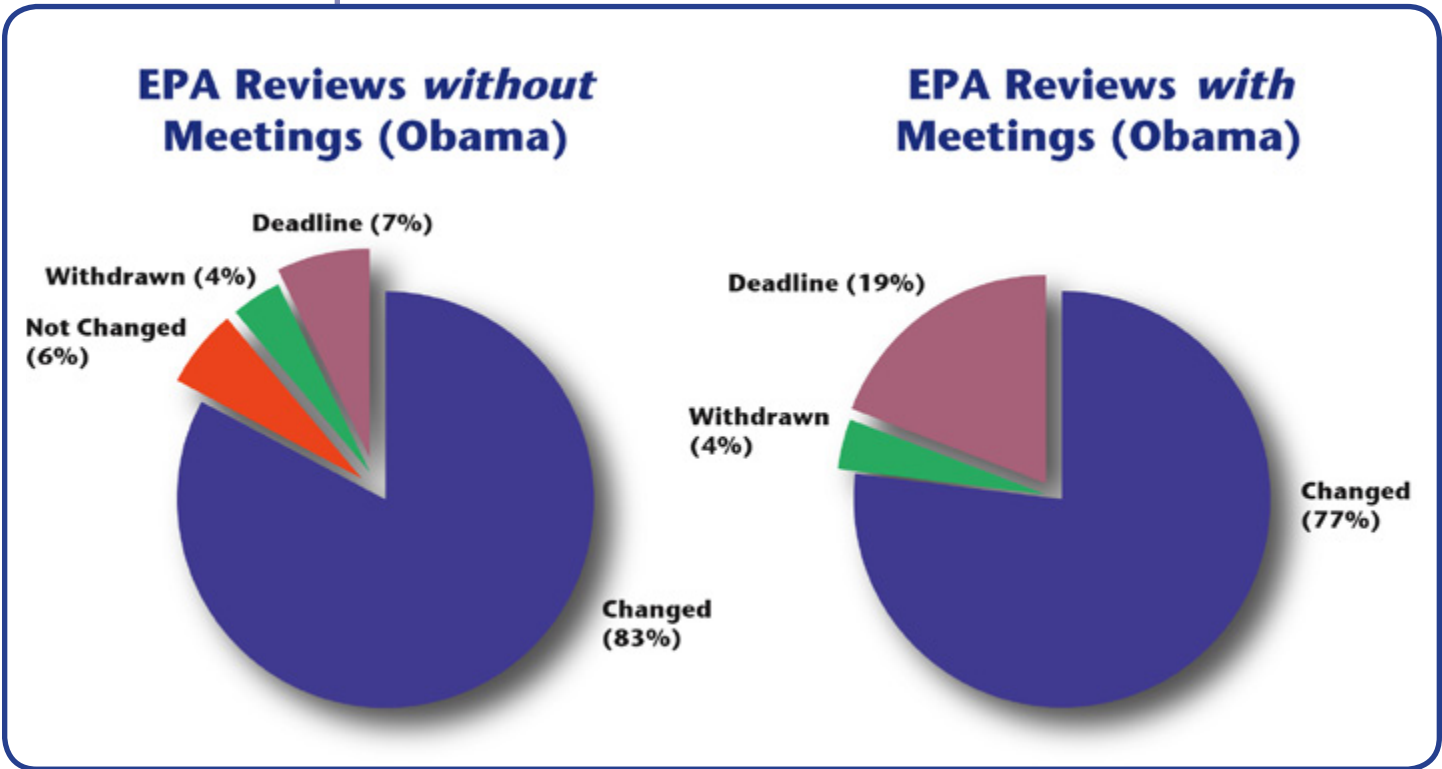
**Figure 20**

Under Obama, OIRA strangely appears less likely to change EPA rules when it meets with outside parties (see Figure 21). But some of the data demand a closer look. First, it is somewhat remarkable that among reviews with meetings, none of the rules passed through “without change.” Second, the results show a surprising number of “deadline” outcomes (19 percent of reviews with meetings) when OIRA met with outside parties, something that was exceedingly rare under Bush. When OIRA’s review is cut short by statutory or judicial “deadline,” the label gives no indication of whether any changes were made during the truncated review. Indeed, it is essentially useless as an indication of what happened during review.

So, we identified the ten EPA rules comprising the 19-percent “deadline” outcomes and searched through the online rulemaking docket for evidence of OIRA’s changes. For nine of them, EPA had posted redlined documents showing OIRA’s revisions, and in most cases, email correspondence between OIRA and EPA implying that changes were made. In seven of these, OIRA had made what seem like extensive changes to the rule—typically both the preamble and the text of the regulation itself.<sup>139</sup> In the other two, OIRA appears to have changed, at the least, the impact assessments that accompany the agency’s rule.<sup>140</sup> Without a clear summary of the changes made, we could not ascertain how substantive or significant these changes were. But given that OIRA uses the label “consistent with change” when even clerical corrections were made, we find it misleading that so many of these rules were simply labeled “deadline.”



If we were to consider these nine “deadline” rules to be “changed,” then EPA rules that are the subject of meetings would have been changed *94 percent* of the time instead of 77 percent. Coincidentally, that is the same exact percentage that Croley found in his Clinton-era study, for EPA rules discussed at meetings with OIRA.<sup>141</sup> With this new figure, it would appear that meetings *do* in fact correspond with the likelihood that OIRA will change EPA rules under Obama, although it is difficult to estimate by what percentage, since we do not know how many “deadline” outcomes among reviews *without* meetings are also hiding OIRA’s changes.

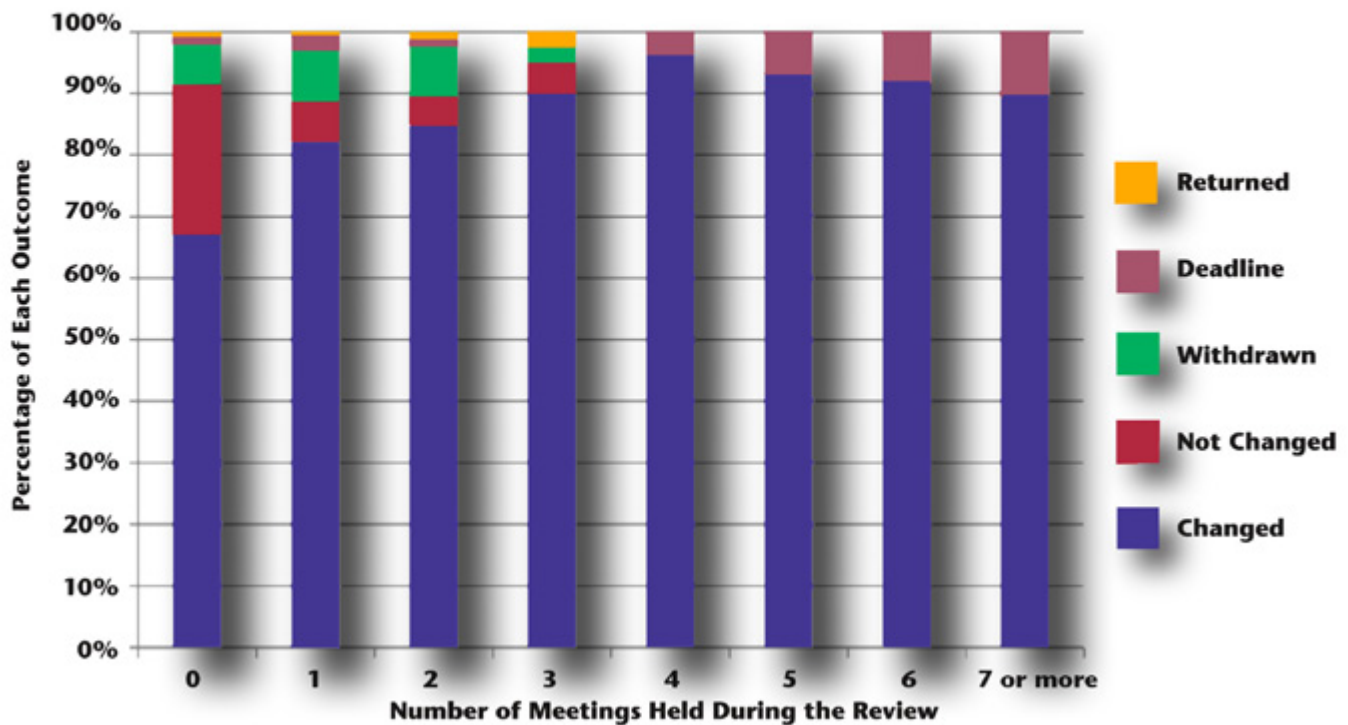


**Figure 21**

In any case, rules from agencies other than EPA are much more sensitive to the effects of meetings, to a greater extent under Bush than under Obama (results not shown here). In the Bush years, when a non-EPA rule became the subject of a meeting, the likelihood that OIRA would change the rule increased by 38 percent (84 percent divided by 61 percent). In the Obama years, the likelihood that OIRA would change the rule increased by only 13 percent (85 percent divided by 75 percent), although the agencies were also 50 percent more likely to withdraw the rule from review when meetings were held (12 percent divided by 8 percent).

Returning to the set of all reviews (from all agencies and under both Administrations), we find that the percentage of rules that are changed increases along with the number of meetings held, as shown in Figure 22. Technically, the percentage of “changed” rules reaches a peak of 96 percent at four meetings (from a low of 67 percent at zero meetings). However, after three meetings, the handful of rules that are not “changed” are listed as “deadline” outcomes, so it is quite likely that virtually *all* reviews with four or more meetings are in fact changed.

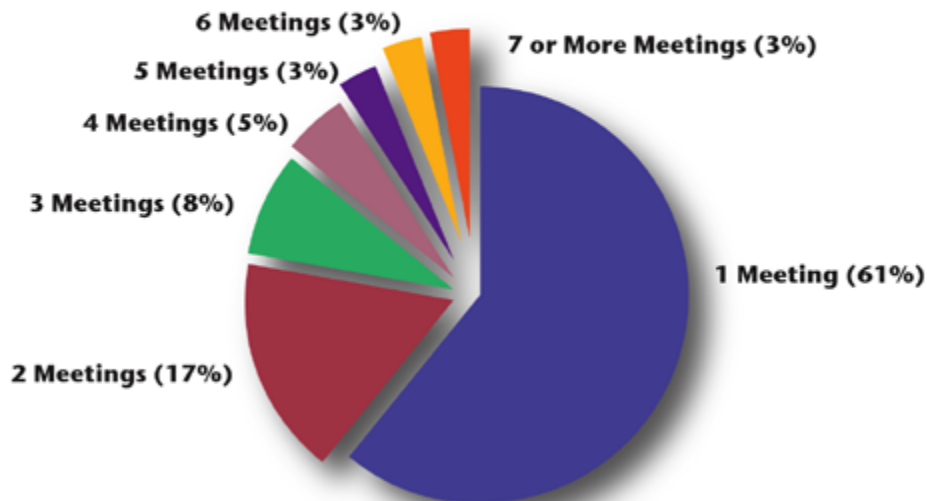
### Relationship between the Number of Meetings and the Outcome of Review



**Figure 22**

This dynamic should only encourage groups of stakeholders to arrange several meetings with OIRA, if they have the resources or wisdom to do so. Among reviews with meetings, 39 percent were marked by more than one meeting (see Figure 23). At the same time, even one meeting with OIRA increases the likelihood that the rule will be changed by 15 percentage points (67 percent to 82 percent, as shown in Figure 22 above), with further meetings bringing diminishing returns. So overall, scheduling just one meeting with OIRA is not an unwise strategy.

### Percentage of Reviews with Various Numbers of Meetings (Among Reviews with Meetings)



**Figure 23**

#### ***OIRA as a One-Way Ratchet That Only Weakens Agency Rules***

While OIRA's vague disclosures give us no indication of *how* it changes any of these rules, a number of studies suggest that OIRA almost exclusively weakens agency rules. A survey of top political appointees at EPA under Bush I and Clinton suggested that OIRA *never or rarely* made changes that would enhance protection of human health or the environment, and *often or always* made regulations less burdensome for regulated entities.<sup>142</sup>

In another study, the GAO identified 25 rules that were “significantly changed” by OIRA between June 2001 and July 2002.<sup>143</sup> CPR Member Scholar David Driesen then examined these changes and concluded that for *24 of the 25 rules*, OIRA's suggested changes “would weaken environmental, health, or safety protection” (in the remaining rule, the change had no impact on safety, one way or another).<sup>144</sup> OIRA met with outside parties about only 11 of these 25 rules, so obviously many of the changes were coming from OIRA itself.<sup>145</sup> Indeed, as our data suggest, even though OIRA is *more* likely to change rules when it meets with outside parties, it still changes rules at an alarming rate (65 to 83 percent) even without meetings. Its institutional role (serving as a “check” on “excessive” regulation) and the biased methodology that it uses (cost-benefit analysis) are more than enough to undermine protective regulations, with or without the shrill complaints of regulated industries to help it along.

At the same time, it would be a mistake to write off the influence of industry participation. Although Croley found a correlation between meetings and rule changes in the Clinton era, he argued that there was no cause-and-effect relationship, simply chalking it up to the underlying controversy of the rules: politically controversial rules would be more likely both to generate meetings and to attract OIRA's more aggressive scrutiny.<sup>146</sup> But in the GAO's study, for 7 of the 11 rules that were the subject of meetings, the changes made by OIRA were directly traceable to the suggestions of industry groups.<sup>147</sup> And in several highly publicized EPA rulemakings during the Obama Administration, industry participants have gotten exactly what they wanted from lobbying OIRA:

- *Coal ash*: The ash-recycling industry insisted that a hazardous-waste designation on disposed coal ash would impose a crippling *stigma* on its “beneficial uses.” OIRA adopted the industry’s argument with such blind enthusiasm that it estimated a “stigma cost” of \$233.5 billion, in a calculation so careless and arbitrary that it should have been embarrassing to an office that prides itself on mathematical rigor.<sup>148</sup>
- *Boiler MACT*: Chemical plants and other manufacturers objected “ferociously” to EPA’s proposed “maximum achievable control technology” (MACT) standard for industrial and commercial boilers, arguing that its costs would be unacceptably high.<sup>149</sup> After meetings with OIRA, at which they argued for a weaker rule and offered letters from members of Congress in support of their attack,<sup>150</sup> the final rule that emerged had been modified so as to cut the costs in half.<sup>151</sup> The resulting protections are “modest” by comparison to EPA’s original proposal.<sup>152</sup>
- *Lead Renovation, Repair, and Painting Program (RRP)*: A key testing provision was dropped from EPA’s proposed lead paint rule following intensive lobbying by the home-renovation industry.<sup>153</sup> One top executive wasted no time boasting of the industry’s influence: “The Window and Door Dealers Alliance made this battle a top priority and organized industry leaders to attend a White House meeting with OIRA officials in order to present the industry case against the regulation ... In the end, we prevailed.”<sup>154</sup>

### ***How Industry’s Dominance of the Meeting Process Translates into Influence***

*Whenever OIRA is confronted over its meeting policy, it dismisses any implication that industry groups are actually gaining an advantage by meeting with OIRA more often: “The numbers of meetings that ‘one side’ gets versus another is not indicative of one side getting more input into the process.”<sup>155</sup> Indeed, OIRA’s “all you can meet” policy is premised on the idea that more information is always better, and that OIRA is capable of objectively filtering through all the information that comes its way—a highly idealized picture of decisionmaking.*

In many ways, though, the amount of information that one side is allowed to inject into the system *does* give it an advantage over other groups that have trouble keeping up. In the

context of lobbying agencies, CPR Member Scholar Wendy Wagner has written about the phenomenon of “information capture,” by which stakeholders use “costly communications—well beyond what is necessary to convey the message—to gain control over regulatory outcomes.”<sup>156</sup> Those with greater access to relevant information, superior resources, and higher stakes are better situated to dominate the game.<sup>157</sup> According to Wagner, information capture is the result of “filter failure.”<sup>158</sup> The administrative process typically fails to impose limits on the content and volume of information submitted by participants, often out of a well-intentioned “commitment to open government and full participation.”<sup>159</sup>

Of course, information capture in the context of OIRA is not exactly the same as it is in the context of the agencies themselves. For example, an agency’s public-comment period creates different incentives for information overload (to preserve claims in future litigation)<sup>160</sup> and spits out whatever information it takes in (by publishing all the comments), further adding to the complexity that other groups have to navigate.<sup>161</sup> But the operating principles are the same: (1) given a sharply uneven playing field, failing to regulate the flow of information will result in a gross imbalance in participation, and (2) in a regulatory system that runs on information, “quantity does matter.”

Indeed, the inherent malleability of cost-benefit analysis—OIRA’s principal decisionmaking tool—renders it particularly susceptible to industry’s influence. Cost-benefit analysis is founded upon the idea that “numbers [are] attachable to the probabilities and magnitudes of possible outcomes,” when in reality “such numbers are rarely available, [so] they are usually assumed or invented.”<sup>162</sup> For instance, when OIRA needs specialized information about how an industry operates, in order to predict how a given regulation will affect its bottom line, the industry is put in a uniquely powerful position. Industry-supplied estimates of technology costs and market effects ultimately become etched in stone. To OIRA, numbers that are biased, speculative, or even arbitrary are preferable to no numbers at all (OIRA’s adoption of the industry’s “stigma” prediction in EPA’s coal-ash rulemaking is a prime example).

## Conclusion

Those familiar with the scholarly work of Cass Sunstein might expect him to understand better than anyone how an overwhelming quantity of industry input could sway decisionmakers. As a scholar and an administrator, Sunstein is fascinated with “behavioral economics,” a theory that emphasizes the cognitive biases and heuristics that limit the rationality of human thinking.<sup>163</sup> Just as Sunstein wastes no opportunity to discuss how the average person’s decisions—what we eat, what we buy, how we spend our time—are shaped by context, we must also recognize the unique institutional and informational context that is likely to influence decisionmaking at OIRA.

The overwhelming abundance of industry-supplied information makes it far more cognitively “available” to OIRA analysts than the rarely heard voices of the public interest community. And in a political context that elevates even the most mundane regulatory dispute to a battle over the soul of the country—determining once and for all whether the President supports

the business community or stubbornly adheres to “big government” tactics—OIRA is hardly immune from the pressure of appeasing powerful business interests. Finally, OIRA’s institutional biases toward economically minded arguments and sober-minded probabilities favor the arguments of industry groups over those of public interest groups, which are often in the position of urging greater protection against unknowable or unprecedented risks.

Theorizing aside, we can at least rely on common sense: if regulated industries consistently failed to get results from their expensive lobbying of OIRA, would they continue spending their resources on a fruitless endeavor?

## Recommendations for Reform

At the beginning of the Obama Administration, CPR Member Scholars urged OIRA Administrator Cass Sunstein to shift OIRA’s emphasis from reviewing individual rules to concentrating on cross-cutting regulatory problems, such as the threats posed by unsafe imports.<sup>164</sup> By the beginning of the third year of President Obama’s first term, it became clear that the Administration was determined to use OIRA as the leading edge of its political efforts to placate big business in an effort to neutralize its attacks on the Administration in general and its regulatory policies in specific. The most recent example is Cass Sunstein’s role as the White House official who instructed EPA Administrator Lisa Jackson to abandon efforts to tighten the NAAQS for ozone (known more familiarly as smog) that has been in effect since 1997 and is significantly weaker than the standard proposed by the Bush Administration.

So we have little hope that the Obama Administration will contemplate the fundamental overhaul of OIRA’s role that is genuinely needed. For the record, however, such reform would include:

- Eliminating OIRA’s review of individual regulatory proposals, and instead re-directing the Office to focus on cross-cutting regulatory problems that require coordinated actions by multiple agencies;
- Helping the agencies to develop proposals to strengthen their effectiveness administratively and legislatively; and
- Advocating targeted budget increases to enable the agencies to enforce existing laws.

Short of those meaningful, fundamental reforms, we offer here a series of more moderate proposals that should be regarded as a “first step” toward solving OIRA’s burgeoning distortion of statutes like the Clean Water and Clean Air Acts, the Food, Drug, and Cosmetic Act, and the Mine Safety and Health Act. These suggested reforms are squarely within reach of the Obama Administration, certainly if it is granted a second term. Although we believe the reforms we offer fall far short of the wide-ranging reform that is needed, and even if followed, will not defuse OIRA’s overly politicized process, one that trumps expert judgments on the protections Americans need and deserve, the changes below would at least eliminate blatant violations of EO 12,866 and make the review process fairer.



## 'First Step' Proposals

### *Transparency*

1. Once OIRA has completed its review of either a proposed or final rule, the agency that originated the proposal should post on the Internet (including as part of the rule's electronic docket) a succinct explanation of the changes OIRA demanded, along with the version of the rule that was submitted to OIRA and the revised document that emerged at the end of the review period.
2. OIRA should post on the Internet (including, as part of the rule's electronic docket) all of the written communications that occurred between its staff and the originating agency during its consideration of any proposed or final rule.
3. OIRA should end the practice of undertaking "informal reviews" of agency policies before they are developed into regulatory drafts and officially submitted for review.

### *Level Playing Field*

4. OIRA should stop meeting with outside parties during its consideration of a proposed or final rule, and instead confine its evaluation to dialogue with agency staff and, if necessary, review of the ample comments in the rulemaking record. The agency process of reviewing public comments is the appropriate venue for outside parties to make their case about how best to enforce the nation's laws via regulation.
5. Nevertheless, if OIRA continues to meet with outside parties, it should assume an active role in balancing the participation, whether through consolidating meetings with like-minded participants (seeing them all at once), reaching out to the relevant public interest groups to encourage their input, or both.

### *Timeliness*

6. OIRA should abide by the deadlines set forth in EO 12,866 that allow a maximum of 120 days for rule review, provided that the agency head agrees to a delay beyond 90 days.
7. If OIRA asks for a 30-day extension, its request and the agency head's approval should be in writing and made public as soon as they are issued.
8. If OIRA misses these deadlines, agency heads should proceed with their rulemaking schedules and the President should support those decisions.

### *Economically Significant Rules*

9. OIRA should focus its review on economically significant regulatory proposals and stop reviewing non-economically significant rules and guidance documents that do not fit under the exceptions provided by EO 12,866: namely, that a proposal would interfere with another agency's work, materially change entitled programs, or pose novel legal or policy issues.
10. In the rare instance when OIRA believes it must exercise its authority to pull a non-economically significant rule into its review process, it should explain in writing how the proposal fits under the exceptions set forth in EO 12,866, and it should promptly post this explanation on the Internet (both on its website and in the rule's electronic docket).

## Appendix A: Text of EO 12,866

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Federal Register

Vol. 58, No. 190

Monday, October 4, 1993

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### Presidential Documents

Title 3—

Executive Order 12866 of September 30, 1993

The President

Regulatory Planning and Review

The American people deserve a regulatory system that works for them, not against them; a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

**Section 1. *Statement of Regulatory Philosophy and Principles.***

(a) *The Regulatory Philosophy.* Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

(b) *The Principles of Regulation.* To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

(1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

(2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is



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intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

(6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

(12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

**Sec. 2. Organization.** An efficient regulatory planning and review process is vital to ensure that the Federal Government's regulatory system best serves the American people.

(a) *The Agencies.* Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and assuring that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order.

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(b) *The Office of Management and Budget.* Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function. Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory policies. To the extent permitted by law, OMB shall provide guidance to agencies and assist the President, the Vice President, and other regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations, as provided by this Executive order.

(c) *The Vice President.* The Vice President is the principal advisor to the President on, and shall coordinate the development and presentation of recommendations concerning, regulatory policy, planning, and review, as set forth in this Executive order. In fulfilling their responsibilities under this Executive order, the President and the Vice President shall be assisted by the regulatory policy advisors within the Executive Office of the President and by such agency officials and personnel as the President and the Vice President may, from time to time, consult.

**Sec. 3. Definitions.** For purposes of this Executive order: (a) "Advisors" refers to such regulatory policy advisors to the President as the President and Vice President may from time to time consult, including, among others: (1) the Director of OMB; (2) the Chair (or another member) of the Council of Economic Advisers; (3) the Assistant to the President for Economic Policy; (4) the Assistant to the President for Domestic Policy; (5) the Assistant to the President for National Security Affairs; (6) the Assistant to the President for Science and Technology; (7) the Assistant to the President for Intergovernmental Affairs; (8) the Assistant to the President and Staff Secretary; (9) the Assistant to the President and Chief of Staff to the Vice President; (10) the Assistant to the President and Counsel to the President; (11) the Deputy Assistant to the President and Director of the White House Office on Environmental Policy; and (12) the Administrator of OIRA, who also shall coordinate communications relating to this Executive order among the agencies, OMB, the other Advisors, and the Office of the Vice President.

(b) "Agency," unless otherwise indicated, means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(c) "Director" means the Director of OMB.

(d) "Regulation" or "rule" means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. It does not, however, include:

(1) Regulations or rules issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;

(2) Regulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;

(3) Regulations or rules that are limited to agency organization, management, or personnel matters; or

(4) Any other category of regulations exempted by the Administrator of OIRA.

(e) "Regulatory action" means any substantive action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices

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of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

(f) "Significant regulatory action" means any regulatory action that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

**Sec. 4. Planning Mechanism.** In order to have an effective regulatory program, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President's priorities and the principles set forth in this Executive order, these procedures shall be followed, to the extent permitted by law:

(a) *Agencies' Policy Meeting.* Early in each year's planning cycle, the Vice President shall convene a meeting of the Advisors and the heads of agencies to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.

(b) *Unified Regulatory Agenda.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official. Agencies may incorporate the information required under 5 U.S.C. 602 and 41 U.S.C. 402 into these agendas.

(c) *The Regulatory Plan.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). (1) As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan (Plan) of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. The Plan shall be approved personally by the agency head and shall contain at a minimum:

- (A) A statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities;
- (B) A summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits;
- (C) A summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order;
- (D) A statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency;
- (E) The agency's schedule for action, including a statement of any applicable statutory or judicial deadlines; and

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(F) The name, address, and telephone number of a person the public may contact for additional information about the planned regulatory action.

(2) Each agency shall forward its Plan to OIRA by June 1st of each year.

(3) Within 10 calendar days after OIRA has received an agency's Plan, OIRA shall circulate it to other affected agencies, the Advisors, and the Vice President.

(4) An agency head who believes that a planned regulatory action of another agency may conflict with its own policy or action taken or planned shall promptly notify, in writing, the Administrator of OIRA, who shall forward that communication to the issuing agency, the Advisors, and the Vice President.

(5) If the Administrator of OIRA believes that a planned regulatory action of an agency may be inconsistent with the President's priorities or the principles set forth in this Executive order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies, the Advisors, and the Vice President.

(6) The Vice President, with the Advisors' assistance, may consult with the heads of agencies with respect to their Plans and, in appropriate instances, request further consideration or inter-agency coordination.

(7) The Plans developed by the issuing agency shall be published annually in the October publication of the Unified Regulatory Agenda. This publication shall be made available to the Congress; State, local, and tribal governments; and the public. Any views on any aspect of any agency Plan, including whether any planned regulatory action might conflict with any other planned or existing regulation, impose any unintended consequences on the public, or confer any unclaimed benefits on the public, should be directed to the issuing agency, with a copy to OIRA.

(d) *Regulatory Working Group.* Within 30 days of the date of this Executive order, the Administrator of OIRA shall convene a Regulatory Working Group ("Working Group"), which shall consist of representatives of the heads of each agency that the Administrator determines to have significant domestic regulatory responsibility, the Advisors, and the Vice President. The Administrator of OIRA shall chair the Working Group and shall periodically advise the Vice President on the activities of the Working Group. The Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues (including, among others (1) the development of innovative regulatory techniques, (2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making, and (3) the development of short forms and other streamlined regulatory approaches for small businesses and other entities). The Working Group shall meet at least quarterly and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas. To inform its discussions, the Working Group may commission analytical studies and reports by OIRA, the Administrative Conference of the United States, or any other agency.

(e) *Conferences.* The Administrator of OIRA shall meet quarterly with representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those governmental entities. The Administrator of OIRA shall also convene, from time to time, conferences with representatives of businesses, nongovernmental organizations, and the public to discuss regulatory issues of common concern.

**Sec. 5. Existing Regulations.** In order to reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regulations promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not



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duplicate or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive order, within applicable law; and to otherwise improve the effectiveness of existing regulations: (a) Within 90 days of the date of this Executive order, each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order. Any significant regulations selected for review shall be included in the agency's annual Plan. The agency shall also identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances.

(b) The Administrator of OIRA shall work with the Regulatory Working Group and other interested entities to pursue the objectives of this section. State, local, and tribal governments are specifically encouraged to assist in the identification of regulations that impose significant or unique burdens on those governmental entities and that appear to have outlived their justification or be otherwise inconsistent with the public interest.

(c) The Vice President, in consultation with the Advisors, may identify for review by the appropriate agency or agencies other existing regulations of an agency or groups of regulations of more than one agency that affect a particular group, industry, or sector of the economy, or may identify legislative mandates that may be appropriate for reconsideration by the Congress.

**Sec. 6. Centralized Review of Regulations.** The guidelines set forth below shall apply to all regulatory actions, for both new and existing regulations, by agencies other than those agencies specifically exempted by the Administrator of OIRA:

(a) **Agency Responsibilities.** (1) Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

(2) Within 60 days of the date of this Executive order, each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

(3) In addition to adhering to its own rules and procedures and to the requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and other applicable law, each agency shall develop its regulatory actions in a timely fashion and adhere to the following procedures with respect to a regulatory action:

(A) Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory actions within the meaning of this Executive order. Absent a material change in the development of the planned regulatory action, those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt

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of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subsection (a)(3)(B) or subsection (a)(3)(C) of this section.

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:

- (i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and
- (ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

(C) For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law):

- (i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;
- (ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and
- (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

(D) In emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of this section. For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rule-making proceedings so as to permit sufficient time for OIRA to conduct its review, as set forth below in subsection (b)(2) through (4) of this section.

(E) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, the agency shall:

- (i) Make available to the public the information set forth in subsections (a)(3)(B) and (C);
- (ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and

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(iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

(F) All information provided to the public by the agency shall be in plain, understandable language.

(b) *OIRA Responsibilities.* The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency. OIRA shall, to the extent permitted by law, adhere to the following guidelines:

(1) OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section.

(2) OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods:

(A) For any notices of inquiry, advance notices of proposed rulemaking, or other preliminary regulatory actions prior to a Notice of Proposed Rulemaking, within 10 working days after the date of submission of the draft action to OIRA;

(B) For all other regulatory actions, within 90 calendar days after the date of submission of the information set forth in subsections (a)(3)(B) and (C) of this section, unless OIRA has previously reviewed this information and, since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based, in which case, OIRA shall complete its review within 45 days; and

(C) The review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.

(3) For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing.

(4) Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements:

(A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review;

(B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines: (i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s);

(ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and

(iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section.

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(C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review:

(i) The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested;

(ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and

(iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

(D) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

(5) All information provided to the public by OIRA shall be in plain, understandable language.

**Sec. 7. Resolution of Conflicts.** To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Vice Presidential and Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.

Resolution of such conflicts shall be informed by recommendations developed by the Vice President, after consultation with the Advisors (and other executive branch officials or personnel whose responsibilities to the President include the subject matter at issue). The development of these recommendations shall be concluded within 60 days after review has been requested.

During the Vice Presidential and Presidential review period, communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review and directed to the Advisors or their staffs or to the staff of the Vice President shall be in writing and shall be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket(s). When the communication is not in writing, such Advisors or staff members shall inform the outside party that the matter is under review and that any comments should be submitted in writing.

At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter.

**Sec. 8. Publication.** Except to the extent required by law, an agency shall not publish in the **Federal Register** or otherwise issue to the public any regulatory action that is subject to review under section 6 of this Executive order until (1) the Administrator of OIRA notifies the agency that OIRA has waived its review of the action or has completed its review without any requests for further consideration, or (2) the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration under section 6(b)(3), whichever occurs first. If the terms of the preceding sentence have not been satisfied and an agency wants to publish or otherwise issue a



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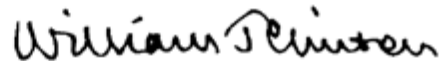
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regulatory action, the head of that agency may request Presidential consideration through the Vice President, as provided under section 7 of this order. Upon receipt of this request, the Vice President shall notify OIRA and the Advisors. The guidelines and time period set forth in section 7 shall apply to the publication of regulatory actions for which Presidential consideration has been sought.

**Sec. 9. Agency Authority.** Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.

**Sec. 10. Judicial Review.** Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

**Sec. 11. Revocations.** Executive Orders Nos. 12291 and 12498; all amendments to those Executive orders; all guidelines issued under those orders; and any exemptions from those orders heretofore granted for any category of rule are revoked.



THE WHITE HOUSE,  
September 30, 1993.

[FR citation 58 FR 51735]

## Appendix B: Methodology

To gauge the relative involvement of various types of interest groups in the meeting process, we first obtained from the OIRA website all records of meetings that occurred between October 16, 2001 and June 1, 2011 (and that were posted as of June 8, 2011).<sup>165</sup> The starting date corresponds with the beginning of OIRA's practice of posting online certain information about its meetings with outside parties.<sup>166</sup> Our data set is necessarily limited by the amount of information that OIRA posted as of June 8, 2011, the day we finished collecting data and began our analysis. Since that date, records of meetings that took place during our period of study continued to show up sporadically on OIRA's website.<sup>167</sup> Because these late-posted meetings could not be incorporated into our study, our results actually understate the number of meetings that occurred from October 16, 2001 to June 1, 2011.

For each meeting, OIRA records the names of every individual who attended the meeting along with his or her affiliation, and if applicable, the client represented (if the affiliation is a law firm, for instance). Where we needed statistics on the number of rules reviewed by OIRA, the average length of review, or OIRA's completed actions, we obtained them from the "Review Counts" page on OIRA's website.<sup>168</sup>

We also connected each meeting to the rule it was about and the OIRA review period to which it related. To do so, we checked the list of meetings against the list of OIRA reviews, available on OIRA's website,<sup>169</sup> and attempted to match them up using the agency, the date, and the topic of the meeting. These review records yielded much more useful information about each meeting's context, including:

- The Rule Identification Number (RIN) for the rule discussed
- The rulemaking stage to which the meeting applied (*e.g.*, Proposed Rule, Final Rule)
- The "economically significant" status of the rule discussed (Yes or No)
- The outcome of OIRA's review (*e.g.*, whether the rule was changed, returned to the agency for reconsideration, withdrawn by the agency, etc.)
- The starting and ending dates of OIRA's review (*i.e.*, the date on which OIRA received the agency's draft rule, and the date on which OIRA completed review)

If a meeting occurred between two OIRA review periods—for example, after OIRA's review of the proposed rule had concluded, but before its review of the final rule had begun—we assumed that the meeting related to the upcoming rulemaking stage (the final rule in this example). This assumption was often confirmed by the written materials submitted at the meeting, where such materials were disclosed.

### **Inadequate Transparency of OIRA Meeting Information**

For each meeting, OIRA discloses only the date, the attendees, a one-line description of the topic, and any documents submitted at the meeting—the bare minimum required by EO 12866.<sup>170</sup> CPR has urged that OIRA enhance its transparency by releasing detailed minutes of these meetings.<sup>171</sup> After all, without knowing what was discussed at these meetings, observers are unable to divine their significance or connect them to the shape of the resulting rule. But what is more troubling is that even OIRA's basic disclosures are disappointingly unclear, often undermining the very transparency they are supposed to foster.

Despite having ready access to OIRA's meeting records, it was often difficult for us to identify the groups represented at the meetings. To begin with, the attendees' affiliations are typically identified by cryptic abbreviations instead of their full names. For example, the American Hospital Association and the American Heart Association are both identified as "AHA,"<sup>172</sup> not even considering the countless other organizations that might share that same abbreviation.<sup>173</sup> To determine the full name of the organization, one often has to perform an Internet search, combining the abbreviation with the name of the individual representative, and hope that some website happens to link the two. Otherwise, one must guess from the topic discussed at the meeting which of several organizations with the same abbreviation would have been likely to attend. The extra time and effort required to identify these participants renders the meeting process quite opaque, as a practical matter. OIRA has recognized this problem since at least 2003, when it promised to improve the clarity of its disclosures and, more specifically, to stop identifying the affiliations of outside parties by abbreviations<sup>174</sup>—yet the practice continues.

The names of individuals and affiliations are made even more obscure by rampant misspellings throughout the records, whether caused by careless typing or some flawed data-entry technology (*e.g.*, auto-complete or optical character recognition). With so few pieces of information to go on, the presence of an undetectable typo is likely to frustrate even a lengthy Internet search for the correct identity. See Table 6 for just a few examples, from the subtle to the bizarre, that we were fortunate enough to resolve.

Year	Misspelling from OIRA's Record	Correct Spelling and Identification
2002	John Ikend, University of MD/Siemen Club <sup>172</sup>	John Ikerd, University of MO/Sierra Club
2003	Lewis Layman & Walter <sup>173</sup>	Lewis Longman & Walker
2003	Arecia <sup>174</sup>	Avecia
2003	Warner Norcross & Juan <sup>175</sup>	Warner Norcross & Judd
2004	USAA <sup>176</sup>	USDA (U.S. Department of Agriculture)
2006	The Levin Group <sup>177</sup>	The Lewin Group
2006	Sen. Rul <sup>178</sup>	Senator Jon Kyl
2007	SecuFit <sup>179</sup>	Securit
2008	NOOPA <sup>180</sup>	NODPA (Northeast Organic Dairy Producers Alliance)
2009	BAM <sup>181</sup>	IAM (International Association of Machinists and Aerospace Workers)
2009	Buzzilnicem USA <sup>182</sup>	Buzzi Unicem USA
2009	Greenberg Training, LLP <sup>183</sup>	Greenberg Traurig, LLP
2009	CML <sup>184</sup>	CMC (Consumer Mortgage Coalition)
2010	POW <sup>185</sup>	Dow (Chemical Company)
2010	MUA LTE Network <sup>186</sup>	MHA LTC Network

**Table 6. Some Examples of Misspellings in OIRA Meeting Records**

It was scarcely any easier to determine the rule that each meeting was about. Differences in wording between the “topic” of a meeting and the “title” of the rule often made it necessary to search the Internet for a clearer description of regulations that were being considered around that time. The use of generic labels, specialized jargon, and numeric codes in the meeting topics only added to the confusion (not even mentioning any typographical errors). Again, OIRA acknowledged in 2003 that it could improve its description of the rule being discussed,<sup>190</sup> but there has been no noticeable improvement. See Table 7 for some examples of the disparities between meeting topics and rule titles since 2003.

Year	Meeting Topic	Title of the Rule Discussed (from Historical Reports)
2003	Part 541 Regulation	Defining & Delimiting the Term "Any Employee Employed in a Bona Fide Executive, Administrative, or Professional Capacity" <sup>188</sup>
2004	Housing Goals Proposed Rule	Secretary of HUD's Regulation of Fannie Mae & Freddie Mac <sup>189</sup>
2004	Wetlines Rule	Hazardous Materials: Safety Requirements for External Product Piping on Cargo Tanks Transporting Flammable Liquids <sup>190</sup>
2005	Definition of Distrub	Protection of Bald Eagles and Definition <sup>191</sup>
2007	LM-30	Labor Organization Officer and Employee Reports <sup>192</sup>
2007	Blending	Renewable Fuels Standard Program <sup>193</sup>
2007	"20-in-10"	Passenger Car and Light Truck Corporate Average Fuel Economy 2011 to 2015 <sup>194</sup>
2008	1CD-10	Revisions to HIPAA Code Sets <sup>195</sup>
2008	Prior Converted Croplands	Wetlands Reserve Program <sup>196</sup>
2008	HZA	Modernizing the Labor Certification Process and Enforcement for Temporary Agricultural Employment of H-2A Aliens in U.S. <sup>197</sup>
2008	10+2	Importer Security Filing and Additional Carrier Requirements <sup>198</sup>
2009	Meaningful Use	Electronic Health Record (EHR) Incentive Program <sup>199</sup>
2010	NPRM	Definition of "Welfare Plan" <sup>200</sup>
2010	300 Column	Occupational Injury and Illness Recording and Reporting Requirements--Musculoskeletal Disorders (MSD) Column <sup>201</sup>

**Table 7. Some Examples of Wording Differences between Meeting Topics and Rule Titles**

The fact that the meeting dates often fell outside of any formal review period by OIRA—many times in a different year—added to the difficulty of identifying the rule from OIRA's review records. For meetings where documents were submitted, they were somewhat helpful in pinning down the rule, but many (if not most) of the meetings do not have any documents posted. With little extra effort, OIRA could make the connections explicit by simply posting the rule's RIN in the meeting record (or adding it to the record once the rule is released) or, even better, cross-referencing the review records and the meeting records with hyperlinks. Instead, the meeting data is kept separate from the review data, and members of the public bear the information costs of connecting the two.

Ironically, OIRA is charged with implementing the Plain Writing Act of 2010 among all executive agencies, which “calls for writing that is clear, concise, and well-organized.”<sup>205</sup> In addition, Section 6(b)(5) of EO 12,866 requires that “[a]ll information provided to the public by OIRA shall be in plain, understandable language.”<sup>206</sup> Yet OIRA stubbornly refuses to clarify even its minimal disclosures for the public.

### **Categorization of Meeting Participants**

We assigned a category to each meeting attendee based on the kind of interest group he or she represented (see Table 1 above for a list of the categories and subcategories that we used).

We did not categorize or include in our data two groups of meeting participants: (1) representatives from OMB or OIRA and (2) representatives from the agency responsible for the rule that is the subject of the meeting. As hosts, at least one OMB or OIRA representative attends every meeting. Similarly, agencies responsible for the rule that is the subject of the meeting generally attend every meeting as well, since EO 12,866 requires that they be invited to such meetings.<sup>207</sup> Consequently, data on the participation of these two groups would have no practical bearing on our results.

While the vast majority of affiliations were easy to categorize, the lines between the categories were not always clear in every case. Given the practical difficulty of determining the views of the various attendees from OIRA’s scant disclosures, we could not always delve into such details. For those organizations that lie at the boundary between an industry group and a public interest group, we attempted to categorize them as best we could, in light of (a) the interests promoted by the group, (b) whether the group itself is subject to regulation, and (c) the other organizations that shared its meetings. Ultimately, how we classified these ambiguous groups is of minor consequence to our results because their appearances before OIRA were few and far between as compared to the other organizations (mostly corporations and trade associations), as suggested in Table 1 above. In other words, had we classified these groups differently, our results would have been virtually unaffected. Below, we identify the common types of ambiguous groups that were challenging to categorize and explain in further detail how we resolved these challenges, acknowledging that reasonable minds may differ:

- *Professional associations:* Often preferring to regulate their professions internally, these associations may resist governmental regulation that would impose additional or conflicting burdens on practitioners or closely related industries. For example, in a presentation before OIRA, several associations of pathologists argued against a proposed regulation that would strengthen the proficiency-testing requirements for certain laboratory professionals, citing the rule’s costly impact on the laboratory industry and doubting its health benefits.<sup>208</sup> On the other hand, some professional

associations have become well-known advocates for public interest policies that protect public health and the environment, quite apart from the interests of the profession itself. For instance, the American Academy of Pediatrics voiced its support for stronger air quality standards for ozone at a meeting with OIRA.<sup>209</sup>

When setting standards of ethics for their practitioners or advancing the noble principles of their professions, these associations may serve the public interest. At the same time, when forcefully defending the interests of their practitioners, and of the profession as a whole, they resemble an industry or trade group more than a public interest group. How we categorized these associations depended on which aspect seemed to dominate.

- *Private hospitals:* While hospitals undoubtedly serve their communities, they are also heavily regulated institutions with an interest in reducing regulatory burdens. Despite the fact that most private hospitals are officially “nonprofit,” both nonprofit and for-profit hospitals seek to maximize profits and cut costs.<sup>210</sup> Likewise, both kinds deliver a similar amount of uncompensated care to patients, much lower than the amount delivered by public, government-owned hospitals (incidentally, we did not observe any public hospitals participating in these meetings).<sup>211</sup> If anything, nonprofit hospitals are even more heavily regulated than for-profit hospitals because there are many conditions they must satisfy in order to retain their preferential tax status.<sup>212</sup>

For these reasons, we concluded that private hospitals are generally closer to a “regulated industry” than a public interest group for the purposes of our study. Indeed, hospitals sometimes appeared alongside industry groups in their meetings with OIRA. For example, Harbor-UCLA Medical Center shared a meeting with Abbott Laboratories, a health-care products company.<sup>213</sup> And the associations of pathologists (mentioned above) were joined by several hospitals in their opposition to proficiency-testing requirements.<sup>214</sup> Most meetings with hospitals were concerned with Medicare payment rules<sup>215</sup> and the requirements for implementing electronic health records,<sup>216</sup> areas in which hospitals are likely to advocate their considerable financial interests.

- *Labor unions:* We made the conservative assumption that all labor unions function as public interest groups, through advancing workplace health and safety, and the rights and benefits of workers. Although we recognize that labor unions are regulated stakeholders, and that they may promote industry positions in the interest of preserving jobs, it would be difficult to determine such details in each case. This way, even if we mistakenly classified too many of them as public interest groups, at least we would not be gratuitously adding to the already-enormous “industry group” tally.

- *For-profit and online colleges:* In 2010 and 2011, a large number of for-profit career colleges met with OIRA about regulations that would heighten the scrutiny of businesses offering for-profit and online higher education.<sup>217</sup> We categorized these as “industry groups” instead of “higher-education institutions” because their involvement was as a regulated industry, not as scholars providing expertise on a separate matter,<sup>218</sup> or as college representatives giving voice to the unique regulatory needs of academic research.<sup>219</sup>



## Endnotes

- <sup>1</sup> See Lawrence Hurley & Gabriel Nelson, *Lawyers Plot Next Steps in Legal Battle Over Ozone Rule*, N.Y. TIMES, Sept. 7, 2011, <http://www.nytimes.com/gwire/2011/09/07/07greenwire-lawyers-plot-next-steps-in-legal-battle-over-o-59778.html>; Mark Drajem & Kim Chipman, *Daley Lobbied by Business, Health Groups on U.S. Ozone Rule*, BLOOMBERG, Aug. 16, 2011, <http://www.bloomberg.com/news/2011-08-16/daley-lobbied-by-business-environment-groups-on-u-s-ozone-rule.html>.
- <sup>2</sup> See U.S. Gov't Accountability Office, High Risk Series, <http://www.gao.gov/docsearch/featured/highrisk.html>.
- <sup>3</sup> See, e.g., Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 72-73 (2006) (a survey of top political appointees at EPA under Bush I and Clinton, in which 89 percent of respondents agreed that OIRA never or rarely made changes that would enhance protection of human health or the environment, and often or always made regulations less burdensome for regulated entities); David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLORADO L. REV. 335, 365 (2006) (examining 25 rules identified by the GAO as "significantly changed" by OIRA between June 2001 and July 2002, and concluding that for 24 of the 25 rules, OIRA's suggested changes "would weaken environmental, health, or safety protection").
- <sup>4</sup> Exec. Order No. 12,866 § 6(b)(4)(C)(iii), 3 C.F.R. 638, 648 (1993), *reprinted as amended in* 5 U.S.C.A. § 601 note (West 2010).
- <sup>5</sup> See Michael Collins, *Environmentalists Critical of Number of Meetings Regulatory Office Has Had with Opponents to New Coal Ash Rules*, KNOXVILLE NEWS SENTINEL, Mar. 19, 2010, <http://www.knoxnews.com/news/2010/mar/19/environmentalists-critical-coal-ash-rules-debate>; Patrick Reis, *Recycling Questions Complicate EPA Coal Ash Decision*, THE NEW YORK TIMES, Jan. 13, 2010, <http://www.nytimes.com/gwire/2010/01/13/13greenwire-recycling-questions-complicate-epa-coal-ash-de-90614.html?pagewanted=all>; Patrick Reis, *GOP Superfriends Have Complicated History with Subsidies - Oil Up despite Market Tumble - DOE's Nat Gas Panel to Release Recommendations Today - NRC Facing Suii*, POLITICO MORNING ENERGY, Aug. 11, 2011, <http://www.politico.com/morningenergy/0811/morningenergy310.html>.
- <sup>6</sup> Collins, *supra* note 5.
- <sup>7</sup> John S. Applegate et al., Center for Progressive Reform, *Reinvigorating Protection Health, Safety, and the Environment: The Choice Facing Cass Sunstein* (Jan. 2009), <http://www.progressivereform.org/articles/SunsteinOIRA901.pdf>.
- <sup>8</sup> Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353, 361 (2005).
- <sup>9</sup> Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 125 (2011).
- <sup>10</sup> Cary Coglianese, *Challenging the Rules: Litigation and Bargaining in the Administrative Process* 75 (1994) (unpublished Ph.D. dissertation, University of Michigan), *cited in* Wagner, Barnes & Peters, *supra* note 9, at 126.
- <sup>11</sup> Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 131-33 (2006). The remainder of the comments were submitted by governmental interests and other non-governmental groups. *Id.* Another study reveals that, for eight rules promulgated by EPA and NHTSA, between 66.7 percent and 100 percent of comments came from industry, while public interest comments topped out at 11 percent. Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 252-53 (1998).
- <sup>12</sup> Wagner, Barnes & Peters, *supra* note 9, at 128-29.
- <sup>13</sup> *Id.* at 128. Another study, this time of a different subset of EPA rules, found a very similar imbalance in participation, with industry participating in almost all the rulemakings (96 percent) and environmental groups participating in less than half of them (44 percent). See Coglianese, *supra* note 10, at 50 tbl.2-2.
- <sup>14</sup> Lettie McSpadden Wenner, *The Reagan Era in Environmental Regulation*, in CONFLICT RESOLUTION AND PUBLIC POLICY 41, 48 (Miriam K. Mills ed., 1990).
- <sup>15</sup> Coglianese, *supra* note 10, at 70.
- <sup>16</sup> See Wendy Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L. J. 1321, 1326, 1379 (2010).
- <sup>17</sup> See *id.* at 1329 (discussing the excessive communications by stakeholders who engage, inadvertently or strategically, in "information capture").
- <sup>18</sup> See *id.* at 1347 n.92.
- <sup>19</sup> See Exec. Order No. 12,866 § 1(b)(6), 3 C.F.R. at 638.
- <sup>20</sup> See Wagner, *supra* note 16, at 1379 ("Regulated industries, for example, enjoy considerably more inside information about how their plants run, how pollution control equipment might or might not work once in place, what approaches have and have not been considered or tried, and a host of other technical issues central to the rulemaking.")
- <sup>21</sup> See Wagner, *supra* note 16, at 1366-69 (describing the implications of pre-proposal participation for the transparency and equitability of the rulemaking process).
- <sup>22</sup> See Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, MICH. J. ENVT'L. & ADMIN. L. (forthcoming 2011).
- <sup>23</sup> Bressman & Vandenbergh, *supra* note 3, at 72-73.
- <sup>24</sup> Steinzor, *supra* note 22.
- <sup>25</sup> Sally Katzen, *A Reality Check on an Empirical Study: Comments on "Inside the Administrative State"*, 105 MICH. L. REV. 1497, 1505 (2007).
- <sup>26</sup> See generally Winston Harrington et al., *Controversies Surrounding Regulatory Impact Analysis*, in REFORMING REGULATORY IMPACT ANALYSIS 10, 14-16 (Winston Harrington et al. eds., 2009), available at <http://www.rff.org/RFF/Documents/RFF-Rpt-ReformingRIA.pdf> ("To its critics, CBA is a flawed technique that, among other things, emphasizes the quantification and monetization of risks, trivializes the future through discounting...and ignores distributional concerns"); Lisa Heinzerling, *Cost-benefit Environmentalism: An Oxymoron*, GRIST, May 14, 2008, <http://www.grist.org/article/cost-benefit-environmentalism-an-oxymoron> ("[C]ost-benefit was never unbiased. Low values for human life, monstrously high discount rates, the shunting aside of effects that cannot be counted, a free pass for deregulatory activities—all of these have been with us since the beginning.").
- <sup>27</sup> See OFFICE OF MGMT. & BUDGET, CIRCULAR A-4: REGULATORY ANALYSIS 28-31 (2003) (describing how to monetize the health and safety effects of regulation).
- <sup>28</sup> See *id.* at 31-37 (describing the rationales and techniques for discounting).
- <sup>29</sup> See, e.g., RENA STEINZOR & MICHAEL PATOKA, CENTER FOR PROGRESSIVE REFORM, COMMENTS – HAZARDOUS AND SOLID WASTE MANAGEMENT SYSTEM; IDENTIFICATION AND LISTING OF SPECIAL WASTES; DISPOSAL OF COAL COMBUSTION RESIDUALS FROM ELECTRIC UTILITIES 11-12 tbl. 3 (Nov. 19, 2010), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-8847> (comparing the few benefits that were quantified to the many benefits that were left out of EPA's cost-benefit analysis for its coal-ash proposal).

- <sup>30</sup> See, e.g., Barack Obama, Closing Speech at Campaign Rally in Canton, Ohio (Oct. 27, 2008) (transcript available at [http://blogs.suntimes.com/sweet/2008/10/obama\\_closing\\_argument\\_speech\\_1.html](http://blogs.suntimes.com/sweet/2008/10/obama_closing_argument_speech_1.html)) (“I do believe that government should do that which we cannot do for ourselves.... [Our government] should also make sure businesses ... play by the rules of the road.”).
- <sup>31</sup> See Rena Steinzor, *Cass Sunstein and the Obama Legacy*, CPRBlog, <http://www.progressivereform.org/CPRBlog.cfm?idBlog=D6F898F5-D9E4-E872-C9E03C7BF0F704EB> (June 28, 2011).
- <sup>32</sup> OFFICE OF MANAGEMENT AND BUDGET, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 5 (2011), available at [http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011\\_cb/2011\\_cba\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf).
- <sup>33</sup> See STEINZOR & PATOKA, *supra* note 29 (critiquing OIRA’s interference in the coal-ash rulemaking).
- <sup>34</sup> See U.S. Small Bus. Admin., Office of Advocacy Staff, <http://www.sba.gov/advocacy/858/12135> (accessed Sep. 17, 2011).
- <sup>35</sup> See U.S. Small Bus. Admin., Office of Advocacy – About Us, <http://www.sba.gov/category/advocacy-navigation-structure/about-us> (accessed Aug. 11, 2011).
- <sup>36</sup> See SBA Size Standards Used to Define Small Business Concerns, 13 C.F.R. § 121.201 (2000).
- <sup>37</sup> See, e.g., Office of Info. & Regulatory Affairs, Meeting Record Regarding: Non-Road Diesel (Mar. 14, 2003), [http://www.whitehouse.gov/omb/oira\\_2060\\_meetings\\_208](http://www.whitehouse.gov/omb/oira_2060_meetings_208) (SBA sharing a meeting with the American Petroleum Institute, the National Petrochemical and Refiners Association, Exxon Mobil, and Marathon Oil); Office of Info. & Regulatory Affairs, Meeting Record Regarding: Cooling Water Intake (Mar. 24, 2011), [http://www.whitehouse.gov/omb/2040\\_meeting\\_03242011](http://www.whitehouse.gov/omb/2040_meeting_03242011) (SBA sharing a meeting with the American Chemistry Council and the American Petroleum Institute); Office of Info. & Regulatory Affairs, Meeting Record Regarding: Aircraft Drinking Water Rule (Aug. 12, 2009), [http://www.whitehouse.gov/omb/2040\\_081209](http://www.whitehouse.gov/omb/2040_081209) (SBA sharing a meeting with Atlantic Southeast Airlines, the Regional Airline Association, and Express Jet Airlines).
- <sup>38</sup> NICOLE V. CRAIN & W. MARK CRAIN, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2010) (developed under a contract with the Small Business Administration’s Office of Advocacy), available at <http://www.sba.gov/sites/default/files/rs371tot.pdf>.
- <sup>39</sup> See Sidney A. Shapiro, Ruth Ruttenberg & James Goodwin, Center for Progressive Reform, *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs* (Feb. 2011), [http://www.progressivereform.org/articles/SBA\\_Regulatory\\_Costs\\_Analysis\\_1103.pdf](http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf).
- <sup>40</sup> James Goodwin, *Sunstein Denounces SBA’s ‘Deeply Flawed’ Study of Regulatory Costs*, CPRBlog, <http://www.progressivereform.org/CPRBlog.cfm?idBlog=5758C6D6-AC7E-4BAF-CF1DA8672B3AB937> (June 3, 2011).
- <sup>41</sup> Bressman & Vandenbergh, *supra* note 3, at 85-88.
- <sup>42</sup> Interagency Working Comments on Draft Rule Under EO 12866, at 21-31, 41-42, available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0350>.
- <sup>43</sup> *Id.* at 16-20.
- <sup>44</sup> See Steinzor, *supra* note 22.
- <sup>45</sup> See Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 865 (2003) (citing Claudia O’Brien, *White House Review of Regulations Under the Clean Air Act Amendments of 1990*, 8 J. ENVTL. L. & LIT. 51, 58-80 (1993); Margaret Carde, *Comment: Can Bambi Ride Herd over Godzilla? The Role of Executive Oversight in EPA’s Rulemaking for the Waste Isolation Pilot Plant*, 36 NAT. RES. J. 643, 666 (1996)).
- <sup>46</sup> *Id.* at 866, 868.
- <sup>47</sup> *Id.* at 866.
- <sup>48</sup> *Id.* at 868.
- <sup>49</sup> See Steinzor, *supra* note 22.
- <sup>50</sup> See Wagner, *supra* note 16, at 1346.
- <sup>51</sup> Croley, *supra* note 45, at 862, 867.
- <sup>52</sup> Disposal of Coal Combustion Residuals from Electric Utilities; Proposed Rule, 75 Fed. Reg. 35,128, 35,211 (proposed June 21, 2010) (to be codified at 40 C.F.R. pts. 257, 261, 264, 265, 268, 271, 302), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0352>.
- <sup>53</sup> See STEINZOR & PATOKA, *supra* note 29, at 15-17 (outlining and critiquing the stigma argument).
- <sup>54</sup> See, e.g., Interagency Working Comments, *supra* note 42, at 13.
- <sup>55</sup> STEINZOR & PATOKA, *supra* note 29, at 46-47.
- <sup>56</sup> See *id.* at 16 (discussing whether the language of the Bevill Amendment permits agencies to consider the cost of “stigma” in listing coal ash as a “hazardous waste” under the Resource Conservation and Recovery Act (RCRA)).
- <sup>57</sup> See U.S. Env’tl. Prot. Agency, Regulatory Impact Analysis for EPA’s Proposed RCRA Regulation of Coal Combustion Residues (CCR) Generated by the Electric Utility Industry 11, 187-88 (Apr. 30, 2010), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0003> (estimating the cost of stigma as \$233.5 billion). See also STEINZOR & PATOKA, *supra* note 29, at 17, 43-46 (breaking down the arbitrary assumptions underlying this estimate).
- <sup>58</sup> See Steinzor, *supra* note 22.
- <sup>59</sup> See U.S. GEN. ACCOUNTING OFFICE, RULEMAKING: OMB’S ROLE IN REVIEWS OF AGENCIES’ DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 3-4 (2003), available at <http://www.gao.gov/new.items/d03929.pdf> [hereinafter GAO 2003 REPORT].
- <sup>60</sup> *Id.* at 21-22.
- <sup>61</sup> *Id.* at 23.
- <sup>62</sup> Exec. Order No. 12,866 § 6(b)(1), 3 C.F.R. 638 at 646.
- <sup>63</sup> *Id.* §§ 3(f)(1)-(4), 3 C.F.R. at 641-42.
- <sup>64</sup> *Id.* § 6(a)(3)(C), 3 C.F.R. at 645-46.
- <sup>65</sup> *Id.* § 6(a)(3)(B), 3 C.F.R. at 645.
- <sup>66</sup> See GAO 2003 REPORT, *supra* note 59, at 24 fig.3 (graph depicting the number of rules reviewed by OIRA before and after Executive Order 12,866); Office of Info. & Regulatory Affairs, Review Counts, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (accessed July 30, 2011) (providing the number of rules reviewed by OIRA for user-specified time periods, also specifying how many are “economically significant” and “not economically significant”).
- <sup>67</sup> See Croley, *supra* note 45, at 850.

- <sup>68</sup> See, e.g., Exec. Order No. 12,866 § 2(b), 3 C.F.R. at 640 (outlining the roles of OMB/OIRA in the regulatory system, including the “[c]oordinated review of agency rulemaking [] necessary to ensure that regulations are consistent with applicable law, the President’s priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency”).
- <sup>69</sup> Notes: *OIRA Avoidance*, 124 HARV. L. REV. 994, 998 n.37 (2011), available at [http://www.harvardlawreview.org/media/pdf/vol124\\_%20OIRA%20avoidance.pdf](http://www.harvardlawreview.org/media/pdf/vol124_%20OIRA%20avoidance.pdf) (citing Telephone Interview with Sally Katzen, former Adm’r, OIRA (Sept. 2, 2010) (on file with the Harvard Law School Library)).
- <sup>70</sup> See Croley, *supra* note 45, at 855. While Croley appears to conclude that 58 percent of meetings were about non-economically significant rules (instead of 58 percent of rules that are the subject of meetings), that is merely an accident of his idiosyncratic methodology. In his study, “multiple meetings about a single given rule are lumped together as one ‘meeting,’” so when he counts “meetings,” he is actually counting the number of rules that are the subject of meetings. *Id.* at 853.
- <sup>71</sup> See Programmatic Regulations for the Comprehensive Everglades Restoration Plan, 67 FED. REG. 50,540, 50,550 (proposed Aug. 2, 2002) (to be codified at 33 C.F.R. pt. 385); U.S. ENVTL. PROT. AGENCY, ECONOMIC ANALYSIS FOR THE PROPOSED INVENTORY UPDATE REPORTING (IUR) MODIFICATIONS RULE 9-1 (2010), available at <http://www.regulations.gov#!documentDetail:D=EPA-HQ-OPPT-2009-0187-0018>.
- <sup>72</sup> See Computer Reservations System (CRS) Regulations, 69 FED. REG. 976, 1026 (Jan. 7, 2004) (to be codified at 14 C.F.R. pt. 255).
- <sup>73</sup> See Hazardous Materials: Transportation of Lithium Batteries, 75 FED. REG. 1302, 1314 (proposed Jan. 11, 2010) (to be codified at 49 C.F.R. pts. 172, 173, 175); Enhancing Airline Passenger Protections, 75 FED. REG. 32,318, 32,332 (proposed June 8, 2010) (to be codified at 14 C.F.R. pts. 234, 244, 250, 253, 259, 399).
- <sup>74</sup> See Statement by Brad Miller (D-NC), Chairman, House House Committee on Science and Technology, Subcommittee on Investigation & Oversight, Feb. 4, 2009: “While the President’s order on Guantanamo Bay may get more of the national spotlight, his decision to rollback this Bush Executive Order is just as important to restoring open government and Constitutional separation of powers,” available at <http://science.house.gov/Press/PRArticle.aspx?NewsID=2350> (accessed Mar.12, 2010).
- <sup>75</sup> See Exec. Order No. 13,497 § 1, 3 C.F.R. 218, 218 (2009) (revoking EO 13,258 and EO 13,422). Of course, President Obama’s apparent commitment to circumscribing OIRA’s influence and preserving agency prerogatives was undermined a month later by an OMB memorandum insisting that OIRA still has preexisting authority to review guidance documents under EO 12,866. See Memorandum from OMB Director Peter Orszag to the Heads and Acting Heads of Executive Departments and Agencies, “Guidance for Regulatory Review” (March 4, 2009), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_fy2009/m09-13.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf) (accessed on August 1, 2011). For a deeper exploration of the issues involved, see Letter from the Center for Progressive Reform to Robert Bauer, White House Counsel (Mar. 17, 2010), available at [http://www.progressivereform.org/articles/WH\\_Counsel\\_re\\_OIRA\\_March2010.pdf](http://www.progressivereform.org/articles/WH_Counsel_re_OIRA_March2010.pdf).
- <sup>76</sup> See Exec. Order No. 12,866, 3 C.F.R. at 638.
- <sup>77</sup> See, e.g., *Chocolate Mfrs. Ass’n v. Block*, 755 F.2d 1098, 1104-07 (4th Cir. 1985) (adopting the “logical outgrowth” test and ordering the agency to reopen its comment period because its proposed rule gave “insufficient notice” that a certain change would be considered in the final rule, thus depriving the plaintiff the opportunity to comment on it).
- <sup>78</sup> Wagner, *supra* note 16, at 1367 (citing, e.g., Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856 (2007); 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 7.3 (5th ed. 2010)).
- <sup>79</sup> See Wagner, *supra* note 16, at 1368 (citing, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977)).
- <sup>80</sup> To remedy this issue, CPR Member Scholar Wendy Wagner has proposed a “policy in the raw” reform that would allow a team within the agency to develop a pre-proposal while isolated from outside pressures. They would work forward from the statutory text rather than backward from the limits and preferences imposed by powerful stakeholders. See Wagner, *supra* note 16, at 1422-27.
- <sup>81</sup> *Id.* at 1366.
- <sup>82</sup> See *id.* at 1366, 1368-69.
- <sup>83</sup> See *supra* notes 9-10 and accompanying text.
- <sup>84</sup> Office of Info. & Regulatory Affairs, Search of Regulatory Review, <http://www.reginfo.gov/public/do/eoAdvancedSearchMain#> (accessed Aug. 13, 2011) (explanations of rulemaking stages that appear when hovering over the search field “Stage of Rulemaking”).
- <sup>85</sup> For example, if a public interest group has not submitted a comment on a rule, it will not be able to challenge the rule in court because it has not exhausted its administrative remedies. See Wagner, *supra* note 16, at 1390-91. And if public interest groups are not involved in the agency’s rule-development phase like industry groups are, it will be more difficult for them to quickly master the significance of details inserted into the proposed rule by the agency in response to industry’s pre-proposal communications. *Id.* at 1385 n.238.
- <sup>86</sup> See Exec. Order No. 12,866 § 6(b)(4)(C), 3 C.F.R. at 647-48 (requiring disclosure of meeting information for all “regulatory actions under review,” clearly including those that take place at the pre-proposal stage).
- <sup>87</sup> *Id.* § 6(b)(4)(D), 3 C.F.R. at 648.
- <sup>88</sup> See U.S. Env’tl. Prot. Agency, Draft: Coal Combustion Residuals (CCR) Proposal Provided to the Office of Management and Budget (OMB) October 16, 2009, available at <http://www.regulations.gov#!documentDetail:D=EPA-HQ-RCRA-2009-0640-0013>.
- <sup>89</sup> See *supra* notes 52-57 and accompanying text.
- <sup>90</sup> EPA posted a redlined version of its proposal, illustrating the changes made during OIRA’s review. See Comparison of October 16, 2009 OMB Review Draft and Final CCR Proposed Rule (2010), available at <http://www.regulations.gov#!documentDetail:D=EPA-HQ-RCRA-2009-0640-0012>.
- <sup>91</sup> Exec. Order No. 12,866 § 6(b)(1), 3 C.F.R. at 646.
- <sup>92</sup> *Id.* §§ 6(b)(2)(B)-(C), 3 C.F.R. at 647.
- <sup>93</sup> See *id.* §§ 6(a)(3)(E)(ii)-(iii), 3 C.F.R. at 646 (requiring agencies to identify substantive changes); *id.* § 6(b)(4)(D), 3 C.F.R. at 648 (requiring OIRA to disclose all documents exchanged during review).
- <sup>94</sup> See Curtis W. Copeland, *The Role of the Office of Info. & Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1280 (2006) (“OIRA has informally reviewed agencies’ draft rules since its reviewfunction was established in 1981, but informal reviews reportedly became more common when Executive Order 12,866 was adopted in 1993 and OIRA’s reviews were focused on ‘significant’ rules.”).
- <sup>95</sup> OIRA Disclosure Memo-B, Memorandum from OIRA Administrator John D. Graham to OIRA Staff § 1(a)(3) (Oct. 18, 2001), available at [http://www.whitehouse.gov/omb/inforeg\\_oira\\_disclosure\\_memo-b](http://www.whitehouse.gov/omb/inforeg_oira_disclosure_memo-b).



- <sup>96</sup> Donald R. Arbuckle, OIRA and Presidential Regulatory Review: A View from Inside the Administrative State 34 (2008) (unpublished manuscript), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=donald\\_arbuckle](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=donald_arbuckle).
- <sup>97</sup> See Copeland, *supra* note 94, at 1280.
- <sup>98</sup> See, e.g., Arbuckle, *supra* note 96, at 35.
- <sup>99</sup> See Rebecca Adams, *Regulating the Rulemakers: John Graham at OIRA*, CQ WEEKLY, Feb. 23, 2002, 520-26 (quoting OIRA Administrator John Graham: “I think that agencies that wait until the last minute and then come to us—well, in a sense, they’re rolling the dice.”), quoted in Copeland, *supra* note 94, at 1280.
- <sup>100</sup> See Bressman & Vandenberg, *supra* note 3, at 74.
- <sup>101</sup> *Id.* at 69.
- <sup>102</sup> *Id.* at 69 n.132.
- <sup>103</sup> See U.S. GEN. ACCOUNTING OFFICE, REGULATORY REFORM: IMPLEMENTATION OF THE REGULATORY REVIEW EXECUTIVE ORDER 10 (1996), available at <http://www.gao.gov/archive/1996/gg96185t.pdf> [hereinafter GAO 1996 REPORT].
- <sup>104</sup> GAO 2003 REPORT, *supra* note 59, at 14. At first, OIRA had urged President Clinton to reconsider those disclosure provisions of EO 12,866, worried that they would interfere with its informal review process, but ultimately decided that it could simply interpret around the problem. See GAO 1996 REPORT, *supra* note 103, at 10.
- <sup>105</sup> See, e.g., Arbuckle, *supra* note 96, at 33-35; Bressman & Vandenberg, *supra* note 3, at 96; Stephen M. Johnson, *Ossification’s Demise? An Empirical Analysis of EPA Rulemaking from 2001-2005*, 38 ENVTL. L. REV. 767, 787 n.125.
- <sup>106</sup> See Testimony of Wesley Warren, Natural Res. Def. Council, on the Role of Science in Regulatory Reform before the Investigations and Oversight Subcommittee of the House Science and Technology Committee 24, Apr. 30, 2009, available at <http://gop.science.house.gov/Media/hearings/oversight09/april30/warren.pdf> [hereinafter NRDC Testimony].
- <sup>107</sup> See *id.* at 24-25 (describing a 6-month-long informal review of an EPA rule in 2006); Copeland, *supra* note 94, at 1280 (describing a 41-day-long informal review of an EPA rule in 2001).
- <sup>108</sup> See GAO 2003 REPORT, *supra* note 59, at 14; Arbuckle, *supra* note 96, at 34 (“Though communications with outside parties are disclosed during informal review, as agreed to by former Administrator Graham, further disclosure is both impractical and, in any case, unlikely to be instituted.”).
- <sup>109</sup> See Arbuckle, *supra* note 96, at 34.
- <sup>110</sup> See NRDC Testimony, *supra* note 106, at 24.
- <sup>111</sup> See GAO 1996 REPORT, *supra* note 103, at 10.
- <sup>112</sup> See James Goodwin, *The Costs of Regulatory Delay: Could We Have Stopped 1,470 from Being Sickened by Salmonella-Laced Eggs?*, CPRBlog, <http://www.progressivereform.org/CPRBlog.cfm?idBlog=CD84F2F3-D48B-4A61-513F8624205315D2> (Sep. 1, 2010) (questioning the FDA’s unexplained “withdrawal” of its salmonella rule from OIRA’s review, which occurred after egg industry representatives met with OIRA to complain about the rule).
- <sup>113</sup> See GAO 2003 REPORT, *supra* note 59, at 10.
- <sup>114</sup> See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1431-32 (1992) (identifying an EPA rule that spent two years in review as OIRA and EPA fought over its substance).
- <sup>115</sup> Exec. Order No. 12,866 §§ 6(b)(2)(B)-(C), 3 C.F.R. at 647.
- <sup>116</sup> See Env’tl. Prot. Agency, Coal Combustion Residuals – Proposed Rule, <http://www.epa.gov/osw/nonhaz/industrial/special/fossil/ccr-rule/index.htm> (accessed Aug. 18, 2011) (explaining the extension of the public comment period).
- <sup>117</sup> See Ken Ward Jr., *EPA Won’t Complete Coal-Ash Rules in 2011*, THE CHARLESTON GAZETTE, Mar. 4, 2011, available at <http://wvgazette.com/News/201103040756>.
- <sup>118</sup> See STEINZOR & PATOKA, *supra* note 29, at 5-7, 35-40 (exploring the public health hazards of coal ash disposal).
- <sup>119</sup> Dave Jamieson, *Child Labor Rules Stalled at White House as Farm Accidents Continue*, THE HUFFINGTON POST, Aug. 15, 2011, [http://www.huffingtonpost.com/2011/08/15/child-labor-rules-white-house\\_n\\_927551.html](http://www.huffingtonpost.com/2011/08/15/child-labor-rules-white-house_n_927551.html).
- <sup>120</sup> *Id.*
- <sup>121</sup> See Office of Info. & Regulatory Affairs, Historical Reports, <http://www.reginfo.gov/public/do/eoHistoricReport> (accessed Aug. 18, 2011) (permitting users to search for review records by agency and year).
- <sup>122</sup> See Table 5 *supra* (listing both of these rules).
- <sup>123</sup> See Matthew Madia, *White House Sitting on Mad Cow Rule*, OMB Watch, <http://www.ombwatch.org/node/8820> (Apr. 16, 2008). Cf. *Cow Sense: The Bush Administration’s Broken Record on Mad Cow Disease*, White Paper of the Ctr. for Sci. in the Pub. Interest, OMB Watch & Consumer Fed’n of Am. (2006), available at <http://www.ombwatch.org/files/regs/2006/cowsense.pdf> (similarly describing the meeting participants during OIRA’s review of the same rule at an earlier stage in 2005).
- <sup>124</sup> Matthew Madia, *With White House Blessing, FDA Finalizes Mad Cow Rule*, OMB Watch, <http://www.ombwatch.org/node/8871?page=0%2C9> (Apr. 25, 2008).
- <sup>125</sup> The review was completed on April 21, 2008, and the announcement about the U.S.-Korea trade deal had been made on April 19, 2008. Joint Press Conference at Camp David with President George W. Bush and President Lee Myung-Bak of the Republic of Korea, Apr. 19, 2008, available at <http://www.cfr.org/trade/president-bush-participates-joint-press-availability-president-lee-myung-bak-republic-korea-april-2008/p16068>.
- <sup>126</sup> See Exec. Order No. 12,866 § 6(b)(4)(D), 3 C.F.R. at 648.
- <sup>127</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS 32 n.40 (2009), available at <http://www.gao.gov/new.items/d09205.pdf> [hereinafter GAO 2009 REPORT].
- <sup>128</sup> See GAO 2003 REPORT, *supra* note 59, at 16.
- <sup>129</sup> See Exec. Order No. 12,866 §§ 6(a)(3)(E)(ii)-(iii), 3 C.F.R. at 646.
- <sup>130</sup> See GAO 2009 REPORT, *supra* note 127, at 32; *OMB Changes Difficult to Document*, OMB Watch, <http://www.ombwatch.org/node/1006> (Sep. 4, 2002).
- <sup>131</sup> See *OMB Changes Difficult to Document*, *supra* note 130.
- <sup>132</sup> See GAO 2009 REPORT, *supra* note 127, at 34.
- <sup>133</sup> *Id.*
- <sup>134</sup> See *id.*; *OMB Changes Difficult to Document*, *supra* note 130.
- <sup>135</sup> See GAO 1996 REPORT, *supra* note 103, at 10.
- <sup>136</sup> See *OMB Changes Difficult to Document*, *supra* note 130.
- <sup>137</sup> See GAO 1996 REPORT, *supra* note 103, at 11.
- <sup>138</sup> See Croley, *supra* note 45, at 868.

- <sup>139</sup> For Rule Identification Number (RIN) 2060-AO91 (Proposed Rule), see Document Changes During Office of Management and Budget (OMB) Review, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2010-0600-0230> (posted Oct. 21, 2010). For RIN 2060-AQ25 (Final Rule), see Correspondence between Brian Shrager, USEPA and OMB regarding Final Rule February 17, 2011, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2002-0058-3257> (posted Mar. 21, 2011). For RIN 2060-AO12 (Final Rule), see CISWI – Summary of EPA Interagency Communications, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2003-0119-2499> (posted Mar. 21, 2011). For RIN 2060-AP90 (Final Rule), see SSI – Summary of USEPA Interagency Communications February 20, 2011, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0559-0166> (posted Mar. 21, 2011). For RIN 2070-AJ57 (Proposed Rule), see Documentation of Review Under Executive Order 12866 (LRRP Clearance NPRM): Cover Form, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPPT-2005-0049-1127> (posted May 6, 2010). For RIN 2060-AP52 (Proposed Rule), see OMB Submittal (03/15/11), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0234-3012> (posted May 3, 2011). For 2060-AO91 (Final Rule), see Changes to Package During Period of OMB Review, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2010-0600-0429> (posted Apr. 21, 2011).
- <sup>140</sup> For RIN 2060-AO48 (Proposed Rule), see Email from Ron Evans, USEPA, to Heidi King, OMB, with Subject: Revised SO2 (Sulfur Dioxide) NAAQS (National Ambient Air Quality Standard) RIA (Regulatory Impact Analysis) Ex Summ 11/16/09 1:44 p.m., <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0769-0033> (posted on Nov. 19, 2009). For RIN 2060-AQ25 (Proposed Rule), see Correspondence with OMB Regarding Technical Memos and RIA (3/30/2010), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2003-0119-0041> (posted on June 4, 2010).
- <sup>141</sup> See Croley, *supra* note 45, at 868.
- <sup>142</sup> See Bressman & Vandenberg, *supra* note 3, at 72-73 (89 percent of respondents agreed with these assertions).
- <sup>143</sup> See GAO 2003 REPORT, *supra* note 59, at 9.
- <sup>144</sup> Driesen, *supra* note 3, at 365.
- <sup>145</sup> GAO 2003 REPORT, *supra* note 59, at 11.
- <sup>146</sup> See Croley, *supra* note 45, at 864-65.
- <sup>147</sup> GAO 2003 REPORT, *supra* note 59, at 11.
- <sup>148</sup> See STEINZOR & PATOKA, *supra* note 29, at 43-46.
- <sup>149</sup> Anne C. Mulkern, *Lobbying: Chemical Company Adds Muscle for Push on Energy, EPA*, GREENWIRE, Nov. 24, 2010, <http://www.eenews.net/public/Greenwire/2010/11/24/1>.
- <sup>150</sup> *Id.*
- <sup>151</sup> See Renee Schoof, *EPA Sets Pollution Controls for Boilers and Incinerators*, McCLATCHY, Feb. 23, 2011, <http://www.mcclatchydc.com/2011/02/23/109291/epa-sets-pollution-controls-for.html>.
- <sup>152</sup> Press Release, Sierra Club, EPA Issues Final Standard to Protect Americans from Boilers' Toxic Air Pollution (Feb. 23, 2011), available at [http://action.sierraclub.org/site/MessageViewer?em\\_id=197724.0&dlv\\_id=169761](http://action.sierraclub.org/site/MessageViewer?em_id=197724.0&dlv_id=169761).
- <sup>153</sup> See *EPA Will Not Impose Lead Clearance Rule for Residential Projects; Commercial Buildings Still Under Evaluation*, GLASS MAGAZINE, July 15, 2011, <http://www.glassmagazine.com/news-item/retail/epa-will-not-impose-lead-clearance-rule-residential-projects-commercial-buildings-s;WDDA> Urges Regulators to Stop Additional RRP Rules, WINDOW & DOOR, May 16, 2011, <http://www.windowanddoor.com/news-item/organizations/wdda-urge-regulators-stop-additional-rrp-rules> (describing the industry's meeting with OIRA).
- <sup>154</sup> See *EPA Will Not Impose Lead Clearance Rule for Residential Projects*, *supra* note 153.
- <sup>155</sup> Patrick Reis, *Recycling Questions Complicate EPA Coal Ash Decision*, *supra* note 5.
- <sup>156</sup> See Wagner, *supra* note 16, at 1329.
- <sup>157</sup> *Id.*
- <sup>158</sup> *Id.*
- <sup>159</sup> *Id.* at 1329-30.
- <sup>160</sup> See *id.* at 1363-64.
- <sup>161</sup> See *id.* at 1334-36.
- <sup>162</sup> JOHN ADAMS, RISK 25-26 (1995).
- <sup>163</sup> See generally CASS R. SUNSTEIN, WORST-CASE SCENARIOS (2007); Cass R. Sunstein, *The Laus of Fear*, 115 HARV. L. REV. 1119, 1123 (2002) (reviewing Paul Slovic, *The Perception of Risk* (2000)); Cass R. Sunstein, Memorandum for the Heads of Executive Departments and Agencies 9-12, June 18, 2010, available at [http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure\\_principles.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf) (plans to incorporate the concepts of behavioral economics into regulation). See also Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 640-693 (1999) (overview of various biases and heuristics posited by behavioral research).
- <sup>164</sup> John S. Applegate et al., Center for Progressive Reform, *Reinvigorating Protection Health, Safety, and the Environment: The Choice Facing Cass Sunstein* (Jan. 2009), <http://www.progressivereform.org/articles/SunsteinOIRA901.pdf>.
- <sup>165</sup> See Office of Info. & Regulatory Affairs, Meeting Records, [http://www.whitehouse.gov/omb/oira\\_meetings](http://www.whitehouse.gov/omb/oira_meetings) (accessed June 8, 2011).
- <sup>166</sup> See OIRA Disclosure Memo-B, *supra* note 95. While the memorandum is dated October 18, the earliest meeting posted online is in fact dated October 16, so that was the starting date we chose for our study.
- <sup>167</sup> See Office of Info. & Regulatory Affairs, Meeting Records – Selected Agency: Office of Prevention, Pesticides and Toxic Substances, [http://www.whitehouse.gov/omb/oira\\_2070\\_meetings](http://www.whitehouse.gov/omb/oira_2070_meetings) (accessed Sep. 18, 2011) (displaying four meetings that took place in May 2011 but only appeared on OIRA's website well after June 8, 2011).
- <sup>168</sup> Office of Info. & Regulatory Affairs, Review Counts, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (accessed June 21, 2011).
- <sup>169</sup> Office of Info. & Regulatory Affairs, Historical Reports, <http://www.reginfo.gov/public/do/eoHistoricReport> (accessed July 9, 2011).
- <sup>170</sup> See Exec. Order No. 12,866 § 6(b)(4)(C)(ii)-(iii), 3 C.F.R. at 647-48.
- <sup>171</sup> See James Goodwin, *Recent Obama Administration Open Government Milestone; Tearing the Wall of Separation Between the American People and Their Government Isn't Easy*, CPRBlog, <http://www.progressivereform.org/CPRBlog.cfm?idBlog=43197A84-FE58-305E-0059154FAD1B91B0> (Apr. 28, 2010).

- <sup>172</sup> Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: Solicitation for Combined Federal Campaign (Oct. 18, 2006), [http://www.whitehouse.gov/omb/oir\\_a\\_3206\\_meetings\\_545](http://www.whitehouse.gov/omb/oir_a_3206_meetings_545) (identifying American Heart Association as “AHA”) with Office of Info. & Regulatory Affairs, Meeting Record Regarding: ARRA Health IT Rules (Mar. 22, 2010), [http://www.whitehouse.gov/omb/0938\\_meeting\\_03222010](http://www.whitehouse.gov/omb/0938_meeting_03222010) (identifying American Hospital Association as “AHA”).
- <sup>173</sup> Other “AHA” candidates include: the American Historical Association, the Arabian Horse Association, the American Homebrewers Association, the American Humanist Organization, the American Humane Association, etc.
- <sup>174</sup> GAO 2003 REPORT, *supra* note 59, at 55.
- <sup>175</sup> Office of Info. & Regulatory Affairs, Meeting Record Regarding: CAFO Rule (Oct. 9, 2002), [http://www.whitehouse.gov/omb/oir\\_a\\_2040\\_meetings\\_175](http://www.whitehouse.gov/omb/oir_a_2040_meetings_175).
- <sup>176</sup> Office of Info. & Regulatory Affairs, Meeting Record Regarding: Corps of Engineers Program Regs (Feb. 7, 2003), [http://www.whitehouse.gov/omb/oir\\_a\\_0710\\_meetings\\_193](http://www.whitehouse.gov/omb/oir_a_0710_meetings_193).
- <sup>177</sup> Office of Info. & Regulatory Affairs, Meeting Record Regarding: Definition of Solid Waste (June 10, 2003), [http://www.whitehouse.gov/omb/oir\\_a\\_2050\\_meetings\\_233](http://www.whitehouse.gov/omb/oir_a_2050_meetings_233).
- <sup>178</sup> Office of Info. & Regulatory Affairs, Meeting Record Regarding: Iron and Steel Foundries MACT (Aug. 13, 2003), [http://www.whitehouse.gov/omb/oir\\_a\\_2060\\_meetings\\_244](http://www.whitehouse.gov/omb/oir_a_2060_meetings_244).
- <sup>179</sup> Office of Info. & Regulatory Affairs, Meeting Record Regarding: Country of Origin Labeling Rule (Jul. 19, 2004), [http://www.whitehouse.gov/omb/oir\\_a\\_0581\\_meetings\\_357](http://www.whitehouse.gov/omb/oir_a_0581_meetings_357).
- <sup>180</sup> Office of Info. & Regulatory Affairs, Meeting Record Regarding: Prospective Payment System for Inpatient Rehabilitation Facilities for FY2007 (Jul. 21, 2006), [http://www.whitehouse.gov/omb/oir\\_a\\_0938\\_meetings\\_551](http://www.whitehouse.gov/omb/oir_a_0938_meetings_551).
- <sup>181</sup> Office of Info. & Regulatory Affairs, Meeting Record Regarding: Revisions to Payment Policies Under the Physician Fee Schedule for Calendar Year 2007 (Jul. 21, 2006), [http://www.whitehouse.gov/omb/oir\\_a\\_0938\\_meetings\\_550](http://www.whitehouse.gov/omb/oir_a_0938_meetings_550).
- <sup>182</sup> Office of Info. & Regulatory Affairs, Meeting Record Regarding: WOSB Fed. Contract Assistance Pgm. (June 14, 2007), [http://www.whitehouse.gov/omb/oir\\_a\\_3245\\_meetings\\_618](http://www.whitehouse.gov/omb/oir_a_3245_meetings_618).
- <sup>183</sup> Office of Info. & Regulatory Affairs, Meeting Record Regarding: Access to Pasture (Sep. 26, 2008), [http://www.whitehouse.gov/omb/oir\\_a\\_0581\\_meetings\\_786](http://www.whitehouse.gov/omb/oir_a_0581_meetings_786).
- <sup>184</sup> Office of Info. & Regulatory Affairs, Meeting Record Regarding: FAR Buy America Civilian Agency Acquisition Council (Mar. 18, 2009), [http://www.whitehouse.gov/omb/0750\\_031809](http://www.whitehouse.gov/omb/0750_031809).
- <sup>185</sup> Office of Info. & Regulatory Affairs, Meeting Record Regarding: NESHAP: Portland Cement Notice of Reconsideration (Apr. 15, 2009), [http://www.whitehouse.gov/omb/2060\\_meetings\\_041509](http://www.whitehouse.gov/omb/2060_meetings_041509).
- <sup>186</sup> Office of Info. & Regulatory Affairs, Meeting Record Regarding: GHG Reporting (Sep. 9, 2009), [http://www.whitehouse.gov/omb/2060\\_meeting\\_090909\\_2](http://www.whitehouse.gov/omb/2060_meeting_090909_2).
- <sup>187</sup> Office of Info. & Regulatory Affairs, Meeting Record Regarding: SAFE Mortgage Licensing Act (Oct. 1, 2009), [http://www.whitehouse.gov/omb/2502\\_meeting\\_100109](http://www.whitehouse.gov/omb/2502_meeting_100109).
- <sup>188</sup> Office of Info. & Regulatory Affairs, Meeting Record Regarding: Boiler MACT (Apr. 9, 2010), [http://www.whitehouse.gov/omb/2060\\_meeting\\_04092010](http://www.whitehouse.gov/omb/2060_meeting_04092010).
- <sup>189</sup> Office of Info. & Regulatory Affairs, Meeting Record Regarding: Policy and Technical Changes to the Medicare Advantage and Prescription Drug Benefit Program (Sep. 22, 2010), [http://www.whitehouse.gov/omb/0938\\_meeting\\_09222010](http://www.whitehouse.gov/omb/0938_meeting_09222010).
- <sup>190</sup> GAO 2003 REPORT, *supra* note 59, at 55.
- <sup>191</sup> Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: Part 541 Regulation (Jan. 30, 2003), [http://www.whitehouse.gov/omb/oir\\_a\\_1215\\_meetings\\_188](http://www.whitehouse.gov/omb/oir_a_1215_meetings_188) with Office of Info. & Regulatory Affairs, View Rule (RIN: 1215-AA14), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200304&RIN=1215-AA14>.
- <sup>192</sup> Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: Housing Goals Proposed Rule (Mar. 29, 2004), [http://www.whitehouse.gov/omb/oir\\_a\\_2501\\_meetings\\_328](http://www.whitehouse.gov/omb/oir_a_2501_meetings_328) with Office of Info. & Regulatory Affairs, View Rule (RIN: 2501-AC92), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200404&RIN=2501-AC92>.
- <sup>193</sup> Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: Wetlines Rule (Sep. 28, 2004), [http://www.whitehouse.gov/omb/oir\\_a\\_2137\\_meetings\\_395](http://www.whitehouse.gov/omb/oir_a_2137_meetings_395) with Office of Info. & Regulatory Affairs, View Rule (RIN: 2137-AD36), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200410&RIN=2137-AD36>.
- <sup>194</sup> Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: Definition of Distrub (Apr. 8, 2005), [http://www.whitehouse.gov/omb/oir\\_a\\_1018\\_meetings\\_431](http://www.whitehouse.gov/omb/oir_a_1018_meetings_431) with Office of Info. & Regulatory Affairs, View Rule (RIN: 1018-AT94), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200510&RIN=1018-AT94>.
- <sup>195</sup> Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: LM-30 (June 13, 2007), [http://www.whitehouse.gov/omb/oir\\_a\\_1215\\_meetings\\_613](http://www.whitehouse.gov/omb/oir_a_1215_meetings_613) with Office of Info. & Regulatory Affairs, View Rule (RIN: 1215-AB49), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200710&RIN=1215-AB49>.
- <sup>196</sup> Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: Blending (Nov. 6, 2007), [http://www.whitehouse.gov/omb/oir\\_a\\_2000\\_meetings\\_671](http://www.whitehouse.gov/omb/oir_a_2000_meetings_671) with Office of Info. & Regulatory Affairs, View Rule (RIN: 2060-AO81), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200904&RIN=2060-AO81>.
- <sup>197</sup> Compare Office of Info. & Regulatory Affairs, Meeting Record Regarding: “20-in-10” (Nov. 15, 2007), [http://www.whitehouse.gov/omb/oir\\_a\\_2000\\_meetings\\_675](http://www.whitehouse.gov/omb/oir_a_2000_meetings_675) with Office of Info. & Regulatory Affairs, View Rule (RIN: 2127-AK29), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200804&RIN=2127-AK29>.
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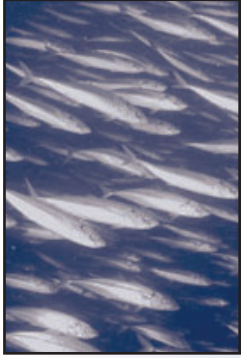
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# **The Hidden Human and Environmental Costs of Regulatory Delay**

**By Catherine O'Neill, Amy Sinden,  
Rena Steinzor, James Goodwin, and Ling-Yee Huang**

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## About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation and improved public access to information. The Center for Progressive Reform is grateful to the Public Welfare Foundation for funding this report, as well as to the Bauman Foundation, the Deer Creek Foundation, and the Open Society Institute for their generous support of its work in general.

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## Introduction

Each year dozens of workers are killed, thousands of children harmed, and millions of dollars wasted because of unjustifiable delays in federal regulatory action. The costs of regulatory delay accrue every time the federal protector agencies—those created by Congress to protect health, safety, and the environment—fail to take timely action to prevent the kind of serious and pressing threats Congress intended for them to address. Thus, when the Occupational Safety and Health Administration (OSHA) vacillates over a new rule to regulate the use of cranes and derricks, the costs come in the form of construction workers killed or injured when their equipment collapses or is improperly used. Similarly, when the Environmental Protection Agency (EPA) issues a regulation that postpones reductions of mercury emissions from U.S. power plants, the inevitable cost is the tens of thousands of children born every year with elevated mercury in their blood, at levels high enough to leave them with irreversible brain damage.

Such delays in regulatory action have become commonplace, part of the wallpaper of Washington's regulatory process for the protector agencies—the Consumer Product Safety Commission (CPSC), EPA, the Food and Drug Administration (FDA), the National Highway Traffic Safety Administration (NHTSA), and OSHA. Outside a small circle of advocates, it has gone largely unnoticed that over the last 10 years OSHA has issued comprehensive workplace regulations for only two chemicals. This small regulatory output from OSHA is astounding, considering that literally hundreds of industrial chemicals in commerce today have either no regulatory standards at all or are sold and used under standards that have not been updated in 40 years, and thus do not reflect anything learned about the chemicals and their impact on human health during that time. Meanwhile at EPA, after years of deliberate delay, the agency is only now starting to make some progress on addressing the greatest environmental challenge of our time: global climate change.

For those who care to examine them, the human and economic costs of regulatory delay are sometimes easy to identify. A delay in regulating toxic pollution might cause death or disease in humans, damage to fragile ecosystems, or massive clean-up costs for future generations. Other human and economic costs may be less obvious, but are no less important. For example, unregulated power plant emissions of mercury will cause developmental delays for some American children. Not only will they and their families suffer as a result, but taxpayers will end up footing the bill for providing special education to children who suffer brain damage. Also less obvious are the social costs of regulatory delay. For example, each instance of delay feeds public disillusionment with the nation's democratic institutions, as voters conclude that they cannot rely on the federal government to prevent serious health, safety, and environmental threats.

Regardless of how the costs of regulatory delay are measured, they represent real harms to real people and the environment—harms that are by definition completely preventable.

**Ignoring the costs of regulatory delay distorts the value of the U.S. regulatory system, skewing it against stronger regulatory protection.**

Moreover, these costs affect everyone from vulnerable subpopulations, such as children and the poor, to mighty industries, such as coal-fired power plants.

Despite its significance, the problem of regulatory delay and the costs it generates has been virtually ignored in the debate over the general wisdom of the U.S. regulatory system over the last 30-plus years. Opponents of the regulatory system have deliberately framed this debate in terms of the “costs and benefits” of regulatory *action*, implying that regulatory *inaction* caused by regulatory delay is somehow cost-free. The one-sided nature of this debate is perhaps best exemplified by the White House Office of Management and Budget’s annual *Report to Congress on the Benefits and Costs of Federal Regulations*, as required by the 2001 Regulatory Right-to-Know Act. These annual reports document in painstaking detail the quantified and monetized costs and benefits of regulatory action, providing aggregate estimates of these costs and benefits for many of the regulations that federal agencies have issued over the previous year as well as over the previous ten years. Not once, however, have these reports ever sought to document the costs of regulatory delay.

The problem with ignoring the costs of regulatory delay is that it provides an incomplete picture of the value of the U.S. regulatory system—one that is inevitably skewed against stronger regulatory protection. Broadly speaking, the purpose of this white paper is to begin the process of filling in the rest of this picture, so that in the future the debate over the general wisdom of the U.S. regulatory system can continue on more robust and balanced terms. To this end, this white paper presents three case studies. Each tells the story of a recent or ongoing example of regulatory delay that has caused real harm to Americans and their environment:

- The first case study examines how EPA first delayed regulating power plant mercury emissions, despite detailed instructions in the 1990 Clean Air Act Amendments, and then actually attempted to adopt a regulatory program that was not only contrary to these detailed instructions but also intentionally postponed emissions reductions until after 2020. As a result of EPA’s continuing failure to regulate these emissions, tens of thousands of American babies are born each year with unsafe levels of mercury in their blood—levels high enough to cause brain damage and other neurological problems. This regulatory delay also may contribute to hundreds of cases of preventable heart disease in adults every year and untold environmental harms.
- The second case study examines how EPA has for decades abdicated its clear duty under the Clean Water Act to control the spread of invasive species from ships’ ballast water discharges. A federal court recently ordered EPA to begin regulating these discharges, but invasive species have already done considerable damage. For example, since it was first introduced in the 1980s, the zebra mussel—an invasive species carried to the United States in ships from Eastern Europe—has spread to hundreds of U.S. waterbodies, causing an estimated \$1 billion in damages every year, by clogging water intake pipes at power plants and other industrial facilities. Zebra

mussel infestations have also permanently altered the fragile ecosystems of lakes and rivers across the country.

- The third case study examines how a much-needed new rule updating regulatory standards for the use of cranes, derricks, and other heavy machinery at construction sites has remained stalled at OSHA for the last five years. The existing standards are now 40 years old and are in dire need of updating to account for changes in technology and construction practices. OSHA's failure to issue the new rule has been costly: The agency estimates that it would save dozens of lives and prevent well over 100 injuries every year.

From these case studies, it is clear that costs of regulatory delay are diverse, extensive, and can be quite severe. These case studies also make it clear that regulatory delay is a systemic problem—not one that is peculiar to any one regulatory agency or to any one presidential administration—and thus will require a systematic solution to correct.

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## CASE STUDY: Mercury Emissions from Power Plants

The 1990 Clean Air Act instructed EPA to determine whether mercury emissions from coal-fired power plants posed a threat to public health by November 1994, and if it found such a threat, to adopt regulations controlling those emissions. Now, more than a decade and a half later, there is still no rule. Meanwhile, some 637,000 American babies are born each year with unsafe levels of mercury in their blood as a result of exposure to human-based sources. An estimated 10 percent of American women of childbearing age have similar, unsafe blood mercury levels. This number nearly triples for women who designate their ethnicity as "other" (*i.e.*, who are Native American, Asian American, or from the Pacific or Caribbean Islands). A full 27.4 percent of these women have unsafe blood mercury levels. Every year as many as 94,000 babies are born in the United States with elevated blood mercury levels—levels high enough to leave them with irreversible brain damage—and as many as 231 children develop mental retardation, all as a direct result of exposure to mercury emissions from U.S. power plants.

### The Issue

Mercury pollution has long been recognized as extremely harmful to humans and the environment. For example, fetal exposure to environmental mercury can impair human brain development, resulting in an array of negative consequences such as IQ loss ranging from 0.2 to 24 points, cerebral palsy, and mental retardation (*i.e.*, an IQ below 70).<sup>1</sup>

Coal-fired power plants are the single largest emitters of mercury pollution in the United States, releasing roughly 48 tons every year.<sup>2</sup> Coal naturally contains trace amounts of

mercury, and the process of combustion causes this mercury to be released into the air. These mercury particles fall into lakes and streams, where they are converted to methylmercury before being consumed by the fish that humans and other animal species eat. An estimated 10 percent of American women of childbearing age have unsafe blood mercury levels, putting many children at risk of fetal exposure to environmental mercury. About 27.4 percent of women who designate their ethnicity as “other” (*i.e.*, who are Native American, Asian American, or from the Pacific or Caribbean Islands) have unsafe blood mercury levels—nearly triple the national average.<sup>3</sup>

Mercury pollution from power plants is taking a devastating toll on childhood brain development. According to data from two studies,<sup>4</sup> strict regulation of mercury emissions from U.S. power plants could prevent around 94,000 American babies every year from being born with elevated blood mercury levels—levels high enough to leave them with irreversible brain damage. It could also prevent as many as 231 children from developing mental retardation every year.

### **The Regulatory Delay**

Mercury poses a *clear problem*. Hundreds of thousands of children are born in the United States every year with elevated blood mercury levels because of mercury air pollution. Congress has provided a *clear solution*: Given the finding that mercury from power plants posed a threat to human health, the 1990 Clean Air Act Amendments required the EPA to drastically reduce mercury emissions from coal-fired power plants. By any reasonable estimate, this regulation should have been issued by 2000 at the latest. It’s now 2009, and EPA has yet to act.

Below, we recount the disappointing sequence of events that has prevented EPA from regulating mercury in accordance with Congress’ clear instructions. From this narrative, certain themes emerge—a lack of resources, industry pressure, and, most pernicious, rules with built-in delay.

### ***Congress Cocks the Hammer . . .***

Frustrated by EPA’s lack of progress in addressing toxic air pollutants under the original Clean Air Act of 1970, Congress put regulation of these pollutants on the fast track when it amended the Clean Air Act in 1990. The Amendments gave special attention to the problem of mercury pollution from power plants.

These Amendments directed EPA to submit to Congress by November 1994 a series of preliminary reports on mercury pollution and alternative control strategies. If, after reviewing these reports and other relevant evidence, EPA determined that regulating power plant mercury emissions was “appropriate and necessary,” the Amendments required the agency to adopt very strict technology-based regulations (a maximum achievable control technology or MACT standard).

Working with reasonable diligence, EPA should have been able to complete a final MACT standard for mercury within a few years after 1994, when the last of the required reports should have been completed. At the very least, EPA should have been able to finish the MACT standard by November 2000, which was the catch-all deadline set by the Amendments for EPA to issue regulations for all toxic air pollutants.

### ***. . . But EPA Can't Pull the Trigger on MACT***

EPA has always been plagued with inadequate resources, but the problem was especially acute during the Clinton Administration. The 1990 Clean Air Act Amendments directed EPA to implement an array of new programs, yet Congress never increased the agency's budget to reflect its increased workload.<sup>5</sup> To make matters worse, the coal and power plant industries worked hard from the beginning to prevent EPA from regulating mercury emissions. One favored tactic was to attack EPA's science. By simply raising the question of whether we "know enough" about mercury's health effects, industry was able to put EPA on the defensive. Of course, it is always the case that more can be learned, and even those scientific conclusions about which we are most certain are always open to question—that is the nature of scientific inquiry. Nonetheless, EPA felt compelled to go to great lengths to answer these attacks. As a result, the agency fell further and further behind the timeline set up by the 1990 Amendments.

Industry began its attacks by criticizing the science in EPA's preliminary reports. EPA responded by holding back one report until new scientific studies became available<sup>6</sup> and by putting some of the reports through a lengthy review process.<sup>7</sup> Even after numerous independent reviews confirmed that the reports were supported by the "best available science," industry continued to pressure EPA to delay submitting them to Congress until better scientific evidence emerged. As a result, EPA did not submit the last of the reports until March 1998—almost four years after they were all due.

Even once the reports were finally done, EPA declined to make the "appropriate and necessary" finding, asserting that it needed to conduct more studies on emissions control technology. Six months later, industry allies in Congress managed to insert a rider into an appropriations bill ordering EPA to delay its "appropriate and necessary" finding even further—until after the National Research Council approved the science underlying one of EPA's reports. Another 21 months went by while EPA waited for approval from the Council, which was ultimately granted in July 2000.<sup>8</sup> Finally, in December 2000, as President Clinton was packing up to leave the White House, EPA made the "appropriate and necessary" finding, six years after all the studies were supposed to have been completed.

### ***The Bush Administration Stomps on the Brake Pedal***

Soon after making the "appropriate and necessary" determination, EPA convened a high-level, multi-stakeholder group of advisors to work with agency staff on the MACT



**Although ultimately unsuccessful, industry's campaign for a cap-and-trade program delayed implementation of a meaningful mercury-control program by several years.**

standard. A court order required EPA to issue the standard by December 2003, and by the beginning of that year, the agency seemed poised to meet the deadline. Even manufacturers of emissions control technology began ramping up their production in anticipation of heightened demand.<sup>9</sup>

In spring 2003 though, EPA's progress came to a screeching halt, when the Assistant Administrator in charge of the Office of Air and Radiation, an EPA political appointee, gathered the relevant staff in his office and told them to abandon the work they had completed to date and adopt an entirely different approach to the issue. Under a creative interpretation of the statute—one that would later be struck down by a federal appeals court—EPA ignored the statute's directive to develop a MACT standard. Instead, EPA began developing a cap-and-trade program for mercury.

EPA managed to issue a proposed rule incorporating the new cap-and-trade approach in December 2003, just in time to meet the court-ordered deadline. Industry favored the cap-and-trade rule, in part because it imposed substantially weaker controls than a MACT standard would have. But the cap-and-trade rule was also highly favorable to industry in another, more subtle way: It had *built-in* delay provisions. The initial 38-ton cap would actually have no impact on mercury emissions at all, since power plants were slated to achieve that level of emissions reduction anyway as an ancillary benefit of another, unrelated clean air program. The cap would not shift to a more stringent 15 tons until 2018, but even then, it would not actually require meaningful reductions for another several years. Because the program allowed power plants to bank credits in the early years while the cap was lax and then use them later, EPA's own models showed that the 15-ton cap would not actually be met until after 2020 or perhaps as late as the 2030s.<sup>10</sup>

EPA adopted the cap-and-trade plan in a final rule, issued in 2005. But three years later, the whole scheme backfired (or so it seemed). In 2008, a three-judge panel for the D.C. Circuit Court of Appeals unanimously agreed that the cap-and-trade program violated the Clean Air Act's requirements and sent EPA back to square one to come up with a new rule.<sup>11</sup> Now, nearly two decades after Congress directed EPA to regulate mercury emissions from power plants, those plants continue to operate free of federal controls. And while industry and its allies did not succeed in writing the toothless cap-and-trade rule into regulation, their campaign did manage to delay the implementation of a meaningful program by several more years.

#### ***Postscript: America's Mercury Future***

In the vacuum left by EPA's interminable delay, 22 states have established their own regulations to control mercury emissions from power plants.<sup>12</sup> Save for these state programs, however, U.S. power plants are free to pump unlimited amounts of mercury pollution into our air for the foreseeable future.

In March 2009, the Obama EPA announced that it will resume development of a MACT standard and recently committed to completing the new regulation by 2011.<sup>13</sup> Meeting this deadline will be challenging. Because the abrupt change in course toward a cap-and-trade program during the Bush years effectively buried the original MACT standard, the agency will need to redo much of its earlier work. For example, EPA announced on July 2, 2009, that it will need to collect more up-to-date data from power plants on their mercury emissions, since the most recent data are now 10 years old and no longer valid.<sup>14</sup> Similarly, EPA will probably need to conduct new analyses of the state of the market for mercury control technology. This technology has greatly improved in recent years in response to the growing number of state programs for regulating mercury. As a result, EPA's old analyses have become outdated.

### **The Costs of Delay**

With each year that EPA fails to take decisive action on power plant mercury emissions, the human and environmental costs pile up. The cost of EPA's inaction that has received the most attention is impaired childhood brain development. According to one study, as many as 637,000 children are born each year with elevated blood mercury levels—that is, blood mercury at levels shown to be associated with cognitive dysfunction including IQ loss and mental retardation. Because coal-fired power plants in the United States are responsible for roughly 15 percent of the mercury pollution to which these children are exposed, this study suggests that strict regulation of power plant mercury emissions could prevent around 94,000 American babies from being born with elevated blood mercury levels each year.<sup>15</sup> A second study concludes that this strict regulation could also prevent as many as 231 children from developing mental retardation every year.<sup>16</sup>

The consequences of impaired brain development are often devastating. IQ loss—one common consequence of childhood brain damage—can adversely affect a child's behavior, memory, and ability to learn and communicate. Other common consequences of childhood brain damage include vision impairment, muscular control dysfunction, and problems with coordination.<sup>17</sup> These adverse effects in turn can harm a child's ability to perform well in school, to make friends, and eventually to be a productive member of society. They also can take a large emotional toll on these children and their families. Imagine the humiliation a child experiences when he performs poorly in school or the anguish a parent might feel when she watches her child struggle with his schoolwork.

Nor are the human health consequences of mercury pollution limited to impaired childhood brain development. Mercury pollution has been linked to kidney disease, damage to the nervous system, and cardiovascular disease in adults. One recent study estimates that limiting power plant mercury emissions to 15 tons per year could prevent up to 380 fatal heart attacks and 210 non-fatal heart attacks each year.<sup>18</sup>

Certain groups, like Asian Americans and American Indian tribes, have been hit particularly hard by the human costs of EPA's inaction. For cultural and other reasons, Asian Americans

**As many as 637,000 children are born each year with elevated blood mercury levels, which are associated with IQ loss and mental retardation.**

and American Indians tend to consume more fish than the general population, which increases their exposure to mercury pollution. As a result, the human health consequences of mercury pollution—particularly the worst cases—tend to fall disproportionately on these communities. For example, among the general population, mercury pollution is estimated to cause typical IQ losses of between 1.60 and 3.21 points. Among the Great Lakes Indian tribes, however, the estimate of typical IQ losses from mercury pollution ranges from 6.2 to 7.1 points.<sup>19</sup>

EPA was not unaware of the risks to these and other populations who consume large amounts of fish. But in the absence of emissions controls, EPA simply referred these groups to the relevant fish consumption advisories, suggesting that they reduce or curtail entirely their intake of several species of fish.<sup>20</sup> For some people, however, avoiding the risks of mercury by ceasing fish consumption is not a realistic option. This concern is especially acute during these difficult economic times, as more and more people consider fishing as a way to put food on the table for themselves and their families. In this way, mercury pollution can impose costs on certain populations by increasing food insecurity.

Some groups also suffer unique cultural costs as a result of mercury pollution. Fishing is central to the culture of American Indian tribes like the Aroostock Band of Micmacs in Maine and is reflected in their ceremonies, language, and songs. To the extent that members of these tribes have had to stop consuming fish for health reasons, these cultural practices are not being passed on to the next generation and risk being lost forever. Similarly, when mercury pollution harms animal species like the loon and mink—which serve as important clan symbols for the Minnesota Chippewa Tribe—it is more than just an environmental cost for American Indians; it is also a serious affront to their tribal identity and dignity.<sup>21</sup>

Lastly, mercury pollution like that emitted from power plants produces significant environmental costs. This pollution can cause brain damage, reproductive system damage, behavioral abnormalities, and even death in birds and mammals that depend on fish, such as bald eagles, loons, kingfishers, osprey, otters, minks, and the endangered Florida panther.<sup>22</sup>

### **In Sum**

The story of EPA's persistent failure to regulate power plant mercury emissions provides a stark and disturbing illustration of how regulatory delay can yield massive and indefensible human costs. Congress first told EPA to regulate toxic air pollutants like mercury in 1970. Two decades later, frustrated with EPA's slow progress, Congress gave the agency a specific directive to regulate mercury emissions from power plants and to get it done by the end of the decade at the latest. Now, nearly two decades after Congress's second directive, power plants continue to emit mercury into the air, free of federal controls. Meanwhile, tens of thousands of children are born each year with blood mercury levels high enough to cause irreversible brain damage that could have been prevented, hundreds die needlessly of heart attacks, and countless additional untold human and environmental losses continue to mount.

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## **CASE STUDY: Ballast Water Discharges and Invasive Species**

In 1972, the Clean Water Act set ambitious goals for cleaning up the country's waters, requiring permits for discharges of a broad range of pollutants. Even though the ballast water routinely discharged by ships into harbors, lakes, and rivers contains biological pollutants clearly covered by the Act, in 1973, EPA issued a regulation exempting ballast water from the Act's permitting requirements. In the decades since, the rapid spread of the zebra mussel—an invasive species from Eastern Europe first brought by ships to Lake St. Clair in Michigan—has demonstrated the dramatic costs of inaction. In the past two decades, this invasive species has ravaged the waterways of 25 states and caused an estimated \$1 billion in damages each year, clogging pipes at power plants and sewage treatment plants and displacing native species. After a federal appeals court invalidated the 1973 exemption, EPA finally began requiring permits for the discharge of ballast water, but this action comes 20 years too late. Today zebra mussels are a permanent and costly nuisance in many freshwater ecosystems.

### **The Issue**

While significant progress has been made in reducing conventional pollutants under the Clean Water Act, invasive species—a type of biological pollutant—have continued to infest native ecosystems and displace native species. What makes these pollutants so insidious is their permanence: Once established, invasive species are nearly impossible to eradicate and forever change native ecosystems. Aquatic invasive species spread through cargo-ship ballast water, which is taken up and discharged at ports along a ship's route. The water is stored on board in pool-sized tanks and helps balance a ship as it loads and unloads cargo.

No bigger than two inches and innocuously named, zebra mussels have spread to hundreds of water bodies around the country in the past two decades. These mussels are native to Eastern European waters and arrived in the United States in ballast water discharged into the Great Lakes. With no natural predators, they have aggressively established populations in many of the country's great waterways. Zebra mussels cause an estimated \$1 billion in losses annually by clogging water intake pipes at power plants, municipal water supplies, and other industrial facilities. Control measures, such as mechanical scrapers, chemical treatment, filtration devices, and physical barriers, are also costly, and no single measure is uniformly effective. In 1989, just one year after the mussels were discovered in Lake St. Clair, the town of Monroe, Michigan, lost its water supply for three days because a zebra mussel colony completely clogged an intake pipe.<sup>23</sup>

When Congress passed the Clean Water Act in 1972, it directed the fledgling EPA to regulate pollution of the nation's waters, including biological pollution. Had EPA followed this mandate—instead of issuing an explicit exemption for ballast water—the nation might have avoided the steep economic and environmental costs of this invasive species.

### The Regulatory Delay

The Clean Water Act prohibits “the discharge of any pollutant” into the nation’s waterways without a permit, and defines “pollutant” broadly to include biological materials. When ships discharge ballast water, they discharge such biological materials and other pollutants into the water. Despite its clear statutory directive, in 1973 EPA issued a regulation exempting ballast water from the Act’s permit requirement.<sup>24</sup> In 2008, a federal appeals court unanimously struck down this regulation, holding that it violated the plain language of the Clean Water Act: to prohibit the discharge of *any* pollutant without a permit.<sup>25</sup> Indeed, the court found the statutory violation so clear that it noted “the EPA does not seriously contest this conclusion.”<sup>26</sup>

When it issued the 1973 regulation, EPA was in its infancy and charged with an ambitious agenda. An EPA official said that at that time the agency was so overwhelmed with “higher priority situations . . . vessels were not important to the overall scheme of things at that time.”<sup>27</sup> The exemption was attractive to the struggling young agency because it would “dramatically reduce administrative costs.”<sup>28</sup> The EPA tried to justify its inaction in the face of a clear statutory directive by asserting that ballast water discharges “generally cause little pollution” anyway. The agency further maintained that the exemption was an attempt to avoid duplicative regulation when other federal bodies—namely the Coast Guard—were likely to be more effective and efficient than EPA. Regulations on ballast water discharges issued by the Coast Guard in 1998 were purely voluntary, however, and proved ineffective at addressing the problem. For decades after it initially declined to regulate biological pollution in ballast water, EPA fell into the easy bureaucratic inertia of inaction. The agency assumed that since Congress knew about the exemption and did not legislatively reverse it, the approach must be permissible despite the CWA’s explicit language to the contrary.

In 1973, it may have been plausible to think that ballast water discharges “generally cause little pollution.” However, by the mid-1990s, it was apparent that invasive species—and zebra mussel in particular—were destroying native ecosystems and pushing native species to extinction. Congress, state governments, and the president realized the severity of the problem. Congress addressed the problem in part by passing the National Invasive Species Act of 1996, authorizing the U.S. Coast Guard to establish ballast water discharge guidelines. As noted above, however, these guidelines were purely voluntary when first issued and had limited effect.<sup>29</sup> President Bill Clinton attempted to address the problem in 1999 with an executive order requiring federal agencies to “use relevant programs and authorities” to “prevent the introduction of invasive species,” and prohibiting federal agencies from authorizing, funding, or undertaking activities that are likely to cause or promote the introduction or spread of invasive species.<sup>30</sup> But despite this prodding, EPA did not revisit its exemption.

While EPA dallied, coastal and Great Lakes states developed their own ballast water regulations. For example, California’s Marine Invasive Species Act requires ships over 300 tons traveling from outside the Pacific Coast Region to discharge ballast water at least 200

nautical miles from shore in water no less than 2,000 meters deep. Washington and Oregon have similar legislation modeled after this act. A federal appeals court recently upheld the Michigan ballast water regulations that require oceangoing vessels to obtain a permit from the state,<sup>31</sup> and other Great Lakes states have begun the process of adopting similar regulations.<sup>32</sup>

After the federal appeals court invalidated EPA's ballast water exemption in 2008, the agency finally began regulating ballast water by requiring a permit for discharge, 20 years after the first zebra mussels were found in the United States.<sup>33</sup> However, advocacy groups and the Michigan Department of Environmental Quality point out that the permit conditions are weak and give "the appearance the agency is avoiding reaction from the shipping industry."<sup>34</sup> Great Lakes states, such as New York, have already passed more stringent controls to supplement EPA's conditions and to better protect their waters.<sup>35</sup> Whether this new program will be effective remains to be determined, but critics seem skeptical.

### The Costs of Delay

Decades of inaction by EPA have been both economically and ecologically costly. Zebra mussels and quagga mussels, a similar invasive species introduced from ballast water, together cost approximately \$1 billion annually in losses from clogged water pipes to expensive equipment installed to clean-up and prevent infestations. Colonies of zebra mussels can reduce the diameter of a water pipe by two-thirds, constricting water flow and reducing water intake for equipment essential to any facility that withdraws water: power plants; municipal water plants; and other industries.<sup>36</sup> The costs of preventing and destroying zebra mussel colonies have been astronomical and are undoubtedly passed along to the public. Ecologically, the impact of zebra mussel infestations has also been dramatic, though harder to quantify. The mussels attach to and smother native species with hard shells and fundamentally alter the food web of freshwater ecosystems.

Since they were first discovered in the Great Lakes, zebra mussels have spread to 25 states. While many of the infestations are connected to the tributaries and waterways of the Great Lakes, zebra mussels have been found as far west as Colorado, Utah, and California. For western states such as California that rely heavily on hydropower, a permanent infestation could spell doom for the industry. At one power plant in Michigan, the colony density measured as high as 700,000 zebra mussels per square meter.

The U.S. Fish and Wildlife Service estimates that for the power industry and water facilities in the Great Lakes region, the clean-up and damage cost associated with zebra mussels will be \$5 billion between 2000 and 2010. At the James A. Fitzpatrick Nuclear Power Plant in New York, the initial installation cost for a chemical treatment system to prevent future infestations was \$300,000, in addition to between \$60,000 and \$80,000 in annual operating costs. Zebra mussels have not yet established colonies in Florida, but one study estimates that if they do, a statewide infestation could cost \$244 million in losses over a 20-year period.

**In 1989, just one year after the mussels were discovered in Lake St. Clair, the town of Monroe, Michigan, lost its water supply for three days because a zebra mussel colony completely clogged an intake pipe.**



Economic damages are not limited to power and other water-dependent industries. The weight of zebra mussel colonies on navigational buoys causes them to sink, and colonies cause corrosion of wooden docks, as well as steel and concrete pilings, undermining their structural integrity.<sup>37</sup> Sharp and jagged zebra mussel shells litter beaches, injuring recreational beach-goers, and decaying carcasses mar a day at the beach with noisome odors.

While the environmental costs may not be easily quantifiable, they are no less significant. Ecologists have declared invasive species to be the second biggest threat to the natural environment, behind only habitat loss and degradation. Transplanted to new surroundings, invasive species have no natural competitors or predators to hold their populations in check. As a result, they proliferate exponentially and aggressively destroy native ecosystems by physically displacing native species and consuming resources. Once established, invasive species cannot be easily eradicated without highly toxic methods that would also wipe out native species.

Zebra mussels are prolific breeders: A single female can produce up to one million eggs, 20 percent of which survive to adulthood. Mobile during their larval stage, they float through waterways and tributaries before attaching onto hard structures as adults. As filter feeders, zebra mussels have dramatically altered the food webs in Lake Erie. In some parts, they have increased water clarity to 30 feet from 6 inches by consuming nearly all the algae in the water. That dramatic change may please swimmers, but it also alters the entire food chain to the detriment of native fish and aquatic species and ultimately impacts fishermen and wildlife that depend on native fisheries. Unlike other mollusks, zebra mussels also attach to native clams and other mollusks, eventually smothering them and causing precipitous declines in their populations. One report predicts that zebra mussels will cause the extinction of up to 140 native species of mussels by 2012.<sup>38</sup>

### **In Sum**

Hamstrung by inadequate resources, EPA made an initial decision not to regulate ballast water, despite a clear statutory directive to do so. In the decades that followed, that decision proved costly as the evidence mounted that zebra mussels brought to U.S. waters in ballast water were taking a devastating economic and ecological toll. The agency remained locked in bureaucratic inertia from which it did not emerge until 2008, when a federal court ordered the agency to take action. Meanwhile, the zebra mussel infestation imposed a billion-dollar price tag annually on industry and government, and now the mussels' permanence in the nation's waterways is all but given. EPA's long-delayed regulation of ballast water has come too late to have much hope of reversing the zebra mussel problem. But we can hope that it will prevent the introduction of the next invasive species.

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## CASE STUDY: Collapsing Cranes

In 1971, the Occupational Health and Safety Administration issued regulations for the use and operation of cranes, derricks, and other heavy machinery at construction sites. Nearly four decades later, OSHA has not updated this rule despite vast changes in technology and work processes. Beginning in the mid-1990s, industry itself began petitioning OSHA for stronger and more comprehensive regulations and in 2004 a committee of industry, labor, and government representatives reached agreement on a draft proposed rule. But five years later, this rule is still trapped somewhere in OSHA, waiting to be issued. Meanwhile, by OSHA's own estimates, 89 crane-related deaths and 263 crane-related injuries occur each year. Implementing the draft rule would reduce these numbers by 59 percent. In other words, every year the rule continues to sit on a desk while OSHA remains understaffed, under-resourced and over-stretched, 53 people die and another 155 are injured unnecessarily.

### The Issue

The *headlines are uncomfortably familiar*. “Crane Collapse in Houston Kills 4,” describing the 2008 collapse of a 30-story-tall crane that smashed into the ground, lifting nearby workers off their feet in Texas where neither state nor federal regulations require crane operators to be licensed; “Crane Topples in Manhattan,” detailing the worst construction accident in the history of New York City when a 20-story-tall crane crashed into surrounding buildings, killing six construction workers and a tourist bystander; and “Two Workers Are Killed in Miami Crane Accident,” recounting the deaths of two construction workers and injuries to five others when a seven-ton section of a crane crashed through the roof of the nearby project’s safety office.<sup>39</sup>

The *numbers are disturbingly high*. An estimated 89 crane-related deaths each year with even more injuries to bystanders and rescue workers and millions of dollars in insurance payments, lawsuits, and project delays.

The *regulations are indefensibly outdated*. Despite technological leaps in construction machinery, OSHA has not updated the standards or requirements for operating cranes and other heavy equipment since 1971, nearly four decades ago.

### The Regulatory Delay

The technological landscape of 1971 would be virtually unrecognizable today: offices ran on typewriters and carbon-copies; most phones were still rotary dialed; and engineers wore slide rules on their belts. This was the year that OSHA adopted the regulation for the operation of cranes, derricks, and other heavy machinery that remains in place today. Nearly four decades later, just as cell phones, laptop computers, and pocket calculators have



**Under the proposed 2004 rule, OSHA estimates that annual deaths and injuries from accidents involving cranes and other heavy equipment would be reduced by 59 percent.**

revolutionized the technological landscape, the technology that operates cranes, derricks, and other heavy machinery at construction sites looks nothing like it did in 1971. Unfortunately for today's crane operators and construction workers, the safety protections in their workplaces are as outdated as slide rules and carbon paper.<sup>40</sup>

Operating a crane in the 21st century is a highly technical and complex enterprise, involving sophisticated electronics and computers and requiring specific skills and experience to avoid accidents. The major causes of crane-related deaths and injuries are electrocution, improper assembly and disassembly, general equipment failure, and crane tip-over. But underlying these causes is a more basic problem: a lack of qualification and training for operators, supervisors, and crewmembers. The old rule, written for a different era, is hopelessly outdated, particularly with respect to the training and certification of personnel.

By the mid-1990s, things were so bad that industry itself was calling for updated federal regulations to reduce the number of crane-related deaths and to address the underlying causes of those accidents. In 1998, OSHA, recognizing the need for an updated standard, established a workgroup to make recommendations for updates to the cranes and derricks rule. Four years later, there was still no rule, but OSHA announced that it would seek a collaborative process involving industry stakeholders and representatives from all interested parties<sup>41</sup> to negotiate an updated federal standard. The committee began its meetings in 2003 and worked under the premise that, if it could agree on a draft rule, OSHA would publish and finalize the draft as its rule.<sup>42</sup> Within a year, the committee achieved consensus on a draft rule, which it submitted to OSHA in July 2004.

The draft rule fills many gaps left by the 1971 standards. It directly addresses the underlying problem of inexperience by requiring operators, inspectors, and assembly and disassembly workers to be certified. The rule accounts for the many technological developments since 1971 by regulating new safety and operating equipment, mandating certain protocols for failures of commonly used technologies, and permitting greater flexibility to select equipment made safer by new technologies. The draft rule also addresses electrocution, a major cause of death, by specifying the minimum distance between equipment and active power lines.<sup>43</sup>

Following completion, the draft rule stalled at OSHA for four years, a victim of stretched resources and competing priorities. Noah Connell, the director of OSHA's Office of Construction Standards and Guidance, explained that finalizing the proposed rule was "quite simply, an enormous undertaking."<sup>44</sup> He described the process of writing the background and justification as "very time-consuming," requiring frequent consultation with other departments on technical questions. When addressing the internal delay, Connell aptly described the signs of an under-resourced and over-stretched agency:

You know, the timelines, it's very difficult to predict these dates. You know, we don't work independently. We work with a number of different agencies within OSHA. Those different parts of OSHA have projects other than

our project and so inevitably there is some competition of resources and, you know, the agency as a whole has been working on many, many projects concurrently.<sup>45</sup>

Not until June 2008—four years after the rulemaking committee reached consensus on a new draft rule—did the proposed rule make it to the White House for final scrutiny. In August 2008, the Office of Management and Budget gave its approval and six weeks later, in October 2008, OSHA published the proposed rule in largely the same form as negotiated by the committee four years earlier.<sup>46</sup> After a series of extensions, the comment period finally ended in June 2009, but to date OSHA has still not issued the final rule. Recently, acting OSHA Director Jordan Barab again attributed the delay to an over-stretched agency, emphasizing the complexity and immensity of the new rule. Barab estimated that OSHA would finalize the new cranes and derricks rule “some time next year,” which means in 2010, nearly four decades after the existing rule was issued and six years after the draft rule was completed.<sup>47</sup>

Notably, the new rule has consistently enjoyed broad-based support. Throughout the delay period, industry representatives, members of the rulemaking committee, OSHA representatives,<sup>48</sup> and Members of Congress have all expressed overwhelming support for the draft rule and have urged final approval. When OSHA first publicly acknowledged the need to update the rule in 1999, it was in response to repeated requests by industry representatives. In July 2008, a group of senators wrote an open letter to Secretary Chao, calling the regulatory delay—both the failure to update the rule since 1971 and the four-year delay in submitting the draft rule to the OMB—“unfathomable.”

### **The Costs of Delay**

By OSHA’s own estimates, 89 crane-related deaths<sup>49</sup> and 263 worker injuries<sup>50</sup> occur each year at construction sites. Under the proposed rule, OSHA estimates that 59 percent of these deaths and injuries could be avoided. In short, every year that goes by without the new rule in place another 53 people die and 155 are injured in accidents that could and should have been prevented.<sup>51</sup>

Accidents involving cranes, derricks, and similar machinery are not only costly in terms of human lives lost but in financial terms for employers and project owners. Take, for example, Miller Park, home of the Milwaukee Brewers baseball team in Milwaukee, Wisconsin. OSHA estimates that the total cost of the project will approach \$1 billion, including the cost of construction, lawsuits, and penalties, after a crane accident killed 3 construction workers in 1999.<sup>52</sup> The workers died when a collapsing heavy-lift crane struck their elevated platform. The crane, nicknamed Big Blue and capable of lifting 1500 tons, was being used to place sections of the Park’s roof weighing over 450 tons. Because of the crane accident, the stadium construction fell one year behind schedule and failed to open

in time for the 2001 baseball season. The cost of the construction alone was 28.5 percent more than budgeted, not including the \$100 million in repair costs covered by insurance and the millions of dollars in civil and punitive damages that a jury awarded to the workers' beneficiaries.

### **In Sum**

With each year that passes without an updated rule governing cranes and derricks at construction sites, another 89 people die and another 263 are injured. Behind each statistic is a compelling story—a new father, a newlywed, a tourist in town for the weekend. But what makes these deaths and injuries particularly tragic is that more than half were entirely preventable. The need for a new rule has been apparent for decades, and for the past five years a new rule has been ready to go, drafted and agreed upon by all relevant stakeholders. Yet it remains lost in the hallways of OSHA—an agency overwhelmed by responsibilities and drastically under-staffed and under-resourced. Meanwhile, the costs of delay continue to climb.

**The proposed 2004 rule has received consistent and broad-based support from senators, industry, construction worker representatives, and OSHA staffers.**

## Conclusion

As these three case studies illustrate, regulatory delay has become commonplace at the protector agencies—the norm in Washington, despite the manifest health, safety, and environmental problems the delays cause. Time and time again, protector agencies like EPA and OSHA unjustifiably delay issuing new regulations or updating old ones, often in clear violation of the statutes under which they operate.

At least three lessons are clear from the foregoing case studies. First, *no single measure can capture the costs of regulatory delay*. In some cases, they are measured in terms of human health, such as the children born with elevated blood mercury levels as a result of EPA's delay in issuing a mercury rule for power plants. In other cases, they are measured in terms of preventable deaths and injuries, such as the dozens of construction workers and innocent bystanders killed or injured as a result of OSHA's delay in updating regulations for the use and operation of cranes and derricks. In still other cases, these costs are measured in terms of ecological damage and disruption—the full scope of which scientists do not even yet understand—such as the countless animal species that have been harmed as a result of EPA's delay in properly regulating the spread of invasive species through ballast water discharges or its delay in regulating mercury from power plants. And finally, there are some cases where the costs can be measured in monetary terms, such as the damage to power plant water intake pipes that have resulted from EPA's failure to prevent the spread of zebra mussels through ballast water discharges.

Second, *regulatory delay has far-reaching consequences, threatening the health and safety of diverse populations, harming business interests and workers, and damaging the environment*. Vulnerable populations, including children, Asian Americans, and American Indians, are particularly hard hit by the mounting costs of EPA's delay in regulating power plant mercury emissions. More and more construction workers suffer the consequences of OSHA's delay in issuing an updated rule on cranes and derricks. The health of freshwater ecosystems throughout the United States worsens, as many are permanently altered by the spread of zebra mussels due to EPA's delay in establishing a regulatory program to prevent the introduction of invasive species through ballast water discharges. Also because of EPA's delay on ballast water, power plants bear the growing costs of unclogging their water intake pipes of zebra mussels rather than directing their resources toward controlling their harmful emissions.

Finally, from these case studies, *it is clear that the costs of regulatory delay tend to remain hidden from public view*. Whether it is children born with elevated blood mercury levels, injured or killed construction workers, or clogged water intake pipes, these costs often accrue gradually over time. Individually, these costs might attract some fleeting public and media attention, but collectively they are rarely understood as the interconnected results of a single delay in regulatory action by a particular agency. The fact that they can occur without much notice, despite their severity and extensiveness, is part of what makes the costs of regulatory delay so insidious.

Unfortunately, regulatory opponents have worked hard to ensure that the costs of regulatory delay remain hidden. As the case studies make clear, the goals of regulatory opponents are served not just when they kill or weaken regulations, but also when they delay them for a considerable amount of time. Accordingly, when it comes to measuring the performance of the U.S. regulatory system, they have sought to skew the focus towards the costs of regulation, rather than towards the cost of regulatory delay.

It is nevertheless crucial to cast a spotlight on these often-hidden costs. Without a clear understanding of how regulatory delay affects real people and the environment, it is impossible to obtain a complete picture of the invaluable role that the U.S. regulatory system plays in our society. Without this clear understanding, it is also impossible to have an open and honest discussion over what needs to be done to reinvigorate these agencies so that they can go about the business of protecting people and the environment.

The White House Office of Management and Budget (OMB) can play an instrumental role in drawing greater attention to the costs that result from regulatory delay by documenting these costs in its annual *Report to Congress on the Benefits and Costs of Federal Regulations*. As explained above, these annual reports have helped reinforce the perception that regulatory delay is cost-free by documenting and aggregating the costs and benefits of regulatory action, while ignoring the costs of delayed regulatory action. OMB should expand these reports to include a description of the costs of delayed regulatory action so that they provide a more accurate picture of the value of regulation.

The problem of regulatory delay—and the profound costs that it generates—will not be solved easily. At a minimum, we need to ensure that the protector agencies receive the resources they need to carry out their respective statutory missions. Beyond that, we need to continue exploring other ways to reinvigorate the protector agencies so they can carry out these missions in as timely a manner as possible.

## End Notes

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- <sup>2</sup> U.S. E.P.A., *Fact Sheet – EPA’s Clean Air Mercury Rule*, <http://www.epa.gov/mercuryrule/factsheetfin.htm> (last visited Aug. 10, 2009).
- <sup>3</sup> Kathryn R. Mahaffey et al., *Adult Women’s Blood Mercury Concentrations Vary Regionally in the United States: Association with Patterns of Fish Consumption (NHANES 1999-2004)*, 117 ENVTL. HEALTH PERSP. 47 (2009).
- <sup>4</sup> Leonardo Trasande et al., *Applying Cost Analyses to Drive Policy That Protects Children: Mercury as a Case Study*, 1076 ANN. N.Y. ACAD. SCI. 911, 916, 919 (2006) [hereinafter Trasande et al., *Applying Cost Analyses*]; Trasande et al., *Methylmercury Toxicity*, *supra* note 1, at 153.
- <sup>5</sup> SIDNEY SHAPIRO & RENA STEINZOR, *THE PEOPLE’S AGENTS: REVIVING GOVERNMENT PROTECTION OF HEALTH, SAFETY, AND THE ENVIRONMENT* (forthcoming 2009).
- <sup>6</sup> Michael Tighe, *Pressure to Release Mercury Report Rises*, L.A. TIMES, June 22, 1997, at 18; Dieter Bradbury, *Coal-Fired Power Plants Spew Mercury But Avoid Crackdown*, PORTLAND PRESS HERALD, Sept. 29, 1997, at 1A.
- <sup>7</sup> Tighe, *supra* note 6.
- <sup>8</sup> John Myers, *Scientists Back EPA Mercury Regulations; Coal-Fired Power Plants Could See Action*, DULUTH NEWS-TRIB., July 16, 2000, at 3D.
- <sup>9</sup> See, e.g., Clean Air Act Advisory Committee, Meeting Summary, June 24, 2004, 4 (Statement of Timothy Johnson, Corning Inc.) (“[A]bout 10 years ago Corning Incorporated invented an absorbent for mercury control in coal fired power plants. EPA completed a technical review of mercury abatement about 10 years ago based on these power plants in Japan and Germany, and had concluded that mercury control costs less than 1/10 to 1/2 of a cent per kW hour. When the promise for a mercury regulation faded away 10 years ago, Corning Incorporated dropped the mercury absorbent technology, stopped the technical symposiums and shifted resources to other pollution controls.”), available at <http://www.epa.gov/oar/caaac/pdfs/062404meetingsummary.pdf>.
- <sup>10</sup> U.S. ENVTL. PROT. AGENCY, TECHNICAL SUPPORT DOCUMENT: METHODOLOGY TO GENERATE DEPOSITION, FISH TISSUE METHYLMERCURY CONCENTRATIONS, AND EXPOSURES FOR DETERMINING EFFECTIVENESS OF UTILITY EMISSION CONTROLS 3, Tables 1.1 and 1.2 (2005), available at [http://www.epa.gov/ttn/ecas/regdata/Benefits/Final\\_Effectiveness.pdf](http://www.epa.gov/ttn/ecas/regdata/Benefits/Final_Effectiveness.pdf) (figures for emissions reductions presented in kg/year; authors’ conversions); JAMES E. MCCARTHY, MERCURY EMISSIONS FROM ELECTRIC POWER PLANTS: AN ANALYSIS OF EPA’S CAP-AND-TRADE REGULATIONS 7-8 (CRS Report RL32868, Apr. 15, 2005), available at <http://www.cleanairnow.org/pdfs/crsrptrule415.pdf>.
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- <sup>14</sup> Agency Information Collection Activities: Proposed Collection; Comment Request; Information Request for National Emission Standards for Coal- and Oil-fired Electric Utility Steam Generating Units, 74 Fed. Reg. 31,725 (July 2, 2009).
- <sup>15</sup> Trasande et al., *Applying Cost Analyses*, *supra* note 4, at 916, 919.
- <sup>16</sup> Trasande et al., *Methylmercury Toxicity*, *supra* note 1, at 153.
- <sup>17</sup> ECONOMIC VALUATION, *supra* note 1, at 26-37.
- <sup>18</sup> *Id.* at 168.
- <sup>19</sup> Catherine A. O’Neill, *Environmental Justice in the Tribal Context: A Madness to EPA’s Method*, 38 ENVTL. L. 495, 531 (2008).
- <sup>20</sup> Proposed National Emissions Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards for Performance for New and Existing Stationary Sources: Electric Utility Steam-Generating Units; Proposed Rule, 69 Fed. Reg. 4652, 4709 (Jan. 30, 2004).
- <sup>21</sup> O’Neill, *supra* note 19, at 496-97, 509-13.
- <sup>22</sup> MERCURY STUDY REPORT, *supra* note 1, at 3-43 to 3-45.
- <sup>23</sup> Great Lakes Sci. Ctr., U.S. Geological Survey, *Zebra Mussel*, [http://www.glsr.usgs.gov/main.php?content=research\\_invasive\\_zebramussel&title=Invasive%20Invertebrates0&menu=research\\_invasive\\_invertebrates](http://www.glsr.usgs.gov/main.php?content=research_invasive_zebramussel&title=Invasive%20Invertebrates0&menu=research_invasive_invertebrates) (last visited Aug. 18, 2009).
- <sup>24</sup> 40 C.F.R. § 122.3 (2009) (exempting from the NPDES permit requirement “any . . . discharge incidental to the normal operation of a vessel”).
- <sup>25</sup> *Nw. Envtl. Advocates v. U.S. E.P.A.*, 537 F.3d 1006 (9th Cir. 2008).
- <sup>26</sup> *Id.* at 1022.
- <sup>27</sup> *Id.* at 1012.
- <sup>28</sup> National Pollutant Discharge Elimination System, 38 Fed. Reg. 13528 (May 22, 1973).
- <sup>29</sup> In 2004, the Coast Guard’s guidelines became mandatory.
- <sup>30</sup> Exec. Order No. 13,112, 64 Fed. Reg. 6183 (Feb. 3, 1999).
- <sup>31</sup> The Michigan Department of Environmental Quality will issue a permit only if a ship can demonstrate that it will not discharge ballast water or will use environmentally sound technology and methods to prevent introduction of aquatic invasive species. 2005 Mich. Pub. Acts 33, available at <http://www.legislature.mi.gov/documents/2005-2006/publicact/pdf/2005-PA-0033.pdf>.
- <sup>32</sup> Great Lakes Comm’n, *Summary of Great Lakes State Ballast Water Legislation* (July 2008), <http://www.glc.org/advocacy/documents/HR-2830-Summary-Fact-Sheet-April-08.pdf>.
- <sup>33</sup> The regulations became effective on February 6, 2009.
- <sup>34</sup> Mich. Dep’t of Envtl. Quality, *Comments on EPA’s Vessel General Permit* (July 29, 2008), <http://www.glelc.org/files/michigan-ballast-water-permit-comments.pdf>.



## End Notes

- <sup>35</sup> Port of Oswego Authority v. Grannis, 2009 WL 1606015 (N.Y. Sup. Ct.) (upholding the New York Department of Environmental Protection's additional, more stringent ballast water discharge conditions).
- <sup>36</sup> U.S. Geological Survey, *NAS – Nonindigenous Aquatic Species: Factsheet*, <http://nas.er.usgs.gov/queries/FactSheet.asp?speciesID=5> (last visited Aug. 18, 2009) [hereinafter *Factsheet*]; Brian Meyer, *Zebra Mussels Clog City's Water Intake Pipe*, BUFFALO NEWS, July 21, 2009.
- <sup>37</sup> *Factsheet*, *supra* note 36.
- <sup>38</sup> Brief for Natural Res. Def. Council as Amicus Curiae Supporting Respondents, Port of Oswego Authority v. Grannis, 2009 WL 1606015 (N.Y. Sup. Ct.) (No. 0010296/2008).
- <sup>39</sup> *Crane Collapse in Houston Kills 4*, USA TODAY, July 18, 2008; Carla Baranauckus, *Crane Topples in Manhattan*, N.Y. TIMES, Mar. 15, 2008; Damien Cave, *Two Workers are Killed in Miami Crane Accident*, N.Y. TIMES, Mar. 26, 2008.
- <sup>40</sup> OSHA did amend it twice—in 1988 and 1993—but the amendments failed to address technological advances, operator certification, or employee training. These amendments clarified the conditions under which employees could be hoisted on personnel platforms and required certain safe distances from equipment, respectively.
- <sup>41</sup> The final committee members represented manufacturers and suppliers, employers, labor organizations, training and operator testing groups, power line owners, and insurance companies. See *Safety Standards for Cranes and Derricks*, 68 Fed. Reg. 39877, 39879 (proposed July 3, 2003) (to be codified at 29 C.F.R. pt. 1926).
- <sup>42</sup> Susan Podziba, Op-Ed., *Safety Starts at the Top*, N.Y. TIMES, June 12, 2008.
- <sup>43</sup> Linda Levine, *Worker Safety in the Construction Industry: The Crane and Derrick Standard 12* (CRS Report RL34658, Nov. 21, 2008), available at <http://fas.org/sgp/crs/misc/RL34658.pdf>.
- <sup>44</sup> Occupational Safety & Health Admin., U.S. Dep't of Labor, Advisory Committee on Construction Safety and Health, Meeting Transcript, Jan. 24, 2008, available at [http://www.osha.gov/doc/accsh/transcripts/accsh\\_012408.html](http://www.osha.gov/doc/accsh/transcripts/accsh_012408.html).
- <sup>45</sup> *Id.*
- <sup>46</sup> During the public comment period, OSHA received initial requests to extend the original deadline for comments. Then, OSHA received requests to hold an informal public hearing. Cranes and Derricks in Construction, 74 Fed. Reg. 4363, 4364-65 (Jan. 26, 2009). OSHA held the hearing in March 2009 and added two post-hearing comment periods that ended in June 2009.
- <sup>47</sup> National Advisory Committee on Occupational Safety and Health, Meeting Transcript, July 15, 2009, available at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a000fa>.
- <sup>48</sup> Levine, *supra* note 43.
- <sup>49</sup> Cranes and Derricks in Construction, 73 Fed. Reg. 59714, 59884 (proposed Oct. 9, 2008) (to be codified at 29 C.F.R. pt. 1926).
- <sup>50</sup> Mike Hall, *OSHA's Four-Year Delay on Crane Safety Standard Highlighted in Wake of N.Y. Deaths*, AFL-CIONOWBLOG, Mar. 20, 2008, <http://blog.aflcio.org/2008/03/20/oshas-four-year-delay-on-crane-safety-standard-highlighted-in-wake-of-ny-deaths/> (last visited Aug. 18, 2009). There are several estimates on the number of deaths and injuries per year related to crane and derricks accidents. The estimates depend on which industries are counted—construction, manufacturing, and mining suffer the most fatalities—and how the cause of death is attributed.
- <sup>51</sup> Cranes and Derricks in Construction, 73 Fed. Reg. 59714, 59884 (proposed Oct. 9, 2008) (to be codified at 29 C.F.R. pt. 1926).
- <sup>52</sup> Occupational Safety & Health Admin., U.S. Dep't of Labor, *The Great American Ballpark*, [http://www.osha.gov/dosp/success\\_stories/compliance\\_assistance/abbott/stadium\\_construction.html](http://www.osha.gov/dosp/success_stories/compliance_assistance/abbott/stadium_construction.html) (last visited Aug. 18, 2009).

## About the Authors



**Catherine A. O'Neill** is a Member Scholar of the Center for Progressive Reform and an Associate Professor of Law at Seattle University School of Law. She has worked on issues of environmental justice with various tribes, advisory committees, and grassroots environmental justice groups. Professor O'Neill was recently a member of the technical advisory board for the Swinomish Indian Tribal Community's four-year study, "Bioaccumulative Toxics in Native Shellfish." Professor O'Neill earned her J.D. from the University of Chicago and was a Ford Foundation Graduate Fellow at Harvard Law School. She has published numerous articles in the areas of environmental justice and environmental policy, many of which have been excerpted in casebooks, anthologies, and other collections.



**Amy Sinden** is a Member Scholar and a Director of the Center for Progressive Reform, and an Associate Professor of Law at the Temple University Beasley School of Law in Philadelphia. Professor Sinden graduated *summa cum laude* from the University of Pennsylvania Law School in 1991. Before joining the Temple Law faculty in 2001, Professor Sinden served as senior counsel for Citizens for Pennsylvania's Future and a staff attorney with Earthjustice. She has written extensively in the area of environmental law and regulatory analysis. Her recent academic writings have criticized the misuse of economic theory in environmental law and have analyzed the application of classical human rights norms to environmental conflicts.



**Rena Steinzor** is the President and a Director of the Center for Progressive Reform and a Professor of Law at the University of Maryland School of Law, with a secondary appointment at the University of Maryland Medical School Department of Epidemiology and Preventive Medicine. Professor Steinzor received her B.A. from the University of Wisconsin and her J.D. from Columbia Law School. She joined the faculty of the University of Maryland School of Law in 1994 from the Washington, D.C., law firm of Spiegel and McDiarmid. From 1983 to 1987, She was staff counsel to the U.S. House of Representatives' Energy and Commerce Committee's subcommittee with primary jurisdiction over the nation's laws regulating hazardous substances. Professor Steinzor has published widely in the areas of environmental federalism, the implications of industry self-regulation on the protection of the environment and public health, and so-called "market based" alternatives to traditional regulation. Her most recent book, *Mother Earth and Uncle Sam: How Pollution and Hollow Government Hurt Our Kids* was published by the University of Texas Press in December 2007.



**James Goodwin** works with CPR's "Clean Science" and "Government Accountability" issue groups. Mr. Goodwin joined CPR in May of 2008. He earned his B.A. in Political Science from Kalamazoo College, his J.D. (with a certificate in environmental law) from the University of Maryland School of Law, and his M.P.P. (with a concentration in environmental policy) from the University of Maryland School of Public Policy. Prior to joining CPR, Mr. Goodwin worked as a legal intern for the Environmental Law Institute and EcoLogix Group, Inc. He is a published author with articles on human rights and environmental law and policy appearing in the *Michigan Journal of Public Affairs* and the *New England Law Review*.



**Ling-Yee Huang** is a Policy Analyst with the Center for Progressive Reform. She graduated *cum laude* from Rice University with a B.A. in biology and received a Rotary Ambassadorial Scholarship to study international law at the University of Kent in Brussels, Belgium, where she received an L.L.M. with distinction. Ms. Huang received her J.D. *cum laude* from the University of Florida Levin College of Law. During law school, she published articles in the *University of Denver Water Law Review*, the *Florida Journal of International Law*, and the *Cardozo Law Review*.



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# COALITION FOR SENSIBLE SAFEGUARDS

May 1, 2015

The Honorable Ron Johnson  
Chairman  
U.S. Senate  
Homeland Security & Governmental Affairs Committee  
Washington, DC 20510

The Honorable Thomas Carper  
Ranking Member  
U.S. Senate  
Homeland Security & Governmental Affairs Committee  
Washington, DC 20510

The Honorable James Lankford  
Chairman  
U.S. Senate  
HSGAC Subcommittee  
Regulatory Affairs & Federal Management  
Washington, DC 20510

The Honorable Heidi Heitkamp  
Ranking Member  
U.S. Senate  
HSGAC Subcommittee  
Regulatory Affairs & Federal Management  
Washington, DC 20510

Dear Senator Johnson, Senator Carper, Senator Lankford and Senator Heitkamp:

Thank you for the opportunity to weigh in on the important conversation on the impact of regulations, the problems with the current rulemaking process and recommendations for improvements to the system. The Coalition for Sensible Safeguards (CSS) is an alliance of more than 150 labor, environmental, public health, scientific, consumer, financial reform, small business, and public interest organizations joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all.

## **BENEFITS OF PUBLIC PROTECTIONS**

### *Importance of Regulation*

In a democracy, citizens expect their government to protect their health and well-being since both lawmakers and agency staff are ultimately accountable to the people. Starting with the Progressive Era in the early 1900s, this meant ensuring that unsafe drugs and food could not be marketed to unsuspecting consumers and that workers in industrial settings were not forced to labor in unhealthy or high-risk workplaces. The New Deal brought more oversight of financial institutions and the associational and workplace rights of workers. With the growth of the consumer and environmental movements in the 1960s and 1970s, government responded to citizen concerns about industrial pollution and toxic chemicals by establishing rules limiting the emissions and substances that businesses are allowed to use or produce. Over time, as our expanding knowledge of medicine and science has improved our ability to evaluate the health risks of hazardous substances, public pressure to regulate their use has also grown.

Rules implement the laws Congress passes and are created utilizing the expertise of agency scientists and technical staff and after extensive research and consultation with scientists, engineers, industry-specific experts, workers, business owners and managers, and the public. These regulations are needed to provide essential protections that we as individuals cannot secure ourselves. Without regulations, we would not have the cleaner air and water or safer workplaces and products that we now take for granted.

In a society with little to no regulation, only the wealthy and privileged could afford protections. This is not how a democratic society should function. Our duty is to ensure equitable protections for everyone, and rules that provide those protections are a vital component to achieving that objective.

is simply omitted.<sup>4</sup> Agency analyses of the benefits of a new rule or standard often list the benefits that are not able to be quantified and monetized, but it is essential that these unquantifiable benefits be considered in estimating the level of protections provided by a regulatory action.

### *Latest Industry Scapegoat*

Contrary to the past few years of misleading claims from industry – especially the U.S. Chamber of Commerce – numerous studies have failed to find evidence that regulations lead to significant overall losses<sup>5</sup> in employment.<sup>6</sup> No evidence shows that regulations lead to significant overall losses in employment or that regulations cause companies to move overseas. In fact, rules may increase employment and competitiveness by encouraging industry to become more productive and innovative in response to the regulations.<sup>7</sup>

Pollution control regulations result in jobs in areas such as construction and technology. For instance, the Manufacturers of Emission Controls Association (MECA) estimated that in 2010, the economic activity that resulted from emission control technology for new cars and trucks in the U.S. totaled \$12 billion. Additionally, MECA member companies provided 65,000 green jobs in the U.S.<sup>8</sup> The Institute of Clean Air Companies (ICAC) forecasts that the overall U.S. market for air pollution control and monitoring technology is around \$5 billion a year (in constant 2012 dollars) and is expected to increase to almost \$6 billion by 2016.<sup>9</sup> The Environmental Protection Agency's (EPA) Mercury and Air Toxics rule, which requires installation of pollution control systems on power plants and large industrial facilities, is projected to result in 46,000 short-term job-years,<sup>10</sup> as well as 8,000 long-term jobs.

## **CONCERNS WITH THE CURRENT FEDERAL RULEMAKING PROCESS**

### *Excessive Regulatory Delay – Undue Industry Influence, Judicial Review & Lack of Transparency*

After Congress passes a law, federal agencies begin to develop rules and standards to implement the legislation. The statutes typically give the responsible federal agencies guidance about the content and timing of the regulations, and agencies gather detailed information on the issue, develop ideas about appropriate standards, examine scientific studies, consult with groups that would be affected by the law, draft proposed rules, conduct cost and benefit analyses of those rules, and solicit public comment on them. It takes months or even years for these regulations to become final and for the impact of the law to actually be felt in the world. As an extreme example, the Government Accountability Office (GAO)

<sup>4</sup> Center for Progressive Reform "Saving Lives, Preserving the Environment, Growing the Economy: The Truth about Regulation." White Paper #1109 (July 2011).

<sup>5</sup> See National Journal, "John Boehner's Remarks at Economic Club of Washington." (Sept. 15, 2011). Available at <http://www.nationaljournal.com/congress/text-john-boehner-s-remarks-at-economic-club-of-washington-20110915>

<sup>6</sup> Since 2007, the Bureau of Labor Statistics has asked firms that have had a mass layoff the reasons behind these layoffs. Only 0.2% to 0.4% of all mass layoffs were due to government regulation, as reported by the firms. Bureau of Labor Statistics (2012) "Extended Mass Layoffs in 2011." United States Department of Labor, Report 1039. Also, randomized surveys of small business owners show that at most, 25% of small business owners are concerned about excessive government regulation. See also American Sustainable Business Council et al. (2012) "Small Business Owners' Opinions on Regulations and Job Creation" (1 Feb). Hall, Kevin (2011) "Regulation, Taxes Aren't Killing Small Business, Owners Say," McClatchy Newspapers (Sept. 1). Dunkelberg, William C., and Holly Wade (2011) NFIB Small Business Economic Trends (August).

<sup>7</sup> Center for Progressive Reform "Saving Lives, Preserving the Environment, Growing the Economy: The Truth about Regulation." (July 2011)

<sup>8</sup> Manufacturers of Emission Controls Association, "MECA Highlights Economic Benefits of Mobile Source Emission Control Industry." (March 2011). [http://www.meca.org/galleries/files/MECA\\_economic\\_benefits\\_press\\_release\\_031111.pdf](http://www.meca.org/galleries/files/MECA_economic_benefits_press_release_031111.pdf). See also Institute of Clean Air Companies "Re: New Source Review Impact on Air Pollution Control (APC) Industry." (February 2004). <http://www.icac.com/?page=jobs&terms=%22re+and+new+and+source+and+review+and+impact+and+air+and+pollution+and+cont+%22>.

<sup>9</sup> Institute of Clean Air Companies. September 2013. Available at

[http://c.y.mcdn.com/sites/www.icac.com/resource/resmgr/market\\_forecast/press\\_release\\_2013\\_market\\_fo.pdf](http://c.y.mcdn.com/sites/www.icac.com/resource/resmgr/market_forecast/press_release_2013_market_fo.pdf)

<sup>10</sup> A "job-year" is one job for one year. See [http://www.whitehouse.gov/assets/documents/Job-Years\\_Revised5-8.pdf](http://www.whitehouse.gov/assets/documents/Job-Years_Revised5-8.pdf)

drivers cannot see by turning around or using their vehicles' mirrors. After a unanimous vote in the Senate and public support for the rule, the standard languished in the rulemaking process. Six years later, and three years past the deadline Congress set for NHTSA to issue the rule, the agency finalized the rule.

Unnecessary deaths and injuries are the costs of delay. In the case of the rear visibility safety rule, 209 children lost their young lives in the three years the standard was delayed.<sup>15</sup> Children like 13-month old Olivia Anne Hellwig who was killed in 2011 after a car backed over her stroller while she and her mother crossed the pedestrian crossing area at their local park.<sup>16</sup> According to DOT's own calculations, 210 fatalities and 15,000 injuries are annually caused from backover crashes.<sup>17</sup> By implementing the rule, NHTSA concluded that annual fatalities would be reduced by 95 to 112, and that 7,072 to 8,374 injuries would be avoided. In its proposed rule, NHTSA elaborated on the disproportionate risk backover crashes pose to children and older individuals. "When restricted to backover fatalities involving passenger vehicles," the proposed rule states, "children under 5 years old account for 44 percent of the fatalities, and adults 70 years of age and older account for 33 percent."

The agency estimated the cost of rearview camera systems at \$159-\$203 per vehicle, or \$58-\$88 for vehicles that already have electronic visual displays but not cameras.<sup>18</sup> Those estimates are based on older data and do not reflect lower prices in newer models that have resulted from some automakers including the cameras as standard equipment.

#### Rear Visibility Safety Rule Timeline<sup>19</sup>

- February 2008: President George W. Bush signs the Cameron Gulbransen Kids Transportation Safety Act into law
- March 2009: NHTSA releases an advanced notice of proposed rulemaking
- December 2010: NHTSA issues proposed version of the rear visibility rule and opens rule to public comment
- February 2011: Deadline the law set to finalize a new rearview safety rule
- February 2011: DOT grants itself its first extension on the rule
- November 2011: NHTSA submits draft of the final rulemaking to OIRA for the allotted 120 days of review
- January 2012: DOT grants itself its second extension on the rule
- December 2012: DOT grants itself its third extension on the rule
- June 2013: DOT withdraws rule from OMB and pushes the deadline back to January 2015
- September 2013: Safety advocates and parents sue DOT for failing to issue the finalized rule
- March 2014: DOT issues final rule – three years late
- May 2018: Date all vehicles over 10,000 pounds, including buses and trucks, must come equipped with rear visibility technology

When commonsense safety standards that will immediately save lives and prevent injuries – especially among children – are continually and unnecessarily delayed, the results are devastating for affected families and communities.

#### IMPROVEMENTS AND RECOMMENDATIONS

##### *Reduce Lobbyists' Ability to Block Public Protections*

Industry influence in the regulatory process flourishes outside of public scrutiny. Today, White House regulatory review – overseen by OIRA – is the most hidden part of the rulemaking process – and where big business lobbyists often exert their

<sup>15</sup> Kids and Cars "National Statistics, Child Nontraffic Fatalities by Type & Year" Available at <http://www.kidsandcars.org/statistics.html>

<sup>16</sup> Kids and Cars "Backover News" Available at <http://www.kidsandcars.org/upload/pdfs/articles/2012/2012-05-09-patch-grayson.pdf>

<sup>17</sup> National Highway Traffic Safety Administration, Federal Motor Vehicle Safety Standards; Rear Visibility Rule (April 7, 2014) Available at <https://www.federalregister.gov/articles/2014/04/07/2014-07469/federal-motor-vehicle-safety-standards-rear-visibility#p-63>

<sup>18</sup> U.S. Dept. of Transportation, Federal Motor Carrier Safety Administration: "Federal Motor Vehicle Safety Standard No. 111, Rearview Mirrors" Available at <http://www.fmcsa.dot.gov/rulesregulations/administration/fmcsr/fmcsrruletext.aspx?reg=571.111>

<sup>19</sup> Kids and Cars: Rear Visibility Safety Standard – lawsuit exhibits <http://www.kidsandcars.org/release-the-rear-visibility-standard-april-11-2013.html>

A regulatory system that works for the American people is one in which agencies effectively fulfill their statutory missions of protecting people and the environment. However, a regulatory system plagued by delay and stymied by regulated industries cannot effectively protect the public.

Many trade associations, lobbyists, and industry interests benefit greatly from the regulatory system's present hobbled state. As long as new rules can be tied up in procedural delays, large companies – some of whom are currently raking in historically large profits – can avoid investing in improved health and safety standards required by law. For the public, these delays represent real harm to real people and communities.

We can and must redesign the regulatory system so that it rewards enterprise while ensuring that the American quality of life is guaranteed for future generations. CSS looks forward to working with the committee to further examine the significant impact of regulations, the problems with the current rulemaking process and our recommendations to improve the system.

Sincerely,



Katherine McFate, President and CEO  
Center for Effective Government  
Co-chair, Coalition for Sensible Safeguards



Robert Weissman, President  
Public Citizen  
Co-chair, Coalition for Sensible Safeguards

*The Coalition for Sensible Safeguards is an alliance of consumer, labor, scientific, research, good government, faith, community, health, environmental, and public interest groups, as well as concerned individuals, joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all.*



**Andrew Lundquist**  
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May 21, 2015

The Honorable Ron Johnson, Chair  
The Committee on Homeland Security and  
Governmental Affairs  
340 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Tom Carper, Ranking Member  
The Committee on Homeland Security and  
Governmental Affairs  
340 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Chairman Johnson and Ranking Member Carper:

Thank you for your letter to our CEO, Ryan Lance, requesting our views on regulations that affect our business and the regulatory process. This is a very important subject for our company, given that the oil and gas industry is one of the most heavily regulated in the economy. Regulations protect the lives of our employees, the environment, and the communities where we operate. Our successful compliance with regulations is essential for maintaining our ability to continue our operations.

At the same time, regulations impose costs. We spend a tremendous amount of time, effort, and resources on understanding and correctly applying regulations to our activities. Whenever we assess a business opportunity, the cost of regulatory compliance is one of the key drivers for determining whether to make an investment or not.

ConocoPhillips is not a company that opposes every regulation. We believe that the key to successful regulatory schemes is balance. They must be cost effective: the benefit of a regulation must equal or exceed the costs. Regulations should be efficient to administer and not impose burdensome paperwork and reporting requirements. Another key feature of a successful regulatory scheme is certainty, not only in their duration, but also in how they are interpreted by the regulating agencies. We are always willing to work with regulating agencies on crafting regulations that meet these goals.

The breadth and complexity of the regulations that we deal with on a daily basis are enormous. Here is a sample list of statutes that authorize the regulations that impact our company and our industry:

Clean Air Act  
Clean Water Act  
Dodd-Frank Wall Street Reform and Consumer Protection Act  
Endangered Species Act  
Marine Mammal Protection Act  
National Environmental Policy Act  
Occupational Safety and Health Act  
Oil Pollution Control Act  
Outer Continental Shelf Lands Act  
Patient Protection and Affordable Care Act

In addition to regulations under these federal statutes, the states where we operate – and even some local governments – also impose regulations on us.

You have asked us to identify existing and proposed regulations that impact our business. Given all of the statutes that we operate under, it would be extremely difficult to give you our views on all of them. We would like to provide you with an overview of the impacts of a handful of statutes and regulations on our business.

In providing this information, we have sought to be candid in our opinions. We would respectfully request that our responses be kept confidential by the Committee's members and staff, and that any disclosure of this information be done in a matter that cannot be attributable to ConocoPhillips.

**National Environmental Policy Act (NEPA)**

Congress should consider streamlining the NEPA process so that individual projects do not have to go through more than one analysis. There is a need for greater consistency here. We have experienced agencies taking a completed NEPA analysis and each of them using their own internal evaluation criteria and processes to reach far different conclusions. We have also been subject to duplicative, costly and unnecessary mitigation requirements.

**Endangered Species Act**

While ConocoPhillips seeks to partner with regulators, elected officials, and NGO's to help landowners, farmers, and ranchers improve and protect the habitat for species on lands they own or lease, we feel that the Endangered Species Act's current rules need to be reexamined. The underlying statute does not weigh costs against benefits, and the designations of species for protection are not always based on sound science. Too often they are based on litigation by pressure groups. Further, the required 5-year review of the species status is not being conducted consistently and timely.

**Clean Air Act**

Regulations pursuant to the Clean Air Act (CAA) that apply to oil and gas operations include New Source Performance Standards (NSPS) and National Emissions Standards for Hazardous Air Pollutants (NESHAPs). In addition, most states require some sort of air permits for most of the oil and gas activities. Some of the larger sources also are required to obtain federally-mandated permits such as CAA Title I

and Title V operating permits. The CAA and its 1990 amendments have historically operated to noticeably improve air quality while providing us with regulatory certainty in our ability to achieve its goals. However, this regulatory certainty is becoming less and less the case. For example, it is no longer certain that a project can obtain an air permit due to the ever-tightening ambient air quality standards and the requirement that one must *model* for compliance with those standards. On the whole, because of the CAA requirement that EPA revisit their standards every 5, 7, or 8 years which we've only seen result in tightening them, it is possible the regulations flowing from the CAA are well past the point of diminishing returns.

NSPS Subpart OOOO – Certain oil and gas sources such as storage tanks, compressors, pneumatic controllers, etc. are required to comply with NSPS standards depending on their date of construction or modification. This is a major federal program that impacts oil and gas activities regardless of their location. While the final rule is greatly improved over the initial proposed rule language, it is extremely complex with burdensome recordkeeping and reporting requirements. The notification, record keeping, monitoring and reporting requirements found in this rule do not provide sufficient environmental benefit from the paperwork to justify the extensive data collection requirements.

Greenhouse Gas Mandatory Reporting Rule – Oil and gas sources are required to report GHG emissions from their operations annually. The activities include combustion sources, storage tanks, flares, pneumatic controllers, equipment leaks, and other sources. This is a very expensive reporting program that requires considerable resources for far flung upstream activities.

Ozone NAAQS – Last December the Environmental Protection Agency (EPA) proposed lowering the National Ambient Air Quality Standard (NAAQS) for ozone from 75 parts per billion (ppb) to 65 – 70 ppb and requested comments on setting the level at 60 ppb. At those levels all but a small proportion of the contiguous United States would be thrown into “non-attainment” status. This will adversely impact all sectors of our economy, particularly manufacturing. The cost of complying with such a new standard would be devastating to our economy.

The Incinerator Rules (40 C.F.R. 60, Subparts CCCC and DDDD) – EPA finalized emission limits for small remote incinerators that are impossible to meet for new units and unworkable for existing units, such as the mobile incinerators used by remote seismic crews. In Alaska, these incinerators are necessary to quickly dispose of food waste in order to keep wildlife away. The rule will preclude the purchase of new units because they cannot meet the standard and, upon its effective date, many existing units will have to shut down. This will jeopardize our crews because of increased human-wildlife interactions. There will also be higher costs and emissions because in some locations garbage will have to be moved off-site by helicopter.

Announced Methane Plan – The Administration announced that it plans to directly regulate methane from new oil and gas sources under Section 111(b) of the Clean



Air Act, and establish a voluntary program to reduce methane emissions from existing sources. At this time we have not seen the details of either proposal, but we have stressed to EPA that the voluntary program should be flexible and must provide some incentives for company participation in the program. It is also essential that the voluntary program preserves the ability for industry to get emission reduction credits that companies can apply to other activities. The oil and gas industry through its trade associations has been working with EPA to develop a rational voluntary methane reduction program for existing sources.

### **Clean Water Act**

**Proposed Waters of the U.S. Rule** – The EPA and the Army Corps of Engineers proposed a vast expansion in the scope and definition of navigable waters subject to regulation under the Clean Water Act. What is particularly troubling about this proposed rule is that it appears to be relying on one sentence of Justice Kennedy’s concurring opinion in *Rapanos vs. the U.S.*, as opposed to the plurality opinion of the majority that sought to clearly limit the jurisdiction of water bodies governed. The proposed rule seems to defy Congress’ intent and ignores the majority consensus of the Supreme Court ruling on this matter. The impact of this proposal will be increased permitting costs, delays and risks of permit denials, citizen suits, and government enforcement actions for Exploration and Production operations.

### **Office of Natural Resources Revenue (ONRR) Proposals**

**Proposed Federal Oil and Gas Royalty Valuation Rule** – The ONRR at the Department of the Interior has proposed regulatory changes to overhaul the royalty valuation structure. The Proposed Rule gives ONRR the ability to disallow actual, reasonable and necessary transportation and processing deductions, even those based on arm-length 3<sup>rd</sup> party contracts. It provides ONRR with complete discretion in determining royalty value resulting in the lack of clarity and certainty for royalty payments on Federal Lands. As previously mentioned, regulations should provide certainty to those being regulated. Industry also needs clarity regarding how royalties are to be calculated to make fundamental business decisions and to avoid confusion and penalties. This will be impossible if ONRR can decide when and how to value the royalties under any basis they deem “reasonable.” Should the Proposed Rule be adopted as it stands, payors would have to submit payment to the best of their ability and hope the ONRR finds their methodology reasonable. One part of the Proposed Rule that had the potential for clarity and certainty is the index pricing option; however, the proposed index prices are much higher than companies actually receive and the proposed standardized deductions are so much lower than what industry is incurring, the index pricing option is not viable as written.

**Proposed Civil Penalties Rule** – ConocoPhillips is committed to working with the Department of the Interior to improve and strengthen its production and royalty reporting and appeals processes, but this proposed rule exceeds the bounds of what Congress intended in the Federal Oil and Gas Royalty Management Act (“FOGRMA”) enacted 30 years ago. It also departs from any semblance of reasonableness and denies due process. While it says its purpose is to “clarify and simplify” ONRR’s existing civil penalty regulations, in reality ONRR’s proposal

constitutes an unprecedented agency overreach that is inconsistent with FOGPMA. This is documented by all the negative comments received on the proposed rule, and the fact there were no favorable or supportive comments.

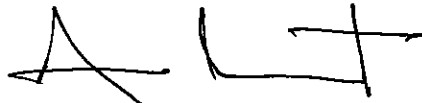
New Requirements – In recent years, ONRR has distributed new guidance to industry through Dear Reporter Letters and various industry association meetings and training. Often, the guidance lacks clarity, is not always supported by current regulations, and may require data industry cannot access such as details of a transporter and processor costs.

**Bureau of Land Management (BLM)**

Recently the Bureau of Land Management (BLM) at the Department of the Interior released the final Hydraulic Fracturing Rule. The original rule was issued in 1982 and last revised in 1988 before the latest hydraulic fracturing technologies became widely used. While ConocoPhillips and the oil and gas industry as a whole have concerns that the new Rule may increase operating costs on federal lands as well as cause permitting delays, ConocoPhillips worked constructively with the BLM as the rule was crafted. BLM utilized some of our technical assistance in writing the Rule to help make it environmentally effective and safe.

I hope this information will be useful to the Committee. We would welcome the opportunity to discuss any of this with you in further detail. Please do not hesitate to contact me or Kevin Avery in our Washington office if you have any questions. Kevin can be reached at 202-833-0914. We look forward to hearing from you.

Sincerely,



Andrew Lundquist

cc: The Honorable James Lankford  
The Honorable Heidi Heitkamp



## Construction Industry Round Table

April 16, 2015

The Honorable Ron Johnson  
Chairman; and  
The Honorable Tom Carper  
Ranking Member  
U.S. Senate Committee on Homeland Security  
and Governmental Affairs  
340 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Johnson & Ranking Member Carper:

On behalf of the Construction Industry Round Table (CIRT)<sup>1</sup>, I want to thank you for your request of the Round Table to participate in the critically important effort to review the *cumulative* impact the federal "regulatory complex" has on every day aspects of American lives, lands, and liberties.

### Introduction

The design and construction industry -- is a highly labor intensive endeavor that provides good paying jobs in communities across the country. Given the work is highly decentralized the firms tend to be small and/or operate in a locale even if they are part of a larger organization. As such, the industry provides vital job opportunities in many locations and participates as a critical member of its community. Just as important as the *direct* employment opportunities created -- the design/construction community also plays a vital role in supporting the nation's ability with respect to global competitiveness, economic activities, and national security, as well as impacting the extraordinary quality of life enjoyed by all Americans.

So, when the design/construction industry is burdened with unnecessary or ineffective mandates that often take valuable time they also cost jobs<sup>2</sup> . . . thus, regulatory delays, redundancies, inefficiencies, and red tape collectively have a direct impact on costs and therefore the vitality and ability of our industry to remain profitable and hire more people.

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<sup>1</sup> *The Construction Industry Round Table (CIRT) strives to create one voice to meet the interest and needs of the design and construction community. CIRT supports its members by actively representing the industry on public policy issues, by improving the image and presence of its leading members, and by providing a forum for enhancing and/or developing strong management approaches in an ever changing environment through networking and peer interaction.*

*The Round Table is composed of approximately 115 CEOs from the leading architectural, engineering, and construction firms in the United States. Together these firms deliver on billions of dollars of public and private sector infrastructure projects that enhance the quality of life of all Americans while directly employing half-million Americans.*

<sup>2</sup> *Unemployment in the construction industry remains one of the highest, averaging 11.33% in 2013, 8.92% in 2014, and 9.97% in 2015 (non-seasonally adjusted). [Source: Table A-14, Bureau of Labor Statistics].*

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*Representing the Interests of America's Industrial Energy Users since 1978*

May 1, 2015

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security & Governmental Affairs  
U.S. Senate  
Washington, D.C. 20510

Dear Chairman Johnson,

The Council of Industrial Boiler Owners (CIBO) would like to thank you and the Committee for initiating your review of the impact of federal regulations. CIBO believes that a few minor changes to outdated regulatory frameworks could immeasurably improve the efficiency and workability of the federal government's environmental regulations without jeopardizing federal agencies' ability to protect health, welfare, safety, and the environment within the confines of the law.

CIBO is a national trade association of over 110 members including industrial boiler owners, architect engineers, related equipment manufacturers, and universities representing 20 major industrial and institutional sectors. CIBO has been working since 1978 to (1) promote the exchange of information between industry and government relating to energy and environmental policies, laws, and regulations affecting industrial boilers and the manufacturing and institutional energy base of our country; (2) promote technically sound, cost-effective laws and regulations; and (3) improve energy and environmental performance, reliability and cost-effectiveness of members' operations through technical interchange. CIBO's membership represents industries as diverse as chemicals, paper, cogeneration, metals, automotive, refining, combustion engineering, and food products. CIBO members also include operators of boiler facilities at over a dozen major universities.

In CIBO's view, needed changes encompass two distinct but mutually reinforcing objectives. First, Congress should clarify certain aspects of the Clean Air Act (CAA) to ensure that the U.S. Environmental Protection Agency (EPA or the "Agency") implements the statute in line with Congressional intent. Second, Congress should ensure that environmental regulations do not inadvertently threaten the fuel diversity upon which so much of our industrial sector relies.

**A. Much-Needed Clarification of the Clean Air Act**

In recent years, EPA has used the CAA as a battering ram to further the Administration's ambitious environmental agenda. In the Agency's rush to promulgate as many pollution control rules as possible in a short period of time, mistakes have been made and deliberate oversights have gone uncorrected. A few examples are particularly egregious, and therefore merit a Congressionally mandated course correction.

First, EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP), promulgated under Section 112 of the CAA, require that industrial boilers abide by the same emissions limitations during malfunction events as during normal operations. A malfunction event places physical limitations on a boiler that, by definition, results in the potential for emissions limitations to be exceeded. EPA's decision to make specific allowances for boiler startup and shutdown but to simultaneously ignore malfunction events is illogical and operates contrary to the mandates of the CAA. Quite simply, if a boiler malfunctions and exceeds its emissions limitations, the owner is vulnerable to a range of federal and state enforcement actions. For more details on this flawed regulatory approach, please see the SSM Coalition's recent letter to the Committee. Congress should insist EPA provide a work practice approach as allowed by the CAA for malfunctioning boilers to correct a misstep by the agency that will impose great costs with no corresponding environmental benefit.

Second, EPA continues to revise its National Ambient Air Quality Standards (NAAQS) for a variety of pollutants without resolving basic problems in the standard-setting process. The five-year statutory review period for standards means the Agency often begins its review of a pollutant threshold before it releases implementation guidance on how to meet the current threshold. States are left with a host of unanswered questions and a short timetable to achieve compliance. EPA often revises its guidance, resulting in additional confusion. Together, these problems have resulted in a broken process that hinders effective environmental protection and economic growth. Congress should lengthen the statutorily mandated review period for NAAQS so that EPA, states, and non-governmental stakeholders have time to implement an achievable standard before a new one comes about.

Finally, EPA's proposed rule to reduce carbon emissions from existing coal-fired power plants suffers from legal flaws so severe a legislative response is necessary. For the first time, the Agency looks to regulate emissions beyond the "fence line" of a source using the logic that the entire electricity system is part of one interconnected pollution apparatus. Not only is this logic nowhere to be found anywhere in the CAA, it would also set a precedent for broad EPA regulation of the entire U.S. energy sector. Congress should clearly state that the CAA does not authorize EPA to require a de facto reorganization of major elements of the U.S. economy, even if doing so does result in an overall reduction in carbon dioxide emissions.

#### **B. The Need For a Coordinated Energy Policy**

The lack of an effective national energy policy that is coordinated with environmental policy results in environmental decisions that exacerbate the energy supply/demand imbalance. For example, a good national energy policy would promote the use of diverse energy sources, which would moderate interruptions and spikes in individual fuel supply availability and price. Such a policy would also provide a framework and incentives to promote the use of diverse energy sources and the full use of U.S. energy resources, including our large reserves of coal. Because we do not have an effective national energy policy, individual fuel decisions are necessarily based on local short-term economics that exacerbate long-term problems.

In the CAA, Congress provided ways to ensure environmental protection and at the same time to meet energy demand by allowing dependence on the full range of the Nation's diverse energy



sources. And for the first 25 years of its implementation, the CAA was interpreted, as intended, to allow industry to rely on all energy resources. However, beginning in the mid-to-late 1990's, environmental policy makers began to favor natural gas over other fossil fuels for its cleaner burning properties. Essentially all new power generation was built for natural gas. This policy of favoring natural gas over other fuels was incorporated into CAA rules applicable to the industrial sector as well.

This misguided approach severely punishes the use of energy sources other than natural gas. Standards are set at a point that makes emissions reductions cost-effective for sources burning natural gas, but cost-prohibitive or technically infeasible for sources burning other fuels. Under those circumstances, existing sources under pressure to comply with CAA standards will (if they can) switch to natural gas. As a result, environmental standard-setting has contributed to the increasing dependence on natural gas and the abandonment of coal and other fuels as reliable alternatives.

CIBO recommends that Congress carefully examine EPA's attempts to use environmental regulations to permanently alter U.S. energy trajectories. The CAA does not give EPA the authority to establish its own national energy policy, regardless of that policy's supposed or theoretical benefits. The loss of fuel diversity in favor of increased dependence on natural gas, if unchecked, will have a substantial negative impact on the long-term vitality of industrial boilers, the entire industrial sector, and the economy as a whole.

### **Conclusion**

Thank you for the opportunity to participate in the Committee's efforts to make the regulatory process more effective. We look forward to assisting the Committee as it carries out this vital task. Please do not hesitate to contact us if you have any questions.

Robert D. Bessette



President

Council of Industrial Boiler Owners

cc: The Honorable Thomas Carper, James Lankford, Heidi Heitkamp

**Measuring the "Regulatory Complex" Overall Burden on the Design/Construction Community**

The process of designing and constructing is one of man's most complex and daunting endeavors. This complexity is borne not just from the number of parties and interested players that may have a hand in or influence over a given project, but also from the number of layered jurisdictions (federal, state, local, etc.) that are involved.

The cacophony of laws, regulations, and rules that we insist on heaping on our private sector job creators is **unprecedented** and their **cumulative burden** is not really known or fully appreciated.<sup>3</sup>

In an effort to better understand the general impact or burden created by the "regulatory complex" on the design/construction industry, CIRT undertook a series of steps to try to quantitatively measure the costs with its members.

The CIRT Sentiment Index, conducted among the Round Table's 115 members, gathered and analyzed information with respect to the burden placed upon the industry by the regulatory complex.<sup>4</sup>

The findings are extraordinary – when the answers were weighed the additional costs and time incurred as the result of "red tape" was **10 percent**.<sup>5</sup> If extrapolated out to cover the annual dollar activities of the industry (even at the sluggish levels of the past few years)<sup>6</sup> – it still amounts to somewhere around **\$90-100 billion dollars in waste and inefficiency** (per year) for infrastructure related projects.

Combining these findings (of 10 percent burden) with studies conducted by the federal agencies that attempt to identify the number of jobs supported

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<sup>3</sup> The most recent CIRT Sentiment Index report found "uncertainty of the direction of government, especially regarding decisions directly affecting the economy," as among the top three business concerns. [See, 1st Qtr./2015 CIRT Index Report].

<sup>4</sup> CIRT conducts a quarterly sentiment index among its 115 members to gauge their views on the direction of the overall economy, specific market areas, and with respect to current or topical policy/business issues of interest. "Attachment A" covers the results of the questions with respect to the impact/cost of red tape. [See, CIRT Sentiment Index, 1st Qtr./2011]

<sup>5</sup> To arrive at the overall 10 percent figure, the responses in Exhibits 3 were weighed from among the individual findings. [See, Attachment A].

<sup>6</sup> "Construction Put in Place" data provided by the U.S. Census Bureau on total dollar expenditures in the industry are: \$930.5B (2013) and \$982.1B (2014), which are off by approximately 20% from the high of \$1.2Trillion in 2006.

(directly in construction) by "a dollar" of construction activity – the magnitude in loss job opportunities is truly staggering at approximately: **1.0 million**.<sup>7</sup>

These findings are not unique to the design/construction industry as shown by other measures and studies that compare different U.S. States and how they create favorable or unfavorable job expanding environments. An analysis by *Investor's Business Daily* of Bureau of Labor Statistics figures found that only 16 states between 2009 and 2012 had enjoyed job growth.<sup>8</sup> Not surprisingly, most of these states all had some common business friendly attributes, such as: tax rates, regulatory constraint, tort reform, and the size of state government.<sup>9</sup>

### Specific Regulatory Burdens

The examples of "red tape" found in procurement of services, environmental requirements, public safety, financial requirements (FinReg), project delivery, payment systems, benefit mandates (health care reform), taxes, and other related areas – are the subject of the comments below.<sup>10</sup>

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<sup>7</sup> This estimate is based on a study conducted by the USDOT, "Employment Impacts of Highway Infrastructure Investment" (April 2008). The 2008 report reviewed and revised earlier work, concluding that approximately 11,920 "construction oriented employment person-years" were supported and/or impacted by an additional \$1.0 Billion dollars of expenditures.

EVEN IF the 1.0 million job loss number could be off-set by productivity gains or better use of the idled manpower associated with "red tape," it STILL REMAINS a very large number of jobs not supported or created as the result of inefficiency. For example: cutting the estimate in half or 50% (still amounts to 500,000 loss jobs), cut 67% (amounts to 330,000 loss jobs), or even if the estimate is reduced by 75% (it amounts to 250,000 loss jobs), any or all of which are unconscionable.

<sup>8</sup> "Jobs Up in Just 16 States Since Obama Took Office" *Investor's Business Daily*, at page A-1 (05/18/2012), by John Merline.

<sup>9</sup> IBD also examined state business friendliness rankings from *Forbes*, *CNBC*, *George Mason University's Mercatus Center*, the *Tax Foundation*, and *Chief Executives* magazine – again, the states ranked at the top of two or more of these lists enjoyed nearly twice the job growth of those states in the bottom 10 of two or more of the lists. *Id.*

<sup>10</sup> The comments/examples raised within this letter ARE NOT related to "building codes/standards" that some 44,000 jurisdictions, all 50 states, several territories, and the federal government each amend, adopt, interpret, and enforce with five major sets of construction codes and over 2,000 technical standards governing the site selection, design, and construction of buildings (NOTE: just "buildings" are covered above – in other words "vertical construction" – not roads, bridges, environmental remediation, etc.) [See, NCSBCS and its 54 national partners web site entitled: *Streamlining the Nation's Building Regulatory Process*. ([www.ncsbc.org/newsite/Streamline/Stream.htm](http://www.ncsbc.org/newsite/Streamline/Stream.htm))]



The more general burdens facing the design and construction industry are not necessarily unique, but rather all too common place and frustrating. Some examples that have been identified by CIRT members include:

- Abolish Insourcing Rules. The federal government should rely on the private sector for services readily available (the "Yellow-Pages Test") – eliminating elaborate requirements, insourcing, cross-agency services, that compete with private-sector firms.
- Restrict Abusive Litigation to Force Rulemakings. Constrain the abusive use of litigation by certain groups to force federal agencies into settlements in order to achieve their goals. This practice has been particularly egregious with respect to EPA rulemakings.
- Prevent Politicization of Federal Procurement Decisions. The numerous restrictions and new reporting requirements threatened in the past by a *draft* Executive Order only apply to private sector companies competing for Federal contracts—ignoring like activities by government employee unions. [Should this effort be renewed, CIRT will oppose it in whatever form it takes].
- Eliminate Mandatory Project Labor Agreements (PLA). Allow the marketplace to effectively determine how the work should be performed – regardless of whether one is a union or non-union contractor. A PLA negotiated by the owner provides no benefit to the industry. Contractors are continually being asked to simultaneously price the project on a union and merit shop basis which is adding cost to overhead – and can be time consuming.
- Revise the FARS (Federal Acquisition Regulations) to allow for Qualifications Based Selection (QBS) of Construction Managers at Risk and Design Build Teams. All of the branches of the government are still trying to impose Bid-Build rules and regulations to alternative forms of procurement inhibiting the chances for success. A number of industry studies have shown that alternative delivery methods (CMAR or CM/GC, DB, etc.) provide greater value relative to cost, schedule, quality, etc. in a teaming, collaborative environment. The government allows Qualifications Based Selection for the procurement of architectural and engineering services but insist on a pricing component for the selection of the builder. As industry utilizes more and more teaming methodologies is it imperative that the entire design and construction team be selected simultaneously prior to the initiation of drawings and specifications. Enabling legislation to allow early selection of the entire team would greatly enhance the utilization of ever changing technology, such as Building Information Modeling (BIM).

- Allow lower tier (Subcontract) Disadvantage Business Enterprise (DBE) to count towards the scores established for the project.  
Establish realistic minority and DBE goals on a project by project basis. In many cases, the current minority and DBE goals are unrealistic and create havoc within the industry because the scope of work is incompatible with the skill sets of the minority contractors available in the local marketplace.
- Simplify the Buy America Act.  
Create one "Buy America Act" for all federal agencies to reflect what can be reasonably procured in the United States.
- Better Define the Qualifications for Quality Control Personnel.  
Reduce the emphasis that quality control personnel must have an engineering degree in lieu of practical experience in many cases. This results in removing the "builder" from a QA/QC career path in construction firms because of our insistence upon a college degree when it is not necessary. Some agencies require a significant number of specialized people on site during construction beyond the traditional QA/QC, Safety and Superintendent. This is not cost efficient nor does it add value.
- Institute standard procurement policies for all federal agencies.  
NAVFAC, USACE, AFCEE, VA, GSA, NIH, NSA, CIA, etc. Every agency has a procurement group and all of them interpret and use the FAR in their own unique way. One set of consistent rules would be much better. If construction procurement was centralized, it would eliminate a lot of the duplication of effort and positions in the federal government and simplify the ability of industry to respond.
- Create a consistent policy among federal agencies for LEED certification levels. Some agencies are concerned about first cost and operational savings and other agencies are still interested in a LEED rating but it may have little to do with savings or measurable value.

#### *Tax Related Burdens*

In addition to the specific regulatory matters there are tax related issues that also create unnecessary or costly burdens (arising from both the code itself and enforcement) to U.S. businesses, including design and construction firms.

#### Tax Simplification

The U.S. tax code is too complex – even the IRS agrees. The IRS Taxpayer Advocate Service routinely cites complexity of the tax code as the most serious problem facing taxpayers and the IRS alike and recommends that Congress substantially simplify the Internal Revenue Code. Tax complexity creates a substantial economic burden which effectively "de-stimulates" economic growth. The annual cost of U.S. income tax compliance alone is estimated to be \$431.1 billion. These excessive, non-productive compliance

costs are dollars diverted from productive activities and investments that would promote economic growth and jobs creation.

Eliminate the Burdensome Look-Back Calculation Requirement for Long-Term Contracts

The look-back calculation determines the amount of interest that needs to be paid to (or refunded by) the IRS on the income from long-term contracts. Look-back interest is calculated once a job has been completed and the final contract revenue and total contract costs are known.<sup>11</sup>

Possible Solutions

Beyond listing individual examples of problems with regulations and over complex jurisdictional matters, are there any larger solutions to consider?

Congress has offered a series of bills that deserve passage to address the many of the concerns of returning some accountability and balance to the regulatory process. Beyond these proposals other potential approaches can, and should, be explored. For example:

**(1) Monetary: There should be financial penalties on agencies (just as they seek to levy on individuals and businesses) when they are found to overreach or abuse their authority or power through regulatory heavy-handedness.**

This represents a potentially effective way to at least make some of the agencies "pause" before attempting to double-down on their expansive or otherwise unjustified rulemakings. Currently, EVEN IF an agency loses a case (or multiple cases) interpreting vast grants of authority to themselves<sup>12</sup> there are NO CONSEQUENCES (a hand slap at best) even when losing their arguments in court! BIG DEAL, the next day the agency can return right-back to interpreting another or next new rule in the same unreasonable self-aggrandizing expansive manner.

*"When regulators lose court cases, it does not hurt them. Sure, they're probably angry at being told "no" but that's it. There are no penalties for*

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<sup>11</sup> Contract revenue reported under the percentage-of-completion method is based on estimates. Look-back calculations determine whether the estimates that were used produced understatements or overstatements of taxable income in each open year of the contract. Look-back calculations are intended to ensure that neither the taxpayer nor the IRS will lose the "time value of money" on the income taxes that should or should not have been paid on income from long-term contracts.

<sup>12</sup> A good example of this unbridled and unaccountable agency behavior or quasi-independent commission activity can be seen in the EPA's most recent expansive definition rulemaking on the "waters of the U.S." (after the US Supreme Court has already ruled on a few occasions that the underlying statute doesn't give EPA broad unfettered authority); OR the recent FCC rulemaking going back once again under the guise of "Net Neutrality" (after White House direction) to attempt to claim the internet fits under laws passed decades before there was even an internet in existence.

*grabbing unwarranted power and mistreating citizens. An adverse court decision, or even a series of them, has no deterrent effect." [See, Thanks, EPA: Your New 'Navigable Waters' Rule Strengthens The Case Against Administrative Law, by George Leef, Law & Regulation article (2/6/2015); [www.forbes.com](http://www.forbes.com)].*

THIS NEEDS to change – there should be a MAJOR MONETARY COST to the agencies – [especially considering the heavy fines they impose on the private sector, which can run into the billions as demonstrated by recent DOJ cases/settlements]. The court imposed fines vs. federal agencies bring accountability and *could be* returned to the GENERAL TREASURY.

**(2) Limit Agency Waiver Authority:** Another area that Congress should consider constraining is the recent approach of crafting the regulations so burdensome, so costly, and so unmanageable that they necessitate – waivers or so-called "Requests for Exemptions." This opens the entire process up to potential cronyism, favoritism, and political shake-downs.<sup>13</sup>

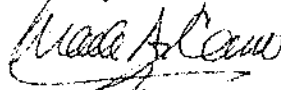
#### **Conclusion**

*The above comments are not about regulatory abandonment -- but rather, putting balance back into the equation: Administration and Congress, and more importantly: between Citizen and Government.*

Short of outright repeal and/or elimination of excessive regulations and rules, as well as streamlining them whereby actions are done concurrently and shared among and between jurisdictions/agencies<sup>14</sup> -- monetary penalties that curb excessive activity by impacting funding holds a yet unexplored avenue to rein in the federal leviathan.

Something must be done to redress the imbalance so that *American lives, lands, and liberties*, which seem to be at the whim and caprice of faceless, nameless, unaccountable bureaucrats – are protected. Otherwise, the "regulatory complex" will continue to spew-out rules/regulations that strangle economic activity and shackle our freedoms.

Sincerely,



Mark A. Casso, Esq.  
President

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<sup>13</sup> Generally speaking this goes to the "evils" the Founders saw in "royal prerogatives" where the monarchs or their minions acted as lawmaker, enforcer, and judge all in one. [See points attributed to Columbia Law School professor Philip Hamburger in "Thanks EPA . ." cited in body of letter].

<sup>14</sup> Title III of H.R. 7 "The American Energy & Infrastructure Jobs Act of 2012" proposed steps to streamline some regulatory rules. Moreover, the current Transportation Act included streamlining provisions, which have been successful to the point this year H.R. 348 [RAPID Act of 2015] and this Committee's S.280 are including similar provisions for widespread use in the federal government.



## Consumer Federation of America

May 1, 2015

Senator Ron Johnson  
Chairman  
Homeland Security and Governmental  
Affairs Committee  
United States Senate  
340 Dirksen Senate Office Building  
Washington, DC, 20510

Senator Thomas Carper  
Ranking Member  
Homeland Security and Governmental  
Affairs Committee  
United States Senate  
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Senator James Lankford  
Chairman  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
601 Hart Senate Office Building  
Washington, DC, 20510

Senator Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
601 Hart Senate Office Building  
Washington, DC, 20510

Dear Senators,

Thank you for the opportunity to provide information about the rulemaking process in the United States. Consumer Federation of America (CFA) is a nonprofit association of nearly 300 consumer groups that, since 1968, has sought to advance the consumer interest through research, advocacy, and education. Our members represent millions of people. As part of that mission, CFA has worked on numerous specific rules to improve consumer protections, and has sought to ensure both that the rulemaking process enhances consumer protections and that the rules that we work on are promulgated in a robust, transparent and timely manner.

Congress created independent federal agencies to develop expertise on how to protect American consumers from dangerous products, tainted food and deceptive financial services products, among other public interest goals. Most agencies work hard to navigate the already complex, time consuming, expensive and difficult rulemaking process.

Our work has been focused on the benefits of the regulatory process. These benefits include increasing consumer protections to reduce harms caused by the lack of necessary protections. I will provide examples of these types of rules that impact product safety, food safety and ensuring a fair financial market place.



## **Product Safety**

CFA has been involved in petitioning the U.S. Consumer Product Safety Commission (CPSC) to promulgate rules about numerous product safety issues including all terrain vehicles, baby bath seats, product registration and window coverings to name but a few. We also have supported legislation that would require the CPSC to promulgate rules to protect consumers through such legislation as the Consumer Product Safety Improvement Act which passed in 2008. We support rulemaking at the CPSC because the benefits are considerable: lives will be saved from product hazards.

The CPSC has always been staffed by technical experts, such as engineers and human factors psychologists, scientists, and economists. These experts use their technical expertise to further the mission of the CPSC – to reduce deaths and injuries caused by potentially unsafe products. It is incredibly important not to place potential political hurdles in front of the CPSC's ability to protect the public.

The CPSC historically, and still in many instances, relies upon voluntary standards to address product hazards. Only when the voluntary standards are not adequately eliminating or reducing the hazard, does the CPSC proceed to the promulgation of a mandatory standard. In these cases, there is a serious problem that must be addressed and time is of the essence. The longer the mandatory standard takes to be finalized, the longer it takes for consumers to be protected, and the more consumers are put at risk and are potentially injured.

CPSC rulemakings historically take many years. In testimony<sup>1</sup> to the House Committee on Energy and Commerce Subcommittee on Oversight and Investigations on July 7, 2011, Commissioner Robert Adler stated that on average the CPSC promulgates a rule every 3 1/3 years and he has since adjusted that number to 3 1/2 years. This is based on the CPSC's promulgation of 10 rules in 34 years.

If however, one looks at a number of specific rulemakings that have yet to be completed, it is clear that 3 1/2 years is an underestimate of the time actually required. For example:

- The CPSC published a Notice of Proposed Rulemaking for ATVs on August 10, 2006. Even after Congress directed the CPSC to complete the rulemaking by 2012, the CPSC has still not issued a final rule. Thus, after over 8 years, the rule is still not completed.
  - The latest data on ATV death and injuries from the CPSC released in March 2015, found that 99,600 people required emergency room treatment in 2013 as a result of ATVs and the estimated and incomplete deaths for 2012 include 650 fatalities. In 2013, ATVs killed at least 62 children younger than 16, accounting for 15 percent of ATV fatalities.
- In 1994 the CPSC began to work on a rule for upholstered furniture flammability and expanded the scope for the rule in 2003 but the rule has still not been completed.

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<sup>1</sup> Statement of Robert S. Adler, Commissioner United States Product Safety Commission, Before the House Committee on Energy and Commerce Subcommittee on Oversight and Investigations  
<http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Adler-OI-Views-on-Independent-Agencies-on-Regulatory-Reform-2011-7-7.pdf>

- More recently, the CPSC published a Notice of Proposed Rulemaking in September of 2012 for high power magnets (skipping the Advanced Notice stage as permitted by the Consumer Product Safety Improvement Act (CPSIA)). The rule was finalized in October of 2014 and was implemented in April of 2015 after overcoming a temporary injunction by the 10<sup>th</sup> Circuit. Thus, that rule which was purportedly on an expedited schedule took over two years to become final and still has not been implemented.
  - The consequences of inhaling or swallowing more than one of these powerful magnets are severe. Children who swallow two or more magnets are at risk of developing serious injuries such as small holes in the stomach and intestines, intestinal blockage, blood poisoning, and even death. Removing magnets surgically often requires the repair of the child's damaged stomach and intestines.
  - This product poses a hidden hazard because parents are often not aware that their child has swallowed such magnets and because the early symptoms of magnet ingestion often mimic other common illnesses, making a magnet ingestion difficult to diagnose.
  - According to the CPSC, 2,900 possible magnet set ingestions occurred in the United States from January 1, 2009 through December 31, 2013, that required emergency department treatment. The CPSC is aware of one fatality that occurred in 2013.

These examples illustrated that while the CPSC rulemaking is incredibly important to prevent deaths and injuries caused by unsafe products, it takes a long period of time and that period of time varies significantly.

Rulemaking at the CPSC takes a long time and one of the reasons for the extensive delay is that the CPSC is subject to numerous comprehensive cost-benefit analyses requirements as part of its rulemaking process. Since the 1981 passage of amendments to the Consumer Product Safety Act (and under other acts it enforces), the CPSC has been required to conduct an extensive cost-benefit analysis when the CPSC promulgates mandatory safety rules. Under these amendments, the CPSC's current cost-benefit approach is as comprehensive, if not more so, than that set forth in any executive order issued by the Office of the President. The CPSC's existing requirements to perform extensive cost-benefit analyses derive from: section 9 of the Consumer Product Safety Act; section 3 of the Federal Hazardous Substances Act; and section 4 of the Flammable Fabrics Act.

To do an adequate job protecting consumers from death and serious injury, the CPSC must be able to act quickly, decisively, and efficiently. Consumers—and Congress—depend on it. However, the current requirements have led the CPSC to promulgate extremely few mandatory safety rules throughout its history.

This has changed for a category of products, infant and toddler products, as a result of provisions in the CPSIA. As a result of this provision, products such as cribs are now subject to the most protective standards in the world. Since June 2011, the new federal crib standard have stopped the sale, re-sale, manufacture, and distribution of drop-side cribs and also prohibits drop-side cribs at motels, hotels and childcare facilities. Drop side cribs have resulted in the deaths of at least 32 infants since 2001. The CPSC's crib standards also made mattress supports stronger, crib



hardware sturdier and compliance testing more rigorous. This was the first time in nearly 30 years that federal crib standards have been updated. Thus, the benefits are profound for consumers but took an incredibly long time to be finalized with the vast cost of at least 32 infant deaths.

Rolling back existing rules would be devastating. For product safety, the recent gains made as a result of the CPSIA have made a huge impact on product safety in this country. While many benefits are not yet quantifiable, the promulgation of these rules has provided some certainty for manufacturers of these products and deregulation in this sector would lead to widespread uncertainty, a waste of resources used to comply with these rules, and a decrease in consumer faith in the strength of our nation's safety net.

### **Food Safety**

Food Safety regulations protect consumers and prevent illnesses. Numerous food safety regulations, however, have been delayed for long periods of time which means that consumers remain at risk of foodborne illness. The Centers for Disease Control and Prevention (CDC) estimates that every year, 48 million Americans are sickened, 128,000 are hospitalized, and 3,000 die from foodborne disease. An unknown number of Americans develop long-term health complications, such as arthritis and kidney failure, as a result of contracting a foodborne illness.<sup>2</sup> Illnesses associated with meat and poultry products are estimated to cost U.S. society almost \$7 billion each year.<sup>3,4</sup>

Improvements, however, have been identified as a result of regulations. For example, the Pathogen Reduction/Hazard Analysis (PR/HAACP) and Critical Control Points Rule promulgated by the Food Safety and Inspection Service (FSIS) was finalized in 1998. This rule requires meat and poultry plants to identify hazards in production process and take steps to prevent contamination from occurring. This rule has resulted in reduced contamination of meat and poultry, particularly from *E. coli*, especially in the early years of implementation, though it could still be strengthened. *Salmonella* was not included in this rule and reductions in contamination have not been seen.

### **Public Health Benefits of PR/HAACP Rule**

Identifying and fully quantifying the public health impact of the PR/HACCP rule is challenging because food contamination can occur at numerous points along the food supply chain and adequate assurance of food safety requires multiple steps and approaches that are often occurring simultaneously. Consequently, distinguishing the impact of any one program, such as HACCP, from all other activities that affect food safety is difficult. Still, most cost/benefit estimates on the PR/HACCP rule show that the benefits exceed the costs by wide margins.<sup>5</sup>

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<sup>2</sup> Centers for Disease Control and Prevention, "CDC Estimates of Foodborne Illness in the United States 2011" via <http://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html>.

<sup>3</sup> Since information regarding the long-term health complications from foodborne illness is incomplete, societal costs are likely underestimates and could change with additional data.

<sup>4</sup> Batz MB, Hoffmann S, Morris JG, "Ranking the Disease Burden of 14 Pathogens in Food Sources in the United States Using Attribution Data from Outbreak Investigations and Expert Elicitation." *Journal of Food Protection* 75 (2012): 1278-1291

<sup>5</sup> Center for Science in the Public Interest (on behalf of the Safe Food Coalition) comments to FSIS on Pathogen Reduction; Hazard Analysis and Critical Control Points (HACCP) Systems, July 5, 1995.



The CDC, which annually tracks the incidence of foodborne illness in the United States, gives the PR/HACCP rule some credit for declines in the incidence of infections caused by *Yersinia*, *Listeria*, *Campylobacter*, and *Salmonella* from 1996 to 2001, which is the initial period of HACCP implementation.<sup>6</sup> Other factors played a role as well: egg-quality assurance programs, improved agricultural practices, seafood and juice HACCP, new intervention technologies to reduce food contamination, food safety education programs, and increased attention to imported food.<sup>7</sup> In addition, concurrent changes in food distribution, retailing, and consumer behavior during that time period no doubt had an impact.<sup>8</sup> As a National Research Council committee has cautioned, identifying a direct causation between the PR/HACCP rule and declines in foodborne illness is difficult.<sup>9</sup>

While it is likely that the PR/HACCP regulation played some role in the decline in foodborne illness from 1996 to 2001, there has been little progress in reducing foodborne illnesses since then. In reviewing CDC's annual data on the incidence of foodborne illness (which refers to illnesses from all food sources, not just meat and poultry products), the rate of illness for most of the major pathogens has either not changed or has increased since the early 2000s. Progress has been made in reducing illnesses from *E. coli* O157:H7, though in recent years that progress may be slipping. Also troubling is the fact that illnesses from non-O157:H7 STECs continue to trend upwards and the incidence of illnesses from non-O157 STECs is now higher than illnesses from *E. coli* O157:H7.

Comparisons to more recent years have also shown little progress. Data from 2013 reveals statistically significant increases from 2006-2008 for illnesses from *Campylobacter*, and virtually no change for illnesses from *Listeria monocytogenes*, *Salmonella*, *E. coli* O157:H7 and other Shiga-toxin producing strains of *E. coli* (non-O157 STECs).<sup>10</sup> The current incidence of foodborne illness from the major pathogens remains far from U.S. government National Health Objective targets set for 2020.<sup>11</sup>

### **Economic Costs of PR/HACCP**

Estimating the economic costs of HACCP is more straight-forward. A common concern of the meat and poultry industry during the debate on the PR/HACCP rule was the high cost of implementing the new requirements. An early analysis of the costs and benefits of the HACCP program by the GAO found that the estimated benefits to the public were far greater than the

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<sup>6</sup> Centers for Disease Control and Prevention, "Preliminary FoodNet Data on the Incidence of Foodborne Illnesses - Selected Sites, United States, 2001." MMWR 51(15); 325-9, April 19, 2002.

<sup>7</sup> Ibid.

<sup>8</sup> Centers for Disease Control and Prevention, "Incidence and Trends of Infection with Pathogens Transmitted Commonly Through Food — Foodborne Diseases Active Surveillance Network, 10 U.S. Sites, 2006–2013." MMWR 63(15); 328-332, April 18, 2014.

<sup>9</sup> National Research Council, "Scientific Criteria to Ensure Safe Food." *The National Academies Press*, 2003, p.154.

<sup>10</sup> Centers for Disease Control and Prevention, "Incidence and Trends of Infection with Pathogens Transmitted Commonly Through Food — Foodborne Diseases Active Surveillance Network, 10 U.S. Sites, 2006–2013." MMWR 63(15); 328-332, April 18, 2014.

<sup>11</sup> U.S. Department of Health and Human Services, "Healthy People 2020: Food Safety" Accessed October 14, 2014 via <http://www.healthypeople.gov/2020/topics-objectives/topic/food-safety/objectives>.

estimated costs of the program to the industry.<sup>12</sup> GAO found that the cost of implementing the PR/HACCP rule varied by plant size and species slaughtered, but estimated that if the consumer bore the entire cost of a plants' HACCP implementation, the cost to consumers would be less than 50 cents per year. Another early report from the U.S. Food and Drug Administration's (USDA) Economic Research Service (ERS) found that the benefits of the PR/HACCP rule, in terms of lower health care costs, lower productivity costs and fewer premature deaths, were far greater than the costs of HACCP implementation.<sup>13</sup>

Several years after implementation of the PR/HACCP rule, the ERS reviewed the program and found that the costs of implementing the PR/HACCP regulation did not significantly increase the overall cost of production. ERS found that HACCP implementation raised a plant's costs of production by about 1.1 percent – 0.4 cents per pound for poultry and 1.2 cents per pound for beef – and noted that the estimated costs to industry were less than one-half the decrease in health care costs associated with reductions in foodborne illnesses due to implementation of the PR/HACCP rule.<sup>14</sup>

HACCP implementation had another important effect. A 2004 report by ERS found that implementation of HACCP spurred significant investments in food safety by the meat and poultry industry. From 1996 through 2000, meat and poultry plants as a whole spent about \$380 million annually and \$570 million in long-term investments to comply with the PR/HACCP regulation, and an additional \$360 million on long-term food safety investments that were not required by the PR/HACCP rule.<sup>15</sup> Still, ERS noted that the annual cost of HACCP compliance amounted to “less than 1 percent of the cost of meat and poultry products.”<sup>16</sup> ERS concluded that these investments in food safety would “undoubtedly have a beneficial effect for consumers in improving the safety of meat and poultry products and would benefit the industry in terms of reduced food safety risk and increased consumer confidence.”<sup>17</sup>

### **Difference in How FSIS treats *E. coli* and Salmonella Shows Differences in Impact of Regulation vs. Inaction**

In the wake of the *E. coli* O157:H7 outbreak linked to Jack in the Box hamburgers, FSIS made the ground-breaking determination that raw ground beef contaminated with *E. coli* O157:H7 would be considered adulterated within the meaning of the Federal Meat Inspection Act

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<sup>12</sup> U.S. Government Accounting Office, “Analysis of HACCP Costs and Benefits.” GAO-RCED 96-62R, February 29, 1996.

<sup>13</sup> Crutchfield SR, Buzby JC, Roberts T, Ollinger M, Lin CTJ, “An Economic Assessment of Food Safety Regulations: The New Approach to Meat and Poultry Inspection.” Economic Research Service, Report No 755, July 1997.

<sup>14</sup> Ollinger M, Mueller V, “Managing for Safer Food: The Economics of Sanitation and Process Controls in Meat and Poultry Plants.” Economic Research Service, Agricultural Economic Report No. (AER-817), April 2003.

<sup>15</sup> Ollinger M, Moore D, Chandran R, “Meat and Poultry Plants' Food Safety Investments: Survey Findings.” Economic Research Service, Technical Bulletin No. (TB-1911), May 2004.

<sup>16</sup> Ibid.

<sup>17</sup> Economic Research Service, “The Interplay of Regulation and Marketing Incentives in Providing Food Safety,” July 2009.



(FMIA).<sup>18</sup> This was a critical step in addressing a deadly pathogen that had made hundreds of consumers sick and killed four children.

When it comes to *Salmonella* in raw products, however, the approach is very different: FSIS does not consider *Salmonella* to be an adulterant. As a result, it is perfectly legal for companies to sell consumers raw ground beef or poultry products that are contaminated with *Salmonella*.

Since FSIS does not consider *Salmonella* to be an adulterant in raw product as it does *E. coli* O157:H7<sup>19</sup> and other Shiga toxin-producing *E. coli* strains,<sup>20</sup> there is no regulatory requirement that raw poultry or ground beef should be free from *Salmonella*.<sup>21</sup> Instead, the agency performance standards serve as “acceptable levels” for *Salmonella* in products that are sold to the public. Yet *Salmonella* levels can increase on raw product if the product is improperly stored or handled, increasing the risk to consumers.

The rules promulgated by the Food and Drug Administration (FDA) as a result of the passage of the Food Safety Modernization Act (FSMA) to address produce safety, preventive controls and imports were delayed for 18 months at the Office of Management and Budget (OMB). Rules are currently being finalized by FDA and then will need OMB approval again. However, the initial delay has significantly slowed down implementation of FSMA and putting in place better food safety programs to protect consumers from contaminated food. The consequence of this delay is the cost to families and to society of unsafe food and illness and death resulting from the failure of preventative controls.

In addition, two other rules have been delayed at FSIS and FDA that contribute to the costs of food borne illness. The USDA announced a regulation expected to prevent, each year, approximately 79,000 cases of foodborne illness and 30 deaths caused by consumption of eggs contaminated with the bacterium *Salmonella* Enteritidis. The Egg Rule was finalized in July of 2009 and went into effect July 2010. The rule requires preventive measures during the production of eggs in poultry houses and requires subsequent refrigeration during storage and transportation. Egg-associated illness caused by *Salmonella* is a serious public health problem. Infected individuals may suffer mild to severe gastrointestinal illness, short term or chronic arthritis, or even death. Implementing the preventive measures would reduce the number of *Salmonella* Enteritidis infections from eggs by nearly 60 percent. The rule requires that measures designed to prevent *Salmonella* Enteritidis be adopted by virtually all egg producers with 3,000 or more laying hens whose shell eggs are not processed with a treatment, such as pasteurization, to ensure their safety.

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<sup>18</sup> Bottemiller H, “Looking Back: The Story Behind Banning *E. coli* O157:H7.” *Food Safety News*, September 14, 2011; Taylor MR, “Change and Opportunity: Harnessing Innovation to Improve the Safety of the Food Supply.” 1994 American Meat Institute Annual Convention, September 29, 1994.

<sup>19</sup> *Supreme Beef Processors, Inc. v. U.S. Dept. of Agriculture*. United States District Court for the North District Of Texas, May 25, 2000.

<sup>20</sup> Food Safety and Inspection Service, Notice 07-13: Control of Agency Tested Products for Adulterants. February 1, 2013.

<sup>21</sup> Marler B, “Why isn’t *Salmonella* a Legal Adulterant?” Blog post, Marlerblog, February 15, 2013 via [http://www.marlerblog.com/lawyer-oped/why-isnt-salmonella-a-legal-adulterant/#.U3z9hXaGe\\_W](http://www.marlerblog.com/lawyer-oped/why-isnt-salmonella-a-legal-adulterant/#.U3z9hXaGe_W).



The Mechanically Tenderized Meat rule that FSIS is working on, has been delayed by USDA and OMB. This rule should have been released in December of 2015, but is still at OMB. Beef is mechanically tenderized through a process of piercing the product with a set of needles or blades, which break up muscle fiber and tough connective tissue, resulting in increased tenderness. These needles or blades pierce the surface of the product increasing the risk that any pathogens, such as *E. coli* or *Salmonella*, located on the surface of the product can be transferred to the interior.<sup>22</sup>

A substantial portion of steaks and roasts are mechanically tenderized. FSIS estimated that over 50 million pounds of mechanically tenderized beef products were being produced each month.<sup>23</sup> RTI further estimated that 10.5% of raw beef products are mechanically tenderized, and 15.8% are mechanically tenderized and enhanced.<sup>24</sup> Additionally, RTI estimates that the food service industry market share for mechanically tenderized beef (including beef containing added solution) is 53 percent and the market share for retail is 47 percent. In its proposed rule, FSIS estimates that mechanically tenderized beef accounts for 6.2 billion servings annually.

Since 2003, the CDC has identified five outbreaks attributable to mechanically tenderized beef products prepared in restaurants and consumers' homes. Among these outbreaks, there were a total of 157 *E. coli* O157:H7 cases that resulted in 34 hospitalizations and 4 cases of hemolytic uremic syndrome (HUS). Failure to thoroughly cook a mechanically tenderized raw or partially cooked beef product was a significant contributing factor in all of these outbreaks.<sup>25</sup>

Thus, though sometimes hard to quantify, the benefits of food safety regulations are considerable, the costs are exceeded by the benefits and delays of the promulgation of these regulations contribute to the costs of foodborne illness.

### **Financial Services**

The regulatory process and promulgation of rules is critical to ensuring a fair financial marketplace. Three specific rules exemplify the benefits of such regulation, the costs saved, and the costs of delay and inaction.

The "Enhancement of Protections on Consumer Credit for Members of the Armed Forces and Their Dependents" rule, docket #: DOD-2013-OS-0133-0039 is in the process of being promulgated by the Department of Defense.

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<sup>22</sup> Luchansky JB, Phebus RK, Thippareddi H, Call JE. Translocation of surface-inoculated *Escherichia coli* O157:H7 into beef subprimals following blade tenderization. *J Food Prot.* 2008 Nov; 71(11):2190-7.

<sup>23</sup> U.S. Department of Agriculture. 2008. Results of Checklist and Reassessment of Control for *Escherichia coli* O157:H7 in Beef Operations, p. 35. Available at: [www.fsis.usda.gov/PDF/Ecoli\\_Reassessment\\_&\\_Checklist.pdf](http://www.fsis.usda.gov/PDF/Ecoli_Reassessment_&_Checklist.pdf).

<sup>24</sup> Based on slaughter volumes multiplied by average carcass weights in the "Expert Elicitation on the Market Shares for Raw Meat and Poultry Products Containing Added Solutions and Mechanically Tenderized Meat and Poultry Products," RTI International, February 2012.

<sup>25</sup> Culpepper W, Ihry T, Medus C, Ingram A, Von Stein D, Stroika S, Hyytia-Trees E, Seys S, Sotir MJ. "Multi-state outbreak of *Escherichia coli* O157:H7 infections associated with consumption of mechanically-tenderized steaks in restaurants—United States, 2009." Presented at International Association for Food Protection; August 1–4, 2010; Anaheim, CA. Swanson, L. E., Scheftel, J.M., Boxrud, D.J., Vought, K.J., Danila, R.N., Elfering, K.M., and Smith, K.E. 2005. Outbreak of *Escherichia coli* O157:H7 infections associated with nonintact blade-tenderized frozen steaks sold by door-to-door vendors. *J. Food Prot* 68:(1198–1202).

### **Benefits of the Enhancement of Protections on Consumer Credit for Members of the Armed Forces and Their Dependents Rule**

The Department of Defense (DoD) is currently considering the expansion of the Military Lending Act (MLA), which caps interest rates at 36 percent for active-duty servicemembers and their dependents. The proposed rule would prevent payday lenders from charging servicemembers interest rates of 400 percent or more without any consideration of their ability to repay the loan in full and on time without additional borrowing. It would also allow safe and sustainable lending, such as small loans from credit unions or lower-cost credit cards, to continue.

### **Cost of Inadequate Regulation of High Cost Credit for Servicemembers**

The DoD's first MLA rule, promulgated in 2007, defined "consumer credit" and applied the 36 percent rate cap to three types of narrowly defined products: closed-end payday loans, car-title loans of limited length, and tax refund anticipation loans. While the rule had a positive impact in protecting servicemembers from those three forms of credit, the narrow definition of consumer credit under the current MLA rule opened the door to harmful evasions.

- ***The current, inadequate rule has resulted in harmful evasions of the original intent of the Military Lending Act:*** instead of complying with the Military Lending Act and the required 36 percent rate cap, lenders developed longer-term or open-ended payday loans with triple digit interest rates that were exempt from the 2007 rule and the MLA's interest rate cap and protections.
- ***More than half of all active-duty servicemembers are at risk of financial abuse:*** A March 2013 analysis by CFA found that over half of servicemembers are currently stationed in states where state law permits high-cost lending that is not included in the 2007 definition of covered consumer credit and exempt from the 36 percent rate cap required by the MLA.
- ***One out of every ten enlisted servicemembers take out loans with interest rates that exceed 36 percent:*** In April 2014, the Department of Defense conducted a survey of servicemembers and military financial counselors. The survey found that, as a result of inadequate regulation, 11 percent of enlisted servicemembers continue to turn to high-cost credit—a strong indication that the current rule is insufficient in protecting servicemembers from debt trap lending.
- ***DoD believes that improved regulation is necessary and would not limit access to safe and sustainable credit:*** The April 2014 DoD report also found that financial education alone is insufficient in reducing demand and expanded restrictions on high-cost credit are needed. The report also concluded that servicemembers would not be negatively impacted if access to high-cost credit was restricted.

### **Toll of Deregulation**

Failure to act swiftly and close the loopholes in the MLA puts servicemembers at risk of sustained financial harm, undermines force-readiness and may result in involuntary separation from the armed forces. The Department of Defense believes that "predatory lending undermines military readiness, harms the morale of troops and their families, and adds to the cost of fielding



an all-volunteer fighting force.”<sup>26</sup> In 2013, the Department of Defense also described payday lending as “the biggest, current financial challenge facing our Servicemembers, Veterans, and their families.”<sup>27</sup>

Another example of a critically important rule is the “Monitoring Availability and Affordability of Auto Insurance,” rule, docket #: TREAS-DO-2014-0001-0001, being promulgated by the Federal Insurance Office (FIO). The comment period for a request for information has closed and the FIO is working on a data collection proposal but this process has been delayed.

### **Benefits of Affordable and Accessible Auto Insurance**

There is strong public support for improving the affordability and accessibility of auto insurance for low-wealth drivers to ensure that all drivers are adequately insured. The FIO has begun a data collection effort to determine the accessibility of auto insurance for low-wealth drivers and has solicited comments from the public on how to best define affordability and proceed with a data collection effort. This effort, which has been published for notice and comment, is ongoing. However, delays as a result of industry opposition have slowed its completion despite a mandate under Dodd-Frank to carry out much-needed data collection to ensure that low-wealth drivers are given every opportunity to comply with state auto insurance mandates and drive safely without being exposed to punitive and counter-productive penalties for failure to carry insurance that is unaffordable.

According to recent CFA research, a typical driver would not have access to an auto insurance premium under \$500 in one out of every three low-income neighborhoods in the 50 largest metropolitan areas. In addition, low-wealth drivers are more likely to have lower credit scores, lower education levels and lower-status occupations, all of which increase the cost of insurance considerably—even controlling for previous accidents or traffic tickets. Collecting data at the national level will ensure that drivers are getting fair rates, inform important state policies to reduce the number of uninsured drivers and protect drivers from abusive pricing practices, such as the widespread practice of increasing rates for drivers that are less likely to comparison shop.

### **Cost of Inadequate Auto Insurance Regulation**

While nearly all states require drivers to carry state minimum liability auto insurance coverage, most state regulation is inadequate to reduce the number of uninsured drivers. Nearly every state focuses its regulatory response on the establishment of penalties for driving without insurance. However, CFA research has shown that uninsured motorist rates are more closely tied to poverty rates than the severity of penalties. At the same time, the widespread and largely unregulated use of non-driving rating factors, such as credit score, level of education or type of occupation has resulted in significantly higher rates for low-wealth people compared to higher-wealth people—increasing premiums threefold in many cases, even for good drivers.

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<sup>26</sup> *Report On Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents*. Washington, DC: Department of Defense, August 9, 2006.

[http://www.defense.gov/pubs/pdfs/report\\_to\\_congress\\_final.pdf](http://www.defense.gov/pubs/pdfs/report_to_congress_final.pdf).

<sup>27</sup> Testimony of Colonel Paul Kantwill, Director of Legal Policy, Office of the Undersecretary for Personnel and Readiness, Department of Defense before the Senate Committee on Veterans Affairs on July 31, 2013 available at <http://www.veterans.senate.gov/imo/media/doc/kantwill-7-31-13.pdf>.

### **Toll of Deregulation of the Auto Insurance Industry**

The deregulation of the auto insurance market is closely tied to greater increases in auto insurance premiums. CFA research released in 2013 found that, since 1989, states with the strongest consumer protections in place saw premiums increase an average of 48 percent while deregulated states saw an average increase of 70 percent. California, one of the most consumer-friendly states in the nation saw a slight decrease over the same time period. CFA research has also determined that, as of 2013, California maintained a highly competitive auto insurance market and that deregulated states, on average, had less competitive insurance markets than those states that had rate regulation in place.

A final example of a critically important rule, is the Payday, Vehicle Title, and Similar Loans rule being promulgated by, the Consumer Financial Protection Bureau (CFPB). The rule is under review by the Small Business Advisory Review Panel.

### **Benefits of a Strong CFPB Payday Lending Rule**

The current CFPB proposal to address the negative effects of payday lending under consideration by the CFPB's small business review panel will establish a common-sense, straightforward ability to repay standard for payday, auto title and payday installment loans. These loans exceed 300 percent interest and have been shown to trap borrowers in a long-term cycle of debt. Repeat borrowing is standard practice—over 80 percent of loans are renewed because a borrower is unable to repay in full and on time and half of all loans are part of a series of ten or more loans. If adopted, the proposal would hold payday, auto title and payday installment loans to similar standards applied to mortgage lenders and credit card issuers—that they make safe and sustainable loans that borrowers can repay without falling into a long-term debt trap. There are a number of improvements to the current proposal that must be included to prevent lenders from exploiting loopholes and offering triple digit interest rate loans without any consideration of a borrower's ability to repay. However, this proposal represents a strong step forward for the millions of borrowers living in states with little to no consumer protections.

### **Cost of Inadequate Regulation of High Cost Lending**

Currently 35 states authorize triple digit interest rate loans with few, if any, consumer protections. As a result 81 percent of Americans live in states that would see a considerable improvement in consumer protections for payday loans if the CFPB rule is enacted. According to the CFPB, 75 percent of payday loan fees are generated by borrowers trapped in at least 11 loans per year and, according to the Center for Responsible Lending, this loan churning results in \$3.5 billion in fees paid by payday loan borrowers and \$3.6 billion in fees paid by title loan borrowers each year.

### **Toll of Deregulation**

If the CFPB issues a weak final rule that provides an exemption to the proposed ability to repay standard, consumers in states that offer stronger consumer protections would likely be harmed as a result of inevitable industry efforts to roll back stronger state protections under the guise of complying with the new CFPB standard. For example, by allowing three back-to-back loans without a review of the borrower's income and expenses, it is likely that lenders would aggressively seek to weaken stronger state laws by arguing that the CFPB has endorsed back-to-back triple digit interest rate lending as a safe practice. The only way to prevent the final CFPB

rule from undermining stronger state laws is to ensure that the ability to repay standard applies to the first loan and every loan.

**Conclusion**

The federal rulemaking process is already lengthy and difficult. Those rules that are finalized and implemented lead to significant benefits to consumers though quantification of those benefits as required by many statutes is difficult and often likely an underestimation. The costs of delay and the costs of deregulation are considerable. For consumer protections, most rules lead to consumer benefits that significantly exceed costs. Efforts to make the rulemaking process more time-consuming, expensive, and burdensome for federal agencies to propose consumer protection measures will result in harm to American consumers.

Sincerely,

A handwritten signature in black ink that reads "Rachel Weintraub". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Rachel Weintraub  
Legislative Director and General Counsel





POLICY & ACTION FROM  
CONSUMER REPORTS

May 1, 2015

The Honorable Ron Johnson  
Chairman  
Senate Committee on Homeland Security  
and Governmental Affairs  
340 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Thomas R. Carper  
Ranking Member  
Senate Committee on Homeland Security  
and Governmental Affairs  
344 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs  
and Federal Management  
B40C Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
and Federal Management  
502 Hart Senate Office Building  
Washington, DC 20510

Dear Chairman Johnson, Ranking Member Carper, Chairman Lankford, and Ranking Member Heitkamp:

On behalf of Consumers Union, the policy and advocacy arm of Consumer Reports, we would like to thank you for undertaking a broad canvassing of viewpoints regarding the impacts that federal regulations have on our society.

Since our founding in 1936, Consumers Union and Consumer Reports have worked to promote a safe, fair, and just marketplace for consumers, and to empower consumers to protect themselves. Advocating for effective regulations has been a key component of our efforts. Regulations provide important protections to the public, the marketplace, the environment, and our overall well-being and security.

We regularly engage in rulemakings undertaken by a wide spectrum of agencies charged with establishing effective protections for consumers and finding the appropriate balance to achieve those protections. Keeping unnecessary compliance costs to a minimum is an important part of finding that balance, and listening to the viewpoints of the regulated entities provides an important source of information.

The list of important regulatory protections we have supported and advocated for over the years would fill many pages. They include ensuring basic safety in food, drugs, children's toys, consumer products, automobiles, airline travel, home building materials, the water supply, our

lakes and streams, and the air we breathe. They include protecting against fraud and deception in business transactions with consumers. They include promoting choice, value, and security in health care, communications services, and the full range of other products and services that consumers depend on in the modern-day marketplace.

To list just a few examples of federal regulations that Americans rely on every day – including some that were implemented recently, and others that have been in place for decades:

- **The ban on lead paint**, and the ban on the use of lead paint in children’s products and furniture, which has prevented a wide range of disorders associated with lead poisoning, including hyperactivity, behavior disorders, slowed learning ability, withdrawal, blindness, seizures, and even death (16 C.F.R. Part 1303).
- **Safety standards for cribs**, implemented in 2011 under the Consumer Product Safety Improvement Act, stopped the sale of drop-side cribs, inherently dangerous products that have led to the death of more than 30 infants since 2001 (16 C.F.R. Part 1219 and 1220).
- **Pacifier size and shape requirements**, which have prevented babies from choking or suffocating on pacifiers (16 C.F.R. Part 1511).
- **Flammability requirements for children’s pajamas and other sleepwear**, which have prevented young children from being injured or dying from burns suffered when their clothes catch fire while sleeping (16 C.F.R. Part 1615 and 1616).
- **Federal motor vehicle safety standards**, which ensure that cars are designed, constructed, and perform in a way that minimizes crashes and the risk of being injured or killed as a result of a crash. These standards include basic safety requirements for seat belts and other types of occupant crash protection, child car seats, fuel system integrity (to reduce the chance of fire in a crash), and electronic stability control systems (implemented in 2007 to reduce rollover risk) (49 C.F.R. Part 571).
- **Food safety requirements for meat and poultry producers**, which require plants to identify food safety hazards in the production process and take steps to keep contamination from spreading (9 C.F.R. Part 417).
- **Enhanced FDA authority to detain potentially unsafe food** – implemented in 2013 under the FDA Food Safety Modernization Act – that allows FDA officials to detain food they have examined when they have reason to believe that the food is adulterated or misbranded.
- **The FDA drug approval process**, which requires clinical testing prior to a drug being approved to ensure that drugs that are dangerous to humans – such as Thalidomide – do not reach the marketplace (21 C.F.R. 310, 312, 314).
- **Health and safety standards under the Safe Drinking Water Act**, which require public water systems to limit contaminants in our drinking water supply (40 C.F.R. Part 141).
- **Regulations under the Truth-in-Lending Act** (12 CFR Part 1026) and the **Real Estate Settlement Procedures Act** (12 CFR Part 1024), which ensure that consumers are not misled by unscrupulous lenders about the costs and risks of major loans, and **regulations under the Fair Debt Collection Practices Act** (12 CFR Part 1006) protect consumers against being bullied by abusive debt collectors.
- **The Children’s Online Privacy Protection Rule**, which gives parents the ability to control what information is collected from their children online (16 C.F.R. Part 312).

- **Commercial aviation safety requirements**, which help ensure that flying is safe by requiring planes to be properly maintained, planes and airports to be operated in a safe manner, and members of the flight crew to be well-rested (14 C.F.R. Chapter I).

And the list could go on.

Absent basic regulatory protections like these, with every purchase, with every meal, with every footstep taken or mile driven, consumers would be risking their well-being and their lives, at the mercy of a motley assortment of self-interested actors with widely varying degrees of willingness to take steps to ensure safety and fair dealing.

As a result of these regulations, many Americans have a great degree of confidence that there are appropriate consumer safeguards behind the products and services they encounter in the marketplace, and behind the industrial activity taking place around them every day. We are committed to ensuring, through our continued efforts, that their confidence is not misplaced – and we believe the agencies, the Congress, the public, and the regulated entities share that responsibility.

We have found in our experience that the rulemaking process – following the Administrative Procedures Act and other relevant statutes Congress has enacted over the years, and developed more fully in each agency to fit the matters it regulates – has generally worked well to solicit and consider all viewpoints. The resulting rules often reflect careful and lengthy consideration of the ramifications of various alternative approaches. We are not always completely satisfied with the resulting regulation, but we do generally believe we have been heard. And regulated entities, which generally have far more resources to devote to the rulemaking process than we do, are certainly heard.

Federal agencies also undertake periodic reviews of existing regulations – often on their own initiative, sometimes on the initiative of OMB’s Office of Information and Regulatory Affairs, and sometimes at the direction of Congress. Outside parties, including regulated entities, can also initiate this process by petitioning for a review. We support this process, and all these avenues for undertaking it. We want agencies to ensure that regulations developed in the past are still achieving their purposes in the most effective manner, and are strengthened or revised as warranted with that goal in mind. We appreciate that a regulation can be complex, and that after a period of experience, ways to improve its functioning and outcomes can become apparent.

It is important, however, that any such review be balanced, with an eye first and foremost on the purpose for which the regulation was initially developed. Regulated entities need to have a key role in the review, but their desire to minimize compliance burdens and costs needs to be carefully weighed against the more important objective of ensuring that the regulations continue to provide effective protection and accountability. Some burdens and costs are unavoidable, and are a necessary component of an effective regulation. Regulated entities are not always in the best position to objectively evaluate which costs are necessary – although it is important and entirely appropriate to seek their viewpoint and to understand it.

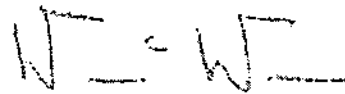
Congress has an important role in helping ensure that regulations are achieving their purposes effectively, and one key component of effectiveness is minimizing unnecessary costs. However, it is also essential that considerations of cost not compromise the overriding protective purposes of the regulations. It is important, moreover, that an agency with limited resources to perform a vital mission to protect consumers, the environment, the economy, or our security not be burdened with repetitious, excessively costly, or unduly distracting reviews, however well-meaning. It is important that our regulatory agencies be encouraged and supported in making careful decisions, based on the technical expertise of agency personnel in law, economics, science, safety engineering, and other fields, as applied to the policy focus of the agency.

We ask that the Committee and Congress keep these considerations in mind as it undertakes its review. We appreciate being included in the Committee's outreach, and we look forward to working with you to ensure that constructive and balanced attention is brought to the consideration of possible recommendations for change.

Respectfully,



George P. Slover  
Senior Policy Counsel  
Consumers Union



William C. Wallace  
Policy Analyst  
Consumers Union



*Representing the Interests of America's Industrial Energy Users since 1978*

May 1, 2015

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security & Governmental Affairs  
U.S. Senate  
Washington, D.C. 20510

Dear Chairman Johnson,

The Council of Industrial Boiler Owners (CIBO) would like to thank you and the Committee for initiating your review of the impact of federal regulations. CIBO believes that a few minor changes to outdated regulatory frameworks could immeasurably improve the efficiency and workability of the federal government's environmental regulations without jeopardizing federal agencies' ability to protect health, welfare, safety, and the environment within the confines of the law.

CIBO is a national trade association of over 110 members including industrial boiler owners, architect engineers, related equipment manufacturers, and universities representing 20 major industrial and institutional sectors. CIBO has been working since 1978 to (1) promote the exchange of information between industry and government relating to energy and environmental policies, laws, and regulations affecting industrial boilers and the manufacturing and institutional energy base of our country; (2) promote technically sound, cost-effective laws and regulations; and (3) improve energy and environmental performance, reliability and cost-effectiveness of members' operations through technical interchange. CIBO's membership represents industries as diverse as chemicals, paper, cogeneration, metals, automotive, refining, combustion engineering, and food products. CIBO members also include operators of boiler facilities at over a dozen major universities.

In CIBO's view, needed changes encompass two distinct but mutually reinforcing objectives. First, Congress should clarify certain aspects of the Clean Air Act (CAA) to ensure that the U.S. Environmental Protection Agency (EPA or the "Agency") implements the statute in line with Congressional intent. Second, Congress should ensure that environmental regulations do not inadvertently threaten the fuel diversity upon which so much of our industrial sector relies.

**A. Much-Needed Clarification of the Clean Air Act**

In recent years, EPA has used the CAA as a battering ram to further the Administration's ambitious environmental agenda. In the Agency's rush to promulgate as many pollution control rules as possible in a short period of time, mistakes have been made and deliberate oversights have gone uncorrected. A few examples are particularly egregious, and therefore merit a Congressionally mandated course correction.



First, EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP), promulgated under Section 112 of the CAA, require that industrial boilers abide by the same emissions limitations during malfunction events as during normal operations. A malfunction event places physical limitations on a boiler that, by definition, results in the potential for emissions limitations to be exceeded. EPA's decision to make specific allowances for boiler startup and shutdown but to simultaneously ignore malfunction events is illogical and operates contrary to the mandates of the CAA. Quite simply, if a boiler malfunctions and exceeds its emissions limitations, the owner is vulnerable to a range of federal and state enforcement actions. For more details on this flawed regulatory approach, please see the SSM Coalition's recent letter to the Committee. Congress should insist EPA provide a work practice approach as allowed by the CAA for malfunctioning boilers to correct a misstep by the agency that will impose great costs with no corresponding environmental benefit.

Second, EPA continues to revise its National Ambient Air Quality Standards (NAAQS) for a variety of pollutants without resolving basic problems in the standard-setting process. The five-year statutory review period for standards means the Agency often begins its review of a pollutant threshold before it releases implementation guidance on how to meet the current threshold. States are left with a host of unanswered questions and a short timetable to achieve compliance. EPA often revises its guidance, resulting in additional confusion. Together, these problems have resulted in a broken process that hinders effective environmental protection and economic growth. Congress should lengthen the statutorily mandated review period for NAAQS so that EPA, states, and non-governmental stakeholders have time to implement an achievable standard before a new one comes about.

Finally, EPA's proposed rule to reduce carbon emissions from existing coal-fired power plants suffers from legal flaws so severe a legislative response is necessary. For the first time, the Agency looks to regulate emissions beyond the "fence line" of a source using the logic that the entire electricity system is part of one interconnected pollution apparatus. Not only is this logic nowhere to be found anywhere in the CAA, it would also set a precedent for broad EPA regulation of the entire U.S. energy sector. Congress should clearly state that the CAA does not authorize EPA to require a de facto reorganization of major elements of the U.S. economy, even if doing so does result in an overall reduction in carbon dioxide emissions.

#### **B. The Need For a Coordinated Energy Policy**

The lack of an effective national energy policy that is coordinated with environmental policy results in environmental decisions that exacerbate the energy supply/demand imbalance. For example, a good national energy policy would promote the use of diverse energy sources, which would moderate interruptions and spikes in individual fuel supply availability and price. Such a policy would also provide a framework and incentives to promote the use of diverse energy sources and the full use of U.S. energy resources, including our large reserves of coal. Because we do not have an effective national energy policy, individual fuel decisions are necessarily based on local short-term economics that exacerbate long-term problems.

In the CAA, Congress provided ways to ensure environmental protection and at the same time to meet energy demand by allowing dependence on the full range of the Nation's diverse energy



sources. And for the first 25 years of its implementation, the CAA was interpreted, as intended, to allow industry to rely on all energy resources. However, beginning in the mid-to-late 1990's, environmental policy makers began to favor natural gas over other fossil fuels for its cleaner burning properties. Essentially all new power generation was built for natural gas. This policy of favoring natural gas over other fuels was incorporated into CAA rules applicable to the industrial sector as well.

This misguided approach severely punishes the use of energy sources other than natural gas. Standards are set at a point that makes emissions reductions cost-effective for sources burning natural gas, but cost-prohibitive or technically infeasible for sources burning other fuels. Under those circumstances, existing sources under pressure to comply with CAA standards will (if they can) switch to natural gas. As a result, environmental standard-setting has contributed to the increasing dependence on natural gas and the abandonment of coal and other fuels as reliable alternatives.

CIBO recommends that Congress carefully examine EPA's attempts to use environmental regulations to permanently alter U.S. energy trajectories. The CAA does not give EPA the authority to establish its own national energy policy, regardless of that policy's supposed or theoretical benefits. The loss of fuel diversity in favor of increased dependence on natural gas, if unchecked, will have a substantial negative impact on the long-term vitality of industrial boilers, the entire industrial sector, and the economy as a whole.

### **Conclusion**

Thank you for the opportunity to participate in the Committee's efforts to make the regulatory process more effective. We look forward to assisting the Committee as it carries out this vital task. Please do not hesitate to contact us if you have any questions.

Robert D. Bessette



President

Council of Industrial Boiler Owners

cc: The Honorable Thomas Carper, James Lankford, Heidi Heitkamp

April 16, 2015

The Honorable Ron Johnson  
United States Senate  
Washington, D.C. 20515

The Honorable Thomas R. Carper  
United States Senate  
Washington, D.C. 20515

The Honorable James Lankford  
United States Senate  
Washington, D.C. 20515

The Honorable Heidi Heitkamp  
United States Senate  
Washington, D.C. 20515

Dear Senators Johnson, Carper, Lankford and Heitkamp:

On behalf of the Credit Union National Association (CUNA), I am writing in response to the Committee's request for feedback on the real world impact of regulation. CUNA is the largest credit union advocacy organization in the United States, representing nearly 90% of America's 6,300 state and federally chartered credit unions and their 102 million members.

Congress has conveyed on credit unions a statutory mission to promote thrift and provide access to credit for provident purposes to its members. Credit unions have proudly fulfilled this mission since their inception in the United States more than 100 years ago. The credit union system was created to be a countercyclical balance to the for-profit banking system, as such, the size and growth of the system in terms of membership, loans and deposits are direct indicators that credit unions are providing considerable value to the American consumer.

Today, credit unions face a crisis of creeping complexity with respect to regulatory burden. The regulations to which credit unions are subject are ever increasing, never decreasing. While credit unions were already challenged by significant regulatory burden prior to the financial crisis, the changes to regulations coming as a result of the crisis have exacerbated the burden on credit unions, and are a key driver to consolidation within the credit union system. Since the beginning of the financial crisis, credit unions have been subjected to more than 190 regulatory change from nearly three dozen Federal agencies totaling nearly 6,000 Federal Register pages. Credit union volunteers and executives are particularly frustrated that they are required to comply with these new and complex regulations notwithstanding the fact that they did not cause or contribute to the financial crisis. To the extent that post-financial crisis regulations result in credit unions offering fewer services to their members or services which are more expensive, we believe the regulations have failed consumers, and add insult to injury.



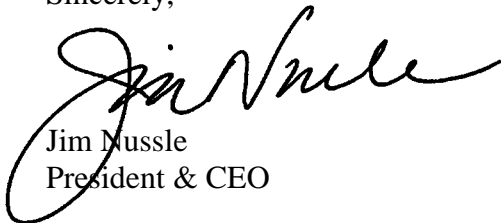
The impact of new regulations on credit unions is well-documented: there are certain upfront costs associated with any regulatory change. Credit union staff and volunteers must take the time to understand the regulation, adjust internal policies and procedures, work with their vendors to implement changes, design and print new forms and disclosure changes; reprogram data processing systems; retrain staff; and explain the changes to their members.

Here is how these changes adversely affect the 102 million credit union members: Because many credit unions employ a small staff and have limited resources, the proportional impact of regulation on credit unions is greater than it is for large banks. Resources – both time and money – diverted to complying with rules designed for large banks are resources that cannot be used to serve credit union members. Moreover, there have been times in recent years when a regulatory change has forced credit unions to make the difficult to decision to suspend a product offering, resulting in credit union members having fewer choices in the market. There is absolutely no pro-consumer case to be made for a rule that results in fewer credit unions offering a product.

CUNA has conducted a review of the regulatory environment in which credit unions operate and created a priority list of just over a dozen suggested changes which would provide credit unions much needed regulatory relief. We have provided a chart attached to this letter highlighting these suggested changes which includes: several improvements to the rulemaking process; NCUA's risk-based capital proposal; FASB's Credit Impairment Proposal; the Department of Defense's Military Lending Act proposal; the IRS's Foreign Account Tax Compliance Act; NCUA's Central Liquidity Facility; NCUA's Member Business Lending regulations; and among others. This list just scratches the surface of the regulatory burden facing credit unions, but it represents a good place to start in addressing these burdens.

We appreciate this Committee's attention to the important issue of regulatory burden, and we look forward to working with you to ensure credit unions can continue to provide sound financial services for the more than 102 million consumers we serve nationwide. If you have any questions about these regulatory provisions please feel free to contact me.

Sincerely,



Jim Nussle  
President & CEO

<p><b>Improvement to Rulemaking</b>  <b>Process:</b>  <i>Require Cost-Benefit Analysis of all NCUA Proposals</i></p>	<p>NCUA should be required to complete an extensive cost-benefit analysis before the agency proposes any rule and should be required to include the analysis with all proposals issued for comment. Credit unions fund NCUA and the National Credit Union Share Insurance Fund. It is reasonable that credit unions should be provided with an analysis of the cost and the benefit of proposals the regulator is proposing.</p>
<p><b>Improvement to Rulemaking</b>  <b>Process:</b>  <i>Require Cost-Benefit Analysis of all CFPB Proposals</i></p>	<p>CFPB should be required to complete an extensive cost-benefit analysis before the agency proposes any rule and should be required to include the analysis with all proposals issued for comment.</p> <p>The burden should be on the Bureau to detail the costs and benefits of its proposals, not on regulated parties to prove that there is a burden. In the 113th Congress, Chairman Shelby introduced the Financial Regulatory Responsibility Act (S. 450) which would have required agencies to compare quantified benefits with quantified costs. The bill also would have required agencies to provide all data and analysis to the public (in the preamble of the rule) so that they can analyze the agencies' conclusions. Further, the legislation would have provided a mechanism for judicial review. We support the reintroduction of this legislation and encourage its enactment.</p>
<p><b>Improvement to Rulemaking</b>  <b>Process:</b>  <i>Require Small Business Regulatory Enforcement Fairness Act Panel for CFPB Rules</i></p>	<p>As required by Dodd-Frank, CFPB has held SBREFA panels for several of its regulations, including the mortgage rules. These panels, which are conducted under the auspices of the SBA's Office of Advocacy, are invaluable for identifying concerns and shedding light on costs small businesses, including credit unions, will have to bear under new proposals. However, the CFPB has taken the view that it is not required to hold a SBREFA panel for rulemakings that involve regulations transferred from other agencies, such as the remittance transfers regulation that was initiated by the Fed. CFPB should be required to hold SBREFA panels for all significant regulations it promulgates.</p>
<p><b>CFPB:</b>  <i>Ability-to-Repay / Qualified Mortgage</i></p>	<p>CUNA continues to strongly advocate for flexibility for credit unions to issue mortgages to well-qualified members, without regard to the QM rules.</p> <p>However, in regard to the QM rules, CFPB should amend Regulation Z to allow for 50% debt-to-income ratio for QM status, rather than current 43%. CFPB should also revise the small creditor definition to \$10B in assets and 2,000 closed-end first lien mortgages originated in previous calendar year, rather than current \$2B in assets and 500 loans.</p>
<p><b>CFPB:</b>  <i>Mortgage Servicing</i></p>	<p>CFPB has promulgated its mortgage servicing rules under Regulation Z.</p> <p>CFPB should amend Regulation Z to increase the small servicer threshold from 5,000 loans to 10,000 loans.</p> <p>Credit unions should at least be exempt from the mortgage servicing rules as they apply to: escrows for higher-priced mortgage loans, early intervention, continuity of contact, servicing file requirements, error resolution, information requests, force-placed insurance, homeownership counseling, loss mitigation, policies and procedures, and servicing transfers,</p>
<p><b>CFPB:</b>  <i>Prepaid Accounts proposal</i></p>	<p>CUNA believes several aspects of the proposal would be ineffective and/or counterproductive. The CFPB should limit any new regulatory requirements on credit unions that offer prepaid accounts, so that such accounts remain accessible, especially by the underserved. Further, we have a number of significant concerns with the proposed rule, including that the potential application of certain Regulation E requirements may not be appropriate for the different risks and attributes of prepaid accounts.</p>
<p><b>CFPB:</b>  <i>Remittance Transfers</i></p>	<p>The remittance transfer rule requires certain disclosures for consumer-members that send and receive international remittance transfers. We support many of the rule's safeguards, such as mandatory disclosure of providers' cancellation and refund policies. However, certain aspects of the rule, such as those related to provider-liability, are having the unintended consequence of driving providers out of the market, forcing consumers to less reputable institutions.</p> <p>Application of the rule is overly broad. Or, put another way, the rule's exemption from certain requirements is much too limited. The CFPB should revisit the current exemption level which applies to providers of less than 100 remittance transfers a year. Based on our research, we believe a threshold of 1,000 transfers annually would be more appropriate.</p>

<p><b>DoD:</b> <i>Military Lending Act proposal</i></p>	<p>DoD’s September 2014 proposed rule would have significant operational impacts on credit unions serving our nation’s servicemembers and their families. Specifically, the proposal would: significantly expand scope of products covered by MLA protections, including credit cards; amend “consumer credit” definition to cover a broader range of closed-end and open-end credit products; and change process for determining “covered borrower” status. DoD has not indicated when a final rule will be adopted; there is speculation that it will occur in late 2015/early 2016.</p> <p>CUNA urges DoD to exempt credit unions from the scope of the proposed rule changes. Alternatively, the expanded definition of “consumer credit” as well as the proposed process for determining “covered borrower” status should not apply to credit unions.</p>
<p><b>FASB:</b> <i>Credit Impairment proposal</i></p>	<p>CUNA does not support a FASB proposal, which would make changes to accounting for credit losses. Proposal will directly affect credit unions, which is why CUNA has urged FASB to exempt credit unions from proposed changes, specifically the proposed requirement to apply the current expected credit loss (CECL) model. CUNA has filed three letters with FASB, and met directly with the FASB Chairman on the proposal. FASB has indicated it hopes to finalize the proposed changes in the third quarter of 2015.</p>
<p><b>IRS:</b> <i>Foreign Account Tax Compliance Act</i></p>	<p>Although it would seem that credit unions should not be affected by FATCA, the over 500 pages of implementing regulations that have been issued since the beginning of 2013 include requirements for all withholding agents, and it is unclear what may or may not apply to U.S. credit unions. As a result, credit unions have spent, and will continue to spend, a tremendous amount of time and resources trying to determine whether FATCA applies to their transactions, for example sending a wire to a foreign country.</p> <p>There are several provisions in the FATCA rules that are not only confusing, but operationally infeasible. For example, the definition of “withholdable payment” includes “any gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States” (26 USC §1473(1)(A)(ii)). This would require credit unions to determine from where the sources of the funds in an account originated. This is an impossible requirement – even the IRS postponed the effective date for this provision until 2017.</p> <p>Credit unions should be exempt from FATCA and any implementing regulations. Credit unions are already subject to statutory requirements for reporting income paid to nonresident aliens, and putting FATCA rules on top of these reporting rules have further complicated compliance. Including U.S. credit unions under FATCA is not only a tremendous regulatory burden, but the amount of funds eventually collected would unquestionably be minimal.</p>
<p><b>NCUA:</b> <i>Accuracy of Advertising and Notice of Insured Status</i></p>	<p>A number of credit unions are advertising via mobile banking/text messaging and have expressed to us concerns with the requirement under section 740.5 that all advertisements include NCUA’s official statement, “This credit union is federally insured by the National Credit Union Administration,” or the abbreviated statement, “Federally insured by NCUA.”</p> <p>Financial institutions insured by the FDIC may comply with the FDIC’s advertising statement requirement by simply displaying “Member FDIC.” In an era of communication via condensed messaging (e.g., Twitter), each character in a text message or on a mobile website must be chosen very carefully. NCUA should revise Part 740 to permit credit unions to use a further abbreviated advertising statement as an option for complying with the agency’s Accuracy of Advertising and Notice of Insured Status rule.</p>

<p><b>NCUA:</b> <i>Central Liquidity Facility</i></p>	<p>CUNA supports the existence and mission of the NCUA’s CLF. The financial crisis has shown that the CLF played an essential role in facilitating the ability of the National Credit Union Share Insurance Fund (NCUSIF) to borrow from the federal government during times of economic stress. More credit unions would be encouraged to use the CLF if they did not have to purchase CLF stock and become members of the CLF prior to applying for a loan.</p> <p>A more robust CLF would be positive for the credit union system and exert less pressure on the Federal Reserve’s discount window during times when liquidity is needed. Currently, banks may borrow from the Fed’s discount window for primary, secondary, and seasonal credit needs, whereas the CLF is essentially a lender of last resort.</p> <p>The CLF could be improved by eliminating the requirement that the CLF be funded by stock subscriptions paid for by member credit unions. The NCUA Board should allow credit unions to obtain loans from the CLF for short term as well as longer term liquidity purposes. In addition, the NCUA Board should report to Congress on further ways to improve the CLF through legislation.</p>
<p><b>NCUA:</b> <i>Member Business Loans</i></p>	<p>More can be done to streamline small business lending for credit unions. All of the regulatory requirements for MBLs that are not specifically required by the Federal Credit union Act should be eliminated. These include: the requirement for the personal guarantee of the borrower(s), loan-to-value ratios, construction and development loan limits, appraisal requirements, and other regulatory restrictions.</p> <p>While these requirements may be waived upon application by the credit union to NCUA, the waiver process has been strongly criticized by a number of credit unions. Rather than subject credit unions to a cumbersome waiver process, we think the agency should eliminate these requirements. At the very least, we urge the agency to develop and implement in all regions a waiver process that will be timely and allow credit unions to obtain much needed flexibility in operating their member business loan programs.</p>
<p><b>NCUA:</b> <i>Risk-Based Capital 2</i></p>	<p>NCUA’s revised RBC proposal, while a marked improvement over the original, is still a solution in search of a problem, particularly considering the costs that credit unions will have to bear in its implementation. We remain unconvinced that the agency’s risk-based capital approach is necessary and question NCUA’s legal authority to implement some parts of the proposal.</p> <p>So long as a credit union meets the level to be considered well-capitalized under PCA, NCUA should not be in the business of instructing credit unions on how to operate their businesses or dictating exact levels of capital NCUA feels any particular credit union should maintain.</p>
<p><b>NCUA:</b> <i>Security Program, Report of Suspected Crimes, Suspicious Transactions, Catastrophic Acts and Bank Secrecy Act Compliance</i></p>	<p>Compliance with BSA and anti-money laundering (AML) requirements remains a substantial regulatory issue for a number of credit unions and other financial institutions. FinCEN’s customer due diligence proposal is a prime example of a problematic regulation for credit unions. While we support the objective of improving the tracking of money laundering and terrorist financing, we are concerned with the seemingly endless changes, including the proposed expansion of “beneficial ownership” requirements.</p> <p>NCUA should work with FinCEN and other regulators to exempt credit unions from or improve the proposed requirements. Credit unions are also interested in greater regulatory and examination consistency among different regulators, including NCUA, state regulators, and FinCEN. In general, the BSA portion of the examination for credit unions should be based on the types of activities the credit union actually engages in and focus on its risks. Such exams should not be “one-size-fits-all.” Further, we support efforts by NCUA and other regulators to work together on additional guidance on BSA compliance and to minimize the overlap of regulations among different agencies.</p> <p>NCUA should also work with regulators to support meaningful legislative and regulatory changes to minimize the costs and problems financial institutions encounter in meeting BSA/AML requirements. Increasing reporting thresholds would help reduce some of these compliance costs. Investigating and filing Suspicious Activity Reports (SAR) and Currency Transaction Reports (CTR) remain very costly, as doing so requires constant vigilance and reporting by credit union employees.</p>

<p><b>NCUA:</b> <i>Truth in Savings</i></p>	<p>Credit unions have concerns with Part 707's use of "average percentage yield earned" (APYE) in statement and account disclosures. NCUA should eliminate the requirement in § 707.5 that requires subsequent disclosures for certificates to be provided to the member 30 days in advance; we believe this is overly burdensome to the credit union and of little or no utility to the member.</p>
<p><b>NCUA:</b> <i>Unfair or Deceptive Acts or Practices</i></p>	<p>With respect to federal credit unions, the Federal Trade Commission (FTC) Act gives NCUA the authority to define and prevent unfair and deceptive practices. Over the past several years, NCUA, the Federal Reserve Board, and the CFPB have issued rules implementing the requirements of the FTC Act. NCUA should work with the other regulators to guidance on which stakeholders could comment that would clarify each regulator's authority over the FTC Act and its implementing regulations.</p>



May 1, 2015

U.S. Senate Committee on Homeland Security and Governmental Affairs  
Dirksen 340  
Washington, DC 20510

Dear Chairman Johnson and Ranking Member Carper:

Thank you for your letter of March 18, 2015 to CropLife America (CLA) and for the opportunity for CLA to provide input on aspects of the federal regulatory process that impact our member companies. CLA represents the developers, manufacturers, formulators and distributors of plant science solutions for agriculture and pest management in the United States. CLA's member companies produce, sell and distribute virtually all the crop protection and biotechnology products used by American growers. CLA is dedicated to supporting responsible stewardship of our members' products to promote the health and well-being of people and the environment, and to promote responsible, science-driven legislation and regulation of pesticides.

CLA and its members share the Committee's goals of a fair, efficient and effective federal regulatory process that allows meaningful input by those affected. To that end, we are providing selected examples of CLA concerns with federal regulations.

On March 9, 2015, CLA submitted comments to the Environmental Protection Agency (EPA) on the *periodic retrospective review of its regulations pursuant to Executive Order 13563*. A copy of those comments is attached with this letter and, also, posted in Docket [EPA-HQ-OA-2011-0156-0190](#). These comments, in turn, include CLA's 2011 comments to EPA at an earlier stage of this retrospective review of that agency's regulations. Most of our concerns from 2011 are still in need of improvement.

Secondly, we are providing CLA's submission to the Office of Management and Budget ("OMB") on EPA's 2014 proposed revisions to the *Agricultural Worker Protection Standard* ("WPS") (EPA-HQ-OPP-2011-0184). CLA's cover letter and attached report lays out in detail serious flaws, gaps and erroneous presumptions in EPA's economic and risk-benefit analyses used to justify the proposed revisions. In addition, CLA provided comments to EPA on the entirety of the proposed revisions to the WPS. These comments are also posted in their entirety in Dockets [EPA-HQ-OPP-2011-0184-2209](#) and [EPA-HQ-OPP-2011-0184-2211](#).

Lastly, we have included below links to documents relating to EPA's 2014 report on the *Benefits of Neonicotinoid Seed Treatments to Soybean Production* (EPA-HQ-OPP-2014-0737), specifically, joint comments by CLA and the American Seed Trade Association (Docket [EPA-HQ-OPP-2014-0737-0928](#)) questioning the premise of the report, and the USDA's strongly-worded public comments critical of EPA's action (Dockets [EPA-HQ-OPP-2014-0737-0942](#) and [EPA-HQ-OPP-2014-0737-0943](#)).



Again, thank you for the opportunity to provide input. Please contact Rebeckah Adcock, Senior Director, Government Affairs, [radcock@croplifeamerica.org](mailto:radcock@croplifeamerica.org), with questions about CLA's response to the Committee, pesticide registration and regulation, or our working relationship with EPA.

Sincerely,

A handwritten signature in black ink that reads "Beau Greenwood".

Beau Greenwood  
Executive Vice President  
Government Relations and Public Affairs  
CropLife America





April 8, 2015

[filed via [www.regulations.gov](http://www.regulations.gov)]

Joel Beauvais  
Associate Administrator, Office of Policy  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**RE: Improving EPA Regulations; Docket No. EPA-HQ-OA-2011-0156; 80 FR 12372;  
March 9, 2015**

Dear Mr. Beauvais:

CropLife America (CLA) is the national trade association representing the companies that develop, manufacture, formulate, and distribute crop protection chemicals and plant science solutions for agriculture and pest management in the United States. CLA's member companies produce, sell, and distribute virtually all the crop protection and biotechnology products used by American farmers. CLA is dedicated to supporting responsible stewardship of our products to promote the health and well-being of people and the environment, and to promote increasingly responsible, science-driven legislation and regulation of pesticides.

CLA is pleased to once again comment on EPA's periodic retrospective review of its regulations, conducted under Executive Order 13563, "Improving Regulation and Regulatory Review," and Executive Order 13610, "Identifying and Reducing Regulatory Burdens." Four years ago now, when this effort was initiated, CLA commented on 22 regulations, policies, processes, and procedures relative to pesticide regulation where we felt there was room for improvement (see attached). At that time, the bewildering array of 15 separate dockets left some confusion about where comments should be submitted, and we are not certain that our comments made it to the right place. In reviewing that list from our 2011 comments, most are all are still relevant to today's discussion and still in need of improvement.

In August of 2011, EPA released its "Final Plan for Periodic Retrospective Reviews of Existing Regulations," outlining numerous intended actions relevant to pesticide regulation. We have not found a subsequent report of progress in meeting those plans, and would be most interested in how they have been carried out. We would also be interested in a dialogue with the Agency on those plans, our original list of needed improvements, and the following additional suggestions. The long list of questions in the FR notice takes much more than 30 days for thoughtful comprehensive responses. We would recommend reopening the docket. The nature of the project and the nature of the information requested would justify keeping the docket open on a permanent basis.

1. EPA has made significant advancements in the science of screening and prioritizing chemicals for endocrine activity in the Endocrine Disruptor Screening Program (EDSP) over the past several years. Considering the progress made in the science, in EPA's understanding of the utility of individual Tier 1 screens, and in the overall efficiency of the Test Order process, updating the Policies and Procedures document would be in order. In particular, since FFDC §408(p)(3) specifically requires that EPA "shall provide for the testing of all pesticide chemicals", EPA should detail in its Policy and Procedure documents the utility of QSAR and ToxCast, and define their contributions to the required "testing" for endocrine effects.
2. In the EDSP, EPA should eliminate the 1-year progress report required of Test Order recipients who have committed to create Tier 1 data, as this document brings little to no value to the program.
3. In the future, pesticides will be tested for endocrine activity as part of registration review required under FIFRA §3(g). EPA should provide details of how it will manage endocrine testing under registration review, where study requests are normally managed by Data Call-ins.
4. It has been EPA's practice, and often a legal requirement, for the Agency to provide adequate notice and opportunity for public comment when the Agency undertakes a significant action or scientific review. In the case of recent FIFRA Science Advisory Panel (SAP) meetings, specifically addressing the EDSP, adequate time has not been afforded stakeholders, including the Panel members, for substantive technical review and analysis of the technical documents. Sufficient time for public review will assist the SAP and the Agency to address the critical scientific and policy issues at hand, yet EPA has implemented a truncated review process that has bypassed robust public review and inhibited adequate peer review by the SAP. This is inconsistent with existing procedural standards and is contrary to President Obama's commitment to scientific integrity, transparency and public participation<sup>[1]</sup>. At a minimum, these documents should be released for a public review and comment period of at least 60 days, closing at least 20 days before the SAP meeting. All written public comments should be transmitted to the peer review members no later than 15 days in advance of the SAP meeting. Neither the public comment period nor the SAP meeting should be compressed or truncated to the extent that meaningful review is compromised.
5. We also reference here detailed comments submitted to this docket recently by Bayer CropScience.

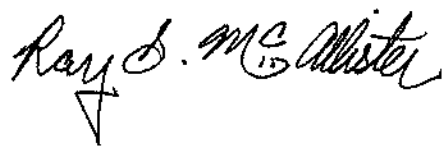
We would like to seek a dialogue with EPA's Office of Pesticide Programs on progress toward the goals outlined in the August 2011 "Final Plan" along with the concerns outlined here. Please feel free to contact me with any questions regarding these comments.

([rmcallister@croplifeamerica.org](mailto:rmcallister@croplifeamerica.org), 202-872-3874)

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[1] <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>

Sincerely,

A handwritten signature in black ink that reads "Ray S. McAllister". The signature is written in a cursive style with a large, stylized "R" and "M".

Ray S. McAllister  
Senior Director, Regulatory Policy

Cc: Jack Housenger, Office of Pesticide Programs  
Nathaniel Jutras, Office of Policy

Attachment: CLA's 2011 comments to Docket No. EPA-HQ-OA-2011-0157





April 4, 2011

[filed via [www.regulations.gov](http://www.regulations.gov)]

Michael Goo  
Associate Administrator, Office of Policy  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**RE: Improving Regulations: Pesticides; 76 FR 9988; February 23, 2011; Docket No. EPA-HQ-OA-2011-0157**

Dear Mr. Goo:

CropLife America (CLA) is pleased to submit these comments in response to the subject Federal Register notice. CLA is the national trade association representing the companies that develop, manufacture, formulate, and distribute crop protection chemicals and plant science solutions for agriculture and pest management in the United States. CLA's member companies produce, sell, and distribute virtually all the crop protection and biotechnology products used by American farmers. CLA is dedicated to supporting responsible stewardship of our products to promote the health and well-being of people and the environment, and to promote increasingly responsible, science-driven legislation and regulation of pesticides.

For these comments, we have selected several individual rules and other regulatory documents relevant to pesticide regulation that are specifically deserving of attention in the "retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome ..." called for in Executive Order 13563, issued by President Obama on January 18, 2011. We emphasize that our list is representative only, not a comprehensive inventory of all regulations that we believe are in need of attention, and not necessarily in priority order. The relatively short time afforded by the FR notice and the magnitude of the task outlined have not allowed sufficient time for an exhaustive inventory of changes needed. We trust this exercise is just the beginning of a more systematic approach to involving regulated industries and other stakeholders in regular review of existing regulations, whether codified in the code of Federal Regulations, or in the form of guidance, guidelines, policy statements, risk assessments, Pesticide Registration Notices, Standard Operating Procedures, data call-ins, test orders, or other documents, whether publicly released or internal.

CLA is separately a party to comments on this FR Notice submitted to Docket No. EPA-HQ-OA-2011-0156 by a coalition led by the American Chemistry Council, which address several important general issues. CLA is also a member of the Endocrine Policy Forum, which has submitted more detailed comments on this FR notice with special relevance to EPA's Endocrine Disruptor Screening Program.

## Example pesticide regulations:

1. The permitting plan for aquatic pesticide use, proposed by EPA's Office of Water under the National Pollutant Discharge Elimination System (NPDES) and subject to the Clean Water Act, is duplicative of the registration process for pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).
2. The Endangered Species Act (ESA) consultation process for pesticides conducted by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service is also largely duplicative of the registration process for pesticides under FIFRA.
3. The Federal Food, Drug and Cosmetic Act (FFDCA) §408(i): "Data and information that are or have been submitted to the Administrator under this section ... in support of a tolerance or an exemption from a tolerance shall be entitled to confidential treatment for reasons of business confidentiality and *to exclusive use and data compensation* to the same extent provided by sections 3 and 10 of the Federal Insecticide, Fungicide, and Rodenticide Act." (Emphasis added.) This provision, enacted as part of the Food Quality Protection Act (FQPA) of 1996, was primarily intended to provide intellectual property protection for data specifically required under FQPA to support inert ingredients in pesticide products. Lacking implementing regulations, the procedures for protecting such data are still uncertain and unclear, leaving registrants without adequate means of assuring they are complying with the law.
4. 40 CFR Part 180 contains voluminous information on the specific tolerances and tolerance exemptions for individual pesticide chemicals on the various food and feed commodities. The rules codified here are frequently modified, added to, and updated. Reformatting the information could make it much more useful and usable for stakeholders.
5. Obsolete regulation: 40 CFR Part 155, Subpart B (§§155.25 through 155.34) outlines public participation procedures for the Registration Standards program, which was rendered obsolete by the FIFRA amendments of 1988. There are also references to the Registration Standards program elsewhere in 40 CFR parts 150 to 189.
6. Obsolete regulation: 40 CFR §152.115(b)(3) requires registrants to submit annual reports of the production of all pesticide products conditionally registered under the provisions of FIFRA §3(c)(7). EPA has told registrants these reports are no longer needed.
7. Obsolete regulation: 40 CFR Part 167 requires pesticide producing establishments to report a large volume of production data that is apparently never used by anyone. It seems to serve no purpose.
8. Obsolete regulation: 7CFR Part 110, Pesticide use reporting – this is a USDA regulation in effect for almost 20 years; farmers have to keep records but don't have to submit to anyone. USDA hires a small army of inspectors to visit farmers to inspect the records; a burden to farmers without apparent utility or benefits.

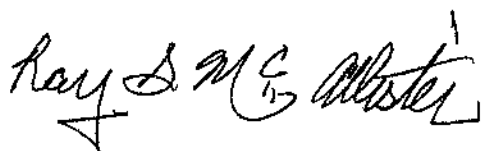
9. Obsolete regulation: USDA organic standards continue to reference EPA's List 4B of inert ingredients, which is no longer maintained.
10. All Pesticide Registration (PR) notices should be evaluated to determine which remain in effect; which need changes, updating, or replacement; and which should really be codified as rules in the Code of Federal Regulations. Some specific examples, including proposed PR notices that have not been finalized:
  - a. Spray drift
  - b. Prohibited words and product names on pesticide labels
  - c. Reporting of nanomaterials in pesticide products
11. Data call-ins are often poorly handled; EPA fails to hold up its side of the obligation (especially timing and decisions), yet yields no leniency to the registrants to make up for the Agency's tardiness and failings, significantly increasing the burden and stress on the registrants.
12. Test orders issued under FQPA – need clear rules and procedures for their use, or they should be placed directly under FIFRA data call-in regulations.
13. Pesticide registration forms could be improved significantly as a joint project between registrants and regulators.
14. Information Collection Requests – greater education of stakeholders about their importance and the opportunity for meaningful input.
15. Standard Operating Procedures for review of pesticide registration applications (across the range of PRIA categories, and more) need to be established and improved. Standardize how the applications are handled, so EPA reviewers know what to do, and can handle applications consistently and more efficiently. Make the SOPs transparent to registrants so they can prepare better and submit more complete and accurate applications. Encourage better, more frequent, more consistent communication between reviewers and applicants. Do not leave the bureaucratic process and decision making to the whims and capriciousness of individual reviewers, without adequate management supervision.
16. Establish clearer procedures within the Administrative Procedures Act for input to the regulatory process from the variety of internet forums, media, and possibilities. These are being handled too casually and chaotically.
17. Clarify the roles and rights of state regulators in EPA regulatory processes, with respect to the Federal Advisory Committee Act, and the corresponding rights and roles of other stakeholders.
18. Compare the most active regulatory issues where EPA's Office of Pesticide Programs spends most of its time (see for example the agenda for the Pesticide Program Dialogue

Committee) to what is on the semi-annual regulatory agenda. There is often little commonality.

19. EPA's Integrated Risk Information System covers pesticide active ingredients, along with other chemicals. With respect to pesticides, the work it encompasses and the information included are largely duplicative of what the Office of Pesticide Programs accomplishes in the course of regulating pesticides.
20. Make "improving regulations" an evergreen, open process.
21. Unnecessary delays in pesticide regulatory decisions made under FIFRA undermine the intellectual property protections that applicants and registrants are afforded under patent statutes and regulations, as well as the exclusive use and data compensation provisions of FIFRA. The delays discourage innovation and penalize innovators.
22. Implementation of EPA's pesticide container and containment regulations (40 CFR Part 165, Subparts C and D) continue to cause some problems, particularly with respect to minibulk containers.

We would welcome the opportunity to discuss with the Agency each of these recommendations and explore additional opportunities for improving regulation of pesticides.

Sincerely,

A handwritten signature in black ink that reads "Ray S. McAllister". The signature is written in a cursive, somewhat stylized font. The first name "Ray" is written in a larger, more prominent script, followed by "S." and "McAllister". There is a small mark above the "i" in "Allister".

Ray S. McAllister, PhD  
Senior Director, Regulatory Policy

Cc: Steven Bradbury, Director, Office of Pesticide Programs





August 18<sup>th</sup>, 2014

Office of Pesticide Programs  
Regulatory Public Docket (EPA-HQ-OPP-2011-0184)  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460-0001

Sent via Federal eRulemaking Portal: <http://www.regulations.gov>

**Re: Public Comment Period Associated with Agricultural Worker Protection Standard Revisions**

This comment regarding the proposed revision to the Agricultural Worker Protection Standard (WPS) under 40 CFR 170 is submitted on behalf of CropLife America. Established in 1933, CropLife America (CLA) represents the developers, manufacturers, formulators and distributors of plant science solutions for agriculture and pest management in the United States. CropLife America's member companies produce, sell and distribute virtually all the crop protection and biotechnology products used by American farmers. CLA is dedicated to supporting responsible stewardship of our products to promote the health and well-being of people and the environment, and to promote increasingly responsible, science-driven legislation and regulation of pesticides. CropLife America comments on Federal Agency actions that broadly affect agriculture and particularly the crop protection industry.

The WPS (OMB No. 2070-0148; EPA No. 1759.06) is a rule published by the Environmental Protection Agency (EPA) aimed at reducing the risk of pesticide poisoning and injury among agricultural workers and pesticide handlers. The WPS requires that owners and employers on agricultural establishments provide protections to; prevent pesticide exposure, trainings on pesticide safety, and mitigation efforts in case of exposures. The proposed revisions are unlikely to improve the effectiveness of the Standard or lead to a marked improvement in worker safety that would warrant the additional administrative burden and time required to comply with the new rule.

The attached report was prepared on behalf of CLA by Summit Consulting LLC (Summit). Summit was contracted to analyze the assumptions underlying the estimate of information collection burden as described in the Information Collection Request (ICR) for the proposed updates to the WPS published by the Environmental Protection Agency on February 19, 2014.

Representing the Crop Protection Industry

1156 15th St. N.W., Suite 400 Washington, D.C. 20005 • 202.296.1585 phone 202.463.0474 fax [www.croplifeamerica.org](http://www.croplifeamerica.org)



The major findings of Summit analysis were:

**Discrepancies in Cost of Increased Burden:** The proposed update to the WPS represent an overall increase in burden hours to approximately four-and-a half times that of the existing 2011 WPS, based on EPA estimates.

**Use of Inappropriate Wage Rates:** In the proposed WPS the use of "Loaded" wage rates were used in the ICR to estimate costs, whereas "Fully Loaded" wage rates were used in the ICR for the 2011 WPS. The use of Fully Loaded rates are appropriate and would increase the cost burden estimate of the proposed WPS by approximately 50%.

**Costs of Recordkeeping Set up and Maintenance:** The burden estimate in the proposed WPS does not include any recordkeeping costs associated with set-up costs for a recordkeeping system, storage costs, or disposal costs for records that may hold sensitive information.

**Estimation of Greenhouse Numbers:** The ICR assumes only 519 greenhouses will be subject to the proposed WPS. Based on the 2012 data from the National Agricultural Statistics Service, the number of greenhouses that would be subject to the proposed WPS is actually over 28,000.

**Burden of Recordkeeping Activities:** Several key recordkeeping activities are estimated to take between one and four minutes per worker when they are likely to actually take much longer.

**Burden of Enforcement:** No consideration is provided in the ICR for rule enforcement costs. WPS agricultural inspections are conducted by state, territorial and tribal pesticide regulatory agencies that will include these updated rules in their inspection.

The estimated annual burden to agricultural employers for the existing (2011) WPS as described in the accompanying ICR is 1,827,493 hours at a cost of \$92 million. The ICR for the proposed rule estimates the burden at 8,316,993 hours at a cost of \$196 million, which represents a total increase of nearly 6.5 million hours and over \$100 million with the implementation of the proposed rule. In the attached analysis, it is shown that EPA under-estimated the cost, which is likely to be as high as \$341 million. There is little justification for this increased burden on small business and the measures proposed need to be reconsidered.

Thank you for the opportunity to comment on this draft guidance.

Sincerely,

A handwritten signature in black ink, appearing to read "Clare Thorpe".

Clare Thorpe  
Senior Director of Human Health Policy  
CropLife America



August 18<sup>th</sup>, 2014

Office of Pesticide Programs  
Regulatory Public Docket (EPA-HQ-OPP-2011-0184)  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460-0001

Sent via Federal eRulemaking Portal: <http://www.regulations.gov>

**Re: Public Comment Period Associated with Agricultural Worker Protection Standard Revisions**

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The attached report was prepared on behalf of CLA by Summit Consulting LLC (Summit). Summit was contracted to analyze the assumptions underlying the estimate of information collection burden as described in the Information Collection Request (ICR) for the proposed updates to the WPS published by the Environmental Protection Agency on February 19, 2014.

**Representing the Crop Protection Industry**

1156 15th St. N.W., Suite 400 Washington, D.C. 20005 • 202.296.1585 phone 202.463.0474 fax [www.croplifeamerica.org](http://www.croplifeamerica.org)





The major findings of Summit analysis were:

**Discrepancies in Cost of Increased Burden:** The proposed update to the WPS represent an overall increase in burden hours to approximately four-and-a half times that of the existing 2011 WPS, based on EPA estimates.

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**Costs of Recordkeeping Set up and Maintenance:** The burden estimate in the proposed WPS does not include any recordkeeping costs associated with set-up costs for a recordkeeping system, storage costs, or disposal costs for records that may hold sensitive information.

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The estimated annual burden to agricultural employers for the existing (2011) WPS as described in the accompanying ICR is 1,827,493 hours at a cost of \$92 million. The ICR for the proposed rule estimates the burden at 8,316,993 hours at a cost of \$196 million, which represents a total increase of nearly 6.5 million hours and over \$100 million with the implementation of the proposed rule. In the attached analysis, it is shown that EPA under-estimated the cost, which is likely to be as high as \$341 million. There is little justification for this increased burden on small business and the measures proposed need to be reconsidered.

Thank you for the opportunity to comment on this draft guidance.

Sincerely,

A handwritten signature in black ink, appearing to read "Clare Thorpe".

Clare Thorpe  
Senior Director of Human Health Policy  
CropLife America



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**Analysis of the Information Collection Requirements for Agricultural  
Workers Protection Standards**

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August 6, 2014

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## Executive Summary

CropLife America (CropLife) has engaged Summit Consulting, LLC (Summit) to analyze the assumptions underlying the estimate of information collection burden as described in the Information Collection Request (ICR) for the proposed updates to the Agricultural Worker Protection Standards published by the Environmental Protection Agency on February 19, 2014. This analysis was conducted for the purpose of supplementing CropLife's response to the ICR as part of the public comment period.

The major findings of this analysis are as follows:

- **Discrepancies in Cost of Increased Burden:** The proposed update to the WPS include increased recordkeeping, training, and posting requirements, which represent an overall increase in burden hours to approximately four-and-a half times that of the existing 2011 WPS, based on EPA estimates. However, due to differences in how wage rates are calculated across the two ICRs, the dollar estimate of the burden less than doubles between the 2011 WPS ICR and the ICR for the proposed WPS. The calculation in the ICR for the proposed WPS does not accurately reflect the difference in burden reflected by the proposed change to the current WPS.
- **Use of "Loaded" Wage Rates:** The use of "Loaded" wage rates appears inconsistent with recent EPA practice in other ICRs, and inappropriate to the type of activities described. The above-noted discrepancy is due to the use of "Loaded" wage rates in the ICR for the proposed standard, whereas "Fully Loaded" wage rates were used in the ICR for the 2011 WPS. Loaded wage rates are sometimes used to estimate burden in cases in which no capital or operating and maintenance costs are incurred by respondent firms; however, that is not the case in this instance. The use of Fully Loaded rates would increase the cost burden estimate of the proposed WPS by approximately 50%.
- **Costs of Recordkeeping Set up and Maintenance:** The burden estimate in the proposed WPS does not include any recordkeeping costs associated with set-up costs for a recordkeeping system, storage costs, or disposal costs for records that may hold sensitive information. Given the use of "Loaded," as opposed to "Fully Loaded" rates, these overhead costs are not reflected anywhere within the burden estimate proposed in the ICR.
- **Estimation of Greenhouse Numbers:** The ICR assumes only 519 greenhouses will be subject to the proposed WPS. Based on the 2012 data from the National Agricultural Statistics Service, CropLife estimates the number of greenhouses that would be subject to the proposed WPS is actually over 28,000. This difference in the number of greenhouses would lead to an approximately 15% increase in the total burden estimate, all other assumptions held constant.
- **Burden of Recordkeeping Activities:** Several key recordkeeping activities are estimated to take between one and four minutes per worker. Generally, the minimum recordkeeping time for individual recordkeeping activities in similar, recent ICRs from EPA is not less than five minutes per task.
- **Burden of Enforcement:** No consideration is provided in the ICR for rule enforcement costs. WPS agricultural inspections are conducted by state, territorial and tribal pesticide regulatory agencies that will include these updated rules in their inspection protocols. The additional recordkeeping requirements may add to the inspection time, as well as require development of additional training and guidelines for inspectors.

The remainder of this document is as follows:

- In the first section of this document, we provide an overview of the proposed rule.

- In the second section, we provide a review of the key assumptions that form the basis for the estimate of burden for the revised rule, as well as a critique of some of the inconsistencies, and potential inaccuracies within those assumptions that substantively affect the estimate of employer burden.
- In the third section of this document, we provide a set of revised burden cost estimates using revisions in the EPA assumptions based on a review of similar, recent ICRs from EPA, a review of EPA’s own internal policies regarding estimating burden, and input from CropLife regarding other inputs of interest. With these revised assumptions, we provide several estimates of costs based on different sets of revised assumptions.

## About the Proposed Agricultural Worker Protection Standard (WPS)

The Agricultural Worker Protection Standard (WPS) (OMB No. 2070-0148; EPA No. 1759.06) is a rule published by the Environmental Protection Agency (EPA) aimed at reducing the risk of pesticide poisoning and injury among agricultural workers and pesticide handlers. The WPS applies to over two million agricultural workers and handlers and requires that owners and employers on agricultural establishments provide protections to prevent pesticide exposure, trainings on pesticide safety, and mitigation efforts in case of exposures.

EPA has recently proposed changes to the 2011 WPS, and has submitted an ICR for public comment regarding those changes under Docket #EPA-HQ-OPP-2011-0184. Prior to the 2011 update, the WPS was implemented through a 2008 version of the rule. The proposed 2014 revision to the WPS introduces a number of new requirements related to recordkeeping, as well as enhanced training requirements. Table 1 shows a tabulation of these proposed activities.

**Table 1: Proposed Revision to the 2011 WPS – New Proposed Activities**

Category	Activity
New Entrant Rule Familiarization	<ul style="list-style-type: none"> <li>• Agricultural or CPHE Employer: Learn/refresh requirements annually</li> </ul>
Information Exchange	<ul style="list-style-type: none"> <li>• Agricultural Establishment provides information on treated areas under an REI to CPHE</li> <li>• CPHE provides application information to agricultural establishment</li> <li>• CPHE provides information to CPHE handlers</li> <li>• CPHE handler receives information from CPHE</li> </ul>
Safe Operation, Cleaning, and Repair of Equipment	<ul style="list-style-type: none"> <li>• Agricultural or CPHE Employer Informs Handlers</li> <li>• Agricultural or CPHE Handler Receives information</li> </ul>
Information for Emergency	<ul style="list-style-type: none"> <li>• Agricultural or CPHE Employer provides information to medical personnel, worker, or handler</li> </ul>

Category	Activity
Pesticide Safety Training	<ul style="list-style-type: none"> <li>Agricultural Employer or CPHE provides training to handlers</li> <li>Agricultural or CPHE Handler attends training</li> <li>Agricultural Employer or CPHE records and maintains handler training records</li> <li>Agricultural Establishment Handlers or CPHE sign acknowledgement of training</li> </ul>
Personal Protective Equipment Information	<ul style="list-style-type: none"> <li>Agricultural Establishment or CPHE handler receives respirator training</li> <li>Agricultural Establishment or CPHE handler undergoes initial respirator survey</li> <li>Agricultural Establishment or CPHE handler undergoes respirator fit-test</li> <li>Health care worker reviews medical evaluation</li> <li>Agricultural Establishment or CPHE handler undergoes follow up evaluation</li> <li>Agricultural or CPHE Employer records and maintains records</li> <li>Agricultural or CPHE Employer informs cleaner/lauderer</li> <li>Agricultural or CPHE Employer maintains closed system repair records</li> </ul>

The estimated annual burden to agricultural employers for the existing WPS as described in the accompanying ICR is 1,827,493 hours at a cost of \$92,729,052. The ICR for the proposed rule estimates the burden at 8,316,993 hours at a cost of \$196,130,463, which represents a total increase of nearly 6.5 million hours and over \$100 million with the implementation of the proposed rule.

In addition to the changes in the worker protection, training, and recordkeeping activities included under the proposed rule, the assumptions used to generate the burden estimates provided within the ICR for the proposed rule differ significantly from the assumptions used in the ICR for the current rule. In this document, we provide a review of the key assumptions that form the basis for the estimate of burden for the revised rule, as well as a critique of some of the inconsistencies, and potential inaccuracies within those assumptions that substantively affect the estimate of employer burden.

## Review of EPA Assumptions Regarding the Burden Estimate in the proposed WPS Revision ICR

A large number of assumptions are used to generate the burden estimates presented in the ICR for the proposed revision to the WPS.

This section describes the methodology and findings associated with analysis of the previously mentioned key assumptions. This section also suggests potential adjustments to the key assumptions in order to more accurately estimate the cost burden of the proposed revision to the WPS ICR.

We focus on three types of burden that are required with an ICR:

1. Estimates of the Respondent Burden for Collection of Information
2. Capital and Operation and Maintenance Costs for Recordkeeping
3. Estimates of the Agency Burden for Collection of Information

## Estimates of the Respondent Burden for Collection of Information

A large number of assumptions are used to generate the burden estimates presented in the ICR for the proposed revision to the WPS. A limited number of key assumptions contributed largely to the overall burden estimate. These key assumptions include:

- Wage Rate Calculations
- Recordkeeping Costs
- Number of Greenhouses
- Burden on Small Businesses

This section describes the methodology and findings associated with analysis of the previously mentioned key assumptions. This section also suggests potential adjustments to the key assumptions in order to more accurately estimate the cost burden of the proposed revision to the WPS ICR.

### Wage Rate Calculations

Wage rates represent the hourly cost of a worker's time, and are used to measure labor burden for various types of labor for activities in the ICR. The wage rate used in the 2011 WPS ICR is calculated as follows in Table 2. Calculations for wage rates used in the cost estimates appear in the cost estimation section in Table 7 and Table 11.

**Table 2: Components of a Fully Loaded Wage Rate Calculation (Attachment D, 2011 WPS ICR)**

Component	Notes	Calculated Amount (Agricultural Workers) <sup>1</sup>
Base Wage Rate	Hourly Salary Amount	\$ 9.23
Fringe Benefits	Equals 43% of the Base Wage Rate, or 30% of the Loaded Wage Rate <sup>2</sup>	\$ 4.02
Loaded Wage Rate	Base Wage Rate + Fringe Benefits	\$ 13.25
Overhead Costs	50% of Loaded Wage Rate	\$ 6.62
Fully Loaded Wage Rate	Base Wage Rate + Fringe Benefits + Overhead Costs	\$19.87

Fully loaded wage rates include fringe benefits (paid leave, supplemental pay, health insurance, other insurance, retirement and savings, other fringe benefits), as well as overhead costs (rent, computer support, phones facilities). Loaded wage rates include fringe benefits but do not include overhead costs.

<sup>1</sup> Attachment D: Wage Rate Tables for Agricultural Employers and Agricultural Workers, Supporting Statement for an Information Collection Request (ICR). EPA-HQ-OPP-2010-0896 and OMB Control No. 2070-0148. (January 31, 2011).

<sup>2</sup> The loading factor of 43% is applied to the hourly salary to calculate the amount of fringe benefits. This loading factor is calculated as the 30/70, or approximately 42.9%. Fringe benefits are assumed to make up 30% of the loaded wage rate, based on data from the Bureau of Labor Statistics (BLS) Employer Costs for Employee Compensation (ECEC) for civilian and private industry workers.



The ICR for the current WPS used a fully loaded wage rate in the calculation of the burden estimate. However, the ICR for the proposed revision to the WPS uses a loaded wage rate instead, preventing a direct comparison of the two ICRs.

### Review Method

Summit selected a sample of recent EPA ICRs from to the Office of Pesticide Programs (OPP) and Office of Pollution, Prevention, and Toxics (OPPT) as part of this analysis. ICRs from these two offices were selected as both the OPP and OPPT are located within the Office of Chemical Safety and Pollution Prevention (OCSPP), and presumably share similar standards for estimation. Recent ICRs from 2013 and 2014 were selected for review in order to reflect the most recent standards.

### Findings

From the sample of ICRs recently published by OCSPP, it appears that the ICRs typically account for some amount of overhead. However, terminology for loaded rates and fully loaded rates are not completely consistent. The three equally used rates include:

- Fully Loaded Rates: Overhead as 50% of Loaded Rates
- Loaded Rates 1: Overhead as 17% of Loaded Rates
- Loaded Rates 2: Overhead not accounted for or explicitly mentioned

Table 3 shows the sample of selected ICRs and the associated wage rate calculations used.

**Table 3: Recent EPA Information Collection Request Comparisons**

Year	EPA ICR No.	Office	ICR Name	Rate Used <sup>3</sup>	Notes
2014	1249.10	OPP	Requirements for Certified Applicators Using 1080 Collars for Livestock Protection	Fully loaded wage rates	Rate calculations are identical to those used in the 2011 and 2008 WPS ICR.
2013	2330.02	OPP	Pesticide Registration Fees Program	Fully loaded wage rates	Rate calculations are identical to those used in the 2011 and 2008 WPS ICR.
2013	2479.01	OPPT	Tier 2 Data Collection for Certain Chemicals Under the Endocrine Disruptor Screening Program (EDSP)	Fully loaded wage rates	Rate calculations are identical to those used in the 2011 and 2008 WPS ICR.

<sup>3</sup> The terms “Loaded wage rates 1” and “Loaded wage rates 2” are named for differentiation. They are both referred to simply as loaded wages within each associated ICR.

Year	EPA ICR No.	Office	ICR Name	Rate Used <sup>3</sup>	Notes
2013	2302.02	OPPT	EPA's Design for the Environment (DfE) Formulator Product Recognition Program	Loaded wage rates 1	Wage rates and fringe benefits are taken from the BLS Employer Costs for Employee Compensation (ECEC) data. An additional loading factor of 17 percent is applied to wages to account for overhead for a loaded wage rate.
2013	1741.07	OPPT	Correction of Misreported Chemical Substances on the Toxic Substances Control Act (TSCA) Chemical Substance Inventory	Loaded wage rates 1	Wage rates and fringe benefits are taken from the BLS Employer Costs for Employee Compensation (ECEC) data. An additional loading factor of 17 percent is applied to wages to account for overhead for a loaded wage rate.
2014	2261.03	OPPT	Safer Detergent Stewardship Initiative (SDSI) Program	Loaded wage rates 1	Loaded rates are taken from the BLS Employer Costs for Employee Compensation (ECEC) data. An additional loading factor of 17 percent is applied to wages to account for overhead.
2014	1246.12	OPPT	Reporting and Recordkeeping for Asbestos Abatement Worker Protection	Loaded wage rates 2	Hourly labor rates reflect wage and non-wage benefits. Information on overhead costs is not explicitly mentioned.
2014	1365.10	OPPT	Asbestos-Containing Materials in Schools and Asbestos Model Accreditation Plans	Loaded wage rates 2	Loaded wages including fringe benefits are used. Information on overhead costs is not explicitly mentioned.
2013	2487.01	OPPT	EPA's Design for the Environment (DfE) Logo Redesign Consultations	Loaded wage rates 2	Indicated that no capital or operating and maintenance costs are incurred by respondents under this ICR.

### Fully Loaded Wage Rates

The two other ICRs from OPP that Summit reviewed used the fully loaded wage rate. This fully loaded wage rate used calculations that were identical to those used in the current WPS ICR. The source document describing the calculation of fully loaded wage rates is an EPA memo prepared by the Office of Prevention, Pesticides, and Toxic Substances (now the OSCPP), which indicates the methodology for estimating OPP ICR wage rates for industry, state, and EPA labor costs. This document is meant to standardize the calculation of wage rates for ICRs published within OPP, including the following:

- **Sectors:** Industry, State Government, EPA
- **Labor Types:** Management, Technical, Clerical

- **Wages:** Unloaded (basic wages), Loaded (wages + benefits), and Fully Loaded (wages + benefits + overhead)

Summit was not able to locate a more recent version of this memo, and so assumed that the 2006 version is the current version.

### Loaded Wage Rates 1 (Limited Overhead Costs)

Three ICRs in the sample used Loaded Wage Rates 1, which used loaded wage rates from the Bureau of Labor Statistics (BLS) and applied an additional loading factor of 17% as overhead. The use of 17% as a loading factor for overhead is substantiated by two source documents published in 2002<sup>4</sup>. Like the wage rates in Fully Loaded Wage rates, the Loaded Wage Rates 1 are divided into standard categories for Management, Technical/Professional, and Clerical labor categories.

### Loaded Wage Rates 2 (No Overhead Costs)

Three ICRs in the sample used Loaded Wage Rates 2, which are just the reported loaded wage rates from BLS. These wage rates do not account for any overhead, and the associated ICRs do not make mention of overhead costs. Likewise, the EPA Economic Analysis associated with the proposed revision to the WPS ICR does not specifically mention accounting for overhead costs.

### Potential Adjustments

Based on the analysis of recent ICRs published by OCSPP, it appears that there is significant reason to use Fully Loaded Wage Rates in the calculation of burden estimates for the proposed revision to the WPS ICR. Using Loaded Wages Rates with no overhead costs is only appropriate when there are no capital or operating and maintenance costs are incurred by respondents under an ICR. However, there are capital and operating and maintenance costs associated with the type of recordkeeping required by the proposed ICR. Doing so would make the proposed revision to the WPS ICR consistent with other ICRs from the OPP, as well as simplify cost estimations for material used in WPS activities, which are otherwise calculated separately.

### Recordkeeping Costs

Proposed revision to the WPS identifies six distinct recordkeeping activities required to maintain compliance. Since the recordkeeping requirement did not exist in previous versions of the WPS, this set of activities is one of the primary sources of increased cost and time burden in the ICR for the proposed revision to the WPS. These activities are summarized in Table 4 below.

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<sup>4</sup> Wage Rates for Economic Analyses of the Toxics Release Inventory Program (EPA, 2002), and Revised Economic Analysis for the Amended Inventory Update Rule: Final Report (EPA, 2002)



**Table 4: Summary of Recordkeeping Activities Proposed in WPS ICR**

#	Record Type	Description	Recordkeeping Time Burden (per unit)
1	Application-specific information	Pesticide application information, including timeframe of application, duration of REI, product label, and SDS information.	<ul style="list-style-type: none"> <li>• Gather record info = 12 minutes</li> <li>• Maintain record = 1 minute</li> <li>• Provide record info upon request = 6 minutes</li> </ul>
2	Training Records	Record of worker/handler training, including training requirements met and agricultural employer data.	<ul style="list-style-type: none"> <li>• 7 minutes per worker</li> <li>• 4 minutes per handler</li> </ul>
3	Recordkeeping associated with handler medical evaluation, fit testing, and respirator training	Records of completion of handlers' medical evaluation, fit testing, and respirator training. Includes results of extensive qualitative and quantitative fit tests and equipment information for the respirator used.	<ul style="list-style-type: none"> <li>• 4 minutes per medical evaluation record (per handler)</li> <li>• 4 minutes per respirator fit test (per handler)</li> <li>• 23% will require follow-up to the medical evaluation (another 4 minutes of recordkeeping for that subpopulation)</li> </ul>
4	Records of system maintenance for handler employers of closed systems	Maintenance records of closed systems; maintenance to be completed as specified in written operating instructions and as needed.	<ul style="list-style-type: none"> <li>• 3 minutes</li> </ul>
5	Records that employees received oral notice of pesticides (for workers exempt from training in first 2 days)	[Exemption for workers that are performing tasks up to 2 days before the training requirement is enacted.] Worker must be provided a copy of an EPA-approved pesticide information sheet and its contents communicated to the work orally in a language the worker understands prior to conducting any tasks.	<ul style="list-style-type: none"> <li>• 10 minutes</li> </ul>

#	Record Type	Description	Recordkeeping Time Burden (per unit)
6	Early entry notifications records	Records of worker early entry activities - includes acknowledgement of notification by printed name, date of birth, and signature of each early-entry workers who received the information.	<ul style="list-style-type: none"> <li>• 4 minutes</li> </ul>

According to the proposed revision to the WPS, the EPA’s rationale for adding the recordkeeping requirements is due to feedback received from the agency’s state regulatory partners, who have indicated “difficulty enforcing some requirements, due primarily to a lack of records.”<sup>5</sup> The EPA notes that “proposed recordkeeping is designed to improve enforcement capability as a means of fostering compliance, thereby improving protections.” EPA also expects that recordkeeping will enhance enforceability of training and notification requirements.<sup>6</sup>

Though EPA’s justification for the increased burden is based on the ability of records to improve consistency across information tracking, the proposed revision to the WPS requires that all records are created and maintained within each agricultural establishment. With no central authority from EPA to create and manage the records in the desired format, the third-party recordkeeping requirement may unnecessarily increase the burden on agricultural employers without comparable improvement in compliance, enforcement capability, or worker safety. This concept is further explored below.

### Review Method

To evaluate the estimated burden of recordkeeping in the proposed revision to the WPS, Summit reviewed various existing ICRs from EPA and the Department of Labor (DOL) to compare recordkeeping costs and time burdens associated with these activities. Summit also reviewed EPA’s *Economic Analysis of Proposed Revisions to the Worker Protection Standards*, which informed the development of cost estimations in the ICR, to examine the calculation methodology in more detail. Since recordkeeping was not included in previous versions of the WPS, the added costs of recordkeeping events in the proposed ICR cannot be compared to any earlier baseline cost estimate.

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<sup>5</sup> Agricultural Worker Protection Standard Training and Notification (Proposed Rule) OMB Control No.: 2070-[new]; EPA ICR No.: 2491.01

<sup>6</sup> Agricultural Worker Protection Standard Training and Notification (Proposed Rule) OMB Control No.: 2070-[new]; EPA ICR No.: 2491.01

## Findings

### Recordkeeping Wage Rate Considerations

Based on Summit's review of other ICRs, including a 2014 DOL ICR related to mine safety standards<sup>7</sup> and a 2013 EPA ICR for recordkeeping associated with the Clean Water Act<sup>8</sup>, there are inconsistencies regarding the wage rate to be assigned to recordkeeping in a nontraditional business environment, such as farming, mining, or pollution mitigation. The proposed revision to the WPS assigns a wage rate of \$28.21 for recordkeeping, which represents the BLS wage rate for an agricultural employer. Each recordkeeping task calculates the total cost of the activity as the time estimate (i.e. 0.05 hours) multiplied by the \$28.21 wage rate. While the DOL mine safety ICR uses this same wage rate to account for creating and maintaining training records, the EPA Clean Water Act ICR calculates the cost for recordkeeping based on wage rates for data clerks hired for such tasks. Since clerical responsibilities are not a typical job function of an agricultural employer, the wage rate of \$28.21 may not adequately incorporate the added burden of recordkeeping efforts, especially within smaller establishments that likely have less experience in this area.

### Lack of Standard Forms

As noted above, the EPA does not require the use of any standard reporting forms for the recordkeeping activities in the proposed revision to the WPS. Though this allows the employers some flexibility, the lack of standard agency forms may increase reporting burden and costs and could decrease compliance as well as cause difficulties for enforcement personnel. Most other ICRs examined during Summit's review utilized standard forms for recordkeeping.

### Potential Adjustments

Overall, Summit found that the following recordkeeping costs are not currently accounted for in the proposed ICR and should be considered for inclusion:

- Set-up costs to establish a recordkeeping system (if one has not already been established)
- Costs to develop internal record forms
- Printing costs (for paper records)
- Computer software/system costs (for electronic records)
- Storage costs
- Disposal costs of records with sensitive information
- Maintenance costs for records beyond the two-year minimum for longer-term employees

Additionally, the time burden for some recordkeeping activities appear to be underestimated, with some activities, like signature-recording, estimated to take only 30 seconds. For example, the time-burden estimate of four minutes for recording the respirator fit test may be low, given the in-depth quantitative and qualitative testing required for this activity.

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<sup>7</sup> DOL Mine Accident ICR 1219-0007 (2014)

<sup>8</sup> EPA-HQ-OECA-2009-0274-0191 (2013)



## *Number of Greenhouses*

The proposed revision to the WPS estimates certain activities, specifically those for notifications and postings, which will require more effort by greenhouse owners than by other WPS-affected establishments. The proposed revision to the WPS ICR estimates the number of greenhouses which would be impacted by this proposed revision to the WPS as 519, which CropLife believes to be too low a number, especially as the current WPS ICR estimates the number of greenhouses as 11,350. Because the number of applicable establishments is an assumption used in determining the burden of a variety of activities, CropLife identified the number of greenhouses as a key assumption.

## *Review Method*

Summit reviewed the EPA Economic Analysis in order to identify how EPA determined the number of greenhouses for the proposed revision to the WPS ICR.

## *Findings*

A review of the EPA Economic Analysis did not reveal how EPA has estimated the number of greenhouses to be affected by the proposed revision to the WPS to be 519. The EPA Economic Analysis does instead clarify that the number of WPS farms, defined as agricultural establishments that produce crops and also hire workers, includes nurseries and greenhouses, as well as livestock operations that also produce crops. The EPA Economic Analysis also identifies the number of WPS farms estimated to use pesticides. However, the EPA Economic Analysis makes no mention on the specific number of greenhouses.

Moreover, without a specific definition for WPS-affected greenhouses, Summit finds the proposed ICR calculation for greenhouse posting requirements to be potentially inaccurate. The proposed ICR subtracts the assumed number of greenhouses (519) from the number of WPS farms, and calculates the posting requirements for each establishment separately. This calculation assumes that WPS farms have at most one greenhouse, though it is possible that a single farm encompasses multiple greenhouses.

Both the small assumed number of greenhouses, as well as the assumption that a WPS farm has a single greenhouse, may lead to an underestimation of proposed revision to the WPS costs for greenhouses.

## *Potential Adjustments*

CropLife has engaged outside consultants to review agricultural data (National Agricultural Statistics Service 2012) to confirm the number of greenhouses within the U.S. The number identified through this study (28,147) may be used to substitute the 519 greenhouse assumption currently used in the proposed revision to the WPS ICR, retaining the conservative assumption that a WPS farm has at most a single greenhouse.

## *Impact on Small Businesses*

The introduction or revision of federal standards often uniquely impacts small businesses, which typically operate with less administrative overhead and may not have sophisticated business systems or infrastructure in place to easily adapt to new regulations. Specifically, the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires special consideration for small entities because such firms often cannot devote staff resources to follow regulatory developments and often are less able to bear the burden of an information collection because of their smaller staff and resources. The

proposed revision to the WPS does not account for a potential differential impact on small businesses that may need to spend additional resources to set up a recordkeeping system or employ staff in the required tasks for WPS compliance.

Within the proposed revision to the WPS, EPA notes that “requirements cannot be reduced for small establishments without significantly compromising the protections offered to their workers and handlers” and that “small entities are required to follow the same requirements as larger establishments” (except in the case of solely family-operated establishments).<sup>9</sup> Costs are estimated on an individual basis (per worker, handler, or employer, for example), which estimates a lower total cost burden for the over 300,000 small farms, nurseries, greenhouses, and other entities affected by the rule. However, the per-unit cost for these activities may actually be greater within smaller establishments due to the lack of business infrastructure found in many larger establishments, noted above.

### *Findings*

In the proposed revision to the WPS, EPA does not provide any cost adjustments for small agricultural entities, as the agency estimates that per-person recordkeeping and training costs will be identical, regardless of the size of the establishment. Though these per-unit costs may be similar, it is likely that smaller entities may incur additional costs to establish a recordkeeping system, for example, if one had not been set up previously that would be adequate to handle the new WPS requirements. Furthermore, small businesses may require additional clerical support to comply with the recordkeeping activities that the agricultural employer may be unable to perform, given other demands from day-to-day operational responsibilities.

The Paperwork Reduction Act, in accordance with the RFA, requires that an agency justify any specific impact to small businesses in an ICR and also explain how the agency attempts to minimize that impact. To meet this requirement, other ICRs have included provisions and established programs to assist small businesses in determining what aspects of the federal rule applies to them, and to provide alternative methods of compliance, if applicable.

In an EPA ICR revising regulations related to the effect of particulate matter on air pollution<sup>10</sup>, the EPA noted that while regulatory flexibility could not be allowed for small businesses, the agency would assist smaller businesses in navigating the requirements of the rule and determining non-applicable components of the rule to limit unnecessary burden. A similar approach could be incorporated in the proposed revision to the WPS, given the necessity for consistency in worker training around pesticide application and protections, but accounting for the differences in accounting and recordkeeping burden, depending on the farm size.

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<sup>9</sup> Agricultural Worker Protection Standard Training and Notification (Proposed Rule) OMB Control No.: 2070-[new]; EPA ICR No.: 2491.01

<sup>10</sup> Information Collection Request for Changes to 40 CFR Parts 51 and 52: Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers (PM2.5) – Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC). (OMB Control Number: 2060-0609)



## Capital and Operations and Maintenance Costs for Recordkeeping

According to the Paperwork Reduction Act (PRA), agencies are required to provide an estimate of the total annual cost burden to respondents or record-keepers resulting from the collection of information. This must include, if applicable, a total capital and start-up cost component, annualized over the expected useful life, as well as a total operation and maintenance. These estimates should take into account costs associated with generating, maintaining, and disclosing or providing the information. In cases in which sensitive information containing personally identifiable information (PII) is created, agencies also often include costs related to protecting this information, or disposal costs, including shredding or destruction of records.

### *Paper vs. Electronic Records*

In the proposed ICR, it is assumed that paper records will be kept. In EPA's *Economic Analysis of Proposed Revisions to the Worker Protection Standards*, the agency includes extremely specific costs for some items such as folders and storage boxes. However, key costs associated with security and disposal of sensitive records are not included.

Other similar ICRs, such as the DOL mine safety ICR noted above, include specific time differentials for standard (paper) compared to e-responses. The DOL ICR also provided evidence that electronic reporting introduced through that ICR would reduce the burden by lowering estimated response times from previous versions. It is also likely that electronic recordkeeping would increase data protection, reliability, and security. Since the agricultural employers have freedom in selecting their method of recordkeeping, the estimated costs should identify the cost variations that account for paper versus electronic systems.

Finally, the proposed revision to the WPS requires that records must be maintained for two years. However, it does not specify whether records must be maintained past the standard two years if an individual worker remains at the establishment as a current employee past this time period. For example, a DOL mine training ICR<sup>11</sup> examined by the Summit team requires this extended record maintenance, which would increase the recordkeeping cost burden in such cases. Disposal costs for outdated records are also excluded from the proposed revision to the WPS.

### *Potential Adjustments*

To account for the introduction of electronic records, costs associated with computer and software set-up and maintenance should be considered for inclusion. Furthermore, data security and disposal costs of records with sensitive information should be incorporated in the burden calculations.

## Estimates of the Agency Burden for Collection of Information

The proposed revision to the WPS specifies that there are no costs to the EPA or other governmental agency for standardization of documents or enforcing compliance with the proposed revision to the WPS. However, with the introduction of the new requirements of the proposed revision to the WPS, some level of state agency action will be required to facilitate the implementation and enforcement of the new proposed revision to the WPS requirements.

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<sup>11</sup> DOL Mine Training ICR 1219-0009 (2014)



With the introduction of recordkeeping requirements, some standardization of records is likely to be necessary, especially as it is difficult to estimate recordkeeping burdens without specifications of what information needs to be recorded. Moreover, without guidance from either the EPA or state agencies, agricultural establishments are likely to incur costs of developing the appropriate records on their own. Standardized documentation for recordkeeping will also reduce any enforcement burdens necessary in ensuring that agricultural establishments comply with the proposed revision to the WPS. Therefore, it is likely that individual states or other local authorities will be tasked with developing standardized forms for the recordkeeping activities. In such cases, state and local authorities will incur costs associated with becoming familiar with WPS requirements, developing standardized documents, and providing standardized documents and guidance to agricultural establishments.

In addition, a certain level of enforcement action by local or state authorities is likely to be necessary to ensure that agricultural establishments comply with the requirements of the proposed revision to the WPS. Though agricultural establishments are not required to submit reports to the EPA for review, local authorities are likely to choose to inspect agricultural establishments periodically to ensure compliance with regard to recordkeeping. This type of review may be undertaken independently, or as part of the review procedures for other state or local actions, such as fulfilling compliance requirements for program participation.

### Review Method

Summit reviewed the sample of ICR published by EPA previously used in the wage rate assumption analysis and identified those ICRs which had actions associated with State agencies or the EPA. The annual burdens per respondent and type of labor used were determined for the following types of actions:

- Standardized Documentation Costs:
  - Rule familiarization
  - Answer Questions
  - Create Guidance/Information
- Enforcements Costs:
  - Review report

### Findings

A review of the sample ICRs indicated that typically EPA, state agency, or both institutions were tasked with some level of information collection preparatory activity or result review. Actions performed by a state agency were sorted into the previously identified task categories based on the following crosswalk in Table 5.

**Table 5: Crosswalk of State Agency Standardization and Enforcement Tasks**

Prospective WPS ICR Task	Crosswalked Tasks	Notes
Rule Familiarization	<ul style="list-style-type: none"> <li>• Read/Hear rule or any collection instrument</li> <li>• Reading and interpreting regulation</li> </ul>	Refers to agency efforts to become familiar with rule.



Prospective WPS ICR Task	Crosswalked Tasks	Notes
Answer Questions	<ul style="list-style-type: none"> <li>Develop correspondence</li> <li>Answer/respond to questions</li> </ul>	Refers to agency efforts to clarify rule to public.
Create Guidance/Information	<ul style="list-style-type: none"> <li>Create information</li> <li>Develop written guidance for implementing rule</li> <li>Implement program that is not less stringent than regulation</li> <li>Prepare instructions/questionnaires/surveys</li> <li>Distribute forms</li> </ul>	Refers to agency efforts to provide standardized guidance, forms, or information for the public
Review Report	<ul style="list-style-type: none"> <li>Process information/data submissions/initial responses</li> <li>Receive/review submissions</li> <li>Review results</li> </ul>	Refers to agency efforts to collect and review data

Based on the crosswalk, the average time burden per activity was determined for the managerial, technical, and clerical labor categories. The cost of developing standardized documentation is the sum of costs for rule familiarization, question response, and guidance creation. The annual average amount of time for each labor category and action is shown below in Table 6.

**Table 6: Sample ICR Standardization and Enforcement Average Agency Burden**

Activity Type	Average Annual per Agency Burden Amount		
	Managerial	Technical	Clerical
Rule Familiarization (per agency)	1	2	0
Answer Questions (per agency)	7	8.4	0
Create Guidance (per agency)	3.7	11.9	39
<b>Standardized Documentation Costs (per agency)</b>	<b>11.7</b>	<b>22.3</b>	<b>39</b>
<b>Enforcement Costs: Review Report (per review)</b>	<b>2.7</b>	<b>7.7</b>	<b>0.7</b>

### Potential Adjustments

Though the current and proposed revision to the WPS have not included standardization and enforcement costs in the associated ICRs, the need for recordkeeping may substantiate increased efforts on the part of local agencies, in order to ensure compliance with the WPS.

Documentation standardization costs are likely to be incurred once the proposed revision to the WPS is issued, with costs annualized over the time the WPS is in place. Enforcement costs are likely to be incurred for each review action, the frequency of which may vary across localities.

## Cost Estimate Scenarios

In order to isolate the quantifiable effect of adjustments to the proposed revision to the WPS, three distinct cost estimate scenarios were developed as a comparison to the base case presented by the EPA developed proposed revision to the WPS ICR. The three scenarios are described as follows:

- **Scenario 1:** The first scenario presents the cost burden of the revision to the WPS using the same time burden estimates as the EPA provided cost burden estimates. However, instead of using a loaded wage rate, a fully loaded wage rate, including costs of overhead, is used for all respondents.
- **Scenario 2:** The second scenario presents the cost burden of the revision to the WPS using the same loaded wage rates as the EPA provided cost burden estimates. However, time burden and respondent assumptions for identified activities are updated, and time burdens and respondent assumptions for additional potentially required tasks are also included.
- **Scenario 3:** The third scenario presents the cost burden of the revision to the WPS using fully loaded wage rates as well as the updated time burden and respondent assumptions used in Scenario 2.

The following sections will explore the assumptions and cost estimates of each section in additional detail, and offer comparisons with the original estimate prepared by EPA.

### Scenario 1 Estimate: Wage Rates Adjustment Only

Scenario 1 presents the cost estimate of the proposed revisions to the WPS using fully loaded wage rates instead of loaded wage rates. The time burden estimates, as well as the number of respondents, remain the same between Scenario 1 and the cost estimate originally provided by EPA.

#### Wage Rate Changes

The loaded wage rates used by the EPA provided estimates for the proposed revisions to the ICR are used to generate the fully loaded wage rates. In Table 7 below, the row labeled Loaded Wage Rate represents the wage rates used by the proposed ICR estimate.

Overhead costs, representing 50% of the loaded wage rate are added to the loaded wage rate to calculate the fully loaded wage rate. This methodology for calculating the fully loaded wage rate is consistent with EPA guidance and wage rate estimation described previously in this report. The fully loaded wage rate is shown for existing labor categories in Table 7 and will be used instead of the loaded wage rate.

**Table 7: Wage Rate Calculations – Existing Respondent Categories**

Component	CPHE Employer	CPHE Handler	Handler Trainer	Ag. Employer	Ag. Handler	Ag. Worker	Healthcare Worker
Base Wage Rate	\$21.21	\$14.07	\$26.51	\$19.75	\$19.75	\$9.40	\$30.04
Loaded Wage Rate	\$30.30	\$20.10	\$37.87	\$28.21	\$28.21	\$13.43	\$42.91

Component	CPHE Employer	CPHE Handler	Handler Trainer	Ag. Employer	Ag. Handler	Ag. Worker	Healthcare Worker
Overhead Costs	\$15.15	\$10.05	\$18.94	\$14.11	\$14.11	\$6.72	\$21.46
Fully Loaded Wage Rate	\$45.45	\$30.15	\$56.81	\$42.32	\$42.32	\$20.15	\$64.37

### Cost Estimate Change by Section

By keeping the time burden and respondent number values the same for Scenario 1, the overall percentage change in Scenario 1 costs are the same as the percentage change in wage rate (50%) from loaded wage rates to fully loaded wage rates. Table 8 displays the changes in cost for each activity category from the EPA proposed estimate to Scenario 1.

**Table 8: Scenario1 Cost Comparison by Activity Category**

Activity Category	Total Time Burden	ICR Estimated Total Cost	Scenario 1 Total Cost
New Entrant Rule Familiarization	233,554	\$ 6,664,253	\$ 9,996,380
Basic Pesticide Safety Information	73,044	\$ 2,060,571	\$ 3,090,857
Pesticide Specific Information	1,472,514	\$ 41,539,611	\$ 62,309,416
Notification of Restricted Entry	2,166,445	\$ 44,256,901	\$ 66,385,352
Establishment Specific Information	47,004	\$ 825,700	\$ 1,238,550
Exchange Information between Agricultural Employer and CPHE	1,472,229	\$ 43,198,278	\$ 64,797,417
Safe Operation, Cleaning, Repair of Equipment	39,990	\$ 982,482	\$ 1,473,724
Emergency Assistance Information	200	\$ 5,645	\$ 8,468
Pesticide Safety Training – Workers	2,101,714	\$ 40,097,930	\$ 60,146,894
Pesticide Safety Training – Handlers	389,121	\$ 9,395,073	\$ 14,092,610
Pesticide Safety Training – CPHE Handlers	21,095	\$ 470,116	\$ 705,174
Personal Protective Equipment - Respirator Uses (Agricultural Handler)	207,868	\$ 4,867,402	\$ 7,301,103
Personal Protective Equipment - Respirator Uses (CPHE Handler)	20,616	\$ 454,101	\$ 681,151
Exemptions - 2 Day Waiting Period	30,445	\$ 603,314	\$ 904,971
Exemptions - Early Entry	41,183	\$ 795,885	\$ 1,193,828
<b>Total</b>	<b>8,317,021</b>	<b>\$ 196,217,264</b>	<b>\$ 294,325,895</b>

## Scenario 2 Estimate: Burden Adjustment Only

Scenario 2 presents the cost estimate of the proposed revisions to the WPS using updated time burden and respondent assumptions. Scenario 2 also includes the time burdens associated with additional tasks that are not included in the proposed ICR estimate provided by EPA. Scenario 2 uses the same loaded wage rates as the EPA proposed estimate provided by EPA.

The following sections describe the assumption changes that were made, as well as the resulting change in cost estimates.

### Time Burden Changes

This section describes the time burden changes that were made in Scenario 2. The majority of these changes fall in the realm of the proposed revisions to the WPS' recordkeeping burden. The tasks that have been changed are listed in Table 9 below.

**Table 9: Adjustments to Burden Estimates for Recordkeeping Activities (Scenario 2)**

Category	Activity	Labor Category	ICR Time Estimate (minutes)	Adjusted Time Estimate (minutes)	Burden Additions
Pesticide Specific Information	Maintain Records	Agricultural Employer	1	5	+ 4 mins.
Pesticide Safety Training - CPHE Handlers	Maintain Record of Training	CPHE Employer	4	5	+ 1 min.
Personal Protective Equipment - Respirator Uses (Agricultural Handler)	Record and Maintain Medical Records	Agricultural Employer	4	5	+ 1 min.
Personal Protective Equipment - Respirator Uses (Agricultural Handler)	Maintenance of Closed System Recordkeeping	Agricultural Employer	3	5	+ 2 mins.
Personal Protective Equipment - Respirator Uses (CPHE Handler)	Record and Maintain Medical Records	CPHE Employer	4	5	+ 1 min.
Personal Protective Equipment - Respirator Uses (CPHE Handler)	Maintenance of Closed System Recordkeeping	CPHE Employer	3	5	+ 2 mins.
Exemptions - Early Entry	Record and Maintain Records	Agricultural Employer	4	5	+ 1 min.



As described in Table 9 above, the burden estimates for the recordkeeping activities have been adjusted upward to reflect a minimum of 5 minutes per activity. This revised estimate is based on research conducted of similar ICRs, which suggested that a minimum standard of 5 minutes is used to approximate the burden for such recordkeeping activities. For example, of the sampled ICRs referenced earlier in this report, the 2014 EPA Asbestos Abatement Worker Protection ICR<sup>12</sup>, the 2014 DOL Mine Safety Standards ICR<sup>13</sup>, and the 2013 EPA ICR associated with the Clean Water Act<sup>14</sup> all utilize a minimum of 0.08 hours (5 minutes) to estimate the burden of comparable recordkeeping activities.

The increases in recordkeeping time burden estimates can also be justified due to EPA's exclusion of key aspects of any recordkeeping requirement, as noted earlier in this report. For example, set-up costs to establish a compliant recordkeeping system, storage costs, and disposal costs of records containing sensitive information are not included in the proposed rule. Furthermore, these specific costs, plus the overall burden estimates for recordkeeping, could be more accurately calculated if EPA factored in the use of electronic records to replace paper records.

Incorporating this time adjustment across all recordkeeping activities listed above, the total cost associated with implementation of the proposed rule would increase approximately 16%, from \$196.2 million to \$227.3 million. It should also be noted that applying the 5-minute minimum to only some of the recordkeeping activities would incur a lower overall cost increase, and that using the 5-minute burden minimum for all activities may represent a more extreme scenario for illustrative purposes.

### *Respondent Changes*

This section describes the respondent changes that were made in Scenario 2. These changes are limited to the greenhouse number assumptions described previously in this report, which in turn affects the respondent level of a number of other items. The following represents the respondent number changes which are included in Scenario 2:

- **Number of Greenhouses:** The proposed ICR estimate uses an estimate of 519 greenhouses as respondents. For Scenario 2, the number of greenhouses has been increased to 28,147, as informed by NASS data.
- **Number of WPS Farms without Greenhouses (Non-Greenhouse):** This number represents the number of WPS farms that do not have a greenhouse, and is calculated as the number of WPS Farms that use pesticides (304,348) less the number of greenhouses. It is assumed for this estimation that a WPS Farm will only have one greenhouse.
- **Breakdown of Greenhouses and Non-Greenhouses by Size:** A detailed breakdown of greenhouses by WPS farm size is determined by applying the pro-rata percentage of greenhouse size from the proposed ICR estimate to the updated number of greenhouses. The breakdown of greenhouses by size is shown below in Table 10.
- **Workers in Greenhouses:** For the proposed ICR estimate, a total of 18,388 workers are assumed to work in greenhouses. For Scenario 2, the cost estimate assumes the same number of workers per greenhouse (35.43) for a total of 997,239 greenhouse workers.

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<sup>12</sup> EPA Reporting and Recordkeeping for Asbestos Abatement Worker Protection 1246.12 (2014)

<sup>13</sup> DOL Mine Accident ICR 1219-0007 (2014)

<sup>14</sup> EPA-HQ-OECA-2009-0274-0191 (2013)

**Table 10: Breakdown of Non-Greenhouses and Greenhouses by Size**

Size	ICR Number of Greenhouses <sup>15</sup>	Percentage of Total	Number of Greenhouses (2012 NASS)	Number of Non-Greenhouses (Calculated from 2012 NASS)
Small-Small	29	5.59%	1,573	39,307
Medium-Small	191	36.80%	10,359	79,200
Large-Small	169	32.56%	9,165	115,795
Large	130	25.05%	7,050	41,899
<b>Total</b>	<b>519</b>	<b>100.00%</b>	<b>28,147</b>	<b>276,201</b>

This change in respondents affects the calculation of the following tasks:

- Basic Pesticide Safety Information
- Notification of Restricted Entry

### *New Task Burdens*

This section describes the new tasks that may be necessary additions to the revisions to the WPS. These tasks that have been added are the following:

- Documentation Standardization and Enforcement by Agencies
- Additional Training the Trainer Costs

### *Documentation Standardization and Enforcement by Agencies*

- Developing Standardized Reporting
- Enforcement and Review Actions

The time burdens for the aforementioned tasks are stated in Table 6 in the assumptions section above, and reflect average value of similar tasks from other ICRs. These new tasks will be performed state agency actors, which are not previously identified in the proposed WPS. The wage rates that are used for local agencies are taken from Bureau of Labor Statistics, and represent loaded wages, which include fringe and benefits, but not overhead. The loaded wage rates for the state actors are shown in the line labeled “Loaded Wage Rate” in Table 11 .

**Table 11: Wage Rate Calculations – Additional Wage Categories**

Component	State Managerial	State Technical	State Clerical
Base Wage Rate	\$38.36	\$26.78	\$18.20
Loaded Wage Rate	\$54.27	\$54.85	\$38.30

<sup>15</sup> Supporting Statement for an Information Collection Request (ICR) for the Proposed Rule to the Agricultural Worker Protection Standard Training and Notification, February 19, 2014.

Component	State Managerial	State Technical	State Clerical
Overhead Costs	\$27.43	\$19.15	\$13.01
Fully Loaded Wage Rate	\$82.28	\$57.44	\$39.04

It is assumed that each state will have one set of respondents, and so documentation standardization and enforcement tasks will be completed by 50 respondents (one for each state, District of Columbia and territories excluded). Costs of developing standardized documentation are annualized over three years. For Scenario 2, it is assumed that states will review all WPS farms once over a three year period.

### *Additional Train-the-Trainer Costs*

The training requirements for the proposed rule specify that all existing and new workers and handlers are generally trained by the start of their third day on an agricultural establishment where a pesticide product bearing a WPS label has been applied, or an REI has been in effect within the last 30 days. Qualified trainers include certified applicators by EPA or a state or tribal agency responsible for pesticide enforcement, or those who have completed a pesticide safety train-the-trainer program approved by EPA. Per the proposed rule, it is assumed that time and cost estimates to equip these individuals as qualified trainers occur outside of the scope of the WPS. At a minimum, therefore, it could be assumed that trainers-in-training would require materials to a) be trained or b) train others.

EPA notes in their 2011 version of the WPS that EPA and industry leaders have created and distributed approved training materials at no cost to many agricultural establishments. In training new trainers, however, a number of establishments may require additional training materials. To account for this additional cost, Summit conservatively estimates that half of the expected trainings coordinated by these newly qualified trainers (from train-the-trainer programs) would require new training materials from the EPA. As observed in other ICRs, we estimate mailing costs to amount to \$2 per package. The adjusted costs for this activity, therefore, are estimated to increase the overall cost by \$3,768 (50% of 11,305 train-the-trainers, times \$2 per mailing, divided by 3 for annual cost over the 3-year rule). This cost would directly impact costs incurred at the state or federal level, and does not include labor costs associated with preparing packages of training materials.

Finally, training costs in the proposed ICR may be grossly underestimated given the wage rates used for the cost calculations. Training wage rates range from \$28.21 per hour (for certified applicators of RUPs) to \$37.87 per hour (for certified applicators and those who completed train-the-trainer programs). According to the Bureau of Labor Statistics, Training and Development Managers earn an average of \$45.86 per hour. While these employees may largely be staffed outside of the agricultural sector, it is important to consider that a higher wage rate (than that included in the proposed rule) may be necessary to attract and retain effective and skilled training staff.

### *Additional Costs to Convert Existing Closed Loading Systems*

In a Director’s Memo issued by DPR and separate from the proposed WPS, the definition of a compliant closed system has been revised in such a way that it will require significant retrofitting of a large percentage of existing closed systems, according to CropLife. For example, the new definition would require that the maximum container pressure not exceed 5 PSI, which is difficult to measure on a consistent basis and even more difficult to regulate. CropLife estimates that the cost to convert an



existing mid-large system to meet the proposed standard would cost an initial \$25,000 to \$100,000 plus annual maintenance costs of \$5,000 to \$10,000.

Given that the proposed WPS estimates that 96,763 large and large-small agricultural establishments have closed systems, a conservative calculation increases overall cost of the proposed WPS by \$1.3 billion<sup>16</sup> in the first year of implementation of the rule. While Summit has not incorporated this extreme cost in its assumption change calculations, this figure serves to illustrate an additional potential burden that would be placed on agricultural producers through the proposed rule.

### Cost Estimate Change by Section

The percentage change in costs from the proposed ICR estimate in Scenario 2 varies by activity. Tasks that are not explicitly mentioned in this section did not change from the proposed ICR estimate.

### Recordkeeping

Table 12 shows the comparative costs between the proposed ICR estimate and Scenario 2 costs of recordkeeping.

**Table 12: Revised Cost Estimates by Activity (Scenario 2)**

Category	Activity	Labor Category	ICR Cost per Activity	Scenario 2 Cost per Activity	Percentage Difference in Cost
Pesticide Specific Information	Maintain Records	Agricultural Employer	\$2,864,801	\$14,324,004	400%
Pesticide Safety Training - CPHE Handlers	Maintain Record of Training	CPHE Employer	\$7,334	\$9,168	25%
Personal Protective Equipment - Respirator Uses (Agricultural Handler)	Record and Maintain Medical Records	Agricultural Employer	\$277,237	\$346,546	25%
Personal Protective Equipment - Respirator Uses (Agricultural Handler)	Maintenance of Closed System Recordkeeping	Agricultural Employer	\$25,141	\$41,901	67%
Personal Protective Equipment - Respirator Uses (CPHE Handler)	Record and Maintain Medical Records	CPHE Employer	\$5,642	\$7,052	25%

<sup>16</sup> \$25,000 initial cost for retrofit divided by 3 years (term of rule) + \$5,000 annual maintenance cost = \$13,333 per retrofit \* 96,763 large and large-small establishments = **\$1,290,173,333**.

Category	Activity	Labor Category	ICR Cost per Activity	Scenario 2 Cost per Activity	Percentage Difference in Cost
Personal Protective Equipment - Respirator Uses (CPHE Handler)	Maintenance of Closed System Recordkeeping	CPHE Employer	\$8,872	\$14,786	67%
Exemptions - Early Entry	Record and Maintain Records	Agricultural Employer	\$247,159	\$308,949	25%
<b>TOTAL</b>			<b>\$3,436,186</b>	<b>\$15,052,406</b>	<b>338%</b>

### Basic Pesticide Safety Information

Changing the number of greenhouse and non-greenhouse respondents affects the cost of tasks under providing basic pesticide information via postings. The changes for the specific tasks are included in Table 13.

**Table 13: Cost Changes for Basic Pesticide Safety Information**

Task	ICR Total Respondents	ICR Total Cost	Scenario 2 Total Respondent Number	Scenario 2 Total Cost	Percentage Difference in Cost
Display Main Poster <sup>17</sup>	304,348	\$ 429,283	304,348	\$ 429,283	0%
Display Decontamination Posters (Non-greenhouses)	789,236	\$ 1,113,217	712,687	\$ 1,005,245	-10%
Display Decontamination Posters (Greenhouses)	2,076	\$ 2,928	112,588	\$ 158,805	5324%
Poster Update Changes	365,220	\$ 515,143	376,541	\$ 531,111	3%
<b>Total</b>	<b>1,460,880</b>	<b>\$ 2,060,571</b>	<b>1,506,164</b>	<b>\$ 2,124,444</b>	<b>3%</b>

### Notification of Restricted Entry

Changing the number of greenhouses and non-greenhouse respondents affects the costs of notification of restricted entry. The changes for the specific tasks are included in Table 14.

<sup>17</sup> Respondent number does not change, as the respondents are not greenhouse/non-greenhouse specific.



**Table 14: Cost Estimation for Notification of Restricted Entry**

Task	ICR Total Respondents	ICR Total Cost	Scenario 2 Total Respondent Number	Scenario 2 Total Cost	Percentage Difference in Cost
Provide Oral Notification (Non-greenhouses)	4,253,606	\$ 5,999,711	3,866,814	\$ 5,454,141	-9%
Provide Oral Notification (Greenhouses)	3,114	\$ 4,392	168,882	\$238,208	5324%
Receive Oral Notification (non-Greenhouses)	22,746,416	\$ 15,274,218	22,746,416	\$15,274,218	0%
Receive Oral Notification (Greenhouses)	66,197	\$ 44,451	3,590,060	\$ 2,410,726	5323%
Post Indoor/Outdoor (Non-Greenhouse)	2,430,632	\$ 22,856,043	2,209,608	\$ 20,777,681	-9%
Post Indoor/Outdoor (Greenhouse)	8,304	\$ 78,085	450,352	\$ 4,234,810	5323%
<b>Total</b>	<b>29,508,269</b>	<b>\$ 44,256,900</b>	<b>33,032,132</b>	<b>\$ 48,389,784</b>	<b>9%</b>

*Additional State Actions*

Task	Respondents	State Managerial Time Burden per Response	State Technical Time Burden per Response	State Clerical Time Burden per Response	State Clerical Material Costs	Estimated Total Costs
Developing Standardized Reporting	17	11.7	22.3	39		\$41,847
Enforcement and Review Actions	32,888	2.7	7.7	0.7		\$15,168,047
Train the Trainer Costs	11,305				\$3,768	\$3,768
<b>Total</b>	<b>44,243</b>	<b>14.4</b>	<b>30</b>	<b>39.7</b>	<b>\$3,768</b>	<b>\$15,213,662</b>

*Summary of Changes*

Table 15 summarizes the cost changes from the proposed ICR estimate in Scenario 2.

**Table 15: Scenario 2 Cost Estimation Changes by Activity Category**

Activity Category	ICR Estimated Cost	Scenario 2 Estimated Cost	Difference in Cost	Percentage Difference Cost <sup>18</sup>
New Entrant Rule Familiarization	\$6,664,253	\$6,664,253	\$0	0%
Basic Pesticide Safety Information	\$ 2,060,571	\$2,124,444	\$63,873	3%
Pesticide Specific Information	\$41,539,611	\$52,998,813	\$11,459,203	28%
Notification of Restricted Entry	\$ 44,256,900	\$48,389,784	\$4,132,882	9%
Establishment Specific Information	\$825,700	\$825,700	\$0	0%
Exchange Information between Agricultural Employer and CPHE	\$43,198,278	\$43,198,278	\$0	0%
Safe Operation, Cleaning, Repair of Equipment	\$982,482	\$982,482	\$0	0%
Emergency Assistance Information	\$5,645	\$5,645	\$0	0%
Pesticide Safety Training - Workers	\$40,097,930	\$40,097,930	\$0	0%
Pesticide Safety Training - Handlers	\$9,395,073	\$9,395,073	\$0	0%
Pesticide Safety Training - CPHE Handlers	\$470,116	\$471,950	\$1,834	0%
Personal Protective Equipment - Respirator Uses (Agricultural Handler)	\$4,867,402	\$4,953,472	\$86,070	2%
Personal Protective Equipment - Respirator Uses (CPHE Handler)	\$454,101	\$461,426	\$7,325	2%
Exemptions - 2 Day Waiting Period	\$603,314	\$603,314	\$0	0%

<sup>18</sup> Calculated values may differ due to rounding.

Activity Category	ICR Estimated Cost	Scenario 2 Estimated Cost	Difference in Cost	Percentage Difference Cost <sup>18</sup>
Exemptions - Early Entry	\$795,885	\$857,675	\$61,790	8%
Additional State Actions	\$0	\$15,293,587	\$15,209,894	N/A
Additional Train-the-Trainer (material costs)	\$0	\$3,768	\$3,768	N/A
<b>Total</b>	<b>196,217,261</b>	<b>\$227,327,595</b>	<b>\$31,110,331</b>	<b>16%</b>

### Scenario 3 Estimate: Wage Rate and Burden Adjustments

Scenario 3 presents the cost estimate of the proposed revisions to the WPS using the fully loaded wage rate, as well the updated time burden and respondent assumptions and additional tasks included in Scenario 2.

The input assumptions for Scenario 3 include those assumption changes for wages made in Scenario 1 and Scenario 2. Fully loaded wage rates of state agency labor categories are shown in the row labeled “Fully Loaded Wage Rate” in Table 11.

#### Cost Estimate Change by Section

The percentage change in costs from the proposed ICR estimate in Scenario 3 varies by activity and is as follows.

**Table 16: Scenario 3 Cost Estimation Changes by Activity Category**

Activity Category	ICR Estimated Cost	Scenario 3 Cost	Difference in Cost	Percentage Difference Cost
New Entrant Rule Familiarization	\$6,664,253	\$ 9,996,380	\$ 3,332,127	50%
Basic Pesticide Safety Information	\$ 2,060,571	\$ 3,186,666	\$ 1,126,095	55%
Pesticide Specific Information	\$41,539,611	\$ 79,498,220	\$ 37,958,610	91%
Notification of Restricted Entry	\$ 44,256,900	\$ 72,584,675	\$ 28,327,774	64%
Establishment Specific Information	\$825,700	\$ 1,238,550	\$ 412,850	50%
Exchange Information between Agricultural Employer and CPHE	\$43,198,278	\$ 64,797,417	\$ 21,599,139	50%
Safe Operation, Cleaning, Repair of Equipment	\$982,482	\$ 1,473,724	\$ 491,241	50%

Activity Category	ICR Estimated Cost	Scenario 3 Cost	Difference in Cost	Percentage Difference Cost
Emergency Assistance Information	\$5,645	\$ 8,468	\$ 2,823	50%
Pesticide Safety Training - Workers	\$40,097,930	\$ 60,146,894	\$ 20,048,965	50%
Pesticide Safety Training - Handlers	\$9,395,073	\$ 14,092,610	\$ 4,697,537	50%
Pesticide Safety Training - CPHE Handlers	\$470,116	\$ 707,925	\$ 237,809	51%
Personal Protective Equipment - Respirator Uses (Agricultural Handler)	\$4,867,402	\$ 7,430,208	\$ 2,562,806	53%
Personal Protective Equipment - Respirator Uses (CPHE Handler)	\$454,101	\$ 692,138	\$ 238,038	52%
Exemptions - 2 Day Waiting Period	\$603,314	\$ 904,971	\$ 301,657	50%
Exemptions - Early Entry	\$795,885	\$ 1,286,513	\$ 490,627	62%
Additional State Actions	\$0	\$ 22,814,840	\$ 22,814,840	N/A
Additional Train-the-Trainer (material costs)	\$0	\$ 3,768	\$3,768	N/A
<b>Total</b>	<b>196,217,261</b>	<b>\$340,863,967</b>	<b>\$144,646,706</b>	<b>74%</b>





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May 1, 2015

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs  
328 Hart Senate Office Building  
Washington, DC 20510

The Honorable Thomas Carper  
Ranking Member  
Committee on Homeland Security  
and Governmental Affairs  
513 Hart Senate Office Building  
Washington, DC 20510

Dear Senators Johnson and Carper:

Thank you for the opportunity to provide the Direct Selling Association's (DSA) views on regulations that might have a negative impact on direct sellers.

The Direct Selling Association is the national trade association representing more than 170 direct selling companies which sell their products and services by personal presentation and demonstration, primarily in the home. The home party and person-to-person sales methods used by our companies and their independent contractor sales forces have become an integral part of the American economy. Direct Sellers had more than \$34 billion in domestic sales last year. The 18 million individual direct sellers who sell for direct selling companies are independent contractors; they frequently sell on a part-time basis to their neighbors, relatives and friends as a means of supplementing other income sources. Direct selling attracts individuals who seek job flexibility, with low startup costs and minimal work experience.

DSA believes that all sectors of free enterprise society should behave responsibly and ethically, ensuring accountability to the consumers they serve. However, government regulations must strike the right balance between achieving these important goals while promoting an environment in which opportunity and growth are accessible to every American.

The entrepreneurial business model of direct selling is predicated on the independent contractor status of our salesforce. This status has been long recognized under federal and state law for nearly 35 years. Being an independent contractor affords millions of Americans – including the more than 90% of direct sellers who choose to sell part time – freedom and flexibility to build and grow their own business on their own terms. For all of these reasons, any regulation that would jeopardize or eliminate the independent contractor status of our independent entrepreneurial salesforce is of great concern to DSA.

Unfortunately, over the years, numerous regulatory and legislative proposals at both the federal and state levels would have unintentionally hampered individual independent contractor direct sellers. Most recently among federal proposals, the Department of Labor (DOL) continues to consider a rule that would require burdensome disclosure requirements and documentation related to an independent contractor's employment status. DOL's "Plan/Prevent/Protect"—



“Right to Know” project would require all independent contractors to conduct a written analysis explaining the legal basis for classifying themselves as an independent for purposes of the Fair Labor Standards Act (FLSA). The precise scope is not clear, but requiring the typical part-time direct selling sales consultant to undertake such an analysis would be unduly burdensome and potentially discourage Americans from considering direct selling as an opportunity.

Furthermore, it is not clear that DOL has the statutory authority to impose this requirement, since FLSA only pertains to employees. Accordingly, such an expansion of the authority of the DOL without prior Congressional hearings would be of concern as DOL’s proposed rulemaking could, whether intentionally or inadvertently, lead to the improper classification of independent sales persons and entrepreneurs as employees. Such an interpretation of DOL’s actions could lead to the demise of the direct selling industry and the opportunity it currently provides to 18 million Americans who generate over \$34 billion in sales.

We appreciate the Committee’s desire to better understand the real-world effects of regulations upon American industries. Should you wish to discuss our response in greater detail, please do not hesitate to contact me directly at 202-416-6419 or [jmariano@dsa.org](mailto:jmariano@dsa.org).

Sincerely,

A handwritten signature in blue ink, appearing to read "J. N. Mariano", with a long horizontal flourish extending to the right.

Joseph N. Mariano  
President



**Jennifer L. Weber**  
Executive Vice President  
External Affairs and Strategic Policy

550 S. Tryon Street  
Charlotte, NC 28202

Mailing Address:  
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o: 704.382.0214  
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[jennifer.weber@duke-energy.com](mailto:jennifer.weber@duke-energy.com)

May 1, 2015

Senator Ron Johnson  
Chairman, U.S. Senate Committee on  
Homeland Security and Governmental Affairs  
340 Dirksen Senate Office Building  
Washington, DC, 20510

Senator Thomas Carper  
Ranking Member, U.S. Senate Committee  
on Homeland Security and Governmental Affairs  
442 Hart Senate Office Building  
Washington, DC, 20510

Senator James Lankford  
Chairman, Subcommittee on Regulatory  
Affairs and Federal Management  
340 Dirksen Senate Office Building  
Washington, DC, 20510

Senator Heidi Heitkamp  
Ranking Member, Subcommittee on Regulatory  
Affairs and Federal Management  
442 Hart Senate Office Building  
Washington, DC, 20510

Dear Chairman Johnson, Ranking Member Carper, Chairman Lankford and Ranking Member Heitkamp:

Thank you for seeking information on federal regulatory policies and the real-world implications these policies have on businesses such as ours. The investor-owned electric power sector is highly regulated at the federal and state level and is an \$840 billion dollar industry that powers nearly 70 percent of America's homes and businesses. Consequently, the regulatory process has the ability to profoundly affect Duke Energy, our customers (which include residential, commercial, manufacturing and industrial customers), the communities we serve, and our nation's electric power sector. Our nation's ability to supply affordable and reliable electricity is one of the main reasons we continue to see our manufacturing and industrial sectors rebound and expand since the financial collapse in 2007.

As the nation's largest electric power holding company, supplying and delivering electricity to more than 22 million people, Duke Energy shares your view that the regulatory process needs to be efficient and effective and allow input by those affected by the regulations. The sometimes unnecessary layering of regulations across the industry, without the various federal agencies communicating amongst themselves, leads to inefficient investment and planning decisions, which ultimately affect the cost of supplying electricity to our customers. It shouldn't be this way. The federal government should take a focused and rational approach to regulating the nation's electric sector, one that focuses on the totality of the sector as a whole, instead of piecemeal parts of it.

It's important for federal agencies to understand that certain rules and regulations may have unintended consequences. If left unaddressed, these unintended consequences will raise electricity rates and reduce capital expenditures that offer an important source of much-needed, high-quality job creation in many local towns and communities. These investments also provide a critical component for states seeking to attract increased economic development opportunities through manufacturing and industrial expansion.

We appreciate the opportunity to share concerns related to the following regulatory matters:

### Environmental

The current regulatory paradigm presents a major challenge for Duke Energy. As agencies issue regulations specific to individual pollutants or sources, they often do not realize those regulations have broad and cross-cutting impacts across our entire fleet of generation sources. As a result, supplying increasingly clean, reliable, and affordable power to our customers has never been more challenging. We urge federal agencies such as the EPA to take cross-cutting impacts into account when rules such as Mercury and Air Toxics Standard (MATS), 316(b), and Coal Combustion Residuals (CCR) are issued. Furthermore, in order to provide regulatory certainty at reduced costs without affecting reliability, the EPA should take a broader look at criteria, toxic, and carbon emissions and focus on coordinated ways that will demonstrably improve air quality in impacted areas.

The passage of the Clean Air Act in 1970 and its subsequent amendments have been very successful in improving air quality and public health. However, its myriad requirements are sometimes redundant and even contradictory. The EPA's application has been to treat many of these requirements in a piecemeal fashion and to layer regulatory programs on top of each other. It is simply impossible for utilities to make prudent planning decisions and investments when a single source may be subject to the Acid Rain Program, Cross-State Air Pollution Rule, MATS, Clean Power Plan, and the requirements from ozone, Particulate Matter (PM), SO<sub>2</sub>, and NO<sub>2</sub> National Ambient Air Quality Standards (NAAQS). Demonstrating compliance with each of these requirements requires industry resources, as well as resources from the local, state, and federal government. Compliance options for these rules should give states and utilities the flexibility to adopt new and emerging technologies as they become commercialized and cost effective for customers.

### Taxation

When it comes to tax and finance issues, the Section 1603 grant program is a challenge. This limited program was designed to allow taxpayers with qualifying projects to apply for a cash grant in lieu of electing the investment tax credit (ITC) or production tax credit (PTC) for qualifying renewable energy projects. Unlike the election for the ITC or PTC, a taxpayer that elects the cash grant in lieu of the tax credit must file an Annual Performance Report and Certification on the date the project is placed in service and for each of the five consecutive years after the in-service date. This report is extremely cumbersome and time consuming for taxpayers. For projects that elect the PTC or ITC, the taxpayer simply reports and claims the credit on a simple form filed along with its consolidated U.S. Federal Income Tax return.

Additionally, the electric utility industry recently met with the IRS and filed a request for Priority Guidance Under Notice 2015-27 for the IRS/Department of Treasury to provide clarifying guidance on the rules which address the criteria for accessing funds from Qualified Decommissioning Trusts that were created by electric utilities under Code Section 468A, enacted by the Tax Reform Act of 1984. At the time these rules were written, electric utilities were not even considering the specifics of the implications of drawing funds from their Qualified Trusts to cover decommissioning costs. There are currently 17 nuclear units that have been shut down and are in various stages of decommissioning. As a consequence, expenditures for decommissioning activities have grown over time and now represent a material cost for these companies. Further clarification is needed within the purview of the IRS and/or Department of Treasury to ensure that companies do not violate the strict rules within the Tax Code for funding their decommissioning costs from their Qualified Funds.

## Cybersecurity

Cybersecurity is one of the most important and challenging issues facing electric utilities and other critical infrastructure industries. Industry regulations tend to rely on performance requirements instead of performance objectives. For example, the North American Electric Reliability Corporation Critical Infrastructure Protection (NERC CIP) regulations attempt to specify specific actions based on security principles, as opposed to asking electric utilities to implement cybersecurity programs that address security objectives. This results in burdensome regulatory requirements with sometimes limited benefit.

Cybersecurity regulations for electric utilities should require performance objectives consistent with other cybersecurity standards such as the Payment Card Industry Data Security Standards (PCI DSS) and the Nuclear Energy Institute 08-09 (NEI 08-09) to assess for cybersecurity vulnerabilities that exist on information and operational technology systems. This would enumerate real and relevant cybersecurity risk data instead of completion of a compliance checklist that validates what we expected to find.

Duke Energy also actively participates in several voluntary activities such as the energy sector – Cybersecurity Capability Maturity Model (ES-C2M2) sponsored by the Department of Energy and adopting the NIST Cybersecurity Framework (NIST CSF) created by Executive Order 13636. The energy industry has spent resources and time working to align the ES-C2M2 and NIST CSF with each other. For future programs sponsored by the government, there is an opportunity to build upon existing programs.

Finally, we understand the Congress is actively working on several pieces of cyber legislation. We support information-sharing legislation with appropriate liability and privacy protections for participating organizations and we encourage Congress to move forward with such legislation quickly.

## Nuclear

As the operator of the nation's largest regulated nuclear power fleet, Duke Energy, along with the rest of the United States nuclear power industry, took to heart the lessons learned from the Three Mile Island Unit 2 reactor accident more than 35 years ago and has established a record of excellence in protecting the health and safety of the public. American nuclear power plants contribute significantly to the security of our energy supply by generating large quantities of carbon-free baseload electricity. However, regulatory costs associated with nuclear power, both direct and indirect, continue to rise. The Nuclear Regulatory Commission (NRC) has expanded dramatically in size and budget, yet it regulates fewer plants now than it did 10 years ago. NRC cost-benefit analyses associated with new regulations have often proven to be inaccurate and ineffective. Fundamental reforms are needed at the NRC to reduce overhead and focus safety oversight activities in a risk-informed manner.

## Healthcare, Benefits, Human Resources, and Retirement

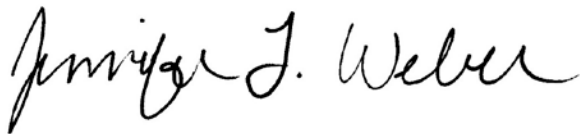
The reporting, disclosure and notification requirements under the Affordable Care Act (ACA) are complex and in some cases administratively burdensome. The most complex reporting and disclosure requirements so far are for the individual and employer mandate which involve annual reports to the IRS and individuals. The complexity exists in the number of data elements required, the fact that the necessary data is not available from a single source but will need to be integrated between multiple sources, and the need to solicit required data from participants that may not already be in our system. Additionally, for employers like Duke Energy whose eligibility for coverage is not based on the number of hours an employee works, the regulations in practice demand a complicated and burdensome reporting approach.

We also have concerns related to the treatment of employer-sponsored wellness programs. With continued increases in health care costs, employer-sponsored wellness programs are increasingly common and are designed primarily to help control rising health care costs by improving the overall health and productivity of employees and their spouses. Congress first endorsed the use of these types of incentive-based wellness

programs over 18 years ago through the enactment of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and more recently through passage of the ACA, which allowed for larger incentives in exchange for participation in wellness programs. The Departments of the Treasury, Labor and Health and Human Services also have published joint regulations and proposed rules to facilitate the implementation and design of incentive-based wellness programs consistent with the intents and purposes of HIPAA and the ACA. However, the U.S. Equal Employment Opportunity Commission (EEOC) has consistently taken the position that the Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits incentives intended to encourage participation in health reimbursement agreements and biometric screenings involving a spouse's genetic information. The EEOC's position on GINA is in direct conflict with the ACA and HIPAA provisions and regulations expressly permitting incentive-based wellness programs. This creates an uncertainty that hampers employer initiatives which are ultimately intended to benefit employees and their families.

Thank you for your interest in these important matters. We appreciate the opportunity to provide information to the committee in its quest to review the effect of federal regulations. Please do not hesitate to contact me if you need further explanation on the issues outlined above or have any questions.

Sincerely,

A handwritten signature in black ink that reads "Jennifer J. Weber". The signature is written in a cursive style with a large, prominent initial "J".

Jennifer Weber  
Executive Vice President, External Affairs and Strategic Policy  
Duke Energy Corporation



Thomas R. Kuhn  
President

April 16, 2015

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510

The Honorable Thomas R. Carper  
Ranking Member  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
Washington, DC 20510

The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
Washington, DC 20510

Dear Chairmen Johnson and Lankford and Ranking Members Carper and Heitkamp:

Thank you for your letter asking for the Edison Electric Institute's assistance in identifying existing and proposed regulations that have had or will have a real impact on our member company electric utilities. We appreciate the opportunity to provide input for your consideration.

The Edison Electric Institute (EEI) is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for 220 million Americans, operate in all 50 states and the District of Columbia, and directly employ more than 500,000 workers. With \$90 billion in annual capital expenditures, the electric power industry is responsible for millions of additional jobs. Reliable, affordable, and sustainable electricity powers the economy and enhances the lives of all Americans.

Our member companies' generation, distribution and transmission operations, as well as financial activities, are heavily regulated at the federal, state, and local levels. Because affordable, reliable electric service is so critical to our country's economic growth, the cost impact of regulations on our industry has a ripple effect throughout the economy.

Federal and state regulations play an important role in electric companies' decisions about every aspect of their business. For example, these regulations impact how our companies are structured, what electric utilities can charge for electricity and the use of their infrastructure, what infrastructure they can build, what environmental requirements apply to their facilities, and how they can raise capital to pay for investments. We are actively participating in rulemakings pending at dozens of federal departments and independent agencies.



We would welcome the opportunity to discuss with you the broad range of regulations affecting our industry. However, I want to focus on several key Environmental Protection Agency (EPA) regulations that will significantly impact the ongoing transition of our generating fleet over the next decade and beyond. Many of these regulations will require dramatic changes to the ways in which electricity is produced, transmitted, and consumed.

We believe it is imperative that all environmental standards established by EPA are achievable, coordinated with other environmental requirements, and provide realistic timeframes in which to make changes to the complex electricity system necessary to achieve these goals. These environmental requirements also must not hamper the sector's obligation and commitment to providing reliable and affordable electricity for all Americans.

Electric companies already have announced approximately 70 gigawatts (GW) of coal-based generation unit closures that will occur between 2010 and 2022. EPA estimates that its proposed Clean Power Plan alone will cause almost another 50 GW of coal-based unit closures before 2020. Electric companies are planning to meet future electricity demand with new generating facilities using natural gas, nuclear fuel, and renewable energy resources, as well as with new energy efficiency and demand response measures. But, policy makers and regulators must be realistic about the amount of time it takes to build new energy infrastructure to replace the coal-fired generation that is being shut down.

#### **EPA Proposed Guidelines for Reducing Greenhouse Gas Emissions (GHGs) from Existing Power Plants**

EPA's proposed guidelines for reducing GHG emissions from existing power plants under section 111(d) of the Clean Air Act (CAA) is potentially the most wide-ranging and impactful regulation affecting the electric power industry ever issued by the federal government. The rule seeks to transform the electric power sector by dramatically reducing the use of coal-fired generation and increasing the use of natural gas-fired generation and renewable energy. The ultimate costs of such a transformation could be staggering, but will depend largely on how EPA addresses a number of issues in the final guidelines. One major concern with the proposed guidelines is that reductions assumed by 2020 do not recognize the time required to design, site, permit and build the necessary infrastructure, including natural gas plants and pipelines, and transmission and distribution lines. As a result, the interim goals are too stringent and cannot be met absent extraordinary reductions, with potentially serious impacts to electric reliability.

#### **Disposal of Coal Combustion Residuals (CCR) from Electric Utilities**

While EPA's final rule (signed December 19, 2014) appropriately regulates coal combustion residuals (CCR) as non-hazardous waste, there are serious flaws in the new rule. Due to statutory limitations, the rule *cannot* be delegated to the states and, even if adopted by a state, the federal rule remains in place as an independent set of criteria that must be met, resulting in dual and likely inconsistent federal and state regulatory requirements.



The rule's only compliance mechanism is for a state or citizen group to bring a Resource Conservation and Recovery Act (RCRA) citizen suit in federal district court, which means that legal disputes regarding compliance with any aspect of the rule will be determined on a case-by-case basis by different federal district courts across the country, resulting in differing and likely inconsistent decisions regarding the scope and applicability of the rule, undermining the uniform application of the rule.

EPA dropped from the final rule risk-based options for conducting cleanups; as a result, the rule overrides existing state risk-based regulatory programs for CCR that have proven protective of human health and the environment. Finally, the rule does not provide the desired certainty that coal ash will *not* be regulated as a hazardous waste; EPA makes clear that it will, at some point in the future, issue a new regulatory determination regarding whether coal ash warrants hazardous waste regulation.

Because of these flaws in the rule, EEI is supporting legislation that would allow for the effective implementation of EPA's rule by the states. EEI is joined in its efforts by a broad coalition of stakeholders.

#### **Waters of The United States (WOTUS)**

EPA and the Army Corps of Engineers proposed a rule in April 2014 to revise the definition of "waters of the United States" (WOTUS) for all Clean Water Act (CWA) programs. The proposed rule would expand federal jurisdiction under the CWA beyond traditional navigable waters, interstate waters, territorial seas, tributaries, and adjacent wetlands to include all water features (including ditches and ephemeral waters) in the flood plains and riparian areas of such waters as well as waters with an ecological "nexus" to the first three categories.

The rule would trigger substantial new CWA regulatory requirements for critical utility operations—including generation, transmission and distribution—as well as the siting and construction of renewable energy sources. If adopted, the proposed rule would have negative impacts on the ability of electric utilities to continue to generate and transmit energy in a cost-effective, efficient, and reliable manner by: (1) hindering construction and upgrades of generation, including renewable energy facilities; (2) delaying construction and maintenance of transmission and distribution lines, thereby affecting grid resiliency; and (3) delaying the restoration of former utility sites.

The broad assertion of jurisdiction in the proposal also would subject utility projects that otherwise would have qualified for relatively streamlined permitting processes under nationwide or regional general permits to lengthier and costlier individual permit procedures. This would increase costs of critical infrastructure projects and impede a smooth fleet transition to low-emitting generation sources. Most stakeholders have encouraged the agencies to withdraw the proposed rule and engage in dialogue with the regulated community, states and localities that are responsible for managing water quality to develop proposed changes that are more precise, clear and set reasonable limits to federal jurisdiction consistent with the CWA and Supreme Court precedent.

### **316(b) Cooling Water Intake Structures (CWIS)**

On May 19, 2014, EPA released the final Clean Water Act section 316(b) rule for cooling water intake structures (CWIS) at existing facilities. The U.S. Fish and Wildlife and National Marine Fisheries Services also issued an Endangered Species Act (ESA) biological opinion for the rule. The rule became effective October 14, 2014, and is currently being litigated.

Section 316(b) requires “that the location, design, construction, and capacity of CWIS reflect the best technology available for minimizing adverse environmental impact.” The regulation focuses on reducing fish and shellfish mortality attributable to “impingement” on intake structure screens and “entrainment” into cooling water systems. The rule applies to existing facilities that commenced construction before January 17, 2002, are point sources subject to National Pollutant Discharge Elimination System permitting, and have a design intake flow of over two million gallons per day where 25 percent or more is used for cooling.

Industry urged that the final rule apply site-by-site flexibility, recognize constraints involved in modifying existing technology, provide full credit for prior actions to reduce CWIS impacts, allow full consideration of costs and other effects of potential changes in CWIS, focus on fishery-level impacts for species of concern, designate pre-approved technologies, and avoid unnecessary additional requirements for facilities that already have such technologies, closed-cycle cooling, de minimis impacts, or low use. Most of these considerations have been reasonably included in the final rule. Such flexibility is necessary to avoid facilities having to incur costs that are significantly out of proportion to the benefits.

While the ESA-related requirements are improved, the U.S. Fish and Wildlife and National Marine Fisheries Services retain a significant role in final permitting decisions. There are elements of ESA requirements that remain unclear and that, if implemented in an unreasonable fashion, would present significant hurdles to cost-effective compliance at many facilities.

EPA estimates that at least 554 power plants will be subject to the final rule, which is a significant portion of existing U.S. generation capacity. EPA has estimated that the total annualized cost of the rule will be \$275 million, not including the cost of site-specific entrainment controls. EPA has estimated total annualized benefits to be \$33 million, including approximately \$12 million of greenhouse gas reduction benefits. Compared to the proposed rule, the final rule’s overall compliance costs will be lower; however, the final rule will present significant operational and compliance challenges.

### **Steam Electric Effluent Guidelines**

EPA is revising steam electric effluent guidelines that will set strict technology-based water discharge limitations for the industry. The anticipated rule will force technological and operational changes at coal, nuclear and gas generating facilities. The final rule is expected by the end of September, and compliance will be required by 2022-23. Costs of retrofitting new treatment technologies could put even more existing generating facilities at risk of retirement. EPA is focusing on seven major wastestreams: (1) flue gas desulfurization wastewater, (2) bottom ash transport water, (3) fly ash transport water, (4) combustion



residual leachate, (5) non-chemical metal cleaning wastewaters, (6) gasification wastewater, and (7) flue gas mercury control wastewaters. According to EPA, the proposal will have little, if any, impact on the cost of compliance, plant closures, or electricity rates. EPA estimates that the cost of its proposal is \$185 million-\$954 million per year and the benefit is \$139 million-\$483 million per year. Industry maintains that EPA is underestimating the costs and overestimating the benefits of the rule.

### **Ozone**

EPA has proposed tightening the 2008 ozone National Ambient Air Quality Standards (NAAQS) by October 1, 2015, even though the range of the tighter health and welfare standards requires greater scientific justification than EPA has provided.

A tighter standard raises concerns regarding implementation challenges for states and regulated entities, costs for customers and the economy, and potential impacts on reliability. Lowering the standards will result in numerous states and hundreds of areas being designated as being in non-attainment. Permitting in non-attainment areas will be a significant challenge under tighter ozone standards and can impose significant delays and costs, including the cost of offsets that have exceeded \$100,000 per ton of nitrogen oxides (NO<sub>x</sub>) emissions in some areas. Importantly, a lowered ozone standard would have significant potential impacts for the electric sector's efforts to comply with EPA's proposed Clean Power Plan. An ozone non-attainment designation would present obstacles for permitting new and expanding existing natural gas pipelines and new natural gas-based plants.

Another key issue is the proximity of the proposed standards to "background" levels; in some cases, even rural areas can fail tighter standards due to uncontrollable natural and international emissions of ozone and its precursors. If standards are set at a level near background ozone concentrations, compliance may be impossible. EPA's suggested "relief mechanisms" to deal with uncontrollable international emissions and exceptional events (like wildfires) are wholly inadequate.

Another consequence of tighter standards would be retrofits of selective catalytic reduction (SCR) controls, which EPA projects to occur on up to 51 GW of generation capacity and which may not be cost-effective, potentially leading to additional coal-based electric generating unit closures. EPA optimistically assumes compliance costs (across all sectors) in 2025 at about \$4 billion for 70 parts per billion and \$15 billion for 65 parts per billion ozone standards, respectively. Finally, lowering the standard from its current level will have significant impacts on the regulation of interstate transport of ozone precursors; a lowered standard will require significant transport obligations on many types of source categories other than power plants.

### **Mercury Air Toxics Standards (MATS)**

EPA's mercury air toxics standards (MATS) are being implemented—with controls due by April 16, 2015, for most sources—at EPA's estimated annual control cost approaching \$10 billion. However, important uncertainties still cast doubt on cost-effective and timely

April 16, 2015

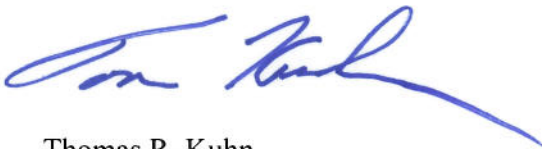
Page 6

implementation. For example, on November 7, 2014, EPA took action on a key reconsideration proceeding that addressed revised definitions of “startup” and “shutdown” and certain monitoring and testing requirements. Because this action created great uncertainty, many companies sought and were granted fourth-year compliance extensions. Further, EPA in February proposed many corrections to the MATS that are far from being resolved. In addition, on March 25, 2015, the Supreme Court heard arguments that address whether EPA should have considered costs when determining whether it was necessary and appropriate to move forward with hazardous air pollutant standards for electric generating units under CAA section 112. The MATS rule is one of the key factors in the announced closures of coal-based generation units.

### **Conclusion**

In conclusion, we appreciate the opportunity to share with you our insights on a number of critical regulations affecting the electricity sector. We recognize that we addressed only a handful of environmental regulations, but we would be happy to discuss with you other regulations impacting our industry. We look forward to working with you as the Committee considers how to improve the regulatory process to make it more efficient and effective, while allowing significant and timely input by those affected by that process.

Sincerely,



Thomas R. Kuhn



May 1, 2015

Chairman Ron Johnson  
Ranking Member Thomas R. Carper  
U.S. Senate  
Committee on Homeland Security and Governmental Affairs  
Dirksen 340  
Washington, D.C. 20510

Dear Chairman Johnson and Ranking Member Carper,

Thank you for the opportunity to provide input to the Committee on the topic of federal regulations and their impact on our organization and members. The Environmental Defense Fund (EDF) is a nonpartisan nonprofit organization with over a million members across our nation and is dedicated to working towards innovative, cost-effective solutions to the most serious environmental problems, building on a foundation of rigorous science, economics and law.

EDF shares the Committee's goal of an efficient and effective regulatory process that is inclusive, fact-based and transparent. Some regulated entities will claim economic harm from having to meet vital public health and environmental safeguards. We urge the Committee to objectively balance those claims with a full assessment of the societal benefits of public health and environmental protections. History has demonstrated that regulations like those established to protect Americans' drinking water, reduce harmful toxic emissions, and rein in climate-destabilizing emissions have saved and improved countless lives. We also urge the Committee to carefully evaluate assertions of economic harm from environmental regulations; more often than not American businesses are able to innovate and find efficient, cost-effective solutions to curb pollution. Indeed, several noted economists have documented that strong environmental regulations enhance American competitiveness. Well-designed regulations save and improve lives, inspire American businesses to develop new innovative technologies, and strengthen our economy.

EDF is grateful for the Committee's willingness to consider input from a wide range of stakeholders. Our comments will focus on the success story of the federal Clean Air Act, a bipartisan, landmark piece of legislation passed in 1970 and amended in 1977 and 1990. Environmental Defense Fund (EDF) is pleased to provide the attached comments.

Sincerely,

*Elizabeth B. Thompson*

Elizabeth B. Thompson  
Vice President  
U.S. Climate & Political Affairs

cc: Members of the U.S. Senate Homeland Security and Governmental Affairs Committee

**Comments from the Environmental Defense Fund on the  
Impact of Federal Regulations**

**I. The Clean Air Act: A Bi-partisan Triumph for Public Health, the Environment, and Economy**

The Clean Air Act is a bedrock public health statute that has provided for extraordinary, bipartisan progress in protecting Americans' health and the environment for over 40 years. Senator John Sherman Cooper, a Republican from Kentucky, captured the spirit of bipartisan cooperation that led to the United States Senate's historic and unanimous adoption of the modern Clean Air Act in 1970:

We worked together. We disagreed. We worried about many provisions of the bill. At last, however, we joined unanimously in recommending and sponsoring this bill, believing that our approach was one that could make progress toward solution of the problem of air pollution.<sup>1</sup>

The unanimous vision forged into law by the United States Senate has secured healthier air for millions of Americans. The *net* benefits of the Clean Air Act from 1970 to 1990 are valued at over \$21 trillion.<sup>2</sup> By 2020, the Environmental Protection Agency ("EPA") estimates the 1990 Clean Air Act Amendments will annually prevent a projected 230,000 deaths; 2.4 million asthma attacks; 200,000 heart attacks; and 5.4 million lost school days,<sup>3</sup> as set out in the Table immediately below. EPA also found that these vital health protections would provide \$2 trillion in monetized benefits.<sup>4</sup> Additionally, EPA projects a net overall improvement in economic growth due to the benefits of cleaner air.<sup>5</sup>

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<sup>1</sup> 116 CONG. REC. S32,917 (daily ed. Sept. 21, 1970) (statement of Sen. Cooper).

<sup>2</sup> U.S. Environmental Protection Agency, *The Benefits and Costs of the Clean Air Act, 1970 to 1990*, at 53 (Oct. 1997), available at <http://www.epa.gov/cleanairactbenefits/copy.html>. Estimates of benefits, in 1990 dollars, range from \$5.6 to \$49.4 trillion, with a central estimate of \$22.2 trillion. *Id.*

<sup>3</sup> U.S. Environmental Protection Agency, *The Benefits and Costs of the Clean Air Act from 1990 to 2020*, at 5-25, tbl. 5-6 (Apr. 2011), available at [http://www.epa.gov/cleanairactbenefits/feb11/fullreport\\_rev\\_a.pdf](http://www.epa.gov/cleanairactbenefits/feb11/fullreport_rev_a.pdf).

<sup>4</sup> *Id.* at 7-3.

<sup>5</sup> U.S. Environmental Protection Agency, Summary Report, *The Benefits and Costs of the Clean Air Act from 1990 to 2020*, at 3, available at <http://www.epa.gov/cleanairactbenefits/feb11/summaryreport.pdf>.



The 1990 Clean Air Act Amendments prevent:

	Year 2010 (cases)	Year 2020 (cases)
Adult Mortality - particles	160,000	230,000
Infant Mortality - particles	230	280
Mortality - ozone	4,300	7,100
Chronic Bronchitis	54,000	75,000
Acute Myocardial Infarction	130,000	200,000
Asthma Exacerbation	1,700,000	2,400,000
Emergency Room Visits	86,000	120,000
School Loss Days	3,200,000	5,400,000
Lost Work Days	13,000,000	17,000,000

This chart shows the health benefits of the Clean Air Act programs that reduce levels of fine particles and Ozone.

Source: EPA<sup>6</sup>

Moreover, the Office of Management and Budget (OMB) annually tallies the benefits and costs of all major rules and regulations. For EPA rules promulgated from 2002 to 2012, benefits outweigh costs anywhere from 3-to-1 up to 20-1.<sup>7</sup>

## II. Claims of Economic Harm from Clean Air Standards Continually Disproven

Nearly any time clean air legislation or clean air standards have been considered there are some who say the costs will be too high, the benefits too low or uncertain, and the economy irrevocably harmed. For example, as the 1990 Clean Air Act Amendments were being considered, there were some industry stakeholders that claimed the costs of meeting stronger clean air standards would be too high, that the economy would suffer, and jobs would be lost:

- The Business Roundtable projected the total economic cost would be \$104 billion a year.<sup>8</sup>
- American Electric Power Company warned of "the potential destruction of the Midwest economy."<sup>9</sup>
- In an editorial that dismissed the scientific case for reducing acid rain, the *Atlanta Journal and Constitution* warned that "Americans can expect their power bills to skyrocket for nothing."<sup>10</sup>

<sup>6</sup> U.S. Environmental Protection Agency, *Benefits and Costs of the Clean Air Act Amendments of 1990*, Fact Sheet, available at <http://www.epa.gov/cleanairactbenefits/feb11/factsheet.pdf>.

<sup>7</sup> Office of Management and Budget, *2013 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, 2013. Available at:

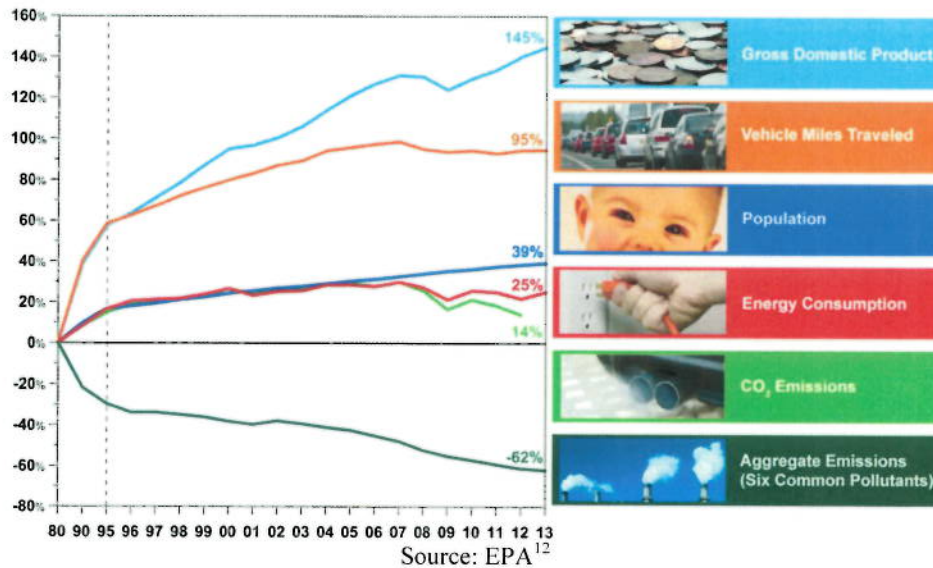
[https://www.whitehouse.gov/sites/default/files/omb/inforeg/2013\\_cb/2013\\_cost\\_benefit\\_report-updated.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/2013_cost_benefit_report-updated.pdf).

<sup>8</sup> Cimons, Marlene, *Los Angeles Times*, "Car Fumes Linked to High Medical Costs : Health: A study says the nation pays \$50 billion a year for emissions-caused illnesses. It calls for strict new pollution controls." January 20, 1990. [http://articles.latimes.com/1990-01-20/news/mn-251\\_1\\_air-pollution](http://articles.latimes.com/1990-01-20/news/mn-251_1_air-pollution) (accessed April 27, 2015.)

<sup>9</sup> Bob Perciasepe, Deputy Administrator, U.S. Environmental Protection Agency, *Testimony before House Subcommittee on Regulatory Affairs, Stimulus Oversight, and Government Spending (July 26, 2011)*. Available at [http://www.epa.gov/ocir/hearings/testimony/112\\_2011\\_2012/2011\\_0726\\_bp.pdf](http://www.epa.gov/ocir/hearings/testimony/112_2011_2012/2011_0726_bp.pdf).

<sup>10</sup> Unsigned Editorial, "1990 Clean Air Act protects neither health nor environment," *The Atlanta Journal (Oct 25, 1990)*

These hyperbolic claims of doom and gloom did not manifest and significant pollution reductions were made all while the economy continued to grow. In fact, between 1990 and 2006, when electric utilities were claiming that electricity rates would increase substantially because of EPA regulations, they actually fell in most states: 47% decline in Arkansas, 32% in Georgia, 64% in Illinois, 28% in Indiana, 35% in Michigan, 30% in North Carolina, 18% in Ohio, 36% in Pennsylvania, 40% in Utah and 36% in Virginia.<sup>11</sup>



Additionally, the clean air technology and services industry in the US is robust. The regulations promote innovations that make the US a world leader in environmental technologies, opening up markets and fostering positive trading relationships. The Department of Commerce<sup>13</sup> study in 2010 estimated that the US environmental technologies and services industry:

- Supported 1.7 million jobs
- Generated \$300 billion in revenues
- Exported goods and services worth \$44 billion
- Generated a positive trade surplus for the past decade

The Department of Commerce study also found that air pollution control equipment specifically generated revenues of \$18 billion in 2008. These figures are in line with earlier assertions from

<sup>11</sup> U.S. House of Representatives, Committee on Energy and Commerce, *Industry Claims about the Costs of the Clean Air Act*, Fact Sheet (June 16, 2009) Available at:

[http://democrats.energycommerce.house.gov/Press\\_111/20090616/dc\\_industryjobs.pdf](http://democrats.energycommerce.house.gov/Press_111/20090616/dc_industryjobs.pdf)

<sup>12</sup> U.S. Environmental Protection Agency, *Air Quality Trends*. Accessed on Apr 30, 2015. Available at:

<http://www.epa.gov/airtrends/aqtrends.html>

<sup>13</sup> U.S. International Trade Administration, *Environmental Technologies Industries: FY2010 Industry Assessment*. Available at:

[http://web.ita.doc.gov/ete/eteinfo.nsf/068f3801d047f26e85256883006ffa54/4878b7e2fc08ac6d85256883006c452c/\\$FILE/Full%20Environmental%20Industries%20Assessment%202010.pdf](http://web.ita.doc.gov/ete/eteinfo.nsf/068f3801d047f26e85256883006ffa54/4878b7e2fc08ac6d85256883006c452c/$FILE/Full%20Environmental%20Industries%20Assessment%202010.pdf)

economists that well-designed environmental regulations can spur innovation and increase competitiveness.<sup>14</sup>

### *Mercury and Air Toxics Standards for Power Plants*

In recent years, similar “sky is falling” claims have been made about clean air standards to control acid rain, cut mercury and other air toxics, reduce soot, and lower tailpipe emissions. The long overdue Mercury and Air Toxics Standards for Coal- and Oil-fired Power Plants (MATS), for example, were finalized in December 2011 and within months, major power companies that had been making “sky is falling” claims about the compliance costs during EPA’s development of these standards were touting to investors that compliance costs were plummeting:

- On July 20, American Electric Power CEO Nicholas Akins confirmed that the company’s projected costs have come down nearly 25% from what AEP originally projected. He added, “[W]e expect it to continue to be refined as we go forward.” In other words, costs will come down even further.<sup>15</sup>
- On May 15, Southern Company CFO and Executive Vice President Arthur P. Beatty stated that the amount the company projects for compliance costs “could be \$0.5 billion to \$1 billion less, because of the new flexibility that [the company has] found in the final rules of the MATS regulation.”<sup>16</sup>
- On August 8, First Energy CEO Anthony Alexander stated, “[W]e have significantly reduced our projected capital investment related to MATS compliance.”<sup>17</sup>

Based on recent earnings calls, American Electric Power Company’s range of cost estimates has fallen by a third to half, Southern Company’s cost estimates have declined by a third, and FirstEnergy’s costs have fallen approximately 77-85 percent.<sup>18</sup>

MATS generated substantial public support through the public comment period, with over 800,000 comments provided in support of the proposal. Diverse stakeholders including power companies, states, mayors, public health groups, environmental groups, faith groups, small

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<sup>14</sup> Ambec et al. “The Porter Hypothesis at 20: Can Environmental Regulation Enhance Innovation and Competitiveness.” Harvard Business School Institute for Strategy and Competitiveness (Jun 2010), available at [http://www.isc.hbs.edu/Documents/pdf/PorterHypothesis\\_at20\\_Montreal.pdf](http://www.isc.hbs.edu/Documents/pdf/PorterHypothesis_at20_Montreal.pdf)

<sup>15</sup> Nicholas Akins, American Electric Power Co., Inc. Q2 2012 Earnings Call Transcript (July 20, 2012), available at: <http://seekingalpha.com/article/736561-american-electric-power-management-discusses-q2-2012-results-earnings-call-transcript?all=true&find=american%2Belectric%2Bpower%2BAEP%2B%2Bjuly%2B12%2C%2B2012>.

<sup>16</sup> Art Beattie, CFO of Southern Company, Deutsche Bank Clean Tech, Utilities and Power Conference Call Recording (May 15, 2012), available at <http://earningscast.com/SO/20120515>.

<sup>17</sup> Anthony Alexander, CEO, FirstEnergy, Q2 2012 Results, Earnings Call Transcript (Aug. 8, 2012), available at <http://seekingalpha.com/article/790061-firstenergys-ceo-discusses-q2-2012-results-earnings-call-transcript>.

<sup>18</sup> See Envtl. Def. Fund, Blog, Power Companies’ Declining Estimates of Compliance Costs of the Mercury & Air Toxics Standards (MATS), [http://blogs.edf.org/climate411/files/2014/05/Declining-costs-of-MATS-compliance.pdf?\\_ga=1.102810441.834084056.1418406109](http://blogs.edf.org/climate411/files/2014/05/Declining-costs-of-MATS-compliance.pdf?_ga=1.102810441.834084056.1418406109).

business groups, the NAACP, moms, scientists, sportsmen and the League of United Latin American Citizens supported MATS. The standards are in effect as of April 2015 for most power companies and, despite claims to the contrary at the time these safeguards were adopted, no reliability crisis has resulted.

### *The Economic and Public Health Toll of Pollution*

Opponents of clean air standards do not mention the real costs inflicted upon Americans every day in health and other impacts from pollution. These costs manifest themselves in emergency room visits, missed work or school days, asthma attacks, and even early death. A 2011 report by economists Nick Muller, Robert Mendelsohn, and William Nordhaus examined the county-level damages from a variety of pollutants, to account for these negative externalities. The pollutants examined included fine particulate matter, oxides of nitrogen, sulfur dioxide, ammonia, coarse particulates, and volatile organic compounds.<sup>19</sup> The results are striking: every ton of coal and every barrel of oil cause more in external damages to health, ecosystems, and the economy than they add value to gross domestic product (GDP). None of this even includes the public health impacts of global warming pollution. For a more detailed view see these maps detailing costs of health and other damages from two of the pollutants Muller *et al.* have examined:

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<sup>19</sup> Muller et al., "Environmental Accounting for Pollution in the United States Economy," *Annual Economic Review* 101 (August 2011): 1649–1675.



Figure 1. Marginal Damage for PM<sub>2.5</sub>.

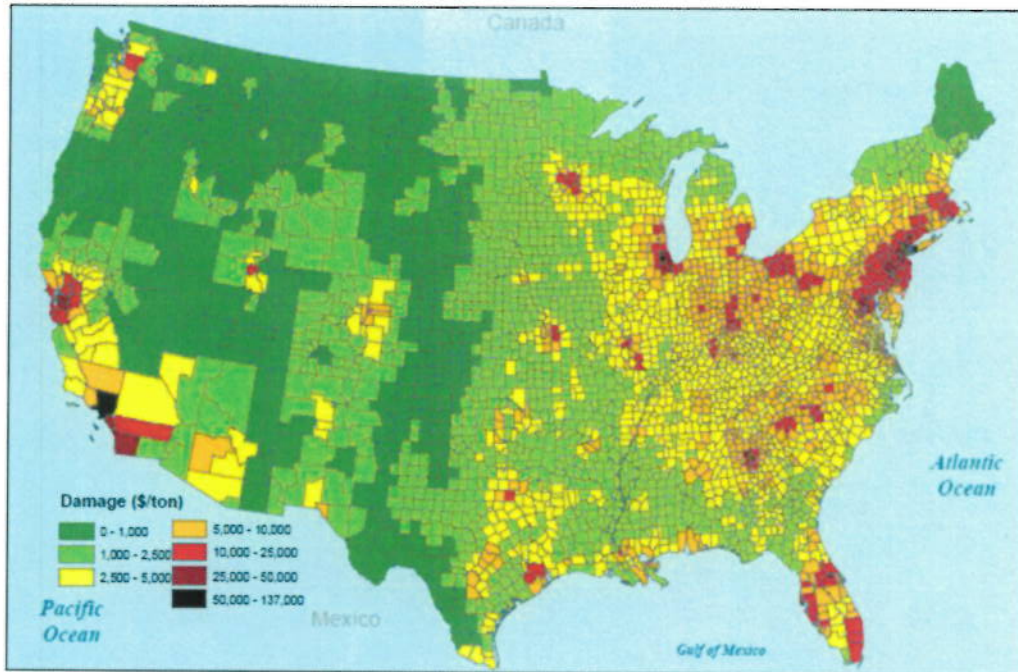
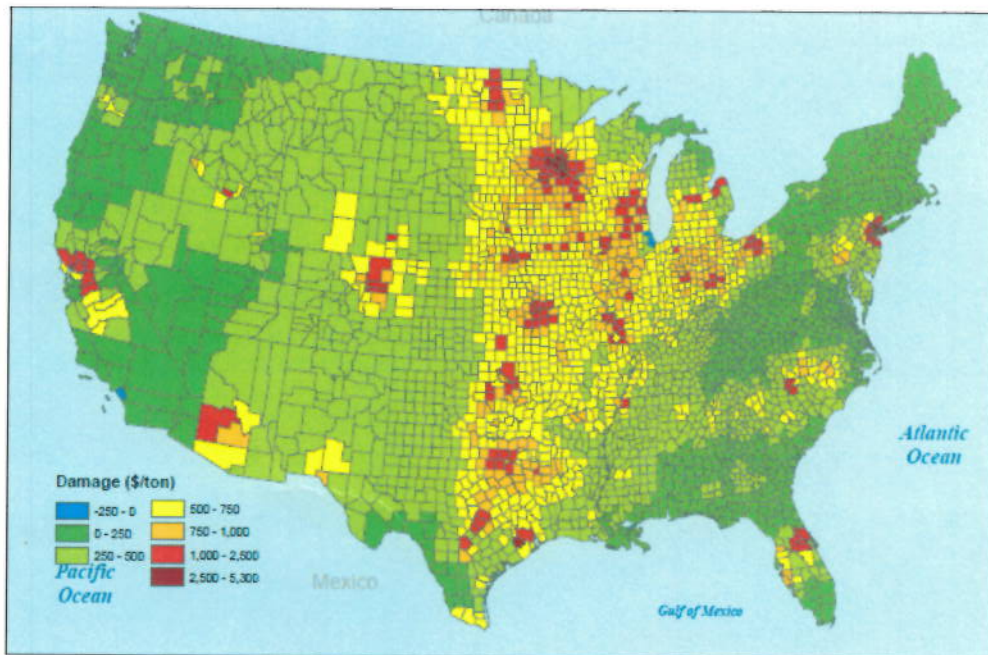


Figure 6. Marginal Damage for NO<sub>x</sub>.



### III. Healthier Families, Longer Lives

Major improvements have been achieved in air quality as a result of the implementation of the Clean Air Act, as demonstrated above. The scientific understanding of pollution's impact is longstanding and more studies demonstrate harms of pollutants at lower levels than many of our current standards reflect. The good news is that prior pollution reductions have yielded tangible benefits for human health. *The New England Journal of Medicine* published new research in March detailing improved lung function in children that breathe cleaner air.<sup>20</sup> The study, focusing on southern California, followed three populations of children, aged 11 to 15, for a period of four years. This age group was chosen because children's lungs develop rapidly during this stage. In all, the study examined more than 2,100 children in five distinct California communities.

The report found that the greatest improvements in lung function were seen with declining levels of particulate pollution, also known as soot; and of nitrogen dioxide, a fuel combustion byproduct. As the air in the region became cleaner, due in large part to emission standards, researchers found that lung development in the children who were born in later years of the study was more robust than those born earlier. And the percentage of children with significantly impaired lung function declined from 8 percent to 3.5 percent.<sup>21</sup>

Cleaner air doesn't just lead to healthier lungs during childhood because the benefits last a lifetime—children with healthier lungs grow up to be adults who have a lower risk of premature death and other serious health problems.

### IV. Conclusion

A rigorous and extensive body of science demonstrates the successful story of implementing the Clean Air Act and the need to make further pollution reductions. The science and law, along with innovative solutions from EPA, states, and industry, create a strong foundation for carrying out the Clean Air Act's founding bipartisan vision to establish air standards that are protective of the health of our children and communities. This vibrant, bipartisan, made-in-America law has stood the test of time—delivering a stronger, healthier and more prosperous nation.

If you have questions or information requests please contact Mandy Warner at [awarner@edf.org](mailto:awarner@edf.org).

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<sup>20</sup> Gauderman et al, "Association of Improved Air Quality with Lung Development in Children," *The New England Journal of Medicine* (March 11, 2015). Available at <http://www.nejm.org/doi/full/10.1056/NEJMoa1414123>

<sup>21</sup> John Hoffman, "Children's Lung Health Improves as Air Pollution Is Reduced, Study Says," *The New York Times* (March 4, 2015). Available at [http://well.blogs.nytimes.com/2015/03/04/childrens-lung-health-improves-as-air-pollution-is-reduced-study-says/?hpw&rref=science&action=click&pgtype=Homepage&module=well-region&region=bottom-well&WT.nav=bottom-well&\\_r=1](http://well.blogs.nytimes.com/2015/03/04/childrens-lung-health-improves-as-air-pollution-is-reduced-study-says/?hpw&rref=science&action=click&pgtype=Homepage&module=well-region&region=bottom-well&WT.nav=bottom-well&_r=1)

June 1, 2015

Senator Ron Johnson  
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Washington, DC 20510

Senator Thomas Carper  
513 Hart Senate Office Building  
Washington, DC 20510

Senator James Lankford  
216 Hart Senate Office Building  
Washington, DC 20510

Senator Heidi Heitkamp  
502 Hart Senate Office Building  
Washington, DC 20510

Dear Senators Johnson, Carper, Lankford and Heitkamp:

Thank you for the opportunity to provide our perspective on regulations and how to improve the regulatory process.

As a U.S.-headquartered energy company with operations around the world, ExxonMobil is regulated by a large number of agencies that oversee energy, environmental, financial, labor, transportation and other matters.

ExxonMobil appreciates the role of well-designed regulations to protect public health and safety, mitigate environmental risks and maintain economic development. However, as the scope and complexity of regulations continue to increase in the U.S., so have the impacts to our business and to society. To compound the issue, underlying authorizing statutes often establish unreasonable deadlines, require unnecessary technology and risk reviews, and provide broad discretion to executive branch agencies. Many agencies have gone unchecked in their implementation actions, and are using regulatory hurdles to impede progress on even the most ordinary of projects. When the costs of regulatory compliance exceed attained benefits, productivity suffers, competitiveness is undermined, administrative burdens increase (detracting the very resources needed to manage risk), and jobs are lost; after all, it is often the American consumer who ultimately bears the costs of excessive or poorly designed regulations.

Below are four specific examples of areas in which the regulatory process could be improved:

- (1) National Ambient Air Quality Standards (NAAQS)



The EPA process for establishing NAAQS could be significantly improved by allowing EPA the discretion to consider cost and feasibility in setting the standard, and by extending the standard review cycle to ten years. Without these needed changes, the cost in terms of jobs and economic growth opportunities will continue to increase. In fact it is estimated that EPA's proposed new standard could be one of the costliest in U.S. history. Furthermore, evidence shows the current 75 ppb standard is protective of public health. As pointed out by the National Association of Manufacturers, if EPA let the current law be implemented, emissions would be reduced by another 36 percent from current levels.

NAAQS implementation policies should also be improved to allow states flexibility in meeting air quality standards. EPA's proposal would dramatically increase the number of "non-attainment" (meaning non-compliant) areas, significantly restricting economic development in the U.S. For example, a 65 ppb standard could put about two-thirds of the country into non-attainment. EPA could improve policies for exceptional events, international transport, and for assisting states in transitioning from one standard to another.

## (2) Renewable Fuel Standard (RFS)

In their current form, the EPA regulations for the RFS are unrealistic, unworkable and should be repealed. For example, the Congressional Research Service estimates that by 2022, the RFS could increase food costs for Americans by \$3 billion annually. Parameters by which the agency exercises its discretion in setting annual standards should be established, including a cap of 9.7 percent or less on ethanol to meet warranties of the majority of vehicles on the road today. Additionally, changes in the annual cellulosic standard and advanced biofuel mandates should also be matched to actual production instead of aspirational goals.

## (3) LNG and Crude Oil Exports

The U.S. is now one of the world's premier suppliers of oil and natural gas. Current laws and regulations governing oil and gas exports are outdated, and rooted in an era of energy dependence rather than the reality of domestic energy abundance and security we are experiencing today. According to a recent study by ICF Consulting, LNG exports would contribute up to 450,000 direct and indirect jobs; lifting the crude oil exports ban could support over 850,000 additional jobs according to IHS Consulting. However, agency inaction and bureaucratic delays have stifled America's competitive ability in a dynamic global marketplace, and have prevented the nation from fully realizing the proven economic benefits associated with exports and free trade.

## (4) Resource Access

Many off-shore and on-shore areas remain off limits to leasing for exploration and resource development. Where leasing is allowed, permitting times are increasing and pending new regulations and guidance regarding Waters of the U.S. and the National Environmental Protection Act would make permit applications and decisions more difficult and time consuming. In addition, new regulations on hydraulic fracturing and methane emissions, and pending regulations on arctic drilling and well control would be overly restrictive (in some instances, increasing operational risk) and would add significantly to societal cost for energy.

ExxonMobil supports a regulatory development process that uses best available scientific information, employs best practices in benefit-cost analysis, is transparent in the use of methods and data, involves appropriate oversight by the courts, utilizes balanced peer review and scientific advisory panels, and engages stakeholders early in the regulatory process.

ExxonMobil believes regulatory reform is essential for the U.S. to maximize its productivity and fully realize its competitive advantage - both domestically and in the international marketplace - and we appreciate the work you are undertaking in this area. We would welcome the opportunity to meet with you or your staff to discuss these needed improvements in more detail.

Finally, I refer you to the submissions provided to your Committee by the U.S. Chamber of Commerce, the National Association of Manufacturers, the American Petroleum Institute, and the Business Roundtable. These organizations are thought leaders on the impact of regulations on American businesses and manufacturing, and on how to make the regulatory process more transparent, efficient, and effective.

Thank you for the opportunity to provide ExxonMobil's perspective on these important issues.

Sincerely,

A handwritten signature in blue ink, appearing to read "Thomas J. Sisk". The signature is written in a cursive style with a horizontal line extending to the right.



2001 Pennsylvania Avenue NW  
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T 202 466 5460 | F 202 296 3184

April 22, 2015

The Honorable Ron Johnson  
Chairman  
United States Senate  
Committee on Homeland Security  
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Washington, DC 20510-6250

The Honorable Thomas R. Carper  
Ranking Member  
United States Senate  
Committee on Homeland Security  
and Governmental Affairs  
Washington, DC 20510-6250

The Honorable James Lankford  
Chairman  
United States Senate  
Committee on Homeland Security  
and Governmental Affairs  
Subcommittee on Regulatory Affairs  
and Federal Management  
Washington, DC 20510-6250

The Honorable Heidi Heitkamp  
Ranking Member  
United States Senate  
Committee on Homeland Security  
and Governmental Affairs  
Subcommittee on Regulatory Affairs  
and Federal Management  
Washington, DC 20510-6250

Dear Chairman Johnson, Ranking Member Carper, Chairman Lankford and Ranking Member Heitkamp:

I am happy to respond to your request for information on the impact of federal regulations and specifically the application of such to the derivatives clearing infrastructure. On behalf of FIA, I commend you for initiating a comprehensive review of the “real-world effects” these regulations impose. FIA has long supported well-regulated markets and your examination will surely contribute to a more effective regulatory framework.

FIA is the leading trade association for the futures, options and cleared swaps markets. FIA’s core constituency consists of futures commission merchants (FCMs) who as members of derivatives clearinghouses play a critical role in the reduction of systemic risk. Our members provide the majority of the funds that support derivatives clearinghouses, facilitate the derivatives clearing process on behalf of end-user clients, and commit a substantial amount of their own capital to guarantee customers’ transactions. FIA’s membership also includes the major global derivatives exchanges, clearinghouses, trading platforms, principal traders, technology vendors and legal services firms representing this industry.

In order to assist your efforts, I have identified below a specific and critical regulatory matter creating inconsistency and unnecessary costs for the derivatives clearing industry – the Basel III leverage ratio application to customer margin for cleared derivatives. Additionally, I have highlighted more general observations related to regulatory implementation processes.

### **New Prudential Bank Capital Regulations Inconsistent With Existing Market Regulations**

Recently, the U.S. prudential banking regulators (the Federal Reserve Board of Governors, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation) finalized several bank capital regulations to implement a framework established by the Basel Committee on Banking Supervision – commonly referred to as “Basel III.” These Basel III regulations contain a leverage ratio formulation which we have determined is inconsistent with the purpose and treatment of the long-standing customer margin requirements contained within the Commodity Exchange Act and imposed by the Commodity Futures Trading Commission (CFTC).

The Commodity Exchange Act requires that customer-posted margin provided to an FCM for the clearing of derivatives transaction be treated as belonging to the customer and therefore segregated from the FCM’s own funds. Therefore, customer margin for cleared derivatives may *not* be used to leverage a bank-affiliated FCM. In carrying out the statute, the CFTC has very robust rules that require such segregation for all cleared derivatives transactions.

Conversely, the recently finalized leverage ratio rule requires capital to be held against customer margin held by a bank-affiliated FCM even though they are prohibited under CFTC regulations from using the collateral to leverage the bank. Not permitting margin collected from the customer, and segregated away from the bank’s own funds, to reduce off-balance sheet derivatives exposures of the bank assumes that the bank can use the collateral to leverage itself. Such an assumption is incorrect: Because CFTC regulations require that customer margin be segregated, the margin cannot be leveraged by a bank-affiliated FCM to fund the bank’s operations. Instead, segregated margin is solely exposure-reducing with respect to a bank’s cleared derivatives exposures, and the leverage ratio should recognize this reduction rather than apply punitive treatment in the context of a prudentially regulated bank’s capital requirements.

Failure to recognize the exposure-reducing effect of segregated customer margin will substantially, and inaccurately, increase a bank-affiliated FCM’s total leverage exposure as calculated under Basel III, resulting in a corresponding increase in the amount of capital required to continue client clearing activities. The lack of recognition of the CFTC requirements in the context of the banking regulators’ new capital rules results in increased costs to the clearing system (including clients utilizing derivatives to manage their risks) exceeding tens of billions of dollars today and hundreds of billions of dollars once more products are required to clear under the new Dodd-Frank Act swap clearing mandates. These increased capital requirements will lead to several harmful consequences:

- The higher levels of capital required to support client clearing activities for derivatives could lead to more clearing firms exiting the clearing business, resulting in a greater concentration of service providers.
- End user access to clearing services will decline as clearing firms become more selective with respect to the quantity and type of clients they can/will accept.
- As clearing costs increase, reduced demand for derivatives will negatively impact derivative market volume and liquidity.

- End users may choose (or be forced) to either not hedge or opt instead for less costly and less precise hedges, with the associated risk of increased portfolio volatility.

In addition to the regulatory contradictions described previously, there is a fundamental inconsistency between these outcomes and post-financial crisis regulatory reforms designed to reduce systemic risk and increase the use of centrally cleared derivatives as required by the Dodd-Frank Act.

Prudentially regulated banks are also subject to market regulators' oversight. In finalizing major regulations, it should be incumbent upon the effectuating regulators to seek an understanding of the related requirements that are outside of their immediate jurisdiction.

### **Regulatory Implementation Cost-Benefit Analysis**

Generally speaking, FIA encourages the Committee to review the various cost-benefit regimes applied across regulatory agencies. FIA supports efforts to subject regulations to both qualitative and quantitative cost and benefits analysis, such as the legislation passed by the House last year to ensure that the cost-benefit analysis conducted by the Commodity Futures Trading Commission closely tracks President Obama's Executive Order No. 13563, which does not extend to independent regulatory agencies.

Specifically, the Order calls for greater coordination across agencies to simplify and harmonize rules; states that our regulatory system "must measure, and seek to improve, the actual results of regulatory requirements;" and instructs each agency "to use the best available techniques to **quantify** anticipated present and future benefits and costs as accurately as possible."

Subsequent to the passage of the Dodd-Frank Act, the CFTC was tasked with implementing a vast array of far-reaching regulations. As rules were finalized, several application hurdles were identified resulting in the need for countless "no-action relief" letters to be issued post finalization. Some of the more challenging problems might have been avoided if more time had been devoted to regulatory coordination both within the divisions of the CFTC as well as among similarly situated regulators. A more robust quantification of the costs related to proposed rules might have better identified obstacles prior to finalization.

In closing, I would like to thank the Committee and its leadership for efforts to coordinate regulatory oversight. The cleared derivatives industry has recently undergone many positive regulatory changes and a review of both legacy requirements and newly imposed rules is essential to ensure the objectives are achieved without avoidable confusion.

Sincerely,



Walt L. Lukken  
President & Chief Executive Officer



Curt Magleby  
Vice President, Government Relations

Ford Motor Company  
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May 5, 2015

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Senator James Lankford  
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Senator Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
& Federal Management  
240 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Johnson, Ranking Member Carper, Chairman Lankford, and Ranking Member Heitkamp:

Thank you for your letter of March 18, 2015 regarding the impact of federal regulatory policies and programs. We appreciate the opportunity to share our views.

The regulatory process and its outcomes have long-lasting and widespread impact on the millions of Ford customers, the tens of thousands of Ford employees and the thousands of Ford suppliers in the United States. Making sure we get these regulations right is essential to the health of not only Ford's business, but the entire U.S. economy.

To that end, it is essential that regulations and the regulatory process be based on meaningful, data-driven analysis of behavior, science, and engineering. It is also important that the process take into account both the societal and consumer costs and benefits of regulations, including alternatives. As new data becomes available, we must use it to reevaluate our initial regulatory assumptions to assure that the policy goals align with this new data and market conditions.

In establishing the MY2017-2025 fuel economy/greenhouse gas (GHG) standards, a "Midterm Review" was included to compare the assumptions used to real world data. This includes customer demand and driving behaviors, fuel prices and technological capabilities and costs under which the regulations were based and to make any needed adjustments based on the findings. To be effective, this review must take into account the current market environment and find the most cost efficient way to achieve our shared policy goals from an economic and societal perspective. For example, with sales of fuel-efficient, advanced technology vehicles tracking closely with the price of gasoline, and with gas prices at historically low levels, consumers have shifted away from smaller and electrified vehicles.

As the Midterm Review process approaches, we hope that the Administration and Congress will see this as an opportunity to demonstrate how flexible and nimble our regulatory process can be in achieving our shared policy goals.

An example of a regulatory process that that was not data driven can be found in EPA's decision to allow up to 15 percent ethanol (E15) into fuel prior to the completion of critical vehicle testing. The vast majority of vehicles on the road today were designed, certified and warranted to only withstand up to 10 percent ethanol in gasoline (E10).

Another area of concern is in regulations and mandates surrounding emerging technologies. As technology develops, the rush to regulate - choosing winners and losers - before market demand and viability is understood can stifle innovation and significantly increase costs in capital intensive industries with long product development cycles. State and federal regulations calling for technology mandates, such as California's zero emission vehicles (ZEV) regulations, which require automakers to sell battery electric or fuel cell vehicles, can actually hinder progress towards achieving larger policy goals.

We would like to commend NHTSA's approach on automated technologies and vehicles. Although some states are rushing to legislate and regulate, while the technology is still emerging, NHTSA's approach of providing early guidance and completing the appropriate research, prior to regulating, is positive. Premature regulation can have the unintended consequence of stifling emerging technologies.

Again, thank you for the opportunity to share our views on this important matter. Please don't hesitate to contact me if you have any additional questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Curt Magleby', with a long horizontal line extending to the left.

Curt Magleby  
Vice President  
Government Affairs  
Ford Motor Company





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May 1, 2015

The Honorable Ron Johnson  
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The Honorable Thomas Carper  
Ranking Member  
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The Honorable James Lankford  
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The Honorable Heidi Heitkamp  
Ranking Member  
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The Hon. Frank Shakespeare

Dear Senators Johnson, Carper, Lankford and Heitkamp:

This is in response to your letter of March 18, 2015 requesting assistance in identifying existing and proposed regulations that merit attention by the Committee. We share your concern over the growing burden of regulation, and commend your efforts to address this critical issue.

The regulatory burdens on Americans have increased at an alarming rate. Based on data from the Government Accountability Office, we have calculated that an unprecedented 184 major new regulations have been imposed by Washington since 2009, with additional costs to consumers and the economy in excess of \$80 billion annually.

The list below identifies regulations we consider to be particularly harmful to economic growth, job creation, investment and innovation.

- 1. FCC Internet Regulation.** Earlier this year, the Federal Communications Commission classified broadband Internet service as “common carriage” under the 1934 Telecommunications Act for the purpose of imposing “network neutrality” restrictions on transmission services. This reclassification is not only unnecessary but potentially destructive. Applying a common carrier framework designed for 19<sup>th</sup> century monopoly railroads to the Internet of the 21<sup>st</sup> century will stunt innovation, investment and Internet expansion. Congress should reverse this reclassification and prohibit the FCC from imposing network neutrality regulation.
- 2. Consumer Financial Protection Bureau.** The Consumer Financial Protection Bureau, established pursuant to the Dodd-Frank financial regulation statute, wields ill-defined powers to create and enforce regulations on all manner of consumer financial products and services. Among its actions to date are rules restricting access to mortgage credit. This regulatory control of the terms and conditions of financing will reduce consumer options and raise the cost of credit services—especially for those with lower incomes or impaired credit, histories. The CFPB’s rules also impose undue burdens on small community banks and other institutions. The bureau was established as an independent agency within the Federal Reserve, and thus its budget is not subject to congressional control. The CFPB’s accountability is further minimized by the vague language of its statutory mandate. Congress should abolish the Bureau’s current funding mechanism (a fixed percentage of the Federal Reserve’s operating budget) and subject it instead to congressional control.
- 3. EPA Endangerment Finding.** The EPA claims authority to regulate carbon dioxide on the basis of its “finding” that greenhouse gases are pollutants that endanger public health and safety. This determination is fraught with implausible assumptions and unsound conclusions, and the ensuing regulations jeopardize jobs, U.S. competitiveness, the affordability and reliability of the nation’s electric power, and national security. As applied to power plants, the regulations are intended to effectively eliminate coal as a power-generating source, which would constitute an enormous energy tax. Congress should restate and clarify in law that the Clean Air Act was never intended to regulate greenhouse gases as air pollutants, and rescind the agency’s Endangerment Finding.

4. **Energy Conservation Standards.** The Department of Energy has imposed restrictive energy efficiency standards on dozens of commercial and residential appliances, including dishwashers, clothes dryers, escalators and furnace fans. Such standards empower the government to control how we clean our clothes, cook our food, wash our dishes, and light, heat and cool our homes. No longer do consumers exercise the freedom to balance appliance performance against cost. Congress should rescind the DOE's authority under the Energy Policy and Conservation Act to set energy conservation standards.
5. **Renewable Fuel Standards.** The Energy Policy Act of 2005 empowered the EPA to set quotas for "renewables" blended in the nation's supply of transportation fuels. The RFS represents a massive subsidy by consumers for ethanol, biomass and other boutique fuel stocks based on political considerations more than environmental outcomes. Congress should repeal the RFS mandates.
6. **Dairy Price Controls.** U.S. consumers pay inflated prices for dairy products as a result of federal programs that manipulate the supply of milk. The Department of Agriculture, for example, issues "milk marketing orders" that financially penalize processors for increasing milk supply. Not only are the costs of dairy products higher, but so, too, are the prices for every product made with dairy ingredients. The programs constitute a huge wealth redistribution from consumers and taxpayers to dairy farmers. Congress should abolish the marketing orders and price support programs.
7. **Sugar Protectionism.** The Byzantine system of price supports and subsidies for domestic sugar production dates to 1789, when the U.S. first imposed tariffs on sugar imports. Tariffs remain in place, along with subsidized loans to sugar processors that require repayment only if the price of sugar exceeds a floor price set by the Department of Agriculture. Inflated sugar prices also are maintained by production quotas (aka "marketing allotments"), while in some instances, the government pays processors to dump inventory to reduce supply (thereby maintaining higher prices). Congress should abolish the sugar price supports and subsidies.
8. **Ozone Rules.** The EPA has proposed strict new limits on ozone emissions. If the agency goes with the strictest standard of 60 parts per billion (ppb), it could be the costliest regulation in U.S. history. But states are just now starting to meet the current 75 ppb standard. Based on EPA's own data, and taking the most generous estimate of ozone benefits, the costs exceed the benefits, ranging anywhere from \$500 million for a 70 parts per billion standard to \$19 billion for a 60 parts per billion standard. The public is being led to believe that reducing ozone achieves these health benefits. In reality, much of these alleged benefits have nothing to do with an actual reduction in ozone (but in a reduction of particulate matter). Congress should prohibit the EPA from expending any funds for development, implementation, and enforcement of the proposed ozone standard.
9. **The Jones Act.** The Merchant Marine Act of 1920 (commonly referred to as the Jones Act) mandates that any freight shipped by water between two points in the United States must be transported on a U.S.-built, U.S.-flagged, and at least 75 percent U.S.-crewed vessel. Originally enacted to sustain the U.S. Merchant Marine, the law has instead fostered stagnation in the U.S. maritime shipping industry by driving up shipping costs, increasing



energy costs, stifling competition, and hampering innovation in the U.S. shipping industry. Furthermore, the Jones Act fleet is unable to meet the needs of the U.S. military, which routinely charters foreign-built ships to fulfill additional sealift needs. The U.S. economy and the U.S. military would be better served without the Jones Act.

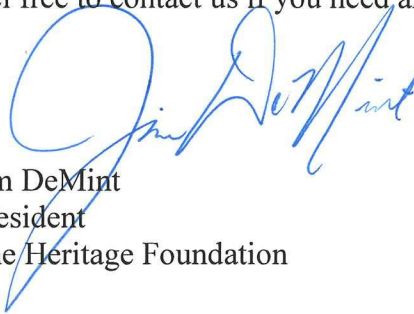
You have also asked for suggestions on how to reform the regulatory process. The following are some specific reforms that we believe will help reduce the unnecessary rules and increase the accountability of regulators to Congress and the executive branch:

- 1. Require congressional approval of new major regulations issued by agencies.** Congress, not regulators, should make the laws and be accountable to the American people for the results. No major regulation should be allowed to take effect until Congress explicitly approves it. The Regulations from the Executive in Need of Scrutiny (REINS) Act would impose such a requirement.
- 2. Require regulatory impact assessments of proposed legislation.** Lawmakers routinely vote on bills authorizing mandates or restrictions on Americans without any systematic assessment of the costs or other potential effects. Just as a Congressional Budget Office (CBO) review is required for any spending measures, a regulatory assessment should be required for any bill before it reaches the floor for a vote. This review function could be performed by a stand-alone entity similar to the CBO, or a separate unit within the Government Accountability Office.
- 3. Establish a sunset date for regulations.** To help ensure that obsolete and ineffective rules are removed from the books, Congress should set sunset dates for all major regulations. After the sunset date, rules should expire automatically if not explicitly reaffirmed by the relevant agency through the normal rulemaking process. As with any such regulatory action, this reaffirmation would be subject to review by the courts. Such sunset clauses already exist for some new regulations. Congress should make them the rule, not the exception.
- 4. Subject “independent” agencies to regulatory review.** Increasingly, rulemaking is being conducted by independent agencies outside the direct control of the White House. Regulations issued by agencies such as the Federal Communications Commission, the SEC, and the Consumer Financial Protection Bureau are not subject to review by OIRA, or even required to undergo a cost-benefit analysis. This is a serious loophole in the rulemaking process. These agencies should be fully subject to the same analytic requirements that apply to executive branch agencies.
- 5. Codify stricter information-quality standards for rulemaking.** Federal agencies too often mask politically driven regulations as scientifically based imperatives. In such cases, agencies fail to properly perform scientific and economic analyses or selectively pick findings from the academic literature to justify their actions and ignore evidence that contradicts their agenda. Congress should impose specific strict information-quality standards for rulemaking, as well as conducting oversight to ensure that the standards are met. Congress should also make compliance with such standards subject to judicial review,

and explicitly state that noncompliance will cause regulation to be deemed “arbitrary and capricious.”

6. **Reform “sue and settle” practices.** Regulators often work in concert with advocacy groups to produce settlements to lawsuits that result in greater regulation. Such practices have become a common way for agencies to impose rules that otherwise would not have made it through the regulatory review process. To prevent such “faux” settlements, agencies should be required to subject proposed settlements to public notice and comment.
7. **Increase professional staff levels within OIRA.** OIRA is one of the only government entities in Washington that is charged with limiting, rather than producing, red tape. But OIRA’s meager staff is outgunned and outnumbered by the regulators whose work they are charged with reviewing. The cost of the additional staffing should be borne by regulatory agencies and based on each regulation submitted to OIRA for review.
8. **Codify the requirements of Executive Order 12866 to assess the costs and benefits of proposed rules and to consider alternatives.** Giving these requirements for cost-benefit analysis the force of law ensures that they cannot be rolled back without congressional action, and provides the basis for judicial review of agency noncompliance.

We look forward to assisting you with our research to ease the burden of regulation on the American people. Please feel free to contact us if you need any additional information.



Jim DeMint  
President  
The Heritage Foundation



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REBECA ROMERO RAINEY  
*Chairman-Elect*  
R. SCOTT HEITKAMP  
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J. MICHAEL ELLENBURG  
*Secretary*  
JOHN H. BUHRMASTER  
*Immediate Past Chairman*  
CAMDEN R. FINE  
*President and CEO*

April 24, 2015

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
and Government Affairs  
United States Senate  
Washington, D.C. 20510

The Honorable Thomas R. Carper  
Ranking Member  
Committee on Homeland Security  
and Government Affairs  
United States Senate  
Washington, D.C. 20510

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
Washington, D.C. 20510

The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
Washington, D.C. 20510

Dear Chairman Johnson, Ranking Member Carper, Chairman Lankford, and Ranking Member Heitkamp:

On behalf of the more than 6,000 community banks represented by ICBA, thank you for your interest in regulatory burden and an efficient and effective regulatory process. Meaningful relief from regulatory burden for community banks will allow them to better serve their customers and communities, promote local economic growth, and create jobs. Regulatory relief is ICBA's highest priority. We appreciate your Committee raising the profile of this critical topic.

### **ICBA Plan for Prosperity**

ICBA has created a Plan for Prosperity (attached) to address the problem of escalating regulatory burden and its impact on community bank customers. The Plan contains nearly 40 separate legislative recommendations organized around three pillars: relief from mortgage regulation to promote lending; improved access to capital to sustain community bank independence; and

*The Nation's Voice for Community Banks.®*

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reform of oversight and examination practices to better target the true sources of risk. Below we identify key recommendations under each pillar.

## **Mortgage Regulation Reform**

Key mortgage recommendations include:

- “Qualified mortgage” status under the Consumer Financial Protection Bureau’s (CFPB’s) ability-to-repay rules for any mortgage originated and held in portfolio for at least three years by a lender with less than \$10 billion in assets.
- An exemption from escrow requirements any first lien mortgage held in portfolio by a lender with less than \$10 billion in assets.

The principal rationale for these provisions, and the reason they can be safely enacted, is they apply only to loans originated and held in portfolio by community banks. As relationship lenders, community bankers are in the business of knowing their borrowers and assessing their ability to repay a loan. What’s more, when a community bank holds a loan in portfolio it holds 100 percent of the credit risk and has an overriding incentive to ensure the loan is well underwritten and affordable to the borrower.

## **Capital Access**

The capital provisions of the Plan are dedicated to strengthening community bank viability by creating new options for capital raising and capital preservation. Key recommendations include:

- Relief for community banks under \$1 billion in asset size from the internal control attestation requirements of Section 404(b) of the Sarbanes-Oxley Act. Since community bank internal control systems are monitored continually by bank examiners, they should not have to incur the unnecessary annual expense of paying an outside audit firm for attestation work. This provision will substantially lower the regulatory burden and expense for small, publicly traded community banks without creating more risk for investors.
- Three capital provisions of the Plan for Prosperity would amend Basel III for banks with assets of \$50 billion or less to restore the original intent of the accord which was intended to apply only to large, internationally active banks.
- Reform of Securities and Exchange Commission Regulation D, which governs private offerings of shares, so that anyone with a net worth of more than \$1 million, including the value of their primary residence, would qualify as an “accredited investor.” The number of non-accredited investors that could purchase stock under a private offering should be increased from 35 to 70.



## **Reforming Bank Oversight and Examination to Better Target Risk**

Plan for Prosperity provisions designed to improve the exam environment for community banks include:

- Allowing highly rated banks to file a short form call report in the first and third quarters of each year. A full-length call report would be filed in the second and fourth quarters. The quarterly call report currently filed by community banks comprises 80 pages of forms and 670 pages of instructions. Only a fraction of the information collected is actually useful to regulators in monitoring safety and soundness and conducting monetary policy. The 80 pages of forms contain extremely granular data such as the quarterly change in loan balances on owner-occupied commercial real estate. Whatever negligible value there is for the regulators in obtaining this type of detail is dwarfed by the expense and the staff hours dedicated to collecting it.
- Allowing highly rated community banks to be examined on a 24 month cycle. Under current statute and agency guidance, banks with assets of less than \$500 million and a CAMELS rating of 1 or 2 are eligible for an 18 month exam cycle. All other banks are subject to a 12 month exam cycle. Preparations for bank exams, and the exams themselves, distract bank management from serving their communities to their full potential.

### **Eliminate Burdensome Data Collection**

The Plan for Prosperity calls for exempting banks with assets below \$10 billion from new small business data collection requirements. This requirement, which is in statute but has yet to be implemented by the CFPB, requires the reporting of information regarding every small business loan application. Adding to the complexity, these records are to be kept separate from the underwriting process if feasible. In other words, the requirement compels the bank to create a separate bureaucracy within the bank that cannot be integrated with lending operations. When this mandate is not feasible, such as in organizations that are too small to accommodate firewall structures, additional notice requirements apply. The cost of these new requirements will be disproportionately high for community banks that do not have the scale to spread compliance costs over a large asset base.

Further, data collected by community banks and subsequently made public by the CFPB could compromise the privacy of applicants in small communities where an applicant's identity may be easily deduced, despite the suppression of personally identifying information.

## **Cost-Benefit Analysis of New Rules**

The Plan for Prosperity also includes process reforms that should be of particular interest to the Committee on Homeland Security and Government Affairs. The Plan calls for legislation that would provide that financial regulatory agencies cannot issue notices of proposed rulemakings unless they first determine that quantified costs are less than benefits. The analysis must take into account the impact on the smallest banks which are disproportionately burdened by regulation because they lack the scale and the resources to absorb the associated compliance costs. In addition, the agencies would be required to identify and assess available alternatives including modifications to existing regulations. They would also be required to ensure that proposed regulations are consistent with existing regulations, written in plain English, and easy to interpret.

## **Introduced Legislation**

ICBA is encouraged by the bills that have been introduced in the Senate and House so far that embody Plan for Prosperity recommendations. Several of these are noted below.

**The Community Lending Enhancement and Regulatory Relief Act of 2015 (the “CLEAR Act”, S. 812)**, introduced by Senators Jerry Moran and Jon Tester, advances three priority provisions of Plan for Prosperity: qualified mortgage status and an escrow exemption for any mortgage held in portfolio by a community bank with less than \$10 billion in assets, and relief from the SOX 404(b) internal control assessment mandate for community banks with less than \$1 billion in assets.

**The CLEAR Relief Plus Act (S. 927)**, also introduced by Senators Moran and Tester, would, among other important provisions, allow a highly rated bank to file a short form call report in the first and third quarters of each year.

**The Privacy Notice Modernization Act of 2015 (S. 423)**, introduced by Senators Moran and Heidi Heitkamp, would eliminate redundant mailings of annual privacy notices when a financial institution’s privacy policy has not changed. A similar bill introduced in the 113<sup>th</sup> Congress garnered a broad list of 75 bipartisan cosponsors. Under Gramm-Leach-Bliley, financial institutions are required to mail annual privacy notices to customers even when their policies have not changed. S. 423 would eliminate this requirement when no change in policy has occurred, while ensuring customers have continued access to their institution’s current privacy policy. Annual notices, when no change in policy has occurred, do not provide useful information to customers and are often a source of confusion to them. What’s more, they

represent an unproductive expense for community banks that could be better directed toward serving consumers.

**S. 970**, introduced by Senators Pat Toomey and Joe Donnelly, would allow a highly rated community bank with assets of less than \$1 billion to use an 18-month exam cycle. As noted above, ICBA also supports a 24-month exam cycle for highly rated community banks. Because examiners have more than sufficient information to monitor a community bank from offsite, we believe that this change would not compromise supervision, and would actually increase safety and soundness by allowing examiners to focus their limited resources on the true sources of risk.

The **Financial Institutions Examination Fairness and Reform Act (S. 774)**, introduced by Senators Moran and Joe Manchin, would go a long way toward improving the oppressive examination environment by creating a workable appeals process. This legislation would improve the appeals process by taking it out of the examining agencies and empowering a newly created Independent Examination Review Director, situated in the Federal Financial Institutions Examination Council, to make final appeals decisions. Though we favor additional measures to bring a higher level of accountability to the regulators and their field examiners, we are pleased to support the provisions this legislation.

## **The Economic Growth and Regulatory Paperwork Reduction Act Review**

While this letter has focused on legislative recommendations, I would also like to address the opportunity for agency regulatory relief presented by the 10-year review required under the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA).

The OCC, the Federal Reserve Board, and the FDIC are required to identify outdated, unnecessary or unduly burdensome regulation on insured depository institutions. This review will be conducted over a two-year period and will proceed by soliciting comment on twelve categories of regulation. This process holds real promise, if the agencies commit themselves to carrying it out in earnest and according to the terms of the statute.

Community bankers were significantly engaged in the last EGRPRA review, completed in 2006. More than 500 community bankers attended meetings around the country and many more submitted comment letters. Their input was substantive and detailed and should have formed the basis of significant regulatory relief. Unfortunately, the process was a lost opportunity and community bankers were deeply disappointed and disillusioned with the results. Though the process fully demonstrated the urgent need for relief, only minimal regulatory changes were made.

For this reason, ICBA is making specific recommendations with regard to the process to increase the chances the results match what was intended by Congress. These recommendations are detailed in our attached comment letter to the agencies.

ICBA also supports S. 881, introduced by Senator Mike Crapo, which would mandate that the EGRPRA review include CFPB rules and other new rules under the Dodd-Frank Act. These rules have been repeatedly cited in surveys of community bankers as among the most burdensome and costly. Many of the Plan for Prosperity recommendations related to CFPB rules and other new rules under the Dodd-Frank Act. In order to reap the greatest benefit from the EGRPRA process, these rules must be included.

We urge this Committee to support S. 881 and our recommendations and to actively ensure the process results in significant regulatory relief. Community banks cannot afford another missed opportunity.

Thank you again for the opportunity to present our recommendations to your Committee. We hope you will consult the Plan for Prosperity for a complete listing of legislative recommendations designed to allow community banks to more effectively and efficiently serve their customers and communities. ICBA hopes to work with this Committee to craft urgently needed solutions.

Sincerely,

/s/

Camden R. Fine  
President & CEO

## **ATTACHMENTS**

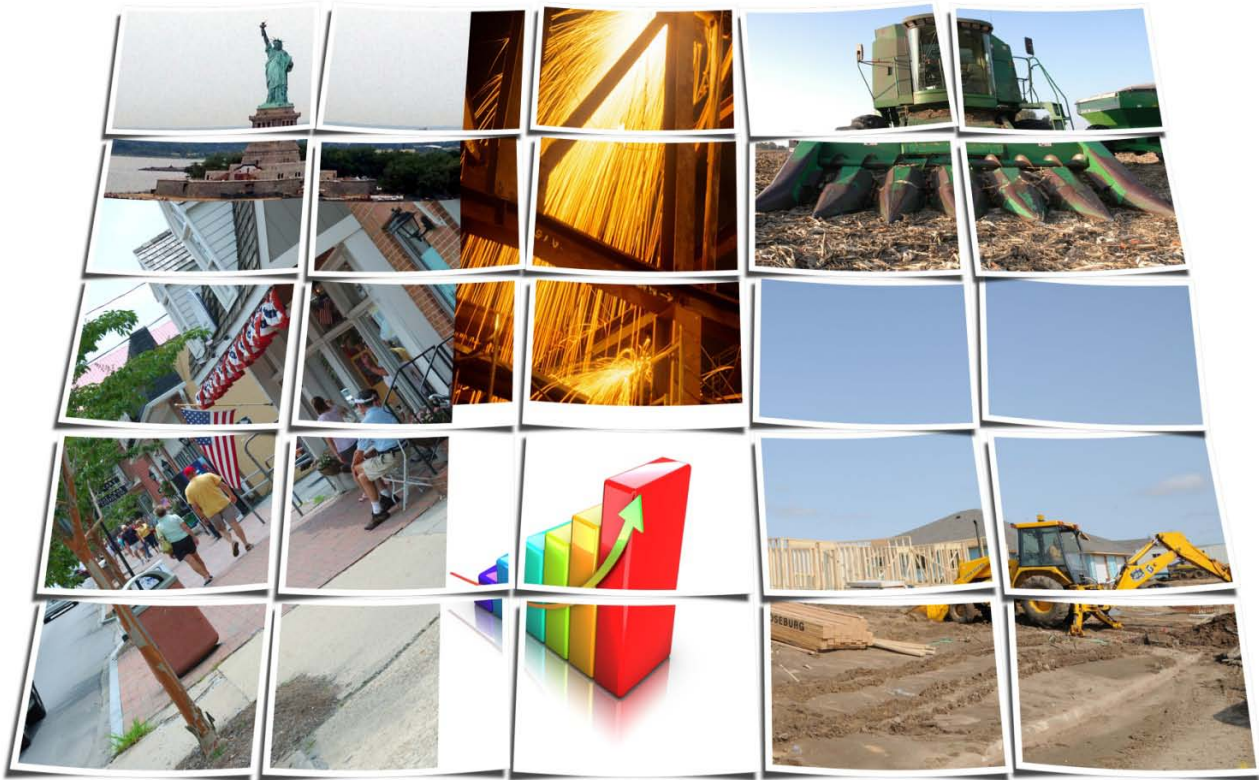
- ICBA Plan for Prosperity. January 2015
- ICBA Comment Letter Regarding the Economic Growth and Regulatory Paperwork Reduction Act Process. September 2, 2014



INDEPENDENT COMMUNITY  
BANKERS of AMERICA

*One Mission. Community Banks.®*

# Plan for Prosperity



**A Pro-Growth Agenda to Reduce the Onerous  
Regulatory Burden on Community Banks and  
Empower Local Communities**

**2015**

## **Plan for Prosperity: An Agenda to Reduce the Onerous Regulatory Burden on Community Banks and Empower Local Communities**

America's 6,500 community banks are vital to the prosperity of the U.S. economy, particularly in smaller towns and rural communities. Providing more than half of all small business loans under \$1 million, as well as customized mortgage and consumer loans suited to the unique characteristics of their local communities, community banks serve a vital role in ensuring the economic recovery is robust and broad based, reaching communities of all sizes and in every region of the country.

In order to reach their full potential as catalysts for entrepreneurship, economic growth, and job creation, community banks must be able to attract capital in a highly competitive environment. An end to the exponential growth of onerous regulatory mandates is critical to this objective. Regulation is suffocating nearly every aspect of community banking and changing the very nature of the industry away from community investment and community building to paperwork, compliance, and examination. A fundamentally new approach is needed: Regulation must be calibrated to the size, lower-risk profile, and traditional business model of community banks.

ICBA's Plan for Prosperity provides targeted regulatory relief that will allow community banks to thrive by doing what they do best – serving and growing their communities. By reducing unsustainable regulatory burden, the Plan will ensure that scarce capital and labor resources are used productively, not sunk into unnecessary compliance costs, allowing community banks to better focus on lending and investing that will directly improve the quality of life in our communities. Each provision of the Plan was selected with input from community bankers nationwide and crafted to preserve and strengthen consumer protections and safety and soundness.

The Plan is a set of detailed legislative priorities positioned for advancement in Congress. A subset of these priorities is specifically dedicated to strengthening community bank viability by creating new options for capital raising and capital preservation. A number of regulatory relief measures would be tiered, with different thresholds for Consumer Financial Protection Bureau rules (generally \$10 billion and under) and safety and soundness regulation (generally \$50 billion and under). The recommended thresholds are based on existing levels and statutory provisions, which may vary by provision.

ICBA is committed to advancing and enacting the provisions of the Plan with all due vigilance and the aggressive use of every resource at our disposal. The Plan is a flexible, living document that can be adapted to a rapidly changing regulatory and legislative environment to maximize its influence and likelihood of enactment. Provisions are described below.

## **ACCESS TO CAPITAL: CREATING NEW OPTIONS FOR THE CREATION AND PRESERVATION OF COMMUNITY BANK CAPITAL**

ICBA is proposing a set of options to strengthen community bank viability by enhancing access to capital.

**Basel III Amendments: Restoring the Original Intent of the Rule.** Basel III was originally intended to apply only to large, internationally active banks. ICBA proposes the following amendments for banks with assets of \$50 billion or less.

- *Exemption from the capital conservation buffer.* The new buffer provisions impose dividend restrictions that have a chilling effect on potential investors. This is particularly true for Subchapter S banks whose investors rely on dividends to pay their pro-rata share of the bank's tax. Exempting community banks from the capital conservation buffer would make it easier for them to raise capital.
- *Full capital recognition of allowance for credit losses.* Provide that the allowance for credit losses is included in tier 1 capital up to 1.25 percent of risk weighted assets with the remaining amount reported in tier 2 capital. This change would reverse the punitive treatment of the allowance under Basel III. The allowance should be captured in the regulatory capital framework since it is the first line of defense in protecting against unforeseen future credit losses.
- *Amend risk weighting to promote economic development.* Provide 100 percent risk weighting for acquisition, development, and construction loans. Under Basel III, these loans are classified as high volatility commercial real estate loans and risk weighted at 150 percent. ICBA's proposed change would treat these loans the same as other commercial real estate loans and would be consistent with Basel I.

**Additional Capital for Small Bank Holding Companies: Modernizing the Federal Reserve's Policy Statement.** Require the Federal Reserve to revise the Small Bank Holding Company Policy Statement – a set of capital guidelines that have the force of law. The Policy Statement, which makes it easier for small bank and thrift holding companies to raise additional capital by issuing debt, would be revised to increase the qualifying asset threshold from \$1 billion to \$5 billion. Qualifying bank and thrift holding companies must not have significant outstanding debt or be engaged in nonbanking activities that involve significant leverage.

**Relief from Securities and Exchange Commission Rules.** ICBA recommends the following changes to SEC rules which would allow community banks to commit more resources to their communities without putting investors at risk:

- Provide an exemption from internal control attestation requirements for community banks with assets of less than \$1 billion. The current exemption applies to any company with market capitalization of \$75 million or less. Because community bank internal control systems are monitored continually by bank examiners, they should not have to sustain the unnecessary annual expense of paying an outside audit firm for attestation work. This provision will substantially lower the regulatory burden and expense for small, publicly traded community banks without creating more risk for investors.



- Due to an oversight in the 2012 JOBS Act, thrift holding companies do not have statutory authority to take advantage of the increased shareholder threshold below which a bank or bank holding company may deregister with the SEC. Congress should correct this oversight by allowing thrift holding companies to use the new 1,200 shareholder deregistration threshold as well as the new 2,000 shareholder registration threshold.
- Regulation D should be reformed so that anyone with a net worth of more than \$1 million, including the value of their primary residence, would qualify as an “accredited investor.” The number of non-accredited investors that could purchase stock under a private offering should be increased from 35 to 70.

## **TARGETED REGULATORY RELIEF**

**Supporting a Robust Housing Market: Mortgage Reform for Community Banks.** Provide community banks relief from certain mortgage regulations, especially for loans held in portfolio. When a community bank holds a loan in portfolio, it has a direct stake in the loan’s performance and every incentive to ensure it is properly underwritten, affordable and responsibly serviced. Relief would include:

- Providing “qualified mortgage” safe harbor status for loans originated and held in portfolio by banks with less than \$10 billion in assets, including balloon mortgages.
- Exempting banks with assets below \$10 billion from escrow requirements for loans held in portfolio.
- An exemption from the higher risk mortgage appraisal requirements for loans of \$250,000 or less provided they are held in portfolio by the originator for a period of at least three years.
- New information reporting requirements under the Home Mortgage Disclosure Act should not apply to community banks.

**Strengthening Accountability in Bank Exams: A Workable Appeals Process.** The trend toward oppressive, micromanaged regulatory exams is a concern to community bankers nationwide. An independent body would be created to receive, investigate, and resolve material complaints from banks in a timely and confidential manner. The goal is to hold examiners accountable and to prevent retribution against banks that file complaints.

**Reforming Bank Oversight and Examination to Better Target Risk.** ICBA makes the following recommendations to allow bank examiners to better target their resources at true sources of systemic risk:

- A two-year exam cycle for well-rated community banks with up to \$2 billion in assets would allow examiners to better target their limited resources toward banks that pose systemic risk. It would also provide needed relief to bank management for whom exams are a significant distraction from serving their customers and communities.
- Banks with assets of \$50 billion or less should be exempt from stress test requirements.
- Community banks should be allowed to file a short form call report in the first and third quarters of each year. The current, long form call report would be filed in the second and fourth quarters. The quarterly call report now comprises some 80 pages supported by almost 700 pages of instructions. It represents a growing burden on community banks without being an effective supervisory tool.

**Redundant Privacy Notices: Eliminate Annual Requirement.** Eliminate the requirement that financial institutions mail annual privacy notices even when no change in policy has occurred. Financial institutions would still be required to notify their customers by mail when they change their privacy policies, but when no change in policy has occurred, the annual notice provides no useful information to customers and is a needless expense.

**Balanced Consumer Regulation: More Inclusive and Accountable CFPB Governance.** The following changes would strengthen CFPB accountability, improve the quality of the agency's rulemaking, and make more effective use of its examination resources:

- Change the governance structure of the CFPB to a five-member commission rather than a single Director. Commissioners would be confirmed by the Senate to staggered five-year terms with no more than three commissioners affiliated with any one political party. This change will strengthen accountability and bring a diversity of views and professional backgrounds to decision-making at the CFPB.
- The Financial Stability Oversight Council's review of CFPB rules should be strengthened by changing the vote required to veto a rule from an unreasonably high two-thirds vote to a simple majority, excluding the CFPB Director.
- All banks with assets of \$50 billion or less should be exempt from examination and enforcement by the CFPB; and CFPB backup (or "ride along") authority for compliance exams performed by a bank's primary regulator should be eliminated.

**Eliminate Arbitrary "Disparate Impact" Fair Lending Suits.** Amend the Equal Credit Opportunity Act and the Fair Housing Act to bar "disparate impact" causes of action. Lenders that uniformly apply neutral lending standards should not be subject to frivolous and abusive lawsuits based on statistical data alone. Disparate impact forces lenders to consider factors such as race and national origin in individual credit decisions, which are specifically precluded by law.

**Ensuring the Viability of Mutual Banks: New Charter Option.** The OCC should be allowed to charter mutual national banks to provide flexibility for institutions to choose the charter that best suits their needs and the communities they serve.

**Rigorous and Quantitative Justification of New Rules: Cost-Benefit Analysis.** Provide that financial regulatory agencies cannot issue notices of proposed rulemakings unless they first determine that quantified costs are less than benefits. The analysis must take into account the impact on the smallest banks which are disproportionately burdened by regulation because they lack the scale and the resources to absorb the associated compliance costs. In addition, the agencies would be required to identify and assess available alternatives including modifications to existing regulations. They would also be required to ensure that proposed regulations are consistent with existing regulations, written in plain English, and easy to interpret.

**Cutting the Red Tape in Small Business Lending: Eliminate Burdensome Data Collection.** Exclude banks with assets below \$10 billion from new small business data collection requirements. This provision, which requires the reporting of information regarding every small business loan application, falls disproportionately upon community banks that lack scale and compliance resources.

**Preserve Community Bank Mortgage Servicing.** The provisions described below would help preserve the important role of community banks in servicing mortgages and deter further industry consolidation, which is harmful to borrowers:

- Increase the “small servicer” exemption threshold to 20,000 loans (up from 5,000). To put this proposed threshold in perspective, the average number of loans serviced by the five largest servicers subject to the national mortgage settlement is 6.8 million. An exemption threshold of 20,000 would demarcate small servicers from both large and mid-sized servicers.
- For banks with assets of \$50 billion or less, reverse the punitive Basel III capital treatment of mortgage servicing rights (MSRs) and allow 100 percent of MSRs to be included as common equity tier 1 capital.

**Creating a Voice for Community Banks: Treasury Assistant Secretary for Community Banks.**

Economic and banking policies have too often been made without the benefit of community bank input. An approach that takes into account the diversity and breadth of the financial services sector would significantly improve policy making. Creating an Assistant Secretary for Community Banks within the U.S. Treasury Department would ensure that the more than 6,500 community banks across the country, including minority banks that lend in underserved markets, are given appropriate and balanced consideration in the policy making process.

**Modernize Subchapter S Constraints.** Subchapter S of the tax code should be updated to facilitate capital formation for community banks, particularly in light of higher capital requirements under the proposed Basel III capital standards. The limit on Subchapter S shareholders should be increased from 100 to 200; Subchapter S corporations should be allowed to issue preferred shares; and Subchapter S shares, both common and preferred, should be permitted to be held in individual retirement accounts (IRAs). These changes would better allow the nation’s 2,200 Subchapter S banks to raise capital and increase the flow of credit.

**Five-Year Loss Carryback Supports Lending During Economic Downturns.** Banks with \$15 billion or less in assets should be allowed to use a five-year net operating loss (NOL) carryback. The five-year NOL carryback is countercyclical and will support community bank capital and lending during economic downturns.

**Risk Targeting the Volcker Rule.** Exempt banks with assets of \$50 billion or less from the Volcker Rule. The Volcker Rule should apply only to the largest, most systemically risky banks. Proposals to apply the rule to community banks carry unintended consequences that threaten to destabilize segments of the community banking industry.

*The Independent Community Bankers of America®, the nation’s voice for 6,500 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. For more information, visit [www.icba.org](http://www.icba.org).*



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CAMDEN R. FINE  
*President and CEO*

September 2, 2014

Robert deV. Frierson, Secretary  
Board of Governors  
Federal Reserve System  
20<sup>th</sup> Street and Constitution  
Washington, DC 20551

Robert E. Feldman, Executive Secretary  
Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street NW  
Washington, DC 20429

Legislative and Regulatory Activities Division  
Office of the Comptroller of the Currency  
400 7<sup>th</sup> Street SW  
Washington, DC 20219

Re: Regulatory Publication and Review Under the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), Docket No. FFIEC-2014-0001; Fed Docket No. OP-1491;

Dear Sirs or Madam:

The OCC, the Federal Reserve Board, and the FDIC are conducting a review of the regulations they have issued to identify outdated, unnecessary or unduly burdensome regulation on insured depository institutions. This review is required under the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA) and will be conducted over a two year period. The Independent Community Bankers of America (ICBA)<sup>1</sup> appreciates the opportunity to comment on the first notice that was published by the banking agencies under EGRPRA to help identify those regulations in the first three categories of regulations that are outdated, unnecessary or unduly burdensome.

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<sup>1</sup> *The Independent Community Bankers of America® (ICBA), the nation's voice for more than 6,500 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services.*

*ICBA members operate 24,000 locations nationwide, employ 300,000 Americans and hold \$1.3 trillion in assets, \$1 trillion in deposits and \$800 billion in loans to consumers, small businesses and the agricultural community. For more information, visit [www.icba.org](http://www.icba.org).*

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Under EGRPRA, the banking agencies will review more than a hundred subject areas of regulations. The banking agencies have grouped these regulations into twelve regulatory categories. Over the next two years, the agencies plan to publish four Federal Register notices, each addressing one or more categories of rules. Our understanding is that the CFPB will not be a part of this process, but is required to review its significant rules and publish a report of its review no later than five years after they take effect.

This letter will comment not only on the first three categories of regulations—Applications and Reporting, Powers and Activities, and International Operations—but will also comment generally on the EGRPRA process and also the severe regulatory environment that community banks now face.

### **EGRPRA Process**

ICBA and its members were very actively engaged during the first EGRPRA review process which was conducted from 2004 to 2006. ICBA members and staff attended many of the outreach meetings and extensively commented on all six of the published EGRPRA notices. According to the final EGRPRA report that the FFIEC published in the Federal Register and sent to Congress in 2007<sup>2</sup>, there were sixteen EGRPRA outreach sessions around the country involving more than five hundred participants, most of whom were community bankers. At the St. Louis outreach session, for instance, there were almost one hundred community banks represented. The agencies received 850 letters from bankers, consumer and community groups, trade associations, and other interested parties in response to their comment requests.

**Despite the strong involvement and input from community banks during the first EGRPRA review process, community banks and the ICBA were deeply disappointed and disillusioned with the outcome.** Since few substantive regulations were repealed, eliminated or substantially amended by the banking agencies, many community bankers have concluded that EGRPRA is no more than a “check the box” regulatory process. On the major issues raised by the bankers in 2004 to 2006, such as repealing the right of rescission under the Truth in Lending Act, raising the \$10,000 Currency Transaction Report threshold, or reducing disclosures under the Home Mortgage Disclosure Act, the banking agencies either rejected the recommendations outright or deferred action until further study could be completed.

Overall, the banking agencies believed that their first EGRPRA review had been a success because they were able to eliminate some duplicative regulation, or accomplish such things as redesigning their financial institution letters, or streamlining their branch application procedures. However, these changes hardly made an impact on the overall regulatory burden that now confronts community banking.

**If the new EGRPRA process is to have any chance at success, there must be a strong commitment by the heads of the banking agencies to do what is necessary to eliminate regulation that is outdated, unnecessary or unduly burdensome. The**

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<sup>2</sup> See the Federal Register, Volume 72, No. 211 on November 1, 2007.

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**EGRPRA statutory mandate requires the agencies to go beyond merely streamlining regulations, tweaking certain regulations, eliminating duplication, or deferring action until some further interagency study can be completed. Rather, the mandate requires the agencies to thoroughly review each regulation and eliminate it if it is outdated, unnecessary or unduly burdensome.**

This will require the agencies to consider the costs and benefits of each regulation and to carefully consider the input they receive from community bankers. Furthermore, even if there are some benefits to having a regulation, it should be eliminated under the EGRPRA process if it can be shown to be unduly burdensome.

**Furthermore, ICBA urges the banking agencies to hold at least six outreach meetings around the country to gather the input and testimony of community banks.** At these outreach meetings, community bankers should be allowed to discuss the overall regulatory burden and how it could be reduced. For those bankers that are unable to attend the outreach meetings, they should be permitted to participate remotely by phone. The best way to truly assess the costs and benefits of banking regulation is to hear the personal experiences and testimony of bankers.

**The banking agencies also should set up an EGRPRA.gov website as they did during the first review.** On the website, the agencies can post the comment letters they receive, post the notices that are published in the Federal Register, and list the regulations that bankers mention the most as being outdated, unnecessary or unduly burdensome. There could be a top ten list of the most burdensome regulations which would include those regulations that are mentioned the most at the outreach meetings and in banker comment letters. The EGRPRA.gov website could also post notices about the outreach meetings and summaries of each meeting.

**Finally, there should be an overall director of the current EGRPRA interagency review process—an EGRPRA czar—who has a strong commitment to reducing unnecessary and unduly burdensome regulation and who can, in certain situations, overcome the objections of individual agencies to specific recommendations and resolve interagency disputes.** Too often during the last EGRPRA review process, burden reducing recommendations were rejected because of the objection of one agency or because the agencies could not achieve a consensus. This director or EGRPRA czar should have the authority to overrule such objections where it is clear that the regulation is unduly burdensome. There will always be someone who can find some reason to preserve a regulation so, to ensure an effective process, there should be a director who can overcome such objections.

### **The Overall Regulatory Burden on Community Banks**

In the preface to the last EGRPRA report in 2007, John Reich, who at that time was not only the Director of the Office of Thrift Supervision but also the leader of the interagency EGRPRA program, warned of the consequences to community banking if the regulatory burden was not reduced. He said:

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“Financial institutions of all sizes suffer under the weight of unnecessary regulatory burden, but small community banks unquestionably bear a disproportionate share of the burden due to their more limited resources. While it is difficult to accurately measure the impact regulatory burden has played in industry consolidation, numerous anecdotal comments from bankers across the country as well as from investment bankers who arrange merger and acquisition transactions indicate it has become a significant factor. Accordingly, I am deeply concerned about the future of our local communities and the approximately 8,000 community banks under \$1 billion in assets...”

Since John Reich’s statement in 2007, the number of community banks has dropped to about 6,500 due mainly to consolidation, and the amount of regulation has grown exponentially.

Several recent studies have attempted to quantify the overwhelming regulatory burden on community banking. For instance, according to a recent KPMG Banking Industry Outlook Survey<sup>3</sup>, sixty percent of bankers said that regulatory requirements account for as much as 10 percent of their total operating costs and that 22 percent said that complying with the regulation is responsible for as much as 11 to 20 percent of their total operating costs. As KPMG concludes, “This significantly adds to the pressure that banks are already feeling to keep costs down to deliver the returns investors expect while also raising the higher levels of capital now required.”

The Mercatus Center at George Mason University recently produced a high quality empirical study<sup>4</sup> on the impact of regulations on community banks since the Dodd-Frank Act was enacted in 2010. The study, which is based on a survey of approximately 200 community banks in 41 states with less than \$10 billion in assets, is largely consistent with the anecdotal evidence. Broad findings from the study include:

- **Additional costs.** Approximately 90 percent of respondents reported that compliance costs have increased since 2010. 83 percent reported that they had increased by more than 5 percent.
- **Outside consultants.** More than half of surveyed community banks (51%) anticipate engaging with outside consultants in connection with the Dodd-Frank Act requirements, and an additional 21 percent are unsure.
- **Additional compliance personnel.** Since 2010, the respondent banks said they have hired additional compliance/legal personnel. 27 percent of respondents plan to hire additional compliance/legal personnel in the next 12 months, and an additional 28 percent are unsure. The survey also finds that employees not exclusively dedicated to compliance, including CEOs and senior managers, are forced to spend more time on compliance issues.

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<sup>3</sup> The KPMG study can be found at:  
[http://www.kpmginfo.com/industryoutlooks-surveys/2014/pdfs/KPMGBankingIndustrySurvey\\_072414.pdf](http://www.kpmginfo.com/industryoutlooks-surveys/2014/pdfs/KPMGBankingIndustrySurvey_072414.pdf)

<sup>4</sup> “How are Small Banks Faring Under Dodd-Frank?” Hester Peirce, Ian Robinson, and Thomas Stratmann. Mercatus Center Working Paper. February 2014.

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- **Regulation is driving consolidation.** 26 percent of respondents anticipate that their bank will engage in merger activity in the next five years, and another 27 percent are unsure. 94 percent of banks anticipate further industry consolidation.

The anecdotal evidence is also compelling. ICBA established an EGRPRA website so that its members could give some feedback online about EGRPRA and regulatory burden. One banker expressed the frustrations of many community banks with this comment:

“Banking has become the most highly regulated industry in the world. Legislation and regulation created to address problems caused by the largest banks has been foisted upon all banks. As such, we are seeing the life-blood sucked out of our local communities. Meanwhile, un-taxed credit unions, already held to a much lower standard of compliance, are allowed seemingly unbridled growth. They now boast membership exceeding 100 million... When coupled with the Farm Credit System loaning any amount to anyone at any rate they choose, you have a serious problem for the continued viability of community banking in this country. Meanwhile, "back at the ranch", you have community bankers, many of whose institutions have been in business for 100+years, seriously considering folding up their tent. I would add that the creation of the Consumer Financial Protection Bureau, with its annual payroll now exceeding \$200 million, will do nothing but increase costs to consumers and make the problems worse. We need less regulation, not more; less government, not more; more action and less talk.

The Mercatus Study noted above also reported narrative comments from respondents about regulation. Here are a few examples:

- “We don’t have the number of employees or the financial resources to keep up with [new] rules ... Why make it harder for community banks to do business and survive? We fill a niche that larger banks can’t and won’t.”
- “Community banks that know their customers will struggle to be able to continue to lend to good, long-term customers.”
- “Many concerned, conscientious community bankers are selling out or just retiring due to the maddening pace of illogical and unnecessary regulation. Not one of the regulations we’ve seen would have done anything to prevent the 2008 collapse.”

These comments, offered anonymously by bankers, illustrate how increasing regulatory burden is fundamentally changing the nature of the business of community banking.

Community banks play a crucial role in the economic life of rural areas and small communities passed over by larger banks. The credit and other financial services they provide in these communities will help advance and sustain the economic recovery and ensure that it reaches every corner of the country. Community banks are responsible for 60 percent of all small business loans under \$1 million. As the economic recovery

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strengthens, small businesses will lead the way in job creation with the help of community bank credit.

The role of community banks in advancing and sustaining the recovery is jeopardized by the increasing expense and distraction of regulation drastically out of proportion to any risk they pose. **Community banks didn't cause the recent financial crisis, and they should not bear the weight of new, overreaching regulation intended to address it.**

**ICBA urges the regulatory agencies as part of the EGRPRA process to conduct their own empirical study of the regulatory burden on community banks to quantify the burden and confirm what the KPMG, Mercatus and other studies are showing—that the burden is significant and is driving community banks out of the business of banking.** Such a study could also identify those regulations that are the most burdensome. The FDIC attempted to conduct such a study as part of its 2012 Community Bank Study. In the appendix to that study, the FDIC summarized its interviews with community bankers concerning regulatory compliance costs but failed to quantify the costs, after concluding it would be difficult.

**We urge the FDIC, the OCC, and the Federal Reserve to confirm what community bankers are also saying anecdotally—that each new regulation is not only reducing the franchise value of their banks but also impairing the ability of their banks to lend to the communities they serve.**

### **Specific Comments on the Three Categories of Regulations**

ICBA has a number of specific burden reducing recommendations regarding the first two of the three categories of regulation that the agencies have requested comments on—Applications and Reporting and Powers and Activities. We have no comments on International Operations regulations.

**Call Report Burden.** With 80 pages of forms to complete and over 670 pages of instructions, the call report has become a significant regulatory burden for community banks to prepare. In fact, as new regulations are issued and old ones are amended, the call report just gets more complicated and more burdensome to prepare. From that perspective, the call report really has become a symbol of the overall regulatory burden community banks currently experience.

For instance, the call report has grown from 18 pages in 1986 to 29 pages in 2003 to nearly 80 pages today! Just recently the regulators proposed another 57 pages of instructions because of the new Basel III regulatory capital framework. The call report—which community banks submit every 65 business days—has more pages than the typical U.S. community bank has employees. Community banks have very limited resources available to tackle the challenges faced when trying to meet ever changing regulatory reporting requirements that do not properly consider the size and complexity of the institution.

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ICBA's recently released its 2014 Community Bank Call Report Burden Survey.<sup>5</sup> According to the survey, 86 percent of community bank respondents said that the annual cost of preparing the report has increased over the past ten years. Further, 98 percent of respondents said ICBA's proposed short-form call report, which qualifying community banks would be able to submit for the first and third quarters of each year, would reduce their regulatory burden. Seventy-two percent said the burden reduction would be substantial. The survey also showed that over the last ten years the number of hours required to complete the call report and the resources involved with meeting reporting obligations has increased.

Recent expansions of the use of the call report as an information gathering tool for consumer protection regulation further damage the effectiveness of the information provided and the use of the report as a safety and soundness metric. ICBA notes that regulated credit unions are not required to produce anywhere near the level of detail that is required by community banks even though their depositors are offered the same levels of protection and they engage in similar and in some cases identical activities as community banks. For example, in the first quarter of 2014, the smallest community bank was required to submit a call report that is 80 pages in length while the largest credit union in the country with over \$58 billion in assets submitted a call report with only 28 pages.

**ICBA believes that highly rated, well-capitalized community banks would benefit greatly from a call reporting structure that allows them to file a short-form call report covering the first and third quarters and a long-form call report for the second and fourth quarters of each year.** Preparers of community bank call reports believe that preparing a short-form call report with limited schedules in certain quarters would reduce the overall time required to meet call reporting obligations and reduce regulatory burden substantially. Without immediate relief for community banks that reduces the current regulatory burden including the increasingly taxing call report requirements, consolidation of community banks in the United States will occur at a rapid rate.

ICBA strongly urges the banking agencies to work actively together to amend the current call report burden by allowing community banks to make use of the short-form call report solution. With only approximately 60 business days between reporting periods, instituting the short-form call report solution will greatly alleviate limited community bank resources that would be better deployed meeting the needs of local communities without compromising on the valuable metrics needed to efficiently assess safety and soundness. ICBA is proposing that in the community bank's fiscal first and third quarters, the complete call report would be replaced by a short-form call report that includes only limited financial schedules such as the income statement, balance sheet, and statement of changes in bank equity capital. These schedules would provide the agencies with sufficient information to detect any significant changes in condition that might warrant additional follow up.

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<sup>5</sup> ICBA's 2014 Community Bank Call Report Burden Survey can be found at <http://www.icba.org/files/ICBASites/PDFs/2014CallReportSurveyResults.pdf>

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We also encourage the Federal Reserve to streamline the FRY-9 for shell holding companies of community banks. The current FRY-9 requires too much information in cases where the holding company has no other assets but the stock of the bank.

**Small Bank Holding Company Policy Statement.** Appendix C of Regulation Y includes the Small Bank Holding Company Policy Statement on Assessment of Financial and Managerial Factors (Policy Statement). This Policy Statement applies only to bank holding companies with pro forma consolidated assets of less than \$500 million that (1) are not engaged in any nonbanking activities involving significant leverage and (2) do not have a significant amount of outstanding debt that is held by the general public.

ICBA strongly believes that the asset threshold under the Policy Statement should be raised to at least \$5 billion. In addition, we recommend the debt-to-equity ratio threshold of 1:1 be increased to 3:1. Increasing the exemption to \$5 billion would improve the ability of small local institutions to sell their stock locally, keeping the financial decisions affecting the community in the local area.

Access to capital for community banks has never been more difficult than it is today. Since 2007, the public capital markets have been either unavailable or unattractive to many community bank and holding companies. Many community banks have had to rely more on existing shareholders, directors and insiders for capital raises and less on new investors, including institutions and private equity investors. Furthermore, many community banks will need to raise additional capital not only for business purposes but also to ensure compliance with regulatory requirements including the new Basel III requirements. Those community banks that have not redeemed their Troubled Asset Relief Program (TARP) or Small business Lending Fund (SBLF) securities, or that have been deferring dividends on their trust preferred securities, have additional reasons for needing capital.

Allowing a larger number of community bank holding companies to qualify under the Policy Statement (i.e., those with consolidated assets of up to at least \$5 billion) would make it easier for these community bank holding companies to issue debt and equity on an unconsolidated basis that could be used to support the capital needs of their banking subsidiaries or to redeem their TARP or SBLF securities. We also believe a 3:1 debt to equity ratio is a reasonable holding company leverage ratio and would also facilitate the raising of capital at the holding company level. Small savings and loan holding companies should also have the ability to benefit from using the Policy Statement.

**De Novo Bank Applications.** ICBA appreciates the meetings we have had with FDIC staff about de novo bank application process. However, we continue to hear from our members and others that FDIC policies and practices are inhibiting the formation of de novo institutions.

For example, it has been reported to us that the requirement that a state nonmember de novo bank is subject to FDIC approval for any material change or deviation in its business plan during the fourth through seventh years serves as a major deterrent to

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organizing groups and their efforts to raise sufficient capital in their communities. There are also reports that at pre-filing meetings with the FDIC, the organizers have been advised that they need to raise capital upfront in amounts sufficient to maintain a leverage ratio of at least 8 percent for a seven year period.

We have also heard from others that the increasingly lengthy and uncertain application process serves as a deterrent to forming de novo banks. Apparently, some would-be applicants are overwhelmed by the uncertainty of approval and timely processing of the applications, and thus decide not to take the considerable risk of subjecting themselves to those uncertainties.

**Given the continuing dearth in de novo applications, ICBA urges the FDIC to streamline the application process.** Furthermore, the FDIC should advise staff that meet with de novo bank applicants and process applications that it is not requiring initial capital to cover the full seven year period, that the application process will not overwhelm applicants, and that the FDIC will not question the judgment of the organizing group of the need for a de novo bank in the market unless it is clearly erroneous.

Also given the misperceptions surrounding the FDIC's policies and practices, **ICBA recommends that the FDIC issue a new Financial Institutions Letter or FIL to help dispel misconceptions and reaffirm the FDIC's support for the formation of de novo banks.**

**Simplification and Update of Regulation O.** Federal Reserve Regulation O still continues to confuse community bankers. The rules on prior approval of extensions of credit, on additional restrictions on loans to executive officers, and the definition of what is an "extension of credit" need to be clarified and simplified. Furthermore, it is time to revisit some of the loan limits, such as the \$100,000 aggregate credit limit to executive officers in Section 215.5.

ICBA suggests also easing some of the requirements for community banks with CAMELS composite ratings of "1" or "2" and management ratings of not lower than "2." We also think that the agencies should issue a Regulation O summary chart to capture the limitations on loans to various types of insiders in an easy comprehensive way, with cross references to Federal Reserve Regulation W.

## **Conclusion**

ICBA hopes that this EGRPRA review process will be more of a success than the last one which failed to make any substantive changes to banking regulations. We strongly recommend that as part of the current EGRPRA process (1) the agencies hold at least six outreach meetings to solicit the comments and testimony of community banks to the regulatory burden, (2) the agencies establish an EGRPRA.gov website to post the comments received and list those regulations that community banks consider the most burdensome, and (3) establish an "EGRPRA czar" who could resolve interagency disputes over the regulations. But more importantly, a strong commitment at the top is

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needed to do what is necessary to eliminate regulation that is outdated, unnecessary or unduly burdensome. Otherwise, the whole EGRPRA process will be a meaningless, regulatory check-the-box exercise.

The overall regulatory burden has increased dramatically since 2007 when the last EGRPRA report was issued and when the EGRPRA director, John Reich, expressed his concerns about the future of community banking. We encourage the regulators to conduct their own empirical research confirming what other studies are showing—that community banks are exiting the business because the regulatory burden is so severe.

ICBA has a number of burden-reducing recommendations concerning the first two categories of regulations. With regard to call reports, we urge the agencies to adopt a streamlined call reporting system that would allow highly rated, well-capitalized community banks to file a short-form call report covering the first and third quarters and a long-form call report for the second and fourth quarters of each year. This would greatly reduce the call report burden.

ICBA also recommends amendment of the Small Bank Holding Company Policy Statement so that bank holding companies with consolidated assets of up to \$5 billion could benefit from it. In addition, we recommend the debt-to-equity ratio threshold under the Policy Statement of 1:1 be increased to 3:1. Increasing the exemption to \$5 billion and easing the leverage ratio would improve the ability of small local institutions to sell their stock locally and would allow them to more easily issue debt at the holding company level to support the capital needs of their banking subsidiaries.

ICBA still hears from our members and others that FDIC policies and practices are inhibiting the formation of de novo institutions. We believe the process should be streamlined and urge the FDIC to issue a FIL to help dispel misconceptions and reaffirm the FDIC's support for the formation of de novo banks.

ICBA also supports the simplification of Regulation O and recommends that the requirements be eased for those community banks with high management and CAMELS ratings. Some of the loan limits should be reviewed and updated, and the regulators should issue a simplified summary of the regulation for community banks.

ICBA appreciates the opportunity to comment on the first notice that was published by the banking agencies under EGRPRA to help identify those regulations in the first three categories of regulations that are outdated, unnecessary or unduly burdensome and to discuss the EGRPRA process and the regulatory burden on community banks. If you have any questions or would like additional information, please do not hesitate to contact me by email at [Chris.Cole@icba.org](mailto:Chris.Cole@icba.org).

Sincerely,  
/s/ Christopher Cole  
Christopher Cole  
Executive Vice President and Senior Regulatory Counsel

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April 30, 2015

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, D.C. 20510

The Honorable Thomas Carper  
Ranking Member  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, D.C. 20510

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs  
and Federal Management  
Washington, D.C. 20510

The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
and Federal Management  
Washington, D.C. 20510

This letter responds to the Senate Homeland Security and Governmental Affairs Committee March 18, 2015, request for information related to existing and proposed regulations that have had, or will have, an impact on the oil and natural gas exploration and production industry. The Independent Petroleum Association of America (IPAA) appreciates your interest in these important issues and welcomes the opportunity to respond.

IPAA represents the thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts, that have been, or will be, most significantly affected by regulatory actions. Independent producers drill about 95 percent of American oil and natural gas wells, produce about 54 percent of American oil, and more than 85 percent of American natural gas. IPAA's membership is diverse. In addition to the hundreds of publicly traded companies that are independent producers, numerically, the overwhelming majority of independent producers are small businesses. Based upon a 2012 survey of IPAA's membership, the typical IPAA member employs 12 full-time and 2 part time employees and has been in business for 23 years. Many independent producers are marginal well operators.

The appendix to this letter more fully develops the scope of federal regulatory actions impacting America's independent producers. Please do not hesitate to contact Lee Fuller ([lfuller@ipaa.org](mailto:lfuller@ipaa.org)) or Matt Kellogg ([mkellogg@ipaa.org](mailto:mkellogg@ipaa.org)) at 202.857.4722 if you require additional information.

Sincerely,

Barry Russell  
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# **APPENDIX**

## **1. Clean Water Act**

### **a. Navigable Waters (Waters of the United States) Definition**

In April 2014, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) released a proposed rulemaking to identify waters protected by the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA) – shifting from “navigable waters” to “waters of the United States” (WOTUS) – and implement the Supreme Court’s decisions concerning the extent of waters covered by the CWA. The comment period for proposed rulemaking had been extended a number of times and closed on November 14, 2014. In connection with the transmission of the draft regulations, EPA’s Science Advisory Board released for public comment a draft scientific report, titled, “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” (connectivity report). A final version of the connectivity report appeared in the Federal Register on October 24, 2014.

Congress authorized the agencies to regulate discharges of pollutants into “navigable waters,” which is defined in the CWA as “waters of the United States”. The determination of what constitutes a water of the United States governs the scope of the agencies’ authority under a variety of CWA programs, including the Spill Prevention, Control, and Countermeasure (SPCC), the National Pollutant Discharge Elimination System (NPDES) program and the Section 404 dredge and fill program. This rulemaking broadly expands EPA’s authority.

Any proposal that could restructure the scope of the CWA is a critical issue confronting American natural gas and petroleum production. The CWA already has far-reaching applications that affect the permitting and compliance activities of the oil and natural gas industry.

It is anticipated that the final rulemaking will be subject to extensive litigation by a broad cross section of industries and environmentalists.

### **b. Effluent Limitation Guidelines**

#### **i. Unconventional Oil and Gas Pretreatment Effluent Limitation Guideline**

In the spring of 2015 EPA proposed an Unconventional Oil and Gas (UOG) Pretreatment Effluent Limitation Guideline (ELG) for waste water going to Publicly Owned Treatment Works (POTW). EPA has not undertaken any analysis regarding whether such an ELG is needed. EPA argues that it must create an ELG to prevent and/or strictly regulate produced water (from fossil fuel extraction operations) from going to POTWs. As justification for its proposed rulemaking, EPA argues that the regulation only maintains current industry practice by encouraging recycling or requiring permanent disposal pursuant to the Underground Injection Control Program of the Safe Drinking Water Act (SDWA). EPA also argues that a number of states have

requested EPA promulgate an ELG to deal with this issue. The desire to create an SGE ELG likely originated with reports of elevated bromide levels in Pennsylvania waterways. However, the Pennsylvania Department of Environmental Protection (DEP) prohibited any produced water from Marcellus Shale wells from being sent to Pennsylvania POTWs. In virtually all other oil and natural gas producing states, produced water is disposed pursuant to the SDWA UIC program – which is already a federally regulated practice. In current commodity price environments, less drilling for oil and natural gas is taking place. As such, there are fewer opportunities to recycle waste water. More waste water requires disposal. Regulatory uncertainty surrounding the UIC programs in certain states exists. Therefore, a rigid, one sized-fits-all ELG standard is unworkable, particularly in light of the fact that an SGE ELG is not needed since the CWA provides for a flexible permitting process, Best Professional Judgment (BPJ). Producers need options to dispose of produced water and should be able to discharge if requisite treatment standards are met.

EPA has now proposed a rigid ELG pretreatment standard – zero discharge. This action is a failure of EPA’s responsibilities. Once it stepped into the ELG process, a final ELG prevents the use of BPJ. Consequently, EPA needs to develop an actual technology based ELG. Instead, EPA has chosen a zero discharge standard based on the direct discharge ELG for oil and gas production. This is a flawed analysis. The direct discharge ELG is based on circumstances in the mid-1970s where EPA concluded that the presence of the SDWA UIC program provided an acceptable produced water management option. However, the very trigger that EPA justified in arguing for a UOG Pretreatment ELG was the use of POTWs in an area where UIC was not available. Consequently, it is inappropriate for EPA to create a zero discharge ELG; it needs to develop appropriate Best Available Technology Economically Achievable (BATEA) standards for a UOG Pretreatment ELG.

## **ii. Centralized Waste Treatment Study**

EPA recently announced its intention to launch a study of centralized waste treatment (CWT) facilities that accept oil and gas extraction wastewater, to examine whether current regulations provide adequate controls for treating waste water. EPA indicated the CWT study will target offsite CWT facilities and, at this time, the effort will not target onsite treatment systems at exploration and production sites nor will the study related to offsite facilities that do not discharge to a “water of the United States” (e.g., recycling and reuse facilities). However, the CWT study will look at all CWTs accepting oil and natural gas wastes – both from conventional and unconventional operations. Limitations on the ability to use CWT facilities will further reduce opportunities to dispose of waste water.

## **2. Clean Air Act**

### **a. New Source Performance Standards – Subpart OOOO**

In August 2012, EPA finalized Clean Air Act (CAA) New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAPS) for the Oil and Natural Gas Sector. Additionally, in 2014, EPA promulgated a second reconsideration rulemaking that focused on NSPS implementation issues and clarifications related to well completions. EPA solicited feedback on the low-pressure well definition that would provide relief to smaller operations. A second set of reconsideration amendments for NSPS Subpart OOOO is now pending.

With respect to the NESHAPS rulemaking, EPA may propose a reconsideration rulemaking in the future. The first issue had been announced earlier in the process and relates to the appropriateness of using the upper protective limit to account for Maximum Achievable Control Technology (MACT) variability when it sets its MACT floors - which EPA did in this rulemaking. Environmental groups have challenged this approach. The other issues fall into two categories relating to either the risk assessment or the technical review – in both instances it appears EPA is attempting to better explain and clarify what it did initially – so wholesale changes are not expected. In terms of the risk assessment, EPA intends to (1) better describe the data that was used in the risk assessment and how it was used, (2) address the adequacy of the data used in its sensitivity analysis; and (3) discuss the adequacy of the Hazardous Air Pollutants (HAPs) addressed and associated emissions points. With regard to the technical review, EPA intends to (1) discuss why/how the technologies reviewed were appropriate and reevaluate/bolster its rationale; and (2) determine if any new data or reports should be considered in its review.

EPA may further expand Subpart OOOO as a part of its Climate Action Plan initiative on methane emissions.

#### **b. Methane Emissions**

In March 2014, President Obama issued the Climate Action Plan Strategy to Reduce Methane Emissions (CAP). President Obama has made climate change a legacy issue for his Administration. Reducing methane emissions are a key component of the President's climate change agenda. Additionally, the Obama Administration is under pressure from environmental advocates and certain think tanks to address global climate issues and target emissions from the oil and natural gas production sector. Environmental groups, for example, have petitioned EPA to promulgate regulations to reduce methane emissions from oil and natural gas production. In January 2015, the Obama Administration announced plans to regulate methane emissions in the oil and natural gas exploration and production (E&P) sector. The exact thrust of the regulatory process is uncertain but it can take a path of building off of Volatile Organic Compound (VOC) regulation or a path of undefined direct methane regulation. EPA has been petitioned by environmental groups to promulgate regulations on oil and natural gas production targeting methane under CAA Section 111 and to regulate air toxics under CAA section 112.

#### **i. Regulation of Methane from New Sources**

The President's CAP directs EPA to develop regulations of new sources of E&P emissions.

As a precursor to potential EPA regulation of methane emissions, EPA released five technical methane white papers that would underlie EPA's future decisions regarding regulation of methane. The five White Papers cover the following types of sources or activities within the oil and natural gas production sector: (1) compressors; (2) emissions from completions and ongoing production of hydraulically fractured oil wells; (3) leaks from natural gas production, processing, transmission, and storage; (4) liquids unloading; and (5) pneumatic control devices. EPA is evaluating a number of options to reduce methane emissions from oil and natural gas E&P. More specifically, EPA seems to be considering the NSPS process for emissions from completions and production from hydraulically fractured oil wells and leaks from E&P operations

Additionally, the President's CAP lists BLM's efforts to regulate venting and flaring as a tool to reduced methane emissions (this issue is discussed below).

## **ii. Regulation of Methane from Existing Sources**

Environmentalists petitioned EPA to undertake a novel interpretation of the CAA to satisfy their concerns – use of Section 111(d) of the CAA – that would target existing operations. While EPA used this approach in its controversial Clean Power Plant rules, it has not yet taken this approach on E&P operations. Industry is urging EPA to develop a voluntary E&P program for existing sources addressing several emissions areas in the white papers; EPA has used voluntary programs for agricultural methane emissions. Additionally, EPA has indicated it will develop Control Techniques Guidelines (CTG) for existing E&P operations in Ozone nonattainment areas as a part of its CAP effort.

### **c. National Ambient Air Quality Standards**

The methane regulation challenges are also compounded by EPA actions to revise the National Ambient Air Quality Standard (NAAQS) for ozone. Methane and Volatile Organic Compounds (VOC) are emitted from oil and natural gas production facilities at the same time from the same equipment. Consequently, reducing one also reduces the other. Because regulation of VOC is a part of ozone nonattainment requirements, action on ozone will have an impact on methane. At issue will be whether the two regulatory initiatives will be coordinated or redundant.

Over the past decade EPA has revised the ozone NAAQS and proposed further modification. In 2011, the Obama Administration decided not to proceed with a further tightening of the ozone NAAQS. EPA proposed possible revisions to the Ozone NAAQS in 2014. EPA has stated in its support documents for its proposed Ozone NAAQS that:

Existing and proposed federal rules...will help states meet the proposed standards by making significant strides toward reducing ozone-forming pollution. EPA projections show the vast majority of U.S. counties with monitors would meet the proposed standards by 2025 just with the rules and programs now in place or under way.

Consequently, these national, federal requirements will essentially protect the overwhelming number of areas which would be placed in Ozone NAAQS nonattainment by a lower NAAQS without any of the local actions that would be required from such categorization.

For these areas that EPA projects would reach attainment using only national, federal mandates regardless of the NAAQS, promulgating a lower NAAQS would compel them to be subject to the requirements of Part D of the Clean Air Act. Because Part D imposes a series of minimum requirements, the proposed NAAQS would impose on those areas emissions controls on new sources, including offsets, which would be burdensome and limit new development, cost ineffective and unnecessary since EPA believes these areas would reach attainment using only its national regulations. Similarly, the Part D requirements could impose on numerous communities the implementation of costly, burdensome and unnecessary vehicle inspection and maintenance programs. And, then, these areas would have to maintain these regulatory burdens for years awaiting EPA to determine that the area is in attainment.

For these areas, EPA's own analysis demonstrates that a lower Ozone NAAQS would be all costs for no added health benefits.

#### d. Regulation of Hazardous Air Pollutants

A large coalition of 64 local, state and national groups filed a petition in May 2014 urging EPA to protect public health by setting pollution limits on oil and gas wells and associated equipment in population centers around the U.S. The petition argues that EPA should issue rules that would require oil and natural gas companies to limit hazardous air pollution from oil and gas wells in urban, suburban and other populated areas. The petition seeks to broadly expand regulation of production operations despite previous determinations by EPA that these production facilities create limited exposures. EPA also has implemented regulations on specific production emissions sources, such as glycol dehydration equipment.

#### e. Air Aggregation

Title V of the CAA requires every "major source" of air pollution to obtain a Title V operating permit. Under Title V, EPA defines a major source to include "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year of any pollutant." To determine a single source, EPA relies on three criteria but ultimately makes determinations on a case-by-case basis.

For multiple facilities to be consolidated for purposes of being defined as a "major source," EPA looks at whether they: (1) are under common control; (2) are located on one or more contiguous or adjacent properties; and (3) belong to the same major industrial grouping. Criteria two – the issue of adjacency – has experienced much tumult. Specifically, in September 2009, EPA promulgated guidance addressing the issue of CAA source determinations in the oil and gas sector. The 2009 guidance withdrew earlier guidance from EPA which concluded that the three-prong aggregation analysis for oil and gas activities focus on the proximity of surface locations. As such, under the Obama Administration EPA, emissions points may be aggregated even if they are many miles apart if EPA finds them otherwise 'interrelated'.

In August 2012, the U.S. Court of Appeals for the Sixth Circuit clarified the definition of "adjacent" in Summit Petroleum v. EPA. In that case, EPA asserted that Summit's facilities met the three criteria to be classified as a major source. In a 2-1 decision, the court disagreed, focusing on the only disputed fact of whether the facilities are adjacent to one another (i.e., Criteria two). "Having determined that the word 'adjacent' is unambiguous, we apply no deference in our review of the EPA's interpretation of it." In response to EPA's argument that its liberal interpretation of "adjacent" was a long-standing policy, the court concluded that "an agency may not insulate itself from correction merely because it has not been corrected soon enough, for a longstanding error is still an error."

Yet 14 months later, EPA corrected its error in only the most limited fashion. According to a December 2012 EPA memo, "EPA may no longer consider interrelatedness in determining adjacency...in areas under the jurisdiction of the 6th Circuit, i.e., Michigan, Ohio, Tennessee and Kentucky...Outside the 6th Circuit, at this time, the EPA does not intend to change its longstanding practice of considering interrelatedness in the EPA permitting actions in other jurisdictions."

Industry secured a significant victory in May 2014 when the D.C. Circuit Court of Appeals struck down EPA's selective adherence to the Summit decision in the case of National Environmental Development Association's Clean Air Project (NEDA/CAP) v. EPA. In NEDA/CAP, the court found EPA's arguments without merit and held that EPA could not limit Summit's application. In August 2014, EPA announced that plans to rewrite its

regulatory consistency policy to revise the Regional for judicial decisions." This appears to be a direct result of the NEDA/CAP decision.

Additionally, in October 2014, environmental groups announced their intention to file a petition with EPA seeking a CAA rulemaking to codify the agency's contested "adjacency" definition that is part of the test for determining whether to aggregate emissions sources for air permitting, in order to revive the strict adjacency test an appellate court scrapped in 2012.

### 3. **Greenhouse Gas (GHG) Regulation**

EPA actions to regulate GHG continue, as do legal actions to prevent regulations. On September 20, 2013, EPA announced its first steps to reduce carbon pollution from power plants. The standards will minimize carbon pollution by guaranteeing reliance on advanced technologies like efficient natural gas units and efficient coal units implementing partial carbon capture and storage (CCS). Much of EPA's justification of the availability of CCS relies on experience from the use of CO<sub>2</sub> Enhanced Oil Recovery (EOR) and thereby raises concerns that action on these regulations adversely impacts EOR use.

In June 2014, the United State Supreme Court decided United Air Regulatory Group v. EPA. The United Air Regulatory Group case determined whether EPA's earlier decisions to consider greenhouse gases as pollutants under the CAA and to regulate vehicles' carbon emissions automatically triggered requirements to regulate greenhouse gases under other air programs. EPA argued that it must include carbon dioxide in a pre-construction permitting program known as Prevention of Significant Deterioration (PSD) and another air permitting program known as Title V. The court held that EPA cannot require PSD or air permits based solely on an agency's release of greenhouse gases, but that emission sources that already need those permits should have to use the best available technology to control greenhouse gases.

### 4. **Mandatory Review Requirements**

Congress constructed the CAA in a manner that requires EPA to regularly revisit and, if necessary, revise air regulations for certain pollutants and sources to improve our nation's air quality. Over time, the CAA regulations for nondiscretionary review requirements have encompassed hundreds of pollutants and sources. Many of these mandatory duties are included in the following sections:

- (1) CAA Section 109 requires EPA to review and revise National Ambient Air Quality Standards (NAAQS) for criteria pollutants<sup>[1]</sup> at five-year intervals;<sup>[2]</sup>
- (2) CAA Section 111 requires EPA to review and revise New Source Performance Standards (NSPS) for 68 source categories<sup>[3]</sup> at least every 8 years;<sup>[4]</sup> and

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<sup>[1]</sup> See 40 C.F.R. Part 50. The six criteria pollutants include: particulate matter, ground-level ozone, carbon monoxide, sulfur oxides, nitrogen oxides, and lead.

<sup>[2]</sup> 42 U.S.C. §7409(d)(1) stating "Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section."

<sup>[3]</sup> See 40 C.F.R. Part 60 for complete list.

<sup>[4]</sup> 42 U.S.C. §7411(b)(1)(B) stating "The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards.

(3) CAA Section 112 established a program to regulate 187 hazardous air pollutants from 164 source categories<sup>[5]</sup> under the National Emission Standards for Hazardous Air Pollutants (NESHAP) program. Each NESHAP must be reviewed no less often than every 8 years.<sup>[6]</sup> EPA is also required by the CAA to also conduct a residual risk assessment within 8 years of the initial promulgation of the standard.<sup>[7]</sup>

In addition to imposing mandatory duties upon EPA to act in the CAA, Congress provided limited causes of action for citizens to sue and compel EPA to proceed with its mandatory duties. One type of citizen suit<sup>[8]</sup>, inserted into the Clean Air Act of 1970, authorizes “any person [to] commence a civil action . . . against the Administrator where there is alleged a failure of the Administrator to perform

While it is worthwhile for EPA to review the effectiveness of its regulations from time to time, the specific deadlines imposed by the CAA are not as practical as when the CAA was originally enacted decades ago. The creation of legal liability for EPA when it fails to meet a mandatory deadline within the CAA – when many regulations subject to mandatory reviews are adequately reducing levels of pollution and may not warrant revision – is particularly problematic when EPA is facing limited resource availability. The fact remains that any interested party could sue EPA for failing to meet any of the nondiscretionary review deadline requirements in the CAA. Every mandatory deadline gives rise to liability that can be successfully exploited in the courts by ambitious litigants seeking to compel political goals rather than protection of the environment.

## **5. Bureau of Land Management Drilling and Hydraulic Fracturing Rulemaking**

On March 21, 2015, the U.S. Department of the Interior (DOI) released its final rule regulating hydraulic fracturing activities on federal lands. This new rule requires pre-approval of hydraulic fracturing operations, regulations on well integrity, disclosure of chemicals used and storage of recovered fluids. The effective date of the final rule is June 24, 2015.

DOI has never made a compelling case that this rule is necessary or identified a state that has insufficient regulations in place to properly regulate hydraulic fracturing activities in their states. This rule will be difficult and costly for industry and the Bureau of Land Management (BLM) to implement and the agency has no clear plan on how to properly train field staff to act on the new measure. The rule is unnecessary and will add another layer of burden to independent producers already struggling to navigate the complex and confusing regulatory program governing federal lands.

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<sup>[5]</sup> See 40 C.F.R. Part 61 and 40 C.F.R. Part 63.

<sup>[6]</sup> See 42 U.S.C. 7412(d)(6) stating “The Administrator shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years.”

<sup>[7]</sup> 42 U.S.C. §7412(f)(2)(A) requiring “. . . the Administrator shall, within 8 years after promulgation of standards for each category or subcategory of sources pursuant to . . . [42 U.S.C. §7412(d)] . . . promulgate standards for such category or subcategory if promulgation of such standards is required in order to provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990) or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect.

<sup>[8]</sup> The CAA also creates a cause of action whereby “any person may commence a civil action . . . against any person . . . who is alleged to have violated . . . or to be in violation of an emission standard or limitation[.]” 42 U.S.C. 7604(a)(1). For the purposes of this letter, we are primarily concerned with liability accruing to EPA brought under 42 U.S.C. §7604(a)(2).



Industry and the states of Colorado, Wyoming and North Dakota are challenging the rule in federal district court in Wyoming, characterizing the federal government's rulemaking as duplicative of states' efforts and unsubstantiated. Colorado argued that the final hydraulic fracturing rule issued by BLM overlaps with state-level regulation and invades state regulatory authority.

#### **6. Bureau of Land Management Onshore Orders**

In 2013, the BLM initiated efforts to modify Onshore Orders 3, 4, and 5 which addressed site security, measurement of oil and measurement of natural gas. Although there may be a need to update equipment standards and reporting procedures involving the Onshore Orders, BLM is describing sweeping changes. The Unified Agenda also suggests BLM will review other Onshore Orders in 2015. No final proposal has been issued to date.

In 2014, BLM shifted its focus to the venting and flaring of natural gas on federal lands. This initiative is also one that is highlighted in the President's CAP. In the first half of 2014, BLM held four listening sessions on their proposal.

In addition to a general concern related to the authority of BLM to directly regulate air emissions, BLM's efforts, if implemented, will have the effect of further exacerbating the decline of production on federal land because wells will be shut-in. Unless the federal government acts to speed up the process for building infrastructure, there are few ways for operators to deal with associated gas other than flaring. If BLM restricts the flaring of gas on federal land, operators will have little choice but to shut-in wells until pipeline infrastructure is available. The net result of this scenario is a steeper decline in production on federal lands.

Second, additional regulations will only make federal lands less competitive for development. Federal lands are already realizing a decline in production, and additional regulations by BLM are only going to add to the cost of doing business on federal lands.

Third, BLM has initiated a series of forums to solicit feedback on a series of slides – there is no actual specific regulatory proposal. Further, BLM alleges that it has not made a decision whether to proceed to an actual rulemaking. This flies in the face of the fact that the White House included BLM venting and flaring management in the CAP. Clearly, BLM is proceeding under direction from the White House and, as such, having specific proposals would create a more informed discussion. BLM has indicated it will promulgate a proposed rulemaking on venting and flaring in the summer of 2015.

#### **7. Office of Natural Resources Revenue (ONRR) Rulemakings**

In 2014, the Office of Natural Resources Revenue (ONRR) within the Department of the Interior (DOI), issued a proposed rulemaking relating to an overhaul ONRR's civil penalty regulations. Although ONRR claims the changes are intended to clarify the current regulations, the proposal makes significant revisions to the regulations. Specifically, the agency intends to create new penalties on incorrect reporting by using knowing or willful civil penalties while at the same time stripping a lessee's legal and procedural rights. IPAA is concerned that ONRR is unnecessarily tightening its ability to impose penalties when it believes royalties are not being paid properly. Additionally, ONRR may impose penalties on an operator/lease owner even if a contractor is the cause of a problem - unbeknownst to the operator/lease owner - while barring companies from legal recourse. Additionally, in 2015, ONRR proposed an Advanced Notice of Proposed Rulemaking (ANPR) related to

royalty valuation. The ANPR changes the regulations on gas valuation for royalty reporting and payment by oil and gas lessees on federal lands and the Outer Continental Shelf (OCS).

## 8. **Endangered Species**

### a. **Critical Habitat**

On June 26, 2013, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) proposed three significant changes to their regulations and policies regarding critical habitat under the Endangered Species Act (ESA). Following is a summary of each proposal:

The first proposal would change the regulations to give FWS, among other things, vast new authority to designate areas as critical habitat that are not currently (and have never been) occupied by a listed species. FWS seeks this authority to deal with the changes in habitat that it anticipates will result from climate change.

The second proposal would change the definition of “destruction or adverse modification.” Persons performing activities pursuant to a federal permit must insure that their activities will not be likely to result in the “destruction or adverse modification” of critical habitat. The proposed changes seek to clarify how “adverse modification” is to be determined. Unfortunately, the proposed changes fail to clarify the matter and, in fact, could result in a significant expansion of the habitat features that must be protected from “adverse modification.”

The third proposal is a draft policy that purports to clarify how FWS will exercise its authority under section 4(b) (2) of the ESA to exclude certain areas from designation even though the areas may qualify for such designation. The ESA states that such exclusion is appropriate when the benefits of excluding an area outweigh the benefits of including the area. Unfortunately, the draft policy imposes a de facto moratorium on the exclusion of areas on federal lands, which is where the most significant conflicts over habitat use are most likely to occur.

### b. **Voluntary Prelisting Conservation Credits**

On March 15, 2012, FWS published an advanced notice of proposed rulemaking in the Federal Register requesting suggestion and input from the public on how best to establish clear mechanisms to encourage landowners and other potentially regulated interests to run or carry out voluntary conservation actions beneficial to candidate and other at risk species by providing assurances that, in the event the species is listed, the benefits of appropriate conservation actions will be recognized as offsetting the adverse effects of activities carried out after listing by that landowner and others. The mechanisms were to be in addition to the Service’s already existing mechanisms for encouraging conservation actions like Habitat Conservation Plans, Safe Harbor Agreements and Candidate Conservation Agreements with Assurances. Based on the “suggestions and input” it received, the Service, on July 22, 2014, announced a draft policy on crediting voluntary conservation actions taken for species prior to their listing. However, this policy, as drafted, fails to promote the goal of incentivizing prelisting action in order to avoid listing.

## 9. National Environmental Policy Act

The National Environmental Policy Act (NEPA) requires federal agencies to consider the potential environmental consequences of the actions they propose to take by preparing one of three NEPA documents (e.g., a Categorical Exclusion (CE), an Environmental Assessment (EA) or an Environmental Impact Statement (EIS)). First, and perhaps most broadly, environmentalists are attempting to insert potential impacts to climate into NEPA analysis. Additionally, with respect to oil and natural gas operations, environmentalists seem to be undertaking a major effort to broadly try to tie any environmental impacts related to upstream oil and natural gas operations, specifically well development, to all NEPA decisions. Finally, there has been some effort by environmentalists in California to include an EA of hydraulic fracturing in NEPA analyses.

The Sierra Club and the Center for Biological Diversity recently won a case in California regarding the inclusion of an analysis related to hydraulic fracturing under NEPA. Specifically, the court held that BLM unreasonably relied on an environmental analysis that (1) assumed only one exploratory well would be drilled on the leased acres when it was reasonably foreseeable that more wells would be drilled, and (2) did not contain a detailed assessment of the environmental impacts of hydraulic fracturing and horizontal drilling.

## 10. Toxic Substances Control Act

In 2011, 120 environmental organizations petitioned EPA to issue Toxic Substances Control Act (TSCA) Section 4 (toxicity testing) and Section 8 (reporting of health and safety studies) rules on oil and natural gas exploration and production chemicals. Specifically, the petition requests that EPA adopt rules to require all manufacturers and processors of oil and natural gas production chemicals conduct toxicity tests of all exploration and production chemicals and that all chemicals mixtures and substances tested be identified.

While EPA denied the petition with regard to its Section 4 request, it indicated that it would partially grant the requests under Section 8 by initiating a rulemaking process to obtain data on chemical substances and mixtures used in hydraulic fracturing. EPA commenced its TSCA efforts in April 2014 by issuing an Advanced Notice of Proposed Rulemaking (ANPR) regarding the application of TSCA to chemicals used in hydraulic fracturing. The nature of the ANPR, however, solicited feedback on a wide array of questions related to hydraulic fracturing chemicals, pathways for exposure and general inquiries pertaining to the need for additional disclosure.

Industry questions the need to regulate chemicals used in hydraulic fracturing operations under TSCA because: (1) EPA action is unnecessary since states have initiated chemical disclosure reporting through FracFocus; (2) chemicals used in hydraulic fracturing already undergo TSCA testing and reporting at the manufacturing level; and (3) TSCA application in the context of oil and natural gas development is entirely beyond the scope of Congress' intent in crafting TSCA. Given the 60-year history that fracturing has not posed unmanaged environmental risks, additional, user-level reporting is inappropriate.

## **11. U.S. Coast Guard Policy Letter on Barging of Shale Gas Extraction Waste Water**

In 2013, the U.S. Coast Guard (USCG) authored a draft policy letter addressing the barging of shale gas extraction waste water.

Discussions with the USCG on the proposed policy regarding barging of “Shale Gas Extraction Waste Water” (SGEWW) and coordination with other trade organizations and individual companies continue.

## **12. Resource Conservation and Recovery Act**

In September 2010, the NRDC petitioned EPA to regulate oil and natural gas production wastes under Subtitle C, the hazardous wastes provision, of the Resource Conservation and Recovery Act (RCRA). EPA should abide by its long-standing position that oil and natural gas drilling fluids and produced waters do not warrant Subtitle C treatment and, as such, deny NRDC’s petition.

RCRA was enacted to address the increasing volume of municipal and industrial wastes. Subtitle C was established to manage hazardous wastes from cradle to grave to ensure that hazardous waste is handled in a manner that protects human health and the environment. Subtitle D of RCRA regulates non-hazardous solid wastes. Most waste generated during oil and gas exploration and production (E&P waste) is governed by Subtitle D.

In 1978, EPA proposed hazardous waste management standards that included stringent regulations for Subtitle C facilities, including oil and natural gas wastes that were high volume and lower toxicity. Subsequently, in 1980, Congress enacted RCRA amendments to exempt drilling fluids, produced waters, and other wastes associated with the exploration and production of oil, natural gas and geothermal energy from regulation under Subtitle C. The RCRA amendments also required EPA to provide a report to Congress on these wastes and to make a regulatory determination as to whether regulation of these wastes under RCRA Subtitle C was warranted.

In 1987, EPA issued a Report to Congress and, in 1988, issued a final regulatory determination finding that regulation of oil and natural gas production wastes under RCRA Subtitle C was not warranted. EPA based its findings on the fact that other state and federal programs could protect human health and the environment more efficiently, that Subtitle C was not appropriate for regulating these oil and natural gas wastes, and that application of Subtitle C to oil and natural gas production wastes would significantly harm U.S. oil and natural gas production. No evidence suggests that EPA would reach a different regulatory determination.

## **13. Emergency Planning and Community Right-to-Know Act – Toxics Release Inventory**

In October 2012, a number of environmental groups, led by the Environmental Integrity Project (EIP), petitioned EPA to include oil and natural gas production in EPA’s Toxic Release Inventory (TRI). The requirements to report to TRI are created in the Emergency Planning and Community Right-to-Know Act (“EPCRA”). EPCRA requires businesses to report the locations and quantities of chemicals stored on-site to state and local governments in order to help communities prepare to respond to chemical spills and similar emergencies. Moreover, EPCRA requires EPA and the states to collect data on releases and transfers of certain toxic chemicals from industrial facilities each year and make the data available to the general public.

To date, there has been no action to include oil and natural gas production in TRI. In early 2014, EPA published a response to the EIP TRI petition in the Federal Register that merely acknowledged EPA's receipt of the petition. EPA did not solicit comments on the appropriateness of including oil and natural gas production sites within TRI. Subsequently, EIP sent a letter to EPA again urging the inclusion of oil and natural gas production in TRI with data alleging incredible emissions from production operations. This data reveals dramatic overestimation and outright inaccuracy.

#### 14. **Safe Drinking Water Act**

##### a. **Induced Seismicity**

Several federal agencies and numerous state agencies are evaluating the potential for linkages between produced water disposal and seismicity. This issue will continue to draw attention and may lead to additional regulatory initiatives under the SDWA.

#### 15. **Extractive Industries Transparency Initiative**

The Extractive Industries Transparency Initiative (EITI) is a global coalition of governments, companies, and civil society working together to improve openness and accountability of revenues from natural resource production through reconciliation by Independent Administrators of the amounts companies paid to government, with the amounts government collected. The Obama Administration committed the U.S. government to implement EITI, focusing on oil, natural gas, and hard rock mining revenues from production on federal lands. DOI is the lead agency for this voluntary effort. The transparency effort began with DOI's Office of Natural Resources Revenue (ONRR) unilaterally publishing in December 2014 the amount paid, by company, for bonuses, rents and royalties on federal lands. For companies paying more than \$50 million to ONRR in calendar year 2013, those 45 companies will be asked to voluntarily reconcile their payments for the first U.S. report, to be published in December 2015. In 2015, companies paying in excess of \$20 million have been asked to reconcile. As part of the multi-stakeholder group (MSG), industry representatives are working to align the requested data with other reporting requirements. The method for reporting taxes, an EITI requirement, has not been finalized.

#### 16. **Pipeline Safety**

DOT's Pipeline Hazardous Materials and Safety Administration (PHMSA) submitted to OMB on October 16, 2014 a Proposed Rule for Pipeline Safety: Safety of Gas Transmission Pipelines. The proposal will focus on expanding integrity management of jurisdictional pipelines beyond high-consequence areas. Of particular concern will be proposed changes to the exemption historically granted to gathering lines. Production lines are excluded from Pipeline Safety Act regulation, although it will be critical to ensure that this delineation is not altered. Industry strongly opposes any changes to the existing definitions for *production operation* and *gathering line* based on a legislative and regulatory history of the current regulatory regime.

## 17. **Financial Reform**

The Dodd-Frank Act initiated a number of regulatory changes from the Commodity Futures Trading Commission (CFTC) that would directly affect independent producers and other commercial end users by imposing margin and capital requirements and determining whether transactions qualified as swaps and outside CFTC regulation. Other financial regulators proposed changes that would indirectly affect producers through the regulation of bank counterparties. The CFTC and the so-called Prudential Regulators have proposed rules for margin and capital requirements that would lessen some of the initial restrictions on commercial end users to manage risk. The CFTC issued a clarification in early November 2014 of the agency's interpretation concerning forward contracts with embedded volumetric optionality. In addition, the reissuance by the Securities and Exchange Commission (SEC) of a regulation implementing Section 1504 of Dodd-Frank remains important. The regulation will require public companies engaged in the commercial development of oil, natural gas, or minerals to disclose in an annual report to the SEC, by project, all payments made to the U.S. or a foreign government that equal or exceed \$100,000. In response to an industry complaint against the initial rule, the D.C. Court of Appeals vacated the rule in July 2013. The SEC is expected to reissue the proposed rule in 2015. The reissued proposed rule will have implications for reporting under EITI and the definition of "project" and the format for reporting taxes.

## 18. **Offshore Bonding**

On August 19, 2014, the Bureau of Ocean Energy Management (BOEM) issued an Advance Notice of Proposed Rulemaking (ANPR) with 54 questions aimed at updating its regulations on Risk Management, Financial Assurances and Loss Prevention. While the direction of agency's regulations remains unclear, BOEM has acted in recent years to tie up more and more company capital in bonds the government does not need or use. While IPAA members agree that there is a role for government-required bonds to assure production facilities are removed, they also agree that the era of over bonding must end. BOEM expects a "Draft NTL" to be issued this summer, with additional bonding-related rulemakings expected in the winter of 2015.

## 19. **Well Control**

On April 17, 2015, the Bureau of Safety and Environmental Enforcement (BSEE) published a notice of proposed rulemaking regarding the requirements for Blowout Preventer Systems and Well Control. IPAA appreciates the great strides industry has taken since Macondo to enhance safety measures and response protocols and is working on responding to the comments with a consortium of allied trades to ensure the agency has guidelines on all potential unintended consequences of this rulemaking.

## 20. **Fire Resistant Clothing**

In October 2009, the Occupational Safety and Health Administration (OSHA) began targeting operators with enforcement actions regarding the use of personal protective equipment (PPE), referring to fire resistant clothing (FRC), on production sites. Historically, OSHA has interpreted the regulation governing the use of FRC at well sites in a manner which gave deference to site managers and companies regarding how best to ensure their employees' safety on the production site.

Additionally, OSHA has issued a notice of proposed rulemaking on the issue. OSHA has remained steadfast in its position regarding its FRC enforcement. Despite that, industry groups continue to reach out to OSHA, but to little avail. On the occasions industry has had an opportunity to meet with OSHA, industry has continued to stress the need for an adequate and appropriate rulemaking process to provide full transparency and opportunity for stakeholder input.

### **21. Federal Motor Carrier Safety Administration Hours of Service Oilfield Exemption**

In June 2012, the Federal Motor Carrier Safety Administration (FMCSA) issued a guidance document stating that the department was changing the hours of service rule as it applied to oilfield workers – specifically changing how “down time” is calculated on commercial vehicles serving oil and natural gas operations. Historically, specially trained drivers of specially constructed vehicles used to service oil and natural gas wells have not had to count waiting time at the well site toward their hours of service limit. This regulatory guidance provides that drivers of support vehicles used directly in the delivery of materials and supplies for oil and natural gas services do not qualify for the same exception. Further, the guidance document took effect on the date it was issued.

### **22. Silica Exposure Issue**

In June 2012, the National Institute for Occupational Safety and Health (NIOSH) and OSHA issued a joint Hazard Alert outlining the health hazards associated with hydraulic fracturing and recommending that employers ensure their workers are properly protected from exposure to silica.

Based on the NIOSH observations at eleven hydraulic fracturing sites around the country, the agency identified seven primary points of dust release or generation from hydraulic fracturing equipment or operations. NIOSH has identified a number of controls to minimize exposure to workers, some of which are simple, but more are complex and could be very costly and time consuming. Additionally, NIOSH is designing conceptual engineering controls to minimize exposure to silica during hydraulic fracturing. The agency is looking for industry partners to help test the engineering prototypes. NIOSH currently has a number of companies from the oil and gas industry involved in this process and it appears that several companies are working to create industry best practices to address worker exposure to silica during hydraulic fracturing.

Industry groups continue to work with NIOSH on an ongoing basis to develop a set of best practices to mitigate exposure to silica dust. These practices will address a variety of controls, including engineering, personal protective equipment, procedural changes, and worker training, to mitigate exposure and impact of silica dust.

The development of a best practices guideline is ongoing. It is anticipated that once these best practices have been finalized that OSHA will begin enforcement of these controls. In September 2013, OSHA proposed a rulemaking addressing occupational exposure to respirable crystalline silica.

### **23. Regulation of Tanker Cars Hauling Crude Oil by Rail**

Following derailments of trains hauling crude oil, the Department of Transportation’s (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) began to move forward with a long stalled regulatory proposal that would require increased safety measures on tanker cars hauling crude oil.



In July 2014, DOT issued a proposed rulemaking that set forth guidelines which address the following areas:

1. Defines high-hazard flammable train (HHFT) as a train carrying 20 or more tank carloads of flammable liquids (including crude oil and ethanol)
2. Classification and sampling guidelines for crude oil
3. Rail routing risk assessment
4. Notification to State Emergency Response Commissions
5. Reduced Operating Speeds
6. Enhanced Braking Systems
7. Enhanced tank car standards for new and existing tank cars

Numerous studies have demonstrated that crude oil produced from the Bakken formation is no more volatile or dangerous than any other light, sweet crude produced and transported in North America. Nevertheless, North Dakota has limited the allowable vapor pressure of Bakken crude oil to assure it is considered stable.

DOT's proposed rule likely includes a phase-out of the existing tanker car fleet. At issue is the time frame for transitioning to new tanker cars and how it will affect US oil production and transportation.



ROBERT E. MURRAY  
Chairman, President, &  
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April 21, 2015

The Honorable Ron Johnson  
Chairman of the Committee on Homeland  
Security and Governmental Affairs  
United States Senate  
340 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Johnson and Committee Members:

We appreciate your letter inviting Murray Energy Corporation ("Murray Energy") to provide the United States Senate Committee on Homeland Security and Governmental Affairs ("Committee") with our insights on the significant impact that various laws and regulations have on our Companies, and the thousands of jobs and livelihoods we support.

As you may know, Murray Energy is the largest privately-held coal company in the United States. We own seventeen (17) underground coal mines, which provide high paying, well-benefited jobs to over 8,600 people in six (6) states. We mine over 88 million tons of coal per year, which is used to provide reliable, low cost electric power to millions of Americans.

Unfortunately, we regret to inform the Committee that the regulatory rampage of the Obama Administration, and his radical appointees, have severely and irreparably harmed the United States coal industry. Indeed, in my fifty-eight (58) years of mining experience, I have never seen our industry so devastated and our people so distraught.

The availability, reliability, and cost of electric power, a staple of life, is being destroyed in America today. Our citizens on fixed incomes will not be able to pay their electric bills, and our manufacturers of products in our Country for the global marketplace will not be able to compete. This hurts all Americans.

I call it a "political power grab of America's power grid". If one wants to transform America in a diabolical way, why not get control of electricity in our

April 21, 2015

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Country by bypassing the law, Constitution, United State House and Senate, and the States and their Utility Commissions in the process? Then put the U.S. Environmental Protection Agency in charge of the availability, reliability, and cost of electric power in America. Our energy security is a National security issue, and it is important that the members of your Committee understand this.

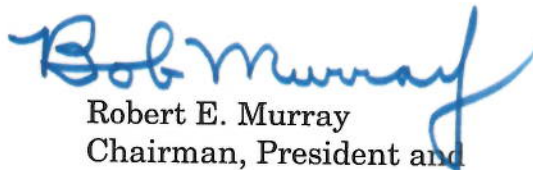
We have enclosed a memorandum which highlights a number of regulations which negatively impact the United States coal industry, with no environmental or health or safety benefit whatsoever. We believe that each of these regulations should to be modified, or eliminated altogether, as outlined herein.

We encourage this Committee to overthrow the Obama Administration's regulatory schemes. When it comes to our Nation's energy supply, affordable electricity and high paying jobs are an issue on which we can all agree. Our proposals advance this goal.

Should you need any additional information, please do not hesitate to contact the undersigned, or Mr. Michael T. W. Carey, our Vice President for Government Affairs. We appreciate you time and consideration, and look forward to working with you to protect and preserve the United States coal industry, the jobs that we provide, and the energy security of the United States of America.

Sincerely,

MURRAY ENERGY CORPORATION



Robert E. Murray  
Chairman, President and  
Chief Executive Officer

REM:plj  
Enclosure

cc: Senator Rob Portman

April 21, 2015

Page 3

bcc: R. D. Moore  
M. O. McKown, Esq.  
G. M. Broadbent, Esq.  
M. T. W. Carey  
R. M. Murray  
E. P. Brady  
J. R. Turner, Jr.  
P. B. Piccolini  
J. R. Forrelli  
The Washington Group

**MURRAY ENERGY CORPORATION'S RESPONSE TO U.S. SENATE COMMITTEE ON  
HOMELAND SECURITY'S REQUEST FOR FEEDBACK ON IMPACT OF FEDERAL REGULATIONS**

*Preliminary Statement*

The burden of Federal policies, which artificially increase energy prices and directly suppress coal markets, is borne primarily by that region of America least equipped to handle it. For example, Murray Energy Corporation (referred to throughout this memo as "We", "the Company" and "Murray Energy") recently made a substantial investment in operations situated in West Virginia, a state that historically has had one of the lowest per capita incomes in nation and depends in large part on our industry. Since 2008, dependence on coal-related jobs in West Virginia has significantly risen as manufacturing jobs left the region. Coal production, however, dropped from 165 million tons to approximately 115 million tons in 2014 – a decline of 31%; the number of producing coal mines has decreased by more than 50%, from 259 in 2008 to just 121 today; and direct mining employment has decreased by approximately 4,000 coal mining jobs, from a high of 22,336 in 2011 to just 18,200 today—a decline of 19%. The decrease in production has directly led to a loss a significant amount of tax revenue, as coal severance revenues have declined by approximately 24% in just the past two years – from a high of \$527 million in 2012, to an estimated \$406 million in 2014. Moreover, this loss occurred despite the fact that West Virginia imposes upon the industry one of the highest coal severance tax rates in the nation. Additional tax revenue is lost in the elimination of coal related jobs.

Accordingly, Federal policies are affecting jobs and revenue in states that are ill-equipped to absorb such losses. This is as "real world" as it gets. Murray Energy respectfully requests that this Committee give serious consideration to the Federal regulations and policies that are overly burdensome, inefficient, and have the effect of crippling our industry and the jobs and livelihoods we provide. Specific examples are listed below.

**I. U.S. Environmental Protection Agency - Clean Air Act**

*De Facto Ban on New Coal Fired Power Plants*

The Clean Air Act ("CAA") for 40 years has given EPA the authority to require that new facilities constructed nationwide must install the very best emission reduction technology that is available, but the Act has never been interpreted by any Court to allow EPA to ban new facilities altogether. Rather than comply with this balance set by Congress or attempt to convince the courts that it should be permitted to impose a ban on new coal-fired power plants, EPA has abused a loophole in the law by relying on one provision and blatantly violating another in order to impose a ban since August 2012 without having it be subject to judicial review.

The loophole is that Congress permitted EPA to essentially backdate its new source standards to the date of proposal, but at the same time required that EPA complete standards within one year. Under that system, Congress essentially allowed EPA to impose a de facto standard (not a ban) for one year between proposal and finalization so that there would not be a rush after proposal of new plants seeking to avoid the new standard. Congress assumed that the agency would only propose standards in good faith that could actually be achieved in a cost effective manner, as

the Act requires, and that EPA would comply with the deadlines so that the standard would be subjected to judicial review.

Since 2012, EPA has proposed successive new source standards for carbon emissions from new power plants that are flagrantly unlawful and absolutely unachievable, without at any time finalizing a standard so that it can be subjected to judicial review. First, EPA proposed a standard for new coal-fired power plants that absurdly and unlawfully required that they burn natural gas instead of coal. With that proposal outstanding, and in light of the Act's backdating provision, no new coal-fired power plant could be built, even if it used the very best emission reduction technology available and even if it was located in a place where natural gas was completely unavailable such that it was not an alternative no matter how cheap its price.

After one year, EPA withdrew that proposal and issued another, this time proposing to require the economically impossible, carbon capture and sequestration, and relying on federally funded experiments that Congress in the Energy Policy Act of 2005 expressly forbid EPA from considering. EPA has achieved an additional year and a half and counting of a ban with no end in sight. Even if EPA finally promulgates a standard and it is thrown out by the courts, EPA will likely once again impose yet another unlawful de facto ban. This abuse of the Act's provisions to avoid its requirements and ban new coal-fired power plants deserves the attention of the Committee.

### ***Clean Power Plan***

EPA's treatment of coal under its proposed New Source Performance Standards for Electricity Generating Units ("NSPS"),<sup>1</sup> flouts congressionally-stated public policy by mandating a fuel-discriminatory standard that requires commercially unproven carbon capture and storage technologies to be used on all new coal plants, while requiring nothing of new gas plants. The effect of the proposal will be to prevent the construction of any new coal-burning units and to impede the very efforts to develop the clean coal technologies that Congress, the Department of Energy, and the power industry have worked so hard to foster. This regulatory approach to the power sector is also directly contrary to the public policy, declared by Congress, to "promote national energy policy and energy security, diversity, and economic competitiveness benefits that result from the *increased* use of coal."<sup>2</sup>

EPA, in its proposed standards for modified and reconstructed stationary sources,<sup>3</sup> has disregarded congressional intent by proposing to regulate modified and reconstructed sources under both section 111(b) and section 111(d) of the CAA at the same time. This proposal triggers the express prohibition in section 111(d) against regulation under that section of a source category already regulated under section 112. Because these Electricity Generating Units are already

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<sup>1</sup> Proposed Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1430 (Jan. 8, 2014).

<sup>2</sup> 42 U.S.C. § 13571(i) (emphasis added); *see also* Energy Policy Act of 2005 § 421(a), Pub. L. No. 109-58, 119 Stat. 594, codified at 42 U.S.C. § 1581, *et seq.*

<sup>3</sup> Proposed Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,960 (June 18, 2014).



regulated under section 112,<sup>4</sup> EPA is disregarding a jurisdictional bar. Dual regulation is also contrary to the text and structure of the CAA, which makes it clear that modified and reconstructed sources are to be regulated as a type of new source. However, implicitly recognizing that compliance by existing sources with the requirements imposed by the new source rule is not feasible, EPA has had to claim a novel and unwarranted power to regulate modified and reconstructed sources under an amalgamation of sections 111(b) and 111(d).

The most astounding claim of authority by EPA under the Clean Power Plan is found in its proposed standards for existing sources.<sup>5</sup> Here, too, EPA is violating the express prohibition on regulation of sources under section 111(d) of the CAA that are already regulated under section 112.<sup>6</sup> In addition, because the CAA does not give EPA authority to meet its CO<sub>2</sub> targets through traditional regulation, EPA proposes to take over the entire American electric grid. Not only has Congress not given EPA the power to transform the electric grid, but to the extent that EPA is claiming authority to commandeer the States to implement its goals through exercises of their police power, the proposed existing source rule is unconstitutional as many commentators—including Professor Lawrence Tribe—have remarked.

The Clean Power Plan not only devastates coal—for example, Arizona and Florida would have to shutter all or nearly all of their coal-fired generating capacity to meet the proposed state targets—but Congress is being improperly bypassed. The common and overarching problem with EPA's approach to these matters is the agency's tendency to advance extravagant claims of existing jurisdiction rather than have recourse to Congress to seek additional authority. In the end, therefore, not only are the proposed rules bad policy measured by the economy in general and the cost and reliability of power in particular, but Congress has an institutional obligation to police EPA's tendency to regulatory overreach.

### *CAA Proposed National Ambient Air Quality Standards for Ozone*

EPA is conducting a rulemaking to reduce the National Ambient Air Quality Standard (“NAAQS”) for ground-level ozone concentrations<sup>7</sup> even though EPA has not completed implementation of the existing standard that EPA determined adequately protects the public health in 2008. This is just one example where EPA is not living up to the responsibilities imposed by the Unfunded Mandates Act. EPA claims this action does not trigger the Unfunded Mandates Reform Act even though EPA admits that it is economically significant regulatory action for purposes of executive review by the Office of Management and Budget. Agency cost estimates that are produced for the Office of Management and Budget are not part of the record for judicial

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<sup>4</sup> Notice of Regulatory Finding, 65 Fed. Reg. 79,825 (Dec. 20, 2000); National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 (Feb. 16, 2012) (estimating that annual compliance costs would amount to \$9.6 billion in 2007 dollars).

<sup>5</sup> Proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (June 18, 2014).

<sup>6</sup> A challenge to the proposed rule based on this jurisdiction point was argued to the D.C. Circuit this past week. See *In re Murray Energy Corp.*, No. 14-1112, Doc. #1534467 (D.C. Cir. Jan. 27, 2015) (consolidated with *West Virginia v. EPA*, No. 14-1146, and *Murray Energy Corp. v. EPA*, No. 14-1151).

<sup>7</sup> Proposed revision to National Ambient Air Quality Standards for Ozone, 79 Fed. Reg. 75,234 (Dec. 17, 2014).



review, whereas the cost estimates the Mandates Act requires are part of the record for judicial review. Accordingly, EPA's refusal to comply with the Mandates Act is preventing the courts from evaluating whether its decision to revise the standard before finishing implementation of the existing standard is arbitrary and capricious. This evasion of the Mandates Act is emblematic of EPA's efforts to avoid scrutiny and deserves the attention of the Committee to ensure that its legislative directives are carried out and achieve the intended judicial checks on agency discretion.

The EPA's proposed NAAQS for ozone, if implemented in its current form, will impose significant burdens on companies such as ours, our employees, and our customers. According to a report commissioned by the National Association of Manufacturers, these regulations could shutter one-third of America's coal-fired power plants. Such a consequence would remove billions from the American economy, lead to considerable energy reliability issues, and increase energy prices for American businesses and consumers.

Further, NERA Economic Consulting has warned that EPA's proposed ozone rule may become the most expensive regulation ever imposed on the American people.<sup>8</sup> Murray Energy and other commenters have filed comments demonstrating the various ways in which the proposed rule is invalid under existing law. However, at least as it relates to the non-air-toxin ozone, there is a 2001 ruling from the Supreme Court that Congress should legislatively overrule. In *Whitman v. American Trucking Associations*,<sup>9</sup> the Supreme Court interpreted section 109(d) of the CAA as not permitting considerations of cost and feasibility with respect to the regulated source in setting ambient air quality standards. Given the great success of this country under the old 80 ppb standard in reducing levels of ozone by nearly 25 percent since 1990, keeping a rule that no level of cost—no matter how damaging to other considerations of public welfare—would justify abstaining from further regulation is irrational.

### ***General Economic Impact of EPA Regulations***

Many statutory provisions require EPA to look at the economic impacts of its regulations, from macroeconomic cost-benefit analyses to the regional and local job losses and shifts that often result from costly environmental regulations. To the extent EPA has been fulfilling its obligations under these requirements, it routinely offers a skewed analysis that greatly favors more regulation. The message from EPA is that additional regulation will always benefit the economy. When EPA has not been able to assure a favorable outcome, for example in this obligation under Section 321(a) of the Clean Air Act to conduct continuing evaluations of the job losses and shifts associated with its administration and enforcement of the Clean Air Act, EPA has refused to comply. Murray Energy has filed a suit against the Administrator to force EPA to evaluate the job impacts of its actions under Section 321, but additional oversight is needed. Industries targeted by EPA, such as the coal industry, face massive costs that are not documented in the administrative record or

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<sup>8</sup> NERA Econ. Consulting, "Assessing Economic Impacts of a Stricter National Ambient Air Quality Standard for Ozone," at S-1 (July 2014) (\$3–4 trillion in cost between 2017–2020 and the annual loss of 2.9–4.3 million job-equivalents at 60 ppb), available at [http://www.nera.com/content/dam/nera/publications/2014/PUB\\_NERA\\_NAM\\_Ozone\\_Report\\_0714.pdf](http://www.nera.com/content/dam/nera/publications/2014/PUB_NERA_NAM_Ozone_Report_0714.pdf). See also NERA Econ. Consulting, "Economic Impacts of a 65 ppb National Ambient Air Quality Standard for Ozone: Executive Summary" at S-1 (Feb. 2015), available at [http://www.nam.org/Issues/Energy-and-Environment/Ozone/Economic-Impacts-of-a-65-ppb-NAAQS-for-Ozone-\(NERA\).pdf](http://www.nam.org/Issues/Energy-and-Environment/Ozone/Economic-Impacts-of-a-65-ppb-NAAQS-for-Ozone-(NERA).pdf).

<sup>9</sup> 531 U.S. 457, 465 (2001).

evaluated by EPA as part of its decision-making process. EPA should be held accountable for failing to live up to its statutory obligations.

One of EPA's responses to the Unfunded Mandates Reform Act was to find ways to "paper over" the massive costs of its regulations by claiming scientifically dubious benefits. The chief example is the agency's repeated touting of the purported benefits of fine particulate matter reductions based on three controversial studies even in regulatory settings that do not address fine particulate matter. This issue has received congressional attention already, and further consideration by the Committee of jurisdiction over the Mandates Act is warranted because the tactic is essentially EPA's bad faith response to that Act.

While EPA is grossly overstating the benefits of its environmental regulations, it is also severely understating their costs. Several recent cost estimates EPA has performed pursuant to the requirements of the Unfunded Mandates Reform Act proved to woefully underestimate the consequences of its regulations. Whatever the cause of these failures, they will likely continue unless agencies are forced to acknowledge when the costs exceed the projections. A process by which EPA can be forced to conduct retrospective analyses to determine the costs and benefits actually resulting from regulations would significantly help and would aid states and the coal industry in pursuing judicial review of agency refusals to reconsider regulations, as it would make refusals to reconsider arbitrary and capricious in those particular instances when retrospective analyses show that regulations were premised on significantly erroneous cost and benefit estimates.

## **II. Office of Surface Mining Reclamation and Enforcement, Surface Mining Control and Reclamation Act ("SMCRA") Stream Protection Rule/Stream Buffer Zone Rule**

The Office of Surface Mining Reclamation and Enforcement's ("OSM") plan to issue a new "stream protection rule" under SMCRA, replacing a "stream buffer zone" rule that has been in place for over thirty years, is flawed. The planned rule (currently under review at the Office of Management and Budget's Office of Information and Regulatory Affairs, before being proposed in the Federal Register) arises out of a 2009 interagency memorandum of understanding focused on "mountaintop mining" in the Appalachian coalfields. But the rule will be far broader in scope, with nationwide impacts. It would mark the most significant revision to OSM's SMCRA regulations since 1983. With a rulemaking of this scope and magnitude, we would expect the states to be heavily involved, especially since Congress gave states the primary role for implementing SMCRA. But to date, states have been wholly excluded from OSM's drafting process. Environmental groups want an outright prohibition on the disposal of excess mining spoil within a 100-foot buffer zone away from streams. Congress never authorized such a prohibition. To the contrary, Congress recognized that certain coal mining activities within buffer zones are both inevitable and necessary. To prohibit such activities would turn SMCRA on its head and cause severe harm to the industry. But this appears to be precisely what OSM intends to do.

### **III. Mine Safety and Health Administration Regulations, Mine Safety and Health Act**

#### ***Pattern of Violations Rule***

The Mine Safety and Health Administration (“MSHA”) is the federal administrative agency charged with implementing and enforcing the Federal Mine Safety and Health Act (“Mine Act”). MSHA amended its Pattern of Violations (“POV”) regulations (30 CFR Part 104) in 2013 to make it easier for MSHA to impose the draconian sanction of a Mine Safety and Health Act section 104(e) POV closure order. The amended POV rule changed the criteria and the procedure for finding a mine operator to be a “pattern” violator of mandatory health and safety standards.

Perhaps most fundamentally unfair is that the POV rule allows a mine operator to be deemed a “pattern” violator—and have its mine operations suspended—even though the mine operator has not been found to have actually violated mandatory health and safety standards. This is because the POV rule allows citations that have not resulted in final determinations of safety violations to be the basis for a “pattern of violations” determination. Thus, unlike the previous POV rule, the current rule allows MSHA to deploy the Mine Act’s most severe sanction based on mere allegations of violations that may ultimately be vacated or overturned. This feature of the POV rule is significant and disturbing because historical data shows that one-third of the citations that could be the basis for a POV finding are overturned when contested by mine operators. Once a pattern of violations order has been issued, it is extraordinarily difficult to be removed from the pattern—all the more reason why the original pattern notice should not be based on mere allegations.

In addition, the POV rule is unlawful because it exceeds MSHA’s authority under the Mine Act. The POV rule states that MSHA will post on its website the specific criteria that it will use in determining whether an operator exhibits a POV. But these criteria were not subject to notice and comment as required by law and may be changed at the whim of MSHA, without notice to mine operators or the public. What the POV Rule has done with these criteria is nothing less than a blatant end run around the notice and comment process mandated by the Administrative Procedure Act.

#### ***Exposure to Respirable Coal Mine Dust Rule***

The underground coal industry is particularly impacted by newly promulgated but not yet fully implemented regulations concerning respirable coal dust levels (“Coal Dust rule”). MSHA’s new Coal Dust rule imposes unattainable requirements which require adoption of a 1.5 mg/m<sup>3</sup> dust standard within an entirely unrealistic timeframe. Mining companies now must take “immediate corrective actions” based on sampling technologies. But, as the National Mining Association has stated, “the effective date of the rule does not provide sufficient time for operators to review and statistically analyze operating histories, make projections for the new sampling scheme, and develop procedures to satisfy the new and substantially higher 80% average production requirement.” Moreover, MSHA did not use the rulemaking process as an opportunity to consider alternative approaches to mitigating coal dust, such as the use of specialized helmets.

These extremely costly and onerous regulations, when fully implemented, could seriously cripple longwall mines which are the safest and most productive coal mines in the Nation. This

adverse regulatory outcome would occur even though the latest available engineering and scientific studies and analyses (ignored by MSHA) show the new Coal Dust rule is neither feasible nor necessary. In fact, though MSHA claims the new rule is needed to protect miners against a nationwide upsurge in coal workers pneumoconiosis and other lung diseases (collectively known as "Black Lung"), the truth is that the respirable coal mine dust regulations in effect for decades have resulted in a remarkable occupational health success story, reducing Black Lung cases nationwide in coal miners to below background levels of similar lung diseases in society at large. In fact, the latest data suggest that the new cases of Black Lung that MSHA relies on to justify the need for the toughened new nationwide regulations are, in reality, limited to a small geographic area in Southern Appalachia where they most likely reflect not coal dust but excessive silica dust exposure. These increasing cases of silicosis are unacceptable and need to be dealt with. They result from mining in thin coal seams surrounded by silica-bearing rock, which is often mined with the coal. Ironically, the new rules do nothing to improve current MSHA rules about exposure to silica dust.

Because of the way the new rules will measure respirable coal mine dust, even the most conscientious mine operators will be out of compliance and facing shutdowns. The new Coal Dust rule requires sampling of coal miners' exposures to mine dust with a new computerized continuous sampler which, although promising, has not been adequately tested in rugged day-to-day mining conditions. This is a huge problem because any single excursion shown by the computer to be excessive can lead to an MSHA order to shut down the mine. Try as we might with ventilation to disperse dust and water sprays to allay dust, these, and other, engineering controls will not always suffice to limit exposure. And, most ironically, MSHA refuses to allow the use of high-tech powered air-supplied respirators ("PAPRs") as a compliance mechanism, even though these devices deliver dust-free air to the breathing zones of miners who wear them. Unlike OSHA, MSHA has flatly rejected the industry's request to allow the use of PAPRs as a supplemental control when all feasible engineering controls are being utilized.

### ***Black Lung Benefits Act***

30 U.S.C. 921(c)(4) of the Black Lung Benefits Act was changed to restore a presumption which had been inapplicable since the Black Lung Benefits Amendments of 1981, now to be applied on any cases which were filed after January 1, 2005 so long as they were pending on or after the effective date of the Affordable Care Act.

If a miner was employed for 15 years or more in underground mines, and there is a chest x-ray negative for complicated pneumoconiosis, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. This presumption may be rebutted only by establishing that (a) such miner does not, or did not, have pneumoconiosis, or that (b) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. The effect of this presumption has been to change the burden of proof from the claimant to the mine operator. The change is wrong and the previous burden of proof should be reinstated.

## *Criteria and Procedures for Assessment of Civil Penalties Proposed Rule*

MSHA has proposed to completely overhaul the penalty criteria and formulas in 30 C.F.R. Part 100, in the “Criteria and Procedures for Assessment of Civil Penalties; Proposed Rule.”<sup>10</sup> But no overhaul is needed, and MSHA has failed to provide any justifiable reason for the Proposed Rule. Much of the existing Part 100 has been in place for over thirty years. As a result, MSHA, the Federal Mine Safety and Health Review Commission and its Administrative Law Judges (who hear and resolve civil penalty disputes), the various courts of appeal, and the mining industry have had many years to interpret and apply the existing criteria, which has given a modest level of predictability and certainty that will disappear if the Proposed Rule is adopted. Sadly, the Proposed Rule appears aimed, in part, at dumbing-down Part 100 to hopefully cure MSHA’s inability to train its current inspectors and personnel to consistently and accurately apply the existing criteria in Part 100. This is bad public policy and, frankly, an inappropriate and improper purpose for rulemaking.

In addition, MSHA’s Proposed Rule will significantly increase the already massive penalties being imposed on the coal mining industry each year. Shockingly, MSHA appears to have been intentionally misstating the Proposed Rule’s potential impact during recent public hearings, repeatedly stating that the industry’s “fears” of increased penalties were unjustified and that MSHA had carefully analyzed the projected impacts of the Proposed Rule (on 121,089 violations from 2013) and concluded that overall penalties probably would decrease slightly after implementing the Proposed Rule.<sup>11</sup> Murray Energy, however, carefully analyzed MSHA’s enormous database and discovered that MSHA made *outright misrepresentations* about some of its assumptions and made multiple other extreme and unreasonable assumptions. When just the few errors identified by Murray Energy are corrected, MSHA’s projections go from a 3% decrease in penalties to a massive \$23,169,033 (or 28.1%) increase.<sup>12</sup> The Proposed Rule should be withdrawn immediately before becoming final and dramatically—and unjustifiably—increasing the amount of penalties being imposed on the coal mining industry.

### *Proximity Detection Systems*

On January 15, 2015, the MSHA published its final rule on proximity detection systems for continuous mining machines in underground coal mines, which will be incorporated into 30 C.F.R. § 75.1732. In an effort to avoid pinning, crushing, or striking accidents, the rule requires proximity detection systems to provide an audible and visual alarm, thereby allowing a miner to move out of the way before being struck by a machine. The rule, which took effect on March 16, 2015, will be phased in over a 36 month period; however, in some instances, the rule allows only an 18-month phase-in period for installment of the devices on newly-manufactured and existing continuous mining machines. This timeframe does not take into account the limited number of

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<sup>10</sup> 79 Fed. Reg. 44,494 (July 31, 2014).

<sup>11</sup> This position is unsurprising because a massive penalty increase is not warranted. The industry-wide fatality rate has been at or near its lowest level the past four years and the nonfatal lost-time injury rate has been steadily decreasing over the past decade. In other words, deterrence through higher penalties is unnecessary.

<sup>12</sup> Murray Energy’s formal comments and analyses can be found at <http://www.regulations.gov/#!documentDetail;D=MSHA-2014-0009-0131> and <http://www.regulations.gov/#!documentDetail;D=MSHA-2014-0009-0130>.

skilled personnel available to install proximity detection systems on those continuous mining machines that would have to be retrofitted. Additionally, we believe that this timeframe will force installation of systems that have not been demonstrated to be consistently effective in a mining environment.

Although the proposed rule would have required proximity detection systems to warn miners when they came within five feet of the machinery, MSHA modified the final rule to require systems to alert miners with an audible visual warning “at a distance that will allow the miner to move away before the proximity detection system causes the machine to stop.” Because there is no set distance at which the proximity detection systems are required to alarm, there may be disagreement and confusion as to how early these systems should be alarming, resulting in potential confusion and delay during implementation of the rule.

The use of proximity detection systems may not immediately reduce the number of pinning, crushing or striking accidents, as mine workers adjust to a new stimulus in their environment. A study by the Office of Mine Safety and Health Research demonstrated that without proper training and sufficient communication regarding the new proximity detection systems, workers are less likely to understand how the systems work, thereby undermining the effectiveness of the new rule in preventing accidents.

### ***Mine Plans***

For almost 45 years, operators of underground coal mines have been required, under Federal mine safety requirements, to have MSHA review and approve their ventilation system, methane and dust control, and roof control plans, along with any plan revisions. These plans function as the detailed “road map” for the shift-to-shift management of complex mining operations. Only with these proper plans can coal mining be accomplished safely and efficiently. The purpose of MSHA plan review and approval is to have MSHA’s mine engineering personnel satisfy themselves that these plans comply with Federal plan standards. There is surely merit in such a system; but, unsurprisingly, since these requirements were put into effect in 1970, there have always been disagreements between MSHA and coal mine operators about the specific application of these plan standards. Indeed, procedures for resolving these disagreements have long been in place, including full-blown litigation before the independent Federal Mine Safety and Health Review Commission (“FMSHRC”).

For years now, however, this company has been concerned that the mine plan approval process has been broken. Recently, MSHA has been using a precautionary principle “cookie-cutter” approach to its review and approval mandate, as opposed to the mine-specific knowledge of operators’ engineers who are underground every day and who know every twist, turn, and nuance of the mines. Since, at the end of the day, an operator cannot mine coal without an approved plan, coal mining can and does frequently grind to a halt due to MSHA’s refusal to approve a plan or its revision. MSHA even delays or fails to invoke the process for FMSHRC review of the plan. The mine plan process has deviated from original intent of the regulation, which was to have a give and take between private and public sector expert mining engineers—with the goal of a mining operation safe for its miners. In its stead, the plan review and approval process is being used more and more to shut down safe costing untold millions of dollars throughout the industry.

### *Self-Contained Self Rescuers*

Federal mine safety rules require each coal miner who works underground to be equipped with a breathing device known as a self-contained, self-rescuer (known as an “SCSR”) designed to provide a supply of breathable air for one-hour or longer in order to permit escape in the event of a mine fire, explosion, or other emergency. SCSRs are generally worn on a miner’s work belt and they can be donned quickly when necessary. Additionally, depending on the size of the mine and the workforce, many other SCSRs are likely to be cached in escapeways along the exits out of the mine. Large longwall mines utilize thousands of SCSRs. SCSRs are also used in the maritime and railroad industries, where they are known as closed-circuit escape respirators or “CCERs.” For years, work has been ongoing in private-sector and Federal laboratories to develop improved CCERs. At the Federal level, the National Institute for Occupational Safety and Health (“NIOSH”) promulgated new requirements for CCERs in 2012 that had to be met by April 9, 2015. These new requirements were intended to allow more effective measurement of the performance, reliability, and safety of CCERs. After April 9, 2015, all new CCERs sold as approved by NIOSH had to meet these new requirements, although users could utilize their existing stock of CCERs until their shelf-life expired.

However, despite NIOSH’s projections, not one CCER manufacturer has applied for approval of a new CCER (SCSR) model suitable for use in underground coal mining. Following expressions of grave concern from coal mine operators and organized labor beginning last summer, in January 2015, NIOSH finally published an interim final rule that extended the deadline until six months after the date of NIOSH approval of a CCER suitable for underground mining. This step, however, does not solve the problem because even should a NIOSH approval be granted, experience we have had with introduction of similar requirements in the recent past teach that it will take many months longer than six to produce the number of SCSRs required, and to train miners in their use.

Even more importantly, considerable public-private research is underway to develop coal mine escape technology that would go well beyond the new NIOSH requirements. Industry, labor, and NIOSH are working cooperatively in a Breathing Air Supplies (“BAS”) Partnership toward that objective. At a recent BAS Partnership meeting, both industry and labor representatives urged NIOSH to be mindful of the straitened economic circumstances of the coal mining industry and told NIOSH jointly that the industry can only sustain one change-out of its emergency escape technologies. Therefore, should NIOSH insist on compliance with its 2012 changes, then the more sweeping changes envisioned by the research program of the BAS Partnership would be cost-prohibitive. The NIOSH rule should exclude coal mining from its requirements in order to let the work of the BAS Partnership bear fruit.

### *Refuge Alternatives*

Should a mine fire, explosion, or other mine emergency occur, miners are trained to don their SCSRs and escape, if at all possible. Following the Sago Mine explosion in 2006, NIOSH was commanded by Congress in the MINER Act to conduct research on the practicality of refuge chambers (known as “refuge alternatives” or “RAs”) in which miners could take shelter following the emergency, if escape were impossible. These RAs were to have air supplies, food, and water sufficient to allow sheltering miners to survive for up to 96 hours. NIOSH carried out the required



research, turned it over to MSHA, which, in turn, promulgated mandatory RA requirements at the end of 2008. A fleet of these RAs are currently deployed in every underground coal mine in the United States. Over time, however, problems with this fleet have been identified. Specifically, ongoing NIOSH research has identified issues dealing with potentially fatal heat-build up inside the units and concerns about their atmospheres being poisoned by leaks into the units from toxic mine gases generated by the fire or explosion. Here too, vital public-private research is underway by a NIOSH Refuge Alternative Partnership to develop a more effective next generation of RAs. Mine operators, RA manufacturers, organized labor, NIOSH research scientists and their contractors, along with representatives of the coal mining states and academia are all involved in this Partnership. MSHA is being kept fully informed through participation of key MSHA staff as Partnership observers.

The research is proceeding well, but the resources of all partners (government and private sector) are limited and time is of the essence because a now unnecessary regulatory deadline stands in the way of translating research outcomes to reality. More specifically, the current MSHA RA requirements demand that currently grandfathered first generation RA structures must be approved by MSHA after December 31, 2018, unless they are replaced first. The flaws identified with the current fleet show that the limited resources available would be best used on developing new RA technology rather than in tinkering with the earlier flawed technology. Deferring the December 31, 2018 deadline, pending the development and deployment of the next generation of RAs would be a preferred approach, allowing the same manufacturers and MSHA personnel who would be involved in approving grandfathered structures of obsolete technology to devote their energies to development and approval of the next generation fleet.

### ***Inconsistent Rulemaking Among Agencies***

MSHA and other Federal agencies should look to eliminate inconsistencies between Federal and state regulations that create a confusing and burdensome regulatory patchwork without a corresponding benefit. For example, Federal and state regulations differ substantially with respect to ventilation of mines, inspections of working areas within mines, and the movement of mining equipment. MSHA should consider studying areas in which it could eliminate regulatory inconsistencies by adopting uniform regulations in partnerships with states or by permitting states to become the primary regulatory for some issues.

## **IV. U.S. Environmental Protection Agency - Clean Water Act**

### ***Redefining of "Waters of the United States"***

The Environmental Protection Agency's ("EPA") joint rulemaking with the U.S. Army Corps of Engineers ("Army Corps") to redefine "waters of the U.S." under the Clean Water Act threatens to burden the regulated community with new rules that are ineffective, excessively burdensome and, indeed, unlawful. The agencies claim that this rulemaking merely clarifies the scope of federal jurisdiction. In reality, however, the agencies' proposal would radically expand federal authority over what is deemed jurisdictional, encompassing not just free flowing streams and rivers but upland areas and even groundwater. In addition, while the agencies claim to be motivated by the need for greater consistency, clarity, and certainty, the proposal would lead to

precisely the *opposite* result – inviting only more confusion and inefficiency in the wake of an abrupt and arbitrary departure from established practice, legal precedent and best available science.

### *Cooling Water Intake Structures*

On August 15, 2014, the EPA published a final rule governing cooling water intake structures at existing facilities (the “Rule”).<sup>13</sup> Many power plants, including coal fired power plants, have cooling systems that use large volumes of water from streams, lakes, rivers, and oceans to condense the steam used to generate electricity and are affected by the Rule. The Rule is estimated to affect 544 power plants and will be extremely costly. Even the EPA projects that the costs of the Rule grossly outweigh the benefits: the EPA projects the rule will cost \$384 million per year and produce annual benefits of only \$18 million. Other organizations have predicted that compliance costs may reach **\$64 billion**.

The EPA received thousands of comments on the proposed rule. Many of the issues raised in comments to EPA were not resolved to the satisfaction of industry representatives. As such, there is a significant amount of litigation about this Rule. In addition, implementation of the Rule will require significant involvement from state and federal regulatory agencies as new S/NPDES permits will need to factor in the standards in the new Rule.

### *“Dredge and Fill” Permits*

Under Section 404 of the Clean Water Act, the Army Corps has primary authority to issue permits for activities, including coal mining, that discharge dredge or fill material into waters of the United States. Under Section 404(c), however, EPA has authority to deny a specification of a given waterway at a site in which such dredge or fill material can be placed, which is commonly referred to as a veto of a Section 404 permit. The EPA has expanded interpretation of its veto authority and has taken action to retroactively veto a permit for an existing operation and to preemptively veto a project before a company had the opportunity to apply for a permit.

The ability of EPA to retroactively veto a Section 404 permit has created considerable uncertainty for many projects, particularly those in the mining industry, and has generated significant recent litigation. Due to the EPA’s actions, businesses cannot be sure that issued permits will be honored or that permit applications will be fairly reviewed.

EPA is also holding 404 permits for review. An investigation by the United States Senate Committee on Environmental and Public Works, dated May 21, 2010, found that “the Obama Administration is using the Clean Water Act Section 404 permitting process to dismantle the coal industry in the Appalachian region.” According to the Committee on Environmental and Public Works, as of 2009, EPA was holding 190 coal mining 404 Permits and “unless EPA releases the remaining 190 permits: [r]oughly 1 in every 4 coal mining jobs in the Appalachian region will be at risk of elimination, 81 small businesses will lose significant income and will be at risk of bankruptcy and over 2 years of America’s coal supply will be in jeopardy.” Murray Energy has

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<sup>13</sup> National Pollutant Discharge Elimination System - Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48299.

not been immune to the EPA's overreach with regard to 404 permits, as Murray's efforts to obtain approval of certain permits have been stymied by EPA.

## **V. Taxation Issues, Internal Revenue Service**

### ***Percentage Depletion Tax Deduction for Mining Activities***

Under current, long-standing law, taxpayers that produce from mines, wells, and other natural deposits are allowed to claim, as a deduction for depletion, a percentage of the gross income from these mining properties. This deduction is known as "percentage depletion."

The percentage depletion tax deduction recognizes the unique nature of mining investments and recognizes that the next ore body or coal mine to be mined will be more costly since the reserve may be smaller and the geology more difficult. Mining requires significant financial commitments to long-term projects to deliver a competitive product at a low margin. Enormous amounts of capital must be expended at the front end of mining projects to realize future returns. With such sizable capital costs, cost recovery through percentage depletion has a significant effect on the margins and prices at which minerals can be profitably sold. The percentage depletion deduction in current law is vitally important to the competitiveness of the domestic mining industry and to the U.S. economy and therefore must be retained.

### ***Ability to Expense for Coal and Other Mining Exploration Costs***

Currently, taxpayers may elect to expense mining exploration costs with respect to domestic ore and mineral deposits. Additional rules apply to require capitalization (and amortization over a 60-month period) of a portion of exploration costs for corporate taxpayers that elect to expense those costs and to recapture expensed exploration costs when a mine reaches the producing stage. Also, taxpayers electing to expense exploration costs may nevertheless elect to capitalize those costs and amortize them over a 10-year period. Similar rules apply with respect to mine development costs.

The expensing of coal and other mining exploration and development costs is part of the current calculation for appropriately measuring taxable income from mining operations. That appropriate measurement of taxable income under present law should not be changed as a way of increasing taxes on the mining industry. Eliminating expensing would impose a massive tax increase on an industry already overburdened by the alternative minimum tax ("AMT").

To the extent coal companies are unable to recover through price increases, the higher taxes caused by repeal of expensing and 60-month/10-year amortization of exploration and development costs, they will have that much less money to employ workers directly or to support additional indirect job creation elsewhere in the economy. The expensing of exploration and development costs reflects Congress's intention to keep U.S. mine products, coal prices, and electricity costs for consumers as low as possible.

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Steven C. Anderson, IOM, CAE  
President & Chief Executive Officer

May 1, 2015

U.S. Senate  
Committee on Homeland Security and Governmental Affairs  
Dirksen 340  
Washington, DC 20510

Dear Chairman Johnson, Ranking Member Carper, and Honorable Committee Members:

On behalf of the National Association of Chain Drug Stores (NACDS), I would like to thank Chairman Johnson and Ranking Member Carper for the opportunity to share with the Senate Committee on Homeland Security and Governmental Affairs our perspectives on federal regulations, regulatory process, and their impact on NACDS.

NACDS represents traditional drug stores and supermarkets and mass merchants with pharmacies. Chains operate more than 40,000 pharmacies, and NACDS' 125 chain member companies include regional chains, with a minimum of four stores, and national companies. Chains employ more than 3.8 million individuals, including 175,000 pharmacists. They fill over 2.7 billion prescriptions yearly, and help patients use medicines correctly and safely, while offering innovative services that improve patient health and healthcare affordability. NACDS members also include more than 800 supplier partners and nearly 40 international members representing 13 countries. For more information, visit [www.NACDS.org](http://www.NACDS.org).

### **DEA Regulations**

First enacted in 1970, the federal Controlled Substances Act (CSA) regulates the manufacture, importation, possession, use, and distribution of prescription drugs that have a potential for diversion and abuse and are collectively known as "controlled substances." The CSA creates a closed system of distribution for controlled substances; the Drug Enforcement Administration (DEA) often refers to this as "cradle-to-grave" control over controlled substances.

The issue of lack of DEA transparency remains an ongoing concern among DEA registrants, including pharmacies. Often, the agency conducts its operations and implements policies in a relatively opaque manner, seemingly unaware of the impact on healthcare delivery. A prime example is the conundrum that pharmacies and pharmacists face under DEA's policies with respect to a pharmacist's "corresponding responsibility."<sup>1</sup>

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<sup>1</sup> According to DEA regulations, the responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility also rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued

Neighborhood retail pharmacists are front-line healthcare providers and are one of the most accessible members of a healthcare team. As such, the CSA requires pharmacists to take on diverse and sometimes conflicting roles. On the one hand, pharmacists have a strong ethical duty to serve the medical needs of their patients in providing neighborhood care. On the other hand, community pharmacists are also required to be evaluators of the legitimate medical use of controlled substances.

Pharmacies fully understand that controlled substances are subject to abuse by a minority of individuals who improperly obtain controlled substance prescriptions from physicians and other prescribers. Pharmacies strive to treat medical conditions and ease patients' pain while simultaneously guarding against the abuse of controlled substances. The key is to guard against abuse while still achieving our primary goal of assisting patients who need pharmacy services.

DEA's enforcement activities include conducting inspections of the entities that are subject to its regulatory oversight. Although such enforcement activities are essential to its mission, DEA has been criticized for a lack of transparency in its inspection and other enforcement actions, and inconsistency among the actions of its numerous field offices. Such opaqueness and inconsistency impose challenges on the compliance efforts of DEA registrants.

To help address the problems of DEA opaqueness and inconsistency, we support efforts to promote accountability and transparency with respect to DEA's inspection and enforcement programs. The following recommendations drawn from Food and Drug Administration transparency and oversight and enforcement initiatives could serve as a model for DEA:

1. Development of a Comprehensive DEA Investigation Program, Corresponding Inspector Manual & Compliance Policy Guides: Specifically, DEA would set forth guidance for its oversight of regulated facilities inspections that provide clear and firm direction.
2. Accountability & Consistency among Field Offices: DEA would ensure the uniformity and effectiveness of its inspection program and oversight over field offices. DEA would provide public training for inspectors, and develop an audit process to ensure that inspections are carried out consistently across field offices.

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not in the usual course of professional treatment is not a prescription within the meaning and intent of section 309 of the CSA (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, is subject to the penalties provided for violations of the CSA.

3. Transparency & Communication -- DEA Inspection Observations: DEA would provide regulated facilities with substantive written feedback upon completion of an inspection when an investigator(s) has observed any conditions that in their judgment may constitute violations of the CSA and implementing regulations. Without receiving such information, it is difficult, if not impossible, for regulated facilities to implement requisite facility and process improvements and take corrective actions where necessary.
4. Public Disclosure - Oversight of Inspections: An important mechanism of accountability is public disclosure of information. Disclosure of final inspection reports of regulated facilities would provide the public with a rationale for DEA enforcement actions and the industry with transparency into agency decision-making, allowing them to make more informed actions to enhance facility compliance.
5. Ombudsman Office: An ombudsman office would address complaints and assist in resolving disputes between companies and DEA regarding interactions with the agency on inspections and compliance issues.

We believe these recommendations would greatly increase predictability and transparency in DEA regulation. The adoption of such recommendations would greatly enhance the compliance efforts of DEA registrants, thus leading to more effective DEA regulation and oversight. Enhanced compliance efforts by DEA registrants and more effective DEA regulation and oversight would have highly beneficial impacts on efforts to combat prescription drug diversion and abuse.

#### **CMS and Medicare Part D**

In January 2014, the Centers for Medicare and Medicaid Services (CMS) issued a proposed rule to update the Medicare Part D program for plan year 2015 and beyond. Contained within the proposed rule were a number of provisions that NACDs urged CMS to adopt with respect to increasing transparency in Medicare Part D preferred networks and expanding access to medication therapy management (MTM). Unfortunately however, CMS has yet to adopt these provisions.

In the final Medicare Part D rule for 2015, CMS stated that it continued to believe there are benefits to increasing transparency in Part D preferred networks and that it will be closely studying the issue and exploring its authority in this area. In conducting a study on the issue, CMS found serious concerns with access to preferred pharmacies, especially in urban settings. CMS recently announced new strategies to improve access to preferred pharmacies within the Medicare Part D program, however, NACDS believes CMS does have the authority to develop and implement the types of regulations proposed in the Part D rule and has urged the agency to implement changes that promote plan transparency and improve



beneficiary access. We believe that CMS understands that improvements in transparency in the Medicare Part D program are needed to ensure an efficient program for beneficiaries and providers.

Pharmacies have noted that oftentimes a beneficiary will not realize until they walk into the pharmacy, and attempt to have a prescription billed to their Medicare Part D plan, that their options for obtaining their prescription medication have changed from the previous plan year, either in terms of the copayment amount, or the ability to even obtain the prescription at all from the pharmacy they have used for years. Beneficiaries need the tools to be able to make informed choices when it comes to selecting the health insurance plan that works best for them. These tools include accurate and clearer information.

Not only should transparency be increased and improved for beneficiaries, but also it should be improved in communication between Part D plans and community pharmacies. Plans should provide advance notice regarding changes in plan design, as well as the status of the pharmacy in terms of whether it has been selected to participate in a standard, preferred, or limited network. Pharmacies report not finding out about the existence of a preferred or limited network, and the pharmacy's resulting exclusion, until after the fact. Because of this, the pharmacy has no ability to work with beneficiaries to inform them of upcoming changes in their plan structure and their ability to continue filling prescriptions at the pharmacy. Such tactics and poor communication impact all involved with the Part D program.

We also continue to urge CMS to implement changes that would improve the Medicare Part D program as a whole, including improving access to MTM. NACDS has urged CMS to implement changes to the MTM program that will increase access to services for more beneficiaries. According to CMS's own findings, eligibility for MTM services is not meeting projected expectations. It is vital that CMS seek ways to increase access to this important program.

CMS could use its regulatory authority to make revisions to the current targeting criteria for MTM eligibility. Currently, beneficiaries must have "multiple" chronic conditions, be taking "multiple" medications, and spend a certain amount each year to be eligible for MTM. CMS has the authority to determine what constitutes "multiple medications" required for MTM eligibility purposes. CMS currently allows plans to select from anywhere between two and eight drugs as the minimum required. According to the CMS MTM Fact Sheet, in 2014 more than half of all MTM programs required beneficiaries to be taking at least eight prescriptions to be eligible. CMS defines the annual cost threshold to be equal to \$3,000, increased by an annual percentage. For 2015 the cost threshold is \$3,138. This cost threshold is



too high, particularly when considering that many medications for chronic diseases are now available in lower cost generic form.

Based on analysis of CMS data, NACDS has found that more effective targeting of beneficiaries may be accomplished through a combination of changes to the flexible targeting criteria currently in place in the MTM program, such as lowering the number of drugs required to no more than four and reducing the cost threshold to no more than \$1,500. Making adjustments to only one of these criteria alone would have less of an impact on beneficiary eligibility and would still exclude beneficiaries who would benefit from the program.

### **CMS and Medicaid**

NACDS continues to urge CMS to preserve Medicaid beneficiaries' access to their prescription medications by encouraging the agency to take steps to ensure that neighborhood retail pharmacies receive appropriate reimbursement for prescriptions dispensed to Medicaid beneficiaries, as well as for the pharmacies' costs for dispensing those medications.

The Deficit Reduction Act established a new approach to setting Federal Upper Limits (FULs) for the federal matching rate for pharmaceuticals provided under Medicaid on the basis of Average Manufacturer Price (AMP). These initial limits cut product reimbursement to pharmacies for Medicaid by as much as two-thirds. The Affordable Care Act changed those reimbursement reductions, but still created the potential for significant payment reductions to pharmacies. CMS proposed to implement the AMP-based FULs reimbursement structure through the proposed Covered Outpatient Drugs Rule, issued in 2012. The changes contemplated in this proposed rule are dramatic. The proposed rule impacts pharmacy reimbursement for brand drugs, generic drugs, and the cost to dispense medications to Medicaid beneficiaries. These reimbursement changes have the potential for impacting our ability to serve both current and future Medicaid beneficiaries.

In June 2014, CMS announced that it would delay releasing the final rule on Medicaid Covered Outpatient Drugs and the final AMP-based FULs. Although CMS has delayed the release of the final rule and final AMP-based FULs, it is still important that states have sufficient time to implement Medicaid drug reimbursement changes necessary to comply with both the final rule and the final AMP-based FULs. CMS expects states to view Medicaid reimbursement as a two-part formula, where the movement toward cost-based drug reimbursement should also correspond with changes to dispensing fees based on pharmacy costs. These dual goals are ambitious and require sufficient time for the states to take compliance actions. In fact, a September 2013 letter from the National Association of Medicaid Directors (NAMD) to CMS outlined the reasons why a transition period of up to one year is necessary for states to implement the AMP-based FULs.

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CMS should consider the concerns of stakeholders and allow states a one-year transition period for implementation of the final AMP-based FULs and corresponding dispensing fee changes once both the AMP-based FULs and final rule are published.

**Conclusion**

NACDS appreciates the opportunity to work with Members of the Committee and Members of Congress, as well as other policymakers, to promote the health and welfare of our patients and all Americans. Accordingly we support efforts to promote efficiency, economy, and effectiveness in government, and are pleased to have had the opportunity to share our comments with Members of the Committee.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven C. Anderson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Steven C. Anderson, IOM, CAE  
President and Chief Executive Officer

Jay Timmons

President and CEO

May 1, 2015

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security and  
Governmental Affairs  
U.S. Senate  
Washington, DC 20510

The Honorable Thomas R. Carper  
Ranking Member  
Committee on Homeland Security and  
Governmental Affairs  
U.S. Senate  
Washington, DC 20510

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs and  
Federal Management  
Committee on Homeland Security and  
Governmental Affairs  
U.S. Senate  
Washington, DC 20510

The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs and  
Federal Management  
Committee on Homeland Security and  
Governmental Affairs  
U.S. Senate  
Washington, DC 20510

Dear Chairmen Johnson and Lankford and Ranking Members Carper and Heitkamp:

On behalf of the National Association of Manufacturers (NAM), thank you for the opportunity to identify high priority federal regulations that are impacting manufacturers. The NAM is the nation's largest industrial trade association and voice for more than 12 million men and women who make things in America. The NAM is committed to achieving a policy agenda that helps manufacturers grow and create jobs.

## **I. Regulatory Environment**

Manufacturers believe regulation is critical to the protection of worker safety, public health and our environment. We believe some critical objectives of government can only be achieved through regulation, but our regulatory system is in need of considerable improvement and reform. New regulations are too often poorly designed and analyzed and ineffectively achieve their benefits. They are often unnecessarily complex and duplicative of other mandates. Their critical inputs—scientific and other technical data—are sometimes unreliable and fail to account for significant uncertainties. Regulations are allowed to accumulate without incentives to reevaluate existing requirements and improve their effectiveness. In addition, regulations many times are one-size-fits-all without the needed sensitivity to their impact on small businesses. We can do better.

Unnecessary regulatory burdens weigh heavily on the minds of manufacturers. In the NAM/*IndustryWeek* Survey of Manufacturers released on March 8, 69.1 percent of respondents cited an unfavorable business climate due to government policies, including regulations and taxes, as a primary challenge facing businesses—up from 62.2 percent in March 2012.

The federal government's own data reflects these challenges. According to the annual information collection budget, the paperwork burden imposed by federal agencies excluding the Department of Treasury<sup>1</sup> increased from 1.509 billion hours in fiscal year (FY) 2003 to 2.446 billion hours in FY 2013, an increase of 62.1 percent. To put this number in perspective, federal agencies—not including the Department of Treasury—imposed more than 279,000 years' worth of paperwork burden in FY 2013.

Manufacturers appreciate the need for recordkeeping and paperwork essential to ensuring compliance with important regulatory requirements, but government-imposed regulatory burdens continue to increase despite advancements in technology and both statutory and executive branch directives that federal agencies minimize unnecessary burdens. Government policies should support the global competitiveness of manufacturers and other businesses in the United States, not impose increasing burdens.

The issue of an increasing federal regulatory burden is not unique to a particular presidency or political party. The non-Treasury paperwork burden increased 60 percent<sup>2</sup> during the eight years that President George W. Bush was in office. The NAM has welcomed efforts by President Barack Obama and his Administration to reduce regulatory burdens. The President has signed executive orders, and the Office of Management and Budget (OMB) has issued memoranda on the principles of sound rulemaking, considering the cumulative effects of regulations, strengthening the retrospective review process and promoting international regulatory cooperation. Unfortunately, these initiatives have yet to provide real cost reductions for manufacturers or other regulated entities.

These directives are well-intentioned, but any benefits realized by these efforts have been subsumed by the unnecessarily burdensome regulations that federal agencies have been and are promulgating. Based on data from the Government Accountability Office, 488 major new regulations—defined as having an annual effect on the economy of at least \$100 million—were issued over the previous six years. These regulations include significant burdens imposed on manufacturers in the United States and represent real compliance costs that affect our ability to expand and hire workers.

## **II. Regulatory Challenges Facing Manufacturers in the United States**

Per your request, we have provided information on federal regulations that have a real impact on manufacturers in the U.S. Your efforts at creating an efficient and effective regulatory system comes at a critical juncture for manufacturers. Manufacturing in the United States lost 2.3 million jobs in the last recession. Since the end of 2009, we have gained back 843,000 manufacturing jobs. To maintain manufacturing momentum and encourage hiring, we need government policies that meet regulatory objectives yet minimize unnecessary burdens. We need smarter regulations.

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<sup>1</sup> The Department of Treasury's burden has increased from 6.590 billion hours in FY 2003 to 7.007 billion hours (or 6.3 percent) in FY 2013. See Office of Information and Regulatory Affairs (OIRA), "Information Collection Budget of the United States Government 2014" (2014), [https://www.whitehouse.gov/sites/default/files/omb/infoereg/icb/icb\\_2014.pdf](https://www.whitehouse.gov/sites/default/files/omb/infoereg/icb/icb_2014.pdf).

<sup>2</sup> Government-wide paperwork burden, excluding the Department of Treasury, was 1.205 billion hours in FY 2000 and 1.929 billion hours in FY 2008. See OIRA, "Information Collection Budget of the United States Government 2009" (2009), [https://www.whitehouse.gov/sites/default/files/omb/assets/infoereg/icb\\_2009.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/infoereg/icb_2009.pdf).

a. Existing Regulations

*Commodity Futures Trading Commission (CFTC): Swap Dealer De Minimis Threshold (77 Fed. Reg. 55904 and 79 Fed. Reg. 41126).* Many manufacturers use derivatives, or swaps, to hedge commercial risk and mitigate against fluctuations in currency, interest rate valuations and commodity prices. When the CFTC issued regulations for the derivatives market as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), they created an \$8 billion *de minimis* level of swaps activities for determining if an entity is a swap dealer. Current CFTC rules will soon automatically lower this \$8 billion *de minimis* level to \$3 billion, potentially sweeping in manufacturers to the swap dealer definition and subjecting them to onerous and unnecessary new regulations. The NAM supported legislation—H.R. 3814, introduced by Rep. Richard Hudson (R-NC), in the 113th Congress—which would require the CFTC to establish a *de minimis* level that is no less than the current level and require the agency to take affirmative action before changing the threshold.

*Customs and Border Protection (CBP): Interpretation of Residue Entries (Ruling Letter HQ H026715).*<sup>3</sup> In June 2009, CBP reversed its longstanding policy allowing containers that were returned with trace amounts of residue to be considered empty. Under this new interpretation, CBP will require previously empty containers to consider the residue as an import and be classified, entered and manifested in compliance with customs laws. The agency initially delayed enforcement of the new rule but has recently moved forward. If implemented, the change would result in millions of dollars of additional costs for entries if these containers, which are empty but contain residue matter, are subject to filing requirements as if they were full. Further, residue entries could trigger other statutory requirements under the jurisdiction of other agencies such as the Environmental Protection Agency (EPA) and the Food and Drug Administration (FDA). The Canadian Association of Importers and Exporters estimates that if containers with residue are subject to entry filing requirements, the additional costs incurred by importers/exporters would be \$17,451,330 for truck and \$9,582,735 for rail entries just from the Northern border alone. The NAM supports bipartisan legislation, such as S. 989, introduced by Sen. Daniel Coats (R-IN) and Ranking Member Heidi Heitkamp (D-ND), and H.R. 1773, introduced by Reps. Kenny Marchant (R-TX) and Ron Kind (D-WI), that would remove the onerous CBP requirement and help streamline international trade.

*Environmental Protection Agency (EPA): Emission Standards for Industrial, Commercial and Institutional Boilers and Process Heaters (Boiler MACT) (78 Fed. Reg. 7138).* In January 2013, the EPA published its final Boiler MACT (maximum achievable control technology) rule. The NAM and business and environmental groups filed legal challenges in a federal appeals court, and the agency received 10 petitions for reconsideration, including one filed by the NAM that also requested reconsideration of related rules involving air pollutants for area sources (Boiler GACT, or generally available control technology) and commercial and solid waste incineration units. The EPA estimates that the MACT portion of the rule alone will impose capital costs of near \$5 billion, plus \$1.5 billion more in annual operating costs. The NAM will continue to advocate for achievable and affordable Boiler MACT regulations. While the rule itself has improved over time, there are still flaws and unsettled legal and regulatory issues that impose significant costs and uncertainty for manufacturers.

*EPA: Cooling Water Intake Structures (79 Fed. Reg. 48300).* In August 2014, the EPA published its final rule under section 316(b) of the Clean Water Act regarding cooling water intake structures at power plants and manufacturing facilities. The regulation impacts power

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<sup>3</sup> <http://rulings.cbp.gov/hq/2009/h026715.doc>

plants and manufacturing facilities that rely on cooling water and thus will have to comply with the new requirements. It will also directly impact manufacturers across the board through increases in electricity prices: the utility sector stated that the final regulation will present “significant operational and compliance challenges” and “will not provide states with sufficient flexibility to regulate cooling water impacts cost-effectively on a case-by-case basis.” The agency itself estimated annual costs at nearly \$300 million and benefits at less than \$30 million. The NAM believes the EPA should revise the rule to reflect a more site-specific approach to managing power plant discharges—one that requires less onerous study, monitoring, reporting and permitting obligations.

*EPA: Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, Tier 4 (69 Fed. Reg. 38958 and 40 CFR §§ 1039, 1065, 1068).* In June 2004, the EPA published its final rule on emission standards for nonroad diesel engines, with the goal of reducing emissions from these sources by more than 90 percent. In June 2013, the EPA issued a direct final rule (78 Fed. Reg. 36370) to assist in the transitioning to Tier 4 standards, but withdrew provisions of the rule due to adverse public comment. The updated final rule (79 Fed. Reg. 7077) was published in February 2014. Our members report that the rule’s aggressive compliance timelines have been very difficult to meet, and are causing manufacturers to divert much-needed research and development (R&D) resources toward developing compliance technologies to meet the new Tier 4 standard. In industries such as farm and construction equipment, where manufacturers must continually develop new products for ever-changing customer needs, any decrease in R&D spending is potentially very damaging.

*EPA: Mercury and Air Toxics Standard (MATS) (77 Fed. Reg. 9304).* In late 2011, the EPA released its final MATS rule. This regulation requires both existing and new power plants to install expensive pollution control technology to reduce mercury emissions and other Hazardous Air Pollutants. It is one of the most expensive EPA regulations ever released and will undoubtedly raise electricity costs for manufacturers. It is also a primary example of the need for better economic forecasting and cost-benefit analysis. The EPA’s final MATS rule estimated that only 4.7 gigawatts (GW) of older, inefficient coal-fired power would be forced to retire; we now know that the EPA was off by a factor of ten, as nearly 50 GW of coal-fired power are already slated to close as a direct result of MATS and the Cross-State Air Pollution Rule. At the time, the EPA refused to model the downstream costs of energy or other indirect costs of the rule. Yet at the same time, the Agency measured both direct and indirect benefits, an important distinction because over 99 percent of the benefits of the MATS rule come from indirect reductions in particulate matter (PM)—not mercury or other “air toxics.” In fact, the EPA claims no benefits from reducing toxics and the benefits of reducing mercury (\$6 million) are overwhelmed by the costs of the rule (\$10 billion).

*EPA: National Ambient Air Quality Standards (NAAQS) for Fine Particulate Matter (80 Fed. Reg. 15340).* On March 23, 2015, the EPA issued proposed requirements for states in implementing NAAQS for fine particulate matter (PM<sub>2.5</sub>). The NAM opposed (and ultimately litigated) the existing PM<sub>2.5</sub> NAAQS, which we believe were stricter than needed to meet the EPA’s goals of protecting public health and welfare and would impose unnecessary economic and regulatory burdens on manufacturers. Implementation of the standard has, as expected, proven to be a challenge. Manufacturers across the country consistently report that they are struggling to obtain air permits for their new facilities, even in areas currently in attainment with the PM<sub>2.5</sub> NAAQS, because of the razor-thin margin between the current standard and naturally-existing background levels of PM<sub>2.5</sub>.

*EPA and the Department of the Interior's Bureau of Land Management (BLM): Hydraulic Fracturing Regulations.* On April 13, 2012, President Obama issued an Executive Order declaring that “states are the primary regulators of onshore oil and gas activities,” and seeking to consolidate and coordinate the ten federal agencies currently considering regulation or oversight of hydraulic fracturing (fracking). Despite this decree, federal agencies are actively seeking to assert their regulatory authority over the hydraulic fracturing process on both public and private lands. In March 2015, the BLM issued its final rule (80 Fed. Reg. 16128) that impacts fracking operations on federal and tribal lands, providing for inspections and requiring the public disclosure of fluids used. In April 2012, the EPA issued a final regulation (77 Fed. Reg. 49490) under the Clean Air Act on hydraulic fracturing emissions and the capture of natural gas. In February 2014, the EPA issued guidance asserting authority under the Safe Drinking Water Act (SDWA) over the use of diesel fuels in fracking. Onshore natural gas exploration is already highly regulated at the federal level through the SDWA; the Clean Water Act; the Clean Air Act; the National Environmental Policy Act; the Emergency Planning and Community Right-to-Know Act; and the Comprehensive Environmental Response, Compensation and Liability Act. States have long been the primary regulators of hydraulic fracturing, and the NAM believes states should remain in that role and is concerned that federal regulations could harm any potential gains resulting from increased exploration of shale oil and gas. Where there is a perceived deficiency in any one state’s regulatory mechanisms, the federal government should work with the state to fill in the gaps rather than imposing one-size-fits-all federal rules on states where no deficiencies exist.

*Federal Communications Commission (FCC): Protecting and Promoting the Open Internet (80 Fed. Reg. 19738).* The Internet has propelled considerable advances in manufacturing and the Internet of Things—the interconnectivity of devices of all kinds—has the potential to reshape our industries, our nation and our world. The wireless and wired broadband infrastructure is the envy of the world and has been constantly improved, enhanced and made more efficient by waves of new investment. This success story is possible because of limited regulation that is market-based and pro-competition, but new regulation of the open Internet by the FCC will curtail investment in our telecommunications infrastructure and therefore will hinder innovation, which drives opportunities for manufacturers. By applying a 1930s-era regulatory framework enacted during the period of radio tubes and rotary telephones, the FCC’s rules create a level of legal uncertainty that will chill future investment decisions and is an unwarranted sea change in federal policy. The NAM supports legislation to prevent the FCC from implementing its unnecessary and precedent-setting power grab. The Internet should remain open from unnecessary regulation that will restrict innovation and impose significant costs on manufacturers and the public.

*Department of Transportation's (DOT) Federal Motor Carrier Safety Administration (FMCSA): Hours of Service of Drivers (76 Fed. Reg. 81134).* On December 22, 2011, FMCSA finalized its Trucking Hours of Service rule. Despite conceding that it lacked evidence to support proposed changes, FMCSA implemented in July 2013 its new 34-hour restart provision. The policy has created frustration and added unnecessary burdens to shippers, exacerbating an ongoing driver shortage, shrinking freight capacity and placing more trucks on the road during peak driving times. The Consolidated and Further Continuing Appropriations Act for FY 2015 included a provision spearheaded by Sen. Susan Collins (R-ME) that temporarily halts the burdensome 34-hour restart provision until September 30, 2015, or upon submission of a study by the Secretary of Transportation of the provision and its impacts. This reprieve provides relief to manufacturers and others who are experiencing the unintended consequences of this rulemaking. While only temporary, the reprieve of the 34-hour restart provision is a good start to achieve a more permanent reform.



*Interagency Working Group on Social Cost of Carbon: Technical Support Document, Social Cost of Carbon for Regulatory Impact Analysis.* In May 2013, the Obama Administration increased its estimates of the “social cost” of emitting carbon dioxide (CO<sub>2</sub>) into the atmosphere (i.e., social cost of carbon). As a result, the new estimates allow agencies to greatly increase the benefits of regulations that target or reduce CO<sub>2</sub> emissions. The process for developing the social cost of carbon estimates was not transparent and failed to comply with OMB guidelines and information quality obligations. Many of the inputs to the models were not subject to peer review, and the interagency working group that developed the new estimates failed to disclose and quantify key uncertainties to inform decision makers and the public. Despite wide public concern over the new estimates, agencies are using them to justify the costs of many of the most costly federal regulations. The OMB public comment period initiated at the end of 2013 yielded significant concerns by stakeholders that have never been adequately addressed, and federal agencies continue to rely on the 2013 social cost of carbon estimates that were developed and finalized without any public participation.

*National Labor Relations Board (NLRB): Ambush Elections (79 Fed. Reg. 74308).* On April 14, the National Labor Relations Board’s Ambush Election rule became effective. The new rule shortens the time in which a union election can take place to as little as 14 days and limits allowable evidence in pre-election hearings. The NLRB provided no evidence supporting the dramatic change in policy. Business owners would effectively be stripped of legal rights ensuring a fair election, and those who lack resources, or in-house legal expertise, will be left scrambling to hastily navigate and understand complex labor processes. The compressed time frame for elections could deny employees the opportunity to make fully informed decisions about unionization. The rule also requires all employers to turn over their employees’ personal email addresses, home and personal cellphone numbers, work locations, shifts and job classifications to union organizers. Employees have no say in whether their personal information can be disclosed, and the recipient of the personal information has no substantive legal responsibility to safeguard and protect workers’ sensitive information. The rule also provides no restriction on how the private information can be used, and employees have no legal recourse to hold accountable an outside group that compromises this important private information.

*Department of Labor’s (DOL) Occupational Safety and Health Administration (OSHA): Letter of Interpretation on Union Walk-Along with Inspectors in Non-union Facilities.*<sup>4</sup> OSHA’s February 21, 2013, letter of interpretation (LOI) explicitly endorses union representatives and other non-employee third parties accompanying OSHA inspectors on walk-around inspections at non-union workplaces. The LOI allows an unspecified number of employees to designate an outside union or community organization as their representative during safety inspections, even though the majority of workers have not authorized the union or other group as their representative for any purpose. While statute and regulations permit employees to designate a representative to accompany the OSHA inspector, they do so in the context of the representatives being included “for the purpose of aiding such inspection.” (29 U.S.C. 657 (e)). OSHA’s LOI permits union representatives, or other third parties, to accompany OSHA inspectors on walk-around inspections at any workplace, including those without a union, for reasons far beyond this context, indeed without any relationship to this context. The fact that this significant change in policy was done through a letter of interpretation and not a rulemaking, although it substantively changes the regulation, means that affected parties had no opportunity

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<sup>4</sup> [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=28604](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28604)

to provide input, and OSHA had no obligation to present any data or evidence demonstrating the need for this change.

*DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA): Transportation of Lithium Batteries.* Section 828 of the FAA Modernization and Reform Act of 2012, (Pub. Law 112-95) prohibits the Secretary of Transportation from issuing or enforcing any regulation or other requirement regarding the transportation by aircraft of lithium ion and lithium metal batteries that is more stringent than the requirements of internationally-adopted regulations.<sup>5</sup> The prohibition includes both shipments of batteries and shipments of batteries packed with or contained in equipment. The NAM opposes efforts to amend or remove section 828, which ensures the U.S. maintains harmonization with the international standards. Despite clear congressional intent, PHMSA has had open rulemakings (78 Fed. Reg. 1119) on lithium batteries in 10 of the last 13 years. This has caused considerable confusion for carriers and shippers of lithium batteries and the products containing such batteries. Maintaining harmonization as required by law would halt the nonstop rulemaking processes that has plagued impacted industries over the last 13 years. The Federal Aviation Administration and PHMSA should be directed to encourage enforcement of international transport regulations. The lack of enforcement and compliance with the lithium battery dangerous goods transport regulations at some points of foreign origin poses significant safety issues for U.S. carriers operating out of certain regions. Regulatory inefficiencies and confusion adversely impact safety and international commerce. Harmonization with international standards will deliver regulatory certainty, greater efficiencies in the logistics supply chain and improved safety of lithium battery shipments.

*Securities and Exchange Commission (SEC): Conflict Minerals (77 Fed. Reg. 56274).* In August 2012, the SEC issued its final rule in accordance with section 1502 of the Dodd-Frank Act. The final rule is not consistent with the realities of global supply chains, and the SEC failed to acknowledge the practical limitations on issuers in monitoring and influencing the behavior of other parties in the supply chain. The agency also dismissed less costly regulatory alternatives, opting for a comprehensive one-size-fits-all regime that arguably does not improve the effectiveness of the final rule. Companies are required to certify with each supplier that no parts or products are made or derived from the regulated minerals coming from the Democratic Republic of the Congo (DRC) or an adjoining country. The necessary infrastructure is not in place to trace the origin of minerals or to determine with certainty that they are not conflict minerals. Without this vital information, it is nearly impossible for companies to know if their products contain conflict minerals. In April 2014, the U.S. Court of Appeals for the District of Columbia Circuit upheld the majority of the rule but ruled in favor of the NAM, who was joined by the Business Roundtable and the U.S. Chamber of Commerce, on an important First Amendment objection to the requirement that companies make misleading and stigmatizing public statements unfairly linking their products to terrible human rights abuses. A month later, the SEC issued a partial stay of the portion of the rule that requires issuers to disclose that any of their products have "not been found to be "DRC conflict free." It denied our request that the entire rule be stayed. The Commission did not, however, stay the effective date (June 2) for complying with all the other requirements of the rule. Companies are struggling to determine the meaning of the SEC's action and what to do. Continued ambiguity is imposing significant cost burdens on companies, particularly small firms who do not have the resources to comply with the SEC's overly burdensome regulation.

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<sup>5</sup> International Civil Aviation Organization, *Technical Instructions for the Safe Transport of Dangerous Goods by Air*.

b. Currently Proposed Regulations

*Consumer Product Safety Commission (CPSC): Information Disclosure under Section 6(b) of the Consumer Product Safety Act (79 Fed. Reg. 10712).* In February 2014, the CPSC issued a proposed rule that would significantly alter its interpretation of section 6(b) of the Consumer Product Safety Act (CPSA), changing the agency's longstanding policy on publicly disclosing information on companies and products. The CPSA requires the CPSC to "take reasonable steps to assure" that any disclosure of information relating to a consumer product safety incident is accurate and fair. The Commission's proposal would limit critically important protections afforded to manufacturers from the disclosure of inaccurate information. If finalized, the rule would significantly narrow the information that is subject to section 6(b) requirements and permit the CPSC to not notify firms when releasing information that is "substantially the same as" information it previously disclosed. Current regulations require notification unless the information is identical. This latter change would eliminate a statutory requirement that manufacturers be provided an opportunity to ensure the accuracy of information the CPSC will release. The proposed rule would eliminate the ability of a company to request notification that the Commission plans to subsequently disclose similar information. The CPSC seeks to eliminate protections for the disclosure of information subject to attorney-client privilege and limit a company's ability to have comments they have provided withheld from the public disclosure. Importantly, the CPSC is proposing to exempt from section 6(b) information that is publicly available, including information that is available on the internet even if the information is inaccurate or unfair. The proposal would undermine a successful and cooperative process that has been in place for more than 30 years.

*CPSC: Mandatory Standard for Recreational Off-Highway Vehicles (79 Fed. Reg. 68964).* In October 2014, the CPSC proposed a mandatory standard for recreational off-highway vehicles (ROVs) despite admitting that it had no evidence showing its proposed changes would improve safety. The ROV industry is highly innovative, using technological advances to improve safety, and it has recently issued new comprehensive voluntary standards. The CPSC, however, is seeking to assert a command-and-control regulatory framework and is attempting to dictate design and handling characteristics of vehicles. The proposal violates statutory requirements that the agency defer to voluntary standards and, when issuing mandatory standards, to issue only performance-based criteria and not design mandates. The CPSC's insistence on a mandatory standard will compromise the mobility and utility of the vehicles in the off-highway setting for which they are intended, negatively impact safety by limiting research and innovation and harm consumer demand. The result of this agency action would be the loss of thousands of American manufacturing and retail jobs. Industry analysis has shown that at least 90 percent of serious incidents with ROVs would not have been affected by the CPSC proposal, but were instead caused by operator actions. The CPSC's threat of a mandatory standard as a way to force an entire industry into accepting unproven design requirements is a dangerous precedent-setting tactic. Such action could greatly harm an entire industry with no clear improvements to safety and no justification for the costs the agency seeks to impose on manufacturers and consumers.

*CPSC: Mandatory Standard for Table Saws (76 Fed. Reg. 62678).* In October 2011, the CPSC initiated rulemaking procedures to establish mandatory safety standards for table saws. The rulemaking, in its current trajectory, would seek to impose a standard that could only be achieved through the use of one patented technology. Regulation should not be used to advantage one technology or one company over another. The CPSA dictates when the Commission can issue a mandatory standard: only upon a finding that an existing voluntary standard would not prevent or adequately reduce the risk of injury in a manner less burdensome

than the proposed CPSC mandatory standard. Data used by the CPSC on table saw injuries are outdated and are not relevant to current voluntary standards. If the CPSC proceeds with a mandatory standard, such action would undermine industry's incentive to develop new alternative table saw safety technology and would impose unnecessary increased costs on consumers. Unfortunately, this rulemaking illustrates a trend at the agency where the CPSC fails to conduct adequate cost-benefit analyses with its rulemakings and imposes prohibitive costs on manufacturers and consumers without accounting for the actual risks associated with products.

*CPSC: Prohibition of Children's Toys and Child Care Articles Containing Specified Phthalates (79 Fed. Reg. 78324).* The 2008 Consumer Product Safety Improvement Act established the Chronic Hazard Advisory Panel (CHAP) to study the effects of all phthalates and phthalate alternatives used in children's toys and child care articles. The law further directs the CPSC to issue a final rule based on the panel's findings and recommendations. The CHAP issued its report and recommendations in July 2014, over three years after the statutory deadline. On December 30, 2014, the CPSC published a proposed rule to implement the CHAP's recommendations. The CHAP report relied on outdated data and was not subject to an open public comment period in accordance with guidelines set forth in the OMB's "Final Information Quality Bulletin for Peer Review," and was only subjected to a non-public peer review. The OMB bulletin establishes strict minimum requirements for the peer review of highly influential scientific assessments, including a requirement that an agency "make the draft scientific assessment available to the public for comment at the same time it is submitted for peer review . . . and sponsor a public meeting where oral presentations on scientific issues can be made to the peer reviewers by interested members of the public." The need for more rigorous peer review is essential because the CPSC's proposed rule is predicated on a precedent-setting cumulative risk assessment used by the CHAP as it developed its recommendations. When misapplied within the regulatory process, this cumulative risk assessment methodology could have broad implications across different agencies and numerous regulatory programs and for all manufacturers of industrial chemicals and consumer products.

*CPSC: Voluntary Remedial Actions and Guidelines for Voluntary Recall Notices (78 Fed. Reg. 69793).* In November 2013, the CPSC issued a proposed rule that would place significant burdens on manufacturers and retailers of consumer products and negatively impact the highly successful voluntary recall process. The proposed rule would make voluntary corrective action plans and voluntary recalls legally binding, increasing enforcement jeopardy and legal consequences in product liability, other commercial contexts or in a civil penalty matter. The proposal would eliminate a company's ability to disclaim admission of a defect or potential hazard. This raises serious First Amendment concerns as the CPSC seeks to prevent companies from making truthful public statements. The proposed rule would also empower CPSC staff to include compliance programs in corrective action plans. The CPSC lacks the statutory authority to proceed with binding regulations for voluntary programs, and despite extensive opposition to the proposed rule, the CPSC indicated in its FY 2015 operating plan that it intends to issue a final rule this year. The success of our consumer product recall system is based on a strong cooperative relationship between the CPSC and the companies it regulates. The rule removes longstanding incentives for firms to proactively cooperate with the CPSC and could seriously threaten the Fast Track recall program, which the CPSC itself highlights as a model of good governance.

*Departments of Commerce, State and Defense: Export Controls.* The current U.S. export control regulations have recently undergone the first major revision since they were

implemented during the Cold War. The Obama Administration has taken steps to modernize the export control system, prioritizing the movement of certain items from the United States Munitions List (USML) to the Commerce Control List. In addition to completing the review of USML Categories before the end of 2015, the NAM encourages the Administration to simplify encryption controls and establish an effective and efficient program license that dramatically reduces the number of licenses among trusted companies and allies required to support U.S. government defense and security programs. We also urge the creation of an intra-company transfer license that allows trusted companies to exchange technology freely within their own organizations, protected by their own compliance processes and technology and intellectual property controls.

*EPA: Formaldehyde Emissions Standards for Composite Wood Products (78 Fed. Reg. 34820).* In June 2013, the EPA issued a proposed rule to implement the Formaldehyde Standards for Composite Wood Products Act, passed in 2010 with the goal of implementing California's formaldehyde standards nationwide. The EPA's proposal differs significantly from Congress's intent and is unnecessarily burdensome. The proposal is based on questionable analysis and would greatly burden manufacturers. The committee report accompanying the FY 2015 Interior and Environment Appropriations bill (H.R. 5171, 113th Congress), which was incorporated in the final joint explanatory statement of the Appropriations law, urged the EPA to finalize a rule that is consistent with the California regulations for laminated products and consistent with current law.

*EPA: Greenhouse Gas (GHG) Emission Limits for Existing Electric Utilities (79 Fed. Reg. 34829 and 79 Fed. Reg. 65482).* The EPA proposed its much-publicized "Carbon Pollution Standard" for existing power plants on June 2, 2014. The proposed rule would set first-of-their-kind performance standards for GHG emissions from existing power plants. The EPA's proposal would fundamentally shift how electricity is generated and consumed in this country, effectively picking winners and losers in terms of both technologies and fuels. The rule also represents an attempt to vastly expand the EPA's traditional authority to regulate specific source categories by setting reduction requirements that reach into the entire electricity supply and demand chain. The requirements will be substantial, potentially costing billions of dollars per year to comply. Some studies estimate that compliance with the rule would cost well over \$300 billion and cause double-digit electricity price increases for ratepayers in most states. Manufacturers are concerned about these potential costs and reliability challenges as electric power fleets are overhauled in compliance with the regulations. We are also keenly aware that the EPA is using this regulation as a model for future direct regulations on other manufacturing sectors—meaning manufacturers could potentially be hit twice by GHG regulations.

*EPA: GHG Emission Limits for New Electric Utilities (79 Fed. Reg. 1430).* On September 20, 2013, the EPA issued first-ever standards of performance for GHG emissions for new fossil fuel-fired electric generating units. The EPA inappropriately concluded that carbon capture and sequestration (CCS) is "adequately demonstrated" for utility-scale applications and its utilization is the basis for the mandated standard for all new coal-fired power plants. As a matter of fact, CCS has not been adequately demonstrated at the utility scale—making a standard that requires it for all new coal plants an effective ban on those plants. Manufacturers support an "all of the above" approach to energy, and the EPA's proposed regulations on new power plants would deselect a fuel source—coal—from the nation's future energy portfolio. Moreover, the manufacturers of CCS worry that the regulation will stifle investment in this promising but as-yet unproven technology. As currently written, the EPA's new power plant regulation appears to be less of a standard of performance and more of a means to an end. The NAM believes the EPA

should withdraw this rule and re-propose a standard for new power plants that is truly the best system of emissions reduction and has been adequately demonstrated.

*EPA: NAAQS for Ozone (79 Fed. Reg. 75234).* On December 17, 2014, the EPA proposed tightening the NAAQS for ozone from 75 parts per billion (ppb) to between 65 and 70 ppb. More than 60 percent of the controls and technologies needed to meet the rule's requirements are what the EPA calls "unknown controls." Because controls are not known, the new regulation could result in the closure of plants and the premature retirement of equipment used for manufacturing, construction and agriculture. The proposal could reduce GDP by \$140 billion annually and eliminate 1.4 million job equivalents per year. In total, the costs of complying with the rule from 2017 through 2040 could top \$1 trillion, making it the most expensive regulation ever issued by the U.S. government. The current standard of 75 ppb—the most stringent standard ever—has not even been fully implemented yet, while emissions are as low as they have been in decades and air quality continues to improve. The EPA itself admits that implementation of the current standard of 75 ppb, when combined with the dozens of other regulations on the books that will reduce ozone precursor emissions from stationary and mobile sources, will drive ozone reductions below 75 ppb (and close to 70 ppb) by 2025. The massive costs of a stricter standard—the most expensive regulation of all time, by a significant margin—are simply not necessary at this time. The NAM supports maintaining the current ozone standard of 75 ppb.

*EPA and the Army Corps of Engineers: Definition of "Waters of the United States" Under the Clean Water Act (79 Fed. Reg. 22187).* In April 2014, the EPA and Army Corps of Engineers issued a proposed rule to greatly extend federal jurisdiction of Clean Water Act programs well beyond traditional navigable waters to tributaries, flood plains, adjacent waters and vaguely-defined "other waters." The proposal would, for the first time, give federal agencies direct authority over land use decisions that Congress has intentionally reserved to the States. Its vague definitions would subject countless ordinary commercial, industrial and even recreational and residential activities to new layers of federal requirements under the Clean Water Act. For manufacturers, the uncertainty of whether a pond, ditch or other low-lying or wet area near their property is now subject to federal Clean Water Act permitting requirements is a regulatory nightmare that could introduce new upfront costs, project delays and threats of litigation. Manufacturers believe the term "waters of the United States" should mean waters that are navigable in fact or that have a relatively permanent navigable surface connection to water. We have urged the EPA to withdraw and re-propose this rule in a way that respects the jurisdictional limitations established by Congress and enforced by the U.S. Supreme Court.

*DOL's OSHA: Improve Tracking Workplace Injuries and Illnesses (78 Fed. Reg. 67253 and 79 Fed. Reg. 47605).* The proposed rule would change current reporting requirements for employer injury and illness logs and permit OSHA to publish the information on its website. While the agency has the statutory authority to collect the information, the statute does not authorize OSHA to make the information publicly available. The proposed rule presents privacy issues for employees as the information contained in injury and illness logs includes personally identifiable information, as well as other private information about individual employees. This information should not be available for public consumption. The employer reports also include information that is unrelated to work activity, which without context could mischaracterize a company's safety record. The NAM believes that the existing recordkeeping system is sufficient to allow employers to identify and address hazards in their workplaces. Finally, despite lacking statutory authority, OSHA issued an update to its proposal that would place companies in enforcement jeopardy if the agency determines that requirements such as additional training or even reflective clothing is an "adverse action" in response to an employee injury report. Finally,

in a supplement to the proposed rule, OSHA provided no regulatory text, but suggests in the questions it posed, that a mere posting of a company's safety record could be viewed by the agency as the company discouraging the reporting of incidents. These proposed updates would inject uncertainty and ambiguity into the workplace safety dynamic. Current protections for employees from retaliation in response to injury reports are comprehensive, well-established and support company initiatives to improve the health and well-being of employees.

*DOL's OSHA: Occupational Exposure to Crystalline Silica (78 Fed. Reg. 56274).* The proposed rule would reduce by half the permissible exposure limits for crystalline silica and mandate extensive and costly engineering controls. It would also require employers to provide exposure monitoring, medical surveillance, work area restrictions, clean rooms and recordkeeping. The proposal is based on outdated data and would impact 534,000 businesses and 2.2 million workers, including 25,000 hydraulic fracturing employees and 1.85 million construction workers. The costs of this proposal could far exceed its benefits. An analysis by engineering and economic consultants estimated that the silica rule would impose \$5.5 billion in annualized compliance costs on affected industries. Silica is perhaps the most common construction and manufacturing material in the world; it is a critical component in many manufacturing, construction, transportation, defense and high-tech industries and is present in thousands of consumer products. Significant progress has been made in preventing silica-related diseases under existing regulations, making proposed changes unnecessary and overly burdensome.

*DOL's Office of Federal Contract Compliance Programs (OFCCP): Government Contractors, Requirement to Report Summary Data on Employee Compensation (79 Fed. Reg. 46562).* The proposed rule would require federal contractors to submit an additional report of "summary data" on compensation paid to employees, including race and sex, to encourage compliance with equal pay laws and to target enforcement more effectively by focusing efforts where there are grave discrepancies. The proposal and expanded recordkeeping requirements would put a company at risk of publicly disclosing employees' private information, potentially expose proprietary information of a company and conflicts with the SEC's proposed pay ratio rule (see below). Moreover, the OFCCP proposal would violate the Paperwork Reduction Act—it is unnecessary and duplicative. Also the agency failed to employ sound rulemaking principles that are outlined in Executive Order 13563. The rule would fail to accomplish the stated regulatory objectives, and the OFCCP did not coordinate with other agencies with similar regulatory responsibility when it developed its proposal.

*DOL's Office of Labor-Management Standards: Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption (Persuader Rule) (76 Fed. Reg. 36177).* On June 21, 2011, the DOL published a proposal that would result in sweeping changes to the rules that administer the Labor-Management Reporting and Disclosure Act. The agency seeks to drastically expand the definition of "persuader" activity to include many activities currently recognized as labor law advice. These new regulations seek to drastically reinterpret longstanding requirements on how employers can work with legal counsel to comply with the complex and nuanced laws governing labor relations. These proposed changes would make it more difficult for manufacturers, especially smaller-sized manufacturers, to access necessary legal assistance. It would also make it more difficult for employers to understand how to legally discuss labor issues with their employees, effectively gagging them by preventing access to legal assistance and keeping many employees from hearing both sides of the unionization debate. Current law requires employers, law firms and other labor union experts to disclose when employers have sought assistance from consultants who intend to directly persuade employees regarding union members. For decades, the law has included a very



important exemption: employers were allowed to obtain legal advice from attorneys to remain compliant with current law. Broadening the definition would violate the tenants of the attorney-client privilege and confidentiality. It is unclear when the revised rules are scheduled for publication.

*SEC: Pay Ratio Disclosure (78 Fed. Reg. 60560).* On September 18, 2013, the SEC proposed regulations to implement section 953(b) of the Dodd-Frank Act. The proposed rule would require companies to regularly disclose the ratio of employees' median pay to the compensation of the company's chief executive. Manufacturers believe that this costly and onerous administrative burden on companies will not produce useful information for investors. Even the SEC's own proposal notes that "neither the statute nor the related legislative history directly states the objectives or intended benefits of the provision or a specific market failure, if any, that is intended to be remedied." Thus, companies will be required to comply with a provision that has no stated benefit but that will require them to incur significant costs and overcome substantial barriers to do so. Moreover, the idea that a single statistic, like the pay ratio, could be an indicator of a company's approach to compensation practices, business strategy or hundreds of other decisions that comprise their business plan is false and overly simplistic. The proposed rule would generate unnecessary paperwork and waste significant company resources. The NAM supports H.R. 414, the Burdensome Data Collection Relief Act, which was introduced by Rep. Bill Huizenga (R-MI) and would repeal section 953(b).

c. Anticipated Proposed Regulations

*CBP: Implementation of the Automated Commercial Environment (ACE).* By the end of 2016, ACE will become the federal government's "single window" for imports and exports. CBP is working with agencies—including the Department of Commerce, the FDA, the CPSC, the EPA and others—on ACE deployment and the Interagency Trade Data System, with the coordinating Border Interagency Executive Council. Manufacturers encourage CBP and the U.S. Census Bureau to preserve—and potentially expand—post-departure Automated Export System filing for eligible companies. The NAM has urged CBP to ensure that availability of post-departure filing (often referred to as "Option 4") is retained for eligible companies and to work collaboratively with exporters. We have also encouraged CBP to carefully consider the potentially negative impacts on exporters if they proceed with plans to require advance electronic manifests in all modes of transportation. CBP is currently rolling out electronic export manifest pilots for various modes, and manufacturers will continue to work closely with carriers and other stakeholders to ensure a smooth transition that does not hinder exports.

*DOL: Contractor Blacklisting, Implementation of Executive Order 13673 (Fair Pay and Safe Workplaces).* The Executive Order could bar federal contractors from new work if there has even been an allegation of a labor law violation in the past three years. It would apply to contracts valued at \$500,000 or more and will be implemented by 2016. DOL will issue guidance through notice and comment and OMB—through the Federal Acquisition Regulatory Council—will spearhead the issuance of a regulation. First and foremost, the President does not have the legal authority to make the regulatory changes that will follow from this order. By directing DOL to develop guidance that will establish degrees of violations not included in the underlying statutes, the Executive Order significantly amends the enforcement mechanisms Congress established for these laws. Additionally, the order disregards existing enforcement powers the Administration already has through federal acquisition regulations and labor laws, as well as the longstanding process by which suspension and debarment actions are taken. This process is set forth in the Federal Acquisition Regulation (FAR) and specifically in FAR Part 9.4. Each agency has the ability to determine, through the agency's suspension and debarment

official, whether the government should refrain from doing business with a particular contractor because the contractor is not “presently responsible.” Factors taken into account for making such a determination include whether there has been a finding of fraud committed on the contract and/or willful and serious violations of other U.S. laws. Furthermore, the agency official may consider whether the contractor has taken measures to remediate past bad actions or eliminated systemic problems from the past. Rather than improving upon these existing processes, the Executive Order would unnecessarily create additional burdens on contractors and further complicate an already complex contracting process.

### **III. Improving the Regulatory Process**

Manufacturing in America is making a comeback, but it could be much stronger if federal policies did not impede growth. If we are to succeed in creating a more competitive economy, we must reform our regulatory system so that manufacturers can innovate and make better products instead of spending hours and resources complying with inefficient, duplicative and unnecessary regulations. Manufacturers are committed to commonsense regulatory reforms that protect the environment and public health and safety as well as prioritize economic growth and job creation.

Manufacturers support reform proposals that would fundamentally change the regulatory process with the goal of improving the quality of rules that agencies issue. Leaders in Washington must view regulatory reform as more than just a rule-by-rule process but instead as a system-by-system and objective-by-objective review. The NAM recommends a number of reforms outlined below that would improve the system through which modern rulemaking is conducted.

#### **a. Streamline Regulations through Sunsets and Retrospective Review**

Our regulatory system is broken, unnecessarily complex and inefficient, and the public supports efforts to streamline and simplify regulations by removing outdated and duplicative rules. Through a thoughtful examination of existing regulations, we can improve the effectiveness of both existing and future regulations. Importantly, retrospective reviews could provide agencies an opportunity to analyze, revise and improve techniques and models used for predicting more accurate benefits and costs estimates for future regulations. As Michael Greenstone, former chief economist at the Council of Economic Advisers under President Obama, wrote in 2009, “The single greatest problem with the current system is that most regulations are subject to a cost-benefit analysis only in advance of their implementation. That is the point when the least is known, and any analysis must rest on many unverifiable and potentially controversial assumptions.”<sup>6</sup> Retrospective review of existing regulations should include a careful and thoughtful analysis of regulatory requirements and their necessity as well as an estimation of their value to intended outcomes.

For an agency to truly understand the effectiveness of a regulation, it must define the problem that the rule seeks to modify and establish a method for measuring its effectiveness after implementation. In manufacturing, best practices include regular reprioritizations and organized abandonment of less useful methods, procedures and practices. The same mentality should apply to regulating agencies: the retrospective review process should be the beginning

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<sup>6</sup> Michael Greenstone, “Toward a Culture of Persistent Regulatory Experimentation and Evaluation,” in David Moss and John Cisternino, eds., *New Perspectives on Regulation*, The Tobin Project, 2009, p. 113, [http://tobinproject.org/sites/tobinproject.org/files/assets/New\\_Perspectives\\_Ch5\\_Greenstone.pdf](http://tobinproject.org/sites/tobinproject.org/files/assets/New_Perspectives_Ch5_Greenstone.pdf).

of a bottom-up analysis of how agencies use their regulations to accomplish their objectives. Agencies should look to the private sector and the concept of “lean manufacturing” as a model for how to improve our regulatory system. Many manufacturers have transformed their operations by adopting a principle called “lean thinking,” where they identify everything in the organization that consumes resources but adds no value to the customer. They then look for a way to eliminate efforts that create no value.

In the government setting, agencies might identify anything that is not absolutely necessary to achieve the regulatory outcome and eliminate it. When considering a new regulation or reviewing existing requirements, agencies must first define the problem, which should include early participation by all stakeholders. They must engage in a bottom-up interagency analysis of how agencies use regulations, guidance and paperwork requirements to accomplish objectives. It is vital to identify all inefficiencies and determine how to eliminate efforts and processes that create no value or assist in meeting objectives. Finally, agencies must institutionalize these best practices.

The Administration strongly promotes the benefits of conducting retrospective reviews. Executive Order 13563 directs agencies to conduct “retrospective analysis of rules that may be outmoded, ineffective, insufficient or excessively burdensome, and to modify, streamline, expand or repeal them in accordance with what has been learned.” Retrospective review of regulations is not a new concept, and there have been similar initiatives over the past 40 years. In 2005, OMB, through the Office of Information and Regulatory Affairs (OIRA), issued a report, titled *Regulatory Reform of the U.S. Manufacturing Sector*. That initiative identified 76 specific regulations that federal agencies and OMB determined were in need of reform. In fact, the NAM submitted 26 of the regulations characterized as most in need of reform. Unfortunately, like previous reform initiatives, the 2005 initiative failed to live up to expectations, and despite efforts by federal agencies to cooperate with stakeholders, the promise of a significant burden reduction through the review of existing regulations never materialized.

There is significant bipartisan interest in implementing federal policies that will tackle the problem of regulations that place unnecessary costs on manufacturers and businesses yet are not benefitting society. Sen. Angus King (I-ME) introduced the Regulatory Improvement Act of 2015 (S. 708) with Sens. Roy Blunt (R-MO), Jeanne Shaheen (D-NH) and Roger Wicker (R-MS). This bipartisan legislation would establish a bicameral and bipartisan Regulatory Improvement Commission to review outdated regulations and submit regulatory changes to Congress for an up-or-down vote. In the 113th Congress, Sen. Amy Klobuchar (D-MN) introduced the Strengthening Congressional Oversight of Regulatory Actions for Efficiency Act (SCORE Act, S. 1472, 113th Congress), which would, among other provisions, require a new division within the Congressional Budget Office (CBO) to analyze economically significant regulations that have been in effect for five years to determine if they are meeting the stated goals they were intended to provide.

To truly build a culture of continuous improvement and thoughtful retrospective review of regulations, retrospective reviews must be institutionalized and made law. One of the best incentives for high-quality retrospective reviews of existing regulations is to sunset rules automatically that are not chosen affirmatively to be continued. The NAM supports the Regulatory Sunset and Review Act (H.R. 2010), introduced by Rep. Randy Hultgren (R-IL), which would implement a mandatory retrospective review of regulations to remove conflicting, outdated and often ineffective regulations that build up over time. If an outdated rule has no defender or continued need for existence or is shown to have decreased in effectiveness over time, it should be sunset.

Adopting lean thinking into the review of existing regulations could produce more robust and significant reductions in regulatory burdens while maximizing the benefits associated with protecting health, safety and the environment. If agencies were conducting this kind of review, we would see requests to Congress to change statutes to allow for greater flexibility in a number of regulatory programs. Rep. Hultgren's bill includes a provision directing agencies to report to Congress on needed legislative changes that would assist them as they implement regulatory changes as a result of their reviews. The necessity of legislative changes should be an opportunity, not a roadblock, to any proposal.

The power of inertia and the status quo is very strong. Without an imperative to review old regulations, it will not be done, and we will end up with the same accumulation of conflicting, outdated and often ineffective regulations that build up over time. These types of systems need to be put in place throughout the government to ensure regulatory programs are thoughtful, intentional and meet the needs of our changing economy.

b. Strengthen and Codify Sound Regulatory Analysis

The complexity of rulemaking and its reliance on highly technical scientific information has only increased since the passage of the Administrative Procedure Act (APA) in 1946. Our administrative process has not kept up with those changes, and agency accountability is lacking without meaningful judicial review. Moreover, the process by which the government relies on complex, scientific information as the basis for rules should be improved and subject to judicial review. Efforts to encourage peer review of significant data and to create consistent standards for agency risk assessment should be part of that process. The NAM supports legislative reforms to the APA to incorporate the principles and procedures of President Clinton's 1993 Executive Order 12866 into the DNA of how every rule is developed. Manufacturers also support legislation that would improve the quality of information agencies use to support their rulemakings. President Obama reaffirmed the principles of sound rulemaking when he issued Executive Order 13563, stating,

Our regulatory system must protect public health, welfare, safety and our environment while promoting economic growth, innovation, competitiveness and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. . . . It must measure, and seek to improve, the actual results of regulatory requirements.

Manufacturers and the general public agree with these principles and believe the regulatory system can be improved in a way that protects health and safety without compromising economic growth. Agencies should, among other things, use the best available science, better calculate the benefits and costs of their rules, improve public participation and transparency, use the least burdensome tools for achieving regulatory ends and specify performance objectives rather than a particular method of compliance to improve the effectiveness of regulatory measures. Members of the Committee on Homeland Security and Governmental Affairs from both sides of the aisle have expressed support for reform proposals that include many important regulatory requirements designed to improve the quality of an agency's analysis and the effectiveness and efficiency of its rules. Last Congress, Sen. Rob Portman (R-OH) introduced the bipartisan Regulatory Accountability Act (S. 1029, 113th Congress), comprehensive reform legislation that would instill sound rulemaking principles into

the fabric of our regulatory system. Agencies would be statutorily required to conduct cost-benefit analysis and recognize the true regulatory impacts of their rules. The House passed the Regulatory Accountability Act (H.R. 185), introduced by House Judiciary Committee Chairman Bob Goodlatte (R-VA), in January, and the NAM supports Senate consideration of this important reform package.

Manufacturers and other businesses are often asked which regulation is the most burdensome. It is a difficult question to answer because the cumulative costs of federal, state and local regulations are extremely complex. Agencies must better consider the cumulative effects of their regulations and requirements. Important reform measures, like Sen. Portman's Regulatory Accountability Act, would require agencies to consider the cumulative costs of regulatory requirements. Executive Order 13563 and OMB guidance for agencies both articulate this principle. President Obama also issued Executive Order 13610, which directs agencies to consider "the cumulative effects of their own regulations, including cumulative burdens . . . and give priority to reforms that would make significant progress in reducing those burdens while protecting public health, welfare, safety and our environment." Agency adherence to each of these regulatory principles is vital if we are to implement fundamental change to our regulatory system that improves the effectiveness of rules in protecting health, safety and the environment while minimizing the unnecessary burdens imposed on regulated entities.

c. Improve Congressional Review and Analysis of Regulations

Congress is at the heart of the regulatory process and produces the authority for the agencies to issue rules, so it is also responsible, along with the Executive Branch, for the current state of our regulatory system. While Congress does consider some of its mandates' impacts on the private sector through regulatory authority it grants in law, it has less institutional capability for analysis of those mandates than the Executive Branch. Congress does not have a group of analysts who develop their own cost estimates of proposed or final regulations. Over the past two decades, members of Congress have proposed to create a congressional office of regulatory analysis. As the Congressional Budget Office parallels OMB, so too should Congress have a parallel to OIRA.

This institutional change to the regulatory system could encourage more thoughtful analysis of the regulatory authority Congress grants in statutes, provide Congress with better tools in analyzing agency regulations and allow Congress to engage in more holistic reviews of the overlapping and duplicative statutory mandates that have accumulated over the years. The NAM supports legislative proposals like Sen. Klobuchar's SCORE Act, which would provide Congress with an office to analyze the prospective impact of economically significant rules in addition to conducting retrospective reviews. Not only would this office give lawmakers better information about the potential impacts of a proposed regulation, but it would also provide agencies with analysis conducted by an objective third party. This is an important rethinking of the institutional design of our regulatory system and could lead to regulations that more effectively meet policy objectives while reducing unnecessary burdens.

d. Support Centralized Review of Agencies' Regulatory Activities

Executive Order 12866 defines OIRA's regulatory review responsibilities. OIRA reviews significant rules issued by executive branch agencies and the analyses used to support those rules at both their draft and final stages. The office applies a critical screen to the contents of regulation, agencies' analytical rigor, legal requirements affecting the proposal and the

President's priorities and philosophy. Nowhere else in the government does this take place. Single-mission agencies are frequently effective in accomplishing their objectives. This intense focus on a relatively narrow set of policies can weaken their peripheral vision, however, including their assessment of duplication between agencies, cumulative impacts of similar rules on the same sector of the economy or other broader considerations. OIRA is the only agency that brings to bear a government- and economy-wide perspective. For that reason, OIRA is a critical institution in our regulatory process for conducting a centralized review of the agencies' regulatory activities, facilitating interagency review, resolving conflicts and eliminating unnecessary duplication.

A key responsibility of OIRA is to ensure that regulating agencies are meeting the requirements of Executive Order 12866 for a significant regulatory action. The Executive Order states, "Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." Importantly, OIRA facilitates public participation in the regulatory process and helps ensure that agencies' analyses, to the extent possible, are accurate. Without quality analysis, it is difficult to ensure that regulations are meeting health, safety and environmental objectives "while promoting economic growth, innovation, competitiveness and job creation," as stated in Executive Order 13563.

Despite its critical function, even as the size and scope of the government has increased, OIRA has shrunk. As OIRA's staff was reduced from a full-time equivalent ceiling of 90 to fewer than 40 employees today, the staff dedicated to writing, administering and enforcing regulations has increased from 146,000 in 1980 to 290,690 in 2013. OIRA's budget has been reduced by more than 60 percent, or nearly \$11 million in real 2005 dollars, while the agencies' budgets have increased from \$15.2 billion to more than \$50 billion in real 2005 dollars. To ensure that OIRA can fulfill its current mission, additional staff and resources are necessary. Much has been made about the length of OIRA reviews, but additional resources would allow OIRA analysts to do their jobs more quickly.

By expanding OIRA's ability to provide objective analysis, to conduct thoughtful regulatory review and to work with regulating agencies, federal regulations will meet health, safety and environmental objectives more effectively at a much lower cost to businesses. A modest investment in this institution will pay back significant returns to the entire economy.

e. Hold Independent Regulatory Agencies Accountable

The President does not exercise similar authority over independent regulatory agencies—such as the FCC, the NLRB, the SEC and the CPSC—as he does over other agencies within the Executive Branch. Independent agencies are not required to comply with the same regulatory principles as executive branch agencies and often fail to conduct any analysis to determine expected benefits and costs.

The President's bipartisan Council on Jobs and Competitiveness made recommendations in its interim and final reports to encourage Congress to require independent regulatory agencies to conduct cost-benefit analyses of their significant rules and subject their analysis to third-party review through OIRA or some other office. Congress should confirm the President's authority over these agencies. If there is consensus that this process makes executive branch rules better, why would we not want to similarly improve the rules issued by

independent regulatory agencies? Consistency across the government in regulatory procedures and analysis would only improve certainty and transparency of the process.

Last Congress, Sens. Rob Portman (R-OH) and Mark Warner (D-VA) introduced the bipartisan Independent Agency Regulatory Analysis Act (S. 1173, 113th Congress), which would authorize the President to require independent regulatory agencies to conduct cost-benefit analysis for significant rules and submit them to OIRA for third-party review. Comprehensive regulatory reform measures, such as the Regulatory Accountability Act, would codify analytical requirements and sound regulatory processes for independent regulatory agencies. These agencies often dismiss sound regulatory analysis as a hindrance to their abilities to regulate. However, the case for the inclusion of independent regulatory agencies in a centralized review of regulations is clear, and Congress should act to make it certain.

f. Increase Sensitivity to Small Business

The Regulatory Flexibility Act of 1980 (RFA) requires agencies to be sensitive to the needs of small businesses when drafting regulations. It has a number of procedural requirements, including that agencies consider less costly alternatives for small businesses and prepare a regulatory flexibility analysis when proposed and final rules are issued. In 1996, Congress passed the Small Business Regulatory Enforcement Fairness Act (SBREFA), which requires the EPA and OSHA to empanel a group of small business representatives to help consider a rule before it is proposed. In recognizing the importance of the SBREFA panel process, the 111th Congress expanded this requirement to include the new Consumer Financial Protection Bureau when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Lawmakers have universally supported the RFA's provisions, but Congress needs to strengthen the law and close loopholes that agencies use to avoid its requirements. Unfortunately, agencies are able to avoid many important RFA requirements by simply asserting that a rule will not impact small businesses significantly. Only a small number of regulations require a regulatory flexibility analysis because "indirect effects" cannot be considered. In addition, despite the success of the small business panel process, it only applies to three agencies. The RFA's requirements are especially important to improving the quality of regulations and have saved billions of dollars in regulatory costs for small businesses. In January 2015, the Small Business Administration's (SBA) Office of Advocacy—an independent office helping federal agencies implement the RFA's provisions—issued its annual report indicating that it helped save small businesses more than \$4.8 billion in FY 2014. The RFA has yielded \$90 billion in savings for small businesses over the past 10 years. Imagine the positive impact on regulations if agencies were not able to avoid the RFA's requirements so easily.

The House has already passed legislation, the Small Business Regulatory Flexibility Improvements Act of 2015 (H.R. 527), introduced by House Small Business Committee Chairman Steve Chabot (R-OH), which would close many of the loopholes that agencies exploit to avoid the RFA's requirements. The NAM supports H.R. 527 and urges Senate consideration. Agency adherence to the RFA's requirements is important if regulations are to be designed in a way that protects the public, workers and the environment without placing unnecessary burdens on small businesses. Through careful analysis and an understanding of both intended and unintended impacts on stakeholders, agencies can improve their rules for small entities, leading to improved regulations for everyone.



g. Enhance the Abilities of Institutions to Improve the Quality of Regulations

As discussed above, the SBA's Office of Advocacy plays an important role in ensuring that agencies thoughtfully consider small entities when promulgating regulations. When Congress created the office in 1976, it recognized the need for an independent body within the federal government to advocate for those regulated entities most disproportionately impacted by federal rules. The office helps agencies write better, smarter and more effective regulations. We urge Congress to support this office and provide it with the resources it needs to carry out its important work.

The Office of Industry Analysis is within the Office of Manufacturing and Services at the Department of Commerce's International Trade Administration and was created to assess the cost competitiveness of American industry and the impact of proposed regulations on economic growth and job creation. The office was created in response to a 2003 executive branch initiative to improve the global competitiveness of the manufacturing sector in the United States and was included as a recommendation in a January 2004 report, titled *Manufacturing in America: A Comprehensive Strategy to Address the Challenges to U.S. Manufacturers*. The report states the office should develop "the analytical tools and expertise . . . to assess the impact of proposed rules and regulations on economic growth and job creation before they are put into effect." This office has developed the analytical tools necessary to perform those functions and to provide the Department of Commerce with a strong, thoughtful voice within the interagency review of proposed regulations. The department must speak for manufacturing when rules are being considered. Unfortunately, the office no longer engages in the type of regulatory analysis for which it was established. The cost of regulatory compliance is an important factor influencing our competitive profile within the global economy. The Office of Industry Analysis was created to reduce the unnecessary regulatory burdens placed on domestic firms, and its role as a provider of objective, third-party analysis to regulators should be restored and strengthened.

h. Improve and Streamline the Federal Permitting Process

An often overlooked piece of regulatory reform is the regulatory process we impose at the federal, state and local levels on permitting for infrastructure projects. Our current system is a product of unintentional design with a myriad of overlapping and duplicative processes that lead to extensive delays and higher costs for both private and government-funded projects. The result is structural decay, lost jobs and an inefficient use of resources. Infrastructure is not keeping up with the demands of a growing economy, and manufacturers in the United States are placed at a competitive disadvantage when the infrastructure is not there or is in decline.

This is another opportunity for government to learn from the private sector and use lean manufacturing thinking to eliminate waste in the process. As we seek to invest scarce federal resources in our nation's infrastructure to support our economy, federal agencies should not overlook the need to improve infrastructure project delivery by eliminating redundant activities, such as duplicative federal reviews and approvals that states are capable of performing.

In January, Sens. Rob Portman (R-OH) and Claire McCaskill (D-MO) introduced the Federal Permitting Improvement Act (S. 280). The bill would greatly improve the permitting process by removing many bureaucratic delays that slow important construction projects. Importantly, S. 280 would establish deadlines and allow contiguous states impacted by an infrastructure project to coordinate and facilitate authorizations. Manufacturers rely on our

nation's vast interconnected infrastructure to support and supply every sector of the economy, and we appreciate the leadership of Sens. Portman and McCaskill on this issue. As discussed throughout this testimony, we must do better than the status quo to maintain our global competitiveness. Permitting reform will ensure that infrastructure performs at a pace to keep up with the needs of business.

#### **IV. Conclusion**

The President stated in his Executive Order 13653 that our regulatory system should promote "economic growth, innovation, competitiveness, and job creation." We agree. Manufacturers look forward to a day when our regulatory system is a competitive advantage for our country, instead of unnecessarily costly, inefficient, adversarial and a barrier to business formation. To achieve those goals, Congress must address the regulatory challenges outlined above. Congress must also permanently reform our regulatory system to protect our country, while being flexible, agile, innovative and imposing only the burdens that are necessary. Thank you for this opportunity.

With all best wishes I remain,

Sincerely,



Jay Timmons

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April 28, 2015

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security and Government Affairs  
Washington, DC 20510

The Honorable Thomas R. Carper  
Ranking Member  
Committee on Homeland Security and Government Affairs  
Washington, DC 20510

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs and Federal Management  
Committee on Homeland Security and Government Affairs  
Washington, DC 20510

The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs and Federal Management  
Committee on Homeland Security and Government Affairs  
Washington, DC 20510

**Re: Retrospective Review of Existing Regulations**

Dear Senators Johnson, Carper, Lankford, and Heitkamp:

You have asked whether the National Black Chamber has suggestions or concerns about the regulatory process, and existing and proposed regulations that are of concern to our organization's membership. The number of regulations impacting American business is greater than ever and growing every day, but not all regulations are created equal with respect to the burden they impose on business. Thus, review and reform of regulations currently on the books

makes sense, provided it targets the regulations that really impose the greatest burden. Further, the large number of regulations on the books that are harmful to Americans' ability to start and run a business successfully is an indication that the system is broken, and attention should be focused on avoiding adding more bad regulations by fixing the regulatory process in addition to reforming and/or eliminating existing bad regulations.

Before discussing retrospective regulatory review, I highlight two recent regulations that are of the highest concern to the National Black Chamber: the Federal Communications Commission's (FCC) recently adopted Open Internet/Net Neutrality rule and the Environmental Protection Agency's (EPA) proposed Ozone National Ambient Air Quality Standard (NAAQS) rule. Both rules impose significant burdens on the National Black Chamber's membership and should be fixed immediately rather than waiting until the damage is already done.

### **FCC Open Internet/Net Neutrality Rule**

On February 26, 2015, the FCC adopted its Open Internet (i.e., net neutrality) rules that will regulate broadband under Title II of the Communications Act of 1934—a provision originally designed to regulate monopoly-era phone service. The Open Internet rules open the possibility that the FCC will now regulate broadband internet service prices through a complex system of rate regulation and fees, including additional state and local fees, potentially raising prices to consumers, especially small business customers who generally buy internet service the same way home users do. Business users of broadband have benefitted greatly from the vast increases in speed and decreases in prices in recent years, spurred by competition among the various broadband service providers. Use of broadband technology to start a business is one of the few ways that lower income individuals in urban areas possess to easily and quickly start a business based on their ideas and hard work, rather than their access to credit, credentials, and ability to navigate the world of permits and licensing. Regulating broadband service the same way the FCC regulated wireline telephone service for fifty years will stop the trend of falling prices, increasing access speeds, and greater availability dead in its tracks.

In addition to raising prices because of rate regulation and new fees, Title II regulation will have a chilling effect on private-sector investment in broadband infrastructure. The reason why Americans used rotary dial telephones on old-fashioned copper lines for so many years in the twentieth century was because of FCC regulation of phone service as a monopoly: regulated monopolists do not invest in improving their network and innovating, they do what the regulators tell them to do. Creating a similar investment environment for broadband service today would be a disaster. It is investment and innovation, spurred by competition for consumer dollars, that has created the world of falling prices and faster service speeds that we now take for granted. This Open Internet regulation will kill that, and along with it the ability for Americans to start businesses and create jobs using broadband technology. The FCC should have recognized that it was inappropriate to shackle today's vibrant and competitive broadband marketplace with rules designed for a bygone era.

### **EPA Ozone NAAQS Proposed Rule**

In November 2014, the EPA proposed lowering the ozone NAAQS from its current level of 75 parts per billion (ppb) to a range between 65-70 ppb. Lowering the ozone standard to those

levels would lead to nonattainment designations for many areas of the country, especially urban areas in certain geographic regions such as the southeast, which severely hampers economic development and construction in an area. The 2008 ozone standard (75 ppb) still has not been fully implemented in many areas. Counties were not designated as nonattainment areas under the 2008 standard until April 2012. Also, EPA did not finalize the 2008 implementation guidance until just recently in February 2015. There is a long list of concerns with this rule, such as EPA's failure to consider ozone transported from offshore, or high levels of naturally occurring background ozone, that make it difficult to impossible for some locations to comply, or the limited resources states and localities have to implement these standards when they are just now working on getting to the 2008 levels.

The NBCC is especially concerned about the ozone NAAQS because nonattainment designations hit urban communities especially hard, and EPA has done nothing to examine the local effect of this regulation on the communities that have difficulty meeting the standard. EPA provides information in its proposal about the national, aggregated costs and benefits of this regulation, but ignores the fact that the actual effects are all local. It is individual states and communities that are handed nonattainment designations and often have to go to great lengths, such as closing businesses and moving the industry that provide communities with jobs and business opportunities. Starting or running a business is difficult enough, but being unable to do so, or being forced to relocate or close your business, because an entire community is handed a nonattainment designation is devastating. A nonattainment designation destroys economic opportunity in a community and makes it difficult for businesses and their customers to earn a living. Businesses that are closed and jobs that are lost do not ever come back, and the cost of this is paid by those living in the affected community. EPA should consider all of these factors in deciding how to set the ozone NAAQS standards. Real people will lose businesses and jobs they have worked hard for based on this decision if EPA keeps going down the path it has laid out in the proposed rule.

### **EPA Proposed Rule to Redefine “Waters of the United States”**

In April 2014, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) proposed a rule that would redefine **“waters of the United States”** (WOTUS) under the Clean Water Act (CWA). Despite significant substantive and procedural concerns over the proposed rule and rulemaking process, the agencies continue to push hard to finalize the rule as quickly as possible.

Navigable waters and other features that fall within the WOTUS definition are regulated at the federal level by EPA; all other waters are regulated by state and local agencies. If finalized as proposed, the substance of the proposed WOTUS definition would result in a massive expansion of federal Clean Water Act jurisdiction far beyond the limits explicitly established by Congress and affirmed by courts. Predictably, the proposed definition also significantly undermines the concept of cooperative federalism which has been the foundation of successful Clean Water Act implementation for decades.

EPA and the Corps have asserted that the proposed definition simply clarifies the current scope of agency authority and that it will have no costs or impacts on anyone. As a result, the agencies' rulemaking process failed to include meaningful consultation to understand how the proposal would affect states, local governments and the regulated community. Only after the proposed rule was published did affected entities understand that the proposed WOTUS

definition clarifies nothing, and actually makes it more difficult (if not impossible) to understand if and how the rule would apply in the real world. This significant uncertainty will delay, or stop altogether, projects across the country; and will add untold investigation, engineering and permitting costs for projects that are ultimately pursued. Local governments, road builders, farmers and ranchers, among others, will bear the brunt of these delays and costs.

### **Retrospective Review**

In addition to the specific rules discussed above, the National Black Chamber calls your attention to retrospective review and reform efforts have been undertaken by three consecutive Administrations, from the Clinton Administration in the late 1990's through President Obama's Executive Orders 13,563 (January 18, 2011), 13,579 (July 11, 2011), and 13,610 (May 10, 2012). We focus on the efforts of two offices within the federal government that have a history of attempting to accomplish retrospective review and reform of regulation.

#### *Retrospective Review at OMB's Office of Information and Regulatory Affairs (OIRA)*

- In the Clinton Administration, OIRA under Administrator Sally Katzen began a comprehensive effort to identify and address outdated and obsolete rules. This first effort included calls for public nominations of rules that should be updated or eliminated by agencies. This general effort continued under Bush Administration OIRA Administrator John Graham in the early 2000's.
- OIRA initiated a government-wide effort in 2004 to reform regulation of the U.S. manufacturing sector. OIRA again requested public nominations of specific regulations, guidance documents, and paperwork requirements that, if reformed, could result in lower regulatory costs. OIRA received 189 nominations of regulations to be reformed or eliminated. Over the next two years, OIRA worked with the agencies whose rules had been nominated for reform or elimination and determined that 76 of the 189 rules justified action by an agency to address the recommended reform. Although agencies did commit to review these reform nominations, very few rules were actually updated, otherwise revised, or eliminated.
- OIRA finally abandoned this project in 2006, with only a few (<10) rules having actually been reformed. None of the rules that were reformed were major rules that had any significant impact on regulatory burden. The OIRA resources needed to oversee the project and agencies' resistance to commit any resources to make suggested changes largely doomed this retrospective review and reform effort.

#### *Retrospective Review by SBA's Office of Advocacy*

- Section 610 of The Regulatory Flexibility Act,<sup>1</sup> enacted in 1980, contains a provision which requires agencies to retrospectively review their existing rules after 10 years. While the intent of section 610 was to have agencies eliminate outdated, unnecessary

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<sup>1</sup> Pub. L No. 96-354, 94 Stat. 1164, codified at 5 U.S.C. §§ 601-612; 5 U.S.C. § 601.

rules, agencies routinely ignore the retrospective review requirement.<sup>2</sup> Other agencies use the review process to justify expanded rules designed to address newer regulatory objectives.<sup>3</sup> Section 610 has never been the effective tool for periodic retrospective review that the business community had hoped for.

- In 2007 the Small Business Administration's Office of Advocacy ("Advocacy") undertook an independent retrospective review to identify and reform obsolete, duplicative, or ineffective rules that harm small businesses. With input from a public reform nomination process, Advocacy identified a total of 14 priority rules that were appropriate for reform. Ultimately, five of these 14 rules were revised or otherwise reformed by federal agencies. Because the Advocacy project was similarly labor-intensive and because agencies balked at implementing significant rule changes, the Advocacy project was abandoned in 2010.

While the OIRA/Advocacy retrospective review process was labor-intensive, it did result in a few reforms. One of the notable successes of the OIRA/Advocacy retrospective review program to de-list milk as a type of "oil" under the Clean Water Act's Spill Prevention, Countermeasure, and Control program. This reform relieved a great deal of regulatory burden on dairies and milk processors, and proved highly worthwhile despite taking time to accomplish and requiring constant pressure on EPA. Other successful reforms relieved unnecessary regulatory burdens on general aviation operating in the Washington, D.C. region, on architectural-engineering firms that rely on government contracts, and on businesses that engage in recycling.

To develop priorities for retrospective review of federal regulations the most logical course of action would be to pick up where these previous attempts were abandoned, and then update the lists for rules enacted in the years since those efforts were abandoned. Attached are the publicly available lists of rules that were deemed appropriate for review and reform in the past, and there is no reason why they are not still appropriate targets for initiating a new effort. This effort would be beneficial to American businesses and consistent with Executive Orders 13,563 and 13,610.

I would also like to take this opportunity to reiterate the need for genuine reform of the regulatory process as well, so that in the future we are more able to avoid bad regulations being put on the books in the first place by fixing the system. Such fixes must include increasing the transparency by which agencies conduct rulemaking, opening the regulatory process more to all interested parties and allowing them equal access to data and information, as well as the ability to challenge such information, and providing a level playing field in the judicial system so that advocacy groups cannot unilaterally control the rulemaking agenda through the court system. Your committee has jurisdiction over regulating reform of the Administrative Procedure Act and hopefully will begin addressing these issues. Such an effort will bring real reform to the workings of the administrative process.

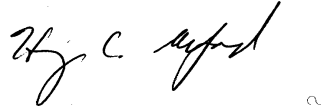
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<sup>2</sup> A Government Accountability Office report released in August 2007 highlighted the need for clearer standards and enhanced public participations in the Section 610 review process; [www.gao.gov/new.items/d07791.pdf](http://www.gao.gov/new.items/d07791.pdf).

<sup>3</sup> See Michael See, Willful Blindness: Federal Agencies' Failure to Comply With the Regulatory Flexibility Act Periodic Review Requirements—And Current Proposals to Invigorate the Act, 33 Fordham Urban L. J. (2006).



Sincerely,

A handwritten signature in black ink that reads "Harry C. Alford". The signature is written in a cursive style with a small flourish at the end.

Harry C. Alford  
President and CEO  
National Black Chamber of Commerce

Links to reports cited above:

- (1) [SBA Office of Advocacy: Report on the Regulatory Flexibility Act FY 2007](#)
- (2) [2005 Office of Management and Budget, Office of Information and Regulatory Affairs: Regulatory Reform of the U.S. Manufacturing Sector](#)



April 24, 2015

Senator Ron Johnson  
Chairman  
Committee on Homeland Security and  
Governmental Affairs  
United States Senate  
Washington, DC 20510

Senator Thomas R. Carper  
Ranking Member  
Committee on Homeland Security and  
Governmental Affairs  
United States Senate  
Washington, DC 20510

Senator James Lankford  
Chairman  
Subcommittee on Regulatory Affairs and  
Federal Management  
United States Senate  
Washington, DC 20510

Senator Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs and  
Federal Management  
United States Senate  
Washington, DC 20510

Dear Chairmen and Ranking Members:

This letter is in response to your March 18, 2015, request seeking assistance in identifying existing and proposed regulations that have had or will have a real impact on members of the National Federation of Independent Business. We appreciate the opportunity to share with you a number of regulations that meet these criteria. While the list that follows is not exhaustive of all regulations impacting our members, it does include those that will have the most impact on a broad swathe of small businesses in all types of industries.

NFIB is the nation's leading small business advocacy association, representing members in Washington, DC, and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States.

Unduly burdensome regulatory requirements continually vex small businesses. According to the NFIB Research Foundation's most recent *Small Business Economic Trends* survey, "government requirements and red tape" was the number two answer when NFIB members were asked to identify the single biggest problem facing their business.<sup>1</sup> The answer has been a top-three concern in the monthly survey since January 2009. While addressing the specific regulations mentioned in this letter will help, we strongly believe that real relief can only come in the form of regulatory reforms that change the process to better consider the impact of federal rules on small businesses.

## **The impact of regulations on small businesses**

Before providing our list of problem regulations, it is important to explain why small businesses are so greatly affected by regulatory burdens, and in particular, those that are unnecessarily complicated, duplicative, and in which the agency did not adequately analyze a rule's impact on small businesses.

Small businesses are disproportionately burdened by federal regulations. Numerous studies have shown this to be true. The most recent study, performed for the National Association of Manufacturers, found that businesses with fewer than 50 employees spent about 29 percent more per employee per year complying with federal regulatory mandates than those businesses with 100 or more employees.<sup>2</sup> A 2010 edition of this study, performed for the U.S. Small Business Administration's Office of Advocacy, and which looked more specifically at smaller companies, found that small businesses with fewer than 20 employees spent 36 percent more per employee per year than their larger counterparts.<sup>3</sup>

For small businesses, complying with federal regulations costs more for a very simple reason: the lack of specialized compliance staff. Large corporations can afford to hire full-time compliance experts that can efficiently identify the regulatory requirements that apply to that company and implement a compliance strategy. Small businesses do not have this luxury. Often, the task of compliance falls on the small business owner directly. Unfortunately, the owner must find time for compliance within the confines of the limited time available from performing all the other tasks necessary to make a business viable – tasks like ordering inventory, generating sales, supervising employees and many more.

Additionally, while small business owners may be experts in the nuts and bolts of their business, they are not experts in digesting complex regulatory requirements. It takes a small business owner significantly longer than a compliance expert to read, understand, and implement a compliance plan. When combined with a ceaseless search for rules that must be complied with, there is little wonder why so many small business owners cite regulation as a major problem.

Because of this reality, it is imperative that agencies only regulate when necessary and do so in a manner that adequately considers small business impact as required by the Regulatory Flexibility Act. Sadly, this is the exception rather than the rule. Too many federal rules are complicated and inflexible.

## **How the Committee can address the problem**

Fortunately, the Committee is in an ideal position to take significant steps to address the problem. We urge the Committee to prioritize regulatory reform legislation that provides the following help to small businesses.

### *Clarify the indirect costs of regulation*

The RFA requires agencies to conduct small-business analyses for any regulation that would impose a significant economic impact on a substantial number of small entities, and the law only requires agencies to consider those small entities that are directly impacted by a new regulation.

Consequently, regulators may ignore foreseeable indirect impacts a new regulation may have on a small business.

Regulatory agencies often proclaim indirect benefits for regulatory proposals, but fail to analyze and make publicly available the indirect costs to consumers, such as higher energy costs, lost jobs and higher prices. NFIB believes agencies should be required to make public and take into account, for procedural purposes, a reasonable estimate of indirect impact. Congress should hold agencies accountable for providing a balanced statement of costs and benefits in public regulatory proposals.

#### *Increase small business input in the process*

Complying with regulations has a disproportionate burden on small businesses, as few small companies have employees devoted to compliance. Typically, the business owner has to deal with complex new rules. To help alleviate this burden, it is critical that agencies only issue rules that are necessary and have considered the impact on small businesses.

Currently, the Small Business Regulatory Enforcement Fairness Act (SBREFA) requires covered federal agencies to conduct a Small Business Advocacy Review (SBAR) panel before publishing a proposed rule. These panels include representatives of the regulated small entities and provide an opportunity for small businesses to collaboratively work with the regulators to find alternatives that minimize any potential burden on small businesses. Unfortunately, these panels currently only apply to the EPA, the Occupational Safety and Health Administration (OSHA) and the Consumer Financial Protection Bureau (CFPB). NFIB believes that SBAR panels, which work well when agencies engage in the process, should be expanded to cover all agencies issuing rules that affect small businesses, as a means to require these agencies to evaluate the burdens their rules place on small employers.

#### *Reduce job-killing penalties and fines*

Many small-business owners cannot afford a full-time compliance staff, which exposes them to potential paperwork penalties and even errors that could be made in good faith. NFIB believes that agencies should waive fines and penalties for small-business owners the first time they commit a harmless error on regulatory paperwork. NFIB encourages Congress to explore requiring agencies to provide small businesses with a grace period to fix minor violations when the public and their employees are not in imminent danger.

#### *Devote more existing agency resources to compliance assistance*

Some agencies, most notably the EPA and the OSHA, fail to understand how small businesses operate in their policies and actions. Small-business owners need assistance from agencies to understand the complex and voluminous regulations affecting their businesses. The expansion of enforcement capability often comes at the direct expense of helpful compliance programs. Compliance assistance programs should be made a priority, not an attempt to play “gotcha” with small-business owners who are struggling to comply.

## **Problem Regulations**

### *Environmental Protection Agency*

#### Definition of Waters of the U.S. Under the Clean Water Act

Final rule currently under review at the Office of Information and Regulatory Affairs

The EPA is aiming to expand the definition of U.S. waters that are “navigable” – in some cases, to even small depressions or farm ponds that do not impair the flow of rivers. Despite state jurisdiction, this rule could impose federal mandates for water quality levels in these local waters or land uses. What’s most troublesome is that the EPA proposed the rule without doing required RFA processes. EPA claims that the rule will have no significant impact on small businesses even though the rule will clearly restrict the ability of small businesses to expand or develop their land and decrease land value.

#### Greenhouse Gas Emissions: New and Existing Power Plants

Final rules expected in summer 2015

EPA’s efforts to regulate greenhouse gas emissions have started with coal and natural gas power plants. A first rule covering new plants was published in January 2014. A second, and likely more economically damaging, rule covering existing power plants was proposed in June 2014. NFIB is concerned about the rules’ impact on affordable electricity, one of the most important costs a small business owner faces. These rules demonstrate the need for Congress to require that agency include an analysis of a rule’s indirect costs for purposes of the RFA. EPA avoided considering small business impact because states will be the entities directly regulated.

#### Lead: Renovation, Repair, and Painting Rule for Public and Commercial Buildings

Proposed Rule Expected in 2015

Following on its problematic Lead: RRP rule covering residential housing, the EPA is poised to expand the rule to cover commercial buildings. While the goal of the rule – protecting people from exposure to lead dust – is laudable, EPA has not yet issued a study or identified data that shows if lead dust from these buildings impact surrounding neighborhoods. In addition, EPA appears intent on adapting its residential rule for commercial buildings. NFIB is concerned about his approach because the residential rule is punitive mostly to companies that try to comply. About 35 percent of small employers, who operate their business outside of their house, own all or part of the building or land on which their business is located. These small businesses face higher costs as well.

### *Department of Labor*

#### Wage and Hour Division – Expansion of Overtime Eligibility

Proposed rule expected in 2015

President Obama directed the DOL to revise regulations relating to overtime eligibility, specifically to find ways to expand time-and-a-half pay to more workers. Unfortunately, this will come at the expense of small business owners. Like most government mandates on business,

increasing the number of workers eligible for overtime will have a deep and disproportionate impact on the small business sector. The vague detail offered by the administration on what the regulation will look like only increases uncertainty for small businesses, and makes them less likely to add new workers.

#### OLMS – Interpretation of the “Advice Exemption”

Final rule expected in 2015

Also known as the “persuader rule,” the DOL’s Office of Labor-Management Standards (OLMS) has proposed a rule that would greatly inhibit the ability of small businesses to rely on labor experts. For nearly 50 years the DOL has recognized that legal advice is excluded from reporting under federal labor law. The proposed new rule would force lawyers and law firms that counsel a small business on most labor relations matters, and whether the business has a union or not, to disclose not only their work with that client, but also all fees and arrangements for all clients for all labor-relations services. The net result could well be that many lawyers will no longer take on clients seeking labor-relations counsel.

#### OSHA – Occupational Exposure to Crystalline Silica

Final Rule Expected in 2015

OSHA is proposing to halve the permissible exposure limit for silica, the second most common mineral in the earth’s crust. The proposal will have serious impact on industries like construction and manufacturing. In addition to lowering the limit, OSHA wants to mandate other expensive requirements on small businesses like engineering controls, medical monitoring of employees, and a vast recordkeeping burden. This is despite the fact that OSHA is unable to ensure compliance with the current PEL for about 30 percent of businesses nationwide. NFIB believes if OSHA ensured compliance, it could largely solve the workplace silica issue.

OSHA is also relying on an SBAR panel from 2003 – some 10 years before the proposed rule – to satisfy its RFA requirements for this costly rule.

#### OSHA – Improve Tracking of Workplace Injuries and Illnesses

Final rule expected in 2015

OSHA is proposing changes to its reporting system for occupational injuries and illnesses that would require employers to submit data from its injury logs electronically to the agency. OSHA will then take the data and create a database – with establishment-specific information – that is available to the public. Our concerns range from the public misinterpreting the safety of businesses to unions using the information to target certain businesses for unionization.

#### *Other Agencies*

#### NLRB – Representation: Case Procedures

Final rule published in December 2014

Commonly referred to as its “quickie elections rule,” the National Labor Relations Board has finalized a regulation that would streamline the union-election process. The NLRB’s goal is to

reduce the median length of a union election substantially from the current 35 days. NFIB believes that an employee's informed choice will be compromised because the shortened timeframe means owners will have to scramble to obtain legal counsel and will have little time to talk to their employees. This shortened timeframe would hit small businesses particularly hard, since small employers usually lack labor-relations expertise and in-house legal departments.

DOJ – Accessibility of Web Information and Services  
Proposed rule expected in 2015

The Department of Justice is planning to propose regulations requiring websites to be accessible to the disabled under the Americans with Disabilities Act. NFIB is concerned that the agency will propose that businesses must retrofit their current websites with accessible technologies, which would be painstaking and expensive.

DOT: FMCSA – Financial Responsibility for Motor Carriers  
Proposed rule stage

The Federal Motor Carrier Safety Administration is considering a rulemaking that would increase the minimum levels of financial responsibility for motor carriers, perhaps by more than 500 percent. NFIB believes that it is unnecessary for FMCSA to raise the minimum financial responsibility requirements given a lack of data indicating higher minimums yield fewer accidents. In addition, attempts to raise the minimums in Congress have not been successful, indicating a lack of need for increases.

**Conclusion**

NFIB applauds the Committee for examining the regulatory burdens facing small businesses. While the individual rules mentioned above warrant specific examination, we strongly urge the Committee to work towards regulatory reform legislation that meets the objectives addressed above. To truly help small businesses, the regulatory process must be reformed in a way that addresses the disproportionate burden placed upon them.

NFIB looks forward to working with the Committee on these rules and on reforming the regulatory process.

Sincerely,



Dan Danner  
President and CEO  
NFIB

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<sup>1</sup> <http://www.nfib.com/Portals/0/PDF/sbet/sbet201504.pdf>

<sup>2</sup> <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Executive-Summary.pdf>

<sup>3</sup> <https://www.sba.gov/advocacy/impact-regulatory-costs-small-firms>





HAL QUINN  
*President & CEO*

May 6, 2015

The Honorable Ron Johnson  
Chairman  
United States Senate  
Committee on Homeland Security  
and Governmental Affairs  
SD-340  
Washington, DC 20510

The Honorable Thomas R. Carper  
Ranking Member  
United States Senate  
Committee on Homeland Security  
and Governmental Affairs  
SD- 340  
Washington, DC 20510

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
SD-340  
Washington, DC 20510

The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
SD-340  
Washington, DC 20510

Dear Chairmen Johnson and Lankford and Ranking Members Carper and Heitkamp:

The National Mining Association (NMA) appreciates the opportunity to respond to your request to identify existing and proposed regulations impacting the mining industry. NMA's members include the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry.

Our members supply energy, metals, minerals and materials used by every sector of our economy that are indispensable for the development of technology and manufacturing of products that improve and sustain our quality of life. The U.S. mining industry operates under a wide range of federal and state laws that cover the production, beneficiation, transportation and use of coal, metals, minerals and materials.

Focused and efficient regulatory frameworks can produce tangible benefits for the public and business. However, poorly designed, inefficient and antiquated rules divert

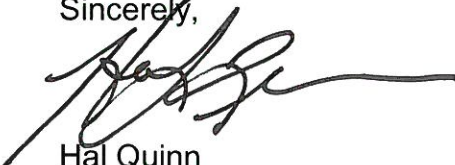
capital from more productive use, impair economic and job growth, impose barriers to innovation and impede sustained performance improvement. The burden of federal regulations as of 2012 exceeds \$2 trillion, or 12 percent of the GDP. See M. Crain and N. Crain, *The Cost of Federal Regulations to the U.S. Economy, Manufacturing and Small Business* (Sept. 10, 2014). Across all businesses, federal regulations cost companies almost \$10,000 per employee. The burden falls disproportionately upon smaller businesses that incur a 17 percent greater cost per employee than the average firm.

Your request is most welcome in view of the many executive orders and directives issued over the years requiring federal agencies to review their existing regulations and proceed with repealing those that are outdated, inefficient and no longer serve a legitimate need or purpose. See e.g., Executive Order 13,653. While businesses must continue to abide by such regulations or face the risk of incurring government sanctions, there is no reciprocity with federal agencies free to either ignore or adhere superficially to these executive order directives with no consequence.

Several bills have passed the House of Representatives in the 112<sup>th</sup> and 113<sup>th</sup> Congresses that would bring greater balance and accountability to the federal regulatory process. We submit that these bills would be a good starting point for the committee's consideration of solutions for ensuring new and existing federal regulations are the most efficient and least burdensome.

We have included in this initial submission examples of regulations that impose costs which greatly exceed any tangible benefits, duplicate other federal or state regulations or lack any compelling purpose and need. We will continue to furnish you additional examples consistent with the purpose of your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read 'Hal Quinn', with a long horizontal flourish extending to the right.

Hal Quinn

## A. Unbalanced Regulations: Cost Greatly Exceed Benefits

1. EPA Utility MATS Rulemaking (77 Fed. Reg. 9304): In 2011 EPA finalized a rule for new and existing coal and oil-fired electric generating units establishing National Emissions Standards for Hazardous Air Pollutant for mercury, trace metal and acid gases which took effect on April 17, 2015. The MATS regulation—the most expensive in EPA history—is a poster child for unbalanced regulations that dismiss the real costs and inflate the benefits to convince the public that the enormous expense is justified. Even by EPA’s own calculation the rule will cost American consumers almost \$10 *billion* each year, but bring, at most, only \$4-\$6 *million* in benefits. To make matters worse, more than half of the costs are attributable to imposing standards for emissions the agency found pose *no danger* to public health. EPA’s position is that while it was allowed to consider costs in choosing whether to regulate, it also retained the discretion to ignore them. And ignore them it did, with a rule that demands consumers pay \$1,600 in exchange for \$1 in benefits. If the Clean Air Act affords EPA the latitude to act so irrationally, the law should be changed to protect the public from such abusive regulatory actions.

EPA’s unbalanced approach to regulation is also evident in its reckless disregard for the impacts its decision would have on the reliability and cost of the nation’s electricity supply. EPA predicted that the rule would force the closure of 4,400 megawatts of base load generation capacity. Experts warned EPA that the rule would likely force the retirement of ten times that amount of capacity. The Energy Information Administration concludes that as much as 60,000 megawatts of base load power generation capacity will close due to the rule. EPA blithely and wrongly attributes these closures to “market forces.” An analysis by Duke University Nicholas School of the Environment concludes that most of the power plant retirements are due to EPA’s rule, not fuel prices or other market forces. Pratson et al., *Fuel Prices, Emission Standard, and Generation Costs for Coal vs Natural Gas Power Plants*, Environ. Sci. Technol. (March 2013). EPA never engaged the Federal Energy Regulatory Commission or the North American Electric Reliability Corporation—the nation’s designated electric reliability organization—in seeking expert analysis and opinion on the impacts of the rule on the reliability and affordability of the nation’s electricity supply.

The direct job impacts of the rule have proven devastating for coal miners, power plant workers and other Americans formerly employed in the coal supply chain. More than 30,000 coal miners have lost their high-wage jobs since 2011 when EPA issued the rule. With at least four other jobs created for every coal mine job, another 120,000 Americans have been separated from their jobs. According to Department of Energy studies and models, coal base



load power creates and sustains more permanent jobs (3 to 9 times more) than other sources of electricity generation.

2. Proposed Greenhouse Gas Emission Standards for Electric Power Plants: EPA has proposed a suite of sweeping regulations that: (1) prohibit the construction of new highly efficient and lower emission coal fired powered plants for electricity generation; and (2) mandate states reduce carbon dioxide emissions from existing power plants by an average of 30 percent nationally. These regulations represent a symbolic yet costly gesture where the costs are real but the benefits are not. Both regulations build upon the MATS rule that collectively, by design, make the nation's electric grid less diverse, less reliable and more expensive. EPA's analysis admits that it cannot quantify any changes in climate as a result of the forecasted reduction in carbon dioxide emissions from power plants. Others, using a climate model developed with EPA's support, estimate that the emission changes from EPA's rule could reduce global temperatures by a mere 0.02 degrees Celsius by 2100.

*GHG Standards for New Power Plants* (79 Fed. Reg. 1430, Sept. 20, 2013): EPA proposes to condition the construction of new coal fueled power plant on the use of technology—carbon capture and storage—that has not been adequately demonstrated at scale at coal fueled base load electricity generation facilities. EPA relies upon one plant under construction—with several years of cost overruns and delays—two plants still lingering on the drawing board and several abandoned demonstration projects. All of these demonstrate nothing in terms of performance and commercial availability of CCS. EPA also ignored the option of setting the standard based upon new higher efficiency coal technology that would produce electricity with emissions 20-30 percent below the current averages for the existing coal power plant fleet. On the other hand, the agency proposes a standard for other fossil fuel power plants—natural gas combined cycle (NGCC)—that over 90 percent of the existing NGCC plants already meet. In short, EPA has proposed a standard that no existing coal based power plant can meet, but chooses the status quo for NGCC. EPA's proposal is designed to reduce the diversity of the nation's electric power supply. With coal supplying more than 45 percent of the nation's electricity over the past decade, this diversity saves consumers more than \$93 billion annually and reduces the volatility of their power bills by half. IHS Energy, *The Value of U.S. Power Supply Diversity* (July 2014).

*GHG Standards for Existing Power Plants* (79 Fed. Reg. 34,829, June 2, 2014): EPA's so-called Clean Power Plan is an attempt to reorganize the nation's electric grid state by state. According to electricity generators, the grid managers and the nation's electric reliability organization, EPA's plan will be difficult, if not impossible, to implement without further degrading grid reliability. Several utilities and grid managers forecast cascading outages and voltage collapse on their systems. Two studies examining the two implementation options offered by EPA estimate the plan will cost \$366-\$412 billion. The Southwest Power Pool recently concluded that compliance will require, at a

minimum, the imposition of a \$45/ton carbon tax on electricity generation in the eight states in which it operates the grid. EPA advances this risky and costly plan in the name of climate change while unable to quantify any climate benefits.

3. Revisions to Ozone NAAQS (79 Fed. Reg. 75,234, Dec. 17, 2014): EPA proposes to reduce the National Ambient Air Quality Standard (NAAQS) for ozone from 75 parts per billion (ppb) to between 60-70 ppb by the fall of 2015. The current standard has not been fully implemented and reducing it further will increase the geographical area classified as nonattainment including many Western and Midwestern states that have not previously had to implement plans to control ozone on a vast scale. Rural areas will be particularly hard hit, since 'background,' or naturally occurring ozone levels in many of these areas are already near or exceed the standards. The proposal would cost as much as \$1 trillion, reduce GDP by \$140 billion annually and eliminate 1.4 million jobs as factories, mines, agricultural facilities and construction is closed or curtailed. EPA's own analysis shows that full implementation of the current standard combined with other regulations in effect will reduce the ozone precursor emissions to drive ozone close to 70 ppb in the next decade.

## **B. Duplicative and Conflicting Regulations and Policies**

1. Proposed Financial Responsibility Requirements for Metals and Minerals Mining (74 Fed. Reg. 37,213, July 28, 2009): EPA targeted the hardrock mining industry as the agency's first priority in the development of financial responsibility requirements under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). CERCLA affords EPA discretion whether to impose financial responsibility requirements on industrial sectors. EPA's proposed regulations will duplicate and preempt financial responsibility requirements already imposed on the metals and minerals mining industry by the Bureau of Land Management and U.S. Forest Service on public lands and by the states on private lands. Those agencies have previously communicated that they did not see sufficient risk to justify EPA actions that would duplicate and perhaps conflict with those agencies that have primary responsibility for regulating the operation, maintenance and closure of mining operations. Hardrock mining companies already post hundreds of millions of dollars in financial assurance instruments under these programs to cover a range of costs associated with the reclamation and closure of their facilities.
2. Proposed Ammonium Nitrate Security Program (76 Fed. Reg. 46,908, Aug. 3, 2011): Pursuant to the Fiscal Year 2008 Department of Homeland Security Appropriations Act, the Department of Homeland Security is directed to "regulate the sale and transfer of ammonium nitrate by an ammonium nitrate facility . . . to prevent the misappropriation or use of ammonium nitrate in an act of terrorism." 6

U.S.C. § 488. As part of this regulatory program, DHS must establish a registration and verification process for facilities that intend to sell or purchase ammonium nitrate. Importantly, the statute allows the DHS secretary to exempt from the program those facilities that produce, sell, or purchase ammonium nitrate “exclusively for use in the production of explosives under license or permit issued” under the existing Bureau of Alcohol Tobacco Firearms and Explosives (BATF) regulations. See 6 U.S.C. § 488a(f). In its proposed rule, DHS’ preferred option *does not exercise this discretion* and only affords a narrow and meaningless exemption based on a faulty and weak “gap” analysis.

The proposed rule is a complex “chain of custody” program that would impose burdensome and duplicative requirements on suppliers and transporters of technical grade ammonium nitrate that is delivered to mining operations and used in the manufacture of explosives necessary for blasting activities. It is also a duplicative registration process for mining facilities that already possess BATF permits for acquiring, using or transporting explosive materials including ammonium nitrate-based explosives (i.e., ammonium nitrate fuel oil or ANFO). Existing regulatory programs, including those administered by the Mine Safety and Health Administration (MSHA) and the Office of Surface Mining Reclamation and Enforcement (OSM) related to the storage, transportation, and use of explosives, and voluntary measures used by the explosives and mining industry adequately protect against the risks of misappropriation or use of ammonium nitrate for a terrorist attack. DHS did not complete an adequate assessment of these regulatory controls and voluntary measures when it proposed the ANSP and therefore has wrongly chosen a regulatory approach that if finalized will result in low risk facilities being subject to duplicative and unnecessary requirements. DHS should exercise the discretion Congress afforded it to avoid duplicative and burdensome requirements by exempting facilities that possess a license or permit issued by BATF.

3. Proposed Groundwater Standards for In Situ Uranium Facilities (80 Fed Reg. 4156 Jan. 26, 2015): EPA proposes new groundwater standards for facilities that produce uranium by *in situ* recovery (ISR). While EPA does have standard-setting authority under the Uranium Mill Tailings Radiation Control Act (UMTRCA), the Nuclear Regulatory Commission (NRC) is charged with implementation of such standards. As such, NRC is the agency with greater expertise and experience with uranium recovery operations, including ISR and NRC has determined these facilities are low risk. The EPA proposal fails to acknowledge the low-risk nature of ISR facilities and would impose numerous overly stringent standards on such facilities that would jeopardize the future of the uranium recovery industry in the United States. Particularly problematic is the requirement that groundwater must be monitored for 30 years after restoration. This is simply unnecessary given the decades of experience demonstrating the very small risk associated with “in situ” recovery operations. EPA should

withdraw the proposed rule until it conducts a more thorough review of existing groundwater restoration data to determine an appropriate post-restoration monitoring timeframe that accounts for the low risk nature of ISR facilities.

4. Mining Permits for Operations on Federal Lands: Few countries can rival our nation's abundance of mineral resources but even fewer have a permitting system as duplicative and inefficient as the United States, where it can take more than 10 years for an operation to be permitted. These delays routinely occur on projects requiring mine permits from federal land management agencies or other federal agencies that administer federal programs applicable to mining operations. Delays significantly impact our domestic mining industry's ability to compete for mineral exploration and development investments. According to the 2014 Ranking of Countries for Mining Investment analysis by expert mining consulting firm, Behre Dolbear, permitting delays are the most significant risk to mining projects in the United States. These delays discourage investment and jeopardize the growth of downstream industries, related jobs and technological innovation that all depend on a secure and reliable mineral supply chain. A recent survey of C-suite manufacturing executives found that more than 90 percent of manufacturers are concerned about access to minerals. Further, 95 percent of executives surveyed are worried that the lag in the permitting process for new minerals mines has a serious impact on U.S. competitiveness.

There are administrative solutions that federal agencies can and should implement, including: (1) early coordination with all involved agencies (federal and state) and stakeholders; (2) establishing and adhering to timeframes for reaching decisions; and (3) avoiding duplication of analysis and review by relying upon other agencies, especially state agencies, whose analysis and review includes similar or identical regulatory requirements. Many of these best practices are within the agencies' authority and are encouraged by the Council of Environmental Quality's National Environmental Policy Act (NEPA) regulations and guidelines. However, agencies continue to eschew using them. A more permanent and effective solution is for Congress to provide direction for federal agencies to do so. The *National Strategic and Critical Minerals Production Act* (H.R. 1937), introduced by Congressman Mark Amodei (R-Nev.), carefully addresses the inefficiencies of our underperforming permitting system, without compromising our rigorous environmental standards, by incorporating best practices for improving coordination among state and federal agencies, clarifying responsibilities, avoiding duplication, setting timeframes and bringing badly needed accountability to the process.

5. EPA and the Army Corps of Engineers Proposed Definition of 'Waters of the United States' (79 Fed. 22,187, April 21, 2014): The proposed definition of 'waters of the United States' under the Clean Water Act would greatly expand federal regulatory reach beyond the common understanding of 'navigable waters' and



breach the constitutional limits of federal power. The agencies assert the rule is simply a “clarification;” actually, as proposed it would extend federal powers over additional water features and insert the federal government into local land use decisions. CWA permits are expensive with the costs including both the technical analysis and mitigation compensation federal agencies demand for any segment of waters they deem impacted by activities. The hidden but real costs include backlogged permit applications that impair the net present value of investments awaiting decisions from agencies. By bringing more waters within the regulatory reach of the CWA, the proposed rule would increase the permitting backlog in a system already overwhelmed and unresponsive to businesses and landowners. The rulemaking is premised, in part, upon the mistaken view that any water not within the jurisdictional ambit of the CWA is unprotected. In fact, states have many programs that already consider measures and protect the integrity of ‘state’ waters that fall outside the CWA.

### **C. Lacking a Compelling Need or Purpose**

1. Office of Surface Mining Stream Protection Rule (pending at OMB): The Office of Surface Mining Reclamation and Enforcement (OSM) recently submitted to the Office of Management and Budget (OMB) its sweeping regulatory rewrite for much of OSM’s existing framework, called the “Stream Protection Rule.” This proposed rule would change the nature and scope of OSM’s regulatory activity by imposing significant new requirements that go well beyond OSM’s authority under the Surface Mining Control and Reclamation Act (SMCRA). The states that possess primary regulatory jurisdiction over coal mining have repeatedly indicated they see no need for the rule. In reviewing their regulatory programs’ rules, OSM’s own oversight reports disclose improving performance in diminishing and eliminating off-site impacts from surface coal mining operations. Many of the anticipated requirements will duplicate and overlap existing Clean Water Act requirements giving rise to agency conflicts, time delay and increased costs for both industry and OSM with no benefit.

The last revisions to the OSM rule were struck down on a small technicality—absence of proper consultation with the Fish & Wildlife Service (FWS). OSM could easily and efficiently remedy this shortcoming by updating its past consultation with FWS. Instead, the agency has embarked upon a broad-ranging search to justify its activities spending \$9.5 million over five years—a clear indication that the rulemaking lacks any identified need or purpose. OSM’s internal analysis of a draft rule under consideration indicated that it would cause more than 7,000 coal miners to lose their jobs. An independent analysis concluded that the rule could cost 55,000-79,000 jobs throughout the United States. Recordings of meetings between OSM and its contractor suggest OSM pressured the contractor to change assumptions to produce lower employment impacts. When the contractor objected that such a change would not reflect “the

real world,” an OSM representative replied: *“It’s not the real world, this is rulemaking.”* See Committee on Natural Resources, Majority Staff Report, 112<sup>th</sup> Cong. at 4. ([http://naturalresources.house.gov/uploadedfiles/staffreport-112-osm\\_sbzr.pdf](http://naturalresources.house.gov/uploadedfiles/staffreport-112-osm_sbzr.pdf)). Throughout the course of this activity, OSM has shut out the states that regulate coal mining. Frustrated by OSM’s failure to engage them as promised, several states have terminated their involvement under a 2009 MOU when OSM began examining whether to revise the rules. In short, the states with responsibilities for permitting and enforcing SMCRA have not been consulted on the need or basis for any rulemaking.

2. Office of Surface Mining Emergency Action Plans for Dams: OSM plans to initiate a rulemaking to require “emergency action plans” (EAP) for high hazard dams. OSM has previously admitted nothing in the law it administers requires EAPs. OSM’s decision to pursue this rulemaking fails to consider existing safeguards already in place in states and the duplication of existing dam safety standards administered by the Mine Safety and Health Administration. OSM has not described what additional benefits would arise from the agency duplicating existing state and federal programs addressing the same subject.
3. DOI, Office of Natural Resources Revenue Proposed Coal Valuation Rules (80 Fed. Reg. 608, Jan. 6, 2015): In Jan. 2015, the Department of the Interior’s Office of Natural Resources Revenue (ONRR) proposed changes to the methods for valuing coal produced on federal leases for paying royalties. The proposal contains a default provision empowering DOI with absolute discretion to establish value of coal produced and sold using a variety of discretionary factors and any other information the secretary believes is appropriate. The result of the proposed rule will be to increase taxes and royalties, which will reduce investment and coal production and lower government (federal and state) revenues. Moreover it will directly increase the price of electricity and cost coal communities’ high-wage coal-related jobs.

The proposed changes are not based upon any analysis demonstrating a compelling need to radically change longstanding coal valuation policies. Disputes over coal valuation have been routinely and efficiently addressed through audits and the record does not disclose any systemic undervaluation of federal coal based upon sales transactions. Existing data demonstrate that the current coal valuation rules and coal leasing system provides stable and substantial tax and royalty revenues (more than \$4.8 billion between 2011-2013) to states and the federal government. Federal coal is already at a distinct disadvantage with a royalty rate that exceeds prevailing rates as much as 40 percent compared to private coal. Moreover, federal coal lessees pay substantial and non-recoupable bonus bids—a cost rarely if ever incurred for mining private coal—for the right to mine federal coal. ONRR should retain the current benchmarks for determining the value of non-arms-length transactions or

alternatively provide opt out provisions similar to those provided for oil and gas leases that allow for use of public sales data.

4. Mine Safety & Health Administration Respirable Coal Mine Dust (79 Fed. Reg. (24,813 May 1, 2014): The Department of Labor, Mine Safety and Health Administration (MSHA), issued a rule requiring all coal operations: (1) reduce the permissible exposure limit to coal dust to which miners can be exposed; (2) modifies the process for collecting samples upon which compliance determinations are made; and (3) requires mine operators to purchase (from a single supplier) patented sampling devices for compliance purposes that remain unreliable and produce inaccurate results.

MSHA contends the rule is designed to reduce the incidence of coal workers pneumoconiosis (CWP) by reducing the exposure of miners to respirable coal dust. However, since 1980, average coal dust exposures and the incidence of CWP have declined under the existing standards. The rule is premised on the discovery of cases of “rapidly progressing CWP” in a three state region located in Central Appalachia. The data does not demonstrate a causal connection between the current coal dust exposure levels and incidence of disease. Rather, MSHA data, and independent analysis, identifies an increase in silica exposure due to mine-seam conditions as the cause of the rise in CWP cases in this small region. Instead of focusing upon the real problem, MSHA is leveraging a localized problem that needs to be addressed—silicosis, not CWP—as justification to impose a nationwide costly regulation on the entire coal industry.

As it stands, the current rule is a lost opportunity to provide better protection for those who actually need it in the clustered geographical area that presents a distinct reason for the isolated cases of increased CWP. At the same time, the rule threatens the viability of mines and the jobs of many coal miners as they incur the unnecessary and out-sized costs of a one-size-fits-all approach. The rule ignores scientific evidence, and equally important, rejects proven solutions such as personal protection technologies and rotation of miners that are used in other industries to effectively address dust exposure.

April 30, 2015

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security &  
Government Affairs  
Washington, D.C 20510-6250

The Honorable Tom Carper  
Ranking Member  
Committee on Homeland Security &  
Government Affairs  
Washington, D.C. 20510-6250

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs &  
Federal Management

The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs &  
Federal Management

Dear Chairmen and Ranking Members:

Thank you for the opportunity to comment on the impact of federal regulations on the aggregates industry. By way of background, NSSGA is the leading voice and advocate for the aggregates industry. Its members – stone, sand and gravel producers and the equipment manufacturers and service providers who support them – produce the essential raw materials found in homes, buildings, roads, bridges and public works projects and represent more than 90 percent of the crushed stone and 70 percent of the sand and gravel mined annually in the United States. Production of aggregates in the U.S. in 2014 totaled 2.17 billion metric tons at a value of \$20.3 billion. The aggregates industry employs approximately 100,000 highly-skilled men and women. Aggregates are a high volume low cost product.

The U.S. has clean water, clean air and safe workplaces that are the envy of the world. These resources are effectively protected by compliance with a host of federal, state and local regulations. The aggregates industry has made huge strides in worker safety and environmental quality over the past several decades; in fact many affected businesses routinely go beyond regulatory compliance with world-class health, safety, and environmental management systems and programs.

NSSGA believes in order to facilitate economic recovery and growth the government should consider cumulative impacts of compliance before more rules are imposed. This would allow the capital costs and feasibility of compliance associated with a new rule to be more thoughtfully understood both by regulators and stakeholders. Anything that affects the costs of aggregates ultimately results in increased costs of public works projects that are passed along to the taxpayers.

Federal regulatory decision-makers must wield their authority with care and should base regulatory decisions on published, peer-reviewed assessments of risk. Rules based on “sound science” – accurately defining the problem as well as a feasible solution to mitigate or reduce risk - may be debated from one scientific perspective or another, but the basic rationale of risk should be rooted in common ground.

Yet new and more restrictive regulations continue to be churned out by federal regulatory agencies, often with negligible benefits and high costs. Too often federal regulators develop unworkable solutions to exaggerated threats, with little understanding of the real world implications. Fines and penalties are often assessed for violations that have little effect on worker safety or the environment. Far more effective, for

example, are efforts to streamline environmental permitting programs and facilitating partnerships in lieu of more regulations. Case in point: the same construction project that used to be handled via a nationwide permit taking months now requires detailed individual permits taking years and many more thousands of dollars, with little to no environmental benefit.

Any new regulations or more restrictive conditions should be strictly vetted. At a minimum, they must address a real problem not covered by existing requirements, and have extensive input from the public, businesses (large and small) and state and local governments. There needs to be compelling evidence based on scientific principles that the proposed regulation will actually solve the problem it claims to remedy, and after a thorough cost-benefit analysis is undertaken. Frequently we find agencies rely on outdated public surveys to justify unnecessary rules.

Further, agencies regularly utilize “guidance” to circumvent formal notice and comment rulemakings allow the government to avoid providing needed notice to the regulated and interested public. In these instances, industry and citizens are bereft of a suitable opportunity to analyze risk abatement, management and compliance costs. Also, this government failure to provide notice and comment leaves no chance for stakeholders to provide input, and/or to assure sufficient time for compliance efforts to occur.

The following pages outline rulemaking or other practices that we believe are overly-burdensome, costly or unnecessary to the aggregates industry and will ultimately increase the cost of building roads, highways, and other public works projects that will be passed along to the American taxpayer. We have attempted to categorize them in several general areas and provide examples for each with associated impacts.

Again, we appreciate the opportunity to provide input to the committee. Please do not hesitate to be in touch with me or Pam Whitted, Sr. Vice President, Legislative & Regulatory Affairs, at [pwhitted@nssga.org](mailto:pwhitted@nssga.org), with any questions.

Sincerely,



Michael W. Johnson  
President and CEO



## **BURDENSOME REGULATIONS AND IMPACTS ON THE AGGREGATES INDUSTRY**

### **1. DOL's OCCUPATIONAL HEALTH & SAFETY ADMINISTRATION SHOULD NOT PROPOSE MAJOR REGULATIONS WITHOUT REQUISITE JUSTIFICATION**

Crystalline Silica—OSHA Should Enforce the Workplace Exposure Limit, Not Reduce It

Background:

The U.S. Occupational Safety and Health Administration (OSHA) has issued a proposed standard for respirable crystalline silica that drastically reduces the current workplace exposure limit—despite a 95 percent decrease in silica-related disease since 1971, when the current limit was established. Not only is OSHA's proposal unnecessary, it fails to demonstrate the health benefits of the proposed lower limit and vastly underestimates the costs of compliance. Moreover, the method proposed for measuring silica exposure doesn't even meet the government's own accuracy criterion. (Crystalline silica is the second most abundant mineral in the Earth's crust. It is ubiquitous in rocks, gravel, sand, and soils; it plays a crucial role in construction and transportation; and it is essential for many manufacturing processes and countless products, e.g., foundries and steel making, paints, high-tech equipment, glass, and ceramics.)

Impact:

Recent estimates by independent economists show that the full annualized costs of the proposed standard exceeds \$10 billion, and an annual reduction of employment of more than 18,000 FTE jobs in general industry and 21,000 in construction—and these impacts exclude the mining industry. The Mine Safety and Health Administration announced this year it will issue a similar rule based on OSHA's flawed regulatory analysis, with impacts that could severely affect the mining sector for many years.

OSHA and MSHA should enforce the current limit where noncompliance constitutes an existing risk rather than reduce the current limit that's protective of health with universal compliance and enforcement.

### **2. DOL's MINE SAFETY & HEALTH ADMINISTRATION SHOULD NOT ARBITRARILY BOOST PENALTY COSTS**

MSHA – Civil Penalties Rule Proposal Will Boost Penalty Costs with No Safety Benefit

Background:

MSHA's proposal of a Civil Penalties (or Part 100) rule announced that the agency wants to substantially change the way in which MSHA inspectors evaluate conditions at mines. The

agency claims that this change will simplify compliance and reduce penalty costs. It does just the opposite. For instance, the proposal eliminates an operator's current ability to demonstrate 'mitigating circumstances' after a finding of violation showing that the violation is not necessarily the result of an operator's egregious error in managing for safety. If this proposal is finalized as is, the rigorous enforcement regime implemented by the Mine Act would actually take away incentives for the operator to invest substantially in safety.

While the agency asserts that these changes will simplify compliance, stakeholders fear that the changes will confuse operators about how violations should be evaluated, and significantly boost penalty costs.

Impact:

The proposal will have the opposite effect of what the agency states. In the event that the rule is finalized as proposed, NSSGA anticipates a significant increase in litigation over inspector findings of operator culpability in negligence of violations. Further, NSSGA's estimate of surveyed companies showed increases in penalty costs of between 50 and 80 percent. Finally, there is nothing in the rule that will make it easier for operators to manage for safe and healthful production.

### **3. U.S. CONSTITUTION SHOULD BE ADHERED TO DURING RULEMAKING**

MSHA - Pattern of Violations Rule's Disregards Due-Process and is Unconstitutional

Background:

MSHA's finalization of its Pattern of Violations (POV) rule announces that the agency will include - in its determination of which troubled mine operators deserve the harsh discipline to be administered through POV - acceptance of inspector allegations of a violation without third party scrutiny of those allegations that is called for in the 1977 Federal Mine Safety and Health Act. This third party review is the way in which operators enjoy their due process rights enshrined in the U.S. Constitution.

The POV rule closes mine facilities with a poor compliance and safety track record. The POV-targeted facility cannot return to production until it has undergone several inspections without any serious and substantial citations. Thus, the POV rule severely cuts an operation's ability to stay open, and productive. Further, the agency failed to state in the final rule the specific criteria for selection of facilities for POV status, making it difficult for operators to know whether they are targeted for further scrutiny under POV as mandated by the rule.

Impact:

Many more operators risk being swept into POV status based on un-adjudicated citations issued to their operations. This risks much higher penalties and steep revenue losses (due to facility closures as a result of a POV finding) just because an inspector - sometimes in error - thought he had found a violation when, in reality, the third party review will have likely prevented



finalization of errant citations. Placement of a facility onto POV status can cost the operator tens of thousands or maybe even millions of dollars in lost production. The aggregates industry, which has been very hard hit by the economic downturn, should not be at risk for further closures when the agency cannot say what the criteria for POV selection are, or affirm that citations at the basis of those determinations are in fact valid.

#### **4. REGULATORS SHOULD NOT GO BEYOND THEIR STATUTORY AUTHORITY**

##### **EPA – EPA Is Not Authorized to Veto Previously-Approved Permits**

Background:

In an attempt to stop mountaintop coal mining, EPA used its questionable veto authority under the Clean Water Act to revoke previously issued, federally-approved U.S. Army Corps of Engineers' operating permits for mining operations.

Impact:

This veto threatens recipients of all federally-issued Clean Water Act permits, including 402 National Pollutant Discharge Elimination System (NPDES) permits issued by EPA or delegated states and 404 dredge-and-fill permits. This action jeopardizes all previously issued operating permits for any mining operation, and the ability to rely on the integrity of such permits and the permit process. EPA should only use its veto authority within a set time frame and within a specific statute of limitations.

##### **EPA – Waters of the U.S. Rule Is an Unjustified Expansion of Federal Power**

Background:

EPA sent the final version of the Waters of the U.S. Rule, which will expand the scope of jurisdiction under the Clean Water Act (CWA), to the White House on April 6. The rule will subject many new waters and landforms to federal jurisdiction, including dry stream beds and most ditches. This agency action is in lieu of action by the 111<sup>th</sup> Congress on the Clean Water Restoration Act, which would have broadened the rule by removing the qualifying term “navigable” from the CWA and redefined “waters of the United States” using very broad and inclusive terms. EPA has ignored input from the majority of states, businesses and the Small Business Administration.

Impact:

EPA's final rule is expected to expand the CWA beyond original Congressional intent and eliminate the federal/state partnership inherent in the law. By expanding jurisdiction under the CWA, aggregate operators will have to seek additional federal approvals and permits in order to complete reclamation projects at significant cost and delay. Enforcement of the rule will put businesses at risk of fines of up to \$37,500 a day if a permit is required and not obtained, and

increase the risk of citizen suits. The rule will make it even more difficult for aggregates operators essential to recovery from the recession. The rule will sweep in many marginally aquatic areas that only have a remote and insubstantial impact to traditionally navigable waters, and will impose costs that far exceed any possible benefits. Aggregates operations estimate costs per new facility of a million dollars or more for increased mitigation. EPA should withdraw the rule and start over with extensive stakeholder participation and an accurate cost benefit analysis.

## Executive Office of the President - Definition of Floodplain Should Not Be Expanded

### Background:

On Jan. 30, President Obama signed Executive Order (EO) 13690, part of the Administration's plan to improve climate resiliency. EO 13690 updates a 1977 EO 11988 that required federal agencies to do what they could to preserve the nation's floodplains. The new EO creates an expansive new flood standard, allowing agencies to choose a climate-informed approach, adding an additional 2 or 3 feet to the base flood elevation of the 100-year flood, or a 500-year floodplain approach. Although the Administration has stated that EO 13690 is targeted to federally funded projects, the EO could affect federal actions, including permitting, such as that under the Clean Water Act. There is no record of the scientific and economic rationale considered during the standard development or any indication that state and local governments were consulted. Most importantly, there is no evidence that the new standard will achieve the stated goals of improving preparedness and resilience against flooding. The necessity of this standard has not been evaluated: many federal, state and local programs that successfully manage water quality and floodplain development were not fully or even partially implemented in 1977.

### Impact:

Allowing agencies to select different floodplain designations could create a regulatory nightmare for stakeholders. For example, a planned aggregates operation might have the Fish and Wildlife Service and U.S. Corps of Engineers designating the floodplain differently. Taken with the Proposed Waters of the U.S. Rule, this would be a vast expansion of federal authority with no justification, and impose costs and delays.

Activities such as aggregates operations should be clearly excluded from the standard. The standard should be evaluated for both regulatory impacts and potential costs, then released for public notice and comment, including input from stakeholders.

###



May 1, 2015

Chairman Ron Johnson,  
Homeland Security and Government Affairs Committee  
U.S. Senate

Ranking Member Tom Carper,  
Homeland Security and Government Affairs Committee  
U.S. Senate

Dear Chairman Johnson, Ranking Member Carper, and Members of the Senate Homeland Security and Government Affairs Committee,

The Natural Resources Defense Council (NRDC) is pleased to comment on the impact, state and role of federal regulation and rulemaking. Since 1970, NRDC has participated in the legal and regulatory processes to promote public health and the environment. Our organization brings decades of expertise in regulations that protect the public and those that do not. We hope that you find our comments helpful in your efforts to evaluate the regulatory system.

Americans rely on regulations to protect human health, the environment and quality of life. These rules correct market failures that make it more likely for an actor to shift the costs of its actions onto the general public. For instance, without regulations it might make economic sense for some actors to dump their pollution into waterways, freely vent chemicals into the air, or deposit harmful contaminants into the surroundings. The public pays a high price when these activities go unchecked. By contrast, it has consistently been shown that benefits of regulations greatly exceed the costs.

Despite this, public benefits are often a footnote in today's "regulatory reform" discussion. Too often, the debate is confined to compliance cost without equal consideration of human health, human lives, and environmental sustainability. NRDC understands that regulations may bring abatement costs and we do not trivialize this. However, it is also appropriate to discuss why regulations are necessary, what is at stake, and the sizeable analytic tasks that are already applied to federal rulemaking. Finally, it is important to stress that efforts to slow or stop the regulatory process will produce very real dangers and harms to Americans and the environment.

Our comments discuss each of these issues. They begin by noting several of the analytic requirements that agencies must already adhere to as part of the rulemaking process. Next, they examine examples of severely delayed and dysfunctional rulemakings that have endangered the public by denying Americans the health and safety benefits guaranteed by congressional enactments and conferring insufficient or grossly delayed benefits. Finally, they examine several examples of well-designed regulations that have benefitted the public immensely.

**NATURAL RESOURCES DEFENSE COUNCIL**

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requires federal agencies to consult with state, local, and tribal governments. UMFRA requires agencies to evaluate a reasonable number of alternatives and select the least costly, most effective or least burdensome alternative.

- **Executive Order 13563:** Adopted in 2011, E.O. 13563 requires meaningful opportunities for all stakeholders to comment on proposed agency action. To the extent feasible, it requires all docket information to be made available and searchable online, including all relevant scientific information. E.O. 13563 allows stakeholders the opportunity to comment on a proposed rule online and requires agencies to solicit the views of affected stakeholders before issuing a Notice of Proposed Rulemaking. The order asks agencies to simplify and harmonize regulations that may overlap or contradict other regulations. It tasks the Office of Information and Regulatory Affairs (OIRA) with creating a plan for retrospective regulatory review.

Despite the time and resource intensive requirements already on the books, bills introduced in this Congress would exacerbate, rather than alleviate, existing problems and illegal delays resulting from missed statutory deadlines. These legislative proposals typically require redundant analyses, needlessly increase the scope and granularity of existing analyses, apply impossible analytic thresholds or impose legal and political uncertainties on the rulemaking process.

NRDC is deeply concerned with legislative proposals that replicate delay and inefficiency across the regulatory spectrum. Bills that hold back rules of urgent public importance and diminish agency resources set dangerous policy. Below, we provide several examples of when poor regulatory design or slow promulgation allowed risks to go unchecked.

## **II. Slow or unworkable regulatory processes subject Americans to greater risk.**

The United States is a nation of innovation and rapid technological development. It is the job of regulators to ensure that public protections remain relevant amid changing conditions. They can only do this when the regulatory system is nimble enough to keep pace with emerging risks. The Toxic Substances Control Act, the BP oil disaster, the decades of delay in Clean Air Act rulemakings, and the sharp growth of crude shipments by rail all illustrate the harmful effects of regulatory lag.

### **A. Unworkable rulemaking requirements prevent the Toxic Substances Control Act from protecting Americans against widely recognized health risks.**

The Toxic Substances Control Act (TSCA) is widely considered to be the greatest failure of any of the environmental laws of the 1970s. The main reason that EPA has historically failed to regulate chemicals under TSCA is the provision requiring the agency to select the regulatory alternative that is the "least burdensome" on industry. In 1989, after spending ten years and millions of dollars, to develop a 45,000 page record, EPA proposed to ban most uses of asbestos in the United States. Roughly 10,000 people die in the U.S. every year as a result of asbestos exposure. Yet in 1991, a federal court overturned EPA's ban on existing uses of asbestos. The court held that EPA did not meet the "least burdensome" test by conducting a thorough cost benefit analysis of each of the potential regulatory options at the agency's disposal and demonstrating that the one it chose was the least costly effective approach. As a result, products containing asbestos are still used in this country despite asbestos bans in 55 other countries. In

Spill and Offshore Drilling lists these regulatory failures as contributors to the spill. It is true that many factors, including industry opposition, contributed to slow regulatory development. However, the disaster clearly shows why the regulatory system must be responsive enough to match present conditions. Blocking the rulemaking process with new obstacles will prevent badly needed adaptation and increase risks to the public.

### **C. Decades of Delayed Clean Air Act Standards Have Meant Thousands of Lives Lost.**

The Clean Air Act's 40-year history has been characterized by incredible success in protecting the public while also growing the economy. But years of delay and missed statutory deadlines have meant that tens of thousands of lives were needlessly lost to air pollution-related harms simply because the congressionally-established statutory deadlines in the Act were not met. To name only a few of the most egregious examples, both EPA's Mercury and Air Toxics standards for power plants, air toxics regulations for industrial boilers and cement kilns, and national health standards for smog pollution were delayed by over a decade each. These standards collectively are estimated to save thousands of lives each year once fully implemented. Decades of delay from just these standards alone has meant tens of thousands of lives lost. Similarly, the Clean Air Act requires that EPA review National Ambient Air Quality Standards (NAAQS) for a number of pollutants every five years. The Agency regularly misses these statutory deadlines, and NAAQS reviews have been delayed by years as well.

A prime example of just how pervasively harmful this delay can be is the health toll to Americans caused by the delay of scores of Clean Air Act rules that Congress directed EPA to adopt under just *one section* of the Clean Air Act, in the 1990 Clean Air Act amendments. Congress revised section 112 of the Act in 1990 specifically because rulemaking to limit toxic air pollution was proceeding too slowly under the previous version of the statute. As a result, Congress wrote explicit statutory deadlines into the statutory language in 1990, requiring EPA to issue one-third of MACT standards within three years after 1990, one third three years after that, and all of them by 2000.<sup>ix</sup> Follow-on provisions of the Act require EPA to review standards after six years, and then every eight years to assess the "residual risk remaining."<sup>x</sup> But if one compares these statutory deadlines to the dates that EPA actually adopted rules, in some cases final MACT standards were not adopted until 10 to 15 years after statutory deadlines.<sup>xi</sup>

We know from the MACT standards ultimately adopted, including the example of EPA's Mercury and Air Toxics standards described above, that they helped or will help avoid thousands of premature deaths, thousands of heart attacks, and hundreds of thousands of asthma attacks.<sup>xii</sup> And the opposite is also true – the missed statutory deadlines in this section of the Clean Air Act alone resulted in many thousands of avoidable deaths, many thousands of heart attacks, and hundreds of thousands of asthma attacks that could have been avoided over many years had EPA complied with the statutory deadline set by Congress.

It must be recognized that these delays result primarily from two factors: first, the failure by Congress to adequately fund EPA's budget at levels that ensure compliance with and enforcement of federal laws established by Congress itself. It is critical that Congress provide federal agencies with the resources they need to ensure that the statutory obligations written into law by Congress can be enacted by the federal agencies tasked with developing rules.

Second, these unlawful failings and delays were also fueled by various administrations pursuit of non-required rulemakings, some of which were deregulatory and starkly unlawful, rather than

### **III. Well-designed regulations save lives and provide substantial economic returns.**

Well-designed regulations that protect human lives, save energy and reduce waste also yield substantial net economic returns. Even Bush Administration analysis shows that the monetized benefits of regulation vastly outweigh its costs. In 2008, for instance, the Office of Management and Budget found that the “estimated annual benefits of major Federal regulations reviewed by OMB from October 1, 1997 to September 30, 2007 range from \$122 billion to \$656 billion, while the estimated annual costs range from \$46 billion to \$54 billion.”<sup>xxi</sup> The balance of this document lists just several examples of well-designed regulations that provide positive economic returns and improve human lives.

#### **A. Upon implementation, Clean Air Act regulations provide massive return on investment, improve health and save lives.**

Upon implementation, the Clean Air Act (CAA) is among the nation’s most successful environmental laws, indeed one of the most successful federal laws ever enacted. In its first twenty years, the Clean Air Act reduced total emissions of the six principal air pollutants by more than 41 percent, while the country’s Gross Domestic Product increased by more than 64 percent.<sup>xxii</sup> This Act’s safeguards limit harmful airborne pollutants across power, industrial, mobile and area sources. By improving air quality, the CAA also reduces chronic respiratory illness, lost work days, hospital admissions, and premature mortality. In 1990 alone, EPA estimated that the Act prevented more than 200,000 premature deaths and avoided almost 700,000 cases of chronic bronchitis.<sup>xxiii</sup> EPA’s Mercury and Air Toxics Standards for power plants alone are estimated to prevent up to 11,000 premature deaths per year, thousands of heart attacks and bronchitis cases, and tens of thousands of asthma attacks. EPA estimates that these standards each year will save between \$39 billion and \$90 billion annually in avoided health costs when fully implemented.<sup>xxiv</sup>

When evaluated more broadly, Clean Air Act regulations continue to yield impressive collective returns. A 2011 EPA analysis estimated that by 2020, the Clean Air Act’s direct benefits will outweigh its direct costs by a factor of 30 to 1. Indeed, the cost-benefit margin is so wide that net gains are unlikely to be reversed under any set of reasonable alternative assumptions.<sup>xxv</sup> What’s more, we should remember that these economic returns flow from lower incidences of mortality and morbidity, representing significant reductions in human suffering.

#### **B. Energy efficiency standards save money, improve air quality, and insulate Americans from price volatility.**

Efficiency standards are a proven regulatory success. For decades, efficiency standards across mobile and stationary sectors have saved energy expenditures, reduced pollution, minimized exposure to price volatility, and introduced new technologies into the marketplace. The aggregate savings are substantial:

- Appliance and equipment standards from rules finalized since 2009 will save American consumers and businesses roughly \$480 billion through 2030.<sup>xxvi</sup>
- According to the Department of Energy, light duty vehicle efficiency standards for model years 2012-2025 will save consumers \$1.7 trillion. By 2025, these standards will also reduce U.S. oil reliance by more than 2 million barrels per day.<sup>xxvii</sup>

current health, food safety, environmental and other federal laws that agencies have not yet implemented. The Congressional Research Service or National Academies could be tasked with this important responsibility to the American people.

All too often, regulatory reform bills focus exclusively on cost without any recognition of the dangers posed by under regulation. As a result, these bills simply double down on existing delays and inefficiencies. History has shown that the public pays heavily when regulatory protections are too slow to evolve and adapt. For these reasons, NRDC urges you to avoid any legislative measures that would further slow or complicate our system of environmental and public health protections.

NRDC thanks you once again for the opportunity to comment on federal regulation and rulemaking. We look forward to working with your committee on this important issue.

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<sup>i</sup> Rabalais, N., *Assessing Early Looks at Biological Responses to the Macondo Event*, *BioScience*, Vol 64(9), pp. 757-759, 2014.

<sup>ii</sup> Haney, J.C., Geiger, H.J., & Short, J.W., *Bird mortality form the Deepwater Horizon oil spill, II, Carcass sampling and exposure probability in the coastal Gulf of Mexico*, *Marine Ecology Progress Series*, vol. 513, pp. 239-252, 2014.

<sup>iii</sup> Williams, R., et al., *Underestimating the damage: interpreting cetacean carcass recoveries in the context of the Deepwater Horizon/BP incident*. *Conservation Letters*, Vol 4:228-233, 2011.

<sup>iv</sup> NOAA Fisheries Office of Protected Resources, *Sea Turtle Strandings in the Gulf of Mexico*, NOAA. Lasted viewed December 30, 2014 at: [www.nmfs.noaa.gov/pr/species/turtles/gulfofmexico.htm](http://www.nmfs.noaa.gov/pr/species/turtles/gulfofmexico.htm).

<sup>v</sup> BP, *Gulf of Mexico Oil Spill Claims and Other Payments*, Public Report, BP, December 31, 2014.

<sup>vi</sup> Oxford Economics, *Potential Impact of the Gulf Oil Spill on Tourism*. Last viewed April 17, 2015 at: [https://www.ustravel.org/sites/default/files/page/2009/11/Gulf\\_Oil\\_Spill\\_Analysis\\_Oxford\\_Economics\\_710.pdf](https://www.ustravel.org/sites/default/files/page/2009/11/Gulf_Oil_Spill_Analysis_Oxford_Economics_710.pdf).

<sup>vii</sup> Peter Lehner and Bob Deans, *In Deep Water: The Anatomy of a Disaster, the Fate of the Gulf, and Ending Our Oil Addiction*, Natural Resources Defense Council, 2010.

<sup>viii</sup> National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling*, January 2011.

<sup>ix</sup> See generally <http://www.epa.gov/air/caa/peg/toxics.html>; 42 U.S.C. §112(e)

<sup>x</sup> 42 U.S.C. §112(f)

<sup>xi</sup> See <http://www.epa.gov/airtoxics/mactfnlalph.html> (listing final MACT standards promulgated)

<sup>xii</sup> See, e.g., EPA's Mercury and Air Toxics Standards for Power Plants; MACT standards for Portland Cement Kilns; MACT standards for Industrial Boilers.

<sup>xiii</sup> Energy Information Administration. Last viewed April 16, 2015 at:

[http://www.eia.gov/dnav/pet/PET\\_MOVE\\_RAILNA\\_A\\_EPCO\\_RAIL\\_MBBL\\_A.htm](http://www.eia.gov/dnav/pet/PET_MOVE_RAILNA_A_EPCO_RAIL_MBBL_A.htm)

<sup>xiv</sup> "Accidents Involving Trains Transporting Crude Oil," *The Big Story*, Associated Press, January 23, 2014. accidents-involving-trains-transporting-crude-oil.

<sup>xv</sup> Dianne Bailey, *It Could Happen Here: The Exploding Threat of Crude by Rail in California*, NRDC, 2014.

<sup>xvi</sup> *Ibid.*

<sup>xvii</sup> Alex Rohr, "DEQ serves violation notice to CSX for Lynchburg oil spill," *The News & Advance*, May 23, 2014.

<sup>xviii</sup> *Safe Transport of Crude Oil*, February 2014.

<sup>xix</sup> Clifford Krauss and Jad Mouawad, "Accidents Surge as Oil Industry Takes the Train", *New York Times*, January 25, 2014.

<sup>xx</sup> Sean Reilly, "Hearing amounts to venting session over slow pace of rulemakings", *Energy and Environmental Daily*, April 15, 2015.

<sup>xxi</sup> Office of Management and Budget, *2008 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, 2008.

<sup>xxii</sup> <http://www.epa.gov/air/caa/40th.html>

<sup>xxiii</sup> *Id.*





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May 1, 2015

The Honorable Ron Johnson  
Chairman  
U.S. Senate  
Homeland Security & Governmental Affairs Committee

Washington, DC 20510

The Honorable James Lankford  
Chairman  
U.S. Senate  
HSGAC Subcommittee  
Regulatory Affairs & Federal Management

Washington, DC 20510

The Honorable Thomas Carper  
Ranking Member  
U.S. Senate  
Homeland Security & Governmental  
Affairs Committee  
Washington, DC 20510

The Honorable Heidi Heitkamp  
Ranking Member  
U.S. Senate  
HSGAC Subcommittee  
Regulatory Affairs & Federal  
Management  
Washington, DC 20510

Dear Senator Johnson, Senator Carper, Senator Lankford and Senator Heitkamp:

Thank you for the opportunity to share Public Citizen's views and concerns with the regulatory process and those existing and proposed regulations that we believe are beneficial to our organization's members as well as the consumers and the public more broadly. For more than 40 years, Public Citizen has successfully advocated for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

We agree with the Committee's goal of "an efficient and effective regulatory process that allows input by those affected by that process." The first step to realizing that goal is recognizing that regulatory paralysis is the most important problem currently facing our regulatory process. The regulatory process is simply too inefficient and ineffective in developing and finalizing new standards to protect the public's health, safety, and financial security. Examples of regulatory delay and inaction abound across agencies and across regulatory programs.

One of the most striking recent examples of regulatory delay has been the ongoing implementation of the Dodd-Frank Wall Street Consumer Protection Act ("Dodd-Frank"). According to current figures compiled by the law firm Davis Polk, about 60% of the required rulemakings under Dodd-Frank have been finalized and an astonishing 22% of required rulemakings have yet to be even proposed. This is far from the model of regulatory efficiency that Congress and the public expects of our financial agencies in

response to one of the greatest economic collapses our country has seen. At the Securities and Exchange Commission (SEC), the pace of rulemaking has been unacceptably lethargic, as a Public Citizen report from last year demonstrates. Our report found that of the 23 rules the SEC expected to finalize in 2014, the agency ended up delaying finalization of 13 of those rules.<sup>1</sup>

Regulatory inefficiency also plagues the Occupational Safety and Health Administration (OSHA), the primary agency charged with protecting the health and safety of American workers. A report released this week by the AFL-CIO<sup>2</sup> finds that about 150 workers are killed every day due to injuries or illnesses caused by unsafe workplace conditions. Yet, according to a GAO report last year, it takes OSHA on average seven years to develop and finalize new health and safety standards.<sup>3</sup> GAO found that the primary culprits for the slow pace of rulemaking were the elaborate and extensive rulemaking procedures OSHA is obligated to follow, including conducting in-person hearings, and a less deferential judicial review standard where OSHA rules are subject to more intensive judicial scrutiny under the “substantial evidence” standard.

Implementation of the bipartisan Food Safety Modernization Act (FSMA), passed in the wake of a string of food safety scandals in 2010 that sickened consumers, fatally in some instances, around the country, is another tragic example of regulatory delay. Despite Congress directing the Food and Drug Administration (FDA) to finalize the critical new food safety rules in seven key areas by 2012, all of those rules missed this mandated Congressional deadline and none have even been finalized to date.

As members of the Subcommittee on Regulatory Affairs and Federal Management heard from the witness testimony of Pam Gilbert, former Executive Director of the Consumer Product Safety Commission (CPSC), the agency primarily charged with protecting consumers from dangerous products must comply with numerous mandatory rulemaking procedures under its authorizing statute. In turn, this has led to a glacially slow pace of rulemaking at the CPSC. In its 30 year history, the agency has produced only a total of 9 consumer product safety standards under the lengthy rulemaking process required under the Consumer Product Safety Act. According to a GAO report from last year,<sup>4</sup> resource intensive cost-benefit analyses of proposed and alternative regulations were identified as a major source of delay. By contrast, when the CPSC has been authorized by Congress to bypass cost-benefit analysis and other burdensome rulemaking procedures, the CPSC has been able to act quickly and effectively in protecting the public, and particularly infants and children, from unsafe products and toys.

One final, very timely, example of regulatory delay should be alarming to members of the Committee. Almost 5 years after the dramatic and tragic British Petroleum oil spill in the Gulf of Mexico caused by an explosion at an off-shore oil rig, the Department of Interior (DOI) this month finally issued a *proposed* rule enhancing the safety of so-called “blowout preventers” whose failure was one of the primary causes of the oil rig explosion. That it took the DOI almost 5 years after one of the worst environmental

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<sup>1</sup> <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=4229>

<sup>2</sup> <http://www.aflcio.org/content/download/154671/3868441/DOJ2015Finalnobug.pdf>

<sup>3</sup> *Workplace Safety and Health: Multiple Challenges Lengthen OSHA's Standard Setting: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions, 113th Cong. (2012)* (statement of Revae Moran, Director, Education, Workforce, and Income Security).

<sup>4</sup> <http://www.gao.gov/assets/670/666488.pdf>

disasters in our country's history to issue this rule, with even more delay until the rule is finalized, is truly an indictment of the unacceptable delays and paralysis that plague our regulatory process.

The foregoing examples are simply illustrative and do not represent an exhaustive list of delayed rulemakings. Public Citizen strongly believes that in many instances, our regulatory process works in neither an efficient nor effective manner. The result is too many dangerous products on the market; too many consumer rip-offs; too many environmental disasters; too many workers injured or killed; too many instances of food poisoning; and much more. The solution is not to layer on further procedural and analytical requirements or to task agencies with work, such as identifying and repealing old rules, that distracts them from their primary mission of developing new safeguards, and certainly if those additional duties are not accompanied with commensurate resources.

Public Citizen's 400,000 members and supporters come from many different backgrounds and reflect the diversity of our organization's interests. Our members include consumers, working families, business owners and professionals, academics, and retirees. The breadth of our organization's engagement on issues requiring government action or government reform mirrors the breadth of our membership. With respect to existing or proposed regulatory standards, Public Citizen supports a wide array of new regulations that are urgently needed to address areas in which a lack of regulation endangers our members and the public, as well as updates to existing regulations that are too weak to adequately protect our members and the public. The following is a selective list of pending regulations that Public Citizen believes will directly benefit not only our members, but the broader public as well, and which Public Citizen supports strongly:

- **"Climate Action Plan" regulations to reduce carbon emissions:** climate change is one of the greatest threats to our public and the environment. Rising carbon emissions are already having a harmful impact on our climate and, left unchecked, will result in irreversible damage to our planet. Public Citizen strongly supports the Environmental Protection Agency's (EPA) proposed regulations to curb carbon emissions from new and existing power plants. In comments submitted to the EPA,<sup>5</sup> Public Citizen identified ways in which the climate regulations would directly benefit consumers and offered constructive suggestions to increase those benefits to consumers, the public, and the environment, by making the rules even stronger and more effective.
- **Dodd-Frank Wall Street Reforms:** While financial agencies have put in place many important reforms of the financial industry in the wake of the 2008 financial collapse, others have languished almost 5 years after passage of Dodd-Frank. Public Citizen supports finalization of the long overdue Dodd-Frank rules, including disclosure of executive-compensation-to-median-pay ratios and tying such compensation to performance metrics, and protections for consumers against abuses from payday lenders.
- **E-Cigarette Regulations:** The Food and Drug Administration (FDA) is currently developing regulations to subject unregulated tobacco products, including electronic cigarettes, to common-sense restrictions and controls. Electronic cigarette use among minors is skyrocketing and the FDA must act quickly to prohibit the sale and marketing of electronic cigarettes to minors along with ensuring that the potential significant health risks of electronic cigarettes are studied and made clear to consumers.

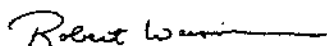
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<sup>5</sup> <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=4340>

- **Oil Train Safety Standards:** The Department of Transportation (DOT) is finalizing new safety standards to enhance the safety of oil trains carrying highly volatile crude oil. Use of the rails to transport crude oil has skyrocketed over the last few years, and safety standards have not kept pace as recent derailments and explosions in communities across the country have tragically shown. DOT must act to ensure that tank cars carrying crude oil are as structurally sound as possible, that train braking systems are enhanced, and the volatility of the crude oil itself is reduced. All of these measures must be phased in as quickly as practicable to avoid future oil train explosions that place communities along oil train routes in danger.
- **Service Member Protections from Predatory Lending:** The Department of Defense (DoD) has proposed updates to existing rules that insufficiently protected active military service members from abuse by predatory lenders. These updates are critical in fixing loopholes that continue to allow unscrupulous lenders to prey on service members, undermining their economic security and our country's national security by harming force readiness.
- **New Workplace Safety Protections:** OSHA is developing new protections and updating outdated standards for workers in several key areas. Public Citizen supports finalization of OSHA's proposed standard reducing worker exposure to known carcinogens such as respirable silica, which leads to black lung disease, and beryllium. Public Citizen also supports increased disclosure to the public of reporting requirements regarding the numbers of injuries and illnesses that workers suffer at worksites.
- **Protecting Retirement Security of Americans:** the Department of Labor (DOL) has proposed important new conflict-of-interest restrictions for brokers who offer investment advice to retirees. Public Citizen supports this measure that is designed to make sure that investment brokers are acting in the best interest of their clients, rather than their own self-interest. This rule puts money back into the pockets of consumers, particularly retirees, instead of ending up in the pockets of brokers and banks as fees.
- **Generic Labeling of Drugs:** FDA has proposed a new rule that properly addresses significant regulatory gaps in the FDA's current generic drug labeling regulations, which allow a generic drug manufacturer to maintain a label even if it knows that label to be inaccurate and out-of-date. Public Citizen supports finalization of this rule to close a loophole that is a direct threat to patient safety.

Once again, Public Citizen thanks the committee for the opportunity to share our views on improving the regulatory process to make it more effective and efficient along with existing and proposed rules that Public Citizen supports as directly beneficial to our members and the broader public. We look forward to working with the Committee to improve both the regulatory process and specific regulations of importance to Public Citizen.

Sincerely



President,

Public Citizen

## Recommendations for Improving the Regulatory Process

### Response to the Senate Homeland Security and Governmental Affairs Committee's Letter Requesting Input on its Regulatory Improvement Effort<sup>1</sup>

The George Washington University Regulatory Studies Center is pleased to respond to the request by Senate Homeland Security and Government Affairs Committee Chairman Johnson, Ranking Member Carper, Subcommittee Chairman Lankford, and Ranking Member Heitkamp for recommendations for improving the regulatory process. The Center commends the Committee for initiating this regulatory improvement effort. Regulation is one of the primary vehicles by which federal policy is formulated, and it affects every household, employee, and business in the United States.

The George Washington University Regulatory Studies Center works to improve regulatory policy through research, education, and outreach. An academic center of the Trachtenberg School of Public Policy and Public Administration, we are a network of scholars from around the globe with experience and credibility on regulatory matters who conduct objective, empirically-based analysis of regulatory policies and practices.

This document summarizes the key insights from some of our research, and provides citations to relevant background documents that provide further detail. Suggestions are divided into six categories relating to regulatory impact analysis, judicial review, congressional oversight, retrospective review, public input, and risk assessment.<sup>2</sup>

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<sup>1</sup> Letter available at: <http://www.hsgac.senate.gov/media/majority-media/-senators-initiate-regulatory-improvement-effort>.

<sup>2</sup> The suggestions presented here reflect the views of the authors of the cited works, and do not represent official positions of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://research.columbian.gwu.edu/regulatorystudies/research/integrity>.

## Improved Analysis for Decision-Making

Presidents of both parties for over 30 years have supported ex ante impact analysis of regulations. Despite enjoying bi-partisan support, however, these requirements are not codified in statute. Codifying these requirements could have several advantages.<sup>3</sup> ([Dudley 2013, p. 8](#))

- First, such legislation would lend Congressional support to the nonpartisan principles of Executive Orders 12866 and 13563. Many existing authorizing statutes ignore or explicitly prohibit analysis of tradeoffs, leading to regulations with questionable benefits that divert scarce resources from more pressing issues. Thus, Congress might also want to consider how to address language in existing legislation that precludes reliance on sound decision criteria or hinders Administrative Procedure Act (APA) procedures.
- Second, legislation could apply these requirements to independent agencies (which Administrations have been reluctant to do through executive order for fear of stirring up debate over the relationship between independent agencies and the President).

Regulatory impact analyses are often developed after decisions are made and used to justify, rather than inform, them. Changing this pattern may require procedural as well as analytical changes.

- Congress might consider requiring agencies to conduct earlier “back of the envelope” analyses that consider a wide range of alternatives.<sup>4</sup> ([Carrigan & Shapiro 2014](#)) For regulations with particularly significant effects, advanced notices of proposed rulemaking could be valuable for soliciting input from knowledgeable parties on a range of possible policy options.<sup>5</sup> ([Dudley & Wegrich 2015](#))
- Agencies should present evidence that the identified problem requires a federal regulatory solution, as well as an objective evaluation of alternative solutions. To this end, it is essential that analytical requirements not be limited to conducting benefit-cost analysis, but rather should include the broader philosophy and principles articulated in E.O. 12866. Legislation could require that regulatory decisions be based on the identification of a compelling public need (a material failure of private markets), an

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<sup>3</sup> Susan E. Dudley, “Reducing Unnecessary and Costly Red Tape through Smarter Regulations,” Testimony before the United States Congress Joint Economic Committee (June 26, 2013): 8,

[http://www.jec.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=f61eebb7-333c-40e6-a110-44c20d97eaa1](http://www.jec.senate.gov/public/index.cfm?a=Files.Serve&File_id=f61eebb7-333c-40e6-a110-44c20d97eaa1).

<sup>4</sup> Christopher Carrigan and Stuart Shapiro, “What’s Wrong with the Back of the Envelope? A Call for Simple (and Timely) Benefit-Cost Analysis,” George Washington University Regulatory Studies Center Working Paper (2014), <http://regulatorystudies.columbian.gwu.edu/whats-wrong-back-envelope-call-simple-and-timely-benefit-cost-analysis>.

<sup>5</sup> Susan E. Dudley and Kai Wegrich. “Regulatory Policy and Practice in the United States and European Union.” The George Washington University Regulatory Studies Center Working Paper (2015) <http://regulatorystudies.columbian.gwu.edu/achieving-regulatory-policy-objectives-overview-and-comparison-us-and-eu-procedures>.



objective review of alternatives (including the alternative of not regulating), and an understanding of the distributional impacts of different approaches.<sup>6</sup> ([Dudley 2013 pp. 9-10](#))

- The [Office of Information & Regulatory Affairs](#) (OIRA) is responsible for reviewing draft regulatory proposals and their supporting analysis. Yet, its staffing has been declining while regulatory agency staffing has increased. Providing OIRA more resources could improve regulatory review and, ultimately, regulatory outcomes.<sup>7</sup> ([Vesey 2011](#); [Drat 2011](#); [Shapiro & Morrall 2013](#))

## Judicial Review

Judicial oversight provides an important Constitutional check, but courts defer to agency expertise when evaluating regulatory records, and requirements in presidential executive orders are not enforceable by law.

- Congress could consider subjecting regulatory impact analysis to judicial review and/or altering the deference courts grant to agencies.<sup>8</sup> ([Dudley 2015](#)) Judicial review could be valuable, not because the courts have a particular expertise in regulatory analysis, but because agencies tend to take more seriously aspects of their mission that are subject to litigation. Like executive and Congressional oversight, judicial oversight would likely make regulatory agencies more accountable for better decisions based on better analysis. ([Dudley 2013](#)) On the other hand, requiring judicial review may make RIAs more detailed but less accurate or useful, so Congress should consider tradeoffs, especially with respect to review of analyses conducted early in the decision process. ([Carrigan & Shapiro 2014](#))
- Courts have interpreted the Regulatory Flexibility Act's (RFA) requirements to assess economic impact as applying only to direct compliance costs. This interpretation has

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<sup>6</sup> Susan E. Dudley, "Reducing Unnecessary and Costly Red Tape through Smarter Regulations," Testimony Before the United States Congress Joint Economic Committee (June 26, 2013): 9-10, [http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/2013\\_06\\_26\\_Dudley\\_JEC\\_statement.pdf](http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/2013_06_26_Dudley_JEC_statement.pdf).

<sup>7</sup> Kathryn Vesey, "OIRA Celebrates 30<sup>th</sup> Anniversary," George Washington University Regulatory Studies Center (2011), [https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20110628\\_oira\\_staffing.pdf](https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20110628_oira_staffing.pdf). See also, Collin Drat, "Who's Regulating the Regulators?," George Washington University Regulatory Studies Center (2011), [https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20110630\\_drat\\_reg\\_staffing1.pdf](https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20110630_drat_reg_staffing1.pdf); and Stuart Shapiro and John Morrall, "Does Haste Make Waste? How Long Does It Take to Do a Good Regulatory Impact Analysis?," *Administration & Society* (2013): 0095399713498745.

<sup>8</sup> Susan E. Dudley, "Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future," forthcoming in *65 Case Western Reserve Law Review* (2015) [http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley\\_Exec-Discretion-Reg-Accountability\\_20150121.pdf](http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_Exec-Discretion-Reg-Accountability_20150121.pdf).



been a burden for small businesses, which often bear indirect costs from regulation. Congress might consider amendments to the RFA to explicitly include indirect impacts.<sup>9</sup> ([Dudley, Engage 2011](#))

## Congressional Oversight

Executive branch oversight of regulatory actions has proven valuable, but it is not sufficient. Congress may want to consider legislation that would strengthen its own ability to oversee regulation.

- Just as the CBO provides independent estimates of the on-budget costs of legislation and federal programs, a Congressional regulatory office could provide Congress and the public independent analysis regarding the likely off-budget effects of legislation and regulation. Importantly, such an office would serve as an independent check on the analysis and decisions of regulatory agencies and OIRA.<sup>10</sup> ([Dudley 2015](#))
- Regulatory expertise in Congress may be particularly important during presidential transitions, when regulatory activity tends to increase.<sup>11</sup> ([Dudley, ALR 2011](#))

## Retrospective Review

Agencies seldom look back to evaluate whether existing regulations are achieving their intended effects. While long-standing executive orders require agencies to conduct retrospective review of their rules, these initiatives have been met with limited success largely because they did not change underlying incentives.<sup>12</sup> ([Dudley, HSGAC 2011](#))

- One major impediment is that agency rules are not designed for review at the outset. Our forthcoming paper on this issue finds that none of the economically significant rules proposed in 2014 included a plan for retrospective review, and none were written and designed to facilitate review of their impacts.<sup>13</sup> ([Miller 2015](#)) While retrospective review

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<sup>9</sup> Susan E. Dudley, “Prospects for Regulatory Reform in 2011,” *Engage* 12, no. 1 (2011): 7-15, [http://regulatorystudies.columbian.gwu.edu/files/downloads/regreform\\_dudley\\_workingpaper\\_20110405.pdf](http://regulatorystudies.columbian.gwu.edu/files/downloads/regreform_dudley_workingpaper_20110405.pdf).

<sup>10</sup> Susan E. Dudley, “Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future,” forthcoming in *65 Case Western Reserve Law Review* (2015) [http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley\\_Exec-Discretion-Reg-Accountability\\_20150121.pdf](http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_Exec-Discretion-Reg-Accountability_20150121.pdf).

<sup>11</sup> Susan E. Dudley, “Observations on OIRA’s Thirteenth Anniversary,” *63 Administrative Law Review* 113 (2011) <http://heinonline.org/HOL/Page?handle=hein.journals/admin63&id=1093>.

<sup>12</sup> Susan E. Dudley, Testimony before the Homeland Security and Governmental Affairs Committee, United States Senate, “Federal Regulation: A Review of Legislative Proposals, Part II,” (July 20, 2011), [http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley\\_HSGAC\\_20110718.pdf](http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_HSGAC_20110718.pdf).

<sup>13</sup> Sofie E. Miller, “Evaluating Retrospective Review of Regulations in 2014” forthcoming from the George Washington University Regulatory Studies Center (2015) <http://regulatorystudies.columbian.gwu.edu/retrospective-review-comment-project>.

will require agency resources, this could be done by reallocating some resources currently devoted to ex ante review. Shifting resources from ex ante analysis to ex post review would not only help with evaluation, but would improve our ex ante hypotheses of regulatory effects.<sup>14</sup> ([Dudley 2013](#))

- Congress could consider several options for encouraging better retrospective review, including establishing an independent body to make recommendations and using budgetary tools.<sup>15</sup> ([Dudley HSGAC 2011](#))
- Going forward, Congress should consider drafting laws that allow implementing rules to be designed in ways that encourage competition and allow for [experimentation](#). These need not be randomized controlled trials in the scientific sense, but rather natural experiments where the outcomes of different policies and test regulatory hypotheses can be observed.<sup>16</sup> ([Dudley 2014](#))

## Public Input

In many respects, the process of developing regulations in the United States is a model of transparency, as it institutionalizes a wide array of opportunities for stakeholder participation.<sup>17</sup> ([Balla 2011](#)) However, the opportunity for public comment comes late in the regulatory development process, after agencies have invested heavily in a specific approach. Furthermore, public comment is largely oriented toward the provision of information and, as a result, does not do as much as it could to maximize deliberative engagement in the regulatory process.<sup>18</sup> ([Balla & Dudley 2014](#))

- Regulatory procedures could take advantage of new technologies that harness the wisdom of dispersed knowledge and facilitate stakeholder participation that is deliberative in orientation. ([Balla & Dudley 2014](#)) A collaborative wiki, for example, might provide opportunities for individuals to build upon one another's contributions, by adding,

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<sup>14</sup> Susan E. Dudley, "A Retrospective Review of Retrospective Review," The George Washington University Regulatory Studies Center Regulatory Policy Commentary. (May 07, 2013) <https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20130507-a-retrospective-review-of-retrospective-review.pdf>.

<sup>15</sup> Susan E. Dudley, Testimony before the Homeland Security and Governmental Affairs Committee, United States Senate, "Federal Regulation: A Review of Legislative Proposals, Part II," (July 20, 2011), [http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley\\_HSGAC\\_20110718.pdf](http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_HSGAC_20110718.pdf).

<sup>16</sup> Susan E. Dudley, "The Utility of Humility," The George Washington University Regulatory Studies Center Regulatory Policy Commentary. December 9, 2014, <http://regulatorystudies.columbian.gwu.edu/utility-humility>.

<sup>17</sup> Steven J. Balla, "Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States," Draft Report to the Administrative Conference of the United States (2011), <https://www.acus.gov/sites/default/files/documents/Consolidated-Reports-%2B-Memoranda.pdf>.

<sup>18</sup> Steven J. Balla and Susan E. Dudley, "Stakeholder Participation and Regulatory Policymaking in the United States," A report prepared for the *Organisation for Economic Co-operation and Development* (2014).

editing, updating, and correcting information and interpretations.<sup>19</sup> ([Dudley & Gray 2012](#))

- Whenever possible, legislative and regulatory approaches should be designed to encourage innovation and learning. Regulation that forces substitution away from products that consumers' actions reveal they value hinders innovation, experimentation, and knowledge discovery. Innovation and learning depend on variation, cross-pollination of ideas, and are stifled by unilateral mandates.<sup>20</sup> ([Dudley 2014](#))
- Congress has authorized federal regulatory agencies to issue certain rules in final form without first undergoing public comment. These “direct final” rules have the force of law without the benefit of receiving input from the regulated public. Congress should avoid legislation that enables agencies to pursue major rulemakings without first seeking public comment.<sup>21</sup> ([Miller 2012](#))
- The Unified Agenda is a semiannual publication of the Office of Management and Budget that provides the public with a chance to see which rules agencies will publish in the next year. However, the past few Agendas have featured completed regulatory actions that were being published for the first time in the Agenda, indicating that the regulated public was not given advance notice of these rules while there was still opportunity to participate in the rulemaking process. ([Miller 2013](#); [Dudley 2013](#); [Miller 2014](#))

## More Transparent Risk Analysis

Policy decisions aimed at reducing health and environmental risks are heavily influenced by hidden normative judgments, opening the door to accusations of “politicized science,” “advocacy science,” or “junk science.”<sup>22</sup> ([Dudley & Gray 2012](#)) Clearly distinguishing risk *assessment* (which involves scientific assessments about health or other effects) from risk *management* (which involves weighing policy alternatives based on scientific information) could improve regulatory policy.<sup>23</sup> ([Bipartisan Policy Center 2009](#))

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<sup>21</sup> For example, the Energy Policy and Conservation Act authorizes the Department of Energy to issue direct final rules setting energy efficiency standards for everyday household appliances, such as air conditioners and dishwashers. Read Sofie E. Miller’s comment on DOE’s direct final rule for dishwasher efficiency here: [http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/DOE\\_EE\\_RE\\_2011\\_BT\\_STD\\_0060.pdf](http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/DOE_EE_RE_2011_BT_STD_0060.pdf).

<sup>22</sup> Dudley, Susan E., and George Gray. “Improving the Use of Science to Inform Environmental Regulation.” In *Institutions and Incentives in Regulatory Science*, edited by Jason Scott Johnston. Lanham, MD: Lexington Books, 2012.

<sup>23</sup> Bipartisan Policy Center, “Improving the Use of Science in Regulatory Policy” (2009) <http://bipartisanpolicy.org/library/science-policy-project-final-report/>.

- Some statutes directed at environmental risks have facilitated more rational regulatory policy than others by recognizing that risk management requires normative judgments that consider tradeoffs. For example, debates over drinking water standards are generally less acrimonious than debates over ambient air quality standards (which the Clean Air Act states should “protect public health” with an “adequate margin of safety.”) This is, in part, because the Safe Drinking Water Act allows explicit consideration of costs and benefits when setting standards, so the full burden of decision-making is not vested in the risk assessment. As a result, policy makers and interested parties may have less incentive to embed policy preferences in the risk assessment portion of the analysis, because they can debate them openly and transparently in the risk management discussion. (Dudley, forthcoming)
- The engagement of scientific advisory panels can provide a valuable source of information and peer review for agency science, but legislation could be clearer when establishing such panels to restrict their advice to matters of science, and not ask them to recommend specific regulatory policies. (Dudley, forthcoming)
- When providing statutory authority for regulation and evaluating proposed and final rules, Congress should be aware that a greater emphasis on understanding cause and effect would improve regulatory outcomes.<sup>24</sup> ([Lutter et al 2015](#)) Rather than estimating risk-reduction impacts based on models that assume causation, agencies should apply well-accepted statistical models to evaluate causal risk relationships.<sup>25</sup> ([Cox 2015](#))

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<sup>25</sup> Cox, Louis Anthony Jr. “Public Comment on EPA’s National Ambient Air Quality Standards for Ozone.” The George Washington University Regulatory Studies Center (2015).  
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Sent via FedEx Priority

April 29, 2015

U.S. Senate  
Committee on Homeland Security and Government Affairs  
Mr. Ron Johnson, Chairman  
340 Dirksen Senate Office Building  
Washington, DC 20510-6250

Re: Burdensome/Outdated Regulations

Dear Chairman Johnson:

This letter is in response to your request dated March 18, 2015 inquiring as to out-dated and burdensome regulations which adversely affect business and which warrant re-examination. We're pleased to share our concerns, and thank you in advance for your interest.

Among items of concern are the following:

Drug Hair Testing. Under applicable DOT regulations, motor carriers perform urine drug tests upon drivers in the following scenarios: pre-employment, random, and post-accident. Although the DOT *does not prohibit* testing hair for the presence of drugs, it *does not recognize* hair testing as a substitute. A number of leading motor carriers, including Schneider, are electing to test hair for drugs in the pre-employment and random test scenarios. Hair testing can detect drug use in the prior 90 day period, while urine testing can only detect usage over a much shorter period of time (48-72 hours), and is more easily circumvented, as many of the drugs of abuse are water soluble. At Schneider, the positive rate for hair testing is 3.56% compared to 0.30% for urine testing. In other words, about 12 times more drug users are identified through hair testing than urine testing. Schneider and other responsible motor carriers are spending literally hundreds of thousands of dollars annually on urine tests which are entirely duplicative of hair tests, albeit with only a fraction of the efficacy of hair testing. HR 1467 and S. 806 would authorize motor carriers to use hair drug testing in lieu of, rather than in addition to urine testing, thereby eliminating the wasting of hundreds of thousands of dollars on an annual basis.

Trailer Repositioning. This issue involves restrictions on our use of Canadian drivers delivering a load originating in Canada, destined to a point in the U.S. The concern is operational flexibility in allowing the motor carrier to move empty trailers or containers

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from a point near delivery of the original load, to a point near where the involved driver is picking up a load, on his return to Canada. The days are long gone where trailers or containers are loaded or unloaded while the driver waits. Instead, trailers or containers are staged in “pools” to be loaded or unloaded, as the case may be, at the shipper’s convenience. Current interpretation by the Department of Homeland Security of existing regulations is that “...the transportation of an empty trailer or container by a non-U.S. driver within the U.S., even if ancillary to the driver’s movement to pick up a return load to Canada, is domestic work, and not permitted under the immigration statute unless the involved trailer or container is the same trailer or container used in connection with the load originating outside the U.S.” This interpretation dramatically reduces operational flexibility. It results in excessive “bobtailing” (i.e., the operation of a tractor without a trailer) and imbalances in trailer/container pools. A change authorizing the movement of empty trailers or containers near the point of unloading of the initial international load, to a location near the point of loading of the return (outbound) international load, would eliminate 1.047m metric tons of CO<sub>2</sub>.

DOT Medical Waivers. The FMCSA is charged with establishing minimum medical qualifications of drivers of commercial motor vehicles. It has, over the course of the last two years, begun granting waivers from its established standards, en masse, including waivers for scores, if not hundreds, of individuals who are deaf, or whose eyesight is impaired, or who have a history of seizures. Schneider’s position is that if the standards are in need of amendment, the FMCSA should utilize its process and follow the recommendations of its own medical examining board rather than, de facto, amend its standards in the absence of medical evidence via the wholesale granting of waivers. A more complete description of this situation is enclosed.

Transportation Worker Identification Credential (“TWIC”). Duplicative background checks and redundant credential requirements are imposed upon drivers of hazardous materials. Currently, drivers who transport hazardous materials must submit to a fingerprint-based background check at a cost of approximately \$90 to obtain an endorsement for their commercial driver’s license. Many of these drivers also access port facilities and therefore must obtain a TWIC at a cost of \$105.25. The background checks for the hazardous material endorsement and the TWIC are identical.

State CDL Training/Skill Testing Delays. It appears that the driver shortage is being exacerbated as a result of delays by various state DOTs in making required Commercial Drivers License (“CDL”) skills testing available to prospective drivers. Our understanding is that Congressman John Duncan and Congresswoman Eddie Bernice Johnson have issued a bipartisan letter requesting the GAO study the impact that the delays in CDL skills testing are having on the driver shortage. We support a unified approach to CDL testing to avoid unnecessary delays.



Mr. Ron Johnson, Chairman  
Committee on Homeland Security and Government Affairs  
Re: Burdensome and Outdated Regulations  
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EEOC's Proposed Wellness Program Rules. The EEOC has attacked employer wellness programs as discriminatory under the Americans With Disabilities Act ("ADA") despite the fact that the Affordable Care Act has been interpreted by the Department of Labor Health and Human Services and Treasury to contain various safe harbors to allow for employee wellness plans. On Monday April 20, 2015, the EEOC published its Proposed Rule to amend the regulations and interpretive guidance implementing Title I of the ADA relating to employer wellness programs. Rather than alleviate employer concerns, the EEOC, through its proposed rule, eliminates important and appropriate employer defenses, imposes new regulatory requirements on employers and suggests potential new theories of enforcement for the EEOC. Attached is a synopsis of the concerns prepared by the U.S. Chamber of Commerce.

We appreciate the opportunity to share with the Committee our concerns, and are eager to provide whatever other data may be helpful.

Sincerely,



Thomas E. Vandenberg  
Director, Government Relations  
Schneider National, Inc.  
Mail Code -U.S. GRB 01.03.07  
3101 S. Packerland Drive  
Green Bay, WI 54313

Enclosures

c: Members of the Committee on Homeland Security and Government Affairs:  
Mr. Thomas R. Carper, Ranking Member  
Mr. James Lankford, Chairman, Subcommittee on Regulatory Affairs and  
Federal Management  
Ms. Heidi Heitkamp, Ranking Member, Subcommittee on Regulatory Affairs and  
Federal Management

## **FMCSA Granting of Waivers to Hearing Impaired Drivers and Other Individuals Who Do Not Meet It's Minimum Medical Qualification Standards**

### Summary:

FMCSA has adopted a practice of granting, en masse, exemptions from its minimum medical qualification standards for drivers of commercial motor vehicles (heavy trucks). It is granting exemptions from, rather than amending its standards after its own Medical Expert Panel ("MEP") and Review Board ("MRB") concluded that amendment of certain of the standards was unwarranted. In 2014, FMCSA published 81 Federal Register notices covering 2,727 individuals. Many are still pending, but given FMCSA's recent practice, one can expect that more than 99% of those which remain pending will be granted. All 430 waiver requests involving the vision standard were granted. 628 of 631 waiver requests of the diabetes mellitus standard were granted. FMCSA has been granting waivers of its hearing requirements and epilepsy/seizure disorders at a similar rate.

### Background:

#### Medical Qualification of Drivers/Hearing.

The minimum medical qualifications of drivers of Commercial Motor Vehicles ("CMVs") are established by the Federal Highway Administration and are found at 49 CFR Subpart E 391.41. Among the qualifications is that a driver must be able to: "First (perceive) a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid . . . or does not have an average hearing loss in the better ear greater than 40 decibels at 500Hz, 1,000 Hz and 2,000 Hz with or without a hearing aid". This standard has been in place for decades.

#### How Hearing Standard is Established.

FMCSA has established the Medical Expert Panel ("MEP") and Medical Review Board ("MRB") "to improve highway safety by providing the FMCSA expert opinion and advice on medical standards and guidance and research on medical certification of CMV drivers". <http://www.fmcsa.dot.gov/regulations/medical/medical-expert-panels>. The MRB is charged with "reviewing all current FMCSA medical standards and the development of new science-based standards and guidelines to ensure that drivers operating CMVs in interstate commerce are physically, mentally and emotionally capable of the safe operation of the vehicles. 49 USC 31149 provides that the MRB *shall establish, review and revise*" medical standards . . .". Accordingly, the appropriate process is for the MEB and MRB to make recommendations to the FMCSA-based upon expert opinion and advice-for changes in the medical requirements for drivers.

#### Amendment to Hearing Standard Considered and Rejected.

In 2008, FMCSA considered revising the hearing standards for CMV drivers. It considered the 2008 Evidence Report which, among other matters, considered the question: "Are individual with hearing loss . . . at an increased risk for a crash?". Dr. Steven Tregear, one of the authors of the report, said that the findings of the report are "inconclusive". More specifically, he testified:



The newer, more recently published studies suggest there may be an increased crash risk for individuals with hearing loss; however, when taken as a whole, the evidence remains inconclusive. It is unclear whether individuals with a hearing deficit are at an increased risk for a crash". FMCSA Medial Review Board Minutes, October 6, 2008 p.3.

Since the findings were at best inconclusive, the hearing standards were *not* amended.

#### Individual Waiver of Medical Standards

There is a procedure by which waivers from the standards may be granted to individuals. The waiver process is found at 49 USC 31315(b). It requires that an applicant provide "specific countermeasures that the person would undertake to ensure an equivalent or greater level of safety than would be achieved absent the requested exemption". FMCSA is to grant a waiver only after establishing terms and conditions for each exemption to ensure that "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption."

Since July, 2011, FMCSA has been entertaining applications by scores of individuals seeking waiver from the hearing requirements.

#### FMCSA Refuses to Publish Required Information to Allow Fully Informed Comments.

49 CFR 281.315(a) sets forth the procedure for consideration of individual waiver requests, which includes public notice and comment regarding the application. According to FMCSA's advice to applicants for waivers: "the notice will give the public an opportunity to review your request and your safety assessment or analysis (as required by s.381.310) and any other relevant information known to the agency". While FMCSA has published notice of the waiver requests, despite repeated requests, it has not published the actual applications, failed to provide the applicant's medical history, the applicant's driving record, it has not identified the specific countermeasures the applicant is to undertake to ensure an equivalent or greater level of safety, nor FMCSA's or the applicant's analysis of the safety impact of the requested exemption effectively preventing interested parties the opportunity to provide substantive commentary. FMCSA has also failed to provide the required material when requested to do so under FOIA, While FMCSA has acknowledged FOIA requests, it indicates its workload is such that the requests won't be honored until well after the period for comments has closed.

FMSCA has granted waivers without requiring the applicants to demonstrate their skills behind the wheel as they have done with applicants for waivers from other medical requirements, e.g. individuals who may be missing a limb.

#### FMCSA Grants Extension of Waivers Before Seeking Comments.

On January 8<sup>th</sup>, FMCSA upped the ante by first granting extensions of previously granted waivers *and then* requested comments on its action. (Docket No FMCSA-2012-0154). FMCSA seems determined to allow data, science or proper procedure to slow its commitment to eviscerate its own standards.

**Major Points:**

- Revision to FMCSA's Hearing Standard was considered by FMCSA's experts and the Medical Review Board whose task is to use science based standards to assure public safety. It rejected revision of the existing standards because the studies and medical literature it reviewed are, at best (from the standpoint of those wishing to degrade the standards) "inconclusive". Since the 2008 Evidence Report is inconclusive, it can't support a finding that a waiver will assure at least the same level of safety as would exist absent the granting of the waiver.
- FMCSA has been entertaining, and granting en masse, exemptions from its hearing standard, essentially de facto eliminating the hearing standard without scientific basis for doing so and contrary to the established mechanism for amending medical qualification standards.
- FMCSA is not requiring that applicants provide "specific countermeasures to assure that the granting of an exemption would likely achieve a level of safety equivalent or greater than that if the waiver were not granted.
- FMCSA is refusing to publish all relevant information related to the waiver requests thereby depriving the public of its right to provide meaningful review and commentary of FMCSA's actions.
- If FMCSA has published "any .... relevant information known to the Agency", then it is clear that FMCSA lacks sufficient information to grant waivers or extensions.
- FMCSA seems to be taking the position that it can experiment by granting the waivers and "see what happens". This approach is not only poor public policy and contrary to its obligations, this approach has been previously rejected by the courts. *Advocates for Highway and Auto Safety v. FHA* (28 F. 3<sup>rd</sup> 1288 (D.C. Cir. 1994)).





LABOR, IMMIGRATION &  
EMPLOYEE BENEFITS DIVISION  
U.S. CHAMBER OF COMMERCE

## EEOC's Proposed Wellness Rule Leaves Many Unanswered Questions

*On Monday April 20, 2015, the EEOC published its [Proposed Rule to amend](#) the regulations and interpretive guidance implementing Title I of the Americans with Disabilities Act (ADA) relating to employer wellness programs. The Chamber was hoping that the Proposed Rule would alleviate much of the uncertainty created by EEOC's recent legal challenges to employer wellness programs. To the contrary, the Proposed Rule contains many potential conflicts with other existing laws and regulations regarding wellness plans, eliminates important and appropriate employer defenses, imposes new regulatory requirements on employers and suggests potential new theories of enforcement for the EEOC. The Proposed Rule from the EEOC:*

1. Fails to Address GINA. Prior regulations promulgated by EEOC to implement the Genetic Information Nondiscrimination Act (GINA) were silent as to an employer's ability to offer financial incentives to spouses through employer wellness plans. Rather than taking the opportunity to address this lack of guidance, this new EEOC Proposed Rule explicitly notes that there will be subsequent EEOC rulemaking relating to GINA in the future to address the extent to which Title II of GINA affects an employer's ability to condition incentives on a family member's participation in a wellness program.
2. Rejects the Current ADA "Safe Harbor" Which Acknowledges that Some Workplace Wellness Programs Established as Part of a Benefit Plan can be Voluntary. In a footnote, the Proposed Rule notes that the ADA's "safe harbor" for insurance plans is "not the proper basis for finding wellness program incentives permissible." This potentially eliminates a major employer defense and improperly contradicts the ruling of a federal court of appeals.
3. Further Restricts the Use of Incentives Permitted by ACA/HIPAA. According to the Proposed Rule, incentives – including financial and in-kind incentives – cannot exceed 30% of the total cost of employee-only coverage for either participatory and/or health contingent programs. Under ACA/HIPAA, the incentive limitations: apply to the total cost of the plan elected (which could



include employee “plus one” or family coverage), do not include in-kind incentives in the calculated limits, and do not apply to participatory programs.

4. Mandates Additional Reasonable Accommodations. Under the Proposed Rule, reasonable accommodations must be provided for participatory *and* health-contingent wellness programs. Under ACA/HIPAA, reasonable alternatives are required only for health-contingent programs.
5. Further Limits Incentives Related to Tobacco/Nicotine. Pursuant to the Proposed Rule, if an employer conducts a disability-related inquiry or medical examination, any incentive(s) must be capped at 30% – even with regard to tobacco use. If the program merely asks if employees use or quit tobacco as a result of the program, then a 50% incentive is permissible. Under ACA/HIPAA, the 50% cap applies, regardless of the type of smoking cessation program.
6. Suggests Additional Affordability Hurdles. The Proposed Rule poses a question to the public about whether certain incentives may render a wellness program involuntary due to the financial circumstances of each individual employee. Under the ACA, an employer may be penalized for not offering an affordable health plan to all full-time employees. However, an employer would not be penalized if, in addition to offering an affordable plan to all full-time employees, the employer also offered a more expensive plan and a full-time employee chose to enroll in the more expensive and unaffordable health plan rather than the affordable plan. Further, the ACA permits employers to deem a plan affordable if satisfying a tobacco cessation programs and earning the premium incentive discount would make that lowest cost plan offered affordable. The EEOC Proposed Rule suggests that affordability must be assessed for each employee based on the plan he/she elects and without considering the premium incentive discount that could be earned for participating in a tobacco cessation program.
7. Highlights Other Discrimination Liability Concerns. The Proposed Rule notes that even if an employer’s wellness program complies with the incentive limits in the ADA regulations, the employer’s program could still violate Title VII and the Age Discrimination in Employment Act if the program discriminates based on race, national origin, sex, or age. This suggests that EEOC may, at some point, take the position that wellness programs have a disparate impact on individuals over 40 and minorities predisposed to certain conditions.

8. Suggests That the EEOC Has the Authority and Should Assess Whether a Wellness Program is Reasonably Designed to Improve or Promote Health. Health risk assessments which merely solicit information from employees without an additional advice component are prohibited under the Proposed Rule because the EEOC does not consider them to be “reasonably designed to promote health.” Conversely, the ACA/HIPAA regulations do *not* require such feedback to be a component of an acceptable health risk assessment. It seems appropriate to afford HHS the ability to assess whether a wellness program is “reasonably designed to promote health,” but it seems improper to suggest that similar deference should be given to the EEOC on the design of wellness programs.
  
9. Imposes a New Notice Requirement. Under the Proposed Rule, employers must provide employees with a written notice that describes what medical information will be collected as part of the wellness program, who will receive the information, how the information will be used, the restrictions placed upon disclosure of the information and how it will be kept confidential.

\* \* \*

The Chamber will continue to review the EEOC’s Proposed Rule and solicit input from our members regarding issues of concern to the employer community. In addition to filing comments on this Proposed Rule by the June 19<sup>th</sup> deadline, the Chamber will continue to advocate on the value and importance of workplace wellness programs and the importance of flexibility in permitting lawful, and meaningful financial incentives.



April 17, 2015

The Honorable Ron Johnson  
328 Hart Senate Office Building  
Washington, DC 20510

Dear Senator Johnson:

SPI: The Plastics Industry Trade Association (SPI) was pleased to receive an inquiry from the Senate Committee on Homeland Security and Governmental Affairs on the impact of regulations on the plastics industry.

Founded in 1937, SPI promotes growth in the \$380 billion U.S. plastics industry. Representing nearly 900,000 American workers in the third largest U.S. manufacturing industry, SPI delivers advocacy, market research, industry promotion, and the fostering of business relationships and zero waste strategies.

SPI and the plastics industry have many concerns regarding the regulatory environment, and many concerns about specific regulations. Some of the specific areas of concern for SPI are the Food Material Safety regulations that are expected later this year, Green Buildings, National Ambient Air Quality Standards for Ozone, Conflict Minerals, and Third-Party Testing Requirements for Lead and Phthalate Content.

#### Implementation of the Food Material Safety Act

FDA has promulgated a number of rules and issued guidance to implement the Food Safety Modernization Act (FSMA), which was signed into law by President Obama on January 4, 2011. On July 26, 2013, FDA released its proposed rule to implement FSMA provisions that establish Foreign Supplier Verification Programs for Importers (§ 301) (FSVP). The proposed FSVP rule does not include an explicit exemption for food contact substances. The proposed rule was followed by a September 19, 2014, proposed revisions to the proposed FSVP rule, which also did not include the sought after exclusion. SPI is concerned that verification and certification programs could be required for substances that are used to manufacture food contact materials, an extremely costly and administratively burdensome proposition without commensurate gains in food safety. SPI is similarly concerned that food contact materials could be interpreted as included within the scope of the proposed rule to implement FSMA provisions for Sanitary Transportation.



SPI is working to ensure that food contact substances are explicitly excluded from FDA's proposed rules to implement the import and sanitary transportation provisions of the Food Safety Modernization Act that are triggered by the general definition of food provided in the Federal Food, Drug, and Cosmetic Act. Inclusion of food contact substances within the scope of these provisions would create a tremendous administrative burden to FDA and industry without commensurate gains in food safety.

## Green Buildings

The U.S. Department of Energy (DOE) proposed revised performance standards for the construction of new federal buildings and major renovations of Federal buildings. The Notice of Proposed Rulemaking specifically addressed the use of sustainable design principles for siting, design, and construction, and the use of water conservation technologies to achieve energy efficiency. The proposed rulemaking also provided criteria for identifying a certification system and level for green buildings that encourages a comprehensive and environmentally-sound approach to certification of green buildings.

SPI's main concern is that DOE has singled out US Green Buildings Council LEED standards as the path forward for the construction of federal buildings. SPI does not believe the LEED approach is derived from an appropriately open process and believes the federal government should consider other alternative building codes. SPI supports and promotes green building codes, standards, rating systems and credits that are developed in conformance with ANSI or ISO-type consensus processes. Specifically, SPI believes it is necessary to have data-driven and science based development of building codes.

## National Ambient Air Quality Standards for Ozone

SPI's concerns are that the ozone standard levels considered in EPA's proposal could push the entire country into "nonattainment." Emissions have been cut in half since 1980, leading to a 33% drop in ozone concentrations, which is a major accomplishment. Moreover, EPA updated ozone standards just six years ago. The current standards are behind schedule due to EPA effectively suspending its implementation from 2010-2012 while the Agency unsuccessfully pursued reconsideration. The country can expect to see even greater reductions in ground-level ozone as states make up lost ground in putting the current standards into effect.

The negative impact of raising the air quality standards and pushing states into nonattainment is that it limits business expansion in nearly every populated region of the United States and impairs the ability of U.S. companies to create new jobs. Increased costs associated with restrictive and expensive permit requirements would likely deter companies from siting new facilities in a nonattainment area.

## Conflict Minerals





The SEC ruled that chemical compounds are excluded from the scope of the Conflict Minerals rule, relieving companies from the reporting burden that use these compounds in the manufacturing of plastic products. SPI and partner trade associations are currently urging the SEC to publish written confirmation of this ruling, which to date has only been documented internally.

### Third-Party Testing Requirements for Lead and Phthalate Content

SPI has asked CPSC to reduce the burden of third-party testing requirements for lead and phthalate content by relying on assurances that materials are food grade and by exempting plastic resins that do not contain phthalates in excess of the 0.1% limit. SPI continues to support efforts led by the Toy Industry Association to urge CPSC to (1) specify that rigid plastic materials with Shore “A” Hardness of 90 or greater will not contain the restricted phthalates in excess of specified limits, and (2) publicly identify the many types of plastic materials that are known not to contain the restricted phthalates in excess of specified limits.

SPI and the plastics industry are greatly encouraged by the concerns of the Committee and hope to keep an open dialogue about existing and new regulations.

Please let me know if I may be of further assistance.

Respectfully,

A handwritten signature in black ink, appearing to read 'Robert Helminiak', is written over a white background.

Robert Helminiak  
Vice President, Science and Regulatory Affairs

CC: Mr. Josh McLeod



May 1, 2015

U.S. Senate  
Committee on Homeland Security and Government Affairs  
Dirksen 340  
Washington, DC 20510

*Re: March 18, 2014 letter seeking input on regulatory issues*

Dear Senators Johnson, Carper, Lankford, and Heitkamp:

The SSM Coalition is an *ad hoc* group of over 15 national trade associations concerned about how the Environmental Protection Agency regulates air emissions from sources that are undergoing startup, shutdown or malfunction (“SSM”) events. Several of the SSM Coalition members received a letter from you, asking them to identify for the Homeland Security and Government Affairs Committee concerns with the regulatory process, including existing and proposed regulations that have or will have a real impact on their organizations. Because EPA’s approach to regulating emission sources during SSM events affects businesses in many sectors of the economy (as well as state government agencies in three-quarters of the states), those members of the SSM Coalition receiving your letters thought it would be appropriate for the SSM Coalition to bring the issue to the Committee’s attention through this letter.

As a result of an agreement with environmental advocacy groups, EPA currently is engaged in a rulemaking, which it committed to complete by May 22, that would declare existing State Implementation Plans (SIPs) of 38 states “substantially inadequate” to meet National Ambient Air Quality Standards or otherwise meet requirements of the Clean Air Act, pursuant to CAA § 110(k)(5). See 78 Fed. Reg. 12,460 (Feb. 22, 2013) and 79 Fed. Reg. 55,920 (Sept. 17, 2014). These “SIP Calls” would be based on alleged inconsistencies of the state plans with an evolving EPA policy on how SSM events should be treated, a policy which has never gone through rulemaking.

EPA would require states to change their SIPs so that all exceedances of emission limitations during SSM events will be deemed violations of the Clean Air Act, even when those excess emissions are unavoidable despite the proper design, maintenance, and operation of the source. EPA asserts that SIPs are substantially inadequate unless they match EPA’s latest view on how SSM events should be treated, without any attempt by EPA to tie current SIP SSM provisions to any failure to meet National Ambient Air Quality Standards. In fact, in the vast majority of cases, the SIPs have been effective in practice at attaining and maintaining such standards over many years. Moreover, numerous SIP provisions EPA now objects to were adopted by the state and approved by EPA in the last few years as being consistent with EPA’s policy on SSM at that time.

The EPA SSM SIP Call rulemaking will, therefore, divert substantial state resources away from SIP revisions needed for other reasons and from other air pollution regulation efforts, to the revision of SIPs that will produce little or no environmental benefit. Likewise, EPA will have to spend its time reviewing these SSM-related SIP revisions, and potentially objecting and

issuing a Federal Implementation Plan (FIP), at a time when EPA already has a backlog of over 650 SIP revisions submitted by the states addressing other issues that await EPA review. Many of the 28 states that submitted public comments opposing the SSM SIP Call proposed rule made just this point. When state resources are diverted to such unproductive efforts, the elapsed time for states to issue air permits necessary for businesses to expand production capacity, improve productivity, implement pollution reduction measures, and so forth will inevitably increase.

SSM provisions in current state law often provide that a facility need not meet a numerical emission limitation derived for normal operations during SSM periods, if the facility can show that it took appropriate measures to limit emissions but nevertheless could not meet the numerical limitation, despite proper operation of appropriately designed and maintained process and air pollution control equipment. Under the SSM SIP calls, 38 states would be directed to eliminate such SSM provisions from their SIPs. But those states would also have to reconsider, at that time, whether the remaining numerical limitations in the SIP remain reasonable, or whether alternative limits are needed in the state regulations.

As explained above, this massive effort would not be based on any demonstrated air quality problem stemming from the existing rules. And since, by definition, the state plan provisions that EPA objects to only address emission excursions that the source could not reasonably have avoided, the primary effect of the SIP revisions EPA is demanding would be to penalize companies that have taken all reasonable steps to comply and minimize their emissions. Although EPA and states could still exercise enforcement discretion not to seek penalties in such cases, see 78 Fed. Reg. at 12,467, 12,480, that does nothing to prevent citizen suits seeking penalties for “violations” associated with SSM events. No Clean Air Act regulation should treat companies as violators for events that are unavoidable and beyond the control of the facility, despite operating the facility according to best practices and striving to be in compliance at all times.

In fact, the SSM SIP Call is but one aspect of a troubling trend in EPA’s development and application of air emission standards for stationary sources. In the past several years, EPA has, in emission standards for new sources under Clean Air Act section 111 and emission standards for hazardous air pollutants under section 112, reversed its decades-long acknowledgment that technology-based emission standards must recognize that process and pollution control technology will sometimes experience conditions (in SSM events) that make compliance with emission limitations derived for normal operations virtually impossible. Although the Clean Air Act gives EPA tools to apply alternative emission limitation or standards to such events (including “a design, equipment, work practice, or operational standard”), EPA recently has taken the position that even emissions that are unavoidable with use of available technology, despite a facility’s best efforts, should be considered violations of the Act. EPA’s new policy does not respond to an air quality problem—those unavoidable excess emissions will still occur, and in fact sometimes they need to occur to avoid conditions that could cause serious harm to workers or to process or pollution control equipment. Rather, EPA’s new approach unfairly subjects businesses to potential penalties and citizen suits for circumstances beyond their control, undercutting the entire legitimacy of the emission standards programs.

If you have any questions about the problems with the regulatory system described in this



letter or wish to discuss these issues further with members of the SSM Coalition, please contact our counsel, Russell Frye, at 202-572-8267 or rfrye@fryelaw.com.

Sincerely,

American Chemistry Council  
American Forest & Paper Association  
American Fuel and Petrochemical  
Manufacturers  
American Iron and Steel Institute  
American Petroleum Institute  
American Wood Council  
Brick Industry Association  
Council of Industrial Boiler Owners  
Florida Sugar Industry  
National Lime Association  
North American Insulation Manufacturers  
Association  
National Association of Manufacturers  
Treated Wood Council  
Vegetable Oil SSM Coalition (consisting of the  
Corn Refiners Association, the National  
Cotton Council, the National Cottonseed  
Products Association, the National Oilseed  
Processors Association, and Sessions Peanut  
Company)

# TOYOTA

## TOYOTA MOTOR NORTH AMERICA, INC.

WASHINGTON OFFICE

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April 28, 2015

U.S. Senator Ron Johnson  
Chairman  
U.S. Senator Thomas R. Carper  
Ranking Member  
Senate Committee on  
Homeland Security and Governmental Affairs  
340 Dirksen Senate Office Building  
Washington, DC 20515

U.S. Senator James Lankford  
Chairman  
U.S. Senator Heidi Heitkamp  
Ranking Member  
Senate Subcommittee on Regulatory Affairs  
& Federal Government  
601 Hart Senate Office Building  
Washington, DC 20515

Dear Senators:

Thank you for your March 18 letter to Mr. Jim Lentz regarding regulations that have had or will have an impact on our company. I am pleased to have this opportunity to respond on Mr. Lentz's behalf.

Toyota's economic impact in the US includes 10 manufacturing facilities, in addition to R & D and sales facilities. Our direct employment exceeds 32,000 and our direct investment over \$20 billion, including 11 expansions since 2011 resulting in over 4,000 new jobs.

Toyota is committed to manufacturing vehicles where we sell them. Over 70 percent of the vehicles we sell in the US are produced in North America. However, in order for automakers to continue to invest in the development and manufacture of vehicles that meet consumer expectations at an affordable price, it is important to maintain a strong focus on regulatory consistency, clarity, simplification and feasibility in order to minimize the cost and enhance the effectiveness of regulations. With that in mind, we offer the following comments in response to your request.

## **Reducing Complexity of Vehicle Fuel Economy and Greenhouse Gas Standards**

Toyota has a long history of leadership in fuel economy and has the highest fleet fuel economy of any full-line automobile manufacturer in the U.S. market. This is a result of our leadership in developing and commercializing not only our revolutionary hybrid technology – which has become a core technology for Toyota and has spread throughout the industry – but a myriad of other, less visible vehicle powertrain and design improvements. Toyota provides a portfolio of advanced technology vehicles to consumers, including plug-in hybrids, pure electrics, hybrids, and coming later this year a zero emission fuel cell vehicle, aptly named the Mirai, which means the “future.” We believe fuel cells will be in our future sooner than many people believe and in greater numbers than expected.

Fuel economy and greenhouse gas standards define industry and company product plans for years into the future. That is why we chose to comment on the current regulatory framework governing those standards.

Over the past six years, the Administration worked with automakers, states, environmental groups and others to develop the “One National Program” (ONP) for regulating motor vehicle fuel economy and greenhouse gas emissions through the 2025 model year.<sup>1</sup> The process that led to these standards was aimed at avoiding a costly and inefficient patchwork of overlapping state and federal regulations that would have resulted from divergent legal statutes<sup>2</sup> governing the authority of National Highway Traffic Safety Administration (NHTSA) and the Environmental Protection Agency (EPA), as well as to California and other states adopting California standards. The standards for 2025 model year are ambitious, aiming to achieve greenhouse gas levels of 163 grams per mile of CO<sub>2</sub> equivalent (about 54.5 miles per gallon) by 2025.

The key to meeting the new standards will be improvements in conventional engines and vehicle technologies, hybrids and other technology options that consumers are able and willing to purchase in sufficient quantities. At this point, it is nearly impossible to predict consumer preference for 2025 model year vehicles since preferences will largely be determined by factors such as fuel price, economic conditions, and technological progress – not all of which are within the control of auto manufacturers. To ensure the standards remain practical in light of these uncertainties, the final rule calls for the feasibility of the 2022-2025 model year standards to be re-examined by 2018. Toyota supports this mid-term evaluation.

Toyota believes the construct of the ONP regulations are a step in the right direction toward minimizing the regulatory complexity that originally prompted the ONP agreements, but are not an optimal solution for the long-term given the considerable differences that remain between the

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<sup>1</sup> The first ONP agreement (ONP1) and rulemaking established EPA greenhouse gas and NHTSA fuel economy standards for 2012-2016 model years. The second agreement (ONP2) established EPA greenhouse gas standards for 2017-2025 model years, and NHTSA fuel economy standards for 2017-2021 model years. The EPA regulations call for a Mid-Term Review (MTR) to be completed by April 2018 to assess whether the 2022-2025 model year EPA standards remain appropriate. The MTR will also be used as input by NHTSA when it establishes fuel economy standards for 2022-2025 model years.

<sup>2</sup> NHTSA’s fuel economy regulations are governed by the Energy Policy and Conservation Act (EPCA) as modified by the Energy Independence and Security Act (EISA). EPA’s greenhouse gas regulations are governed by the Clean Air Act (CAA).

EPA and NHTSA programs and regulations. Without addressing the underlying statutory differences between EPCA/EISA and the CAA, automakers have no certainty that we will not face the same untenable situation in the future, likely forcing all stakeholders to once again negotiate a way out from under the legislative overlap and inconsistency. Toyota would welcome debate and discussion as to the most appropriate long-term legislative options that can lead to a true “single national standard” for fuel economy and greenhouse gases.<sup>3</sup> To be clear, our suggestion is unrelated to the stringency of standards, but rather focused on whether the underlying structure of multiple statutes and regulations is the most effective and efficient way to achieve the desired outcomes.

Toyota also supports a review of the legislative structure surrounding adoption of EPA-approved California greenhouse gas emissions regulations and advanced technology sales mandates in states outside California. Section 209 of the CAA provides that under certain circumstances, EPA may waive federal preemption and allow California to adopt its own state-level standards in addition to the federal standards. Further, Section 177 of the CAA allows other states with air quality attainment challenges to opt-in to the California standards. For traditional criteria tailpipe emissions standards, this structure has worked well for a number of years. However, unlike traditional criteria pollutant tailpipe emissions standards in which “feasibility” is largely contingent on the “availability” of technology, the feasibility of meeting greenhouse gas standards and advanced technology vehicle sales mandates are further dependent on fleet mix, consumer willingness to purchase advanced technology vehicles, and in some cases, necessary infrastructure. All of these factors vary significantly from state to state, and certainly vary greatly between California and other states. Yet, according to EPA<sup>4</sup>, it lacks authority under the CAA to exercise its considerable knowledge and expertise in this area, and states are free under Section 177 to adopt California greenhouse gas regulations and advanced technology sales mandates despite the fact that key underlying factors that may support feasibility in California may not exist in those states. We would welcome debate and discussion as to the appropriate oversight role EPA should have in assessing the feasibility of EPA-approved California greenhouse gas regulations and advanced technology sales mandates in states outside California under Section 177 of the CAA. Again, to be clear, we are not suggesting elimination of EPA’s ability to waive federal preemption for California emission standards, but rather whether the unique nature of motor vehicle greenhouse gas standards and advanced vehicle sales mandates necessitates a different approach to ensure feasibility for other states that adopt California standards under Section 177 of the CAA.

### **Providing Certainty Around the Availability of Spectrum for Next-Generation Crash Avoidance Systems**

Toyota believes that the ultimate desire of a society that values mobility should be the eventual elimination of traffic fatalities and injuries. Toyota has long been focused on realizing this goal and remains dedicated to deploying innovative and cutting-edge safety technologies. For example,

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<sup>3</sup> Notwithstanding legislative differences governing the EPA and NHTSA regulations, Toyota believes there are administrative actions that could be taken to further harmonize the two programs toward the objective of a “One National Program”.

<sup>4</sup> See *Federal Register*, Vol. 78, No. 6; Wednesday, January 9, 2013.

in March, Toyota announced that it would be making low-cost active safety technologies available throughout its lineup.

One proposed regulation that is currently creating significant challenges for us with respect to next-generation crash avoidance systems relates to the Federal Communications Commission's Notice of Proposed Rulemaking (NPRM) 13-22, which was issued on February 20, 2013. Among other things, the NPRM seeks to open up 75 MHz of spectrum in the 5.9 GHz band (specifically 5.85-5.925 GHz) for Unlicensed National Information Infrastructure (U-NII) devices. The 5.9 GHz band is currently licensed for vehicle-to-vehicle and vehicle-to-infrastructure communication technology using the Dedicated Short Range Communication (DSRC) protocol. DSRC-enabled vehicle-to-vehicle and vehicle-to-infrastructure communication technology is a critical element in our ability to dramatically reduce the number of people who are injured or killed in vehicle crashes in the United States by preventing those crashes in the first place.

Since the Federal Communications Commission first allocated the 5.9 GHz band for these technologies, the auto industry and the U.S. Department of Transportation have spent thousands of hours and, by some counts, more than \$1 billion to research, develop, and validate these crash avoidance systems. At the time the Federal Communications Commission issued its NPRM, the industry was on the verge of bringing this life-saving technology to the United States market. The Federal Communications Commission's proposed rulemaking has created uncertainty around the spectrum available for these purposes and has forced companies like Toyota to put the brakes on those product plans. As long as this rulemaking remains open, the uncertainty it has created for this critical auto safety will remain.

One particular proposal being considered by the Commission would require re-channelization of some of the industry's core DSRC functions and is clearly beyond the scope of the NPRM. The focus on this proposal has unfortunately diverted attention away from a sharing proposal that all of the major automakers believe has a tremendous amount of potential for success and which is clearly within the scope of the NPRM. In addition, the activity at the Federal Communications Commission is complicating ongoing efforts at the National Highway Traffic Safety Administration to advance this safety-of-life technology.

Toyota appreciates the opportunity to respond to the Committee's request and I would be happy to respond to any further questions.

Sincerely,



Stephen Ciccone  
Group Vice President  
Government Affairs

The Honorable Ron Johnson  
Chairman  
U.S. Senate  
Homeland Security & Governmental Affairs Committee  
Washington, DC 20510

The Honorable Thomas Carper  
Ranking Member  
U.S. Senate  
Homeland Security & Governmental Affairs Committee  
Washington, DC 20510

The Honorable James Lankford  
Chairman  
U.S. Senate  
HSGAC Subcommittee  
Regulatory Affairs & Federal Management  
Washington, DC 20510

The Honorable Heidi Heitkamp  
Ranking Member  
U.S. Senate  
HSGAC Subcommittee  
Regulatory Affairs & Federal Management  
Washington, DC 20510

Dear Senators:

At the Union of Concerned Scientists, our 450,000 members and supporters throughout the country are committed to science-informed regulation that makes a real difference in the lives of our families and the lives of future generations.

Our members are people who care about the environment, and environmental justice, public health and safety. They are parents and grandparents. They embrace a wide range of scientific professions; they are engineers, physicians, physicists, statisticians, oceanographers, economists, biologists, ecologists and chemists. Many of them work in federal agencies. On both a personal and professional level, they support science-informed common-sense regulations that protect public health and safety and the environment. They also want Congress to ensure that life-saving regulations are not delayed, weakened or blocked.

We appreciate this opportunity to illustrate with a few case studies why protective rules, implemented by federal agencies in a timely fashion, have real-world impacts both on our members and the larger American public.

### **Protecting small children and parents from the grief of avoidable backover crashes**

In 2002, Long Island pediatrician Greg Gulbransen was backing out of the family SUV when he felt a bump. He stopped the car, wondering what he'd hit. What he discovered, he testified before Congress in 2007, "was my two-year old son Cameron in baby blue pajamas, holding his blanket, face up, dying of a massive head injury." Gulbransen had checked his rear-view and side-view mirrors, but larger models of cars often have blind zones where a driver can't see a small child. That's what happened in Gulbransen's accident. <sup>1</sup>

We know that food companies' multi-billion-dollar ad budgets have helped increase sugar consumption over time. In 1970, the average American consumed more than 18 teaspoons of sugar a day. By 2012, Americans were eating more than 20 teaspoons per day. This is almost double what the U.S. Department of Agriculture's recommended allowance of about 10 teaspoons per day. That total is more than double the American Heart Association's recommended daily allowance for men of 9 teaspoons, and more than triple the association's recommended allowance for women of six teaspoons. The quantity and availability today of foods and beverages with excessive added sugar leave all consumers, but especially children, vulnerable to the pressure from industry advertising and marketing to over-consume. <sup>vii</sup>

The Food and Drug Administration is considering requiring food makers to report added sugars on the Nutrition Facts label, a move that would provide much needed information to consumers about the amount of sugar that has been added to their food. <sup>viii</sup>

This rule would simply provide information. Consumers would be free to eat as they always do. But their choices would be based on the facts, not on food company ads.

If enacted, the rule could lead to better health outcomes because of both changes in consumer behavior and manufacturing practices. Such changes could mitigate Americans' sugar overconsumption and lower their risks for diabetes, cardiovascular disease and other adverse health effects. Our members believe that this regulation could make a difference.

That's why 28,500 Union of Concerned Scientist members and supporters sent letters to General Mills and asked the company to change its position and support more consumer information on added sugar. UCS members also sent 23,000 comments to the Food and Drug Administration, asking the agency to require information about added sugars on nutrition labels.

If we believe that knowledge is power, American families need this knowledge to empower them to look out for their health.

### **Beneficial rule required by Congress will save lives**

In 2005, Joshua Oukrop, a 21-year old college student from Grand Rapids, Minnesota, died suddenly when the defibrillator implanted by his doctors in 2002 shorted out. Oukrop had a genetic heart condition that can cause sudden heart failure, and the device was implanted to revive him. Oukrop was on a hike, felt faint and collapsed. His girlfriend saw him fall from his bike. CPR was attempted, but it was too late. He died of a heart attack. His physician did an autopsy and concluded that if the device had worked, Jacob would have lived. He also discovered that the company that made the device had known about its problems since 2002. <sup>ix</sup>

Jacob's death was not a fluke. The FDA estimated that over the five-year period between 2007 and 2012 alone, more than 17,000 deaths were linked to faulty medical devices reported to the FDA. <sup>x</sup> But during that same period, device makers have recalled more than 100,000 defective artificial hips, and tens of thousands of other types of implantable heart devices. <sup>xi</sup>



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<sup>vi</sup> "Sugary drinks and obesity fact sheet," The Nutrition Source, T.H. Chan School of Public Health, Harvard University.  
<http://www.hsph.harvard.edu/nutritionsource/sugary-drinks-fact-sheet/>

<sup>vii</sup> Deborah Bailin, Gretchen Goldman, Pallavi Phartiyal, *Sugar-coating Science*, Center for Science and Democracy, Union of Concerned Scientists, May 2014. <http://www.ucsusa.org/sites/default/files/legacy/assets/documents/center-for-science-and-democracy/sugar-coating-science.pdf>

<sup>viii</sup> "Proposed changes to nutrition facts label," FDA, August 1, 2014.  
<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm#Summary>

<sup>ix</sup> "When medical implants fail," CBS News, April 4, 2012. <http://www.cbsnews.com/news/when-medical-implants-fail/>

<sup>x</sup> Thomas M. Burton, "FDA Unveils Medical Device Tracking Plan," *Wall Street Journal*, July 3, 2012.  
<http://www.wsj.com/articles/SB10001424052702304211804577505094143301240>

<sup>xi</sup> Matthew Perrone, "FDA requires tracking codes on medical implants," *USA Today*, September 13, 2014.  
<http://www.usatoday.com/story/news/nation/2013/09/20/fda-tracking-codes-medical-implants/2843835/>

<sup>xii</sup> Michael Halpern, "For Sara, Faulty Medical Device Leads to Unnecessary, Invasive Surgery," *The Equation Blog*, May 24, 2012.  
<http://blog.ucsusa.org/for-sara-faulty-medical-device-leads-to-unnecessary-invasive-surgery>

<sup>xiii</sup> Matthew Perrone, op. cit.

CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA

THOMAS J. DONOHUE  
PRESIDENT AND  
CHIEF EXECUTIVE OFFICER

1615 H STREET, NW  
WASHINGTON, DC 20062-2000

April 17, 2015

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510

The Honorable Thomas Carper  
Ranking Member  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
Washington, DC 20510

The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
Washington, DC 20510

Dear Senators Johnson, Carper, Lankford, and Heitkamp:

Thank you for your letter of March 18, 2015, requesting examples from the U.S. Chamber of Commerce of current and proposed regulations that have or will have a real negative impact on our members. As the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, the Chamber has been actively involved in analyzing—and raising concerns about—the long-term impacts from regulations. The enclosed materials convey the broad scope, complexity, and burdensome nature of the modern regulatory state, as well as the dysfunctional process federal agencies use to impose even the largest new regulatory mandates.

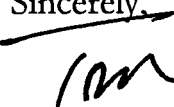
The Chamber recognizes that regulations are essential for maintaining the health, safety, and prosperity of our society. It is essential, however, that agencies use adequate data to support new regulations, that they fully evaluate the impacts their rules have on people and communities, and that they hold themselves accountable to the people and Congress.

The Honorable Ron Johnson  
The Honorable Thomas Carper  
The Honorable James Lankford  
The Honorable Heidi Heitkamp  
April 17, 2015  
Page Two

In December of last year, the Chamber laid out four clear principles for improving our dysfunctional federal regulatory process:

1. **Restore Accountability**—Agencies must be able to demonstrate that the costliest rules are truly needed and that they are pursuing the least burdensome alternative to achieve their regulatory goal.
2. **Improve Transparency**—Agencies should disclose the information and assumptions they rely on in a rulemaking and so that citizens can determine whether the agency is correct.
3. **Improve Public Participation in the Regulatory Process**—Agencies should be required to inform the public about the most important pending rules much earlier in the process, disclose relevant data and economic models, and allow enough time for stakeholders to understand how they will be affected and be able to respond with detailed comments.
4. **A Safe but Swift Permitting Process**—Regulators need to make decisions on permits in a timely manner. The lack of deadlines and poor interagency coordination means that critical energy, infrastructure, and other projects are needlessly delayed or killed.

We want to offer our gratitude for your efforts to highlight the problems with our current regulatory system and to move important regulatory reform bills through your committee, in particular S. 280, the “Federal Permitting Improvement Act of 2015” and, after it is introduced, the “Regulatory Accountability Act of 2015.” We will be happy to respond to any further requests or discuss these examples in more detail.

Sincerely,  


Thomas J. Donohue

Enclosure

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## REGULATORY PROCESS ISSUES

The Administrative Procedure Act (APA)<sup>1</sup> was enacted in 1946 to create a uniform process that federal agencies must follow when they issue new regulations. The centerpiece of the APA is the “notice and comment” rulemaking process. This process allows an agency to issue a legally enforceable regulation after the agency has published the proposed rule in the *Federal Register*, allowed time (typically 30 to 60 days) for public comments, considered the public comments, made appropriate revisions to the proposal based on public comments, and published the final rule in the *Federal Record*. Most agencies rely exclusively on the notice and comment rulemaking process to issue their new regulations.

In addition to the APA’s requirements, federal agencies are also required to carefully consider a number of important factors when they develop new regulations. The Regulatory Flexibility Act<sup>2</sup> and the Unfunded Mandates Reform Act<sup>3</sup> specifically require agencies to consider the likely impact a proposed rule will have on regulated parties and states, respectively, and to consider the least costly and burdensome alternative that achieves the regulatory objective. Similarly, Executive Order 12,866,<sup>4</sup> “Regulatory Review and Planning,” requires agencies to (1) clearly articulate why a new regulation is needed and how it will address a societal problem, (2) develop the factual and economic analyses supporting the proposed rule, and (3) consider alternative regulatory approaches, and (4) consider the most cost-effective way to accomplish the regulatory objective, based on a cost-benefit analysis. Subsequent Executive Orders issued by this administration<sup>5</sup> have reaffirmed the requirement that federal agencies (1) propose a rule only when its benefits justify its costs, (2) tailor the rule to impose the least burden on society consistent with achieving its objective, and taking into account the cumulative cost of regulations, (3) select the alternative that maximizes net benefits, (4) use performance measures rather than requiring “command and control” measures, and (5) identify alternatives to direct regulation. Executive Order 13,610 specifically requires agencies to “give consideration to the cumulative effects of their own regulations, including cumulative burdens, and . . . give priority to reforms that would make significant progress in reducing those burdens . . . .”<sup>6</sup> Moreover, the Office of Management and Budget’s Circular A-4 requires agencies to explain the assumptions they rely on in developing a rule, as well as explaining why the agency chose to structure the final rule the way that it ultimately did. In sum, agencies must be transparent during the rulemaking process, informing stakeholders and the public what they are doing and what facts are driving agency decision-making.

All of these requirements share the goal of ensuring that federal agencies clearly communicate their objectives, take the time to learn how a planned rule will affect regulated parties, and consider ways to reduce adverse impacts while still achieving their objectives.

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<sup>1</sup> 5 U.S.C. § 551 *et seq.*

<sup>2</sup> 5 U.S.C. § 601 *et seq.*

<sup>3</sup> 2 U.S.C. § 1501 *et seq.*

<sup>4</sup> 58 Fed. Reg. 51,735 (September 30, 1993).

<sup>5</sup> Executive Order 13,563, “Improving Regulation and Regulatory Review,” 76 Fed. Reg. 3,821 (January 21, 2011); Executive Order 13,610, “Identifying and Reducing Regulatory Burdens,” 77 Fed. Reg. 28,469 (May 14, 2012).

<sup>6</sup> 77 Fed. Reg. 28,470 (May 14, 2012).

The following two examples illustrate how the rulemaking process is improved when agencies put in the effort to follow proper stakeholder involvement procedures.

- **January 2004 rule to reduce air pollutants from lime manufacturing plants.**<sup>7</sup> EPA met with affected lime manufacturing companies early in 2002, several months **prior** to proposing the rule. The face-to-face meetings allowed EPA to explain the rule, its requirements, and its anticipated costs in detail to potentially affected companies. In return, EPA received additional information about the industry and the actual costs and burdens the rule would impose. EPA took the comments seriously, and redesigned the proposed rule so that several lime companies would not be put out of business because of requirements they couldn't possibly comply with. Because EPA thoroughly engaged with the industry in the pre-proposal consultative process, the final rule was well-designed and lime plants were able to fully comply with it.
- **June 2004 rule to control emissions from non-road diesel engines and fuels.**<sup>8</sup> EPA met with industry representatives in late 2002, several months before the multi-billion dollar rule was proposed. EPA was well-prepared for the meeting, and had detailed estimates of the costs, emissions reductions, and technical feasibility of a variety of alternative regulatory approaches. Representatives of affected businesses (engine manufacturers and equipment makers) pointed out problems with the proposed rule (e.g., costs for controls on very small engines that exceeded the cost of the engines themselves, lack of durability of control technologies, etc.). As a result of direct input from entities that would be regulated, EPA modified the design of the rule to reflect the concerns of business. The resulting rule achieved the agency's regulatory objective without putting companies out of business or creating unintended consequences (such as incentivizing consumers to prolong their use of older equipment with dirtier engines rather than buying far costlier new equipment).

Unfortunately, these two examples are atypical of the rulemaking process currently used by federal agencies. Agencies now routinely ignore or downplay the procedural requirements that apply to them. They fail to adequately explain why a new rule is needed. They make entirely unrealistic assumptions about the cost of new mandates and the ability of regulated parties to pay those costs or obtain bank loans. They ignore data that contradicts their preferred policy choice. They ignore less burdensome alternatives. They rely on inflated benefits estimates to offset high costs in their cost-benefit analyses. They selectively ignore adverse public comments and embrace supportive ones. They disregard evidence that a specific technology the agency prefers is infeasible. They are secretive and resist attempts to review the data they rely on for the rulemaking. And they ignore the larger impact a major rule can have on targeted industries and the fragile economy of local communities where those industries are located.

Agencies often avoid these required procedural steps in the name of expedience, or circumvent the rulemaking process altogether by issuing guidance, despite their goal of substantively

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<sup>7</sup> EPA, "National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Plants; Final Rule," 69 Fed. Reg. 394 (January 5, 2004).

<sup>8</sup> EPA, "Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuels: Final Rule," 69 Fed. Reg. 38,958 (June 29, 2004).



changing regulatory requirements. Many of the problematic regulations discussed below originated as rushed rulemakings where the agency, intent on acting within a deadline (often imposed by outside advocacy groups),<sup>9</sup> cut procedural corners in order to get a rule out on time. When these important procedural steps are bypassed, the administration loses its best opportunity to know whether a rulemaking will be controversial, is likely to have unintended adverse impacts, and will draw a legal challenge that will succeed.

The most promising proposed legislation to address this regulatory process breakdown is the “Regulatory Accountability Act of 2015.” This legislation would update the 69-year old Administrative Procedure Act rulemaking process and improve how federal agencies are allowed to develop regulations with the most significant impact on jobs and economic growth.

The Regulatory Accountability Act would enhance the regulatory process by:

- Increasing public participation in shaping the most costly regulations before they are proposed;
- Requiring that agencies must choose the least costly option, unless they can demonstrate that public health, safety, or welfare requires a more costly requirement;
- Giving interested parties the opportunity to hold agencies accountable for their compliance with the Information Quality Act;
- Providing for on-the-record administrative hearings for regulations that would impose a billion dollars or more per year in costs to ensure that agency data is well tested and reviewed;
- Restricting agencies’ use of interim final regulations where no comments are taken before a regulation takes effect and providing for expedited judicial review of whether that approach is justified; and
- Providing for a more rigorous test in legal challenges for those regulations that would have the most impact.

The Regulatory Accountability Act builds on established principles of fair regulatory process and review. By creating more transparency and public participation, and holding agencies accountable for the nature and quality of their data, the bill would greatly improve the rulemaking process for the most important rules. By compelling agencies to do their homework and show the public the data that supports their action early in the process, the bill would result in far better final rules.

The Regulatory Accountability Act is a powerful tool to ensure that the most costly and complex new rules are well-designed and tailored to accomplish their goal without causing collateral damage to our nation’s economy. Passed out of the House of Representatives in January, the Regulatory Accountability Act awaits Senate action. In the view of the U.S. Chamber, it is the most important potential regulatory reform under the jurisdiction of the Homeland Security and Governmental Affairs Committee.

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<sup>9</sup> See U.S. Chamber, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) at [www.sueandsettle.com](http://www.sueandsettle.com).

## ENVIRONMENTAL PROTECTION AGENCY

### Final Rules

#### Utility MACT rule

EPA finalized this air toxics rule for electric utilities in December 2011. The rule is estimated by EPA to cost **\$10 billion** to implement. Although the rule is supposedly designed to reduce emissions of *mercury* and other *toxic air pollutants*, more than 99.9% of the rule's purported health benefits come from requiring reductions in fine particulate matter (which is already adequately regulated under several existing rules). EPA should have more fully considered the impact to the nation's electricity supply from forcing 25% or more of the country's power stations to shut down. The assumed health benefits of the rule should have been more carefully evaluated to determine whether the rule's benefits actually exceeded its costs. Now the subject of a court challenge, the U.S. Supreme Court is currently reviewing the Utility MACT rule and considering whether EPA properly conducted a cost-benefit analysis for the rule. A decision in the case is expected in June 2015.

#### Greenhouse Gas rules

In 2009, EPA designed and implemented a sweeping new regulatory program to limit CO<sub>2</sub> and other greenhouse gases (GHGs), despite a lack of clear statutory authority from Congress. The agency issued a series of complex, interrelated GHG rules over a very short timeframe, while largely ignoring industry objections about the unprecedented scope and cost of the regulatory program. These rules included the GHG endangerment finding, the GHG tailpipe rule, the "Johnson Memo" linking mobile source GHG reductions to stationary source requirements, and the tailoring rule temporarily deferring GHG permitting requirements for smaller sources. The GHG rules will ultimately impact over six million businesses of all sizes, including hotels, hospitals, churches, schools, and office buildings. These sources will have to apply for GHG permits before they can build, expand or modify their operations, and they will have to obtain GHG permits to continue to operate. These permits are costly and time-consuming to obtain, and require GHG sources to take steps to reduce their GHG emissions, including installing new equipment, switching fuels, and carbon capture and sequestration. These requirements will significantly burden businesses and institutions of all sizes, and hamper their ability to compete in the global marketplace.

The impact of these rules began to be felt in 2011. CO<sub>2</sub> emission limits have been proposed for several construction and modernization projects at utilities and manufacturing plants. These limits will result in higher production costs and higher prices for consumers. EPA should have had to carefully evaluate the impact of greenhouse gas rules on businesses of all sizes, and on the economy as a whole. The agency would have been able to take the time to design its GHG program more carefully, so that many of the coordination problems – including state/federal coordination – could have been avoided. The EPA would have been well served to do a better job of understanding the long-term implications of its sweeping new regulatory regime before putting the new requirements into effect. Indeed, many of these concerns were validated with the U.S. Supreme Court's June 2014 decision in *UARG v. EPA*, in which the Court held, among other things, that GHG emissions alone cannot trigger PSD and Title V permitting obligations, and that the tailoring rule is invalid.

### Regional Haze Program

In 2009, several nonprofit environmental advocacy groups filed lawsuits against EPA, alleging that the Agency had failed to act on state proposals for action under the Clean Air Act's Regional Haze program. EPA settled with the groups, agreeing to act by a specific deadline. Then, for a variety of reasons, EPA determined that each of the state proposals were deficient. The Agency then argued that it was obligated by its settlement agreement with the environmental groups to act immediately and assume control of the state Regional Haze programs and impose its own preferred visibility controls, rather than the controls selected by that state. Thus, despite clear provisions in the Clean Air Act that *the states* are to determine the appropriate visibility controls, not EPA, the Agency used lawsuit settlements to entirely bypass the states. As a result, power plants and other facilities in the affected states are being forced to shut down or spend millions of additional dollars to improve local visibility. These costly requirements do nothing to improve public health, and the visibility improvements they are supposed to deliver are so slight as to be imperceptible to the average person. These regional haze rules are currently being challenged in court by a number of states. Additionally, EPA is in the process of proposing federal implementation plans for those states that the Agency disapproved state implementation plans. For instance, EPA recently proposed a regional haze FIP for Texas and Oklahoma. With the comment period expiring on April 20, 2015, several business and industry groups are planning on filing comments challenging the proposal because EPA is exceeding its legal authority under the Clean Air Act and EPA is converting the state-driven regional haze program into a centralized, federal program with little meaningful input from states or regulated entities.

### Proposed Rules/Guidance

#### Revised Ozone National Ambient Air Quality Standard (NAAQS)

The EPA is currently undertaking the five-year review of the NAAQS for ground-level ozone. In November 2014, the EPA proposed lowering the ozone NAAQS from its current level of 75 parts per billion (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 hamper severely economic development and construction in an area. According to a February 2015 National Association of Manufacturers economic study, a 65 ppb standard could reduce U.S. GDP by \$140 billion, result in 1.4 million fewer jobs, and cost the average U.S. household \$830 in lost consumption – each year from 2017 to 2040. That would mean a total of \$1.7 trillion in lost U.S. GDP between 2017 and 2040. Business and industry have advocated for EPA to retain the current 2008 ozone standard (75 ppb) because it has still not been fully implemented. 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 are committing time and resources to meet the 75 ppb standard; the proposed rule would strain limited state resources and fail to give states a chance to meet the current standard. Other concerns with the proposed rule include EPA's failure to factor in significant evidence showing the movement of ozone from foreign sources, including Asia, Canada and Mexico, and the fact that the proposed standard is approaching natural background levels of ozone in certain areas. Failing to factor in these issues means EPA may be setting an ozone standard with which it is impossible to comply.

### “Waters of the United States” definition change

In April 2014, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) proposed a rule that would redefine “**waters of the United States**” (WOTUS) under the Clean Water Act (CWA). Waters and adjacent land areas classified as WOTUS are subject to federal permitting and use restrictions, rather than being administered by state and local authorities. While EPA and the Corps say the WOTUS redefinition merely “clarifies” the scope of the CWA, in reality the rule goes far beyond merely clarifying the scope of federal jurisdiction. The rule vastly increases the reach of federal requirements over land use decisions that are now handled by states, counties, and local communities. The proposed rule severely damages the federal-state partnership that Congress built into the CWA, and which the courts have repeatedly upheld.

EPA and the Corps also used a fatally flawed process to develop the WOTUS rule. They initially claimed the rule would have no costs and no impacts on anyone. The proposal was so vague and relied on so many expansive definitions that potentially affected entities found it nearly impossible to understand how the revised WOTUS definition would affect them. EPA and the Corps did not substantially consult with small businesses, states, or local governments to see what impacts their rule would have on regulated entities. Although EPA and the Corps have done little or nothing to correct these procedural problems, they continue to push hard to finalize this rule as quickly as they can. If finalized, the WOTUS rule will have serious negative impacts on the Nation’s economy by stopping or delaying development projects across the entire country, imposing massive new costs on routine activities such as ditch and road maintenance, and threatening traditional business activities such as farming, ranching, mining, and many others. For the first time, the federal government would have the final say over how businesses and other private landowners can use their land, forcing landowners to either acquiesce to agency decrees or engage in costly, lengthy legal fights to preserve their rights.

### Pre-emptive and Retroactive “Veto” of Clean Water Act permits

Securing a permit for a large infrastructure or natural resource project can cost millions of dollars for the project sponsor. This investment is made with the clear expectation by businesses securing a permit that the project will be able to operate for the term of the permit as long as all permit conditions are met. If an agency has objections to a proposed permit, it is during the permit review process that those objections should be raised. Between 1981 and 2008, EPA used its “permit veto” under section 404(c) of the Clean Water Act (CWA) a total of 12 times to deny or restrict CWA permits for use of certain areas. EPA always took action to veto a proposed permit within the timetable of the permit review process.

In 2009, however, EPA determined for the first time that it had the legal authority to retroactively revoke a permit several years after the permit had been issued. The permit in question had been issued by the Army Corps of Engineers to a coal company for the discharge of material from its mine. During the permit review process, EPA expressed its concern to the Army Corps of Engineers that the mine could have significant environmental impacts. Nonetheless, EPA clearly stated that it “we have no intention of taking our ... concerns any further from a Section 404 standpoint...”[1] The section 404 permit was subsequently issued on January 22, 2007, with a term that extended to December 31, 2031.

Subsequently, EPA developed a new standard to measure water quality, known as conductivity. After evaluating the permit in question under the new conductivity standard, on January 13, 2011, EPA published a Final Determination prohibiting the discharge of material from the mine. Essentially, EPA changed the rules in the middle of the game and revoked an existing permit under section 404(c). It is important to note that there was no alleged environmental damage or harm that occurred as a result of operations at the mine. EPA based its section 404(c) decision on exactly the same facts and figures that it relied upon when approving the permit four years earlier, only this time EPA applied its new standard to those facts and figures. Nowhere in the legislative history of the Clean Water Act does it state that the congressional intent was to provide EPA with the unlimited authority to retroactively veto an already-issued permit whose terms and conditions were being fully complied with. Congress created specific roles for EPA and the Corps. EPA would have a clearly limited role and the Army Corps would be the lead.

EPA's expansion of its regulatory powers using the retroactive veto provision under Section 404 (c) of the Clean Water Act is only one of many regulatory interpretations EPA has recently adopted to increase its regulatory powers over businesses, communities, local governments, and land uses in the United States. Another recent example is a planned copper mine project in Alaska. In this situation, EPA managed the Clean Water Act permitting process in a manner that allows it to preemptively veto the project, prior to the submission of any permit application.

Before any actual construction can commence at a major project such as the Alaska copper mine, the project sponsors must first secure numerous state and federal mining permits (in this instance, some 50 state and federal permits are required). Before any of these permits could even be applied for, EPA was petitioned by activists who requested that EPA preemptively shut down the project. EPA then took the extra-regulatory action of conducting a watershed assessment of the potential mine's area using an outdated and inaccurate model of the mine as the template for the study. Essentially, EPA modeled the characteristics of the mine by using very old assumptions of the workings of a mine that did not take into account technological advancements that have been made in the past few decades.

EPA's retrospective and preemptive vetoes of mining permits represent a substantial and dangerous expansion of the agency's regulatory reach. No permit holder will be willing to make long-range plans if the permit a project depends on can be revoked on the whim of a federal agency. Likewise, no business will sink substantial resources into large-scale development projects if a federal agency is free to rely on inaccurate data to preemptively kill a project.

#### CEQ's NEPA Guidance on GHG Emissions and Climate Change Impacts

In December 2014, CEQ proposed revised draft guidance for federal agencies on the consideration of greenhouse gas emissions and climate change impacts in reviews under the National Environmental Policy Act (NEPA). NEPA requires that a federal agency review the environmental consequences of any major federal action it is undertaking. For example, oil and gas development – both for development on federal land as well as other infrastructure needed to transport and process products – frequently trigger NEPA reviews. Similarly, feedstock supply chains and infrastructure projects connected to the current manufacturing renaissance are subject to NEPA review. In March 2015, more than twenty business and industry groups filed comments, urging CEQ to withdraw this proposed NEPA guidance because of its serious

deficiencies. For example, the proposed guidance directs agencies to include upstream and downstream emissions in NEPA analyses even though those analyses are not supposed to include potential environmental effects that are too remote, too speculative, or beyond the scope of the agency's decision-making authority. The proposed guidance also inappropriately expands the scope of NEPA reviews to include transnational environmental effects, land and resource management decisions, social cost of carbon estimates, and an arbitrary 25,000 tons/year threshold trigger for GHG emissions. Given that CEQ's proposed NEPA guidance almost certainly will create overwhelming burdens, delays and litigation risks to new projects and other significant federal actions, CEQ should withdraw the guidance and correct the deficiencies.

#### New Source Performance Standards for Greenhouse Gases from Power Plants

In September 2013, EPA proposed a rule for regulating greenhouse gas emissions from new power plants. The proposed rule sets separate CO<sub>2</sub> emission limits for new coal-fired power plants and new natural gas-fired power plants. The emission limit for new coal-fired power plants is so stringent that any new coal-fired power plant would require carbon capture and sequestration (CCS) technology in order to comply. EPA, however, failed to show that CCS is a commercially viable and adequately demonstrated technology for new coal-fired power plants. In fact, there is not a single utility-scale power plant in the world currently operating with CCS. The proposed 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. By essentially eliminating new coal-fired power plants, this proposed regulation could threaten the reliability of the nation's electric grid. Case in point is the January 2014 "polar vortex." Some regions of the country experienced situations during that time where demand for natural gas exceeded supply, which would have led to electricity service interruptions if other generation sources – particularly coal-fired generation – were not available to support electricity demand. The comment period for the EPA's proposed GHG regulation for new power plants closed on May 9, 2014; EPA recently announced that it expects to issue a final regulation in "mid-summer 2015."

#### Existing Source Performance Standards for Greenhouse Gases from Power Plants

In June 2014, EPA proposed the "Clean Power Plan (CPP)" – a rule under the Clean Air Act that would regulate greenhouse gas emissions from existing power plants. The proposed rule sets a goal of a 30% nationwide reduction of 2005 GHG emission levels by 2030. Using Section 111(d) of the Clean Air Act, the proposed CPP would create 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).'" Portions of those reduction goals would have to be met on an interim basis in 2020, and then the full reductions achieved by 2030. EPA developed those state-specific goals using four "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; (3) increasing nuclear and renewable EGU capacity; and (4) demand-side energy efficiency. There are significant concerns with EPA's proposed Clean Power Plan and the impacts that it will have on reliable and affordable electricity in the U.S. for industrial and residential consumers. Legally, the Clean Air Act does not allow EPA to regulate GHG emissions from existing coal-fired power plants under Section 111(d) because these same coal-fired power plants are already regulated by EPA under Section 112 of the Clean Air Act. Additionally, even if EPA believes it has the basic

authority to regulate, Section 111(d) allows EPA to set emission standards based solely on emission reductions that can be achieved “inside the fence” at power plants. The CPP proposal, however, requires substantial reductions “outside the fence,” or at places and with entities separate and apart from the emissions purportedly subject to regulation. Economically, the proposed CPP threatens to cause serious harm to the U.S. economy, raising energy prices and costing jobs. EPA’s own estimates project that its proposed rule will cause nationwide electricity price increases averaging between 6-7% in 2020, and up to 12% in some areas. EPA also estimates annual compliance costs between \$5.4 and \$7.4 billion in 2020, rising up to \$8.8 billion in 2030. Notably, these are power sector compliance costs only; they do not include the cascading impacts of higher electricity rates on overall economic activity. Regarding electric reliability, 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, particularly given that EPA itself projects that the proposal would cause up to 49,000 megawatts of additional coal-fired electric generating capacity to retire by 2020. The proposed CPP also suffers from rushed timelines and deadlines: (1) states repeatedly have said that they need more time to develop state implementation plans; (2) many states also have called for elimination of the interim emissions reduction goals because compliance with them are impossible; and (3) there are serious questions about whether the infrastructure needed to comply with the CPP can be built within the proposed rule’s deadlines. With the comment period for the proposed CPP having closed on December 1, 2014, EPA expects to issue a final regulation in “mid-summer 2015.” EPA agreed to issue the GHG NSPS rule for new and existing power plants as well as for refineries, in settlement of a lawsuit brought by environmental advocacy groups.

### **Regulations that Circumvent the Regulatory Process: Sue and Settle**

EPA’s settlement with environmental advocacy groups to issue the GHG NSPS rule for power plants is just one example of how federal environmental agencies, in particular the EPA, are frequently imposing major costs on the public by ignoring the rulemaking process developed by Congress.

In recent years, many of the most costly and burdensome regulations have been developed through a process known as “sue and settle.” Organizations sue federal agencies to issue regulations and then agencies settle these lawsuits behind closed doors. Only *after* a settlement has been agreed to does the public have a chance to provide any comments. Public comments are largely irrelevant, however, because the agency has already committed itself to issue a rule containing specific requirements by a specific date.

Since 1946, the Administrative Procedure Act has governed the rulemaking process, with a central purpose of promoting public participation through an open and transparent process. Through sue and settle, agencies are able to circumvent the law by entering into consent decrees and settlement agreements that allow agencies to make major policy decisions without meaningfully involving the public.

For example, statutes will often require agencies to make scientific judgments before entering into rulemakings; by agreeing to issue regulations in consent decrees, agencies essentially



prejudge the outcome of that scientific judgment. These settlements also go beyond mandating that agencies issue regulations; they also can shape the specific terms of regulations. Many statutes allow environmental groups to sue agencies to take *nondiscretionary* actions (i.e. to fulfill clear-cut requirements). However, through sue and settle, agencies often agree to take actions that are not required, and even worse, they take actions not authorized by statute.

On January 19, 2012, several members of Congress sent a letter to EPA Administrator Lisa Jackson highlighting the EPA exceeding its statutory authority:

We are concerned that EPA has demonstrated a disturbing trend recently, whereby EPA has been entering into settlement agreements that purport to expand Federal regulatory authority far beyond the reach of the Clean Water Act and has been citing these settlement agreements as a source of regulatory authority in other matters of a similar nature.<sup>10</sup>

Sue and settle undermines the public participation principles of the rulemaking process. The public’s voice in the rulemaking process should not be silenced, especially when agencies are making decisions that have a major impact on the public.

On the following pages is a list of numerous sue and settle cases, covering a recent 18-month period, where agencies entered into regulatory settlements that had a major impact on public policy.

### Sue and Settle Cases Resulting in New Rules and Agency Actions (2009–2012)

Case	Agency	Issue and Result
<b><i>American Petroleum Institute v. EPA (petroleum refineries NSPS)</i></b>	EPA	<b>Issue:</b> Greenhouse gas (GHG) New Source Performance Standards (NSPS) for petroleum refineries
08-1277 (D.C. Cir.)		<b>Result:</b> EPA agreed to issue the first-ever NSPS for GHG emissions from petroleum refineries.
Settled: 12/23/2010 (date is from EPA website)		
<b><i>American Lung Association v. EPA (consolidated with New York v. Jackson)</i></b>	EPA	<b>Issue:</b> National ambient air quality standards (NAAQS) for particulate matter
12-00243 (consolidated with 12-00531) (D.D.C.)		<b>Result:</b> EPA agreed to sign a final rule addressing the NAAQS for particulate matter. In January 2013, EPA published a final rule making the standard more stringent.
Settled: 6/15/2012		
<b><i>American Nurses Association v. Jackson</i></b>	EPA	<b>Issue:</b> Maximum achievable control technology (MACT) emissions standards for hazardous air pollutants (HAP) from coal- and oil-fired electric utility

<sup>10</sup> Letter to EPA Administrator Lisa P. Jackson from Rep. John L. Mica, Chairman, Committee on Transportation and Infrastructure, Rep. Bob Gibbs, Chairman, Subcommittee on Water Resources and Environment, Senator James M. Inhofe, Ranking Member, Committee on Environment and Public Works, and Senator Jeff Sessions, Ranking Member, Subcommittee on Water and Wildlife, January 19, 2012.

Case	Agency	Issue and Result
08-02198 (D.D.C.) Settled: 10/22/2009		steam generating units (EGUs)  <b>Result:</b> EPA entered into a consent decree requiring the agency to issue MACT standards under Section 112 of the Clean Air Act for coal- and oil-fired electric utility steam generating units (known as the "Utility MACT" rule). The rule was finalized in February 2012.
<b>Association of Irrigated Residents v. EPA et al. (2008 PM<sub>2.5</sub> SIP)</b>	EPA	<b>Issue:</b> CA state implementation plan (SIP) submission regarding 1997 PM <sub>2.5</sub> NAAQS  <b>Result:</b> EPA agreed to take final action on the 2008 PM <sub>2.5</sub> San Joaquin Valley Unified Air Control District Plan for compliance with 1997 PM <sub>2.5</sub> NAAQS. The final action was taken in November 2011.
10-03051 (N.D. Cal.) Settled: 11/12/2010		
<b>Association of Irrigated Residents v. EPA et al. (SIP revisions)</b>	EPA	<b>Issue:</b> CA SIP revision regarding two rules amended by the San Joaquin Valley Unified Air Pollution Control District  <b>Result:</b> EPA agreed to take final action on the SIP revision and specifically the two rules amended by the San Joaquin Valley Unified Air Pollution Control District (Rule 2020 "Exemptions" and Rule 2020 "New and Modified Stationary Source Review Rule"). The final action was taken in May 2010.
09-01890 (N.D. Cal.) Settled: 10/21/2009		
<b>Center for Biological Diversity et al. v. EPA (kraft pulp NSPS)</b>	EPA	<b>Issue:</b> Kraft pulp NSPS  <b>Result:</b> EPA agreed to review and, if applicable, revise the kraft pulp NSPS air quality standards.
11-06059 (N.D. Cal.) Settled: 8/27/2012		
<b>Center for Biological Diversity v. EPA</b>	EPA	<b>Issue:</b> GHGs and ocean acidification under the Clean Water Act  <b>Result:</b> In a settlement agreement, EPA agreed to take public comment and begin drafting guidance on how to approach ocean acidification under the Clean Water Act. On November 15, 2010, in guidance, EPA urged states to identify waters impaired by ocean acidification under the Clean Water Act and urged states to gather data on ocean acidification, develop methods for identifying waters affected by ocean acidification, and create criteria for measuring the impact of acidification on marine ecosystems.
09-00670 (W.D. Wash.) Settled: Settlement agreement (parties entered into it on 3/10/10). Notice of voluntary dismissal, 3/11/10. Notice discusses settlement agreement.		
<b>Center for Biological Diversity v. U.S. Department of Agriculture</b>	Dept. of Agriculture, U.S. Forest Service	<b>Issue:</b> Southern California Forest Service Management Plans  <b>Result:</b> Conservation groups sued U.S. Forest Service over a forest management plan for four California national forests. The challenged plans designated more than 900,000 roadless acres for possible road building or other development. In 2009, a federal district court agreed with the groups, ruling that the plans violated the National Environmental Policy Act (NEPA). The parties entered into a settlement agreement that withholds more than 1 million acres of roadless areas from development. Further, the agency allowed the advocacy groups to participate in a collaborative process to, among other things, identify a list of priority roads and trails for decommissioning and/or restoration projects.
08-03884 (N.D. Cal.) Settled: 12/15/2010		
<b>Center for Biological Diversity v. U.S. Dept. of the Interior (DOI)</b>	DOI, Dept. of Agriculture, BLM, U.S.	<b>Issue:</b> Grazing fees on federal lands; environmental groups wanted the fees raised  <b>Result:</b> In a settlement agreement, agencies agreed to respond to the
10-00952 (D.D.C.)		

Case	Agency	Issue and Result
Settled: 1/14/2011	Forest Service	plaintiffs' petition by January 18, 2011, and determine whether a NEPA environmental impact statement was required to issue new rules for the fee grazing program. The agencies ultimately declined to revise the rules for the fee grazing program, citing other high-priority efforts that took precedence.
<b><i>Coal River Mountain Watch et al. v. Salazar et al.</i></b>	EPA and DOI	<b>Issue:</b> Stream Buffer Zone Rule
08-02212; A related case is National Parks Conservation Association v. Kempthorne: 09-00115; Settlement agreement: 09-00115 (D.D.C.) (D.D.C.)		<b>Result:</b> The 1983 stream buffer rule restricted mining activities from impacting resources within 100 feet of waterways. The Bush administration revised the rule to allow activity inside the buffer if it was deemed impractical for mine operators to comply. Environmental groups want the Obama administration to undo that change and declare that the stream buffer zone rule prohibits "valley fills." Environmental groups sued DOI in 2008 over the changes. Secretary Salazar tried to revoke the rule in April 2009, but a court held that OSM must go through a full rulemaking process. OSM agreed to amend or replace the stream buffer rule.
Settled: 3/19/2010		
<b><i>Colorado Citizens Against Toxic Waste, Inc. et al. v. Johnson</i></b>	EPA	<b>Issue:</b> National emission standards for radon emissions from operating mill tailings
08-01787 (D. Colo.)		<b>Result:</b> EPA agreed to review and, if appropriate, revise national emission standards for radon emissions from operating mill tailings. EPA also agreed to certain public participation stipulations.
Settled: 9/3/2009		
<b><i>Colorado Environmental Coalition v. Salazar</i></b>	DOI	<b>Issue:</b> Bureau of Land Management (BLM) decision to amend resource management plans (RMPs), which opened 2 million acres of federal lands for potential oil shale leasing; plaintiffs alleged failure to comply with NEPA and other statutes
09-00085 (D. Colo.)		<b>Result:</b> BLM agreed to consider amending each of the 2008 RMP decisions. As part of the amendment process, BLM agreed to consider several proposed alternatives, including alternatives that would exclude lands with wilderness characteristics and core or priority habitat for the imperiled sage grouse from commercial oil shale leasing. BLM also agreed to delay any calls for commercial leasing, but retained the right to continue nominating parcels for Research, Development, and Demonstration (RD&D) leases and to convert existing RD&D leases to commercial leases.
Settled: 2/15/2011		
<b><i>Comite Civico del Valle, Inc. v. Jackson et al. (CA SIP)</i></b>	EPA	<b>Issue:</b> CA SIP regarding measures to control particulate matter emissions from beef feedlot operations within the Imperial Valley
10-00946 (N.D. Cal.)		<b>Result:</b> EPA agreed to take final action on the SIP revision regarding particulate matter emissions from beef feedlot operations within the Imperial Valley. The final rule was published on November 10, 2010.
Settled: 6/11/2010		
<b><i>Comite Civico del Valle, Inc. v. Jackson et al. (Imperial County 1)</i></b>	EPA	<b>Issue:</b> CA SIP revision regarding Imperial County Air Pollution Control District Rules 800-806 (addressing PM <sub>10</sub> )
09-04095 (N.D. Cal.)		<b>Result:</b> EPA agreed to take final action on the Imperial County Air Pollution Control District's Rules 800-806 (addressing PM <sub>10</sub> ) that revise the CA SIP. A proposed rule was published on January 7, 2013.
Settled: 11/10/2009		
<b><i>Comite Civico del Valle, Inc. v. Jackson et al. (Imperial County 2)</i></b>	EPA	<b>Issue:</b> CA SIP revision regarding Imperial County Air Pollution Control District Rules 201, 202, and 217

Case	Agency	Issue and Result
10-02859 (N.D. Cal.) Settled: 10/12/2010		<b>Result:</b> EPA agreed to take final action on Imperial County Air Pollution Control District Rules 201, 202, and 217 that revise the CA SIP.
<b><i>Defenders of Wildlife v. Jackson</i></b> 10-01915 (D.D.C.) Settled: 11/5/2010, 11/8/10 moved for entry same day the complaint was filed (see page 3 of the 3/18/12 memorandum opinion), 3/18/12 (ordered)	EPA	<b>Issue:</b> Effluent Limitation Guidelines for Steam Electric Power Generating Point Source  <b>Result:</b> EPA agreed to sign a notice of proposed rulemaking regarding revisions to the effluent guidelines for steam electric power plants, followed by a final rule. In this case, the advocacy group's complaint was filed on the same day that the parties moved to enter the consent decree.
<b><i>El Comite Para El Bienestar De Earlimart et al. v. EPA et al.</i></b> 11-03779 (N.D. Cal.) Settled: 11/14/2011	EPA	<b>Issue:</b> CA SIP submission regarding fumigant rules in San Joaquin Valley  <b>Result:</b> EPA agreed to take final actions on the Pesticide Element SIP Submittal and the Fumigant Rules Submittal. A final rule was published on October 26, 2012.
<b><i>Environmental Defense Fund v. Jackson</i></b> 11-04492 (S.D.N.Y.) Settled: 7/6/2012	EPA	<b>Issue:</b> NSPS for municipal solid waste landfills  <b>Result:</b> EPA agreed to review and, if applicable, revise the NSPS for municipal solid waste landfills.
<b><i>Florida Wildlife Federation v. Jackson</i></b> 08-00324 (N.D. Fla.) Settled: 8/25/2009	EPA	<b>Issue:</b> Numeric nutrient criteria for waters in FL  <b>Result:</b> Environmental groups sued EPA in July 2008 to develop numeric nutrient criteria for FL. EPA entered into a consent decree with the plaintiffs in 2009. As part of the consent decree, EPA agreed to issue limits in phases. Limits for FL's inland water bodies outside South FL were finalized on December 6, 2010; the limits for estuaries and coastal waters, and South FL's inland flowing waters were proposed on December 18, 2012. Final rules, by consent decree, are required by September 30, 2013.
<b><i>Fowler v. EPA</i></b> 09-00005 (D.D.C.) Settled: 5/10/2010	EPA	<b>Issue:</b> Clean Water Act regulatory regime for Chesapeake Bay  <b>Result:</b> EPA agreed to establish a Total Maximum Daily Load for the Chesapeake Bay. The settlement requires EPA to develop changes to its storm water program affecting the Bay.
<b><i>Friends of Animals v. Salazar</i></b> 10-00357 (D.D.C.) Settled: 7/21/2010	DOI	<b>Issue:</b> DOI non-action on plaintiff's petitions to list 12 species of parrots, macaws, and cockatoos as endangered or threatened under the Endangered Species Act  <b>Result:</b> DOI agreed to issue 12-month findings on the 12 species contained in the petition.
<b><i>In re Endangered Species Act Section 4 Deadline Litigation (This case relates to Center for Biological Diversity v. Salazar, 10-0230, and 12 different WildEarth Guardians complaints)</i></b>	DOI	<b>Issue:</b> WildEarth Guardians cases: 12 lawsuits seeking to designate 251 species as threatened or endangered under the Endangered Species Act. CBD case: Seeking 90-day findings for 32 species of Pacific Northwest mollusks, 42 species of Great Basin springsnails, and 403 southeast aquatic species.  <b>Result:</b> WildEarth: U.S. Forest Service agreed to make a final determination on Endangered Species Act status for 251 candidate species on or before

Case	Agency	Issue and Result
10-00377 (D.D.C.) Settled: Wildlife Guardians: 5/10/2011 CBD: July 12, 2011		September 2016. CBD: FWS agreed to make requested findings no later than the end of 2011 (this covers 32 species of Pacific Northwest mollusks, 42 species of Great Basin springsnails, and the 403 southeast aquatic species). Note: There are additional actions required for both settlements.
<b><i>Kentucky Environmental Foundation v. Jackson (Huntington-Ashland SIP)</i></b>	EPA	<b>Issue:</b> KY SIP revision addressing 1997 PM <sub>2.5</sub> NAAQS <b>Result:</b> EPA agreed to take final action on the Kentucky SIP addressing 1997 PM <sub>2.5</sub> NAAQS for the Huntington-Ashland area. The final rule was published in April 2012.
10-01814 (D.D.C.) Settled: 8/4/2011		
<b><i>Kentucky Environmental Foundation v. Jackson (Louisville SIP)</i></b>	EPA	<b>Issue:</b> KY SIP regarding 1997 PM <sub>2.5</sub> NAAQS <b>Result:</b> EPA had already taken actions by the time the agreement was made. EPA did agree to take final action on the PM <sub>2.5</sub> emissions inventory for the Louisville SIP.
11-01253 (D.D.C.) Settled: 2/27/2012		
<b><i>Louisiana Environmental Action Network v. Jackson</i></b>	EPA	<b>Issue:</b> LA SIP for 1997 ozone NAAQS <b>Result:</b> LEAN brought the case to compel EPA to take action on ozone standards in the Baton Rouge area. As part of the settlement, LEAN agreed to ask the court to hold the litigation in abeyance and EPA agreed to take action if the Baton Rouge area does not come into attainment.
09-01333 (D.D.C.) Settled: 11/23/2010		
<b><i>Mossville Environmental Action NOW v. Jackson</i></b>	EPA	<b>Issue:</b> New MACT standards for polyvinyl chloride (PVC) manufacturers <b>Result:</b> Environmental groups previously litigated and won a decision overturning EPA's 2002 decision not to make the MACT standards for PVC makers more stringent. Environmental groups brought this case in 2008 to compel EPA to set new MACT standards. In 2009, there was a settlement agreement between EPA and the plaintiffs. The agreement called upon EPA to finalize the new MACT standards. EPA issued a final rule in April 2012.
08-01803 (D.D.C.) Settled: 10/30/2009		
<b><i>National Parks Conservation Association v. Jackson (Regional haze FIPs and SIPs)</i></b>	EPA	<b>Issue:</b> Regional haze FIPs and SIPs <b>Result:</b> EPA agreed to deadlines to promulgate proposed and final regional haze FIPs and/or SIPs (or partial FIPs and SIPs).
11-01548 (D.D.C.) Settled: 11/9/2011		
<b><i>Natural Resources Defense Council et al. v EPA</i></b>	EPA	<b>Issue:</b> Reporting requirements for concentrated animal feeding operations (CAFOs) <b>Result:</b> EPA agreed to create publicly available guidance to assist in the implementation of NPDES permit regulations and Effluent Limitation Guidelines and Standards for CAFOs. The agency also agreed to publish a proposed rule regarding reporting requirements for CAFOs. A proposed rule was published in October 2011 and later withdrawn in July 2012.
09-60510 (5th Cir.) Settled: 5/25/2010		
<b><i>Natural Resources Defense Council v. EPA</i></b>	EPA	<b>Issue:</b> Pesticide human testing consent rule <b>Result:</b> A 2006 human-testing rule required subjects of paid pesticide experiments to provide "legally effective informed consent." Environmental groups challenged the rule. A June 2010 settlement required EPA to propose amendments to the rule to make it stricter. The settlement required EPA to
06-0820 (2d Cir.) Settled: 6/17/2010 (see EarthJustice press release), Finalized on 11/3/10 (see		

Case	Agency	Issue and Result
proposed rule)		incorporate specific language in the rule. The new rules were proposed on February 2, 2011. The final rule was published on February 14, 2013 and includes the negotiated language.
<b>Natural Resources Defense Council v. EPA (California SIP)</b>	EPA	<b>Issue:</b> CA SIP submission for 1997 ozone and PM <sub>2.5</sub> NAAQS
10-06029 (C.D. Cal.)		<b>Result:</b> EPA agreed to take action on SIPs as they apply to PM <sub>2.5</sub> and ozone for California's South Coast Air Basin.
Settled: 12/13/2010		
<b>Natural Resources Defense Council v. Salazar</b>	Fish and Wildlife Service (FWS); DOI	<b>Issue:</b> Listing of whitebark pine tree as an endangered species under the Endangered Species Act as a result of climate change
10-00299 (D.D.C.)		<b>Result:</b> On July 19, 2011, FWS found that the whitebark pine tree should be listed as threatened or endangered under the Endangered Species Act as a result of climate change. It was the first time the federal government has declared a widespread tree species in danger of extinction because of climate change.
Settled: 6/18/2010		
<b>New York v. EPA</b>	EPA	<b>Issue:</b> GHG NSPS for power plants
06-1322 (D.C. Cir.)		<b>Result:</b> On April 13, 2012, EPA proposed the first-ever NSPS for GHG emissions from new coal- and oil-fired power plants. This came about as a result of a settlement of a 2006 lawsuit challenging power plant NSPS.
Settled: 12/23/2010 (see EPA settlement page)		
<b>Northwoods Wilderness Recovery v. Kempthorne</b>	FWS; DOI	<b>Issue:</b> FWS's exclusion of 13,000 acres of national forest land in Michigan and Missouri from the final "critical habitat" designation for the Hine's emerald dragonfly under the Endangered Species Act
08-01407 (N.D. Ill.)		<b>Result:</b> FWS agreed to a remand without vacatur of the critical habitat designation in order to reconsider the federal exclusions from the designation of critical habitat for the Hine's emerald dragonfly. FWS doubled the size of the critical habitat from 13,000 acres to more than 26,000. The final rule was published in April 2010.
Settled: 1/13/2009		
<b>Portland Cement Assn. v. EPA</b>	EPA	<b>Issue:</b> MACT standards for cement kilns
07-1046 (D.C. Cir.)		<b>Result:</b> EPA settled a lawsuit seeking to force the agency to control mercury emissions from cement kilns. The settlement was between EPA and numerous petitioners that challenged the 2006 cement MACT rule. The petitioners included environmental groups, states, and the cement industry. The final cement MACT rule was published in the Federal Register on September 9, 2010; environmental groups and cement industry petitioned for reconsideration of the 2010 rule. EPA denied in part and amended in part the petitions to reconsider. EPA published a new final rule on February 12, 2013. The reconsidered rule relaxed some aspects of the 2010 rule, and allowed cement companies more time to comply.
Settled: 1/6/2009 (This date is based on when DOJ signed the settlement agreement)		
<b>Riverkeeper v. EPA</b>	EPA	<b>Issue:</b> Clean Water Act 316(b) standards on cooling water intake structures
06-12987 (S.D.N.Y.)		<b>Result:</b> The EPA agreed to propose and finalize a rule regulating cooling water intake structures under 316(b), and to consider the feasibility of more stringent technical controls.
Settled: 11/22/2010		
<b>Sierra Club et al. v. Jackson (ozone NC, NV, ND, HI, OK,</b>	EPA	<b>Issue:</b> Action on 1997 ozone NAAQS revisions for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA



Case	Agency	Issue and Result
<b>AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA)</b> 10-04060 (N.D. Cal.) Settled: 8/12/2011 (Date that court ordered Joint Motion to Stay All Deadlines. This motion was filed with the Notice of Proposed Settlement)		<b>Result:</b> EPA agreed to take final action on 1997 Ozone NAAQS revision for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA.
<b>Sierra Club et al. v. Jackson et al. (CA RACT SIP)</b> 11-03106 (N.D. Cal.) Settled: 1/6/2012	EPA	<b>Issue:</b> CA SIP submissions regarding reasonably available control technology demonstration  <b>Result:</b> EPA agreed to take final action on the CA RACT SIP.
<b>Sierra Club et al. v. Jackson et al. (San Joaquin Valley)</b> 10-01954 (N.D. Cal.) Settled: 11/8/2010	EPA	<b>Issue:</b> CA SIP submission for 1997 ozone NAAQS  <b>Result:</b> EPA agreed to take final action on the 8-hour ozone plan submitted by the San Joaquin Valley Air Pollution Control District, the purpose of which is to achieve progress toward attainment of 1997 ozone NAAQS. A final rule was published on March 1, 2012.
<b>Sierra Club et al. v EPA (lead case)</b> 08-1258 (D.C. Cir.) Settled: 8/24/2009 (see also the amended settlement agreement referring to this date)	EPA	<b>Issue:</b> Lead Renovation, Repair and Painting Program  <b>Result:</b> In 2008, numerous environmental groups commenced lawsuits against EPA to challenge the Lead Renovation, Repair, and Painting Program Rule, and these suits were consolidated in the DC Circuit Court of Appeals. As part of this settlement agreement, EPA agreed to propose significant and specific changes to the rule that were outlined in the settlement agreement. Significantly, EPA agreed to drop an "opt-out" provision that would allow millions of homes without children or pregnant women to waive the lead restrictions.
<b>Sierra Club filed a notice of intent to file a lawsuit</b> NOTICE OF INTENT Settled: 12/19/2011	EPA	<b>Issue:</b> Attainment determinations for 1997 ozone NAAQS for areas in NY, NJ, CT, MA, IL, MO and other areas  <b>Result:</b> EPA agreed to make attainment determinations for 1997 ozone NAAQS for areas in NY, NJ, CT, MA, IL, and MO. The "other areas" were not included because EPA and plaintiffs agreed that EPA had already addressed the issues for those areas.
<b>Sierra Club v. EPA (Nitric Acid)</b> 09-00218 (D.D.C.) Settled: 11/3/2009	EPA	<b>Issue:</b> Nitric acid plants NSPS  <b>Result:</b> EPA agreed to review NSPS for nitric acid plants. As a result of this review, EPA proposed NSPS for nitric acid plants in October 2011. The final rule was published in August 2012.
<b>Sierra Club v. EPA et al. (clay ceramics)</b> 08-00424 (D.D.C.) Settled: 11/20/2012	EPA	<b>Issue:</b> Brick MACT  <b>Result:</b> EPA agreed to issue final rules setting MACT standards for brick and structural clay products manufacturing facilities located at major sources and clay ceramics manufacturing facilities located at major sources.
<b>Sierra Club v. EPA et al. (TX ozone PM SIP)</b>	EPA	<b>Issue:</b> TX SIP submission regarding 1997 ozone and PM <sub>2.5</sub> NAAQS



Case	Agency	Issue and Result
10-01541 (D.D.C.) Settled: 9/13/2011		<b>Result:</b> EPA agreed to take final action on certain infrastructure components of TX SIP submissions for 1997 ozone and PM <sub>2.5</sub> NAAQS.
<b>Sierra Club v. Jackson (21 states)</b> 10-00133 (D.D.C.) Settled: 4/29/2010 (EPA lodged consent decree with court on this date)	EPA	<b>Issue:</b> 21 states' SIPs submissions for 1997 ozone NAAQS <b>Result:</b> EPA agreed to approve or disapprove the 1997 8-hour ozone NAAQS Infrastructure SIPs for ME, RI, CT, NH, AL, KY, MS, SC, WI, IN, MI, OH, LA, KS, NE, MO, CO, MT, SD, UT, and WY.
<b>Sierra Club v. Jackson (28 different MACT)</b> 09-00152 (N.D. Cal.) Settled: 7/6/2010	EPA	<b>Issue:</b> MACT standards for 28 industry source categories <b>Result:</b> Sierra Club sued EPA on January 13, 2009—seven days prior to the change in administration—to review and revise Clean Air Act MACT standards for 28 different categories of industrial facilities, including wood furniture manufacturing, Portland Cement, pesticides, lead smelting, secondary aluminum, pharmaceuticals, shipbuilding, and aerospace manufacturing. On July 6, 2010, EPA lodged a consent decree that required EPA to revise MACT standards for all 28 categories.
<b>Sierra Club v. Jackson (AL and GA SIPs)</b> 11-02000 (D.D.C.) Settled: 7/20/2012	EPA	<b>Issue:</b> AL SIP submission for 1997 PM <sub>2.5</sub> NAAQS and GA SP submission for 1997 ozone NAAQS <b>Result:</b> EPA agreed to take final action on "numerous SIP submittals" by AL for the 1997 PM <sub>2.5</sub> NAAQS and GA for the 1997 8-hour ozone NAAQS.
<b>Sierra Club v. Jackson (AR Regional Haze)</b> 10-02112 (D.D.C.) Settled: 8/3/2011	EPA	<b>Issue:</b> AR Regional Haze SIP <b>Result:</b> EPA agreed to sign a notice of final rulemaking to approve or disapprove the AR Regional Haze SIP.
<b>Sierra Club v. Jackson (Boiler MACT and RICE rule)</b> 01-01537 (D.D.C.) Settled: RICE and Boiler MACT: 5/22/03 (consent decree). For RICE: 11/15/07 amendment to change deadlines; 11/9/09 amendment to change deadlines; 2/10/10 was a third modification to the deadline.	EPA	<b>Issue:</b> MACT standards for boilers and stationary reciprocating internal combustion engines (RICE) <b>Result:</b> In 2003, EPA and Sierra Club entered into a consent decree that required MACT standards for boilers and RICE. There were other MACT standards requirements as well. For Boiler MACT: The rule history is extremely complicated. In 2006, the DC District court issued an order detailing a schedule. EPA and Sierra Club both agreed multiple times to extend the deadline to finalize rules. However, Sierra Club opposed EPA's motion to extend a January 16, 2011 deadline that was established in a September 20, 2010, order, from January 16, 2011 to April 13, 2012. EPA realized that it needed much more time for the final rules. Judge Paul Friedman of the DC District Court decided that enough was enough and gave EPA only one month to issue the rules. EPA did in fact issue the rule on March 21, 2011, and that same day published a notice of reconsideration. The final rules based on the reconsideration were published on January 31, 2013, and February 1, 2013. For the RICE rule: In 2007, 2009, and 2010, EPA and Sierra Club modified the deadline dates for final action as required in the decree. EPA agreed to take additional comment on the RICE rule in June and October 2012, and published the final RICE rule in January 2013.
<b>Sierra Club v. Jackson (DSW Rule)</b>	EPA	<b>Issue:</b> Revisions to the Definition of Solid Waste under RCRA

Case	Agency	Issue and Result
09-1041 Consol. with 09-1038 (D.C. Cir.) Settled: 9/7/2010 (see also proposed rule that says this date, pp. 44, 102)		<b>Result:</b> Sierra Club challenged the 2008 "Definition of Solid Waste" rule, which established requirements for recycling hazardous secondary materials. To settle the lawsuit, EPA agreed it would review and reconsider the rule. In July 2011, EPA published a proposed rule, significantly tightening the types of materials that can be recycled under RCRA.
<b>Sierra Club v. Jackson (Houston-Galveston-Brazoria)</b> 12-00012 (D.D.C.) Settled: 6/21/2012	EPA	<b>Issue:</b> TX SIP submission for 1997 ozone NAAQS <b>Result:</b> EPA agreed to take final action on the SIP for the Houston-Galveston-Brazoria 1997 8-hour ozone nonattainment areas.
<b>Sierra Club v. Jackson (Kentucky Regional Haze)</b> 10-00889 (D.D.C.) Settled: 10/29/2010	EPA	<b>Issue:</b> KY SIP submissions for 1997 ozone NAAQS and Regional Haze <b>Result:</b> EPA agreed to the following: By April 15, 2011, EPA would take final action on ozone SIP submittals for various Kentucky ozone maintenance areas; by March 15, 2012, EPA would take final action on KY's Regional Haze SIP.
<b>Sierra Club v. Jackson (MA, CT, NJ, NY, PA, MD, and DE SIPs)</b> 11-02180 (D.D.C.) Settled: 7/23/2012	EPA	<b>Issue:</b> SIP submissions for certain NAAQS by MA, CT, NJ, NY, PA, MD, and DE <b>Result:</b> EPA agreed to take final actions on SIPs for certain NAAQS for MA, CT, NJ, NY, PA, MD, and DE.
<b>Sierra Club v. Jackson (ME, MO, IL, and WI SIPs)</b> 11-00035 (D.D.C.) Settled: 11/30/2011	EPA	<b>Issue:</b> SIP submissions for 1997 ozone NAAQS by ME, MO, IL, and WI <b>Result:</b> EPA agreed to take final action on the SIPs for certain areas of IL, ME, and MO. Wisconsin was not included because the issue was already resolved.
<b>Sierra Club v. Jackson (NC and SC SIPs)</b> 12-00013 (D.D.C.) Settled: 6/28/2012	EPA	<b>Issue:</b> NC and SC SIP submissions regarding 1997 ozone NAAQS <b>Result:</b> EPA agreed to take final actions on North Carolina and South Carolina SIPs for Charlotte-Gastonia-Rock Hill.
<b>Sierra Club v. Jackson (OK SIP)</b> 12-00705 (D.D.C.) Settled: 10/15/2012	EPA	<b>Issue:</b> OK SIP revision regarding excess emissions <b>Result:</b> EPA agreed to take final action on a revision to the OK SIP regarding excess emissions.
<b>Sierra Club v. Jackson (ozone TX, CT, MD, NY, NJ, MA, and NH)</b> 11-00100 (D.D.C.) Settled: 9/12/2011	EPA	<b>Issue:</b> Attainment determinations for 1-hour ozone for areas in TX, CT, MD, NY, NJ, MA, and NH <b>Result:</b> EPA agreed to make attainment determinations for 1-hour ozone for areas in TX, CT, MD, NY, NJ, MA, and NH.
<b>WildEarth Guardians et al. v. Jackson (ozone AZ, NV, PA, and TN)</b> 10-04603 (N.D. Cal.) Settled: 3/23/2011 (Date found in the notice of proposed settlement)	EPA	<b>Issue:</b> Nonattainment of 1997 ozone NAAQS for areas in AZ, NV, PA, and TN <b>Result:</b> EPA agreed to set a deadline for issuing findings of failure to submit SIPs for the 1997 ozone NAAQS for areas in NV and PA. Other actions addressed concerns in two other states.
<b>WildEarth Guardians v.</b>	EPA	<b>Issue:</b> Area designations for 2008 ground level ozone NAAQS

Case	Agency	Issue and Result
<b>Jackson (2008 ozone NAAQS)</b>		
11-01661 (D. Ariz.)		<b>Result:</b> EPA agreed to sign for publication in the Federal Register a notice of the Agency's promulgation of area designations for the 2008 ground-level ozone NAAQS.
Settled: 12/12/2011		
<b>WildEarth Guardians v. Jackson (2nd suit for Phoenix)</b>	EPA	<b>Issue:</b> AZ SIP submission for 1997 ozone NAAQS
11-02205 (N.D. Cal.)		<b>Result:</b> EPA agreed to take action on AZ SIP submission pertaining to Phoenix-Mesa's plan to achieve progress toward attainment of 1997 ozone NAAQS. EPA issued a final rule on June 13, 2012.
Settled: 6/7/2011		
<b>WildEarth Guardians v. Jackson (CO, UT, MT, and NM SIPs)</b>	EPA	<b>Issue:</b> Final action on 22 SIP submissions from CO, UT, and MT
09-02148 (D. Colo.)		<b>Result:</b> EPA agreed to take final action on 22 SIP submissions from CO, UT, and MT, and then added 19 SIP submissions from NM, for a total of 41 SIP submissions.
Settled: 2/1/2010		
<b>WildEarth Guardians v. Jackson (oil and gas)</b>	EPA	<b>Issue:</b> Clean Air Act Regulations on Oil and Gas Drilling Operations
09-00089 (D.D.C.)		<b>Result:</b> In January 2009, environmental groups sued EPA to update federal regulations limiting air pollution from oil and gas drilling operations. EPA settled with environmentalists on December 3, 2009. The settlement required EPA to review and update three sets of regulations: (1) NSPS for oil and gas drilling; (2) MACT standards for hazardous air pollutant emissions; (3) and "residual risk" standards. On August 23, 2011, EPA proposed a comprehensive set of updates to these rules, including new NSPS and MACT standards. On August 16, 2012, EPA issued final rules covering NSPS, MACT, and residual risk for the oil and gas sector.
Settled: 12/3/2009		
<b>WildEarth Guardians v. Jackson (ozone)</b>	EPA	<b>Issue:</b> SIP submissions for 1997 8-hour ozone and PM <sub>2.5</sub> NAAQS by CA, CO, ID, NM, ND, OK, and OR
09-02453 (N.D. Cal.)		<b>Result:</b> EPA agreed to decide, for each state, whether to approve or deny SIPs for the 1997 8-hour ozone and PM <sub>2.5</sub> NAAQS, or whether to instead force the states to comply with a federal implementation plan.
Settled: 2/18/2010		
<b>WildEarth Guardians v. Jackson (PM<sub>2.5</sub>)</b>	EPA	<b>Issue:</b> SIP submissions for 2006 PM <sub>2.5</sub> NAAQS infrastructure by 20 states
11-00190 (N.D. Cal.)		<b>Result:</b> EPA agreed to sign a final action to approve or disapprove the 2006 PM <sub>2.5</sub> NAAQS infrastructure SIPs for AL, CT, FL, MS, NC, TN, IN, ME, OH, NM, DE, KY, NV, AR, NH, SC, MA, AZ, GA, and WV.
Settled: 8/25/2011		
<b>WildEarth Guardians v. Jackson (CO, WY, MT, and ND SIPs)</b>	EPA	<b>Issue:</b> CO, WY, MT, and ND SIP submissions for Regional Haze and excess emissions standards
11-00001 (Consolidated with 11-00743) (D. Colo.)		<b>Result:</b> EPA agreed to decide for each state whether to approve or deny the SIP submissions.
Settled: 6/6/2011		
<b>WildEarth Guardians v. Jackson (Utah breakdown provision)</b>	EPA	<b>Issue:</b> Utah SIP revision regarding breakdown provision
09-02109 (D. Colo.)		<b>Result:</b> EPA agreed to take a final action regarding the "Utah breakdown provision," which allows sources to exceed their permitted air pollution limits during periods of "unavoidable breakdown." In April 2011, EPA found the breakdown provision inadequate and called on the state to revise its SIP.
Settled: 11/23/2009		

Case	Agency	Issue and Result
<b>WildEarth Guardians v. Jackson (Utah SIP)</b>	EPA	<b>Issue:</b> Utah SIP submissions for Regional Haze and PM <sub>10</sub> NAAQS  <b>Result:</b> EPA agreed to sign a final action approving or disapproving, in whole or in part, Utah's request to redesignate Salt Lake City's attainment status for PM <sub>10</sub> NAAQS. EPA also agreed to take final action on Utah's Regional Haze submission.
10-01218 (D. Colo.)		
Settled: 10/28/2010		
<b>WildEarth Guardians v. Jackson, et al. (Utah Salt Lake and Davis Counties SIP)</b>	EPA	<b>Issue:</b> Deadline for action on Utah SIP for 1997 NAAQS for ozone regarding Salt Lake and Davis Counties  <b>Result:</b> EPA agreed to sign a notice of final action regarding Utah's proposed SIP revision for maintenance of the 1997 8-hour NAAQS for ozone in Salt Lake and Davis Counties.
12-00754 (D. Colo.)		
Settled: 7/11/2012		
<b>WildEarth Guardians v. Kempthorne</b>	DOI	<b>Issue:</b> Critical habitat designation for the Chiricahua leopard frog  <b>Result:</b> DOI under the Bush administration listed the leopard frog as threatened under the Endangered Species Act but declined to designate a critical habitat because doing so would not be "prudent," as is permitted by the Endangered Species Act. WildEarth Guardians sued to challenge this decision, and the Obama administration's DOI settled the case. The terms of the settlement provided that DOI would reconsider its prudency determination. On March 20, 2012, DOI finalized a rule that reversed its prudency decision and designated approximately 10,346 acres as critical habitat for the Chiricahua leopard frog.
08-00689 (D. Ariz.)		
Settled: 4/29/2009		
<b>WildEarth Guardians v. Locke</b>	Dept. of Commerce	<b>Issue:</b> Alleged failure by National Marine Fisheries Service (NMFS) to set Endangered Species Act protections for sperm whales, fin whales, and sei whales  <b>Result:</b> NMFS agreed to issue recovery plans for sperm whales, fin whales, and sei whales by the end of 2011.
10-00283 (D.D.C.)		
Settled: 6/25/2010		
<b>WildEarth Guardians v. Salazar (674 species)</b>	DOI	<b>Issue:</b> DOI non-action on plaintiff's petitions to list 674 plant and animal species as threatened under the Endangered Species Act  <b>Result:</b> DOI agreed to issue decisions on hundreds of species for which no finding had already been made.
08-00472 (D.D.C.)		
Settled: 3/13/2009		
<b>WildEarth Guardians v. Salazar (Wright's marsh thistle)</b>	DOI	<b>Issue:</b> DOI non-action on petition to list the Wright's marsh thistle as endangered or threatened under the Endangered Species Act  <b>Result:</b> DOI agreed to issue a decision on whether to list the the Wright's marsh thistle. FWS listed the Wright's marsh thistle as endangered or threatened on November 4, 2010 (it was a 12-month petition finding).
10-01051 (D. N.M.)		
Settled: 6/2/2010		

Most sue and settle cases are resolved through a consent decree or settlement agreement. However, there is a comparable type of case in which the case is resolved by agency action in response to the legal challenge, as opposed to resolving the case with a consent decree or settlement agreement. Like with the "standard" sue and settle cases, special interests bring legal actions to compel agencies to take their desired actions. A common thread between the cases is the special interests are able to change policy affecting the general public without the public having sufficient notice or opportunity to change agency actions.

Case	Agency	Issue and Result
<p><b>California v. EPA</b></p> <p>08-1178 (D.C. Cir.)</p> <p>Settled: 6/30/2009 (EPA granted the waiver; see also EPA waiver web page)</p>	EPA	<p><b>Issue:</b> Grant of California GHG Waiver</p> <p><b>Result:</b> EPA, California, environmental groups and the automobile industry negotiated a settlement of a multi-party lawsuit requesting that EPA set Clean Air Act Title II emissions limitations on GHG emissions from automobiles, and granting California a waiver to set its own automobile GHG standards. EPA had previously denied the waiver in 2008; a lawsuit followed. In January, 2009, California asked for reconsideration of the waiver request. EPA granted the waiver in June 2009 (the notice was published in the Federal Register on July 8, 2009).</p>
<p><b>Center for Biological Diversity v. Kempthorne</b></p> <p>08-05546 (lead case--a consolidated case is NRDC v. DOI, 08-05605) (N.D. Cal.)</p> <p>Settled: 5/14/2009</p>	DOI, NMFS, Dept. of Commerce	<p><b>Issue:</b> December 2008 amendments to the Section 7 consultation rules under the Endangered Species Act and the decision to exempt greenhouse gas emitters from regulation under the Endangered Species Act</p> <p><b>Result:</b> While the lawsuit was pending, the Department of Interior unilaterally revoked the Section 7 rule at issue, reverting to the Section 7 consultation process as it existed prior to the December 2008 amendments. The parties to this lawsuit then jointly agreed to dismiss the case. A formal settlement agreement was not issued.</p>
<p><b>Greater Yellowstone Coalition v. Kempthorne</b></p> <p>08-02138 (D.D.C.)</p> <p>Settled: 11/2/2009</p>	National Park Service, DOI	<p><b>Issue:</b> December 2008 rule allowing limited recreational snowmobile use (720 snowmobiles per day) inside Yellowstone National Park</p> <p><b>Result:</b> While the lawsuit was pending, the National Park Service announced, on October 15, 2009, a new winter rule superseding the December 2008 rule of which the plaintiffs complained. The plan reduced snowmobile usage to 318 snowmobiles per day, which is less than half the allowed number under the prior rule.</p>
<p><b>League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Kevin Martin</b></p> <p>09-01023 (D. Or.)</p> <p>Settled: Stipulation of Dismissal, 12/30/2009</p>	U.S. Forest Service	<p><b>Issue:</b> Whether authorization of the Wildcat Fuels Reduction and Vegetation Management Project in the Umatilla National Forest violates NEPA and Administrative Procedure Act</p> <p><b>Result:</b> U.S. Forest Service agreed to withdraw its decision notice for the project, which would have allowed timber to be harvested from the National Forest. The parties then agreed to dismiss the case.</p>
<p><b>Mississippi v. EPA (ozone case)</b></p> <p>08-1200 (D.C. Cir.)</p> <p>Settled: 1/19/2010 (This is the publication date of the proposed ozone standards)</p>	EPA	<p><b>Issue:</b> Ozone NAAQS Reconsideration</p> <p><b>Result:</b> Earthjustice sued EPA in 2008 challenging the NAAQS for ground-level ozone, which were lowered at the time from 84 parts per billion (ppb) to 75 ppb. In 2009, EPA announced it would reconsider the rule, and Earthjustice agreed to place its lawsuit on hold as long as EPA imposed stricter ozone NAAQS. EPA proposed new NAAQS somewhere in the range of 60 and 70 ppb. The Obama Administration put the planned rule on hold. However, the rule is expected to be proposed in late 2013.</p>
<p><b>Natural Resources Defense Council v. Federal Maritime Commission</b></p> <p>08-07436 (C.D. Cal.)</p>	Federal Maritime Comm'n	<p><b>Issue:</b> Federal Maritime Commission (FMC) decision to terminate portions of the Port of Los Angeles' and Long Beach's Clean Trucks Programs</p>

Case	Agency	Issue and Result
Settled: 9/11/2009		<b>Result:</b> While the lawsuit was pending, FMC ended its administrative investigation against the Ports of Los Angeles and Long Beach related to their clean trucks programs, and in a related case, FMC's attempt to block implementation of the ports' clean trucks program was dismissed.
<b>Natural Resources Defense Council v. DOI</b>	DOI, NMFS, Dept. of Commerce	<b>Issue:</b> December 2008 amendments to the Section 7 consultation rules under the Endangered Species Act and the decision to exempt greenhouse gas emitters from regulation under the Endangered Species Act  <b>Result:</b> While the lawsuit was pending, the Department of Interior unilaterally revoked the Section 7 rule at issue, reverting to the Section 7 consultation process as it existed prior to the December 2008 amendments. The parties to this lawsuit then jointly agreed to dismiss the case. A formal settlement agreement was not issued.
08-05605 (N.D. Cal.)		
Settled: 5/15/2009		
<b>Ohio Valley Environmental Coalition v. Army Corps of Engineers</b>	EPA	<b>Issue:</b> Clean Water Act Guidance for Mountaintop Removal Mining Permits  <b>Result:</b> Environmental groups challenged Clean Water Act permitting for mountaintop removal mining, saying EPA did not account for the impact on stream function. EPA issued this "guidance" while suit was pending in the U.S. Supreme Court, which effectively settled the case.
09-247 (R46-024) (U.S.)		
Settled: 7/30/2010 (Memo that effectively settled the case)		
<b>Sierra Club v. EPA (emission case)</b>	EPA	<b>Issue:</b> Emission-Comparable Fuels (ECF) conditional exclusion reconsideration  <b>Result:</b> EPA issued a December 2008 rule creating a category of Emission-Comparable Fuels (ECF) wastes that could be burned in industrial boilers without triggering RCRA combustion requirements, as long as the resulting emissions were comparable to those produced by burning fuel oil. Environmental groups sued, and EPA proposed a rule that would withdraw this conditional exclusion for ECF. In June, 2010, EPA published a final rule that revoked this conditional exclusion.
09-1063 (D.C. Cir.)		
Settled: 6/15/2010 EPA revoked the rule		
<b>Southern Appalachian Mountain Stewards v. Anninos</b>	Army Corps	<b>Issue:</b> Decision to issue a streamlined nationwide Clean Water Act permit for surface coal mining  <b>Result:</b> Army Corps suspended the use of Nationwide Permit 21, which authorized discharges of dredged or fill material into waters of the United States for surface coal mining activities. As a result, coal mining companies must obtain costly, time-consuming individual dredge and fill permits from the Corps.
09-00200 (Complaint, Army Corps Joint Status Report (stating decision to suspend NWP 21 permit), Stipulation of Dismissal)		
Settled: 6/18/2010 (This date is based on a 6/30/10 status report explaining the suspension of permits as of 6/18/10)		
<b>Taylor v. Locke</b>	National Marine Fisheries Service	<b>Issue:</b> Atlantic Herring Fishery Revocation of Exemption  <b>Result:</b> Settlement removes exemption that allowed herring industrial trawlers to release small amounts of fish that remain after pumping
09-02289 (D.D.C.)		
Settled: 7/19/2010		



Case	Agency	Issue and Result
	(NMFS)	without federal inspection. The new final rule by NMFS, published in 2010, requires federal accounting and inspection for all fish brought on board.

## FEDERAL COMMUNICATIONS COMMISSION

### Open Internet/Net Neutrality

On February 26, 2015, the FCC adopted its Open Internet (i.e., net neutrality) rules that would regulate broadband under Title II of the Communications Act of 1934. The FCC twisted data and cited to hypothetical concerns to justify its decision that reversed nearly two decades of bipartisan support for the current light-touch regulatory framework that has allowed the Internet to thrive. The Open Internet rules allow the FCC to tell broadband service providers how to price (through backdoor rate regulation), market, and manage their networks. It is estimated that Title II regulation will reduce private-sector investment in broadband infrastructure over five years by **\$28.1 billion to \$45.4 billion**. Title II also could enable up to **\$11 billion** per year in added state and local fees, plus possible federal universal service fees, to be included on consumer’s broadband bills. The FCC should not shackle today’s vibrant and competitive broadband marketplace with rules originally designed to regulate monopoly-era phone service when rotary-dial telephones were considered modern technology.

### Telephone Consumer Protection Act

To combat unwanted calls, the Telephone Consumer Protection Act (TCPA) of 1991 restricts the making of telemarketing calls, the use of automatic dialers, and the sending of faxes. Specifically, enacted when cell phones were high-cost technology owned by very few people, the TCPA imposes certain limitations on the use of “automatic telephone dialing systems” as well as artificial or prerecorded voice message when placing calls (and texts) to wireless devices.

While the wireless marketplace and consumer use of mobile technology have evolved rapidly over 24 years, the FCC’s regulations implementing the TCPA have not kept pace. The law is being abused through litigation theories never intended by Congress. For example, companies are being sued for reasons outside of their control, such as dialing a number provided by a customer that was later reassigned to another party. As a result, TCPA litigation has exploded—increasing **560%** between 2010 and 2014—and important, time-sensitive communications (e.g., alerts regarding data breaches, fraud, product recalls, flight delays, power outages, prescription refills, billing issues, upcoming appointments, etc.) to consumers are being hindered.

While Congress enacted the TCPA as a tool against abusive marketers, businesses in every economic sector now face significant litigation risk for technical violations of the law that cause no actual injury or harm to any consumer. Average attorney fees from TCPA class action settlements have increased from **\$870,000** in 2011 to **\$2,400,000** in 2014, while the average amount received per class member decreased from **\$9.53** to **\$4.12** during this same timeframe. The FCC has failed to recognize this threat to U.S. businesses and has yet to issue decisions on the numerous pending, TCPA-related petitions that seek regulatory relief that would curb these abusive lawsuits.



## CAPITAL MARKETS

### Conflict Minerals

Section 1502 of the Dodd-Frank Act requires businesses to disclose the use of four minerals (cassiterite, columbite-tantalite, gold, and wolframite), or their derivatives in any products and to certify that the source of those minerals is not from certain mapped conflict areas of the Congo. The final rules implementing Section 1502 were adopted by the SEC in August 2012, and created a process in which issuers would have determine whether any of the materials used in their manufacturing processes originated from militia-controlled mines in the Democratic Republic of the Congo (DRC). Companies would then be required to disclose whether their products are “conflict free” i.e. none of their manufacturing materials were sourced from such mines. The SEC estimated that the final rule would impose \$3-4 billion in implementation costs and between \$207-609 million in ongoing annual costs. Following a lawsuit led by the Chamber and others, the U.S. Court of Appeals for the District of Columbia struck down the rule’s labeling requirements as a violation of the First Amendment, but left intact some of the due diligence and other requirements. Additionally, several recent reports – including a December 2014 Washington Post front page story – have documented the harmful effects that the rule is having on people in the DRC; because of U.S. businesses pulling out of the region, more people are being driven into poverty or into the hands of violent militia. Not only is this rule a misguided burden on the American economy, it is actually serving to increase poverty and destitution in the DRC.

### Pay Ratio

Section 953(b) of the Dodd-Frank Act requires businesses to disclose the ratio of CEO pay to that of the median worker of the company. This requirement will add significant data collection burdens on businesses and their shareholders, particularly when considering that many companies have large overseas operations. Moreover, pay ratios did not cause the financial crisis and such a disclosure provides no decision-useful information to investors. The SEC proposed rules to implement 953(b) in September of 2013, yet woefully underestimated the potential costs of the rule. A survey and report released by the Chamber last year estimated that the rule would impose costs of over \$700 million on the economy; the SEC estimated that costs to be 1/10<sup>th</sup> of that. The SEC is expected to finalize the pay ratio rule later this year.

### Incentive Compensation

The Dodd-Frank Act requires eight financial regulatory agencies to jointly prescribe regulations or guidelines with respect to incentive based compensation practices at covered financial institutions. The agencies proposed prescriptive rules that will impose a one-size-fits-all system for compensation design on financial firms, failing to account for the unique characteristics of each firm’s ownership structure and business model and their impact on compensation design.

### Proxy Advisory Firms

The proxy advisory industry is currently dominated by two companies that have become the de-facto standard setters for corporate governance in the United States. These firms operate with very little transparency and their businesses models are rife with conflicts of interest. To address these deficiencies, the SEC issued guidance in 2014 that set out a number of reasonable

standards for the proxy advisory industry. What remains to be seen is whether the proxy advisory firms will adjust their business models as needed to conform with the SEC's guidance.

#### Nongovernmental Entities Acting as Regulators

Non-governmental bodies, including the Financial Accounting Standards Board (FASB), Public Company Accounting Oversight Board (PCAOB), as well as self-regulatory organizations such as the Financial Industry Regulatory Authority (FINRA) engage in regulatory-type rulemaking but are not subject to the checks and balances that other agencies are under the Administrative Procedures Act and other statutes. Such "shadow regulation" can cost the economy billions of dollars and increase the red tape that businesses, consumers, and investors have to deal with.

#### FINRA's "Comprehensive Automated Risk Data System" (CARDS) Initiative

In 2014, FINRA proposed a data collection program – known as CARDS – that would authorize FINRA to collect vast amounts of account-level data from broker-dealers. CARDS would impose tremendous burdens on broker-dealers – particularly small and mid-size broker-dealers – and would put at risk the sensitive financial information of millions of American investors.

#### SEC's Proposed Amendments to Reg D, Rule 506

Title II of the Jumpstart our Business Startups (JOBS) Act of 2012 directed the SEC to promulgate rules that would allow private companies to solicit their securities offerings, so long as the ultimate investors in such an offering were "accredited investors" under the SEC's definition. When the SEC finalized Title II rulemaking in 2013, it also proposed a set of amendments – not authorized under the JOBS Act – that, if adopted, could potentially make such private offerings *less* attractive than they were prior to the JOBS Act. Such an outcome would directly contravene the stated intent of the JOBS Act.

#### Volcker Rule

As a part of the Dodd-Frank Act, the Volcker Rule bans proprietary trading by banks, with exceptions for market-making and underwriting, which are critical services needed by business to raise capital. Regulators charged with implementing the rule admitted that they do not know how to define normal market-making and underwriting practices and have created a system to subjectively review trades. This rule, which was finalized in December 2013, will increase capital raising costs by billions of dollars while shutting some issuers from debt and equity markets entirely. In fact, regulators have extended the conformance period for an additional year to July 2016 as the normal shock absorbers in the market place were not there in late 2014 when the debt markets were in distress, and regulators need additional time to determine what fixes need to be made.

#### Office of Financial Research

The Office of Financial Research was created by the Dodd-Frank Act. OFR falls outside of the Congressional appropriations process and has wide ranging capabilities and rulemaking authority to compel businesses to provide proprietary data. While OFR is supposed to streamline data requests and use existing data to the best extent possible, it has wide ranging subpoena powers and ineffective post-employment restrictions that could allow proprietary business information to government custody. Moreover, the OFR's analysis and research – in particular its September 2013 report on asset managers for systemic risk purposes which is relied on by FSOC does not

go through the normal notice and comment process and has proven to be biased and factually incorrect.

### Basel III Capital Standards Framework

The Basel Committee on Banking Supervision – an international consortium of financial regulators – has adopted a number of standards to increase prudential regulation of the banking system worldwide. Many of these standards have been proposed for U.S. financial institutions by the Federal Reserve and other regulators. These include the proposed surcharges for globally systemically important banks (GSIBs), the liquidity coverage ratio (LCR) and the net stable funding ratio (NSFR). The combination and complexity of these requirements will likely impose severe burdens on the banking system that could ripple throughout the broader economy.

### Money Market Mutual Funds

In July 2014, the SEC made a second round of significant changes to money market fund regulation since the 2008 crisis, adding onto reforms it already made in 2010. The latest regulatory efforts fundamentally changed the way money market mutual funds price shares, moving from a stable net asset value to a floating net asset value (NAV) for prime institutional funds that are large purchasers of corporate commercial paper. This move to a fluctuating NAV is significant deterrence for institutional investors that are likely to shift cash to other options for liquidity and investment. If the capital pool from money funds diminishes, corporations that rely on money funds to purchase their commercial paper will be forced to find alternate, more expensive sources of capital to meet working capital needs.

### Definition of Predominantly Engaged in Financial Activities

Companies that are deemed to be “predominantly engaged in financial activities” are subject to consideration by the Financial Stability Oversight Council (FSOC) for designation as a Systemically Important Financial Institution (SIFI). While Dodd Frank set the revenue and asset threshold at 85% and defined “financial activities” the Federal Reserve is responsible for drafting rules. The Fed has circumvented congressional intent and expanded the list of activities considered to be “financial activities,” sweeping in a slew of companies that would not otherwise be eligible for designation. The rule and a supplemental rule were finalized in 2013.

### SIFI Designation

Nonbank financial companies may be designated by the FSOC and subject to enhanced prudential standards by the Federal Reserve. FSOC finalized rules and guidelines on the designation process and plans to designate firms by the end of the year. To date, FSOC has designated four nonbank companies, one of which is legally challenging its designating in court and another is actively working to sell assets and business units in an effort to become undesignated. Designation will have a profound impact on the capital markets, as there are significant limitations, activities and capital requirements that companies must comply with.

### Enhanced Prudential Standards

Bank holding companies in excess of \$50 million and designated nonbank SIFIs will have to comply the Federal Reserve’s Enhanced Prudential Standards rule. This rule was finalized for banks but the Federal Reserve has reserved the right to tailor rule for nonbanks and has only propose standards for one of the SIFIs. If rules are not tailored specifically to the industry and

the business model of the SIFI but look more like banking regulation, there is great risk that risk will be concentrated and will imperil the diversity of capital and tighten up liquidity in the marketplace.

### Whistleblower Rule

Dodd Frank provided for a bounty to any whistleblower that provides information to the SEC that leads to sanctions of \$1 million or more. Such rules completely ignore the stringent compliance programs that companies have developed in response to Sarbanes Oxley and improperly incentivize whistleblower to bypass internal reporting mechanisms. Moreover, a recent SEC enforcement action represents a very subjective interpretation of the whistleblower rules, and has caused a great amount of uncertainty for issuers who are looking to comply with the rule.

### Complaint Narratives

The CFPB recently finalized a “policy statement” that will allow the Bureau to post consumer complaint narratives. To this point, the CFPB has only published raw, unverified, aggregated complaint data, which was bad enough, but as of February, anyone can use a government website to rail against a financial services provider, with little or no due diligence on the Bureau’s part. There is no evidence that consumers use this database as a shopping tool as the Bureau suggests, rather it is used by special interest groups and the plaintiffs’ bar to target companies.

### Prepaid Cards

In December, the CFPB proposed a regulation that would create new, rigid, and biased disclosure obligations on providers of reloadable prepaid cards, and limit some card features. The proposal would interfere with card providers’ ability to compete on cards terms, and would effectively ban overdraft features on these cards. In addition, the proposal could make it more difficult for employers to use payroll cards to compensate their unbanked employees by requiring payroll card disclosures to be accompanied by a poorly worded warning that suggests there is something wrong with these cards.

### Arbitration

The CFPB is very likely to propose a regulation later this year that would explicitly or effectively ban pre-dispute arbitration clauses in consumer financial contracts. Dodd Frank required the Bureau to study these clauses, and if necessary based on the study results, regulate them. The CFPB completed its study in March, 2015, concluding incorrectly that “Arbitration clauses limit consumer relief.” In fact, arbitration is a faster, cheaper alternative to seeking redress through the courts, and the use pre-dispute arbitration has been one of the most significant tort reform measures in recent decades by limiting class actions.

### Military Lending Act

The Department of Defense, in conjunction with the CFPB, proposed a regulation in September that could seriously limit servicemembers’ access to credit. The Military Lending Act (MLA) was intended to address predatory lending, but the DOD’s proposal would bring all consumer credit under the strictures of the act, including a hard APR cap and a ban on pre-dispute arbitration (see above). The proposal assumes that companies can make instant determinations about a potential customer’s military status, when, in fact, that capability is extremely limited.

### Non-Bank Supervision

The CFPB has proposed a regulation to define which non-bank financial product/service providers are subject to bank-like examinations. The proposal contains no cost benefit analysis, and the Bureau did not conduct a small business impact panel, because they contend that defining the universe of companies that *may* be examined imposes no cost – at least not until they decide to actually undertake an exam. Of course, every company that the rule covers, based on annual receipts, will have to assume the Bureau will initiate an exam, and begin making costly preparations.

## **LABOR**

### NLRB Representation-Case Procedures (Ambush Election Regulations)

On December 22, 2011, the National Labor Relations Board published a final regulation governing numerous technical provisions governing the method by which union organizing elections are held. The Chamber filed a lawsuit challenging the regulations and on May 14, 2012 a federal district court ruled that the Board did not have a quorum when it adopted the regulations and invalidated the rule. After its request for reconsideration was rejected, the Board rescinded the changes and repropose the same rule on February 6, 2014. On December 15, 2014, the Board promulgated the final rule, which the Chamber challenged in federal court on January 5, 2015.

The end result of these changes, should they go into effect, is that union elections will take place much quicker, perhaps in half the time of the current average 39 days. The speedier elections occur at the expense of employer due process and free speech rights and will tilt the playing field in favor of organized labor and against employers and employees. The Board grossly underestimated the cost impact of the proposal. NLRB only considered cost from the perspective of the small number of employers who typically faced election petitions in the past, and they ignored the facts that (1) the proposal may increase the likelihood of petition filings and (2) that the shortened schedule imposes preparation costs on employers to anticipate the risk of a petition in advance of actual filing. Regardless of whether they are subject to an election petition in a given year, every firm covered by NLRB jurisdiction will be required to be prepared to respond in the event that a petition is filed. For example, the requirement in the rule that employers provide lists of employees in specified format within two days of receipt of a petition means that every employer will need to keep up-to-date information that they may not currently maintain because the two day production requirement is too short to enable complete assembly of the required information after a petition is received. Even if only one hour of advance preparation time were required each year, the NLRB rule would impose over \$121.8 million in new compliance cost burdens on the 2.5 million private employers potentially affected.

### NLRB Notice of Employee Rights under Labor Laws Regulation

On August 30, 2011, the National Labor Relations Board finalized regulations mandating that all employers covered by the NLRA post a biased notice of employee rights under the NLRA. Over 5 million private establishments with employees are subject to NLRB jurisdiction, and the posting requirement would impose a compliance burden of over \$60 million. On September 19,

2011, the Chamber filed a lawsuit against the NLRB in South Carolina, challenging this regulation. A similar lawsuit was also filed in federal court in the District of Columbia. The federal court in D.C. upheld the authority of the Board to require employers to post notices. However, the D.C. court invalidated most of the enforcement provisions, including the creation of a new unfair labor practice and the tolling of the statute of limitations. Meanwhile, on April 13, 2012 the federal court in South Carolina ruled that the Board does not have the authority to issue the rule at all. On June 14, 2013, in the lawsuit brought by the Chamber, the 4<sup>th</sup> Circuit Court of Appeals struck down the regulation, stating that the NLRB did not possess the statutory authority to promulgate the notice-posting requirement. On August 12, 2013, the 4<sup>th</sup> Circuit Court of Appeals denied NLRB's petition for rehearing *en banc*. On September 4, 2013, the Court of Appeals for the D.C. Circuit denied a similar request by the Board. On January 3, 2014, the NLRB did not petition the case to the Supreme Court, effectively ending the litigation. As a result, the poster requirement will not be enforced.

#### OFCCP Federal Contractor Affirmative Action Obligations under the Rehabilitation Act Proposed Regulation

On December 9, 2011, the Office of Federal Contract Compliance Programs published a notice of proposed rulemaking significantly altering the regulations implementing Section 503 of the Rehabilitation Act. The final regulations, which were published on September 24, 2013 establish utilization goals for contractors and require contractors to ask for employees and applicants to self-identify as individuals with disabilities. In addition to these requirements, the rule imposes numerous new burdensome paperwork and recordkeeping requirements that, according to DOL's own estimates could cost contractors upwards of \$659 million per year without any guarantee of actually increasing the percentage of individuals with disabilities in the workforce. The OFCCP regulatory analyses omitted significant categories of compliance cost burdens and grossly underestimated others.

#### OFCCP Compensation, Data Collection, and Analysis Regulations and Guidance

The OFCCP is embarking on an effort to collect massive amounts of individually identifiable pay and benefits data without adequate privacy protections and without even a scintilla of evidence of wrongdoing.

On August 8, 2014, the Office of Federal Contract Compliance Programs promulgated a proposed rule, developing a compensation data collection tool. Under the proposal, companies that file EEO-1 reports with the federal government, and that have more than 100 employees and hold federal contracts or subcontracts worth \$50,000 or more would have to submit summary pay data on their workforces broken out by race, sex and ethnicity to the OFCCP in an "Equal Pay Report." The report would require the submission of summary data on employee compensation by sex, race, ethnicity, specified job categories, and other relevant data points such as hours worked, and the number of employees.

Given the resources required, the total one-time burden estimate of \$33.5 million and recurring annual burden estimate of \$12.6 million fall far short of the expected costs to be imposed on contractors. The OFCCP does not cite any source for these estimates of labor hours. Instead, the hours used throughout OFCCP's calculations of contractors' compliance costs appear to be

arbitrary guesses with no basis in the realities of the operation of human resource management and reporting systems.

#### Employer and Consulting Reporting Under the LMRDA Persuader Regulations

On June 21, 2011, the Labor Department published a proposed rule that would greatly narrow the definition of the “advice” exemption under the Labor Management Reporting and Disclosure Act. If implemented, even the most routine advice from a lawyer to an employer facing an organizing drive would be subject to disclosure. The end result will be a chilling effect on the number of lawyers providing labor relations advice and increased pressure on employers not to exercise their legally protected rights, such as free speech. The agency estimated that its expanded requirements for completion and filing of the LM Form 10 under the LMRDA would require just twenty minutes per year for each potentially affected employer to review the Form 10 instructions and to determine whether or not a report is required. This time estimate was not based on any actual data from affected employers; it was just an arbitrary estimate made by the rule-writing bureaucrats. Our analysis, based on interviews and input from real employers who have actual experience complying with the relevant recordkeeping requirement found that the realistic time requirement would be more than twice as long for just that initial step of determining whether filing the form is required. The agency also grossly underestimated the number of employers who would at least need to make that initial coverage determination. When both the time and coverage errors are corrected the annual compliance cost jumps from the Department of Labor’s estimate of less than \$1 million per year to an economically significant total of more than \$203 million per year.

#### EEOC Guidance on Employer Use of Criminal history Information

On April 25, 2012 the EEOC adopted new enforcement guidance regarding employers’ use of applicant and employee criminal history information. The guidance makes clear that the EEOC will be much more aggressive in enforcing non-discrimination laws, under a disparate impact theory, against employers who consider criminal history records. In particular, employers will be under pressure to demonstrate that they have established a tight nexus between the criminal history for which they are screening and the jobs in question and whether they offer the applicant or employee an “individualized assessment” in order to explain the criminal history.

#### New OSHA Regulation Requiring Reporting of Hospitalizations

On January 1, 2015, OSHA’s new regulation requiring employers to report the hospitalization of any employee (previously only required with three or more employees), an amputation, or loss of an eye went into effect. Employers have 24 hours from the admission of the employee to the hospital for treatment or cure, or from when the employer finds out about the hospitalization to report to OSHA via a phone call to either the area office or a toll free national number. A planned online web portal is not available. OSHA has stated that these records will be posted on the internet, and will also trigger follow up contact, possibly including inspections, from OSHA.

By dropping the threshold of employees from three or more to any individual employee, OSHA has created several problems. Chief among them is whether the hospitalization is work related. Under the previous three or more employees threshold, there would not be any question whether the hospitalization was work related. Under the new standard, many hospitalizations may not be work related (such as heart attacks, or even a woman going into labor), but employers will be



inclined to report regardless given OSHA's aggressive enforcement posture. OSHA is therefore about to be inundated with reports, many of which will be of no value to OSHA. Furthermore, many of these reports that will be posted on the internet will paint an inaccurate picture of the employer's safety practices—merely because there is a hospitalization does not mean a company's approach to safety was at fault. Finally, OSHA is expecting employers with hospitalizations to submit to OSHA a "Root Cause Analysis" describing what happened, what went wrong, and how the employer will remedy the problem. Submitting such an analysis would essentially be an admission of guilt and jeopardize the employer's due process rights.

#### OSHA Proposed Revised Respirable Crystalline Silica standard

OSHA's proposed revisions to the silica standard would impose dramatic and tremendously disruptive new requirements on employers in a wide variety of industries such as construction, ceramics, brick manufacturing, foundries, hydraulic fracturing, and glassmaking. The rule-making suffers from several fundamental problems: 1) OSHA has never been able to explain the need for the new regulation in light of a precipitous decline in silica related mortalities (93% since 1968 according to CDC data) despite approximately 30% of workplaces with silica still having exposures above the current limit—in other words why is a new exposure level, along with many other requirements, necessary if OSHA has not demonstrated full compliance with the current level and death rates have come down anyway? 2) OSHA's technological feasibility assessment does not account for testing labs not being able to measure exposure down to the levels specified in the rule-making. 3) OSHA's recommended protective measures are impractical and in some cases unworkable—the agency has explicitly ruled out the least expensive and most effective forms of protection in favor of large scale and exceedingly expensive "engineering controls." 4) OSHA's economic feasibility assessments do not include many significant cost factors such as testing and monitoring exposure. 5) OSHA refused to conduct a new SBAR panel despite the previous one being done 10 years before this rulemaking was proposed and lacking representation from several key industries that were not prominent when the panel was conducted in 2003 such as hydraulic fracturing. The key recommendation of the small entities participating in that panel was for OSHA to not proceed with this rule-making as it had not justified its need. 6) The administrative hearings conducted were heavily biased and did not give industry representatives adequate opportunity to question OSHA experts while subjecting industry experts to unlimited questioning by OSHA representatives.

#### OSHA Proposed Regulation to Improve Tracking of Workplace Injuries and Illnesses (electronic injury and illness reporting)

OSHA has proposed a new regulation that will require employers to submit to the agency their injury and illness records—currently these must be made available to OSHA during an inspection but there is no specific requirement to submit them. Once submitted, OSHA plans to post the employer-specific records online in a searchable data base. This rule-making has the following fundamental problems: 1) This rule is not authorized by statute—the sections of the Occupational Safety and Health Act upon which OSHA relies, only authorize OSHA to create reporting regimes that provide information to the agency, the act does not authorize OSHA to gather data for public dissemination. 2) The proposed rule will not achieve OSHA's stated purpose of improving workplace safety. It will merely create arbitrary enforcement action subject to attack under the Fourth Amendment. 3) The proposed rule will require more resources than OSHA will ever have. OSHA must scrub millions of pieces of private employee data before

putting the reports on the internet—a process clearly beyond the agency’s resources. 4) Even if OSHA had the resources to review and remove employee identifying information, publication of the reports will violate the legitimate privacy interests of employees. For employers who operate facilities in small communities, for example, the information to be made available, such as the date of the injury, location, severity, and treatment, will make it easy for members of those communities to identify the employee. For all employers, the location of any injury, coupled with information on OSHA’s Form 300s, 300As, and 301s, may be sufficient to reveal the employee.

#### OSHA Supplemental NPRM to Rule-Making to Improve Tracking of Workplace Injuries and Illnesses—Upending Statutory Whistleblower Protections

Following on the original proposed rule-making OSHA issued a “supplemental” NPRM that would fundamentally alter the statutory whistleblower protections. The proposal would give OSHA the ability to issue citations to employers for violations of whistleblower protections without an employee filing a complaint<sup>11</sup> as required by the statute<sup>12</sup>, i.e. *without a whistleblower*. The supplemental also failed as any type of a proposed regulation as there was not one word of proposed regulatory text, nor even any general descriptions of what the regulatory text would be, thereby undermining the ability of the regulated community to provide meaningful comments. OSHA provided no data, reports, or studies to support this action, relying instead solely on comments made by a few union representatives at the public meeting on the underlying rule-making (see above). In addition, the proposal lacked any of the required discussions of how OSHA had handled its obligations under various rule-making requirements like the Regulatory Flexibility Act, the Paperwork Reduction Act, the Unfunded Mandates Act, and E.O. 12866. The proposal did not receive E.O. 12866 review which meant there was no indication it was coming and its publication was a complete surprise. Nor did OSHA provide any of the required discussions on economic and technological feasibility.

#### OSHA Column to Track Ergonomic Injuries Under Injury Logs

On January 29, 2010, OSHA proposed a new regulation reinstating a column on the OSHA injury log to track work-related musculoskeletal disorders (WMSDs)—the kind of injuries associated with ergonomic risks. Determining whether an MSD is work related is very difficult as many non-workplace factors and life style issues can play significant roles. Furthermore, OSHA’s economic analysis was woefully inadequate. A final regulation proposal went to the Office of Management and Budget’s Office of Information and Regulatory Analysis, on July 14, 2010. On January 25, 2011, OSHA announced that they were withdrawing the proposal from OMB review to solicit more input from small businesses. The Consolidated Appropriations Act, 2012 (P.L. 112-74) included a defunding rider blocking the Department of Labor from using any funds to proceed forward with this regulation during FY 2012 (Oct. 2011-Oct. 2012). That rider was discontinued starting with the FY 2014 appropriations package. Despite this regulation being listed on the long-term action list of the Regulatory Agenda, this is a regulation that could be finalized at the end of the Obama administration.

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<sup>11</sup> 79 Fed. Reg. 47607.

<sup>12</sup> 29 U.S.C. 660 (c)(2).

### OSHA Rulemaking Problems

The agency has avoided beneficial steps in the rule-making process in the name of expediency, or even avoided rule-making altogether despite trying to implement substantive changes to regulations.

OSHA has repeatedly not conducted Small Business Advocacy Review (those called for by the Small Business Regulatory Enforcement Fairness Act) panels for proposed regulations that would have direct impacts on small businesses and where small business input could have helped the agency shape a better regulation. Examples of this include: the recently finalized rulemaking to change industrial classifications from the Standard Industrial Classification (SIC) system to the North American Industrial Classification System (NAICS) which determined which industry classifications of small businesses would have to maintain records and also included new reporting requirements for hospitalizations that will directly impact small businesses; the injury and illness reporting rule-making mentioned above as well as the supplemental NPRM upending the whistleblower protections; and a since-withdrawn proposed regulation that would have made small businesses who volunteer to use OSHA-provided safety consultations more vulnerable to inspections. While OSHA may, in some of these examples, be able to claim that the rulemakings did not reach the trigger of having “significant economic impacts on a substantial number of small entities,”<sup>13</sup> OSHA always has the option of conducting SBARs at their own discretion and doing so would have provided the agency valuable input before a proposal was published.

OSHA has also aggressively worked to avoid having proposed regulations undergo reviews at OIRA under E.O. 12866. This is important for several reasons. Conducting these reviews is a way for the administration to know whether a rule-making is controversial and may draw a legal challenge. More importantly, interested parties are able to tell when something is undergoing review by checking OIRA’s website, and then schedule meetings to raise concerns, and know when something is due to be published. Without these reviews, there is no advanced notice. As mentioned above, the supplemental NPRM that will substantively change the statutory whistleblower protections was never given a 12866 review. OSHA has also convinced OIRA not to conduct a 12866 review for an upcoming proposal that will undo an appellate court ruling invalidating an OSHA enforcement policy claiming that a statute of limitations actually means OSHA has five years to issue a citation for recordkeeping violations instead of the six months specified in the statute. As the dispute is over statutory language, and not policy, OSHA cannot affect this change through a regulation; it requires Congressional legislation. In both of these examples, the regulations may not meet the \$100 million effect on the economy trigger for review under E.O. 12866, but they both “raise novel legal or policy issues”<sup>14</sup> that deserve to be examined closely.

OSHA has also sought to implement substantive regulatory changes through non-rule-making actions such as memos to field staff and letters of interpretation. In these cases, there are no notices that something is coming, no opportunity for those affected by these actions to provide any input, and very little opportunity to hold the agency accountable. In one example, a memo to area directors on scenarios that would represent violations of whistleblower protections included the use of safety incentive programs despite the complete absence of any statutory or regulatory

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<sup>13</sup> 5 U.S.C. 605(b).

<sup>14</sup> E.O. 12866, Sec. 3 (f)(4).

definitions or guidance on this point. OSHA thus created a new consequence for employers with these programs without providing any data, explanation, or support for this position, and with no statutory authority to do so. In another example, OSHA issued a letter of interpretation, at the request of a union that contradicted regulations requiring employee representatives accompanying an OSHA inspector to be employees of the company rather than outside third parties, with only limited exceptions, thereby permitting union representatives not affiliated with the company to accompany OSHA inspectors during walk around inspections. This would allow union representatives to use OSHA inspections to come onto company property during organizing campaigns in ways they would not otherwise be permitted to do. Both of these actions needed to have been done through full rule-makings where OSHA would have had to present compelling rationales and data for implementing these changes.

### **ADMINISTRATION’S 2011 REGULATORY RETROSPECTIVE REVIEW**

The 2011 Obama administration retrospective review was neither unique nor credible. The administration proclaimed it an “unprecedentedly ambitious government-wide review of existing federal regulations”<sup>15</sup>. Yet, Section 610 of the Regulatory Flexibility Act already directs agencies to conduct such a review for regulations 10 years old or older. In addition, every recent administration going back to the Reagan administration has sought to eliminate unnecessary and out of date regulations.

The previous review also lacked credibility when the administration claimed to have reduced regulatory burden by \$4 billion over five years<sup>16</sup> from three regulations from DOL, EPA, and DOT. This translates into less than \$1 billion of savings per year. This number shrinks even further when \$2.5 billion (about \$500 million/year) of the \$4 billion was attributed to the 2012 OSHA Global Harmonization System/Hazard Communication System regulation. When spread out over the approximately 5 million employers OSHA claims will be covered, this meant about \$100 per company per year. The theory behind the reduced burden was that before this regulation, producers and users of covered chemicals had to maintain two series of labels and data sheets if they sold their products into other countries covered by the UN adopted GHS regulation. By harmonizing these standards, these companies now only have to deal with one set of labels and data sheets, but such claims ignore the cost of developing and maintaining new labels and data sheets to conform to the new standards. Furthermore, the OSHA GHS regulation was NOT the result of the lookback process. It was initiated by the Bush administration and had been called for by Congressional Republicans and even businesses. This regulation homogenizes two similar but not identical regulatory schemes into one—it does not go back and eliminate an old regulation that was outdated.

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<sup>15</sup> “Washington is Eliminating Red Tape,” Op-ed by Cass Sunstein, Wall Street Journal, August 23, 2011.

<sup>16</sup> *Id.*

## PENSIONS

### DOL Definition of Fiduciary Regulation

On October 21, 2010, the Department of Labor (DOL) Employee Benefits Security Administration issued a proposed regulation on the definition of a fiduciary under ERISA with the intent of more broadly defining the circumstances under which a person or entity is considered to be a fiduciary when giving investment advice to an employee benefit plan or a plan's participants. The Chamber believes that the expansion of the fiduciary definition should not be interpreted to include every act related to a retirement plan. Rather, a balance needs to be struck that protects participants and allows for the free flow of information and services in the market. The Chamber's comments noted several areas of concern including the potential impact on ESOPs, broker-dealers, and IRAs. The Chamber's analysis found that the EBSA estimates of the economic impact of the proposed regulation were seriously deficient, including omission of the effect of the rule on employment in the affected industries. EBSA estimated annualized costs of \$1.9 million to \$2.1 million for affected service providers to conduct compliance review and to implement changes in operating procedures necessary to comply with the fiduciary status requirement. EBSA assumed that the average service provider would require only 16 hours of labor per year at a cost of \$119 per hour to accomplish the necessary compliance review. There was no empirical basis for the assumption that the average service provider would be able to conduct an adequate compliance review of its entire business "book" in 16 person hours. Neither is the \$119 per hour labor cost based on empirical evidence. At the very least EBSA should have conducted interviews of potentially affected service providers to determine this key parameter. In addition, EBSA significantly underestimated the number of affected entities as only 5,300. EBSA omitted large classes of small employers whose administration of benefit plans would be affected and underestimated the impacted employer population by more than 100,000. EBSA failed to consider that imposing the proposed new fiduciary responsibilities on service providers would require changes in the way in which their services are provided and would generally increase the costs of the services that they provide. These increased costs would be reflected in higher service fees charged to plans for the affected services. The resulting higher plan administration costs would directly impact plan participants in terms of lower returns on investment or smaller employer contributions to participant's retirement savings plans as a result of the higher plan administration costs. In addition to the direct costs of higher service fees, plans and participants may also be adversely affected by the reduction in services available as some service providers withdraw from the market or restrict the range of services offered in response to the requirements of the regulation. Including these economic impacts would likely bring the total annual cost burden of the proposed regulation to an amount in excess of \$100 million per year.

On August 5, 2011, the Chamber sent a letter to Labor Secretary Solis requesting a re-proposal of the proposed regulation based on the lack of sufficient economic analysis and on September 19, 2011, the DOL stated that it will re-propose the definition of a fiduciary. In February 2015, the DOL submitted the re-proposed rule to the Office of Management and Budget's Office of Information and Regulatory Analysis and it was released on April 14, 2015. The Chamber will act as necessary to ensure that a proper balance is struck.

## IMMIGRATION

### Forthcoming DHS - DOL Joint Rule for the H-2B Visa Program

Recent litigation concerning the regulation of the H-2B program (temporary non-agricultural lesser skilled workers) has created a state of uncertainty for H-2B employers. When a federal judge in the Northern District of Florida ruled that DOL did not have the authority to issue rules governing the operation of the program, the court permanently enjoined the 2012 and 2008 H-2B program rules promulgated by DOL. DOL and DHS temporarily shut down the H-2B program, which caused a bipartisan backlash on Capitol Hill. In response to the outcry, DOL and DHS resumed processing H-2B petitions after a stay on the court's injunction was issued by the judge. DOL and DHS publicly announced that they would be jointly issuing an emergency rule to govern the future processing of H-2B petitions. It is feared that the two agencies will propose something similar to DOL's 2012 H-2B program rule that would have devastated H-2B employers because the rule would have imposed many of the regulatory burdens that currently afflict the H-2A program for temporary agricultural workers. In addition, the Administration wants to eliminate the practice of employers using private wage surveys to determine what wages need to be paid to H-2B workers. In short, the Administration wants to raise the costs of using the H-2B program across the board.

Given that the H-2B visa category is the only program for employers to lawfully hire temporary, non-agricultural, lesser-skilled workers, if DOL and DHS propose a rule that would undermine the viability of the program, many small businesses and their American workers would directly suffer the repercussions brought about by an ill-conceived regulation. The types of costs the Administration sought to impose under the 2012 rule would have left many small businesses with razor-thin profit margins not only without the workers they need, but it would have put many small H-2B employers out of business. New regulations on both the wage methodology and the overall program went to OIRA for review on April 13, 2015. There is some expectation that they may be implemented as interim final regulations.

### USCIS Proposal for New Employment Verification Form (I-9 form)

The I-9 employment verification form is used by all employers in America to verify the employment authorization of any new employee at the time of hire. In January 2011, the Chamber asked the U.S. Citizenship and Immigration Services (USCIS) to develop a government-provided electronic I-9 form that would program out most technical and procedural errors, as well as some violations considered easily avoidable. Instead of introducing a "smart I-9" in 2013, USCIS published and finalized a paper-only approach with a new two page form and seven pages of instructions.

### CBP Failure To Engage In Rulemaking To Eliminate Arrival-Departure Card (I-94 Card)

Customs and Border Protection (CBP) is moving to an electronic admission number to document the arrival and departure of non-immigrant foreign nationals. This commendable development has been tainted by the failure of CBP and the other agencies whose existing regulations require the use of the I-94 admission number to properly update their regulations to transition to the new system. In practice, many Chamber members have experienced difficulties using this electronic system wherein out-of-date I-94 documents are displayed in the records that CBP provides for

public use, or no I-94 admission data can be located for an individual employee. When an employer is obligated to complete the Form I-9 within three business days after hire, the employer is dependent upon the I-94 admission information being accurate and available. The inability to timely access the correct information is an ongoing issue for our members. Meaningful administrative changes to the electronic I-94 system will not happen unless Congress conducts proper oversight that pushes the Administration to improve the system's functionality.

## **HEALTH CARE**

### Definition of Minimum Value Coverage

On November 4, 2014, the Department of Health and Human Services (HHS) and the Internal Revenue Service (IRS) issued additional Guidance that even further imposes inappropriate requirements which exceed the statutorily-prescribed minimum value definition under the employer mandate requirement. Specifically, this Guidance requires a group health plan to provide "substantial coverage for inpatient hospitalization services" to be considered a minimum value plan (Notice 2014-69).

Similar language was also reiterated and included in the HHS Notice of Benefit and Payment Parameters for 2016 (Proposed Rule) issued on November 26, 2014. Both the Proposed Rule and the Guidance include language that contradicts specific language in the Affordable Care Act (ACA) which states that a plan meets the minimum value requirement "if the plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of such costs." This statutory language does not compel, or even suggest, that minimum value is to be assessed based on a comparison to a third-party benchmark or is to mandate coverage of an essential health benefit.

Despite the repeated reiteration of the statute which only requires plans offered in the small group and individual markets to cover essential health benefits, the Proposed Rule improperly imposes additional benefit mandates on employer-sponsored plans that are either self-insured plans or purchased in the large group market. The statute does not specify, nor does it suggest that the Secretary should specify, what precise benefits must be covered by an employer sponsored plan to satisfy the minimum value standard.

The process and precedent that the Proposed Rule follows and paves is alarming. The Proposed Rule substitutes the statute's plan-based benchmark, which requires that a plan simply cover 60 percent of the total costs of the plan's benefits, to a new requirement that the plan include substantial coverage of inpatient hospital services and physician services. In light of HHS's conclusion that 98 percent of covered persons already have minimum value coverage, it is unreasonable to redraft statutory language through regulation, burdening employers with proving in the affirmative what the report shows the overwhelming majority of employers already offer.

### 40 Percent Excise Tax on High Cost Health Coverage

The Treasury Department and the IRS issued a Notice/Request for Information on February 23, 2015 on the ACA's Excise Tax on High Cost Employer-Sponsored Health Coverage in § 4980I. This Excise Tax was intended to be an avoidable tax that encouraged employers to curtail excessive health coverage offerings which insulate employees from the cost of health care



services, thereby fostering unnecessary utilization. In fact, based on analyses by the Joint Committee on Taxation in 2009, only about 3% of premiums will be affected by this provision in 2013. However, the Notice issued in early 2015 considers including in the calculation of a plan, the employee's tax preferred contributions to a Health Savings Account (HSA) or Flexible Spending Account (FSA).

This is problematic for a number of both procedural and substantive reasons. First, the amount of money that an employee elects to contribute on a tax-preferred basis to his/her HSA/FSA is an election that the employer does not control. The only way for an employer to control and limit this election which could be by the Guidance interpretation push a plan over the threshold would be to cap the amount of employee salary dollars that could be contributed to the HSA/FSA. This would be substantively problematic, since HSAs/FSAs were by-design intended to help individuals pay for their health care services and promote greater consumerism by individuals. By including the employee's contributions to HSAs/FSAs, this guidance will exponentially multiply the number of plans that exceed the threshold and also undercut a central goal of the ACA: affordable access to health care services.

#### Improperly Short Comment Periods

The U.S. Chamber of Commerce submitted four requests to the Secretary of HHS between December 7, 2012, and January 18, 2013, asking for an extension of the comment periods for the following proposed rules to allow for appropriate review and feedback. The proposed rules dealt with: (1) Standards Relating to Essential Health Benefits, Actuarial Value, and Accreditation; (2) Health Insurance Market Rules; Rate Review; (3) HHS Notice of Benefit and Payment Parameters for 2014; and (4) Medicaid, Children's Health Insurance Programs, and Exchanges. These proposed rules all had comment periods that ranged from 22 to 30 days: the first two rules' comment periods began on the date of publication in the federal register and the latter two rules had comment periods beginning from the date of filing for public inspection. While these regulations all have extremely short comment periods, especially in light of their length and complexity, the dates when the regulations were signed, approved, released, and published raise additional questions about the abnormal process the administration has been using throughout the implementation of ACA. Given how costly, complex, and burdensome the ACA regulations are for the business community, the minimum of a 60-day comment period for all proposed rules would have been much more appropriate and would have allowed for an increased opportunity for a meaningful comment process.

## **TRANSPORTATION**

### Positive Train Control (PTC)

"A mandate that is off the rails." (George Will, Washington Post, 2013)

Positive Train Control is advanced technology designed to automatically slow or stop a train before certain accidents—collisions, derailments, or unauthorized movement of trains onto tracks—occur. The Rail Safety Improvement Act of 2008 mandated nationwide implementation of PTC by December 31, 2015. As described by the Association of American Railroads, "Due to PTC's complexity and the enormity of the implementation task — and the fact that much of the technology PTC requires simply did not exist when the PTC mandate was passed and has had to

be developed from scratch — much work remains to be done.” Due to numerous regulatory and technological barriers, full development and deployment of PTC by December 2015 is impossible:

- FCC approval of each of 22,000 PTC-related antennas, one-third of which are on tribal lands.
- Interoperability across the United States.
- Availability of spectrum.
- Technology still under development.
- Magnitude of equipment deployment—along 60,000 miles of freight track, in every locomotive, and in thousands of wayside stations.
- Capital cost.

The Federal Railroad Administration (FRA) cited a cost-benefit ratio of 22:1 in its final rule (2010) implementing PTC. The railroad industry—freight, passenger and commuter—will make \$12-15 billion in capital outlays for PTC, and maintenance costs could approach \$1 billion per year. Yet, according to FRA, trespasser and highway-rail grade crossings account for 95% of all rail-related deaths (GAO, 2013), and PTC will address none of these.

Congress has the opportunity to take action to extend the deadline for meeting PTC requirements and allow Railroad Rehabilitation and Improvement Financing (RRIF) resources to be used for the necessary capital investments.

#### Trucking Hours of Service (HOS)

In a final rule issued December 27, 2011, the Federal Motor Carrier Safety Administration (FMCSA) adopted a significant change to existing hours of service rules for commercial truck drivers called the “34-hour restart provision.” Through the rule, FMCSA sought to address concerns that, “Working long daily and weekly hours on a continuing basis is associated with chronic fatigue, a high risk of crashes, and a number of serious chronic health conditions.” Opponents of the 34-hour restart provision, including the U.S. Chamber and the American Trucking Association, argued that the projected safety benefits of the new restart restrictions were unsubstantiated and were not based on sound scientific evidence when first promulgated. The American Trucking Associations sued FMCSA to overturn the rule, but the U.S. Court of Appeals for the District of Columbia upheld all but a minor provision of the rule in its August 5, 2013, decision.

The FMCSA estimated \$133 million in net benefits attributable to the restart provision of the rule. However, an industry analysis of FMCSA’s estimates resulted in a \$189 million net loss to the industry—a \$322 million difference. Trucking companies have noted a number of operational and financial effects of the rule, including:

- Being forced to buy more power units.
- Having fewer drivers available to make trips, while simultaneously dealing with an industry-wide driver shortage.
- Reduced fleet miles and increased operating costs per mile.
- Lost earnings to drivers.

Although FMCSA has suspended enforcement of one aspect of the rule -- the restart provision -- pursuant to the Consolidated and Further Continuing Appropriations Act, 2015, enacted December 16, 2014, the suspension is only temporary until the later of September 30, 2015, or upon submission of a final report to be issued by the Secretary of Transportation.

## **ENERGY EXPORTS & INFRASTRUCTURE**

### Natural Gas Export

The Natural Gas Act of 1938, as amended requires all shipments of natural gas to foreign countries first be approved by the Department of Energy (DOE). DOE promulgated regulations (10 CFR Part 590) to implement this requirement that in part deems applications to countries with which the United States has entered into a Free Trade Agreement (FTA) automatically considered in the public interest. If the application is for export to a non-FTA country, DOE will approve it if it finds such exports are inconsistent with the public interest. Such potential disparate treatment of World Trade Organization countries is in violation of the U.S.'s obligations under the WTO. Additionally, the licensing process does not provide a time requirement for DOE to make a decision which causes significant market uncertainty.

### Crude Oil Export

The Energy Policy & Conservation Act of 1975 prohibits the export of crude oil produced in the United States. The Bureau of Industry and Security (BIS) at the Department of Commerce administers this prohibition through Export Administration Regulations (15 C.F.R. Parts 730-774). These regulations have been amended to allow various exceptions to the prohibition, including for the export of crude oil to Canada. Treating WTO member countries disparately violates the WTO requirements, which the U.S. is a party. Moreover, this restraint on trade and commerce is harming the national interest by acerbating a growing glut of domestically produced crude oil and forcing domestic producers to sell oil at prices below what their competitors abroad can obtain. This market distortion is costing the U.S. economy hundreds of thousands of jobs and billions of dollars of economic growth. Additionally, this prohibition forces the U.S. to forego potential geopolitical benefits of export crude oil such as undermining oil exporting countries which use such exportation as leverage against importing countries.

### Presidential Permit process for cross border infrastructure

Executive Order 13337 provides that a facility connecting the United States with a foreign country, including a pipeline, requires a Presidential Permit from the Department of State (DOS) before it can proceed. A decision to issue or deny a Presidential Permit application is based on a determination that the proposed project would serve the "national interest." This term is not defined in the Executive Orders. There is no time limit for DOS to make a National Interest Determination, nor is there a limit for the number of environmental assessments that may be required for a project. Consistent with the President's broad discretion in the conduct of foreign affairs, DOS has significant discretion in the factors it examines in making a National Interest Determination. The lack of a defined or streamlined process and a deadline for a National Interest Determination has led to excessive delays for critical projects and stranded and sunk capital.

## RETROSPECTIVE REVIEW

It is worthwhile to consider potential techniques for improving the retrospective review of existing federal regulations. As the number of existing regulations now exceeds 185,000, the task of reviewing and dealing with obsolete, duplicative, and ineffective rules is more important than ever.

The U.S. Chamber has been a stakeholder and an active participant in retrospective review and reform efforts under three Administrations, from the Clinton Administration in the late 1990's through President Obama's Executive Orders 13,563 (January 18, 2011), 13,579 (July 11, 2011), and 13,610 (May 10, 2012). It is useful to consider the successes and failures of these previous efforts.

- Section 610 of The Regulatory Flexibility Act,[1] enacted in 1980, contains a provision which requires agencies to retrospectively review their existing rules after 10 years. While the intent of section 610 was to have agencies eliminate outdated, unnecessary rules, some agencies routinely ignore the retrospective review requirement.[2] Other agencies use the review process to justify expanded rules designed to address newer regulatory objectives.[3] Section 610 has never been the effective tool for periodic retrospective review that the business community had hoped for.
- In the late 1990's, OMB's Office of Information and Regulatory Affairs (OIRA) under Administrator Sally Katzen began a comprehensive effort to identify and address outdated and obsolete rules. This effort included calls for public nominations of rules that should be updated or eliminated by agencies, an effort that continued under OIRA Administrator John Graham in the early 2000's.
- Significantly, OIRA initiated a government-wide effort in 2004 to reform regulation of the U.S. manufacturing sector. OMB again requested public nominations of specific regulations, guidance documents, and paperwork requirements that, if reformed, could result in lower regulatory costs. In response to the public call for nominations, OIRA received 189 distinct reform candidates, including seven from the U.S. Chamber. Over the next two years, OIRA worked with the agencies whose rules had been nominated for reform or elimination and determined that 76 of the 189 rules justified action by an agency to address the recommended reform. Although agencies did commit to review these reform nominations, very few rules were actually updated, otherwise revised, or eliminated—and none of the Chamber's recommendations were acted upon by the agencies.
- By the time OIRA totally abandoned this project in 2006, only a few (<10) rules had actually been reformed. None of the rules that were reformed were major rules that had any significant impact on regulatory burden. The OIRA resources needed to oversee the project and agencies' resistance to commit any resources to make suggested changes largely doomed this retrospective review and reform effort.

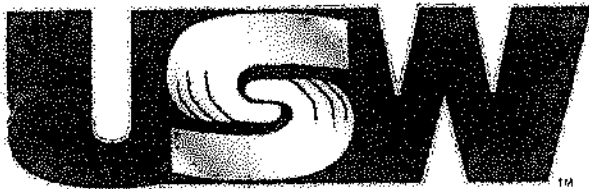
- Subsequently, in 2007 the Small Business Administration’s Office of Advocacy (“Advocacy”) undertook a similar, but scaled-down project to identify and reform obsolete, duplicative, or ineffective rules that harm small businesses. With input from a public reform nomination process (including comments from the U.S. Chamber), Advocacy identified a total of 14 priority rules that were appropriate for reform. Ultimately, five of these 14 rules were revised or otherwise reformed by federal agencies. Because the Advocacy project was similarly labor-intensive and because agencies balked at implementing significant rule changes, the Advocacy project was abandoned in 2010.
- While the OIRA/Advocacy retrospective review process was labor-intensive, it did result in a few reforms. One of the notable successes of the OIRA/Advocacy retrospective review program was the successful effort to de-list milk as a type of “oil” under the Clean Water Act’s Spill Prevention, Countermeasure, and Control program. This reform relieved a great deal of regulatory burden on dairies and milk processors, and proved highly worthwhile despite taking time to accomplish and requiring constant pressure on EPA. Other successful reforms relieved unnecessary regulatory burdens on general aviation operating in the Washington, D.C. region, on architectural-engineering firms that rely on government contracts, and on businesses that engage in recycling.
- In 2011, the Chamber wrote to several independent regulators asking that they comply with Executive Orders 13563 and 13579 and conduct retrospective reviews of existing regulations. The Chamber went so far as to propose potential processes for such a review with the Securities and Exchange Commission. Such a review has not taken place as of yet. In July, 2014, the Chamber identified 20 outdated regulations that should be removed as part of the SEC’s disclosure effectiveness program.
- If the federal government is serious in its desire to pursue retrospective reviews of existing federal regulations, the most logical course of action would be to pick up where it and the Office of Advocacy left off in 2006/2010. There is still a significant list of rules that OIRA and Advocacy determined were appropriate for review and reform (see attached lists), and no reason why those uncompleted rule reviews/reforms could not quickly be taken up by OIRA (and/or the Office of Advocacy) and completed. Such an effort would certainly be consistent with Executive Orders 13,563 and 13,610, and promote an improved retrospective review process.

Links to reports cited above:

(1) [SBA Office of Advocacy: Report on the Regulatory Flexibility Act FY 2007](#)

(2) [2005 Office of Management and Budget, Office of Information and Regulatory Affairs: Regulatory Reform of the U.S. Manufacturing Sector](#)

**UNITED STEELWORKERS**



**UNITY AND STRENGTH FOR WORKERS**

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May 1, 2015

The Honorable Ron Johnson, Chairman  
The Honorable Tom Carper, Ranking Member  
Committee on Homeland Security and Governmental Affairs  
United States Senate  
340 Dirksen  
Washington, D.C. 20510

The Honorable James Lankford, Chairman  
The Honorable Heidi Heitkamp, Ranking Member  
Committee on Homeland Security and Governmental Affairs  
Subcommittee on Regulatory Affairs and Federal Management  
United States Senate  
340 Dirksen  
Washington, D.C. 20510

Dear Senators Johnson, Carper, Lankford, and Heitkamp:

Thank you for the opportunity to discuss the significant impact that regulations have on the members of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW). Our union is the largest industrial union in North America. We represent 850,000 workers in the US and Canada, in sectors across the economy including metals, rubber, chemicals, paper, oil refining, plus the service and public sectors. Our members work for small businesses, large corporations, and municipalities.

We agree that regulations are indispensable in protecting public health, welfare, safety, and our environment. For our members, regulations protect the safety and health of our members at work, protect their rights to collective action, and allow them to live in safer, cleaner communities across the country. In most cases, the benefits of regulations outweigh the costs.

This response to your request will briefly discuss only a handful of the many regulations that affect USW members:

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United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union  
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## OSHA Silica Rule

The Occupational Safety and Health Administration (OSHA) has been working on it updating its standard for exposure to crystalline silica in the workplace for decades. Exposure to crystalline silica causes lung cancer, kidney disease, autoimmune diseases and silicosis. Our members are exposed to silica in foundries, shipyards, and glass manufacturing. Since the original rule was passed in 1971, new technologies have increased the effectiveness of available engineering controls and necessitated a lowered standard to protect worker health. The passage of time and the advances in science and technology have rendered the 1971 standard weak and inadequate to properly protect worker health. A proposed rule was released in 2013, and the comment period is now closed. Now the agency is working on a final rule that could prevent 700 deaths and 1,600 cases of silica-related disease per year.

One member of the USW, a worker from Buffalo, New York, dedicated his life to a foundry and put in countless hours to work his way above the poverty line and provide for his family. As a single parent he was ready to establish a lasting career at the foundry where his father and brother had worked, but did not realize he was also risking his life. The very drive that allowed him to support his family led him to a disease what will now affect the rest of his life. He developed silicosis while in his 40's due to his exposures at work. This leaves him to live the rest of his life in fear; fear of losing his job due to increasing respiratory changes affecting his ability to perform his work; fear of not being able to provide for his family, and the fear that his life will be cut short due to his occupational exposure to respirable crystalline silica. This member said, "What happened to me is preventable with this proposed standard in effect and it can help companies too [by preventing the costs associated with turnover due to silica-related disease]."

Unfortunately, the updated silica standard is a classic example of delays in the regulatory process that cost lives. Progress on the rule languished during the Bush Administration, and it took several years during the Obama Administration for OSHA to get the rule to OMB. The proposed rule was held up at OMB for over two years when there should have only been a 90 day review period. After decades of waiting and countless lives lost, this final rule needs to be issued without delay.

## OSHA Recordkeeping

The OSHA Recordkeeping rule is a beneficial regulation that requires employers to report and annually post records about the occupational illnesses and injuries suffered by workers at that workplace. Accurate data is a vital tool for workers and employers to evaluate the hazardous equipment, processes, or areas in the workplace



that cause injuries so that they can be fixed before others are injured or even killed. However, our members' experience is that most logs of injury and illness reports have omissions or errors that result in a risk of hazardous conditions remaining in the workplace to injure others.

This is a good example of updating a rule to keep with changing technology. OSHA has made proposals to phase out hard-copy paper reporting in favor of electronic reporting. For example, employers would be able to submit and workers could view injury logs online. Most employers already keep electronic logs of information and make some of this information publicly available online via their corporate sustainability reports. We do not believe that these updates will be a significant burden on employers; and they will be a significant help to employees.

Despite the valuable aspects of the existing rule and the proposed updates, we still believe that the OSHA Recordkeeping rule could be strengthened to prevent inaccuracies and omissions in the logs. One important update is the prohibition of programs that disincentivize or threaten retaliation against workers who report injuries. Unfortunately, workers are often reluctant to report injuries or access their employers' injury logs because they fear losing their job or other forms of retaliation. As previously mentioned, the result is that hazards in the workplace are not addressed, which puts other workers at risk.

### OSHA Ergonomics Standard

The OSHA Ergonomics standard is a prime example of the harm caused from deregulation. OSHA passed the Ergonomics standard at the end of the Clinton Administration. It was effective for two months before Congress used the Congressional Review Act to invalidate it.

USW represents workers in a wide variety of workplaces where ergonomic issues are a significant cause of injuries. For example, OSHA has cited that there were 27,020 cases of ergonomic-related injuries among healthcare workers in 2010, which is more than seven times greater than the average for other industries. A key concern for our members who work in healthcare is the ergonomics related to safe patient handling. One USW member said, "[The training says], 'lift from the knees!' The problem is that there is no obligation for the employer to buy additional patient lifts or to provide me with proper training on handling patients [because there is no regulation]."

Healthcare workers are not alone in experiencing adverse health effects due to the deregulation of ergonomics. Cumulative trauma disorders and repetitive strain injuries among USW members is a constant concern heard by the USW Health, Safety, and Environment Department. At one facility, workers insert metal pieces into a rotating

cell coater. One worker said, "We produce around 50 pieces a minute. I continuously grab a piece of metal with tongs, put it in the box and repeat." That worker will soon undergo carpal tunnel surgery due to repetitive strain injuries that could have been prevented if a proper job hazard analysis including ergonomic issues had been required of the employer.

### EPA Tier 3 Sulfur Rule

In 2014 the U.S. Environmental Protection Agency finalized a significant rule designed to reduce air pollution from passenger cars and trucks through the reduction of sulfur in gasoline. The reduction coincided with European Union and Chinese sulfur standard reductions lowering the permissible sulfur content in gasoline to 10 parts per million. The primary purpose and benefit of this important regulation was to reduce air pollution, but it also had a positive benefit on capital investment and jobs.

Although there were some costs of implementing the regulations, USW's support for that rule came after considering our diverse membership that includes refinery workers. The ability of refineries to comply with the regulations at a significantly lower cost than originally anticipated was critical. EPA's regulation will keep the United States competitive in global fuel standards and reduce 23,000 upper and lower respiratory symptoms in children, improving the air we breathe.

A benefit for USW members who work in manufacturing was that the regulation provided certainty for domestic manufacturers building the next generation of catalytic converters, which eliminate air toxics and aligned the US refining industry to better compete in the global market. Partly because of this regulation, Corning Glass in Corning, NY approved a capital expenditure of \$250 million to increase manufacturing capacity of the company's catalytic converter facilities. The Corning facilities will increase local jobs and also keep over 1,000 miners at Stillwater Mine in Montana extracting palladium, a critical component for the catalytic converter.

### NLRB Elections Rule

In December 2014, the National Labor Relations Board (NLRB) finalized a rule governing representation-case procedures designed to streamline board procedures for workers and companies during a union election procedure. The final rule increased transparency and uniformity across all NLRB regions and created modern communication methods to reduce costs to the agency and unions.

The ability for parties to file documents, such as petitions, electronically finally brought the agency into the email age which was a much-needed update to reduce the

cost and effort required for compliance. The rule also streamlined Board procedures and will reduce unnecessary litigation, which reduces NLRB costs for taxpayers.

Our members will greatly benefit from this rule because they have witnessed employers using delay tactics with the NLRB election process to intimidate and even fire workers. Faith Clark testified before the NLRB on behalf of the United Steelworkers, highlighting the significant delays in their election and company retaliation. (Please see her testimony here: <https://www.youtube.com/watch?v=loe3z4fAQfk>). The rule will go a long way in restoring fairness and protecting worker rights in the NLRB election process.

Thank you again for the opportunity to share a description of just a few of the regulations that affect USW members. We look forward to continuing a dialogue with you about the importance of regulation and the regulatory process. If you have any questions, please feel free to contact me at [afendley@usw.org](mailto:afendley@usw.org) or 202-778-4384.

Sincerely,



Anna Fendley  
Legislative Representative



WALTER B. MCCORMICK, JR.  
President and Chief Executive Officer

May 21, 2015

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
340 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Tom Carper  
Ranking Member  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
513 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
316 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
and Federal Management  
United States Senate  
110 Hart Senate Office Building  
Washington, D.C. 20510

Dear Chairmen Johnson and Lankford, and Ranking Members Carper and Heitkamp:

Thank you for your letter of March 18, 2015, and the opportunity to provide you with comments and analysis on the impact that existing and proposed regulations have on the broadband industry. USTelecom is the nation's oldest and largest association for providers of wired communications, and the overwhelming majority of its members offer broadband in rural and urban areas across the United States. USTelecom and its members strongly support policies that promote continued broadband deployment so that broadband services are accessible to all Americans.

### **Imposition of Utility-Style Regulations on Internet Service Providers**

The most significant regulatory impact currently faced by our industry is the recent decision by the Federal Communications Commission to impose utility-style regulation on Internet Service Providers using Title II of the Communications Act. USTelecom has long supported an open and transparent Internet, and our industry remains firmly committed to open Internet principles. However, we have consistently argued that a Title II approach is ill-advised and not needed to protect consumers or the open Internet.

Title II utility regulation has its roots in the 1887 Interstate Commerce Act, which pervasively regulated the railroad industry for nearly a century. The imposition of 19th century railroad regulation on the 21st century Internet is misguided policy that will harm consumers, stifle innovation, and suppress investment. Congress never intended to apply this regulatory model to the Internet. Indeed, by 1996 Congress had already repealed it for the traditional common carriers – rail carriers, motor carriers and air carriers – under the leadership of a Democratic Administration, House, and Senate. Congress knew then – and knows today – that this form of economic regulation was regulation for a bygone era, had contributed to the financial collapse of the railroads, and was

detrimental to investment. In enacting Section 230 of the Communications Act in 1996, Congress noted that Internet access services “have flourished, to the benefit of all Americans, with a minimum of government regulation.”

The FCC, in reversing longstanding bipartisan precedent, and imposing public utility regulation on the most dynamic sector of our nation’s economy, adopted policies that were not designed – nor ever intended – for the Internet. History has shown that common carrier regulation slows innovation, chills investment, and leads to increased costs on consumers. Investment has thrived under the Title I environment over the past two-plus decades with the industry spending \$60 to \$70 billion dollars a year in infrastructure and fiber deployment projects. The United States has been a global leader in broadband investment, investing twice what Europe invests per capita in broadband.

### **Forbearance from Outdated Common Carrier Regulations**

In addition to the new Title II regulatory obligations imposed on broadband ISPs by the FCC, USTelecom’s member companies remain subject to archaic legacy regulation intended for the telephone monopolies of yesterday. Last year, USTelecom filed a petition with the FCC to remove these rules which act as barriers to competition and investment in broadband.<sup>1</sup> The petition seeks forbearance from outdated regulations dating back to the days of “Ma Bell”, which today inhibit innovation and serve no meaningful role in protecting consumers.<sup>2</sup>

USTelecom’s petition offers a strategically targeted set of reforms that include removing antiquated rules such as those requiring companies to separate local and long-distance businesses, and requiring traditional phone companies to continue the provisioning of obsolete technology, instead of allowing them to invest in the kind of advanced communications services that consumers want today.

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<sup>1</sup> See, Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. §160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks, WC Dkt. No. 14-192 (filed October 6, 2014) (*USTelecom Modernization Petition*); see also, FCC Public Notice, Pleading Cycle Established for Comments on United States Telecom Association Petition for Forbearance From Certain Incumbent LEC Regulatory Obligations, DA 14-1585 (November 5, 2014).

<sup>2</sup> USTelecom’s Petition addresses disparate regulations that apply only to ILECs and impede infrastructure investment and competition. These regulations include: 1) outdated provisions in Sections 271 and 272, and the related equal access rules; 2) Rule 64.1903 structural separation requirements for rate of return companies; 3) The requirement that an ILEC provide an unbundled 64 kbps voice channel where it has replaced a copper loop with fiber; 4) Section 214(e)(1) eligible telecommunications carrier (“ETC”) requirements where a price cap carrier does not receive high-cost universal service support; 5) The remaining Computer Inquiry rules; 6) The Section 224 and 251(b)(4) requirement that ILECs share newly deployed entrance conduit; and 7) Rules prohibiting the use of contract tariffs to offer special access and high capacity data services in the absence of pricing flexibility.

### **Legacy Regulation is Barrier to Investment**

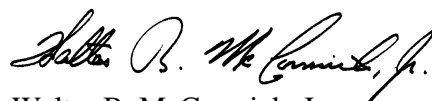
Whether through the imposition of Title II common carrier regulations on broadband ISPs,<sup>3</sup> or the continued application of outdated monopoly telephone regulations to the now-competitive voice market,<sup>4</sup> such regulations hinder the national policy goals of broadband deployment and competition. One key barrier to the deployment of new fiber facilities is the continued application of legacy regulatory requirements to traditional voice service providers. Evidence indicates that these requirements divert substantial resources away from next-generation networks, denying many consumers the benefits of fast reliable broadband.

While cable, wireless, and competitive fiber providers are free to focus their expenditures on next-generation networks suited to delivering higher-speed services, ILECs must direct a substantial portion of their expenditures to maintaining legacy networks and fulfilling regulatory mandates whose costs far exceed any benefits. The FCC's own National Broadband Plan from five years ago warned of the adverse impact of carryover regulations from the 20th Century that require telephone companies, and telephone companies alone, to continue to invest in antiquated services and technology.<sup>5</sup>

### **Congress Should Focus on Pro-Deployment and Pro-Competition Goals**

USTelecom maintains that under these circumstances there is no reason for the FCC to “short-change its pro-deployment, pro-competition goals by declining to forbear from the regulations at issue here.” FCC Chairman Wheeler recently observed that “the elimination of circuit-switched monopoly markets certainly obviates the need for old monopoly-based regulation of that technology.” Elimination of such regulations will result in the directing of additional resources toward the high-speed networks of tomorrow, heralding an era of further increases in competition in the market for truly high-speed broadband services. Such a result will further Congress' core objectives as it moves towards updating the communications laws for the nation.

Sincerely,



Walter B. McCormick, Jr.

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<sup>3</sup> Report And Order On Remand, Declaratory Ruling, And Order, *Protecting and Promoting the Open Internet*, 80 FR 19737, FCC 15-24 (released March 12, 2015).

<sup>4</sup> *USTelecom Modernization Petition*.

<sup>5</sup> FCC Report, *Connecting America: The National Broadband Plan*, March 16, 2010 (available at: <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>) (visited May 13, 2015).



April 17, 2015

United States Senate  
Committee on Homeland Security and Governmental Affairs  
Dirksen 340  
Washington, DC 20510

Dear Sen. Johnson, Sen. Lankford, Sen. Carper, Sen. Heitkamp, and Committee Members:

Thank you for providing us with the opportunity to provide you with information on the real-world impact of federal regulations, regulatory processes and policies on our organization, our members and the communities throughout the United States that we work with on a daily basis to address the financial, health and environmental impacts of inadequately regulated pollution.

Founded in 1996, Waterkeeper Alliance is a global movement uniting more than 250 Waterkeeper Organizations around the world in shared vision for clean water and strong communities. In the United States, Waterkeepers working in 156 distinct watersheds combine firsthand knowledge of their waterways with an unwavering commitment to the rights of their communities and to the rule of law. Waterkeepers depend on federal environmental laws and regulations to protect waterways and the people who depend on clean water for drinking water, recreation, fishing, economic growth, food production, and all of the other water uses that sustain our way of life, health and well-being.

We agree with the statement in your letter that federal regulations “play an indispensable role in protecting public health, welfare, safety, and our environment,” and we understand that industries must devote financial and human resources to controlling pollution generated by their operations. Sometimes significant resources are required to control pollution generated by an industry, but we know from past and current experience that failure to do so causes others to bear those costs in the form of human illness or death; devastation of recreational and commercial fisheries; abandoned hazardous and radioactive waste sites; loss of drinking water supplies; dangerous oil and hazardous chemical spills; high municipal and public water supply treatment costs; and many other externalized costs.

We are pleased to be able to provide the Committee with information about some of the harms we are observing in communities and waterways across the country as our nation’s regulations and regulatory frameworks are being weakened – often in the name of reducing regulatory burdens and costs. We hope that the Committee recognizes that the costs and burdens of dealing with pollution cannot be reduced simply by removing or weakening federal environmental

CLEAN WATER  STRONG COMMUNITIES

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regulations. People, industries, and communities need clean water to survive, and we all bear unacceptable burdens and costs when our environmental laws are weakened or not enforced.

While the federal laws and regulations have been very effective in controlling pollution in many respects, many of our major waterways remain polluted, and by some indications pollution appears to be increasing. For example, while water quality in a large percentage of our nation's waters has not been assessed, the most recent available data from the U.S. Environmental Protection Agency (EPA) shows water pollution in assessed waters has impaired 558,999 river/stream miles, 12,197,097 lake acres, 26,120 sq. miles of estuarine waters, 7,204 miles of coastal waters, and 53,270 sq. miles of the Great Lakes.<sup>1</sup> By comparison, EPA's 2004 CWA Section 305b Report showed that there were 246,002 miles of impaired rivers/streams and 10,451,401 acres of impaired lakes as of 2004.<sup>2</sup> Based on these reports from the states, it appears that the number of polluted rivers and stream across the country has more than doubled since 2004.

Waterkeeper organizations all over the country have been responding to an increased number of major spills into waterways from the fossil fuel industry, including the following:

- A 1 billion gallon coal ash spill into the Emory River from the Tennessee Valley Authority Kingston coal-fired power plant in Tennessee.
- 3.19 billion barrels of oil spilled into the Gulf of Mexico over 87 days by BP that impacted Louisiana, Texas, Mississippi, Alabama and Florida.
- A 140,000 ton coal ash spill into the Dan River by Duke Energy in North Carolina.
- A 450,000 gallon crude oil spill from a CSX train derailment in Alabama.
- A 7,500 gallon crude methylcyclohexanemethonal spill into the Elk River by Freedom Industries in West Virginia contaminating water supplies for 300,000 people.
- A 50,000 gallon crude oil spill from a CSX train derailment and explosion that set the James River on fire and caused the evacuation of downtown Lynchburg, Virginia.

The Deepwater Horizon oil well blowout killed eleven people. One hundred and sixty nine people had to seek medical treatment after they consumed contaminated drinking water that resulted from the West Virginia spill into the Elk River. Collectively, the six spills above contaminated drinking water and fouled miles of water across nine states. The spills also did billions of dollars in collateral damage to other businesses that are dependent on clean water. These spills and many more smaller ones like them in other states were the result of a deadly combination of failed enforcement, weak regulations and companies who recklessly failed to follow proper health and environmental safety requirements.

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<sup>1</sup> EPA, Watershed Assessment, Tracking & Results, National Summary of State Information, *available at* <http://ofmpub.epa.gov/waters10/altains.nation.cy.control>.

<sup>2</sup> EPA, National Water Quality Inventory: Report to Congress, 2004 Reporting Cycle, *available at:* [http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2009\\_05\\_20\\_305b\\_2004report\\_report2004pt3.pdf](http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2009_05_20_305b_2004report_report2004pt3.pdf)

Additionally, agriculture remains one of the largest unaddressed sources of water pollution in the United States, and much of this pollution is caused by corporate-controlled industrialized poultry, beef, swine and dairy production.<sup>3</sup> These operations are called Concentrated Animal Feeding Operations or CAFOs, and are required to be, but rarely are, regulated as point sources under the federal Clean Water Act. As described in the EPA's National Enforcement Priorities document for FY 2008-2010:

States have consistently reported to EPA that agricultural activities, including CAFOs, are leading sources of pollutants such as nutrients (nitrogen and phosphorus), pathogens (bacteria), and organic enrichment (low dissolved oxygen) that are contributing to water quality impairment in U.S. surface waters. Adverse impacts on ecosystems and human health associated with discharges of animal wastes include fish kills, algal blooms, and fish advisories, contamination of drinking water sources, and transmission of disease-causing bacteria and parasites associated with food and waterborne diseases.<sup>4</sup>

CAFO pollution is a major contributor to well-documented, severe problems in key U.S. water resources like the harmful algal blooms in Lake Erie that closed beaches and shut down Toledo's drinking water supply in 2014; algae blooms, hypoxia and decimation of the fishery in the Chesapeake Bay; the enormous Dead Zone in the Gulf of Mexico; algae blooms, hypoxia and massive fish kills in North Carolina's coastal estuaries; and many other significant water resources across the country. It is estimated that CAFOs generate 1.1 billion tons of animal manure each year, and although CAFOs have been a National Enforcement Priority since 1998, EPA recently reported that only 36% of the nations' largest CAFOs are regulated as required under the CWA – down from 42% in 2011.<sup>5</sup>

In essence, CAFOs are major sources of pollution that are virtually unregulated contrary to the requirements of the CWA, and as a result, the public health, welfare, safety, and our environment is not being protected. The impacts tend to be most severe in rural and minority communities. According to EPA, "CAFOs are often located near poor rural communities, and animal waste that gets into ground water can contaminate nearby residents' drinking water supplies. Toxic air pollution can affect the health of poor and minority communities that often are located closest to industrial facilities with toxic air emissions."<sup>6</sup>

It is our collective experience that federal and state regulatory agencies continue to endanger the safety of our communities and our drinking water by failing to enact and enforce reasonable

<sup>3</sup> Watershed Assessment, *supra* note 1.

<sup>4</sup> <http://www.epa.gov/compliance/data/planning/priorities/cwacafo.html> [Emphasis added] [Webarchive]; See also, e.g.,

<http://www.epa.gov/compliance/resources/publications/data/planning/priorities/fy2008prioritycwacafo.pdf>.

<sup>5</sup> <http://www.epa.gov/npdes/pubs/tracksum%20endyear2013.pdf>;

[http://www.epa.gov/npdes/pubs/cafo\\_tracksum\\_endyear2011.pdf](http://www.epa.gov/npdes/pubs/cafo_tracksum_endyear2011.pdf)

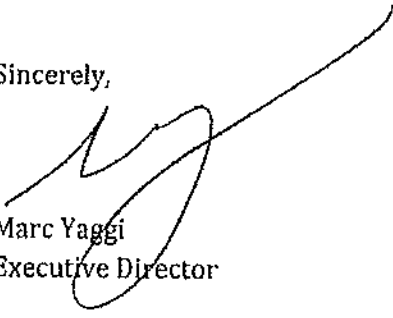
<sup>6</sup> <http://www.epa.gov/environmentaljustice/plan-ej/ce-initiatives.html>.

regulations or worse, weakening regulations that were insufficient to begin with. As Waterkeeper Alliance responded to more toxic spills into waterways than ever before in our history, over the last five years we watched state and federal regulators sit on their hands while people became sick, drinking water supplies were polluted, beaches were closed, our infrastructure crumbled, waterways burned, and substandard tank cars derailed and exploded, incinerating homes, poisoning waterways and contaminating the drinking water of millions of Americans. The climate of lax federal regulations is more deadly and dangerous than ever due to extensive budget cuts to state and federal regulatory agencies.

There is an urgent need for Congress to stop weakening regulations and cutting the budgets of enforcement agencies so that more of our communities and waterways won't have to suffer enormous harm from the polluting effects of industry. Clean water is one of the most basic and essential human rights. With water resources declining in quality and quantity across the United States, we must ensure that our federal environmental laws and regulations are not weakened as a result of undue industry influence. Federal regulatory agencies must be adequately funded and allowed to proceed with sound regulatory actions authorized by federal law in order to protect human health and the environment. Where states are operating federally delegated programs in a manner that is not consistent with federal laws and regulations, and especially where this noncompliance is endangering human health and the environment, the EPA must step in to ensure inadequate state programs are brought into compliance with federal law and the public is protected.

Thank you again for providing us with this opportunity. If you need additional information or would like to further discuss any of these issues, please do not hesitate to contact me at 212.747.0622 x114.

Sincerely,



Marc Yaggi  
Executive Director