

REGULATORY CHAOS: FINDING LEGISLATIVE SOLUTIONS TO BENEFIT JOBS AND THE ECONOMY

HEARING BEFORE THE SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY OF THE COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

JULY 14, 2011

Serial No. 112-74



Printed for the use of the Committee on Energy and Commerce
energycommerce.house.gov

U.S. GOVERNMENT PRINTING OFFICE

72-862 PDF

WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
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REGULATORY CHAOS: FINDING LEGISLATIVE SOLUTIONS TO BENEFIT JOBS AND THE ECONOMY

THURSDAY, JULY 14, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 9:08 a.m., in room 2322 of the Rayburn House Office Building, Hon. John Shimkus (chairman of the subcommittee) presiding.

Members present: Representatives Shimkus, Murphy, Whitfield, Pitts, Latta, McMorris Rodgers, Cassidy, Gardner, Barton, Green, Butterfield, Barrow, and Waxman (ex officio).

Staff present: Charlotte Baker, Press Secretary; Jerry Couri, Professional Staff Member, Environment; Heidi King, Chief Economist; Dave McCarthy, Chief Counsel, Environment and the Economy; Carly McWilliams, Legislative Clerk; Tina Richards, Counsel, Environment and the Economy; Chris Sarley, Policy Coordinator, Environment and the Economy; Alison Cassady, Democratic Senior Professional Staff Member; Greg Dotson, Democratic Energy and Environment Staff Director; Caitlin Haberman, Democratic Policy Analyst; and Alexandra Teitz, Democratic Senior Counsel, Environment and Energy.

Mr. SHIMKUS. The committee will come to order. We want to welcome you all here. I would like to recognize myself for the first 5-minute opening statement.

OPENING STATEMENT OF HON. JOHN SHIMKUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

From our first hearing of this Congress we have continued to focus on the impact that Federal regulations can have on the economy, particularly on job prospects.

We have heard from Administration officials speaking for the White House, Department of Energy, the Environmental Protection Agency, and even the Department of Homeland Security. We have asked them, did you take economic impacts into account when you proposed these regulations? Did you perform a job impact analysis? Are you concerned as much about protecting existing jobs, particularly in the manufacturing and energy sectors, as the President claims to be about creating new jobs in the so-called green economy?

The problem for many of the people who send us here to find solutions is not the green economy. It is the red ink economy. Family debt, unemployment, collapsed home values, mortgages underwater. These are real life problems we are challenged to solve.

And witness after witness before the subcommittee has traced the root of many of their challenges to the burden of Federal regulations that drive up cost of doing business while adding no economic value. That is not to say that all regulations are bad. I am thankful for the many good and important Federal regulations.

For example, every time I take a flight home to my family I am thankful for the Federal aviation regulations that keep planes flying safely from one place to another. When you step outside this building and take a deep breath, even on a hot summer day, you can thank Federal and State regulations for the improvement in air quality over the past 10 or 20 years. I don't want the ranking member of the full committee to faint on that statement, but we all know that that is true.

And just yesterday this committee overwhelmingly reported on a bill to set up an innovative new regime that balances State management and Federal standards to ensure safe handling of coal ash whether it is recycled or disposed of as waste.

But then we hear the horror stories about other regulations. We have heard from witnesses about EPA proposals to impose needless new burdens on hard rock mining that duplicate what other Federal and State agencies already have on the books and which could put some facilities out of business. We hear about proposed restrictions on recyclers that could actually discourage beneficial reuse from fly ash to printer ink.

Enough of the problems. We are not psychologists. We need solutions to prevent the issues that have us in this predicament. Today we will hear from the small business sector, the farm community, the manufacturers, and other business voices. We hope our witnesses will bring along some suggestions to make things better.

How can we guide the Federal Government toward good regulations? How can we make sure that the benefits really do outweigh the economic costs? Can we be sensitive to impacts on job opportunities?

We will also ask, are there any laws on the books that can become a model regulatory approach? If so, what is it, and what other steps can Congress take to ensure the Administration only proposes regulatory action that serve the people instead of harming them?

And just an aside, when we travel back to our districts every week and we hear from our farmers and our small manufacturers and the small businesses, we hear this concern everywhere we go. This hearing is an attempt to put a national voice and bring forth the concerns that we are hearing at home at a national level. So I appreciate you all attending. I look forward to the hearing.

[The prepared statement of Mr. Shimkus follows:]

Chairman John Shimkus
Opening statement hearing before the Subcommittee on Environment
and the Economy
July 14, 2011

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And witness after witness before this Subcommittee has traced the root of many economic problems to the burden of over-the-top Federal regulations that drive up the cost of doing business while adding no economic value.

That is not to say that all regulations are bad. I am thankful for many good and important federal regulations. For example, every time I take a flight home to my family I am thankful for Federal aviation regulations that keep planes flying safely from one place to another. When you step outside this building and take a deep breath, even on a hot summer day, you can thank federal and state regulations for the improvement in air quality over the past 10 or 20 years.

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We welcome our witnesses, thank them for appearing today, and look forward to their suggestions.

Mr. SHIMKUS. And now I would like to yield to the ranking member of the subcommittee, Mr. Green from Texas.

**OPENING STATEMENT OF HON. GENE GREEN, A
REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS**

Mr. GREEN. Thank you, Mr. Chairman, for calling this hearing because we all share an interest in sharing the appropriate balance between cost and benefits in environmental regulation. This committee has held numerous hearings, examined the regulatory look back process envisioned by the President's January Executive Order. Executive Order 13563 calls for Federal agencies to develop preliminary plans for periodically reviewing existing regulations to determine whether any should be modified, streamlined, expanded, or repelled.

Well, I certainly share my colleague's concern about certain regulations, and I do not believe that all regulations or even the process of reviewing regulations are overly burdensome and hurts the economy. By focusing on regulatory cost of business we sometimes risk ignoring the real, very real human costs of unchecked pollution and the costs that these burdens place on the economy as a whole.

I will give you an example. For years I have worked with local officials in Harris County, I have a very urban industrial district in East Houston, Harris County, Texas, to address a significant threat from a superfund site that is in our area. The San Jacinto Waste Pits in the 1960s, a paper mill that actually was in our district, dumped dioxin contained waste in a waste pit in a sandbar in the San Jacinto River. Unfortunately, the resource recovery, Resource Conservation Recovery Act had not been passed and neither had the EPA in—until 1969. Regulations of disposal of dioxin waste from paper mills were not yet developed.

If these regulations had been placed, the waste would not have been dumped where they were, and the superfund site would not have been created. Now that the San Jacinto River has reclaimed that sandbar, these vessels were below water, examinations widespread and cleanup will be very costly.

Harris County officials and the EPA have been working hard to ensure that taxpayers don't bear the cost of that cleanup, and they are continuing the fight. Proper waste regulations could have avoided these cleanup costs and these litigation costs and could have protected the people in my district. Examples like this demonstrate why it is so important to review the laws and regulations to ensure we protect public health, the environment, and the economy.

OMB estimated that the economic benefits of major regulations over the last 10 years have found tremendous benefits up to \$616 billion. The benefits outweighed the cost by three to one and by as much as 12 to one in some cases. The economic benefits of environmental regulation offer reflected avoided costs, costs associated with treated asthma attacks, costs associated with educating children with developmental delays, costs associated with lost work or productivity due to pollution and illnesses.

So while I agree we should carefully examine the regulations to be sure we are not inadvertently harming jobs, not all regulations

are the enemy. They do protect the public and to save the Federal Government money, and I yield back my time.

Mr. SHIMKUS. The gentleman yields back his time.

The chair recognizes the vice-chairman of the subcommittee, Mr. Murphy from Pennsylvania.

Mr. MURPHY. Thank you, Mr. Chairman. By the way, we do have a psychologist on the committee.

Mr. SHIMKUS. And it is not me.

OPENING STATEMENT OF HON. TIM MURPHY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

Mr. MURPHY. While deliberations are continuing to deal with our \$14.3 trillion deficit or debt, America is concerned where we are going. June unemployment at 9.2 percent and the growth of only 18,000 jobs translates to a meager 360 jobs per State. Let us keep in mind that one way to balance America's budget, one very important way to deal with America's debt is to grow jobs. For each 1 percent decline in unemployment it is \$90 billion to \$200 billion per year in Federal revenue. That is a decrease in unemployment compensation, that is an increase in Federal revenues, that is one and a half million jobs for every 1 percent decline in unemployment.

Well we can't grow jobs, and we saddle job creators with \$1.75 trillion in regulatory costs according to numbers from the Small Business Administration. As we look at these issues of how to deal with a wide range of energy sources, I want to highlight another way we can create jobs.

Instead of sending \$129 billion a year to OPEC for foreign aid to buy their oil, let us drill and use our own. A bill I introduced, H.R. 1861, the Infrastructure Jobs and Energy Independence Act, would yield between \$2.2 trillion and \$3.7 trillion over a 30-year period in new Federal revenues, but it is not from raising taxes. It is just using the standard royalties and lease agreements that come from this, and it is not borrowing from China. This bill leads to 1.2 million jobs annually. It is jobs for the roughnecks, the steelworkers, the electrician and laborers who work on these rigs. It is jobs for those who take the oil and refine it into gasoline. It is jobs for those who build all the infrastructure as this bill also provides the money needed to begin to build, rebuild our roads, bridges, locks, dams, water and sewer projects, and it funds nuclear power plants and the cleaning up of our coal-fired power plants.

So with our leaders over at the White House arguing over how to take care of the debt, let us not forget Americans are saying, grow more jobs to grow more taxpayers, not finding ways of increasing taxes and not finding ways of increasing regulations that move our jobs into submission.

And with that I yield back.

Mr. SHIMKUS. The gentleman yields back his time.

Seeing no other members on the minority side I would now like to turn to the panel and welcome you for coming. I will do an overall introduction of the table, and then we will go individually. At the first—at our panel is Mr. William Kovacs, Senior Vice Presi-

dent, Environment, Technology, and Regulatory Affairs for the U.S. Chamber of Commerce. Welcome.

Kirk Liddell, President and CEO of IREX Corporation on behalf of the National Association of Manufacturers. Karen Harned, Executive Director of National Federation of Independent Business Legal Center, and Kevin Rogers, President of the Arizona Farm Bureau Federation and on behalf of the American Farm Bureau Federation.

So welcome. I would like to now recognize Mr. Kovacs, your full statement is submitted for the record. You have 5 minutes for an opening statement. As you can see, we may not be that pressed for time, so you don't have to kill yourself, and we will be very patient with the clock here. So you are recognized for 5 minutes.

STATEMENTS OF WILLIAM L. KOVACS, SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY, AND REGULATORY AFFAIRS, U.S. CHAMBER OF COMMERCE; W. KIRK LIDDELL, PRESIDENT AND CEO, IREX CORPORATION, ON BEHALF OF NATIONAL ASSOCIATION OF MANUFACTURERS; KAREN R. HARNED, EXECUTIVE DIRECTOR, SMALL BUSINESS LEGAL CENTER, NATIONAL FEDERATION OF INDEPENDENT BUSINESS; AND KEVIN ROGERS, PRESIDENT, ARIZONA FARM BUREAU FEDERATION, ON BEHALF OF AMERICAN FARM BUREAU FEDERATION

STATEMENT OF WILLIAM L. KOVACS

Mr. KOVACS. Thank you very much, Mr. Chairman and Ranking Member Green and members of the committee. I would like to spend the first minute of my 5 minutes on how we got here into this regulatory chaos and then go into some solutions.

Congress has been dealing with what they—what you might call regulatory chaos since 1946. I mean, we have been trying to get control of the agencies when you passed the Administrative Procedure Act, which really was the first time you required the agencies to be somewhat transparent, and you involved the public.

But, unfortunately, over the years one of the things that happened after this and within its structure is that Congress passed vague laws that required the agencies to fill in the blanks, and as the agencies began to fill in the blanks, one of the things that happened was the courts began in the 1980s to award deference to the agencies. So you had an agency that was, one, filling in the blanks, and now the courts were looking at them as the experts, and this literally allowed them to go from filling in the blanks to writing legislation. And this combination of delegation and deference really has tipped the constitutional scales to the Executive Branch.

Now, Congress has tried very, very hard, both Republicans and Democrats, to gain control over the agencies. In the '80s you passed the Regulatory Flexibility Act, unfunded mandates, Information Quality Act later on, data access, paperwork reduction, and in all of your environmental bills you have some of the best jobs analysis provisions in the entire body of the U.S. Codes. You have done what you need. I think the conclusion is best summed up when CBO and GAO concluded in several studies that the agencies are literally masters at manipulating the regulatory process. So as you

talk about cost benefit or finding out what the \$100 million threshold is, they know how to do the system better than you will ever know how to do the system.

So what is it that we can do, because I think that is really where you want to go. There are some issues that would hopefully be bipartisan. The first is in very simple terms you require the agencies to do just what Congress has asked them to do for years. I mean, if you look, let us just take Section 321 of the Clean Air Act. Between Section 321, which requires continuing jobs analysis for all major regulations, which you haven't gotten in 30 years, that is just besides the point, Section 312 and 317, which requires both the cost benefit and an economic assessment, all of which Congress has in there. They are all mandated on the agencies, so this isn't a discretionary. This isn't something discretionary. Congress needs to start with that, and frankly, even with the President's Executive Order, had they decided instead of just doing an Executive Order, had they demanded that the agencies implement what Congress has passed, I think we would be further ahead.

Another statute that is really an excellent statute is unfunded mandates. There are two provisions in unfunded mandates relating to major Federal actions, which are very significant. One is that actually for every major role, the agency that is over \$100 million, the agency actually has to identify a reasonable number of regulatory alternatives, and it must, under Congress's rule, select the least costly and the least burdensome approach to it. And if they don't, then the head of the agency must state why they selected a more expensive approach. That is generally honored in the breach or not even observed. UMRA also requires before the publication of the rural statement of anticipated costs and benefits that impact the national economy.

So a lot of what Congress is trying to do today on jobs is there, and then you have the Information Quality Act, which is perhaps one of the most significant transparency acts that Congress has ever passed, and there you have a requirement that the agencies actually use the most up-to-date data, that they use peer reviews data based on sound, whether it be science or economics. So you have four acts.

The second issue is permit streamlining. This is an issue that Congress has agreed upon many times in the last several years. We did this report called Project No Project, and we just examined the number of permits that were not being issued in the year 2010 for energy-based facilities, and there were 351, but the key is that by denying those 351 facilities' permits, there was—we failed to capture about \$1.1 trillion in economic activity for our GDP, and we failed to capture—and we lost the ability to create 1.9 million jobs annually during the construction period.

So this—not giving a permit is significant, and the key point in this is that Congress in I think it was 2006, passed the Permit Streamlining Provisions to safely move the Highway Infrastructure Bill, bipartisan, and then the Stimulus Act you had two very different senators, Senator Barrasso and Senator Boxer, coming to an agreement that if you are going to get projects into commerce, you were going to have to do something with the permitting process, and they used—and I will stop after this. And they used as part

of that, they required the most expeditious route possible for addressing NEPA, and that was a categorical exclusion. The Administration was able to use that simple provision over 180,000 times for 220,000 projects.

So Congress can come to grips with this, and they have shown they can. It is just a question of going back and enforcing the laws, I think, that you have already got on the books.

[The prepared statement of Mr. Kovacs follows:]



Statement of the U.S. Chamber of Commerce

ON: REGULATING CHAOS: FINDING LEGISLATIVE
SOLUTIONS TO BENEFIT JOBS AND THE
ECONOMY

TO: HOUSE COMMITTEE ON ENERGY AND
COMMERCE, SUBCOMMITTEE ON
ENVIRONMENT AND THE ECONOMY

BY: WILLIAM L. KOVACS
SENIOR VICE PRESIDENT, ENVIRONMENT,
TECHNOLOGY AND REGULATORY AFFAIRS

DATE: JULY 14, 2011

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

**BEFORE THE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY
OF THE U.S. HOUSE OF REPRESENTATIVES**

**“Regulating Chaos: Finding Legislative Solutions to Benefit Jobs and the
Economy”**

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

July 14, 2011

Good morning, Chairman Shimkus, Ranking Member Green, and members of the Subcommittee on Environment and the Economy. My name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. The Chamber is the world’s largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. You have asked me to come before the Subcommittee today to discuss legislative solutions to fixing the regulatory system so that jobs and economic growth benefit. On behalf of the Chamber and its members, I thank you for the opportunity to testify here today.

The very first sentence of Article I of the U.S. Constitution reads: “All legislative powers herein granted shall be vested in a Congress of the United States.” As any elementary school student knows, the Congress makes the nation’s laws, and the Executive Branch carries them out. Over time, however, this separation of powers has eroded to such an extent that federal agencies can now use the regulatory process to “legislate by regulation.” And at times, agency regulations create broad new policies that impact many industries in the regulated community; these policies can literally determine the fate of industrial sectors and the competitiveness of the nation. Given the current political climate, Congress cannot easily get its power back.

The Congress has long recognized the challenges posed by the power of Executive Branch agencies. Therefore, it has repeatedly attempted to create statutory safeguards to ensure the regulatory state is transparent and accountable, and to ensure agency power is properly cabined within appropriate constitutional and statutory limits. For example, in 1946 Congress enacted the Administrative Procedure Act (APA) requiring agencies to regulate openly and with notice to and comment from the public, and subject to judicial review. Over time, the procedural protections in the APA grew in importance as Congress passed vague laws delegating agencies with ever more expansive power. However, increased judicial deference to agency decisions and Congress’s general abdication of its oversight authority combined to severely limit the operational checks on the regulatory power of federal agencies.

By the late 1970s, it had become clear that the delegation of congressional authority to the agencies to “fill in the legislative blanks,” the lack of congressional oversight over the agencies, and judicial deference were fundamentally altering the original constitutional balance between the legislative and executive branches of government. Starting in 1980, Congress began enacting laws to restore the balance and to check executive power. Over the past three decades, Congress has repeatedly attempted to rein in the Executive Branch agencies, but it would be an understatement to assert that efforts to control expanding agency power have been of little impact. Agencies are just too skilled at manipulating the regulatory system.

Regulations are a necessary part of a complex society. But an unbalanced regulatory process has led to an unprecedented increase in major, economically significant regulations, some of which are harming the economy and inhibiting job creation, and to erosion of the carefully calibrated constitutional system of checks and balances that is the foundation for our system of government. Therefore, the Chamber supports efforts to reform the regulatory process to make it more effective and accountable to Congress and the American people and to restore balance between regulation and job creation. My testimony will analyze the regulatory state and its impact on jobs, and propose substantive measures to restore proper checks and balances between the Legislative and Executive Branches of our government and help create jobs.

I. Overview of the Growing Regulatory Problem

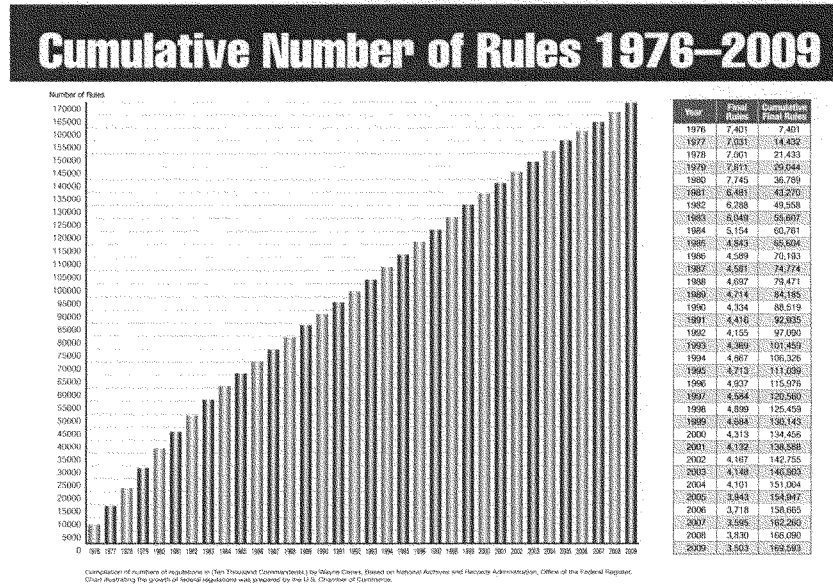
A. Number and Scope of Regulations

The U.S. Small Business Administration estimates that the overall cost of regulations to the United States is as high as \$1.75 trillion annually.¹ Regulations cost \$8,086 per employee annually and impose an average of \$10,585 on small businesses.² This almost equals the amount of taxes collected by the federal government: FY2009 gross individual income tax collections (before refunds) were \$1.18 trillion, gross corporate income tax collections were \$225.5 billion, gross employment tax collections were \$858.2 billion, and combined excise, gift and estate tax collections were \$71.3 billion.

¹ “The Impact of Regulatory Costs on Small Firms,” Nicole V. Crain and W. Mark Crain, analysis performed for the Small Business Administration Office of Advocacy, September 2010, *available at* <http://archive.sba.gov/advo/research/rs371tot.pdf>.

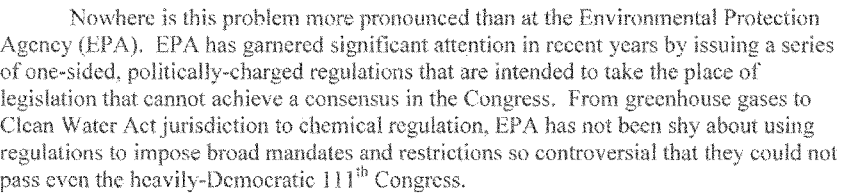
² *Id.*

This \$1.75 trillion regulatory cost is the result of the accretion of roughly 170,000 individual regulations over the past four decades:



The Chamber believes the sheer number of regulations, though staggering, is not necessarily the problem that calls most for immediate attention, nor is it the reason why bipartisan concerns about the integrity of the regulatory process have intensified in recent years. Rather, the key problem is that the number of *economically significant* regulations—*i.e.*, those costing the businesses, consumers and the economy more than \$100 million—has increased substantially. As the chart below shows, the number of economically significant rules issued each year has increased more than 60 percent over the past five years, from 137 to 224³:

³ The 224 rulemakings are not final, but rather “in the pipeline,” and include both final and proposed rules. Clyde Wayne Crews, *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, available at <http://cei.org/10KC>.



As the chart below shows, the reasons for economically significant rulemakings vary from agency to agency:

Economically Significant Rules 1997–2010					
Agency	Economically Significant Total Rules 1997–2010	Spending Rules (1)	Commerce Rules (2)	Commerce Rules/Judicial Deadline (3)	Commerce Rules/Statutory Deadline (4)
Agriculture	85	51	34	0	9
HHS	187	122	65	0	16
Interior	22	1	21	0	0
Labor	33	5	28	0	5
EPA	75	0	75	36	15

1. "Spending" rules involve the exercise of spending authority (e.g. Medicare reimbursement, disaster relief, grants).

2. "Commerce" rules directly regulate commerce or behavior (e.g. emissions limits, food safety standards).

3. "Commerce Rules/Judicial Deadline" are rules OIRA notes as subject to a specific judicial action-forcing deadline.

4. "Commerce Rules/Statutory Deadline" are rules OIRA notes as subject to a specific statutory action-forcing deadline.

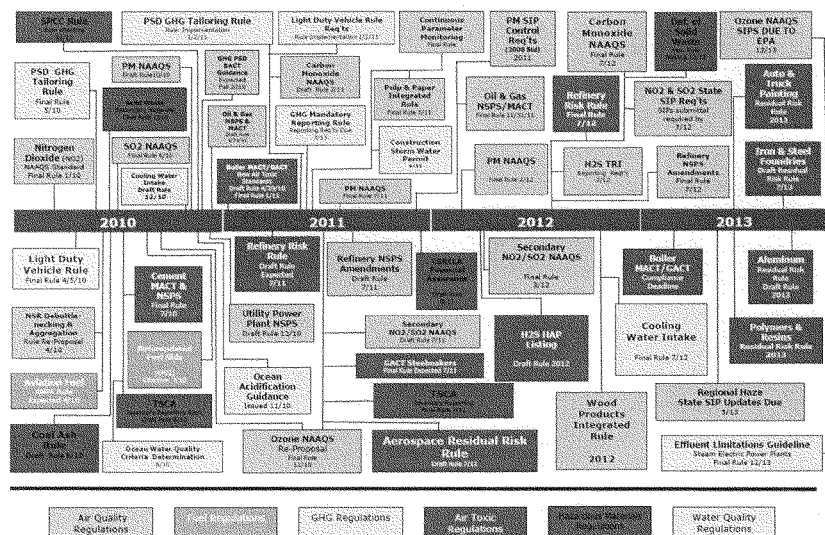
OIRA website: www.eo13563.gov

EPA appears to be an outlier among the five agencies surveyed above: more than any other agency, EPA is "forced" to act, either by court order or statutory requirement. Most troubling is that EPA is the only agency that regularly initiates rulemakings by what is commonly referred to as "Sue and Settle Rulemaking."

Sue and Settle Rulemakings occur when EPA initiates a rulemaking to settle a lawsuit by an environmental group. When questioned about the scope or rationale for the rulemaking by Congress, EPA simply explains that it is bound by a court order to move forward with the regulation. What is missing from the story, however, is the fact that EPA would not be bound by the court order if it simply chose to litigate. In recent years, Sue and Settle Rulemaking has resulted in several of EPA's most controversial major rulemakings, including: New Source Performance Standards (NSPS) for greenhouse gas emissions from electric utilities and refineries; numeric nutrient criteria for the State of Florida; revisions to the Definition of Solid Waste under RCRA; NESHAP for cement kilns; Clean Water Act guidance for mountaintop removal mining permits; the California Waiver; the Stream Buffer Zone Rule; multi-industry Clean Air Act Section 112 air toxics rules; Ozone NAAQS reconsideration; Clean Air Act regulations on oil and gas drilling operations; and EPA's proposal to regulate greenhouse gases under the Clean

Water Act. Because Sue and Settle Rulemakings occur as a result of EPA's settlement with an environmental group, the terms of the settlement are often one-sided and give little consideration to the industry sector(s) that will be covered by the new regulations.

Between Sue and Settle rulemakings, statutory obligations, and other rules in the pipeline, EPA will continue to throw a massive number of new rules and regulations at industry over the next few years. The chart below illustrates the problem.



B. How Regulations Stop Progress

The cumulative impact of regulatory action can be overwhelming: agencies literally have the power to decide the fate of firms and entire industries. American Electric Power Co. made headlines last month when it disclosed that EPA's "train wreck" of coal industry regulations—Coal Ash, Utility MACT, the Transport Rule and Cooling Water Intake structures—would force the utility to retire 6,000 megawatts of coal-fired generating capacity and spend another \$6 billion to \$8 billion reworking the rest of its fleet. AEP would close three power plants in West Virginia, one in Ohio and one in Virginia, and would retire several boilers at coal plants in Indiana, Kentucky, Ohio, Texas and Virginia.

AEP is not alone. Six other power plants have announced early retirement due to excessive regulation: Portland Gas & Electric's Boardman coal-fired power plant in Oregon; Exelon Corporation's Oyster Creek Nuclear Generating Station in New Jersey; TransAlta Corporation's Centralia coal-fired power plant in Washington; and, just this week, three Georgia Power plants in the next two years. In each case, the utility was

forced to choose between installing several hundred million dollars' worth of pollution controls to comply with EPA regulations, or simply shut down early. In all cases, the utility chose early retirement.

The onslaught of new requirements not only causes havoc when they are released by the agency. Once the rules have gone into effect, project-level "Not In My Back Yard" (NIMBY) activists capitalize on even more tools to stop economic development. The Chamber's *Project No Project* Web site chronicles 351 state-level projects in 49 states that have been stopped, stalled, or outright killed due to NIMBY activism, a broken permitting process and a system that allows limitless challenges by opponents of development. Results of the assessment are compiled at <http://www.projectnoproject.com>, which serves as a web-based project inventory. The purpose of the *Project No Project* initiative is to enable the Chamber to understand potential impacts of serious project impediments on our nation's economic development prospects.

The Chamber commissioned a first-of-its kind economic study to examine the lost economic value and jobs foregone by not building these 351 projects. The study, *Progress Denied: The Potential Economic Impact of Permitting Challenges Facing Proposed Energy Projects*, produced by Steve Pociask of TeleNomic Research, LLC and Joseph P. Fuhr, Jr. of Widener University, found that successful construction of the 351 projects identified in the Project No Project inventory could produce a \$1.1 trillion short-term boost to the economy and create 1.9 million jobs annually. Moreover, these facilities, once constructed, continue to generate jobs, because they operate for years or even decades. Based on their analysis, Pociask and Fuhr estimate that, in aggregate, each year the operation of these projects could generate \$145 billion in economic benefits and involve 791,000 jobs. While it is unreasonable to think that all 351 projects would be constructed, even a subset of the projects would yield major value. For instance, Pociask and Fuhr estimate that the construction of only the largest project in each state would generate \$449 billion in economic value and 572,000 annual jobs.

The chart below illustrates the diversity of the energy projects impacted by a broken regulatory process. *Project No Project* proves the saying that it is just as hard to site a wind farm in the U.S. as it is a coal-fired power plant.



The best way to fix the project-level regulatory impediments that developers face is to fix the federal regulatory process that places these tools into NIMBY toolbelts. And that begins by requiring agencies to follow the laws that require them to consider jobs and economic impacts of their regulations.

II. How to Fix the Regulatory Process and Create Jobs

The Chamber has spent a great deal of time working with its members to develop legislative solutions to existing regulatory problems. Several of these can be enacted easily; others are more complex and will require substantial debate.

A. **Permit Streamlining**

Congress should take steps to streamline the siting and permitting process for new energy projects. Potential solutions that could be included in streamlining legislation include:

- Require completion of environmental reviews within a defined time period, such as six months.
- When multiple agencies are involved in a NEPA review, a lead agency must be designated, agencies must engage early and in a coordinated way,

deadlines should be set, NEPA reviews must be concurrent, and agencies must be accountable if they do not engage early in the process.

- Provide opportunities for public engagement early and often, but also reduce default comment periods.
- All NEPA reviews must be completed “on an expeditious basis” and utilize “the shortest available NEPA process.”
- Accept state “little NEPA” reviews where the state has done a competent job, and avoid duplicating state work with a federal NEPA review.
- Reduce the statute of limitations for legal challenges.
- Create an Office of Permit Efficiency within the administration that will:
 - Collect data on delayed projects, and make this data publicly available; identify trends and common obstacles in permit delays; analyze the scope and nature of lawsuits to stop projects, and whether abuse exists; and recommend solutions to address common permitting challenges and delays.
 - Oversee federal actions and process to ensure that they are organized to maximize the competitiveness of U.S. commercial activities. A Federal Project Coordinator office would coordinate issuance of all federal permits. It would be charged with shepherding projects through federal agencies, working with companies to understand what permits are needed and when they need to be issued in order to meet project deadlines. The Coordinator would work with federal agencies to develop project timelines for the issuance of permits and would stay in contact with key federal officials to ensure that deadlines are being met and that adequate resources are being applied. When it is determined that adequate resources for permitting/environmental work are not available, the Coordinator would have a list of approved third party contractors that could be immediately brought in to perform the necessary work. Another function of the coordinator would be to work to ensure that permits and environmental studies are not vulnerable to litigation. It would work with the Justice Department to assess the vulnerability of federal actions to litigation. It would then act to reduce that vulnerability.
 - The Office of Permit Efficiency would provide overall assessments of the abilities of federal agencies to determine if adequate resources are in place for the issuance of permits. It would analyze the jobs and economic growth creation capacity/potential of each federal agency and rate the agencies in terms of their achievements in jobs creation. It would look at the priorities of federal agencies and rate them in terms of jobs creation/jobs destruction. It would work to guide agencies toward

activities and process that grow the economy, collect data on delayed projects, and make this data publicly available; identify trends and common obstacles in permit delays; analyze the scope and nature of lawsuits to stop projects, and whether abuse exists; and recommend solutions to address common permitting challenges and delays. The Office of Permit Efficiency could also have an oversight role in NEPA reviews and issue a coordination plan or “road map” for agencies.

Several of these concepts can be found in existing legislation. Lawmakers may therefore want to model legislation off one or more effective and workable streamlining provisions already in place: SAFETEA-LU Section 6002, National Environmental Policy Act (NEPA) streamlining language in the American Recovery and Reinvestment Act, or the Federal Communications Commission’s “shot-clock.”

i. SAFETEA-LU Section 6002

Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (SAFETEA-LU) accelerates the environmental review process for federal highway projects. Section 6002 contains two key components: (1) process streamlining and (2) a statute of limitations. The process streamlining component does not in any way circumvent any NEPA requirement; rather, it designates a lead agency (in SAFETEA-LU’s case, DOT) and requires early participation among the lead agency and other participating agencies. The goal of the process is to facilitate interagency and public coordination so that the process moves faster. The second key element in Section 6002 is a 180-day statute of limitations to “use it or lose it” on judicial review. Without such a provision, the prevailing statute of limitations is the default six-year federal statute of limitations for civil suits.

Section 6002 is working, and working well. A September 2010 report by the Federal Highway Administration found that just the process streamlining component of Section 6002 has cut the time to complete a NEPA review in half, from 73 months down to 36.85 months. The 180-day statute of limitations is cutting back on a typical NIMBY practice of waiting until the very last day to file a lawsuit against a project. Because the only real motive is to exploit the law to delay projects, this tactic is particularly effective with a six-year statute of limitations. Even with the 180-day statute of limitations, groups still wait until the last week or last day to file, so that the project is delayed as long as possible. A good example of this happening is the Maryland InterCounty Connector⁴ highway project.

ii. NEPA Streamlining in the Stimulus

During debate on the 2009 economic stimulus bill, the American Recovery and Reinvestment Act (“Recovery Act”), the Chamber called attention to the fact that the

⁴ <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/01/AR2006110103155.html>. The final Record of Decision was issued on May 29, 2006. Sierra Club and Environmental Defense gave notice of intent to sue on November 2, 2006, and filed the lawsuit on December 20, 2006.

flawed permitting process in effect ensures that no project will ever truly be “shovel-ready.” Senators Barrasso and Boxer worked together to secure an amendment to the bill requiring that the NEPA process be implemented “on an expeditious basis,” and that “the shortest existing applicable process” under NEPA must be used.

This amendment has made all the difference in getting Recovery Act projects underway. According to a February 2011 report to Congress by the White House Council on Environmental Quality, over 180,000 of the 272,000 Recovery Act projects covered by NEPA received the most expeditious form of compliance treatment possible—a categorical exemption—and work was able to begin and jobs were created.⁵ Moreover, only 830 projects received an environmental impact statement, the longest available process under NEPA.⁶ These circumstances confirm a recognition among some policymakers that the permitting process is harming our ability to grow our economy so we can compete with the world.

The Chamber is not asking that anyone’s rights be denied; rather we are suggesting that those opposing a project must exercise their rights in a defined period of time after a decision is made, and that all claims be immediately addressed. The developer of a project should at least be afforded a decision to begin construction in one or two or even three years, not ten or fifteen.

iii. FCC Shot-Clock

Even cellular telephone towers are challenged by NIMBYs. At one point it was estimated that the construction of approximately 700 cell towers were being challenged. Without the new cell towers, the expansion of broadband was limited. To address this issue, the Federal Communications Commission (FCC) issued new regulations in November 2009 to speed up the siting and permitting of cellular telephone towers and antennas. Under the new rules, state and local governments have a 90-day deadline to process applications for co-located facilities where two or more providers share a tower, and 150 days to process applications for new towers. However, if the government authority has not acted on the application within the requisite time period, the applicant may file a claim in court. There is not enough data yet to judge the effectiveness of the rule, which is currently being challenged by several municipalities.

B. Enforce Existing Mandates

Agencies can and should comply with the statutes that govern their operations. However, they frequently do not. Congress should demand that agencies fully comply with existing statutory mandates that impact job creation:

⁵ The Eighth Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects, *available at* http://ceq.hss.doe.gov/ceq_reports/reports_congress_feb2011.html.

⁶ *Id.*

- i. Existing laws that require EPA to consider jobs and economic impact. Section 312 of the Clean Air Act requires EPA to conduct a cost-benefit analysis for most major air rules.⁷ Section 317 requires economic impact assessments for most major air rules.⁸ And Section 321 requires the Administrator to do a continuing study of the effect of its regulations on employment or the threat of job loss.⁹ Identical provisions to Section 321 exist in most other environmental statutes, such as the Clean Water Act, Toxic Substances Control Act, the Solid Waste Disposal Act, and CERCLA.¹⁰ Yet EPA either flat-out ignores these requirements (as it did with Section 321 and its GHG rules), or it does such a poor job with the economic assessment and the underlying data that the result is misleading, usually overstating benefits and understating costs. The Chamber recommends suspending all EPA regulations issued in 2009 and 2010 that did not adequately comply with Sections 312, 317 and 321.
- ii. The Unfunded Mandates Reform Act of 1995 (UMRA).¹¹ UMRA was designed to restrain the imposition of unfunded federal mandates on state, local, and tribal governments and the private sector, primarily by providing more information and focusing more attention on potential federal mandates in legislation and regulations. Before promulgating a final rule, UMRA requires agencies to undertake a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including costs and benefits and future compliance costs, and estimates of the effect of the rule on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and services (if and to the extent that the agency determines accurate estimates are feasible). For rules of over \$100 million in economic impact, UMRA requires the agency to identify and consider a “reasonable number” of regulatory alternatives from which the agency shall select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. Alternatively, the head of the agency must publish with the final rule an explanation of why the least costly, most cost-effective or least burdensome method of achieving the rule’s objectives was not chosen. GAO has recognized that, despite the goals of UMRA, “statutes and final rules containing what affected parties perceive as ‘unfunded mandates’ can be enacted or published without being identified as federal mandates with costs or expenditures at or above the thresholds established in UMRA,” and “many statutes and final rules with potentially significant financial effects on nonfederal

⁷ 42 U.S.C. § 7612.

⁸ *Id.* at § 7617.

⁹ *Id.* at § 7621.

¹⁰ The provision can also be found in the Clean Water Act (33 U.S.C. § 1367), Solid Waste Disposal Act (42 U.S.C. § 6971), Toxic Substances Control Act (15 U.S.C. § 2623), Powerplant and Industrial Fuel Use Act (42 U.S.C. § 8453), and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9610).

¹¹ 2 U.S.C. §§ 658 and 1511, *et seq.*

parties were enacted or published without being identified as federal mandates at or above UMRA's thresholds."¹²

iii. The Information Quality Act (IQA).¹³ The IQA was designed to impose greater transparency and improve the quality of agency information, especially with respect to non-regulatory information disseminated by administrative agencies with respect to scientific and statistical matters. It requires:

- Compliance with OMB's information quality guidelines that mandate transparency, full disclosure of all data and reports used to justify or formulate an agency position on a given topic, and full disclosure of all uncertainties or error sources so that a member of the public may evaluate and reproduce the results of an agency analysis or study;
- Use of the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices and data collected by accepted methods or best available methods;
- For claims, statements or policies regarding human health or environmental risks, the agency must specify (1) each population addressed by any estimate of public health effects; (2) the expected risk or central estimate of risk for the specific populations; (3) each appropriate upper-bound or lower-bound estimate of risk; (4) each significant uncertainty identified in the process of the assessment of public health effects and studies that would assist in resolving the uncertainty; and (5) peer-reviewed studies that support, are directly relevant to, or fail to support any estimate of public health effects and the methodology used to reconcile inconsistencies in the scientific data; and
- A procedure to allow affected persons to "seek and obtain" correction or disclosure of information that fails OMB information quality requirements.

The IQA's drafters intended agency actions under the IQA to be subject to normative APA judicial review. However, the bureaucracy has taken the position that there is no judicial review or remedy for IQA violations and one Court of Appeals has adopted this view. In other words, the Executive Branch of the federal government and one Circuit hold Congress passed IQA without creating any rights for persons harmed by agency violations of its provisions. Consequently, agencies refuse to comply with the IQA.

If the agencies still fail to comply with these statutory mandates, Congress can condition appropriations on the agency's undertaking of these statutorily-required

¹² General Accountability Office, "Unfunded Mandates: Analysis of Reform Act Coverage," GAO-04-637 (May 2004).

¹³ 44 U.S.C. §§ 3504(d)(1), 3516.

analyses. Conversely, the administration, as part of its regulatory efficiency efforts being implemented by Executive Order 13563, could easily order agency compliance.

C. Strengthen Existing Statutes

Because agencies have become so adept at circumventing existing statutory safeguards, Congress must put teeth in other well-crafted regulatory statutes that circumscribe agency discretion. Only then can these safeguards be enforced by citizens adversely impacted by agency actions. The Chamber recommends the following:

- i. Clarify that UMRA and IQA Violations are Judicially Reviewable. No judicial review is available for UMRA violations, and agencies take the position that IQA violations are not judicially reviewable. This undermines each statute's effectiveness and is contrary to controlling APA norms and original Congressional intent. Congress should confirm that IQA violations are judicially reviewable and that IQA quality standards apply to all studies, statistics, and other information used to support promulgation of rules and guidance. It should also amend UMRA to allow judicial review for aggrieved parties.
- ii. Codify Executive Order 12866 including Guidance Documents. President Clinton issued E.O. 12866 requiring agencies considering new rules to identify and assess alternative forms of regulation, adopt the least burdensome regulatory alternative, use the best reasonably obtainable science, and highlight economic impact concerns, among other things, and then to submit major rules to OMB's Office of Information and Regulatory Affairs (OIRA) for review. OIRA, in turn, was authorized to return regulatory proposals that failed to comply with the E.O. to the relevant agency for revision. President Bush amended E.O. 12866 to include guidance documents and to require best estimates of cumulative regulatory costs and benefits. President Obama repealed the Bush amendments. However, the Chamber believes E.O. 12866, ideally including the Bush amendments, ought to be codified with a private right of action for persons affected by agency or OIRA non-compliance.
- iii. Amend the Regulatory Flexibility Act to Consider "Indirect" Impacts. The Regulatory Flexibility Act requires agencies to determine if a rule will have a "significant economic impact on a substantial number of small entities." If so, then the agency must explain why it has chosen this rule over other options. Due to a court decision, only the direct impact of a rule (i.e., cost of compliance) need be assessed. However, indirect costs such as litigation and enforcement risk and lost business opportunities ought to be accounted for as well. Therefore, the Chamber proposes amending the Act to include indirect impacts.

- iv. Amend the Regulatory Flexibility Act to Require Cost-Benefit Estimates and Science Reviews by an Independent Third Party not Agency Staff. Many current laws and Executive Orders already require agencies to conduct cost-benefit estimates and science reviews. However, these estimates and reviews likely would be more accurate and more credible if conducted by an independent third party and not agency staff. Requiring cost-benefit estimates and science reviews to be conducted entirely by an independent third party would be an important check and balance on agency power and improve regulatory quality.

D. Reform the APA

To make a real impact, however, Congress should focus on economically significant rules and significant guidance documents. These rules and guidance documents have historically been defined as those likely to result in an annual effect on the economy of over \$100 million; lead to a major increase in costs or prices; raise novel policy or legal issues; or have significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises. These are also the rules and guidance most likely to raise compelling federalism and constitutional separation of powers concerns. As the chart on the Overview of Agency Rulemakings 2005-2010 illustrates, these economically significant regulations only comprise four percent of agency regulations but they impose both the vast majority of economic impact and job destruction and are the rules that most insert the agencies into the legislative process.

Currently, the same standard of agency justification and judicial review applies to both general regulations and the most economically significant regulations. This means that an agency only need establish the same level of support for the most minor of rules as for rules that have significant economic impact on many sectors of the economy. By allowing agencies to use this “one-size-fits-all” regulatory process, agencies are able to ignore the built-in statutory checks and balances. When coupled with the substantial deference provided during judicial review of agency action, agencies are able to ignore Congress. Moreover, a divided Congress has little to no ability to reclaim the powers it delegated to agencies over the past few decades. In this situation, agencies are free of Congressional control until Congress can get the votes to pass a law that restricts their discretion or limits their funding. To address this lack of constitutional checks and balances, Congress should place on agencies a responsibility that is commensurate with the costs the agency is imposing on the regulatory community, jobs and the nation’s competitiveness. The Chamber recommends the following measures to restore balance to the regulatory process:

- i. Pass the REINS Act. The Chamber supports H.R. 10 and S. 299, the “Regulations from the Executive In Need of Scrutiny (REINS) Act.” The REINS Act requires both houses of Congress to affirmatively approve, and the president to sign, any new “major rule”—i.e., a rule with a

projected impact to the economy of over \$100 million—before it could become effective. The Chamber believes the REINS Act is an effective regulatory reform, which would improve Congressional oversight, increase the quality of agency rulemakings, and better ensure all branches of the Federal government are accountable. It restores to Congress the duty and obligation to make balancing decisions with respect to regulations. This is what the Constitution provides, and this is how the system ought to work.

- ii. Require Formal Rulemaking for the economically significant “Super Rules”. Formal rulemaking under the APA means a quasi-judicial hearing with testimony under oath, depositions and cross-examination. The agency, as the rule’s proponent, carries the burden of proof by substantial evidence. “Substantial evidence” is enough relevant evidence for a reasonable person to conclude the record is adequate to support the proposed agency action. This is a more demanding test than the traditional “arbitrary and capricious” standard applied by courts to rules promulgated by informal rulemaking. Formal rulemaking is appropriate for the small category of “super rules” with significant economic impact on a major portion of the economy.
- iii. Use the OSHA Hybrid Rulemaking Model to Give Interested Parties a Chance to Question Agencies about Proposed Rules. The APA generally provides for notice and comment (“informal”) or adjudicatory (“formal”) rulemaking. However, Congress created a unique “hybrid” rulemaking model for OSHA, allowing the agency to propose rules and standards via notice and comment but requiring an informal hearing with cross-examination of the agency, on key issues, at a stakeholder’s request. Extending the OSHA hybrid approach to all rules and guidance that are not classified as “Super Rules”—which includes review under the substantial evidence test—will promote transparency and promote regulatory quality by ensuring more rigorous internal and external review of agency actions. Congress should extend the substantial evidence test to all rules and guidance, save for a subset of minor, non-controversial regulations that would retain the arbitrary and capricious standard.

Thank you for the opportunity to testify today. I look forward to answering any questions you may have.

Mr. SHIMKUS. Thank you very much.
Now I would like to recognize Mr. Liddell for 5 minutes. Sir, welcome.

STATEMENT OF W. KIRK LIDDELL

Mr. LIDDELL. Thank you. Thank you, Chairman Shimkus, Ranking Member—

Mr. SHIMKUS. If you would just hold—we are going to get you all set up there.

Mr. LIDDELL. Yes. Got to push the button.

Mr. SHIMKUS. Yes. Thank you.

Mr. LIDDELL. Well, thank you for the opportunity to testify before you today about reform of the regulatory system and job creation.

My name is Kirk Liddell. I am the President and CEO of IREX Corporation based in Lancaster, Pennsylvania, Congressman Pitts' area. We are very proud of Congressman Pitts. We are a specialty contracting business. Although we are based in Lancaster, we have operations throughout the United States and Canada. Today we employ approximately 1,500 individuals, many of whom are building trades union members, and that is down from about 2,500, 2,700 in our peak at 2008. So we are down about 1,000 employees. I serve as a board member of the National Association of Manufacturers. I am a member of their executive committee, and I am here today testifying on their behalf.

Manufacturers provide good, high-paying jobs, and yet we have lost about 2.2 million manufacturing jobs in this economy since the recession, since December of 2009. We have, in fact, generated about 250,000 net new jobs, but the last couple of months that slowed. We have definitely slowed the job creation over the last few months, and to regain momentum and return to net manufacturing job gains we do need improved economic conditions and improved government policies.

And the deluge in regulation the past couple of years has not helped us, has not helped us in our effort to create jobs and to improve the economy. Unnecessary or cost ineffective regulations dampen economic growth and hold down job creation. Regulatory change and uncertainty impose high costs on businesses, especially small business, disproportionately small businesses, and of course, most manufacturers are small businesses.

Unintended adverse consequence of government regulations are also a huge problem and a growing problem. A current example is the EPA's accelerated recondition—reconsideration of the already stringent and costly ozone air quality standard. The Manufacturers' Alliance studied this one proposal and concluded that it could cost as many as 7.3 million jobs and add up to \$1 trillion in new regulatory costs annually between 2020 and 2030.

And on behalf of manufacturers I thank Chairman Shimkus, Representative Barrow, and several other members of this subcommittee for sending a letter to EPA Administrator Lisa Jackson in late June, urging the EPA to defer its reconsideration until 2013, which is the normal 5-year reconsideration timeframe. And I would encourage other members of this subcommittee to join that effort.

Now, at a broader level there are a number of powerful and potentially bipartisan regulatory reforms to choose from. One would be an easy one, I believe, would be for Congress to confirm the authority of OMB's Office of Regulatory Analysis to review the regulations issued by independent regulatory agencies and to ensure their adherence to strong analytical requirements.

We do applaud the President's recent request to independent agencies that they conclude retrospective regulatory reviews of their own regulations. We believe giving him the formal authority to do so would compliment this voluntary request and importantly be a positive sign of seriousness about regulatory reform.

Another helpful reform would be strengthening the Regulatory Flexibility Act to ensure that agencies engage in thoughtful analysis, of proposed rules, and their economic impact on small businesses. Most manufacturers, as I said, are small businesses, and an agency should not be permitted to view the law as a mere formality. I would urge the subcommittee's support of H.R. 527, the Regulatory Flexibility Improvements Act, which was favorably recorded out of both the Judiciary and Small Business Committees.

Congress pays an important role within the regulatory process but does not have a group of analysts who develop their own cost estimates of proposed or final regulations. OMB has OIRA to review regulations, and Congress, perhaps through the Congressional Budget Office, should have a parallel office that analyzes and reviews the impact of significant regulatory initiatives.

To truly build a culture of continuous improvement and thoughtful, retrospective review of regulations, the existing regulations should automatically sunset unless they are fervently shown to have strong continued justification.

In my written statement I concluded additional broad-based regulatory reform examples for your consideration. I appreciate the opportunity to provide testimony today on behalf of manufacturers. I applaud you for holding today's hearing, and I would be happy to respond to any questions you have.

[The prepared statement of Mr. Liddell follows:]



Leading Innovation. Creating Opportunity. Pursuing Progress.

Testimony

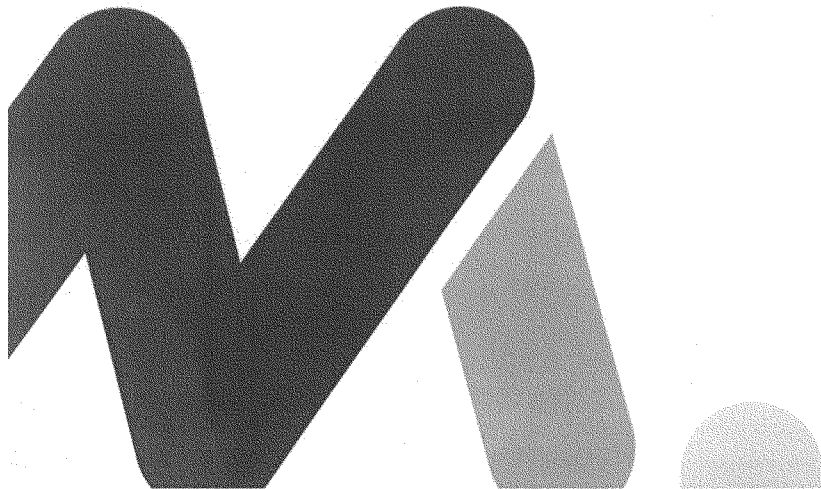
of W. Kirk Liddell
President and CEO
IREX Corporation
Lancaster, Pa.

on behalf of the National Association of Manufacturers

before the Subcommittee on Environment and the Economy
Committee on Energy and Commerce
U.S. House of Representatives

on Regulatory Chaos: Finding Legislative Solutions
to Benefit Jobs and the Economy

July 14, 2011



**COMMENTS OF THE NATIONAL ASSOCIATION OF MANUFACTURERS
BEFORE THE**

**SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY
COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES**

JULY 14, 2011

Chairman Shimkus, Ranking Member Green and members of the Subcommittee on Environment and the Economy, thank you for the opportunity to testify before you today about reform of the regulatory system and job creation.

My name is Kirk Liddell, and I am president and CEO of IREX Corporation, based in Lancaster, Pa. IREX owns and provides support services to a group of companies with expertise in mechanical insulation contracting, interior contracting, asbestos abatement and other specialty contracting services throughout the United States and Canada. Its subsidiaries operate 32 branches and in recent years have averaged 2,000 employees. Principal industries served include power generation, oil production and refining, process manufacturing, health care, pharmaceutical, education and other nonresidential construction.

I also serve as a member of the Board of Directors of the National Association of Manufacturers (NAM) and as a member of the NAM's Executive Committee. I am pleased to testify on the NAM's behalf today. The NAM is the nation's largest manufacturing trade association, representing manufacturers in every industrial sector and in all 50 states. Manufacturing has a presence in every single congressional district providing good, high-paying jobs. The United States is the world's largest manufacturing

economy. It produces \$1.6 trillion in value each year, or 11.2 percent of GDP, and employs nearly 12 million Americans working directly in manufacturing.

On behalf of the NAM and the millions of men and women working in manufacturing in the United States, I wish to express my support for your efforts to reform the regulatory process and allow manufacturers in this country to do what they do best – make things and create jobs.

Manufacturers have been deeply affected by the recent recession. The manufacturing sector lost 2.2 million jobs during this period. Since the trough of the recession in December 2009, manufacturers have generated 251,000 net new jobs, just over 10 percent of our total losses in the downturn. But in the last few months, job growth in manufacturing has slowed dramatically.

To regain manufacturing momentum and return to net manufacturing job gains, we need improved economic conditions and improved government policies. Because of the significant challenges affecting manufacturing, the NAM developed a strategy to enhance our growth.

The NAM published its "Manufacturing Strategy for Jobs and a Competitive America" in June of last year. In that strategy, we identified three overarching objectives: 1) to be the best country in the world to headquarter a company and to attract foreign investment; 2) to be the best country in the world to do the bulk of a company's research and development; and 3) to be a great place to manufacture, both to meet the needs of the American market and to serve as an export platform to the world. To achieve those objectives, we need sound policies in taxation, energy, labor, trade, health care, education, litigation and, certainly, regulation.

The focus of today's hearing is to review legislative solutions to reforming our chaotic regulatory system. I would be remiss if I did not provide the Subcommittee with a warning about one specific costly and unnecessary regulatory proposal and recommend

your action. The Environmental Protection Agency (EPA) has embarked on a decades-long process to implement the Clean Air Act and its amendments. There is no doubt that our nation has gained enormous benefits from efforts to improve air quality. But the continued ratcheting down of emission limits produces diminishing returns at far higher marginal costs. This means that each new air rule will have a greater impact on job creation than those in the past.

Costs of pollution abatement are capital intensive. In a time of economic recovery where capital is extremely scarce, every dollar diverted from productive use creates additional pressure to reduce labor costs. When the prices of commodities and other manufacturing inputs are increasing, as they are today, even more pressure builds to squeeze labor costs. In this environment, it is clear that unnecessary or cost-ineffective regulation dampens economic growth and will continue to hold down job creation. For some firms, it will be the final straw that destroys the whole business.

That is why it is so shocking that the EPA proposed making an enormously costly Bush Administration rule, the National Ambient Air Quality Standard (NAAQS) for Ozone, even more stringent and costly when a reconsideration was not required by law. One study by the Manufacturers Alliance/MAPI estimates that the most stringent ozone proposal being considered would result in the loss of 7.3 million jobs by 2020 and add \$1 trillion in new regulatory costs per year between 2020 and 2030.

We have a short reprieve from this rule because the EPA has delayed its final proposal until sometime this month, but the EPA was not required to review this rule again until 2013. We encourage this Subcommittee to direct the EPA to defer this reconsideration altogether and devote its resources to the every-five-year review mandated by law and next slated for 2013. We thank Chairman Shimkus, Representative Barrow and several members of this Subcommittee for sending a letter on June 22 to EPA Administrator Lisa Jackson urging just that course of action.

Manufacturers believe a fundamental premise of Congress and the Administration going forward should be: first, do no harm to the recovery. Deferring a reconsideration of NAAQS for Ozone would be a strong signal to the marketplace of a new, common-sense approach to regulation and a step toward increasing certainty.

If we are to be successful in creating a more competitive economy, we must also reform the design of our regulatory system to ensure we never again reach the state we find ourselves in today. The NAM makes the following recommendations to the Subcommittee on the design of the institutions and systems through which modern rulemaking is conducted.

Independent Agencies – As this Subcommittee is aware, the President does not exercise similar authority over the independent regulatory agencies as he does over other agencies within the Executive Branch. Congress has given the President's OMB review authority over those independent agencies' information collection and paperwork requirements; there is little distinction then to extending its review to the regulations that impose those paperwork burdens.

On July 11, 2011 the President issued a new Executive Order suggesting that independent agencies should conform to the principles of his regulatory review Executive Order 13563 and participate in retrospective reviews of their existing regulation. The President should be praised for this action, but this approach is still more tepid than necessary. As a result, Congress should confirm the authority of the President over these agencies. The same reasons for which centralized White House review of regulations benefits other single-mission agencies, like a broader economy-wide perspective on regulatory proposals, would similarly benefit independent agency rules. Consistency across the government in regulatory procedures and analysis would only improve certainty and transparency of the process. During recent crises in the regulatory sphere of the independent agencies, they proved no better than other Executive Branch

agencies at preventing bad outcomes. The case for their inclusion in centralized regulatory review is clear and Congress should act to make it certain.

RFA Reform – The Regulatory Flexibility Act (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 in some cases must empanel a group of small business representatives to help consider a rule before it is proposed. Currently, under the RFA, only a small number of regulations require this analysis because “indirect effects” cannot be considered and the small business panel process only applies to three agencies. We believe this process is helpful and has saved billions of dollars in regulatory costs for small businesses. The Subcommittee and its Members should support reforming the RFA along the lines of the H.R. 527, the Regulatory Flexibility Improvements Act which has been favorably reported out of the House Committee on the Judiciary and is being marked up this week in the House Committee on Small business. We believe this is a significant opportunity for bipartisan regulatory reform.

APA Reform – The Administrative Procedure Act (APA) turns 65 this year. Though it is by no means ready for retirement, it could use some updates and reform. This Act emerged from the rapid increase in regulatory activity brought on by the New Deal. Its supporters believed that the public and regulated entities were entitled to fair notice and an opportunity to comment and participate in rulemaking and to make full use of the courts when an agency acted irrationally or contrary to congressional enactments. Much has changed over those 65 years in the composition of agencies, the complexity of rulemaking and their reliance on highly technical scientific information. Our administrative process has not kept up with some of those changes. We recommend that the Subcommittee endorse reforming the APA to incorporate the principles and procedures of President Obama's Executive Order 13563 and President Clinton's

Executive Order 12866 into the DNA of how every rule is developed. This would create greater certainty about the expectations of agencies when developing regulations and would improve regulatory outcomes.

U.S. Congress – The U.S. Congress is a fundamental institution in the regulatory process. Congress produces the authority for the agencies to issue rules, so it is also responsible, along with the Administration, for the current state of affairs in regulation. While Congress does consider some of the impact of the mandates it may be imposing 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 regulation.

Over the last two decades, there have been proposals in Congress to create a congressional office of regulatory analysis. As Congress has a Congressional Budget Office that is a parallel institution to the OMB, so too should it have a parallel to OIRA. This could encourage more thoughtful analysis of the regulatory authority Congress grants in statutes, provide Congress with better tools to analyze agency regulations and allow Congress to engage in more holistic reviews of the overlapping and duplicative statutory mandates that have accumulated over the years. We believe this is an important part of rethinking the institutional design of our regulatory system.

Sunsets/Retrospective Review – To truly build a culture of continuous improvement and thoughtful retrospective review of regulations, the process must be institutionalized and be made law. The best incentive for high-quality retrospective reviews of existing regulations is to automatically sunset rules that are not affirmatively chosen to be continued. If an outdated rule has no defender, no continued need for existence, or is shown to have decreased in effectiveness over time, it should be sunset.

The power of inertia and the status quo is very strong. If there is no necessity to review old regulation, 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. There is no natural constituency for regular cleanup of our Code of Federal Regulations. These types of systems need to be put in place throughout government to ensure regulatory programs are thoughtful, intentional and meet the needs of our changing economy.

OIRA – The Office of Information & Regulatory Affairs (OIRA) in the White House Office of Management and Budget (OMB) is the central clearinghouse for non-independent agency significant rulemaking. It applies a critical screen to the contents of regulation, agencies' analytical rigor, legal requirements affecting the proposal and the President's priorities and philosophy. This review does not take place anywhere else in government. Single-mission agencies are frequently effective in accomplishing their objectives. Their 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-wide, economy-wide perspective. For that reason, OIRA is a critical institution in our regulatory process for conducting centralized review of agencies' regulatory activities, facilitating interagency review, resolving conflicts and eliminating unnecessary duplication.

Despite its critical function, even as the size and scope of government has increased, OIRA has shrunk. As OIRA's staff was reduced from an FTE ceiling of 90 to 50 employees, the staff dedicated to writing, administering and enforcing regulations across all agencies increased from 146,000 in 1980 to 242,000 in 2006 (see Figure 1). As OIRA's budget was reduced by more than 50 percent, or \$7 million in real 2000 dollars, all regulatory agencies' budgets increased from \$12.9 billion to over \$36 billion in real 2000 dollars (see Figure 2). To ensure that OIRA is able to fulfill its current mission,

additional staff and resources are necessary. A modest investment in this institution will pay back significant returns to the entire economy.

U.S. Department of Commerce – When the Department of Commerce was reorganized to include an assistant secretary for manufacturing and services, the Office of Industry Analysis was created to assess the cost-competitiveness of American industry and the impact of proposed 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. Recent efforts have sought to redirect and undermine the Department's ability to participate effectively in a competitiveness review of regulation. We believe this Subcommittee should recommend that the Secretary of Commerce halt efforts to limit this office's role in regulatory review and strengthen its capabilities so that the Department can strongly support the President's Executive Order 13563 on Improving Regulation and Regulatory Review and to further improve the institutional design of our regulatory system.

SBA's Office of Advocacy – The U.S. Small Business Administration's (SBA) Office of Advocacy is an independent office consisting of fewer than 50 economists and lawyers whose job is to help federal agencies implement the Regulatory Flexibility Act (RFA) and its amendments. Its resources should be augmented to handle the expanded panel process envisioned in H.R. 527 and to increase its effectiveness.

Information Quality/Peer Review/Risk Assessment – As a corollary to the above, the process by which government relies on complex, scientific information as the basis for rules should be improved. Efforts to improve the quality of the information, to encourage peer review of significant data and to create consistent standards for agency risk assessment have been attempted across administrations. The Subcommittee should

recommend further improvements to the Administration's initiatives on transparency and use of objective data in regulatory proceedings to produce better informed regulations.

This Subcommittee is unique in its jurisdiction because it has the Safe Drinking Water Act within its purview, which serves as a model for current and future regulatory statutes. The Act requires benefit-cost analysis of standards and requires them to be based on the best available peer-reviewed science and requires transparency for the risk estimates. Reforms of other environmental statutes along these lines would significantly improve regulatory outcomes.

Infrastructure Project Delivery – 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 privately-funded and government-funded projects. 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. The time and efforts of federal officials are best spent ensuring stewardship of federal funding at the programmatic levels, rather than project-by-project assessments, because states have proven to be effective managers of the project review process.

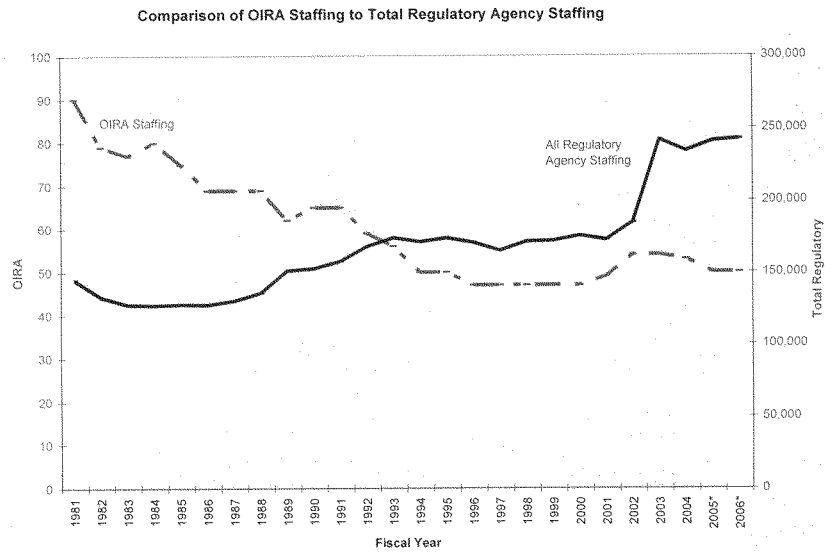
While efforts have been made to streamline and reduce the time it takes to conclude the environmental review process for federally-sponsored highway projects, it still takes 13 years or more to advance a highway project. That is too long for suppliers to the construction industry and end-users of the system. According to the National Surface Transportation Revenue and Policy Study Commission, reducing the project

delivery time from 13 years to 6 years could reduce the cost of a project by almost 40 percent, making far better use of taxpayer dollars.

Other federally-sponsored infrastructure projects are in need of a changed project management approach as well. The Army Corps of Engineers inland waterways lock and dam replacements take far too long to complete, driving up costs that far surpass the rate of inflation. As a workhorse for a variety of domestic industries, including power generation, energy, chemical and agriculture, the nation's inland waterway system requires a more focused effort to ensure resources are dedicated to project completion. The average time to complete a major lock replacement project has ballooned from just over 6 years in the late 1980s to nearly 17 years today, driving up costs beyond what Congress has authorized for such projects. While a new business model is needed that is dedicated to reducing federal bureaucracy and improving project delivery, users of the nation's river systems will lose out to foreign competitors when the aging system proves inefficient and unreliable for the many industries it serves.

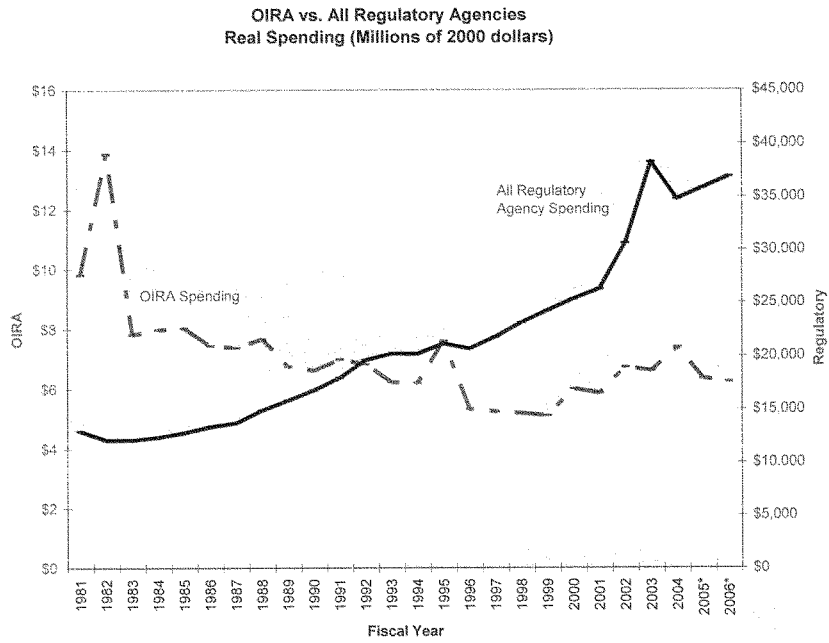
Thank you for the opportunity to share our views on proposals for improving the regulatory system and increasing the competitiveness of our economy. We are committed to working with you to advance legislation, as outlined above, that will restore common sense and thoughtful analysis to federal rulemaking.

Figure 1



Sources: OIRA: *Office of Management & Budget Directories* 81-01, OMB provided data 02-06; agencies: *Analysis of the U.S. Budget*, Dudley/Warren, Weidenbaum/Mercatus, various years.

Figure 2



Sources: OIRA: *Budget of the United States*, various years; agencies: *Analysis of the U.S. Budget*, Dudley/Warren, Weidenbaum/Mercatus, various years.

Mr. SHIMKUS. Thank you very much.

And now I would like to recognize Ms. Karen Harned from the Executive Director, National Federation of Independent Business Legal Center. Welcome. You have 5 minutes.

STATEMENT OF KAREN R. HARNED

Ms. HARNED. Thank you. Good morning, Chairman Shimkus and Ranking Member Green.

NFIB, the Nation's largest small business advocacy organization, commends the subcommittee for examining legislative solutions like those proposed in H.R. 527, which would grow the economy by reducing overly-burdensome regulations. The NFIB Research Foundation's Problems and Priorities, has found unreasonable government regulations to be a top ten problem for small businesses for the last 2 decades.

Job growth in America remains at recession levels. Small businesses create two-thirds of the net new jobs in this country, yet those with less than 20 employees have shed more jobs than they have created every quarter but one since the second quarter of 2007, according to the Bureau of Labor Statistics. Moreover, for the first 6 months of 2011, 17 percent of small businesses responding to the NFIB Research Foundation's Small Business Economic Trends cite regulation as their single most important problem. Reducing the regulatory burden would go a long way toward giving entrepreneurs the confidence that they need to expand their workforce.

NFIB does believes that Congress must take actions like those proposed in H.R. 527 to level that playing field. One key reform would expand the Small Business Regulatory Enforcement and Fairness Act and its Small Business Advocacy Review Panels to all agencies, including independent agencies. In so doing, regulators would be in a better position to understand how small businesses fundamentally operate, how the regulatory burden disproportionately impacts them, and how the agency can develop simple and concise guidance materials.

In reality, small business owners are not walking the halls of Federal agencies lobbying about the impact of proposed regulation on their business. Despite great strides in regulatory reform, too often small business owners find out about a regulation after it has taken affect. Expanding SBAR panels and SBREFA requirements to other agencies would help regulators learn the potential impact of regulations on small business before they are promulgated. It also would help alert small business owners to new regulatory proposals in the first instance.

Regulatory agencies often proclaim indirect benefits for regulatory proposals, but they decline to analyze and make publicly available the indirect costs to consumers, such as higher energy costs, jobs lost, and higher prices. The indirect cost of environmental regulations is particularly problematic. It is hard to imagine a new environmental regulation that does not indirectly impact small business. Whether a regulation mandates a new manufacturing process, sets lower emission limits, or requires implementation of new technology, the rule will increase the cost of producing

goods and services. Those costs will be passed onto the small business consumers that purchase them.

But does that mean that all environmental regulation is bad? No, but it does mean that indirect costs must be included in the calculation when analyzing the costs and benefits of new regulatory proposals.

NFIB member Jack Buschur of Buschur Electric in Minster, Ohio, for example, recently testified that because of the time and financial costs of EPA's lead renovation and repair rules, which took effect in April of 2010, he will no longer bid on residential renovation projects. Because he will no longer bid on these projects, Mr. Buschur will not be hiring new workers at his company, which has 18 employees, and that is down from 30 employees in 2009.

NBIB member Hugh Joyce of James River Air Conditioning in Richmond projected in testimony that new greenhouse gas regulations will add 2 to 10 percent in consulting costs to his projects. This is particularly telling because Mr. Joyce is committed to doing business in an environmentally-friendly manner. He is a member of the U.S. Green Building Council and conducts LEED-certified green housing projects.

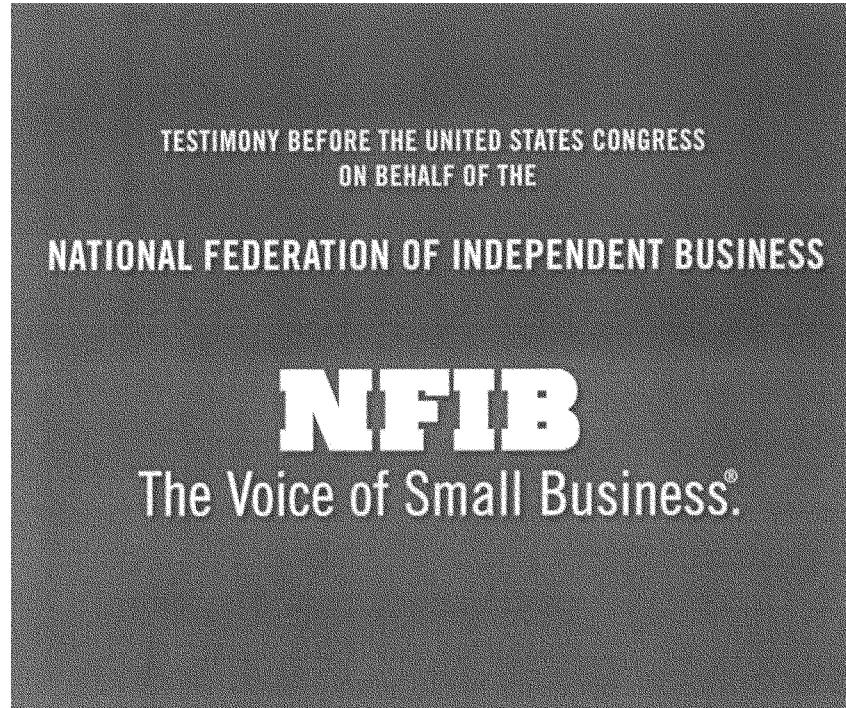
The moratorium on off-shore drilling in the Gulf of Mexico has indirectly hurt those small businesses that depend on that industry. It has impacted all small business owners through further dependence on foreign oil and higher gas prices. Energy costs were ranked as the second biggest problem small business owners face in the NFIB Research Foundation's most recent Problems and Priorities.

Other regulatory forums that would help minimum unintended consequences of regulation on small business include reforms that would strengthen the role of SBA's Office of Advocacy, increase judicial review within SBREFA, insure agencies focus adequate resources on compliance assistance, and waive fines and penalties for small businesses the first time they commit a non-harmful error on regulatory paperwork.

With job creation continuing at recession levels, Congress needs to take steps to address the growing regulatory burden on small businesses. The proposed reforms in H.R. 527 are a good first step.

Thank you.

[The prepared statement of Ms. Harned follows:]



**House of Representatives Committee on Energy and Commerce
Subcommittee on Environment and the Economy**

on the date of

July 14, 2011

on the subject of

Regulating Chaos: Finding Legislative Solutions to Benefit Jobs and the Economy

Dear Chairman Shimkus and Ranking Member Green:

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record this testimony for the Subcommittee on Environment and the Economy hearing entitled "Regulating Chaos: Finding Legislative Solutions to Benefit Jobs and the Economy."

My name is Karen Harned and I serve as the executive director of the NFIB Small Business Legal Center. NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., 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.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

NFIB and the small business owners it represents commend this Subcommittee for examining legislative solutions to help grow the economy by reducing overly burdensome regulation.

The burden of regulation on small business has been among small business' top ten concerns for years. The NFIB Research Foundation's Problems and Priorities, which has been conducted every four years since 1982 and is designed to establish the relevant importance of small business concerns, has found "unreasonable government regulations" to be a top ten problem for small businesses for the last two decades.¹

Overzealous regulation is particularly burdensome in times like these when the nation's economy remains sluggish. Unfortunately, the regulatory burden on small business has only grown. A recent study by Nicole and Mark Crain for the U.S. Small Business Administration Office of Advocacy found that the total cost of regulation on the American economy is \$1.75 trillion per year.²

If that number is not staggering enough, the study reaffirmed that small businesses bear a disproportionate amount of the regulatory burden. The study found that for 2008, small businesses spent \$10,585 per employee on regulation, which amounts to 36 percent more per employee than their larger counterparts.

¹ Phillips, Bruce D. and Wade, Holly, "Small Business Problems & Priorities", June 2008, at Table 5.

² Crain, Nicole V. and Crain, W. Mark, *The Impact of Regulatory Costs on Small Firms*, 2010.
<http://www.sba.gov/advo/research/rs371tot.pdf>

Job growth in America remains at recession levels. Small businesses create two-thirds of the net new jobs in this country, yet those with less than 20 employees have shed more jobs than they have created every quarter but one since the second quarter of 2007, according to the Bureau of Labor Statistics.³ Moreover, for the first six months of 2011, 17% of small businesses responding to the NFIB Research Foundation's *Small Business Economic Trends* cite regulation as their single most important problem.⁴ Thus, reducing the regulatory burden would go a long way toward giving entrepreneurs the confidence they need to expand their workforce in a meaningful way.

NFIB believes that Congress must take actions — like those proposed in H.R. 527 to level the playing field, and the following ideas will help improve regulatory conditions for small businesses. In particular, we are very pleased to see that H.R. 527 provides for expansion of the Small Business Regulatory Enforcement Fairness Act (SBREFA) and the inclusion of indirect costs in economic impact analyses. If enacted, these reforms would be instrumental in giving small business owners a stronger voice in the regulatory process and better assessing regulatory impact on small business.

Expansion and oversight of SBREFA

SBREFA — when followed correctly — can be a valuable tool for agencies to identify flexible and less burdensome regulatory alternatives. NFIB believes Congress should expand SBREFA's reach into other agencies and laws affecting small businesses. SBREFA and its associated processes, such as the Small Business Advocacy Review (SBAR) panels, are important ways for agencies to understand how small businesses fundamentally operate, how the regulatory burden disproportionately impacts small businesses, and how the agency can develop simple and concise guidance materials.

Furthermore, Congress should take steps to require independent agencies to follow SBREFA requirements. Last year, Congress took an important initial step to do this by requiring the new Consumer Financial Protection Bureau to conduct SBAR panels on the rules that will affect small businesses. Now more than ever, the rules promulgated by independent agencies have a considerable impact on small businesses. Congress should hold these independent agencies accountable for their effect on the small business economy.

In reality, small business owners are not walking the halls of federal agencies lobbying about the impact of a proposed regulation on their businesses. Despite great strides in regulatory reform, too often small business owners find out about a regulation *after* it has taken effect. Expanding SBAR panels and SBREFA requirements to other agencies would help regulators learn the potential impact of regulations on small business before they are promulgated. In addition, it would help alert small business owners to new regulatory proposals in the first instance.

³ <http://www.bls.gov/bdm/>

⁴ NFIB Research Foundation, *Small Business Economic Trends*, July 2011.

While SBREFA itself is a good first step, in order for it to provide the regulatory relief that Congress intended the agencies must make good-faith efforts to comply. As an example, the Environmental Protection Agency's (EPA) proposed Boiler MACT rule from last year failed to heed the recommendation of its SBAR panel to adopt a health-based standard and instead proposed a much higher standard that is virtually impossible to attain at any reasonable cost. This higher standard provided little, if any, additional benefit to the public over the health-based standard. Moreover, EPA is now revising its rule because the standard it proposed is too expensive and not practically attainable. If the agency had followed the SBAR recommendations in the first instance, it would not have to jump through these additional hoops.

Committees with oversight authority should hold agencies accountable to the spirit of the law, and the Office of Advocacy should uphold its obligation to ensure that agencies consider the impacts of their rules on small businesses. There are instances where EPA declined to conduct an SBAR panel despite developing significant rules, or a rule that would greatly benefit from small business input.

Congress should require agencies to perform regulatory flexibility analyses. Agencies should also be required to list all of the less-burdensome alternatives that they considered, and in the final rule, provide an evidence-based explanation for why they chose a more-burdensome alternative versus a less-burdensome option — or why no other means were available to address a rule's significant impact. Agencies should also address how their rule may act as a barrier to entry for a new business.

SBREFA contains a process known as Section 610 review, which requires agencies to periodically review existing rules and determine if they should be modified or rescinded. NFIB supports this requirement, but believes it could be improved — since all too often it is disregarded by agencies. H.R. 527 would require agencies to amend or rescind rules where the 610 review shows that the agency could achieve its regulatory goal at a lower cost to the economy.

Finally, when SBREFA was enacted it required all agencies to perform a one-time report on how they had reduced penalties for violations from small businesses. NFIB believes that Congress should explore making such reports an annual requirement. Many of the original reports occurred at least a decade ago. Congress should investigate ways to make agencies provide updated information and require that information on an annual or biannual basis.

Indirect costs in economic impact analyses

Regulatory agencies often proclaim indirect benefits for regulatory proposals, but decline to analyze and make publicly available the indirect costs to consumers, such as higher energy costs, jobs lost, and higher prices. The indirect cost of environmental regulations is particularly problematic. It is hard to imagine a new environmental regulation that does not indirectly impact small business. Whether a regulation

mandates a new manufacturing process, sets lower emission limits, or requires implementation of new technology, the rule will increase the cost of producing goods and services. Those costs will be passed onto the small business consumers that purchase them. Does that mean that all environmental regulation is bad? No. But it does mean that indirect costs must be included in the calculation when analyzing the costs and benefits of new regulatory proposals. Following are a few recent examples of the indirect cost of regulation on small business:

- NFIB member Jack Buschur, of Buschur Electric in Minster, OH, recently testified that because of the time and financial costs of EPA's lead renovation and repair rule, which took effect in April 2010, he will no longer bid on residential renovation projects.⁵ Because he will no longer bid on these projects, Mr. Buschur will not be hiring new workers at his company of 18 employees, down from 30 employees in 2009.⁶
- NFIB member Hugh Joyce, James River Air Conditioning, Inc., Richmond VA, projected in testimony that new greenhouse gas regulations will add two to ten percent in consulting costs to his projects.⁷ This is particularly telling because Mr. Joyce is committed to doing business in an environmentally-friendly manner. He is a member of the U.S. Green Building Council and conducts LEED certified green housing projects.
- The moratorium on off-shore drilling in the Gulf of Mexico has indirectly hurt those small businesses that indirectly depend on that industry and has impacted all small business owners through further dependence on foreign oil and higher gas prices. Energy costs were ranked as the second biggest problem small business owners face in the NFIB Research Foundation's most recent Problems and Priorities.⁸

Agencies should be required to make public a reasonable estimate of a rule's indirect impact. This requirement exists if agencies follow the Regulatory Impact Analysis (RIA) mandate contained in Executive Order 12866 signed during the Clinton Administration. Congress should hold agencies accountable and clarify the agencies' responsibility for providing a balanced statement of costs and benefits in public regulatory proposals.

Strengthen the role of the Office of Advocacy

The Office of Advocacy plays an important role within the government to ensure that federal agencies consider the impact of regulations on small businesses. This role was further strengthened by executive order 13272. This order required agencies to notify the Office of Advocacy of any draft rules that may have a significant impact on small

⁵ Testimony of Jack Buschur, before the House Committee on Oversight and Government Reform, "Regulatory Impediments to Job Creation, February 10, 2011.

⁶ Id.

⁷ Testimony of Hugh Joyce, before the House Energy and Commerce Subcommittee on Energy and Power, "EPA's Greenhouse Gas Regulations and Their Effect on American Jobs," March 1, 2011.

⁸ Phillips, Bruce D. and Wade, Holly, "Small Business Problems & Priorities", June 2008

businesses, and “[g]ive every appropriate consideration to any comments provided by Advocacy regarding a draft rule.”

Despite this executive order, agencies frequently fail to give proper consideration to the comments of the Office of Advocacy. In addition, there is no mechanism for resolving disputes regarding the economic cost of a rule between the agency and the Office of Advocacy.

NFIB believes that the Office of Advocacy needs to be strengthened. The Chief Counsel for Advocacy should have the ability to issue rules governing how agencies should comply with regulatory flexibility requirements. This will help ensure that agencies fully consider the views of the Office of Advocacy.

Increase judicially reviewable agency requirements within SBREFA

As this committee well knows, SBREFA provided important reforms to the Regulatory Flexibility Act (RFA), including providing that agency decisions are judicially reviewable once a rule is finalized and published in the *Federal Register*. However, waiting until the end of the regulatory process to challenge a rule creates uncertainty for the regulated community — which directly stifles employment growth. Under the current system, an agency could make a determination of no significant impact on a substantial number of small entities on its initial regulatory flexibility analysis that may be years before the rule is finalized.

In addition, we have had the experience of filing a lawsuit when a rule is finalized, won the case, yet received a resolution that was of no benefit to small business. About a decade ago, the U.S. Army Corps of Engineers (USACE) issued a rule on what it considers a wetland pertaining to its Nationwide Permits (NWP) program. The USACE performed no regulatory flexibility analysis and instead pushed through the rule using a “streamlined process.” After four years of legal battles, we emerged victorious — a federal court ruled that the agency had violated the RFA. Yet, instead of sending the rule back to be fixed, the court only required that the USACE not use its streamlined process in the future. Small business owners affected by the NWP rule realized no relief.

Because of the regulatory flexibility process improvements inherent within H.R. 527, NFIB is hopeful that judicial review of agency actions will provide greater deference to small business concerns.

Agency focus on compliance

NFIB is concerned that many agencies are shifting from an emphasis on small business compliance assistance to an emphasis on enforcement. Unfortunately, the evidence in this area is plentiful. Both of the five-year strategic plans released last year by EPA and the Department of Labor strongly emphasized increased enforcement. In OSHA's FY 2011 budget request, it proposed shifting 35 staff members from compliance assistance

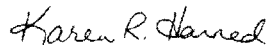
to enforcement activities. Most recently, OSHA has proposed significant changes in its On-site Consultation Program that would reduce incentives for small businesses to participate and identify potential workplace hazards. Small businesses rely on compliance assistance from agencies because they lack the resources to employ specialized staff devoted to regulatory compliance. Congress can help by stressing to the agencies that they need to devote adequate resources to help small businesses comply with the complicated and vast regulatory burdens they face.

Additionally, Congress should pass legislation waiving fines and penalties for small businesses the first time they commit a non-harmful error on regulatory paperwork. Because of a lack of specialized staff, mistakes in paperwork will happen. If no harm is committed as a result of the error, the agencies should waive penalties for first-time offenses and instead help owners to understand the mistake they made.

With high rates of unemployment continuing, Congress needs to take steps to address the growing regulatory burden on small businesses. The proposed reforms in the Regulatory Flexibility Improvements Act are a good first step.

Thank you for holding this important hearing on reducing the regulatory burden on small businesses. I look forward to working with you on this and other issues important to small business.

Sincerely,



Karen R. Harned, Esq.
Executive Director
NFIB Small Business Legal Center

CORE VALUES

We believe deeply that:

Small business is essential to America.

Free enterprise is essential to the start-up and expansion of small business.

Small business is threatened by government intervention.

**An informed, educated, concerned, and involved public
is the ultimate safeguard for small business.**

Members determine the public policy positions of the organization.

**Our employees and members, collectively and individually, determine the success of
the NFIB's endeavors, and each person has a valued contribution to make.**

**Honesty, integrity, and respect for human and spiritual values are important
in all aspects of life, and are essential to a sustaining work environment.**

NFIB

The Voice of Small Business®.

Mr. SHIMKUS. Thank you very much.

Now we would like to recognize Mr. Rogers for 5 minutes.

STATEMENT OF KEVIN ROGERS

Mr. ROGERS. Thank you. Good morning. My name is Kevin Rogers. I am a fourth generation farmer from the Phoenix area. My family farms over 7,000 acres. We produce cotton, alfalfa, wheat, barley and corn silage. I farm with my dad and my brothers and my sister and my uncle. I currently serve as President of the Arizona Farm Bureau Federation. I am here on behalf of the American Farm Bureau. I also have served on the USDA Air Quality Task Force for the past 10 years. I am pleased to be able to testify before this subcommittee.

While there are many issues dealing in agriculture, this committee's jurisdiction can help us to improve, I wanted to touch on just a few of the more serious issues we have in front of us today.

The first issue is the pending EPA decision on revising the Ambient Air Quality Standard for coarse particulate matter, PM₁₀, otherwise known as farm dust. Unlike the smaller fine particles, coarse particulate matter is primarily naturally occurring and made up of dirt and other crustal materials. It occurs while driving on unpaved roads, using tractors in the fields, moving livestock from pen to pen and pasture to pasture.

Also, unlike fine particles where the health impacts are well studied, EPA says for coarse PM it would be appropriate to consider either retaining or revising the current standard based on the science. Even with the lack of data the Clean Air Science Advisory Committee, CASAC, recommends that the standard level be reduced. EPA is currently considering this option. Many areas in urban America already have difficulty meeting the current standard. My own county, Maricopa County, is currently non-attainment, serious non-attainment, and we are having a hard time meeting the current standard we have.

Just a couple of weeks ago you probably saw on the news the big wall of dust that came through out valley, mile high, 50 miles across, it swept through Phoenix. We certainly hope that they will declare that a naturally-occurring event and give us the exception to the standard for that day.

A recent study shows there will be many more rural areas that will not be able to meet a revised standard. This will result in more regulation of farming and ranching activities such as restrictive speed limits on unpaved roads, restrictions on when and how we can work in the fields or move livestock as States attempt to get back into the attainment area.

We favor retaining the current standard, especially where there is little or no science to justify the change of it. We support H.R. 2458 from Mr. Flake that would put a review of the Ambient Air Quality Standards on a more reasonable 10-year cycle instead of the current 5-year cycle. Too often EPA is revising the standards before States have had time to comply with the previous standard. H.R. 2458 would correct this situation.

We also support H.R. 2033 that would exclude naturally-occurring events from Federal regulation unless it causes serious adverse health and welfare affects.

The second issue that I would like to address is the continuing regulation of greenhouse gases by EPA. As we have testified previously before this committee, farmers and ranchers receive a double economic jolt from such regulations.

First, any costs incurred by utilities, refineries, manufacturers, and other large emitters to comply with greenhouse gas regulatory requirements will pass onto the consumers those costs of production, namely farmers and ranchers. The costs that will be passed down will result in higher fuel and energy costs to grow food and fiber. Farmers and ranchers, on the other hand, cannot pass these increased costs of production.

Secondly, farmers and ranchers will also incur direct costs as a result of the regulation of greenhouse gases by EPA. For the first time any farms and ranch operations will be subject to direct new source review, prevention of significant deterioration, construction permits, and Title V permits requirements under the Clean Air Act. EPA itself has estimated there are over 37,000 farms that will emit between 125,000 tons of greenhouse gases per year and thus have to attain the Title V permit. Using EPA's numbers, just the expense of obtaining these permits could cost agriculture over \$866 million.

On the other hand, this costly burdensome regulatory scheme will produce very little, if any, environmental benefit. Unless and until the countries of the world agree on an international treaty on greenhouse gas emissions, unilateral regulation of greenhouse gases by EPA will have little environmental effort. The Farm Bureau strongly supports H.R. 910, which passed the House.

In light of the recent Supreme Court decision in *American Electric Power versus Connecticut*, we believe additional legislation is necessary to clarify that entities cannot be sued just because they emit greenhouse gases. The court left open the issue of standing and common-law actions in the absence of EPA regulatory authority. Legislation is needed to resolve those issues.

We thank the subcommittee for its attention to the needs of rural America, and I look forward to answering your questions. Thank you.

[The prepared statement of Mr. Rogers follows:]



**Statement of the
American Farm Bureau Federation**

**TO THE
HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY
REGARDING: REGULATORY CHAOS: FINDING LEGISLATIVE
SOLUTIONS TO BENEFIT JOBS AND THE ECONOMY**

July 14, 2011

Presented by Kevin Rogers
President, Arizona Farm Bureau Federation
Testifying on Behalf of the American Farm Bureau Federation

Summary Statement of Testimony of
Kevin Rogers, President, Arizona Farm Bureau Federation

- Farmers and Ranchers are faced with an increasing array of federal environmental regulations.
- These regulations cover a broad range of elements, including:
 - Clean Air Act requirements;
 - Clean Water Act permitting and other requirements;
 - Restrictions on pesticides and other farm in-puts; and
 - Regulatory burdens involving both crops and livestock operations.
- While not all such regulations can be quantified, some are substantial.
 - For example, greenhouse gas regulations alone could potentially impose as much as \$866 million in costs to the sector.
- Congress can and should take action to alleviate these regulatory burdens.
 - H.R. 2458, referred to the Energy & Commerce Committee, would provide a more realistic (i.e., 10-year) interval for updating national ambient air quality standards (NAAQS).
 - The House should adopt language in the House Interior Appropriations bill that incorporates the provisions of H.R. 910, a bill adopted earlier by the Energy & Commerce Committee and the full House of Representatives to allow Congress, not EPA, to determine how to regulate greenhouse gases.
 - Congress should adopt language to be offered to the House Interior Appropriations bill that would prevent EPA from regulating agricultural dust, forcing many rural areas into non-attainment status.

Written Testimony of
Kevin Rogers, President, Arizona Farm Bureau Federation

Mr. Chairman and Members of the Subcommittee:

My name is Kevin Rogers. I am a fourth generation farmer and work over 7,000 acres of land in Arizona with other members of my family. We produce cotton, alfalfa, wheat, barley and corn. I am president of the Arizona Farm Bureau Federation, having previously served on the Board of Directors of the American Farm Bureau Federation, and I also have the privilege of serving on the United States Department of Agriculture (USDA) Air Quality Task Force, which advises the Secretary of Agriculture on federal clean air policies that affect farmers. I am pleased to provide this testimony on behalf of the American Farm Bureau Federation on "Regulatory Chaos: Finding Legislative Solutions to Benefit Jobs and the Economy" and to provide members of the subcommittee the perspective of farmers and ranchers who have to deal with an increasing array of federal regulations.

At the outset, I would like to commend the chairman and members of the subcommittee for conducting this hearing. It could not come at a more important time, and it is no exaggeration to say that the onslaught of federal regulations now confronting farmers and ranchers across America is truly overwhelming. I would like to give the subcommittee some perspective about the breadth and extent of the significant regulatory challenges currently facing America's farmers and ranchers. While some of these issues fall outside this committee's jurisdiction, a farmer trying to manage his land and his crops isn't really concerned about committee

jurisdiction or which agency is overseeing his operations. He only knows that the federal government is making it tougher and tougher to make a living from the land. At the end of my testimony, I will attempt to highlight some legislative solutions that would help the agricultural community.

Greenhouse Gases

In response to a question at the USDA Agricultural Air Quality Task Force meeting in Sept. 2010, Environmental Protection Agency (EPA) staff stated that emissions of methane (a greenhouse gas) from livestock operations are not categorized as fugitive emissions, and, thus, would be required to obtain a permit. This raises the potential of the agency imposing permit fees on dairy and other operations that could effectively impose millions of dollars of costs on the agriculture sector.

EPA began regulating stationary sources (including farms and ranches) of greenhouse gas (GHG) emissions on Jan. 2, 2011. Such sources could be required to obtain pre-construction permits and operating permits if they emit, or have the potential to emit, more than 100 or 250 tons of GHG per year, depending on the program. Although EPA claims it has the authority to phase in these limits, that authority is being challenged in court. EPA estimates over 37,000 agricultural facilities will be covered, at an average cost of more than \$23,200 per permit, resulting in costs of over \$866 million to producers.

Coarse Particulate Matter (Dust)

EPA is in the process of reviewing its National Ambient Air Quality Standard (NAAQS) for coarse particulate matter (PM₁₀). PM₁₀, which is essentially dust, is more common in rural areas than urban areas, yet EPA acknowledges it has very little data on health impacts in rural areas. Despite the fact that some rural areas already have difficulty meeting current standards, EPA is considering cutting the allowable ambient level in half.

Pesticides

For the first time in the 38-year history of the Clean Water Act, EPA will require Section 402 permits for normal and routine applications of pesticides in certain situations. This permitting scheme is the result of what many feel to be a flawed court ruling. Unfortunately, when it had the opportunity, the current EPA leadership failed to defend the agency's own regulation. The House of Representatives passed H.R. 872 by an overwhelming majority earlier this year to remedy this problem, but the measure is currently stalled in the Senate and time is growing short.

The Section 7 consultation process required by the Endangered Species Act (ESA) poses tremendous problems for crop protection chemicals. Recently, EPA made a precedent-setting decision to impose harsh restrictions on the use of three critical crop protection products that will essentially prohibit their use in public health sector control programs and food production in large areas of Washington, Oregon, California and Idaho. Additional restrictions on other inputs appear probable.

In an action that is unprecedented, in 2009, the EPA re-opened its consideration of atrazine, one of the most important crop protection inputs for corn, sorghum and other crops. This pesticide had been re-registered in 2006, but due to a campaign by environmental activists, EPA is reconsidering farmers' access to this important crop protection tool.

Concentrated Animal Feeding Operations (CAFOs)

EPA is aggressively working to impose new regulations on livestock:

- Under a settlement agreement reached with environmental activists, EPA has agreed to propose a new regulation to collect detailed information about farms and post that information on the Internet.
- EPA is increasingly changing which activities constitute discharges. For example, in many parts of the country, EPA treats small amounts of dust and feathers blown out of poultry house ventilation fans as regulated discharges, forcing farmers to obtain permits.
- EPA has issued a total maximum daily load (TMDL) in the Chesapeake Bay that limits the ability of CAFOs to obtain new permits or expand operations.
- EPA is expected to propose regulations that would make it easier for the agency to designate small and medium sized livestock operations as CAFOs, thus increasing their regulatory burden.
- EPA is in the process of developing additional regulations that would limit the use of manure as a valuable crop nutrient and limit a farmer's ability to sell manure nutrients to crop farmers.

- EPA is also considering a petition to declare ammonia emitted from CAFOs as a “criteria pollutant” under the Clean Air Act.
- EPA is weighing the option of reinstating reporting requirements for ammonia and hydrogen sulfide emissions for CAFOs under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)/Emergency Planning and Community Right to Know Act (EPCRA).

Non-point Source Regulation

Even though Section 319 of the Clean Water Act explicitly leaves regulation of non-point source regulation and land-use decisions to the states, EPA is seeking to claim jurisdiction:

- As part of planned regulations covering animal feeding operations, the agency is attempting to narrow the statutory agricultural storm-water exemption that farmers have historically relied on. In the Chesapeake Bay, EPA has required states to impose mandatory controls on non-point sources.
- EPA has entered into a settlement agreement with environmental activists to adopt unrealistic and unattainable numeric nutrient criteria in Florida.
- EPA is also in the process of increasing its oversight and requiring more stringent water quality standards nationwide. Key among EPA’s proposals are measures to pressure states into issuing numeric nutrient standards, to tighten rules over point and non-point sources and give environmental activists greater ability to challenge livestock operations and land use activities of farmers and ranchers.

Spill Prevention

Even though the agriculture community has repeatedly asked EPA for additional time to inform farmers and ranchers about their obligations under the Spill Prevention, Control and Countermeasures (SPCC) rule, the agency has declined to do so.

Federal EPA Jurisdiction

EPA has proposed “guidance” which it intends to use to inform its regulatory decisions on all Clean Water Act programs. The agency is doing this despite being admonished by the U.S. Supreme Court that it should proceed under a thorough, formal rulemaking under the Administrative Procedure Act as to how it regulates navigable waters of the United States. EPA’s proposal could give it jurisdiction not only over isolated wetlands and waters, but also over dry land features such as ditches on farm land. This is an enormous expansion of authority by the agency.

Prior Converted Cropland (PCC)

EPA is attempting to undo a 1993 regulation that stipulates that PCC remains PCC even when the use of the land changes. The effect will be to seriously erode farmers’ investments in their land.

I now would like to focus on two critically important items with pending legislative proposals that merit quick action, which fall under the jurisdiction of the Energy and Commerce Committee. The first is the issue of agricultural dust – coarse particulate matter or PM₁₀. The second is the issue of greenhouse gas regulation.

Earlier this year, before the House Committee on Agriculture, Lisa Jackson, the Administrator of the EPA, provided testimony in which she sought to dispel five “myths” about how EPA is targeting the agricultural community for increased regulation. One of those “myths” related to agricultural dust. In her oral statement, Administrator Jackson said:

Another mischaracterization is the claim that EPA is attempting to expand regulation of dust from farms. We have no plans to do so, but let me also be clear. The Clean Air Act passed by Congress mandates that the Agency routinely review the science of various pollutants, including Particulate Matter, which is directly responsible for heart attacks and premature deaths. EPA’s independent science panel is currently reviewing that science, and at my direction EPA staff is conducting meetings to engage with and listen to farms and ranchers well before we even propose any rule.¹

In her statement, the Administrator said that the agency has “no plans” to expand regulation of dust from farms but went on to say that the Agency must “routinely review the science of various pollutants, including Particulate matter.” In fact, the Clean Air Science Advisory Committee (CASAC) has been meeting extensively on the question of changing the NAAQS for PM₁₀. The

¹ Statement of Administrator Lisa Jackson delivered to the House Committee on Agriculture, March 10, 2011.

latest EPA Draft Policy Assessment for coarse PM stated: “available evidence could support either revising the current PM₁₀ standard...or retaining the current standard.” The revised standards discussed by EPA in the assessment would lower the allowable levels of PM₁₀ and would result in more areas coming into non-attainment, most of them in rural areas. This includes farms and ranches.

Coarse particulate matter is much more prevalent in rural areas due to unpaved roads, working farm fields and wind. With very little evidence of adverse health impacts from PM₁₀ (and virtually no evidence from rural areas), EPA is proceeding to consider revising 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 PM₁₀ 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.

There is a legislative solution to this problem. We hope that the Interior Appropriations bill will include language sponsored by Rep. Jeff Flake (R-Ariz.) that states the following:

None of the funds made available by this Act may be used to modify the national primary ambient air quality standard or the national secondary ambient air quality standard applicable to coarse particulate matter (generally referred to as “PM10”) under section 109 of the Clean Air Act (42 U.S.C. 7409).

If, as Administrator Jackson testified, the agency has “no plans” to regulate agricultural dust, then this amendment should not be at all problematic. Farm Bureau strongly supports the Flake amendment and hopes it will be adopted by the House. We also support H.R. 2458, also introduced by Rep. Flake. That legislation would change the frequency of review of air quality criteria under Section 108 of the Clean Air Act and national primary and secondary ambient air quality standards under Section 109 of the act from 5- to 10-year intervals.

The second issue on which a legislative solution is imperative is that of greenhouse gases.

EPA began regulating greenhouse gas emissions at stationary sources (including farms and ranches) on Jan. 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 pre-construction 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 tons per year (tpy) – a level a thousand times above that explicitly set by Congress in the law. EPA’s greenhouse gas emission 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.

On April 7 of this year, on a vote of 255-172, the House of Representatives adopted H.R. 910, the *Energy Tax Prevention Act of 2011*. That legislation effectively puts the policy decision about regulating greenhouse gases where it belongs – in Congress, not in the federal bureaucracy. This is a critical legislative initiative that must be pursued.

As I mentioned earlier, EPA itself admits as many as 37,000 farms and ranches could be subject to Title V Clean Air Act operating permits if the agency moves forward on its agenda. This is the genesis of reports about a “cow tax,” which EPA sought to dispel as a myth in its testimony before the House Agriculture Committee. It is gratifying to know that this committee and the House of Representatives agree with our view that such a regulatory scheme is nothing more than tax. Unless Congress acts, it is clear that this burden will be felt by farmers and ranchers.

In her testimony, Administrator Jackson said, “The truth is – EPA is proposing to reduce greenhouse gas emissions in a responsible, careful manner and we have even exempted agricultural sources from regulation.” Mr. Chairman, we have looked at the Clean Air Act very carefully, and we have not found any place in the law where the committee gave the administrator the authority to exempt agricultural sources. We are not confident that the exemption exists, either in fact or in statute. We are greatly concerned that the agency feels it can effectively do what it likes, irrespective of the law. If they are allowed to exempt agriculture where they don’t have the authority, perhaps another place they might include agriculture where Congress didn’t intend. That is a frightening prospect for farmers and ranchers.

We urge this committee to continue to work for enactment of H.R. 910. It is our understanding that the language of this bill will be incorporated in the text of the Interior Appropriations bill. We hope the committee will support adoption of that language and do everything possible to have it enacted into law.

In order to give farmers and ranchers greater certainty, additional legislation is needed. Recently, the U.S. Supreme Court ruled unanimously in *American Electric Power v. Connecticut* that there was no federal common law right of action for emission of greenhouse gases. The decision, however, left unanswered the questions whether plaintiffs could maintain standing to sue, and whether suits could be maintained under state law. Legislation is necessary to clarify that there is no common law action under either state or federal law for emissions of greenhouse gases.

Mr. Chairman and members of the subcommittee, I appreciate this opportunity to testify this morning and will be pleased to respond to any questions.

Mr. SHIMKUS. Thank you very much, Mr. Rogers. Thank you all for your opening statements, and now I would like to recognize myself for 5 minutes for the first round of questions.

And I want to start with Mr. Kovacs because you laid out a history of how we got where we are. You also, I think, implied that if we just enforce some of the laws on the books this wouldn't happen. I have been interested in this whole judgment fund issue where the environmental groups or concerned citizens can sue a Federal agency and then there is a settlement out of court that is where the plaintiffs want to go without going through the legislative process, and then we pay the court costs.

I mean, that sounds pretty crazy to me. Is that the way that works?

Mr. KOVACS. We call it sue and settle, but, yes, the judgment fund is part of it. What—it is actually a new twist to the regulatory process. Historically you would go through a rule making, you would give input to—you would take input, you would propose the rule, you would respond to the rule, and that eventually would be litigated.

What is happening now is that the agency is being sued and rather than defending itself it is entering into a consent decree and as part of the consent decree it agrees to do two things. One is it agrees to move forward with regulation that the environmental group or group wanted, and two, in many instances it agrees also to pay the attorneys' fees. The attorneys' fees comes out of the judgment fund, and the judgment fund has been around literally since the beginning of the Republic but around 1995, it appears that it was taken off the books, and it is now considered a permanent, unlimited, non-disclosed fund. And even if you go onto the Treasury Department's Web site, what you find is a lot of computer code, but you have no idea who the payments are made to. And there have been some attorneys in the United States who have done some discovery in very narrow areas, and the numbers are significant. They are in the tens and perhaps hundreds of millions or more.

So one of the things that needs to be done if you are going to—you have two problems with that process. One is should the agencies be defending itself. It is one thing if the agency thinks that it is completely wrong, and that happens, and the agency has the discretion to settle, of course, but when you begin a systematic program of sue and settle where the agency is doing this on a regular basis, and I think we have got, we are up to 16 of these in the last several years, this is becoming more of a pattern of—more of a practice.

And then the second part is, is that there is—the agencies are unwilling, meaning mainly the Treasury Department, to provide any of the information on who is getting the claim. So the government really has no idea. You have no idea who is being paid.

Mr. SHIMKUS. That is astounding, and I think that will give us some focus on something that we should be able to have access to. All citizens should know where their tax dollars are going and who is making—we are making payments to.

Ms. Harned, I saw you kind of light up. Do you want to add anything to that?

Ms. HARNED. No, other than just——

Mr. SHIMKUS. I want to go quickly because I got one more question.

Ms. HARNED. Oh. OK.

Mr. LIDDELL. I would like to add——

Mr. SHIMKUS. Yes, sir.

Mr. LIDDELL [continuing]. If I may. I think that has implications for OIRA's regulatory review process, too, when it is a sue-and-settle process. I think both in terms of time and substance, it ties their hands somewhat on what kinds of review they can do on agency rules.

Are you familiar with that, Mr. Kovacs? No? OK.

Mr. SHIMKUS. Let me just—is there any truth to the rumor that there may be encouragement by the Federal agency, in this case the EPA, encouraging this type of process to move a regulation faster, and have you, Mr. Kovacs, do you—I have heard that claim.

Mr. KOVACS. Well, we have heard a lot of claims. The difficulty is when you have a non-disclosed, unlimited appropriation and you have an agency very willing to not defend its own actions, it invites that kind of conduct. Whether or not it is occurring, that is something really Congress is going to have to determine. Some of these lawsuits are brought, and they are relatively quickly settled. Others do happen over time. One of the things that we are looking at is how many of these exist, because it is not just to—it is not just on regulations that are not on the books and someone wants it on the books, they are also right now—some of these lawsuits are opening up regulations that have been settled for 20 and 30 years such as coal ash, ozone——

Mr. SHIMKUS. Let me—thank you very much because I want to get to Mr. Rogers just for a second. When Administrator Jackson was here I put up on the screen the harvesting of soybeans and the dust that comes after that, that organic material. I have used that quite a bit to talk about the dust regulations to some extent where—there are some environmental attacks on me saying that that is a bogus claim, that these dust regulations will not hurt agricultural America. Obviously your statement says otherwise.

Mr. ROGERS. Well, I happen to farm right in the Phoenix area, and we have been serious non-attainment for a number of years, and those farmers who are impacted there by the urban area truly have to farm under a different set of rules and regulations than anyone else in the country does, and so as our rural America becomes in a non-attainment area, irregardless of where they are, there is different things you have to do because what you do on the farm is now under a microscope, and if those monitors trigger, wherever the monitors may be located, you will have to change your practices to reduce PM10 from your tractor operations. We do it every day.

Mr. SHIMKUS. You either don't—you either will stop farming or you will bring water trailers trailing behind agricultural machines to knock the dust down before it gets into the air. Is that true?

Mr. ROGERS. Well, you have to figure out ways to farm without disturbing the soil in any way, and as we have told EPA and as we have told our Department of Environmental Quality——

Mr. SHIMKUS. I think you did that with a stick. You put a stick in the ground——

Mr. ROGERS. Yes.

Mr. SHIMKUS [continuing]. Put a corn kernel in the ground.

Mr. ROGERS. We tell them sooner or later you have to disturb the soil.

Mr. SHIMKUS. I am way over my time, and I would like to recognize the ranking member, Mr. Green, for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman, and I have some questions. I appreciate our panel for being here.

Mr. Kovacs, you talked about the judgment fund that was created, and I have a lot of years in the State Legislature, and I know Congress, that was created because at one time if a business sued the Federal Government for anything, they had to come to Congress to be able to get, even though the Judge may have said, OK. Federal Government was wrong, you owe this money, they had to come to Congress to get permission. We had to pass legislation on every judgment, and that is why you have that.

In the State of Texas we had that problem, too, my first years in the '70s in the legislature. We would have to approve literally of every judgment against the State, and frankly I had a lot of small businesses and businesses who were looking for assistance because they couldn't. Now, maybe it is being—what is happening in the court system is wrong, and we need to look at that, but I think attacking the judgment system you may have some of your members of the Chamber or the independent business folks or even the Farm Bureau who may be concerned that if they want a judgment from a Federal court, that it would be up to Congress to actually pay for it.

Do you want to respond to that?

Mr. KOVACS. Oh, sure. I mean, as I said, the judgment fund has been around since the beginning of the republic. I mean, when you have judgments against you, the United States has to pay. No one is arguing that.

What happened in 1995 is you stopped keeping track of it, and that seems to be where the problem is because in——

Mr. GREEN. Maybe that is an entitlement we need to look at.

Mr. KOVACS. Well, it may be, but the difficulty is it is not disclosed, and it is unlimited, and it is permanent, and you have in the system now because we didn't have this at the time, a group—groups that would sue and then enter into settlement agreements where the agency would agree to pay the attorneys' fees. There is—the agency should be litigating to defend its position.

Mr. GREEN. And I agree, and I don't know if our committee has jurisdiction over that, you know. The Judiciary Committee probably has it but I think it is a problem because, you know, it sounds like it is a sweetheart deal, and we may need to address that.

The other issue is I know it was brought up on sunset legislation, and I have been a supporter of sunset legislation, although it has never passed both the House and the Senate and—because, again, my experience in the legislature where we sunsetted State agencies every 10 to 12 years, and I was on the Sunset Commission, and it was a terrible job because for a part-time legislature because you are actually full time while you are on that commission.

And Congress, I guess our compromise is we have reauthorizations, and you know, bills we do here all the time we put a 5-year reauthorization, 7 years, sometimes 10 years, sometimes Congress doesn't reauthorize them so they end up being a rider on appropriations on a yearly basis. That is, I guess, our compromise but I agree that the sunset legislation would be good, although it may be a little duplicative of what we do already with reauthorizations.

As I said in my opening statement the committee has held numerous hearings to examine the regulatory look back process envisioned by the President's Executive Order of 13563, calls for federations to develop primarily plans. My understanding that EPA has drafted such a plan, and it is opened up for public comment.

My question did each of your organizations provide public comment to the EPA? Did the Chamber of Commerce and—

Mr. KOVACS. I am not sure we have yet, but I know we will be.

Mr. GREEN. OK.

Ms. HARNED. Yes. NFIB has.

Mr. GREEN. Have you? Well, that is one of the important things about it because even when, you know, you have to be at the table, and my, believe me, probably more so than a lot of folks coming from my area, we have differences with EPA on a regular basis. But we need to make sure we are there.

Do you think EPA and the other agencies are effectively involving stakeholders in the regulatory review process, and what ways could they improve that, their efforts? I mean, EPA is just one agency but it is pretty all-encompassing I know from you all's businesses.

Mr. KOVACS. Well, I mean, on some of the major regulations, for example, like on the comment period for greenhouse gas, an extension of time was asked for, and it was not granted, and that was thousands of pages of scientific documents that people were trying to review.

So, you know, one of the things I think you will find is that there is a disconnect between what I would call the economically-significant regulations and everything else. And if you look at the 170,000 regulations that have been adopted by the Federal Government across since 1976, there is only about, roughly about 100 to 200 each year that are economically significant. A lot of the regulations as you have heard today are—have general support. They are actually business practices that people want and need.

The difficulty, and I can't stress this enough, is that when Congress began passing these broad statutes and delegating powers to the agencies, that was probably workable, but when the courts gave the agencies deference, you actually—you got yourself in a position where the law you passed, which was reasonable, once you added deference to it became something where they tipped the balance, the Constitutional balance of checks and powers. And that is the difficulty you have in today and with a divided government it is very difficult to get that power back, and I think that is what we are all struggling with.

Mr. GREEN. And I know I am out of time, Mr. Chairman, but we still have access to the court system. If EPA does something that is, like you said, that is different from what the law—then the law should be interpreted, we still have access to the judicial process,

but, again, that is a long process, but because I know at least in the State of Texas we have a lot of experience in suing EPA but—and sometimes coming to agreed settlements, which is, you know, kind of dividing of the child, I guess.

Mr. Chairman, thank you for your time.

Mr. SHIMKUS. Thank you, and the chair recognizes the gentleman from Pennsylvania, Mr. Pitts, for 5 minutes.

Mr. PITTS. Thank you, Mr. Chairman, and welcome. Thank you to the witnesses, especially to Kirk Liddell from Lancaster, and I will start with you, Kirk.

How does the current regulatory environment in the United States prevent NAM members from being what you cite as your number one issue in your strategy being the best country in the world, the headquarter company, and to attract foreign investment? What specific things from your own company's experience should be enacted into law to make companies want to make their base of operations headquartered in the U.S.?

Mr. LIDDELL. Congressman, there are many, many regulations, of course, that affect the cost of doing business in the United States, and oftentimes the cost of these same activities outside of the United States is less. We, for example, we are primarily an employer. We hire a lot of people, and the cost of complying with various regulations is a true cost of hiring people. We have to—we are kind of neutral on this. We take the world as it is, and we recognize that those are costs we have to bear if we have to hire people in the United States.

So we try to find other ways to satisfy those needs. Sometimes that is hiring people outside of the United States where we can get the work done. We have an office in India, for example, where we can do a lot of back office things much less expensively and completely, you know, legally and the like.

So I think in that case didn't force us to relocate outside of the country, but that is just an example, and I know a lot of the firms, the big public firms that deal with securities issues and the like are finding a significant extra cost of raising capital and conducting business in the United States and are now, you know, relocating outside of the country and the like.

Mr. PITTS. Besides the tax code if you could prioritize the next most important—is regulatory uncertainty number two? What would be, you know—

Mr. LIDDELL. Well, I don't have a clear list in my mind. I would be happy to get back to you on that—

Mr. PITTS. Yes.

Mr. LIDDELL [continuing]. But I just mentioned the securities, the SEC rules and the accounting rules and the like that are, Sarbanes Oxley and the like, that are handicapping U.S. companies, you know, vis-a-vis foreign—

Mr. SHIMKUS. If the gentleman would yield?

Mr. PITTS. Yes.

Mr. SHIMKUS. If you would submit that to us, that list—

Mr. LIDDELL. Sort of a priority list of things that are affecting—

Mr. SHIMKUS. Right. That would be helpful to us.

Mr. LIDDELL. I would be happy to do so.

Mr. PITTS. Thank you. Ms. Harned, many times the Executive Branch agencies do economic impacts of their rules, and either do not apply them as part of the final regulation consideration or possibly misapply them. How important is the application of this criterion and any rule, and how do we prevent bad outcomes from occurring?

Ms. HARNED. Right, and that really is the key is all of the front-end work that I know truthfully is frustrating to the regulators because they think that it just makes it harder for them to get a reg out, is so critical, and following what we want to see is following the letter and the spirit of the law on the front end, making sure that all the costs are assessed, making sure that all the stakeholders are brought to the table.

Like Mr. Green was alluding to, I mean, that continues to be a problem quite frankly within different agencies, including the EPA with rules that they are more willing to say, oh, this isn't going to have a significant impact because they know once they say that there is going to be a lot more work they are going to have to do on the front end.

But the bottom line from our members' perspective is doing this front end work, doing these analyses, making the agencies hold their feet to the fire on this is critical because once the regulation is out, pulling it back is next to impossible.

Mr. PITTS. Thank you, and Mr. Kovacs, do you believe that Congress delegates too much regulatory authority, discretion, thereby allowing the Executive Branch to write and rewrite Congressional intent?

Mr. KOVACS. Well, I think you have delegated a sufficient amount of regulatory authority that the courts even in the most recent, *Connecticut v AUP*, put a significant amount of the opinion, even though it was about Congressional delegation, and once you delegate this broad authority to the agencies, they are recognized by the courts as the expert, and at that point in time they are writing the law. Yes.

Mr. SHIMKUS. Would the gentleman yield on that?

Mr. PITTS. Yes.

Mr. SHIMKUS. So would you say that since then the courts really default to the agency because they assume that they are the experts. So there is really—talking about people could go to court, but you already got the courts almost—it is way disproportionate to the Federal agency.

Mr. KOVACS. That is correct. You have—absolutely. You have several difficulties there. You, one, you put a relatively low standard in the Administrative Procedure Act as to what the agencies had approved. If they can show something in the record, that is sufficient for the court to find in their favor.

Then in the 1980s when courts gave them deference, it literally said not only does the agency not have a high burden of proof, but we are going to recognize the agencies as the expert.

So you have really—the structure of vague loss plus the delegation plus deference has put Congress in quite a bind.

Ms. HARNED. If I may, there is a reform in H.R. 527 that speaks to this and speaks to the question that you had asked me, too, which is when the Office of Advocacy and an agency are to have

a disagreement, which does happen with regards especially to economic impact on small business, H.R. 527 would require deference to be made to the Office of Advocacy, and that is a support, that is a reform that we think would be very helpful in this regard in particular.

Mr. PITTS. Thank you, Mr. Chairman. I yield back.

Mr. SHIMKUS. Thank you. Very good round of questions.

Now I would like to recognize Mr. Latta from Ohio, and just as an introduction he has really been focused on this issue, especially in his manufacturing sector in the State of Ohio.

So Mr. Latta, you are recognized for 5 minutes.

Mr. LATTI. Well, thank you very much, Mr. Chairman, and I appreciate this hearing today, and I will let you know right off the bat I have worked with everyone sitting at this table with your organizations in my State. I not so long ago had asked NAM to give me numbers of members on the Energy and Commerce Committee. We represented about 1.7 million manufacturing jobs several months ago. The new numbers I got just last week we are down to about 1.55 million jobs.

You know, jobs is the number one issue that this Congress has got to be facing, and everything that I talk about is about jobs, because they are fleeing this country, they are fleeing our States, and I am worried, because first, I used to be the largest manufacturing district in the State of Ohio. I have dropped to number two. Several years ago my district was the eighth largest manufacturing district in Congress. I also represent the largest agricultural district in the State of Ohio. We are large in row crops, and so everything comes right down to jobs, jobs, jobs.

And I was very interested in your testimony that you all had talked about today because, you know, when you are talking about manufacturing and manufacturing product what is scaring me now is when I talk to my manufacturers in my district, this is what they are telling me.

They have come up with a great idea how to make a new pencil, and wholesalers say to them, this is fantastic. Now tell me how you can make this in China at a cheaper price that we can sell it. Not making it here but making it someplace else, even though we have got the idea right here in this country.

And if I could, just to ask a few questions, and I know my time is short, but as we are looking I know that—a couple questions I would like to ask each of you.

I have got—my folks that manufacture in my district that when I have talked to them and after I have heard from the problems they have had with regulators say, why didn't you contact me, and they said they were afraid to. And when the regulators out there have got the fear of God in the people that are in this country that are supposed to be creating jobs that they don't even contact their elected representatives, there is something wrong.

So, first, I would like to ask, you know, on that statement, right down the line for all of you, you know. Is there a fear that people have about speaking up about regulations because of the retribution that they get from those regulators?

Ms. HARNED. If I could, this is a very big problem that the small business owners we represent at NFIB tell us about constantly,

and what we have seen definitely within the last 2 to 3 years is a—or 2 years, I guess, is a big shift and you are seeing it in the budget and also in the culture within the agencies to go back to this gotcha type of mentality. And it is very, very disheartening to our members and really almost can be paralyzing to them when we are trying to get them to, you know, even know the rules that do the right thing, they feel like they can't even ask anybody for help to know what that would be because of, you know, what microscope that might put in front of their business.

Mr. LIDDELL. I would say in general we are not afraid to contact regulators. We do quite a bit, actually, and that is not the issue. It is more just do we want to get involved in all that, the time, the effort, the, you know, it is oftentimes better just, you know, kind of go your own way and keep a low profile and just, you know, move on.

There is some concern with OSHA and some of the other agencies like that that you will—there will be some retribution, but personally that hasn't been a big issue. But, you know, we are busy people. We don't really have time to spend a lot of time with you all and regulators and everybody else. We have a job to do.

Mr. KOVACS. I take a little bit different or maybe a similar look. I don't know that they are afraid of the regulator. I think they are afraid of the process, and let me just give you a quick example.

If you are a company and you are trying to get an EPA permit, you have 40,000 pages of regulations. Any provision on any of those 40,000 pages will stop you getting a permit, which is why I keep on talking all this time about permit streamlining.

So if you can be stopped by anything and let us—somebody mentioned Title V, Title V of the Clean Air Act, that is merely a paperwork requirement, but once you file that paperwork, anyone in the United States under laws passed by Congress can sue you to stop your permit. So you have 40,000 pages of problems, any one of which you miss is gone, and the second thing is once you file for a permit, anyone in the United States can sue you.

So I think they are afraid of the process, and no one wants to put their head up to be visible. They just want to move through.

Mr. ROGERS. My comment as well, you know, our folks in agriculture would just as soon stay on the farm and continue to grow the food and fiber for this country, and when you talk about the fear, I think deep down they all assume, well, we got to grow food. What are they going to—how can they do that to us, and I think it is more of an education issue for them to get involved and understand what could be coming so they do contact their representatives and say, hey, what we do every day is in peril, it is in jeopardy, and we need to reach out to you folks and ask you for help to make sure you understand what is going on.

There is always that fear of retribution when you step up to the plate. In Arizona in Maricopa County we actually, when we understood what the Clean Air Act said, that it is a health-based standard, that it doesn't matter if you only get 8 inches of rain versus 50 inches of rain, the standard is the same across the board, we knew we had to come to the table because EPA has the hammer. Ultimately they can come in and FIP you, Federal Implementation

Plan, which could put us out of business depending on how that goes.

So we came to the table as a community and sat down and negotiated a plan for best management practices so farmers will reach out and be educated about what is going on, but I think there is a fine line that you bring up. Thank you, sir.

Mr. LATTA. Well, thank you very much, and my time has expired, and I yield back.

Mr. SHIMKUS. The gentleman yields back his time.

The chair recognizes the gentleman from Colorado, Mr. Gardner, for 5 minutes.

Mr. GARDNER. Thank you, Mr. Chairman, and I thank the witnesses for their time and testimony today, and I appreciate the opportunity to learn from you.

Mr. Rogers, thanks for being here. I am your neighbor to the north in Colorado, and this committee has spent a lot of time asking regulators questions about whether or not they will have an impact on the economy, whether or not they have taken into account jobs into their analysis, and last week we had a hearing with independent agencies, including FERC, where we asked, you know, whether or not they take into account their impact on the economy and jobs. And the answer was, oh, we certainly do, and then the follow up was, all right. Well, do you take into account the jobs that are impacting—the jobs that will be impacted when you implement a rule, and that rule then increases the cost of energy, do you take into account the jobs impacted by those who have had their energy bills go up or on those who have had their energy bills go up? And I think the answer was, no, they didn't take a look at that.

And so we have had some good opportunities to really learn what is happening in this country when it comes to the economy.

Your testimony talked about the impact that greenhouse gas regulations would have on farming and on agriculture. Your testimony goes into statements made before the Energy and Commerce Committee by Administrator Jackson when it comes to agriculture. We heard, I heard testimony from the Administrator over and over, she said that agriculture is exempt from greenhouse gas regulations.

Do you believe that to be true?

Mr. ROGERS. Well, I haven't seen that specifically in law anywhere where EPA or Congress has exempted us from it, but I think as you narrow down the Title V requirements and you narrow down what happens when there is a lawsuit brought up and EPA is sued for not enforcing the rules and regs that they have and enforcing what Congress has passed over the years, and until they specifically come out with a change, you know, if you have got more than, you know, 50 head of cattle, depending on what they determine, you could be required to get this permit and—

Mr. GARDNER. So 50 head of cattle you could be required to have the permit. Can anybody survive with 50 head of cattle? Can you make it—

Mr. ROGERS. No.

Mr. GARDNER [continuing]. As a rancher with 50 head of cattle?

Mr. ROGERS. No, not at all.

Mr. GARDNER. Can you make it as a family farm operation with 50 head of cattle?

Mr. ROGERS. No. It is difficult.

Mr. GARDNER. If cap and trade had passed, when Cap and Trade Bill passed last year, there was conversations that agriculture was exempt, if, even if agriculture, if a tractor, if a cow, if your farm had been directly exempted from that act, would the consequence of cap and trade still have affected and impacted that culture?

Mr. ROGERS. Certainly. It will be devastating on agriculture as well as all the business community. The things that we do, the fertilizers I use, the energy, the diesel fuel, all the inputs that I use in agriculture, the prices will skyrocket due to that, and those trickle-down effects will be devastating. We have no way to pass those costs onto our consumers at all.

Mr. GARDNER. Do we have any assurance from Lisa Jackson, Administrator Jackson, that agriculture will not be included in future greenhouse regulations? I believe the so-called exemption for agriculture expires in 2013. Do we know what happens beyond?

Mr. ROGERS. I do not know.

Mr. GARDNER. And so there is a large possibility that we could see these regulations applying directly to agriculture including what is referenced to in your testimony as a cow tax?

Mr. ROGERS. That is correct.

Mr. GARDNER. Thank you. Thank you for your time, and I yield back my time.

Mr. SHIMKUS. The gentleman yields back his time.

The chair now recognizes Mr. Whitfield for 5 minutes.

Mr. WHITFIELD. I thank you, Mr. Chairman, and thank you for being with us today. This is such an interesting topic, and I think a vitally important area because as many of you pointed out in your testimony these regulatory bodies and particularly EPA and the Clean Air Act are issuing more and more and more regulations, and it is almost unprecedented of the way that they are moving over at EPA.

And I was delighted that you brought up, Mr. Kovacs, this sue and settle because many of us feel like that is precisely what is happening, that the courts are making the decisions about environmental policy, and what makes it even worse is that we asked recently for EPA to provide us a list of all the organizations that they have been giving grants to, and they were making large sums, they have a large sum of money to give grants, and many of those grants are going to the environmental groups that then turn around and file the lawsuits and then as you say, they enter into a consent decree, and then they pay all the legal fees.

And it is almost like an in-house job here, and it is not the way we need to do policy in the United States. And I think your point about this judgment fund definitely needs to be looked at because we need transparency there. We need to know how much money is being spent. We have asked EPA how many lawsuits do they have pending against them, and they haven't been totally direct, but the indications are there is somewhere between four and 500 lawsuits pending right now against the EPA.

And as Chairman Shimkus said, we have reason to believe from discussions with a lot of different groups that EPA is actually out there encouraging these lawsuits, and I might just also add that on the TVA lawsuits, Sierra Club filed suit against TVA, and TVA,

according to its President, was not even allowed to hire its own legal counsel to defend itself in that suit, but the solicitor general and EPA lawyers defended them, and they agreed in a consent decree to close down 18 coal-powered plants and pay the Sierra Club millions of dollars in not only legal fees but also contributions to them for—to use in whatever way they wanted to.

So one—I get so worked up about it, and I need to be asking questions, but Mr. Liddell, I have been told that you are an expert on the Data Quality Act. We hear many people say, well, the Data Quality Act is a way that you can question the models being used and calculating costs and benefit analysis. Has your firm used the Data Quality Act?

Mr. LIDDELL. We do not, and I don't know where you got that about me being an expert on that. I don't feel I am.

Mr. WHITFIELD. Oh. OK.

Mr. LIDDELL. So—

Mr. WHITFIELD. So but are you familiar with the Data Quality Act? Is—are any of you familiar?

Mr. KOVACS. I am familiar with the Data Quality Act. That is probably, even though it was only a few sentences, one of the finest laws Congress ever passed.

Mr. WHITFIELD. Right.

Mr. KOVACS. It attempted to do something very simple, which is to require agencies to use the absolute best data that was useful, up to date, and transparent, and it allowed the public to actually correct the data if the agency found that it was wrong, and you passed it, I believe, in 2001. We litigated it for several years, and the courts made the decision that unlike the NEPA, for example, where they said anyone has a right to sue, a similar type of statute, the courts ruled that no one has a right to sue, and it is completely between OMB and the agencies as to how they want to require data to enter the system.

And one of the things that I would suggest is there is an example where if there was a private right of action, where when I submit data to the agency, they have an obligation to review it, because let me tell you. When you—when we as a private party decide that we are going to submit data, it—first of all, it is very expensive. We have to go out and hire our own scientists, we have to do our own studies, we have to develop our own models. Then we have to submit it, and for the agency not even to review the data after it is submitted, and all we are asking them to do is correct it if it is wrong or tell us why you are right. And that is the whole purpose of the law, and that has been frustrated since 2003.

Mr. WHITFIELD. Well, I mean, I think the system is broken, you know, whether you have a conservative Administration or a liberal Administration, there needs to be more balance in this process because you get the Office of Information and Regulatory Affairs that are reviewing these regulations over at OMB, and that is controlled by the Administration. The agencies are controlled by whoever is in charge of the government at that time, and that it appears that there definitely needs to be some independent source to have the ability to analyze what is going on in these agencies because no one—the models used, there is like a transparency there, and when

you start calculating the value of a life and the way they determine economic value of a life, no one really understands it.

So would you all agree that there needs to be some independent analysis of cost benefits that these agencies make in issuing these regulations?

Mr. KOVACS. I certainly would.

Mr. LIDDELL. Yes.

Mr. ROGERS. Yes.

Ms. HARNED. Yes.

Mr. WHITFIELD. Well, Mr. Chairman, my time has run out, too, but I hope that we would have an opportunity to work with you and your organizations and try to develop some legislation to help address some of these shortcomings.

Mr. SHIMKUS. Great. Thank you. I just want to for the record let—in that last question you posed that all the panelists agreed and said yes just for the record.

The chair now recognizes the vice-chairman of the subcommittee, Mr. Murphy, for 5 minutes.

Mr. MURPHY. Thank you, Mr. Chairman. I would like to follow up on that very question, give all of you a chance to respond to that with regard to reviewing these regulations. We—when we just dealt with a bill that moved out of the full committee dealing with coal ash issues, it was simply to ask members of the President's Cabinet to comment on economic impact or job impact. I was amazed at the amount of dispute we had among our committee members about whether or not we should even required the Administration to make reference to jobs.

So given you are from so many different organizations represented here, I wonder if you could comment more on this about having independent reviewers review some of these regulatory issues and guidelines and comment on what you think the benefits of that would be.

Mr. Kovacs, do you want to start off with that?

Mr. KOVACS. Sure. The—well, if there is any issue that is important to the institution of Congress it is getting at least some parity with agencies, which is something you don't have now, and in the present system the way it is structured is even on your regulatory laws like the unfunded mandates where they require this kind of an analysis, the way the law is structured is they could give you a half a page which says we did everything and everything is fine, and that is sufficient for court review. And that is the difficulty, but that is the law that you structured.

But what—because so much of the economy with 170,000 plus regulations belongs to the agencies, because they have this deference, and because the courts look at them as the experts, you really have no ability at this point in time to really check the agencies. And short of being able to pass a new law which regains this kind of authority, you are at a great disadvantage as an institution.

Mr. MURPHY. Mr. Liddell, could you comment on that?

Mr. LIDDELL. Well, it is certainly a strong, good idea to have independent analysis and certainly be strong and supportive of that. I guess some of our frustrations is oftentimes when we do kind of like Mr. Kovacs said, we do provide information, well thought-out information, information that we have worked have to

develop. It is still up to the agencies to kind of determine whether they are going to, you know, listen to it, think about it, you know, give it substantive value, and I am not quite sure that it is so much the issue of the quality of the data, it is the willingness of the organization, the agency to seriously consider the value and the ability to do so.

You know, one of the things on job impact is, you know, there are multiple levels. First, will the agency consider job impact. That is important. That was sort of the question number one. And then there is another question is can they do that. When I think about as a business person all the things we do, all the incentives that are created by regulations to reduce jobs, I am not sure that anybody is able to really consider all the unintended consequences and the impacts on jobs. So that is an issue, and I am not sure independent analysis would do that. I think some kind of real-world pragmatic experience might do that.

Mr. MURPHY. Let me make sure I understand this. So when it comes to analyzing impact on jobs, perhaps those doing the analysis should be people who have created jobs?

Mr. LIDDELL. Yes. Oddly enough I think—

Mr. MURPHY. Well—

Mr. LIDDELL [continuing]. People who have sat in the seat of not just creating—

Mr. MURPHY. Like if you have a problem with your health, go to a doctor as opposed to just—OK. Thank you.

Ms. HARNED.

Ms. HARNED. Yes. No. I think that this is a very interesting idea, and really what we see after Congress gets, you know, these procedural protections in place that are really meant to get small business impact, which is obviously our best, our most important thing to brief amendments and the Regulatory Flexibility Act, you start seeing, and we definitely see this with all the agencies, a check-the-box mentality, like, you know, we go through, and we have done that small business impact analysis, and they know how to do it just enough to meet their obligation. And I think more oversight that Congress can give to ensure that that process was really done completely, in particular when you are looking at things like did the agency really consider less burdensome alternatives and seriously consider those alternatives and what that could mean for getting the job done from a policy perspective, from their perspective, but not hurt, you know, job creators and the economy and leave everybody in the wake.

So I think that those kinds of issues really do need more Congressional oversight, and that, again, is, I think that particular reform on the less burdensome alternatives is in H.R. 527, which Mr. Liddell indicated just was marked up and passed.

Mr. ROGERS. We could support the independent review. We are always looking for ways to reform regulations, and I will bring it back to PM10 and the dust issue. All that is done a lot on modeling and if they don't have the research on coarse particulate matters, they will make it up because that is what the modeling requires. They have to plug in a coefficient somewhere so that they can put a number in to decide how to regulate it. So we are all for doing more research and making sure that the models they use are cor-

rect, because they have to have them to plug them in to determine whether or not we are at attainment or non-attainment.

Mr. MURPHY. I appreciate that, and Mr. Chairman, you know, as you know, this town is often so poisoned by things, and it is not a matter that sometimes people look at what a document says but who says it that sometimes people decide before they even read it if it is of value, and it is oftentimes looked upon not what a regulation does for jobs but what it does for votes.

I tend to think that is an insult to job makers and workers, too, but thank you very much. I appreciate it.

Mr. SHIMKUS. I thank my friend. I do plan based upon time maybe to do a second round just to ask additional questions, but before we do that I would like to recognize Mr. Butterfield for 5 minutes.

Mr. BUTTERFIELD. Thank you very much, Mr. Chairman, and thank the witnesses for coming forward today with their testimony.

I am sensitive to the topic that we are talking about today. I represent, as most of my colleagues know, a largely rural district that depends very heavily on agriculture, and we depend also on manufacturing. It is important to me that my constituents continue to have the opportunity to produce goods and put bread on the table, and sometimes that means examining the flexibility and the timing and the efficacy of particular rules.

Having said that, I am deeply concerned that this committee is turning into the "no regulation committee." We have spent a majority of our hearings and markups not developing new plans in energy and telecom and health care but instead breaking out the eraser for any and all Obama administration proposed rules.

While I support review of these rules, at least some of them, and after careful consideration of impacts during these trying economic times, these hearings begin to smack of political rabble rousing.

Let me start with Mr. Rogers, and thank you, Mr. Rogers, for your testimony. I have a few questions for you. You state in your testimony that 37,000 agriculture facilities will be covered by the greenhouse gas rule and will be forced to spend over \$20,000 on permits. I hope I am restating your testimony. This rule has been in effect since January. How many facilities have gone, have had to get a permit thus far, if you know?

Mr. ROGERS. These are the permits here? I don't have that number right this minute, sir.

Mr. BUTTERFIELD. Based on our research it would be absolutely none. Why have these facilities not had to purchase permits? Do you know that?

Mr. ROGERS. I believe that EPA is still determining what the magic number is. I don't think the final rule is out on what is going to be required. They are working with one of the new committees they just put together, EPA and Agriculture and Rural Committee, to help decipher what is appropriate and what is not appropriate.

Mr. BUTTERFIELD. Well, under the tailoring rule can you tell me when any of these facilities will be subject to a Title V or NSR permit?

Mr. ROGERS. No, I can't. It will depend on when EPA determines that that regulation will be enforced.

Mr. BUTTERFIELD. Projected costs are always a complicated subject for rules and regulations. Often the estimates vary widely from those produced by advocacy organizations, EPA, and industry groups.

However, I would note a study from 2010, by Resources for the Future, which I ask unanimous consent to be added to the record, where the researchers found that EPA and other agencies routinely overestimate potential costs. In fact, of the 17 rules studied 14 were found to have costs less, sometimes considerably less, than their estimates.

[The information follows:]

How Accurate Are Regulatory Cost Estimates?

Winston Harrington, Richard Morgenstern, and Peter Nelson
Resources for the Future
 March 5, 2010

Anecdotal information often drives the perception that environmental regulation is responsible for significant economic damage to regulated industries, including reduced productivity and lost jobs. Thus, opponents often claim that rules will be catastrophically costly. Proponents argue the contrary. In a study we conducted several years ago, we examined how well government agencies estimate the costs of pending regulations. We compared the U.S. Environmental Protection Agency's (EPA) pre-regulatory estimates of the direct costs of individual regulations to the actual costs when the regulations went into effect. Did cost estimates calculated before regulations were implemented accurately predict the realized economic burden of regulation?

When we first reviewed the literature (2000)¹ we found only about two dozen rules for which ex post cost estimates were available, primarily those issued by EPA and the U.S. Occupational Safety and Health Administration (OSHA). Subsequent reviews² by the Office of Management and Budget (OMB; 2005) and Harrington (2006) updated our earlier review and expanded the list to include studies completed after 1999, adding some that were not represented in the original sample from other federal agencies, such as the Department of Energy, the National Highway Traffic Safety Administration, and the Nuclear Regulatory Commission, thereby doubling the sample size.

Overall, we found that EPA and other regulatory agencies tend to overestimate the total costs of regulations; their estimations of the cost per-unit of pollution eliminated by regulations tend to be more accurate, however. Calculations of the total cost of regulation include not only the "unit costs" multiplied by the number of units of pollution avoided, but also estimates of the basic adjustment process and costs of change itself. Of the rules initially examined, 14 projected inflated total costs, while pre-regulation estimates were too low for only 3 rules. These exaggerated adjustment costs are often attributable to underestimates of the potential that technological change could minimize pollution abatement costs.

¹ Harrington, Winston, Richard D. Morgenstern, and Peter Nelson. 2000. On the accuracy of regulatory cost estimates. *Journal of Policy Analysis and Management* 19(2): 297–322.

² OMB. 2005. *Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*. Available at http://www.whitehouse.gov/omb/inforeg/regpol-reports_congress.html;

Harrington, Winston. 2006. *Grading Estimates of the Benefits and Costs of Federal Regulation: A Review of Reviews*. Discussion paper 06-39. Washington, DC: Resources for the Future.

Why have EPA's estimates (calculated pursuant to requirements of Executive Order 12291) of the costs of its own regulations tended to be on the higher side? Case studies, other analyses, and discussions with regulatory experts provided the following explanations.

- Projecting technological innovation is extremely difficult. Economists can only say with confidence that the cost of compliance will likely decline over time, based on historical experience, but no one can say at what rate. In fact, for the acid rain (SO₂) program (on which most climate change cap-and-trade proposals are modeled), scrubbing turned out to be more efficient and more reliable than expected. Estimates before regulation assumed that scrubbers operate at 85 percent reliability and remove 80 to 85 percent of the sulfur. In fact, scrubbers typically run in excess of 95 percent reliability, removing 95 percent of the sulfur. The original estimate of opportunities to blend low- and high-sulfur coal in older boilers was a 5/95 mixture. In fact, industry was able to achieve a much more efficient 40/60 mixture.
- Timing, particularly delays, can affect the costs of compliance. For example, industry vigorously protested a proposed regulation of ozone-depleting chlorofluorocarbons (CFCs), claiming that implementation would cause widespread economic harm. Delays in promulgating the rule gave industry two years to identify and develop technological alternatives. Some observers said industry was crying wolf; others thought that if the regulation had been promulgated immediately the costs would have been higher than initially estimated. In this case, delay worked in favor of lowered compliance costs.
- A key determinant of overall cost is the amount of pollution reduction that results from a regulation. In many cases, prospective analyses have misestimated the emissions reductions resulting from a rule. As a result, total costs are different than expected, even though the per-unit cost was forecasted accurately. Frequently, regulations that have produced lower pollution reductions than were expected are cited as examples of ex ante cost overestimation. However, in these cases, total benefits are smaller as well. Society pays less, and it gets less.
- In some instances, EPA underestimated the emissions reductions the rule could achieve, thereby increasing estimated costs per unit of emissions eliminated. In others, it inaccurately predicted emissions reductions because it misestimated baseline emissions that would exist without the regulation. In the case of SO₂, analysts did not foresee an estimated two million tons of reductions from railroad deregulation and other factors unrelated to the EPA interventions, and thus overstated the impact of the agency's actions.
- Besides misestimating baseline emissions, ex ante analysis can inaccurately predict the regulation's effectiveness in achieving the desired pollution reduction. In the case of OSHA's 1976 coke oven standard, a retrospective analysis found that industry expenditures had been far below expectations, but this was mainly due to incomplete compliance. Similarly, the ban on the pesticide dinoseb resulted in a net savings after EPA granted an exemption allowing farmers to use an alternative, paraquat, on their crops. OSHA's occupational lead standard was met primarily through the use of protective gear for workers rather than the engineering approach envisioned by the ex ante cost analysis. Although workers were protected, air lead levels in plants remained extremely high several years after the regulation's promulgation. In these cases, looking only at total costs is misleading, because

the high cost of the regulations resulted in compliance strategies that did not produce the desired benefits. Paradoxically, the underestimation of per-unit costs can lead to the overestimation of total costs.

Cost estimates may be inflated because they were calculated at the proposal stage of rulemaking, not on the final rule. The purpose of notice and comment rulemaking is to solicit information on the assumptions underpinning the proposed rule. The final rule is often adjusted to reduce its economic impacts, based on comments received from industry and others. The final result reflects greater agency understanding of the regulated industry's constraints. These changes in the rule can occur at the very end of the rulemaking process and for a variety of reasons are not captured in the final cost estimates. The failure to capture such changes, especially because they tend to involve cost savings, almost guarantees that the agency's estimate will overstate the true costs of a rule.

- There is a tendency, sometimes inadvertent and sometimes deliberate, for a regulatory agency to estimate the maximum cost to industry rather than the mean—in other words, emphasizing the worst rather than the average impact. Use of the maximum figure may result because the agency's understanding of installed pollution control equipment is out-of-date.
- Industry is frequently the source of cost estimates. For example, in the multimedia rulemaking for the pulp and paper industry, EPA sought the cooperation of the main trade association; the association obtained information from its members or served as a conduit for an EPA-designed questionnaire. Industry typically also submits cost estimates as part of the rulemaking process. For example, trade associations sometimes hire contractors to conduct their own cost studies, as when the auto industry retained Sierra Research to estimate the cost of meeting the low-emitting vehicle (LEV) and ultra low-emitting vehicle (ULEV) standards. Even if regulators are skeptical of industry's estimates, the estimates establish a standard that must be addressed in the rulemaking process. The agency must justify its actions if it rejects the industry numbers; a simple suspicion will not do legally. Thus, the mere existence of industry studies may exert upward pressure on regulators' cost estimates. An industry's cost submissions may be motivated by strategic considerations, but they may also result from firms' unwillingness to devote resources to figuring out the best way to comply with a proposal that may or may not end up as a final rule. Asked "what will it cost?" a firm's analyst may respond with the cost of an "off-the shelf" compliance technology, when in fact a more considered approach may reveal that compliance cost can be cut substantially through an innovative process change. In the latter case, firms are not necessarily employing strategic behavior, but just choosing not to expend resources to determine how compliance could be achieved at minimum cost in advance of final regulation.

In sum, our analysis indicates that a variety of factors contribute to initial government agency cost estimates that may differ from the realized results, although in some cases this is coincident with differences in benefits produced by regulations.

Background

Federal agencies are required by Executive Order 12291 to assess the benefits and costs of any major proposed regulation and alternatives to it; economic impacts include the effect of the regulation on the inflation, employment, and profits of affected industries. The Office of Management and Budget's Office of Information and Regulatory Affairs is required to provide centralized review of regulations and the accompanying regulatory impact assessment (RIA).

A separate law, The *Regulatory Right-to-Know Act of 1999* requires OMB to prepare and report to Congress an annual accounting statement that include benefits and costs in total, by agency, and by major rule plus an assessment of the impacts of federal regulations on local and state governments, the private sector, small business, wages, and economic growth; the statute also requires recommendations for reform of ineffective or inefficient regulations.

Mr. BUTTERFIELD. Mr. Kovacs—and I hope I am pronouncing that correctly—could it be possible that these rules help drive innovation quicker than a baseline scenario, thus lowering costs below the projected amounts?

Mr. KOVACS. Well, Congressman, there is more than sufficient controversy over the cost estimate analysis and the kind of assumptions you use because you can make it come out depending on the assumptions any way you want. I can only tell you how, you know, when we do a study how we do it and how we do our audits and how we do peer review.

But when you get into a study like that, one of the things that is the most important is what are the assumptions that they have used. Do they assume that EPA will implement it? Do they assume they won't? Do they assume innovation? Do they assume it won't? And I think on that each regulation is different, and one of the things if the agency seriously wanted to address this issue, that right up front in the Unfunded Mandates Act, for example, they have to do some kind of an analysis of what are the anticipated costs and benefits and impact on the society so that as part of the rule we can begin that discussion. That generally does not happen.

So I think there is a lot of room in that area for solid discussion among everyone.

Mr. BUTTERFIELD. This was certainly the case with the Acid Rain Program. Is there any other reason as to why it might be lower than you could think of?

Mr. KOVACS. Well, acid rain had a lot of things going on simultaneously. I mean, my recollection is that at the same time you did acid rain, you had the Staggers Act, the distinguished chairman of this committee, which deregulated the railroads, and you began to move low sulfur coal from the west to the east. So you had a few factors, and I think if you look at the history books and the ledger and articles there is a great debate as to whether it was regulation or low sulfur coal and the deregulation of the railroads.

Mr. BUTTERFIELD. Thank you. We are right on target.

Thank you, Mr. Chairman.

Mr. SHIMKUS. And I thank you and I hope my colleagues don't mind since you here I would like to go to a second round, and I just want to follow up on that because that is so true on the acid rain and the '92, Clean Air Act is that there was two issues, fuel switching and technology, and that is the problem we have with the greenhouse gas issue is we don't have the technology. You know, we are—so for in Illinois where we have high sulfur coal, that is where I know you have never seen that poster of mine with those miners, but they lost their jobs because they fuel switched. That is really the debate. They moved low sulfur coal from Montana, and the power plant is still there. The mine across the street was closed, so that is a little bit—I would agree with you on that analysis.

I just want to go to Mr. Liddell and Mr. Rogers because they are the actual producers, actually job. When you decide to make a decision, either, one, to expand a manufacturing facility or to buy 500 more acres, don't you do a cost benefit analysis?

Mr. LIDDELL. Absolutely. You have to.

Mr. SHIMKUS. Mr. Rogers?

Mr. ROGERS. Without a doubt.

Mr. SHIMKUS. And why do you do that? Why do you do that, Mr. Liddell? Why do you do that?

Mr. LIDDELL. Well, it seems obvious you don't want to spend more than you are going to get in return from an investment, and it is critical that you measure all the costs, all the assumptions, all the risks, and end up with a high level of confidence that you are going to be better off for having made that investment than not or else you are not going to go forward.

Mr. SHIMKUS. All right. Mr. Rogers?

Mr. ROGERS. And we have to look at commodity prices, do I have enough labor, do I have enough equipment, what is going to mean to my banker if I increase the size of my farm, can I borrow the extra funds for the cost of production of that 500 acres? In order to grow 500 acres of cotton, you know, it costs \$1,000 an acre so there is an extra half million dollars right off the top.

Mr. SHIMKUS. Our point is is that this is nothing abnormal in the business sector, and that is our point. The subcommittee has been renamed Environment and the Economy, and the reason why is we want to continue to grow on economy, and we are checking upon, and we are trying to do that balance between environmental regs that are needed, I have stated the Clean Air Act has been very beneficial, but there is an affect on the economy, and that is why your testimony is so great today.

Ms. Harned, I think it was your opening statement you mentioned Barrow-Shimkus letter on NAAQS. Who did that? Mr. Liddell? Explain that one more time. I think this is very important. This gives you an example how environmental agencies intervene, distort the ability of business to plan because—what is going on in this situation?

Mr. LIDDELL. Well, this is the ozone——

Mr. SHIMKUS. Yes.

Mr. LIDDELL [continuing]. Review that EPA has taken on.

Mr. SHIMKUS. And when were they supposed to—when are they supposed to——

Mr. LIDDELL. It is a 5-year process.

Mr. SHIMKUS. Five-year process. And where are we at in that 5 years?

Mr. LIDDELL. Well, 2013, would be the normal time for the review.

Mr. SHIMKUS. So the review is due in 2013, but the agency is doing it now.

Mr. LIDDELL. Correct.

Mr. SHIMKUS. Why?

Mr. LIDDELL. Well, I think they have a mission. They want to see the standards tightened.

Mr. SHIMKUS. And what is that effect on jobs in the economy?

Mr. LIDDELL. Well, we have a pretty good measure on that from a study, and, again, you know, subject to some give and take. We are looking at, I think it is 7.3 million jobs, as many as 7.3 million jobs and about \$1 trillion in new regulatory costs annually between 2020 and 2030.

Mr. SHIMKUS. So, I mean, that is Exhibit A of numerous exhibits of, I mean, you aren't asking not to do this.

Mr. LIDDELL. No.

Mr. SHIMKUS. They should do it by their rules and regs 2 years from now, but they are moving it forward. Is this they don't have anything else to do?

Mr. LIDDELL. Well, and as if they don't seem to understand what is going on in the economy right now. I mean, if you are ever going to have an impact on jobs, now is not the time to have a negative impact on jobs.

Mr. SHIMKUS. Yes, and I have taken a lot of notes, of course, I am all over the place. I do really appreciate your testimony. It has given us some issues. I would also encourage you all specific rifle shots of things that we can do. We are very interested in doing that, trying to, again, protect public health but also bring some certainty in these uncertain times to keep the economy where it is at and actually start growing again.

And while I have my last 18 seconds left, fortunately we are going to a second round of questions because in the back is the people responsible for me being either good or bad if anyone was looking at me as a member of Congress, my mom and dad. So I want to recognize them as they walk in. So they are here for the baseball game, so with that is there anyone else seeking time to—the chair recognizes Mr. Green for 5 minutes.

Mr. GREEN. Mr. Chairman, I want to recognize your parents. Your son and I played basketball together when we were much younger in Congress, so now we just spar verbally instead of bumping into each other on the court.

I get lots of e-mails and requests from my constituents on a program that would be a Federal mandate, and I was wondering if any of your agencies or associations have taken a stand on it.

The E-Verify Program was created trying to deal with Federal contractors so we would know at least on the Federal level if someone was on a contract that was paid for by the Federal Government that we would make sure that their Social Security numbers are correct.

And I am just getting a number of e-mails requesting we expand that. I have some concern because I think we have done studies, the GAO or someone, that said, you know, sometimes, you know, my name is Gene Green. I have always been known by that, but the IRS knows me by Raymond Eugene Green, and that is my Social Security number, that if we applied that E-Verify, what would it do to a farming operation or a restaurant or anybody who is a member of any of your associations?

Mr. ROGERS. Mr. Green, it is something I have had to deal with in Arizona for the last couple of years is mandatory E-Verify, and I will tell you that it is in my opinion as a leader of agricultural organization, it is not ready for primetime. It is not ready to go nationwide. It doesn't specifically — I can run your name and your Social Security number through the process, and it says, yes, you are good to work, but it could be somebody else that has your information.

And so that puts me at risk in a couple of lawsuits because if I do hire you and come to find out that it is wrong, then I am in trouble, but if I don't hire you, then I am in trouble as well, and so we understand technology is coming and needs to be there. Or-

ganizationally we don't think it is good in this economy to put business under more regulations and more scrutiny and turn this program into a program that determines whether I hire you or not.

In agriculture we are concerned about labor. We have been on the Hill for a number of years asking for temporary worker programs. We have to have workers to harvest our crops, and so we are concerned that if E-Verify comes down the path without some kind of temporary worker program or reform in some way, agriculture will be devastated.

Mr. GREEN. And that was imposed by the State, not by the Federal Government.

Mr. ROGERS. Correct. That is correct. So we have had the experience with it where the State imposed that law mandating it, and it is practically impossible to hire somebody.

Mr. SHIMKUS. Would the gentleman yield on that same point?

Mr. GREEN. Sure.

Mr. SHIMKUS. If laws were passed to indemnify the employer, would that help? In other words, if you have done everything right and then you are not held liable to litigation.

Mr. ROGERS. That would certainly be a step in the right direction. Our problem is there is not enough people who want to come work and bale hay at 3:00 in the morning, milk cows all night, and cut lettuce every day.

Mr. SHIMKUS. With 9.2 percent unemployment?

Mr. ROGERS. That is exactly correct.

Mr. GREEN. Let me ask the other associations because I only have 2 minutes left and did your association take a stand on the potential for Federal legislation on E-Verify?

Mr. LIDDELL. Could I comment as a business person? We are very familiar with E-Verify. We hire people all over the country, and we are hiring and rehiring and laying off. We got transient employees, transient workforce.

The problem with us and E-Verify is that kind of the intended consequences. The rules haven't thought through the fact that you are going to hire somebody, put them on the job site today, and there is time that it take for them to—that they can't go to work. There is extra burden, extra costs associated with it, so it is more the mechanics of E-Verify than the theory or the concept of E-Verify that is our problem.

Mr. GREEN. Has the Chamber of Commerce made a determination?

Mr. KOVACS. Well, I would be very thrilled to have our labor division send you a response for the record.

Mr. GREEN. OK. Appreciate it.

Ms. HARNED. Right, and I am going—we will have to get back to you on that as well.

Mr. GREEN. OK. Appreciate it. That was just an example, in this case it is a State-imposed regulation, and I know some States are doing that, and it can cause problems in just producing a product. So——

Mr. ROGERS. Well, and we are using the Federal program. I mean, Arizona didn't develop a new program. We are mandated to use E-Verify, and it is not very workable right now.

Mr. GREEN. OK. Thank you, Mr. Chairman.

Mr. SHIMKUS. Great questions. Thank you. The chair recognizes my friend from Kentucky, Mr. Whitfield.

Mr. WHITFIELD. Thank you very much, and Mr. Kovacs, would you mind getting back to us on this Data Quality Act on ways that it could be improved, because I don't have an in-depth understanding of it, but it is my understanding that you really cannot utilize that until the rule has become final. And then at that point as Ms. Harned said, once a rule becomes final, from a practical standpoint, there is not a lot can be done. So if you wouldn't mind—

Mr. KOVACS. I would be glad to.

Mr. WHITFIELD [continuing]. We would really appreciate that.

Mr. KOVACS. Just one quick point on that. The way the law is structured is you should be able to use it not only in—as part of the rule-making process but literally at any other place in the agency process where they are doing studies whether they be economic or scientific so that you can go in and actually input into the study so that the agency gets it right at the end. It is supposed to begin in the beginning, not at the—

Mr. WHITFIELD. But you have to file a lawsuit. Right?

Mr. KOVACS. You can file what they call a petition for correction. It is just that the agencies really aren't addressing them at all, and the courts have said that we don't have a right to sue.

Mr. WHITFIELD. Right. OK. On this National Ambient Air Quality Standard you all have already pointed out that EPA is moving in advance of when they are really required to. Do any of you have any information right now about what percent of the population live in non-attainment areas right now?

Mr. ROGERS. I just know in Arizona that it is Maricopa County, which is the urban area. You know, in Arizona we only have 15 counties compared to some of your States that have, you know, hundreds of counties.

Mr. WHITFIELD. Right.

Mr. ROGERS. So it is a monster country, but—and it tends to be more of an urban issue. The issue we have is those of us that farm in that area get sucked into the regulation, get sucked into the clean up, and we have agreed we all need to step up and do our fair share to—

Mr. WHITFIELD. But you are in non-attainment now?

Mr. ROGERS. That is correct. We are in non-attainment now at 150, and if the proposal goes through and they change it to either 65, 75, or 85, all of our data shows the entire State will become non-attainment.

Mr. WHITFIELD. Yes, and I think a big portion of the whole country will be in non-attainment, and then that is going to—as you say, Mr. Liddell, it is going to have a real negative impact on job creation because everybody is going to be limited in development in their area.

In other comment I would make on how aggressive EPA is being, Congress on two or three separate occasions explicitly said no to greenhouse gas regulation under the Clean Air Act. One was in 1990, when the Clean Air Act was last amended. There actually was a vote at that time on an amendment about greenhouse gas, and that was rejected, and then the U.S. Senate rejected almost

unanimously the Kyoto Protocol and then there was another vote in the House on it. But because of that tailoring rule, you know, they expanded that now, and of course, there are lawsuits pending on that as well.

But I for one think that—I know that the Clean Air Act is almost sacro-sane but the last time we looked at it in any depth was 1990, and I genuinely believe it should be reviewed because a lot of things have happened since 1990, and so I would hope that at some point down the road that we might get into reviewing the Clean Air Act in its entirety.

And I yield back the balance of my time.

Mr. SHIMKUS. The gentleman yields back his time.

The chair recognizes the gentleman from Pennsylvania, Mr. Murphy, for 5 minutes.

Mr. MURPHY. Thank you. Just a couple of quick items here.

I want to ask about another area, and that is guidance documents. We talked about regulations, but those have some enforcement, but guidance documents as you know are just something that various agencies says we think you ought to do this, but it is no force on that.

Can you describe some impact that some of those might have upon some job and economic development? Whoever wants to comment on those things. Whoever wants to anything on that. Mr. Kovacs?

Mr. KOVACS. I mean, if you go strictly by the way the courts have applied it, that if it has no impact on the rights of a citizen, it is truly guidance. The difficulty that we have is if you have 170,000 regulations, you probably have 400,000 documents or 400,000 guidance documents, and many of the documents can be used as part of an inspection so that even though it is only guidance, the question is do you have to comply, and if you don't comply, the difficulty you have is you have to really defend that in court.

So the guidance puts parameters around it, and theoretically it doesn't have any impact, but in most of the major, in most of the regulations or most of the legislation it addresses it. It goes after guidance and as well as when John Graham was Administrator of OIRA, as part of how he administered, he did put out guidance on guidance and how it had to be truly non—it had to be truly not impacting rights, and that seems to be the distinction. If it impacts a right, it certainly is a regulation and should go through the process. If it impacts no rights, then it really shouldn't matter, and you should be able to disregard it.

Unfortunately, in an inspection, for example, you really get put in the position of defending yourself.

Ms. HARNED. Right.

Mr. MURPHY. I am not sure I am understanding what you are saying. Be with you in a second. So that is—so if someone is inspecting a factory, a pharmaceutical company, or something, and they have these guidance, and they will ask have you done the following things, and if the owner of that plant says, no, then they say, then you have to do them or else they are brought to court. They defend—they win the case if it is just guidance, but they still have to defend their position.

Mr. KOVACS. That would be the case. Yes.

Mr. MURPHY. OK.

Mr. KOVACS. That—

Ms. HARNED. And I have actually seen that when I used to practice law in defending a small business owner at an administrative hearing level. We saw, truthfully an inspector overused the guidance against the small business owner, pulling out one of the factors that was in a guidance as something that he shouldn't have done, and he did, and so I have seen that as a practical matter.

I would also say just more generally, though, small business owners really work hard to keep up with the regulations that are on the books, so there is a great concern in the small business community that when you have got a guidance material on top that that they need to know about and that is, you know, not really readily apparent to them. As Mr. Kovacs said, it really is an enforcement area that we see the biggest problems with that and small business owners often don't even know they exist.

Mr. MURPHY. Thank you. Anyone else want to comment on that issue? Yes, Mr.—

Mr. LIDDELL. I would make one experience, a risk experience that comes to mind. I think, you know, we are as business people kind of—we are not looking to fight. We are looking to comply with the rules. So, you know, guidance documents to us are the Bible. I mean, we follow those, and I can remember one specific thing, you know, our board of directors was talking about, you know, which course of action should we take, there was a guidance document there, we followed it, you know, and so they almost have at least on companies like ours, the impact of a regulation or of law.

Mr. MURPHY. Thank you. I would like to point out three final things, Mr. Chairman. One is I certainly encourage all members of this and other committees in Congress to spend some time touring offices and factories and farms and in the midst of that tour instead of just photo ops, asking to see what those guidance documents and regulations are and how they go along with it. It is a worthwhile thing to do, and it will open the eyes.

The second thing I would like to point out in relation to the other question asked, what about regulations, back in the Herbert Hoover Administration, June, 1930, when Congress passed the Smoot-Hawley Act that imposed 59 percent tariffs on things, at that time the American Economic Association, I think it was, sent a thousand some petitions to veto the act, and they didn't, and we know what that did, when they did not listen to the independent people.

And third, I just—so it is unanimous consent, I would like to ask to have the—this powerful Subcommittee on the Environment declare this Mr. and Mrs. Shimkus Day.

Thank you very much.

Mr. SHIMKUS. If I could just reclaim the 15 seconds remaining and ask this question: Should Federal agency guidance documents be subject to proposal and comment period like regulations? What do you think?

Mr. KOVACS. Certainly if they have an impact. If the agency is anticipating that even as a part of an inspection they have to be complied with, they should be subject to regulatory proceedings.

Mr. SHIMKUS. Mr. Liddell? You don't care.

Mr. LIDDELL. Well, we do treat them as—

Mr. SHIMKUS. No. I—

Mr. LIDDELL. So I would say, yes, they should go through the process to the extent the process is a good one.

Mr. SHIMKUS. Ms. Harned.

Ms. HARNED. We would support that.

Mr. SHIMKUS. Mr. Rogers.

Mr. ROGERS. I would agree.

Mr. SHIMKUS. Great. Thank you. I really appreciate your time this morning, and we will take your comments and put them through the mix and see what if we can do with this committee or maybe other committees of jurisdiction. Appreciate my colleagues for their attendance. Appreciate my mom and dad for being in the audience, and with that I will adjourn this hearing.

[Whereupon, at 10:47 a.m., the subcommittee was adjourned.]

