

**EXAMINING THE FEDERAL REGULATORY  
SYSTEM TO IMPROVE ACCOUNTABILITY,  
TRANSPARENCY, AND INTEGRITY**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON THE JUDICIARY**  
**UNITED STATES SENATE**  
ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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**WEDNESDAY, JUNE 10, 2015**

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10 a.m., in Room 226, Dirksen Senate Office Building, Hon. Charles E. Grassley, Chairman of the Committee, presiding.

Present: Senators Grassley [presiding], Hatch, Cornyn, Flake, Perdue, Tillis, Whitehouse, Coons, and Blumenthal.

**OPENING STATEMENT OF HON. CHARLES E. GRASSLEY,  
A U.S. SENATOR FROM THE STATE OF IOWA**

Chairman GRASSLEY. Good morning, everybody. The Senate has a constitutional duty to conduct oversight, and, of course, that is oversight of the executive branch, and in doing that, we want to ensure that the Federal regulatory system remains accountable, and, of course, transparency brings about accountability. Today's hearing gives us a chance to take a broad look at where things stand.

We all remember from civics classes that under our constitutional separation of powers, Congress makes the laws, the executive branch enforces, and the judicial branch interprets. If only it were that straightforward.

According to Professor of Law Jonathan Turley, quote, "Our carefully constructed system of checks and balances is being negated by the rise of a fourth branch, an administrative state of sprawling departments and agencies that govern with increasing autonomy and decreasing transparency", end of quote.

The Federal Register indicates that there are over 430 departments, agencies, and sub-agencies in the Federal Government. The pronouncements of this ever-expanding administrative state impact nearly every aspect of Americans' daily lives.

Data support this. The 113th Congress enacted just under 300 laws. Over the same 2-year period, the Federal bureaucracy finalized 7,000 regulations. Just looking at these numbers, there is no denying that unelected bureaucrats are a real lawmaking force in our country.

If you remember, in 1946, why Congress passed the Administrative Procedure Act because of growing power of the Federal bureaucracy, and they did this to help ensure that regulations are

crafted in an open, accountable, and transparent manner, and that agency actions are reviewable by the courts to ensure compliance.

Among the protections built into the APA is the public notice-and-comment rulemaking process, whereby Americans can weigh in on regulations, and agencies must objectively take those concerns into account before finalizing. This process is supposed to provide a meaningful opportunity for the public to hold regulators accountable and to help insure that regulations are crafted in the public interest and according to law rather than tailored to special interests. The Judiciary Committee has primary jurisdiction over the Administrative Procedure Act, and we need to improve our oversight of it.

Unfortunately, we see repeated efforts today by agencies to undermine the public's role in rulemaking and tactics that render the notice-and-comment process a formality.

Some agencies resort to litigation tactics like sue and settle to speed up the rulemaking process and to keep affected members of the public—and even the States—away from the table when key regulatory decisions are being negotiated behind closed doors.

These tactics often result in consent decrees or settlement agreements between an agency and like-minded interest groups, committing the agency to actions that have not been publicly scrutinized. In February, I introduced the Sunshine for Regulatory Decrees and Settlements Act, a bill that would shine light on these tactics and provide much needed transparency. That is just one part of the issue.

We also see agencies going through the motions of notice-and-comment rulemaking, yet the public's role in the process appears to be anything but meaningful. The EPA's recent finalized Waters of the U.S. rule stands out as a sweeping example of that problem.

Instead of attempting to address the legitimate concerns raised during the open comment period, the EPA and its allies in the professional advocacy community pushed a narrative that portrayed critics of the rule as misinformed, nutty, or in favor of water pollution.

Agencies are supposed to remain objective during the notice-and-comment period. The EPA's efforts to drive support for its own rule—while belittling the concerns of the public—indicate that it had a clear end goal in mind, regardless of public opinion or the rule of law.

According to the New York Times—now, take this into consideration. In the New York Times, quote “the EPA's tactics in supporting the rule are clearly designed to move public opinion, at a time when Congress was considering legislation to block the agency from putting the rule into effect,” end of quote.

I share the concerns of folks in my State of Iowa with the Waters of the U.S. rule. Its sweeping scope has left farmers in limbo about what they can and cannot do on their own land. The indifferent attitude the EPA took toward agriculture is a real concern for my constituents who understand the impact that agriculture has on the State's economy. It is just like the EPA does not know that only God determines if it rains 10 minutes or 10 inches in one night.

More broadly, it is a real concern for just how unaccountable our regulatory system has become. Congress recognized early in the

threat of agency overreach. Accordingly, the APA provides for judicial review.

However, as the influence and reach of the administrative state grows, it seems like the ability and willingness of the Federal courts to hold it accountable has diminished. Over 30 years ago, the Supreme Court articulated the now famous *Chevron* doctrine, whereby Federal courts largely defer to an agency's legal interpretation of a statute it administers.

Recently, the Supreme Court determined that such heavy deference extends even to an agency's interpretation of the scope of its own jurisdiction.

Placing such questions of law into the hands of those who also write and enforce laws raises serious concerns. I often quote James Madison, so let me do it again: quote, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny," end of quote.

It is important that we consider these issues carefully. It is equally important that Congress recognize its own responsibility on the expansion of rulemaking. For too long, Congress has delegated in broad strokes, asking the agencies to sort out details. If Congress is going to ask courts to tackle the tough questions, it needs to be willing to do so itself by reasserting its lawmaking power and by speaking clearly and precisely when it chooses to use that power.

What is clear is that the status quo is not acceptable. Today small businesses and entrepreneurs operate in a regulatory environment that provides little relief from excessive red tape, and one that offers little certainty upon which to base risk and investment. Agencies are falling far short of their duties to weigh the costs and benefits of new regulations, and there is little the courts seem to want to do to hold them accountable. Regulations with hundreds of millions—and even billions—of dollars in impact are being imposed on the U.S. economy, all without a sufficient check.

We have this hearing, and I call on my Ranking Member, who may have different views on this issue, but he and I get along very well. I hope you understand that.

**OPENING STATEMENT OF HON. SHELDON WHITEHOUSE,  
A U.S. SENATOR FROM THE STATE OF RHODE ISLAND**

Senator WHITEHOUSE. I understand it very well, Mr. Chairman. I enjoy working with you, but as you predicted, we do have very different views on this particular topic.

I thank the witnesses for joining us, and I thank Chairman Grassley for calling attention to the important topic of Federal regulation.

The title of this hearing sounds neutral enough. Who can argue against transparency and integrity? I am concerned that its purpose is simply to further my Republican colleagues' relentless and extreme anti-regulatory, pro-big-business polluter agenda. It is an agenda with which, according to polls, most Americans disagree but which special interests love. Whether we are talking about environmental or health or consumer or financial regulations, today's Republican Party, unlike previous Republican Parties, seems deter-

mined to roll back important public protections, and often in very misleading terms.

Over in another room in this building today, we are marking up what is Orwellianly called the “Federal Water Quality Protection Act,” a bill whose purpose is to take down Federal water quality protections.

The arguments tend to be one-sided, highlighting potential jobs lost, while completely ignoring potential jobs created and economic and health gains, and railing against overzealous regulation while never acknowledging the role of overly lax regulation in contributing to recent crises and disasters.

Regulatory agencies have through our lifetimes provided vital protection to the American people, and we in Congress should exercise our oversight responsibly, focusing on realities rather than on rhetoric.

One of the majority’s case studies for overzealous regulation today is the rule recently finalized by EPA and the Army Corps of Engineers to define Waters of the United States under the Clean Water Act. This rule was developed over many months, following more than 400 meetings across the country, review of over 1 million public comments, and vigorous grassroots outreach.

In my home State of Rhode Island, this rule is going to protect small streams and wetlands that are vital for our fish and wildlife. Rhode Island residents and nonresidents spend hundreds of millions yearly on wildlife recreation, including \$130 million on fishing alone. More than 400,000 Rhode Islanders participated in wildlife recreation activities in 2011 when the sample was taken. This rule is good economic news in Rhode Island, and actually probably good economic news in most places around the country. That is why the American Sustainable Business Council, which represents 200,000 businesses that rely on clean water, supports the Clean Water Rule. A polling commissioned by the council found that 89 percent of small business owners, including 78 percent of Republicans, favor Federal rules like those proposed by the EPA to protect upstream headwaters; 71 percent of small business owners agree that clean water is necessary for jobs and the economy; 67 percent are concerned that water pollution could hurt their business in the future. Of course, others pushing for this Clean Water Rule are the American Fisheries Society, the American Fly Fishing Trade Association, Back Country Hunters and Anglers, the Berkley Conservation Institute, the Bull Moose Sportsmen’s Alliance, the Dallas Safari Club, the Izaak Walton League of America, the National Wildlife Federation, Theodore Roosevelt Conservation Partnership, and Trout Unlimited.

Attacks on this rule often seem based more in terms of conspiracy theory than factual accuracy. Here is just a sampling of what some Republican colleagues have said about the proposed rule.

Here is one: “Under this plan, there would be no body of water in America, including mud puddles and canals, that would not be at risk from job-destroying Federal regulation.” That is former Representative Doc Hastings.

House Small Business Committee Chairman Sam Graves: “Permits may be required for activities such as removing debris and

vegetation from a ditch, applying pesticides, building a fence, or pond, or discharging pollutants”—well, maybe discharging pollutants.

Republican Representative Glenn Thompson of Pennsylvania calls the rule, “a historic power grab that poses,” get this, “a fundamental threat to our economy and way of life.”

“Brazen effort” is another phrase that has been used. “Gross Federal overreach”; “would require cost-prohibitive Federal permits for any proposal tangentially affecting virtually any body of water in the United States.” We have even heard from colleagues on the EPW Committee that the rule might jeopardize fireworks on the 4th of July.

In fact, the rule maintains the exclusion of prior converted cropland, meaning over 50 million acres of Clean Water Act permitting is still not required. It excludes the vast majority of roadside ditches and ditches on agricultural lands. It eliminates jurisdiction over artificially irrigated areas, constructed stock watering ponds, irrigation basins, and the like. It fully preserves the permitting exemptions for farming, ranching, and forestry, and it clearly states that the Clean Water Act does not apply to groundwater.

Unfortunately, this does not stop the histrionics. When the final rule came out, House Speaker Boehner said this rule, quote “is a raw and tyrannical power grab that will crush jobs,” and that, and I’ll quote again “the rule is being shoved down the throats of hard-working people with no input”—no input. What was it, 400 million outreaches, meetings? —“and places landowners, small businesses, farmers, and manufacturers on the road to a regulatory and economic hell.”

Mr. Chairman, the only people who think clean streams and rivers are economic hell are deep-pocketed polluters, and I am confident that there will be fireworks on the 4th of July after this rule goes into effect.

Thank you.

Chairman GRASSLEY. We are not going to put you down on the undecided list.

[Laughter.]

Thank you.

Senator WHITEHOUSE. Thank you, sir.

Chairman GRASSLEY. Normally I do not call on other Members, but I want to call on Senator Cornyn because he has had an interest in this for a long time and helped us get this moving.

Senator CORNYN. Thank you, Mr. Chairman, and I promise to be brief.

Senator WHITEHOUSE. Would the Senator yield just for one moment? The EPW is marking up the Federal—humorously called “Federal Water Quality Protection Act,” so, I have to go back and forth. Forgive me if I get up and come back and forth. It has nothing to do with what any Senator or any witness has said.

Chairman GRASSLEY. Thank you. Go ahead.

**OPENING STATEMENT OF HON. JOHN CORNYN,  
A U.S. SENATOR FROM THE STATE OF TEXAS**

Senator CORNYN. Thank you, Mr. Chairman. I think this is perhaps one of the most profound and least well understood issues

confronting our self-governing democracy today, and I realize that is a dramatic statement, but I believe it is actually true. Increasingly, as you point out, regulatory agencies have become the lawmaker, the judge, the jury, and the executioner, rhetorically speaking, when it comes to the administrative state.

I am particularly troubled, as you pointed out, with the decisions by the courts which have shown deference to the legal interpretation of the agencies' own jurisdiction and own authorities. That is a power, I believe, reserved to the judiciary and not to an administrative agency.

As you point out, this has become a fourth branch of Government which serves very useful purposes if kept within its proper bounds. Unfortunately, it has become a runaway train with no accountability and the kind of accountability that we experience, which is entirely appropriate, that when people disagree with us and what we do, they vote us out of office. They vote against us. You cannot do that to a nameless and faceless bureaucrat.

Most recently this has come to my attention when, of course, the Securities and Exchange Commission decided to take its administrative appeals in-house because of their losing streak in the courts. Recently a Federal judge ruled this decision likely—to move in-house to more favorable circumstances and venue for the administrative agency—one Federal judge said that that was likely unconstitutional.

There is an important role that the regulatory agencies play in our lives, and contrary to Senator Whitehouse's statements, this is not about no regulation or overregulation. This is about keeping it within its proper bounds.

I very much appreciate your holding this hearing because I think this is one of the most profound issues confronting our self-governing democracy today, and, unfortunately, it is one of the least well understood. Thank you for giving me a chance.

Chairman GRASSLEY. I am about ready to introduce the witnesses, but a couple housekeeping matters.

I will be here for about half of this hearing, and then Senator Hatch is going to take over because I have constituent meetings. Of course, as always, the record will remain open 1 week for the submission of written questions and other materials, and we would appreciate the witnesses' responding to those.

I will now introduce William Kovacs, senior vice president for Environmental, Technology & Regulatory Affairs, Chamber of Commerce. He leads the Chamber's efforts on comprehensive energy legislation, environmental rulemaking, telecommunications reform, emergency technologies, and the application of sound science to the Federal rulemaking process.

Robert Weissman is president of Public Citizen, a consumer and public interest advocacy group, very well noted here on the Hill and throughout the country. He is also co-chair of the Coalition of Sensible Safeguards.

Ellen Steen, general counsel and secretary of the American Farm Bureau Federation. Prior to Farm Bureau affiliation, she was a partner in the Environmental and Natural Resource Group of the law firm of Crowell and Moring. Her practice primarily focused on policy litigation, enforcement defense, administrative advocacy con-

cerning Federal water quality, particularly issues involving the validity and interpretation of the Clean Water Act.

Professor Patrick Parenteau, who is professor of law and senior counsel, Environmental and Natural Resources Law Clinic at Vermont Law School, previously serving as vice president for conservation with National Wildlife Federation, regional counsel to New England Regional Office of the EPA, and commissioner of the Vermont Department of Environmental Conservation.

Charles Cooper is a founding member and chairman of Cooper & Kirk, a litigation firm specializing in commercial, regulatory, and constitutional disputes. He has over 35 years of legal experience, both Government and private practice, with several appearances before the Supreme Court. In 1985, President Reagan appointed him to the position of Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice.

I welcome all of you, and most importantly, thank you all for the long statements that you are submitting for the record and the 5 minutes in which you are testifying and being here to answer questions. We will start as I introduced you, from my left to my right. Mr. Kovacs.

**STATEMENT OF WILLIAM L. KOVACS, SENIOR  
VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY  
& REGULATORY AFFAIRS, U.S. CHAMBER  
OF COMMERCE, WASHINGTON, DC**

Mr. KOVACS. Senator Grassley and Members of the Committee, thank you for inviting me to testify today on examining the Federal regulatory system to improve accountability, transparency, and integrity. These are perhaps the three most essential characteristics for the proper functioning of the regulatory process.

While we have interest groups and, frankly, Members of Congress fighting every day over the benefits and costs of specific regulation, there is an unfortunately little attention paid to how the process works and how regulations are developed.

The rule book, as Senator Grassley stated, was written in 1946 by Congress when it enacted the Administrative Procedure Act. At that time, there were very few agencies and far less complexity.

How rules are developed should be the absolute top priority of Congress since how regulations are developed is essential to ensuring that the powers Congress delegates to agencies are used to achieve congressional intent.

The regulatory process is massive with almost 200,000 regulations that impact every sector of society. However, when the Chamber did an analysis of all of what we would call the regular rules, the major impact rules, and the high impact rules, we came to the conclusion that the rulemaking process works reasonably well for what we would call routine matters. However, there are deficiencies in the process that allow agencies to enact very broad and costly regulations that are not based on the words of a statute but are considered by the courts to be quote, unquote, "permissible" in the reading of a statute. These regulatory laws, such as net neutrality or Waters of the U.S., are far broader than Congress could ever enact in this present political environment. Yet they are imposed upon us by heads of agencies with little effort.

Our Founders intended the lawmaking process to be difficult for Congress, but with Congress passing these broad and vague laws that delegate great discretion to agencies to enact wide-ranging laws through regulation, lawmaking has become extraordinarily easy.

Adding to the ease of lawmaking through regulations, the courts have extended deference to agency action, thereby insulating agency decisions from stringent judicial review needed as a check on the abuse of power. Congress has been recognized that Congress can delegate, and that when it delegates, whatever interpretation the agency provides is permissible. Then when you add court deference to agency action, you have completely taken the checks out of the system.

The challenge, therefore, is for Congress to preserve the efficiency of the informal rulemaking structure for the vast bulk of the 4,000 regulations issued every year while ensuring that when agencies engage in broad-based lawmaking, that the agencies establish that rule in a way in which Congress intended.

Several suggestions for achieving the accountability, transparency, and integrity of the regulatory process.

First, we strongly support and urge you to support the Regulatory Accountability Act, which has already passed the House of Representatives. It skillfully addresses the few regulations a year costing over \$1 billion and having nationwide impact. I say a few, because out of the 4,000, when you analyze it, you have about 3,700 that are what we would call run-of-the-mill, standard-setting, and routine. You have about 300 that are called major and significant in the sense that they cost over \$100 million or more. Then you have literally three or four that are what we call the high impact. These are Waters of the U.S., net neutrality, the Clean Power Plan. These are the regulations that are nationwide rulemakings, and they need different attention. Over the last 15 years, there have only been 30 of these. The Regulatory Accountability Act accomplishes this goal by requiring more disclosure up front, integrating the Information Quality Act as part of the rulemaking process, and imposing the same requirements on independent agencies as executive agencies. It also establishes requirements for a more stringent administrative record and sets a higher standard for court review.

We would also recommend passage of the Federal Permitting Improvement Act of 2015, which was passed out of Committee by a vote of 12–1. It provides timelines for agencies for reviewing permits and reduces the statute of limitations for bringing a lawsuit from 6 years to 2 years.

We also strongly support S. 378, Senator Grassley's Sunshine for Regulatory Decrees, which addresses the sue and settle issue, which I am sure I will have questions on.

We would also recommend that you take the citizen suits which are scattered throughout the entire code and codify them in Title 28. The purpose of codifying them in Title 28 is so you can undertake the kind of oversight that you really need on citizen suits because they have greatly changed who has access to the courts and who has standing to be in court.

Thank you very much.

[The prepared statement of Mr. Kovacs appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Kovacs. Mr. Weissman.

**STATEMENT OF ROBERT WEISSMAN,  
PRESIDENT, PUBLIC CITIZEN, WASHINGTON, DC**

Mr. WEISSMAN. Thank you very much, Mr. Chairman.

I think the starting point for a discussion about the regulatory process should be a recognition of how important regulation is in preserving our standard of living. Much of what we take for granted on a day-to-day basis is due to effective regulation. As a result of regulations adopted over the last many decades, our food is safer, our air is cleaner to breathe, our water safe to drink; the disabled have better access to facilities across the country; consumers have been saved countless billions of dollars; workers are guaranteed a minimum wage, safe workplaces. The benefits of regulations adopted over the last decade as well as earlier vastly outweigh the costs even by corporate-friendly accounting measures.

These are not just historic gains. These are ongoing gains. Recent rules have benefited consumers and the environment by improving auto fuel efficiency. Rules have been adopted to implement your very important Physician Payments Sunshine Act, and many other developments in the last several years.

We know as well that regulatory failure comes with enormous costs, both through deregulation, the failure to adopt appropriate regulation, and especially the failure to enforce existing regulatory rules. There are different stories for what caused the Great Recession, but they all essentially involve massive abuse by Wall Street and the failure of regulators to control Wall Street.

It is important to recognize the costs associated. Millions of people were thrown out of work; millions lost their homes. The economy lost \$20 trillion, according to the GAO, a number that vastly exceeds anything that could ever be attributed to the cost of regulation with reasonable accounting measures.

We have a whole series of recent disasters that should be properly understood as regulatory failures: the BP oil blowout; the GM ignition switch disaster, killing more than 100 people; the Takata air bag scandal; the New England Compounding pharmacy disaster; and many others. That is what happens when we do not have a properly functioning regulatory system.

As those comments suggest, underscoring the importance of regulation does not mean that the regulatory system is working effectively as it is. And in my written testimony, I outline a number of areas for improvement. I wanted to focus just briefly in my oral comments on two crucial areas.

The first is the need to improve regulatory enforcement in a variety of ways. Various inspection agencies are massively underresourced and cannot possibly do their job of protecting workers, the food supply, the safety of our medicines, and many others.

Additionally, I think we have seen in the last decade a very disturbing trend regarding criminal prosecution for corporate wrongdoing, or I should better say criminal nonprosecution for corporate wrongdoing. The Justice Department has evolved a pattern over the last decade or more of entering into deferred and nonprosecu-

tion agreements with corporate wrongdoers basically engaging in regulatory-type violations but violations of the criminal law. These giant corporations, large banks especially but not only, are able to escape the kinds of criminal penalties that would apply to a street criminal.

We have also seen, particularly in the last few weeks, some criminal prosecutions, but the accompaniment of those criminal prosecutions by waivers of the sanctions that would normally apply—the Securities and Exchange Commission and potentially elsewhere. I hope the Committee can focus great attention on this. It is really a double standard that has now become systemic to favor large businesses, not available to small companies, not available to individuals.

A second area that I wanted to focus on of a serious problem in the current regulatory system is delay. It takes a long time to issue regulations. Regulatory delay is pervasive in the system, and agencies, moreover, routinely fail to meet congressional directives for specific deadlines to issue rules. The submitted testimony from the Chamber of Commerce says that the EPA misses targeted deadlines more than 90 percent of the time. Five years after the passage of *Dodd-Frank*, more than a third of the required rules with targeted deadlines have not been met. It routinely takes the Occupational Safety and Health Administration 8 or 12 years to get rules out. We were involved in a case discussed in my testimony that it has taken 20 years to get a rule for truck driver safety training that is still not issued.

This delay leads to both regulatory uncertainty and lost benefits to society. Its causes, I think, are excessive industry influence at the agencies, but also too many analytic requirements imposed on the agencies, and I think the one thing Congress should not do in this regard is impose additional requirements that would certainly mean additional delay at the agencies.

There is much more to be said, as you indicated in your opening remarks. This is a very broad topic, and we look forward to further conversation. Thank you very much.

[The prepared statement of Mr. Weissman appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Weissman. Ms. Steen.

**STATEMENT OF ELLEN STEEN, GENERAL  
COUNSEL AND SECRETARY, AMERICAN FARM  
BUREAU FEDERATION, WASHINGTON DC**

Ms. STEEN. Chairman Grassley and Members of the Committee, thank you for the opportunity to testify on behalf of the American Farm Bureau Federation and the Nation's farmers and ranchers. My name is Ellen Steen, and I am the general counsel and secretary of AFBF. I have spent roughly two decades immersed in the development, implementation, and judicial review of EPA rules and policies under the Clean Water Act. I have been involved in dozens of agency rulemakings, litigated the validity and interpretation of EPA rules, and experienced firsthand the deference that courts extend to Agency regulations and to Agency interpretations of their rules.

I am here today because of my organization's experience over the past year with a major new Clean Water Act rulemaking by EPA and the U.S. Army Corps of Engineers. This is a rule of extraordinary practical importance for farmers, ranchers, and most anyone else who grows, builds, or makes anything in this Nation. After carefully studying the proposed rule about a year ago, we at AFBF concluded that the rule's vague and broad language would define Waters of the United States to include countless land areas that are common in and around farm fields and ranches across the countryside. These are areas that do not look a bit like water. They look like land, and they are farmed. By defining them as Waters of the U.S., the rule would make it illegal to farm, yes, build a fence, cut trees, build a house, or do most anything else there without first navigating a costly and complex permitting regime.

From the day it first issued the proposed rule, EPA behaved like an advocate for a decision that was already made, willing to say most anything to achieve the desired result. It waged a public relations campaign aimed directly at farmers and ranchers, providing false and misleading assurances in speeches and in blogs that the rule will not increase permitting requirements for farmers or get in the way of farming.

Those of us who have litigated Agency rules and Agency interpretations of their rules know that courts will not give weight to today's speeches and blogs. Our experience is that EPA and the Corps will interpret their rules broadly, not narrowly. In the enforcement proceedings that are sure to come, with an agency, a judge, and an ambiguous regulation, the Agency's interpretation will be unassailable.

EPA also engaged in an extraordinary social media campaign aimed at a different audience: the broader public. That campaign consisted almost entirely of nonsubstantive platitudes about the importance of clean water, which no one disputes. It used simplistic blogs, tweets, and YouTube videos to generate purported support for the rule among well-intended people who have absolutely no idea what the rule would actually do or what it will cost.

EPA later claimed public support for the rule, even though the vast majority of those who actually read the rule—State and local governments, businesses, and organizations representing virtually every sector of the American economy—vehemently opposed it.

Regardless of whether you support it, oppose, or never heard of the Waters rule, I would hope that many of you would agree that this is not how rulemaking should be conducted. Call me old-fashioned, but I believe agencies should try to keep an open mind or at least the appearance of an open mind during rulemaking. They should try to be honest and transparently account for the regulatory impact and the cost of their actions, even when they expect opposition. I hope this Committee's efforts will lead us in that direction.

Thank you.

[The prepared statement of Ms. Steen appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Ms. Steen. Professor Parenteau.

**STATEMENT OF PATRICK PARENTEAU,  
PROFESSOR OF LAW AND SENIOR COUNSEL,  
ENVIRONMENTAL AND NATURAL RESOURCES  
LAW CLINIC, VERMONT LAW SCHOOL,  
SOUTH ROYALTON, VERMONT**

Professor PARENTEAU. Thank you, Mr. Chairman and Members of the Committee. I appreciate the opportunity to be here. I would note the irony. I am going to address specifically the Waters of the U.S. rule. The irony here is that the Supreme Court refused to give the agencies deference under *Chevron* and also was unable to come to any consensus on the Supreme Court as to where the limits of Federal jurisdiction were. That is why it fell to EPA to write the rule. Chief Justice Roberts was very pointed in his concurring opinion in *Rapanos*, saying the agencies have the discretion to write a rule, you should do such a thing. That recommendation was joined by Justice Breyer. It was joined by Justice Alito in a subsequent case.

EPA and the administration went to Congress, asked for a bill to clarify the scope of Federal jurisdiction under the Clean Water Act to address the concerns raised by the Supreme Court in the *Rapanos* case, but, of course, those bills went nowhere.

It is a real irony that the responsibility for resolving what has been a very, very unfortunate 10 years of confusion, uncertainty, and frustration has fallen to EPA. In my judgment, EPA has made a good-faith effort, has gone well beyond any standard under the Administrative Procedure Act that you could possibly require an agency to do.

You might think of a benchmark. In response to the *Rapanos* decision, the George W. Bush administration issued a set of guidance documents. There was no public participation on that guidance. There were no meetings, no outreach, no public comments, no scientific analysis. The guidance was issued, and the response from nearly everyone was, we do not need guidance, we need a rule. We need a rule that is based on science. We need a rule that takes account of the unintended consequences that might occur if it is not well-crafted. We need you to take the time to do it right.

In my judgment, Mr. Chairman, that is exactly what EPA has done here. Nothing in the law requires 400 meetings across the country with stakeholders, with local officials, with farmers, and others concerned about this rule. Nothing in the Administrative Procedure Act or law requires 207 days of public comment. That is four times the amount of public comment period that is the standard under the Administrative Procedure Act.

Nothing in the Administrative Procedure Act, the Clean Water Act, or any other law required EPA to commission a 300-page scientific assessment of where to draw some of these very complicated, difficult lines. Nothing in the law required EPA to have that scientific study peer-reviewed by the Scientific Advisory Board, which is a body that exists for that purpose but does not usually do that for rules like this.

EPA in every measure went beyond what the law requires, what history and practice had been, and did the very best job it possibly could. It is not surprising that not everybody is satisfied with it. There are many in the environmental community that are not sat-

isfied with it, I can assure you. In many respects, EPA listened to what people were saying, the criticisms that it got. It made major changes in the final rule. I can say this after 40 years of dealing with this statute, I have never seen the Agency be clearer and more quantitative and draw brighter lines on the limits of Federal jurisdiction than what I see in this final rule. It will now be subject to judicial review, and there will be a number of challenges. Those who say that it is an overreach by the Agency, that it is a violation of the Clean Water Act, that it is a violation of the Constitution, that it is confiscating people's private property, that it is regulating puddles, whatever it is that they say and have said consistently through the comment period, now they will have their day in court. They will have the opportunity to put on the record the facts and the law to back up the allegations that have been made about the deficiencies in this rule. That is our system. For better or for worse, that is our system.

I have been on both sides of the deference issue. I have argued in favor of it; I have argued against it. I have won some; I have lost some. That is the way it works in our system of three-part Government.

I think it says something when three former EPA Administrators of different administrations, bipartisan, all three of them—Christie Todd Whitman, Carol Browner, Bill Reilly—all three of them said EPA in this instance has gone above and beyond what EPA has done before in outreach to the public. The group that is the advisory group to EPA on local—consultation and outreach with local officials praised EPA for its collaborative partnership approach, and that began in 2013, long before the formal rulemaking process began.

I think it is time to let this rule work. You could have had 401 meetings. You could have had 500 meetings. It would not have satisfied those that are opposed to broad Federal jurisdiction. It is time to give EPA's rule a chance to work.

Thank you, Your Honor.

[The prepared statement of Professor Parenteau appears as a submission for the record.]

Chairman GRASSLEY. Thank you. Mr. Cooper, now go ahead.

**STATEMENT OF CHARLES J. COOPER,  
FOUNDING PARTNER AND CHAIRMAN,  
COOPER & KIRK, PLLC, WASHINGTON, DC**

Mr. COOPER. Good morning, Chairman Grassley and Senator Hatch and other distinguished Members of the Committee, and thank you for inviting me to appear in this important hearing.

As Chief Justice Roberts has recently lamented, "The Framers could hardly have envisioned today's 'vast and varied Federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities." The modern administrative state has become a sovereign unto itself, a one-branch Government whose regulatory grasp reaches virtually into every human activity.

The focus of my remarks this morning will be on the *Chevron* doctrine, a judge-made rule of judicial deference to agencies that,

when it was decided in 1984, placed the administrative state's regulatory power on steroids.

*Chevron* requires courts to read any ambiguity in a Federal statute as an implicit congressional delegation authorizing the administering agency to fill a gap left open by Congress with the agency's own interpretation of the statute, an interpretation that the courts are bound to accept and to enforce, so long as it is reasonable.

In the three decades since *Chevron* was decided, *Chevron* and its progeny have transformed the administrative state into a kind of super court, vested with the last word, binding even on the U.S. Supreme Court as to the meaning of ambiguous statutory and regulatory provisions.

Since the early part of the 20th century, the administrative state has been permitted to accumulate and exercise legislative, executive, and judicial power, despite the Constitution's careful allocation of these powers exclusively in the Congress, the President, and the courts. Although the powers wielded by the administrative state are vast, it is politically accountable neither to the Congress nor, for the most part, to the President. *Chevron* exacerbates these serious separation of powers concerns by ensuring that the administrative state also largely escapes legal accountability to the courts.

I believe that *Chevron's* doctrine of deference is at war both with the Administrative Procedure Act itself and with the Constitution's separation of powers.

Turning first to the APA, *Chevron* is flatly inconsistent with the plain text of Section 706, which instructs the reviewing court to decide all relevant questions of law and to interpret any statutory provisions. The language is imperative, commanding that courts shall decide all questions of law. Under *Chevron*, the agency under review, not the reviewing court, authoritatively decides the relevant questions of law. *Chevron* simply cannot be squared with this language in Section 706.

Nor can *Chevron* be squared with our constitutional structure. It has been clear since *Marbury v. Madison* that the authority conclusively to say what the law is is a judicial power, one that Article III vests exclusively in the judicial department, not the executive. Since the Constitution also does not give the legislative branch any share of the judicial power, Congress cannot delegate that power to an agency.

It follows, I would submit, that courts must retain the sole authority to issue binding interpretations of law, not only by Congress' express direction in the APA itself, but by constitutional command. *Chevron*, by licensing the wholesale transfer of this authority to agencies, is at war with both.

I want to close by urging Congress to act to abrogate *Chevron* and enforce our Constitution's fundamental design. Of course, abrogating *Chevron* will not alone reform the administrative state. A broader reform effort is required and should be undertaken, an effort that should include careful consideration of pending legislation like the SCRUB Act, the REINS Act, the Sunshine Act—Senator Grassley—all of which seek to curb different pathologies of the fourth branch. No reform of the administrative state will be adequate without addressing *Chevron*. Congress has the power to abro-

gate *Chevron* simply by amending Section 706 of the APA to add language making explicit—I should say, rather, making even more explicit that reviewing courts must decide all questions of law without according any deference to an agency, and by further providing that any ambiguity in a statute shall not be construed as a delegation to an agency of either lawmaking or interpretive power. By abrogating *Chevron* in this way, Congress not only would reaffirm its original command in the APA that reviewing courts rather than the agencies under review decide all questions of law, but it would also restore one of our Nation’s most basic constitutional principles.

Thank you.

[The prepared statement of Mr. Cooper appears as a submission for the record.]

Chairman GRASSLEY. Before I start my questioning, I announced that Senator Hatch was going to take over because I had constituent meetings. I just want to thank Senator Hatch—he is so busy as Chairman of the Finance Committee—that he would do that, so thank you very much, Senator.

Before I question, I would like to back up to what Mr. Cooper said by quoting Senator McCarran’s remark about Section 706, which reads—this is what comes from, I think, the Congressional Record: “To the extent necessary to decision, and when presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning for the applicability of the terms of an agency action.” That goes back to when the Act was passed.

Mr. Kovacs, I am particularly concerned about the practice of sue and settle. It is a litigation process to negotiate agreements behind closed doors, as I have said. I am concerned that the practice keeps affected parties away from the process. Could you speak specifically to the ways that sue and settle tactics undermine the transparency and accountability needed—built into the APA? I think more importantly than that question is how the practice of sue and settle is inconsistent with how the APA was envisioned to work.

Mr. KOVACS. Yes, Senator, the APA, after having been fought out in Congress for almost 18 years, really was an attempt to have the agencies for the first time become transparent and to put the regulated industries on an equal footing with the agencies, and that information was to be disclosed.

What sue and settle does is more than just affecting the agencies and the APA. It literally affects all of federalism. For example, when sue and settle occurs, you have a private party dealing with an agency, and the private party says you have missed a deadline, or we think you ought to do this particular regulation.

What happens in that situation is when you have an agency like EPA, which Mr. Weissman says—and he quotes our testimony—“misses the deadline 98 percent of the time,” the sue and settle agreement takes 1 of the 400 rules that EPA may issue in a year, 1 of the 400 or 2 of the 400, 5 of the 400, and puts them under court supervision with a consent decree, at the top of the list. What you are doing at that point is, rather than having the Agency acting as an independent neutral party, deciding how to prioritize many duties, with sue and settle, you have interest groups coming

in and getting the court to sign off the consent decree and prioritize specific regulations.

The interest groups have actually taken control over the Agency through this process.

Chairman GRASSLEY. Ms. Steen, I have had the same concerns about Waters of the U.S. expressed by my constituents, and under current judicial deference doctrines, agencies have wide discretion interpreting their own regulations. Question: Are you concerned that courts will grant broad deference to EPA's interpretation of its own rules and then for your members and even business owners and others who are not your members will be left with little certainty about whether their actions are in compliance with the law?

Ms. STEEN. Yes, sir, that is a huge concern of ours, because this new rule is going to get a lot of deference from the courts. EPA's interpretation of the rule is going to get almost complete deference from the court. The traditional agricultural exemptions that EPA keeps referring to throughout this rulemaking process have been extremely limited by the agencies and their interpretations of the law over the years. That is why we know, we read this rule, and we can see—anyone who practices law in this area can see where this train is headed, and it is headed toward wide-scale permitting requirements for farmers and ranchers. Any practitioner under the Clean Water Act knows that. EPA officials in this town will acknowledge it in private conversations, and yet the talking points and the speeches by the Agency in this rulemaking have denied it. They have denied it to farmers and ranchers. They have provided misleading assurances that farmers and ranchers are not going to face increased permit requirements.

Those statements are not going to be before the court. What is going to be before the court is the text of the rule, the Federal Register preambles, and all of those documents have been carefully set up to invite—not just allow but invite the interpretation that land that is farmed today can be farmed no longer without a Federal permit for farmers and ranchers.

If you think that is a good idea, if you want wide-scale permitting, Federal permitting under the Clean Water Act for farming activities, fine, let us have that discussion. Let us look at the cost. Let us look at the impact on the 96 percent of U.S. farmers who are family owned and operated small businesses. Let us look at the effect on those operations. Let us look at the effect. What will the effect be on forcing consolidation within agriculture, forcing larger farms? Because small farms have very little ability to deal with these types of regulatory programs. EPA has refused to look at those costs and to look at those impacts, denying that they exist, and going forward with a rule that they know is going to have that result. That is infuriating to me.

Chairman GRASSLEY. I am going to yield the floor, the Chairmanship, to Chairman Hatch.

I am sorry I did not do this before. I have a statement by the Ranking Member, Senator Patrick Leahy, to put in the record. Without objection.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Senator Hatch.

Senator HATCH. Thank you.

Chairman GRASSLEY. I will have questions to submit to the rest of you. I am sorry I did not get further. Go ahead.

Senator HATCH [presiding.] Let me ask this of you, Mr. Cooper. Federal regulations today impose by some estimates a burden of \$1.86 trillion on the economy. That is roughly \$15,000 per household and more than corporate and individual income taxes combined. Too much regulation, especially too much outdated regulation, means higher prices, lower paychecks, and fewer jobs for hardworking Americans.

Every President since Jimmy Carter has agreed on the need to review our existing regulations to make sure that they are efficient and are no more intrusive and burdensome than is absolutely necessary. Nevertheless, the regulatory burden keeps growing year after year. The Code of Federal Regulations, now more than 175,000 pages long, contains more than 200 volumes.

According to the study by the American Action Forum, the Obama administration's efforts to review old rules actually added more than \$23 billion in costs on the economy and nearly 9 million hours of paperwork.

To turn this long-standing bipartisan commitment into a reality, we need to take the responsibility of reviewing old rules away from the bureaucrats who keep failing at that task. That is why I introduced the SCRUB Act, which uses the successful model of the independent BRAC commission and applies it to our existing regulatory burden.

Mr. Cooper, as an expert on administrative law, do you agree that it is time we take a different approach to tackling this problem with outdated red tape burdening our economy so that we can actually get some things done in this country and get some of this regulatory burden off our backs?

Mr. COOPER. Senator Hatch, I very much agree with those propositions. I think there may be some irony, I guess, in someone who decries, as I do, the breadth and the growth of the administrative state to support the addition of another commission to that body. The purpose of this commission, as I understand it, under the SCRUB Act, would be to examine the administrative state, examine retroactively, which has never been done, examine retroactively in a systematic fashion the regulatory burdens that these thousands and thousands, 176,000 pages, as I understand it, of regulations imposed upon our economy and the American people. I think that would be an excellent place to start anyway with regulatory reform.

It also, I think, respects our constitutional system of separation of powers. Nothing would come out of this commission, as I understand it, without—its actions would be recommendations, just like the BRAC commission, as you said, Senator Hatch. They would come to the Congress, and they would be enacted under fast-track procedures, to be sure, but enacted or not enacted. The Constitution's structure is respected.

Yes, Senator Hatch, I do certainly embrace that reform.

Senator HATCH. Thank you.

Mr. Kovacs, your testimony identified a whole range of ways in which the current process by which agencies make regulations is

utterly broken, from curtailing the opportunity for meaningful input from the public to flouting the legal requirements for transparency and accountability. Given this mess, the courts are often the only practical means of holding this out-of-control bureaucracy accountable.

Does not excessive deference by the courts to the agencies critically—does that not critically limit the opportunity to hold the agencies accountable and instead has not this deference allowed the agencies to expand the scope of their power dramatically?

Mr. KOVACS. Certainly, Senator Hatch, once you have deference, the agency really does not have a check on it. I mean, I think most of us would agree with that. It would be unfair to say that getting rid of deference would solve all the problems. Congress has delegated very broad authorities to the agencies. The Supreme Court has recognized the delegation. Congress has imposed or has legislated citizen suits and really since the time they were enacted has not had any oversight on them. The standing provisions, because of the citizen suit and who can get into court, are substantially different for the business community than they are for the environmental community. There have been statistics showing that it is about a 2:1 ratio in terms of who has standing. Then on top of that, you add deference.

This hearing is very important because there are ways in which we could begin to address this, especially with—and I keep on saying—the Regulatory Accountability Act.

Senator HATCH. Thank you. My time is up. Senator Perdue, we will turn to you next.

Senator PERDUE. Thank you, Mr. Chairman.

You know, the U.S. economy has actually shrunk in the last—first part of this year. The liberal economic policies of this administration, which includes the most draconian overreach of the regulator force, regulator agencies, that have occurred in my lifetime, have absolutely served to destroy this economy. This administration is failing the very people it champions—the middle class—the working middle class it claims to champion.

I can tell you from my trips home that bankers, farmers, manufacturers, doctors, retailers, anybody that I talk to tells me the number one issue in Washington is not their dysfunction, not their gridlock, but the effects of this dramatic and combative and punitive overreach of Federal regulators. We have created the fourth arm of Government: the regulators. They create more laws than we do in Congress. The economy, our free enterprise system, is the one that is being impacted the most, and the people who work in that economy.

It is hard to underestimate—or overestimate the burden that the Federal regulators are putting on our economy today. We do not have the luxury in a competitive world to do this. Nobody wants to destroy our water, our air, our environment. The people, in my experience, who do the best job of protecting that are the farmers, and they are the ones that are out-crying the most right now about this overreach on the U.S. waters act, and I have a question about that for Ms. Steen.

According to a recent study, a very respected study done by a national association, our regulation costs our businesses \$2.1 trillion

annually. That is almost 12 percent of our GDP, or \$10,000 for every employee in America per year. Of course we want rules. We have had those since our beginning. Of course, we want regulation. This dramatic overreach is killing American business and our ability to compete abroad.

It is just a fact that Federal regulation disproportionately hurts small businesses. It takes 17 percent of small businesses' revenue right now just to deal with Federal regulation. That does not account for State regulation. Those are just the economic burdens. The loss of productive man-hours and associated drag on innovation and entrepreneurial energy and to push countries—companies to leave our country for this very reason.

These side effects and unintended consequences are unimaginable. When I was a kid working on a farm growing up, the agent would show up and actually help us understand how to comply. I actually worked in a dairy for a while, and they showed us how to comply. Today those same agents are looking to put people out of business. The punitive nature is unacceptable. More than 40 years I have worked in the private sector, and I have dealt first-hand with this overreach. I have never seen it to be more aggressive, more punitive, more combative than it is today in the last 5 or 6 years.

I have seen what excessive Federal regulation can do to a business' productivity, profitability, and its job-creating ability. Right now we have had for a few years the most overreaching impact on our businesses due to our regulators.

Combating this enormous regulatory burden and actually shrinking it is one of the main reasons I personally came to Washington and give up my life to do this.

I want to thank the Chairman for holding this hearing. I think this is the single most important issue and poses the biggest threat to our free enterprise system today, second probably only to our national debt.

Turning to Waters of the U.S., Ms. Steen, very quickly, I am very concerned about this. This is unprecedented. It is a radical assertion of agency jurisdiction and would have a dramatic impact on my State, Georgia farmers particularly. This is a letter that I received from a board of commissioners of one of the largest counties in our State. These are not radical people, and the sarcasm from the other side that tells me that—or tells the public that anybody that disagrees with the Waters of the U.S. impending regulation is ignorant and self-serving and, you know, just the marginalizing condescension is intellectually insulting to me.

This is a very well thought out letter. They have over 3,000 miles of roads in that county, 1,500 miles of streams, almost 1,000 miles of ditches on the right-of-ways of those roads, and 1,400 miles of additional drainage ditches that would come under the purview of this law. Frankly, the way the EPA marketed—you mentioned this earlier, Ms. Steen—and promoted this rule in social media just boggles my mind. This was not notice-and-comment rulemaking. Yes, they talked to 400 people out there—400 meetings, and then they promptly ignored most of it. This was not notice and comment at all. This was a political campaign that the Obama administration was running from the very get-go through the EPA, just like when

they could not get cap and trade, they told the EPA to kill coal, and they did it in a year.

Ms. Steen, about the Waters of the U.S., have you seen other agencies behave like this in your career? You have got a long, distinguished career. Can you put in context for us these actions and the dramatic broad-reaching impact with respect to this rule-making?

Ms. STEEN. I would like to be able to do that more broadly beyond EPA, but my career has focused on EPA. What I can say is that throughout my career of dealing with EPA regulations—and I have always been on the industry side. I have always been on the regulated side of the issues, and many of those issues and rulemakings have been very hotly contested over the years. What I have never seen even from EPA is the level of gamesmanship and deception that I have seen going on in this rulemaking. For those who believe that there should be an open and honest discussion with the public, with Congress, an open and honest analysis on the front end of the cost and the impact of new regulations, it is frightening, and it is disheartening, and it is disillusioning. No, I have never seen anything like it before.

Senator PERDUE. Thank you.

Mr. Kovacs, I would like to go back to sue and settle. This is a question that I think bears a lot of comment and thought. I would like to address how litigants are able to game the regulatory system by using citizen suits and, as has recently been the case, work with sympathetic agency officials, sometimes past co-workers, who are not interested in normal notice-and-comment procedures. Do we have any idea what the overall impact of these types of sue-and-settle cases is on the regulatory framework?

Mr. KOVACS. Certainly, just—and this sort of dovetails nice with Ellen's comments. We went back and did an analysis of all the—what we call the high-impact rules, those over \$1 billion between 2000 and 2013. There were 30 of them from all of the Federal agencies. Seventeen of them came out of EPA, and most of them were related to sue and settle. That is the impact. They are able to begin prioritizing the Agency agenda, and that I think is a much bigger problem than anything else, because they literally not only own the Agency and their priorities, but they also have a court that is supervising the Agency, and the only party that can actually intervene into the court proceeding is either the environmental group or the Agency. We are locked out because we do not have standing.

Senator PERDUE. Thank you.

Mr. Chairman, I am over my time, but I just want to make one last comment. I really applaud the Chairman for conducting this hearing. I think we need to have further hearings on this. I will submit other questions, but I would love to talk about not just the EPA but what the NLRB is doing, the CFPB, and other regulators out there. This is having a dramatic impact on our ability to drive a recovery and get people back to work again. Thank you, Mr. Chairman.

Senator HATCH. I sure agree with you. Senator Tillis.

Senator TILLIS. Thank you, Mr. Chair.

While the Senator from Rhode Island was reading his statement, I almost felt guilty because I realized that I have made some state-

ments and not properly attributed the other Senators who had used the comments before, because I associate myself with a lot of the concerns that other Senators have expressed about regulatory overreach.

I was the Speaker of the House down in North Carolina for 4 years before I came into the Senate back in January, and we, in 4 successive years, implemented regulatory reform that has, I think, been one of the single greatest stimulators for our economy. We are outperforming almost every other State in the Southeast as a result of right-sizing reforms. We did simple things like saying you cannot promulgate new regulations in excess of Federal standards unless you consult with the legislature, have a business case, demonstrate the environmental or other benefit for the regulation versus the cost, commonsense reforms like that that I think this Congress needs to take a look at.

I have just a few brief questions. I think the first one may be most appropriate for Ms. Steen or Mr. Kovacs. You know, I think the other thing that is lost in the discussion, we talk about regulatory abuse and corporate greed. In North Carolina, 80 percent of the jobs that are created are created by small businesses. A lot of these are mom-and-pop shops that do not have the advantage of large departments of regulatory affairs.

A lot of the jobs that have been created over the past couple of years have been hundreds of thousands of jobs in regulatory affairs departments. Not a single hour of productivity is created by these jobs. We all high-five and we say hundreds of thousands of jobs have been created. Go take a look at those jobs and understand why we are not increasing productivity, why we are not seeing capital investments, why we are not seeing savings applied to productive ends.

Back in these small businesses, the thing that I worry about when I talk to farmers, and I talk to small businesses, they do not have the benefit—Ms. Steen, I will star with you. They do not really have the benefit to engage on a proactive basis in the public comment period to really be able to articulate at their level the damaging effects, depending upon where you go with regulation, some of which are needed. Do you—and, Mr. Kovacs, you can chime in as well. Do you all have any suggestions on ways that we could really improve more genuine and meaningful input of these folks that oftentimes do not even hear about the regulations or the promulgation or the potential implementation of the regulations until it is too late for them to provide meaningful, practical input? Any suggestions on the process? We will start with you, Ms. Steen, and then we will come to Mr. Kovacs.

Ms. STEEN. I wish I could think of a fantastic new idea for how to improve the voice of those ordinary Americans in the process. I think with respect to farmers and ranchers, many of them rely on groups like ours to dissect the new regulations, to make sense of it, to translate it into terms that a non-Clean Water Act practitioner can understand, and then to help them have that voice. We try to do a good job of that.

What is so frustrating is that—and we had a really important conversation with our stakeholders, with farmers and ranchers across the country during this process, and many of them did get

very active, very vocal to try to speak out on the rule. When you speak out and the response back from the Agency is, “That is silly,” “That is silly,” “That is ludicrous,” “You do not need a permit now, you are not going to need one later,” what do you, an ordinary person, say when the Administrator of the EPA says that to you?

Senator TILLIS. Mr. Kovacs.

Mr. KOVACS. Senator, this is truly one area where Congress has really tried to have input. If you go through—for example, you enacted the Regulatory Flexibility Act, which was specifically to empanel businesses to have them talk to the Agency. For both Waters of the U.S. as well as the others, the Agency refused to go through this panel process.

To involve States, Congress has enacted the Unfunded Mandates Reform Act. Any regulation over \$100 million, the Agency has to determine whether it is an unfunded mandate on the State. The agencies have refused to undertake this process. Thirty-five years ago, Congress was so concerned about the regulatory impact on jobs that it mandated that EPA do a continuing evaluation of the impact on employment, and it has never done one in 35 years.

You have got a process where the agencies have completely separated themselves from Congress, and they really do not feel as though they have to do this for you, and because the courts, unlike with NEPA where the courts have actually grafted on a private right of action, the courts have not grafted on a private right of action for UMRA or Regulatory Flexibility or for the employment impacts.

So, it’s much deeper. This is some kind of disregard, where they don’t even attempt to do what you have asked them to do, so they get all the facts as part of the process.

Senator TILLIS. Thank you. Thank you, Mr. Chair. I have several questions that I am going to submit, and hopefully we can get your feedback. One that I find particularly disturbing or offensive as a nonlawyer is the sue and settle practice and some ideas on how we may be able to get more active involvement and other third parties or the courts in that. I will submit those for the record and look forward to all of your feedback. We submit it to each and every one of you for your feedback.

Senator TILLIS. Thank you. Thank you, Mr. Chair.

Senator HATCH. Thank you, Senator. Senator Whitehouse.

Senator WHITEHOUSE. Thank you very much. Sorry I have had to be in and out. We have actually been marking up the bill that is to some degree the subject of this hearing over in the EPW, so I have had to be back and forth.

Professor Parenteau, could you just give us a quick overview of the—on the Clean Waters rule, the backdrop from the U.S. Supreme Court that constrains and informs what EPA is obliged to do under this rule and how that has played out in the rule? Sometimes people commenting on this rule act as if the EPA had a free hand to do anything, to ignore certain types of pollution, to ignore certain types of effects on waterways and so forth. In fact, the Supreme Court has spoken pretty strongly about this, and under our system of Government, administrative agencies are obliged to follow what the U.S. Supreme Court has said.

Professor PARENTEAU. Correct, Senator Whitehouse, and the seminal decision is the *Riverside Bayview* case from 1985. That is the first time the U.S. Supreme Court squarely addressed the question of what did Congress intend to cover when it enacted the 1972 Clean Water Act. It was a unanimous decision. You do not see that very often anymore—a unanimous decision 9 to 0 from the U.S. Supreme Court, authored by Justice White, a westerner, who understands water, if anybody did. The decision is worth reading, and I commend it to every Member of the Committee, because the U.S. Supreme Court read and interpreted Congress' intent in 1972 to give a very broad definition to the term "Waters of the United States" and grounded that interpretation on science.

The opinion really was a foreshadowing of what we now think of as more of the ecological age. Justice White went on about the functions and values of streams and wetlands to public health, to recreation, to fisheries, to economic interests, to the national interest, and it is a ringing endorsement of strong Federal involvement in the effort to restore and maintain the chemical, physical, biological integrity of the Nation's waters.

From that very high point of jurisprudence under the Clean Water Act in 1985, we go to the 2001 decision in *SWANCC*, in the Rehnquist Court, and in that decision Justice Rehnquist was able to garner a majority, 5 to 4, a narrow decision, to say we are not going to give *Chevron* deference to the Agency's interpretation of the scope of the Clean Water Act. We cannot decide for ourselves exactly what the scope of that Act is, but we know that whatever the Corps is using at the time is not it. Then we had a hiatus period between 2001 and 2006 when the *Rapanos* case came down, where people were trying to figure out what is the meaning of the *SWANCC* decision? It dealt with a very atypical situation of an abandoned sand and gravel pit in northern Cook County, Illinois, and no hydrologic connection to any other water, totally intrastate, nonnavigable, and the Corps had asserted jurisdiction based on migratory bird use. So, a very narrow decision by the Court.

In *Rapanos*, once again you had another wetlands question, and once again a narrow—this time actually a fractured decision where no majority of the Court could agree on where the line should be drawn. Again, refusing to grant the Agency's interpretation any deference, but unable to come up with a judicial definition and a default. That is where Chief Justice Roberts squarely said to the agencies you have to engage in a rulemaking. Justice Kennedy said that rulemaking has to be grounded in science. It has to be grounded in the functions and values of the streams and wetlands you are talking about. It has to be qualitative. It has to be rigorous. EPA has picked up that challenge. That is what they have done in this rule.

Senator WHITEHOUSE. Did the Supreme Court give any instructions about the extent to which economic considerations had to be balanced into that equation?

Professor PARENTEAU. Of course, the Supreme Court is always saying Congress has more than one purpose in mind with every statute, including the Clean Water Act, and the EPA has to take into account the impacts on the regulated community and others from rules that are adopted in interpreting the law. EPA is always

caught in the middle. There are people pushing EPA to restrict the jurisdiction of the Act, people pushing EPA to extend it, people saying, "I rely on clean water." We had testimony before EPW, as you will recall, Senator Whitehouse, from the brewing industry saying, "God help us if we do not have clean water to make beer." We had testimony from the fishing industry saying, "God help us if we do not have clean water to support our fisheries, and if we do not have streams where the fish can spawn, and if we do not have wetlands that provide the nutrients for the fisheries to grow. Please protect these economic assets for our business interests."

These are complex issues. There are a lot of winners and losers, if you want to look at it that way. Some people benefit from strong regulation; some people benefit from weak regulation. The Agency is caught in the middle, always, in trying to balance these competing concerns. There is no perfect outcome, there is no formula for this. You do the best that you can, and I think EPA did.

Senator HATCH. Thank you, Senator. The Senator from Arizona.

Senator FLAKE. Thank you. I also am very concerned about the EPA's Waters of the U.S. rule. Coming from Arizona, we have a lot of dry river beds that have somehow been caught up in this as well, and the logic just seems beyond most of us for this.

I recently introduced the Defending Rivers from Overreaching Politics Act of 2015 with Senator McCain and Senator Fischer. I think the bill is necessary because the science behind the rule is essentially unfinished.

The Assistant Secretary of the Army Corps, I think it was Jo-Ellen Darcy, stated the regulations were based on the Scientific Connectivity Report. They claimed the report showed connections between nearly all water bodies, but the proposed rule was drafted before the science on which the proposed rule was based had been reviewed by the Scientific Advisory Board of the EPA. I do not think it makes sense to most of us to promulgate a rule before the science is more settled in this regard.

Do you want to comment on that, Ms. Steen? Have they gotten ahead of some of the science here?

Ms. STEEN. Well, I think they have taken a very aggressive approach to the science, and I think they have done it—of course, science is relevant to the question of what is a jurisdictional water, and this report's cases support that. I think the Agency has taken the opportunity to take the science and use it to extend the law right back to where it was before those Supreme Court decisions to encompass essentially any water, any water feature within the United States if the Agency chooses to do that. I do not think that is what Congress meant in 1972, and I do not think that any amount of science about the interconnectedness of things would persuade anyone that in 1972, when it wrote the Clean Water Act, Congress had in mind that you might take that and regulate a small dip in the landscape where water simply channels and flows when it rains and at no other time. In my opinion, the Agency has taken the opportunity to cloak the rule in science because science is very difficult to challenge in court.

Senator FLAKE. Mr. Cooper, do you have any thoughts on this with regard to science?

Mr. COOPER. Senator Flake, I am going to defer to Ms. Steen's response to the specific study on that question.

Senator FLAKE. All right. A question for you, Mr. Cooper. As everybody here has testified to, there are a number of requirements on agencies to improve transparency and accountability when issuing regulations such as the notice-and-comment process. However, we are seeing a practice among agencies of pursuing quasi-regulatory strategies such as memoranda, policy statements, and guidance in an attempt to effect policy change without triggering some of the requirements with regard to notice. Do you want to comment on that? Is that a real problem?

Mr. COOPER. It is a very serious problem, Senator Flake. Just in the context of my own experience as a practitioner and litigator, I am involved in a lawsuit challenging what is called Operation Choke Point, a situation in which the banking regulatory agencies along with the Department of Justice have sought very aggressively to try to cutoff, to choke off the financial access of certain disfavored businesses; perfectly lawful but disfavored businesses in this country. They have done that not through notice-and-comment rulemaking but through backroom types of pressure on the banks, the banks they regulate, to try to terminate—terminate the relationships that the banks have and the access to critical financial services of these disfavored businesses that the banks have banking relationships with.

Senator Flake, I would also add that the authority that the regulators have, the administrative state has, not only to interpret the statutes under which they are authorized, but to also interpret authoritatively the regulations that they then enact under those provisions creates a kind of a domino effect, giving them just enormous, enormous powers. They get not only to write the rules, they can interpret the rules that they actually write.

Senator FLAKE. Thank you, Mr. Chairman.

Senator HATCH. Thank you. The Senator from Delaware.

Senator COONS. Thank you, Senator Hatch. To the witnesses today and Senators, I come to the Senate with myself having some experience in business, having spent 8 years as in-house counsel at a company, a multinational where compliance with regulations was a challenge for us and was a cost and something that we wrestled with at times. As a Senator and former county executive, I have heard complaints from businesses large and small about compliance costs, complexity, difficulty, whether EPA or OSHA. I am well aware that regulations sometimes cause a cost and headaches and concerns that corporations would rather not pay.

I have also had the opportunity, just as a citizen as well as an elected official, to see instances where corporations cut corners and ruined lives, and we are all aware of the regulatory capture that facilitated some of the Deepwater Horizon disaster, which fouled the gulf coast and caused more than \$50 billion in damages and closed thousands of small businesses. I am wary of legislative proposals that try to roll back agency action on the basis that industry does not have enough say in rules. I think we need to both respect the needs of business and their legitimate concerns, but not lose sight of the fact that the first goal of regulations ought to be to protect the public health and safety.

Mr. Weissman, if I might, I just wanted to open with a question about the cost of regulation, which is a common complaint that I have heard and experienced. An OMB analysis suggested in 2013 regulatory benefits for major rules exceeded total regulatory costs by several multiples, somewhere between 2 and 14 times. Can you talk to how Federal regulatory agencies consider costs and benefits when deciding whether to go forward with a regulation? How does that assessment of costs and benefits differ from how a business might look at it?

Mr. WEISSMAN. Thank you very much, Senator Coons. The idea—I would say as a starting point that agencies by and large are deeply sensitive to compliance costs of the rules they issue, in our view often too sensitive and often too close to the industries that are complaining about it.

For rule from the executive branch, they are subjected to review by the OMB through the OIRA Office, and they go through one or another version of cost-benefit analysis where there is very careful consideration of costs and actually, I must say, less careful consideration of benefits. I detail the disparity between the two in my written testimony.

Looking at the aggregate picture, as you point out, the actual documented cost of significant rules versus the actual documented benefit of significant rules over the last decade, the benefits vastly exceed the cost. You take the low-end benefit and the high-end cost, it is about 2-1/2 times. If you go to the other spectrum, it is now 15 times in the last report from OMB. The benefits of rule-making using narrow accounting measures really are significant for society. Those I think undercount—they overcount costs because they often rely on cost estimates from industries that do not take into account technological dynamism, economies of scale, the ability to adapt, and, retrospectively, costs are usually far less than they were predicted to be. They also undercount on the benefits side second-order effects, but also all kinds of things that are not quantifiable. It is hard to reduce health, safety, privacy, democracy, fairness, sense of community to dollar terms, but that is what they are forced to do when they are looking across that. I think from a social point of view, there is no question about this.

You are correct that businesses may look at the cost issue differently. A technological standard that may impose a cost on one firm, say \$1 million, that firm might reasonably just look at it as a \$1 million cost. That is, in fact, how it will be counted in a cost-benefit analysis. From a social point of view, there may be so many offsetting benefits just from that cost, which is to say they are investing, they are buying some new technology, someone is innovating to respond to that technology. There may be all kinds of economic benefits—even though there is a cost to the firm, there may be social—offsetting social benefits, social and economic benefits for society.

Senator COONS. I would assume that all of us would agree that a Federal agency, when going through rulemaking, should consider the costs and benefits to all affected Americans, not just or solely the corporations that are affected.

Just as a closing comment, with the indulgence of the Chair, my twins just turned 16. I am particularly sensitive to the fact that

automobile accidents claim 30,000 lives a year and are the leading cause of death for young people. As a perhaps overly concerned parent, Public Citizen was founded in large part to promote commonsense automobile regulations in the face of strong resistance because of implementation costs. Since Public Citizen's founding, automobile deaths have declined 60 percent. This is a per capita population basis. Is that an example of regulatory success or failure?

Mr. WEISSMAN. I would say that is an example of enormous regulatory success, but there are some failures that are worth pointing out. The GM ignition switch failure, which has cost more than 100 lives, that is an example of regulatory failure. The agency should have done a better job, and it is now saying so in a recent report.

I also detail in my testimony the failure of the agency to adhere to congressionally mandated deadlines to impose a back-over rule that would prevent accidents where people are unable—drivers are unable to see what is behind them and back into usually small children or sometimes the elderly. We had to sue the agency to get a rule out of the Department of Transportation. The effect of that delay was about 100 lives a year or more because the agency failed to act. Why did the agency fail to act? Partly because of misguided cost-benefit analysis and maybe especially because of undue political interference from the auto industry.

Senator COONS. Thank you, Mr. Weissman. I see I have exceeded my time. Thank you for your work.

Senator HATCH. Thank you, Senator. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman.

You know, when I think about rulemaking, I often think about the tragedy that occurred at L'Ambiance Plaza in Bridgeport, Connecticut. I do not know how many of you are familiar with what happened in 1987, or with the 28 men who never came home that day, men like Mike Adona, who left his wife and his three daughters to go to work. He never came home. Like 27 of his co-workers, he was killed when a half-finished structure that he was building collapsed on him, killing 28 of them. His employer had been using a method known as "lift slab construction." The Occupational Safety and Health Administration knew that lift slab construction was dangerous. In 1982, in fact, it initiated a rulemaking designed to strictly regulate that process. 1982. It knew that similar use of that construction process had led to deaths around the country, but it did nothing, partly because of burdensome procedural requirements. Partly because of special interest pushback, partly because of a lack of will on the part of the agency, those regulations had not been finalized on the day that Mr. Adona lost his life in 1987. That death—his death—was preventable, so were the deaths of 27 of his co-workers, if the regulatory process had worked.

Regulations have real-life consequences. They have real-life costs in dollars and lives. Delay has costs as well when agencies have to jump through hoop after hoop after hoop and fail to do their job.

I have just come from a hearing of the Commerce Committee where we were discussing the issue of positive train control, a technology that has been in existence for years and years and years. The deadline for implementing it is approaching at the end of 2015. Most railroads will have failed to adopt it, and the FRA, a Federal

agency, has failed to take sufficient action to enforce that deadline, as well as some 60 or 70 other recommendations from the NTSB for rail safety.

I think that the blame will be on Congress as well as the FRA and the railroads for failing to implement stronger measures that will impose fines and penalties for failure to meet regulatory deadlines.

I would like to ask, Mr. Weissman, if your authority to implement citizen suits is taken away, will there be a sufficient check on the Government to meet these deadlines?

Mr. WEISSMAN. I should say, first of all, we do not have nearly the authority as a public interest advocacy group that has been characterized here. In contrast to what Mr. Kovacs said, in general, regulated industry has standing always to bring challenges. Public interest groups have a difficult time bringing cases on behalf of a general public interest rather than a particularized one. Exactly as you say, regulatory delay has real human cost, and I think we cannot do enough to tell the stories that you are telling because they remove us from the statistical abstractions that make it easy to avoid the real-life consequences.

The cases that we bring or the cases that are really regulatory accountability, agency accountability cases, that are misnamed "sue and settle," those are cases designed to force agencies to comply with deadline as Congress has instructed them to do overwhelmingly. What we see in case after case is that the agencies feel free to ignore congressional deadlines until there is a subsequent judicial order. The agencies will tell you that. Those cases are really vital.

The examples you highlighted—and just to go back to this back-over rule case, which you know a great deal about, and I think is really infuriating, congressional mandate to take action, and the regulators were slow-walking it. They did not like the cost-benefit analysis. They were not thinking about the real lives at stake. Had we not brought litigation to force a rule out, we would still be waiting for that rule, and we would probably be waiting for that rule in 2020.

Senator BLUMENTHAL. I appreciate that very excellent answer.

Mr. Kovacs, can you discuss the contention that sue and settle lawsuits undermine public participation in rulemaking?

Mr. KOVACS. Certainly. We—the issue is that EPA, and I think there is agreement on it, misses somewhere between 85 percent and 98 percent of all of its deadlines. What happens when you have a sue and settle and you have a court order ordering the Agency to do a certain thing, those rules actually then become the priority. What happens is the Agency itself, instead of being this independent actor deciding what the priorities are based on what you in Congress give them as a budget and what they think you are directing them to do, are now pigeonholed into dealing with a certain group of cases because they have a court order. Under the Administrative Procedure Act, we all should have an equal access to both the Agency as well as to the court.

The second point there is a law review article where they did a statistical analysis, and the business community was denied standing 50 percent more of the time than the public advocacy side.

Senator BLUMENTHAL. Any other comments in response to that question? Thank you, Mr. Chairman.

Senator HATCH. Thank you, Senator—did you want to say something?

Mr. WEISSMAN. I would like to say something, if I might, Mr. Chair. It is not the case that the agency has discretion to choose to follow congressional orders. There is no discretion in these cases. The agency does not get to choose its priorities. The agencies are supposed to do what Congress has instructed them to do.

Senator BLUMENTHAL. Because it is the law of the land.

Mr. WEISSMAN. Because it is the law. The lawsuits are intended to enforce congressional will. There is no agencies run amok. There are no special powers conferred on public interest groups. We are trying to help enforce congressional will on the agencies.

Senator BLUMENTHAL. Essentially, the lack of Federal enforcement means that either citizens or State attorneys general or others take the place of those Federal agencies that are neglecting their duty.

I think there was one more comment.

Professor PARENTEAU. Thank you, Senator Blumenthal. Just a very quick one, and that is to say that in no circumstance could a court ever enter an order that would bind an agency in a future rulemaking, period. Under the Meese memorandum, the Department of Justice incorporates—and I have seen every one of them—the Department of Justice incorporates in every single decree a requirement that if rulemaking is anticipated as a result of the settlement agreement, that rulemaking will be conducted under the Administrative Procedure Act. Nothing that is done in the consent decree can bind the agency in any way, shape, or form, so public participation is protected in these decrees.

Senator BLUMENTHAL. I think that answers the question that I raised about the effect on public participation. Thank you.

Senator HATCH. Thank you, Senator.

Mr. Cooper, in his seminal opinion in *Marbury v. Madison* that secured the principle of judicial review, Chief Justice John Marshall wrote, quote, “It is emphatically the province and duty of the judicial department to say what the law is”, unquote. Is *Chevron* compatible with Justice Marshall’s words? Or is *Chevron* better described as commanding the judiciary to say what the law is almost anything that a Federal agency wants the law to be?

Mr. COOPER. Senator Hatch, *Chevron* is not at all compatible with *Marbury v. Madison*. That was one of the opening points I tried to emphasize in my statement. The Court made clear that it is the province, peculiar province, of the judiciary to say what the law is, and in that regard they were relying on Alexander Hamilton’s famous statement in Federalist No. 78.

Contrast that with the *Chevron* doctrine where, despite the language of Section 706 of the APA which directs, consistent with the separation of powers, that the reviewing court rather than the reviewed agency, the reviewing court shall decide all questions of law and, therefore, to interpret the statutes before them. Contrast that with *Chevron*, which demands that the courts actually accept agency interpretations notwithstanding the fact that they think they are wrong, they think they are wrong, they are not the best under-

standing using the traditional tools of statutory construction, the best understanding of Congress' meaning, the meaning of the statute, Congress' intent. So long as the agency is somewhere on the target—somewhere on the target—Senator Hatch, the courts must defer to that even though, again, they believe they are wrong. That includes the U.S. Supreme Court. It is the reviewing—it is now the agency that has the last word, and that cannot be squared with *Marbury v. Madison* or our separation of powers.

Senator HATCH. Mr. Kovacs, and also you, Mr. Cooper, would you identify some of the most unreasonable cases that you have encountered over the years in which *Chevron* is used as an excuse to allow an agency to defy the law? One example that readily comes to my mind is the *King v. Burwell* case that is before the Supreme Court right now, which is heard by the Court this term, and which the fourth circuit below ratified HHS' effort to rewrite what I consider to be the unambiguous text of the Obamacare statute using *Chevron* deference. I will turn to you first, Mr. Kovacs.

Mr. KOVACS. I think when you get into the deference issue, it is more of—yes, it is case by case and it is what the courts are doing, but it is more of the psychology of the agency. There is no check in the system. Some courts do not always apply deference but most do. What happens is the agency knows that they can push the limits of their rulemaking and there is really not going to be a check because the agency knows that the court is generally going to apply the deference. I think that is the bigger problem that is driving this. It just unlocks any inhibitions the agency has to ignoring congressional intent.

Senator HATCH. Could you list a few unreasonable cases?

Mr. KOVACS. I will give you—send you a response to that in writing, and we will give you three or four of them.

Senator HATCH. That would be fine.

Mr. COOPER. Senator Hatch, let me give you a concrete example of the liberating effect that I would submit to you *Chevron* has on the administrative state and all of the agencies within it. In a case called *Utility Air Regulatory Group v. EPA*, decided just, I guess, last term actually, the term before, perhaps, the issue was whether the EPA could effectively and, you know, quite straightforwardly ignore numerical requirements in a statute. The statute itself imposed permitting requirement on all stationary sources emitting 100 or 250 tons of air pollutants per year. The EPA, in regulating greenhouse gas emissions, could not live with those numerical requirements, and so it simply rewrote them to require permit applications relating to 82,000 tons of air pollution a year.

The Supreme Court rejected that use of the Agency's interpretive authority saying now they have gone beyond even where *Chevron* allows them to go. But that case was 5 to 4. There were four Justices prepared to accept under *Chevron* deference an agency's actually rewriting interpreting numerical requirements to be something other than what they are.

There are legions—legions of cases, Senator Hatch, that show the Agency is quite understandably extending their interpretive authority to the very extent of its limits, and its limits are very wide—anything that is reasonable, any interpretation that is within the permissible scope of Congress' possible meaning.

It is hard enough, Senator Hatch, when an agency or a court attempts in good faith using the traditional tools of statutory construction to discern the meaning as best they can, the best meaning of a statute. With the agencies being given essentially carte blanche authority to get anywhere on the target, they will always get as close to the edge as they can that advances their particular bureaucratic agenda. That is understandable, and I do not blame them for that. The problem is there is no judicial check on that activity.

Senator HATCH. Mr. Kovacs, proponents of increased regulation frequently frame their efforts as an attack on big business. Isn't it true that a lot of small businesses are affected and that many of these expensive new rules hurt small businesses the most, and farmers and ranchers and others, because they cannot afford the expensive compliance infrastructure of larger businesses? Moreover, isn't it worth considering how the costs of regulations get passed on to ordinary Americans in the form of higher prices, smaller paychecks, fewer job opportunities? I could go on and on.

Mr. KOVACS. Senator, as you know, Congress in the passage of the Regulatory Flexibility Act required the Small Business Advocacy Group to meet with the agencies on regulations that have a substantial impact on a large number of small businesses, and, for example, in the WOTUS rule, EPA refused to meet with any of the panels. They did the same thing in the Clean Power Plan, and they did the same thing with ozone. They took the position that there was absolutely no cost on small business.

Again, going back to *Chevron* and the psychology, you have an agency that says, "We just do not have to comply," and that is a little bit different than saying that they should care.

The second part is, 35 years ago, Congress in all of the environmental statutes put in this requirement on EPA to do this continuous evaluation on employment and job impacts. For 35 years, the Agency has refused. What happens is when you go back to the 1970s and you look at what really the structure of the deal was between Democrats and Republicans—Congress recognized that regulations would have an impact on jobs, and it would have an impact on industry because they were going to be expensive. In return, Congress asked for this continuing evaluation. Congress got the regulations. Congress never got the evaluation. To some extent, you are dealing without the information you have asked for 35 years to have.

The second thing in terms of the modeling, we did a very extensive study on how EPA uses modeling, and out of the 56 rules that would have had to be modeled just because of their cost, 54 of the rules used what they call the "partial economic analysis." Partial economic analysis only estimates how many new jobs you would put into a facility just to comply with the regulation. They did not use the whole economy modeling, which would have actually looked at, well, what is the cost of the new jobs, what is the cost of the new product, and how does that cost travel through the economy?

One quick example. On the utility MACT, for example, EPA estimated, I believe, that there were going to be 8,000 jobs created by the regulation; they would be the consultants. When we did the whole economy modeling and we actually took EPA's numbers and

just ran it with the whole economy model, it came out to, I think, about 85,000 lost jobs.

Even in the model—and the Senate has taken care of a lot of that, you and Senator Vitter have got the SAB doing now this whole economy modeling to find out why the Agency is not using it more.

Senator HATCH. Thank you.

Mr. Cooper, just another question to you. Would you discuss your views on the *Skidmore* decision? Compare it to the *Chevron* deference. Is *Skidmore* an improvement over *Chevron*, or does it suffer from the same faults?

Mr. COOPER. Senator Hatch, I believe *Skidmore* is a large improvement over *Chevron*. *Chevron* essentially liberated the agencies from *Skidmore*. *Skidmore* had been the governing standard of judicial review of agency action.

Do not misunderstand me, though. *Skidmore* was not—was framed in vague enough language that it, too, obscured what in my opinion should be the goal of any agency and should be the standard of review of any court reviewing agency interpretation of ambiguous statutory provisions, which is: What is the right answer? What is the answer that, again, using the traditional tools of statutory construction, best captures the meaning of the provision that Congress intended?

*Skidmore*—*Skidmore* essentially says to put it in bottom-line terms. The Court will review anything that the agency considered, including its consistency with its own prior practices, that is persuasive to the Court that the agency got it right. That is an improvement on *Chevron*, but it is not, in my opinion, the right standard.

Senator HATCH. There are a whole bunch of other questions I would like to ask, but I think we have kept you all here long enough, so I will submit those in writing.

Senator HATCH. This is an important hearing, and, of course, we are trying to find some effective solutions that will work for everybody rather than just one side or the other, because right now it is not working. Right now, bureaucracy tends to engulf everything in our lives, and somehow or other we have got to get back to where statutes mean what they say and we do not have unelected bureaucrats deciding all these laws the way they are today and imposing them upon everybody at a cost of trillions of dollars over the years.

This is important stuff, and I just want to thank all of you for being here and for taking time off of your busy schedules to help us on the Committee to understand a little bit more about what this is all about.

Thanks for your time, and we appreciate your effort, and with that—I do not see anybody else here—we will adjourn until further notice. Thank you.

[Whereupon, at 11:52 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

## A P P E N D I X

**Submitted by Senator Leahy:**

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**Prepared Statement by Senator Chuck Grassley of Iowa  
Chairman, Senate Judiciary Committee  
Hearing on “Examining the Federal Regulatory System to Improve Accountability,  
Transparency and Integrity”  
June 10, 2015**

Good morning. The Senate has a constitutional duty to conduct oversight of the Executive Branch to ensure that the federal regulatory system remains accountable to the People, and transparent in its operations. Today’s hearing gives us a chance to take a broad look at where things stand.

We all remember from civics class that under our constitutional separation of powers, Congress makes the laws, the Executive Branch enforces the laws, and the Judicial Branch interprets those laws.

If only it were that straightforward.

According to professor of law Jonathan Turley at George Washington University, “Our carefully constructed system of checks and balances is being negated by the rise of a fourth branch, an administrative state of sprawling departments and agencies that govern with increasing autonomy and decreasing transparency.”

The Federal Register indicates there are over 430 departments, agencies, and sub-agencies in the federal government. And the pronouncements of this ever-expanding administrative state impact nearly every aspect of Americans’ daily lives.

The data support that fact. The 113th Congress, for example, enacted just under 300 laws. Over the same two-year period, the federal bureaucracy finalized over 7,000 regulations. Just looking at these numbers, there’s no denying that unelected bureaucrats are the real law-making force in this country.

In 1946, Congress recognized the growing power of the federal bureaucracy and enacted the Administrative Procedure Act (or “APA”) to help ensure that regulations are crafted in an open, accountable and transparent manner—and that agency actions are reviewable by the courts to ensure compliance with the law.

Among the protections built into the APA is the public notice-and-comment rulemaking process, whereby Americans can weigh-in on proposed regulations, and agencies must objectively take those concerns into account when crafting a final rule. This process is supposed to provide a meaningful opportunity for the public to hold regulators accountable, and to help insure that regulations are crafted in the public interest—rather than tailored to special interests. The Judiciary Committee has primary jurisdiction over the APA, and we need to improve our oversight of it.

Unfortunately, we see repeated efforts today by agencies to undermine the public's role in the rulemaking process—and tactics that render the notice-and-comment process a mere formality. Some agencies are resorting to litigation tactics, known as sue-and-settle, to speed up the rulemaking process and to keep affected members of the public—and even the States—away from the table when key regulatory decisions are negotiated behind closed doors.

These tactics often result in consent decrees or settlement agreements between an agency and like-minded interest groups, committing the agency to actions that haven't been publicly scrutinized. In February, I introduced the Sunshine for Regulatory Decrees and Settlements Act, a bill that would shine light on these tactics and provide much-needed transparency before regulatory decisions are finalized.

But that's just one part of the issue.

We also see agencies going through the motions of notice-and-comment rulemaking, yet the public's role in the process appears to be anything but meaningful. The EPA's recently finalized Waters of the U.S. (or "WOTUS") rule stands out as a sweeping example of this problem.

Instead of attempting to address the legitimate concerns raised during the open comment period, the EPA and its allies in the professional advocacy community pushed a narrative that portrayed critics of the rule as misinformed, nutty, or in favor of water pollution.

Agencies are supposed to remain objective during the notice-and-comment period. But EPA's efforts to drive support for its own rule—while belittling the concerns of the public—indicate that it had a clear end-goal in mind, regardless of public opinion or the rule's impact.

According to a recent New York Times article, "the EPA's tactics in supporting the rule are clearly designed to move public opinion, at a time when Congress was considering legislation to block the agency from putting the rule into effect."

I share the concerns of folks across Iowa with the WOTUS rule. Its sweeping scope has left farmers in limbo about what they can and cannot do on their own land. And the indifferent attitude the EPA took toward agriculture is a real concern for my constituents who understand the impact that agriculture has on the state's economy.

More broadly, it's a real concern for just how unaccountable our regulatory system has become.

Congress recognized early on the threat of agency overreach. And accordingly, the APA provides for judicial review over the administrative state.

However, as the influence and reach of the administrative state has grown, it seems like the ability and willingness of the federal courts to hold it accountable has diminished. Over 30 years ago, the Supreme Court articulated the now-famous Chevron doctrine, whereby federal courts largely defer to an agency's legal interpretation of a statute it administers.

And recently, the Supreme Court determined that such heavy deference extends even to an agency's interpretation of the scope of its own jurisdiction.

Placing such questions of law into the hands of those who also write and enforce laws raises serious concerns. As James Madison correctly observed, "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many... may justly be pronounced the very definition of tyranny."

So it's important that we consider these issues carefully, taking into account both the practical realities of our modern system of government and the separation of powers in our Constitution.

It's equally important that Congress recognize its own responsibility in the expansion of the administrative state. For too long, Congress has delegated in broad strokes, asking the agencies to sort out the details. If Congress is going to ask courts to tackle the tough questions, it needs to be willing to do so itself by reasserting its lawmaking power—and by speaking clearly and precisely when it chooses to use that power.

What's clear is that the status quo is not acceptable. Today, small businesses and entrepreneurs operate in a regulatory environment that provides little relief from excessive red-tape, and one that offers little certainty upon which to base risk and investment. Agencies are falling far short of their duties to weigh the costs and benefits of new regulations, and there's little the courts can do to hold them to account. And regulations with hundreds of millions—and even billions—of dollars in impact are being imposed on the U.S. economy, all without a sufficient check by Congress.

In order to promote job growth and the American economy, we all must do better.

Today we're going to take a closer look at these and other concerns that have been raised. And we're going to ask what Congress can do to restore accountability and transparency in the federal regulatory system.

Now, I'll turn to the Ranking Member for his opening remarks.

**Statement Of Senator Patrick Leahy (D-Vt.),  
Ranking Member, Senate Judiciary Committee,  
Hearing on “Examining the Federal Regulatory System to Improve Accountability,  
Transparency and Integrity”  
June 10, 2015**

Today’s hearing will examine the federal regulatory system, an oft-misunderstood and vital component of our Nation’s government. This hearing will raise a number of important issues that deserve serious consideration, including the role federal regulations play in public policy and ensuring that the public can meaningfully participate in the rulemaking process.

We all agree that regulations should be fair and tailored to achieve the public protections for which they are designed. As we listen to criticisms of the regulatory system, it is critical that we recognize the fundamentally important role that regulations play in protecting American workers and consumers. We all benefit from products that have been tested to meet strong health and safety standards. Workplace safety rules ensure that American workers are not put in danger when they simply show up for work. Regulations protect our air and water supply from contamination, protect investors from deceptive financial products, and help ensure that the toys we give our children are safe. Effective regulation can guarantee a minimum level of protection for us all.

Accountability, transparency, and integrity are important democratic principles and I have fought for decades to ensure that our federal government protects these values through legislation to update and strengthen the Freedom of Information Act. These principles are not in conflict with the Administrative Procedures Act and regulations that are issued in accordance with that law. Regulations, like those related to workplace safety, can have a meaningful positive impact on a company’s bottom line. For example, two Vermont breweries—Long Trail and Otter Creek—are among a small number of breweries in the country to be recognized by the Occupational Safety and Health Administration (OSHA) for operating an exemplary injury and illness prevention program. According to the breweries, the workplace safety protocols they have adopted have added to the bottom line “as the capital investment in safety resulted in a more productive, more efficient, and healthier workforce.”

Some witnesses will raise concerns about public participation in agency rulemakings. I agree that participation is essential, but it strikes me that corporate interests have little difficulty making their voices heard. There are entire law practices built around representing businesses before agencies. We should encourage agencies to proactively seek public comments and harness the power of the Internet to allow *citizens* to participate in rulemakings. The sheer volume of comments filed in recent rulemakings like the Federal Communications Commission’s (FCC) Open Internet Order or the Environmental Protection Agency’s (EPA) Clean Water Rule demonstrate that the public cares about strong, effective regulation to protect consumer interests.

A common response to a result that you disagree with is to complain about the process that led to that result. In the face of criticisms of specific outcomes, we must ensure that the process through which rules are promulgated remains efficient and enables agencies to fulfill their mandates. When an agency is delayed for years in implementing a statute passed by Congress

because of political and procedural hurdles, it undermines Congressional intent and prevents the agency from serving the public interest for which it was created.

We have seen numerous legislative proposals this Congress and in the recent past that will simply add more hurdles and undermine the important missions of agencies. Under these proposals, corporate stakeholders would be free to use their resources to hold up the regulatory process, delaying the adoption and implementation of important consumer, health, and safety protections. I have been skeptical of these legislative proposals because we need efficient and effective regulation that works for everyone. For each legislative proposal, we should look closely to see if it actually furthers that goal.

I welcome the witnesses, including Professor Pat Parenteau from the Vermont Law School, a widely-respected scholar on administrative and environmental law. I thank you all for joining us and look forward to your testimony.

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**Statement of Senator David Vitter**  
**Senate Judiciary Committee**  
**Hearing: “Examining the Federal Regulatory System to Improve**  
**Accountability, Transparency and Integrity”**  
**Wednesday, June 10, 2015**

I am very troubled with recent trends by agencies when it comes to rulemaking. One of the most glaring examples of the need for reform and accountability in the agency rulemaking process comes from the actions of the Environmental Protection Agency (EPA) and Army Corps of Engineers in promulgating the new waters of the United States (WOTUS) rule. The reports that the EPA actively engaged in public lobbying efforts in favor of the WOTUS rule are extremely worrisome. EPA – like any agency created to serve the American people – should not be working hand-in-hand with special interests like far-left environmental groups to push unfavorable and harmful rules. A federal agency certainly should not be hiring a PR person associated with the President’s last political campaign to create media “spin” for its proposed rules. In May, I sent a letter to EPA Administrator Gina McCarthy that criticized these reported actions, and demanded that EPA produce more information on this matter.

Furthermore, I am concerned that the EPA’s conduct in this case may not be in line with the law. The Anti-Lobbying Act—and multiple legal opinions from the Department of Justice—clearly forbids agencies from lobbying citizens to contact Congress in support of proposed agency rules. EPA’s alleged actions come very close to crossing that line, and more information is needed. I look forward to EPA’s response to my letter.

As Chairman of the Senate Small Business Committee, I held a hearing last month that examined the EPA and the Army Corps’ decision to certify that the WOTUS rule did not have a significant economic impact on a substantial number of small businesses. This determination

allowed those agencies to virtually shut out the input of American small businesses during the rulemaking process, and clearly defied the law set forth in the Regulatory Flexibility Act (RFA). These are not only my opinions, but also the opinions of the Office of Advocacy which is an independent office within the Small Business Administration charged with monitoring whether agencies comply with the law when their proposed rules directly impact small businesses. The Office of Advocacy testified that the letter they sent to the EPA and Army Corps strongly urging them to follow the RFA by convening a Small Business Advocacy Review panel was completely ignored.

At that hearing, we also heard from small business owners from Iowa and Louisiana fearful of the impact WOTUS will have on private property and the ability to grow businesses. They left no doubt that the rule will make their lives more difficult and seemed just as dismayed as the Office of Advocacy that EPA would shut them out of the rulemaking process.

Taken together, EPA's actions show a clear and disappointing failure in priorities. They show that EPA is willing to invest its time and resources into creating a PR campaign to "spin" and "sell" an unpopular rule to the public with the help of special interests, while deliberately disregarding the concerns of American small businesses and the law.

While such conduct demonstrates the need for greater transparency and accountability in the rulemaking process, it also shows that the law, especially with regard to the treatment of small businesses, needs changing. This year I introduced legislation that will strengthen the Regulatory Flexibility Act to close the loopholes that allow EPA and other agencies to avoid including small business feedback for rules that will have a significant economic impact on small entities. This is just one step in reforming the system and ensuring that agencies follow the law when making rules.



## Statement of the U.S. Chamber of Commerce

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**ON: Hearing on Examining the Federal Regulatory System to  
Improve Accountability, Transparency, and Integrity**

**TO: U.S. Senate Committee on the Judiciary**

**DATE: June 10, 2015**

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1615 H Street NW | Washington, DC | 20062

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

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

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

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

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

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

**BEFORE THE COMMITTEE ON THE JUDICIARY OF THE U.S. SENATE****Hearing on Examining the Federal Regulatory System to Improve Accountability,  
Transparency, and Integrity**

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

**June 10, 2015**

Good morning, Chairman Grassley, Ranking Member Leahy, and distinguished Members of the Committee. My name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. I was asked to appear before you to discuss the Chamber's perspective on accountability, transparency, and integrity in the federal regulatory process and the critical role that the courts play in supervising the regulatory process. We believe that an examination of the regulatory process is overdue because our research indicates that the last time the full Senate Judiciary Committee conducted a hearing focussing on regulatory reform occurred twenty years ago in 1995.<sup>1</sup>

The goal of the regulatory process should be to produce regulations that implement the intent of Congress in the most efficient way possible. Accountability, transparency and integrity are the essential characteristics needed to achieve the development of good regulations. Considering that agencies utilizing a "New Deal" regulatory process, have issued almost 200,000 regulations between 1976 and today, the regulatory process has generally worked well in managing routine matters. Unfortunately, however, the system is badly fraying for the most complex and high-cost regulations. Congress needs to pay far more attention to how agencies develop these critical rules since they govern major segments of the nation's activities.

The Chamber has spent several years examining the regulatory process in detail.<sup>2</sup> Our research indicates that, over time, Congress has enacted many broad and vague laws that

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<sup>1</sup> See *Hearing Before the Committee on the Judiciary, United States Senate, on S. 343, A Bill to Reform the Regulatory Process, and for Other Purposes*, 104th Cong. (1995).

<sup>2</sup> See U.S. Chamber of Commerce, *Truth in Regulating: Restoring Transparency to EPA Rulemaking* (Apr. 2015) available at [https://www.uschamber.com/sites/default/files/021935\\_truthinregulating\\_opt.pdf](https://www.uschamber.com/sites/default/files/021935_truthinregulating_opt.pdf); U.S. Chamber of Commerce, *Charting Federal Costs and Benefits* (Aug. 2014) available at [https://www.uschamber.com/sites/default/files/021615\\_fed\\_regs\\_costs\\_benefits\\_2014reportrevise\\_jrp\\_fin\\_1.pdf](https://www.uschamber.com/sites/default/files/021615_fed_regs_costs_benefits_2014reportrevise_jrp_fin_1.pdf); U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) available at <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf>; U.S.

delegated significant policy making authority to agencies, which have used that authority to fill in many of the legislative gaps. This “gap filling” authority is supported by the courts as they grant deference to agency decisions rather than being a strong check on agency power.

As agencies began expanding their policy making power, Congress responded by enacting statutes requiring the agencies to analyze, as part of the rulemaking process, cost/benefit analysis, unfunded mandates, the use of the best quality information, data and peer reviewed materials, impacts on small business and small local governments, as well as mandating, for at least one agency, the continuous evaluation of the potential loss or shifts in employment due to the agency’s regulations.

One agency in particular—the U.S. Environmental Protection Agency (EPA)—has been systematically allowed by the courts to expand its regulatory power well beyond the scope of environmental laws such as the Clean Water Act and the Clean Air Act. In addition to issuing increasingly costly rules on accelerated timeframes, the agency has moved well beyond its traditional regulatory boundaries:

- On May 27, 2015, the U.S. Environmental Protection Agency (EPA) finalized the “waters of the United States” (WOTUS) definition rule under the Clean Water Act. The rule dramatically expands federal jurisdiction over land uses, usurps state and local water quality programs, and threatens property rights across the country.
- In August, the EPA plans to issue final regulations for greenhouse gas emissions from power plants in the U.S. The rule would give EPA unprecedented authority over the way energy is used within states, and could adversely impact the reliability and affordability of electricity in this country.
- This autumn, EPA is expected to lower the ozone National Ambient Air Quality Standard, which is likely to put much of the country in “nonattainment” with the standard, making it very difficult for these areas to attract new businesses or grow existing ones.

Thus, within a period of less than six months, EPA has launched or intends to launch three massive regulatory programs that will push the boundaries of federal authority further than they have ever been extended. Each of these regulatory initiatives greatly expands federal power at the expense of state and local authorities—despite the fact that the states have long shouldered the vast majority of the burden of implementing and enforcing federal environmental laws, and

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Chamber of Commerce, *Impacts of Regulations on Employment: Examining EPA’s Oft-Repeated Claims that Regulations Create Jobs* (Feb. 2013) available at [https://www.uschamber.com/sites/default/files/documents/files/020360\\_ETRA\\_Briefing\\_NERA\\_Study\\_final.pdf](https://www.uschamber.com/sites/default/files/documents/files/020360_ETRA_Briefing_NERA_Study_final.pdf); U.S. Chamber of Commerce, *EPA’s New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012) available at [https://www.uschamber.com/sites/default/files/documents/files/1207\\_ETRA\\_HazeReport\\_Ir\\_0.pdf](https://www.uschamber.com/sites/default/files/documents/files/1207_ETRA_HazeReport_Ir_0.pdf); U.S. Chamber of Commerce, *Project No Project, Progress Denied: A Study on the Potential Economic Impact of Permitting Challenges Facing Proposed Energy Projects* (Mar. 2011) available at [http://www.projectnoproject.com/wp-content/uploads/2011/03/PNP\\_EconomicStudy.pdf](http://www.projectnoproject.com/wp-content/uploads/2011/03/PNP_EconomicStudy.pdf).

the ultimate success of EPA's programs overwhelmingly depends on the states.<sup>3</sup> These rules not only undermine the cooperative federalism model carefully crafted by Congress, they threaten to wreak havoc on the states' ability to operate effective environmental programs.

It is worthwhile to ask – *how could this happen?* How can a single federal agency take unto itself the authority not only to protect the environment, but also to establish national land use policies, to determine the allowable level of economic development, and to dictate the composition of the country's energy portfolio?

The short answer is that for the most costly, burdensome and complex regulations being issued by agencies, the regulatory process is critically dysfunctional. Agencies fill in so many "gaps" they make more law than Congress, all the while ignoring the impacts analyses that Congress requires. Meanwhile, the courts avoid dealing with the complexity by granting tremendous deference to agency decisions. And Congress has focused so intently on the problems with specific rules that it has ignored for almost seventy years one of the most important aspects of our complex society—that while regulators make many laws, all legislative power is still vested in Congress and Congress needs to better ensure that agencies carry out its intent. While some members of Congress may be pleased by specific agency action and others displeased, the administrative process has become about how unelected officials make laws. That process must be carried out with accountability, transparency and integrity if it is to provide the management of government the American people deserve.

Regulatory dysfunction started to occur decades ago when Congress, with good intentions, wrote broad, remedial statutes and delegated significant authority to the agencies to implement the laws. The courts granted more and more deference to agency decisions through the *Chevron* doctrine, rather than acting as a check on unrestrained regulatory powers. Congress gave citizens the right to sue to enforce environmental statutes, and the courts systematically granted broad standing on advocacy group plaintiffs. Advocacy groups became adept at using lawsuits against sympathetic agencies to expand aggressive agency agendas through court-approved settlement agreements. Courts not only unquestioningly approve these "sue and settle" agreements, they sometimes exclude other stakeholders from participating in the settlement meetings.

To reverse this dysfunctional situation, the Senate Homeland Security and Government Affairs Committee (HSGAC) and the Judiciary Committee should work together to support a judicial process that ensures agency accountability in implementing the intent of Congress. Congress needs to ensure the regulatory and judicial processes work together in a way that is transparent, accountable, and whose integrity is above question. This is essential in order to protect the integrity of Congress as it delegates authority to agencies, but most importantly, to ensure that Congress acts as a check on the other branches of our government.

<sup>3</sup> The states implement approximately 96.5% of federal environmental programs. See [https://www.dropbox.com/s/jgdbu4rq129oexh/EEEnterprise%20One%20Pager%205\\_21%20FINAL.docx](https://www.dropbox.com/s/jgdbu4rq129oexh/EEEnterprise%20One%20Pager%205_21%20FINAL.docx). EPA provided \$3.6 billion in 2013 for the administration of its programs. See EPA FY 2014 Budget in Brief, p. 87. (<http://www2.epa.gov/planandbudget/fy2014>).

## I. BACKGROUND

A complex society needs regulations. As U.S. Chamber President and CEO Thomas Donohue has said, “[b]usiness has long recognized the need for sensible regulations to ensure workplace safety, guarantee worker rights, and protect public health.”<sup>4</sup> As they endeavor to regulate more and more facets of American society, federal agencies must operate in an even-handed fashion, be open with the public, and follow the directives of Congress.

Preserving transparency and the ability of Congress to manage federal agencies has been a continuing challenge since the day the first agency, the Interstate Commerce Commission, was created in 1887. Prior to 1935 and the creation of the *Federal Register*,<sup>5</sup> every agency published its own new regulations and there was no central repository for interested parties to monitor. Moreover, agencies were not required to take public comment on their proposed rules and respond to those comments in the rulemaking record until 1946, when Congress enacted the landmark Administrative Procedure Act (APA), which established a uniform rulemaking process, citizen participation, procedural transparency, and standards for judicial challenges to agency rulemaking actions.

### A. The Administrative Procedure Act and Rulemakings

Enacted in the wake of the New Deal’s vast expansion of federal authority and the government’s assumption of extensive control over the U.S. economy in order to fight World War II, the Administrative Procedure Act (APA) has been called “the bill of rights for the new regulatory state.”<sup>6</sup> One commenter has noted that the APA expressed the nation’s decision in 1946 to “permit extensive government, but to restrain agencies’ unfettered exercise of their regulatory powers.”<sup>7</sup>

The APA was written as a compromise that allows agencies to use informal “notice and comment rulemaking”—an agency only has to publish a notice of a proposed rule, allow some opportunity for public comment, and respond to any public comments when the agency finalizes the rule. Courts that evaluate those rulemaking decisions use a relaxed standard of review, and defer to agencies’ technical expertise. The APA’s compromise “struck between promoting individuals’ rights and maintaining agencies’ policy-making flexibility,”<sup>8</sup> actually makes it relatively easy for agencies to issue new rules that more often than not will be upheld by the courts.

Each year, federal agencies churn out thousands of new regulations. For the vast majority of these rulemakings, the APA process has worked very well. Most of the thousands of small rules that agencies propose each year receive little or no public comment and require no procedural effort beyond publishing notices in the *Federal Register*. The ease with which

<sup>4</sup> Remarks of Thomas Donohue before the Des Moines Rotary Club, Des Moines, Iowa (October 7, 2010) at 3.

<sup>5</sup> Federal Register Act of 1935, 44 U.S.C. Chapter 15. The first *Federal Register* notice was published on March 14, 1936.

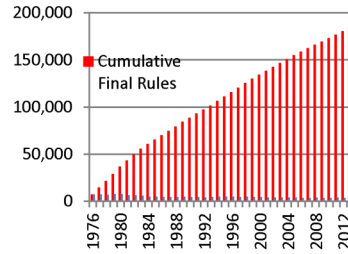
<sup>6</sup> Shepherd, G., *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 *Northwestern University Law Review* 1557, 1558 (1996).

<sup>7</sup> See *id.* at 1559.

<sup>8</sup> *Id.* at 1558.

agencies can write new rules helps explain how agencies could collectively issue almost 200,000 final rules over a 36-year period, as illustrated below.

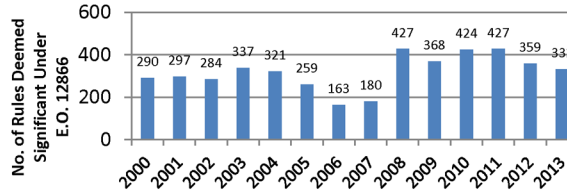
**Cumulative Federal Rules Since 1976**



Source: *Federal Register*

Despite the historic success of the APA in managing small, “run-of-the-mill” rulemakings, the ordinary notice-and-comment rulemaking process has become less and less capable of handling today’s most extensive and complex regulatory actions.

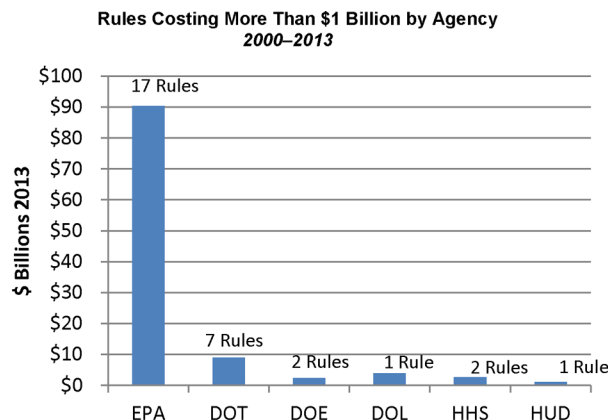
**Significant Final Rules: 2000–2013**



Source: *Federal Register*

Of all the significant rules issued each year, as shown above, only a tiny handful impose **\$1 billion or more** each year in regulatory costs. In 2011, for example, seven proposed rules had compliance price tags of \$1 billion or more.<sup>9</sup> The Chamber’s analysis of the agencies’ own economic data identifies the rules that carry the largest nationwide cost and regulatory burden.

<sup>9</sup> Letter from President Obama to Speaker Boehner (August 20, 2011), Appendix “Proposed Regulations from Executive Branch Agencies with Cost Estimates of \$1 Billion or More.” The seven rules: EPA, Reconsideration of the 2008 Ozone NAAQS (\$19-90 billion), EPA, Utility MACT (\$10 billion), EPA, Boiler MACT (\$3 billion), EPA, Coal Ash Rule (\$0.6-1.2 billion), DOT, Federal Motor Vehicle Safety Standard – Rear-View Mirrors (\$2 billion), DOT, Hours of Service On-Board Recorders/Recordkeeping (\$2 billion), and DOT, Hours of Service (1 billion).



Sources: EPA rules from agency RIAs; other agencies' rules from OMB Draft 2013 and Draft 2014 Reports to Congress on Costs and Benefits of Regulations.

The data shows that from 2000 to 2013, a total of **30** rules from Executive Branch agencies, each with a cost of more than **\$1 billion** per year, are now imposing nearly **\$110 billion** each year on the U.S. economy.<sup>10</sup> Significantly, EPA not only issued more of these rules than all the other agencies combined, the 17 EPA rules collectively imposed **82.5%** of all the monetized compliance costs. While the high cost of these rules is important, these rules are typically also highly complex and burdensome. The rules are far more intrusive than smaller rules and have the potential to have profound effects (often unintentional) on fundamental sectors of our national economy (e.g., energy, financial institutions, healthcare, education, and the Internet).

#### **B. The APA Notice and Comment Process Does Not Work For Billion-Dollar-Plus Rulemakings**

One might assume that, because of their importance, agencies would proceed especially carefully when they prepare billion- and multibillion-dollar per year rules. An agency would be expected to try to understand how a massive new rule will affect specific regulated industries and the communities where those industries are located. Unfortunately, however, this is very often not the case. Time and time again, informal notice-and-comment rulemaking procedures have proven insufficient to afford interested parties and the public adequate information about the

<sup>10</sup> Independent regulatory agencies (e.g. the Federal Communications Commission (FCC), Securities and Exchange Commission (SEC), and Commodities Futures Trading Commission (CFTC)) are not subject to Executive branch oversight by the Office of Management and Budget (OMB) and do not routinely perform regulatory impact analysis (RIAs) as directed by OMB Circular A-4 guidance on cost-benefit analysis. Consequently, even in the cases when independent regulatory agencies estimate the costs and benefits of their regulations, they generally do not adhere to the standards established and enforced by OMB and the cost estimates are often not complete or comparable.

most significant, complex, and costly proposed rules, or adequate time to give useful feedback to the agency in question.

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

- ***Agencies make unproven factual assumptions.*** Recent rulemakings have been grounded entirely on assumptions that are speculative and highly likely to be false (e.g., 65% of ozone emission reductions, according to EPA’s own Regulatory Impact Analysis for its proposed ozone standards, are estimated to come from unknown controls<sup>11</sup>). The ordinary notice-and-comment rulemaking process gives stakeholders virtually no real opportunity to disprove these assumptions, because agencies only have to show that they have considered an adverse comment and are essentially free to disregard it.
- ***The public (and very often the agency itself) does not have enough information to fully understand how a rule will work in real life.*** Federal agencies frequently fail to grasp the impact that a large new regulation – added to prior rules and those of *other agencies* – have on businesses, communities, and the economy as a whole.
- ***30-, 60-, or 90-day comment periods are too short to allow stakeholders to develop detailed comments about complex or opaque proposed rules.*** By the time a full analysis of a rule’s impact can be completed, the rule is final and has already taken effect.
- ***The information agencies rely upon is often of poor quality, or is not verifiable.*** Agencies often rely on data that is difficult to obtain or verify independently, that is based on too few data points, or was developed using improper methodology.
- ***Agencies are required by law to consider the impacts a new rule will have on regulated entities,<sup>12</sup> but these reviews are limited, rushed, or ignored altogether.*** Agencies have to take shortcuts to meet tight rulemaking deadlines, and often do not complete the analyses necessary to know how to develop a rule that accomplishes its purpose without inflicting unnecessary harm.

### **C. Agencies Fail to Adequately Comply with Congressional and Executive Branch Requirements for Transparency and Accountability in the Regulatory System**

<sup>11</sup> NERA Economic Consulting, “Economic Impacts of a 65 ppb National Ambient Air Quality Standard for Ozone,” February 2015, available at [www.nam.org/ozone](http://www.nam.org/ozone). (Study and estimates based on data from the EPA’s Regulatory Impact Analysis of the Proposed Revision to the National Ambient Air Quality Standards for Ground-Level Ozone, pp. ES-8, ES-9 (November 2014)).

<sup>12</sup> See, e.g., Executive Order 12,866 (1993) (requiring interagency economic review of “major rules” that are likely to have an annual effect on the U.S. economy of \$100 million or more); Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.* (requiring federal agencies to consider the impact their proposed rules will have on small businesses and small governments). Independent agencies such as FCC, SEC, CFTC, and OCC are not bound by this Executive Order.

Congress and executive orders have attempted to address the deficient rulemaking process through: (1) Section 321(a) of the Clean Air Act, (2) the Information Quality Act, (3) the Unfunded Mandates Reform Act, (4) the Regulatory Flexibility Act, (5) Section 109(d)(2)(C) of the Clean Air Act, (6) Executive Order 12,866, and (7) Executive Order 13,563. Unfortunately, agencies such as the EPA often either ignore or do not adequately comply with these important regulatory requirements.

### 1. Agencies Fail to Utilize the Information Quality Act

Perhaps the most effective mechanism for ensuring federal agencies use high quality data in their rulemakings is to vigorously implement the Information Quality Act (IQA).<sup>13</sup> 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.<sup>14</sup>
- A procedure to allow affected persons to "seek and obtain" correction or disclosure of information that fails OMB information quality requirements.

Unfortunately, federal agencies have taken the position that they need not comply with IQA because there is no private right of action to enforce the statute.<sup>15</sup>

<sup>13</sup>44 U.S.C. §§ 3504(d)(1), 3516.

<sup>14</sup> Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452, 8457-58 (Feb. 22, 2002).

<sup>15</sup> *Harnoken v. Dep't of Justice*, No. C 12-629 CW, 2012 U.S. Dist. LEXIS 17145, at \*24 (N.D. Cal. Dec. 3, 2012) (ruling on the DOJ and OMB's assertion that IQA does not provide a private right of action or judicial review).

## 2. Agencies Fail to Comply with the Unfunded Mandates Reform Act (“UMRA”)

UMRA requires federal agencies to assess the effects of a rule on state and local governments before imposing mandates on them of \$100 million or more per year without providing federal funding for state and local governments to implement the mandate. As noted above, states implement approximately **96.5%** of the federal environmental laws. When EPA finalizes three historically significant regulations within a six month period—WOTUS, CPP, and the ozone NAAQS—mandate after mandate is rapidly piled on the states. The states can only do so much with their existing resources. Yet EPA ignores the new burdens it places on its critical partners and undermines the concept of cooperative federalism.<sup>16</sup> For example, in formulating the WOTUS rule, EPA and the U.S. Army Corps of Engineers (the Corps), without supporting data, certified that “[t]his action does not contain any unfunded mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995, (12 U.S.C. §§ 1531-1538), and does not significantly or uniquely affect small governments.”<sup>17</sup> EPA similarly certified that the CPP and Ozone NAAQS rules do not impose these unfunded mandates. The EPA should have fulfilled its statutory obligation under UMRA by evaluating the impact of imposing an unfunded mandates over \$100 million on state and local governments through the WOTUS rule without providing implementation funding.

## 3. Agencies Fail to Adequately Comply with the Regulatory Flexibility Act

In order to give small entities a voice in the federal rulemaking process,<sup>18</sup> Congress enacted the Regulatory Flexibility Act (RFA) which requires federal agencies to assess the economic impact of their planned regulations on small entities and to consider alternatives which would lessen those impacts.<sup>19</sup> EPA has been specifically required to conduct Small Business Advocacy Review Panels, which provided face-to-face interactions with smaller members of the regulated community, when a planned rule is likely to have a significant impact on smaller entities. EPA has failed to comply with the RFA in both its CPP and WOTUS rulemakings. In fact, the U.S. Small Business Administration’s Office of Advocacy publicly advised EPA and the Corps that they improperly certified the WOTUS proposal under RFA.<sup>20</sup> The EPA and Corps should have satisfied their statutory obligations under the RFA by properly assessing impacts on small entities and convening a Small Business Advocacy Review Panel early in the process of developing the Clean Power Plan and the WOTUS rule.

<sup>16</sup> In the case of the WOTUS rule, EPA also failed to comply with the consultation requirements of Executive Order 13,132, “Federalism,” 64 Fed. Reg. 43,255 (Aug. 10, 1999).

<sup>17</sup> U.S. Environmental Protection Agency & U.S. Department of the Army, Economic Analysis of the EPA-Army Clean Water Rule (May 2015), at 61, *available at* [http://www2.epa.gov/sites/production/files/2015-05/documents/final\\_clean\\_water\\_rule\\_economic\\_analysis\\_5-15\\_2.pdf](http://www2.epa.gov/sites/production/files/2015-05/documents/final_clean_water_rule_economic_analysis_5-15_2.pdf). *See also* Definition of “Waters of the United States” Under the Clean Water Act; Proposed Rule, 79 Fed. Reg. 22,220 (April 21, 2014).

<sup>18</sup> 5 U.S.C. §§ 601-612.

<sup>19</sup> 5 U.S.C. § 605(b).

<sup>20</sup> Letter from Winslow Sargeant, Chief Counsel for Advocacy, to Gina McCarthy, Administrator, EPA and General John Peabody, Deputy Commanding General, Corps of Engineers, on Definition of “Waters of the United States” Under the Clean Water Act (Oct. 1, 2014) at 4.

#### 4. EPA Fails to Comply with Clean Air Act Section 321(a)

Congress enacted in the Clean Air Act Amendments of 1977 a provision, now codified as section 321(a), which requires the EPA to conduct continuing evaluations of potential losses or shifts of employment arising from Clean Air Act policies.<sup>21</sup> In 2009 when a large number of regulations was being issued by EPA, six U.S. Senators wrote to EPA requesting the results of its continuing Section 321(a) evaluation of potential loss or shifts of employment which may result from the suite of regulations EPA had proposed or finalized.<sup>22</sup> On October 26, 2009, EPA responded to the six Senators stating “EPA has not interpreted CAA section 321 to require EPA to conduct employment investigations in taking regulatory actions.”<sup>23</sup> EPA has deprived Congress of critical information necessary for agency oversight by refusing to conduct employment impact studies pursuant to section 321(a) of the Clean Air Act.

#### 5. EPA Fails to Utilize Clean Air Act Section 109(d)(2)(c)

Section 109 of the Clean Air Act provides for the independent Clean Air Science Advisory Committee to “advise the [EPA] Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of [an existing National Ambient Air Quality Standard (“NAAQS”) or NAAQS revisions].”<sup>24</sup> EPA has declined such advice from the Clean Air Science Advisory Committee.<sup>25</sup>

#### 6. Agencies Fail to Examine Inconsistent or Incompatible Regulations as Required by Executive Order 12,866

Executive Order 12,866 makes federal agencies responsible for ensuring that a new regulation will not conflict with other requirements, specifying that “each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.”<sup>26</sup> For example, EPA projects that the CPP will cause up to 49,000 megawatts of coal-fired electric generating capacity to retire by 2020. To replace this generating capacity, utilities will need to construct fuel delivery infrastructure such as pipelines, storage, railroad track and improved roads—all of which will be subject to more extensive permitting and reviews under the new WOTUS rule. EPA did not properly account for the increased costs and delays companies will incur under the WOTUS rule in order to also comply with the CPP, as required by Executive Order 12,866.

<sup>21</sup> Section 321(a) of the Clean Air Act; 42 U.S.C. § 7621.

<sup>22</sup> Letter from Senators Vitter, Risch, Johanns, Inhofe, Ensign and Hatch to EPA Administrator Lisa Jackson, October 13, 2009.

<sup>23</sup> Letter from EPA Assistant Administrator for Air Gina McCarthy to Senator Inhofe (Oct. 26, 2009) at 2.

<sup>24</sup> 43 U.S.C. § 7409(d)(2)(C)(iv).

<sup>25</sup> *EPA Science Advisory Panels: Preliminary Observations of the Processes for Providing Scientific Advice Before the U.S. Senate Subcommittee on Superfund, Waste Management, and Regulatory Oversight, Committee on Environment and Public Works*, 114th Cong. (2015) (statement of J. Alfredo Gomez, Director of Natural Resources and Environment, GAO) available at [http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=cc9167e9-7dd1-4c53-8cca-8a2820b69108&CFID=181664324&CFTOKEN=79870804](http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=cc9167e9-7dd1-4c53-8cca-8a2820b69108&CFID=181664324&CFTOKEN=79870804).

<sup>26</sup> Executive Order 12,866, “Regulatory Planning and Review,” 58 Fed. Reg. 51,735 (Sept. 30, 1993), § 1 (b)(10).

### 7. Agencies Fail to Properly Analyze the Cumulative Impacts of Regulations Pursuant to Executive Order 13,563

Executive Order 13,563, issued by the Obama Administration in 2011, provides that each agency must, among other things, “tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, *taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.*”<sup>27</sup> EPA, for example, failed to comply with this Executive Order when it planned to develop three massive rulemakings (CPP, WOTUS, and the stricter ozone standards) that would be timed to take effect virtually one on top of the other.

In sum, using a deficient informal rulemaking process for the biggest rules, while at the same time ignoring the analytic requirements in statutes and Executive Orders, often produces flawed, unworkable rules. These defective rules eventually must be corrected through lengthy court challenges, tying up the resources of the courts and leaving regulated parties uncertain of their present legal obligations.

## II. CITIZEN SUIT PROVISIONS AND RELAXED STANDING REQUIREMENTS GIVE ADVOCACY GROUPS EASY ACCESS TO COURTS

In 1970, Congress enacted the first citizen suit provision,<sup>28</sup> which was contained within the Clean Air Act.<sup>29</sup> A citizen suit allows a private citizen to sue any person (including the government) for violating a mandatory requirement of a statute. Further, the private citizen can sue the federal government for failure to take nondiscretionary acts or duties that are required by a statute.<sup>30</sup> Citizen suits are also often used to challenge other matters such as the issuance of a permit.

Citizen suits are not designed to enrich the plaintiffs, but to serve the interests of the public.<sup>31</sup> Therefore, as “private attorneys general,” plaintiffs are not awarded damages, but they may receive injunctive relief to secure the desired action and may be entitled to litigation costs, including attorney and expert witness fees, when a court deems it is appropriate.<sup>32</sup> Under some environmental statutes, moreover, plaintiffs can also trigger penalties on polluters. These penalties are placed in a United States Treasury fund that helps finance compliance and enforcement activities.<sup>33</sup>

<sup>27</sup> Executive Order 13,563, “Improving Regulation and Regulatory Review,” 76 Fed. Reg. 3,821 (Jan. 21, 2011), § 1(b)(2) (emphasis added).

<sup>28</sup> See e.g. Barton H. Thompson, Jr., Symposium: Innovations in Environmental Policy: *The Continuing Innovation of Citizen Enforcement*, 2000 U. Ill. L. Rev. 185 (2000).

<sup>29</sup> Clean Air Amendments of 1970, Pub. L. No. 91-604 (1970).

<sup>30</sup> See e.g. 42 U.S.C. § 7604. For a brief discussion of these two types of citizen suit lawsuits, see e.g. Daniel P.

Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 Ind. L.J. 65 (1996) at 72-73.

<sup>31</sup> See *supra* note 12 at 198; See also *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

<sup>32</sup> See e.g. 42 U.S.C. § 7604.

<sup>33</sup> *Id.*

### A. Lack of Congressional Oversight Over Citizen Suits

The prevalence of citizen suits in our regulatory system raises several critical issues that need to be regularly considered by the Senate and House Judiciary Committees, including questions of judicial resources and workloads. In the 1970's, Congress enacted citizen suit provisions in twenty environmental statutes. These provisions allow any citizen the right to mandate that agencies implement and enforce the environmental statutes and to challenge private actions alleged to be in violation of statutes. It also authorized the payment of attorneys' fees to citizens that prevail or partially prevail in the litigation. These provisions are found in titles 15, 16, 30, 33, and 42 of the U. S. Code.

The Judiciary Committees nevertheless have never conducted any oversight over the numerous citizen suit provisions in environmental statutes. This is significant because the inclusion of a citizen suit provision in the Clean Air Act was far from certain when the bill was being considered in 1970. The House version of the bill did not include a citizen suit provision.<sup>34</sup> While the Senate bill did include a citizen suit provision,<sup>35</sup> serious concern was expressed during the Senate floor debate.

After acknowledging the importance of the overall clean air bill, Senator Roman Hruska (R-NE), who was the ranking member of the Senate Judiciary Committee, expressed his specific concerns about the citizen suit provision. First, he remarked that the Senate Judiciary Committee had not been involved in drafting the provision. Next he noted that the Senate not been given sufficient time study the language and understand its implications before their vote:

Frankly, inasmuch as this matter [the citizen suit provision] came to my attention for the first time not more than 6 hours ago, it is a little difficult to order one's thoughts and decide the best source of action to follow.

\* \* \*

Had there been timely notice that this section was in the bill, perhaps some Senators would have asked that the bill be referred to the Committee of the Judiciary for consideration of the implications for our judicial system.<sup>36</sup>

Senator Hruska sought to send the bill back to committee for lack of consideration. He only relented from his objections because of the promise that the Judiciary committee would have hearings on the issue. That was 1970 and, to date, there have not been hearings on the issue. The same is true for the citizen suit provision in the Clean Water Act, which was enacted just two years later.<sup>37</sup> While there was a Senate Judiciary Committee hearing 30 years ago on the Superfund law that discussed various issues, including citizen suits, there has never been a House

<sup>34</sup> See e.g. "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980, Conference Report, at 205-206.

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

<sup>36</sup> *Id.* Senate debate on S. 4358 at 277.

<sup>37</sup> "A Legislative History of the Water Pollution Control Act Amendments of 1972, Together with a Section-By-Section Index," Library of Congress, U.S. Govt. Print. Off., 1973-1978; The legislative history was also searched using Lexis.

or Senate Judiciary Committee hearing focused on citizen suits since the creation of the first citizen suit provision in 1970.<sup>38</sup>

As shown below, there are at least 20 environmental statutes that have citizen suit provisions. Every major environmental statute has a citizen suit provision except the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).<sup>39</sup>

**Figure 1**  
**Statutes and Citizen Suit provisions**, including whether the original bill creating the citizen suit provision was heard by the Senate or House Judiciary Committee.

Statute	Provision	Was the original bill creating the citizen suit provision heard by the Senate or House Judiciary Committee?	
		Yes	No
Act to Prevent Pollution from Ships	33 USC § 1910		<input checked="" type="checkbox"/>
Clean Air Act	42 USC § 7604		<input checked="" type="checkbox"/>
Clean Water Act	33 USC § 1365		<input checked="" type="checkbox"/>
Superfund Act	42 USC § 9659		<input checked="" type="checkbox"/>
Deepwater Port Act	33 USC § 1515		<input checked="" type="checkbox"/>
Deep Seabed Hard Mineral Resources Act	30 USC § 1427		<input checked="" type="checkbox"/>
Emergency Planning and Community Right-to-Know Act	42 USC § 11046		<input checked="" type="checkbox"/>
Endangered Species Act	16 USC § 1540(g)		<input checked="" type="checkbox"/>
Energy Conservation Program for Consumer Products	42 USC § 6305		<input checked="" type="checkbox"/>
Marine Protection, Research and Sanctuary Act	33 USC § 1415(g)		<input checked="" type="checkbox"/>
National Forests, Columbia River Gorge National Scenic Area	16 USC § 544m(b)		<input checked="" type="checkbox"/>
Natural Gas Pipeline Safety Act	49 USC § 60121		<input checked="" type="checkbox"/>
Noise Control Act	42 USC § 4911		<input checked="" type="checkbox"/>
Ocean Thermal Energy Conservation Act	42 USC § 9124		<input checked="" type="checkbox"/>
Outer Continental Shelf Lands Act	43 USC § 1349(a)		<input checked="" type="checkbox"/>
Powerplant and Industrial Fuel Use Act	42 USC § 8435		<input checked="" type="checkbox"/>
Resource Conservation and Recovery Act	42 USC § 6972		<input checked="" type="checkbox"/>
Safe Drinking Water Act	42 USC 300j-8		<input checked="" type="checkbox"/>
Surface Mining Control and Reclamation Act	30 USC § 1270		<input checked="" type="checkbox"/>
Toxic Substances Control Act	15 USC § 2619		<input checked="" type="checkbox"/>

<sup>38</sup> In 1985, the Senate Judiciary Committee held a hearing on the Superfund Improvement Act of 1985 that, among other things, discussed citizen suits (S. Hrg. 99-415). The hearing covered a wide range of issues, such as financing of waste site clean-up, liability standards, and joint and several liability. To find hearing information, a comprehensive search was conducted using ProQuest Congressional at the Library of Congress. The search focused on hearings that addressed citizen suits from 1970 to the present.

<sup>39</sup> Meltz, Robert, "The Future of Citizen Suits After Steel Co. and Laidlaw," Congressional Research Service, January 5, 1999.

Because citizen suits are inherently a legal matter, the expertise of the Judiciary Committees is needed to adequately oversee them. Some of the most important legal questions are brought up as a result of citizen suits. For example, the issue of standing is central to citizen suits. Standing is the question of whether a plaintiff has suffered an “injury in fact,” which is an actual or imminent harm.<sup>40</sup>

The relationship between citizen suits and standing is unique because citizen suit provisions often give plaintiffs unusually wide latitude to sue in federal court. Constitutional standing requirements, rooted in Article III of the Constitution, have undergone several major modifications through Supreme Court decisions over the last four decades.

### **B. The Dramatic Expansion of Standing for Interest Groups in Citizen Suits**

The courts have greatly expanded standing for certain plaintiffs and have also grafted private rights of action onto statutes in which Congress did not provide a private right of action.

1. **The courts interpret a right of judicial review of agency action (1971).** In *Calvert Cliffs Coordinating Comm. v. AEC*,<sup>41</sup> the U.S. Court of Appeals for the D.C. Circuit found that an agency’s compliance with an environmental statute is reviewable, and that the agency is *not* entitled to assert that it has wide discretion in performing the required procedural duties. Judge Skelly Wright wrote that “[the statute] contains very important procedural provisions – provisions which are designed to see that all federal agencies do in fact exercise the substantive discretions given them. These provisions . . . establish a strict standard of compliance.”
2. **The courts find that agencies have very limited discretion in determining how to meet their environmental review obligations (1971).** In *Citizens to Preserve Overton Park v. Volpe*,<sup>42</sup> the Supreme Court considered a challenge to the Department of Transportation’s decision to route an Interstate highway through a park. The Court noted that “[a] threshold question – whether petitioners are entitled to any judicial review – is easily answered. Section 701 of the Administrative Procedure Act [] provides that the actions of “each authority of the Government of the U.S. is subject to judicial review except where there is a statutory prohibition on review or where “agency action is committed to agency discretion by law.” The Court found no evidence that Congress sought to prohibit judicial review or restrict access to judicial review.
3. **The courts find that third-party environmental groups have standing to sue on environmental claims (1972).** In *Sierra Club v. Morton*,<sup>43</sup> the Supreme Court found that an environmental group had not adequately alleged that it or its members’ activities would be affected by a proposed action of the U.S. Forest Service, thereby failing to satisfy the requirements for judicial standing. Although the Court held that the group had

<sup>40</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>41</sup> 449 F.2d 1109 (D.C. Cir. 1971).

<sup>42</sup> 401 U.S. 402 (1971).

<sup>43</sup> 405 U.S. 727 (1972).

not met the standing requirements, the Court gave the group clear instructions on how it could satisfy the standing requirement. The environmental group amended its complaint following the Court's decision, and, with adequate allegations of individualized impact on the group, it satisfied the standing requirement. Following this case, environmental group plaintiffs had a relatively simple task of establishing standing in environmental cases.

4. **The Supreme Court temporarily tightens the standing threshold for all plaintiffs.** The Court maintained a relaxed, open approach to standing throughout the 1970s and 1980s. By the early 1990s, however in *Lujan I* and *Lujan II*,<sup>44</sup> the U.S. Supreme Court found that for Article III standing, a party must set forth that she has suffered a case-specific *injury-in-fact* – i.e., a concrete and particularized, actual or imminent invasion of a legally protected interest – that is “causally linked to the alleged unlawful conduct, which is likely to be *redressed* by a favorable decision by the court.” Only by making this stringent showing can a party satisfy the “irrevocable constitutional minimum of standing.”
5. **The courts relax standing requirements for advocacy groups.** When the Supreme Court in *Laidlaw Environmental Services*<sup>45</sup> sharply moved away from *Lujan I* and *Lujan II*'s restrictive postures towards standing, the key result was that advocacy groups no longer needed to show concrete, actual environmental harm to establish injury. They merely have to demonstrate a reasonable fear that an environmental harm will affect their members' aesthetic or recreational enjoyment of a place.
6. **Business groups still face *Lujan*-like barriers to standing.** The Court's newly relaxed view of standing for environmental plaintiffs did not extend to business groups, however. Thus, courts have discretion to use *Lujan* to grant or deny standing to business plaintiffs as they please. In a 2011 article,<sup>46</sup> Christopher Warshaw and Gregory Wannier analyzed every environmental law decision by an appellate court between 1976 and 2009, and found about 50% more business cases were dismissed for lack of standing than cases brought by environmental advocacy groups. In the D.C. Court of Appeals, business groups are frequently denied standing on the basis that (a) they cannot show a particularized injury different from that of other interests (“injury-in-fact”), (b) they cannot show that agency action caused their injury, or (c) they cannot show that their injury could be redressed through judicial action. Businesses are also denied standing for “prudential” standing reasons. Prudential standing requires that the claim fall within the “zone-of-interest” of the statute in question. Courts often find that purely economic injury claims fall outside the zone-of-interest protected by environmental statutes.

Currently before the Supreme Court is the case, *Spokeo, Inc. v. Robins*.<sup>47</sup> The Court granted *certiorari* in *Spokeo* on April 27, 2015 and will likely hear arguments this Fall. The case

<sup>44</sup> *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>45</sup> *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167(2000).

<sup>46</sup> *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 Harv. L. & Pol'y Rev. 289

<sup>47</sup> *Petition for Certiorari Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. May 1, 2014).

focuses on whether one need only suffer a statutorily-created harm notwithstanding a lack of real-life, concrete injuries, in order to obtain Article III standing. The *Spokeo* plaintiff claims that an online aggregator of information violated the Fair Credit Reporting Act by placing inaccurate information about him online. If the Supreme Court affirms standing of the plaintiff in this case, companies could be exposed to potentially billions of dollars in class action damages despite the plaintiff *not* actually suffering any real injuries.<sup>48</sup> Congress should take steps to prevent abusive citizen suits, which are not grounded in claims for actual damages.

### III. EPA’S FAILURE TO MEET STATUTORY DEADLINES INVITES ADVOCACY GROUPS TO SUE THE AGENCY

Under several of the major environmental laws, such as the Clean Air Act and the Clean Water Act, the EPA is required to promulgate regulations or review existing standards by specific statutory deadlines. The EPA overwhelmingly fails to meet those deadlines, however. For example, according to a 2014 *Harvard Journal of Law & Public Policy* article, “[i]n 1991, the EPA met only 14% of the hundreds of congressional deadlines” imposed upon it.<sup>49</sup>

Another study by the Competitive Enterprise Institute examined the EPA’s timeliness to promulgate regulations or review standards under three programs administered through the Clean Air Act: the National Ambient Air Quality Standards, the National Emissions Standards for Hazardous Air Pollutants, and the New Source Performance Standards.<sup>50</sup> The CEI study concluded that since 1993, “98 percent of EPA regulations (196 out of 200) pursuant to these programs were promulgated late, by an average of 2,072 days after their respective statutorily defined deadlines.”<sup>51</sup>

When the EPA misses these deadlines, it is its subsequent actions that cause the real harm. Once a deadline is missed, outside groups, use “citizen suit” provisions in the applicable environmental statutes to sue the agency for failure to promulgate the subject regulation or to review the standard at issue. The “sue and settle” agreements that often result have serious consequences, as explained in the following section.

<sup>48</sup> *U.S. Chamber of Commerce Brief in Support of Petition for Certiorari* at 19 n.5, *Spokeo, Inc. v. Robins*, No. 13-1339 (June 6, 2014) (citing *Evans v. U-Haul Co. of Cal.*, No. CV 07-2097-JFW, 2007 WL 7648595, at \*4 (C.D. Cal., Aug. 14, 2007)).

<sup>49</sup> Henry N. Butler and Nathaniel J. Harris, *Sue, Settle, and Shut Out the States: Destroying Environmental Benefits of Cooperative Federalism*, HARVARD JOURNAL OF LAW & PUBLIC POLICY, Vol. 37, No. 2 at 599 (2014) (available at [http://www.harvard-jlpp.com/wp-content/uploads/2014/05/37\\_2\\_579\\_Butler-Harris.pdf](http://www.harvard-jlpp.com/wp-content/uploads/2014/05/37_2_579_Butler-Harris.pdf)) (citing Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law* 54 LAW & CONTEMP. PROBS. 311, 323 (1991) (available at

<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1158&context=facpub>). According to Lazarus, “the 14% compliance rate refers to all environmental statutory deadlines, 86% of which apply to EPA.” *Id.* at 324 (citing *Statutory Deadlines In Environmental Legislation: Necessary But Need Improvement* 13-14 (ENVIR. & ENERGY STUDY INST AND ENVIR L INST, 1985)).

<sup>50</sup> “EPA’s Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, ‘Sue and Settle’ by William Yeatman, July 10, 2013 (*emphasis added*) (available at <https://cei.org/web-memo/epas-woeful-deadline-performance-raises-questions-about-agency-competence-climate-change-re>).

<sup>51</sup> *Id.*

#### IV. “SUE AND SETTLE” AGREEMENTS HAVE NOW BECOME THE KEY DRIVER OF EPA POLICIES

The Chamber’s May 2013 report, *Sue and Settle: Regulating Behind Closed Doors*,<sup>52</sup> provides detailed information on the extent of the sue and settle problem, as well as the public policy implications of having private parties exert direct influence on the regulatory priorities of federal agencies through agreements negotiated in secret behind closed doors.

##### A. What is Sue and Settle and Why Is It a Problem?

Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups which effectively dictate the priorities and duties of the agency through legally-binding, court-approved settlements negotiated behind closed doors – with no participation by other affected parties or the public.<sup>53</sup>

As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest, into an actor subservient to the binding terms of settlement agreements, including using its congressionally-appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process – review by the Office of Management and Budget and the public, and compliance with executive orders – at the critical moment when the agency’s new obligations are created.

Because sue and settle agreements developed through the imposition of a court-approved consent decree bind an agency to meet a specified deadline for regulatory action – a deadline the agency often cannot meet – the agreement essentially reorders the agency’s priorities and its allocation of resources. The realignment of an agency’s duties and priorities at the behest of an individual special interest group runs counter to the larger public interest and the express will of Congress.

Chamber research shows that between 2009 and 2012, a total of 71 lawsuits were settled under circumstances that can be categorized as sue and settle cases.<sup>54</sup> These cases include EPA settlements under the Clean Air Act and the Clean Water Act, along with Fish and Wildlife Service settlements under the Endangered Species Act. These settlements directly resulted in more than **100** new federal rules, many of which are major rules estimated to cost more than \$100 million annually in terms of compliance.

<sup>52</sup> U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) (available at <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf>)

<sup>53</sup> The coordination between outside groups and agencies is aptly illustrated by a November 2010 sue and settle case where EPA and an outside advocacy group filed a consent decree and a joint motion to enter the consent decree with court *on the same day* the advocacy group filed its Complaint against EPA. *See* *Defenders of Wildlife v. Perciasepe*, 714 F. 3d 1317 (D.C. Cir. 2013) at 6.

<sup>54</sup> *See supra* note 52.

Sue and Settle Agreements Create Costly Federal Rules
<ol style="list-style-type: none"> <li>1. Utility MACT rule - up to <b>\$9.6 billion</b> annual costs<sup>55</sup></li> <li>2. Lead Repair, Renovation &amp; Painting rule - up to <b>\$500 million</b> in first-year costs<sup>56</sup></li> <li>3. Oil and Natural Gas MACT rule - up to <b>\$738 million</b> annual costs<sup>57</sup></li> <li>4. Florida Nutrient Standards for Estuaries and Flowing Waters - up to <b>\$632 million</b> annual costs<sup>58</sup></li> <li>5. Regional Haze Implementation rules: <b>\$2.16 billion</b> cost<sup>59</sup></li> <li>6. Chesapeake Bay Clean Water Act rules - up to <b>\$18 billion</b> cost to comply<sup>60</sup></li> <li>7. Boiler MACT rule - up to <b>\$3 billion</b> cost to comply<sup>61</sup></li> <li>8. Standards for Cooling Water Intake Structures - up to <b>\$384 million</b> annual costs<sup>62</sup></li> <li>9. Revision to the Particulate Matter (PM<sub>2.5</sub>) NAAQS - up to <b>\$350 million</b> annual costs<sup>63</sup></li> <li>10. Reconsideration of 2008 Ozone NAAQS - up to <b>\$90 billion</b> cost<sup>64</sup></li> </ol>



### B. Sue and Settle Goes Far Beyond Simply Enforcing Statutory Deadlines

Advocacy groups often argue that these lawsuits are really just about deadlines, and that the settlements are only about **when** the agency must fulfill its nondiscretionary duty.<sup>65</sup> This argument ignores several critical facts, however. First, by being able to sue and influence agencies to take actions on specific regulatory programs, advocacy groups use sue and settle to dictate the policy and budgetary agendas of an agency. Instead of agencies being able to use their discretion as to how best utilize their limited resources, they are forced to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups. Congress has the authority to control EPA's budget and resource priorities through appropriations, and Congress should not allow advocacy groups to use sue and settle agreements

<sup>55</sup> Letter from President Obama to Speaker Boehner, *supra* note 9.

<sup>56</sup> 75 Fed. Reg. 24,802, 24,812 (May 6, 2010).

<sup>57</sup> Fall 2011 Regulatory Plan and Regulatory Agenda, "Oil and Natural Gas Sector-NSPS and NESHAPS," RIN: 2060-AP76.

<sup>58</sup> EPA, Proposed Nutrient Standards for Florida's Coastal, Estuarine & South Florida Flowing Waters (Nov. 2012).

<sup>59</sup> William Yeatman, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012).

<sup>60</sup> Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans on Key Maryland Industries* (April 2011); *Chesapeake Bay Journal* (Jan. 2011).

<sup>61</sup> Letter from President Obama to Speaker Boehner, *supra* note 9.

<sup>62</sup> 2012 Regulatory Plan and Unified Agenda, "Standards for Cooling Water Intake Structures," RIN: 2040-AE95.

<sup>63</sup> EPA, "Overview of EPA's Revisions to the Air Quality Standards for Particle Pollution (Particulate Matter) (2012).

<sup>64</sup> Letter from President Obama to Speaker Boehner, *supra* note 9.

<sup>65</sup> Advocacy groups often point to a December 2014 Government Accountability Office (GAO) report that evaluated seven consent agreements that EPA entered into between May 31, 2008 and June 1, 2013. The report concluded that these settlement agreements had little or no impact on EPA or its rulemakings because they did not require EPA to modify its discretion, take an otherwise discretionary action, or prescribe a specific substantive rulemaking outcome. The GAO report suffers from several fatal flaws, however, including the fact that GAO relied exclusively on information provided by EPA and DOJ, the report only considered seven settlement agreements out of more than 60 such settlements identified in the *Federal Register*, the report itself acknowledges that agencies cannot meet compliance obligations under previous settlement agreements, let alone new ones, and the settlement agreements have forced EPA to redirect its resources into meeting agreed-upon deadlines, to the detriment of all other scheduled regulatory actions, which themselves are overdue.

to circumvent the appropriations process.

Second, when advocacy groups and agencies negotiate deadlines and schedules for new rules through the sue and settle process, the ensuing rulemakings are often rushed and flawed. These hurried rulemakings typically require correction through technical corrections, subsequent reconsiderations or court-ordered remands to the agency. It can take months or years for courts to correct these defective rules.

Third, by setting accelerated deadlines, agencies very often give themselves insufficient time to comply with the important analytic requirements that Congress enacted to ensure sound policymaking. Setting an unreasonable deadline for one rule draws resources from other agency rulemakings that are also under deadlines.<sup>66</sup>

Fourth, advocacy groups can also significantly affect the regulatory environment by compelling an agency to issue substantive requirements that are not required by law.<sup>67</sup> Even when a regulation is required, agencies can use the terms of sue and settle agreements as a legal basis for allowing special interests to dictate the discretionary terms of the regulations.<sup>68</sup>

Finally, one of the primary reasons that advocacy groups seek sue and settle agreements approved by a court is that the court retains long-term jurisdiction over the settlement and the plaintiff group can readily enforce perceived noncompliance with the agreement by the agency.

### **C. Notice and Comment After A Sue and Settle Agreement Is Final Does Not Give the Public Real Input**

The opportunity to comment on the product of sue and settle agreements, either when the agency takes comment on a draft settlement agreement or takes notice and comment on the subsequent rulemaking, are not sufficient to compensate for the lack of transparency and participation in the settlement process itself. In cases where EPA allows public comment on draft consent decrees, EPA only rarely alters the consent agreement, even after it receives adverse comments.<sup>69</sup> Moreover, because the settlement agreement directs the timetable and the structure (and sometimes even the actual substance) of the subsequent rulemaking, interested

<sup>66</sup> This is illustrated clearly by sue and settle agreements entered into between advocacy groups and the U.S. Fish and Wildlife Service (FWS). FWS agreed in May and July 2011 to two consent decrees with an environmental advocacy group requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the ESA.<sup>66</sup> Agreeing to propose listing this many species all at once imposes an overwhelming new burden on the agency, which requires redirecting resources away from other—often more pressing—priorities in order to meet agreed deadlines. According to the Director of the FWS, in FY 2011 the FWS was allocated \$20.9 million for endangered species listing and critical habitat designation; the agency was required to spend more than 75% of this allocation (\$15.8 million) undertaking the substantive actions required by court orders or settlement agreements resulting from litigation.<sup>66</sup> In other words, sue and settle cases and other lawsuits are now driving the regulatory agenda of the Endangered Species Act program at FWS.

<sup>67</sup> For example, EPA's imposition of TMDL and stormwater requirements on the Chesapeake Bay was not mandated by federal law.

<sup>68</sup> Agreed deadlines commit an agency to make one specific rulemaking a priority, ahead of all other rules.

<sup>69</sup> In proposed settlement agreements the Chamber has commented on, such as for the revised PM<sub>2.5</sub> NAAQS standard, the timetable for final rulemaking action remained unchanged despite our comments insisting that the agency needed more time to properly complete the rulemaking. Even though EPA itself asserted that more time was needed, the rulemaking deadline in the settlement agreement was not modified.

parties usually have very limited ability to alter the design of the final rule or other action through their comments.<sup>70</sup>

#### V. EXCESSIVE *CHEVRON* DEFERENCE GIVES AGENCIES, NOT CONGRESS, THE POWER TO MAKE NATIONAL POLICY

The U.S. Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("Chevron") has played a critical role in the expansion of federal agencies' regulatory missions and authority. As Justice Scalia noted in a subsequent case, "Under *Chevron* . . . if a statute is unambiguous the statute governs; if, however, Congress' silence or ambiguity has 'left a gap for the agency to fill,' courts must defer to the agency's interpretation as long as it is 'a permissible construction of the statute.'"<sup>71</sup>

Agencies invoke *Chevron* to pursue increasingly aggressive regulatory agendas, claiming Congress vested them with policy-making power through alleged "ambiguities" in statutes written in the 1980s and 1990s. Unfortunately, some courts have been willing to find "gaps" in statutes where Congress clearly did not intend them. The exceptionally broad deference afforded agency decision-making by some courts has allowed agencies to push the outer bounds of their regulatory authority far beyond what Congress provided. In the case of a statute such as the Clean Air Act, a court is likely to find that an aggressive new regulatory program is consistent with the broad, remedial purpose of the Act, and that an agency such as the Environmental Protection Agency is entitled to deference in its technical and scientific policymaking. The *Chevron* doctrine essentially allows federal agencies to expand the scope of their regulatory power without any direct authorization from Congress.

This exceptionally broad grant of deference to agency decision making clearly diminishes the ability of both Congress and the courts to effectively oversee agency activities, allowing poorly conceived, poorly drafted rules to survive challenge and take legal effect. If Congress desires to regain even minimal control over agencies, the scope of *Chevron* deference must be clearly delineated and limited.

- Courts should give deference to agency interpretations of the scope of their own authority and jurisdiction **only** when Congress has directly and unequivocally vested such authority in an agency.
- Courts should not give deference to agency interpretations of statutes Congress has not charged the agency with administering.
- Agency decisions in technical and policy areas that lie wholly outside the expertise of the agency should not receive *Chevron* deference.

<sup>70</sup> EPA overwhelmingly rejected the comments and recommendations submitted by the business community on the major rules that resulted from sue and settle agreements. These rules were ultimately promulgated largely as they had been proposed. See, e.g., the Chamber's 2012 comments on the proposed PM NAAQS rule and the proposed GHG NSPS rule for new electric utilities.

<sup>71</sup> *Stinson v. United States*, 508 U.S. 36, 44 (1993).

## VI. LEGISLATIVE RECOMMENDATIONS

### A. The Regulatory Accountability Act Requires More Extensive Rulemaking Procedures for the Most Important New Federal Rules

A modernized APA is needed to restore the kinds of checks and balances on federal agency action that the 1946 APA—the “bill of rights” for the regulatory state—intended to provide the American people. While HSGAC has primary jurisdiction over how the agency conducts its rulemaking activity, the Judiciary Committee has a huge stake in getting the rulemaking process right because poorly written rules flood the federal judicial system as judges are asked to do the job that agencies should. The Regulatory Accountability Act of 2015 would address this deficiency. The legislation would put balance and accountability back into the federal rulemaking process, without undercutting vital public safety and health protections. The bill focuses on the process agencies must use when they write the most important new regulations. The Regulatory Accountability Act would achieve these important goals by:

- Defining “high-impact” rules as a way to distinguish the 1-3 rulemakings each year that would impose more than \$1 billion a year in compliance costs.
- Giving the public an earlier opportunity to participate in shaping the most costly regulations *before* they are proposed in the *Federal Register*. At least 90 days prior to the time the rule is proposed, the agency must provide the public with a written statement of the problem to be addressed, as well as the data and evidence that supports the regulatory action. The agency must accept public comments on the proposal.
- Requiring agencies (including independent agencies) to select the least costly regulatory alternative that achieves the regulatory objective, unless the agency can demonstrate that a more costly alternative is necessary to protect public health, safety, or welfare.
- Requiring agencies to consider the cumulative impacts of regulations and the collateral impacts their rules will have on businesses and job creation.
- Allowing stakeholders to hold agencies accountable for complying with the Information Quality Act.<sup>72</sup> The public would also have the opportunity to seek to correct data that does not meet IQA standards.
- Providing for on-the-record administrative hearings for the 1-3 most costly rules each year to verify that the proposed rule is fully thought out and well-supported by good scientific and economic data.
- Requiring agencies to be better-prepared before they propose a costly new rule. It requires agencies to justify the need for the rule and show that their proposal is actually the best alternative. Although agencies often resist undertaking this detailed degree of

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<sup>72</sup> Public Law 106-554, Section 515 (2001); 67 Fed. Reg. 8,452 (Feb. 22, 2002).

preparation, making them “do their homework” produces a better rule that is more likely to survive judicial challenge.

- Restricting agencies’ use of “interim final” regulations, where the public has no opportunity to comment before a regulation takes effect.

The Regulatory Accountability Act would require federal agencies do a better job of explaining the rationale for new rules and being more open and transparent when they write those rules. The Act simply requires additional process to ensure a better rulemaking product; it does *not* compel any particular rulemaking outcome. The Act would bring the Administrative Procedure Act of 1946 into the modern era.

The Regulatory Accountability Act passed the House of Representatives on January 13, 2015 by a vote of 250-175.

#### **B. Recodification of Citizen Suits into Title 28**

The Judiciary Committee has jurisdiction over the revision and codification of the statutes of the United States. The Senate Judiciary Committee should consider codifying all the citizen suit provisions that give access to the Federal courts and consolidate them into Title 28 of the U.S. Code. Such an action would allow the Committee to conduct oversight over these lawsuits to determine their impact on the federal judicial system. Presently, there are few statistics as to how many of these citizen suits have been filed or by whom.

#### **C. The Sunshine for Regulatory Decrees and Settlements Act**

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

#### **D. The Information Quality Act**

As previously discussed, federal agencies have taken the position that they need not comply with the IQA because there is no private right of action to enforce the statute.<sup>73</sup> Congress should ensure that agencies comply with the IQA by enacting the Regulatory Accountability Act or, alternatively, by adding an explicit private right of action to the statute.

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<sup>73</sup> Harnoken v. Dep’t of Justice, No. C 12-629 CW, 2012 U.S. Dist. LEXIS 17145, at \*24 (N.D. Cal. Dec. 3, 2012) (ruling on the DOJ and OMB’s assertion that IQA does not provide a private right of action or judicial review).

## VII. CONCLUSION

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

The Administrative Procedure Act of 1946 certainly served its purpose of initially injecting transparency and accountability in our nation's regulatory structure. Since then, however, forces such as special interests utilizing sue-and-settle tactics, the emergence of *Chevron* deference to agency decisions, and increasing grants of standing to special interests in federal courts have been contributing to dysfunctional rulemaking and resultant, expensive litigation.

Many of the recommendations identified above can be traced back to bipartisan proposals which were made during the 1930s regulatory reform debates. Unlike the 1940's-era struggle over the New Deal that lead to the APA, today's regulatory reform efforts such as the Regulatory Accountability Act are not about partisan attacks but about establishing good governance. An effective regulatory system is one under which agencies operate efficiently, transparently, and accountably. We propose that such good governance and effective rulemaking can be achieved with a "Regulatory New Deal," which would include:

- The Regulatory Accountability Act, which would allow better public involvement in the rulemaking process and result in better rules;
- The codification of all citizen suits under Title 28 in order for the Judiciary Committee to oversee the impact of citizen suits on the judicial system;
- The Sunshine for Regulatory Decrees and Settlements Act, which would enable greater public input to curb the outsourcing of regulatory priorities; and
- The establishment of a right of action for the public to enforce the IQA and states to enforce UMRA.

I look forward to answering any questions you may have. Thank you.

Written Testimony of

**Robert Weissman**  
**President, Public Citizen**

before the

**The Senate Judiciary Committee**

**on**

“Examining the Federal Regulatory System  
to Improve Accountability, Transparency and Integrity”

June 10, 2015



Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today on regulatory policy issues. I am Robert Weissman, president of Public Citizen. Public Citizen is a national public interest organization with more than 400,000 members and supporters. For more than 40 years, we have advocated with some considerable success for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

Public Citizen co-chairs the Coalition for Sensible Safeguards (CSS). CSS is an alliance of more than 75 consumer, small business, labor, scientific, research, good government, faith, community, health and environmental organizations joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all. Time constraints prevented the Coalition from reviewing my testimony in advance, and today I speak only on behalf of Public Citizen.

Over the last century, and up to the present, regulations have made our country stronger, better, safer, cleaner, healthier and more fair and just. Regulations have made our food supply safer; saved hundreds of thousands of lives by reducing smoking rates; improved air quality, saving hundreds of thousands of lives; protected children's brain development by phasing out leaded gasoline; saved consumers billions by facilitating price-lowering generic competition for pharmaceuticals; reduced toxic emissions into the air and water; empowered disabled persons by giving them improved access to public facilities and workplace opportunities; guaranteed a minimum wage, ended child labor and established limits on the length of the work week; saved the lives of thousands of workers every year; protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques; ensured financial system stability (at least when appropriate rules were in place and enforced); made toys safer; saved tens of thousands of lives by making our cars safer; and much, much more.

The benefits of rules adopted during the Obama administration, as with rules adopted during the Bush administration, vastly exceed the costs, even when measured according to corporate-friendly criteria.

We have also seen in recent years with great clarity the impact of regulatory failure—lack of regulatory enforcement, regulations delayed or rolled back, and insufficient regulatory standards and protections in place. Most notably, it was regulatory failure that was significantly responsible for the Great Recession, which imposed far greater costs on the economy and cost far more jobs than regulations ever could.

To review the facts of how regulation strengthens our country and safeguards jobs, however, is not to suggest that all is well with the regulatory system. There is a need for significant regulatory reform—including reforms to toughen regulatory enforcement, increase criminal penalties for corporate wrongdoers, reduce regulatory delay, avoid the imposition of inappropriate analytic obligations on agencies, address imbalances in judicial review of agency rulemaking, and address anti-competitive practices that injure small businesses, consumers and the national economy.

The first section of this testimony argues that regulatory benefits vastly exceed costs and that regulatory failure—inadequate rules, and too little regulatory enforcement—should be understood as a key cause of the Great Recession and ongoing economic weakness. The second section of the testimony focuses on needed reforms to strengthen our regulatory system so that it fulfills its role of protecting the American people and strengthening our economy.

## I. Regulations are Economically Smart

### A. Regulatory benefits vastly exceed costs

Rhetorical debates and cost-benefit abstractions can obscure the dramatic gains our country has made due to regulation. Regulation has:

- Made our food safer.<sup>1</sup>
- Saved tens of thousands of lives by making our cars safer.<sup>2</sup>
- Made it safer to breathe, saving hundreds of thousands of lives annually.<sup>3</sup>
- Protected children's brain development by phasing out leaded gasoline and dramatically reducing average blood levels.<sup>4</sup>
- Empowered disabled persons by giving them improved access to public facilities and workplace opportunities, through implementation of the Americans with Disabilities Act.<sup>5</sup>
- Guaranteed a minimum wage, ended child labor and established limits on the length of the work week.<sup>6</sup>

<sup>1</sup> American Public Health Association. (2010, November 30). *APHA Commends Senate for Passing Strong Food Safety Legislation*. Retrieved 24 February, 2012, from

[http://www.makecourfoodsafes.org/tools/assets/files/APHA\\_Senate-Passage-Food-Act\\_FINAL2.pdf](http://www.makecourfoodsafes.org/tools/assets/files/APHA_Senate-Passage-Food-Act_FINAL2.pdf)

<sup>2</sup> NHTSA's vehicle safety standards have reduced the traffic fatality rate from nearly 3.5 fatalities per 100 million vehicles traveled in 1980 to 1.41 fatalities per 100 million vehicles traveled in 2006. Steinzor, R., & Shapiro, S. (2010). *The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment*: University of Chicago Press.

<sup>3</sup> Clean Air Act rules saved 164,300 adult lives in 2010. In February 2011, EPA estimated that by 2020 they will save 237,000 lives annually. EPA air pollution controls saved 13 million days of lost work and 3.2 million days of lost school in 2010, and EPA estimates that they will save 17 million work-loss days and 5.4 million school-loss days annually by 2020. See U.S. Environmental Protection Agency, Office of Air and Radiation. (2011, March). *The Benefits and Costs of the Clean Air and Radiation Act from 1990 to 2020*. Available from: <<http://www.epa.gov/oar/sect812/feb11/fullreport.pdf>>.

<sup>4</sup> EPA regulations phasing out lead in gasoline helped reduce the average blood lead level in U.S. children ages 1 to 5. During the years 1976 to 1980, 88 percent of all U.S. children had blood levels in excess of 10µg/dL; during the years 1991 to 1994, only 4.4 percent of all U.S. children had blood levels in excess of that dangerous amount. Office of Management and Budget, Office of Information and Regulatory Affairs. (2011). *2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*. Available from: <[http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011\\_cb/2011\\_cba\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf)>.

<sup>5</sup> National Council on Disability. (2007). *The Impact of the Americans with Disabilities Act*. Available from: <<http://www.ncd.gov/publications/2007/07262007>>.

<sup>6</sup> There are important exceptions to the child labor prohibition; significant enforcement failures regarding the minimum wage, child labor and length of work week (before time and a half compensation is mandated). But the quality of improvement in American lives has nonetheless been dramatic. Lardner, J. (2011). *Good Rules: 10 Stories*

- Saved the lives of thousands of workers every year.<sup>7</sup>
- Saved consumers and taxpayers billions of dollars by facilitating generic competition for medicines.<sup>8</sup>
- Protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques.<sup>9</sup>
- For half a century in the mid-twentieth century, and until the onset of financial deregulation, provided financial stability and a right-sized financial sector, helping create the conditions for robust economic growth and shared prosperity.<sup>10</sup>

These are not just the achievements of a bygone era. Regulation continues to improve the quality of life for every American, every day. Ongoing and emerging problems and a rapidly changing economy require the issuance of new rules to ensure that America is strong and safe, healthy and wealthy. Consider a small sampling of rules recently issued, pending, or that are or should be under consideration:

- **Fuel efficiency standards.** Pursuant to the Energy Policy and Conservation Act, the Energy Independence and Security Act and the Clean Air Act, the National Highway Safety and Transportation Agency and the Environmental Protection Agency have proposed new automobile and vehicular fuel efficiency standards. The new rules, on an average industry fleet-wide basis for cars and trucks combined, establish standards of 40.1 miles per gallon (mpg) in model year 2021, and 49.6 mpg in model year 2025. The agencies estimate that fuel savings will far outweigh higher vehicle costs, and that the net benefits to society from 2017-2025 will be in the range of \$311 billion to \$421 billion. The auto industry was integrally involved in the development of these proposed standards, and supports their promulgation.
- **Food safety rules.** In 2010, with support from both industry and consumer groups, and in response to a series of food contamination incidents that rocked the nation, Congress passed the Food Safety Modernization Act. The Act should improve the safety of eggs, dairy, seafood, fruits, vegetable and many processed and imported foods, but its effective

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*of Successful Regulation*. Demos. Available from:

<[http://www.demos.org/sites/default/files/publications/goodrules\\_1\\_11.pdf](http://www.demos.org/sites/default/files/publications/goodrules_1_11.pdf)>.

<sup>7</sup> Deaths on the job have declined from more than 14,000 per year in 1970, when the Occupational Safety and Health Administration was created to under 4,500 at present. See AFL-CIO. (2015, April.) *Death on the Job: The Toll of Neglect*. p. 1. Available from:

<<http://www.aflcio.org/content/download/154671/3868441/DOTJ2015Finalnbug.pdf>>. Mining deaths fell by half shortly after creation of the Mine Safety and Health Administration. Weeks, J. L., & Fox, M. (1983). Fatality rates and regulatory policies in bituminous coal mining, United States, 1959-1981. *American journal of public health*, 73(11), 1278.

<sup>8</sup> Through regulations facilitating effective implementation of the Drug Price Competition and Patent Term Restoration Act of 1984 ("Hatch-Waxman"), including by limiting the ability of brand-name pharmaceutical companies to extend and maintain government-granted monopolies. Troy, D. E. (2003). *Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Amendments)*. Statement before the Senate Committee on the Judiciary. Available from: <<http://www.fda.gov/newsevents/testimony/ucm115033.htm>>.

<sup>9</sup> See 16 CFR 410-460.

<sup>10</sup> See Stiglitz, J. E. (2010). *Freefall: America, free markets, and the sinking of the world economy*: WW Norton & Co Inc.; Kuttner, R. (2008). *The Squandering of America: how the failure of our politics undermines our prosperity*: Vintage.

implementation depends on rulemaking. Not so incidentally, food contamination incidents have major harmful economic impact on the agriculture and food industries and job creation and preservation in those industries.

- **Energy efficiency standards.** Pursuant to the Energy Security and Independence Act, the Department of Energy has proposed energy efficiency standards for a range of products, including Metal Halide Lamp Fixtures, Commercial Refrigeration Equipment, and Battery Chargers and External Power Supplies, Walk-In Coolers and Walk-In Freezers, Residential Clothes Washers.<sup>11</sup> The Department of Energy estimates the net savings from implementation of the Energy Security and Independence Act to be \$48 billion - \$105 billion (in 2007 dollars).<sup>12</sup>
- **Rules to avert workplace hazards.** By way of example, consider the case of beryllium, a toxic substance to which workers in the electronics, nuclear, and metalwork sector are exposed. The current OSHA beryllium standard, based on science from the 1950s, allows workers to be exposed at levels that are ten times higher than those allowed by Department of Energy for nuclear power plant workers. Public Citizen petitioned OSHA to update the standard in 2001. In response, the agency began a rulemaking in November 2002. It is a testament to major problems in the regulatory process that OSHA has still not issued appropriate rules. Issuance of a rule could avert thousands of cases of serious disease.<sup>13</sup>
- **Controls on Wall Street.** As discussed in more detail below, the 2008 financial crash was a direct result of regulatory failures. These failures including inadequate regulation of mortgages and other consumer financial products, on the one hand, and esoteric financial products and the markets on which they trade, on the other. Another critical failure was permitting the rise of too-big-to-fail financial institutions, traceable both to the failure to enforce existing rules and policies, and the repeal and nonissuance of important rules. Few people are entirely satisfied with the Dodd-Frank legislation—Public Citizen is highly critical of a number of important omissions—but the Act does include an array of very important reforms that will make our financial system fairer and more stable—if properly implemented through robust rulemaking.

Among many other important provisions are crucial consumer protections. Dodd-Frank created the Consumer Financial Protection Bureau, charging the agency with the single mission of protecting consumers and empowering it to issue new consumer protection rules. Given the very considerable extent to which the financial industry has constructed a business model around trickery and unjust fees, CFPB rulemaking can afford consumer dramatic benefits. Such rules may concern matters including: requiring mortgage lenders to consider borrowers' ability to pay; prohibiting banks from charging excessive overdraft

<sup>11</sup> List of Regulatory Actions Currently Under Review. Available from: <<http://www.reginfo.gov/public/jsp/EO/eoDashboard.jsp>>.

<sup>12</sup> U.S. Department of Energy. (2007). *Energy Independence and Security Act of 2007 Prescribed Standards*. Available from: <[http://www1.eere.energy.gov/buildings/appliance\\_standards/m/eisa2007.html](http://www1.eere.energy.gov/buildings/appliance_standards/m/eisa2007.html)>.

<sup>13</sup> U.S. Occupational Safety and Health Administration. (2007). *Preliminary Initial Regulatory Flexibility Analysis of the Preliminary Draft Standard for Occupational Exposure to Beryllium*.

fees or tricking consumers into opting in to unreasonable overdraft fee harvesting schemes; eliminating forced arbitration provisions in consumer financial contracts; banning unfair practices in the payday loan industry; prohibiting kickbacks to auto dealers who steer buyers into overpriced loans; stopping student loan companies from tricking students into taking high-priced private loans before they exhaust cheaper federal loans.<sup>14</sup>

- **Generic competition for biotech medicines.** An overlooked component of the Affordable Care Act was the creation of a process for the Food and Drug Administration to grant regulatory approval for generic biologic pharmaceutical products—essentially generic versions of biotech medicines. Because the molecular composition of biologic drugs is more complicated than traditional medicines, FDA had adopted the position that, with some exceptions, it could not grant regulatory approval for biologics under its previously existing authority. In an important provision of the Affordable Care Act—supported by the biotech industry—FDA was explicitly granted such authority. The provision wrongly grants extended monopolies to brand-name biologic manufacturers, but belated generic competition is better than none. Implementation of the new regulatory pathway for biogenerics, however, depends on issuance of rules by the FDA. Biogeneric competition will save consumers and the government billions of dollars annually.
- **Crib safety.** Pursuant to the Consumer Product Safety Improvement Act of 2008, the Consumer Product Safety Commission (CPSC) finalized updated safety standards for cribs that halted the manufacture and sale of traditional drop-side cribs, required stronger mattress supports, more durable hardware and regular safety testing. These new crib safety standards mean "that parents, grandparents, and caregivers can now shop for cribs with more confidence—confidence that the rules put the safety of infants above all else."<sup>15</sup>
- **The Physician Payment Sunshine Act.** This component of the Affordable Care Act requires the disclosure of payments and gifts by pharmaceutical and medical device companies to physicians and hospitals. The mere fact of disclosure is expected to curtail the improper influence of industry over research, education and clinical decision making. Putting the Act into place required implementing rules.<sup>16</sup>
- **Other examples.** The list of regulatory benefits is almost endless. Other recent examples from the wide spectrum include rules to address invasive species, require labeling of gluten in food, establishing standards for school lunch programs and specifying the migratory bird hunting season.

<sup>14</sup> National Consumer Law Center. (2010). *An Agenda for the Consumer Financial Protection Bureau: Challenges for a New Era in Consumer Protection*. Retrieved 24 February, 2012. Available from: <[http://www.nclc.org/images/pdf/regulatory\\_reform/pr-cfpb-agenda.pdf](http://www.nclc.org/images/pdf/regulatory_reform/pr-cfpb-agenda.pdf)>

<sup>15</sup> Consumer Federation of America. (2011, June 28). *Senators, CPSC, Consumer Advocates Applaud Strong Crib Safety Standards to Prevent Infant Deaths and Injuries*. Available from: <<http://www.consumerfed.org/pdfs/crib-standards-press-release-6-28-11.pdf>>.

<sup>16</sup> 42 CFR Parts 402 and 403. February 8, 2013.

Although most regulations do not have economic objectives as their primary purpose, in fact regulation is overwhelmingly positive for the economy.

While regulators commonly do not have economic growth and job creation as a mission priority, they are mindful of regulatory cost, and by statutory directive or on their own initiative typically seek to minimize costs; relatedly, the rulemaking process gives affected industries ample opportunity to communicate with regulators over cost concerns, and these concerns are taken into account. To review the regulations actually proposed and adopted is to see how much attention regulators pay to reducing cost and detrimental impact on employment. And to assess the very extended rulemaking process is to see how substantial industry influence is over the rules ultimately adopted—or discarded.

There is a large body of theoretical and non-empirical work on the cost of regulation, some of which yields utterly implausible cost estimates. There is also a long history of business complaining about the cost of regulation—and predicting that the next regulation will impose unbearable burdens. More informative than the theoretical work, anecdotes and allegations is a review of the actual costs and benefits of regulations, though even this methodology is significantly imprecise and heavily biased against the benefits of regulation. Every year, the Office of Management and Budget analyzes the costs and benefits of rules with significant economic impact. The benefits massively exceed costs.

The principle finding of *OMB's draft 2014 Report to Congress on the Benefits and Costs of Federal Regulation* is:

The estimated annual benefits of major Federal regulations reviewed by OMB from October 1, 2003, to September 30, 2013, for which agencies estimated and monetized both benefits and costs, are in the aggregate between \$217 billion and \$863 billion, while the estimated annual costs are in the aggregate between \$57 billion and \$84 billion. These ranges are reported in 2001 dollars and reflect uncertainty in the benefits and costs of each rule at the time that it was evaluated.<sup>17</sup>

In other words, even by OMB's most conservative accounting, the benefits of major regulations over the last decade exceeded costs by a factor of more than two-to-one. And benefits may exceed costs by a factor of 15.

These results are consistent year-to-year as the following table shows.

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<sup>17</sup> Office of Management and Budget, Office of Information and Regulatory Affairs. (2014). *Draft 2014 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*. pp.1-2. Available from: <[https://www.whitehouse.gov/sites/default/files/omb/info/reg/2014\\_cb/draft\\_2014\\_cost\\_benefit\\_report\\_updated.pdf](https://www.whitehouse.gov/sites/default/files/omb/info/reg/2014_cb/draft_2014_cost_benefit_report_updated.pdf)>.

**Total Annual Benefits and Costs of Major Rules by Fiscal Year (billions of 2001 dollars)<sup>18</sup>**

Fiscal Year	Number of Rules	Benefits	Costs
2001	12	22.5 to 27.8	9.9
2002	2	1.5 to 6.4	0.6 to 2.2
2003	6	1.6 to 4.5	1.9 to 2.0
2004	10	8.8 to 69.8	3.0 to 3.2
2005	12	27.9 to 178.1	4.3 to 6.2
2006	7	2.5 to 5.0	1.1 to 1.4
2007	12	28.6 to 184.2	9.4 to 10.7
2008	11	8.6 to 39.4	7.9 to 9.2
2009	15	8.6 to 28.9	3.7 to 9.5
2010	18	18.6 to 85.9	6.4 to 12.4
2011	13	34.3 to 98.5	5.0 to 10.2
2012	14	53.2 to 114.6	14.8 to 19.5
2013	7	25.6 to 67.3	2.0 to 2.5

The reason for the consistency is that regulators pay a great deal of concern to comparative costs and benefits (even though there is, we believe, a built-in bias of formal cost-benefit analysis against regulatory initiative<sup>19</sup>; see further comments below). Very few major rules are adopted where projected costs exceed projected benefits, and those very few cases—one of which is the Congressional mandate for railroads to adopt Positive Train Controls, a technology that would have averted the recent Amtrak accident—typically involve direct Congressional mandates.

It should also be noted that relatively high regulatory compliance costs, as discussed further below, do not necessarily have negative job impacts; firm expenditures on regulatory compliance typically create new jobs within affected firms or other service or product companies with which they contract.

Moreover, the empirical evidence also fails to support claims that regulation causes significant job loss. Insufficient demand is the primary reason for layoffs. In extensive survey data collected by the Bureau of Labor Statistics, employers cite lack of demand roughly 100 times more

<sup>18</sup> Office of Management and Budget, Office of Information and Regulatory Affairs. (2014). *Draft 2014 Report to Congress on the Benefits and Costs of Federal Regulations on Unfunded Mandates on State, Local, and Tribal Entities, Table 1-4*, pp. 20-21. Available from:

<[https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014\\_cb/draft\\_2014\\_cost\\_benefit\\_report\\_updated.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/draft_2014_cost_benefit_report_updated.pdf)>; 2001-2003 data from: Office of Management and Budget, Office of Information and Regulatory Affairs. (2011). *2011 Report to Congress on the Benefits and Costs of Federal Regulations on Unfunded Mandates on State, Local, and Tribal Entities, Table 1-3*, p. 19-20. Available from:

<[http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011\\_cb/2011\\_cba\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf)>.

<sup>19</sup> See, e.g., Shapiro, S. et al., *CPR Comments on Draft 2010 Report to Congress on the Benefits and Costs of Federal Regulations 16-19* (App. A, Pt. C.) (2010). Available from:

<[http://www.progressivereform.org/articles/2010\\_CPR\\_Comments\\_OMB\\_Report.pdf](http://www.progressivereform.org/articles/2010_CPR_Comments_OMB_Report.pdf)>; Steinzor, R. et al., *CPR Comments on Draft 2009 Report to Congress on the Benefits and Costs of Federal Regulations 16-19* (App. A, Pt. C.) (2009). Available from: <[http://www.progressivereform.org/articles/2009\\_CPR\\_Comments\\_OMB\\_Report.pdf](http://www.progressivereform.org/articles/2009_CPR_Comments_OMB_Report.pdf)>.

frequently than government regulation as the reason for mass layoffs!<sup>20</sup> (Unfortunately, in response to budget cuts, the BLS ceased producing its mass layoff report in 2013.)

**Reason for layoff: 2008-2012<sup>21</sup>**

	2008	2009	2010	2011	2012
<b>Business Demand</b>	516,919	824,834	384,564	366,629	461,328
<b>Governmental regulations/intervention</b>	5,505	4,854	2,971	2,736	3,300

It is also the case that firms typically innovate creatively and quickly to meet new regulatory requirements, even when they fought hard against adoption of the rules.<sup>22</sup> The result is that costs are commonly lower than anticipated.

**B. Job-destroying regulatory failure and the Great Recession**

Missing from much of the current policy debate on jobs and regulation is a crucial, overriding fact: The Great Recession and the ongoing weak jobs market and national economy are a direct result of too little regulation and too little regulatory enforcement.

A very considerable literature, and a very extensive Congressional hearing record, documents in granular detail the ways in which regulatory failure led to financial crash and the onset of the Great Recession. "Widespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets," concluded the Financial Crisis Inquiry Commission.<sup>23</sup> "Deregulation went beyond dismantling regulations," notes the Financial Crisis Inquiry Commission. "[I]ts supporters were also disinclined to adopt new regulations or challenge industry on the risks of innovations."<sup>24</sup>

The regulatory failures were pervasive, the Financial Crisis Inquiry Commission concluded:

<sup>20</sup> U.S. Department of Labor, Bureau of Labor Statistics. (2012, November). *Extended Mass Layoffs in 2011. Table 5. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2009-2011*. Available from: <<http://www.bls.gov/mls/mlsreport1039.pdf>>.

<sup>21</sup> U.S. Department of Labor, Bureau of Labor Statistics. (2012, November). *Extended Mass Layoffs in 2011. Table 5. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2010-2012*. Available from: <<http://www.bls.gov/mls/mlsreport1043.pdf>>. U.S. Department of Labor, Bureau of Labor Statistics. (2013, September). *Extended Mass Layoffs in 2011. Table 4. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2009-2011*. Available from: <<http://www.bls.gov/mls/mlsreport1039.pdf>>; U.S. Department of Labor, Bureau of Labor Statistics. (2011, November). *Extended Mass Layoffs in 2010. Table 6. Reason for layoff: extended mass layoff events, separations, and initial claimants for unemployment insurance, private nonfarm sector, 2008-2010*. Available from: <<http://www.bls.gov/mls/mlsreport1038.pdf>>.

<sup>22</sup> Mouzoon, N., & Lincoln, T. (2011). *Regulation: The Unsung Hero in American Innovation*. Public Citizen. Available from: <<http://www.citizen.org/documents/regulation-innovation.pdf>>.

<sup>23</sup> Financial Crisis Inquiry Commission. (2011). *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*. Washington, D.C.: Government Printing Office. p. 30.

<sup>24</sup> *The Financial Crisis Inquiry Report*. p. 53.

The sentries were not at their posts, in no small part due to the widely accepted faith in the self-correcting nature of the markets and the ability of financial institutions to effectively police themselves. More than 30 years of deregulation and reliance on self-regulation by financial institutions, championed by former Federal Reserve Chairman Alan Greenspan and others, supported by successive administrations and Congresses, and actively pushed by the powerful financial industry at every turn, had stripped away key safeguards, which could have helped avoid catastrophe. This approach had opened up gaps in oversight of critical areas with trillions of dollars at risk, such as the shadow banking system and over-the-counter derivatives markets. In addition, the government permitted financial firms to pick their preferred regulators in what became a race to the weakest supervisor.

A sampling of the very extensive regulatory failures that contributed to the crisis include:

**Failure to stop toxic and predatory mortgage lending that blew up the housing bubble.**

Concludes the Financial Crisis Inquiry Commission: "The prime example is the Federal Reserve's pivotal failure to stem the flow of toxic mortgages, which it could have done by setting prudent mortgage-lending standards. The Federal Reserve was the one entity empowered to do so and it did not."<sup>25</sup> Regulators failed almost completely to use then-existing authority to crack down on abusive lending practices. The Federal Reserve took three formal actions against subprime lenders from 2002 to 2007.<sup>26</sup> The Office of Comptroller of the Currency, with authority over almost 1,800 banks, took three consumer-protection enforcement actions from 2004 to 2006.<sup>27</sup>

**Repeal of the Glass-Steagall Act.** The Financial Services Modernization Act of 1999 formally repealed the Glass-Steagall Act of 1933 (also known as the Banking Act of 1933) and related laws, which prohibited commercial banks from offering investment banking and insurance services. The 1999 repeal of Glass-Steagall helped create the conditions in which banks created and invested in creative financial instruments such as mortgage-backed securities and credit default swaps, investment gambles that rocked the financial markets in 2008. More generally, the Depression-era conflicts and consequences that Glass-Steagall was intended to prevent re-emerged once the Act was repealed. The once staid commercial banking sector quickly evolved to emulate the risk-taking attitude and practices of investment banks, with disastrous results. "The most important consequence of the repeal of Glass-Steagall was indirect—it lay in the way repeal changed an entire culture," notes economist Joseph Stiglitz. "When repeal of Glass-Steagall brought investment and commercial banks together, the investment-bank culture came out on top. There was a demand for the kind of high returns that could be obtained only through high leverage and big risk taking."<sup>28</sup>

<sup>25</sup> *The Financial Crisis Inquiry Report*, p. xvii.

<sup>26</sup> Tyson, J., Torres, C., & Vekshin, A. (2007, March 22). *Fed Says It Could Have Acted Sooner on Subprime Rout*. Bloomberg. Available from:

<<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a1.KbcMbvliA&refer=home>>.

<sup>27</sup> Torres, C., & Vekshin, A. (2007, March 14). *Fed, OCC Publicly Chastised Few Lenders During boom*.

Bloomberg. Available from:

<<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a6WTZifUUh7g&refer=us>>.

<sup>28</sup> Stiglitz, J. (2009). Capitalist fools. *Vanity Fair*, 51(1).

**Unregulated Financial Derivatives.** The 2008 crash proved Warren Buffet's warning that financial derivatives represent "weapons of mass financial destruction" to be prescient.<sup>29</sup> Financial derivatives amplified the financial crisis far beyond the troubles connected to the popping of the housing bubble. AIG made aggressive bets on credit default swaps (CDSs) that went bad with the housing bust, and led to a taxpayer-financed rescue of more than \$130 billion. AIG was able to put itself at such risk because its CDS business was effectively subject to no governmental regulation or even oversight. That was because first, high officials in the Clinton administration and the Federal Reserve, including SEC Chair Arthur Levitt, Treasury Secretary Robert Rubin, Deputy Treasury Secretary Lawrence Summers and Federal Reserve Chair Alan Greenspan, blocked the Commodity Futures Trading Commission (CFTC) from regulating financial derivatives;<sup>30</sup> and second, because Congress and President Clinton codified regulatory inaction with passage of the Commodity Futures Modernization Act, which enacted a statutory prohibition on CFTC regulation of financial derivatives.

**The SEC's Voluntary Regulation Regime for Investment Banks.** In 1975, the SEC's trading and markets division promulgated a rule requiring investment banks to maintain a debt-to-net capital ratio of less than 12 to 1. It forbade trading in securities if the ratio reached or exceeded 12 to 1, so most companies maintained a ratio far below it. In 2004, however, the SEC succumbed to a push from the big investment banks—led by Goldman Sachs, and its then-chair, Henry Paulson—and authorized investment banks to develop their own net capital requirements in accordance with standards published by the Basel Committee on Banking Supervision. This essentially involved complicated mathematical formulas that imposed no real limits, and was voluntarily administered. With this new freedom, investment banks pushed borrowing ratios to as high as 40 to 1, as in the case of Merrill Lynch. This super-leverage not only made the investment banks more vulnerable when the housing bubble popped, it enabled the banks to create a more tangled mess of derivative investments—so that their individual failures, or the potential of failure, became systemic crises. On September 26, 2008, as the crisis became a financial meltdown of epic proportions, SEC Chair Christopher Cox, who spent his entire public career as a deregulator, conceded "the last six months have made it abundantly clear that voluntary regulation does not work."<sup>31</sup>

**Poorly Regulated Credit Ratings Firms.** The credit rating firms enabled pension funds and other institutional investors to enter the securitized asset game, by attaching high ratings to securities that actually were high risk—as subsequent events revealed. The credit ratings firms

<sup>29</sup> Buffett, W. (2003). *Report to Shareholders, February 21, 2003*. Berkshire Hathaway. Available from: <<http://www.berkshirehathaway.com/letters/2002pdf.pdf>>.

<sup>30</sup> After the collapse of Long-Term Capital Management, Born issued a new call to regulate financial derivatives. "This episode should serve as a wake-up call about the unknown risks that the over-the-counter derivatives market may pose to the U.S. economy and to financial stability around the world," Born told the House Banking Committee two days later. "It has highlighted an immediate and pressing need to address whether there are unacceptable regulatory gaps relating to hedge funds and other large OTC derivatives market participants." But what should have been a moment of vindication for Born was swept aside by her adversaries, and Congress enacted a six-month moratorium on any CFTC action regarding derivatives or the swaps market. In May 1999, Born resigned in frustration. Born, B. (1998). *Testimony of Brooksley Born, Chairperson, Commodity Futures Trading Commission Concerning Long-Term Capital Management Before the U.S. House of Representatives Committee on Banking and Financial Services*. Available from: <<http://www.cftc.gov/opa/speeches/opaborn-35.htm>>.

<sup>31</sup> Faola, A., Nakashima, E., & Drew, J. (2008, October 15). *What Went Wrong*. The Washington Post. Available from: <[www.washingtonpost.com/wp-dyn/content/story/2008/10/14/ST2008101403344.html](http://www.washingtonpost.com/wp-dyn/content/story/2008/10/14/ST2008101403344.html)>.

have a bias toward offering favorable ratings to new instruments because of their complex relationships with issuers,<sup>32</sup> and their desire to maintain and obtain other business dealings with issuers. This institutional failure and conflict of interest might and should have been forestalled by the SEC, but the Credit Rating Agencies Reform Act of 2006 gave the SEC insufficient oversight authority. In fact, under the Act, the SEC was required to give an approval rating to credit ratings agencies if they adhered to their own standards—even if the SEC knew those standards to be flawed.

The regulatory failure story can perhaps be summarized as follows: Financial deregulation and non-regulation created a vicious cycle that helped inflate the housing bubble and an interconnected financial bubble. Weak mortgage regulation enabled the spread of toxic and predatory mortgages that helped fuel the housing bubble. Deregulated Wall Street firms and big banks exhibited an insatiable appetite for mortgage loans, irrespective of quality, thanks to insufficiently regulated securitization, off-the-books accounting, the spread of shadow banking techniques, dangerous compensation incentives and inadequate capital standards. Reckless financial practices were ratified by credit ratings firms, paving the way for institutional funders to pour billions into mortgage-related markets; and an unregulated derivatives trade offered the illusion of systemic insurance but actually exacerbated the crisis when the housing bubble popped and Wall Street crashed.

The costs of this set of regulatory failures are staggeringly high, and far outdistance any plausible story about the "cost" of regulation.

To prevent the collapse of the financial system, the federal government provided incomprehensibly huge financial supports, far beyond the \$700 billion in the much-maligned Troubled Assets Relief Program (TARP). The Special Inspector General for the Troubled Assets Relief Program (SIGTARP) estimated that "though a huge sum in its own right, the \$700 billion in TARP funding represents only a portion of a much larger sum—estimated to be as large as

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<sup>32</sup> The CEO of Moody's reported in a confidential presentation that his company is "continually 'pitched' by bankers" for the purpose of receiving high credit ratings and that sometimes "we 'drink the Kool-Aid.'" A former managing director of credit policy at Moody's testified before Congress that, "Originators of structured securities [e.g., banks] typically chose the agency with the lowest standards," allowing banks to engage in "rating shopping" until a desired credit rating was achieved. The agencies made millions on mortgage-backed securities ratings and, as one member of Congress said, "sold their independence to the highest bidder." Banks paid large sums to the ratings companies for advice on how to achieve the maximum, highest quality rating. "Let's hope we are all wealthy and retired by the time this house of cards falters," a Standard & Poor's employee candidly revealed in an internal email obtained by congressional investigators.

Other evidence shows that the firms adjusted ratings out of fear of losing customers. For example, an internal email between senior business managers at one of the three ratings companies calls for a "meeting" to "discuss adjusting criteria for rating CDOs [collateralized debt obligations] of real estate assets this week because of the ongoing threat of losing deals." In another email, following a discussion of a competitor's share of the ratings market, an employee of the same firm states that aspects of the firm's ratings methodology would have to be revisited in order to recapture market share from the competing firm.

See Weissman, R., & Donahue, J. (2009, March). *Sold Out: How Wall Street and Washington Betrayed America*. Essential Information and Consumer Education Foundation. Available from: <[http://wallstreetwatch.org/reports/sold\\_out.pdf](http://wallstreetwatch.org/reports/sold_out.pdf)>.

\$23.7 trillion—of potential Federal Government support to the financial system."<sup>33</sup> Much of this sum was never allocated, and most of the TARP funds were paid back. However, the regulatory reform policy debate should acknowledge that such unfathomable sums were put at risk thanks to regulatory failure.

Even more significant, however, are the actual losses traceable to the regulatory failure-enabled Great Recession. These losses are real, not potential; they are at a comparable scale of more than \$20 trillion; they involve an actual loss of economic output, not just a reallocation of resources; and they have imposed devastating pain on families, communities and national well-being.

A GAO study found that "[t]he 2007-2009 financial crisis, like past financial crises, was associated with not only a steep decline in output but also the most severe economic downturn since the Great Depression of the 1930s."<sup>34</sup> Reviewing estimates of lost economic output, GAO reported that the present value of cumulative output losses could exceed \$13 trillion.<sup>35</sup> Additionally, GAO found that "households collectively lost about \$9.1 trillion (in constant 2011 dollars) in national home equity between 2005 and 2011, in part because of the decline in home prices."<sup>36</sup>

The recession threw millions out of work, and left millions still jobless or underemployed. "The monthly unemployment rate peaked at around 10 percent in October 2009 and remained above 8 percent for over 3 years, making this the longest stretch of unemployment above 8 percent in the United States since the Great Depression," GAO noted.<sup>37</sup>

The economic impact on families is crushing, even leaving aside social and psychological consequences. "Displaced workers—those who permanently lose their jobs through no fault of their own—often suffer an initial decline in earnings and also can suffer longer-term losses in earnings," reports GAO. For example, one study found that workers displaced during the 1982 recession earned 20 percent less, on average, than their non-displaced peers 15 to 20 years later.<sup>38</sup> Thanks to lost income and especially collapsed housing prices, families have seen their net worth plummet. According to the Federal Reserve's Survey of Consumer Finances, median household net worth fell by \$49,100 per family, or by nearly 39 percent, between 2007 and

<sup>33</sup> Special Inspector General for the Troubled Assets Relief Program (SIGTARP) (2009, July 21.) Quarterly Report to Congress. p. 129. Available from:

<[http://www.sig tarp.gov/Quarterly%20Reports/July2009\\_Quarterly\\_Report\\_to\\_Congress.pdf](http://www.sig tarp.gov/Quarterly%20Reports/July2009_Quarterly_Report_to_Congress.pdf)>.

<sup>34</sup> U.S. Government Accountability Office. (2013, Jan. 13). *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*. p. 12. Available from: <<http://www.gao.gov/products/GAO-13-180>>.

<sup>35</sup> *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*. p. 16.

<sup>36</sup> *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*. p. 21. There is necessarily a significant amount of uncertainty around such analyses. Other estimates have placed the loss somewhat lower. A recent Congressional Budget Office study estimates the cumulative loss from the recession and slow recovery at \$5.7 trillion." (Congressional Budget Office. 2012. *The Budget and Economic Outlook: Fiscal Years 2012 to 2022*. p. 26.) One complicating issue is determining which losses should be attributed to the recession and which to other issues. For example, GAO notes, "analyzing the peak-to-trough changes in certain measures, such as home prices, can overstate the impacts associated with the crisis, as valuations before the crisis may have been inflated and unsustainable."<sup>36</sup> *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*. p. 17.

<sup>37</sup> *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*. pp. 17-18.

<sup>38</sup> *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*. pp. 18-19.

2010.<sup>39</sup>

The foreclosure crisis stemming from the toxic brew of collapsing housing prices, exploding and other unsustainable mortgages and high unemployment has devastated families and communities across the nation.<sup>40</sup>

The financial crash and Great Recession is also, not so incidentally, the primary explanation for historically high federal deficits. Reports GAO:

From the end of 2007 to the end of 2010, federal debt held by the public increased from roughly 36 percent of GDP to roughly 62 percent. Key factors contributing to increased deficit and debt levels following the crisis included (1) reduced tax revenues, in part driven by declines in taxable income for consumers and businesses; (2) increased spending on unemployment insurance and other nondiscretionary programs that provide assistance to individuals impacted by the recession; (3) fiscal stimulus programs enacted by Congress to mitigate the recession, such as the American Recovery and Reinvestment Act of 2009 (Recovery Act); and (4) increased government assistance to stabilize financial institutions and markets.<sup>41</sup>

It should be noted that there are, to be sure, dissenting views to narratives that place regulatory failure at the core of the explanation for the Great Recession and financial crisis. Perhaps the most eloquent version of this dissent is contained in the primary dissenting statement to the Financial Crisis Inquiry Commission.

The dissent explained that "we ... reject as too simplistic the hypothesis that too little regulation caused the Crisis,"<sup>42</sup> arguing that the *amount* of regulation is an imprecise and perhaps irrelevant metric. This is a reasonable position (and it applies equally to those who complain about "too much" regulation); what matters is the quality of regulation—both the rules and standards of enforcement.

The FCIC dissent began its explanation for the financial crisis with the creation of a credit bubble and a housing bubble, which it argued laid the groundwork for a financial crisis thanks to a series of other, interconnected factors, including the spread of nontraditional mortgages, securitization, poor functioning by credit rating firms, inadequate capitalization by financial firms, the amplification of housing bets through use of synthetic credit derivatives, and the risk of contagion due to excessive interconnectedness.

However, to review this list is to see how the FCIC dissent also implicitly argued that the crisis can be blamed in large part on regulatory failure. For all of these factors should have been tamed by appropriate regulatory action.

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<sup>39</sup> Cited in *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*, p. 16.

<sup>40</sup> *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*, pp. 23-24.

<sup>41</sup> *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*, p. 26.

<sup>42</sup> *The Financial Crisis Inquiry Report*. (Dissenting Views By Keith Hennessey, Douglas Holtz-Eakin, and Bill Thomas.) p. 414.

## II. Improving Regulation

Recognizing the crucial role that regulation plays in improving our standard of living underscores the importance of ensuring that the regulatory process works well. Regulators should be nimble and flexible, able to act quickly with appropriate new rules in response to changing technologies, new science and social learning, evolutions in industry structure and other emerging trends and developments. At the same time, regulators must effectively enforce new and old rules; they must be adequately funded, equipped with needed regulatory tools including inspection powers and sufficiently tough penalties for lawbreakers, independent from the parties they regulate while maintaining appropriate responsiveness, and guided by leadership with sufficient political will and protected from interference. Unfortunately, those qualities by and large do not describe the current state of the regulatory process or enforcement.

There is an acute need for regulatory reform, to increase and improve regulatory enforcement, stiffen penalties for corporate wrongdoing, improve transparency, address undue industry influence over the rule-making process, address uneven judicial review of regulations, and adopt pro-competitive rules to level the playing field for small business and improve the economy and consumer well-being. I discuss these problem areas in this portion of my testimony, concluding each section or subsection with proposed remedies.

### A. Strengthening regulatory enforcement

In general, it is fair to say that the inspection agencies are understaffed and under-resourced.

Nowhere is the shortfall of inspectors more glaring than in the workplace safety and health area. "The federal Occupational Safety and Health Administration (OSHA) and the state OSHA plans have a total of 1,882 inspectors (894 federal and 1,035 state inspectors) to inspect the 8 million workplaces under the OSH Act's jurisdiction," according to an AFL-CIO analysis. "This means there are enough inspectors for federal OSHA to inspect workplaces once every 140 years, on average, and for state OSHA plans to inspect workplaces once every 91 years."<sup>43</sup> Our nation's workers deserve better.

To take another example among many, there is general agreement that the Food and Drug Administration (FDA) does not have sufficient resources to meet its statutorily mandated responsibilities to ensure the safety of drugs and medical products, including through inspection of overseas plants. "Our current examination of FDA's resources confirms that the agency's ability to protect Americans from unsafe and ineffective medical products is compromised," the GAO recently found.<sup>44</sup> GAO explained that "[t]he structure of the agency's funding—its reliance on user fees to fund certain activities, particularly those related to the review of new products—is a driving force behind which responsibilities FDA does and does not fulfill. The approval of new products has increasingly become the beneficiary of the agency's budget, without parallel

<sup>43</sup> AFL-CIO. (2015, April.) *Death on the Job: The Toll of Neglect*. p. 1. Available from: <<http://www.aflcio.org/content/download/154671/3868441/DOJ2015Finalnobug.pdf>>.

<sup>44</sup> Government Accountability Office. (2009, June.) *Food and Drug Administration: FDA Faces Challenges Meeting Its Growing Medical Product Responsibilities and Should Develop Complete Estimates of Its Resource Needs*. p.34. Available from: <<http://www.gao.gov/new.items/d09581.pdf>>.

increases in funding for activities designed to ensure the continuing safety of products, once they are on the market."

Of course, the issue with adequate enforcement is not solely a matter of resources. Many agencies do an inadequate job of enforcing rules due less to resource limitations than issues involving allocation of resources, prioritization and/or insufficient rigor. The 2013 fungal meningitis outbreak, for example, could and should have been prevented by FDA. The agency issued a warning letter to the New England Compounding Center in 2006, instructing the company to stop manufacturing-scale operations. However, FDA failed to follow up adequately. For whatever reason, whether inattentiveness or lack of compliance and legal resources, by not aggressively enforcing the regulations related to drug manufacturing and interstate commerce, the FDA allowed the company to continue its wide-scale manufacturing and interstate distribution operation of multiple high-risk drugs, including injectable steroids. The eventual result was the meningitis outbreak and 48 deaths.<sup>45</sup>

The GM ignition switch debacle provides another example of regulatory failure—resulting in at least 111 deaths, and climbing. What is unique here is that the agency, now under new leadership, acknowledges its failures. A just released NHTSA report blames GM for its horrible misconduct, but also assigns major responsibility to NHTSA itself.<sup>46</sup> The report's major findings:

- GM withheld critical information about engineering changes that would have allowed NHTSA to more quickly identify the defect.
- NHTSA did not hold GM accountable for providing inadequate information.
- Neither GM nor NHTSA completely understood the application of advanced air bag technology in GM vehicles.
- NHTSA did not consider alternate theories proposed by internal and external sources.
- NHTSA did not identify and follow up on trends in its own data sources and investigations.

**Remedies:** The agency resource problem is easily solved with sufficient political will, though budget tightening efforts have cramped rather than expanded enforcement budgets. This is surely a penny wise but pound foolish approach. In areas where regulators are able to apply stiffer penalties, they may be able to bring more money into the treasury than they expend. Far more important is the social cost accounting: the economic benefits of properly enforced laws vastly exceed costs. This is most obviously true in the financial sector, as the discussion earlier regarding the Great Recession and regulatory failure elaborates, but it is true in virtually all areas. The economic benefits of reducing food contamination through inspection and regulatory enforcement, for example, vastly exceed costs. Indeed, if regulatory budgets were set based on the kind of cost-benefit analyses that are applied to new regulation, they would be dramatically larger.

<sup>45</sup> See Carome, M. and Wolfe, S. (2012, October 24.) Letter to Secretary of Health and Human Services Kathryn Sebelius. Available from: <<http://www.citizen.org/documents/2080.pdf>>.

<sup>46</sup> Department of Transportation (2015). NHTSA's Path Forward. Available from: <<http://www.nhtsa.gov/About+NHTSA/Press+Releases/nhtsa-forming-new-safety-teams>>.

Ensuring a sufficiently robust enforcement culture at regulatory agencies is not a problem that lends itself to a simple solution, though and stronger Congressional oversight of agency enforcement would go a long way. The NHTSA example—a major change for the agency—of critical self-reflection in the wake of horrendous failure should be monitored, studied and, assuming it does generate a change in the culture and practice at the agency, emulated.

**B. Criminal prosecution of corporations for egregious violation of regulations and criminal statutes.**

Although there are some areas of vibrant corporate criminal prosecution, including for violations of the Foreign Corrupt Practices Act, illegal marketing of drugs and some environmental crimes, in many areas, massive corporate wrongdoing escapes meaningful criminal enforcement.

Widespread illegality by Big Banks and Wall Street firms is a case in point, and the situation is probably far worse than we know, with Wall Street professionals themselves saying that criminal behavior is rampant in the industry.<sup>47</sup> Nearly half of Wall Street respondents to a recent survey believe their competitors have ignored the law or acted unethically, and a third of those making over half a million dollars annually say they have first-hand knowledge of wrongdoing in their own office.

**1. Inappropriate use of deferred and non-prosecution agreements.**

Often, corporations are able to commit crimes but escape criminal prosecution, even when caught. In the past decade, there has been a dramatic rise in federal prosecutors choosing not to prosecute corporations that have committed crimes. Instead, the U.S. Department of Justice has adopted an alternative approach, entering into agreements with corporations to either defer prosecution or abstain from prosecution entirely if the corporation meets the terms set out in these agreements. When first introduced, these types of agreements, also known as "pre-trial diversion," were intended to apply not to corporations, but primarily to juvenile delinquents, with the aim of clearing the courts to allow them to attend to major criminal cases.<sup>48</sup> Yet, when deferred and non-prosecution agreements are used in response to massive corporate crimes, it is exactly such perpetrators of major crimes that reap the benefits.

Prior to 2003, the DOJ entered into fewer than five deferred prosecution agreements and non-prosecution agreements with corporations per year. In the first decade following the millennium, these numbers gradually crept upwards, entering the double digits by 2005. Numbers rose to a high of 42 deferred and non-prosecution agreements in 2007 and continue to number in the dozens every year, according to a forthcoming report from Public Citizen.<sup>49</sup>

<sup>47</sup> University of Notre Dame and Labaton Sucharow LLP. (2015, May.) The Street, the Bull and the Crisis. Available from: <<http://www.labaton.com/en/about/press/Historic-Survey-of-Financial-Services-Professionals-Reveals-Widespread-Disregard-for-Ethics-Alarming-Use-of-Secrecy-Policies-to-Silence-Employees.cfm>>.

<sup>48</sup> Mokhiber, R. (2005). Crime without Conviction: The Rise of Deferred and Non Prosecution Agreements. Available from: <<http://corporatecrimereporter.com/deferredreport.htm>>.

<sup>49</sup> Ben-Ishai, E. and Weissman, R. (forthcoming, 2015). Justice Deferred -- and Denied. Public Citizen. The most detailed account and analysis of deferred prosecution agreements is contained in Garrett, B. (2014.) Too Big To Jail: How Prosecutors Compromise with Corporations. Harvard University Press.

Deferred and non-prosecution agreements are a special gift to large corporations, which are enabled to escape prosecution for serious crimes in a manner rarely afforded to individuals or small business. The logic of these agreements is that they permit prosecutors to put in place special compliance mechanisms to prevent future wrongdoing. These compliance mechanisms can equally be obtained through criminal plea agreements, however, so the claim that deferred and non-prosecution agreements offer some unique benefit is incorrect. Worse, deferred prosecution agreements offer little or no deterrent effect, either for the (non-)charged corporation or for others. Corporations entering into deferred and non-prosecution agreements have a strikingly high recidivism rate, including companies such as AIG, Barclays, Bristol-Myers Squibb, Chevron, GlaxoSmithKline, Hitachi, Lucent, Merrill Lynch, Pfizer, Prudential and UBS.<sup>50</sup>

Perhaps the most appalling example of the abuse of deferred prosecution—one which emphasizes how this kid-glove treatment is designed primarily for giant corporations—involves the banking giant HSBC. In December 2012, the company agreed to pay more than \$1 billion in fines and entered into a deferred prosecution agreement for anti-money laundering and sanctions violations. Assistant Attorney General Lanny Breuer said the company was guilty of "stunning failures of oversight—and worse" and that the "record of dysfunction that prevailed at HSBC for many years was astonishing."<sup>51</sup>

Breuer was correct.

The statement of facts attached to the deferred prosecution agreement with HSBC is startling. Just two illustrative examples:

- As regards money laundering for Latin American drug cartels, "Senior business executives at HSBC Mexico repeatedly overruled recommendations from its own AML [anti-money laundering] committee to close accounts with documented suspicious activity. In July 2007, a senior compliance officer at HSBC Group told HSBC Mexico's Chief Compliance Officer that '[t]he AML committee just can't keep rubber-stamping unacceptable risks merely because someone on the business side writes a nice letter. It needs to take a firmer stand. It needs some cojones. We have seen this movie before, and it ends badly."<sup>52</sup>
- As regards efforts to facilitate evasion of U.S. government sanctions against other countries, the statement of facts says, "[B]eginning in the 1990s, HSBC Bank plc ("HSBC Europe"), a wholly owned subsidiary of HSBC Group, devised a procedure whereby the Sanctioned Entities put a cautionary note in their SWIFT payment messages including, among others, 'care sanctioned country,' 'do not mention our name in NY,' or 'do not mention Iran.' Payments with these cautionary notes automatically fell into what

<sup>50</sup> Ben-Ishai, E. and Weissman, R. (forthcoming, 2015). *Justice Deferred -- and Denied*. Public Citizen.

<sup>51</sup> Breuer, L. (2012, December 11.) *Assistant Attorney General Lanny A. Breuer Speaks at the HSBC Press Conference*. Available from: <<http://www.justice.gov/criminal/pt/speeches/2012/crm-speech-1212111.html>>.

<sup>52</sup> United States of America Against HSBC Bank USA, N.A. and HSBC Holdings PLC, *HSBC Deferred Prosecution Agreement Attachment - Statement of Facts*, (2012, December 11.) p. 13. Available from: <<http://www.justice.gov/opa/documents/hsbc/dpa-attachment-a.pdf>>.

HSBC Europe termed a 'repair queue' where HSBC Europe employees manually removed all references to the Sanctioned Entities. The payments were then sent to HSBC Bank USA and other financial institutions in the United States without reference to the Sanctioned Entities, ensuring that the payments would be processed without delay and not be blocked or rejected and referred to OFAC. HSBC Group was aware of this practice."<sup>53</sup>

Why did a company engaging in such egregious practices, which facilitated illegal drug trafficking and evasion of U.S. sanctions against foreign countries, escape without a criminal prosecution?

According to Breuer, the worry was that a criminal prosecution of a giant bank like HSBC might bring down the company and threaten the global financial system's stability.<sup>54</sup> "In trying to reach a result that's fair and just and powerful, you also have to look at the collateral consequences," Breuer said at the news conference announcing the deferred prosecution deal.<sup>55</sup> "If you think that by doing a certain thing you risk either a charter being revoked, you think that counterparties in a massive financial institution may go away, you think that there is a risk that many, many innocent people will be harmed from a resolution, and by another resolution you think you can mitigate the risk of innocent people suffering, the economy being affected, and you can home in on those and the institutions and address the issues underlying, to the Department of Justice, that's a very real factor, and so it is a fact that you consider. It's one factor," Breuer said.<sup>56</sup>

In other words, the mere fact of its excessive size enabled HSBC to escape criminal penalties; it has been judged too big to jail.

A smaller bank, presumably, would have received no such deferential treatment.

American Banker—not an outlet known for shrill criticism of the banking industry—eloquently captured the moral outrage of this state of affairs. Shortly after the HSBC deferred prosecution deal, American Banker highlighted the case of G&A Check Cashing, a small firm found to have violated anti-money laundering laws for over \$8 million in transactions. (By contrast, HSBC was found to have laundered at least \$881 million in drug trafficking proceeds, and failed to monitor properly \$200 trillion in wire transfers.) Two of its executives were sentenced to jail terms, and the company was placed on probation for two years. The case highlights "the disparate treatment of certain institutions for violations of anti-laundering laws," American Banker commented. "[M]any have responded to the settlement with disdain for the basic message they said it sent about parity under the law."<sup>57</sup>

<sup>53</sup> HSBC Deferred Prosecution Agreement Attachment - Statement of Facts, pp. 22-23.

<sup>54</sup> O'Toole, J. (2012, December 12.) *HSBC: Too Big To Jail?* CNNMoney. Available from: <<http://money.cnn.com/2012/12/12/news/companies/hsbc-money-laundering/index.html>>.

<sup>55</sup> Viswanatha, A. and Wolf, B. (2012, December 12.) HSBC to pay \$1.9 billion U.S. fine in money-laundering case. Reuters. Available from: <<http://www.reuters.com/article/2012/12/11/us-hsbc-probe-idUSBRE8BA05M20121211>>.

<sup>56</sup> Finkle, V. (2013, Jan. 22.) *Are Some Banks 'Too Big To Jail'?* American Banker. Available from: <[http://www.americanbanker.com/issues/178\\_15/are-some-banks-too-big-to-jail-1056033-1.html?zkPrintable=1&nopagination=1](http://www.americanbanker.com/issues/178_15/are-some-banks-too-big-to-jail-1056033-1.html?zkPrintable=1&nopagination=1)>.

<sup>57</sup> *Are Some Banks 'Too Big To Jail'?*

In response to the very strong public criticism around the HSBC and other deferred prosecution deals, top officials at the Department of Justice walked back prior statements that such sweetheart deals were needed because of the potential systemic risk posed by prosecuting Wall Street giants. But there is little doubt that the too-big-to-jail comments reflected the actual views inside the Department of Justice.

Criticisms of disparate treatment for large banks did strike a chord inside the Department of Justice, however. DOJ has recently secured some criminal pleas from giant financial firms, most notably in regards to the extraordinary manipulation of foreign exchange markets by five major banks. These banks—Barclays, Citigroup, JP Morgan Chase, the Royal Bank of Scotland and UBS—colluded on the size, timing and nature of their buy and sell orders for U.S. dollars and euros. The conspirators referred to themselves as the “mafia,” and one said, “if you ain’t cheatin’, you ain’t tryin’.” There is no question of intentionality in this case.<sup>58</sup>

Yet even though guilty pleas were obtained from four of the banks and a deferred prosecution agreement was rescinded for the fifth, UBS, the Department of Justice maneuvered yet again to protect the banks from the normal consequences of law-breaking. A final deal on the guilty pleas was apparently held off until the SEC granted waivers to the banks from rules that would otherwise prevent them from undertaking certain securities activities.<sup>59</sup> It is expected in the next several months that the Department of Labor will consider whether to waive its normal penalties for pension providers guilty of criminal wrongdoing. The very strong expectation, unfortunately, is that the Labor Department will follow the lead of the SEC—unless perhaps sufficient public and political pressure is brought to bear. It has also been reported that the Department of Justice obtained pleas from the banks’ parent companies, rather than from subsidiaries, to protect those subsidiaries from other possible sanctions, including state charter revocation.<sup>60</sup>

DOJ’s efforts to protect the banks from the consequences of a criminal plea are so far-reaching that it is fair to say that we may be entering the era of prosecution in name only—deferred prosecution by another name.

Again, it is virtually inconceivable that a small financial firm, or any small business, would be accorded such extraordinary accommodations in the context of pleading guilty to such a far-reaching conspiracy.

## **2. Reckless endangerment and concealment of hazards: the criminal penalty gap.**

Paralleling the problem of insufficient prosecution of corporate wrongdoers under existing criminal statutes is the problem of insufficient criminal penalties for companies that recklessly

<sup>58</sup> Department of Justice. (2015, May 20.) Five Major Banks Agree to Parent-Level Pleas. Available from: <<http://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>>.

<sup>59</sup> Reuters. (2015, May 20.) U.S. SEC Grants Waivers to Banks After Guilty Pleas. Available from: <<http://www.reuters.com/article/2015/05/20/banks-forex-settlement-waivers-idUSL1N0YB1GA20150520>>.

<sup>60</sup> Proress, B. and Corkery, M. (2015, May 13.) 5 Big Banks Expected to Plead Guilty to Felony Charges, but Punishments May Be Tempered. New York Times. Available from: <<http://www.nytimes.com/2015/05/14/business/dealbook/5-big-banks-expected-to-plead-guilty-to-felony-charges-but-punishments-may-be-tempered.html>>.

endanger consumers or their workers. There are no or inadequate statutory criminal penalties for violating auto safety rules in ways that endanger consumers, for recklessly selling unsafe pharmaceuticals, for recklessly putting other hazardous consumer products into the stream of commerce, and for endangering or killing workers due to unsafe working conditions.

In some notable cases, prosecutors have used general criminal statutes to criminally prosecute companies and individual executives who have recklessly endangered the public or workers. Recent examples include prosecutions related to the BP oil platform explosion and subsequent oil eruption—both for violation of environmental statutes and for reckless behavior that led to the death of 11 oil workers—the New England Compounding Center disaster, and the Peanut Company of America.<sup>61</sup>

But these examples are the exception to the rule. Reckless action that kills employees is rarely criminally prosecuted. There are unlikely to be appropriate criminal charges related to the GM ignition switch debacle—despite the deaths of at least 111 people—or the flawed Takata air bags that have resulted in at least six deaths, or the Jeep defective fuel tanks which have killed dozens or perhaps many more. This even though in all of these cases there is substantial evidence that the companies knew of the product defects, knew what the consequences would be, and concealed information from regulators and the public. Similarly, companies too frequently sell dangerous drugs, despite their own studies showing unacceptable risks, resulting in hundreds, thousands or even tens of thousands of deaths in the case of Vioxx, but evade criminal prosecution. These actions simply aren't treated as criminal, in part because there are inadequate specific criminal provisions in relevant regulatory statutes or the general criminal law.

*Remedies:*<sup>62</sup> When it comes to corporate wrongdoing, our system of criminal justice has gone awry. Because of a lack of will and/or statutory authority, prosecutors fail to prosecute corporations and corporate executives for reckless conduct the likes of which would generate full-on prosecution and harsh sentences if committed by individuals outside of the corporate context. Through deferred and nonprosecution agreements, large companies, and especially but not only big banks, get special treatment, enabling them to avoid criminal prosecution for egregious wrongdoing simply by promising not to commit wrongs in the future. And even criminal prosecutions are engineered to enable giant banks to avoid meaningful penalties.

These matters should be a priority concern for the committee, both because of the nexus with regulatory policy and especially because they involve core issues related to the equal application of the criminal law and the failure to use of criminal prosecution to deter future wrongdoing.

Aggressive oversight can hopefully cure some of these problems, but oversight alone is not enough.

First, Congress should act to remedy the problem of insufficient criminal penalties by adopting a criminal statute to make it a crime for corporations or corporate executives to conceal

<sup>61</sup> For careful and detailed profiles of these cases, see Steinzor, R. (2014.) *Why Not Jail?* Cambridge University Press.

<sup>62</sup> For discussion of the kinds of remedies highlighted here, but also especially the need for individual corporate executive prosecutions, see Steinzor, R. (2014.) *Why Not Jail?* Cambridge University Press.

information of hazards posing a risk of serious injury or death to workers or consumers. Senators Blumenthal, Harkin and Casey introduced such legislation, the Hide No Harm Act, in the last Congress.

Second, the abuse of deferred and non-prosecution agreements must be curbed. Whether from inside the Department of Justice or imposed by Congress, there should be new guidelines regarding these arrangements. If they are not prohibited outright, at minimum a strong presumption against such deals should be established, so they are used only in rare cases upon specific showings of their necessity, and never in cases of repeat offenders.

Third, criminal prosecutions and guilty pleas should come with consequences, and not just fines which giant companies can easily absorb, almost no matter the size. If Congress has seen fit to adopt statutes that strip persons or corporations that have pled or been found guilty of a crime of the right to carry out certain activities, sell to the government, hold certain licenses or maintain privileges, then those sanctions should be enforced. Congress should look to prohibit the granting of waivers in these areas, or at minimum imposing tough standards as a prerequisite to such waivers.

Fourth, so long as deferred prosecutions and waivers continue, there should be greatly enhanced transparency around the decision-making process. If government officials are worried that prosecuting a financial firm will pose too much systemic risk, that has important policy consequences, and Congress and the public need to know. They also need to know who is expressing such worries, and how they are interacting with prosecutors. Similarly, if government prosecutors are declining to prosecute drug companies, or manipulating the corporate entity that they prosecute, out of a fear that the government would otherwise not be able to buy needed pharmaceuticals from that company, they should say so explicitly. There is little reason to expect this transparency to come voluntarily. Congress should pass legislation that requires it.

Fifth, and similarly, when the government operates in the civil context and settles cases relating to serious wrongdoing, it should be required to disclose what it has learned in its investigation. Otherwise, the public and the courts have no way to assess the adequacy of any proposed settlement, nor can there be an appropriate debate over legislative and regulatory remedies to prevent future wrongdoing. The DOJ's November 2013 \$13 billion settlement with JP Morgan is instructive; the government failed to disclose meaningful information about what it had found in its investigation, or why the \$13 billion settlement amount was commensurate with the wrongs discovered.<sup>63</sup>

Last, the HSBC example, as well as other examples from the financial sector, point to the need to look not just at prosecutorial policy. It is clear that regulators genuinely are afraid of enforcing the law when it comes to the megabanks. As a result, these banks are not deterred from violating the law—indeed, they are literally not subject to the same standards as other banks and other companies. A democratic society cannot tolerate having banks above the law. The solution to this problem is straightforward: these megabanks should be broken up.

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<sup>63</sup> See *Better Markets v. Department of Justice*, Complaint for Declaratory and Injunctive Relief, February 2014, Available from: <<http://www.scribd.com/doc/206070627/Complaint-Better-Markets-v-U-S-Department-of-Justice>>.

### C. Combating unreasonable delay

Unreasonable delay permeates almost all aspects of the rulemaking process. The consequences of delay are serious. As opposed to issuance of new rules, delay creates the regulatory uncertainty that many business spokespeople denounce. Delay also means that lives are needlessly lost, injuries needlessly suffered, environmental harm needlessly permitted, consumer rip-offs extended, and more.

Three years ago, Public Citizen conducted an analysis of public health and safety rulemakings with congressionally mandated deadlines.<sup>64</sup> Our analysis showed that most rules are issued long after their deadlines have passed, needlessly putting American lives at risk. Of the 159 rules analyzed, 78 percent missed their deadline. Federal agencies miss these deadlines for a variety of reasons, including having to conduct onerous analyses, dealing with politically motivated delays, inadequate resources or agency commitment, and fear of judicial review.

A high proportion of pending rules with statutory deadlines are mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act. The financial regulatory agencies are far behind schedule. The most recent report from the law firm DavisPolk finds that, through the first quarter of 2015, regulators have still not complied with a third of the 271 statutory deadlines that have passed. This is five years after passage of the Act.<sup>65</sup>

The problem of protracted delay is pervasive in the rule-making sphere and reflective of a rulemaking process gone askew. This is far more than a “bureaucratic” problem; the source of the problem is not inept government officials and workers, but a thicket of legislatively mandated process and multiple analyses, along with inappropriate influence exerted by and for regulated parties. And the consequences are far more severe than a generic inefficiency—lengthy delay costs money and lives; it permits ongoing ecological destruction and the infliction of needless injury; and it enables fraudsters and wrongdoers to perpetuate their misdeeds.

Although extended delay is arguably the defining feature of rulemaking, the extent, severity, causes and consequences of such delay are not well understood. I highlight several illustrative examples here to illuminate these matters.

#### 1. Cranes and derricks.

The Occupational Safety and Health Administration's cranes and derricks rule, adopted in 2010, is designed to improve construction safety. By the late 1990s, construction accidents involving cranes were killing 80 to 100 workers a year. OSHA later estimated that a modernized rule would prevent about 20 to 40 of those annual tragedies. Worker safety advocates and the construction industry alike wanted an updated rule.

<sup>64</sup> Mouzoon, N. (2012). *Public Safeguards Past Due: Missed Deadlines Leave Public Unprotected*. Public Citizen. Available from: <<http://www.citizen.org/documents/public-safeguards-past-due-report.pdf>>.

<sup>65</sup> DavisPolk. (2015) *Dodd-Frank Progress Report*. Available from: <<http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report>>.

Nonetheless, it took a dozen years to get a final rule adopted. "During the dozen years it took to finalize the cranes rule," a Public Citizen report summarized, "OSHA and other federal agencies held at least 18 meetings about it. At least 40 notices were published in the Federal Register. OSHA was required by a hodgepodge of federal laws, regulations and executive orders to produce several comprehensive reports, and revisions to such reports, on matters such as the makeup of industries affected by the rule, the number of businesses affected, and the costs and benefits of the rule. OSHA also was repeatedly required to prove that the rule was needed, that no alternative could work, and that it had done everything it could to minimize the effects on small businesses. The regulatory process afforded businesses at least six opportunities to weigh in with concerns that the agency was required to address."<sup>66</sup>

## **2. Silica rule.**

OSHA's lifesaving silica dust standard has been delayed for a dozen years. More than two million workers in the United States are exposed to silica dust, with construction, foundry and metal workers most at risk. Inhaling the dust causes a variety of harmful effects, including lung cancer, tuberculosis, and silicosis (a potentially fatal respiratory disease). OSHA acknowledges that its current silica dust standard is obsolete.<sup>67</sup> The first concrete action it took to update the standard was in October 2003, when it convened a small business panel to review its proposed rule. In 2011, OSHA submitted to OIRA a draft proposed rule to reduce exposure to deadly silica dust. Although OIRA is supposed to complete reviews in three months, it took years for OIRA to complete the review. No explanation for this delay ever emerged. Since OIRA finally released the rule, it has been stuck at OSHA.

What is clear: people are dying needlessly due to delay. "OSHA estimates that the proposed rule would prevent between 579 and 796 fatalities annually—375 from non-malignant respiratory disease, 151 from end-stage renal disease, and between 53 and 271 from lung cancer—and an additional 1,585 cases of moderate-to-severe silicosis annually."<sup>68</sup> And the rule has now been a dozen years in the making.

## **3. Truck driver training.**

In 1991, Congress passed a law requiring a rulemaking on training for entry-level commercial motor vehicle operators. More than 20 years, three lawsuits, and another statutory mandate later, the Department of Transportation still has not enacted regulations requiring entry-level drivers to receive training in how to drive a commercial motor vehicle. It now says it plans to complete the rule in 2016.<sup>69</sup>

<sup>66</sup> Lincoln, T. and Mouzoon, N. (2011, April.) Cranes & Derricks: The Prolonged Creation of a Key Public Safety Rule. Public Citizen. p. 4. Available from: <<http://www.citizen.org/documents/CranesAndDerricks.pdf>>.

<sup>67</sup> OSHA Occupational Exposure to Crystalline Silica, 75 Fed. Reg. 79,603 (2010, Dec. 20).

<sup>68</sup> OSHA. (2013). Preliminary Economic Analysis and Initial Regulatory Flexibility Analysis: Supporting document for the Notice of Proposed Rulemaking for Occupational Exposure to Crystalline Silica. Available from: <[https://www.osha.gov/silica/Silica\\_PEA.pdf](https://www.osha.gov/silica/Silica_PEA.pdf)>.

<sup>69</sup> A full account of this history is included in In Re Advocates for Highway and Auto Safety: Petition for Writ of Mandamus, September 18, 2014. Available from: <<http://www.citizen.org/documents/in-re-advocates-for-highway-and-auto-safety-petition-for-writ-of-mandamus.pdf>>.

In the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991, Congress required the Secretary of Transportation to report to Congress on the effectiveness of private sector training of entry-level commercial motor vehicle drivers by December 18, 1992, and to complete a rulemaking proceeding on the need to require training of all entry level drivers of commercial motor vehicles by December 18, 1993. The required report, which was submitted to Congress on February 2, 1996 (slightly more than three years later), concluded that training of new commercial motor vehicle drivers was inadequate; in an accompanying analysis, the agency determined that the benefits of an entry-level driver training program would outweigh its costs. It requested comments on the studies and held one public hearing on training entry-level drivers. In the next six years, however, the agency took no steps towards issuing a rule on entry-level driver training.

In November 2002, organizations concerned about motor vehicle safety filed a petition for a writ of mandamus in the DC Circuit Court of Appeals, seeking an order directing the Secretary of Transportation to fulfill his statutory duty to promulgate overdue regulations relating to motor vehicle safety, including the regulation on entry-level driver training. As part of a settlement agreement between the organizations and DOT, DOT agreed to issue a final rule on minimum training standards for entry-level commercial motor vehicle drivers by May 31, 2004.

On August 15, 2003, almost 12 years after ISTEA was enacted, DOT (through the Federal Motor Carrier Safety Administration, FMCSA) published a notice of proposed rulemaking on minimum training requirements for entry-level commercial motor vehicle operators, and on May 21, 2004, it published a final rule.

Although the agency expressly acknowledged that training for entry-level drivers was inadequate and stated its belief that a 360-hour model curriculum developed by the Federal Highway Administration that includes extensive behind-the-wheel training “represents the basis for training adequacy,” it proposed instead a weak rule that required only 10 hours of training.

Advocates for Highway and Auto Safety, among others, subsequently filed a petition for review of the final rule, arguing that the rule was arbitrary and capricious because it did not require entry-level drivers to receive any training in how to operate a commercial motor vehicle. The DC Circuit agreed, holding that the FMCSA had “adopted a final rule whose terms have almost nothing to do with an ‘adequate’ CMV [commercial motor vehicle] training program.”

On December 26, 2007, approximately two years after the court ruling, FMCSA issued a stronger proposed rule. But, four years after the comment period had closed, the agency still had not issued a final rule.

In 2012, Congress again directed DOT to conduct a rulemaking on the issue, requiring a final rule by October 1, 2013.

Yet instead of moving forward, the FMCSA published notice in September 2013 that it was withdrawing its proposed rule.

We still have no proposed rule. In September 2014, Public Citizen with Advocates for Highway Safety filed another lawsuit, on behalf of a number of parties, asking that the agency be ordered to issue a rule in compliance with the law. That case is now stayed, in reliance on an agency statement that it plans to issue a rule by September 2016.

More than 20 years have passed since Congress ordered the DOT to adopt an appropriate truck driver training rule, and there is still no rule. This is due in large part to the agency's overly cozy relationship with the trucking industry. Congress has mandated a driver training rule—twice—out of the recognition that better driver training will save lives; and the two-decade-long refusal of the agency to comply with Congressionally imposed obligations means lives have been—and continue to be—lost needlessly.

#### **4. Backover rule<sup>70</sup>**

One night in 2002, Dr. Greg Gulbransen was backing up his SUV in his driveway when his two-year-old son Cameron darted out into the driveway behind the vehicle. Too small to be seen by his father using any of the vehicle's rearview or sideview mirrors, Cameron was struck by the moving car and killed. Dr. Gulbransen's tragedy is not an isolated case; each week, 50 children are injured, two fatally, in these "backover" crashes, that is, collisions in which a vehicle moving backwards strikes a person (or object) behind the vehicle. Each year on average, according to the Department of Transportation, backovers kill 292 people and injure 18,000 more—most of whom are children under the age of five, senior citizens over the age of 75, or persons with disabilities. Backovers generally occur when the victim is too small to be seen in the rearview mirror of the vehicle or too slow to move out of the way of the vehicle, even one moving at slow speed.

To prevent the injuries and deaths caused by backovers, in 2008 Congress passed and the President signed the Cameron Gulbransen Kids Transportation Safety Act. The Gulbransen Act directed DOT to revise an existing federal motor vehicle safety standard to expand the area that drivers must be able to see behind their vehicles. (This can be done through the use of rear-view cameras, or other technologies.) The Gulbransen Act mandated that DOT issue the final rule within three years of the law's enactment—by February 28, 2011. The Act also allowed DOT to establish a new deadline for the rulemaking, but only if the otherwise-applicable deadline "cannot be met."

When it prepared a draft final rule in 2010, DOT estimated that the proposed rule, which specified an area immediately behind each light vehicle that a driver must be able to see when the car is in reverse gear, would prevent between 95 and 112 deaths and between 7,072 and 8,374 injuries each year.

DOT failed to meet the February 2011 deadline. Instead, DOT repeatedly set a new "deadline," failed to meet it, and then set yet another "deadline," although the agency never made a showing that the statutory deadline could not be met.

<sup>70</sup> A full account of this history is available from *In Re Dr. Greg Gulbransen: Petition for a Writ of Mandamus*, September 25, 2013. Available from: <<http://www.citizen.org/documents/In-re-Gulbransen-Backover-Petition.pdf>>.

In light of the extent of the delay, the repeated self-granted extensions, and the hundreds of preventable deaths and thousands of preventable injuries that will occur while the public waits for the final rule, Public Citizen filed a petition with the United States Court of Appeals for the Second Circuit seeking a writ of mandamus compelling DOT to issue the rule within 90 days. The petition was filed September 25, 2013 on behalf of Dr. Gulbransen, Sue Auriemma (another parent who backed into her own child), and the consumer safety groups Advocates for Highway and Auto Safety, KidsAndCars.org, and Consumers Union. On March 31, 2014, one day before the Second Circuit was scheduled to hear argument in the case, DOT issued the rear visibility safety standard that petitioners sought.

In this case, much remains unknown about the cause of the protracted delay. The department had been on track to issue a rule by or near the Congressional deadline, but then pulled back. It is widely believed that the rule was delayed by OIRA out of concern about the agency's cost-benefit analysis—the auto makers predictably made unrealistic claims about potential cost—or by political intervention from high officials in the White House.

Whatever the cause, that delay led to the pointless deaths of hundreds and tens of thousands of injuries. What a horrible tragedy it is for a parent to live with the knowledge that he or she ran over their child. But what a monstrous outrage for those tragedies to perpetuate because corrective action was delayed due to inappropriate political influence.

#### **5. Executive pay ratio rule.**

Section 953(b) of the Dodd Frank Act requires companies to disclose the ratio of CEO-to-median workers' pay. This is perhaps the simplest of Dodd Frank required rules. Companies already disclose their CEO compensation. Basic accounting requires them to know what they pay their employees, and determining the median pay for all employees is a simple enough determination. Figuring out the ratio between the two is a simple enough arithmetic calculation. Somehow, however, the nation's biggest firms have proffered the view that such a disclosure requirement and calculation would be incredibly burdensome. This hard-to-swallow claim has, apparently, paralyzed the Securities and Exchange Commission. It proposed a rule in September 2013 with a standard 60-day comment period; but the final rule has yet to emerge. In the latest Unified Agenda of Regulatory and Deregulatory Actions, the agency inexplicably reports that the rule is now targeted for completion by April 2016. This is a modest measure to be sure—though it will provide important information to both investors and employees—but precisely because of its simplicity, the SEC should have been able to issue a rule expeditiously.<sup>71</sup>

**Remedies:** There needs to be much more Congressional oversight of rule-making delay. The agencies appear to treat Congressionally mandated deadlines for the issuance of new rules as suggestions rather than duties; it is up to Congress to hold them accountable.

The problem of industry exercising inappropriate influence at regulatory agencies, or even through the White House, is not easily cured. One important step to help would be new legislation to slow the revolving door between regulatory agencies and regulated parties. When

<sup>71</sup> See Naylor, B. (2015, June 2.) Mary Jo Wait. Huffington Post. Available from: <[http://www.huffingtonpost.com/bartlett-naylor/mary-jo-wait\\_b\\_7494336.html](http://www.huffingtonpost.com/bartlett-naylor/mary-jo-wait_b_7494336.html)>.

agency officials and staff slide back-and-forth between working for the public and working on behalf of regulated parties, it's only natural that they will be overly sympathetic to industry when in public service, more deferential to requests for delay and less urgent in their advocacy for the public interest. The revolving door is a fundamental feature of the regulatory state. A recent report from the Project on Government Oversight (POGO) highlighted the pervasiveness of the problem at one agency, the Securities and Exchange Commission, finding that "from 2001 through 2010, more than 400 SEC alumni filed almost 2,000 disclosure forms saying they planned to represent an employer or client before the agency." And those disclosures, POGO notes, "are just the tip of the iceberg, because former SEC employees are required to file them only during the first two years after they leave the agency."<sup>72</sup>

Appropriate statutory reform would require longer cooling off periods before ex-agency staff can lobby their former agency for pecuniary purposes, broader definitions of what constitutes lobbying activity, strong rules against the reverse revolving door (persons moving from regulated industry employment to regulating agencies) and with high standards for any exceptions.

OIRA-caused delay is a less significant problem than earlier in the Obama administration, but reforms are necessary to ensure the agency does not contribute to delay or inappropriately weaken rules. OIRA processes are closed and non-transparent.<sup>73</sup> What is known is that OIRA meetings with outside parties are dominated by regulated industries (with industry meetings five times more prevalent than those with public interest groups), and that meetings correlate with changes in rules.<sup>74</sup> If OIRA is going to continue to its current function, it must be subject to much more transparency requirements. For example, agencies should put in the rulemaking docket all documents submitted to OIRA, and all changes and comments that they receive on proposed and/or final rules from OIRA or other agencies.

Most importantly, Congress must not act to make the problem of regulatory delay worse. In recent years, there have been numerous legislative proposals to further hinder agencies' abilities to do their jobs, imposing vast new analytic requirements on agencies and increasing the scope of OIRA authority. To review the record of persistent regulatory delay—and to recognize the degree to which current analytic requirements are responsible for that delay—is to understand how misguided these proposals are, and how serious would be their consequences. Many of these proposals would require agencies to perform new and additional cost-benefit analyses, a particularly flawed approach which I discuss in more detail below.

<sup>72</sup> Project on Government Oversight. (2013, February 11.) *Dangerous Liaisons: Revolving Door at SEC Creates Risk of Regulatory Capture*. Available from: <<http://pogoarchives.org/ebooks/20130211-dangerous-liaisons-sec-revolving-door.pdf>>.

<sup>73</sup> Government Accountability Office. (2009, April.) *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews*. Available from: <<http://www.gao.gov/new.items/d09205.pdf>>.

<sup>74</sup> Steinzor, R., Patoka, J. and Goodwin, J. *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety and the Environment*. Center for Progressive Reform. 2011. Available from: <[http://www.progressivereform.org/articles/OIRA\\_Meetings\\_1111.pdf](http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf)>.

#### D. An Appropriate Role for Cost-Benefit Analysis

Whatever the benefits of cost-benefit analysis as a tool to assist in regulatory decision-making, it should be recognized that cost-benefit analysis is highly imperfect and, at least as implemented in the real world, suffers from a set of flaws that tend to systematically skew in favor of regulated parties and against the broader public interest, by overestimating costs and underestimating benefits. Even ardent supporters of cost-benefit analysis, such as Cass Sunstein, the former OIRA administrator, argue that cost-benefit analysis is more appropriate as a guidance tool for agencies, rather than as a definitive metric directing agencies into a particular course of action.<sup>75</sup> As such, it would be a mistake to require any additional cost-benefit analysis in the regulatory system, or to give it a more prescriptive role in regulatory decision making.

The problems with cost-benefit analysis are legion.

First, regulated industry typically has an undue influence over cost estimates, in large part because it controls access to internal corporate information, as well as because of its ability to commission studies that tend to support the interest of their funders. This information asymmetry is a significant problem in the conduct of cost-benefit analysis, including because businesses may not provide important cost information or disclose methodological assumptions in their submitted cost estimates.<sup>76</sup>

It should not be controversial to recognize that corporations have a natural bias to overestimate cost of rules that may affect the way they conduct business. As a result, while there is a long history of industry claiming that the next regulation under consideration would unreasonably raise the cost of doing business, those claims routinely prove to be overblown.

- Bankers and business leaders described the New Deal financial regulatory reforms in foreboding language, warning that the Federal Deposit Insurance Commission and related agencies constituted "monstrous systems," that registration of publicly traded securities constituted an "impossible degree of regulation," and that the New Deal reforms would "cripple" the economy and set the country on a course toward socialism.<sup>77</sup> In fact, those New Deal reforms prevented a major financial crisis for more than half a century—until they were progressively scaled back.
- Chemical industry leaders said that rules requiring removal of lead from gasoline would "threaten the jobs of 14 million Americans directly dependent and the 29 million Americans indirectly dependent on the petrochemical industry for employment." In fact, while banning lead from gasoline is one of the single greatest public policy public health

<sup>75</sup> U.S. Senate Comm. on Homeland Sec. and Governmental Affairs, Pre-hearing Questionnaire for the Nomination of Cass R. Sunstein to Be Administrator of the Office of Information and Regulatory Affairs, p. 5. Available from: <[http://www.ombwatch.org/files/regs/PDFs/Sunstein\\_questions.pdf](http://www.ombwatch.org/files/regs/PDFs/Sunstein_questions.pdf)>. ("[C]ost-benefit analysis is a tool meant to inform decisions; it should not be used to place regulatory decisions in an arithmetic straightjacket").

<sup>76</sup> Ruttenberg, R. (2004). Not Too Costly, After All: An Examination of the Inflated Cost Estimates of Health, Safety and Environmental Protections. Available from <<https://www.citizen.org/documents/ACF187.pdf>>.

<sup>77</sup> Lincoln, T. (2011). *Industry Repeats Itself: The Financial Reform Fight*. Public Citizen. Available from: <<http://www.citizen.org/documents/Industry-Repeats-Itself.pdf>>.

accomplishments, the petrochemical industry has continued to thrive. The World Bank finds that removing lead from gasoline has a ten times economic payback.<sup>78</sup>

- Big Tobacco long convinced restaurants, bars and small business owners that smokefree rules would dramatically diminish their revenue—by as much as 30 percent, according to industry-sponsored surveys. The genuine opposition from small business owners—based on the manipulations of Big Tobacco—delayed the implementation of smokefree rules and cost countless lives. Eventually, the Big Tobacco-generated opposition was overcome, and smokefree rules have spread throughout the country—significantly lowering tobacco consumption. Dozens of studies have found that smokefree rules have had a positive or neutral economic impact on restaurants, bars and small business.<sup>79</sup>
- Rules to confront acid rain have reduced the stress on our rivers, streams and lakes, fish and forests.<sup>80</sup> Industry projected costs of complying with acid rain rules of \$5.5 billion initially, rising to \$7.1 billion in 2000; ex-ante estimates place costs at \$1.1 billion to \$1.8 billion.<sup>81</sup>
- In the case of the regulation of carcinogenic benzene emissions, "control costs were estimated at \$350,000 per plant by the chemical industry, but soon thereafter the plants developed a new process in which more benign chemicals could be substituted for benzene, thereby reducing control costs to essentially zero."<sup>82</sup>
- The auto industry long resisted rules requiring the installation of air bags, publicly claiming that costs would be more than \$1000-plus for each car. Internal cost estimates actually showed the projected cost would be \$206.<sup>83</sup> The cost has now dropped significantly below that. The National Highway Traffic Safety Administration estimates that air bags saved 2,300 lives in 2010, and more than 30,000 lives from 1987 to 2010.<sup>84</sup>

There is a long list of other examples from the last century—including child labor prohibitions, the Family Medical Leave Act, the CFC phase out, asbestos rules, coke oven emissions, cotton dust controls, strip mining, vinyl chloride<sup>85</sup>—that teach us to be wary of Chicken Little warnings about the costs of the next regulation.

<sup>78</sup> Crowther, A. (2013). *Regulation Issue: Industry's Complaints About New Rules Are Predictable -- and Wrong*. p.8. Available from: <<http://www.citizen.org/documents/regulation-issue-industry-complaints-report.pdf>>

<sup>79</sup> *Regulation Issue: Industry's Complaints About New Rules Are Predictable -- and Wrong*. p.10.

<sup>80</sup> Environmental Protection Agency. *Acid Rain in New England: Trends*. Available from: <<http://www.epa.gov/region1/eo/acidrain/trends.html>>.

<sup>81</sup> The Pew Environment Group. (2010, October). *Industry Opposition to Government Regulation*. Available from: <[http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Fact\\_Sheet/Industry%20Clean%20Energy%20Factsheet.pdf](http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Fact_Sheet/Industry%20Clean%20Energy%20Factsheet.pdf)>.

<sup>82</sup> Shapiro, I., & Irons, J. (2011). *Regulation, Employment, and the Economy: Fears of job loss are overblown*. Economic Policy Institute. Available from <<http://www.epi.org/files/2011/BriefingPaper305.pdf>>.

<sup>83</sup> Behr, P. (August 13, 1981). U.S. Memo on Air Bags in Dispute. Washington Post.

<sup>84</sup> National Highway Traffic Safety Administration. (2012). Traffic Safety Facts: Occupant Protection. Available from: <<http://www.nrd.nhtsa.dot.gov/Pubs/811619.pdf>>.

<sup>85</sup> *Regulation Issue: Industry's Complaints About New Rules Are Predictable -- and Wrong*; Hodges, H. (1997). *Falling Prices: Cost of Complying With Environmental Regulations Almost Always Less Than Advertised*. Economic Policy Institute. Available from: <<http://www.epi.org/publication/bp69>>; Shapiro, I., & Irons, J. (2011).

Second, cost-benefit analyses tend to include static estimates of cost, based on existing technologies and business systems. But industry and our national economy is characterized by technological dynamism, and compliance costs regularly fall quickly once new rules are in place. Many of the examples above—from benzene to air bags—illustrate this point, and there are many other examples. Indeed, regulation spurs innovation and can help create efficiencies and industrial development wholly ancillary to its directly intended purpose.

Looking at a dozen emissions regulations in 1997, Hodges found that early estimates of cost were at least double subsequent estimates or actually realized costs. (Interestingly, the Hodges study found that while emissions reductions estimated or actual costs fell dramatically over time, costs for clean-up typically exceeded estimates—underscoring the case for preventative regulation.)<sup>86</sup>

“Part of the reason for the error” of repeated overestimations of regulatory cost,” Hodges found “is that, over time, process and product technologies change. An estimate of the cost of compliance with a particular regulation might be based on one technology while actual compliance costs are based on another.” Once business must respond to implemented regulations, they stop bemoaning them and work to do so as efficiently as possible; technological innovation, learning by doing, and economies of scale routinely cut costs far below initial estimates.<sup>87</sup>

A decade ago, in a detailed report prepared for Public Citizen, Ruttenberg cited a series of factors that explained how technological dynamism led to actual costs far below those estimated in cost-benefit analysis:

- Cost-benefit analyses routinely exhibit inaccurate assumptions about the compliance path industry actually follows once new standards are in place;
- Cost-benefit analyses regularly fail to consider new adaptations of existing technologies to meet new standards;
- Cost-benefit analyses generally do not consider the positive effects of learning by doing and economies of scale;
- Cost-benefit analyses often fail to considering adaptations to technology already in place in other industries; and
- Cost-benefit analyses typically fail to account for new innovations that follow from new regulatory standards.<sup>88</sup>

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*Regulation, Employment, and the Economy: Fears of job loss are overblown.* Economic Policy Institute. Available from: <<http://www.epi.org/files/2011/BriefingPaper305.pdf>>.

<sup>86</sup> Hodges, H. (1997). *Falling Prices: Cost of Complying With Environmental Regulations Almost Always Less Than Advertised.* Economic Policy Institute. Available from: <<http://www.epi.org/publication/bp69>>

<sup>87</sup> Hodges, H. (1997). *Falling Prices: Cost of Complying With Environmental Regulations Almost Always Less Than Advertised.* Economic Policy Institute. Available from: <<http://www.epi.org/publication/bp69>>

<sup>88</sup> Ruttenberg, R. (2004). *Not Too Costly. After All: An Examination of the Inflated Cost Estimates of Health, Safety and Environmental Protections.* Available from <<https://www.citizen.org/documents/ACF187.pdf>>. pp 22-32.

Ruttenberg highlights the case of vinyl chloride as an illustrative case study. When OSHA began developing a new health standard to reduce the risk of workers developing liver cancer, the industry claimed that the new standard threatened to “shut down” the industry and estimated costs on the order of \$65-90 billion. Once the standard was in place, industry quickly implemented six technological changes—ranging from improved housekeeping to reduce exposures to new computerized production processes that reduced exposures and saved money—within 18 months. Retrospective analyses of costs placed them at far below 1 percent of industry’s pre-rule analyses, with actual costs placed at between \$25 million to \$182 million, depending on how costs are calculated.<sup>89</sup>

Third, although numerous business trade association papers suggest to the contrary, capital-intensive compliance costs do not continue to accumulate in perpetuity. When a new standard is in place, industry invests in improvements or new capital equipment to comply with new rules, after which costs are generally not recurring. (There are, to be sure, ongoing compliance costs in some instances, notably for ongoing reporting requirements, but those typically do not involve costs at the scale of regulations requiring significant capital investments.) One piece of evidence in this regard is that while industry regularly and aggressively contests new rules, at least in the health, safety and environmental areas, it does not continue to complain about rules once they are well established.<sup>90</sup>

Fourth, claims of precision notwithstanding, cost-benefit analysis is open to bizarre and second- and third-order accounting, in practice especially on the cost side. One deeply troubling example of bizarre cost-accounting is the “lost pleasure principle,” an application of “consumer surplus” theory. Under this theory, when a regulation takes away an option from consumers or makes it less likely they will choose an option they would have in the absence of the regulation, cost-benefit analysis should take into account the resulting “lost pleasure.” This is not the kind of factor that proponents of cost-benefit analysis would normally factor on the benefit side, to say the least, as I discuss further below. But they urge it be considered on the cost side. And the value they attribute to this purported cost can be extraordinarily high, since they impute the price that consumers were willing to pay for the product pre-regulation as the cost (multiplied by number of purchases).<sup>91</sup>

Confoundingly, some economists have even argued for application of the lost pleasure principle when regulations lead consumers to make new choices simply based on new information; one would actually anticipate that consumer welfare increases when consumers are better informed and make choices accordingly, with no diminution in consumer “pleasure.” If I choose to eat apples instead of apple pie because nutrition labeling has educated me on the health impact of eating too much apple pie, it hardly makes sense to say a regulation has cost me pleasure. I’ve made my own choice, based on regulation helping me better understand my choices.

<sup>89</sup> Ruttenberg, R. (2004). Not Too Costly, After All: An Examination of the Inflated Cost Estimates of Health, Safety and Environmental Protections. Available from <<https://www.citizen.org/documents/ACF187.pdf>>. pp 32-33.

<sup>90</sup> Lincoln, T. (2014, September 16.) Streamlining the Rules-Making Process. The Hill. Available from: <<http://thehill.com/blogs/congress-blog/the-administration/217751-streamline-the-rules-making-process>>.

<sup>91</sup> See Ashley, E., Nardinelli, C. and Lavaty, R. (2015.) Estimating the Benefits of Public Health Policies that Reduce Harmful Consumption. 24 Health Economics 5, 617-624.

Yet actual economists doing cost-benefit analysis that helps establish new government rules have employed exactly this Through-the-Looking-Glass logic. They have done so even in the case of an addictive product, cigarettes,<sup>92</sup> where there is a new layer of absurdity because most adult users actually say they would like to stop using it.<sup>93</sup>

Against all measures of common sense, these economists for a time succeeded in applying the lost pleasure principle to food labeling and tobacco regulations. After an ensuing public controversy—and deep concern expressed by a number of Senators, including on this committee—the Department of Health and Human Services scaled back, at least for now, use of the lost pleasure principle.<sup>94</sup> Thus, it appears that the ongoing outrage of the lost pleasure principle interfering with proper standard setting—at least in the consumer health area—has been alleviated, for now. But the serious suggestion of such an approach, which was held to reduce benefits by as much as 70-90 percent in some cases, shows how easy it is to manipulate cost-benefit analysis, and underscores the massive imprecision in cost-benefit exercises.

Fifth, cost-benefit analysis systematically underestimates benefits. New regulatory costs can—and should—also be considered benefits in many cases. That is, costs to regulated businesses are not the same as social costs. New productive capital investment helps create new demand, creates new jobs, and helps spur new technology. These benefits are rarely captured in cost-benefit analyses, in part because they are uncertain, in part because they appear to be second-order effects (even though the mirror image of direct costs). Yet these benefits are significant, which is why the actual impact on employment of consumer, health, safety and environmental regulation is far less than anti-regulatory forces claim and in many cases may well register a net zero or positive impact.

Cost-benefit analysis also systematically underestimates benefits because of its insistence on, or at least strong bias in favor of, monetization. Yet health, safety, consumer, environmental, employment and similar regulatory protections yield benefits that are not easily monetized, and attempts to translate these benefits into monetary terms almost always fall short of capturing the full range of improvements they afford to our standard of living. The benefits of not losing an arm, of not choking for air when breathing, of not dying a painful and early death from cancer, of not feeling the stress of debt collector calls or the prospect of losing your home go far beyond what can be captured in a dollar figure. So too many other benefits of regulation—enhanced privacy, dignity, equality, freedom and liberty, fairness, community, a functioning democracy and many others—evade easy capture by a dollar figure.

<sup>92</sup> See Begley, S. (2014, June 2.) FDA Calculates Costs of Lost Enjoyment if E-cigarette Rules Prevent Smoking. Reuters. Available from: <<http://www.reuters.com/article/2014/06/02/us-fda-tobacco-insight-idUSKBN0ED0A620140602>>.

<sup>93</sup> See Chaloupka, F. et. al. (2014, December 30.) An evaluation of the FDA's Analysis of the Costs and Benefits of the Graphic Warning Label Regulation. Tobacco Control. 10.1136/tobaccocontrol-2014-052022; Song, A., Brown, P., Glantz, S. (2014, May 30). Comment on the Inappropriate Application of a Consumer Surplus Discount in the FDA's Regulatory Impact Analysis, Docket No. FDA-2014-N-0189. Available from: <<https://tobacco.ucsf.edu/sites/tobacco.ucsf.edu/files/u9/FDA-comment-consumer-surplus-May30-%201jy-8cdp-qb60.pdf>>.

<sup>94</sup> Begley, S. and Clarke, T. (2015, March 18.) U.S. to Roll Back "Lost Pleasure" Approach on Health Rules. Reuters. Available from: <<http://www.reuters.com/article/2015/03/18/us-usa-health-lostpleasure-idUSKBN0ME0DD20150318>>.

What is the price tag on the pain a parent feels when they back their car over their child? That's not easily answered, but surely the benefit of preventing that pain is real. But such considerations generally do not merit inclusion in official cost-benefit analyses.

When Congress directs the Department of Justice to eliminate prison rape but to avoid "substantial additional costs," should the government also conduct a cost-benefit analysis reliant in part on what victims would be willing to pay to avoid rape? It is common sense that the answer is no, but this actually occurred. Morally revolting on its face, Georgetown University Professor Lisa Heinzerling lays bare the logic of this exercise: "In the strange logic and twisted morality of cost-benefit analysis, the victim—not the perpetrator—must be willing to pay up to avoid the crime." She adds, pointedly, that "rape is a serious crime, not a market transaction" and "that framing rape as a market transaction strips it of the coercion that defines it."<sup>95</sup>

Last, and related to the previous point, while perhaps it is unavoidable in some areas of public policy, the idea of placing a dollar value on a human life should, at minimum, be approached with great humility—an attribute one would not normally associate with the practitioners of cost-benefit analysis.

Justin Zemser.

Jim Gaines.

Abid Gilani.

Rachel Jacobs.

Dr. Derrick Griffith.

Giuseppe Piras.

Laura Finamore.

Bob Gildersleeve.

These are the names of the men and women killed in the recent Amtrak crash.<sup>96</sup> The National Transportation Safety Board says that crash could have been prevented if Positive Train Control technology had been in place, as the NTSB has long advocated. Yet although the NTSB has urged adoption of the technology since 1970, and although Congress in 2008 mandated that all railroads deploy the technology by December 31, 2015, this objective will not be met. (Amtrak appears to be ahead of most railroads in deployment.) There are plainly many factors accounting

<sup>95</sup> Heinzerling, L. (2012, June 14.) Cost-Benefit Jumps the Shark: The Department of Justice's Economic Analysis of Prison Rape. Available from: <<http://www.progressivereform.org/CPRBlog.cfm?idBlog=EB3B070D-F7A0-1489-B361DA6B35ABC16E>>.

<sup>96</sup> AP. (2014, May 14.) All 8 Fatal Victims in Amtrak Crash Identified. Available from: <<http://6abc.com/news/all-8-fatal-victims-in-amtrak-crash-idd/719973>>.

for the delay in meeting the Congressional mandate. But it may be that one reason for that regulatory delay was that some officials believed that the regulatory standard was not cost effective.<sup>97</sup>

That was easy enough to say when the deaths averted were just statistical abstractions. Now, with the horrible and apparently preventable deaths of identifiable human beings, things are dramatically different. The cost-benefit-analysis-influenced delay of the implementation of Positive Train Control technology now seems callous, cruel and fundamentally wrong—and it was. But all that has changed is we now replace statistical abstractions with human compassion.

**Remedies:** Decision makers should recognize that cost-benefit analysis is a flawed analytic tool that may be of some assistance on some occasions, but not one that should be determinative in the rulemaking process. At bare minimum, Congress should not act to impose new cost-benefit analytic requirements on agencies, or to make cost-benefit determinations more controlling.

#### **E. Imbalanced and inappropriate judicial review**

Judicial review of agency action is an important and necessary part of our administrative process and general system of checks and balances, but judicial review of rulemakings has gone awry. Most major rules are challenged in court upon issuance, and lengthy challenges by regulated parties are standard. One significant problem is that there is a major imbalance in the ability of regulated parties and the public to challenge rules (or the failure to issue rules) on procedural or substantive grounds. A second major problem is the misguided importation by courts of cost-benefit requirements into review of agency action. There are other problems related to judicial review of agency action, notably an overly expansive view of corporate First Amendment speech rights, that are beyond the purview of this testimony, but worth noting.

##### **1. Imbalanced rights to challenge agency action: the standing problem.**

On behalf of consumers and the public whom all regulation is ultimately intended to benefit, Public Citizen has brought numerous challenges to agency regulations during our almost 45-years of work. The challenges are an important tool for ensuring that agencies adhere to statutory requirements and make rational decisions based on the available information. Over the past 20 or so years, however, a series of unduly narrow standing decisions have impeded our ability, and the ability of litigants representing the broad public interest, to obtain judicial redress for unlawful agency action that will cause them injury.

The Supreme Court's and DC Circuit's standing decisions aim to confine the federal courts to their legitimate function of resolving "actual cases or controversies" and "to prevent the judicial process from being used to usurp the powers of the political branches."<sup>98</sup> But in too many cases, a court has denied standing to parties who are threatened with "certainly impending" injuries that

<sup>97</sup> See Mann, T. (2013, June 17.) Rail Safety and the Value of a Life. Wall Street Journal. Available from: <http://www.wsj.com/articles/SB10001424127887323582904578485061024790402>; Freedman, D. (2015, May 18.) Obama Official Once Said Train-Safety Cost Outweighed Benefit. Connecticut Post. Available from: <http://www.ctpost.com/local/article/Obama-official-once-said-train-safety-cost-6271486.php>.

<sup>98</sup> *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

are “fairly traceable” to an agency’s action,<sup>99</sup>—even action that they claim violates a clear statutory limit on the agency’s authority. In these cases, to dismiss the case for lack of standing constitutes an abdication of the judicial function of deciding cases. That abdication is all the more serious when, as has happened in several cases, it prevents adjudication of a legal issue that has profound national consequences.

To be sure, “generalized grievances” are not a basis for standing.<sup>100</sup> And we do not suggest that the fact that a regulation or policy may be harmful means that the particular parties challenging it necessarily have standing. By the same token, the fact that a policy causes concrete harms to a many members of the public does not mean that each of those people do not have standing to challenge it.<sup>101</sup>

For example, in one case, the DC Circuit’s very narrow view of standing barred litigation of challenge to a NHTSA rule setting the standard for tire pressure monitoring systems that Congress directed the agency to make driving safer. Although the standard was intended for the benefit of the public, that court held that Public Citizen did not have standing to challenge it on behalf of our members (all at some point vehicle owners, drivers, passengers, or pedestrians) unless we could show statistically that the agency’s rule presented a substantially increased risk of harm to consumers and that the ultimate risk is substantial. In addition, the court said that because the injury alleged was based on the government’s regulation of automakers, not regulation of Public Citizen members, to demonstrate standing we had to show that causation did not depend on choices made by the automakers. Specifically, we were instructed to show that automakers would not voluntarily exceed the safety standard that NHTSA adapted; that drivers would not seek to prevent injury to themselves or to other people by manually checking their tires and then inflating them properly; and to show that drivers will pay attention to the warning light that will be installed in cars. Not only had two of these topics had been addressed specifically in the Federal Register notices that accompanied issuance of both rules, but the court’s instruction effectively questioned the conclusions of Congress in enacting the law requiring NHTSA to require these monitoring devices.

When Congress has addressed the matter that is the subject of our suit and the agency failed to do what Congress asked it to do, the courts are an appropriate and proper place to hold the executive branch accountable for failure to abide by the law. It is simply not practicable or desirable to expect Congress to revisit the issue each time the agency does not live up to the legislative mandate. Congress, through the Administrative Procedure Act and statutes that authorize judicial review of agency actions, has confirmed that courts can and should entertain such suits. That does not mean that a plaintiff or a petitioner does not need to have stake in the case, because, after all, the case or controversy requirement comes from the Constitution, not from Congress. Once Congress has spoken, however, and the agency has acted, the courts have an important role to play.

What is crucial to emphasize is that judicially created standing doctrine does not affect all parties evenly; instead, it creates a structural advantage for the corporate sector. In general, the courts

<sup>99</sup> *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1143 (2013).

<sup>100</sup> *Lance v. Coffman*, 549 U.S. 437, 439 (2007).

<sup>101</sup> See *Federal Election Comm’n v. Akins*, 524 U.S. 11, 24-25 (1998).

typically hold that regulated parties have standing to challenge agency action. In contrast, organizations and individuals seeking to realize rights and protections conferred by Congress face much greater difficulties; under the case law, it is not uncommon that no person or individual is deemed to have standing to enforce agency compliance with congressional directives.

## 2. Judicially imposed requirements of cost-benefit analysis.

The relationship between Congress, the regulatory agencies and the courts is a complicated one, not subject to simple formulaic rules about appropriate level of judicial deference to agency action. On the one hand, it is appropriate for the courts to ensure agencies are faithful to Congressional directives. On the other hand, the courts need show deference to the technical expertise of agencies, which are designed to convert broad Congressional directives into concrete rules. Judges should not abrogate well-crafted rules, nor invent requirements for rules to be justified by cost-benefit tests that are not statutorily required.

Yet as cost-benefit analysis has intruded deeper into the rulemaking process, courts have begun to subject these analyses to scrutiny, or to impose their own cost-benefit requirements on agency decision making. Because of the inherent imprecision of cost-benefit analysis, and because of relative institutional strengths, courts should subject agency cost-benefit analyses to no or exceedingly deferential review and should not impose cost-benefit requirements on agencies.

*Business Roundtable v. SEC*<sup>102</sup> is a case that highlights the concern about courts and cost-benefit analysis. In *Business Roundtable*, the D.C. Circuit struck down rule 14a-11 (the "proxy access rule"). Adopted by the SEC pursuant to authority under the Dodd-Frank Act, the rule would have allowed long-term shareholders to include nominees for the board of directors in a publicly traded company's proxy statement. Without such a right, shareholders in most instances have no realistic means of running candidates for director against management-selected candidates.

The D.C. Circuit held that the SEC had failed to meet its "unique obligation"<sup>103</sup> to analyze rules for their impact upon "efficiency, competition, and capital formation"<sup>104</sup> under Section 3(f) of the Exchange Act,<sup>105</sup> thereby rendering the SEC's promulgation of the rule "arbitrary and capricious."<sup>106</sup> Yet, nothing in the relevant legislative history indicates that Congress intended for the SEC's economic analyses relating to "efficiency, competition, and capital formation" to be akin to full blown cost-benefit analysis or take precedence over the SEC's primary mission to protect investors.<sup>107</sup> Nonetheless, in a string of recent cases,<sup>108</sup> the D.C. Circuit has interpreted this language as imposing a duty on the SEC to fully assess the costs and benefits of their

<sup>102</sup> *Business Roundtable v. SEC* 647 F.3d 1144 (D.C. Cir. 2011).

<sup>103</sup> *Business Roundtable v. SEC*, 1148.

<sup>104</sup> *Business Roundtable v. SEC*, 1148.

<sup>105</sup> 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a-2(c).

<sup>106</sup> *Business Roundtable v. SEC*, 1155.

<sup>107</sup> See Generally James D. Cox and Benjamin J.C. Baucom, *The Emperor Has No clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 Tex. L. Rev 1811 (2012).

<sup>108</sup> *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005); *American Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010).

regulations and determine, in some instances, that the regulation yields a "net benefit."<sup>109</sup> In the *Business Roundtable* opinion, the D.C. Circuit lambasted the SEC for "having failed once again ... adequately to assess the economic effects of a new rule"<sup>110</sup> by having "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgment; contradicted itself; and failed to respond to substantial problems raised by commenters."<sup>111</sup>

Several features of the decision are remarkable. First, the SEC was acting pursuant to specific Dodd-Frank-conferred power, which authorized the agency to adopt a rule requiring "that a solicitation of proxy, consent, or authorization by (or on behalf of) an issuer include a nominee submitted by a shareholder to serve on the board of directors of the issuer."<sup>112</sup> This fact was unmentioned in the court's decision, and earned the agency no deference. Second, the court failed to address the fact that the benefit of advancing shareholder democracy is inherently non-quantifiable. Third, the extraordinarily intrusive review of agency decision-making included a challenge to the benefit of shareholder democracy—a value that one might think speaks for itself, but in any case was clearly the underlying objective of Congress in authorizing the SEC to issue a proxy access rule.<sup>113</sup>

**Remedies:** *Business Roundtable* has cast a shadow over Dodd-Frank and other agency rulemaking, making agencies fearful and reluctant to proceed with rulemakings. Congress should act to establish clearer and more deferential standards of judicial review where agencies are acting in response to specific Congressional directives, and as regards cost-benefit analysis, and should make clear that courts are not to impose their own cost-benefit tests on agency action.

#### F. Regulation to assist small business and promote competitive markets

Much of the regulatory policy debate over the last couple years has misleadingly focused on the impact of regulation on small business, with regulation critics claiming that regulation poses unreasonable burdens on small business. In surveys and poll data, small businesses generally do not agree with their purported advocates. They cite inadequate demand and economic uncertainty as their biggest problems.<sup>114</sup> And regulatory law is replete with special and intentional protections for smaller firms, which are exempt from many rules.

<sup>109</sup> *Business Roundtable v. SEC*, 1153.

<sup>110</sup> *Business Roundtable v. SEC*, 1148.

<sup>111</sup> *Business Roundtable v. SEC*, 1148-49.

<sup>112</sup> Section 971.

<sup>113</sup> *Business Roundtable v. SEC*. ("By ducking serious evaluation of the costs that could be imposed upon companies from use of the rule by shareholders representing special interests, particularly union and government pension funds, we think the Commission acted arbitrarily.")

<sup>114</sup> Small Business Majority. (2011). *Opinion Survey: Small Business owners Believe National Standards Supporting Energy Innovation Will Increase Prosperity for Small Firms*. Available from: <[http://smallbusinessmajority.org/energy/pdfs/Clean\\_Energy\\_Report\\_092011.pdf](http://smallbusinessmajority.org/energy/pdfs/Clean_Energy_Report_092011.pdf)>. Similarly, in a 2011 informal survey, McClatchy/Tribune News Service found no business owners complaining about regulation. Hall, K. G. (2011, 1 September). *Regulations, taxes aren't killing small business, owners say*. McClatchy Newspapers. Available from: <<http://www.mcclatchydc.com/2011/09/01/122865/regulations-taxes-arent-killing.html>>.

What has been missing from the regulatory policy debate is a focus on the ways that regulation does—or should—assist small business in creating a level playing field.

First, as a preliminary matter in this area, policymakers concerned about aiding small business might fruitfully focus on the issue of regulatory compliance. Small firms may on occasion have difficulty discerning what standards apply to them and what they must do to meet their obligations under various rules. There may be value in legislation encouraging agencies to conduct more outreach, education and compliance assistance to small businesses on their regulatory obligations. Agencies with Small Business Ombudsman offices could be tasked with ensuring that those offices are conducting effective regulatory outreach and education to small businesses. “Best practices” guidelines for federal agencies could be established, including those with Small Business Ombudsman offices, to follow when working to ease regulatory compliance for small businesses.

A larger area of Congressional focus should aim to address the problem that leading sectors of the economy are highly concentrated, and that widespread anti-competitive conduct unfairly disadvantages small business, while also hurting consumers and overall economic efficiency.

Congress and regulators should look to reinvigorate antitrust and competition policy. Action across a broad range of areas would very meaningfully advance small business success, and ensure smaller companies are not unfairly exploited, disadvantaged or eliminated by larger rivals.

- Large banks receive a massive implicit government subsidy thanks to the widespread market perception that these institutions are “too big to fail”—in other words, that protestations to the contrary, the government will in times of crisis bail out these giant banks to prevent a financial system meltdown. Because the market judges these institutions too big to fail, the giant banks are able to access capital at costs significantly below that are available to regular banks, as well as obtain other implicit subsidies. Various analysts place this benefit as ranging from tens of billions of dollars annually to more than \$100 billion, with the scale of the subsidy varying over time.<sup>115</sup>

**Remedies:** This subsidy plainly disadvantages smaller banks and credit unions, and is itself a compelling reason—there are many other such reasons—to break up the giant banks. At bare minimum, this goliath bank subsidy emphasizes the imperative of a financial sector competition policy that removes the unfair advantage giant firms obtain.

- Patent enforcement by patent acquiring entities—often known colloquially as “patent trolls”—imposes a significant tax on innovation, especially by small business. Enforcement actions and license fees by these entities are skyrocketing, now costing almost \$30 billion a year, with researchers finding only a quarter of this total flowing

<sup>115</sup> See Federal Reserve of Minneapolis. (2013, November 18-19). Workshop: Quantifying the Too Big to Fail Subsidy. Available from: <<https://www.minneapolisfed.org/publications/special-studies/too-big-to-fail/quantifying-the-too-big-to-fail-subsidy>>. Bloomberg. (2013, Feb 20.) *Why Should Taxpayers Give Big Banks \$83 Billion a Year*. Available from: <<http://www.bloomberg.com/news/2013-02-20/why-should-taxpayers-give-big-banks-83-billion-a-year.html>>.

back to innovation.<sup>116</sup> **Remedies:** Stronger rules should protect small business innovators, and innovative large corporations as well, from improper patent enforcement actions.

- Anticompetitive practices are widespread in the energy industry, including in electricity markets. "Anticompetitive agreements between sellers in regional wholesale electricity markets have forced consumers to pay hundreds of millions of dollars more for electricity than they would have in the absence of such conduct," notes the American Antitrust Institute's Diana Moss. "In these markets, which are structurally vulnerable to the exercise of market power, anticompetitive agreements spanning even a short time can result in large wealth transfers from consumers to suppliers."<sup>117</sup> Those consumers include small business.

Recently, enforcement against anticompetitive conduct by the Federal Electric Regulatory Commission has picked up considerably, with FERC notably suspending companies found to have lied to regulators and engaging in anticompetitive actions. However, the deregulated structure of electricity markets creates the potential for anticompetitive activity, and suggests the need for new rules to ensure competitive benefits are actually accruing.

Last month, for example, Public Citizen filed an emergency complaint at FERC<sup>118</sup> alleging that Houston-based Dynegy, Inc. may have intentionally withheld several of its power plants from a power auction conducted by the Midcontinent Independent System Operator (MISO), the results of which were announced on April 14, 2015. The auction was intended to procure adequate supplies through 2016 for most of downstate and midstate Illinois. The bidding strategies of Dynegy and other suppliers, combined with the rules under which the auction was conducted, pushed auction prices up for much of Illinois from \$16.75 per megawatt-day last year to \$150 this year, an increase of 800 percent. Even if illegal manipulation did not occur, the dramatic spike—resulting in a rate for Illinois that is more than 40 times that in neighboring states despite abundant generating capacity in Illinois—indicates a violation of the Federal Power Act's fundamental requirement that rates be just and reasonable. These are the sort of market abuses that impact small business and demand a regulatory response.

**Remedies:** New rules should be created to ensure transparency standards apply to the non-governmental agencies, known as Regional Transmission Organizations, charged

<sup>116</sup> See Leibowitz, J. (2012, Dec. 10.) Patent Assertion Entity Workshop: Opening Remarks. Federal Trade Commission. Available from: <<http://www.ftc.gov/speeches/leibowitz/121210paeworkshop.pdf>>; Skitol, R. (2012, Dec. 14.) FTC-DOJ Workshop on Patent Assertion Entity Activities: Fresh Thinking on Potential Antitrust Responses to Abusive Patent Troll Enforcement Practices. Available from: <[http://www.antitrustinstitute.org/~antitrust/sites/default/files/PAE%20Workshop%20\(3051321\\_1\).pdf](http://www.antitrustinstitute.org/~antitrust/sites/default/files/PAE%20Workshop%20(3051321_1).pdf)>.

<sup>117</sup> Moss, D. (2013, Jan. 10.) *Collusive Agreements in the Energy Industry: Insights into U.S. Antitrust Enforcement*. American Antitrust Institute. p. 6. Available from: <[http://www.antitrustinstitute.org/~antitrust/sites/default/files/AAI%20Working%20Paper%202013-2\\_%20Section%201%20Energy.pdf](http://www.antitrustinstitute.org/~antitrust/sites/default/files/AAI%20Working%20Paper%202013-2_%20Section%201%20Energy.pdf)>.

<sup>118</sup> Public Citizen, Inc. v. Midcontinent Independent System Operator, Inc.. Emergency Section 206 Complaint of Public Citizen, Inc. And Request For Fast Track Processing, May 28, 2015. Available from: <<http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=5533>>.

with running deregulated electricity markets. New rules should be established to ensure consumer, small business and state government representation in their decision-making processes. Additionally, legislation or perhaps new regulation is needed to overturn the "filed rate doctrine," which can immunize electricity traders from antitrust liability where conduct involves regulated, filed rates.

- Private antitrust enforcement—an important tool for small firms victimized by unfair practices from larger competitors—has become increasingly difficult. One notable obstacle to effective private enforcement are unreasonably high pleading standards, which require victimized plaintiffs to make evidentiary showings that they frequently cannot make before undertaking discovery. **Remedies:** Congress should act to overturn the ruling in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), as well as *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
- Forced arbitration provisions in contracts are denying small businesses and consumers effective access to justice on a large scale. These provisions also often unfairly treat small business franchisees, which are often victimized by forced arbitration provisions in their franchise agreements.

In recent years, the Supreme Court has issued a series of rulings holding that the pro-arbitration preference of the Federal Arbitration Act preempts state rules designed to ensure consumers access to traditional civil courts, as well as state rules protecting consumers' rights to join together in class actions. As a result, large corporations are able to include forced arbitration provisions in standard form contracts; and to insert anti-class action language into their arbitration provisions as a way to block collective actions that are often critical to addressing wrongdoing that affects large numbers of people in a small way.

The Supreme Court's 2013 decision in *American Express v. Italian Colors Restaurant* illustrates the potential stakes for small business.<sup>119</sup> In this case, American Express sought to enforce an arbitration agreement that prohibits merchants that accept its charge cards from filing class actions or otherwise sharing the cost of legal proceedings against it. The merchants aimed to hold American Express liable for a tying arrangement that allegedly violated antitrust laws (American Express insists merchants accept its unpopular credit cards if they want to accept its popular charge cards), but because expensive expert testimony was required to prove the claims, the cost of arbitrating an individual case would dwarf any possible recovery. Even in this case, where the arbitration agreement and class action ban concededly made it impossible for a small business to bring an antitrust lawsuit against a large company, the Supreme Court held that the arbitration agreement was controlling. It did not matter to the Court that this was a case where a large company used its market power to force on small business a provision that prevents them from seeking a remedy to an abuse of market power.

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<sup>119</sup> *American Express v. Italian Colors Restaurant*, 570 U. S. \_\_\_\_ (2013).

*Remedies:* Congressional remedies to these problems should include a prohibition on forced arbitration provisions in consumer, employment and civil rights cases<sup>120</sup> and a restoration of states' authority to enforce their contract and consumer protection laws.

### **III. Conclusion: Strengthening the System of Regulatory Protections to Strengthen America**

There is much to celebrate in our nation's system of regulatory protections. It has tamed marketplace abuses and advanced the values we hold most dear: freedom, safety, security, justice, competition and sustainability. We should celebrate the achievements of regulatory protections.

But in its current form, the regulatory system is failing to meet its promise. Rather than looking at how to scale back or hinder the regulatory system, Congress should look to reforms to strengthen regulatory enforcement, stiffen penalties for corporate wrongdoing, speed the rulemaking process, address uneven judicial review of regulations, and adopt pro-competitive rules to level the playing field for small business and improve the economy and consumer well-being.

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<sup>120</sup> See the Arbitration Fairness Act, S. 1133, introduced by Senator Al Franken.



**Statement of the  
American Farm Bureau Federation**

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*Testimony of*

**Ellen Steen  
General Counsel and Secretary  
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*before the*

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**“Examining the Federal Regulatory System  
to Improve Accountability, Transparency and Integrity”**

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June 10, 2015

Chairman Grassley, Ranking Member Leahy, and Members of the Committee, thank you for calling this important hearing on the transparency and integrity of federal agency rulemaking and inviting me to testify on behalf the American Farm Bureau Federation (AFBF) and the nation’s farmers and ranchers.

My name is Ellen Steen, and I am the General Counsel and Secretary of AFBF. In my current position and in two decades of private law practice prior to joining AFBF, I have been involved in dozens of agency rulemakings, primarily focused on U.S. Environmental Protection Agency (EPA) rules under the Clean Water Act. I have litigated the validity and interpretation of EPA rules and policies, experiencing first-hand the deference that courts show agency regulations and agency interpretations of their regulations.

As I explain below, the new “waters of the U.S. rule” rulemaking broke new ground, turning an already imperfect process into essentially a public relations campaign. Like any campaign, the last year has been full of “spin” created by former campaign officials now leading agency communications teams, mutual accusations of misleading the public, public officials derisively dismissing concerns of the opposition, suggestions that opposition to the rule amounts to opposition to clean water, tit-for-tat responses and public rejection of opposing views—all in the middle of a rulemaking public comment period. If this characterization of the rulemaking process troubles the Committee, it should. I invite the Committee to peruse the attachments to this testimony to get a flavor of what has become of our federal rulemaking process.

**Executive Summary**

The notice-and-comment procedure for rulemaking is designed to ensure that agencies take honest account of the thoughts and concerns of the regulated public and to hold agencies to their stated rationales when regulations are challenged in court. When it works as it should, the notice-and-comment process guarantees just what Congress, with the APA, set out to accomplish: a deliberative process of soliciting and considering public input, followed by an agency decision and response to the public’s input. It’s often not exciting—sometimes even dull—but that back-and-forth is essential to sound decision-making and to the integrity of the rulemaking process.

EPA’s handling of the Waters of the United States Rule—a regulation of extraordinary practical and financial importance to farmers, ranchers and most anyone else who grows, builds,

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or makes anything in this Nation—flouted the APA’s notice-and-comment process in three key respects:

- *First*, throughout the rulemaking process, EPA publicly derided concerns expressed about the proposed rule (including the concerns of Farm Bureau and our farmer and rancher members). Legitimate concerns how the rule would affect agriculture, in particular, were subtly twisted and then dismissed as “silly” and “ludicrous” and “myths.” Public statements from the agency’s highest officials made it clear that the agency was not genuinely open to considering objections to the rule.
- *Second*, EPA engaged in an extraordinary public relations campaign to solicit support for (but not informed comment on) the rule. The campaign consisted almost entirely of non-substantive platitudes about the rule’s purported benefits, while omitting any meaningful information about the actual content of the rule—i.e. *what the rule would do, and what activities would be regulated as a result*. The campaign substituted blogs, tweets and UTube videos for what should have been an open and honest exchange of information between the agency and the public.
- *Finally*, the agency allowed its own internal timeline, and perhaps the presidential election cycle, to dictate issuance of a proposed rule before the fundamental scientific study underlying the proposal was complete and available for public review—and then to dictate issuance of a final rule without providing a further opportunity for public comment on major changes made in that final rule. Regardless of the agency’s motivations, the integrity of the rulemaking process demands that the public have an opportunity to review and comment on the basis for an agency’s proposal and on any major changes *before* they appear in a final regulation.

This flawed process recently culminated in the issuance of a deeply flawed regulation, the true costs and regulatory impact of which have not been seriously considered and may not be known for years. But regardless of whether you supported, opposed, or never heard of that rule, you should shudder to think that this is how controversial regulations will be developed in the age of social media. Agencies must strive maintain an open mind throughout the rulemaking process—and to inform rather than indoctrinate and obfuscate—even when policy issues have become controversial and politicized.

The overbroad and vague rule that EPA has promulgated to define “waters of the United States” perfectly illustrates another serious problem with agency rulemaking. The federal courts’ current approach to determining whether a rule is lawful involves deferring to the agency’s interpretation of a statute and deferring again to the agency’s interpretation of its own rules. As scholars and some of the Justices of the Supreme Court have pointed out, this two-stage system of deference actually encourages agencies to promulgate broad and vague rules, and then to expand their power by interpreting those rules broadly during the course of implementation and enforcement.

With the “waters” rule, EPA has repeatedly and emphatically assured farmers and the public, in speeches and blogs, that the new rule will not increase permitting obligations for farmers or “get in the way” of farming. But those of us who have litigated agency rules, and

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agency interpretations of their rules, know that courts are unlikely to give much weight to speeches and blogs. Months and years from now, with an ambiguous regulation before a judge, the agency's interpretation will be unassailable. The end result is that the regulated community is ambushed: the rules allow for a wide range of interpretations, the agency's informal campaign during rulemaking provides a narrow and comforting interpretation, and the regulated first learn their actual obligations and liabilities when the enforcement actions begin. This is not how it was meant to be.

### Introduction

As the Members of this Committee know better than most, the statutes enacted by Congress—no matter how carefully drafted—frequently leave room for interpretation. That isn't necessarily a bad thing. It would be as unwise and it would be impracticable for Congress to attempt to foresee every possible application of each statute that it writes. Leaving room for interpretation introduces common sense flexibility as unanticipated circumstances arise. The law gets worked out as much in its implementation as it does in its drafting.

As the Supreme Court explained in the watershed case, *Chevron v. Natural Resources Defense Council*, by leaving interpretive “gaps” in statutes, Congress leaves it to expert agencies to promulgate regulations to *fill* those gaps. But there is reason to be cautious on that score. There is very little, after all, to distinguish a statute enacted by Congress from the statute's implementing regulations, promulgated by a federal agency comprising unelected bureaucrats. According to the Supreme Court, agency rules that fill gaps in statutes have the force and effect of law and, under *Chevron* deference, are given controlling weight by the courts. Put simply, rules that fill gaps in statutes have *legislative* effect.

For that reason, it's essential that the process for promulgating agency rules be open and transparent and ensure accountability. That is precisely the purpose of the APA. The APA was enacted in 1946 against a background of rapid expansion of administrative rulemaking as a check on federal agencies whose enthusiasm for rulemaking risked regulatory excesses not contemplated by Congress. The Act guards against such excesses in part by mandating a public notice-and-comment process.

The notice-and-comment process is at the heart of the APA and the goals it was designed to achieve. As a general matter, before an agency makes a rule, it must *first* notify the public of the proposal and invite comment on the rule's perceived virtues and vices; *second*, consider the comments and arguments submitted by the public; and *finally*, make a final decision and explain that decision in a statement of the rule's basis and purpose. This process should force agencies to take honest account of the knowledge, experience, and concerns of the public (including the regulated public) and allow courts to later hold agencies to their stated rationales when regulations are challenged in court. When it works as it should, the notice-and-comment process ensures just what Congress set out to accomplish with the APA: ensuring meaningful public input and a public record to hold agencies accountable for their stated rationale and intent in the rulemaking process.

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Unfortunately, agencies have recently been testing—and we think exceeding—the limits of what the notice-and-comment procedure permits. AFBF’s recent experience with EPA’s “Waters of the United States Rule” offers a troubling example.

First, a little background. Under the 1972 Clean Water Act, it is illegal (without a permit or other specific statutory authorization) to discharge pollutants from a point source—such as nozzles on equipment used to spread fertilizer and pesticides—into the “navigable waters.” Congress defined “navigable waters” as “waters of the United States.” The term has been the subject of controversy, rulemaking by both EPA and the U.S. Army Corps of Engineers, and inconsistent judicial interpretation ever since. Not surprisingly, EPA’s most recent regulation defining its jurisdiction over “waters of the United States” was the subject of vigorous debate.

It is no surprise that agriculture and other industries that engage in activities on the land have very serious substantive concerns with scope of EPA’s Waters of the U.S. rule—which defines as “waters of the U.S.” many features that simply look like *land*, not *water*, and that are ubiquitous across the countryside. It will not be a surprise that we strongly believe the rule is an arbitrary and capricious interpretation of the Clean Water Act, exceeds EPA’s constitutional authority, and is simply bad policy that will cause costly and unhelpful disruptions in the national economy. But we understand those concerns are beyond the scope of this Committee’s current inquiry. Here we will focus on the defects in the process by which EPA arrived at the rule, which we believe help to explain why EPA got the substance of the rule so wrong. EPA made mistakes because it finalized the rule according to an opaque and deeply flawed process that failed to hold EPA to account to state and local governments, the regulated public, and the basic economic and other analyses that are meant to inform agency rulemaking—in fact, it treated these as obstacles to be overcome rather than as sources of input and information that would improve the final rule.

There were three core problems with the rulemaking process that should be of special concern to the Committee and its Members, which I have identified in bullet points in the Executive Summary of this testimony. I’ll now say a bit more about each of these concerns.

#### **Closed-Mindedness**

EPA first published the proposed Waters of the United States rule on April 21, 2014, and the public comment period remained open until November 14, 2014. AFBF did not immediately oppose the rule. Rather than jump to conclusions, our staff carefully reviewed the lengthy proposal and came to the conclusion that the rule’s vague language would dramatically expand EPA’s jurisdiction, allowing it to regulate virtually all “waters”—including countless land areas across the countryside where rain channels and flows only immediately after rainfall, ditches running alongside and within farm fields, and isolated low spots in the middle of farm fields. We prepared information for our members to help them understand the rule and voice their concerns (since we are a grassroots advocacy organization). In the end, we and scores of other organizations representing agriculture and other industries’ interests—plus the vast majority of state, county and municipal governments—submitted detailed comments as part of the notice-and-comment process, expressing grave concerns about the impact of the rule on a wide range of commonplace and essential land use and land management activities.

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But long before we sent the official comments to the record, all indications were that EPA's mind had already been made up, and that our comments had no hope of being taken seriously. For example, in an article appearing in *Farm Futures* (perma.cc/KH98-6WVU), EPA Administrator Gina McCarthy was quoted—on July 9, 2014, in the middle of the public comment period—as calling the Farm Bureau's concerns “ludicrous” and “silly” and based on “myths.” Farmers and ranchers across the country told us they read her remarks and took them personally. How could we expect our comments to receive fair consideration when they were already being dismissed out-of-hand as silly? The answer—we could not.

Instead, as described below, EPA's conduct over the coming months demonstrated not only that its mind and ears were closed, but also that it was firmly entrenched and fiercely “messaging” a misleading picture of the proposed rule designed to placate opposition within the regulated community and build ill-informed support among the lay public.

#### **Manipulation of the Public and the Process**

EPA's conduct throughout the rulemaking gave the striking appearance of advocacy aimed at generating public support and “cooking the books” to overcome procedural hurdles like the economic and regulatory impact analyses.

With regard to public support, EPA engaged in an aggressive social media and promotional campaign designed to dampen opposition and manufacture support for the rule. Immediately upon releasing the proposed rule (before we at Farm Bureau or the general public had even had an opportunity to read it), EPA announced purportedly wide-spread support for the rule from businesses and agriculture.<sup>1</sup> Fast on the heels of that came a public webcast sponsored by EPA's Watershed Academy, proclaiming that the rule “does NOT protect any new types of waters”, “does NOT broaden historical coverage of the Clean Water Act,” “does NOT expand regulation of ditches,” would “benefit” agriculture, and was shaped by “input from the agricultural community.”<sup>2</sup>

EPA's campaign right out of the gate made it incumbent on Farm Bureau, the nation's largest general agricultural organization representing farmers and ranchers, to not only develop comments to the agency, but to launch our own campaign to inform our members and the public about the true impact of the rule. The result was our “Ditch the Rule” grassroots campaign, which explained to farmers and rural America through our website and social media how EPA's proposed rule would expand federal jurisdiction over stormwater drainage paths, ditches, and small “wetland” areas—in the process increasing federal permit requirements for routine farming and ranching practices as well as other common private land uses, like building homes.

Not long after our campaign went live, a competing campaign called “Ditch the Myth” went public and continues today. Remarkably, however, that campaign was not launched by an environmental advocacy group—instead, it was launched by *EPA itself*. To our knowledge, this

<sup>1</sup> EPA News Release, “Here's What They're Saying About the Clean Water Act Proposed Rule” (March 25, 2014).

<sup>2</sup> EPA Waters of the U.S. Proposed Rule Webcast (April 7, 2014).

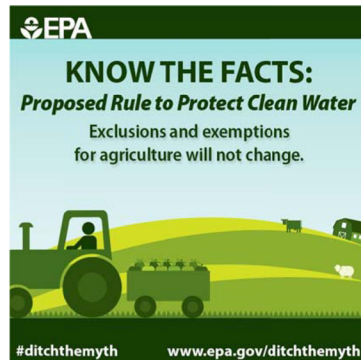
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was an unprecedented move. The APA requires EPA to listen to comments and concerns on its proposed rule; it does not contemplate an agency engaging in a publicly funded campaign to influence the comments that the public makes and explicitly reject public criticisms of a proposed rule during the comment period.

Worse, the content of EPA’s “Ditch the Myth” campaign was fundamentally misleading and directed at rejecting criticisms made by the very same industries that would be regulated by the rule. For example, EPA’s “Know the Facts” slides assured the public that “normal farming activities like planting crops and moving cattle do not require permits.” But that is extremely misleading, since “normal” farming under the Clean Water Act is in fact a term of art that has been extremely narrowly interpreted and has *never* been construed to include moving cattle (not to mention commonplace activities like applying fertilizer and crop protection products). The agency also asserted that “regulation of ditches is actually decreased.” But that, too, is simply false—the rule would automatically regulate many ditches as “tributaries,” whereas previously any ditch that does not carry water most of the time could only be regulated after a case-specific analysis by the agency. In the end, most claims that EPA made in its public campaign were, at best, artfully phrased to mislead the public:



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Similarly, throughout the summer and early fall of 2014, EPA put out official blogs on its websites and “question and answer” documents for public consumption—again, in the middle of the public comment period—rejecting the Farm Bureau’s and other groups’ arguments that the rule: (1) dramatically expands the agency’s jurisdiction compared to current law (given that the Supreme Court has long since found the previous decades-old overbroad regulations to be unlawful); (2) perpetuates the costly vagueness of prior rules; and (3) would allow EPA and the Corps of Engineers to require permits or simply disallow innumerable commonplace activities on the land nationwide, including farming and ranching activities like building a fence, fertilizing and protecting crops, and grazing livestock. The question-and-answer document put forth a new round of carefully crafted and misleading statements that the rule would not increase federal jurisdiction (false), would not regulate land where water flows after rainfall (false), and would

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not require permits for the protection and fertilization of crops (false).<sup>3</sup> Farm Bureau responded the following month with a detailed rebuttal,<sup>4</sup> and the public battle waged on. Strikingly, this battle was not over the policy merits of expanding jurisdiction or of increasing federal permitting of farming and other land uses—which would be a worthwhile public discussion—but simply over whether or not the rule *would* expand jurisdiction and increase federal regulation of land use. EPA has insisted it will not, but those statements are absent from the official public notices that judges would typically look to in construing an agency rule.

Beyond its “Ditch the Myth” campaign, EPA engaged in an aggressive “Thunderclap” social media campaign, designed to drum up superficial support for the rule outside the regulated community. Thunderclap is a company that provides a “crowdspeaking” platform, which, in its own words, “allows a single message to be mass-shared, flash mob-style, so it rises above the noise” and helps “create action and change like never before.” See [perma.cc/EBD4-KLR5](http://perma.cc/EBD4-KLR5). EPA’s Thunderclap campaign coupled a picture of a child drinking water over a meaninglessly one-dimensional statement: “Clean water is important to me. I support EPA’s efforts to protect it for my health, my family, and my community.” Thunderclap then directed people to a link so they could support the rule through social media and further the campaign. EPA’s Thunderclap campaign purportedly reached 1.8 million people.<sup>5</sup>

Through Thunderclap and the coordinated efforts of environmental groups and political action groups (in particular, Organizing for America (OFA)), EPA was able to boost superficial support for the rule by hundreds of thousands of well-intended people who never read or even looked at the proposed rule. In the preamble to its final rule, EPA boasts that the agency received “over 1 million public comments on the proposal, the substantial majority of which supported the proposed rule.” Of course, this omits that over 900,000 of the so-called “comments” fit on less than four single-paced pages. It also omits that the rule was overwhelmingly opposed in detailed substantive comments by the majority of state governments, county and municipal governments, and associations and companies from virtually every sector of the U.S. economy.<sup>6</sup> Of course, agency rulemaking does not and should turn on public polling—but for EPA to claim to be responsive to public comments—in this context—rings hollow.

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<sup>3</sup> See Questions and Answers – Waters of the U.S. Proposal, EPA and U.S. Army Corps of Engineers (undated but released in September 2014) (attached).

<sup>4</sup> See Trick or Truth? What EPA and the Corps of Engineers Are *Not* Saying About Their “Waters of the U.S.” Proposal (Oct. 30, 2014) (attached).

<sup>5</sup> “I Choose Clean Water” Thunderclap, by U.S. Environmental Protection Agency (attached).

<sup>6</sup> Although agencies traditionally have discounted comments submitted as part of a mass campaign, EPA appears to have adopted a different approach—counting and tallying up individual non-substantive comments like petition signatures, postcards, and copied emails. For example, rather than counting one electronic petition bearing 218,542 names as one comment, EPA appears to have counted it as 218,542 comments. Similarly, a petition organized by OFA, the former campaign for the President Obama (which still uses the President’s picture on its communications), generated 69,369 signatures, each of which was counted as a separate comment. In contrast, a single, detailed substantive comment letter signed by attorneys general from 11 states and governors from 6 states opposing the rule appears to have been counted as one comment.

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EPA also seems to have gamed the economic and other required analyses designed to ensure an informed final rule. EPA's economic analysis, for example, cited a 3% increase in the scope of its jurisdiction, which was revised for the final rule to 4%. EPA widely cited this 3% figure in its public communications, as evidence of the modest impact of the rule. The final economic analysis itself (at page vi), however, states that it *does not* purport to estimate the scope of the increase in CWA jurisdiction under the rule—and indeed EPA has made no effort to estimate the degree of expansion:

“To estimate how the costs and benefits of CWA programs may change as a result of a change in the number of positive jurisdictional determinations under this rule, the EPA reviewed a sample of negative jurisdictional determinations (JDs) (i.e., determinations of no jurisdiction) completed by the Corps in fiscal years 2013 and 2014 to assess how the JD would change if the final rule had been in place. The EPA looked at a random sample of 188 jurisdictional determination files, which represents 782 individual waters in 32 states. *It is important to emphasize that the economic analysis focuses exclusively on the costs and benefits from CWA programs that would result from the associated change in negative JDs, rather than an analysis of how the scope of jurisdiction changes - nationwide data do not exist on the extent of all waters covered by the CWA.* The agencies generally only make jurisdictional determinations on a case-specific basis at the request of landowners.” (emphasis added)

Thus, according to the agencies' economic analysis, they actually do not know, and haven't attempted to estimate, how much the scope of CWA jurisdiction will increase under the rule.

Likewise, EPA certified that the proposed rule would not have a significant economic impact on small businesses for purposes of Section 609(b) of the Regulatory Flexibility Act, asserting that the rule would be *narrower* in scope than previous regulations. Yet those prior rules have long since been found overbroad and unlawful, and which therefore do not reflect current practice, as pointed out in an objection by the SBA Office of Advocacy.<sup>7</sup>

In promoting the environmental benefits of the rule to the lay public, however, the agencies use a much larger figure. In this context, EPA boasts that the rule will protect 60% of the nation's flowing streams, and millions of acres of wetland, that otherwise lack clear protection.<sup>8</sup>

<sup>7</sup> SBA Office of Advocacy letter to The Honorable Gina McCarthy (Oct. 1, 2014).

<sup>8</sup> “But right now 60 percent of the streams and millions of acres of wetlands across the country aren't clearly protected from pollution and destruction. In fact, one in three Americans—117 million of us—get our drinking water from streams that are vulnerable.... EPA and the U.S. Army Corps of Engineers has proposed to strengthen protection for the clean water that is vital to all Americans.” EPA Thunderclap campaign ending Sept. 29, 2014 (copy attached). “The Supreme Court decisions in 2001 and 2006 left 60 percent of the nation's streams and millions of acres of wetlands without clear federal protection, according to EPA, causing confusion for landowners and government officials.” <http://abcnews.go.com/Politics/wireStory/epa-rules-protect-drinking-water-regulate-small-streams-31332848>

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So how big is this expansion of EPA's regulatory reach? 3-4%, 0%, or 60%? Most seasoned Clean Water Act practitioners would tell you the answer is somewhere closer to 60%—maybe more. Yet this is nowhere reflected in the economic and regulatory impact analysis underlying the rule.

#### **Circumvention of Notice and Comment**

Much of the communication by EPA to AFBF, other stakeholder groups, and the public during this rulemaking occurred outside the Federal Register and the formal public comment process. Yet even within the formal notice-and-comment process, EPA gave short shrift to the substantive give-and-take that Congress envisioned when it enacted the APA. Under settled APA notice and comment requirements, “[a]mong the information that must be revealed for public evaluation are the technical studies and data upon which the agency [relies in its rulemaking].” *American Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 236 (D.C. Cir. 2008). Agencies are not permitted to promulgate rules based on “data that, to a critical degree, is known only to the agency.” *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 376, 393 (D.C. Cir. 1973). Instead, the “critical factual material” used by the agency must *itself* be “tested through exposure to public comment.” *American Radio Relay League*, 524 F.3d at 236.

That did not happen in the Waters of the U.S. rulemaking. Throughout the comment period, the EPA's linchpin scientific report was undergoing review by the Science Advisory Board. It wasn't until October 2014 that the Advisory Board submitted its formal review to the agency. And that review suggested major changes to the report, which as a result was not finalized until well *after* the close of the comment period. Organizations like the Farm Bureau should have had an opportunity to comment on the final science report, which we believe is deeply flawed. EPA could easily have reopened the comment period for a short time for the express purpose of allowing comment on the amended science report. Consistent with its efforts to marginalize critical comments, however, EPA issued a final rule and report without ever having allowing the public to comment on the amended version of the science report that underlies the final rule.

Furthermore, the substantial changes that EPA made between its proposed and final rule means that many of the key provisions of the final rule, including definitions of key concepts like “tributary,” “neighboring,” and “significant nexus,” have never been tested by notice and comment. While we understand EPA's desire to limit rulemaking to one round of notice and comment, there is no doubt that when an agency makes substantial changes from the proposed rule the rulemaking process would benefit from seeking comments on those changes. A practice of reopening the comment period to address major changes before a rule becomes final would improve agency transparency and accountability and result in better rules that are less open to attack in litigation. And the lack of such a practice could encourage agencies to save the “real” rule for final publication and thereby avoid public comment on key but controversial provisions of the rule.

### Conclusion

The net result of all of this should, in our view, be of deep concern to the Members of this Committee. As a result of its unprecedented public relations campaign and the cutting short of the comment process, EPA effectively pulled the wool over the lay public's eyes. Among EPA's public explanations for the rule was its promise that the rule would bring greater clarity and predictability. In fact, the rule accomplished the exact opposite, leaving agency bureaucrats with unbridled discretion to determine the reach of the Clean Water Act. The result will be widespread uncertainty and enforcement risk for the hundreds of thousands of family farmers and ranchers whose interests the Farm Bureau represents.

But beyond its practical impact on the regulated public, this uncertainty does even further violence to the integrity of the notice-and-comment rulemaking process. As you know, the general rule is that courts will defer to an agency's interpretation of its own ambiguous regulations. The Supreme Court has warned in recent cases that this so-called *Auer* deference encourages agencies to be vague in framing regulations, which then allows them the discretion to make case-by-case "interpretations" of the regulation later. The result is that subsequent interpretations of vague regulations—many of which will be made, in this case, in the context of enforcement actions—form the true substance of the regulation, but are never tested through the notice and comment procedure. See *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part). In other words, *Auer* deference allows an agency, "under the guise of interpreting a regulation, to create de facto a new regulation" without going through formal APA rulemaking. *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 881 (2011). That is just what the Waters of the U.S. rule accomplishes—EPA has promulgated a vast and vague regulation, the *real* substance of which will be determined by unaccountable agency staff, without notice-and-comment rulemaking. Such opaque and unaccountable governance should be of deep concern to every member of this Committee, and to the public at large.

We at the American Farm Bureau Federation appreciate the Committee's willingness to listen to our concerns. Thank you.

**Attachments to Steen  
Written Testimony**

**June 10, 2015**

**CONTACT:**

[press@epa.gov](mailto:press@epa.gov)

**FOR IMMEDIATE RELEASE**

March 25, 2014

## Here's What They're Saying About the Clean Water Act Proposed Rule

**WASHINGTON** -- Today, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers released a proposed rule to clarify protection under the Clean Water Act for streams and wetlands, benefitting families who rely on safe places to swim and healthy fish to eat, farmers who need reliable sources of water to grow their crops, hunters and fishermen who depend on healthy waters for recreation and work, and businesses that need a steady supply of water for operations. Streams and wetlands provide many benefits to communities, including trapping floodwaters, recharging groundwater supplies, removing pollution, and increasing economic vitality because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.

Here's what folks are saying about the proposed rule:

**American Sustainable Business Council (ASBC) | Richard Eidlin, Co-founder and Policy Director**

"American business has always depended on the availability of clean water for its success, and EPA's regulation in this area historically has been a prime example of the vital partnership between business and government. Whether a company is a food producer, a high tech manufacturer of silicon wafers, outdoor recreation guide or a beer manufacturer, businesses rely on clean water to produce high quality and safe products. Ever since the passage of the Clean Water Act in 1972, the EPA has been charged with ensuring that our water supply remains safe. Today, we applaud the EPA for taking steps to clarify that small streams, wetlands and other tributaries are protected by the Act. Degradation and loss of wetlands or small streams can increase the risk of floods there by threatening businesses."

**ASBC member businesses and partners also commented on the proposed new rule.**

"On behalf of the employee owners at New Belgium Brewing and our Alternately Empowered culture, we offer a toast to 40 great years of the Clean Water Act and to the EPA and Obama Administration's leadership to make sure our water -- and our beer -- continues to be of the highest quality. We are thrilled for these incremental protections announced today that will help improve whole system watershed health," said Andrew Lemley, Government Relations Director for **New Belgium Brewing Company**, Fort Collins, CO.

"As a small business owner who personally experienced the negative economic impact of a recent chemical spill in West Virginia's Elk River, I know how crucial it is for strengthening EPA regulations to protect our waterways," said Nancy Ward, CEO, **Cornucopia**, Charleston, WV.

"Water is quite literally the main ingredient for the foods we eat, and it is also central to the daily operations of our business. Clean and protected water thus couldn't be more important to King Arthur Flour and our commitment to healthy foods and a healthy planet," said Suzanne McDowell, VP of Human Resources, **King Arthur Flour Company**, Norwich, VT.

"Protection of small streams and wetlands is critical for maintaining the health of our food supply, communities, and businesses dependent on clean water. Used for livestock and crop irrigation upstream, and in food production, breweries, home kitchens and restaurants further down, the incalculable economic and social value of unpolluted water requires more than adequate safeguards and protections for a strong economy," said Hilary Baum, Director, **Chefs for the Marcellus**, a campaign of food producers and businesses dedicated to protecting NYC's regional foodshed. [[Press Release](#), 3/25/2014]

**National Farmers Union | Chandler Goule, National Farmers Union (NFU) senior vice president of programs**

"NFU has long advocated for increased certainty surrounding Clean Water Act requirements for family farmers and ranchers in the wake of complicating Supreme Court decisions. Today's draft rule clarifies Clean Water Act jurisdiction, maintains existing agricultural exemptions and adds new exemptions, and encourages enrollment in U.S. Department of Agriculture conservation programs. In addition, farmers and ranchers who are voluntarily enacting certain conservation practices on their farms will be exempt from Clean Water Act Section 404 permitting requirements. Today's ag-friendly announcement clearly indicates that NFU and other agricultural stakeholders made their voices heard, and EPA took notice." [[Press Release](#), 3/25/2014]

**Natural Resources Defense Council | Peter Lehner, Executive Director**

"This is good news for boaters, anglers, swimmers and families who rely on clean drinking water. EPA took an important step to finally rescue these waters from legal limbo. Even though these are commonsense protections, the polluters are sure to attack them. People who care about clean water need to make their voices heard in the comment period." [[Press Release](#), 3/25/2014]  
NRDC Blogs by [Peter Lehner](#), [Karen Hobbs](#) & [Jon Devine](#).

**North Carolina Wildlife Federation | Tim Gestwicki, CEO**

"This is a huge step forward for protecting our waters and wildlife. We simply cannot protect our rivers, lakes, and bays without protecting the many small streams and wetlands that feed into them. The proposal clarifies which waters are—and which are not—protected by the Clean Water Act. It will protect many streams and wetlands that are currently in legal limbo. The rule also specifically excludes many man-made ditches, ponds, and irrigation systems and honors the law's current exemptions for normal farming, ranching, and forestry practices." From mountain trout anglers, to piedmont bass enthusiasts and duck hunters in eastern NC, this is a critical step towards protecting our sporting heritage and our outdoor future." [[Press Release](#), 3/24/2014]

**Center for Rural Affairs| John Crabtree, CEO**

"The proposed rule is a commonsense effort to clear the regulatory waters, protect the quality of the nation's surface waters, and provide an environment in which economically vital activities such as hunting, fishing and birding as well as farming and ranching can both thrive and contribute to a better quality of life and safer drinking water for those of us that live here, and also for our neighbors downstream." [[Press Release](#), 3/25/2014]

**Izaak Walton League | Scott Kovarovics, Executive Director**

"The Corps and EPA are proposing balanced, science-based policy to restore essential protections for streams, wetlands, and other waters. The proposal will better protect streams that provide drinking water to 117 million people and help conserve streams and wetlands that are vital to a vibrant outdoor recreation economy." [[Press Release](#), 3/25/2014]

**Ducks Unlimited | Dale Hall, CEO**

"The release of the draft rule gets us one step closer to better defining Clean Water Act regulations in regard to wetlands. We are also pleased with the open process EPA has adopted, which invites the public, Congress and all interested parties to participate in the discussion. EPA's draft science report last year showed many categories of wetlands, including prairie potholes, may be geographically isolated but are still connected to, and have a significant impact on, downstream waters." [[Press Release, 3/25/2014](#)]

**Trout Unlimited| Chris Wood, President and CEO**

"Today's proposal speaks to the heart of the Clean Water Act—making rivers more fishable and swimmable. The waters affected by today's proposal provide vital spawning and rearing habitat for trout and salmon. Simply stated, the proposal will make fishing better, and anglers should support it. Restoring protections to these waters ensures healthy habitat for fish and a bright future for anglers." [[Press Release, Blog, 3/25/2014](#)]

**Environment America| Margie Alt, Executive Director**

"Whether we look back to the recent spill in West Virginia that left 300,000 people without drinking water or ahead to the dead zones that will blight Lake Erie and the Chesapeake Bay this summer, it's obvious that our waterways are not as clean or safe as we need them to be – for our drinking water, for recreation, or for the health of our ecosystems and wildlife. Today's action by the EPA will help ensure that all our waterways get the protection they need so we can enjoy them for years to come. When finalized, this rule will be the biggest step forward for clean water in more than a decade." [[Press Release, 3/25/2014](#)]

**American Rivers | Bob Irvin, President of American Rivers**

"What happens in small streams and wetlands upstream affects the health of our rivers and the communities that depend upon them downstream. The proposed rule released today by the Environmental Protection Agency relies on sound science to clarify the scope of protections under the Clean Water Act for these critical upstream waters that contribute to our drinking water supplies and protect us from flooding. This is an important step forward to better protect and restore our nation's rivers." [[Press Release, 3/25/2014](#)]

**Clean Water Action| Bob Wendelgass, Clean Water Action President and CEO**

"These small streams are critical to the health of drinking water sources for nearly one third of all Americans. The rule proposed today is clear, concise, and well supported by both the law and science. It's long overdue - Congress protected these vital resources when the landmark Clean Water Act passed in 1972 and these protections were wrongly revoked 12 years ago. This proposal, when finalized, will go a long way toward restoring protections and reflecting the way that water works in the real world." [[Press Release, 3/25/2014](#)]

**League of Conservation Voters | President Gene Karpinski, CEO**

"This is an important step forward for restoring the true scope of the Clean Water Act and protecting our nation's waterways. This rule will protect vital streams and wetlands that provide drinking water for over 117 million Americans, filter pollution, and reduce the impacts of flooding and erosion." [[Press Release, 3/25/2014](#)]

**Theodore Roosevelt Conservation Partnership | Whit Fosburgh TRCP President and CEO**

"Several leading sportsmen's organizations – the [American Fly Fishing Trade Association](#), [Berkley Conservation Institute](#), [Izaak Walton League of America](#), [National Wildlife Federation](#), [Theodore Roosevelt Conservation Partnership](#), [Trout Unlimited](#) and [Wildlife Management Institute](#) – applauded the release of the proposed rule, saying that it would better protect important habitats for fish and wildlife. We

are pleased the administration has taken this crucial step to provide clarity and certainty to landowners, conservationists and businesses regarding waters of the United States. Long overdue, this action restores some – but not all – Clean Water Act protections to these critical resources, conserving healthy habitat, upholding water quality and supporting the sporting traditions that tens of millions of Americans enjoy." [[Press Release](#), 3/25/2014]

**Clean Water Action | Minnesota Center For Environmental Advocacy Minnesota Conservation Federation | Minnesota Trout Unlimited | Izaak Walton League | Minnesota Environmental Partnership**

"State conservation groups strongly support a new federal rule, announced today by the Obama Administration, which aims to better protect U.S. waters from pollution and destruction, including those in Minnesota. This rule will benefit millions of people across the country and in Minnesota. The rule removes confusion over which streams and wetlands are covered by the Clean Water Act due to polluter friendly court decisions and subsequent Bush administration policies. It's good for our environment, economy, and quality of life." [[Press Release](#), 3/25/2014]

**Conservation Federation of Missouri/National Wildlife Federation | Larry Schweiger, the National Wildlife Federation's President and Chief Executive Officer**

"This is a huge step forward for protecting America's waters and wildlife. You cannot tear out a tree's fine roots and expect it to survive. The streams and wetlands protected by this rule supply drinking water to more than one-third of all Americans. Our rivers, lakes, and bays will be cleaner and healthier once this rule becomes the law of the land. "This proposal clarifies which waters are-and which are not-protected by the Clean Water Act. It will protect streams and wetlands that are currently in legal limbo. The rule also specifically excludes many man-made ditches, ponds, and irrigation systems and honors the law's current exemptions for normal farming, ranching, and forestry practices. "Our only disappointment is that the proposal stops short of restoring full protections for many wetlands important for wildlife, such as prairie potholes, Carolina bays, vernal pools, and playa lakes. We look forward to making the legal and scientific case for protecting these waters during the comment period to come." [[Press Release](#), 3/25/2014]

**Outdoor Alliance member American Whitewater | National Stewardship Director Kevin Colburn**

"The recreational, ecological, and economic benefits of clarifying Clean Water Act protection for headwater streams are enormous. The new rule will protect the quality of water in our taps, flowing through our communities, and under our boats. The nation's headwater rivers and streams are particularly important in providing clean cold drinking water for millions of Americans. These same streams offer world-class recreation opportunities that improve the quality of life and economic viability for countless communities."

[[Press Release](#), 3/25/2014]

**Evangelical Environmental Network | Rev. Mitch Hescox President & CEO**

"We are thankful that the U.S. Army Corps of Engineers and the EPA have worked together to propose a new rule that clarifies the protection needed to ensure pure water, defend our children's health, and codify exemptions that have long applied to farmers. There are simply too many stories like a crude oil spill in Texas that fouled drinking water, 5000 gallons of oil spilled into a stream in Denver, or livestock waste in Georgia polluting a local lake. Each of the above and many more were never enforced because of confusion created." [[Press Release](#), 3/25/2014]

R068

# Waters of the U.S. Proposed Rule

Webcast sponsored by EPA's Watershed Academy



**Monday, April 7, 2014**  
**1:00pm – 3:00pm Eastern**

**Instructors:**

**Nancy Stoner**, Acting Assistant Administrator, Office of Water, U.S. Environmental Protection Agency

**Donna Downing**, Jurisdiction Team Leader, Wetlands Division, U.S. Environmental Protection Agency

## Tips for Attending Our Webcasts

- **If you hear an echo** – Close all browser windows except the webcast presentation and/or mute the presentation using the microphone icon in the lower left corner of the screen.
- **If you experience technical difficulties** – Type your issue in the text box located at the bottom of your screen, and click on the Ask button. You may need to use the scroll bar to see the response below.
- **If you cannot see the Ask a Question box at the bottom of your screen** – Change your screen resolution by clicking on Tools in your web browser and selecting Zoom out.

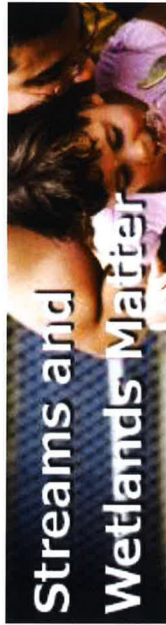
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- **To See Closed Captioning** – Turn your pop-up blocker off and click on the “closed captioning” button.
- **To Complete the Evaluation** – Click on the radio button to the left of your choice and click submit. Do not type your answer in the questions box at the bottom of your screen.

## Today's Webcast

- **“Waters of the US” Proposed Rule**
  - Developed and released jointly by the US Environmental Protection Agency and the US Army Corps of Engineers
  - The proposed rule defines the term “waters of the United States,” which describes waters protected by Clean Water Act programs
  - Clarifies protection under the Clean Water Act for streams and wetlands





Streams and  
wetlands  
benefit  
communities



Streams and wetlands are economic drivers

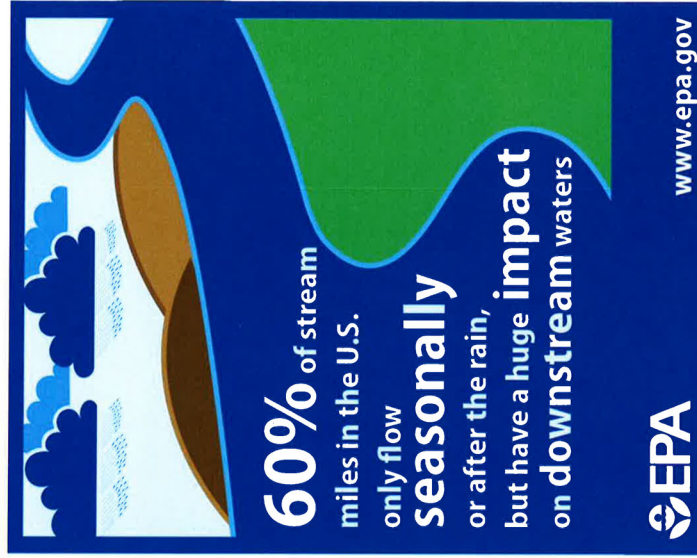
**Streams and wetlands are major economic drivers because of their role in**

- fishing
- hunting
- agriculture
- energy
- recreation
- manufacturing

**EPA** [www.epa.gov](http://www.epa.gov)

The infographic features a central circular graphic with a blue and green wave pattern. Six icons are arranged around this central graphic, each representing an economic sector: a fish for fishing, a person with a bow for hunting, a tractor for agriculture, a power plant for energy, a person swimming for recreation, and a factory for manufacturing. The text 'Streams and wetlands are major economic drivers because of their role in' is positioned to the left of the central graphic. The EPA logo and website URL are at the bottom.

Upstream  
waters impact  
downstream  
waters



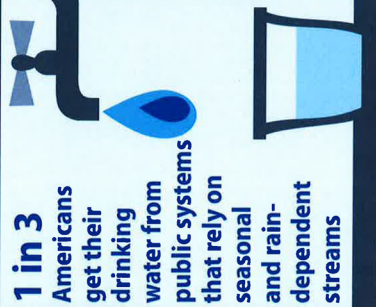
**60%** of stream  
miles in the U.S.  
only flow  
**seasonally**  
or after the rain,  
but have a huge **impact**  
on **downstream** waters

**EPA**

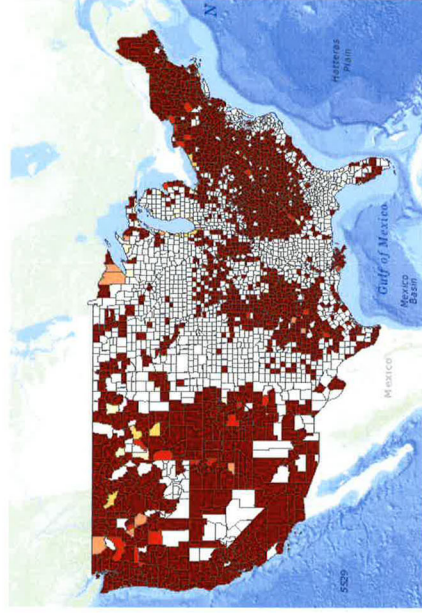
[www.epa.gov](http://www.epa.gov)

Streams provide drinking water

**1 in 3**  
Americans  
get their  
drinking  
water from  
public systems  
that rely on  
seasonal  
and rain-  
dependent  
streams



**EPA** [www.epa.gov](http://www.epa.gov)





Rulemaking was requested by many stakeholders

Congress Industry Public

State & local government Agriculture

Hunters & fishermen Environmental groups

# Protection

under the law has been difficult

Drinking Water and Edwards Creek, Texas



Recreation in Lake Blackshear, Georgia

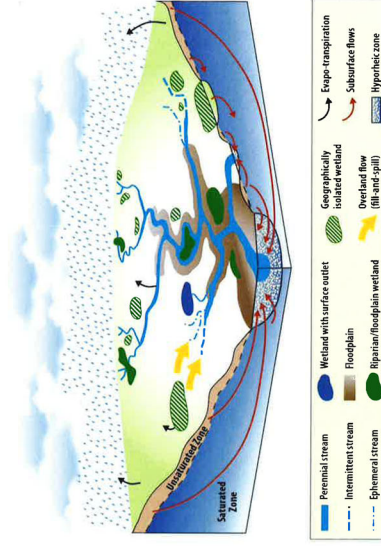


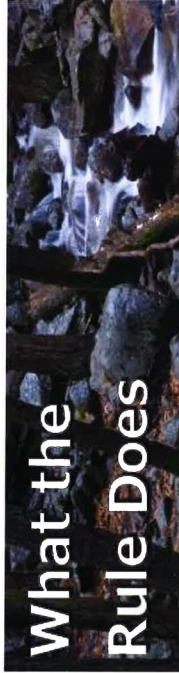
Pollution in San Pedro River, Arizona



Supported by latest peer-reviewed science

Scientific  
assessment of  
**1,000+**  
pieces of  
literature







Reduces  
confusion  
about  
Clean  
Water Act  
protection

---

Stream systems are protected



Wetlands near  
rivers and  
streams  
are protected





Other types of waters will be evaluated on a case specific analysis.

Saves Time and Money



Provides More Benefits to Public Than Costs

**BENEFITS**

**\$388 to  
\$514 million**

- Reducing flooding
- Filtering pollution
- Providing wildlife habitat
- Supporting hunting & fishing
- Recharging groundwater

**COSTS**

**\$162 to  
\$279 million**

- Mitigating impacts to streams & wetlands from dredged or fill material
- Taking steps to reduce pollution to waterways.

Helps states to  
protect their  
waters



**36 states** have limitations  
on the ability to  
**protect waters**  
that aren't covered by the  
**Clean Water Act**

Source: Environmental Law Institute

**EPA** [www.epa.gov](http://www.epa.gov)



What the Rule Does **NOT** Do

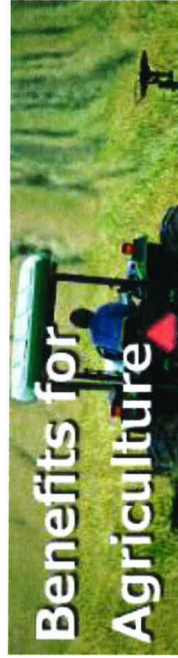
Does **NOT** protect any new types of waters

Does **NOT** broaden historical coverage of the Clean Water Act

Does **NOT** regulate groundwater

Does **NOT** expand regulation of ditches

Does **NOT** remove any exemption currently in the statute or regulations



Input from agriculture community  
shaped the proposal



## All Exemptions and Exclusions Preserved

- Normal farming, silviculture, and ranching practices.
- Artificial lakes or ponds created by excavating and/or diking dry land and used for purposes such as rice growing, stock watering or irrigation.
- Upland soil and water conservation practices.
- Agricultural stormwater discharges.
- Artificial ornamental waters created for primarily aesthetic reasons.
- Return flows from irrigated agriculture.
- Water-filled depressions created as a result of construction activity.
- Construction/maintenance of farm or stock ponds or irrigation ditches on dry land.
- Pits excavated in upland for fill, sand, or gravel.
- Maintenance of drainage ditches.
- Prior converted cropland.
- Construction or maintenance of farm, forest, and temporary mining roads.
- Waste treatment systems (including treatment ponds or lagoons).
- Artificially irrigated areas that would revert to upland if irrigation stops.

# 56 conservation practices exempt from dredged or fill permitting

- Conservation cover
- Wildlife habitat restoration
- Wetland enhancement
- Riparian forest buffer
- Tree/shrub establishment
- Stream crossing

Permit not needed for the specific NRCS practices



### Questions?

.....

22)

## How we got here

The Clean Water Act, Supreme Court cases, and calls for rulemaking

## The Clean Water Act



- The Clean Water Act covers “navigable waters,” which the Act defines as “waters of the United States including the territorial seas.”
- The scope of Clean Water Act jurisdiction affects all Clean Water Act programs, including pollutant permitting (§402), permitting for dredged or fill material (§404), and oil spill prevention (§311).
- The Clean Water Act’s goal is to protect the physical, chemical, and biological integrity of the nation’s waters
- The Act does not define “Waters of the United States,” leaving it to the EPA and the Corps to give more detail to the term through rulemaking.
- The current regulatory definition is **essentially unchanged since the late 1970s**



## Supreme Court Decisions

- **Riverside Bayview Homes (1985)**: Unanimous decision upholding agencies' regulatory definition including "adjacent wetlands" as waters of the U.S.
- **SWANCC (2001)**: Use of waters by migratory birds not sufficient basis for jurisdiction.
- **Rapanos (2006)**: Splintered decision provides relative permanence and significant nexus as standards for determining CWA protection.

## About the proposed rule

## WUS Proposal Overview

- Defines “waters of the US” (WUS) for all CWA programs in light of Supreme Court cases.
- Establishes bright line categories for:
  - Waters that are WUS and covered by the CWA.
  - Waters that are not WUS.
- **Retains** existing exemptions.
- For certain issues, poses questions to solicit public comment on options.

## Bright line categories of jurisdictional waters

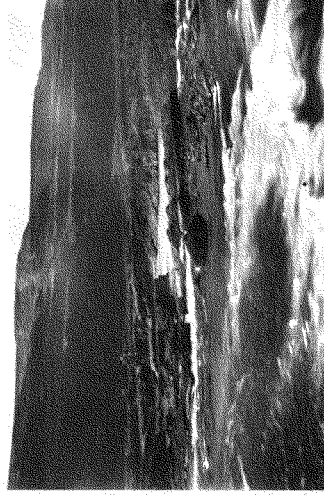
### Traditional Navigable Waters (TNWs)

- Rule language is unchanged: categorically a water of the U.S.
- TNWs are waters that either carry or have potential to carry commercial navigation, including recreational navigation.
  - When deciding if water has potential for future commercial navigation, among relevant factors are the water's physical characteristics.
- Does not define or affect scope of waters for which states can assume responsibility for CWA section 404 permitting.



## Interstate Waters

- Rule language is unchanged: categorically a water of the U.S.
- Proposal and its Appendix B discuss interstate waters, emphasizing they are jurisdictional even if the interstate water is neither a traditional navigable water (TNW) nor is connected to a TNW.
- Supports states' ability to protect against pollution from outside their borders



## Territorial Seas



165

- Rule language is unchanged: categorically a water of the U.S.
- The CWA lists territorial seas as jurisdictional

## Impoundments

- Proposal indicates impoundments of TNWs, interstate waters, territorial seas, and tributaries are jurisdictional
- Current regulations provide that impoundments of waters of the US remain jurisdictional



### Tributaries

- Existing regulations and proposal both consider tributaries to be waters of the U.S.
- Existing peer-reviewed scientific literature supports a conclusion that tributaries categorically have a significant nexus.



- Proposal for first time defines “tributary” –
  - Waters with “bed and banks” and an “ordinary high water mark” (OHWM) that contribute flow to TNW, interstate water, or territorial sea.
  - Wetlands can be a “tributary” if contribute flow even if lacking bed and banks and OHWM.

## Adjacent Waters



- Waters adjacent to TNW, interstate water, territorial sea, tributary or jurisdictional impoundment are waters of the U.S.
- Existing peer-reviewed scientific literature supports a conclusion that adjacent waters categorically have a significant nexus.
- Existing regulations define “adjacent” as “bordering, contiguous, or neighboring.” That regulatory definition is unchanged, while proposal defines “neighboring” for the first time.
- Existing regulations include wetlands as “adjacent.” Proposal applies adjacency to all waters, thereby clarifying the status of ponds and lakes adjacent to jurisdictional waters.

## Questions?

485

Waters that require a  
case-specific evaluation

## “Other Waters” Including Geographically Isolated Waters

- Waters that do not fall into the categories above are jurisdictional only where case-specific analysis shows that they have a significant nexus to a TNW, interstate water, or territorial sea.
  - “Significant nexus” is test for jurisdiction laid out in U.S. Supreme Court cases.
- A significant nexus analysis considers whether an “other water,” either alone or in combination with similarly situated waters in the region, has a significant nexus that is more than speculative or insubstantial.
  - This language is based on Justice Kennedy’s opinion in *Rapanos*
  - Which waters are aggregated during a significant nexus analyses depends on size of the “region” and which waters are “similarly situated.”
  - The rule provides EPA’s proposed definitions of “region” and “similarly situated”
- EPA’s connectivity report suggests that there is a gradient of connection between categories of “other waters” and large rivers and other large waters downstream.

Bright line categories of  
non-jurisdictional waters

## Waters Not Jurisdictional

- Retains exemptions in CWA or in existing regulations:
  - Prior converted cropland (PCC)
  - Waste Treatment Systems
- Does not affect how these exemptions are implemented

## Waters Not Jurisdictional, cont.

- Adds to regulations several waters that ongoing practice has considered generally non-jurisdictional, providing additional certainty.
  - Irrigated areas that would revert to upland if irrigation ceased.
  - Artificial lakes or ponds created on dry land and used exclusively for stock watering, irrigation, settling basins, or rice growing
  - Artificial reflecting or swimming pools created on dry land
  - Small ornamental waters created on dry land
  - Water-filled depressions created incidental to construction activity
  - Groundwater, including groundwater drained through sub-surface drainage systems
  - Gullies and rills and non-wetland swales

## Waters Not Jurisdictional, cont.

- Proposal narrows jurisdiction over ditches somewhat as compared to existing guidance and for the first time would exempt certain ditches by regulation:
- **EXEMPTED ARE:**
  - Ditches excavated wholly in uplands, draining only uplands, and that have less than perennial flow.
  - Ditches that do not contribute flow, either directly or through other waters, to a traditionally navigable water, interstate water, or territorial sea.

## Waters Not Jurisdictional – Important Points

- Waters listed as non-jurisdictional cannot become jurisdictional even if they have a significant nexus.
- Non-jurisdictional waters may serve as a hydrologic connection for purposes of determining adjacency or a significant nexus analysis.

Questions?

## Comparison of Existing Regulations and Proposed Rule

Existing Regulatory Definition of WOVS	Draft Proposed Rule
Includes all traditional navigable waters	Same
Includes all interstate waters	Same – clarify that interstate waters are treated as TNW
Includes all tributaries	Tributaries that meet the regulatory definition of tributary are jurisdictional <i>per se</i> . <i>Explicitly recognizes non-jurisdictional ditches</i>

## Comparison of Existing Regulations and Proposed Rule

Existing Regulatory Definition of WOUS	Draft Proposed Rule
<p>Includes all wetlands adjacent to a jurisdictional tributary</p>	<p>All waters that meet the regulatory definition of "adjacent" are jurisdictional <i>per se</i>. Covers all adjacent waters, not just wetlands.</p>
<p>Includes "other waters" (e.g., geographically isolated wetlands) with an effect on interstate commerce (e.g., wetlands used for recreation, fishing, industrial purposes). Most "other waters" jurisdictional before 2001.</p>	<p>Other waters included where they have a significant nexus to a traditional navigable water. Other waters may be aggregated where they perform similar functions and located close together in the same watershed.</p>

## Comparison of Existing Regulations and Proposed Rule

Existing Regulatory Definition of WOUS	Draft Proposed Rule
Regulation does not define "tributary"	Defines "tributary" based on presence of bed and bank and "ordinary high water mark." Also defines "significant nexus," "neighboring," "floodplain," and "riparian area"
Regulation excludes jurisdiction over waste treatment systems and prior converted croplands	Same
Regulation does not identify features that are never jurisdictional	Includes list of features that are not jurisdictional including erosional features, upland ditches, rills, non-wetland swales

## Costs and Benefits

57

## Provides More Benefits to Public Than Costs

### BENEFITS

**\$388 to  
\$514  
million**

Reducing flooding

Filtering pollution

Wildlife habitat

Supporting hunting & fishing

Recharging groundwater

### COSTS

**\$162 to  
\$279  
million**

Mitigating impacts to streams & wetlands

Taking steps to reduce pollution to waterways.

## Costs and Benefits

- **The costs and benefits are indirect.** Any direct costs and benefits come as other Clean Water Act programs are implemented, not from changing the definition of “waters of the US.”
- **All Clean Water programs affected by the rule are considered in the estimated costs and benefits.** These programs included 303, 311, 401, 402, and 404.
- **The analysis**
  - **Includes consideration of aggregation** – in other words, for considering the cumulative effects of similar other waters in a watershed on downstream waters.
  - **Accounts for the possibility that confusion has led some people not to apply for permits where in fact they must.**

## Benefits and Efficiencies Outweigh Costs

- Restores CWA protection to some water bodies
- More clearly and accurately implements the SWANCC and Rapanos decisions
- Benefits habitat overall, especially headwater and ephemeral water bodies, and some “other waters”
- Clearer requirements should help expedite some aspects of permit evaluations (JDs, impact assessment, compensatory mitigation planning)
- Establishing policy via regulatory revision best assures consistent national implementation/fairness
- Prevents costs of repairing damage caused by unchecked pollution (such as drinking water filtration and stream restoration)

Science runs through it

887

888

## Science Report

- Review and synthesis of the published, peer reviewed scientific literature on the “connectivity” of waters
- Findings:
  - Following categories clearly demonstrate connections and effects on downstream waters:
    - All tributaries, regardless of size or flow
    - Wetlands and open waters in riparian areas and floodplains
  - Currently insufficient information exists to generalize about the connectivity or downstream effects of “geographically isolated” waters
- Status:
  - Peer-reviewed draft now undergoing additional SAB review
  - Recent release of SAB panel comments; teleconferences soon



Public input was considered

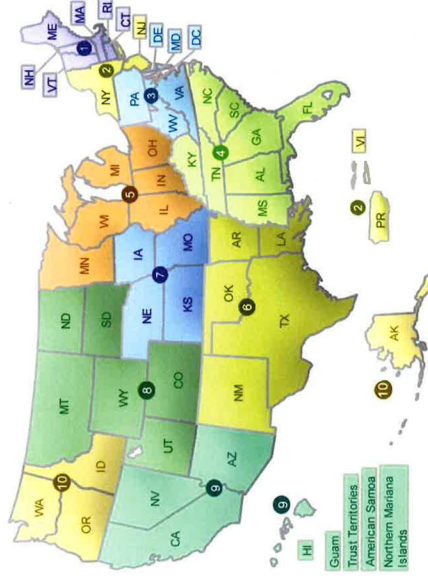
**4+** years of dialogue

**415,000** comments

Dozens of stakeholder meetings and listening sessions

64

Outreach is underway across the country



Want Comments and Input on Proposed Rule

**90** day public comment period

For more, see  
[www.epa.gov/uswaters](http://www.epa.gov/uswaters)

Questions?

Next Watershed Academy Webcast



**Living Shorelines**  
May 2014

Information will be posted at  
[www.epa.gov/watershedwebcasts](http://www.epa.gov/watershedwebcasts)

## Participation Certificate

If you would like to obtain participation certificates **type the link below into your web browser:**

<http://water.epa.gov/learn/training/wacademy/upload/2014-04-07-certificate.pdf>

You can type each of the attendees names into the PDF and print the certificates.

Menu



## Clean Water Rule

### Ditch the Myth

#### Let's get serious about protecting clean water

This page addresses concerns and misconceptions about the proposal by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers to protect clean water. The proposed rule clarifies protection under the Clean Water Act for streams and wetlands that form the foundation of the nation's water resources. The following facts emphasize that this proposed rule cuts through red tape to make normal farming practices easier while also ensuring that waters are clean for human health, communities, and the economy.

- Download a PDF of this information
- Get the facts about the proposed rule
- Read a speech by Administrator McCarthy
- Find all documents related to the proposed rule


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**MYTH: The rule would regulate all ditches, even those that only flow after rainfall.**

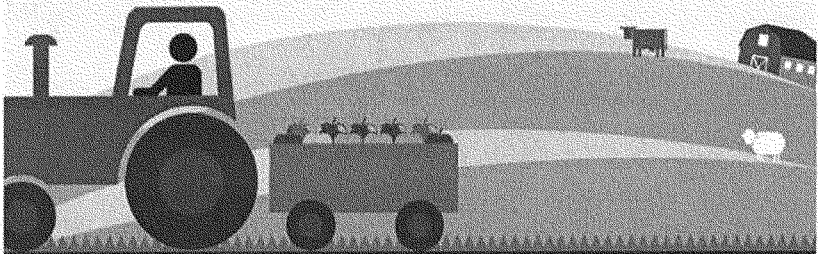
**TRUTH:** The proposed rule actually reduces regulation of ditches because for the first time it would exclude ditches that are constructed through dry lands and don't have water year-round. Tweet the truth 🐦

**MYTH: A permit is needed for walking cows across a wet field or stream.**

**TRUTH:** No. Normal farming and ranching activities don't need permits under the Clean Water Act, including moving cattle. Tweet the truth 🐦



**KNOW THE FACTS:**  
***Proposed Rule to Protect Clean Water***  
 Exclusions and exemptions  
 for agriculture will not change.



**#ditchthemyth**      **[www.epa.gov/ditchthemyth](http://www.epa.gov/ditchthemyth)**

**MYTH: Ponds on the farm will be regulated.**

**TRUTH:** The proposed rule does not change the exemption for farm ponds that has been in place for decades. It would for the first time specifically exclude stock watering and irrigation ponds constructed in dry lands. Tweet the truth 🐦

**MYTH: Groundwater is regulated by the Clean Water Act.**


**TRUTH:** The proposed rule specifically excludes groundwater. Tweet the truth 🐦

**MYTH: The federal government is going to regulate puddles and water on driveways and playgrounds.**


**TRUTH:** Not remotely true. Such water is never jurisdictional. Tweet the truth 🐦

**MYTH: EPA is gaining power over farms and ranches.**

**TRUTH:** No. All historical exclusions and exemptions for agriculture are preserved. Tweet the truth 🐦



**KNOW THE FACTS:**  
***Proposed Rule to Protect Clean Water***  
 Normal farming activities like planting crops  
 and moving cattle do not require permits.



**#ditchthemyth**      **[www.epa.gov/ditchthemyth](http://www.epa.gov/ditchthemyth)**

**MYTH: The proposed rule will apply to wet areas or erosional features on fields.**

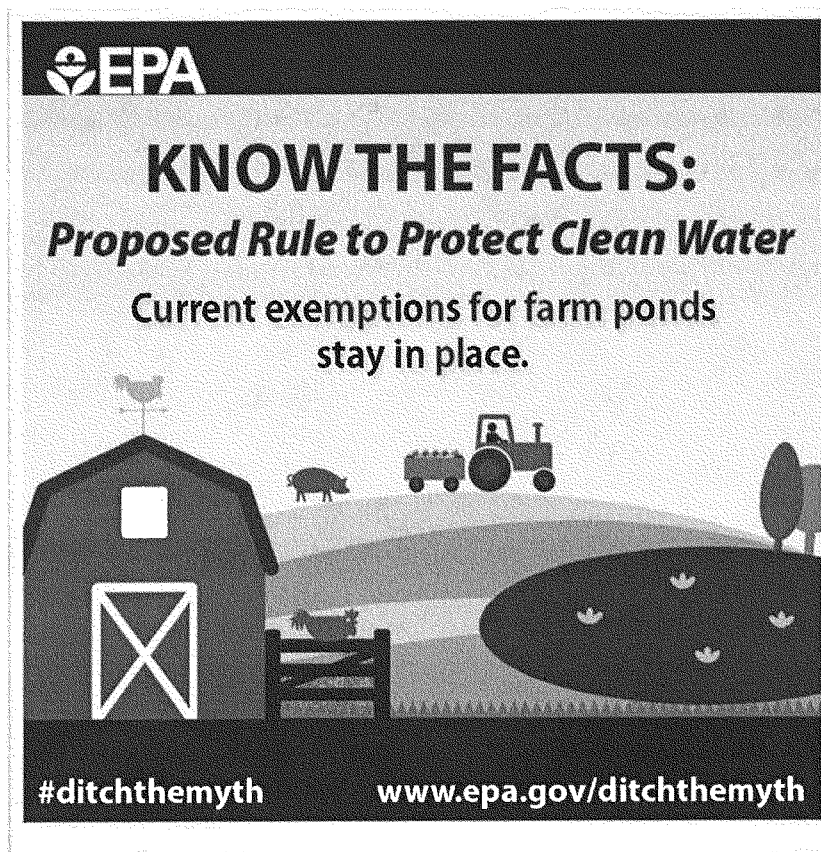
**TRUTH:** Water-filled areas on crop fields are not jurisdictional and the proposal specifically excludes erosional features. Tweet the truth 🐦

**MYTH: This is the largest land grab in history.**

**TRUTH:** The Clean Water Act only regulates the pollution and destruction of U.S. waters. The proposed rule would not regulate land or land use. Tweet the truth 🐦

**MYTH: EPA and the Army Corps are going around Congress and the Supreme Court.**

**TRUTH:** EPA and the Army Corps are responding to calls from Congress and the Supreme Court to clarify regulations. Chief Justice Roberts said that a rulemaking would provide clarification of jurisdiction. Tweet the truth 🐦



**MYTH: The proposal will now require permits for all activities in floodplains.**

**TRUTH:** The Clean Water Act does not regulate land and the agencies are not asserting jurisdiction over land in floodplains. Tweet the truth 🐦

**MYTH: The proposed rule will harm the economy.**

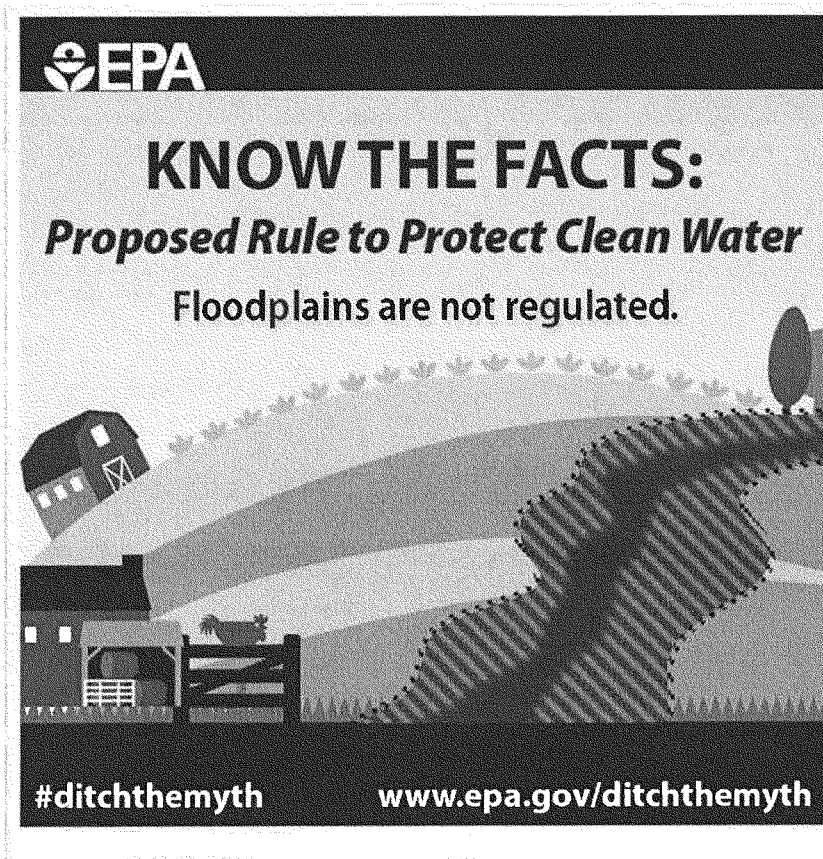
**TRUTH:** Protecting water is vital to the health of the economy. Streams and wetlands are economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing. Tweet the truth 🐦

**MYTH: The costs of this proposal are too burdensome.**

**TRUTH:** The potential economic benefits of the proposed rule are estimated to be about double the potential costs – \$390 to \$510 million in benefits versus \$160 to \$278 million in costs. Tweet the truth 🐦  
Download an economic analysis about the proposed rule

**MYTH: This is a massive expansion of federal authority.**

**TRUTH:** The proposal does not protect any waters that have not historically been covered under the Clean Water Act. The proposed rule specifically reflects the more narrow reading of jurisdiction established by the Supreme Court and the rule protects fewer waters than prior to the Supreme Court cases. Tweet the truth 🐦



**MYTH: This is increasing the number of regulated waters by including waters that do not flow year-round as waters of the United States.**

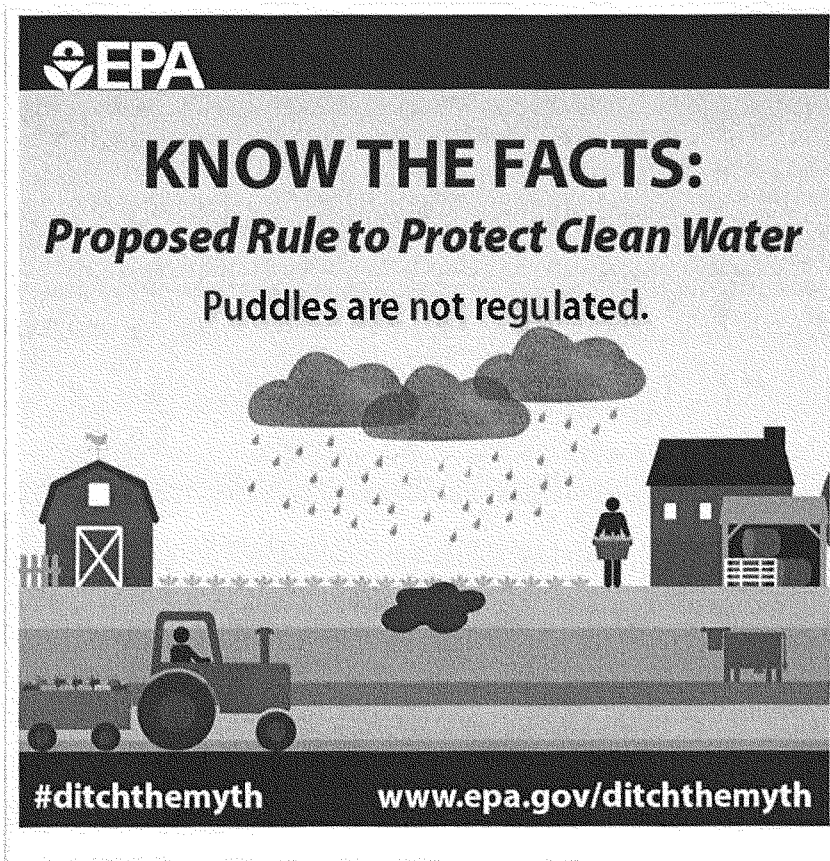
**TRUTH:** Streams that only flow seasonally or after rain have been protected by the Clean Water Act since it was enacted in 1972. More than 60 percent of streams nationwide do not flow year-round and contribute to the drinking water supply for 117 million Americans. Tweet the truth 🐦  
 See a map of counties that depend on these sources for drinking water

**MYTH: Only actual navigable waters can be covered under the Clean Water Act.**

**TRUTH:** Court decisions and the legislative history of the Clean Water Act make clear that waters do not need actual navigation to be covered, and these waters have been protected by the Clean Water Act since it was passed in 1972. Tweet the truth 🐦

**MYTH: The rule includes no limits on federal jurisdiction.**

**TRUTH:** The proposed rule does not protect any waters that have not historically been covered under the Clean Water Act and specifically reflects the Supreme Court's more narrow reading of jurisdiction, and includes several specific exclusions. Tweet the truth 🐦



**MYTH: This rule is coming before the science is available.**

**TRUTH:** EPA's scientific assessment is based on more than 1,200 pieces of previously peer-reviewed and publicly available literature. Tweet the truth 🐦

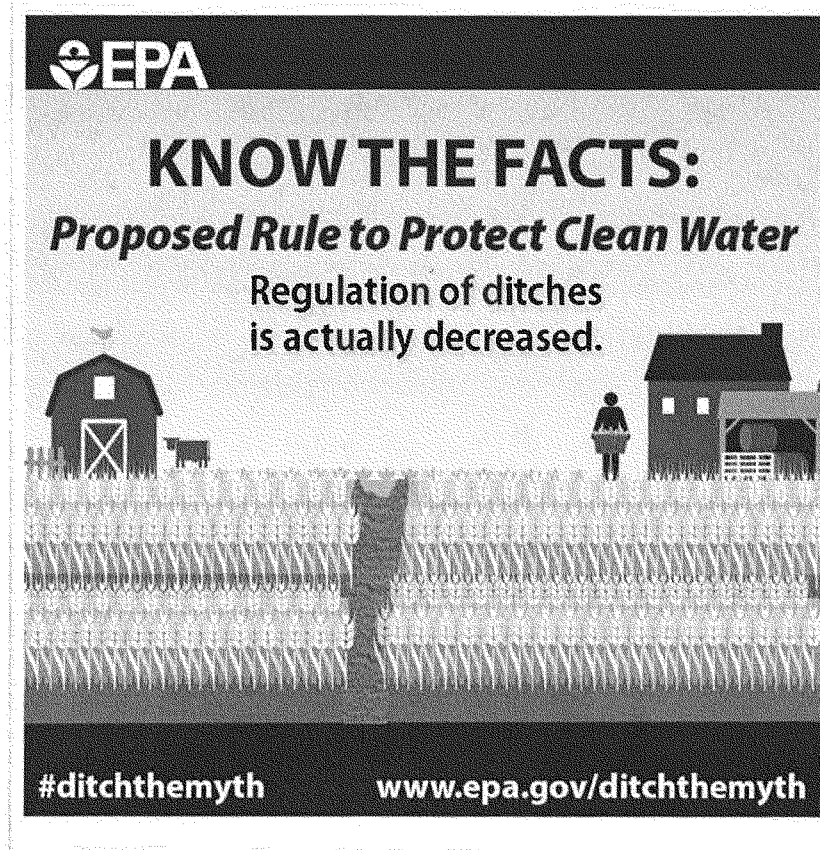
Read the final report.

**MYTH: This is about little streams in the middle of nowhere that don't matter.**

**TRUTH:** Everyone lives downstream. This means that our communities, our cities, our businesses, our schools, and our farms are all impacted by the pollution and destruction that happens upstream. Tweet the truth 🐦

**MYTH: The proposal infringes on private property rights and hinders development.**

**TRUTH:** EPA, the Army Corps, and states issue thousands of permits annually that allow for property development and economic activity in ways that protect the environment. The proposed rule will help reduce regulatory confusion and delays in determining which waters are covered. Tweet the truth 🐦



**MYTH: Stakeholders were not consulted in the development of the proposed rule.**

**TRUTH:** This is a proposal. Agencies are seeking public comment and participating in extensive outreach to state and tribal partners, the regulated community including small business, and the general public. Tweet the truth 🐦

**MYTH: The federal government is taking authority away from the states.**

**TRUTH:** This proposed rule fully preserves and respects the effective federal-state partnership and federal-tribal partnership established under the Clean Water Act. The proposed rule will not affect state water laws, including those governing water supply and use. Tweet the truth 🐦

**MYTH: Nobody wanted a rulemaking to define Waters of the U.S.**

**TRUTH:** A rulemaking to provide clarity was requested by the full spectrum of stakeholders: Congress, industry, agriculture, businesses, hunters and fisherman, and more. Tweet the truth 🐦  
 See who requested a rulemaking



**U.S. Army Corps  
of Engineers®**

## **QUESTIONS AND ANSWERS – WATERS OF THE U.S. PROPOSAL**

### **Key Background**

Congress enacted the modern Clean Water Act in 1972 to address pollution entering the nation’s waters to complement statutes such as the Rivers and Harbors Act written to protect navigation. As a pollution prevention statute, Congress wrote the CWA to extend beyond waters that are actually navigable to include the headwater streams, lakes, and wetlands. Since 1972, the CWA and agency regulations have successfully contributed to the protection of public health and water quality. Federal courts, including the Supreme Court, have consistently agreed that the geographic scope of the CWA should cover such waterbodies: “We have twice stated that the meaning of “navigable waters” in the Act is broader than the traditional meaning of that term.” (Justice Scalia in *Rapanos*, 2006)

Supreme Court decisions in 2001 and 2006 changed the test for determining which waters upstream of navigable waters should be protected under the Act. The basis for determining jurisdiction under the CWA changed from whether degraded water quality would have an effect on interstate commerce, to a more technical and scientific understanding of water features and their connection and importance to downstream traditional navigable waters. In this rule, EPA and the U. S. Army Corps of Engineers (the agencies) are proposing to apply this principle, and in particular the “significant nexus” test, to clarify the waters – *based on sound peer-reviewed science* – that are vital to protect under the CWA if the CWA is to be successful. The proposal also identifies waters that are not subject to the CWA. The agencies are not expanding the CWA. The proposed rule does not add protection to any new types of waters that have not historically been covered by the CWA, nor does the rule in any way limit current regulatory and statutory exemptions and exclusions. Simply put, if an activity was exempted or excluded before this proposal, it will remain exempted or excluded. If you didn’t need a permit for a type of activity before, you won’t need one now.

### **Applying the Decisions of the Supreme Court**

In 2008, the agencies issued guidance to interpret and apply the 2001 and 2006 Supreme Court decisions. This guidance was effective in providing agency field staff and the public with the kinds of information needed for permit decisions. However, with improved science and practical knowledge based upon years of experience, the agencies believe that regulatory improvements can and will be made with the proposed rule. Members of Congress, developers, farmers, states and local governments, energy companies, and many others demanded new regulations to make the process of identifying waters protected under the Act clearer, simpler, and faster. In response to the many comments received, the agency’s proposed science-based rule is consistent with the Supreme Court’s decisions and will improve the process for identifying which waters are and are not subject to the CWA.

The agencies then focused their efforts on proposing this rule to implement the decisions of the Supreme Court. The rule:

- Reduces the scope of waters protected under the CWA compared to waters covered during the 70’s, 80’s and 90’s to conform to the Supreme Court’s significant nexus test.
- Limits CWA jurisdiction only to those types of waters that have a “*significant nexus*” on downstream traditional navigable waters - not just any hydrologic connection.

- Improves efficiency, clarity and predictability for all land owners including the nation’s farmers, as well as permit applicants, while maintaining all current exemptions and protecting public health, water quality, and the environment.
- Uses the law and sound, peer-reviewed science as its cornerstones.

#### **“Significant Nexus”**

The focus of the agencies’ new proposed rule is to interpret and apply the “significant nexus” test established in Supreme Court decisions, based consistently on the law and science. To meet this goal, the new proposed rule must ensure that waters are protected under the CWA in circumstances where science supports an important and identifiable chemical, physical, or biological effect on downstream traditional navigable waters. This protection would prevent downstream waters from pollution upstream. For example, science demonstrates that the upstream headwaters, wetlands, lakes, man-made channels, or other waters act together to significantly influence downstream waters by:

- Protecting downstream water quality
- Contributing clean water for drinking, irrigation, recreation, commercial fishing, and industrial uses downstream, or
- Filtering pollution and reducing downstream treatment costs
- Providing habitat for fish and other aquatic life that live in traditional navigable waters
- Reducing downstream flooding and protecting property and infrastructure

#### **The Proposed Rule**

In implementing the Supreme Court’s decisions, the proposed rule uses the law and science to clarify that:

- Science demonstrates that waters like tributaries and adjacent waters must be protected under the CWA because they significantly affect the quality of downstream waters.
- Tributaries include only those waters whose volume, duration and frequency of flow is sufficient to create certain well-known and easy to observe and document, hydrologic characteristics that typically take years to form, such as the formation of a clear channel with bed and banks and an ordinary high water mark.
- Ground water, gullies and erosion channels, and features on farm land including swales, farm and stock ponds that are built on dry land, as well as all ditches that do not have the features of tributaries or are explicitly excluded under the proposed rule, all prior converted croplands, and tile drainage systems – are not protected under the CWA.
- The definition of wetlands continues to exclude features that do not have the soil, vegetation, and saturation characteristics that take years to form.
- A group of water features like prairie potholes, vernal pools and playa lakes are identified as warranting a case-specific review to determine if they act as a collective group of similar waters, and may meet the significant nexus test and therefore warrant protection.

#### **Conclusion**

America thrives on clean water. It is vital for the success of the nation’s businesses, agriculture, energy development, and the health of our communities. The agencies are eager to define the scope of the Clean Water Act that achieves the goals of protecting clean water and public health, and promoting jobs and the economy. Americans should not have to choose among these goals.

The agencies have proposed a new rule for public review and comment. The notice and comment process recognizes that an agencies’ thinking can be improved by hearing from by landowners, business people, farmers, scientists, energy companies, conservationists, states and local governments, and others who have valuable experience, clear perspectives, and important information . We will not complete the rule until we have carefully read through all and address the public comments, until our scientific analysis and peer review are complete, and until we have worked to make the rule understandable, technically accurate, and legally correct.

During this public comment period, the agencies are hearing numerous specific and technical questions and have been asked for a clear articulation of the intent and reading of the proposal.

**1. What is the purpose of this Q&A document?**

ANSWER: This document explains the agencies intent and understanding of the rule text and is based on questions raised so far during the public comment period. We are hopeful that it will help inform the comments we receive and the conversations we are having with stakeholders, to allow the agencies to have a better understanding of how the rule and preamble can be written as clearly as possible when the final version is completed.

**2. Is the proposal an expansion of jurisdiction?**

ANSWER: No. From the Clean Water Act's enactment, its scope of jurisdiction, included any waterbody that had a connection with interstate commerce. However, the Supreme Court has now focused on a more technical and scientific understanding of water features and their connections to downstream traditional navigable waters. This new focus placed certain waters in a gray area, where case-specific determinations were required in the absence of agency rulemaking. This gray area creates uncertainty, litigation risk for some land owners, and inconsistent application of the CWA. The proposed rule clearly applies the "significant nexus" test as contemplated by Justice Kennedy. It also reduces litigation risk by reducing the amount of waters in this gray area.

**3. Doesn't the Economic Analysis indicate jurisdiction would expand by at least 3 percent compared to the existing regulation?**

ANSWER: The economic analysis examines the costs and benefits of the proposal. In doing so, the agencies compared the proposed rule to current practices. This analysis indicates that there would be a three percent increase, or roughly 1500 acres nationwide, in cases where the agencies would find waters jurisdictional. This increase is largely a result of clarifying the current confusion and difficulty of assessing "other waters." When the proposed rule is compared to the agencies' existing regulations, however, the proposed rule reflects a substantial reduction in waters protected by the CWA as a consequence of recent decisions of the Supreme Court.

**4. If a water on my property is jurisdictional, does that mean the federal government controls my use of the water?**

ANSWER: No. It is important to emphasize that CWA permitting only applies where someone proposes to dump waste or other pollutants into the nation's streams, rivers, lakes, and wetlands. These are waters where communities get their drinking water, where families swim and boat, and where fish are caught for recreation and for sale to markets and restaurants. If you're not polluting these water bodies, you don't need any sort of permit. Also, normal farming practices that involve dredged or fill material, regardless of jurisdiction, do not need a permit, since the law permanently excludes those practices.

**5. Didn't the Supreme Court direct the agencies to only cover waters that are navigable?**

ANSWER: No. The Supreme Court has clearly held all three times it has considered the issue that the CWA extends its protection beyond the navigable-in-fact waters. In fact, Justice Scalia makes it clear in Rapanos when he wrote, "the Act's term 'navigable waters' includes something more than traditional navigable waters. We [the Supreme Court] have twice stated that the meaning of 'navigable waters' in the Act is broader than the traditional meaning of that term." The courts, including the Supreme Court, have consistently found that the jurisdiction of the CWA extends beyond waters that are navigable-in-fact to include waterbodies such as wetlands and small tributaries. This is important because protecting downstream, navigable waters requires also protecting the waters that feed into them.

**6. This proposed rule includes seasonal and rain dependent streams when they meet the definition of a tributary. Would the water that flows on my land only after a rainstorm now become jurisdictional?**

ANSWER: Rainwater that flows on top of the land, sometimes referred to as sheetflow, or through an erosion feature is not jurisdictional under the CWA. The proposed rule would only cover features that have a bed and bank and ordinary high water mark. These features take years to develop. An erosion feature is not jurisdictional because it does not have these characteristics. Thus, the proposed rule specifically excludes erosional features, such as gullies.

**7. Doesn't this rule make all "other waters," such as prairie potholes jurisdictional?**

ANSWER: No. The rule maintains the status quo by treating unique waters like prairie potholes on a case-specific basis. However, pursuant to Justice Kennedy's opinion in the *Rapanos* case, the proposed rule considers the aggregate importance of these waters in a geographic area and their connection (if any) to traditionally navigable waters, when determining whether to extend CWA protections. Aggregation of waters is only appropriate for certain waters, like prairie potholes, that are very similar in specific location, size and proximity to jurisdictional waters.

**8. The rule would continue to require a case-specific significant nexus analysis for "other waters", like Prairie Potholes. Does the rule allow the agencies to evaluate an adjacent Prairie Pothole wetland that has a significant nexus together with near-by non-adjacent Prairie Pothole wetlands when doing this significant nexus analysis?**

ANSWER No. A case specific significant nexus analysis for an "other water" may only consider additional "other waters" of the same type located in the same region, but the analysis would not combine "other waters" with "adjacent waters" even if they are of the same type and located in the same region.

**9. Are there maps that USGS put out showing that nearly all the waters in the United States now come under the jurisdiction of the CWA?**

ANSWER: No. There are no maps of CWA jurisdiction from USGS or any other Federal agency. Due to the resolution of USGS maps, they do not distinguish between land and water and thus make waters appear more prevalent than is actual. USGS maps do not depict the scope of waters protected under the Clean Water Act or the scope of waters that would be protected under the proposed rule.

**10. Doesn't this rule expand the opportunity for legal challenges under the CWA?**

ANSWER: No. The regulated community has long been concerned that ambiguity in jurisdiction of the CWA would allow for third party lawsuits regarding where the CWA applies. The proposed rule reduces the grey area and reduces the opportunity for third party challenges.

**11. Do I need a CWA permit when I am applying pesticides or herbicides to any farm fields?**

ANSWER: No. A permit is only needed when pesticides are applied to waters that are jurisdictional. For example, if wetlands protected under the CWA are being farmed, activities such as plowing, seeding, and harvesting do not require a CWA permit. Applying pesticides or herbicides *in* jurisdictional wetlands, however, would generally require a permit, and may be satisfied by a general permit. In addition, neither agricultural stormwater nor return flows from irrigation need permits.

**12. Do I need a CWA permit to fill puddles on my property?**

ANSWER: No.

**13. Will stormwater management systems permitted under the CWA, commonly called MS4s, become “waters of the US” under the proposed rule?**

ANSWER: No. The proposed rule does not change the status of an MS4 under the CWA. The proposed rule does not regulate any types of waters that are not regulated under the current rule. We are eager to work with stakeholders and the public to ensure the final rule reflects this intent.

**14. Will I need a Clean Water Act permit to fill in the wet area in my back yard?**

ANSWER: No. Wet areas in your back yard, like puddles on your lawn that hold water temporarily following rainfall or snowmelt, are not subject to the CWA.

**15. Would the proposed rule protect, as tributaries, all “channels” regardless of how often they flow or how much water they carry?**

ANSWER: No. The agencies proposed, consistent with the Supreme Court decisions, to protect those flowing waters that significantly affect downstream navigable waters. Simply establishing a connection does not mean that the connection creates the required significant effect. The agencies have defined tributaries based on physical indicators of flow – bed and banks and ordinary high water mark – and many “channels” will not meet this definition. The agencies are eager to review public comments on the proposed rule to ensure that the definition of tributary is clear and reflects this.

**16. While the proposed rule says groundwater is not jurisdictional, the proposal considers subsurface flows when deciding if a water is adjacent. Isn’t this another way of making groundwater jurisdictional?**

ANSWER: No. Although shallow subsurface flow can be used to establish a connection to Waters of the U.S. under the definition of “neighboring,” it is not itself jurisdictional, and the proposal specifically excludes groundwater.

**17. Why doesn’t the definition of “floodplain” in the rule include a single frequency interval?**

ANSWER: The proposed rule does not define floodplain because there is no scientific consensus on how to do so. However, the agencies want to hear specific comments on how this is possible to do.

**18. Is all land and water in a floodplain subject to CWA jurisdiction?**

ANSWER: No. The CWA does not apply to uplands. Only water features such as streams, wetlands, and ponds in floodplains are potentially covered by the CWA. It is important to keep in mind that normal farming practices can, do, and will continue to occur in waters in floodplains without the need for a 404 permit.

**19. Will the proposed rule expand CWA jurisdiction over ditches, canals, and similar man-made channels?**

ANSWER: No. The proposed rule would reduce jurisdiction over ditches currently covered by the CWA. For example, the rule would exclude ditches constructed on dry land and that flow less than year round. This would exclude from CWA protection, for example, many roadside ditches and irrigation ditches. Simply put, if a ditch is not constructed through a wetland or a stream, and if it doesn’t flow year round, it would not be included in the jurisdiction of the CWA. Where a ditch is constructed through a wetland or a stream and connects to a navigable water, it will be treated the exact same way it was treated before this proposal.

**20. How is the term “upland” used in the proposed rule?**

ANSWER: Under the rule, an “upland” is any area that is not a wetland, stream, lake or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CWA jurisdiction.

**21. If a ditch listed as excluded from jurisdiction is also located in a floodplain, does it become jurisdictional?**

ANSWER: No. A ditch excluded from the CWA under the proposed rule would remain excluded even if located in a floodplain. For example, upland areas exist in floodplains. If a ditch drains upland areas, even in a floodplain, and it flows less than 365 days a year, the ditch is not jurisdictional. None of the water features excluded in the proposed rule can be brought back under CWA jurisdiction. Once a water feature qualifies for the exclusion, it is out.

**22. Is my rain garden regulated as a “water of the US” under the proposal?**

ANSWER: No. Rain gardens and similar green infrastructure would not be regulated under the proposed rule because they are not wetlands or built in waters protected by the CWA.

**23. If I have a water listed as “excluded” under the proposed rule, can it become jurisdictional if it also falls into the category of “adjacent waters” or some other category of jurisdictional water?**

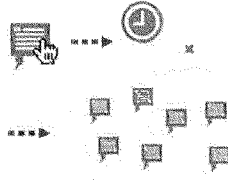
ANSWER: No. In the proposal, where a water meets a criterion for being excluded from the definition of waters of the U.S., it remains excluded regardless of any other considerations.

**24. Will the proposed rule change the current exclusion regarding waste treatment systems constructed in waters of the US?**

ANSWER: No. The proposed rule would not change, in any way, existing application of the waste treatment system exclusion.

**25. Will the proposed rule change the current exclusion for prior converted cropland?**

ANSWER: No. The exclusion from jurisdiction for prior converted cropland is carried forward unchanged from the current rule.



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**United States Senate**

**Committee on the Judiciary**

***Examining the Federal Regulatory System to Improve Accountability,  
Transparency and Integrity***

**June 10, 2015**

**Statement of Patrick Parenteau**

**Professor of Law and Senior Counsel,**

**Environmental and Natural Resources Law Clinic**

**Vermont Law School**

Thank you, Chairman Grassley and Ranking Member Senator Leahy for the opportunity to testify today. I appear in my individual capacity and not as a representative of any particular interest group. My comments will focus on the development of the final rule titled "Clean Water Act: Definition of Waters of the United States" ("Waters of the US Rule") signed by EPA Administrator Gina McCarthy and Assistant Secretary for the Army (Civil Works) Jo-Ellen Darcy on May 27, 2015. The final rule will be published in the Federal Register in the near future.

By way of background I have been involved in various ways with the Clean Water Act for over forty years. A law review article I wrote in 1975 on the scope of the CWA was cited by the US Supreme Court in its seminal decision in *E.I. Du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977). From 1975-1984, while with National Wildlife Federation in Washington, I participated in many of the legislative debates, judicial actions, rulemakings, and other administrative proceedings during the formative stages of the Act's programs. During the Reagan Administration in the mid 80's I served as Regional Counsel for EPA's New England regional office with responsibility for overseeing the implementation and enforcement of the CWA in major cases including the cleanup of Boston Harbor. Following that I served as Commissioner of the Vermont Department of Environmental Conservation with responsibility for implementing the CWA at the state level. From there I joined the Perkins Coie law firm in Portland Oregon where I provided advice and representation to business interests on permitting, compliance, enforcement and other regulatory matters. For the past 22 years I have been on the faculty of the Vermont Law School where I teach the CWA, conduct training programs for judges and practitioners, research and publish articles, write amicus briefs in cases before the Supreme

Court and other courts, and frequently give presentations on the latest developments under the Act. In short I have seen the CWA from a variety of perspectives and am very familiar with the subject matter of today's hearing.

My initial comment is that the Waters of the US Rule (WOUS) is a long overdue clarification of the muddled state of the law created by Supreme Court decisions in *SWANCC* and *Rapanos*. In critically examining the process by which the rule was developed I would urge the committee not to lose sight of the fact that this rule is of vital importance to the health and well-being of the American people. One in every three Americans gets their drinking water from seasonal and rain dependent streams protected by this rule. Protecting tributary systems is critical to the fishing industry that supports over a million jobs and generates over 48 billion in economic benefits to communities across the land. Water based recreation generates another \$86 billion to the economy. One third of endangered species depend upon the wetlands protected by this rule. To have healthy waters downstream we must protect the tributary systems upstream. As the Science Advisory Board stated in its review of the proposed rule:

*There is strong scientific evidence to support the EPA's proposal to include all tributaries within the jurisdiction of the Clean Water Act. Tributaries, as a group, exert strong influence on the physical, chemical, and biological integrity of downstream waters, even though the degree of connectivity is a function of variation in the frequency, duration, magnitude, predictability, and consequences of physical, chemical and biological processes.*

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*The available science supports the EPA's proposal to include adjacent waters and wetlands as waters of the United States. This is because adjacent waters and wetlands have a strong influence on the physical, chemical, and biological integrity of navigable waters.*

The decade long process that led to this final rule reflects a high degree of "accountability, transparency and integrity." The process employed by EPA reflects an unprecedented degree of public outreach and responsiveness to concerns and suggestions of numerous stakeholders. The rule is based on the best available peer reviewed science and it reflects a very conservative exercise of the statutory authority granted by the CWA. It addresses the confusion and uncertainty that has plagued administration of the CWA since the *SWANCC* and *Rapanos* decisions and places new, measurable limits on the extent of federal jurisdiction that should put concerns about Federalism to rest.

I. **The WOUS Rule is a Considered Response to Numerous Calls from the Courts, the Congress, the States, the Stakeholders and the Public to clarify what Waters are and are not covered by the Clean Water Act.**

In his concurring opinion in *Rapanos* Chief Justice Roberts said: “It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis.” *Rapanos v. United States* 126 S.Ct. 2208 (2006). The Chief Justice admonished the Corps and EPA for not following through on an earlier attempt to initiate a rulemaking following the *SWANCC* decision and he underscored the considerable discretion the agencies have to shape a rule that meets the goals of the Act while placing reasonable limits on the reach of federal power:

*Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer [citations omitted]. Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority. Id at 2236*

In his dissenting opinion Justice Breyer similarly urged the agencies to conduct a rulemaking forthwith:

*If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review). In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. That is not the system Congress intended. Hence I believe that today’s opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so. Id at 2266*

Subsequently in *Sackett v EPA*, 132 S. Ct. 1367 (2012), a case dealing with the rights of landowners to challenge administrative compliance orders under the CWA, Justice Alito criticized the agencies’ reliance on informal guidance and stressed the importance of developing a rule that more clearly defined the reach of federal jurisdiction:

*For 40 years, Congress has done nothing to resolve this critical ambiguity, and the EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase. Instead, the agency has relied on informal guidance. But far from providing clarity and predictability, the agency’s latest informal guidance advises*

*property owners that many jurisdictional determinations concerning wetlands can only be made on a case-by-case basis by EPA field staff. Id at 1375*

Nearly everyone has recognized the need for a rulemaking to address these problems. For example the Water Advocacy Coalition comprised of over 40 trade associations representing agricultural, industrial and commercial business interests stated in a February 2013 letter to EPA:

*We have long believed that there is an opportunity, through a rulemaking that balances the many interests that lie at the heart of the jurisdictional issues, to improve water quality without increasing burden and delay on activities that are at the core of a growing, vibrant economy.*

Though there has been vigorous opposition from the agricultural community there has also been strong support for the rulemaking as this 2012 letter from the Colorado Farming Coalition illustrates:

*To protect our cherished waters like the Colorado River, we urge you to finalize your guidelines and move forward with a rulemaking to restore critical protections to these waters under the Clean Water Act and reaffirm the broad scope of the Clean Water Act that existed for more than three decades. We believe, by restoring the Clean Water Act, that your administration can put us back on track to becoming a country where all farmers can depend on clean water for their crops and livestock, and all Americans will have access to water that is safe for swimming, fishing, and drinking.*

EPA has [complied](#) and made available hundreds of such requests from every sector of the economy, from every level of government, from the regulated community as well as the conservation community, from the scientific community as well as the public health community. In my 40+ years of experience with the CWA I cannot recall any other rulemaking that has received more scientific review, public scrutiny, critical analysis, open debate, and responsive action by the agencies as the WOUS rule.

## **II. The WOUS Rule Has Been a Decade in the Making**

The current rulemaking must be viewed in the context of a decade's long effort to address the jurisdictional quagmire created by the opaque *SWANCC* decision in 2001 followed by the even more confused *Rapanos* decision in 2006. There have been no less than four [guidance](#) documents and legal opinions issued over the past decade. Each time the agencies wrestled with the same basic questions about how to interpret the vague and conflicting opinions in *SWANCC* and *Rapanos*. The succession of guidance documents did more to confuse than clarify matters and led to inconsistent decisions in the field and frustration on the part of the

regulated community, the states and the public. In response to the virtually unilateral issuance of the 2008 guidance EPA received over 200,000 comments in 2011 calling for a more deliberate approach to the issues through an open rulemaking.

### III. The Agencies Outreach Efforts Were Unprecedented

Long before the current rulemaking was initiated EPA and the Corps were reaching out to affected interests. In 2011, the agencies conducted an outreach meeting designed to exchange information with small entities that may be interested in this action. The outreach effort was led by representatives from EPA's Office of Wetlands, Oceans, and Watersheds within EPA's Office of Water; the Army Corps of Engineers Regulatory Program; the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB), and the Office of Advocacy of the Small Business Administration (SBA).

During the formal rulemaking process EPA and the Corps conducted over 400 public meetings around the country. Hearing the concerns of some sectors of the agricultural community EPA made a special effort to reach out to them. EPA officials including Administrator McCarthy visited farms in Arizona, Colorado, Maryland, Mississippi, Missouri, New York, Pennsylvania, Texas, and Vermont.

EPA also met with small business representatives to hear their concerns. EPA has received considerable support from major sectors of the small business community. A [survey](#) by the American Sustainable Business Council found that 80 percent of small business owners favor including small streams and headwaters in federal clean water protections. More than 300 small businesses across the country wrote a letter to the President supporting protections for critical waterways across the country. The 800,000 Latino-owned businesses that make up the Latin Business Association voiced their [support](#) for the rule.

EPA and the Corps also met with hundreds of local officials and worked closely with key intergovernmental associations to understand local issues. Administrator McCarthy asked EPA's Local Government Advisory Committee to host a series of meetings with local officials around the country and report to her on findings and recommendations. While critical of the proposed rule in many respects the LGAC also acknowledged the lengths to which EPA was going to solicit unvarnished feedback: In a November 14 2014 [letter](#) to Administrator McCarthy LGAC stated: "We are especially appreciative that you have engaged the Local Government Advisory Committee's (LGAC) Protecting America's Waters Workgroup to facilitate outreach to local, state and tribal agencies in the spirit of collaborative partnership."

EPA also granted requests to extend the public comment period to allow ample time for people to digest the information and fully air their views. The normal time for public comment on a proposed rule is 60 days. EPA twice extended the comment period, giving the public over

200 days to provide input and suggest refinements. EPA received over one million comments, the vast majority of which were supportive of the rule.

It also is instructive to compare the process used to develop this rule with the process used to adopt the *2008 Rapanos Guidance* which was initially issued in 2007 without any prior opportunity for public review or comment. Nor was there any consultation with states and stakeholders. Nor was there a scientific assessment to understand the implications of the jurisdictional lines being drawn. While EPA solicited comments on the 2007 guidance after the fact, the 2008 revised guidance reflects very little substantive change from the 2007 version. The WOUS rulemaking stands in stark contrast to what has been done before. As former EPA Administrators Christine Todd Whitman, Carol M. Browner and William Reilly said in a recent release:

*Administrator Gina McCarthy has engaged an unprecedented number of Americans and industry, environmental, public health, elected and public official stakeholders from across the country. The EPA's use of all available communications tools has been the foundation of that outreach and engagement.*

#### **IV. The Final Rule Reflects Significant Changes in Response to Comments and Criticisms**

The proof that EPA and the Corps listened carefully to all points of view expressed during the long rulemaking process is found in the text of the final rule and the detailed explanations comprising almost 300 pages. The final rule clarifies definitions of key terms such as ditches and tributaries, and what adjacency means. For the first time EPA has drawn bright lines on what waters are not subject to federal jurisdiction. It has spelled out in specific detail how the rule does not protect any waters that have not historically been covered by the CWA; how it does not add any new regulatory requirements for agriculture; how it does not impinge on private property rights; how it does not regulate land use; how it does not cover erosional features such as gullies, rills and non-wetland swales; and how it does not include groundwater, shallow subsurface flow and tile drains. In addition to existing exclusions for waste treatment systems and prior converted cropland, the rule codifies for the first time exclusions for a number of types of waters such as certain ditches, artificially irrigated areas that would revert to dryland, and other artificial and constructed waters. These numerous deletions and exclusions represent a major change in CWA regulations and practice.

It also recognizes the scientific fact that certain types of wetlands such as prairie potholes, pocosins, Carolina bays, Texas coastal wetlands and California vernal pools share similar ecological functions and provide a host of water quality, flood control, wildlife habitat and other ecosystem services that in the aggregate have a significant impact on the chemical

physical and biological integrity of downstream waters. These important wetlands are not automatically classified as jurisdictional but must still be evaluated on a case by case basis to establish their significance in relation to other waters of the US.

**V. The Final Rule Represents a Conservative Exercise of Agency Authority under the CWA.**

Prior to the *SWANCC* and *Rapanos* decision the courts had overwhelmingly upheld the coverage of the CWA to “the entire tributary system” (including adjacent wetlands) of the navigable waters. As the Fourth Circuit said in *United States v Deaton* 332 F.3d 698, 708 (4th Cir. 2003):

*In sum, the Corps's regulatory interpretation of the term “waters of the United States” as encompassing nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress's power or alter the federal-state framework. The agency's interpretation of the statute therefore does not present a serious constitutional question that would cause us to assume that Congress did not intend to authorize the regulation. Indeed, as our discussion of Congress's Commerce Clause authority makes clear, the federal assertion of jurisdiction over nonnavigable tributaries of navigable waters is constitutional.*

For three decades before *SWANCC*, the courts consistently upheld the assertion of federal jurisdiction over intermittent, ephemeral, and artificial tributaries (including ditches and arroyos) and adjacent wetlands that were many miles from traditionally navigable waterways. Yet despite the expansive view of federal control commerce flourished, the GDP more than doubled and agricultural [productivity](#) grew at an average rate of 1.59% per year. In short federal regulation did not have the draconian consequences that some have attributed to the current proposal.

Indeed, the final WOUS rule stops well short of this historic “high water” mark of federal jurisdiction. It does not go as far as the SAB recommended in protecting types of waters that provide significant water quality and other benefits to society. Contrary to the advice of the SAB the rule excludes many “other waters” (such as playa lakes) that in the aggregate could have significant impacts on water quality in major rivers. It excludes ditches that may perform functions similar to natural tributaries and that courts in the past have said are jurisdictional. Clearly EPA could have gone much further than it did.

This will of course make the rule much more defensible in court. The rule easily satisfies the different tests set forth in *Rapanos*. EPA could have opted to include waters that met either the plurality opinion by Justice Scalia or the concurring opinion by Justice Kennedy, as several lower courts have ruled. EPA chose to take the more conservative approach by fashioning the rule on Justice Kennedy’s “significant nexus” test. Every Circuit Court that has interpreted *Rapanos* has

adopted the significant nexus test as either the controlling or the exclusive test to be applied in jurisdictional determinations. Hence EPA is on solid footing to defend the rule from the inevitable legal challenges.

#### **VI. Conclusion**

Considerable progress has been made over the past forty five years cleaning up polluted waters due to a strong federal-state partnership that features significant public investment in wastewater treatment systems and a comprehensive regulatory program that protects the interests of downstream states. Yet over forty percent of the nation's waters still do not meet water quality standards that protect human health and aquatic ecosystems. The reason is clear: where sources of pollution are regulated under the Act's comprehensive NPDES permit program administered by the states with active EPA oversight compliance rates are high and harmful pollutants have been reduced dramatically. By contrast where sources of pollution are not subject to regulation—so-called nonpoint sources—voluntary control measures (BMPs) administered by the states with little or no EPA oversight have largely failed to prevent significant impairment of water quality (Chesapeake Bay, Gulf Dead Zone, Lake Erie, Lake Champlain...). The key to success, as Congress recognized in 1972, is to control pollution at the source rather than wait for it to reach major water bodies, by which time it is too late to prevent damage to water quality that can prove difficult if not impossible to undo. As a point of emphasis over 40% of the sources, nearly 15,000 facilities, currently regulated under the Act discharge into small or intermittent tributaries located in the headwaters of navigable rivers. It is clear that reducing the scope of the Act reduces protection of water quality across the nation.

The time has come to end the acrimony and misinformation that has unfortunately characterized much of the debate over this rule. I would urge the committee to give it a chance to work.

Thank you.

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Testimony of Charles J. Cooper  
Cooper & Kirk, PLLC

The Administrative State and  
Congressional Abrogation of the *Chevron* Doctrine

Hearing Before the  
Committee on the Judiciary  
United States Senate

June 10, 2015

Washington, DC

Chairman Grassley, Ranking Member Leahy, and members of the Committee: thank you for providing me this opportunity to discuss the urgent need for Congress to reform and restrain the sweeping and largely unaccountable governmental powers exercised by administrative agencies.<sup>1</sup> As Chief Justice Roberts has recently lamented, “[t]he Framers could hardly have envisioned today’s ‘vast and varied federal bureaucracy’ and the authority administrative agencies now hold over our economic, social, and political activities.”<sup>2</sup> The modern Administrative State has become a sovereign unto itself, a one-branch government whose regulatory grasp reaches into virtually every human activity.

The focus of my remarks will be on the Supreme Court’s policy of deferring to agency interpretations of ambiguous statutes, known as the *Chevron* doctrine. In my view, this doctrine is of doubtful validity under both the Administrative Procedure Act (“APA”) and the Constitution’s separation of powers, and it exacerbates other constitutional concerns created by the rise of the modern Administrative State. My purpose today is to outline these serious problems with *Chevron* and to offer a few preliminary thoughts on actions that Congress can and should take to abrogate or at least restrain the doctrine.

### I. The Rise of the Administrative State

As Justice Thomas observed in his concurring opinion in *Perez v. Mortgage Bankers Association* earlier this year, the modern Administrative State “has its root[s] in . . . the Progressive Era.”<sup>3</sup> And the seeds from which those roots sprang were planted primarily by Woodrow Wilson, the Publius of the Administrative State. In his 1887 essay, “The Study of

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<sup>1</sup> Founding partner, Cooper & Kirk, PLLC. Mr. Cooper served as the Assistant Attorney General for the Office of Legal Counsel from 1985–1988 and in the Civil Rights Division of the Justice Department from 1981–1985. Much of his practice focuses on cases involving the separation of powers and the Administrative Procedure Act. As part of that practice, Mr. Cooper has litigated numerous important cases in the Supreme Court and in the lower federal courts.

<sup>2</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting).

<sup>3</sup> 135 S. Ct. 1199, 1223 n.6 (2015) (Thomas, J., concurring in the judgment).

Administration,”<sup>4</sup> Wilson argued for broad delegations of regulatory authority to “expert” administrative agencies. Wilson believed that the economic and social transformations of the late-nineteenth century required a national government that could act with “the utmost possible efficiency.”<sup>5</sup> But he lamented that our constitutional structure, with its carefully crafted system of separated powers and checks and balances, was not designed to be efficient;<sup>6</sup> to the contrary, it was designed to safeguard the People’s liberty by making the exercise of Federal governmental power difficult.<sup>7</sup> Wilson complained that, under our system, “advance must be made through compromise, by a compounding of differences, by a trimming of plans and a suppression of too straightforward principles.”<sup>8</sup> These inefficiencies were, to Wilson’s mind, made even worse by the need to justify governmental reforms to the People, whom he regarded as “selfish, ignorant, timid, stubborn, or foolish.”<sup>9</sup>

Wilson preferred to place governmental powers in the hands of those who could claim to have expertise relating to the policy issues under consideration. It was crucial to “discover the simplest arrangements by which responsibility can be unmistakably fixed upon officials,” providing them with “large powers and unhampered discretion.”<sup>10</sup> In Wilson’s analogy, “[t]he cook[s] must be trusted with a large discretion as to the management of the fires and the ovens.”<sup>11</sup> By conferring sweeping powers on the “experts,” Wilson hoped to overcome the

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<sup>4</sup> Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 198 (1887).

<sup>5</sup> *Id.* at 197.

<sup>6</sup> *INS v. Chadha*, 462 U.S. 919, 944 (1983) (“By the same token, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . .”).

<sup>7</sup> *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2597 (2014) (Scalia, J., concurring in the judgment) (describing “the folly of interpreting constitutional provisions designed to establish a structure of government that would protect liberty on the narrow-minded assumption that their only purpose is to make the government run as efficiently as possible” (quotation marks and citation omitted)).

<sup>8</sup> Wilson, *supra* note 4, at 207.

<sup>9</sup> *Id.* at 208.

<sup>10</sup> *Id.* at 213.

<sup>11</sup> *Id.* at 214.

inefficiencies of our constitutional system—that is, its checks and balances—and permit agencies to make policy swiftly, insulated from the political pressures faced by the People’s elected representatives.

This vision of expansive bureaucratic power took hold in the Supreme Court’s jurisprudence in the early twentieth century, particularly during the New Deal. As Wilson made clear, the key to the Progressives’ vision of the Administrative State was the delegation of broad authority to agencies, and that meant that its greatest obstacle was the Constitution’s exclusive, nondelegable grants of the three great powers of government to three separate branches of governments.

“[T]he Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government.”<sup>12</sup> Article I vests “[a]ll legislative Powers herein granted . . . in a Congress of the United States”;<sup>13</sup> Article II vests “[t]he executive Power . . . in a President of the United States”;<sup>14</sup> and Article III vests “[t]he judicial Power of the United States . . . in one supreme Court,” and in congressionally established inferior courts.<sup>15</sup> “The declared purpose of separating and dividing the powers of government, of course, was to diffus[e] power the better to secure liberty.”<sup>16</sup>

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<sup>12</sup> *Department of Transp. v. Association of American R.R.*, 135 S. Ct. 1225, 1240 (2015) (Thomas, J., concurring in the judgment).

<sup>13</sup> U.S. CONST. art. I, § 1.

<sup>14</sup> *Id.* art. II, § 1.

<sup>15</sup> *Id.* art. III, § 1.

<sup>16</sup> *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (alteration in original) (quotation marks omitted).

The Supreme Court has recognized that “[t]hese grants are exclusive”;<sup>17</sup> no branch can delegate its power to another branch. The constitutional text confirms this,<sup>18</sup> for its careful division of legislative, executive, and judicial powers would be senseless if those powers could be reallocated by the branches themselves.<sup>19</sup> Nor could the branches perform their task of checking and balancing each other if they delegated away their unique roles in the constitutional structure. As Madison said in *Federalist No. 51*: “[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others . . . .”<sup>20</sup> The Founders, accordingly, armed each branch with a variety of checking powers so that they could prevent encroachments and abuses by the other two. For these reasons, the Court once believed that the doctrine forbidding the delegation of

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<sup>17</sup> *Association of American R.R.*, 135 S. Ct. at 1240–41 (Thomas, J., concurring in the judgment). See *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011) (“Under the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government adopted in the Constitution, the ‘judicial Power of the United States’ . . . can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.” (alterations in original) (quotation marks omitted)); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 496–97 (2010) (“[T]he President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch.” (quotation marks omitted)); *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“Article I, § 1 . . . permits no delegation of those powers . . .”).

<sup>18</sup> See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 336–53 (2002). Notably, the Founders knew how to authorize delegations where they thought it necessary. Article II, section 2, clause 2 vests the power to appoint Executive officers in the President with the advice and consent of the Senate, but it also provides that “the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” This makes the absence of a broader authority to delegate all the more significant.

<sup>19</sup> *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (“That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow.”); see also *Free Enter. Fund.*, 561 U.S. at 497 (“But the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment.” (citation omitted) (quotation marks omitted)); *Wellness Int’l Network, Ltd. v. Sharif*, 2015 WL 2456619, at \*25 (U.S. May 26, 2015) (Roberts, C.J., dissenting) (“In a Federal Government of limited powers, one branch’s loss is another branch’s gain, so whether a branch aims to ‘arrogate power to itself’ or to ‘impair another in the performance of its constitutional duties,’ the Constitution forbids the transgression all the same.” (citation omitted) (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996))).

<sup>20</sup> THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961).

Congress' legislative power to the Executive Branch "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."<sup>21</sup>

Despite the nondelegation doctrine's firm foundation in the structure of the Constitution and in Supreme Court precedent, the Court "has abandoned all pretense of enforcing a qualitative distinction between legislative and executive power."<sup>22</sup> The Court's last decisions invalidating statutes delegating legislative power to the Executive Branch<sup>23</sup> date back to 1935. During the 80 years since then, numerous agencies have essentially been granted regulatory carte blanche—authorized to regulate, for example, "in the public interest"—and the Supreme Court has uniformly upheld such boundless delegations of legislative authority.<sup>24</sup> As a practical matter, the nondelegation doctrine was laid to rest in *Whitman v. American Trucking Associations*. In upholding the Clean Air Act's delegation to the EPA of power to set ambient air quality standards "requisite to protect the public health,"<sup>25</sup> the Court acknowledged that it had "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."<sup>26</sup>

The Court has also permitted the judicial power, although vested by Article III exclusively in the federal courts, to be delegated to the Administrative State. The leading case is *Crowell v. Benson*, which upheld a Federal workman's compensation statute that made agency findings of fact final and binding upon Article III courts.<sup>27</sup> The Court held that this agency

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<sup>21</sup> *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

<sup>22</sup> *Association of American R.R.*, 135 S. Ct. at 1250 (Thomas, J., concurring in the judgment).

<sup>23</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935).

<sup>24</sup> *American Trucking Ass'ns*, 531 U.S. at 474 (collecting cases).

<sup>25</sup> *Id.* at 472.

<sup>26</sup> *Id.* at 474–75.

<sup>27</sup> 285 U.S. 22, 46 (1932).

exercise of judicial power is constitutionally permissible so long as an Article III reviewing court is able to decide all questions of law *de novo*.<sup>28</sup> Since *Crowell*, it has been an unquestioned principle of the Supreme Court's jurisprudence that administrative agencies can adjudicate private rights and issue findings of fact that bind even Article III courts.<sup>29</sup>

Thus, by the time *Chevron* was decided in 1984, all three governmental powers had been united in the "expert" hands of the Administrative State, despite Madison's famous warning in *Federalist No. 47* that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."<sup>30</sup> And it has exercised its government powers independent of control by the Congress or the courts. But the Wilsonian vision of the modern Administrative State could not be fully realized unless the experts in the agencies were also liberated from the control of the President. In *Humphrey's Executor v. United States*, the Court held that Congress has the authority to restrict the President's removal of executive branch officers who are empowered to exercise, in the words of the Court, "quasi legislative and quasi judicial" power.<sup>31</sup> Because the power to remove an officer is essential to the ability to control the officer,<sup>32</sup> the effect of *Humphrey's Executor* was to free many of the Federal Government's most powerful agencies from direct presidential control.

The short of it is this: the Administrative State is now a *de facto* one-branch government, and most of the "experts" who run it are politically accountable to no one. They are not elected, nor are they controlled by those who are elected.

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<sup>28</sup> *Id.* at 54.

<sup>29</sup> *See, e.g., FTC v. Schor*, 478 U.S. 833, 853–57 (1986) (holding that an agency could adjudicate a private, state-law counterclaim).

<sup>30</sup> THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

<sup>31</sup> 295 U.S. 602, 629 (1935).

<sup>32</sup> *Morrison v. Olson*, 487 U.S. 654, 726 (1988).

## II. *Chevron* and Its Rationales

And so we arrive at *Chevron v. NRDC*,<sup>33</sup> which freed the Administrative State from meaningful judicial review. *Chevron* created a now-familiar two-step framework for federal courts to evaluate agency regulations and other decisions interpreting federal statutes. First, if the language of the statute is unambiguous, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>34</sup> But if the statute is “silent or ambiguous with respect to the specific issue,” the agency’s interpretation will be upheld if it is “based on a permissible construction of the statute,” even if it is not the construction that the court, using “traditional tools of statutory construction,” would adopt.<sup>35</sup> Under *Chevron*, then, ambiguity in the text of a law is the source of the agency’s interpretive authority—its jurisdiction—to resolve the ambiguity. And because statutory ambiguity is ubiquitous in the United States Code, *Chevron* grants administrative agencies interpretive discretion over virtually the entire sweep of federal statutory law.

In the three decades since *Chevron* was decided, the doctrine of judicial deference to agency interpretations of ambiguous laws has been extended to the full reach of its logic. For example, the Court held in *Auer v. Robbins* that an agency’s interpretation of its own regulations is entitled to deference, thus compounding its insulation from meaningful judicial review.<sup>36</sup> The Court has even held, in the *Brand X* case, that an agency’s interpretation of an ambiguous statute prevails over a federal court’s prior contrary interpretation.<sup>37</sup> And, most recently, in *City of Arlington*, the Court extended *Chevron* to questions of agency *jurisdiction*, holding that, when a

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<sup>33</sup> 467 U.S. 837 (1984).

<sup>34</sup> *Id.* at 842–43.

<sup>35</sup> *Id.* at 843 & n.9.

<sup>36</sup> 519 U.S. 452, 461 (1997).

<sup>37</sup> *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).

statute is ambiguous on whether the relevant agency has authority to interpret it, courts must defer to the agency's determination that it has such authority.<sup>38</sup> The bottom line is that *Chevron* and its progeny have transformed the Administrative State into a kind of Super Court, vested with the last word, *binding even on the Supreme Court*, on what ambiguous statutory and regulatory provisions mean, including on the jurisdictional question whether Congress actually authorized it to interpret the statute in the first place.

As Justice Scalia, perhaps the foremost proponent of *Chevron* on the Court, has acknowledged, *Chevron* is a “judge-made doctrine[ ] of deference.”<sup>39</sup> It “did not purport to be based on statutory interpretation” of the Administrative Procedure Act.<sup>40</sup> Indeed, as discussed below, *Chevron* flies in the face of the plain text of Section 706 of the APA. Nor is it required by the Constitution.<sup>41</sup> To the contrary, as also discussed below, the constitutionality of *Chevron*'s rule of judicial deference to agency statutory interpretations is highly doubtful.

The rationale for *Chevron*'s judge-made rule of deference has proven elusive. Its most prominent justification is that Congress, by enacting an ambiguous provision, implicitly signals an intent to delegate power to resolve the ambiguity to the agency. But the Court has been schizophrenic about the *kind of power*—legislative or judicial—that Congress has supposedly delegated through ambiguous statutes. *Chevron* itself offers both answers. The rule of deference is at times framed in terms of judicial power: the Court speaks of “an agency's construction of

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<sup>38</sup> 133 S. Ct. at 1868–71.

<sup>39</sup> *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment).

<sup>40</sup> Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 785 (2010).

<sup>41</sup> See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2129–31 (2002); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514–16. Some scholars have argued, implausibly, that *Chevron* might be required by principles of judicial restraint and separation of powers, see, e.g., Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 277–78, 283, 285 (1988); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 308–09, 312 (1986).

the statute which it administers,”<sup>42</sup> and the agency is described as offering an “interpretation” of an ambiguous statute’s “meaning.”<sup>43</sup> Yet elsewhere the Court states that the rule of deference is based on a “legislative delegation” that “involve[s] reconciling conflicting policies” and adopting “wise policy,”<sup>44</sup> quintessential exercises of legislative power.

*Chevron*’s conflation of “legislative” and “interpretive” power has persisted in the caselaw. Most recently, for example, in *City of Arlington v. FCC*, the Court described *Chevron* deference as follows: “Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.”<sup>45</sup> Here we see *Chevron* couched in terms of statutory interpretation binding on the parties and the courts, a plainly judicial power. But in the same opinion the Court said that “*Chevron* prevents” judges from “substituting their own interstitial lawmaking for that of an agency,”<sup>46</sup> which leaves no doubt that the agency is exercising legislative power. Indeed, in one telling sentence, the Court described “archetypal *Chevron* questions” as involving agency “*interpretive decisions* . . . about how best to *construe* an ambiguous term in light of competing *policy interests*.”<sup>47</sup> The Court here seems to be describing the offspring of an illicit affair between the legislative and judicial branches—an agency whose job description is to reconcile competing policy interests (a legislative act) through binding interpretations of ambiguous statutory terms (a judicial act).

The dissent in *City of Arlington* likewise blurred the constitutionally critical line between lawmaking and binding interpretation. Chief Justice Roberts described *Chevron* as requiring courts to “defer to an agency’s *interpretation of law* when and because Congress has conferred

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<sup>42</sup> *Chevron*, 467 U.S. at 842.

<sup>43</sup> *Id.* at 844–45.

<sup>44</sup> *Id.* at 865.

<sup>45</sup> 133 S. Ct. at 1868.

<sup>46</sup> *Id.* at 1873 (quotation marks omitted).

<sup>47</sup> *Id.* (emphases added)

on the agency interpretive authority over the question at issue.”<sup>48</sup> But elsewhere the Chief Justice said, “[B]efore a court may grant such deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency *lawmaking power* over the ambiguity at issue.”<sup>49</sup> Finally, the Chief Justice melded into a single sentence delegations of both judicial and legislative powers: “An agency’s *interpretive authority*, entitling the agency to judicial deference, acquires its legitimacy from a delegation of *lawmaking power* from Congress to the Executive.”<sup>50</sup>

*Chevron*’s delegation rationale, then, is completely indifferent to whether the agency action at issue is *making* law or *interpreting* law, or both. Either way, however, *Chevron* deference raises serious constitutional questions, for it was precisely to keep these fundamentally different government powers *separate*, and to also separate them from the executive power, that the Framers vested them in *separate* branches. And the constitutional problem is not ameliorated by describing the powers delegated to the Administrative State as “*quasi-legislative*” or “*quasi-judicial*.”

The Court has also justified *Chevron* deference on a rationale of agency expertise, in keeping with the Wilsonian emphasis on the rule of experts:

Judges are not experts in the field, and are not part of either political branch of the Government . . . . In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.<sup>51</sup>

Relatedly, by requiring deference to agency expertise, it follows that *Chevron* requires courts to accept changes in agency interpretations reflecting new facts or changes in administration policy.

<sup>48</sup> *Id.* at 1877 (Roberts, C.J., dissenting) (emphasis added).

<sup>49</sup> *Id.* at 1880 (emphasis added).

<sup>50</sup> *Id.* at 1886 (emphases added).

<sup>51</sup> 467 U.S. at 865. See, e.g., *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990) (“This practical agency expertise is one of the principal justifications behind *Chevron* deference.”).

It is true, of course, that allowing agencies to continuously revise their statutory interpretation avoids the “ossification of large portions of our statutory law” that would occur if courts provided a definitive interpretation of the statute.<sup>52</sup> But a fundamental precept of the rule of law is (or at least once was) that the meaning of a statute enacted by Congress does not change unless *Congress* changes it. In any event, this rationale makes no pretense of providing a statutory or constitutional justification for *Chevron*, and it does not answer the serious statutory and constitutional objections to the validity of the doctrine.<sup>53</sup>

The Court’s final justification for *Chevron* rests on the idea of political accountability:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.<sup>54</sup>

The political accountability rationale has several problems. First, it fails to grapple with the constitutional objections to *Chevron* discussed below.<sup>55</sup> In fact, this rationale for *Chevron* is in the teeth of the Framers’ purpose in vesting “all the legislative power” exclusively in Congress: to make the People’s locally elected representatives in Congress politically accountable for any policy choices that would govern them *as law*. Second, the notion that agencies are overseen and controlled by a democratically elected President is highly suspect in the case of many agencies and clearly wrong in the case of independent agencies. As noted earlier, the Court in *Humphrey’s Executor* largely freed independent agencies from presidential oversight, and “with hundreds of federal agencies poking into every nook and cranny of daily life, th[e] citizen

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<sup>52</sup> *United States v. Mead Corp.*, 533 U.S. 218, 247–48 (2001) (Scalia, J., dissenting); see also *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1852 (2012) (Kennedy, J., dissenting) (“Agencies with the responsibility and expertise necessary to administer ongoing regulatory schemes should have the latitude and discretion to implement their interpretation of provisions reenacted in a new statutory framework.”).

<sup>53</sup> See *infra* at 14–16.

<sup>54</sup> *Chevron*, 467 U.S. at 865–66.

<sup>55</sup> See *infra* at 14–16.

might . . . understandably question whether Presidential oversight—a critical part of the Constitutional plan—is always an effective safeguard against agency overreaching.”<sup>56</sup> Third, experience since *Chevron* has shown that the evil of unelected bureaucrats abusing their interpretive power is even worse than unelected judges abusing theirs.

In sum, *Chevron* does not purport to establish a rule required by the Constitution or by statute. Its status as a judge-made fiction is largely uncontested among scholars, both defenders and critics of *Chevron*.<sup>57</sup> Any analysis of *Chevron*’s continuing viability, then, should begin by acknowledging its status as a doctrine without basis in any source of written law. But the central problem with *Chevron* is not just that it is made-up; the problem is that *Chevron* is at war with the clear text of the APA and the basic structural principles of our Constitution.

### III. *Chevron* and the APA

Section 706 of the APA provides, “To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”<sup>58</sup> As Justice Scalia recently observed, “[Section 706] thus contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations.”<sup>59</sup> After all, the statute says that the reviewing court “shall decide *all relevant questions of law*.” The language is imperative, commanding that courts are not to permit *anyone else* to decide questions of law.

<sup>56</sup> *Id.* at 1879 (Roberts, C.J., dissenting).

<sup>57</sup> See, e.g., Thomas W. Merrill, *Step Zero After City of Arlington*, 83 *FORDHAM L. REV.* 753, 759 (2014) (“Even *Chevron*’s most enthusiastic champions admit that the idea of an ‘implied delegation’ is a fiction.”); Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 *YALE L.J.* 2580, 2590 (2006) (stating that “*Chevron* rests on a fiction” that is “not at all easy to defend”); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 *TEX. L. REV.* 113, 192 (1998) (“*Chevron* is actually an aggressive fashioning of judge-made law by the Court.”); Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 *ADMIN. L. REV.* 363, 370 (1986) (“For the most part courts have used ‘legislative intent to delegate the law-interpreting function’ as a kind of legal fiction.”).

<sup>58</sup> 5 U.S.C. § 706.

<sup>59</sup> *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring).

The interpretation of a statute is indisputably a question of law.<sup>60</sup> To make this point even more explicit, the statute specifically requires courts to “interpret constitutional and statutory provisions.”

This language cannot be squared with *Chevron*’s rule of deferring to agency interpretations of federal statutes. When a court defers to an agency interpretation, the agency, not the court, is deciding the relevant “question[] of law” and “interpret[ing]” the “statutory provision[.]” “So long as the agency does not stray beyond the ambiguity in the text being interpreted, deference compels the reviewing court to ‘decide’ that the text means what the agency says.”<sup>61</sup> Indeed, the Supreme Court has expressly stated that when a court defers under Step 2 of *Chevron*, it is *not* deciding the meaning of the statute; rather, it is acknowledging the agency’s authority as the “authoritative interpreter” of the statute.<sup>62</sup> In this way, *Chevron* is “[h]eedless of the original design of the APA.”<sup>63</sup>

Some scholars have pointed out that *Chevron* conflicts with Section 706 only if the agency is understood to be exercising *interpretive* authority. If the agency is instead understood to be exercising delegated *legislative* power to “fill any gap left” in the statute,<sup>64</sup> then the agency’s rule—within the boundaries of reasonableness—is the equivalent of a statute. Under that view, the agency is not deciding any questions of law or interpreting any statutes: it is

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<sup>60</sup> See, e.g., *Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995) (“Because statutory terms are at issue, their interpretation is a question of law and it is the court’s duty to define the appropriate standard.”).

<sup>61</sup> *Perez*, 135 S. Ct. at 1212.

<sup>62</sup> *Brand X*, 545 U.S. at 983 (“Since *Chevron* teaches that a court’s opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency’s decision to construe that statute differently from a court does not say that the court’s holding was legally wrong. Instead, the agency may, consistent with the court’s holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.”).

<sup>63</sup> *Perez*, 135 S. Ct. at 1211.

<sup>64</sup> *Chevron*, 467 U.S. at 843.

*legislating*, and the courts at *Chevron* Step 2 are simply acknowledging that the agency had authority to legislate as it did, not “deferring” to an agency’s interpretation.

This rationale, however, runs squarely into Article I and the nondelegation doctrine, which is discussed in the following section.

#### IV. *Chevron* and the Constitution

**A. Article III.** To the extent that *Chevron* rests on an implicit delegation of *judicial* power to administrative agencies, it is at war with Article III. It is indisputable that Congress does not have the power “to issue a judicially binding interpretation of the Constitution or its laws.”<sup>65</sup> Nowhere does the Constitution assign that power to Congress. Rather, it is inherent in the judicial power to “say what the law is.”<sup>66</sup> As Alexander Hamilton wrote in *Federalist No. 78*, “[t]he interpretation of the laws is the proper and peculiar province of the courts.”<sup>67</sup> And Congress, “[l]acking the power itself, cannot delegate that power to an agency.”<sup>68</sup> Therefore, the notion that Congress can make an agency the “authoritative interpreter”<sup>69</sup> of a federal statute not only is contrary to the text and structure of the Constitution; it is incoherent. Congress surely cannot delegate a power that it does not possess.<sup>70</sup>

There is also a strong argument that *Chevron* violates Article III even apart from nondelegation concerns. This view was first articulated by Professor Philip Hamburger<sup>71</sup> and has been embraced recently by Justice Thomas. “Those who ratified the Constitution knew that legal texts would often contain ambiguities,” and “[t]he judicial power was understood to include the

<sup>65</sup> *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment).

<sup>66</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>67</sup> THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>68</sup> *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment).

<sup>69</sup> *Brand X*, 545 U.S. at 983.

<sup>70</sup> In addition to the Article III violation, any attempted delegation along these lines would violate Article I as well, since Congress is limited to its enumerated powers.

<sup>71</sup> See Philip Hamburger, *Chevron Bias*, GEO. WASH. L. REV. (forthcoming).

power to resolve these ambiguities over time.”<sup>72</sup> But along with the judicial power came a duty to exercise independent judgment, “to decide cases in accordance with the law of the land, not in accordance with pressures placed upon them . . . from the political branches, the public, or other interested parties.”<sup>73</sup> And to preserve judges’ independent and impartial judgment, the Constitution gives the federal judiciary life tenure and salary protection, as Hamilton noted in *Federalist No. 79*.<sup>74</sup>

Under this view of Article III, *Chevron* is an impermissible abdication of judicial duty. When a judge defers to an agency at Step 2, the judge relinquishes his independent judgment and subordinates his views to those of the agency, which does not have the protections required by Article III—life tenure and salary protection—for the exercise of judicial power. As Justice Thomas has concluded, “[b]ecause the agency is thus not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns.”<sup>75</sup>

**B. Article I.** To the extent that *Chevron*’s rule of deference is based on a supposed implicit congressional delegation of legislative power to agencies, its validity under Article I’s exclusive grant of *all* legislative power must be assessed. To be sure, the nondelegation has lain dormant since the 1930s and, as discussed above, the Supreme Court’s repeated acquiescence in broad delegations of legislative power to administrative agencies has been one of the principle contributing factors to the rise of the Administrative State and the sweeping power it wields today. The Supreme Court has never formally overruled the nondelegation doctrine, however,

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<sup>72</sup> *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment).

<sup>73</sup> *Id.* at 1218.

<sup>74</sup> *Id.* (“Because ‘power over a man’s subsistence amounts to a power over his will,’ [Hamilton] argued that Article III’s structural protections would help ensure that judges fulfilled their constitutional role.”).

<sup>75</sup> *Perez*, 135 S. Ct. at 1220.

nor could it strike the clear language of Article I from the Constitution. Indeed, at least some Justices have expressed the desire to breathe new life into the nondelegation doctrine,<sup>76</sup> and I would welcome this development. But regardless of whether the *Supreme Court* chooses to revisit its reluctance to enforce the distinction between executive and legislative power, *Congress*, of course, retains the power—and, I believe, the obligation—to recognize the constitutional problem posed by agencies wielding legislative power and to itself maintain the distinction, and the constitutional boundaries, between legislative and executive power. Thus, regardless of whether *Chevron* is understood to be based on a delegation of legislative or judicial power, Congress remains free to adopt reforms to enforce the Constitutional design.

#### V. Reforming *Chevron*

Judicial deference to the Administrative State has always been controversial. Even before *Chevron*, Congress debated proposals that would have directed courts to review agency statutory interpretations without deference.<sup>77</sup> Among scholars and jurists alike, there has been sustained criticism of *Chevron*'s legitimacy,<sup>78</sup> and that criticism has now reached the point where even

<sup>76</sup> See, e.g., *Association of Am. R.R.*, 135 S. Ct. at 1237 (Alito, J., concurring); *id.* at 1251–52 (Thomas, J., concurring in the judgment); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672–688 (1980) (Rehnquist, J., concurring in the judgment)

<sup>77</sup> The Bumpers Amendment, sponsored by Senator Dale Bumpers (D-AR), was debated in Congress from 1975–1985. The amendment's language changed over time, but its initial draft would have amended § 706 to, among other things, make clear that “the reviewing court shall decide *de novo* all relevant questions of law.” 123 CONG. REC. S639 (daily ed. Jan. 10, 1977) (statement of Sen. Bumpers) (amendment in bold). Senator Bumpers explained that the amendment was necessary because “much of the power customarily exercised by these three original branches has been taken over by what in truth amounts to a fourth branch of government, the administrative branch, a branch that is not elected by anyone, and unlike the judiciary, is not insulated from political influence.” 121 CONG. REC. S29,956 (daily ed. Sept. 24, 1975) (statement of Sen. Bumpers). The amendment was also introduced in the House by then-Congressman Chuck Grassley (R-IA), who later became a Senate co-sponsor. The House Judiciary Committee favorably reported the amendment in 1980, and the Senate passed a version of the amendment in 1981 as part of the Regulatory Reform Act. See Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 5–9 & n.10 (1985). But the amendment was never enacted into law.

<sup>78</sup> See, e.g., PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

*Chevron*'s proponents have begun to acknowledge its questionable underpinnings.<sup>79</sup> The time is ripe for congressional action to restore the constitutional boundary between courts and administrative agencies.

Of course, any proposal to abrogate *Chevron* must be part of a broader effort to reform the Administrative State. Congress is currently considering several worthy proposals to do just that. The SCRUB Act has the important goal of eliminating all *current* unnecessary and harmful regulations,<sup>80</sup> while the REINS Act would require congressional approval of all *future* regulations that have a major impact on the economy.<sup>81</sup> In addition, the House version of the Regulatory Accountability Act, by seeking to eliminate *Seminole Rock* deference,<sup>82</sup> would complement congressional legislation to do away with *Chevron*. These proposals deserve Congress's careful consideration.

But no reform of the Administrative State would be adequate without addressing *Chevron*. It is *Chevron* that exacerbates all of the Administrative State's pathologies and enables its worst excesses. Congress can and should abrogate it by statute.

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<sup>79</sup> See, e.g., *Perez*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment); cf. *id.* at 1213–25 (Thomas, J., concurring in the judgment) (arguing that *Seminole Rock* deference might be unconstitutional using many arguments that would also apply to *Chevron*).

<sup>80</sup> S. 3011, 113th Cong. (2014). The SCRUB Act would create the Retrospective Regulatory Review Commission to review all existing federal regulations with a goal of eliminating 15% in their total cost. *Id.* §§ 101(a), (h). The Commission would end after five years, whereupon it would submit final recommendations to Congress. *Id.* §§ 101(a), (i). If Congress approved the recommendations by joint resolution, the agencies would have to eliminate the regulations identified by the Commission. *Id.* § 101(j). Some of these regulations would be eliminated by the Act's "cut-go" procedure, which would require offsetting the costs of new regulations by cutting existing regulations. *Id.* §§ 101(i), 201(a). Finally, the Act would require all new agency rules to include a plan for a review of that rule's necessity ten years after the rule's promulgation. *Id.* § 301.

<sup>81</sup> S. 226, 114th Cong. (2015). The REINS Act would forbid all major agency rules from going into effect unless approved by a congressional joint resolution. *Id.* § 801(b). A "major rule" includes all rules that would have an annual effect of \$100,000,000 or more on the U.S. economy. *Id.* § 804(2). The Act establishes procedures for expedited review of joint resolutions to approve major rules, including immunizing such resolutions from amendment and limiting the amount of time to debate a resolution in the Senate. *Id.* § 802.

<sup>82</sup> H.R. 185, 114th Cong. (2015). The House version of the Act would amend § 706 to provide that "[t]he court shall not defer" to an agency's interpretation of its own rules unless the interpretation has gone through the rulemaking procedures of § 553 or §§ 556–57. *Id.* § 7.

As noted earlier, *Chevron* is a “judge-made doctrine[] of deference.”<sup>83</sup> And regardless of one’s views about its validity under the APA or the Constitution, it is certainly not *required* by any statute or constitutional provision.<sup>84</sup> It can therefore be abrogated or otherwise modified by Congress.

*Chevron* is sometimes characterized as a standard of judicial review,<sup>85</sup> and, if so, Congress has power to prescribe a different standard of review as a necessary and proper means of carrying into execution both its own statutes and the judicial power.<sup>86</sup> Alternatively, *Chevron* can be viewed as a rule of statutory interpretation.<sup>87</sup> But because *Chevron*, by its own terms, is “rooted in a background presumption of congressional intent,”<sup>88</sup> Congress has power to rebut any presumed implicit delegation of interpretive discretion by declaring its contrary intent explicitly by statute. There can be little dispute, then, that “[i]f Congress wanted to repudiate *Chevron*, it could do precisely that.”<sup>89</sup>

<sup>83</sup> *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment).

<sup>84</sup> See *supra* note 40.

<sup>85</sup> *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 58 (2011) (describing *Chevron* as a standard of review).

<sup>86</sup> Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1590–91 (2000) (“At a minimum, the Necessary and Proper Clause permits Congress to proscribe any procedure or practice of courts that impairs the faithful exercise of ‘[t]he judicial Power’ and to prescribe rules and procedures conducive to the faithful exercise of that power.”).

<sup>87</sup> Rosenkranz, *supra* note 41, at 2129–31.

<sup>88</sup> *City of Arlington*, 133 S. Ct. at 1868.

<sup>89</sup> Sunstein, *supra* note 57, at 2589; see also *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) (describing the conflict between § 706 and *Chevron* and stating that “[t]he problem is bad enough, and perhaps insoluble if *Chevron* is not to be uprooted”); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 884 (7th Cir. 2002) (Easterbrook, J., concurring in part and concurring in the judgment) (“Congress can choose to delegate, or not, statute-by-statute or through framework laws such as the APA; it could undo *Chevron* across the board if the doctrine functioned as kryptonite to its enactments.”); Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1031 (1992) (“As previously indicated, I think that Congress has the constitutional power to direct courts to abandon the *Chevron* approach.”); Laurence H. Silberman, *Chevron—the Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 824 (1990) (“Congress could reverse *Chevron*’s presumption generically by amending the Administrative Procedure Act (APA).”).

Should Congress wish to abrogate *Chevron*, it could do so by simply amending Section 706 to specify that federal courts are to review agency interpretations without deference. One possible approach would be to amend Section 706 to include the following bolded language:

To the extent necessary to decision and when presented, the reviewing court—**without according any deference to an agency**—shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. **The reviewing court shall not, on the basis of ambiguity or vagueness, construe a statute as delegating to an agency the power or authority to select among possible interpretations of the statute.**

The amendment thus has two components. The first simply makes explicit (rather, even more explicit) what Section 706 originally was intended to require: that judicial review of agency interpretations be *de novo*. But the first component, standing alone, leaves open the possibility of circumvention. To the extent that *Chevron* Step 2 is premised on a delegation of legislative—rather than judicial—power (as some have argued in seeking to reconcile *Chevron* with Section 706<sup>90</sup>), courts do not “defer” to an agency when they sustain agency action at Step 2. Rather, because the agency is exercising lawmaking power, the agency action is binding on the courts (in the same way that a congressional statute is) unless the agency has exceeded its delegated authority, and because the courts determine the reasonableness of the agency rule (and thus whether it has exceeded its delegated authority) *without* deference, *Chevron* does not accord deference to an agency at all.

The second component of the suggested amendment is necessary to foreclose this argument. It instructs courts that ambiguities in a statute do not constitute implicit delegations of authority to the agency to select among possible interpretations.

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<sup>90</sup> See *supra* note 57 and accompanying text.

A statute combining an explicit instruction to review agency statutory interpretations *de novo* and an express refutation of *Chevron*'s presumption of legislative delegation should suffice to abrogate *Chevron*.

**CONCLUSION**

*Chevron* is contrary to law. It is at war with the APA and the structure of the Constitution, and makes the Administrative State the authoritative judge of its own powers. Congress should exercise its constitutional authority to abrogate *Chevron* and, thus, to reaffirm this nation's basic constitutional principles.

- Although you praised the open comment period for the definition of waters of the United States, saying that the EPA extended the public comment period beyond what the law required, the EPA also systematically compromised the public comment period by driving support for the expanded definition through social media and other media while also suppressing the concerns of stakeholders. From an ethical standpoint, do you believe that this type of behavior is appropriate from a federal agency, which should remain neutral and objective during the comment period?
- Under the final rule in WOTUS, ponds, ditches, and ephemeral drainages may now come under federal jurisdiction. Everything from golf courses to farmland that have these waters on them or near them will likely be required to obtain costly, federal permits for any land management activities or land use decisions in, over or near them such as pesticide and fertilizer applications and stream bank restorations and the moving of dirt.
  - Please explain Congress' constitutional authority to regulate such waters.
  - Chief Justice Marshall in *McCulloch v. Maryland* proclaimed that our federal government is one of enumerated powers and, "this principle is now universally admitted." Does the "substantial effect test" laid out in *Wickard v. Filburn* comport with this principle?
- On June 15, 2012, former DHS Secretary Napolitano issued a memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (DACA Memorandum). The DACA Memorandum initiated the Administration's grant of deferred action against aliens who were illegally present in the United States but met certain criteria, namely age of arrival, justifying their non-removal from the United States. On November 20, 2014, current DHS Secretary Johnson issued a memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents" (DAPA Memorandum), which further eased DACA requirements for illegal childhood arrivals and established deferred action standards for the parents of those children. As Judge Andrew S. Hanen from the District Court of the Southern District of Texas said in his opinion in *Texas v. U.S.*, the Government violated the Administrative Procedure Act by failing to provide the public with notice and an opportunity to comment on the DAPA and expanded DACA programs. Do you support Judge Hanen's opinion and his call for greater Federal agency accountability? Why or why not?

- You mentioned the cost benefit analyses which Federal agencies are required to conduct on proposed regulations during the rulemaking process as being an effective tool to balance the impact of these regulations, however, agencies are pursuing regulatory strategies to deliberately avoid the Office of Information and Regulatory Affairs review of these analyses. For example, in July 2013, the IRS delayed the reporting requirements for employers under the 2010 Patient Protection and Affordable Care Act for one year through an announcement in a Treasury Department blog post, as opposed to a proposed rule in the Federal Register. Based on this information, do you think this process leads to rules that balance regulatory impact?
- On June 15, 2012, former DHS Secretary Napolitano issued a memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children” (DACA Memorandum). The DACA Memorandum initiated the Administration’s grant of deferred action against aliens who were illegally present in the United States but met certain criteria, namely age of arrival, justifying their non-removal from the United States. On November 20, 2014, current DHS Secretary Johnson issued a memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents” (DAPA Memorandum), which further eased DACA requirements for illegal childhood arrivals and established deferred action standards for the parents of those children. As Judge Andrew S. Hanen from the District Court of the Southern District of Texas said in his opinion in *Texas v. U.S.*, the Government violated the Administrative Procedure Act by failing to provide the public with notice and an opportunity to comment on the DAPA and expanded DACA programs. Do you support Judge Hanen’s opinion and his call for greater Federal agency accountability? Why or why not?

Charles J. Cooper  
 “Examining the Federal Regulatory System  
 to Improve Accountability, Transparency and Integrity”  
 Written Responses to Senator David Vitter’s Questions for the Record  
 July 10, 2015

1. **QUESTION:** In *Marbury v. Madison*, the Supreme Court held that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” Although cases like *United States v. Mead Corp.* softened some of the blow from the decision in *Chevron v. NRDC* by increasing the formality standards for statutory interpretations by Federal agencies, the so-called “Chevron deference” created by the case still gives great authority to these agencies that should rest in the hands of the judicial branch regarding statutory interpretation. What are some of the more egregious examples that you can recall of this judicial power being abused by Federal agencies?

**ANSWER:** *Chevron* has led to much mischief. The most extreme examples fall into one of two categories: some cases are *structurally* unreasonable, pressing *Chevron*’s own reasoning to the limits of its logic and demonstrating just how impossible it is to square *Chevron*’s explicit abdication of the judicial role with the enduring structural principles of our Constitution. A prime example of this type of abuse is the *Brand X* case I mentioned in my testimony, which gives agencies the authority to essentially overrule a federal court’s prior interpretation of a statute—even the *Supreme Court*’s interpretation. *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). Another troubling example is the line of circuit court cases that have deferred to agency statutory interpretations even in *criminal prosecutions*, under statutes like the Securities and Exchange Act, *United States v. Royer*, 549 F.3d 886, 899 (2d Cir. 2008), and the Federal Election Campaign Act, *United States v. Kanchanalak*, 192 F.3d 1037, 1047 (D.C. Cir. 1999).

A second set of cases are *substantively* unreasonable, upholding agency interpretations under *Chevron* that are obviously at war with the text both the agency and the court are purporting to construe. Examples of this type of abuse abound. The example on everyone’s mind right now is the IRS’s interpretation of the Affordable Care Act which the Supreme Court just upheld in *King v. Burwell*, 2015 WL 2473448 (U.S. June 25, 2015). In establishing a system of subsidies for individuals who purchase health insurance from government-operated insurance exchanges, Congress could not have been clearer that those subsidies were available only for insurance purchased on “an Exchange established by [a] State under 1311”—the statutory section governing state, not federal, exchanges. But, as is well known, the IRS ignored this clear limit, promulgating regulations that make subsidies available also to individuals who purchase insurance on a *federal* exchange and thus essentially rewriting the clear language chosen by Congress. And based on ephemeral inferences from the general purpose, context, and structure of the ACA, the Supreme Court last month upheld the IRS’s interpretation. Though the Court’s opinion expressly eschewed reliance on *Chevron*, the Fourth Circuit, in the opinion affirmed by the Supreme Court, explicitly relied on *Chevron* deference to uphold the IRS’s re-write, and the IRS, like all administrative agencies, undoubtedly was

emboldened in drafting the rule by the Court's longstanding *Chevron* doctrine requiring deference to agency interpretations.

Another particularly vivid example of *Chevron*'s susceptibility to abuse is the D.C. Circuit's interpretation of the Brady Act in *NRA v. Reno*, 216 F.3d 122 (D.C. Cir. 2000). That statute created a National Instant Criminal Background Check System (the "NICS") that allowed the FBI to instantly search the backgrounds of prospective gun purchasers. Congress was particularly worried that the government might use the information generated by NICS background checks to compile identifying information on legal gun owners, so it forbade the Attorney General from retaining such information. In fact, it forbade retention of this information *in three separate places* of the statute: first, by requiring the NICS to "destroy all records" relating to each background check upon completion of the check, 18 U.S.C. § 922(t)(2); second, by barring any federal agency or employee from "requir[ing] that any record . . . generated by the [NICS] be recorded," Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(i)(1), 107 Stat. 1536, 1542 (1993); and finally, by emphatically forbidding the government from "us[ing] the [NICS] system . . . to establish any system for the registration of firearms, firearm owners, or firearm transactions," *id.* § 103(i)(2). Notwithstanding this prohibition *in triplicate*, the Justice Department promulgated a regulation permitting the FBI to "retain records of all NICS background searches—including names and other identifying information about prospective gun purchasers" for a period of six months. *NRA*, 216 F.3d at 125. And the D.C. Circuit upheld this interpretation 2-1, straining to find each of these three clear-as-day provisions somehow "ambiguous" and thus susceptible to *Chevron* deference. *Id.* at 126–32.

The D.C. Circuit's interpretation of the 1984 Cable Act in *American Scholastic TV Programming Foundation v. FCC*, 46 F.3d 1173 (D.C. Cir. 1995), is almost as egregious an example of *Chevron* deference. In 1984, Congress enacted "a series of media cross-ownership restrictions," including 47 U.S.C. § 533(b), which prohibited a telephone company from "provid[ing] video programming directly to subscribers in its telephone service area." (Congress ultimately repealed this provision in 1996). On the face of the text, this provision barred cross-ownership of *any* "video programming"—a term that Congress, as though to underscore the point, defined expansively as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station," *id.* § 522(20). Congress did not refer in any fashion to the medium through which such video programming was transmitted. But the FCC thought this blanket prohibition should apply only to video programming delivered through a physical cable, and interpreted it as allowing cross-ownership of programming transmitted through wireless cable. And undeterred by the plain text of Congress's statute, the D.C. Circuit upheld the FCC's interpretation, finding sufficient ambiguity in "the underlying purposes of the Cable Act," along with its "structure and legislative history," to justify deference under *Chevron*. *American Scholastic*, 46 F.3d at 1179–81.

Cases like these dramatically illustrate just how loose the judicial reins on agency authority are after *Chevron*. Indeed, some agencies have even *invoked Chevron in their own deliberations* as giving them *carte blanche* to adopt freewheeling interpretations of

the statutes that are meant to constrain them. See Gary Lawson, *Dirty Dancing – The FDA Stumbles with the Chevron Two-Step: A Response to Professor Noah*, 93 CORNELL L. REV. 927, 933–35 (2008) (noting the FDA’s reliance on *Chevron* during a 2003–04 rulemaking as giving it substantial discretion to adopt a “reasonable” interpretation of a statute’s use of the term “food”). *Chevron* sanctions—indeed, *encourages*—basically unreviewable agency behavior, and it is time for Congress to make the judicial check on agency action meaningful again.

2. **QUESTION:** Under the final rule in WOTUS, ponds, ditches, and ephemeral drainages may now come under federal jurisdiction. Everything from golf courses to farmland that have these waters on them or near them will likely be required to obtain costly, federal permits for any land management activities or land use decisions in, over or near them such as pesticide and fertilizer applications and stream bank restorations and the moving of dirt.
- Please explain Congress’ constitutional authority to regulate such waters.
  - Chief Justice Marshall in *McCulloch v. Maryland* proclaimed that our federal government is one of enumerated powers and, “this principle is now universally admitted.” Does the “substantial effect test” laid out in *Wickard v. Filburn* comport with this principle?

**ANSWER:** There can be little doubt that the Supreme Court’s current Commerce Clause jurisprudence—and *Wickard v. Filburn* in particular—eviscerates the limitations placed on Congress’s authority by the Constitution. Article I’s vesting clause makes clear that Congress only has those legislative powers “herein granted,” and Section 8 enumerates specific powers given to Congress. “The Constitution’s express conferral of some powers makes clear that it does not grant others. And the Federal Government can exercise only the powers granted to it.” *NFIB v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (opinion of Roberts, C.J.) (quotation marks omitted). If there were any doubt on that point, the Founders made it explicit in the Tenth Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. The Tenth Amendment, as a rule of construction, instructs us that we are to read a negative implication against Congress’s powers. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 867–77 (1995) (Thomas, J., dissenting); *NFIB*, 132 S. Ct. at 2578.

Despite these clear textual commands, Congress now relies on the Commerce Clause to wield power far surpassing the clause’s original meaning. At the Founding, the term “commerce” meant “selling, buying, and bartering, as well as transporting for these purposes.” *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring). Congress’s power under the Commerce Clause, therefore, did not reach activities such as manufacturing or agriculture. *Id.* at 586.

But in *United States v. Darby*, the Supreme Court expressly rejected the distinction between commerce and manufacturing in sustaining a Federal minimum-wage and maximum-hours law that regulated the manufacturing of goods intended for interstate commerce. 312 U.S. 100, 113 (1941). The Court extended *Darby* in *Wickard v. Filburn*, which upheld the Agricultural Adjustment Act’s regulation of the amount of wheat grown

by a farmer exclusively for use on his own farm. 317 U.S. 111, 118–19 (1942). *Wickard* is often seen as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity,” *Lopez*, 514 U.S. at 560, but, as the joint dissent in *NFIB v. Sebelius* pointed out, the Federal Government attempted to go beyond even *Wickard* when it enacted the individual mandate as part of the Affordable Care Act, 132 S. Ct. at 2588 (opinion of Scalia, Kennedy, Thomas, and Alito, JJ.). The basis for the Government’s assertion of power in *NFIB* was the so-called “substantial effects test,” announced in *Wickard*, by which Congress can regulate any activity that has a “substantial economic effect on interstate commerce.” 317 U.S. at 125. As Justice Thomas observed in *United States v. Lopez*, “This test, if taken to its logical extreme, would give Congress a ‘police power’ over all aspects of American life.” *Lopez*, 514 U.S. at 584. This is a clear violation of the Constitution’s system of enumerated powers.

The real question, then, in assessing Congress’s authority to regulate on the scale of the proposed WOTUS rule, is whether the constitutional analysis is governed by the original meaning of the Commerce Clause or by current Supreme Court jurisprudence. I have not studied the WOTUS rule sufficiently to render an opinion on its constitutionality under current Commerce Clause doctrine, but I am confident that it far exceeds Congress’s authority under the original meaning of the Commerce Clause. Waters that exist entirely within a state and that do not serve as a means of transporting goods between states cannot plausibly be regulated as a form of *interstate* commerce under the Commerce Clause’s original meaning.

I would also note that, even if Congress had the power to regulate the waters of the United States to the extent contemplated by the WOTUS rule, there would be the separate problem that this rule is *not* being enacted directly by Congress. Rather, it is being promulgated by an agency pursuant to a delegation of lawmaking authority. As I explained in my written testimony, such delegations raise serious constitutional questions under the nondelegation doctrine. There are, therefore, good reasons to doubt the constitutionality of a regulation like the WOTUS rule under the original meaning of the Constitution.

3. **QUESTION:** On June 15, 2012, former DHS Secretary Napolitano issued a memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children” (DACA Memorandum). The DACA Memorandum initiated the Administration’s grant of deferred action against aliens who were illegally present in the United States but met certain criteria, namely age of arrival, justifying their non-removal from the United States. On November 20, 2014, current DHS Secretary Johnson issued a memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents” (DAPA Memorandum), which further eased DACA requirements for illegal childhood arrivals and established deferred action standards for the parents of those children. As Judge Andrew S. Hanen from the District Court of the Southern District of Texas said in his opinion in *Texas v. U.S.*, the Government violated the Administrative Procedure Act by failing to provide the public with notice and an opportunity to comment

on the DAPA and expanded DACA programs. Do you support Judge Hanen's opinion and his call for greater Federal agency accountability? Why or why not?

**ANSWER:** As you know, the U.S. Court of Appeals for the Fifth Circuit recently affirmed Judge Hanen's preliminary injunction, and I agree with the Fifth Circuit's reasoning. Judge Jerry Smith, writing for the Court, held that the Government was unlikely to succeed in showing that the plaintiffs lacked standing. Judge Smith pointed out that at least one plaintiff, the State of Texas, had shown that it would be obligated to issue driver's licenses to illegal aliens under DAPA and would lose at least \$130.89 on each license. That was sufficient to confer standing.

Critically, the Fifth Circuit then held that DAPA is not a mere act of non-enforcement—the kind of traditional prosecutorial discretion that courts often find unreviewable. As the Fifth Circuit said,

If [nonenforcement] were all DAPA involved, we would have a different case. DAPA's version of deferred action, however, is more than nonenforcement: It is the affirmative act of conferring 'lawful presence' on a class of unlawfully present aliens. Though revocable, that new designation triggers eligibility for federal and state benefits that would not otherwise be available.

*Texas v. United States*, 2015 WL 3386436, at \*9 (5th Cir. Mar. 26, 2015). This key insight explains why the Fifth Circuit correctly held that DAPA was justiciable under the APA.

Finally, Judge Smith explained that, because DAPA imposes rights and obligations and does not leave government officials genuinely free to deport qualifying aliens, the Government did not make a strong showing that DAPA was immune from notice-and-comment rulemaking procedures. Here, the Fifth Circuit relied on the district court's factual finding that the Administration's repeated emphasis on the discretionary and case-by-case nature of DAPA was mere pretext. The Government has represented that DAPA is a discretionary policy when it is, in fact, an across-the-board grant of lawful presence to qualifying aliens. Because the Government did not show that it was likely to succeed on the merits of the APA argument, the Fifth Circuit affirmed the district court's grant of a preliminary injunction.

Again, I believe that the Fifth Circuit's reasoning is sound.

Charles J. Cooper  
 “Examining the Federal Regulatory System  
 to Improve Accountability, Transparency and Integrity”  
 Written Responses to Senator Orrin G. Hatch’s Questions for the Record  
 July 10, 2015

1. **QUESTION:** Courts have demonstrated their competence in handling highly technical areas of law in a broad array of contexts, from evaluating the reliability of expert testimony to tackling technologically complex patent cases.
  - a. Given these comparisons, is there a reasonable justification for doubting the competence of courts in the particular context of administrative law?

**ANSWER:** The supposed policy expertise of agencies, as compared to Courts, has long been relied upon by *Chevron*’s supporters. As an initial matter, I think it is important to note that this argument for freeing agencies from any judicial check is wholly based on policy considerations, and thus does little to answer the severe *constitutional* concerns with *Chevron* that I highlighted in my testimony. If agency expertise really is a strong, overriding policy reason for courts to defer to agency interpretations of law, then we should amend the Constitution to allow the practice, not pretend that the separation-of-powers constraints on government action that that document imposes do not exist.

But in truth, I do not even think *Chevron* has that much going for it as a policy matter, in part for the reasons your question suggests. To be sure, one of the chief premises of the New Deal expansion of the administrative state was that agency expertise justified the delegation of substantial policy-making authority to the “experts.” But as you point out, digesting highly difficult scientific or technological arguments is part of a judge’s ordinary diet. Indeed, we even entrust judges with this technically complex and demanding role *in administrative law*, under the “hard look” review of agency action that the Supreme Court directed in *Motor Vehicles Manufacturers Ass’n v. State Farm*, 463 U.S. 29 (1983).

Moreover, I think it is important to emphasize that agencies simply are *not* experts at matters of statutory interpretation—at least as compared to courts. Judges spend pretty much every day of their judicial career scrutinizing, analyzing, and interpreting legal texts; it is hard to imagine a branch of government more “expert” in answering questions of statutory interpretation and meaning. And when judges defer to an agency under *Chevron*, they are deferring to its conclusion about how to *interpret the law*. The judiciary has built up a body of expertise on *that* type of question over the course of *centuries*.

2. **QUESTION:** Given how judicial deference to the agencies tends to get attention in the context of high-profile challenges to a presidential administration’s signature regulatory efforts, many argue that observers’ views on the merits of judicial deference change based on which party controls the White House. While that may accurately characterize a small set of cases, the sheer size of the federal bureaucracy casts significant doubt on the

ability of a President or any politically accountable administration official to exert active control over the federal leviathan.

- a. Instead of focusing solely on the abuses of any particular administration, should we also think about judicial deference to agencies as a limit on the courts' ability to check the power a giant, unaccountable bureaucracy that presidential administrations of both parties frequently struggle to control?

**ANSWER:** Yes, we certainly should think about the way judicial deference removes a crucial check on the Administrative State. The problem of unaccountable agencies began with the Supreme Court's decision in *Humphrey's Executor v. United States*, which largely freed so-called "independent agencies" from presidential control. 295 U.S. 602, 624, 631 (1935). By restricting the President's power to remove the heads of such agencies—in violation of Article II's vesting of all executive power in the President—*Humphrey's Executor* removed the President's ability to effectively oversee some of the most powerful agencies in the Government, such as the National Labor Relations Board or the Federal Communications Commission.

But even apart from the problem of independent agencies, the sheer scale of the Administrative State makes it impossible for the President to closely supervise the Federal bureaucracy. The Administrative State issues as many as 4,500 final rules *every year*. MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 1 (2014). In 2013 alone, 3,659 final rules were issued, adding 26,417 pages to the Federal Register. *Id.* at 19. All told, the Code of Federal Regulations contains 175,496 pages of regulations spread out over 235 volumes as of 2013. Clyde Wayne Crews, *New Data: Code of Federal Regulations Expanding, Faster Pace under Obama*, Competitive Enter. Inst. (March 17, 2014), <https://cei.org/blog/new-data-code-federal-regulations-expanding-faster-pace-under-obama>. As Chief Justice Roberts observed in his dissenting opinion in *City of Arlington v. FCC*, "[W]ith hundreds of federal agencies poking into every nook and cranny of daily life, th[e] citizen might . . . understandably question whether Presidential oversight—a critical part of the Constitutional plan—is always an effective safeguard against agency overreaching." 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting). In the words of then-Professor Elena Kagan, "[N]o President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity." Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250 (2001).

"The declared purpose of separating and dividing the powers of government, of course, was to diffus[e] power the better to secure liberty." *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (alteration in original) (quotation marks omitted). By giving to each branch the power to check the others, the Founders intended to create "security against a gradual concentration of the several powers in the same department." THE FEDERALIST NO. 51, at 321 (James Madison) (C. Rossiter ed., 1961). With Congress having delegated enormous power to agencies and the President having very little ability to oversee them, the only remaining effective check on the power of the Administrative State is the judiciary. Within the scheme of separated powers, "the power of [t]he interpretation of the laws [is] the proper and peculiar province of the courts." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S.

211, 222 (1995) (second alteration added) (quotation marks omitted). But *Chevron* removes this last restraint on agency power by allowing *agencies* to issue interpretations of Federal statutes binding even on the Supreme Court. The result is essentially a massive and powerful one-branch government that answers to no one—precisely what the Constitution is designed to avoid. That is a problem that *any* administration—regardless of political party—should find alarming.

3. **QUESTION:** In your testimony, you identified one of the opinions in *Utility Air Regulatory Group v. EPA* as a particularly egregious application of *Chevron* deference.
- a. Would you identify some other examples of the most unreasonable cases that you have encountered over the years in which *Chevron* deference or its progeny allowed an agency to defy the law as written?

**ANSWER:** *Chevron* has led to much mischief. The most extreme examples fall into one of two categories: some cases are *structurally* unreasonable, pressing *Chevron*'s own reasoning to the limits of its logic and demonstrating just how impossible it is to square *Chevron*'s explicit abdication of the judicial role with the enduring structural principles of our Constitution. A prime example of this type of abuse is the *Brand X* case I mentioned in my testimony, which gives agencies the authority to essentially overrule a federal court's prior interpretation of a statute—even the *Supreme Court*'s interpretation. *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). Another troubling example is the line of circuit court cases that have deferred to agency statutory interpretations even in *criminal prosecutions*, under statutes like the Securities and Exchange Act, *United States v. Royer*, 549 F.3d 886, 899 (2d Cir. 2008), and the Federal Election Campaign Act, *United States v. Kanchanalak*, 192 F.3d 1037, 1047 (D.C. Cir. 1999).

A second set of cases are *substantively* unreasonable, upholding agency interpretations under *Chevron* that are obviously at war with the text both the agency and the court are purporting to construe. Examples of this type of abuse abound. The example on everyone's mind right now is the IRS's interpretation of the Affordable Care Act which the Supreme Court just upheld in *King v. Burwell*, 2015 WL 2473448 (U.S. June 25, 2015). In establishing a system of subsidies for individuals who purchase health insurance from government-operated insurance exchanges, Congress could not have been clearer that those subsidies were available only for insurance purchased on "an Exchange established by [a] State under 1311"—the statutory section governing state, not federal, exchanges. But, as is well known, the IRS ignored this clear limit, promulgating regulations that make subsidies available also to individuals who purchase insurance on a *federal* exchange and thus essentially rewriting the clear language chosen by Congress. And based on ephemeral inferences from the general purpose, context, and structure of the ACA, the Supreme Court last month upheld the IRS's interpretation. Though the Court's opinion expressly eschewed reliance on *Chevron*, the Fourth Circuit, in the opinion affirmed by the Supreme Court, explicitly relied on *Chevron* deference to uphold the IRS's re-write, and the IRS, like all administrative agencies, undoubtedly was emboldened in drafting the rule by the Court's longstanding *Chevron* doctrine requiring deference to agency interpretations.

Another particularly vivid example of *Chevron*'s susceptibility to abuse is the D.C. Circuit's interpretation of the Brady Act in *NRA v. Reno*, 216 F.3d 122 (D.C. Cir. 2000). That statute created a National Instant Criminal Background Check System (the "NICS") that allowed the FBI to instantly search the backgrounds of prospective gun purchasers. Congress was particularly worried that the government might use the information generated by NICS background checks to compile identifying information on legal gun owners, so it forbade the Attorney General from retaining such information. In fact, it forbade retention of this information *in three separate places* of the statute: first, by requiring the NICS to "destroy all records" relating to each background check upon completion of the check, 18 U.S.C. § 922(t)(2); second, by barring any federal agency or employee from "requir[ing] that any record . . . generated by the [NICS] be recorded," Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(i)(1), 107 Stat. 1536, 1542 (1993); and finally, by emphatically forbidding the government from "us[ing] the [NICS] system . . . to establish any system for the registration of firearms, firearm owners, or firearm transactions," *id.* § 103(i)(2). Notwithstanding this prohibition *in triplicate*, the Justice Department promulgated a regulation permitting the FBI to "retain records of all NICS background searches—including names and other identifying information about prospective gun purchasers" for a period of six months. *NRA*, 216 F.3d at 125. And the D.C. Circuit upheld this interpretation 2-1, straining to find each of these three clear-as-day provisions somehow "ambiguous" and thus susceptible to *Chevron* deference. *Id.* at 126-32.

The D.C. Circuit's interpretation of the 1984 Cable Act in *American Scholastic TV Programming Foundation v. FCC*, 46 F.3d 1173 (D.C. Cir. 1995), is almost as egregious an example of *Chevron* deference. In 1984, Congress enacted "a series of media cross-ownership restrictions," including 47 U.S.C. § 533(b), which prohibited a telephone company from "provid[ing] video programming directly to subscribers in its telephone service area." (Congress ultimately repealed this provision in 1996). On the face of the text, this provision barred cross-ownership of *any* "video programming"—a term that Congress, as though to underscore the point, defined expansively as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station," *id.* § 522(20). Congress did not refer in any fashion to the medium through which such video programming was transmitted. But the FCC thought this blanket prohibition should apply only to video programming delivered through a physical cable, and interpreted it as allowing cross-ownership of programming transmitted through wireless cable. And undeterred by the plain text of Congress's statute, the D.C. Circuit upheld the FCC's interpretation, finding sufficient ambiguity in "the underlying purposes of the Cable Act," along with its "structure and legislative history," to justify deference under *Chevron*. *American Scholastic*, 46 F.3d at 1179-81.

Cases like these dramatically illustrate just how loose the judicial reins on agency authority are after *Chevron*. Indeed, some agencies have even *invoked Chevron* in their own deliberations as giving them *carte blanche* to adopt freewheeling interpretations of the statutes that are meant to constrain them. See Gary Lawson, *Dirty Dancing – The FDA Stumbles with the Chevron Two-Step: A Response to Professor Noah*, 93 Cornell L. Rev. 927, 933-35 (2008) (noting the FDA's reliance on *Chevron* during a 2003-04

rulemaking as giving it substantial discretion to adopt a “reasonable” interpretation of a statute’s use of the term “food”). *Chevron* sanctions—indeed, *encourages*—basically unreviewable agency behavior, and it is time for Congress to make the judicial check on agency action meaningful again.

Charles J. Cooper  
 “Examining the Federal Regulatory System  
 to Improve Accountability, Transparency and Integrity”  
 Written Responses to Senator Thom Tillis’s Questions for the Record  
 July 10, 2015

1. **QUESTION:** During the hearing, much was said regarding efforts to improve accountability, transparency, and the integrity of our federal regulatory system. In determining how we might best accomplish those objectives, it would be helpful for us to agree on the appropriate markers we could use to measure the current regulatory environment and the effectiveness of any ensuing reforms. How might we, as members of the Congress charged with continually evaluating the regulatory landscape, quantify the current volume or level of regulations in play in the federal regulatory system? In other words, what metrics could or should Congress use to determine whether the administrative rulemaking process is appropriately balanced? What are the correct indicators for us to use to evaluate whether things truly are out of balance at this point in time as opposed to at prior points in the modern era of administrative law generally?

**ANSWER:** There are several ways in which we might try to quantify and measure the growing impact of the administrative state. One would be to look purely at volume. For example, in 2013, 3,659 final rules were issued, adding 26,417 pages to the Federal Register. MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 19 (2014). By contrast, in 1976, less than half this number of pages were added. *Id.* at 18. A second, perhaps more finely-grained measure would look at the rough *proportion* of federal lawmaking done by agencies. The 26,000 pages that agencies added to Federal Register in 2013 outnumbered on the order of 21-to-1 the 1,208 pages that Congress added to the Statutes at Large in the 2013–2014 session, VITAL STATISTICS ON CONGRESS tbl. 6-4 (Norman J. Ornstein, et al. eds.), <http://goo.gl/AmNwgT>; that is starkly higher than the corresponding 3-to-1 ratio between the 1976 Federal Register and the output of Congress in the 1975–1976 session, *cf. id.* with CAREY, COUNTING REGULATIONS at 18.

But I want to emphasize that this exponential growth is baked into the very nature of the Administrative State. As is often the case, Publius put the point best. “[P]ower,” Madison noted in *Federalist 48*, “is of an encroaching nature.” THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961). And while the framers most feared that the legislative branch would “draw[ ] all power into its impetuous vortex,” *id.* at 309, this equally describes the inevitable growth of administrative state, once that unaccountable Fourth Branch is *armed with legislative* as well as executive power. Indeed, the Framers also foresaw the danger that lies in “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands.” THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). Possessing all three types of power comingled, and loosed from the reins that the Constitution imposes on the lawmaking process that *it* envisions, we should not be surprised to find that the Administrative State’s appetite is voracious.

2. **QUESTION:** The use of “sue-and-settle” tactics creates a significant loophole in the legislative process that can allow special interest groups to unfairly influence rule-making decisions without the open and transparent notice and comment period. In terms of addressing “sue-and-settle,” is there an argument that the courts should actually have a more active role in this, perhaps by being more liberal with intervention rights of third parties or perhaps with statutorily defined time limitations as to how quickly an agency may formally settle after publicly disclosing the terms of such a settlement?
- a. Is there a statutory solution that would make this process less likely to shut out stakeholders with a different viewpoint than those espoused by a hypothetical plaintiff and sympathetic or collusive agency-defendant?
  - b. Should Congress consider reforms to make settlements and consent decrees achieved through “sue-and-settle” tactics more transparent? If so, how?

**ANSWER:** Other witnesses before this Committee have specifically addressed the many problems posed by “sue and settle” and the most promising ways of potentially curbing its abuses. I have not studied this issue closely, but based on what I do know, it certainly seems clear to me that sue-and-settle too often allows an end-run around the modest constraints that the APA imposes on the notice-and-comment rulemaking process. And this is all the more alarming given that the courts’ lopsided prudential standing rules give special interest groups, rather than regulated entities, disproportionate opportunities to affect the regulatory agenda in this way. The Sunshine for Regulatory Decrees and Settlements Act, by ensuring that the settlement agreements or consent decrees that agencies seek to enter in sue-and-settle lawsuits are aired publicly before they are entered, would go far toward restoring some necessary transparency to the agency lawmaking process.

3. **QUESTION:** Currently, under *Chevron*, if a statute is deemed ambiguous, an agency must merely show that their interpretation of the statute was reasonable and, in the words of Chief Justice Roberts, within “the bounds of the permissible.” In your expert opinion, should Congress consider raising this bar in an effort to reduce judicial deference to agencies’ rule-making authority? If so, what should the standard be?

**ANSWER:** As I stated in my testimony to the Committee, I believe that Congress should abrogate *Chevron* in its entirety, both because it contradicts the plain text of the Administrative Procedure Act and because there are serious questions about *Chevron*’s constitutionality. Congress has the authority to abrogate *Chevron* legislatively, and it should do so.

Short of full abrogation, congressional efforts to replace *Chevron* with a standard of judicial review that is less deferential to agency statutory interpretations would certainly be a positive development. One way to do that would be to replace *Chevron* deference with what the Court calls *Skidmore* deference. *Skidmore* deference holds that “[t]he

weight of such [an agency's interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). I tend to agree with Justice Scalia that *Skidmore* boils down to this: "A judge should take into account the well-considered views of expert observers." *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J., dissenting).

4. **QUESTION:** Given the current vast and expanding bureaucratic structure of the federal agencies, most, if not all, of their current focus is placed on the promulgation of new rules. There are over 176,000 pages of regulations which some sources have stated amount to a regulatory burden of \$1.6 trillion. This regulatory effect is increasingly frustrating for business owners of all sizes, including farmers and ranchers. In your opinion, do you feel there should be a process to retroactively review rules to eliminate any excessive or duplicative rules to help simplify the current regulatory scheme and reduce the current regulatory burden felt by so many businesses and farmers?
- c. Further, should Congress create a commission to review and recommend the elimination of outdated, ineffective, and duplicative regulations in an effort to reduce the current regulatory burden?
  - d. Alternatively, should agencies be required to make systematic reviews of their own rules to determine if there are any duplicative or outdated rules?

**ANSWER:** I strongly believe that reforming the Administrative State requires a review of current regulations. To that end, I think Senator Hatch's SCRUB Act is an important step in the right direction. The SCRUB Act would create an independent commission—modeled on the BRAC commissions—to review all current regulations with a goal of eliminating 15% of their total cost. In accordance with the Constitution's bicameralism and presentment requirements, the Act would require Congress to enact a joint resolution approving of the Commission's recommended regulatory repeals before they could go into effect. *See* U.S. CONST. art. I, § 7, cl. 3 (requiring joint resolutions to be presented to the President for signature); *Clinton v. City of New York*, 524 U.S. 417, 436–41 (1998); Although I suspect that more than 15% of the cost of current regulations is unjustified, the 15% goal is a reasonable starting point.

The SCRUB Act also contains a provision requiring agencies to review new rules ten years after the rules' enactment. I think it is a healthy exercise to require agencies to conduct such a review, but given that agencies have little incentive to repeal their own regulations, I think the Act rightly places more emphasis on the Commission's retrospective review. If the Commission were successful, it could be reauthorized every few years, as with the BRAC Commissions. That would decrease reliance on agency reviews and revisions of their own regulations.

5. **QUESTION:** Many states have implemented policies aimed at reviewing regulations and removing those that increase regulatory burden without accomplishing net positives for the public. For example, in 2013, North Carolina passed a comprehensive regulatory reform measure that slated all regulations for sunset in 10 years if they were not reviewed by their originating agency before that period. Further, the process includes significant public comment periods to ensure transparency and accountability. In addition, North Carolina has a Rules Review Commission to ensure rules are promulgated with appropriate authority, clarity, and necessity. Are these types of reforms transferrable to the federal level? Said differently, is the regulatory environment of the federal government too leviathan to be improved by similar, incremental reforms? What other reforms would you recommend we consider?

**ANSWER:** I think North Carolina should be applauded for its pioneering efforts at regulatory reform. By subjecting all state regulations not required by federal law to a thorough, structured, and publicly accountable process of review, it has done much to rid the books of burdensome regulations *that even the agency that promulgated them no longer thinks necessary*. As I noted in response to your first question, the growth of the administrative state is by its very nature exponential, and part of the reason for this is the influence of special interest groups and administrative inertia. Once an agency has put a regulation on the books, it can be very difficult for it to wipe the slate clean even after the cause that supposedly justified the regulation has come and gone. By enacting the Regulatory Reform Act of 2013, North Carolina has taken a significant step towards freeing its citizens of the burden built up by special interests and regulatory inertia on the state level. The rest of the nation also stands to gain. As Justice Brandeis famously noted, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). North Carolina is acting as such a laboratory, here, and the rest of the country would do well to study its example.

Which brings me to the question whether North Carolina's reforms are transferrable to the federal leviathan, as you aptly put it. I think they are, to a great extent. I have already noted that the federal rulebooks are filled with obsolete, costly regulations. Congress should act, just as North Carolina has, to require a comprehensive view of the C.F.R. for such outdated regulations. The SCRUB Act, which Senator Hatch recently introduced in the Senate, is designed to do just that. While its details differ somewhat from North Carolina's Act, its goal is the same: making sure that only those regulations that are justified by some *current* need remain on the books.

Of course, no one piece of legislation can solve all of the pathologies of the Administrative State. The SCRUB Act is just one among a larger suite of promising regulatory reform bills that Congress currently has before it, and it should give all of these bills careful consideration. In addition to the SCRUB Act and the sue-and-settle reform I mentioned earlier, I think Congress should give close attention to the Regulatory Accountability Act, which among other things would eliminate the courts' dangerous practice of deferring to agencies' interpretations of their own regulations, and also the

REINS Act, which would restore Congress's constitutional role in approving all *future* regulations that have a major impact on the economy. And of course, I also strongly believe that Congress should consider amending the APA, along the lines I recommended in my written testimony, to repudiate the *Chevron* doctrine. The constitutional and practical difficulties posed by the administrative state are all-encompassing, and any adequate response by Congress will have to be equally comprehensive.

Charles J. Cooper  
 “Examining the Federal Regulatory System  
 to Improve Accountability, Transparency and Integrity”  
 Written Responses to Chairman Charles E. Grassley’s Questions for the Record  
 July 10, 2015

1. **QUESTION:** It’s often argued that agencies are the real policy experts, and that because of their objective expertise in specific areas, it only makes sense to largely let them interpret laws they administer—particularly on questions involving complex, technical matters.
  - a. Assuming agencies are full of policy experts, does that justify the level of deference that federal courts give to agencies?

**ANSWER:** The supposed policy expertise of agencies, as compared to Courts, has long been relied upon by *Chevron*’s supporters. As an initial matter, I think it is important to note that this argument for freeing agencies from any judicial check is wholly based on policy considerations, and thus does little to answer the severe *constitutional* concerns with *Chevron* that I highlighted in my testimony. If agency expertise really is a strong, overriding policy reason for courts to defer to agency interpretations of law, then we should amend the Constitution to allow the practice, not pretend that the separation-of-powers constraints on government action that that document imposes do not exist.

But in truth, I do not even think *Chevron* has that much going for it as a policy matter, in part for the reasons your question suggests. To be sure, one of the chief premises of the New Deal expansion of the administrative state was that agency expertise justified the delegation of substantial policy-making authority to the “experts.” But digesting highly difficult scientific or technological arguments is part of a judge’s ordinary diet. Indeed, we even entrust judges with this technically complex and demanding role *in administrative law*, under the “hard look” review of agency action that the Supreme Court directed in *Motor Vehicles Manufacturers Ass’n v. State Farm*, 463 U.S. 29 (1983).

Moreover, I think it is important to emphasize that agencies simply are *not* experts at matters of statutory interpretation—at least as compared to courts. Judges spend pretty much every day of their judicial career scrutinizing, analyzing, and interpreting legal texts; it is hard to imagine a branch of government more “expert” in answering questions of statutory interpretation and meaning. And when judges defer to an agency under *Chevron*, they are deferring to its conclusion about how to *interpret the law*. The judiciary has built up a body of expertise on *that* type of question over the course of *centuries*.

2. **QUESTION:** Some have argued that agencies actually rely on *Chevron* deference as a sort of get-out-of-jail-free card when stretching the interpretation of federal laws, and that they may be taking advantage of statutory ambiguities to further their agendas.
  - a. Do you believe *Chevron* deference influences the behavior of agencies, or of agency staff? Do you believe it creates an incentive for agencies to take advantage of ambiguous terms or phrases in the statutes they administer?

**ANSWER:** *Chevron* certainly incentivizes agencies to push the limits of their authority as far as possible to achieve their policy objectives. If there is a non-frivolous argument in favor of an agency-empowering interpretation, the agency has every reason to adopt that interpretation and take its chances in court.

Few cases so vividly illustrate this problem as *Utility Air Regulatory Group v. EPA*, which I mentioned in my oral testimony but which merits mention here. In that case, the EPA interpreted the Clean Air Act (CAA) to impose permitting requirements on all stationary sources emitting 100 or 250 tons of greenhouse gases per year, depending on the permitting requirement in question. 134 S. Ct. 2427, 2436 (2014). The 100- and 250-ton figures were in the statute itself; EPA was simply applying them to greenhouse gases. However, EPA recognized that its decision to interpret the CAA in this fashion would have “calamitous consequences,” such as increasing permit applications from 800 per year to nearly 82,000 and “causing construction projects to grind to a halt nationwide.” *Id.* at 2442–43. To remedy this problematic consequence—one that resulted from the EPA’s own agency-empowering interpretation of the statute—the EPA announced that it would “tailor” the statute by replacing the 100- and 250-ton statutory thresholds with a 100,000-ton threshold of its own invention. *Id.* at 2444–45. The EPA literally rewrote numerical requirements specified in the statute to suit its own policy purposes.

Fortunately, a majority of the Supreme Court held that even *Chevron* deference cannot authorize such an effort. It affirmed that “[a]n agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.” *Id.* at 2445. “It is hard to imagine a statutory term less ambiguous than the precise numerical thresholds at which the Act requires . . . permitting. When EPA replaced those numbers with others of its own choosing, it went well beyond the bounds of its statutory authority.” *Id.* (quotation marks omitted). The Court noted that, instead of changing the statute’s requirements—requirements to which Congress and the President had agreed—the agency should have realized that its need to do so signaled “that it had taken a wrong interpretive turn.” *Id.* at 2446.

Yet, had just one Justice switched his vote, the EPA would have succeeded in its brazen attempt to rewrite an Act of Congress. Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, would have permitted the EPA to read an “implicit exception” into the “less important language” of the statute—that is, “the particular number used by the statute.” *Id.* at 2454. In doing so, Justice Breyer noted that the EPA was merely “exercising the legal authority to which it is entitled under *Chevron*.” *Id.* at 2453.

The EPA rewrote the indisputable, numerical requirements of a statute, and, because of *Chevron*, its gamble almost paid off. When an agency regulation directly contradicts its authorizing statute, and yet the Court still comes within one vote of sustaining the agency’s action, the lesson to the administrative agencies is to seize as much power as possible, confident that they will have a fighting chance in court.

**“Examining the Federal Regulatory System  
to Improve Accountability, Transparency and Integrity”  
Written Questions for the Record Submitted by Chairman Charles E. Grassley of Iowa  
June 17, 2015**

**Questions for Mr. Kovacs**

1. In January, the GAO issued a report concluding that “[t]he effect of settlements in deadline suits on EPA’s rulemaking priorities is limited.”
  - a. Do you agree or disagree with the report’s conclusion? Why or why not?

The Chamber disagrees with the assertion that settlement agreements in deadline suits have a limited effect on EPA’s rulemaking priorities. The December 2014 Government Accountability Office (GAO) report that evaluated seven consent agreements that EPA entered into between May 31, 2008 and June 1, 2013 suffers from several fatal flaws and cannot be relied upon.

The report acknowledges that GAO relied exclusively on statements and materials provided by EPA and DOJ personnel and that GAO made no attempt to conduct any independent research of its own. Accordingly, the report only parrots the positions on the “sue and settle” issue stated by EPA and DOJ. Moreover, while the report notes that “[w]e relied on EPA because neither EPA nor DOJ maintain a database that links settlements to rules, and there is no comprehensive public source of such information,” GAO apparently does not consider this lack of transparency to be a problem. For years, Congress and the public have asked EPA to release more information about sue-and-settle negotiations and agreements, which the agency has refused to provide. The report simply accepts EPA’s lack of transparency as fact, rather than considering its adverse impact on the rulemaking process.

The report notes that all of the settlement agreements studied came out of just one EPA office, the Office of Air and Radiation (OAR). While this implies that settlement agreements are an isolated, perhaps unimportant phenomenon at EPA, the report ignores the fact that Clean Air Act rules issued by OAR represented 96.6% of total annual costs of all EPA regulations issued between 2008 and 2013.<sup>1</sup>

Significantly, the report only considers 7 settlement agreements. Based on *Federal Register* notices of proposed Clean Air Act agreements lodged with courts, at least 60 such agreements were reached between 2009 and 2012.<sup>2</sup> Why were the vast majority of these agreements ignored?

The title of the report gives the impression that GAO’s research found that settlement agreements in deadline suits have no impact on rules issued by EPA or on the public’s ability to participate in agency decision-making. The report itself clearly contradicts this impression, however. The report states that with respect to the recurring reviews of hazardous air pollutant standards for specific industries under the NESHAP program, “most of the resources available to complete [the recurring reviews] are focused on a 2011 settlement... and they have been unable to meet all of the time frames contained in the 2011 settlement... Officials said that they intended to complete all of the overdue [reviews] but are focused on fulfilling the terms of the 2011 settlement and several other settlements[.]” In other words, the 2011 settlement and other settlements have forced EPA to redirect its resources into meeting agreed-upon deadlines to the detriment of all other scheduled reviews, which themselves are overdue.

<sup>1</sup> Source: EPA Regulatory Impact Analyses for the individual rules. With a 7% discount rate, these rules totaled \$56.9 billion in estimated compliance costs.

<sup>2</sup> U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) at 14.

EPA often agrees to bind itself to deadlines for regulatory action that it cannot meet. The agency subsequently uses the deadline it agreed to as justification for requiring shorter comment periods, relying on incomplete or questionable technical data, and cutting corners on regulatory reviews. The resulting rulemakings are rushed, sloppy, and often require years of litigation to fix.

**b. Is there any evidence that these tactics do, in fact, impact regulatory agendas at federal agencies?**

Sue-and-settle tactics do in fact impact regulatory agendas at federal agencies. The GAO's report itself acknowledges that agencies cannot meet compliance obligations under previous settlement agreements, let alone new ones, and the settlement agreements have forced EPA to redirect its resources into meeting agreed-upon deadlines, to the detriment of all other scheduled regulatory actions, which themselves are overdue. EPA in fact misses, according to various sources, between 86 % and 98 % of its statutorily-imposed deadlines.<sup>3</sup> When an agency misses nearly all of its deadlines, each citizen suits sets a priority over other regulations causing agencies to lose discretion.

Agency resource diversion is illustrated by the sue-and-settle agreements entered into between advocacy groups and the U.S. Fish and Wildlife Service (FWS). FWS agreed in May and July 2011 to two consent decrees with an environmental advocacy group requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the ESA. Agreeing to propose listing this many species all at once imposes an overwhelming new burden on the agency, which requires redirecting resources away from other—often more pressing—priorities in order to meet agreed deadlines. According to the Director of the FWS, in FY 2011 the FWS was allocated \$ 20.9 million for endangered species listing and critical habitat designation; the agency was required to spend more than 75% of this allocation (\$15.8 million) undertaking the substantive actions required by court orders or settlement agreements resulting from litigation. In other words, sue and settle cases and other lawsuits are now driving the regulatory agenda of the Endangered Species Act program at FWS.

**2. Some critics of the Sunshine for Regulatory Decrees and Settlements Act argue that it's a "solution in search of a problem" and that it would effectively prevent citizens from holding the government accountable.**

**a. Do you agree or disagree with what critics have said? Why or why not?**

The Chamber strongly disagrees. The Sunshine for Regulatory Decrees and Settlements Act would simply require that agencies are more transparent about settlements that bind the federal government to pursue a specified course of regulatory action. Increased transparency is clearly needed to increase government accountability. When an agency like EPA fails to meet 84% to 98% of its statutory deadlines, the various citizen suit provisions invite special interest groups to set regulatory priorities through sue-and-settle agreements. Sue and settle agreements lead to: (1) diversion of agency resources to

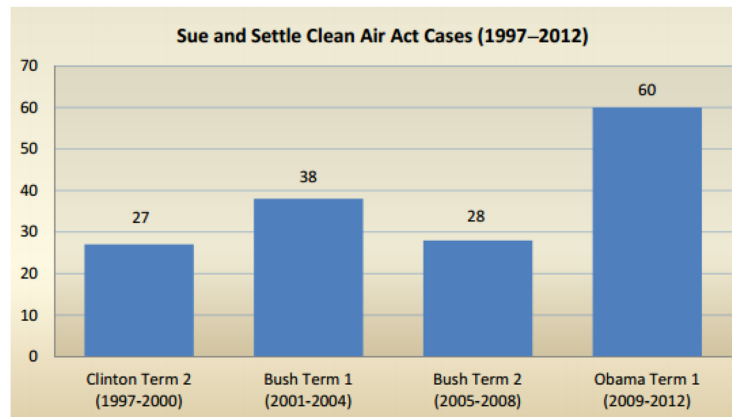
<sup>3</sup> Henry N. Butler and Nathaniel J. Harris, *Sue, Settle, and Shut Out the States: Destroying Environmental Benefits of Cooperative Federalism*, HARVARD JOURNAL OF LAW & PUBLIC POLICY, Vol. 37, No. 2 at 599 (2014) (available at [http://www.harvard-jlpp.com/wp-content/uploads/2014/05/37\\_2\\_579\\_Butler-Harris.pdf](http://www.harvard-jlpp.com/wp-content/uploads/2014/05/37_2_579_Butler-Harris.pdf)) (citing Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law* 54 LAW & CONTEMP. PROBS. 311, 323 (1991) (available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1158&context=facpub>). According to Lazarus, "the 14% compliance rate refers to all environmental statutory deadlines, 86% of which apply to EPA." *Id.* at 324 (citing *Statutory Deadlines In Environmental Legislation: Necessary But Need Improvement* 13-14 (ENVIR. & ENERGY STUDY INST. AND ENVIR. L. INST., 1985)); William Yeatman, *EPA's Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, "Sue and Settle"* (July 10, 2013) (available at <https://cei.org/web-memo/epas-woefuldeadline-performance-raises-questions-about-agency-competence-climate-change-re>).

address court-ordered settlements; (2) rushed and sloppy rulemaking to meet court ordered deadlines leading to technical and court-ordered remands for agency improvement; and (3) insufficient time to comply with congressionally-mandated analysis.

The Sunshine for Regulatory Decrees and Settlements Act would provide notice to the public that private parties and federal agencies are settling public policy issues in private, and allow affected parties a limited ability to intervene when their interests are not being protected by the parties to the consent decree. This approach is a good way to ensure that critical decisions are not made behind closed doors and that affected parties can participate.

3. **In 2004, Professor Parenteau published an article criticizing the George W. Bush Administration for entering into “sweetheart deals to settle lawsuits brought by favored interests,” and its use of “closed-door negotiations” in the process. He acknowledged that “environmentalists have benefitted from these in the past,” but asserted that the Bush Administration used the technique “routinely to make major policy decisions without public participation or Congressional review.” It’s clear, therefore, that allegations of sue-and-settle tactics are not limited to just one administration or one political party.**
  - a. **Do you agree that it’s time Congress takes action to address the issue? Should combatting sue-and-settle tactics be an effort supported by folks on both sides of the aisle?**

Congress should take action to address the abuse of citizen suits through sue-and-settle agreements. The Chamber conducted an analysis comparing the use of Sue and Settle in Clean Air Act cases over a 15 year period between 1997 and 2012. The following chart compares Clean Air Act sue-and-settle settlement agreements and consent decrees finalized during that period.



The results show that the sue and settle tactic has been used during both Democratic and Republican administrations.<sup>4</sup> The sue-and-settle problem requires a bipartisan solution which can be addressed

<sup>4</sup> The sue-and-settle problem dates back to at least the 1980s. In 1986, Attorney General Edward Meese III issued a Department of Justice memorandum, referred to as the “Meese Memo,” addressing the problematic use of consent

through the Sunshine for Regulatory Settlements and Decrees Act and by consolidating citizen suit provisions under Title 28 to provide greater congressional oversight of the issue. This oversight does not now occur because jurisdiction over citizen suits rests with many committees and none of them have undertaken oversight of the provisions in their jurisdiction. Finally, consent decrees are about policymaking and the public should be involved.

**4. In his written testimony, Mr. Weissman asserts that the rulemaking process “gives affected industries ample opportunity to communicate with regulators over cost concerns, and these concerns are taken into account.”**

**a. Do you agree with this observation? Why or why not?**

The Chamber disagrees strongly with Mr. Weissman’s assertion, and believes he misconstrues the point on the issue of industry concerns with rulemaking. Mr. Weissman seems to be stating that the only concern industry has with agency rulemaking is how the agency estimates costs. This is incorrect. The Chamber’s concerns are with the entirety of the regulatory process, which now allows agencies to complete rulemaking after rulemaking that lack transparency and accountability across the board. Industry supports a robust, transparent, and accountable regulatory process that ensures the best information available is used to inform agencies of the impact of a regulation, including its impact on jobs, competitiveness, and communities, and that the information is weighed appropriately. However, the rulemaking process often does not work this way, leading to regulatory failure.

The Environmental Protection Agency (EPA) provides the most salient example of regulatory failure in this respect. In the past year the agency has concurrently undertaken three massive new rulemakings that vastly expand the agency’s reach: the Clean Power Plan (CPP), Waters of the U.S. (WOTUS), and Ozone NAAQS. Mr. Weissman asserts that the notice and comment process, as currently practiced by the EPA, provides ample opportunity for industry to voice concerns over costs. However, each of these rules represents an expansion of EPA authority that creates significant uncertainty by asking states and the regulated community to implement three rules that have the potential to conflict with one another.

For example, the CPP may force the closure of a coal-fired plant in a non-attainment area for Ozone, but because of natural gas access needs, a replacement plant might need to be built in a current attainment area and need a natural gas pipeline to provide it a supply of gas for operations. The newly built natural gas facility may affect ozone levels in that area sufficiently that further actions need to be taken to remain in attainment. Further, that new gas plant might require new pipeline construction to ensure gas supply, which will likely raise Clean Water Act permitting issues that would not have existed prior to WOTUS. The bottom line is that planning becomes impossible when all parts of the system are moving at once.

Moreover, for each new rule the agency has failed to properly perform important, statutorily required analyses that provide information to the public and information that Congress demanded through multiple statutes. Congress passed the Regulatory Flexibility Act (RFA) to ensure that agencies examine the effects of their rules on small businesses and small local governments; it passed the Unfunded Mandates Reform Act (UMRA) to make certain that agencies were not simply passing the buck to states by requiring the states to bear the administrative costs of implementing and enforcing complicated and

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decrees and settlement agreements by the government, including the agency practice of turning discretionary rulemaking authority into mandatory duties. See Meese, Memorandum on Department Policy Regarding Consent Decrees and Settlement Agreements (March 13, 1986).

costly rules; and Congress passed the Information Quality Act (IQA) to make certain that the EPA and other agencies were not using faulty scientific studies to promote their preferred policies and instead used the best information available.

Congress also included § 321(a) in the Clean Air Act (CAA), which requires the EPA to evaluate the employment impacts from its rulemakings. EPA has never complied with this requirement. It is simply not possible for businesses to have ample opportunity to voice concerns over a rulemaking when the agency fails to provide all of the relevant information in a transparent manner. (See attachment for an analysis of EPA's compliance with all of the above-referenced statutory analytical requirements, as well as its compliance with EO 12866 and 13563, in the three recent major rulemakings discussed here.)

- 5. In his written testimony, Mr. Weissman discusses unreasonable delays in the rulemaking process. He says “the source of the problem is not inept government officials and workers, but a thicket of legislatively mandated process and multiple analyses, along with inappropriate influence exerted by and for regulated parties.”**
- a. Do you agree with this observation? Why or why not?**

In direct terms, what Mr. Weissman finds to be a “thicket of legislatively mandated process and multiple analyses” are mandates Congress imposed on agencies to determine the impact of their rules on state and local governments, workers, small businesses, communities, and competitiveness. While Mr. Weissman may view this information to be a “thicket” of requirements, it is the information that Congress needs to effectively legislate, and which Congress was forced to mandate because agencies routinely engaged in non-transparent rulemakings. Even after enacting these mandates requiring information needed to evaluate the impacts of a rule, agencies still routinely ignore them and publish rules claiming that their regulation imposes little cost and great benefits. Congress has requested agencies provide certain data on the impacts of a regulation. It needs this data for decision making.

The problem, however, with the federal regulatory process is that Congress has enacted vague laws which delegate significant, poorly defined authority to federal agencies. That authority is then used by unelected bureaucrats to craft massive, costly, intrusive regulations that Congress never attended, and which the courts approve by granting court-created deference to the agency. In recent years, agencies like the EPA have continued to formulate ever more intrusive and costly regulations, even though our air and water are already far cleaner than even the EPA mandates in many cases. The EPA is currently in the process of proposing and finalizing three of the most massive, and expansive rules in American history, effectively expanding its authority not only to protect the environment, but also to establish national land use policies, to determine the allowable level of economic development, and to dictate the composition of the country's energy portfolio.

These high impact, high cost rules are laws due to the fact that Congress delegated lawmaking authority to the agencies. But what is most unfortunate is that these laws are far more sweeping than Congress could enact in current circumstances and these rules are enacted at the discretion of one or a few unelected bureaucrats. This situation at the very least demands greater scrutiny over what these unelected bureaucrats do and how they do it. These high impact rulemakings should require that the agency slow down its process and gather more information, updating Congress and allowing it to provide the necessary oversight, not speed things up and push these rules out at a faster pace. (Once again, see the attachment for an analysis of how the EPA has circumvented the statutorily mandated provision of information to Congress and the public for the Clean Power Plan, Waters of the U.S., and Ozone NAAQS.)

6. In his written testimony, Mr. Weissman asserts that high regulatory compliance costs do not necessarily have negative job impacts but that “firm expenditures on regulatory compliance typically create new jobs....”
- a. Do you think your members would agree that government regulation is a productive means of job creation?

The Chamber’s members do not consider new regulations to be a job creation mechanism. On the contrary, while regulatory compliance may create some new jobs, the jobs lost due to regulation, when fully measured by whole economy modeling, will almost always outweigh those gained. In 2013 the Chamber released a study on regulatory job loss analysis conducted by the EPA.<sup>5</sup> First, it is important to note that EPA rarely performs a more comprehensive analysis using a whole economy model of jobs impacts in its rulemakings, doing so on only 2 out of 56 cases examined (see chart on next page). In all other cases EPA performed job loss analysis using only a limited model and a job creation formula clearly inappropriate for most of the rules where EPA used it. Congress tasked the agency to perform ongoing analyses of job displacement in § 321(a) of the Clean Air Act (CAA) and provide that information to Congress. To date, the agency has never performed its duties under § 321(a).

Secondly, the Chamber study of job impact analyses demonstrated exactly why EPA’s claims that regulations create jobs are incorrect. In performing job impact analyses the few times it did, EPA used an inappropriate modeling framework, looking only at a limited sample of impacts and ignoring impacts on other sectors of the economy. This type of model is referred to as a “partial economy model”, in contrast with a whole economy model, which attempts to model the entire economy and account for impacts across all industries, such as electric power utilities, the mining of fuel for electricity generation, manufacturing, transportation, and retail and wholesale sales. The benchmark case that the report uses to demonstrate how different the job impact results can be when a more comprehensive and appropriate whole economy model is used estimates job losses from the Mercury and Air Toxics Standard (MATS). EPA estimated that the costly, \$10 billion per year rule would create a net 8,000 jobs in 2015, while estimation using a whole economy model that examines all of the impacts of the regulation showed that compliance with the rule would cause 180,000 job losses in 2015.<sup>6</sup>

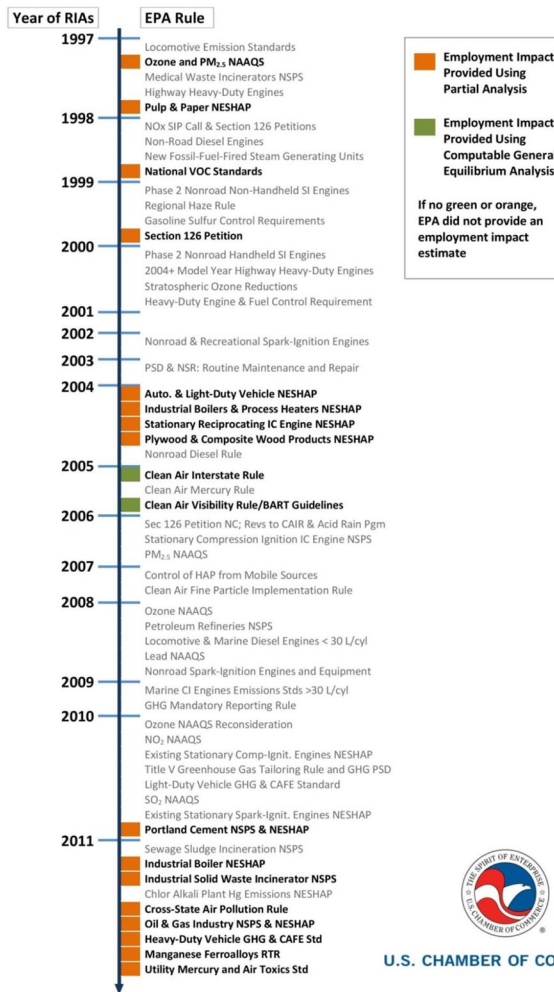
In light of the vast differences in estimates of regulatory impacts based on which type of model is used, it becomes even more imperative that agency regulatory analysis be held to high standards. All data used in analyses of costs and benefits should be made available to the public for review so that if need be the quality of the data and analysis can be challenged under the provisions of the Information Quality Act.

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<sup>5</sup> U.S. Chamber of Commerce, *Impacts of Regulations on Employment: Examining EPA’s Oft-Repeated Claims that Regulations Create Jobs*, 2013. See <https://www.uschamber.com/report/impacts-regulations-employment-examining-epa-s-oft-repeated-claims-regulations-create-jobs>.

<sup>6</sup> *Id.* at 29.

Timeline of Air Regulatory Impact Analyses Found to Contain Employment Impact Estimates



U.S. CHAMBER OF COMMERCE

**ATTACHMENT:  
EPA Compliance with Statutory and E.O. Requirements on Recent Major Rulemakings**

	<b>Clean Power Plan (Proposed)</b>	<b>WOTUS (Final)</b>	<b>Ozone (Proposed)</b>
<b>UMRA</b>	EPA states that the rule contains no unfunded mandates on state or local governments. NAAQS rules also have never been covered by UMRA, as the burden to set up plan is on state agency but ultimately the costs are borne by the private sector (note that for NAAQS rules, EPA cites cost consideration under <i>ATA</i> case as justification for ignoring UMRA, but that does not necessarily apply here, so ultimately as stated below for the RFA, applicability will rely upon broader issues of this rule’s legality under EPA’s authority in § 111(d) of the CAA.)	EPA states that the rule does not impose any mandate on states or local governments – EPA’s reason: definitional only and “applies broadly” to CWA programs.  Because many of the requirements of CWA programs that will be affected by the expansion of covered waters are managed by state and local governments, the new rule does expand the responsibilities of those entities and increase their burden.	EPA has not ever considered the requirements on states to implement NAAQS standards as covered by UMRA, and always states that NAAQS rules produce no unfunded mandates. EPA cites <i>American Trucking Assoc. v. EPA</i> , 175 F.3d 1029, 1043-45 (D.C. Cir. 1999) “(noting that because the EPA is precluded from considering costs of implementation in establishing NAAQS, preparation of a Regulatory Impact Analysis (RIA) pursuant to the Unfunded Mandates Reform Act would not furnish any information which the court could consider in reviewing the NAAQS).”
<b>RFA</b>	RFA applies and EPA should have done an Initial Reg Flex Analysis to estimate small business impacts.  EPA certifies that the rule does not have a significant impact on small entities because the rule only mandates states to	EPA certified that the rule had no significant impact under the RFA – EPA’s reason: 1) the rule actually narrows the scope of waters covered by CWA, and 2) no small entities are actually made “subject” to any new requirements because the definitional change applies	RFA does not apply to NAAQS under <i>American Trucking Assoc. v. EPA</i> , 175 F.3d 1029, 1043-45 (D.C. Cir. 1999) and <i>Mid-Tex Electric Cooperative v. FERC</i> (agency does not impose costs directly on small entities by setting NAAQS, therefore agency need

	<p>comply with emissions limits, and that the states will determine how by submitting SIPs similar to the NAAQS process. EPA cites <i>American Trucking Assoc. v. EPA</i>, 175 F.3d 1029, 1043-45 (D.C. Cir. 1999) (NAAQS do not have significant impacts upon small entities because NAAQS themselves impose no regulations upon small entities).</p> <p>Obviously, the courts will determine if EPA's decision to model this rule on NAAQS requirements, despite the fact that it covers a non-criteria pollutant and was promulgated under an unrelated section of the CAA, is authorized under the CAA.</p>	<p>broadly to CWA programs.</p> <p>According to SBA Advocacy, EPA incorrectly certified. On 1) above, EPA contradicts itself as its EA states that covered waters needing permits will expand between 2.84% and 3.65%, an expansion the agency estimates will cost a minimum of \$158.6 million annually. On 2) above, EPA incorrectly states that the rule does not subject any small entities to new requirements, but again, the agency's EA states that the rule will cost a minimum of \$158 million annually as the result of newly required permits, which clearly impose a burden on any small entities that need a permit under the new definition and did not previously.</p>	<p>not consider impacts on small entities.)</p>
<b>E.O. 12866</b>	<p>Yes, 12866 required.</p> <p>EPA's statement from preamble: "Consistent with EO 12866 and <a href="#">EO 13563</a>, the EPA estimated the costs and benefits for illustrative compliance</p>	<p>Yes, 12866 required.</p> <p>EPA states that the rule is "economically significant" and refers to the EA in its preamble.</p> <p>The EA produced by EPA and the Corps inadequately</p>	<p>Yes, 12866 required.</p> <p>EPA states that the rule is "economically significant" under 12866, refers to the RIA produced as showing "illustrative examples" of a limited number of potential emission control</p>

	<p>approaches of implementing the proposed guidelines. This proposal sets goals to reduce CO<sub>2</sub> emissions from the electric power industry. Actions taken to comply with the proposed guidelines will also reduce the emissions of directly emitted PM<sub>2.5</sub>, sulfur dioxide (SO<sub>2</sub>) and nitrogen oxides (NO<sub>x</sub>). The benefits associated with these PM, SO<sub>2</sub> and NO<sub>x</sub> reductions are referred to as co-benefits, as these reductions are not the primary objective of this rule.</p> <p>The EPA has used the social cost of carbon estimates presented in the 2013 <i>Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866</i> (2013 SCC TSD) to analyze CO<sub>2</sub> climate impacts of this rulemaking.”</p> <p>Issues with the EPA’s RIA of the CPP and with SCC in general have been noted in various comment letters.</p>	<p>estimates the increase in burden from the definitional change (see memo on issues with cost estimation due to sample inadequacy).</p>	<p>scenarios that states might implement, but also adds its usual NAAQS caveat: “[T]he CAA and judicial decisions make clear that the economic and technical feasibility of attaining ambient standards are not to be considered in setting or revising NAAQS, although such factors may be considered in the development of state plans to implement the standards. Accordingly, although an RIA has been prepared, the results of the RIA have not been considered in issuing this proposed rule.”</p> <p>All NAAQS standards are examples of a long-running disconnect between what 12866 requires regarding analysis and policy choices among various alternatives and what the CAA states. EPA generally does RIAs for NAAQS but frequently discounts its own analysis with respect to policy choices. It is difficult to reconcile EPA’s insistence that only the science matters for NAAQS decisions AND that under the LNT assumption for</p>
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			toxicity benefits go all the way to zero with setting any standard above zero, unless some other factor (i.e. cost and feasibility, which are ultimately the same thing) is actually used to make the de facto determination.
<b>E.O. 13563</b> <sup>7</sup>	(See above, EPA issued the same statement for 13563 as for 12866.)	(See above, EPA issued the same statement for 13563 as for 12866.)	(See above, EPA issued the same statement for 13563 as for 12866.)
<b>IQA</b>	The primary IQA issue with the CPP is the use of the SCC benefits estimates used to justify the rule. Note, however, that under some compliance scenarios EPA modeled in the RIA, the “co-benefits” of PM and Ozone reduction discussed above are sufficient to offset the estimated compliance costs.	EPA used a sample of “jurisdictional determinations” from the Army Corps database that is likely not representative of the universe of covered waters under the expanded scope of the new rule (see memo). However, it is uncertain whether this data inadequacy constitutes an IQA violation.	The major data adequacy issue with the ozone rule is whether there was sufficient new scientific evidence to justify lowering the standard beyond the 2008 determination. However, EPA hides behind the CASAC report stating that there is to produce its own staff risk assessment document. (See Chamber Ozone coalition letter and Gradient review of science for critique of EPA’s decision.)

<sup>7</sup> In general, E.O. 13563 reaffirms the requirements of E.O. 12866, but asks agencies to consider the cumulative impact its rulemaking will have.

**Senator Orrin G. Hatch**  
**Questions for the Record**  
**U.S. Senate Committee on the Judiciary**  
**“Examining the Federal Regulatory System to Improve Accountability, Transparency, and Integrity”**  
**June 17, 2015**

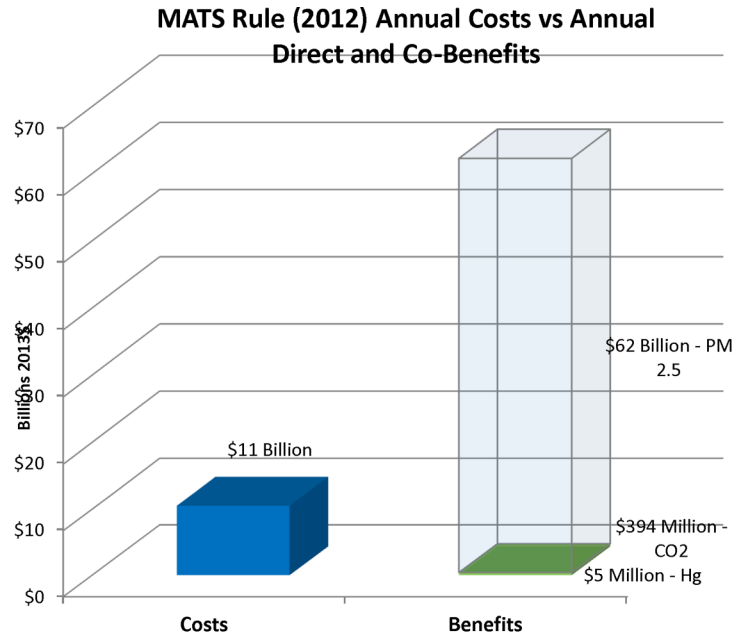
**Questions for William Kovacs**

- 1. Your testimony details what is arguably a troubling pattern of agency misconduct throughout numerous stages of the rulemaking process.**
  - a. Given this pattern of behavior, is this faith in the integrity of the regulatory process justified?**
  - b. If not, does the lack of integrity in the rulemaking process undermine the case for judicial deference?**

The regulatory process is broken and Americans should not have faith that the unelected bureaucrats responsible for making regulations at federal agencies are acting in a transparent, accountable manner. Rulemaking at the U.S. Environmental Protection Agency (EPA) is the best example of the of out-of-control regulatory process. The process for developing EPA rules, especially economically significant and high-impact rules, lacks transparency, accountability, and integrity.

EPA routinely tells the public that it is regulating a targeted pollutant, i.e. mercury, as the agency did when it was conducting the Mercury and Air Toxics Standard (MATS) rulemaking in 2011 and 2012. In reality, EPA regulated a different pollutant, i.e. fine particulate matter (PM2.5). EPA insisted that the rule was crucial to protect children’s brain development from mercury poisoning, and that while the rule’s costs of nearly ten billion dollars each year were high, they were more than justified by annual benefits that ranged from thirty to eighty billion dollars. What EPA and green advocacy groups consistently hid from the public was that the rule only removed enough mercury from the air to produce six *million* dollars in measurable mercury benefits, or about 0.001% of the total benefits EPA trumpeted for the rule.

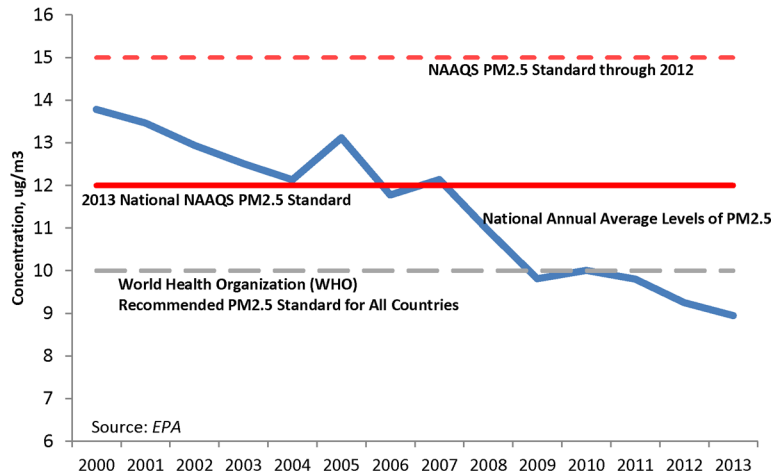
As it turned out, the rest of the benefits were all from reductions in fine particulate matter, a pollutant that is separately regulated by EPA and is subject to review and revision every five years under the Clean Air Act. In fact, even after EPA adjusted the standard for fine particulates downward from 15 micrograms per cubic meter to 12 in 2013, actual exposure levels for virtually all Americans were already more than thirty percent below the level that EPA set to protect human health and welfare with an adequate margin of safety. Yet, EPA claimed tens of billions of dollars in benefits for reducing those levels even further (despite the fact that nearly all Americans already have PM2.5 exposures well *below* the new (2013) standard. Moreover, PM2.5 levels will drop further once the MATS rule actually takes effect and begins producing results, which should be observable in the data by 2016).



The American public deserves a rulemaking process that is transparent and accountable, wherein agencies explain to the public exactly what they are regulating and demonstrate clearly the benefits of that control and its costs. Restoring integrity in the process will eliminate tactics like EPA's bait-and-switch with mercury pollution. This transparency will require EPA to convince the public that more fine particulate regulation is needed on its own terms. EPA would then find it difficult to conduct business as it does now. Since 2000, the EPA has used reductions in fine particulate matter to justify over 97% of all the benefits it has claimed for its rules protecting human health.<sup>1</sup>

<sup>1</sup> See U.S. Chamber of Commerce, [Truth in Regulating](#), 2015.

**PM2.5 Air Quality, 2000 to 2013**  
**33% Decrease in National Annual Average PM2.5 Levels**



Simply put, with fine particulates the EPA found a convenient pollutant that is ubiquitous, naturally occurring, and emitted by virtually every industrial process, which it can use to justify any action the agency wants to take by using the bait-and-switch benefit tactic. This is why particulate matter reductions are responsible for nearly all of the agency's claimed health improvement benefits. But the EPA did not simply stumble upon the fine particulates bonanza of health benefits that it now avails itself of in every major rulemaking, rather the EPA created the bonanza itself by formulating a scientific consensus that the public could never validate or challenge directly because the agency has kept the data and original research out of the hands of everyone except a select group of agency-funded insiders.<sup>2</sup>

EPA's hand has been strengthened because of the *Chevron* doctrine of judicial deference, which supports its rules and findings as long as they are merely a "permissible reading" of the statute.

<sup>2</sup> See, for example, the House Science Committee subpoena of EPA-funded science that forms the foundation for all of its PM2.5 benefits claims. All of the studies EPA cites in support of its health benefits calculations flow from two original studies, known as the Harvard Six Cities Study and the Cancer Prevention Study II. Only EPA and a small group of researchers funded by EPA have access to the data and analyses that underlie the published findings. Despite the force of the Congressional subpoena, EPA refused to divulge these data and analyses. [House Science Committee Subpoena of EPA "Secret Science"](#)

**2. Agencies' unique expertise and resources have been invoked by numerous jurists and scholars as a crucial predicate of judicial deference.**

**a. Is the expertise provided by agencies always materially superior to the expertise supplied the regulated community?**

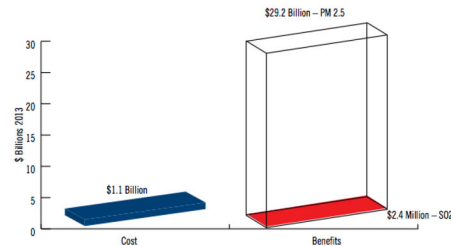
Making the argument that the federal agencies have a unique expertise meriting judicial deference is difficult considering agencies routinely withhold the information upon which they rely in rulemaking. For example, the House Committee on Science, Space, and Technology issued a subpoena for data maintained by Douglas W. Dockery and C. Arden Pope, III, which has been relied upon by EPA for decades to justify regulations on air pollution. Members of the Senate Environment and Public Works Committee raised concerns that studies such as those by Pope and Dockery calculated extraordinary high benefits for costly regulations. Pope and Dockery have refused to release the data based on privacy grounds. The privacy justification for refusing to turn over the data is specious because the U.S. Department of Health and Human Services issued guidelines for de-identifying personal data and has worked with institutions producing data upon which EPA has relied.<sup>3</sup>

An example of EPA's lack of transparency is its 2010 Primary Sulfur Dioxide (SO<sub>2</sub>) NAAQS. In forming its SO<sub>2</sub> NAAQS, the EPA failed to fully justify reductions of SO<sub>2</sub> and relied almost exclusively on particulate matter (PM<sub>2.5</sub>) benefits to justify the rule. PM<sub>2.5</sub> is itself covered by a NAAQS standard. The public deserves to be told how the agency can set a NAAQS standard as required by law and still rely on calculated benefits from PM<sub>2.5</sub> reductions to drive up the stringency of the SO<sub>2</sub> standards. 97.2% of all claimed EPA benefits, including for water, toxics, and all other regulatory programs, come from PM<sub>2.5</sub> reductions. From the perspective of a regulatory "consumer," it is impossible to know if each new EPA rule actually provides valuable benefits as claimed, or whether the agency is simply using PM<sub>2.5</sub> reductions to mask overly burdensome regulations that cannot be justified on their own merit.<sup>4</sup>

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<sup>3</sup> UNITED STATES SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, MINORITY STAFF REPORT, EPA'S PLAYBOOK UNVEILED: A STORY OF FRAUD, DECEIT, AND SECRET SCIENCE (2014) available at [http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=b90f742e-b797-4a82-a0a3-c6848467832a](http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=b90f742e-b797-4a82-a0a3-c6848467832a).

<sup>4</sup> U.S. Chamber of Commerce, *Truth in Regulating: Restoring Transparency to EPA Rulemaking* (Mar. 2015) available at [https://www.uschamber.com/sites/default/files/021935\\_truthinregulating\\_opt.pdf](https://www.uschamber.com/sites/default/files/021935_truthinregulating_opt.pdf).

Figure 6. 2010 Primary SO<sub>2</sub> NAAQS Annual Costs vs. Benefits

As previously discussed, another example is the EPA's 2012 Mercury and Air Toxics (MATS) rule, with EPA informing the public that its \$10.6 billion price tag was more than justified by approximately \$60 billion (mid-point of range) in health benefits. What EPA did not clearly explain, however, is that the estimated benefits from reducing mercury under the rule total only about \$6 million. Virtually all of the remaining calculated benefits of the rule (99.4%) come from incidental reductions in PM<sub>2.5</sub>, with CO<sub>2</sub> reductions making up most of the remaining 0.6%. Mercury accounts for only 0.001% of quantified benefits.

Fine particulate matter in the United States has been steadily declining such that current average atmospheric levels for most Americans are well below the levels in virtually every other country. The question remains—*why is the EPA imposing massive regulations for mercury and sulfur dioxide yet the benefits derived come almost entirely from fine particulate matter which is already below both U.S. and World Health Organization standards?* The answer is that our nation needs truth in regulating.

In an effort to bring more transparency to the rulemaking process and the underlying science beyond federal regulations, Congress enacted the Information Quality Act (IQA). The IQA mandates 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. Unfortunately, the federal bureaucracy has asserted that no private right of action exists which would provide the enforcement mechanism to ensure agencies are complying with the IQA.

The claims of agency expertise are currently unverifiable given the lack of disclosure of data used to justify rulemakings, judicial deference, and a lack of enforcement of the IQA. Enactment of the Regulatory Accountability Act, which provides a substantial evidence test and requires evidence which must be placed on the official record in major rulemakings, or at very least, provisions for a private right of action under the IQA, could significantly bring light to the claimed expertise by federal agencies.

- 3. Given how the courts are one of the only effective avenues for the victims of regulatory overreach to seek relief, the ability to get in the courthouse door is absolutely critical. Nevertheless, there seems to be a trend developing in the case law in which regulated parties that are burdened by agency actions are finding it increasingly difficult to have their challenges heard, while advocacy groups pushing for more burdensome rules can get into court very easily—sometimes even based on a potential future minor risk of generalized injury.**
- a. Do you agree with this characterization?**

The Chamber agrees with the assertion the regulated community disproportionately is denied standing to bring challenges to adverse rulemakings. In a 2011 article<sup>5</sup>, Christopher Warshaw and Gregory Wannier analyzed every environmental law decision by an appellate court between 1976 and 2009, and found about 50% more business cases were dismissed for lack of standing than cases brought by environmental advocacy groups. In the D.C. Court of Appeals, business groups are frequently denied standing on the basis that (a) they cannot show a particularized injury different from that of other interests (“injury-in-fact”), (b) they cannot show that agency action caused their injury, or (c) they cannot show that their injury could be redressed through judicial action. Businesses are also denied standing for “prudential” standing reasons. Prudential standing requires that the claim fall within the “zone-of-interest” of the statute in question. Courts often find that purely economic injury claims fall outside the zone-of-interest protected by environmental statutes. The Sunshine for Regulatory Settlements and Decrees Act, for example, would afford affected parties at least a limited opportunity to intervene prior to the filing of a consent or settlement decree which goes toward making the playing field even for the regulated community to have a say in the settlement process.

- b. If so, is this disparity hindering the judiciary’s ability to hold the bureaucracy accountable for its overreach?**

Yes, the imbalance in standing requirements enables overreach by federal agencies. Businesses are discriminated against by having a higher standing requirement under *Lujan* and agencies receive court deference which allows agencies to legislate and interpret statutes rather than a court. Courts need to be the check on the legislative agencies.

- 4. We tend to talk about judicial deference to agencies in the narrow context of specific court cases, but its effects are not limited to the courtroom.**
- a. Can you describe how deference influences agency behavior throughout the regulatory process?**

The effects of *Chevron* deference extend far beyond the courtroom and into the policy rooms of federal agencies. When Congress passes broad and vague laws and courts extend judicial deference, agencies have a license to push the envelope of their authority without fear of reversal. As a result, agencies engage in making rules based upon questionable and opaque science while ignoring congressional mandates to analyze the effects on the states which

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<sup>5</sup> *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 6 Harv. L. & Pol’y Rev. 289.

implement the vast majority of EPA regulations pursuant to the Unfunded Mandates Reform Act or conducting employment effects analyses under statutes such as Section 321(a) of the Clean Air Act.

To illustrate how *Chevron* deference has encouraged agencies to push the regulatory envelope, agencies are actually interpreting their own jurisdiction with court acquiescence. In the *City of Arlington v. Federal Communications Commission*, the United States Supreme Court applied *Chevron* deference to the FCC's interpretation of its own jurisdiction. The case arose from a dispute between local governments and the FCC about the agency's authority to regulate state and local land-use decisions regarding the placement of wireless communications facilities.

5. **Some commentators assert that our bureaucracy suffers from so-called "regulatory paralysis," the notion that agencies face too many obstacles to promulgating new rules.**
  - a. **Do you think our regulatory bureaucracy is somehow doing too little too slowly?**

Under our Constitution, legislating is designed to be difficult. It requires House and Senate passage and a signature by the President to make a law. Complex laws can take years. Agencies, however, by interpreting broad and vague laws and relying on judicial deference, can enact sweeping national laws in months and it can be done by one or a few agency heads. Examples abound of massive new regulations that were developed and issued swiftly: OSHA's Ergonomics standard (12 months), EPA's Greenhouse Gases (GHG) endangerment finding (8 months), the Waters of the United States Rule (11 months), and the FCC's net neutrality rule (11 months).

Congress, in its current divided state, could not pass such laws in years or perhaps could never pass such laws, while agencies promulgate massive regulations within a period of months. Not only are the restraints on agency rulemaking too few; there is the deference awarded agency action by courts. Together these factors encourage fast-paced, large-scale agency action.

The business community would describe the regulatory environment today as a "Regulatory Onslaught" or a "Regulatory Tsunami." Agencies have promulgated approximately 4,000 regulations annually and about 190,000 in aggregate since 1976. Just this year alone, EPA is forcing 3 major regulations on the states (the Waters of the United States Rule, stricter ozone standards, and the Clean Power Plan) which implement 98% of delegated EPA programs. The states need to address these regulations impacting water, air, *and* energy. Many of the regulations overlap and following one of these regulations may conflict with the ability of states and business to follow others.

For example, Executive Order 12866 makes federal agencies responsible for ensuring that a new regulation will not conflict with other requirements, "specifying that each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies."<sup>6</sup> EPA projects that the Clean Power Plan (CPP) will cause up to 49,000 megawatts of coal-fired electric generating capacity to retire by 2020. To

<sup>6</sup> Executive Order 12866, "Regulatory Planning and Review," 58 Fed. Reg. 51,735 (Sept. 30, 1993), § 1(b)(10).

replace this generating capacity, utilities will need to construct fuel delivery infrastructure such as pipelines, storage, railroad track and improved roads—all of which will be subject to more extensive permitting and reviews under the new Waters of the United States (WOTUS) rule. EPA did not properly account for the increased costs and delays companies will incur under the WOTUS rule in order to also comply with the Clean Power Plan as required by Executive Order 12,866. Examples such as this illustrate that the real problem is *not* a regulatory paralysis inflicted on agencies but a regulatory onslaught which will act as an impediment to the business community.

**b. Does “regulatory paralysis” accurately describe the environment facing businesses today?**

Congress imposed various mandates on agencies to determine the impact of their rules on state and local governments, workers, small businesses, communities, and competitiveness. While some may view these requirements to provide information to Congress to be a cause of “regulatory paralysis,” it is the information that Congress needs to effectively legislate. Congress was forced to impose these requirements because agencies routinely engage in non-transparent rulemakings. Congress enacted the Regulatory Flexibility Act (RFA) to ensure that agencies examine the effects of their rules on small businesses and small local governments. It enacted the Unfunded Mandates Reform Act (UMRA) to make certain that agencies were not simply passing the buck to states by requiring the states to bear the administrative costs of implementing and enforcing complicated and costly rules. Congress enacted the Information Quality Act (IQA) to make certain that the EPA and other agencies were not using faulty scientific studies to promote their preferred policies and instead used the best information available. Congress also included § 321(a) in the Clean Air Act (CAA) to require the EPA to assess job loss and displacement from its rulemakings, a task the EPA has refused to undertake. Even after enacting these mandates for information and analysis, agencies still routinely ignore them and churn out rules asserting the rule has no impact on state and local governments, small businesses, and jobs.

The problem, however, with the federal regulatory process is that Congress has enacted vague laws which delegate significant, poorly defined authority to federal agencies. That authority is then used by unelected bureaucrats to craft massive, costly, intrusive regulations that Congress never attended, and which the courts approve by granting court-created deference to the agency. In recent years, agencies like the EPA have continued to formulate ever more intrusive and costly regulations, even though our air and water are already far cleaner than even the EPA mandates in many cases. The EPA is currently in the process of proposing and finalizing three of the most massive, and expansive rules in American history, effectively expanding its authority not only to protect the environment, but also to establish national land use policies (Water of the U.S.), to determine the allowable level of economic development (Ozone NAAQS), and to dictate the composition of the country’s energy portfolio (Clean Power Plan).

These high impact, high cost rules are laws due to the fact that Congress delegated lawmaking authority to the agencies. But what is most unfortunate is that these laws enacted by

regulations are far more sweeping than Congress could enact in current circumstances, and these regulatory laws are enacted at the discretion of one or a few unelected bureaucrats. This situation at the very least demands greater scrutiny over what these unelected bureaucrats do and how they do it. These high impact rulemakings should require that the agency slow down its process, gather more information, and provide Congress with the information requested. (See the attachment for an analysis of how the EPA has circumvented the statutorily mandated provision of information to Congress and the public for the Clean Power Plan, Waters of the U.S., and Ozone NAAQS rules.)

## ATTACHMENT:

## EPA Compliance with Statutory and E.O. Requirements on Recent Major Rulemakings

	Clean Power Plan (Proposed)	WOTUS (Final)	Ozone (Proposed)
UMRA	EPA states that the rule contains no unfunded mandates on state or local governments. NAAQS rules also have never been covered by UMRA, as the burden to set up plan is on state agency but ultimately the costs are borne by the private sector (note that for NAAQS rules, EPA cites cost consideration under <i>ATA</i> case as justification for ignoring UMRA, but that does not necessarily apply here, so ultimately as stated below for the RFA, applicability will rely upon broader issues of this rule's legality under EPA's authority in § 111(d) of the CAA.)	EPA states that the rule does not impose any mandate on states or local governments – EPA's reason: definitional only and "applies broadly" to CWA programs.  Because many of the requirements of CWA programs that will be affected by the expansion of covered waters are managed by state and local governments, the new rule does expand the responsibilities of those entities and increase their burden.	EPA has not ever considered the requirements on states to implement NAAQS standards as covered by UMRA, and always states that NAAQS rules produce no unfunded mandates. EPA cites <i>American Trucking Assoc. v. EPA</i> , 175 F.3d 1029, 1043-45 (D.C. Cir. 1999) "(noting that because the EPA is precluded from considering costs of implementation in establishing NAAQS, preparation of a Regulatory Impact Analysis (RIA) pursuant to the Unfunded Mandates Reform Act would not furnish any information which the court could consider in reviewing the NAAQS)."
RFA	RFA applies and EPA should have done an Initial Reg Flex Analysis to estimate small business impacts.  EPA certifies that the rule does not have a significant impact on small entities because the rule only	EPA certified that the rule had no significant impact under the RFA – EPA's reason: 1) the rule actually narrows the scope of waters covered by CWA, and 2) no small entities are actually made "subject" to any new requirements because the definitional	RFA does not apply to NAAQS under <i>American Trucking Assoc. v. EPA</i> , 175 F.3d 1029, 1043-45 (D.C. Cir. 1999) and <i>Mid-Tex Electric Cooperative v. FERC</i> (agency does not impose costs directly on small entities by setting NAAQS, therefore agency need not

	<p>mandates states to comply with emissions limits, and that the states will determine how by submitting SIPs similar to the NAAQS process. EPA cites <i>American Trucking Assoc. v. EPA</i>, 175 F.3d 1029, 1043-45 (D.C. Cir. 1999) (NAAQS do not have significant impacts upon small entities because NAAQS themselves impose no regulations upon small entities).</p> <p>Obviously, the courts will determine if EPA's decision to model this rule on NAAQS requirements, despite the fact that it covers a non-criteria pollutant and was promulgated under an unrelated section of the CAA, is authorized under the CAA.</p>	<p>change applies broadly to CWA programs.</p> <p>According to SBA Advocacy, EPA incorrectly certified. On 1) above, EPA contradicts itself as its EA states that covered waters needing permits will expand between 2.84% and 3.65%, an expansion the agency estimates will cost a minimum of \$158.6 million annually. On 2) above, EPA incorrectly states that the rule does not subject any small entities to new requirements, but again, the agency's EA states that the rule will cost a minimum of \$158 million annually as the result of newly required permits, which clearly impose a burden on any small entities that need a permit under the new definition and did not previously.</p>	<p>consider impacts on small entities.)</p>
<p><b>E.O. 12866</b></p>	<p>Yes, 12,866 required.</p> <p>EPA's statement from preamble: "Consistent with EO 12866 and <a href="#">EO 13563</a>, the EPA estimated the costs and benefits for illustrative</p>	<p>Yes, 12866 required.</p> <p>EPA states that the rule is "economically significant" and refers to the EA in its preamble.</p> <p>The EA produced by EPA and the Corps</p>	<p>Yes, 12866 required.</p> <p>EPA states that the rule is "economically significant" under 12866, refers to the RIA produced as showing "illustrative examples" of a limited number of potential emission</p>

	<p>compliance approaches of implementing the proposed guidelines. This proposal sets goals to reduce CO<sub>2</sub> emissions from the electric power industry. Actions taken to comply with the proposed guidelines will also reduce the emissions of directly emitted PM<sub>2.5</sub>, sulfur dioxide (SO<sub>2</sub>) and nitrogen oxides (NO<sub>x</sub>). The benefits associated with these PM, SO<sub>2</sub> and NO<sub>x</sub> reductions are referred to as co-benefits, as these reductions are not the primary objective of this rule.</p> <p>The EPA has used the social cost of carbon estimates presented in the 2013 <i>Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866</i> (2013 SCC TSD) to analyze CO<sub>2</sub> climate impacts of this rulemaking.”</p> <p>Issues with the EPA’s RIA of the CPP and with SCC in general have been</p>	<p>inadequately estimates the increase in burden from the definitional change (see memo on issues with cost estimation due to sample inadequacy).</p>	<p>control scenarios that states might implement, but also adds its usual NAAQS caveat: “[T]he CAA and judicial decisions make clear that the economic and technical feasibility of attaining ambient standards are not to be considered in setting or revising NAAQS, although such factors may be considered in the development of state plans to implement the standards. Accordingly, although an RIA has been prepared, the results of the RIA have not been considered in issuing this proposed rule.”</p> <p>All NAAQS standards are examples of a long-running disconnect between what EO 12866 requires regarding analysis and policy choices among various alternatives and what the CAA states. EPA generally does RIAs for NAAQS but frequently discounts its own analysis with respect to policy choices. It is difficult to reconcile EPA’s insistence that only the science matters for NAAQS decisions AND that under the LNT assumption for toxicity benefits go all</p>
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	noted in various comment letters.		the way to zero with setting any standard above zero, unless some other factor (i.e. cost and feasibility, which are ultimately the same thing) is actually used to make the de facto determination.
<b>E.O. 13563</b> <sup>7</sup>	(See above, EPA issued the same statement for 13,563 as for 12866.)	(See above, EPA issued the same statement for 13,563 as for 12866.)	(See above, EPA issued the same statement for 13563 as for 12866.)
<b>IQA</b>	The primary IQA issue with the CPP is the use of the SCC benefits estimates used to justify the rule. Note, however, that under some compliance scenarios EPA modeled in the RIA, the “co-benefits” of PM and Ozone reduction discussed above are sufficient to offset the estimated compliance costs.	EPA used a sample of “jurisdictional determinations” from the Army Corps database that is likely not representative of the universe of covered waters under the expanded scope of the new rule (see memo). However, it is uncertain whether this data inadequacy constitutes an IQA violation.	The major data adequacy issue with the ozone rule is whether there was sufficient new scientific evidence to justify lowering the standard beyond the 2008 determination. However, EPA hides behind the CASAC report stating that there is to produce its own staff risk assessment document. (See Chamber Ozone coalition letter and Gradient review of science for critique of EPA’s decision.)

<sup>7</sup> In general, E.O. 13563 compliance is difficult to judge as the order did not actually require any specific, new analysis of regulatory costs or benefits. It simply reaffirmed E.O. 12866 requirements with softer, less precise language. Most agencies have done what EPA does, simply rolling 13563 into 12866 analysis in rule preambles, but not actually changing the process of OMB review or cost-benefit analysis in any meaningful way.

Questions for the Record from Senator Thom Tillis

“Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity”

June 10, 2015

Honorable Charles J. Cooper, Founding Partner and Chairman, Cooper & Kirk, PLLC,  
Washington, D.C.

Ms. Ellen Steen, General Counsel and Secretary, American Farm Bureau Federation and  
Affiliates, Washington, D.C.

Professor Patrick Parenteau, Professor of Law and Senior Counsel, Environmental and Natural  
Resources Law Clinic, Vermont Law School, South Royalton, Vermont

Mr. Robert Weissman, President, Public Citizen, Washington, D.C.

Mr. William L. Kovacs, Senior Vice President, Environment, Technology and Regulatory  
Affairs, U.S. Chamber of Commerce, Washington, D.C.

- 1. During the hearing, much was said regarding efforts to improve accountability, transparency, and the integrity of our federal regulatory system. In determining how we might best accomplish those objectives, it would be helpful for us to agree on the appropriate markers we could use to measure the current regulatory environment and the effectiveness of any ensuing reforms. How might we, as members of the Congress charged with continually evaluating the regulatory landscape, quantify the current volume or level of regulations in play in the federal regulatory system? In other words, what metrics could or should Congress use to determine whether the administrative rulemaking process is appropriately balanced? What are the correct indicators for us to use to evaluate whether things truly are out of balance at this point in time as opposed to at prior points in the modern era of administrative law generally?**

My testimony discussed how Congress delegated vast powers to regulatory agencies through broad statutes that allow agencies to use this discretion to fill in many legislative gaps. Congress attempted to guide the development of regulations by requiring agencies to provide analyses of how their rules impact affected entities and the economy, but the agencies simply ignore these requirements which would address the impact of a regulation on state and local government, small business, jobs, communities, and the use of high quality data.

Perhaps the clearest example can be found within the Clean Air Act. While Congress delegated substantial authority to the U.S. Environmental Protection Agency (EPA) to improve and protect air quality across the country (including, in some cases, imposing regulatory requirements without having to consider the costs of compliance), Congress at the same time requires EPA to continuously evaluate the impact that its air quality programs have on employment and job displacement (section 321(a) of the Act) and to analyze adverse social and

economic effects brought about by its standards (section 109(d) of the Act). Congress clearly made EPA responsible for gathering this critical information and reporting it. By having this information available to it, Congress could see whether air quality requirements were working properly, or whether they were having unintended impacts—causing jobs to be lost disproportionately in one region of the country, or needlessly shuttering entire industries. Congress could subsequently take corrective action, thereby preventing air regulations from imposing more harm than good at the local community level.

EPA, however, has never conducted the analysis required by section 321(a)<sup>1</sup> or requested the analysis available to it under section 109(b). Thus, EPA has deprived Congress of critical information that otherwise could have been used to improve the management of environmental protection efforts.

Congress also required agencies to perform analyses under the Unfunded Mandates Reform Act (UMRA) and Regulatory Flexibility Act (RFA) in order to provide information on impacts of regulations on state and local governments and small businesses. The reason for this requirement was because agencies were shifting regulatory burdens to states, which, for instance, lack sufficient budgets to undertake implementation of the 96.5% of all EPA delegated programs for which they are responsible.

In addition, the 1996 RFA amendments require EPA to establish a small business panel to gather information about a regulation before it is proposed from impacted small firms. EPA failed to conduct these small panels on a number of occasions, leaving Congress without the proper data and analysis on small business impacts and potential job losses. The Information Quality Act (IQA) was passed to rein in agency claims of using valid science when in fact they were using flawed studies and methodology. In all of these cases, the EPA was a main offender that helped spur Congress to action, and yet the agency remains an offender today after these attempts at improving oversight.

Between 2000 and 2013 the executive branch federal agencies created 30 new regulations that each cost over \$1 billion annually, and EPA alone was responsible for 17 of the 30 rules, accounting for 82.5% of the total costs. In promulgating all of those major regulations the EPA seldom did more than insert boilerplate language as a response to its requirements under these analytical statutes.

In the past year, EPA has proposed and/or finalized three of the most significant regulations in history: the Clean Power Plan (CPP), Waters of the U.S. (WOTUS), and Ozone NAAQS. The agency failed to perform proper analyses for UMRA and the RFA in all three rules, and its lack of compliance with the IQA is an ongoing concern, largely because much of EPA's analysis for all of its rules is done using scientific data and analyses that cannot be examined or validated by the public. Further, the agency has never conducted an analysis of job loss and displacement as Congress required of it in § 321(a) of the Clean Air Act which was enacted in 1977.

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<sup>1</sup> Provisions that mirror section 321(a) were included in each of the major environmental statutes (e.g., Clean Air Act, Clean Water Act, RCRA, Superfund, TSCA, etc.).

It is difficult to understand how Congress or the public could ever have confidence that the EPA is balancing all necessary concerns in the rulemaking process when the agency absolutely refuses to provide significant information that would allow such assessment to take place. Meanwhile, the EPA marches on creating ever larger and more intrusive regulations that affect virtually the entire U.S. economy.

2. **The use of “sue-and-settle” tactics creates a significant loophole in the legislative process that can allow special interest groups to unfairly influence rule-making decisions without the open and transparent notice and comment period. In terms of addressing “sue-and-settle,” is there an argument that the courts should actually have a more active role in this, perhaps by being more liberal with intervention rights of third parties or perhaps with statutorily defined time limitations as to how quickly an agency may formally settle after publicly disclosing the terms of such a settlement?**

The Chamber believes that the courts must have a more active role in consent decrees in which the agency and a private party agree to implement public policy through rulemaking. Currently, the courts treat sue-and-settle agreements the same as agreements between private parties and sign them as if they are simple settlement agreements. Sue and Settle amounts to a policy decision and as such it must be open to public involvement including notice to the public of the settlement and the right to comment to the court as well as the right to intervene if parties' interests are not protected. Moreover, courts need to evaluate draft settlement agreements concerning agency rulemakings with a critical eye, and inquire whether the agency has been realistic in agreeing to a deadline (e.g., is there sufficient time to comply with procedural requirements under the APA, the RFA, the IQA, and UMRA?). Similarly, courts need to inquire whether the agency has the statutory authority to enter into the settlement, and whether the agency has improperly surrendered its discretion to the special interest group. Finally, before signing on consent decrees the court must explore the impact of its order on agency resources and other programs.

- a. **Is there a statutory solution that would make this process less likely to shut out stakeholders with a different viewpoint than those espoused by a hypothetical plaintiff and sympathetic or collusive agency-defendant?**

A statutory solution does exist for stakeholders shut out of court. The sue-and-settle problem is exacerbated by the fact that there is a relaxed view of standing for environmental plaintiffs which does not extend to business groups. In a 2011 article<sup>2</sup>, Christopher Warshaw and Gregory Wannier analyzed every environmental law decision by an appellate court between 1976 and 2009, and found about 50% more business cases were dismissed for lack of standing than cases brought by environmental advocacy groups. In the D.C. Court of Appeals, business groups are frequently denied standing on the basis that (a) they cannot show a particularized

<sup>2</sup> *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 6 Harv. L. & Pol'y Rev. 289.

injury different from that of other interests (“injury-in-fact”), (b) they cannot show that agency action caused their injury, or (c) they cannot show that their injury could be redressed through judicial action. Businesses are also denied standing for “prudential” standing reasons. Prudential standing requires that the claim fall within the “zone-of-interest” of the statute in question. Courts often find that purely economic injury claims fall outside the zone-of-interest protected by environmental statutes. The Sunshine for Regulatory Settlements and Decrees Act would afford affected parties an opportunity to intervene prior to the filing of a consent decree which goes toward leveling the playing field even for the regulated community to have a say in the settlement process.

**b. Should Congress consider reforms to make settlements and consent decrees achieved through “sue-and-settle” tactics more transparent? If so, how?**

Congress should enact the Sunshine for Regulatory Decrees and Settlements Act in order to bring about transparency in the settlement process. The Act would require agencies to give notice to the public when they receive notices of intent to sue from private parties and publish notice of a proposed consent decree or settlement in the *Federal Register*, and take (and respond to) public comments at least 60 days prior to the filing of the decree or settlement. The bill would also require agencies to do a better job showing that a proposed agreement is consistent with the law and in the public interest.

**3. Currently, under *Chevron*, if a statute is deemed ambiguous, an agency must merely show that their interpretation of the statute was reasonable and, in the words of Chief Justice Roberts, within “the bounds of the permissible.” In your expert opinion, should Congress consider raising this bar in an effort to reduce judicial deference to agencies’ rule-making authority? If so, what should the standard be?**

Congress should enact legislation which reins in agency overreach enabled by generous judicial deference. *Chevron* deference is required by neither the Constitution nor statute. In fact, Section 706 of the Administrative Procedure Act states that reviewing courts “shall decide all relevant questions of law.” The deference provided in *Chevron* can be largely described as judicial legislating because it grants agencies expanded powers by enabling them to fill in the gaps of ambiguous and vague statutes. In essence, when courts grant deference to agency actions, the court abdicates its constitutional obligation to interpret the law and serve as a check on the actions of federal agencies. Congress has primary authority and responsibility to legislate and when delegating it must clearly restrain the agency and conduct oversight to assure that agency legislating conforms to congressional intent. Likewise, courts have the primary authority to interpret the law and should not merely rubber-stamp agency interpretations of statutes. The Chamber believes that the Regulatory Accountability Act (RAA) would greatly alleviate many of the problems and massive rules imposed as a result of *Chevron* deference. The RAA defines a “high-impact” rule as a way to distinguish the few rulemakings each year that would impose more than \$1 billion a year in compliance costs. These high-impact rules would be required to undergo on-the-record administrative hearings to verify that the proposed rule is fully thought out and well-supported by good scientific and economic data. Regulations deemed “high-impact”

would undergo a substantial evidence standard of review.

- 4. Given the current vast and expanding bureaucratic structure of the federal agencies, most, if not all, of their current focus is placed on the promulgation of new rules. There are over 176,000 pages of regulations which some sources have stated amount to a regulatory burden of \$1.6 trillion. This regulatory effect is increasingly frustrating for business owners of all sizes, including farmers and ranchers. In your opinion, do you feel there should be a process to retroactively review rules to eliminate any excessive or duplicative rules to help simplify the current regulatory scheme and reduce the current regulatory burden felt by so many businesses and farmers?**
- a. Further, should Congress create a commission to review and recommend the elimination of outdated, ineffective, and duplicative regulations in an effort to reduce the current regulatory burden?**
  - b. Alternatively, should agencies be required to make systematic reviews of their own rules to determine if there are any duplicative or outdated rules?**

There should be a process to review existing regulations and ensure that old rules that are no longer needed, have been superseded by technological progress or changes in the economy, or are found to duplicate or overlap other rules are modified or eliminated. However, because businesses continuously attempt to comply with all laws, past regulations become part of their business practices and eliminating them can sometimes cause as much uncertainty as implementing a new regulation. Therefore, it is and will always be the case that businesses are most concerned about new regulations. Changing the regulatory process to ensure that new regulations are created in a more transparent and accountable way using all necessary and relevant information is the best approach to minimizing the economic harm done by overzealous federal regulators.

The current regulatory process consists of Congress delegating broad and vague powers to agencies and courts granting deference to agency decisions on how to implement those powers through regulation. This process allows agencies to regulate aggressively since there are few checks in the system. Once agencies have these delegated powers they fill in the gaps in the legislation and then further interpret the meaning of the law while being given deference to do so by the courts. This makes it hard to restrain agency action. Moreover, agencies like the EPA routinely ignore the Unfunded Mandates Reform Act (UMRA) and Regulatory Flexibility Act (RFA) analytical requirements, the mandates of the Information Quality Act (IQA), and has to date never performed its duty to analyze job loss and displacement as Congress required in section 321(a) of the Clean Air Act.

Congress should commit to reviewing the regulatory system, but not by establishing a committee to review old regulations. Instead, Congress should review the statutes that delegate broad authorities to federal agencies and determine whether or not such delegation is necessary and beneficial, or whether agencies should be given more narrow mandates with greater guidance and oversight. As long as agencies like the EPA have free reign under, for instance, the

Clean Air Act to ignore analytical mandates and continuously expand their authority under the cover of data and analysis that the public is not allowed to review or validate, they will continue to run free of constitutional checks and balances.

Requiring agencies to periodically review their own rules has been tried and has failed. Section 610 of the Regulatory Flexibility Act (RFA) requires agencies to perform an analysis of all regulations ten years after they have been enacted, and every ten years thereafter, and nominate for review and reform any that are duplicative or overlapping, or otherwise no longer relevant. The RFA has been on the books for over thirty years. However, agencies have seldom (if ever) undertaken even a nominal review, and mostly comply with the Sec. 610 requirement the same way they comply with other statutory analytical mandates: by cut-and-pasting boilerplate language asserting that they have performed the analysis and that they found nothing.

Additionally, the Office of Information and Regulatory Affairs (OIRA) has undertaken numerous retrospective regulatory reviews since the 1990s asking for nominations from the public of regulations to review and potentially change or repeal. This effort has been largely unsuccessful, as ultimately the process depended upon vetted nominations being handed back to agencies wherein the agency that promulgated the regulation had the ultimate responsibility of analyzing it and determining whether modification or repeal was warranted. Unsurprisingly, the agencies seldom found any reason to change or eliminate even their most burdensome and controversial regulations. In essence, asking agencies to review their own regulations is like putting the proverbial fox in charge of the henhouse. Agency overreach under insufficient oversight is the problem with the regulatory system, and we should not expect the agencies to begin policing themselves, even if required by statute.

5. **Many states have implemented policies aimed at reviewing regulations and removing those that increase regulatory burden without accomplishing net positives for the public. For example, in 2013, North Carolina passed a comprehensive regulatory reform measure that slated all regulations for sunset in 10 years if they were not reviewed by their originating agency before that period. Further, the process includes significant public comment periods to ensure transparency and accountability. In addition, North Carolina has a Rules Review Commission to ensure rules are promulgated with appropriate authority, clarity, and necessity. Are these types of reforms transferrable to the federal level? Said differently, is the regulatory environment of the federal government too leviathan to be improved by similar, incremental reforms? What other reforms would you recommend we consider?**

The Chamber commends the efforts of North Carolina to promote regulatory transparency and accountability through its Rules Review Commission and legislative review of regulations. Unfortunately, given the unique position of the federal government, determining whether programs administered by states are transferable to a federal context may prove to be difficult.

Specifically, after a regulation is in effect for years, it may become a business practice and eliminating the regulation may be as disruptive as implementing the rule years before. In addition, some statutes mandate the promulgation of regulations and provide private parties with the ability to sue if the regulation is not implemented. While the Chamber disagrees with the prudential standing imposed by citizen suits, it would be difficult to eliminate these regulations resulting from such lawsuits without repealing the statute mandating the regulation. Also, the Administrative Procedure Act allows for the petition of regulations to implement laws, so merely adding some regulations and removing others could become a regulatory merry-go-round.

The Chamber continues to recommend passage of: (1) the Regulatory Accountability Act in order to provide heightened scrutiny in the rulemaking process for major and high-impact rules; (2) the Sunshine for Regulatory Settlements and Decrees Act in order to bring greater transparency and access for parties aggrieved by sue-and-settle tactics; and (3) the creation of a private right of action under the Information Quality Act (IQA).

## VITTEK QUESTIONS

1. In *Marbury v. Madison*, the Supreme Court held that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Although cases like *United States v. Mead Corp.* softened some of the blow from the decision in *Chevron v. NRDC* by increasing the formality standards for statutory interpretations by Federal agencies, the so-called "Chevron deference" created by the case still gives great authority to these agencies that should rest in the hands of the judicial branch regarding statutory interpretation. What are some of the more egregious examples that you can recall of this judicial power being abused by Federal agencies?

Under the current system, federal agencies are blurring the lines of separation of powers if they are able to write legislative regulations and then take on the role of the judiciary by interpreting those rules without adequate procedural safeguards. When this occurs there is little check on agency power. The following cases are representative of examples of the abusive exercise of agency power under *Chevron* deference:

***Perez v. Mortgage Bankers Association*, No. 13-1041 (U.S. Mar. 9, 2015)**

In *Perez v. Mortgage Bankers Association*, the United States Supreme Court upheld a Department of Labor (DOL) interpretative rule, which did not undergo notice-and-comment, relating to employees exempted from hourly wages. The substance of the rule at issue departed significantly from previous DOL interpretive rules. Challenges were made to the interpretive rule based on *Paralyzed Veterans of America v. D.C. Arena, L.*,<sup>1</sup> which stood for the proposition that agencies must use the APA's notice-and-comment rulemaking if they wish to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation. The Court overturned *Paralyzed Veterans* and concluded that the APA did not require adherence to notice-and-comment rulemaking for interpretive rules.

Although the Court found for DOL on APA grounds, Justice Thomas in his concurring opinion held that the Court should address the issue of whether agencies generally have the power to interpret their own rules, a power in the purview of the judicial branch. Justice Thomas took issue with the Court's granting of deference to agencies to interpret their own rules which essentially have the force of law. Justice Scalia also weighed in on the issue by asserting that "there are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means."<sup>2</sup> Without reining in broad judicial deference to agency interpretative rules, Scalia noted that "the agency need only write substantive rules more broadly

<sup>1</sup> "Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586-87 (D.C. Cir. 1997); See also *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (guidance must go through notice-and-comment rulemaking if it is to have legal effect)."

<sup>2</sup> *Perez v. Mortgage Bankers Association*, No. 13-1041 (U.S. Mar. 9, 2015) (J. Scalia dissenting).

and vaguely, leaving plenty of gaps to be filled in later, using interpretative rules unchecked by notice and comment. The APA does not remotely contemplate this regime.”

**White Stallion Energy Center, LLC. V. EPA, 748 F.3d (D.C. Cir. April 15, 2014)**

In *White Stallion*, the Court of Appeals found that Congress had left a “gap” in one provision of the Clean Air Act by not specifying what public health risks should be deemed a “hazard” to be regulated by the Environmental Protection Agency (EPA) under the hazardous air pollution program. The court found that “Congress delegated to EPA the authority to give reasonable meaning to the term,” and that EPA’s finding that it is “appropriate and necessary” to regulate electric utility units under section 112 of the Clean Air Act is entitled to *Chevron* deference. The court further gave *Chevron* deference to EPA’s decision not to consider costs as part of the “appropriate and necessary” determination, finding that “we hold that EPA reasonably concluded that it need not consider costs in making its “appropriate and necessary” determination.”

Throughout the *White Stallion* case, the majority found gaps in the Clean Air Act, and that agency interpretations meant to fill those gaps were reasonable and permissible under the *Chevron* doctrine. By contrast the dissenting judge found that the majority ignored the legislative history of the Clean Air Act, and relied on *Chevron* to uphold an impermissibly costly and unnecessary regulatory action: “EPA’s reading of the statute replaces its authority to regulate electric utilities if “appropriate” with a command to regulate electric utilities under the MACT program regardless of costs. That is not what Congress intended or permitted and thus is beyond EPA’s authority. *See Chevron*, 467 U.S. at 843 n. 9.”

**City of Arlington v. Federal Communications Commission, 133 S. Ct. 1863, No. 11-1545 (May 20, 2013).**

In *City of Arlington v. FCC*, The United States Supreme Court applied *Chevron* deference to the FCC’s interpretation of its own jurisdiction. The case arose from a dispute between local governments and the FCC about the agency’s authority to regulate state and local land-use decisions regarding the placement of wireless communications facilities. The Chamber’s Litigation Center argued that *de novo* judicial review of agency assertions of jurisdiction have served as an essential check against agency aggrandizement of power. That safeguard protects not only regulated entities, but also helps preserve the proper allocation of authority within the federal government and the relationship between the federal government and the states.

- 2. Chief Justice Marshall in *McCulloch v. Maryland* proclaimed that our federal government is one of enumerated powers and, “this principle is now universally admitted.” Does the “substantial effect test” laid out in *Wickard v. Filburn* comport with this principle?**

In *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), the U.S. Supreme Court found that Congress had delegated broad legislative authority to an agency—the EPA—and that the agency’s exercise of that authority was constitutional. The Supreme Court reversed an earlier Court of Appeals ruling that the agency’s 1997 rulemaking to establish national air quality standards for ozone and fine particulate matter was, in the absence of an “intelligible principle” guiding the stringency of the standards, an unconstitutional delegation of Congress’s legislative authority. The *Whitman* decision, together with cases granting broad *Chevron* deference to agency interpretations meant to fill perceived gaps in statutory provisions, have cumulatively given agencies substantial authority to exercise legislative power in the absence of any directives or clear expressions of intent on the part of Congress.

If Congress desires to reclaim some portion of its legislative authority, it must find ways to establish boundaries for the courts in their interpretation of *Chevron* deference. Congress must also be careful when it enacts new statutes that it does not unknowingly delegate legislative power to agencies by creating obvious gaps that agencies will have to attempt to fill. The limits of an agency’s legislative powers should be clearly delineated to the extent possible when statutes are written. Effective congressional oversight of the degree to which agencies have exercised legislative authority is also essential.

- 3. You mentioned “sue and settle” practices in your testimony, where rather than allowing the entire rulemaking process to play out, the Federal agency being sued settles the lawsuit by agreeing to move forward with the requested action they and the litigants both want. Besides the fact that other parties, as you mentioned, are routinely denied standing in these situations, taxpayers, including those impacted regulatory victims, are put on the hook for legal fees of both colluding parties. Please explain the full economic burden of this practice on the economy and the Federal debt.**

The integrity of the rulemaking process generally is negatively impacted by rules instituted through sue-and-settle practices. Chamber research shows that between 2009 and 2012, a total of 71 lawsuits were settled under circumstances that can be categorized as sue-and-settle cases.<sup>3</sup> These cases include EPA settlements under the Clean Air Act and the Clean Water Act, along with Fish and Wildlife Service settlements under the Endangered Species Act. These settlements directly resulted in more than 100 new federal rules, all of which are major rules

<sup>3</sup> U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) available at <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf>.

estimated to cost more than \$ 100 million annually in terms of compliance. Below is a short list of certain rules.

<b>Sue and Settle Agreements Create Costly Federal Rules</b>
1. Utility MACT rule - up to <b>\$9.6 billion</b> annual costs <sup>4</sup>
2. Lead Repair, Renovation & Painting rule - up to <b>\$500 million</b> in first-year costs <sup>5</sup>
3. Oil and Natural Gas MACT rule - up to <b>\$738 million</b> annual costs <sup>6</sup>
4. Florida Nutrient Standards for Estuaries and Flowing Waters - up to <b>\$632 million</b> annual costs <sup>7</sup>
5. Regional Haze Implementation rules: <b>\$2.16 billion</b> cost <sup>8</sup>
6. Chesapeake Bay Clean Water Act rules - up to <b>\$18 billion</b> cost to comply <sup>9</sup>
7. Boiler MACT rule - up to <b>\$3 billion</b> cost to comply <sup>10</sup>
8. Standards for Cooling Water Intake Structures - up to <b>\$384 million</b> annual costs <sup>11</sup>
9. Revision to the Particulate Matter (PM <sub>2.5</sub> ) NAAQS - up to <b>\$350 million</b> annual costs <sup>12</sup>
10. Reconsideration of 2008 Ozone NAAQS - up to <b>\$90 billion</b> cost <sup>13</sup>

In addition, attorneys representing advocacy groups can obtain attorney fees by way of the Equal Access to Justice Act (EAJA). The EAJA enables prevailing parties in cases brought by or against the federal government to be awarded fees and other expenses unless a court finds the position of the United States to be substantially justified, but in a sue-and-settle case the government admits that it is wrong, so fees are automatically awarded.<sup>14</sup> The fees awarded under EAJA include reasonable attorney fees which “shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a *special factor*, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.”<sup>15</sup> EAJA parties in order to recover costs may not have a net worth of over \$2 million for individuals and over \$7 million for entities.<sup>16</sup> 501(c)(3) entities, such as environmental groups, are exempted from net worth limits under the EAJA.<sup>17</sup> Attorneys for environmental groups engaging in citizen suits typically are awarded substantially higher hourly rates than for other

<sup>4</sup> Letter from President Obama to Speaker Boehner, *supra* note 9.

<sup>5</sup> 75 Fed. Reg. 24,802, 24,812 (May 6, 2010).

<sup>6</sup> Fall 2011 Regulatory Plan and Regulatory Agenda, “Oil and Natural Gas Sector-NSPS and NESHAPS,” RIN: 2060-AP76.

<sup>7</sup> EPA, Proposed Nutrient Standards for Florida’s Coastal, Estuarine & South Florida Flowing Waters (Nov. 2012).

<sup>8</sup> William Yeatman, *EPA’s New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012).

<sup>9</sup> Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans on Key Maryland Industries* (April 2011); *Chesapeake Bay Journal* (Jan. 2011).

<sup>10</sup> Letter from President Obama to Speaker Boehner, *supra* note 9.

<sup>11</sup> 2012 Regulatory Plan and Unified Agenda, “Standards for Cooling Water Intake Structures,” RIN: 2040-AE95.

<sup>12</sup> EPA, “Overview of EPA’s Revisions to the Air Quality Standards for Particle Pollution (Particulate Matter) (2012).

<sup>13</sup> Letter from President Obama to Speaker Boehner, *supra* note 9.

<sup>14</sup> 28 U.S.C. § 2412(d)(1)(A).

<sup>15</sup> *Id.* at § 2412(d)(2)(A)(emphasis added).

<sup>16</sup> *Id.* at § 2412(d)(2)(B).

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

specialties such as veterans and social security benefits counsel, because courts have found that environmental attorneys engage in a practice that requires distinct knowledge where counsel is not available at the statutory rate.<sup>18</sup>

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<sup>18</sup> *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991).



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July 10, 2015

United States Senate Committee on the Judiciary  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

Re: "Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity" - Responses to Post-Hearing Questions for the Record

Chairman Grassley, Ranking Member Leahy, and Members of the Committee, thank you again for the invitation to testify on behalf the American Farm Bureau Federation (AFBF) and the nation's farmers and ranchers on this important hearing on the transparency and integrity of federal agency rulemaking. The "Waters of the U.S." rule is now final and by the end of the summer, farmers, ranchers, business owners, cities, municipalities and other landowners across the nation will face new restrictions and tremendous uncertainty and legal risk regarding commonplace activities on their land as a result of this flawed and illegal rulemaking. Although the lawsuits have already been filed by AFBF and others representing farmers and ranchers, other major segments of the U.S. economy, and 28 state governments (so far), it is entirely appropriate that this Committee should consider the lessons to be learned from this poster child for the regulatory process gone wrong. I hope my responses to your questions below shed some light on those flaws and will be useful to the Committee as it contemplates how to improve our regulatory system.

#### RESPONSES TO QUESTIONS POSED BY SENATOR GRASSLEY

1. Concerns have been raised about the EPA's efforts to rally support for the proposed WOTUS rule during the open comment period and to downplay legitimate concerns raised by farmers, small business owners, and others who might be impacted by its provisions.
  - a. Do you believe the WOTUS rulemaking process provided a meaningful opportunity for the public to have their opinions heard and seriously considered?

**Response:** No, it did not. Rather than seriously considering the concerns expressed by agriculture, other industries and the vast majority of state, county and municipal governments, EPA launched its public comment period with an extraordinary public *advocacy* campaign to solicit support for (but not informed comment on) the proposed rule. Hundreds of public meetings were nothing more than a forum for delivery of EPA's talking points, and many were simply staged photo ops for EPA and a carefully selected audience supportive of the proposed rule. These meetings, along with a blitz of blogs, tweets and YouTube videos long on rhetoric, but lacking any substantive explanation of

the rule, were the substitute for what should have been an open and honest exchange of information between the agency and the public.

In private meetings with high-level agency staff and so called “stakeholder” meetings, farmers, ranchers and their representatives reported back to us that they asked specific questions about the rule, but EPA staff rarely dared to move off script. Instead, they told farmers, ranchers and their representatives that their questions were based on “misunderstandings” of the proposed rule and if they had concerns they could raise them through written comments. Perhaps if agency staff had moved away from their talking points, engaged in a real conversation and avoided the “dog and pony show”, some questions would have been answered and critics would have at least felt that they were heard. Instead, the agencies aimed to conduct enough “outreach” sessions so that they could claim, as they do now, that the agencies “listened” to agriculture.

As I stated in my testimony, EPA started responding to public comments (particularly those comments from the agricultural community) the moment the proposed rule was released for public comment and before critics had the time to carefully review the proposal. The agency publicly rejected our criticisms and those of other industries, states and local governments long before the original comment period closed. When EPA extended the comment period, it took the opportunity to further its propaganda campaign, letting critics (such as AFBF, farmers and ranchers) know that their opinions had already been heard and rejected. Clearly, submitting comments loses some of its appeal when those comments have already been rejected by the agency.

b. In your opinion, was the EPA sufficiently open-minded in the WOTUS rulemaking process?

**Response:** No, EPA was anything but open-minded at any time during or after the comment period. From the very first day the proposed rule was made public, EPA’s written materials, websites, presentations made during stakeholder meetings and public statements by key agency officials sought to undermine the credibility of anyone who expressed valid concerns about how the proposed rule would affect agriculture. EPA essentially called any concerns or criticism a “misunderstanding” of the rule – as if farmers, ranchers and their representatives (such as AFBF) were not capable of reading the rule and understanding what it really means. Nothing we said was considered a valid concern—it was all just a misunderstanding that the agency would further clarify either in its publicity campaign materials or the final rule itself. Even EPA’s website for the rule contained absolutely nothing of substance about the content of the rule, but focused entirely on the rule’s purported benefits and debunking the “myths” of its critics, mainly AFBF.

EPA made this personal—high-level political appointees such as the Administrator herself made public statements dismissing as “silly” and “ludicrous” and “myths” our organization’s serious concerns about the rule during the public comment period. It is personal for me—as an experienced Clean Water Act lawyer who has litigated these issues for decades—because I can personally attest to the legitimacy of our concerns

regarding the rule. But more important, when a high level agency official publicly rejects and even ridicules objections during the comment period, it is a clear signal to those who have not yet commented that the minds of the agency's decision-makers are not open. This extraordinary behavior, by the Administrator and other senior officials as part of an artfully orchestrated advocacy campaign, clearly demonstrates the agency's mind was closed from the moment the proposed rule was released.

2. In *Decker v. Northwest Environmental Defense Center*,<sup>1</sup> Justice Scalia warned of the dangers of deferring to agencies' interpretations of their own vague regulations, because it might encourage agencies to be vague and ambiguous when first drafting rules.

- a. Do you think the EPA may have been deliberately vague with some of the terms it included in the WOTUS rule?

**Response:** Yes, many of the key terms in the final rule are undeniably vague—even key terms, such as “waters,” that are crucial to understanding the scope of the rule. Farmers and ranchers, and even experts in the field of Clean Water Act regulation with well-qualified technical consultants, cannot read the final rule and then reasonably determine what features on the landscape are jurisdictional waters. What we don't know is whether EPA and the Corps will come forth with guidance to provide landowners with more information on evaluating features or will simply interpret the rule in the context of enforcement actions. Guidance would certainly be preferable. But either way, the formal rulemaking process and the opportunity for public comment has ended without providing the public an opportunity to understand and comment on the full impact of the rule.

3. In his written testimony, Professor Parenteau states that “[t]he process employed by EPA reflects an unprecedented degree of public outreach and responsiveness to concerns and suggestions of numerous stakeholders.”

- a. Do you agree with this assessment of the WOTUS rulemaking? Why or why not?

**Response:** What was unprecedented was EPA's publicity and advocacy campaign designed to manufacture support for the rule among the public and dampen opposition. As far as “public outreach” is concerned, EPA held hundreds of “listening sessions” across the country, but few of them were open to the stakeholders most likely to have concerns about the rule—the farm and ranch community. Our members reported back to us that some of those meetings were open only to carefully selected and supportive farmers. Others, with broader farmer and rancher representation, were just another part of the PR campaign consisting almost entirely of non-substantive platitudes about the rule's purported benefits, while omitting any meaningful information about the actual content of the rule—i.e. what the rule would do, and what activities would be regulated as a result. For the most part, agency representatives did not move off their scripts, told farmers that their concerns were based on misunderstandings, myths and falsehoods (if questions were allowed or answered at all), and if farmers wished to comment they must do so separately. Was EPA “responsive” to criticisms? Not if “responsive” means listening to and honestly addressing the issues.

<sup>1</sup> See *Decker v. Nw. Env'tl Defense Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part).

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4. In his written testimony, Professor Parenteau states that “[t]he rule is based on the best available peer reviewed science and it reflects a very conservative exercise of the statutory authority granted by the CWA.”
- a. Do you agree with this assessment of the WOTUS rulemaking? Why or why not?

**Response:** I do not agree. It is frankly ridiculous to claim that the WOTUS rule is a “conservative” exercise of statutory authority. That is pure rhetoric with no basis in reality, and it matches the rhetoric we have heard from EPA throughout its extraordinary advocacy efforts to sell its new rule. Now, I suppose some previous EPA and Corps interpretations of their Clean Water Act jurisdiction arguably have been as bold as parts of the new WOTUS rule—such as the unlawful “migratory bird rule” invalidated in the Supreme Court’s *SWANCC* decision. But to have overreached badly before does not make the agency’s current regulatory stretch “conservative.”

Far from being conservative, the WOTUS rule is an aggressive expansion of regulatory power calculated to allow EPA and the Corps to regulate—or disallow—countless commonplace land use activities throughout every corner of the country. The WOTUS rule is full of vague and expansive definitions designed to aggrandize the agencies’ power: vague definitions of “tributary,” “adjacent,” “neighboring,” “substantial nexus,” “aquatic functions,” and other terms, the interpretation of which will be essentially left to the agencies’ judgment with extreme deference from the courts.

With regard to science, I presume Professor Parenteau is referring to the so-called connectivity study on which the agencies based their assertion of jurisdiction over features that otherwise appear to be quite isolated from navigable waters. Our primary objection to reliance on that study is that it was never available to the public in its final form until after the public comment period had ended. The agencies may maintain that it is the best available peer reviewed science, but the public was unable to assess and comment on that during the rulemaking process. I would add that other scientific and technical underpinnings of the rule are completely invalid. The economic analysis, for example, is indefensible. And there have been credible reports that expert staff within the agencies themselves raised serious objections to its validity, only to have those concerns ignored.

#### RESPONSES TO QUESTIONS POSED BY SENATOR VITTER

Under the final rule in WOTUS, ponds, ditches, and ephemeral drainages may now come under federal jurisdiction. Everything from golf courses to farmland that have these waters on them or near them will likely be required to obtain costly, federal permits for any land management activities or land use decisions in, over or near them such as pesticide and fertilizer applications and stream bank restorations and the moving of dirt.

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- Please explain how this expanded definition will affect hardworking American farmers and consumers.

**Response:** Thank you for recognizing that farming and ranching is a profession done by hardworking families who dedicate their lives not only to growing food and fiber but protecting our natural resources. The problem with this rule, however, is that it uses the wrong tool for the job. It applies a cumbersome, highly complex and costly regulatory and permitting regime—with tens of thousands of dollars in potential penalties for even paperwork violations—to hundreds of thousands of farmers and ranchers and their routine farming and land management practices. These are small business owners without legal and technical staff on hand to navigate this complex program—and without the resources to hire teams of lawyers and consultants just to farm a field.

Because ditches and ephemeral drainages are ubiquitous on farm and ranch lands—running alongside and even within farm fields and pastures—the new WOTUS rule will make it impossible for many farmers to apply fertilizer or crop protection products to those fields—or even move dirt in those fields—without triggering Clean Water Act “discharge” liability and permit requirements. A Clean Water Act “pollutant discharge” to waters of the U.S. arguably would occur each time even a *molecule* of fertilizer or pesticide falls into a jurisdictional ditch, ephemeral drainage or low spot—even if the feature is *dry* at the time of the purported “discharge.” To avoid liability, farmers will have no choice but to seek a federal permit to farming, or else farm around these features—allowing wide buffers to avoid activities that might result in a discharge. Such requirements are unnecessary to protect water quality and present a major roadblock to farming.

Another problem is the level of uncertainty over created by the rule. Because of the vague definitions of regulated “waters” (which often don’t look like “water” at all), the rule leaves farmers and ranchers with no idea what features on their land are jurisdictional “waters” and which ones are not. But farmers and ranchers must make decisions now about where they can apply crop protection products, where they may use fertilizer—even where they can harvest a growing crop without violating the law. If they make the wrong decision, even in good faith, they risk tremendous potential liability and penalties if EPA, the Corps, the state, or even an ordinary citizen decides to enforce the law. Hardworking people acting in good faith should not have to live under this cloud of legal risk.

- Please explain Congress’ constitutional authority to regulate such waters.

**Response:** Congress’s authority to regulate water pollution under the Clean Water Act arises under the Commerce Clause of Article 1, Section 8 of the U.S. Constitution. The Supreme Court explained in *United States v. Lopez*, 514 U.S. 549 (1995), that the Commerce Clause permits the regulation of “three broad categories” of activities: “the use of the *channels* of interstate commerce,” “the *instrumentalities* of interstate commerce, or persons or things in interstate commerce,” and activities “that *substantially affect* interstate commerce.” *Id.* at 558-559. The Supreme Court in *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), held that Congress adopted the Clean Water Act solely under the first head of its Commerce Clause authority, over waters as channels of interstate commerce.

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Accordingly, the Clean Water Act applies to traditionally navigable waters, which—like interstate highways—are capable of being used by the public for transportation and commerce and play an integral role in the Nation’s economy. It also covers waters that are immediately adjacent to, and have a direct and unmistakable impact on, such waters. But Congress’s “channels” Commerce Clause power does not extend to wholly intrastate waters (like ponds and the like) or to interstate waters that are not navigable in fact and do not have a direct impact on navigable waters (like ephemeral drains and ditches).

- Chief Justice Marshall in *McCulloch v. Maryland* proclaimed that our federal government is one of enumerated powers and, “this principle is now universally admitted.” Does the “substantial effect test” laid out in *Wickard v. Filburn* comport with this principle?

**Response:** The Court in *Wickard* held that activity—even wholly local activity—is subject to regulation by the federal government “if it exerts a substantial economic effect on interstate commerce.” 317 U.S. 111, at 125 (1942). It is unclear whether the Supreme Court today would come to the same conclusion as it did in *Wickard* in 1942. But whatever the virtues and vices of the *Wickard* decision, it does not help the EPA or the Corps when it comes to justifying the WOTUS Rule. As described above, Congress in the Clean Water Act did not rely on the “effects on commerce” power addressed in *Wickard*. Instead, the Clean Water Act rests on Congress’s power over the “channels” of interstate commerce, which *Wickard* does not address. The Supreme Court in *Solid Waste Agency* made clear that the *Wickard* effects analysis does not apply to the Clean Water Act when it struck down EPA’s and the Corps’ “migratory bird rule,” which purported to bring isolated ponds within the reach of the Act because migratory birds used those ponds and migratory birds affect interstate commerce (through hunting and bird watching, for example). *Wickard* is thus irrelevant to, and cannot justify, any application of the Clean Water Act.

#### RESPONSES TO QUESTIONS POSED BY SENATOR TILLIS

AFBF has extensive policy on regulatory reform. Before responding to your specific questions, I would like to cite several provisions from our policy book because I believe they touch on the subject matter of the committee’s review. Our farmer and rancher members believe that:

- No federal agency shall be allowed to legislate through their regulatory power.
- Federal regulations should be based on sound scientific data than can be replicated and peer reviewed.
- Risk assessment analysis should be conducted prior to final action.
- An estimate of the costs and benefits associated with public and private sector compliance action must be conducted prior to final action.
- Alternatives to the action must be thoroughly and publicly considered, especially market-based incentives.
- The ability to intervene in regulatory actions should be limited to only those parties that can demonstrate they are directly affected by the alleged violation.
- All federal regulations should have sunset provisions.
- Congress should provide for strong congressional oversight of regulatory and significant agency actions as well as a willingness to override unacceptable agency actions.

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Other aspects of our policy express support for “zero-base budgeting” to federal agencies as a method of regulatory reform; development of an annual comprehensive report on the efficiency of regulations; and more vigorous congressional scrutiny of agencies. In sum, AFBF policy generally supports the activities of your Committee in its review of the federal regulatory system and the impact of that system on American agriculture. The following are specific replies to your questions.

1. During the hearing, much was said regarding efforts to improve accountability, transparency, and the integrity of our federal regulatory system. In determining how we might best accomplish those objectives, it would be helpful for us to agree on the appropriate markers we could use to measure the current regulatory environment and the effectiveness of any ensuing reforms. How might we, as members of the Congress charged with continually evaluating the regulatory landscape, quantify the current volume or level of regulations in play in the federal regulatory system? In other words, what metrics could or should Congress use to determine whether the administrative rulemaking process is appropriately balanced? What are the correct indicators for us to use to evaluate whether things truly are out of balance at this point in time as opposed to at prior points in the modern era of administrative law generally?

**Response:** There can be little doubt that the cumulative impact of federal regulations is substantial, particularly on agriculture. There may well be a benefit to estimating or evaluating the overall volume or extent of the regulatory landscape. AFBF has participated in congressional efforts along these lines. Just two months ago, AFBF prepared an extensive submission to the Senate Committee on Homeland Security and Governmental Affairs as it conducted its regulatory review; a copy of that letter is attached. AFBF prepared similar materials for the House Committee on Government Reform and Oversight several years prior in a similar endeavor.

While such efforts are undoubtedly helpful, it is worth recognizing that departments and regulatory agencies, in promulgating rules, are in large part implementing responsibilities granted to them by Congress. An overall assessment as to whether the system is out of balance might help foster deserved scrutiny. But such an assessment isn't essential for identifying and bringing appropriate oversight to bear on particular agencies run amok. Each congressional committee with authorizing authority should set as a high priority the need to conduct vigorous oversight of how their laws are being implemented. This is particularly so where agencies have active rulemaking in the implementation of decades old laws such as the Clean Water Act, Clean Air Act and Endangered Species Act.

2. The use of “sue-and-settle” tactics creates a significant loophole in the legislative process that can allow special interest groups to unfairly influence rule-making decisions without the open and transparent notice and comment period. In terms of addressing “sue-and-settle,” is there an argument that the courts should actually have a more active role in this, perhaps by being more liberal with intervention rights of third parties or perhaps with statutorily defined time limitations as to how quickly an agency may formally settle after publicly disclosing the terms of such a settlement?

**Response:** AFBF policy supports limiting the ability to intervene in regulatory actions to only those parties who can demonstrate that they are directly affected by the alleged violation. While this policy was written in the context of regulations, we believe the reasoning behind this position applied equally to litigation. Unfortunately, we find in many instances that federal agencies (EPA in particular) are more likely to oppose intervention by regulated interests, including agricultural associations' such as AFBF. In addition, the law has developed to grant environmental groups far greater latitude to intervene. This imbalance should be corrected and the Judiciary Committee may wish to consider options for legislation to accomplish that.

- a. Is there a statutory solution that would make this process less likely to shut out stakeholders with a different viewpoint than those espoused by a hypothetical plaintiff and sympathetic or collusive agency-defendant?

**Response:** Creating a statutory solution that minimizes the chances for “sue and settle” while also allowing parties the ability to settle their claims is a challenge. At this point I have no specific statutory language to suggest, but would welcome the opportunity to work with the Committee to find a solution.

- b. Should Congress consider reforms to make settlements and consent decrees achieved through “sue-and-settle” tactics more transparent? If so, how?

**Response:** The first major step is to ensure that agencies do not bind themselves into finalizing a rule or any particular policy as part of any settlement or consent decree, when those actions must be implemented under the APA.

3. Currently, under *Chevron*, if a statute is deemed ambiguous, an agency must merely show that their interpretation of the statute was reasonable and, in the words of Chief Justice Roberts, within “the bounds of the permissible.” In your expert opinion, should Congress consider raising this bar in an effort to reduce judicial deference to agencies’ rule-making authority? If so, what should the standard be?

**Response:** AFBF believes the question of Chevron deference merits careful review and attention by the Committee. However, Congress can’t predict every possible application of each statute that it writes, and leaving room for interpretation allows for common sense application of the statute as unanticipated circumstances arise. The interpretive gaps that result have to be filled by someone—either by a judge behind a bench, or an administrator behind a desk. As a practical matter, there can be benefits to assigning the task to an agency. Agencies often develop technical expertise, which they can bring to bear on the interpretive question. And the notice-and-comment process allows the regulated parties to make important policy-based arguments that lack traction in a courtroom. On the other hand, there are also disadvantages. In particular, because agencies are prone to expanding their power rather than narrowing it, deference to agencies leads to predictable growth of the administrative state. So, in my view, *Chevron* deference cuts both ways.

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In the end, I see two potential checks on the inappropriate agency interpretation of statutes. . The first is for Congress, to the greatest degree practicable, to set out clear directions in its legislative drafting, thereby providing reasonably intelligible guidelines within which agencies should operate. A second might be action by Congress to better articulate the standard to be applied by courts at *Chevron* “Step One”—the determination of whether the statute is ambiguous on the question at issue. Time and time again, we see courts engaging in mental gymnastics to find a statutory phrase “ambiguous”—and therefore triggering deference to any “permissible” agency interpretation—when in fact the words used by Congress support one clearly best, common sense interpretation. In my view, it would certainly be worthwhile to explore whether the standard for judicial review at *Chevron* Step One could be more clearly articulated to aid courts in overturning agency interpretations that are at odds with the plain meaning of the words written by Congress.

I would add that an even better candidate for potential congressional action is *Auer* deference, which requires courts to defer to agencies’ interpretations of their own vague regulations. This second layer of deference perversely encourages agencies to draft ambiguous regulations, so that they can later issue “interpretations” that amount to de facto new regulations. The result is vague rules that leave the regulated public guessing about what is required of them, followed by the issuance of binding interpretations that are not subject to the notice and comment process. Several justices of the Supreme Court have recently expressed serious doubts about *Auer* deference, explaining that, when “the power to prescribe is augmented by the power to interpret,” it encourages agencies “to speak vaguely and broadly, so as to retain a ‘flexibility’ that will enable ‘clarification’ with retroactive effect.” *Decker v. Nw. Env’tl Defense Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part).

If Congress is concerned about excessive deference to agency decision-making, I suggest focusing on *Auer* deference. Doing away with *Auer* deference would be a very meaningful step toward ensuring that agencies issue clearer and more predictable regulations from the outset.

4. Given the current vast and expanding bureaucratic structure of the federal agencies, most, if not all, of their current focus is placed on the promulgation of new rules. There are over 176,000 pages of regulations which some sources have stated amount to a regulatory burden of \$1.6 trillion. This regulatory effect is increasingly frustrating for business owners of all sizes, including farmers and ranchers. In your opinion, do you feel there should be a process to retroactively review rules to eliminate any excessive or duplicative rules to help simplify the current regulatory scheme and reduce the current regulatory burden felt by so many businesses and farmers?
  - a. Further, should Congress create a commission to review and recommend the elimination of outdated, ineffective, and duplicative regulations in an effort to reduce the current regulatory burden?
  - b. Alternatively, should agencies be required to make systematic reviews of their own rules to determine if there are any duplicative or outdated rules?

**Response:** AFBF policy supports a thorough review of existing federal regulations. In fact, AFBF policy specifically supports the “immediate review and revision of existing federal regulations to limit promulgation only to rules that are essential to the protection of human health and public safety.” Legislative proposals, such as the SCRUB Act, are designed to address this proposal; we believe such an approach is worth considering to judge how well it can meet this important goal.

Even greater relief, however, would result from congressional action to rein in specific regulatory overreach resulting from the misinterpretation of existing law. For example, there is now ongoing litigation related to emissions of greenhouse gases and EPA’s clean power rules. Congress could address this controversy by amending the law to clarify whether and how greenhouse gases are regulated by the Clean Air Act. Unfortunately, this all stems from the Supreme Court’s ruling in *Massachusetts v. EPA*, which gave the agency the discretion to characterize CO<sup>2</sup> as a pollutant. Similarly, Justice Kennedy’s concurring opinion in *Rapanos v. U.S. Army Corps of Engineers* has been deemed by many courts and EPA itself and the controlling opinion in that case. This has led EPA to base its entire “waters of the U.S.” regulation on Justice Kennedy’s “significant nexus” test (as over-broadly construed by the agency). It is astonishing to realize that one individual sitting on the Supreme Court has set the United States on a policy of regulating land as “water.” As AFBF has stated repeatedly, elected officials who are accountable to citizens—not life-tenured judges or bureaucrats—should be making these decisions.

5. Many states have implemented policies aimed at reviewing regulations and removing those that increase regulatory burden without accomplishing net positives for the public. For example, in 2013, North Carolina passed a comprehensive regulatory reform measure that slated all regulations for sunset in 10 years if they were not reviewed by their originating agency before that period. Further, the process includes significant public comment periods to ensure transparency and accountability. In addition, North Carolina has a Rules Review Commission to ensure rules are promulgated with appropriate authority, clarity, and necessity. Are these types of reforms transferrable to the federal level? Said differently, is the regulatory environment of the federal government too leviathan to be improved by similar, incremental reforms? What other reforms would you recommend we consider?

**Response:** AFBF would support incremental reforms—such as greater transparency, longer comment periods, more open science and more scrupulous attention by agencies to their obligations under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). One particular initiative that we support is the Regulatory Accountability Act, H.R. 185. This legislation passed the House of Representatives on January 13 of this year. Among other provisions, this legislation revises rulemaking notice requirements to require agencies to:

- publish in the Federal Register advance notice of proposed rulemaking involving a major or high-impact rule, a negative impact on jobs and wages rule, or a rule that involves a novel legal or policy issue arising out of statutory mandates (NOTE: a ‘major’ rule is a rule defined as having on the general economy an impact of greater

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- than \$100 million; a 'high-impact' rule is defined as having on the general economy an impact of greater than \$1 billion);
- consult with the Administrator of OMB before issuing a proposed rule and after the issuance of an advance notice of proposed rulemaking;
- provide interested persons an opportunity to participate in the rule making process;
- hold a hearing before the adoption of any high-impact rule;
- expand requirements for the adoption of a final rule, including requiring that the agency adopt a rule only on the basis of the best evidence and at the least cost; and
- grant any interested person the right to petition for the issuance, amendment, or repeal of a rule.

While HR 185 is by no means the whole solution to the problem of federal regulatory burdens, it does take the important step of attempting to revise the Administrative Procedure Act, a 1946 law that desperately needs updating in light of the changes in the regulatory and judicial landscape that have occurred in the last 70 years.

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We at the American Farm Bureau Federation appreciate the Committee's willingness to listen to our concerns and this opportunity to provide additional input into this important issue of regulatory accountability and transparency. Thank you.

**Former EPA Administrators: EPA Use of Technology for Engagement and Communication  
Appropriate**

May 19, 2015 – Washington, DC: Former EPA Administrators Christine Todd Whitman, Carol M. Browner and William Reilly today released the following statement:

"Engaging the American public in the development of public health safeguards is an important function of the Environmental Protection Agency. Just as they use the best available science to develop these safeguards, The EPA should use the best available technology to engage with the American people about them.

"Administrator Gina McCarthy has engaged an unprecedented number of Americans and industry, environmental, public health, elected and public official stakeholders from across the country. The EPA's use of all available communications tools has been the foundation of that outreach and engagement.

"As former Administrators, we only wish we had the tools available to today's EPA when implementing safeguards against lead in gasoline, protecting the public from acid rain, and cleaning up our waterways from toxic pollution amongst many other measures. It is appropriate for the EPA to use these tools to engage as many Americans as possible especially as the agency moves forward with important public health protections in development today."

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