Statement of the U.S. Chamber of Commerce

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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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.

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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
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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.[1]

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.[2] Our research indicates that, over time, Congress has enacted many broad and vague laws that

[1] 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).
[2] See U.S. Chamber of Commerce, *Truth in Regulating: Restoring Transparency to EPA Rulemaking* (Apr. 2015) *available at* https://www.uschamber.com/sites/default/files/021935_truthinregulating_opt.pdf; U.S. Chamber of Commerce, *Charting Federal Costs and Benefits* (Aug. 2014) *available at* https://www.uschamber.com/sites/default/files/021615_fed_regs_costs_benefits_2014reportrevise_jrp_fin_1.pdf; U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) *available at* https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf; U.S.

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; 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_lr_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.

the ultimate success of EPA's programs overwhelmingly depends on the states.[3] 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.

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[3] The states implement approximately **96.5%** of federal environmental programs. *See* https://www.dropbox.com/s/jgdbu4rql29oexh/EEnterprise%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."[4] 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*,[5] 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."[6] 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."[7]

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,"[8] 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

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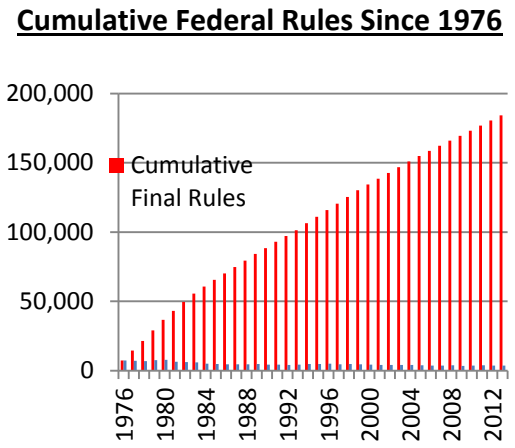
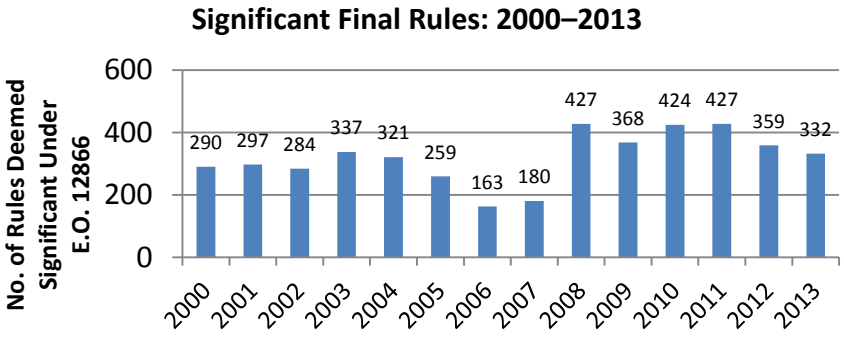
[4] Remarks of Thomas Donohue before the Des Moines Rotary Club, Des Moines, Iowa (October 7, 2010) at 3.
[5] Federal Register Act of 1935, 44 U.S.C. Chapter 15. The first *Federal Register* notice was published on March 14, 1936.
[6] Shepherd, G., *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 Northwestern University Law Review 1557, 1558 (1996).
[7] *See id*. at 1559.
[8] *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.



Source: *Federal Register*

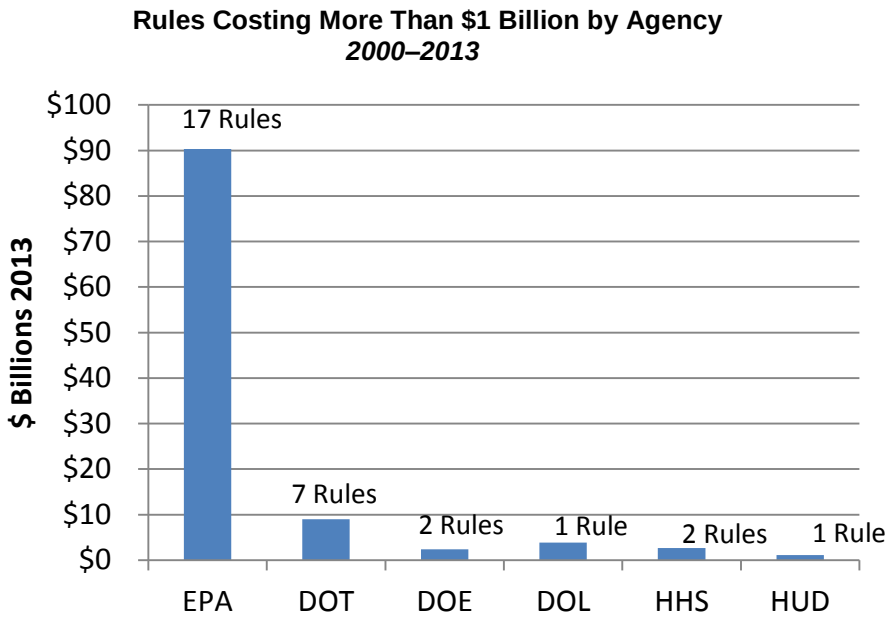
Despite the historic success of the APA in managing small, "run-of-the-mill" rulemakings, the ordinary notice-and-comment rulemaking process has become less and less capable of handling today's most extensive and complex regulatory actions.



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.[9] The Chamber's analysis of the agencies' *own* economic data identifies the rules that carry the largest nationwide cost and regulatory burden.

[9] 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.[10] 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

[10] 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[11]). 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,[12] 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

[11] NERA Economic Consulting, "Economic Impacts of a 65 ppb National Ambient Air Quality Standard for Ozone," February 2015, *available at* 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)).

[12] *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).[13] The IQA was designed to impose greater transparency and improve the quality of agency information, especially with respect to non-regulatory information disseminated by administrative agencies with respect to scientific and statistical matters. It requires:

- Compliance with OMB's information quality guidelines that mandate transparency, full disclosure of all data and reports used to justify or formulate an agency position on a given topic, and full disclosure of all uncertainties or error sources so that a member of the public may evaluate and reproduce the results of an agency analysis or study.

- Use of the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices and data collected by accepted methods or best available methods.

- For claims, statements or policies regarding human health or environmental risks, the agency must specify (1) each population addressed by any estimate of public health effects; (2) the expected risk or central estimate of risk for the specific populations; (3) each appropriate upper-bound or lower-bound estimate of risk; (4) each significant uncertainty identified in the process of the assessment of public health effects and studies that would assist in resolving the uncertainty; and (5) peer-reviewed studies that support, are directly relevant to, or fail to support any estimate of public health effects and the methodology used to reconcile inconsistencies in the scientific data.[14]

- 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.[15]

[13] 44 U.S.C. §§ 3504(d)(1), 3516.
[14] 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).
[15] *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.[16] 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."[17] 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,[18] 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.[19] 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.[20] 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.

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[16] 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).

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

[18] 5 U.S.C. §§ 601-612.

[19] 5 U.S.C. § 605(b).

[20] 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.[21] 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.[22] 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."[23] 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]."[24] EPA has declined such advice from the Clean Air Science Advisory Committee.[25]

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."[26] 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.

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[21] Section 321(a) of the Clean Air Act; 42 U.S.C. § 7621.
[22] Letter from Senators Vitter, Risch, Johanns, Inhofe, Ensign and Hatch to EPA Administrator Lisa Jackson, October 13, 2009.
[23] Letter from EPA Assistant Administrator for Air Gina McCarthy to Senator Inhofe (Oct. 26, 2009) at 2.
[24] 43 U.S.C. § 7409(d)(2)(C)(iv).
[25] *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.
[26] 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*."[27] 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,[28] which was contained within the Clean Air Act.[29] 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.[30] 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.[31] 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.[32] 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.[33]

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[27] Executive Order 13,563, "Improving Regulation and Regulatory Review," 76 Fed. Reg. 3,821 (Jan. 21, 2011), § 1(b)(2) (emphasis added).
[28] *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).
[29] Clean Air Amendments of 1970, Pub. L. No. 91-604 (1970).
[30] *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.
[31] *See supra* note 12 at 198; *See also* Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983).
[32] *See e.g.* 42 U.S.C. § 7604.
[33] *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.[34] While the Senate bill did include a citizen suit provision,[35] 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.[36]

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.[37] 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

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[34] *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.
[35] *Id.*
[36] *Id.* Senate debate on S. 4358 at 277.
[37] "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.[38]

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).[39]

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

[38] 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.

[39] 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.[40]

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*,[41] 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*,[42] 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*,[43] 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

[40] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
[41] 449 F.2d 1109 (D.C. Cir. 1971).
[42] 401 U.S. 402 (1971).
[43] 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*,[44] 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*[45] 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,[46] 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*.[47] The Court granted *certiorari* in *Spokeo* on April 27, 2015 and will likely hear arguments this Fall. The case

[44] Lujan v. National Wildlife Federation, 497 U.S. 871 (1990); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
[45] Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167(2000).
[46] *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 Harv. L. & Pol'y Rev. 289
[47] *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.[48] 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.[49]

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.[50] 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."[51]

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.

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[48] *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)).)

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

[50] "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).

[51] *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*,[52] 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.[53]

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.[54] 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.

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[52] 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.)

[53] 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.

[54] See *supra* note 52.

Sue and Settle Agreements Create Costly Federal Rules
1. Utility MACT rule - up to $**9.6 billion** annual costs[55] 2. Lead Repair, Renovation & Painting rule - up to **$500 million** in first-year costs[56] 3. Oil and Natural Gas MACT rule - up to **$738 million** annual costs[57] 4. Florida Nutrient Standards for Estuaries and Flowing Waters - up to **$632 million** annual costs[58] 5. Regional Haze Implementation rules: **$2.16 billion** cost[59] 6. Chesapeake Bay Clean Water Act rules - up to **$18 billion** cost to comply[60] 7. Boiler MACT rule - up to **$3 billion** cost to comply[61] 8. Standards for Cooling Water Intake Structures - up to **$384 million** annual costs[62] 9. Revision to the Particulate Matter ($PM_{2.5}$) NAAQS - up to **$350 million** annual costs[63] 10. Reconsideration of 2008 Ozone NAAQS - up to **$90 billion** cost[64]

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.[65] 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

[55] Letter from President Obama to Speaker Boehner, *supra* note 9.
[56] 75 Fed. Reg, 24,802, 24,812 (May 6, 2010).
[57] Fall 2011 Regulatory Plan and Regulatory Agenda, "Oil and Natural Gas Sector-NSPS and NESHAPS," RIN: 2060-AP76.
[58] EPA, Proposed Nutrient Standards for Florida's Coastal, Estuarine & South Florida Flowing Waters (Nov. 2012).
[59] William Yeatman, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012).
[60] Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans on Key Maryland Industries* (April 2011); *Chesapeake Bay Journal* (Jan. 2011).
[61] Letter from President Obama to Speaker Boehner, *supra* note 9.
[62] 2012 Regulatory Plan and Unified Agenda, "Standards for Cooling Water Intake Structures," RIN: 2040-AE95.
[63] EPA, "Overview of EPA's Revisions to the Air Quality Standards for Particle Pollution (Particulate Matter) (2012).
[64] Letter from President Obama to Speaker Boehner, *supra* note 9.
[65] 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.[66]

Fourth, advocacy groups can also significantly affect the regulatory environment by compelling an agency to issue substantive requirements that are not required by law.[67] 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.[68]

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 <u>After</u> 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.[69] Moreover, because the settlement agreement directs the timetable and the structure (and sometimes even the actual substance) of the subsequent rulemaking, interested

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[66] 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.[66] 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.[66] In other words, sue and settle cases and other lawsuits are now driving the regulatory agenda of the Endangered Species Act program at FWS.

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

[68] Agreed deadlines commit an agency to make one specific rulemaking a priority, ahead of all other rules.

[69] In proposed settlement agreements the Chamber has commented on, such as for the revised $PM_{2.5}$ 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.[70]

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.'"[71]

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.

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[70] 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.

[71] 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.[72] 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

[72] 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.[73] 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.

[73] 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.