Statement of the U.S. Chamber of Commerce

ON: Hearing on The Administrative State: An Examination of Federal Rulemaking

TO: U.S. Senate Committee on Homeland Security & Governmental Affairs

DATE: April 20, 2016

1615 H Street NW | Washington, DC | 20062

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

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

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

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

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

BEFORE THE COMMITTEE ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS OF THE U.S. SENATE

Hearing on The Administrative State: An Examination of Federal Rulemaking

Testimony of William L. Kovacs
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U.S. Chamber of Commerce

April 20, 2016

Good morning, Chairman Johnson, Ranking Member Carper, 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 discuss the Chamber's perspective on the current condition of our regulatory state.[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 not working as Congress intended for the most complex and high-cost regulations that have the most profound effect on the fabric of our society. 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

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[1] Nothing in these comments shall constitute a waiver of any arguments the Chamber has made or will make in the context of any litigation involving the EPA and Army Corps of Engineers' definition of "Waters of the United States."

[2] See U.S. Chamber of Commerce, *Truth in Regulating: Restoring Transparency to EPA Rulemaking* (Apr. 2015) *available at* https://www.uschamber.com/sites/default/files/021935_truthinregulating_opt.pdf; U.S. Chamber of Commerce, *Charting Federal Costs and Benefits* (Aug. 2014) *available at* https://www.uschamber.com/sites/default/files/021615_fed_regs_costs_benefits_2014reportrevise_jrp_fin_1.pdf; U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) *available at* https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf; U.S. Chamber of Commerce, *Impacts of Regulations on Employment: Examining EPA's Oft-Repeated Claims that Regulations Create Jobs* (Feb. 2013) *available at*

delegated significant policy making authority to agencies. As agencies began expanding their policy making power, Congress responded by enacting statutes requiring the agencies to analyze, as part of the rulemaking process, regulatory costs and benefits; 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. These analyses are intended to be a check on agency actions, but as demonstrated below, they are often ignored, to the great detriment of citizens, businesses and state and local governments.

One agency in particular, the Environmental Protection Agency (EPA), has fallen down in its evaluation of critical impact analyses, and at the same time has expanded its regulatory footprint exponentially. Within a period of less than six months in 2015, EPA finalized three massive regulatory programs the Waters of the United States (WOTUS) definition rule[3], greenhouse gas rules for existing power plants under the Clean Power Plan[4], and the revised Ozone National Ambient Air Quality Standards (NAAQS).[5] Together, these programs push the boundaries of federal authority further than they have ever been extended. Each of these regulatory initiatives seeks to greatly expand federal power at the expense of state and local governments—despite the fact that the states have long shouldered the vast majority of the burden of implementing and enforcing federal environmental laws, and the ultimate success of EPA's programs overwhelmingly depends on the states.[6] These rules not only undermine the cooperative federalism model carefully crafted by Congress, they threaten to wreak havoc on the ability of states' to operate effective environmental programs.

It is worthwhile to ask – ***how could this happen?*** How can federal agencies exercise authority to create laws broader than Congress could enact in a divided government?

The short answer is that for the most costly, burdensome and complex regulations being issued by agencies, the regulatory process is critically dysfunctional. As a result, agencies make more law than Congress, all the while ignoring the impact analyses that Congress requires. Meanwhile, the courts too frequently avoid dealing with the complexity by deferring to agency decisions. And Congress has focused so intently on the problems with specific rules that it has

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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.

[3] EPA and U.S. Army Corps of Engineers, "Definition of "Waters of the United States," Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015).

[4] EPA, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," Final Rule, 80 Fed. Reg. 64, 662 (October 23, 2015).

[5] EPA, "National Ambient Air Quality Standard for Ozone," Final Rule, 80 Fed. Reg. 65, 292 (October 26, 2015).

[6] Testimony of Teresa Marks, Director, Arkansas Department of Environmental Quality and President, Environmental Council of the States, before the House Energy and Commerce Committee, Subcommittee on Environment and the Economy (February 15, 2013) at 3, available at http://docs.house.gov/meetings/IF/IF18/20130215/100242/HHRG-113-IF18-Wstate-MarksT-20130215.pdf).

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.

Reversing this dysfunctional situation is essential to protecting the integrity of Congress as it delegates authority to agencies, but most importantly, to ensure that Congress preserves constitutional checks and balances.

I. BACKGROUND

A complex society needs regulations; however, as federal agencies regulate more and more facets of American society, they 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 regulatory agency, the Interstate Commerce Commission, was created in 1887. Prior to 1935 and the creation of the *Federal Register*,[7] 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). The APA 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 APA was called "the bill of rights for the new regulatory state."[8] 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."[9]

The APA was written as a compromise that allows agencies to use informal "notice and comment rulemaking," which means 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. Case law interpreting the APA has established a high bar to invalidate agency action, and courts frequently defer to agencies' technical expertise. The APA's

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[7] Federal Register Act of 1935, 44 U.S.C. Chapter 15. The first *Federal Register* notice was published on March 14, 1936.

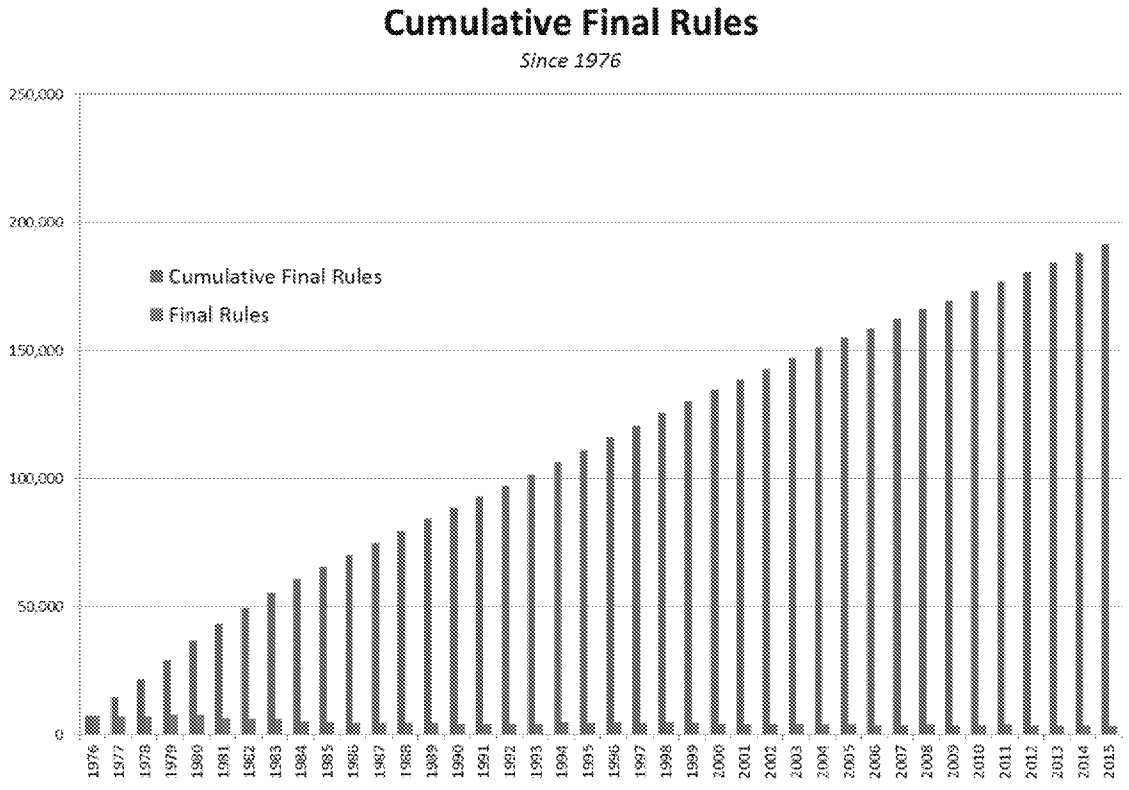
[8] Shepherd, G., *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 Northwestern University Law Review 1557, 1558 (1996).

[9] *See id.* at 1559.

compromise "struck between promoting individuals' rights and maintaining agencies' policy-making flexibility,"[10] actually makes it relatively easy for agencies to issue new rules that, more often than not, will be upheld by the courts.[11]

Each year, federal agencies churn out thousands of new regulations (see Figure 1). 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 agencies can write new rules helps explain how agencies could collectively issue almost 200,000 final rules over a 40-year period, as illustrated below.

Figure 1:



Source: Federal Register

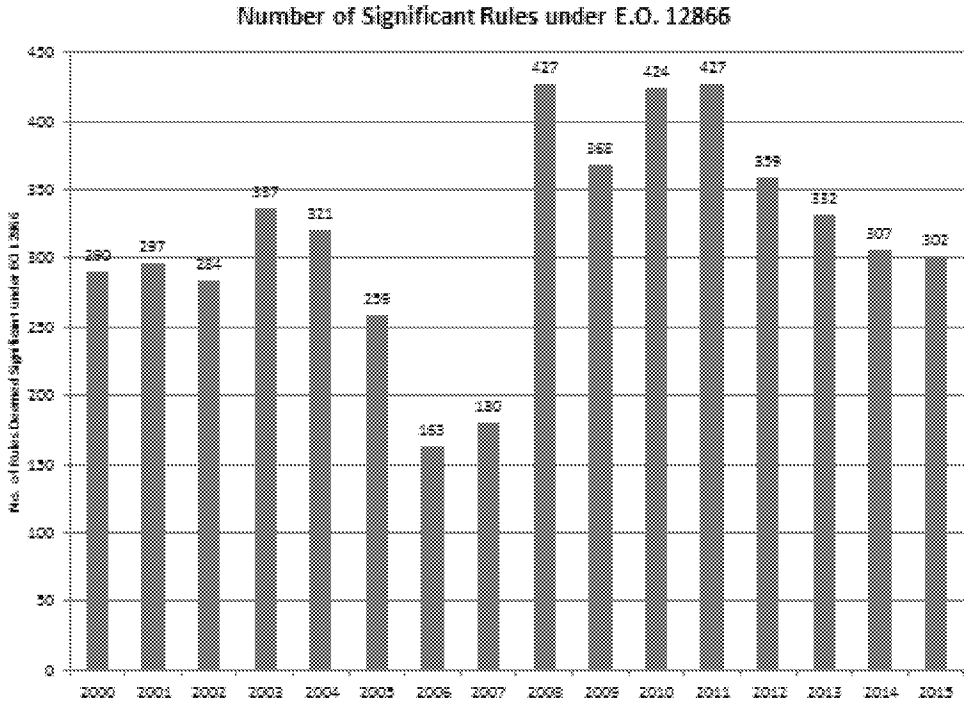
Despite the historic success of the APA in managing small, "run-of-the-mill" rulemakings, the ordinary notice-and-comment rulemaking process has become less and less capable of handling today's most extensive and costly regulatory actions, which include "significant rules" over $100 million in cost annually and "high-impact" over $1 billion annually. Hundreds of significant rules are issued each year (see Figure 2). Of all the significant

[10] *Id.* at 1558.

[11] See, e.g., Joseph M. Feller, Have Judges Gone Wild? Plaintiff's Choices and Success Rates in Litigation Against Federal Agencies, 44 ENVT'L L 287, 295 (2014) (citing to studies finding up to 76.6% rates of affirmances by courts in administrative law cases in 1984-85.).

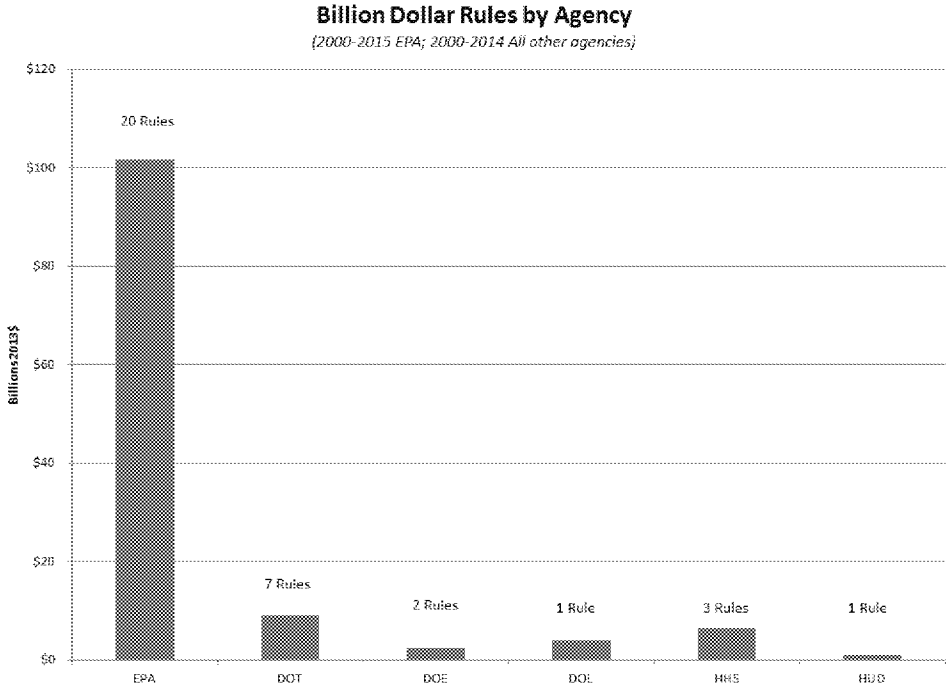
rules issued each year, as shown below, only 34 rules impose **$1 billion or more** between 2000 and 2015 in regulatory costs.

Figure 2:



Source: Federal Register

Figure 3:



Sources: EPA rules from agency RIAs; other agencies' rules from OMB *2013, 2014, and 2015, Reports to Congress on Costs and Benefits of Regulations*.

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The data shows that from 2000 to 2015, a total of **34** rules from Executive Branch agencies, each with a cost of more than **$1 billion** per year, are now imposing nearly **$125 billion** each year on the U.S. economy.[12] Significantly, EPA not only issued more of these rules than all the other agencies combined, the 20 EPA rules collectively imposed **82%** of all the monetized compliance costs (see Figure 3). While the high cost of these rules is important, these rules are typically also highly complex and burdensome. Such rules are far more intrusive than "run of the mill" 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 rules that cost a billion dollars per year or more. In those circumstances, an agency would be expected to analyze and understand how a massive new rule will affect specific regulated industries and the communities where those industries are located. Indeed, as the D.C. Circuit Court of Appeals has noted, the essential purpose of informal notice and comment rulemaking procedures is "(1) to ensure that the agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."

Unfortunately, however, agencies often fail to achieve these important objectives, even for billion-dollar-plus rules.[13] Time and time again, informal notice-and-comment rulemaking procedures have proven insufficient to afford interested parties and the public adequate information about the 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 data from EPA's own Regulatory Impact Analysis for its 2015 Ozone NAAQS rule, are estimated to come from unknown controls that the agency simply assumes will cost the same as existing control technologies[14]).

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[12] 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.

[13] *International Union, United Mine Workers of America v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005), citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

[14] 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

The informal 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.*** Agencies often take years and sometimes decades to develop large and complex rules and the technical justification. But the public and affected stakeholders are given a far more limited amount of time to evaluate all of the information and data the agency relied upon. 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,[15] 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 develop a rule that accomplishes its purpose without inflicting unnecessary harm.

II. A CASE STUDY ON REGULATORY DYSFUNCTION: THE "WATERS OF THE UNITED STATES RULE"

The revised definition of "Waters of the United States" (WOTUS) issued jointly by the EPA and the U.S. Army Corps of Engineers (Corps) on June 29, 2015,[16] expands federal Clean Water Act jurisdiction far beyond the limits explicitly established by Congress and affirmed by the courts. The rule gives EPA and the Corps unprecedented permitting and enforcement authority over land use decisions that Congress intentionally reserved to the States.

The WOTUS rule is a critical example of the type of regulatory mess that results when agencies fail to comply with Congressional mandates. This section details many of the

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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)).

[15] *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.

[16] 80 Fed. Reg. 37,054 (June 29, 2015).

fundamental problems with the WOTUS rule. The agency's procedural failures are detailed in later sections.

1. The WOTUS Rule Greatly Expands Federal Jurisdiction Through Complex Definitions.

The rule contains several key new definitions. These new definitions, while important by themselves, also fundamentally transform other existing Clean Water Act definitions. Besides being extremely difficult to fully understand, the interplay of these new and existing definitions has the potential to fundamentally change the relationship between the federal government and the states—all in the absence of any new Congressional directive. Importantly, the WOTUS Rule actually fails to define two critical terms used throughout the rule: "waters" and "dry land". The final rule preamble lists several types of features that are "waters" but then inexplicably states that features will be "identifiable by water…"[17] The second undefined term is "dry land" – which is used throughout the rule to describe certain types of features, mostly those intended to be excluded from the rule. The agencies concluded that "there was no agreed upon definition given geographic and regional variability".[18] Considering the complex terms the agency chose to define, it is quite telling that they were unable to define what is water and what is dry land. The new key definitions the agencies decided to include are:

- **"Significant nexus"** - The final WOTUS rule states that any chemical, physical, or biological effect on jurisdictional waters not thought to be "speculative or insubstantial" will be considered "significant." This so-called "significant" effect can be caused by a single water or wetland or "in combination with other similarly situated waters in the region." The practical result of the Agencies' approach is that, if **any** effect exists, it is deemed significant. Moreover, a land user will need to consider not only the effect of the water or wetland on his property, but also the combined effects of other "similarly situated" waters throughout an entire watershed to determine if a nexus exists.[19] This expansion of federal authority is totally unjustified. The concept of a "significant nexus" historically arose in the narrow context of ***wetlands*** areas that actually abutted—and were therefore "inseparably bound up with"—traditional navigable waters.[20] Now, the WOTUS rule requires an esoteric inquiry into whether an isolated water or wetland could – on its own or in combination with other similar waters -- theoretically have an impact on (or be impacted by) any other water within an entire watershed of a traditional navigable water, interstate water or territorial sea. The meaning of "significant nexus" in the context of chemical, physical, and biological effects could occupy the federal courts for years to come.

- **"Tributary"** - The Agencies' definition of "tributary" is extraordinarily vague and overbroad. A "tributary" need only demonstrate the bare minimum evidence (including

[17] 80 Fed. Reg. 37055 fn 1 (June 29, 2015).
[18] *Id.* at 37099
[19] The final rule provides a vague and unhelpful explanation of what it means to be "similarly situated": "waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters." 80 Fed. Reg. 37,108 (June 29, 2015).
[20] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 at 172 (2001) (quoting *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

computer-generated evidence, irrespective of actual field conditions) of a water's flow through any channel, a bed, bank and ordinary high water mark. A tributary can be anything that "contributes" even the tiniest amount of water during rare, extreme precipitation events. A tributary may contribute water to major waters by an "indirect" route through another "water," which in turn also could convey only small, infrequent flows via indirect routes. A ditch could be a tributary, if it includes areas that can be characterized as "wetland" anywhere along its entire length, or if they occasionally receive stormwater overflow from any "wetland" or other water. Projects with any land disturbance that includes a ditch are much more likely to trigger a "dredge and fill" permit, and specifically an individual permit instead of a Nationwide permit under section 404 of the Clean Water Act (CWA). Businesses will have to incur the cost and project delays of many more of these permits—which EPA itself has estimated to have a median cost of $155,000.[21]

- **"Adjacent Waters"** – The application of the term "adjacent" has historically only been used to bring wetlands under federal jurisdiction; however, the final WOTUS rule significantly expands the application of the term to bring "adjacent waters" under federal jurisdiction. The term "adjacent waters" also creates a new term – "neighboring" – which is lengthy, expansive and problematic in its own right. These definitions not only expand the universe of jurisdictional waters far beyond the traditional concept of "adjacency" (and the Supreme Court's interpretation of that concept), they create profound uncertainty as to which waters are likely to be jurisdictional.[22]

Together, these definitions not only expand CWA jurisdiction well beyond anything Congress could have intended to include in the term "navigable waters," but they leave land users with virtually no way to assess the status of their local water, short of undertaking a complex and costly watershed study. A facility may find itself in WOTUS for the first time because it is "adjacent" to or "neighboring" a water, has one or more ditches that are a "tributary," or contains a water that somehow has combined "significant" effects with other "similarly situated" waters to create a nexus.

Very often, the new definitions will create federal Clean Water Act jurisdiction over a vast geographic area previously regulated by the states. The extraordinarily broad scope inhibits the ability of a land owner to make any reasonable judgment concerning the jurisdictional status of any specific, local water. Moreover, by considering a particular water "in combination with" other waters located in such a broad region, the Agencies would examine the cumulative impacts of multiple waters, ranging from large to very small, in order to determine the jurisdictional status of a particular water in question.

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[21] EPA and U.S. Army Corps of Engineers, *Economic Analysis of EPA-Army Clean Water Rule* (May 2015), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/news/final_CWR_eco_analysis.pdf.
[22] *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 at 135 (1985).

2. The WOTUS Rule Imposes Massive New Burdens on the States and the Business Community.

Significantly, **EPA itself** developed detailed maps during the WOTUS rulemaking that indicate vastly expanded areas of federal Clean Water Act jurisdiction. These detailed maps, developed by EPA and the U.S. Geological Survey, were released to the public by the House Science Committee on August 27, 2014.[23] The maps indicated more than **8.1 million miles** of rivers and streams across the 50 states could be included under the proposed WOTUS definition.[24] This sharply contrasts with a January 2009 EPA report to Congress that estimated **3.5 million miles** of rivers and streams categorized as WOTUS.[25] Although the final WOTUS rule differs somewhat from the agencies' original proposal, the signification overreach of jurisdiction in the final rule remains.

Based on these EPA maps, the WOTUS rule represents a potential expansion in federally jurisdictional stream miles of at least **130%**. Critical to this analysis, and as discussed further below, EPA certified that the WOTUS rule had no significant impact under the Regulatory Flexibility Act since the rule actually narrowed the scope of waters covered and no small entities are made subject to any new requirements under the definitional changes. It is disingenuous and simply not credible for EPA on the one hand to generate maps demonstrating significant increases in federal jurisdiction, and on the other hand to certify that the rule actually narrows the scope of federal jurisdiction.

Likewise, analyses by the states of their own waters reveals that the revised definition would increase the amount of stream miles under federal jurisdiction by orders of magnitude. For example, the state of Kansas has estimated that the proposed rule definition of "tributary" would increase the amount of jurisdictional stream miles from around 30,000 miles to 174,000 miles, as shown below, an increase of approximately **460%**.[26]

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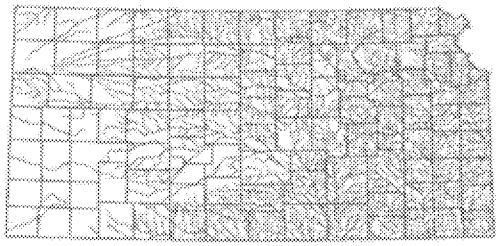
[23] Press Release, House Committee on Science, Space & Technology, "Smith: Maps Show EPA Land Grab" (August 27, 2014) (the map hyperlink is embedded in the release).

[24] EPA and the Corps consider these revised maps to be good indicators of the extent of federal jurisdiction. The agencies noted that "[w]hen considering whether the tributary being evaluated eventually flows to [a navigable] water, the tributary connection may be traced using direct observation or U.S. Geological Survey maps, aerial photography or other reliable remote sensing information, or other appropriate information." 79 Fed. Reg. 22,202 (April 21, 2014) (emphasis added).

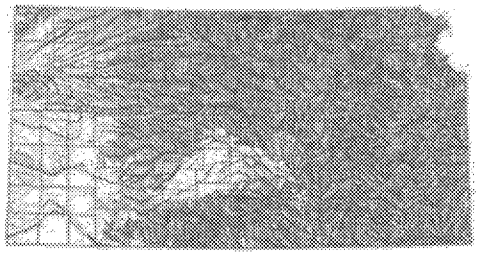
[25] EPA Office of Water, National Water Quality Inventory: Report to Congress, EPA 841-R-08-001 (January 2009).

[26] *Senate Legislative Hearing on S. 1140, The Federal Water Quality Protection Act Before the S. Comm. on Environment and Public Works*, 114th Cong. (May 19, 2015) (Statement of Susan Metzger, Assistant Secretary, Kansas Department of Agriculture) ("Currently, in what's approved by EPA as our waters of the U.S. in the absence of the proposed rule, is what we consider those waters with designated uses that are by state statute put into our state surface water quality standards, and that encompasses about 30,000 – a little better than 30, 000 – stream miles in Kansas. As we interpret the blanket definition of "tributary" in the proposed rule, that would result in about 174,000 stream miles. That's a 460% increase.").

Figure 4:



Current WOTUS Streams in Kansas



"Ephemeral" Streams Under Proposal

The expanded jurisdictional areas depicted in maps prepared by EPA and the States, respectively, are based primarily on the inclusion of "ephemeral" streams—those that only flow after rains, perhaps only once every few years—as waters of the U.S. Ephemeral streams are currently regulated in the majority of States as "waters of the State."[27] Regulating these waters (which look more like land than "waters" to most people)—and any small wetlands and ponds "adjacent" to them—as WOTUS would be one of the largest regulatory expansions in history.

Although the WOTUS rule is ostensibly intended to simply clarify the scope of federal jurisdiction, the rule will federalize a much larger universe of clean water programs now run by States and localities:

- Stormwater programs run by municipalities will be required to impose more stringent controls on facilities with parking lots, storage pads, or other large paved areas. These facilities would become subject to more stringent stormwater management requirements, potentially including the requirement to obtain National Pollutant Discharge Elimination System (NPDES) permits for the first time, and to treat their stormwater before it leaves the property. This is likely to impact grocery stores, shopping centers, big box stores, stadiums, airports, schools, churches, hospitals, and many other kinds of commercial and institutional facilities;

- The revised WOTUS definition requires businesses to update and expand their Spill Prevention, Control, and Countermeasure (SPCC) Plans under section 311, and their stormwater discharge permits/plans under section 402;

- States will be immediately responsible for developing and issuing tens of thousands—maybe hundreds of thousands-- of new and revised NPDES point source permits to sources under section 402;

- States will also be required to establish water quality standards under section 303 for all newly regulated waters—including potentially 4.6 million miles of "ephemeral" tributaries, and innumerable small wetlands and ponds;

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[27] The Association of State Wetland Managers, "Report on State Definitions, Jurisdiction, and Mitigation Requirements in State Programs for Ephemeral, Intermittent and Perennial Streams in the United States" (April 2014).

- The states will be required to certify that Federal actions meet those new water quality standards under section 401;

- The expansion of jurisdictional waters is also likely to result in a greater number of "impaired" federal waters under section 303, with additional burdens on States to evaluate and list these waters, and assign Total Maximum Daily Load (TMDL) pollutant caps to these waters; and,

- States will be required to implement their own TMDLs, or EPA-issued TMDLs, to achieve the new water quality standards for each newly regulated feature.

The states would be responsible for implementing all of these expanded duties within their existing budgets and staffing levels. Because businesses depend on being able to get state-issued permits within a reasonable timeframe, the additional workload the revised definition would place on the states would become a serious obstacle to commercial activity.

3. Real-World Impacts of the WOTUS Rule on Counties and Local Jurisdictions

The WOTUS rule would impose a particularly heavy regulatory burden on counties and local government jurisdictions. Much of this burden would come in the form of permits and approvals never before required to conduct routine infrastructure maintenance. According to the National Association of Counties, the nation's counties are responsible for building and maintaining 45% of the roads in 43 states.[28] Because the WOTUS Rule defines "tributaries" to include ditches, flood channels, and other infrastructure, counties would immediately be required to obtain section 402 and/or 404 permits for work in those areas that may disturb soil or otherwise add any "pollutant" that could affect the "tributary."[29] County irrigation districts, flood control districts, road departments, weed control districts, pest control districts, etc., would be required to obtain these permits in addition to section 402 permits for discharges to these waters.

Individual section 404 permits currently may take more than a year to obtain, and have an estimated median cost of $155,000.[30] These permits are required by the CWA, regardless of the environmental benefit, if any, and permittees' lack of resources to address this new federal requirement.[31]

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

[29] The final WOTUS rule does contain some exclusions for particular features under very specific circumstances, but the exclusions are complex, require technical analyses to determine if they apply, and are likely to be interpreted very narrowly. For example, some ditches are excluded from federal jurisdiction, but only if they were not originally excavated in a "tributary" as broadly defined by the rule, not a relocated "tributary" and do not drain a wetland. 80 Fed. Reg. 31705 (June 29, 2015). However, any segment of such a ditch that intersects with a wetland is jurisdictional, and portions of the ditch up and down the stream of that wetland intersection must be assessed on a case by case basis. *Id.* at 37098.

[30] EPA and U.S. Army Corps of Engineers, *Economic Analysis of EPA-Army Clean Water Rule* (May 2015), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/news/final_CWR_eco_analysis.pdf.

[31] The Lake County, Oregon, Road Department, for example, located in a county with 7,711 residents in 2012, must maintain the county's road network, including ditches, culverts, and bridges, with only a dozen or so employees.

III. EPA DOES NOT FOLLOW CONGRESS' REGULATORY DIRECTIVES

Since the first agency was established, Congress has attempted to control agency rulemakings through legislation, oversight and funding, but with little to no impact. Many of the adverse impacts of regulations would have been addressed by the agencies (or at least identified) had they merely implemented congressional mandates concerning the impact on jobs, the use of the best data in rulemakings, the impact of the regulations on small business, state and local governments, and the cumulative impact of regulations. As described below, the WOTUS Rule provides a textbook example of how a federal agency failed to follow congressional directives in a significant rulemaking.

A. The EPA Fails to Comply with the Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act ("UMRA") requires federal agencies to assess the effects of a rule on state and local governments and the private sector before imposing mandates on them of $100 million or more per year without providing federal funding for state and local governments to implement the mandate. In essence, UMRA is intended to prevent federal agencies from shifting the costs of federal programs to the states. In the WOTUS rule, the EPA and the Corps certified that "[t]his action does not contain any unfunded mandate under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995, (12 U.S.C. §§ 1531-1538), and does not significantly or uniquely affect small governments."[32] This definitive statement is clearly at odds with the facts, however.

For example, according to the National Association of Counties, 1,542 of the 3,069 counties in the nation (50%) have populations of less than 25,000,[33] are considered "small governments" and are therefore protected by both the UMRA and RFA. These counties are responsible for building and maintaining 45% of the roads and associated ditches in 43 states,[34] which is where some of the largest permitting impacts of the WOTUS rule are expected to be felt. As a result of the WOTUS rule, these counties will be required to bear the cost of obtaining Clean Water Act permits in greatly-expanded areas, but will receive no additional federal funding for the increased responsibility imposed by the rule.

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

See www.lakecountyor.org/government/road.master.php. Brown County, North Dakota officials have also cited concerns about WOTUS permit delays "for something as simple as replacing a culvert." Gary Vetter, Assistant to the Brown County Commissioners, cited in "EPA's Proposed Definition Change Concerns County, Thune," Aberdeen News, Local News (posted August 16, 2014).

[32] 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).

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

[34] *Id.*

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

Congress passed the Regulatory Flexibility Act ("RFA") in 1980 to give small entities a voice in the federal rulemaking process.[35] Put simply, the RFA requires federal agencies to assess the economic impact of their planned regulations on small entities and to consider alternatives that would lessen those impacts. The RFA requires each federal agency to review its proposed and final rules to determine if the rule in question will have a "significant economic impact on a substantial number of small entities."[36] If the rule is expected to have such an impact, the agency must assess the anticipated economic impacts of the rule and evaluate whether alternative actions that would minimize the rule's impact would still achieve the rule's purpose.

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

In the case of WOTUS, the EPA certified without any factual evidence (and contrary to jurisdictional maps the agency itself generated) that the WOTUS rule actually represents a *reduction* in the regulatory burdens affecting small entities, and that the rule would not have a substantive or direct regulatory effect on any small entity, so the RFA doesn't apply.[37] Yet, because the WOTUS rule defines "tributaries" to include ditches, flood channels, and other infrastructure, businesses and small governmental jurisdictions will be subject to section 404 permitting requirements for work in ditches, on roads adjacent to ditches, on culverts and bridges, etc. that disturbs soil or otherwise affects the "tributary."[38] These permits can take more than a year to obtain, at a median cost of $155,000.[39] This is why the U.S. Small Business Administration's Office of Advocacy publicly advised the EPA and the Corps that they improperly certified the WOTUS proposal under the RFA.[40]

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

[35] 5 U.S.C. §§ 601-612.
[36] 5 U.S.C. §605(b).
[37] EPA again certified in the final WOTUS rule that the rule will not have a significant economic impact on a substantial number of small entities and that the RFA does not apply. 80 Fed. Reg. 37,102 (June 29, 2015).
[38] See fn 29, *supra*.
[39] EPA and U.S. Army Corps of Engineers, *Economic Analysis of Proposed Revised Definition of Waters of the United States* (March 2014) at 12.
[40] Letter from Winslow Sargeant, Chief Counsel for Advocacy, to Gina McCarthy, Administrator, EPA and General John Peabody, Deputy Commanding General, Corps of Engineers, on Definition of "Waters of the United States" Under the Clean Water Act (October 1, 2014) at 4.

C. The EPA Fails to Follow the Information Quality Act

The Agencies' WOTUS rule neither complies with the Information Quality Act (IQA) as implemented under Office of Management and Budget (OMB) guidelines, nor EPA's own information quality guidelines.[41]

The Agencies developed the WOTUS Rule based upon EPA's Report, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence. The Report purports to establish a scientific basis for the connectivity of isolated, often evanescent "waters" to traditional "navigable" waters under the CWA. The Agencies argue that the hydrologic "connectivity" of these remote waters, which ultimately reach navigable waters, establishes federal jurisdiction over these waters. The information contained in the Agencies' Report clearly meets the OMB definition of "information." "'Information' means any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic . . . ."[42]

The information at issue also meets the OMB definition of "influential" information. "Influential" means "that the agency can reasonably determine that the dissemination of the information will have or does have a clear and substantial impact on important public policies . . . ."[43] The Agencies have directly relied upon the Report in making findings regarding the extent of hydrologic connectivity sufficient to support an assertion of federal jurisdiction. OMB has stated that "influential information" should be held to a heightened standard of quality.[44] The Report clearly meets the definition of "influential" information that needs to be of the highest quality.

On the date the Agencies published the proposed WOTUS rule, EPA's Science Advisory Board (SAB) had not completed its review of the Report. In fact, the SAB did not complete its review of the Report until September 30, 2014. EPA and the Corps ultimately extended the public comment period until November 14, 2014. But commenters had no opportunity to consider EPA's response to the SAB, and only a limited time to review the final Report before the opportunity to comment had ended. EPA and the Corps should have re-proposed the rule with an updated discussion of the Report, or alternatively, the agencies should have extended the public comment period further to allow for informed input from stakeholders on the information quality of the Report.

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

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[41] *See* Treasury & General Governmental Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554 § 515(a); 44 U.S.C. § 3516 (notes); EPA Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Environmental Protection Agency, EPA/260R-02-2008 (October 2002).

[42] OMB Guidelines § V.5.

[43] OMB Guidelines § V.9

[44] 67 Fed. Reg. 8,452 (February 22, 2002).

D. EPA Has Failed to Conduct the Congressionally Mandated Employment Impacts Evaluation

Congress has debated whether environmental regulations cause job loss and adversely impact communities since the first environmental laws were debated in the early 1970's. During the debate over the 1972 Clean Water Act claims were raised by industry that environmental regulations cost jobs. While there was great debate over the issue, Congress specifically wanted to resolve this issue of whether environmental regulations cost jobs.

Congress addressed this issue five times over two decades by placing similar provisions in the five major environmental statutes directing EPA to conduct continuing evaluations on potential loss or shifts in employment which may result from the issuance of regulations under the respective statutes. The congressional intent behind these provisions is clear: Congress knew that regulations, such as those issued under the Clean Water Act and Clean Air Act, would impact the operations of facilities, cause loss of job, and adversely impact communities but it did not know if such losses were the primary cause or if there were other causes. Congress wanted to resolve this issue but it needed information from the agencies issuing the regulations.

During the 92nd Congress (1971 – 1973), the debate over the Federal Water Pollution Control Act Amendments of 1972 addressed this issue for the first time. As part of the floor debate, Representative William D. Ford of Michigan offered an amendment mandating the continuous evaluation of the potential loss or shifts of employment resulting from the issuance of water regulations.[45] In support of the amendment, Representative Bella Abzug of New York stated:

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[45] 33 U.S.C. § 1367(e) (1972)(e) Investigations of Employment Reductions, The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the issuance of any effluent limitation or order under this chapter, including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such limitation or order. Any employee who is discharged or laid-off, threatened with discharge or lay-off, or otherwise discriminated against by any person because of the alleged results of any effluent limitation or order issued under this chapter, or any representative of such employee, may request the Administrator to conduct a full investigation of the matter. The Administrator shall thereupon investigate the matter and, at the request of any party, shall hold public hearings on not less than five days notice, and shall at such hearings require the parties, including the employer involved, to present information relating to the actual or potential effect of such limitation or order on employment and on any alleged discharge, lay-off, or other discrimination and the detailed reasons or justification therefor. Any such hearing shall be of record and shall be subject to section 554 of title 5. Upon receiving the report of such investigation, the Administrator shall make findings of fact as to the effect of such effluent limitation or order on employment and on the alleged discharge, lay-off, or discrimination and shall make such recommendations as he deems appropriate. Such report, findings, and recommendations shall be available to the public. Nothing in this subsection shall be construed to require or authorize the Administrator to modify or withdraw any effluent limitation or order issued under this chapter.) In subsequent statutes the job impact provision was split into two sections; one mandating the continuous evaluation of job impacts and one section authorizing employees impacted by the regulation to seek an on the record hearing with the administrator of EPA. See also: [45] The Clean Air Act, 42 U.S.C. § 7621(a), (1977); § 321(a); The Solid Waste Disposal Act, 42 U.S.C. § 6971 (1976); § 7001(e); The Toxic Substances Control Act, 15 U.S.C. § 2623 (1976); § 24(a); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610 (1980); § 110(e).

> Mr. Chairman, I am pleased to rise in support of the amendment, which would require the Environmental Protection Administration to study and evaluate, on a continuing basis, the effect of effluent limitations upon employment…this amendment will allow Congress to get a close look at the effects on employment of legislation such as this, and will thus place us in a position to consider such remedial legislation as may be necessary to ameliorate those effects. This is a good amendment and I urge its adoption.[46]

This amendment laid the framework for similar provisions in future legislation.[47]

The 95th Congress (1977 – 1979), again addressed the effects of regulation on employment in debate over the Clean Air Act. The Committee on Public Works noted:

> [I]t has been argued that environmental laws have in fact been responsible for significant numbers of plant closings and job losses. In any particular case in which a substantial job loss is threatened, in which a plant closing is blamed on Clean Air Act requirements, or possible new construction is alleged to have been postponed or prevented by such requirements, the committee recognized the need to determine the truth of these allegations. For this reason the committee agreed to…a mechanism for determining the accuracy of any such allegation.[48]

In the Clean Air Act Amendments of 1977 Congress enacted a similar provision mandating EPA to conduct continuous evaluations of potential loss or shifts of employment.[49] That provision is codified as section 321(a) of the Clean Air Act, which reads:

> **(a) Continuous Evaluation of Potential Loss or Shifts of Employment**
> The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this chapter and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement.[50]

Subsequent Congresses enacted similar legislative provisions in the Solid Waste Disposal Act,[51] the Toxic Substances Control Act,[52] and the Comprehensive Environmental Response, Compensation and Liability Act.[53]

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[46] 1 Environmental Policy Division of the Cong. Research Serv., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 658-59 (1973) (Remarks of Rep. Abszug).
[47] *See* 95 Cong. House Report 294 (Stating that "Section 304 of the committee bill [the Clean Air Act] is based on a nearly identical provision in the Federal Water Pollution Control Act.")
[48] *Id.*
[49] *See generally* 95 Cong. Conf. Bill H.R. 6161; CAA 77 Leg. Hist. 24.
[50] 42 U.S.C. § 7621(a) (1977); § 321(a).
[51] 42 U.S.C. § 6971 (1976); § 7001(e).
[52] 15 U.S.C. § 2623 (1976); § 24(a).
[53] 42 U.S.C. § 9610 (1980); § 110(e).

Unfortunately, EPA never conducted any of the evaluations of employment impacts required by the five environmental statutes. In response to a Freedom of Information Act request from the U.S. Chamber, EPA states that it cannot find any records that indicate it prepared a continuing evaluation of the potential loss or shifts of employment resulting from its regulations. Specifically, EPA stated: "after conducting searches, neither the Office of Air and Radiation nor the Office of Policy were able to find any documents pertaining to your request".[54]

Therefore, the debate that started over 45 years ago and which resulted in Congress enacting provisions that would help it understand the adverse effects that environmental regulation have on employment remains unresolved due to EPA's failure to undertake the evaluations mandated multiple times by Congress. Congress wanted information to develop remedial legislation, if needed to protect jobs while it protects the environment.

The EPA must comply with its statutory obligation under the Clean Water Act and conduct a continuing evaluation of the employment impacts of CWA regulations.

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

Executive Order 12, 866[55] requires federal agencies to conduct several analyses prior to proposing or finalizing new regulations. The Executive Order makes agencies responsible to ensure that a new regulation is necessary (as opposed to a non-regulatory alternative); put another way, the agency must show that a problem exists that can **only** be successfully addressed through a regulation. In the case of the WOTUS rule, neither EPA nor the Corps showed that waters currently regulated by states and localities are not adequately protected. EPA and the Corps did not explain how the public would be better off if waters regulated by the states were transformed into areas under federal jurisdiction. Although EPA and the Corps ***inferred*** that the states were not doing an adequate job of protecting surface waters, it did not make the kind of showing that would typically be required to take federal control over a state's water quality program.[56] Similarly, the ozone NAAQS was updated in 2015 before the 2008 standard was even fully implemented.

In the case of WOTUS, the final rule was issued at a time when two other major rules (Clean Power Plan and the Ozone NAAQS standard) were also issued. To be clear, during a six-month period of time in 2015, EPA imposed on the states three major rules that have significant impacts on this nation's economy and infrastructure. When issuing these three rules in 2015, the EPA should have fully considered how each rule, if finalized, might affect regulated entities' ability to comply with the other two.

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[54] Letter from Jim DeMocker, Acting Director, EPA Office of Policy Analysis and Review to William L. Kovacs, U.S. Chamber of Commerce, Freedom of Information Request No. EPA-HQ-2012-001352 (June 14, 2013).
[55] See Executive Order 12,866 (Sept. 30, 1993) available at https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf.
[56] 33 U.S.C. § 304(l)(3).

For example, the EPA itself projects that the Clean Power Plan will cause significant coal-fired electric generating capacity to retire by 2022.[57] To replace this generating capacity, utilities will need to construct fuel delivery infrastructure such as pipelines, storage, railroad track, and improved roads. In order to compensate for a lack of generating capacity, these infrastructure projects will have to be completed before the existing coal-fired generating units are taken off-line. Yet these projects will be subject to more extensive permitting and reviews by virtue of the WOTUS rule.

The EPA did not properly account for the increased costs and delays that utilities, pipeline companies, railroads, and other companies will face in complying with the WOTUS rule, which is made necessary because of the need to comply with the Clean Power Plan.

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

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

Executive Order 13,563, issued by the Obama administration in 2011,[58] even more clearly calls on federal agencies to review and understand the cumulative impacts of their regulatory programs. Section 1(b)(2) provides that each agency must, among other things, "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, *taking into account, among other things, and to the extent practicable, the costs of cumulative regulations*."[59] Again, the EPA should have complied with this Executive Order when it planned to develop three massive rulemakings that would be timed to take effect virtually one on top of the other.

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

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

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

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[57] *See* EPA, "Regulatory Impact Analysis for the Clean Power Plan Final Rule," (October 23, 2015) available at https://www.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf.
[58] Executive Order 13,563, "Improving Regulatory and Regulatory Review," 76 Fed. Reg. 3,821 (Jan. 18, 2011).
[59] *Id.* at 3,821 (emphasis added).

- As noted above, the massive new infrastructure requirements that are at the heart of the Clean Power Plan will be complicated, delayed and made more expensive by the expanded number of Clean Water Act permits required by the WOTUS rule. In addition to the cost of applying for federal permits, infrastructure developers will have to pay mitigation costs for wetlands restoration, which often approach or exceed all other project costs.

- In its economic analysis of the WOTUS rule, the EPA based its conclusion that the rule would only increase the amount of federal jurisdictional waters under the CWA by 2.84% to 3.65% on a *very* small sample of negative determinations from two preceding years, essentially using just a tiny slice of pre-WOTUS determinations. The EPA ignored conflicting evidence from federal and state authorities that the rule could impose anywhere from a 300% to 800% increase in federal jurisdictional waters. EPA is supposed to work with these stakeholders to discuss these impacts, instead of ignoring them or denying them altogether. By ignoring these congressional mandates for developing effective regulations, the EPA fails to secure an understanding of the real world impacts of its rules.

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

H. EPA Violated Anti-Lobbying Laws

In addition to the legal and procedural deficiencies described above, the U.S. Government Accountability Office (GAO) also determined that during the rulemaking process, EPA violated prohibitions against publicity or propaganda and grassroots lobbying and violated the Antideficiency Act, 31 U.S.C. sec. 1341(a)(1)(A).[60] In particular, the GAO determined that EPA's use of a Thunderclap social media campaign during the rulemaking process was unlawful. Thunderclap is a social media tool that first gathers "supporters" for a particular cause, then simultaneously blasts a message to each supporter's social media accounts, including Facebook, Twitter, and Tumblr.[61] The purpose is to have the original message reach everyone who views its supporters' social media pages. Accordingly, EPA first solicited and secured 980 supporters for its message promoting the WOTUS rule. However, and crucial to this analysis, when EPA's message was re-posted on supporters' accounts using Thunderclap, the message no longer identified EPA as the source. The GAO determined that these unattributed messages constituted "covert propaganda" and violated the Antideficiency Act.[62] According to the GAO, the improper communications associated with the Thunderclap campaign were estimated to have reached 1.8 million people.[63]

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[60] B-326944, Dec. 14, 2015 (Environmental Protection Agency – Application of Publicity or Propaganda and Anti-lobbying Provisions).
[61] www.thunderclap.it/faq
[62] B-326944, Dec. 14, 2015.
[63] *Id.* at 12.

Illegally soliciting support for the WOTUS rule from 1.8 million people is significant. A total of 1,081,166 public comments were received on the WOTUS rulemaking docket. Of those, approximately 1,050,000 comments were generated from mass comment campaigns. In the final WOTUS rule preamble, EPA relied upon that large number of public comments received to support finalizing the rule. Indeed, the Federal Register states that that "over 1 million public comments" were received on the proposed WOTUS rule, and "the substantial majority of which supported the proposed rule." 80 Fed. Reg. 37,057. These statements are now part of the official rulemaking record, which the agency is using to defend its rule in the ongoing WOTUS litigation.

EPA Administrator McCarthy also testified before Congress about the purported wide public support for the rule, "we have received over one million comments and about 87.1 percent of those comments we have counted so far – we are only missing 4,000 – are supportive of this rule. Let me repeat, 87.1 percent of those one plus million are supportive of this rule."[64]

In sum, EPA unlawfully solicited support from 1.8 million people for its WOTUS rule. EPA then relied on more than one million mass mailing comments in support to justify its WOTUS rule to the public, before Congress, and will no doubt use the same ginned up "support" to defend the WOTUS rule in court.

In addition to using Thunderclap, EPA hyperlinked official EPA websites and social media pages to external websites that contained clear appeals to the public to contact Members of Congress in support of the WOTUS rule.[65] The GAO found this activity constituted indirect or grassroots lobbying, in violation of the anti-lobbying provisions of the law.

IV. THE WOTUS RULE CAUSES MASSIVE CONFUSION

Shortly after the WOTUS rule was finalized, lawsuits were filed by at least thirty states and numerous industry groups and environmentalists, all objecting to the scope of the rule or the process by which it was promulgated. Lawsuits were filed in at least twelve different federal district courts and in eight different federal circuit courts of appeal.

Lawsuits were filed in both district courts and courts of appeal because there is no agreement as to which court even has jurisdiction to hear the case. For example, the district court in North Dakota issued an injunction that prevents the rule from being implemented or enforced within the thirteen states that filed lawsuits in North Dakota. The Southern District of Georgia, however, denied a motion for injunction on the grounds that jurisdiction is proper at the court of appeal level; this decision has been appealed to the Eleventh Circuit.

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[64] *House-Senate Joint Hearing on State and Local Impacts of Administration's Proposed Expansion of Waters Regulation Before the S. Comm. on Environment and Public Works and H. Comm. on Transportation and Infrastructure*, 114th Cong. (Feb. 4, 2015) (Statement of Gina McCarthy, Administrator of the Environmental Protection Agency).

[65] B-326944, Dec. 14, 2015.

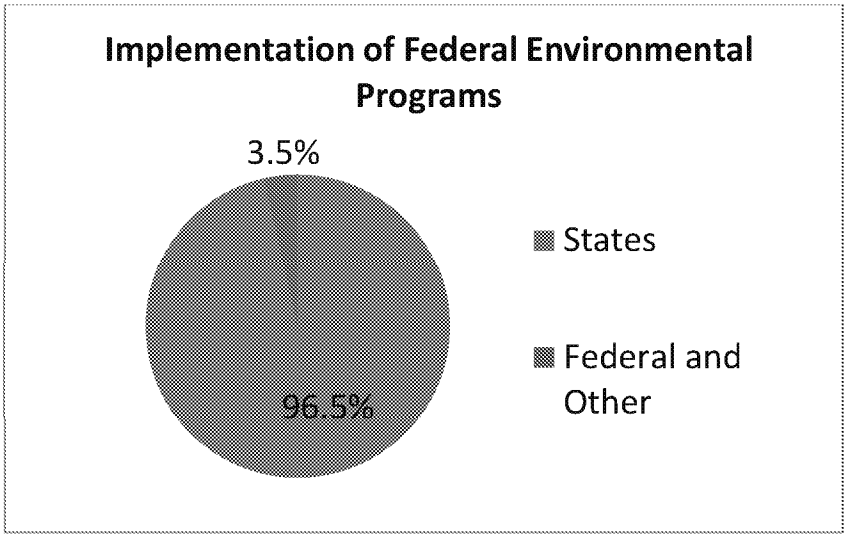
Meanwhile, the lawsuits filed in the courts of appeal have been consolidated and will all be heard in the Sixth Circuit. The Sixth Circuit issued a nationwide injunction of the rule, preventing EPA and the Army Corps from implementing or enforcing the WOTUS rule during the pendency of litigation. A three-judge panel of the Sixth Circuit recently issued a fractured ruling (with three separate opinions) concluding that court has jurisdiction. But parties (including the U.S. Chamber) have requested a rehearing of the jurisdictional issue before the entire Sixth Circuit.

Landowners are now waiting for a decision on the merits of whether the WOTUS rule is lawful or if the agencies must once again start from scratch. The confusion created by the WOTUS rule and the varied potential outcomes of the resulting litigation translate into an environment of uncertainty for landowners and business owners.

V. *STATES* IMPLEMENT MOST FEDERAL ENVIRONMENTAL REGULATIONS, NOT THE EPA

The real victims of the federal administrative state overreach are the states. According to the Environmental Council of the States (ECOS), the states in 2013 implemented approximately **96.5%** of federal environmental laws through delegated programs.[66] State agencies also conduct **90%** of all environmental inspections, enforcement actions, data collection, and issue the vast bulk of the permits needed to build or operate a facility.[67]

Figure 5:



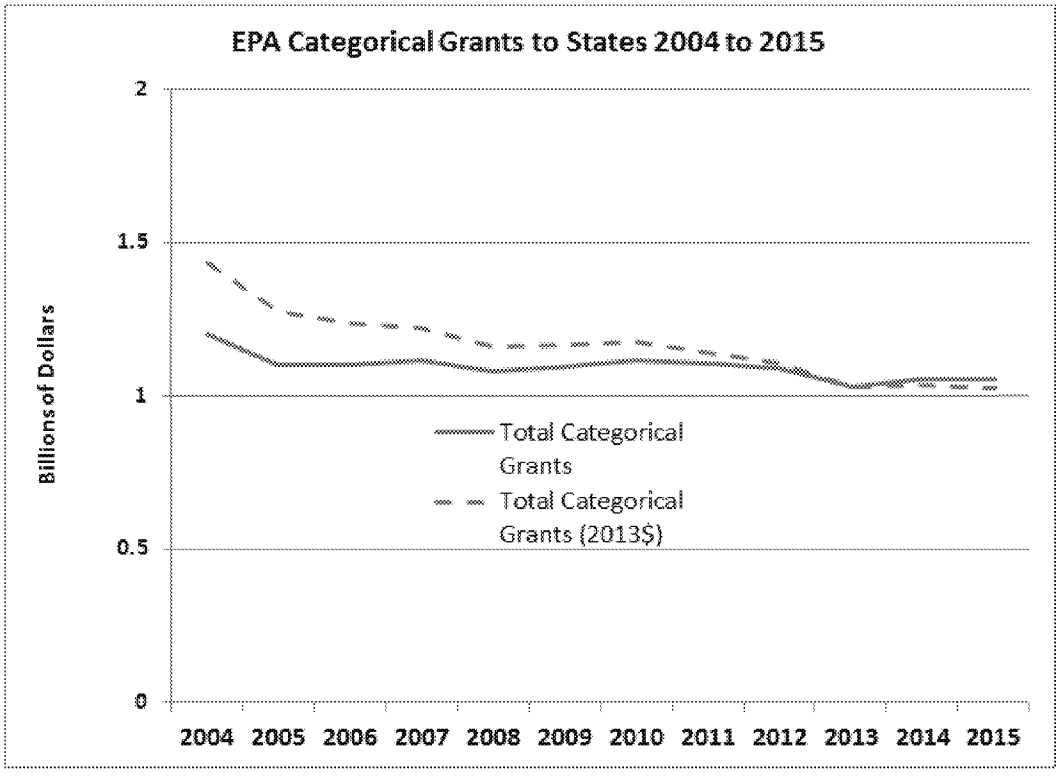
Source: ECOS

[66] Testimony of Teresa Marks, Director, Arkansas Department of Environmental Quality and President, Environmental Council of the States, before the House Energy and Commerce Committee, Subcommittee on Environment and the Economy (February 15, 2013) at 3, available at http://docs.house.gov/meetings/IF/IF18/20130215/100242/HHRG-113-IF18-Wstate-MarksT-20130215.pdf).
[67] *Id.*

In a February 15, 2013 hearing before the House Committee on Energy and Commerce, Subcommittee on Environment and the Economy, an ECOS witness testified that **"[S]tates find themselves in 2013 with a lot more [environmental] rules, and the possibility of a lot less money to implement them. States are very unsure how much longer these two trends can continue before the core environmental programs in each state begin to significantly suffer."**[68]

The management of federal environmental programs is a tremendous burden for states, particularly from a time, money and resource perspective. To add to the difficulties that states face, annual budget data collected by the Congressional Research Service between 2004 and 2015 confirms that EPA grants to the states have been flat or, in real terms have steadily declined since 2004.[69] In 2015, Categorical Grants to the states, the federal funding to states for implementation of EPA regulatory mandates, were about **29% lower** in inflation-adjusted dollars than they were in 2004.

Figure 6:



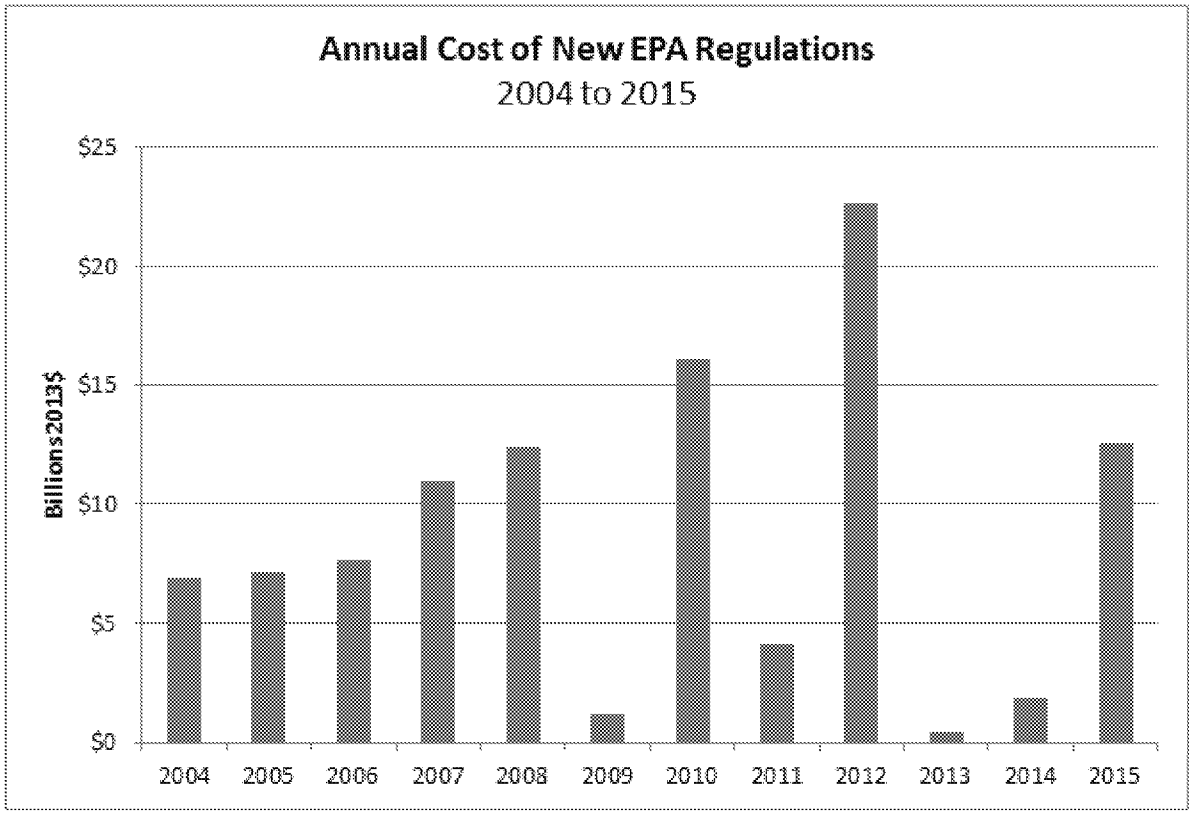
Source: Congressional Research Service

[68] Testimony of Teresa Marks, Director, Arkansas Department of Environmental Quality and President, Environmental Council of the States, before the House Energy and Commerce Committee, Subcommittee on Environment and the Economy (February 15, 2013) (emphasis added), available at http://docs.house.gov/meetings/IF/IF18/20130215/100242/HHRG-113-IF18-Wstate-MarksT-20130215.pdf).

[69] Likewise, a 2013 GAO report noted that "annual appropriations for these grants have decreased by approximately $85 million between fiscal year 2004 and fiscal year 2012." GAO, *Funding for 10 States' Programs Supported by Four Environmental Protection Agency Categorical Grants*,13-504R Information on EPA Categorical Grants (May 6, 2013).

At the same time that EPA's real-dollar grant assistance to the states declined **29%**, the agency imposed approximately **$104 billion** in new annual regulatory obligations (see Figure 7).

Figure 7:

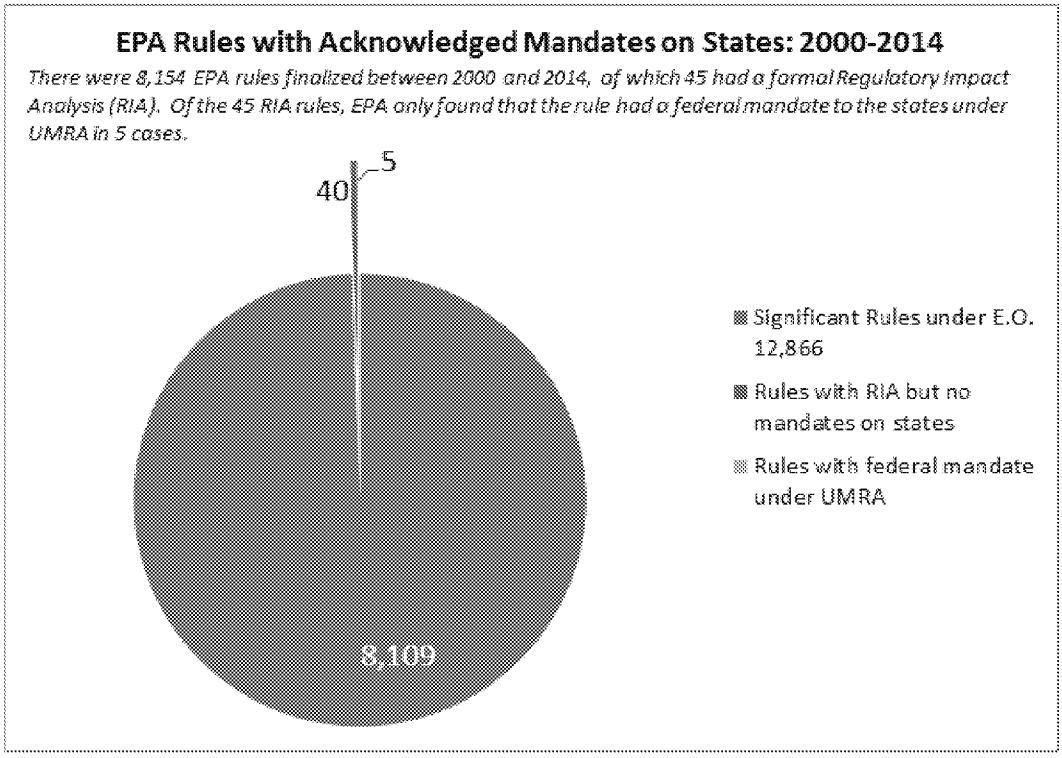


Source: EPA Regulatory Impact Analyses (RIAs) and *Federal Register*

Significantly, as described above, in 2015 alone, EPA issued three new "mega-rules" that impose tremendous burdens on the states: WOTUS,[70] the Clean Power Plan,[71] and the revised Ozone NAAQS.[72] Although each of these rulemakings imposes major new responsibilities on states, the agency certified in each case that the regulation imposed **no unfunded mandates**. In fact, the EPA has seldom acknowledged that any of its regulations impose unfunded mandates on the states.

[70] EPA and U.S. Army Corps of Engineers, "Definition of "Waters of the United States," Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015).
[71] EPA, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," Final Rule, 80 Fed. Reg. 64, 662 (October 23, 2015).
[72] EPA, "National Ambient Air Quality Standard for Ozone," Final Rule, 80 Fed. Reg. 65, 292 (October 26, 2015).

Figure 8:



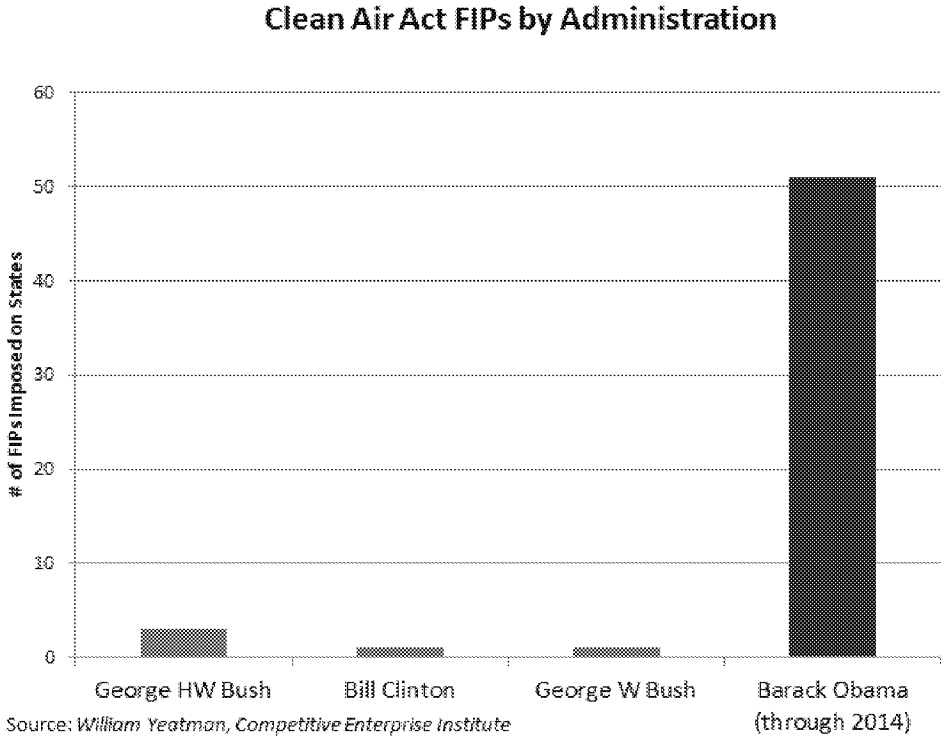
Source: EPA Regulatory Impact Analyses (RIAs) and *Federal Register*

States have complained in recent years that EPA increasingly ignores them or takes unilateral actions that the states disagree with. Rather than being treated by EPA as co-regulators with complementary powers, states complain that their views and concerns are increasingly ignored by EPA. As one state official put it, "the State role is now **less partner and more pawn**."[73] EPA's failure to consult with the states violates the spirit, if not the letter, of Executive Order 13,132, "Federalism."[74]

One result of EPA's failure to adequately consult with its state partners is a substantial increase in the number of Federal Implementation Plans (FIPs), representing an unprecedented federal takeover of state environmental priorities and programs. As the chart below clearly shows, the EPA under the current Administration has in fact imposed far more FIPs on states than any previous administration, ever. These FIPs include 13 dealing with regional haze, 9 relating to greenhouse gas permitting programs, and 28 for the cross-state air pollution rule.

[73] Letter from Becky Keogh, Director, Arkansas DEQ to Senator James M. Inhofe, Chairman, Senate Committee on Environment and Public Works (March 2, 2016) at 1 (emphasis added). Available at http://www.epw.senate.gov/public/_cache/files/89138698-8bc6-4cec-b624-eebe81b3e251/arkansas.pdf.
[74] 64 Fed. Reg. 43,255 (August 10, 1999).

Figure 9:



By requiring states to implement WOTUS, Clean Power Plan, and ozone NAAQS simultaneously, the inconsistent segments of each statute make planning impossible. While the EPA ignored potential inconsistencies created by issuing all three rules simultaneously, states simply cannot ignore the problems of implementing all three at the same time. For example, in writing a State Implementation Plan (SIP) for the Ozone NAAQS, states cannot ignore the probable shifts in criteria pollutant levels resulting from the Clean Power Plan and the expanded redefinition of WOTUS. Because the Clean Power Plan could require significant changes to the nation's electric generation infrastructure, reshuffling of the deck would dramatically shift the current map of criteria pollutant concentrations as power companies site new generation facilities away from existing sites. In particular, this could undermine the ability of many states to meet the current air and water standards as the states simultaneously implement WOTUS, Clean Power Plan, and ozone NAAQS.

VI. LEGISLATIVE RECOMMENDATION

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. Congress must get the rulemaking process right since poorly written rules flood the federal judicial system as judges are asked to do the job that agencies

should. S. 2006, the Regulatory Accountability Act of 2015, which rests in the jurisdiction of this committee, would address this deficiency. The legislation would put balance and accountability back into the federal rulemaking process for the most critical rules, without undercutting vital public safety and health protections. The bill focuses on the process agencies (including independent agencies) must use when they write the most important new regulations. The Regulatory Accountability Act would achieve these important goals for major and high-impact rules by requiring the following:

- 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.

- Codifying many of the regulatory requirements in Executive Order 12866 and applying them to both executive and independent agencies.

- Involving the public early in the process by allowing the public to propose alternatives for accomplishing the objectives in the most effective manner.

- Requiring 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.

- 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.

- The rulemaking should be based upon the best available scientific, technical or economic information.

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

- Independent agencies would also have to comply with the new APA requirements.

For the most costly rules, the opportunity for a hearing – with the ability to ask specific questions to the agency – gives stakeholders the best way to verify the underlying data an agency relies on, as well as the regulatory alternative the agency selected. In typical APA notice and comment rulemaking also known as "informal rulemaking," the agency is free to discount written comments and information with which it does not agree. Stakeholders have a very limited ability to inquire directly of the agency why various choices were made and get a response. Even if those stakeholders get contrary data or other information into the rulemaking docket, a reviewing court typically defers to the agency's determination of which data to rely on. Under S. 2006, however, interested parties in the most costly rulemakings can petition the

agency to probe the data and evidence an agency is using through an administrative hearing.[75] This hearing would be on-the-record, meaning that a transcript of the proceedings would become part of the docket for the rulemaking. This transcript would be available for any subsequent legal challenges to the rule.

In rulemakings involving the most costly regulations (***$1 billion or more*** per year), where there is concern about whether an agency has grounded its regulation on adequate, reliable data and whether the agency has fully considered reasonable alternatives, an on-the-record hearing is the most effective way to ensure that these critical issues are explored in a manner that is open and transparent.

The Occupational Safety and Health Act (OSHA) currently provides for a similar type of hybrid hearing at the request of interested parties.[76] Experience with these hearings has shown that they have minimal impact on an agency's ability to issue rules in a timely fashion. Indeed, in what was perhaps the highest profile example—the ergonomics regulation proposed at the end of the Clinton administration—the agency published the proposal, held a hearing, and issued the final rule **within one year**, even though it was one of the most complicated and controversial regulations in the agency's history.[77]

Hearings on the record are commonplace for other types of administrative proceedings, even relatively routine ones. The U.S. Department of Agriculture, Agricultural Marketing Service, for example, uses on the record hearings as part of the process of issuing milk pricing regulations. This type of hearing is particularly useful because it defines the facts that either support or call into question the proposed regulation. This type of hearing also focuses the relevant facts through truth testing, and it confines the facts upon which a rule may be issued to those within the hearing record. This process produces a hearing record that will be invaluable to a reviewing court.

VII. CONCLUSION

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

Unfortunately, over the decades, the EPA has ignored the guidance given by Congress and Executive Order for developing rules in a cost-effective manner that achieve congressional intent. The result of such conduct is an agency that issues massive mandates that the states and

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[75] In the case of major rules, a stakeholder could petition for the hearing, which the agency can deny.

[76] 29 U.S.C. § 655(b)(3). *See also* 29 C.F.R. §§ 1911.15-18. Other statutes require agencies to provide formal or "hybrid" rulemakings: 15 U.S.C. § 57a(c)(2)(B)(Federal Trade Commission); 21 U.S.C. § 371(e)(Food and Drug Administration); and 15 U.S.C. § 2603(b)(5)(EPA Toxic Substances Control Act).

[77] The controversial ergonomics rule is the only rule to be formally disapproved by Congress and the Executive under the Congressional Review Act. See S. J. Res. 5, which became Public Law 107-5 (Signed by President Bush on March 20, 2001).

the business community must implement regardless of cost. As such, EPA becomes the primary lawmaker on environmental issues, not Congress. This is a travesty and Congress must regain its role as the primary legislative body.

There is an even deeper harm however, inflicted by the EPA's failure to fully analyze the impact of its regulations. That harm is the deliberate avoidance of any attempt to understand real world impacts of regulations on people and the communities that will be adversely impacted by its actions. If the goal of every agency is to produce quality rules that implement the intent of Congress, why would an agency fail to evaluate job impacts, the cumulative impacts of regulations, develop regulations using peer reviewed studies, and use the best science and economics? The Regulatory Accountability Act of 2015 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 bipartisan vote of 250-175.[78] The Senate has the opportunity to make this reform a reality and should take up and pass S. 2006 as soon as possible.

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

[78] The House passed previous versions of Regulatory Accountability Act in 2011 and 2013. H.R. 3010, the Regulatory Accountability Act of 2011, passed the House on a bipartisan 253-157 vote on December 2, 2011. H.R. 2122, the Regulatory Accountability Act of 2013, passed the House as part of H.R. 2804, the ALERRT Act, on a bipartisan vote of 236-179 on February 27, 2014. The Senate versions of those bills, S. 1606 and S.1029, were not acted upon.